No. _____

In the
Supreme Court of the United States

ABDULLA NAGI NASER DAIFULLAH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review here is:

1. Whether 8 U.S.C. § 1451(a)'s requirement that the United States Attorney for the respective district institute proceedings is a jurisdictional requirement?

The Constitution provides that "The Congress shall have power ... to establish a uniform rule of naturalization … throughout the United States." Article I, § 8, cl. 4. Accordingly, "Congress alone has the constitutional authority to prescribe rules for naturalization," *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (*quoting United States v. Ginsberg*, 243 U.S. 472, 474 (1917)). Exercising this power, "Congress has provided a special judicial procedure which must be followed, if a citizen is denaturalized. That procedure is contained in [8 U.S.C. § 1451]. It provides for canceling a certificate of naturalization on the ground that it was procured 'by concealment of a material fact or by willful misrepresentation.' Suit may be brought by the United States Attorney in the District Court 'upon affidavit showing good cause.' The citizen whose citizenship is challenged has 60 days "in which to make answer to the petition of the United States." *United States v. Minker*, 350 U.S. 179, 196 (1956) (Douglas, J. concurring) (citing current 8 U.S.C. § 1451(a)). Through § 1451 Congress has granted jurisdiction to "the district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of

naturalization"; and has mandated that the invocation of that jurisdiction "shall be the duty of the United States attorneys for the respective districts" which may only to "institute proceedings" under § 1451 "upon affidavit showing good cause therefor[.]" 8 U.S.C. § 1451(a); *see also*, *United States v. Minker*, 350 U.S. 179, 195 (1956) (Black, J. concurring) ("[r]esponsibility for initiating such cases is placed on *district attorneys* 'upon affidavit showing good cause therefor….'") (emphasis in the original) (*quoting* 8 U.S.C. § 1451(a)).

This Court has reiterated § 1451(a) mandatory requirements by affirming dismissal where a United States Attorney failed to file an "affidavit showing good cause" but rather filed a verified complaint, stating: "We hold that [§1451] is the only Section under which a United States attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a procedural prerequisite to the maintenance of proceedings thereunder." *United States v. Zucca*, 351 U.S. 91, 99 (1956); *Bindczyck v. Finucane*, 342 U.S. 76, 83 (1951) ("Congress formulated a self-contained, exclusive procedure[] [w]ith a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15 [current section 1451]." Five years later this Court "h[e]ld that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)." *Costello v. United States*, 365 U.S. 265, 285 (1961).

The Eighth Circuit in its opinion below determined that *Costello* and *Zucca* were a product of the era of "drive-by jurisdictional rulings" which "have no precedential effect" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) by noting that *Costello* and *Zucca* "predate the Supreme Court's concerted effort to use that term in a more disciplined fashion." (Pet. App. 10) (citing, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009). Nonetheless, *Costello*'s holding has had continued vitality not just in denaturalization proceedings, but has been cited as the basis as an example of the doctrine of "curable defect" in *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.). In *Dozier*, then-Judge Scalia expressly relied on *Costello*'s jurisdictional dismissal to explain: "The 'curable defect' exception applies where a 'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit — for example, the Government's filing of an affidavit of good cause in a denaturalization proceeding." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (citing *Costello v. United States,* 365 U.S. 265, 284-88, 81 S.Ct. 534, 544-46, 5 L.Ed.2d 551 (1961); *Martin v. Dep't of Mental Hygiene,* 588 F.2d 371, 373 n. 3 (2d Cir. 1978) (proper service of process); *Napper v. Anderson,*500 F.2d 634, 637 (5th Cir. 1974), *cert. denied,*423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975) (or residency adequate to invoke diversity jurisdiction)). Judge Scalia further explained that: "What all these cases have in common is that the jurisdictional deficiency could be

remedied by *occurrences subsequent to the original dismissal*. The deficiency pertained to a fact (filing of affidavit, service of process or present residence) separate and apart from the past and completed transactions that constituted the cause of action." *Id.* Thus, under the "curable defect" doctrine, a case dismissed for lack of jurisdiction, can be re-filed upon curative events subsequent to the dismissal. *See, also Eaton v. Weaver Mfg. Co.,* 582 F.2d 1250, 1256 (10th Cir. 1978) (citing *Costello v. United States,* 365 U.S. at 286 for the proposition that "In some cases, however, dismissal for want of jurisdiction is no bar to another suit."); Additionally, *Costello* has been relied upon as authority for "the customary rules for dismissing claims for lack of jurisdiction" without prejudice. *Ernst v. Rising*, 427 F.3d 351, 366-67 (6th Cir. 2005) (citing *Bauer v. RBX Indus., Inc.,* 368 F.3d 569, 581 (6th Cir. 2004) ("vacating a district court's judgment for lack of jurisdiction and concluding (in reliance on *Costello*) that the "district court should have dismissed the [statutory] claim without prejudice'"); *Shoup v. Bell Howell Co.*, 872 F.2d 1178, 1180-81 (4th Cir. 1989)(citations omitted) (citing *Costello* and noting "that a dismissal on statute of limitations grounds" is not "like a dismissal for failure to file an affidavit of good cause, a dismissal for lack of jurisdiction, and thus not a final adjudication on the merits" which are "paradigms of non-merits adjudication In such a dismissal the court does not regard the merits of an action. It merely classif[ies] [an] action, whatever its merits, as one on which the court concerned cannot speak. In contrast, a statute of limitations dismissal assumes the court could have spoken but refuses to do

so. The power to declare law, including the law relating to the statute of limitations, is present.")

In section 1451(a) Congress has required that "for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization" "it shall be the duty of the United States attorneys for the respective districts" "institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit." *Id.* This Court has held that "the normal interpretation of the word "institute" is synonymous with the words 'begin' and 'commence' The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before "invocation of the judicial process." *McNeil v. United States*, 508 U.S. 106, 112 (1993) (affirming the Seventh's Circuit dismissal of lack of subject matter jurisdiction and holding that the Federal Tort Claims Act administrative exhaustion requirement is a jurisdictional requirement). In *McNeil* this Court decided "[t]he narrow question before us is whether his action was timely either because it was commenced when he lodged his complaint with the District Court on March 6, 1989, or because it should be viewed as having been 'instituted' on the date when his administrative claim was denied." *McNeil v. United States*, 508 U.S. 106, 110-11 (1993).

Similarly, under section 1451(a)'s before a district court may exercise jurisdiction to "revok[e] and set[] aside the order admitting such person to citizenship and canceling the certificate of naturalization" the

appropriate United States attorney must "institute proceedings" by filing a complaint in the required district court. In this matter, proceedings were instituted in the United States District Court for the Eastern District of Arkansas, but the United States Attorney for the Eastern District of Arkansas did not sign, file, nor was included in the pleadings.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

The decision of the Eighth Circuit is reported at 11 F.4th 888. The decision of the Eastern District of Arkansas is Board of Immigration Appeals is unreported.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Abdulla Nagi Naser Daifullah, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 2a) is reported at 11 F.4th 888. The decision of the Eastern District of Arkansas is Board of Immigration Appeals (Pet. App. 14a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on September 1, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

8 U.S.C. § 1451(a) provides:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation,

> and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

Article I, § 8, cl. 4 of the Constitution of the United States provides:

> "The Congress shall have power ... to establish a uniform rule of naturalization … throughout the United States."

INTRODUCTION

Since *Costello*, this Court has observed that "jurisdiction had become a word of many, too many,

meanings." *Steel Co. v. Citizens for a Better Environment*, 87 523 U.S. 83, 90 (1998) (citations omitted). This Court has also clarified that the term "jurisdiction" refers "'the authority by which courts and judicial officers take cognizance of and decide cases[.]'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (quoting Black's Law Dictionary 991 (4th ed.1951) (emphasis in *Sand & Gravel Co.*). "Accordingly, the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority." *Reed Elsevier v. Muchnick*, 559 U.S. 154, 160-61 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). "A rule is jurisdictional '[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Gonzalez v. Thayer, 132 S. Ct. 641, 648 (2012)* (alteration in original) (emphasis added) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)). This Court has clarified that there are two types of procedural requirements: non-jurisdictional "claims-processing rules" seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times[,]" *Henderson ex rel.*, 562 U.S. at 435 ; and jurisdictional rules implicating "a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). "A statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Reed Elsevier v. Muchnick*, 559 U.S. 154, 166 (2010) (quoting *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393 (1982) (emphasis added). In distinguishing between claims-processing rules and jurisdictional rules, "the

jurisdictional analysis must focus on the "legal character" of the requirement, which [this Court will] discern[] by looking to the condition's text, context, and relevant historical treatment." *Id. citing Zipes* at 393–395; see also *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 119–121 (2002). A requirement is jurisdictional if Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh,* 546 U.S. at 515–16, (footnote omitted). Additionally, "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision, as Congress has done with the amount-in-controversy requirement for federal-court diversity jurisdiction. See 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000 ... and is between (1) citizens of different States ....")" or where "the Court has stated it would treat a requirement as 'jurisdictional' when "a long line of [Supreme] Cour[t] decisions left undisturbed by Congress" attached a jurisdictional label to the prescription." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849, 204 L. Ed. 2d 116 (2019) (citing, *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 82, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009) (citations omitted).

The Eighth Circuit below incorrectly determined that 1451(a)'s requirements were not jurisdictional, conflicting not only with the explicit holdings in *Zucca* and *Costello*, but this Court's recent jurisprudence which treats restrictions on court's adjudicative

authority or the "classes of cases and litigants implicating that authority." *Reed Elsevier* 559 U.S. at 160-61. Here, section 1451(a)'s requirement directly restrict who may file a suit invoking the federal court's authority (the United States' Attorney for the respective district); and ties the courts authority to "set[] aside the order admitting such person to citizenship and cancel[] the certificate of naturalization" to the requirement that the United States Attorney file a complaint with supporting affidavit ("for the purpose").

STATEMENT OF THE CASE

I. Statutory Framework

Section 1451(a)'s requirement that the United States Attorney's for their respective districts "institute" proceedings has been retained in the statute since it was first enacted by Congress in the 1906 Naturalization Act (Act of June 29, 1906, c. 3592, 34 Stat. 596), which "Congress undertook … to prescribe 'and fix a uniform system and a code of procedure in naturalization matters.'" *United States v. Ginsberg*, 243 U.S. 472, 473 (1917) (quoting Report Committee on Immigration and Naturalization, H.R. 1789, Feb. 26, 1906). The original interpretation of the statute was that only the United States attorneys could institute denaturalization proceedings. *United States v. Andersen*, 169 F. 201, 206 (D. Idaho 1909) ("Moreover, it may be remarked that it is not one of the functions of the Bureau of Immigration and Naturalization, or of its representatives, to prosecute proceedings of this character. That duty is, by the plain provisions of the act, imposed upon the United States district attorney,

where it properly belongs, and there is no reason for presuming that the department of justice will fail to provide him with adequate assistance for the proper performance of his official duties."); *see also,* John P. Roche, *Statutory Denaturalization: 1906-1951*, 13 U. PITT. L. REV. 276, 288 n. 55(1952).

Even though the requirement remained in substantially the same form as originally adopted, Congress has in fact modified the statute in the intervening century. In 1918, after successful lobbying by the Bureau of Naturalization, Congress amended the requirement by providing that the Commissioner or Deputy Commissioner of Naturalization may also institute denaturalization proceedings. *See*, Act of May 9, 1918 Sec.1; 40 Stat.544 ; 8 U. S. C., title 8, Sec. 405 ("the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization"); *see also*, Senate Report No. 388, 65th Congress, 2nd Session p. 3 (1918) ("It also gives specific concurrent authority for the Bureau of Naturalization to institute proceedings to cancel certificates of naturalization, a duty which has been performed under the general charge which the Bureau of Naturalization has by law over all matters concerning the naturalization of aliens."). This amendment was passed based on the practice of the Bureau of Naturalization. See, Testimony of Morris Bevington, Chief Naturalization Examiner, *Hearings before the*

Committee on Immigration and Naturalization, House of Representatives, Sixty-seventh Congress, First session. October 21, 1921. Washington, Govt. Print. Off., 1921 at page 1047 ("the practice grew up many years ago of *my acting for the district attorneys in these matters. When a case would eventually reach them from Washington they would call upon me to take charge of the same, by way of preparing pleadings and the trial of the causes. Of course, all pleadings were actually signed by them and they took care of any costs that were incident to such litigation.* As I have intimated the practice has sometimes varied and *there have been times that we have been permitted to ourselves present cases direct to the district attorneys in the field with a request for the institution of cancellation proceedings*.") (emphasis added).

However, when Congress recodified the naturalization laws in 1940, the authority to institute denaturalization proceedings was again delegated only to the United States Attorneys. See, Roche, *Statutory Denaturalization* at 288 n. 55 (noting that 'in 1918 the naturalization laws were amended to allow the Commissioner or Deputy Commissioner of Naturalization to enter suit on behalf of the United States under Section 15. See 40 STAT. 544 (1918). However, this latter authorization was deleted from the law in 1940, see 54 STAT. 1158 (1940), 8 U.S.C.A. § 738 (1942). Presumably, the United States attorney is now the only person qualified to institute such actions."). However, the bill introduced after significant study originally contained the 1918 amended version of 1451(a)'s requirement:

> SEC. 338. (a) It shall be the duty of the United States district attorneys for the respective districts, *or the Commissioner, or a Deputy Commissioner,* upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizen- ship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

See, Draft Bill, H.R Report No. 2396, 76th Cong. 3rd Session (1940). Nonetheless, provision was substantively returned to the 1906 authorization of only authorizing the United States Attorneys to institute proceedings.

In the 1952 adoption of the Immigration and Nationality Act, Congress changed the authorization for the grounds of judicial revocation of naturalization. H.R. Rep. No. 82-1365, 1952 U.S.C.C.A.N. 1653, 1741. "One of the major changes in existing nationality law provided by the bill is contained in section 340 ***which authorized judicial revocation of naturalization***. Under the provisions of section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or was procured illegally. The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a

material fact or by willful misrepresentation." The framing of the authority being describing as a "authorization" of "judicial revocation of naturalization" supports the conclusion that Congress has long considered section 1451 requirements as conferring jurisdiction or speaking to the authority of the courts to hear and decide a matter.

Congress again addressed jurisdiction over naturalization in the 1990 Immigration Act, Pub.L. 101-649, which implemented a Congressional policy of "administrative naturalization" where jurisdiction to naturalize was removed from the federal courts and transferred to the Attorney General. However, even though Congress specifically amended the still maintained exclusive denaturalization authority in the federal courts and exclusive authority to institute proceedings pursuant to 1451(a) to the United States Attorneys. However, as part of the adoption of the new naturalization procedures, the 1990 Act explicitly placed exclusive denaturalization authority and jurisdiction to the federal district courts. See, Subsec. (a). Pub.L. 101-649 , § 407(d)(18)(A) (amending 1451(a) by deleting "in any court specified in subsection (a) of section 1421 of this title" and inserting "in any District Court of the United States"). As part of this same revision Congress substituted the "Attorney General" into other sections 1451 and thus can be presumed to deliberately have chosen not to transfer the United States Attorneys' exclusive authority to institute proceedings under 1451(a) or the federal district court's to revoke an order of naturalization and cancel the certificate of naturalization to the Attorney General along with the authority to grant naturalization. *See*,

Id. at § 407(d)(18)(D) (amending 1451(i), by striking "any naturalization court" and all that follows through "to take such action" and inserting the following: "the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person"); see also, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original). Since that time, section 1451's structure language has not been materially altered or amended.

II. Factual and Procedural Background

Petitioner, Abdulla Daifullah, is a naturalized citizen of the United States who was admitted to the United States on March 10, 2006 with an immigrant visa issued to him as the married son of his United States Citizen father. Mr. Daifullah owns two small businesses, pays his taxes, and is an otherwise law-abiding citizen. Mr. Daifullah has achieved such success in spite of his minimal education, functional illiteracy in his native language and his inability to speak English fluently and inability to read English entirely. However, prior to his entry to the United States on an immigrant visa for which his father petitioned for him, Mr. Daifullah had previously entered the United States under a different name in 1991, applied for asylum, and departed the country under an order of voluntary departure in 1997. At his hearing before an immigration judge in 1997 Mr. Daifullah disavowed the contents of his asylum

application, explaining that he left his native country because of fears of his father's wife's family, and accepted an order of voluntary departure. After returning to Yemen, Mr. Daifullah's father again petitioned for him to immigrate to the United States, resulting in Mr. Daifullah's entry to the United States in 2006 as a Legal Permanent Resident. In 2011, Mr. Daifullah applied for naturalization, which was approved on April 27, 2012. On May 11, 2012, Mr. Daifullah took the oath of allegiance becoming a naturalized citizen of the United States. Mr. Daifullah maintained that he relied on attorneys and translators to prepare his documents. Mr. Daifullah also repeatedly disavowed and corrected false statements and information upon his personal discovery of that information. Mr. Daifullah also entered the United States, gained lawful permanent residency and naturalized based on his real parent-child relationship with his United States citizen father; an issue which was not contested and which differentiates Mr. Daifullah from most other people who are denaturalized for fraud or misrepresentation as Mr. Daifullah didn't naturalize under a name other than his birth name or based on a fraudulent relationship.

On June 19, 2018, an attorney with the Office of Immigration Litigation instituted revocation proceedings pursuant to section 1451(a) against Mr. Daifullah by filing a complaint in the United States District Court for the Eastern District of Arkansas. While, the charge alleging that Mr. Daifullah has previously been ordered removed was withdrawn after the government's erroneous determination was discovered, the district court granted the government's

motion of summary judgment and denied Mr. Daifullah's motion on February 3, 2020. Mr. Daifullah timely appealed the decision to the Eighth Circuit Court of Appeals, who denied his appeal on September 1, 2021. Mr. Daifullah now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Opinion Conflicts with Prior Decisions of this Court and Thus Granting of the Petition is Appropriate under Rule 10(c).

"The power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress." *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) *Chirac v. Chirac*, 15 U.S.(2 Wheat.) 259, 263 (1817). However, "[t]he simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual.]" Once exercised, the Constitution requires that the "Judicial power is [] exercised … for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738, 827, 866 (1824) (Marshall, C. J., for the Court). Article III of the Constitution provides "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119(2015) (Thomas, J. concurring). Accordingly, the judiciary's "role is to interpret the language of the

statute enacted by Congress." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) (citations omitted) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "In case after case, [this Court] ha[s] rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings." *Fedorenko v. United States*, 449 U.S. 490, 517 (1981). This is because "[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." *Id.* at 518 (quoting *United States* v. *Ginsberg*, 243 U.S. 472, 474-475 (1917). Similarly here, the Eighth Circuit has created a statutory exception to Congress's requirement that the United States Attorney institute proceedings, which this Court has previously found to be jurisdictional. The Eighth Circuit's decision does not comport with the plain statutory requirements or this Court's historical understanding of judicial naturalization and denaturalization authority.

Congress adopted the 1451(a)'s current substantive requirements in the 1906 Naturalization Act as part of a comprehensive act which Congress adopted "[w]ith a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure . . . ." *United States v. Zucca*, 351 U.S. 91, 95 (1956) (quoting *Bindczyck v. Finucane*, 342 U.S. 76, 83 (1951). Since, that time this Court, in compliance with its own Constitutional obligations, has defined the meaning of the naturalization laws. This Court has noted that the 1906 Act's "detailed provisions for revoking a naturalization because of

fraud or illegal procurement" are "a self-contained, exclusive procedure" which "covers the whole ground" containing the "clearly defined procedure[s]" upon which "Congress insisted" including the detailed, explicit provisions of [former] § 15." *Bindczyck* 342 U.S. 83, 84. As Justice Frankfurter observed in *Bindczyck*, Congress intended section 1451's terms to deprive or grant courts of jurisdiction over denaturalization proceedings: "[s]ignificantly, floor action on § 15 in the House reveals a specific purpose to deprive the naturalizing court as such of power to revoke. The original bill authorized United States attorneys to institute revocation proceedings in the court issuing the certificate as well as in a court having jurisdiction to naturalize in the district of the naturalized citizen's residence." *Bindczyck* 342 U.S. at 83 (citing H.R. 15442, 59th Cong., 1st Sess., § 17)). However, "[a] committee amendment adopted just before final passage put the section in the form in which it was enacted. That amendment, in the words of Congressman Bonynge, the manager of the bill, 'takes away the right to institute [a revocation proceeding] in the court out of which the certificate of citizenship may have been issued, unless the alien happens to reside within the jurisdiction of that court.'" *Id.* (citing 40 Cong. Rec. 7874). Thus, from the adoption of the language of 1906, the requirement has been understood as jurisdictional. *See,e.g.*, *United States v. Olaechea*, 293 F. 819, 821 (D. Nev. 1923) ("Jurisdiction is clearly conferred on this court by section 15 of the Act of June 29, 1906, to cancel a certificate of citizenship on the ground that it was issued fraudulently or procured illegally in the state court.") Similarly, in *Zucca*, this Court noted that "Shortly after its enactment, the [] Attorney General

rendered an opinion to the Secretary of Commerce and Labor to the effect that the filing of an affidavit was "necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate.'" *United States v. Zucca*, 351 U.S. 91, 96 (1956) (citing, Letter of Attorney General Bonaparte, March 26, 1907 (unpublished, National Archives), cited in a contemporary treatise by a recognized authority on the statute. Van Dyne, Law of Naturalization (1907), 138.). This Court while admitting that "[w]ere we obliged to rely solely on the wording of the statute, we would have no difficulty in reaching the conclusion that the filing of the affidavit is a prerequisite to maintaining a denaturalization suit" *Zucca*, 351 U.S. at 94 relied in part on this contemporaneous agency construction to determine that "not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause. The District Court below correctly dismissed the proceedings in this case because of the failure of the Government to file the required affidavit." *Zucca*, 351 U.S. at 100.

In *Zucca* and *Bindcyzk*, this Court upheld and applied, in denaturalization proceedings, the strict compliance with the naturalization laws as written by Congress which had historically been applied to this Court's requirements for naturalization courts to strictly comply with the statutory requirements during naturalization proceedings. *See, e.g.*, Roche, *Statutory Denaturalization* at 283 (noting that early cases construing 1451(a)'s legal authority relied on "the doctrine of 'jurisdictional fact,' a doctrine under which

the jurisdiction of one court is open to challenge in another court, and which in this instance allowed the United States to attack the substance of a judgment under the guise of attacking the competence of the court which rendered it."). For example, in *Maney v. United States*, 278 U.S. 17, 22 (1928), Justice Holmes writing for this Court found that "that the filing with the [naturalization] petition of the certificate of arrival was a condition attached to the power of the court" and upheld the revocation of a court order granting naturalization because "record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had." *Maney v. United States*, 278 U.S. 17, 23 (1928). Similarly, in *United States v. Ginsberg*, this Court found that the "plain language" of the 1906 Naturalization Act's requirement that proceedings be held in open court "repels the idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere" and upheld revocation of naturalization where the naturalization proceedings were held in chambers. *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). This Court upheld the revocation of naturalization "procured when prescribed qualifications have no existence in fact [] is illegally procured" and "a manifest mistake by the judge cannot supply these nor render their existence non-essential." *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). Thus, the early treatment of the judicial naturalization orders saw the naturalization court's failure to comply with the statutory procedural requirements as implicating the authority of the naturalization court to issue the order in the first instance for lack of

jurisdiction, and thus avoiding concerns over reopening and invalidating the final orders of state and federal courts by another court.

1451(a)'s requirements that the United States attorney institute proceedings by filing a complaint and affidavit of good cause are similarly jurisdictional, in that the requirement a United States attorney to "institute" proceedings is a requirement that relates to the very act of invoking the federal court's jurisdiction: the filing of the complaint in district court. At the time 1451(a)'s requirements were adopted by Congress in 1906, this Court had only 10 years earlier ruled, that "*proceedings cannot be said to be* brought or *instituted* until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate." *Post v. United States*, 161 U.S. 583, 587 (1896) (emphasis added). This Court's decision in *Post* would also be cited under the definition of "institute" in the 1910 edition of Black's Law's Dictionary. *See*, Black's Law Dictionary (2nd Ed. 1910) (defining "INSTITUTE, v. To inaugurate or commence; as to institute an action *Com. v. Duane*, 1 Binn. (Pa.) 608 , 2 Am. Dec. 497; *Franks v. Chapman*, 61 Tex. 580; *Post v. U.S.*, 161 U. S. 583, 16 Sup.Ct. 611, 40 L. Ed. 816"). The definition of "institute" has not changed much since the adoption of 1451(a)'s requirements in 1906. *See, e.g.*, INSTITUTE, Black's Law Dictionary (11th ed. 2019) ("To begin or start; commence <institute legal proceedings against the manufacturer>"); *Local Union No. 38 v. Pelella*, 350 F.3d 73, 82 (2d Cir. 2003) ("An action is therefore instituted when a plaintiff files a complaint as that constitutes the first step invoking the

judicial process"); (citing *Black's Law Dictionary* (defining the verb "institute" as "[t]o begin or start; commence"); *McNeil v. United States,* 508 U.S. 106, 112 (1993) ("[T]he normal interpretation of the word 'institute' is synonymous with the words 'begin' or 'commence.'"); *United States v. $8,221,877.16 in United States Currency,* 330 F.3d 141, 159 (3d Cir. 2003) ("In the context of civil actions, the word 'commence' does not encompass broad concepts, but rather requires 'invocation of the judicial process'") (quoting *McNeil,* 508 U.S. at 112); see also, *Black's Law Dictionary* 183 (6th ed. 1991) (defining "commence" as "t]o initiate by performing the first act or step; [t]o begin, institute or start").

Under the Court's treatment of jurisdiction, 1451(a)'s requirement that a United States attorney institute proceeding is jurisdictional because it is a mandatory procedure, without the act of which, a federal district court never can have jurisdiction over the matter to determine the merits. In *Zucca*, the three dissenting Justices understood the majority as issuing a jurisdictional holding as o dissenting in part because "the identical point on which the case today is decided was present in two earlier cases where it apparently was not considered important enough to be presented to this Court[,]" *Zucca*, 351 U.S. at 101 Clark, J. dissenting), noting that "[i]n *Schwinn* v. *United States*, 112 F.2d 74, the Ninth Circuit held that the filing of the affidavit was not 'jurisdictional,' and passed on the merits. We granted certiorari and affirmed summarily 'on the sole ground' that the certificate had been illegally procured. In *Schneiderman* v. *United States*, 320 U.S. 118, we considered the merits at length, even

though the 'affidavit' filed in that case by the Immigration Inspector revealed that his information was based, as here, solely on the Government's files, and was in exactly the form used here." *Id. at* n.2.

The adherence to statutory requirements both in judicial naturalization and denaturalization proceedings are firmly rooted in the fact that "[f]ederal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and Statute ... which is not to be expanded by judicial decree[,]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). However, within the confines of Congressionally-vested jurisdiction, to the degree there is room from interpretation, this Court has counseled that "in an action instituted under [8 USC § 1451] for the purpose of depriving one of the precious right of citizenship previously conferred" both "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman* 320 U.S. at 122. Nonetheless, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *United States v. Brogan*, 522 U.S. 398, 408 (1998). "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources, [their] imaginations" (or in the case here because they "need not labor"), they run the "risk [of] amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (citing, *New Prime Inc.* v. *Oliveira*,

139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). If *Zucca* and *Costello*'s holdings are to be abrogated, overruled, or modified, it should be done so by this Court. The Eighth Circuit's ruling that 1451(a)'s requirements are not jurisdictional conflict with holding of this Court in *Zucca* and *Costello*, as well as the opinions based on *Costello*'s formulation of basis of doctrine of curable defect.

II. This Court Should Grant the Petition to Clarify Uncertainty With Its Own Precedent Regarding 1451(a)'s Requirements and in the Circuits' Reliance on this Court's Past Opinions

In holding that that 1451(a)'s requirements are not jurisdictional, the Eighth Circuit noted that "[a]lthough *Costello* and *Zucca* both used the term "jurisdictional" when discussing the mandatory affidavit rule, they predate the Supreme Court's concerted effort to use that term in a more disciplined fashion." (Pet. App. 10). In fact, the Eighth Circuit was left to divine the meaning of *Costello* and *Zucca* noting "both cases contain clues the Supreme Court did not believe failure to follow the affidavit rule deprived a federal court of subject matter jurisdiction." *Id.* The Eighth Circuit further noted that in "*Costello*, for example, the Supreme Court recognized a distinction between violation of the mandatory affidavit rule and 'fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter.'" *Id.* (citation omitted). Regarding *Zucca*, the Eight Circuit noted that "the Supreme Court described the

affidavit rule as a "procedural prerequisite" and noting that other courts had adopted similar conclusions. *Id.* (citing *Title v. United States*, 263 F.2d 28, 30 (9th Cir. 1959). While "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit[,]'" *Reed Elsevier v. Muchnick*, 559 U.S. 154, 166 (2010) (quoting *Zipes,* 455 U.S., at 393, 102 S.Ct. 1127 (emphasis added); section 1451(a)'s requirements speak to the authority of the district to even hear the matter in the first instance. Accordingly "the jurisdictional analysis must focus on the "legal character" of the requirement, which [this Court will] discern[] by looking to the condition's text, context, and relevant historical treatment." *Id.* (citing *Zipes* at 393–395, 102 S.Ct. 1127; see also *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 119–121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

The "legal character" of 1451(a)'s filing requirements are similar to the legal character of other jurisdictional statutes. For example, in *Reed Elsevier*, this Court found that the provision in question "fits in th[e] mold" of nonjurisdictional requirements as "Section 411(a) imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions. See §§ 411(a)-(c). Section 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents." *Reed Elsevier v. Muchnick*, 559 U.S. 154, 166 (2010). Section 1451(a)'s requirement that only the United States Attorney for the respective district "shall institute" revocation proceedings "fits in

this mold" of mandatory requirements that fit the "legal character" of a jurisdictional requirements, as the statute creates a mandatory process for the "invocation of the court's jurisdiction" without which a court lacks authority to hear and determine the matter. *Cf. McNeil* 508 U.S. at 111. Similarly, this Court has noted that statutes of limitations that "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims" are "more absolute" and thus can be considered "jurisdictional." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (citing *United States v. Brockamp,* 519 U.S. 347, 352–353, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997). 1451(a)'s filing requirements don't necessarily serve a case-specific purpose, but rather speak to the broad processing of claims by requiring specific officers of the United States to make the decision to institute the proceedings. *See*, *Zucca* at 351 U.S. 99-100 ("The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause.").

Nonetheless, even if the Eighth Circuit's decision is affirmed, this court's decisions in *Zucca*, and particularly *Costello* have already created significant uncertainty that requires guidance from this Court. *See, e.g.* 18A Wright & Miller Fed. Prac. & Proc. Juris. § 4435 (3d ed.) (criticizing *Costello*'s "method of interpreting Rule 41(b) [a]s directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction. In addition, it appears to be self-contradictory: by treating the affidavit as a matter of jurisdiction, it requires that dismissal be without prejudice even though the question was not reached until the defendant had undertaken all of the burdens of preparing and perhaps presenting a defense."). For this reason, this Court should grant the petition.

III. Granting Review Will Provide Clarity and Certainty in an Important Area of Law Where Agency Practice Increasingly at Odds With the Clear Statutory Requirements.

This Court should grant review to provide the federal agencies and the lower courts with explicit guidance as the number of the denaturalization increases. "According to USCIS, it is referring cases to DOJ faster than USAO/OIL can review them." USCIS Ombudsman, *Annual Report to Congress* June 2020 at p. 38.[1] In order to accommodate this increase, "USCIS

[1] https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf (last accessed November 29, 2021).

is in communication with OIL in structuring the new section's process to coordinate efforts, and it expects the new denaturalization section will narrow the gap between referred and court initiated cases." *Id.* Further, the Department of Justice has established a "Denaturalization Section" which is "dedicated to investigating and litigating revocation of naturalization" which The Denaturalization Section "will join the existing sections within the Civil Division's Office of Immigration Litigation—the District Court Section and the Appellate Section" as "the growing number of referrals anticipated from law enforcement agencies motivated the creation of a standalone section dedicated to this important work." *See*, Department of Justice Press Release, "The Department of Justice Creates Section Dedicated to Denaturalization Cases," February 26, 2020.[2]

The DOJ itself has stated that the: "*the INA specifically delegates the authority to the U.S. Attorney to institute denaturalization proceedings*" and that "OIL-DCS seeks the written authorization of the U.S. Attorney to proceed with them. OIL-DCS typically will also request that an Assistant U.S. Attorney be assigned to a denaturalization action to serve as local counsel and can include the U.S. Attorney and AUSA on all pleadings."[3] The agency however further

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[2] https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases (last accessed on November 29, 2021).

[3] Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. ATTYS' BULL. 7 (July 2017)

instructs that: "For the sake of clarity, the Ninth Circuit recommended that the U.S. Attorney's Office be represented on the complaint in future cases." *Id.* at n. 14. According to the USCIS Ombudsman, "[e]xcept in the Eastern District of New York, Southern District of New York, and for the most part in the Eastern District of Virginia, USAO delegates the responsibility to litigate the civil denaturalization cases to DOJ's Office of Immigration Litigation (OIL) attorneys." USCIS Ombudsman, *Annual Report to Congress* June 2020 at p. 38.[4] Thus, in spite of the unambiguous statutory requirement, and the DOJ's own representations that the INA requires district attorney's for the respective district, must institute proceedings, practice by the agencies is inconsistent.

The growing number of denaturalization cases coupled with DOJ's establishment of a specific Denaturalization Section supports granting review by this Court now in order to provide certainty and guidance to district and appellate courts who will handle these cases. A ruling from this confirming that the 1451(a)'s proceedings must be "instituted" by the United States attorneys is in fact a jurisdictional requirement will most certainly prevent the government from repeating similar mistakes in the future and will provide district courts with the

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available at: https://www.justice.gov/usao/page/file/984701/download (last accessed November 29, 2021).

[4] https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf (last accessed November 29, 2021).

necessary explicit guidance to dispose of jurisdictionally defective cases quickly and efficiently. Furthermore, the same reasoning applies even if this Court were to hold that 1451(a)'s filing requirements were non-jurisdictional, as similar challenges would be foreclosed by the decision of this Court and efficiently disposed of by the district courts. Thus, granting the petition will provide the Court an opportunity to clarify its own precedent while providing executive officers with certainty upon which it can rely in carrying out its duties.

CONCLUSION

For the above stated reasons, this honorable Court should grant this petition for a writ for certiorari.

Dated: November 30, 2021

Respectfully Submitted,

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