No. _____

In the Supreme Court of the United States

MOHAMED IDRIS AHMED,
aka Maxamad Idiris, aka Mahamoud Ahmed,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the plurality decision in *Kungys v. United States,* 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 839 (1988) addressing the procurement element of a claim based on 8 U.S.C. § 1451(a) has caused such confusion and varied and conflicting interpretations by lower courts as to merit a reexamination of the legal test for the proof of procurement.

2. Whether the courts below failed to require that the United States prove, by clear, unequivocal and convincing evidence that Petitioner illegally procured naturalized citizenship by the willful concealment of information during the naturalization process, as required by *Kungys,* 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 839 (1988) and as addressed in *Maslenjak v. United States,* 582 U.S. ____, 137 S. Ct. 1918, 198 L. Ed. 2d 460 (2017).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner (defendant-appellant below) is Mohamed Idris Ahmed, a naturalized United States citizen, and Respondent (plaintiff-appellee below) is the United States.

No party to this proceeding is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mohamed Idris Ahmed, through his counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra (App.), 17-4046) is not reported in the Federal Reporter, but the opinion is available at 2018 WL 2357422. The opinion of the district court (No. 2:12-cv-951) is not reported in the Federal Supplement but is available at 2017 U.S. Dist. LEXIS 213956.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are included in the appendix to this petition.

STATEMENT

Petitioner Mohammed Ahmed is a prominent Somali Imam who lawfully immigrated to the United States from Saudi Arabia in 1996. Since then, Mr. Ahmed travelled extensively throughout the United States and the world lecturing and preaching moderation and peace, and speaking out against radicalization of Muslim youth and terrorism. His work has been published broadly on social media.

(Trial Transcript pt. 2, Doc #59, PAGEID #1434, 1467 - 1468).

In May 2002, Mr. Ahmed sought United States citizenship via naturalization. With his limited understanding of the English language at the time and unfamiliarity with the immigration law processes, Mr. Ahmed sought help from the WIN Translation Service. The assigned translator was a man who, like Mr. Ahmed, spoke English as a second language. (*Id.*, PAGEID #1441 - 1443).

Mr. Ahmed met with the translator once, for about 15 – 20 minutes. At that meeting, the translator filled out the Application for Naturalization, asking Mr. Ahmed his name, where he was from, where he worked, whether he was married, the names of his children, and the name of his wife. (*Id.*, PAGEID #1442). Mr. Ahmed had brought his then-current passport – showing his extensive foreign travel - and his green card to the meeting, and he provided those items to the translator. The translator looked at his passport, but asked him no questions about his travel. (*Id.*, PAGEID #1486).

At the end of their meeting, the translator asked Mr. Ahmed to sign the signature page of the Application for Naturalization that the translator had completed for him. The translator did not show Defendant the completed form, and the translator kept the form after Mr. Ahmed signed it. (*Id.*, PAGEID #1449 - 1450).

Unbeknownst to Mr. Ahmed, the translator had answered questions on the form to the effect that Mr. Ahmed had engaged in no foreign travel. (*Id.*, PAGEID

#1443, 1486). Defendant *had* engaged in foreign travel – he regularly traveled to different Somali communities as part of his preaching and lecturing circuit, and to visit family. (*Id.*, PAGEID #1434 – 1436; Trial Exhibit 14). His foreign travel was recorded in the passport that Mr. Ahmed gave to the translator for purposes of completing the Application for Naturalization. (*Id.*, PAGEID #1436 – 1437; 1442; 1450).

Although uncertain as to the number and duration of his trips abroad when questioned at his deposition, Mr. Ahmed, after reviewing his passports, testified affirmatively at trial that he did not exceed the 30-month limit for foreign travel during the relevant five-year period. (Trial Transcript pt. 2, Doc #59, PAGEID #1454). Petitioner produced to the Government in discovery his three Somali Democratic Republic passports covering the time frame of May, 1998 to March, 2003 before his deposition on December 4, 2013, and the Government questioned him about them at the deposition. (Ahmed Deposition, pp. 45-50, *filed under seal*). The Government offered no testimony or other evidence at trial regarding the duration and number of trips reflected in the passports.

Nearly one year after the translator submitted his N-400 application, Mr. Ahmed received a letter directing him to appear at the USCIS district office in Seattle to undergo an interview on his Application for Naturalization. The letter stated that Mr. Ahmed "**MUST BRING"** (emphasis in original) his passport and other travel documents with him to the interview. The interview was scheduled for February 27, 2003. The letter stated that the interview would take about two hours. (*Id.*, PAGEID #1451 – 1453; Trial

Transcript pt. 1, Doc #58, PAGEID #1298 – 1299; Trial Exhibit 7).

Mr. Ahmed appeared for his interview as scheduled, with his passport and other travel documents as instructed. There, he was interviewed by USCIS District Adjudication Officer Yvonne Jarrett, *nee* Valenzuela. (Trial Transcript pt. 1, Doc #58, PAGEID #1337; Trial Transcript pt. 2, Doc #59, PAGEID #1453). Mr. Ahmed gave his passport to Ms. Jarrett. (Trial Transcript pt. 2, Doc #59, PAGEID #1453 - 1454). She left the room with the passport – which, again, showed Mr. Ahmed's foreign travel - then returned and gave the original passport back to Mr. Ahmed. (*Id.*, PAGEID #1487 - 1488). Whether Ms. Jarrett made a copy of Mr. Ahmed's passport is unknown to this date. She cannot remember anything about Mr. Ahmed or his interview, and no such copy was found in Mr. Ahmed's A-file when the Government initiated the underlying action to revoke Mr. Ahmed's naturalization nearly ten years after approving Mr. Ahmed for Citizenship. (Trial Transcript pt. 1, Doc #58, PAGEID #1340, 1363 – 1364). It seems either Ms. Jarrett decided not to make a copy (she testified that she often would not make a copy of the passport if, upon review, the travel did not appear to be an issue for the Application for Naturalization) or the agency lost the copy (other documents were missing from Mr. Ahmed's A-file, too). (*Id.*, PAGEID #1292, 1315, 1362 – 1363, 1366-1369; Trial Transcript pt. 2, Doc #59, PAGEID #1459 - 1460).

Ms. Jarrett spent only a few minutes interviewing Mr. Ahmed. (Trial Transcript pt. 1, Doc #58, PAGEID #1291, 1310 - 1312). The USCIS was experiencing a

substantial backlog of cases at that time. Ms. Jarrett estimates that she was performing approximately twelve interviews a day at that point; the USCIS Reverifier assigned to Mr. Ahmed's Application for Naturalization estimates that he was performing 20 – 25 interviews a day at that time. (*Id.*, PAGEID #1290 – 1292, 1363 – 1365).

In their brief time together, Ms. Jarrett was "kindful" toward Mr. Ahmed, who was the Preacher at a local Islamic Center at the time and wore his robe to the interview. (Trial Transcript pt. 2, Doc #59, PAGEID #1457 - 1458; Trial Exhibit 4, p. 3). Referring to Mr. Ahmed's Application for Naturalization, Ms. Jarrett verified select information throughout the Application. (Trial Transcript pt. 1, Doc #58, PAGEID #1372 – 1373). She included some checkmarks throughout the application, but no notations – she believed she was not supposed to write information on the application. (*Id.*, PAGEID #1269 – 1270, 1371 – 1373; Jarrett Deposition, p. 77, l. 5 – p. 78, l. 2, *filed under seal*). She did not ask about Mr. Ahmed's foreign travel, and she did not show him his Application. (Trial Transcript pt. 2, Doc #59, PAGEID #1467). Like the translator had done, Ms. Jarrett simply instructed Mr. Ahmed to sign the Application on the last page at the end of the interview. (*Id.*, PAGEID # 1459).

Mr. Ahmed remembers the interview well; for him, it was a singular moment on his path to becoming a United States citizen. Ms. Jarrett does not remember the interview at all. (Trial Transcript pt. 1, Doc #58, PAGEID #1363 - 1365).

At the conclusion of the interview, on February 27, 2003, Ms. Jarrett found that Mr. Ahmed was a person

of good moral character and she recommended that his application for citizenship be approved. CIS Reverifier Terence Lee reviewed her recommendation and agreed that Mr. Ahmed should be approved for citizenship. (*Id.*, PAGEID #1317, 1358). Mr. Ahmed was sworn in as a United States citizen on March 3, 2003. (Trial Exhibit A).

Mr. Ahmed lived here peacefully as a U.S. citizen, continuing his work as an Imam and preaching against violence. Then, the United States filed the underlying action.

On October 16, 2012, the Government filed a complaint under 8 U.S.C. § 1451(a) seeking to revoke the order admitting Mr. Ahmed to citizenship. (Complaint, Doc #1, PAGEID #1). The Government alleged that Mr. Ahmed illegally procured citizenship and concealed material facts and willfully misrepresented information concerning his foreign travel and marital status[1] during the naturalization application process. Mr. Ahmed denied those allegations. (Answer, Doc #12, PAGEID #55). He did not know the contents of the application until after the Government had brought this action. (Trial Transcript pt. 2, Doc #59, PAGEID #1459, 1487, 1497 – 1498).

A bench trial was held on April 26 – 27, 2016. Mr. Ahmed testified, generally, that he did not know that his Application for Naturalization stated that he had

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[1] Although presented at trial, issues related to Mr. Ahmed's marital status, and the question of whether he was a person of "good moral character" pursuant to 8 U.S.C. § 1101(f) were not addressed in the trial court's decision. See Findings of Fact and Conclusions of Law in the appendix to this petition.

engaged in no foreign travel during the 5-year period leading up to his application at trial. He also gave detailed testimony of his encounter with the translator who completed his Application for Naturalization for him, and his interview with Ms. Jarrett. The United States called four witnesses: (1) Bich Truong (from the translator service that prepared Mr. Ahmed's Application for Naturalization); (2) Terence Lee (the USCIS reverifier); (3) Yvonne Jarrett (the USCIS interviewer); (4) Justin Myers (Investigator for the U.S. Department of Homeland Security). None of the first three witnesses remembered Mr. Ahmed, or their encounters with him or his Application for Naturalization. The fourth witness had no dealings with Mr. Ahmed, personally, as his involvement in the case began in October, 2011, when he started investigating Mr. Ahmed's immigration file on a "tip" (Trial Transcript pt. 1, Doc #58, PAGEID #1395). (Trial Transcript pts. 1 and 2, Doc #58 and 59, PAGEID #1218 - 1503).

With regard to the 30-month physical presence requirement, the actual amount of time that Mr. Ahmed spent outside of the United States was never established. The only documentary evidence of travel submitted by the Government (Trial Exhibit 11) showed 11 trips within the statutory period (May 28, 1997, to May 28, 2002), not 13. The District Court speculated that there could have been others within the statutory period "but it is not apparent from the record" and there was "ambiguity". (Findings of Fact and Conclusions of Law, Doc #65, PAGEID #1607). The District Court did not have the benefit of any analysis of the number and duration of the trips as reflected in the passports because, despite having the

passports for 2 ½ years, the Government offered no analysis of them at trial. The District Court speculated that, based on Mr. Ahmed's uncertain and general deposition testimony concerning the duration of his trips, the Government had met its burden of proving the elements of 8 U.S.C. § 1451(a) by clear, unequivocal and convincing evidence.

After determining that Mr. Ahmed's travel abroad was material, the trial court shifted the burden to Mr. Ahmed to prove, by a preponderance of evidence, that he in fact met the 30-month physical presence requirement.

The District Court issued its Judgment Entry on September 20, 2017, and ordered Mr. Ahmed to surrender his certificate of naturalization and all other indicia of United States citizenship, including his United States passport. (Judgment Entry, Doc #66, PAGEID #1633).

Mr. Ahmed filed a timely notice of appeal on October 3, 2017. (Notice of Appeal, Doc #68, PAGEID #1636). By its Decision of May 24, 2018, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. (Decision, Doc #22-2, PAGEID #1-13).

ARGUMENT IN SUPPORT OF THE PETITION

I. THE NEED FOR A CLEAR LEGAL STANDARD.

Although several issues were contested at trial, Petitioner seeks this Court's review only of the standard of proof for the procurement element of a claim for denaturalization pursuant to 8 U.S.C. § 1451(a).

Case by case, fact scenario by fact scenario, lower courts must divine whether the Government has presented clear, unequivocal and convincing evidence giving rise to a fair inference of ineligibility, or if the evidence shows a mere "possibility" that an applicant for citizenship may have been ineligible. The Ninth Circuit, commenting on this Court's plurality decision in *Kungys v. United States,* 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988), stated;

> [a]fter *Kungys,* however, it is no simple task to divine the meaning of "material" under the denaturalization statute. The eight Justices who decided *Kungys* (Justice Kennedy did not participate) wrote five separate opinions and offered three distinct tests for determining when a statement is material."

United States v. Puerta, 982 F.2d 1297, 1302 (9th Cir. 1992). Likewise, the Seventh Circuit noted that *Kungys* was "not a clean opinion. It is maddeningly fractured." That court then restated the Supreme Court Reporter's explanation of who was on what side in *Kungys*, which reads like a rather famous skit popularized by Abbott and Costello. *United States v. Latchin,* 554 F.3d 709, 713 (7th Cir. 2009).

It is worth noting that the Ninth Circuit disregarded this Court's distinction between materiality and procurement when it applied to the materiality element the burden shifting analysis apparently intended by this Court to apply only to the procurement element:

> While we agree with much of the Ninth Circuit's analysis, we think the dispute between Justices Brennan and Scalia concerned the proper interpretation of "procure" not "material". In other words, it involved step 4, not step 3. . . . The discussion of a presumption arose only in step 4 of the Court's analysis. Thus, while Brennan's opinion may be controlling with respect to interpreting the word "procure", it in no way conflicts with the lead opinion's definition of "materiality."

Monter v. Gonzales, 430 F.2d 546, 555 (2nd Cir. 2005) (fn. 13). The District Court in the present case made the same mistake, for it applied the burden-shifting presumption analysis to the materiality element of the Government's claim.

Last year, this Court tried to bring some clarity to this most confusing of standards when it elaborated upon the propriety of jury instructions given in a trial alleging violation of the analogous criminal statute, 18 U.S.C. § 1425(a). *Maslenjak v. United States,* 582 U.S.___, 137 S. Ct. 1918, 198 L. Ed. 2d 460 (2017). There, the Sixth Circuit erred when it upheld a conviction based upon a jury instruction that disregarded the requirement that the Government prove "that the defendant lied about facts that would have mattered to an immigration official, because they

would have justified denying naturalization or would predictably have led to other facts warranting that result." *Id. at* 137 S. Ct. 1923. This Court found that mere proof of any misrepresentation or concealment was not enough to warrant conviction. Instead, when the Government claims that a misrepresentation frustrated its investigative efforts, the fact misrepresented or concealed must 1) be sufficiently relevant to naturalization that its disclosure would have prompted a reasonable official to undertake further investigation, and 2) while the government need not prove actual ineligibility, it must prove that the investigation "would predictably have disclosed" some legal disqualification. *Maslenjak, id.* at 137 S. Ct. 1929.

With all due respect, the test adopted in *Maslenjak* provides no clearer guidance in the present case as to what evidence shows a mere "possibility" that an alleged misrepresentation may have illegally procured citizenship as addressed in Justice Brennan's concurring opinion in *Kungys*, and what is clear, unequivocal and convincing evidence that a misrepresentation gives rise to an inference of ineligibility resulting in the rebuttable presumption as addressed in Justice Scalia's opinion in *Kungys.* As noted by Justice Gorsuch in his concurring opinion, joined by Justice Thomas;

> In an effort to "operationalize" the statute's causation requirement, the Court says a great deal more, offering, for example, two newly announced tests, the second with two more subparts, and a new affirmative defense—all while indicating that some of these new tests

> and defenses may apply only in some but not all cases.

Maslenjak, id. at 139 S. Ct. 1931.

The impractical and esoteric formulations set forth in the compilation of opinions in *Kungys* provide an uncertain foundation for all the analysis that has followed. This lack of clear direction is a disservice to the courts below, and the parties in civil and criminal denaturalization proceedings. As this Court noted in *Maslenjak,*

> The Government needs to know what prosecutions to bring; defendants need to know what defenses to offer; and district courts need to know how to instruct juries. Telling them only "§1425(a) has something to do with causation" would not much help them make those decisions.

Id. at 137 S. Ct. 1928 (fn 4). Error dwells in the house of uncertainty.

A majority of this Court in *Chaunt v. United States,* 364 U.S. 350, 81 S. Ct. 147, 5 L. Ed. 2d 120 (1960), and three Justices in *Kungys* advanced a clear and straightforward standard of causation. As Justice Stevens, joined by Justices Marshall and Blackmun, wrote:

> Thus the Government cannot prevail in a denaturalization action based on a false statement in an application for a naturalization certificate unless it can prove by clear, unequivocal, and convincing evidence the existence of a disqualifying fact.

Kungys, id. at 488 U.S. 789. Whatever its faults, this clear, simple and direct standard, or one like it, would bring clarity to the confusion that is the law of denaturalization.[2]

II. THE NEED FOR AN EXAMPLE OF WHAT DOES NOT MEET THE EXISTING LEGAL STANDARD.

The burden of proof at trial was on the Government, and its task was to prove by "clear, unequivocal, and convincing" evidence that Mr. Ahmed illegally procured his citizenship by concealment of a material fact or by willful misrepresentation. 8 U.S.C. § 1451(a); *Kungys, id.* (concurring opinion of Justice Brennan).

Faced with specific testimony from the Petitioner that he disclosed his foreign travel by providing his passport to the translator who helped him with the application and the adjudicator who interviewed him, the admissions of the witnesses for the Government that they had no recollection of the interview or the materials they reviewed, "ambiguous" testimony and documentary evidence regarding the number of trips taken, and no evidence as to the length of any one of the trips, the trial court, and then the court of appeals,

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[2] Such a standard, going forward, makes more sense than it may have in the past. The "record" of naturalization proceedings to date has been the fading memories of immigration officials, testimony as to their standard practices, and paper forms with red ink checkmarks of varied completeness and reliability. Today, an interviewer can put a GoPro on her desk and make a complete video recording of what she asks and what the applicant says in response, copy that to a portable storage device, and slip that into the applicant's file.

determined that the scant evidence the United States presented was sufficient to justify revocation of Petitioner's citizenship.

In fact, Mr. Ahmed's ineligibility was merely a "possibility", as addressed by Justice Brennan:

> Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right, see, *e.g., Klapprott v. United States,* 335 U.S. 601, 611-612, 69 S.Ct. 384, 388-389, 93 L.Ed. 1099 (1949), and as such should never be forfeited on the basis of mere speculation or suspicion. I therefore would not permit invocation of the presumption of disqualification in circumstances where it would not otherwise be fair to infer that the citizen was actually ineligible.

Kungys, 485 U.S. at 784. In other words, as the *Latchin* court succinctly stated; "At the end of the day, then, the government only wins if it shows that the citizen misrepresented a material fact and it is 'fair to infer that the citizen was actually ineligible'." *Latchin*, 554 F.3d at 751.

Foreign travel is not disqualifying, and its existence does not give rise to a fair inference that the applicant is actually ineligible. In fact, the applicant can be absent from the United States for as much as half the relevant five-year period preceding naturalization. 8 U.S.C. § 1427(a). Further, an absence of six months at one time also is not disqualifying if the applicant's

employment in the United States has not been terminated, the applicant has retained full access to his U.S. abode, and other means. *See* 8 C.F.R. § 316.5(c)(1)(A)-(D). To get to a fair inference of ineligibility justifying a shift in the burden of proof, the Government had to provide not just any evidence, but clear, unequivocal and convincing evidence that the duration of his absences gave rise to a reasonable inference that he was ineligible for citizenship. The evidence presented at trial showed a mere possibility that Mr. Ahmed was absent from the United States for more than 30 of the 60 months before his naturalization.

The Government cannot claim that it lacked the ability to meet its burden of proof due to the passage of time and the unavailability of reliable evidence. Although its own travel records were unreliable, the Government obtained in discovery a full 2 ½ years before trial Mr. Ahmed's passports showing all of his departures from and reentries to the United States during the relevant 5-year period and beyond. And yet it presented no testimony regarding the duration of the trips apparent from the passports. Mr. Ahmed's was the only testimony on this point, and he stated that he was not absent from the United States for more than 30 months. (Findings of Fact and Conclusions of Law, Doc #65, PAGEID #1631). The failure to present such evidence gives one pause to wonder if the Government did not do the analysis or, if it did the analysis and did not deem it prudent to present the evidence at trial.

When the Government presents evidence for the purpose of revoking the most precious of rights, it should be held to a higher standard than the

presentation of incomplete, unreliable and "ambiguous" travel records and testimony. It should be required to meet specific testimony regarding events with specific testimony of reliable witnesses who either can recall the events, or who can testify that the records reliably reflect those events. If the records that the Government keeps are not reliable, the Government should be required to keep better records, rather than be allowed to guess as to what those records might mean based on usual practices.

By hearing this case, the Court will have the opportunity to address these issues, and provide some real and valuable guidance to trial courts and parties. Is it acceptable for the trial court to point out that testimony and travel records are incomplete, unreliable and ambiguous, but then to rely upon that testimony and those records as evidence in revoking citizenship? Must the Government, when it has on hand specific evidence that may conclusively resolve the question of ineligibility, present that evidence at trial rather than rely on vague and ambiguous records and testimony? Whether at the burden shifting phase or the rebuttal of the presumption phase, may the trial court speculate as to the issue of the duration of absence from the United States when the only testimony regarding the actual duration of the absences establishes that they are within the statutory limits?

If this Court determines that it must maintain the standards set forth in *Kungys,* it should take the opportunity "operationalize" that decision and provide guidance to the courts below as to what the Government must present to establish an inference of ineligibility, justifying the burden shifting

presumption. As the Government routinely relies on the kinds of travel records and testimony regarding customary practices presented in the present case, a decision addressing these issues will have broad application.

III. CONCLUSION

It has been widely reported that the United States Citizenship and Immigration Services has formed a task force to engage in a systematic and focused review of the records of hundreds of naturalized citizens for the purpose of seeking the revocation of their citizenship.[3] This makes a portion of this Court's decision in *Maslenjak* prescient, for the Court warned there that the Government should not be allowed to scour a naturalized citizen's paperwork in search of any possible misrepresentation, and then use that evidence to gain "nearly limitless leverage over newly naturalized Americans", leaving them with "precious little security." *Maslenjak id.* at 137 S. Ct. 1927. Lower courts need a clear, simple and specific legal standard for judging the coming wave of such cases. Today they face the prospect of being mired in the "maddeningly fractured" compilation of opinions that is *Kungys.*

For these reasons, Petitioner respectfully requests that this Court issue a writ of certiorari, and review the present case.

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[3] The Washington Post, June 13, 2018, *Scanning Immigrants' Old Fingerprints, U.S. Threatens to Strip Thousands of Citizenship.*

Respectfully submitted,

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