No. 13-___

IN THE

Supreme Court of the United States

KAMAL PATEL,

Petitioner,

v.

JANET NAPOLITANO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal courts are divided over how to interpret 8 U.S.C. § 1101(a)(22), which defines U.S. nationality to encompass not just citizens, but also persons who owe "permanent allegiance to the United States." The resulting uncertainty goes to fundamental and recurring issues concerning rights in the immigration, detention, employment, and immunity contexts.

Here, Petitioner Kamal Patel filed suit in federal court seeking a declaration that he is a U.S. national in order to enjoy the benefits of certain prison programs. Under Fourth Circuit case law, Mr. Patel undisputedly qualified as a U.S. national. But despite the plain language of § 1101(a)(22) and on-point circuit precedent, the Fourth Circuit deferred to the far narrower interpretation of U.S. nationality adopted by the Board of Immigration Appeals. In so deferring, the decision below solidified a conflict of authority among the courts of appeals, which generally refuse to apply deference in nationality cases.

There are two questions presented.

1. Is the Board of Immigration Appeals entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when interpreting the definition of "national" codified at 8 U.S.C. § 1101(a)(22)?

2. Does the definition of "national" in 8 U.S.C. § 1101(a)(22) encompass persons like Mr. Patel who have undisputedly shown their "permanent allegiance to the United States," *id.*, including through the filing of an application for U.S. citizenship?

PARTIES TO THE PROCEEDING

The plaintiffs in this case is Kamal Patel, a/k/a Kamalbhai Kanti Patel.

The defendants are Janet Napolitano, Eric Holder, and Harley Lappin, in their official capacities.

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The decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 2a) is reported at 706 F.3d 370. The decision of the United States District Court for the Eastern District of North Carolina (Pet. App. 19a) is unreported.

JURISDICTION

The Fourth Circuit denied reconsideration of its decision affirming the district court's final judgment on June 18, 2013. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1101(a)(22).

   The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

2. 8 U.S.C. § 1252(b).

   (A) Court determination if no issue of fact

   If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

   (B) Transfer if issue of fact

   If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the

district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

3. 8 USC § 1503(a)

(a) Proceedings for declaration of United States nationality

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States

(1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or

(2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final

> administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

STATEMENT OF THE CASE

1. Mr. Patel and his family arrived in the United States from the UK when Mr. Patel was approximately ten years old. Pet. App. 26a ¶ 9 Mr. Patel is a longstanding lawful permanent resident of the United States, with strong family roots in Texas and Oklahoma. *Id.* at 26a ¶¶ 9-14. Mr. Patel has demonstrated his permanent allegiance to the United States in numerous ways. *Id.* at 26a ¶¶ 9-14. First, Mr. Patel registered with the Selective Service when he was 18 years old. *Id.* at 26a ¶ 11. Second, Mr. Patel has been a lawful permanent resident for many years. *See id.* at 26a ¶ 9. Third, Mr. Patel has applied for United States citizenship. *Id.* at 26a ¶ 12. Fourth, Mr. Patel has sent sworn declarations to various departments of the United States, including an Immigration Law Judge, the President, and Secretary of State, which reiterated his allegiance to the United States. *Id.* at 26a ¶¶ 13-14.

Moreover, Mr. Patel's immediate family resides in the United States and are either U.S. citizens or lawful permanent residents. *Id.* at 26a ¶ 10. For example, his parents came to the United States with Mr. Patel. Soon thereafter, Mr. Patel's parents became owners of a series of hotels in the Oklahoma and Texas area. Many of Mr. Patel's close family members have carried on this hotel business and several relatives are accountants, lawyers and physicians in

the United States. Additionally, Mr. Patel's father and brother as well as all of Mr. Patel's aunts and uncles and his first cousins are U.S. citizens. His brother's children were all born in the United States.

2. In 1992, after lending money to a friend who financed illegal narcotics purchases, Mr. Patel was convicted of a drug offense. Since that time, he has been incarcerated in the United States. During the time that Mr. Patel has been incarcerated, the Federal Bureau of Prisons has classified Mr. Patel as an alien, instead of as a national. *Id.* at 27a ¶ 17. Because of this classification, the Bureau of Prisons has determined that Mr. Patel is ineligible for several prison programs that are limited to United States nationals. *Id.* These programs include, but are not limited to, pre-community release, pre-community placement, participation in the Residential Drug Abuse Program, participation in the Life Connections Program, and half-way house placement. *Id.* at 27a ¶¶ 17-18.

As a result of this classification, Mr. Patel filed a complaint on June 4, 2010 in the United States District Court for the Eastern District of North Carolina. *Id.* at 23a-28a. In his Complaint, Mr. Patel sought a declaratory judgment that he is a national as defined in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996). Pet. App. 24a; *see also* Pet. App. 27a ¶ 21 (requesting "Declaratory Judgment pursuant to its authority provided by 28 U.S.C. § 2201 and 8 U.S.C. § 1503 declaring Plaintiff to be a National of the United States"). In essence, Mr. Patel's Complaint sought a declaratory judgment so that he may at least be eligible for consideration for certain prison programs, in which he wishes to participate. *Id.* at

27a ¶ 17 (alleging that the prison's classification of him as an alien has made him ineligible for numerous prison programs). Mr. Patel's Complaint did not request a judgment that he is constitutionally entitled to be enrolled into any specific prison program. *See id.* at 23a-28a. Moreover, Mr. Patel's Complaint did not state, or even mention, that he sought any cause of action or relief under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), 28 U.S.C. § 2241, or 28 U.S.C. § 2255.

In its review of Mr. Patel's Complaint under 28 U.S.C. § 1915A, the district court did not analyze whether Mr. Patel had stated a claim seeking a declaratory judgment that he was a national so that he may at least be considered for certain prison programs. *See id.* at 19a-22a. Rather, the district court construed Mr. Patel's claim as one seeking a constitutional right to certain prison programs under *Bivens*, 28 U.S.C. § 2241, or 28 U.S.C. § 2255. *Id.* at 20a. In so doing, the court stated that regardless of whether Mr. Patel's claim was cognizable under 28 U.S.C. § 2241, 28 U.S.C. §2255 or in a civil rights complaint filed pursuant to *Bivens*, it fails to state a valid cause of action because a prisoner is not constitutionally entitled to be enrolled in any particular prison program. *Id* at 21a. The court then dismissed Mr. Patel's Complaint. *Id.* at 21a. The court never addressed the merits of Mr. Patel's claim under § 1503. *Id.* at 19a-22a.

3. In a divided decision, the Fourth Circuit affirmed the district court's dismissal of Mr. Patel's complaint.

The majority opinion acknowledged several critical facts in Mr. Patel's complaint. For example, the

Court recognized that Mr. Patel "has resided in the United States since the age of eleven and has been a permanent resident for almost twenty-five years," Pet. App. 3a, and "[n]early every member of [Mr. Patel's] family is a United States citizen or permanent resident." *Id.* Further, Mr. Patel "has sworn an oath of allegiance to the United States," as well as to the President of the United States and other federal officials. *Id.* Finally, and perhaps most importantly, Mr. Patel "applied for citizenship." *Id.*

The majority opinion agreed with Mr. Patel as to two important issues. First, the district court had "misconstrued" Mr. Patel's claim and so disposed of it on an erroneous basis. Pet. App. 4a. Second, the majority opinion also "agree[d] with Patel that he would state a claim under *Morin*'s interpretation of § 1101(a)(22)(B)." Pet. App. 6a. In other words, the decision below agreed that Mr. Patel would have stated a claim if the definition of U.S. national at § 1101(a)(22) were read according to its terms to encompass not just citizens, but also persons with "permanent allegiance to the United States." *See id.* Nonetheless, the majority deferred to and adopted the BIA's interpretation of § 1101(a)(22)(B). Under that interpretation, Mr. Patel cannot become a national unless he completes the naturalization process.

The majority opinion expressly recognized that its decision to apply *Chevron* deference to the BIA's interpretation solidified a disagreement among the federal courts of appeals. As the majority put it, the Fourth Circuit's previous decision in *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007), "disagree[d] with some of our sister circuits, which have declined to afford *Chevron* deference to the BIA's interpreta-

tion of the INA in nationality claims, reasoning that Congress placed the determination of nationality claims exclusively in the hands of the courts." Pet. App. 9a n.1. The majority stated that it was "bound by our holding in *Fernandez*."

Judge Davis dissented. In addition to urging that the majority violated circuit precedent and erred in reaching the merits, Judge Davis pointed out that the Government itself had previously advanced Mr. Patel's plain-text reading of § 1101(a)(22). Indeed, it was the Government's understanding of § 1101(a)(22) and U.S. nationality that had prevailed in *Morin*, where the Fourth Circuit found U.S. nationality based on an individual's application for citizenship, even though that individual had not completed the naturalization process. As Judge Davis put it: "It is indeed curious that a statute this Court had no difficulty interpreting in 1996 (in a manner urged by the agents of the Attorney General) now requires deference to . . . the BIA, when the very words of the statute have not changed." Pet. App. 17a n.3. As Judge Davis wrote below, "there is something odious in the government arguing (in *Fernandez* and the case at bar) *the opposite of what it argued* in *Morin*, when it suited the government's purpose." *Id.*

REASONS FOR GRANTING THE PETITION

Courts are divided *both* as to whether *Chevron* deference applies in cases involving U.S. nationality *and* as to the meaning of U.S. nationality. These questions are important and recurring in a variety of contexts, including in cases concerning entitlement to benefits, deportation, prison conditions, employment discrimination, and foreign official immunity. There is no reason for the same statutory language at 8

U.S.C. § 1101(a)(22) to be viewed differently in different cases—yet that is precisely what is happening, in part because the United States has taken different positions on the meaning of this key statutory term. This Court should resolve this persisting issue by granting Mr. Patel's petition for a writ of certiorari.

First, the Fourth Circuit's decision below self-consciously solidified a well-recognized division of authority in the federal courts of appeals over whether *Chevron* deference is owed to the BIA in nationality cases. The Fourth Circuit is the only federal appellate court to afford *Chevron* deference in nationality cases, which typically implicate core personal rights. In contrast, the Fifth, Ninth, Tenth, and Eleventh Circuits have all squarely refused to apply *Chevron* in nationality cases, because Congress has expressly assigned interpretive authority of U.S. nationality to the federal courts. *See* 8 U.S.C. § 1252(b). This split is entrenched and well-recognized, including by the divided decision below. Moreover, this case poses an ideal vehicle. The decision below affirmed a dismissal of Mr. Patel's complaint. Therefore, the decision below rested on a pure issue of law unencumbered by any factual disputes or potential alternative grounds of decision. Moreover, the Fourth Circuit's outlier view will be outcome-determinative not only in the present case, but also in all similar nationality cases arising in the Fourth Circuit.

Second, there is also widespread disagreement among federal courts over the proper interpretation of the term "national" in 8 U.S.C. § 1101(a)(22). This issue implicates a number of statutes that cross-reference § 1101(a)(22), including employment discrimination statutes and the Foreign Sovereign Im-

munity Act. In those contexts, a number of courts have adopted the reading proposed by Mr. Patel, whereby an application for citizenship and related evidence of permanent allegiance to the United States is sufficient to establish nationality. Indeed, the United States itself has sometimes advanced the view of nationality that Mr. Patel now defends. This Court's review is therefore warranted.

I. THE DECISION BELOW SOLIDIFIES A SPLIT OF AUTHORITY OVER *CHEVRON*'S APPLICABILITY TO NATIONALITY CASES

The Court should grant Mr. Patel's petition for a writ of certiorari because the decision below solidified a well-recognized division of authority regarding the applicability of *Chevron* deference in cases involving nationality claims. Indeed, the decision below expressly recognized that it entrenched a conflict between the Fourth Circuit and two other Courts of Appeals. *See* Pet. App. 9a n.1 (explaining that the panel decision below "disagreed with some of our sister circuits"). This Court should resolve that division of authority regarding an important issue of law.

A. Most Federal Courts of Appeals Do Not Apply *Chevron* Deference In Nationality Cases

The Fifth, Ninth, Tenth, and Eleventh Circuits have all squarely held that the BIA is not entitled to *Chevron* deference in cases concerning the meaning and scope of U.S. nationality.

1. *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004), recognized that it generally owed "substantial deference to an agency's construction of a statute that it administers." *Id.* at 510. But an "exception to the general rule of *Chevron* arises . . . where Congress, by

the terms of the statute itself, instructs the courts to apply a less deferential standard of review as to a particular issue of statutory interpretation." *Id.* The Fifth Circuit then discussed statutory provisions specifically providing that legal questions involving U.S. nationality would be resolved by the federal courts—not the BIA. *See* 8 U.S.C. § 1252(b)(5)(A) ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim"); § 1252(b)(5)(C) ("The petitioner may have such nationality claim decided only as provided in this paragraph").

Through § 1252(b)(5), the Fifth Circuit reasoned, Congress has specifically assigned interpretive authority to the courts, while it retracted any delegation of similar authority to the BIA or any other federal agency. "Thus, based on the plain language of the INA," the Fifth Circuit "conclude[d] that Alwan's nationality claim is a purely legal question that Congress has not consigned to the discretion of the BIA." *Alwan*, 388 F.3d at 510. Having found that *Chevron* deference did not apply, the Fifth Circuit reviewed the statutory interpretation question "de novo." *Id.*

The Fifth Circuit has consistently adhered to this position by denying deference to the BIA's interpretation of the meaning of U.S. nationality. *See Marquez-Marquez v. Gonzales*, 455 F.3d 548, 554 (5th Cir. 2006) ("Moreno's nationality claim is a question of law that we review *de novo*." (citing *Alwan*, 388 F.3d at 510)); *Ramos-Garcia v. Holder*, 483 F. App'x 926, 933 (5th Cir. 2012) (explaining that,

"[w]hether a petitioner is a national is a purely legal issue that this court decides *de novo*").

2. The Ninth Circuit has repeatedly followed *Alwan* in citing statutory text and legislative intent as the reasons why the BIA should not receive *Chevron* deference in nationality cases. *See Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003); *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001). As the Ninth Circuit has explained, "In the context of an order of removal . . . the INA explicitly places the determination of nationality claims solely in the hands of the courts of appeals." *Hughes*, 255 F.3d at 758 (citing 8 U.S.C. § 1252(b)(5)). This conclusion follows from § 1252(b)(5): "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). Underscoring the exclusivity of judicial interpretation in this area, the Act goes on to make clear that "[t]he petitioner may have such nationality claim decided only as provided in this paragraph." 8 U.S.C. § 1252(b)(5)(C). Therefore, the Ninth Circuit held, "Congress did not grant discretion to the BIA to decide questions of law related to nationality." *Perdomo-Padilla*, 333 F.3d at 967.

3. The Tenth Circuit has also concluded that "Congress 'explicitly place[d] the determination of nationality claims solely in the hands of the courts of appeals.'" *Shepherd v. Holder*, 678 F.3d 1171, 1181 (10th Cir. 2012) (quoting *Hughes*, 255 F.3d at 758). Citing both Fifth and Ninth Circuit cases, including *Alwan*, the Tenth Circuit has declined to defer to the

BIA's interpretations regarding alienage and nationality. According to the Tenth Circuit, § 1252(b) "requires that the federal courts make a plenary determination of the issue." *Id.* Therefore, "once the issue of citizenship is put before the courts, 'the BIA's decision is no longer relevant.'" *Id.* (quoting *Lopez v. Holder*, 563 F.3d 107, 110 (5th Cir. 2009)).

4. The Eleventh Circuit has also arrived at the same conclusion as the Fifth and Ninth Circuits. *See Sebastian-Soler v. United States*, 409 F.3d 1280, 1283 (11th Cir. 2005). Citing the Fifth Circuit's seminal decision in *Alwan* denying deference to the BIA in nationality cases, the Eleventh Circuit has agreed that 8 U.S.C. § 1252(b)(5) specifically withdraws statutory interpretation regarding nationality issues from the purview of the BIA. Therefore, the Eleventh Circuit concluded, "We review *de novo* legal questions arising from claims of nationality." *Sebastian-Soler*, 409 F.3d at 1283 (citing *Alwan*, 388 F.3d at 510).

In sum, at least the Fifth, Ninth, Tenth, and Eleventh Circuits have all expressly agreed that Congress has withdrawn interpretive authority from the BIA in nationality cases and, therefore, that *Chevron* deference should not apply in those cases.

5. Finally, two other Courts of Appeals—the Second Circuit and the Third Circuit—also appear to have adopted the majority position that *Chevron* does not apply in nationality cases. In *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005), the Second Circuit implicitly refused to extend deference to the BIA's interpretation of "national" by making no mention of *Chevron* in its analysis of the BIA's interpretation of that term. *Id.* at 216–219. And, in *Denis v. Attorney General of the US*, 633 F.3d 201 (3d Cir.

2011), the Third Circuit held that no deference should be given to the BIA's interpretation of 8 U.S.C. § 1101(a)(43), since the issue was a legal one over which the agency had no particular expertise. Thus, the circuit split is best viewed as 6-1, with the decision below on the short side.

B. The Decision Below Entrenches The Fourth Circuit's Outlier Rule That *Chevron* Applies In Nationality Cases

The Fourth Circuit has self-consciously and consistently broken from other courts of appeals by applying *Chevron* deference to purely legal issues arising in nationality claims. The decision below solidifies that split.

The Fourth Circuit first addressed the meaning of U.S. nationality in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), which involved a federal criminal prosecution. Under the plain terms of § 1101(a)(22), a person is a "national" insofar as he or she "owes permanent allegiance to the United States.'" 8 U.S.C. § 1101(a)(22). *Morin* therefore held that an individual can establish U.S. nationality in federal court without completing the naturalization process so long as he has demonstrated allegiance to the United States, such as by submitting a citizenship application. *See Morin*, 80 F.3d at 126-27. As *Morin* put it: "a 'national of the United States' may also be 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'" *Id.* at 126 (quoting 8 U.S.C. § 1101(a)(22)). And, *Morin* further reasoned, "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.* *Morin* therefore held that an individual

"was indeed 'a national of the United States'" because, as "a permanent resident alien of the United States," he "had applied for United States citizenship." *Id.* Notably, *Morin* did not apply *Chevron* deference, but rather construed the relevant statutory text *de novo*, according to its plain terms.

Later, in *Fernandez*, 502 F.3d 337, the Fourth Circuit held for the first time that *Chevron* deference should apply in nationality cases. A permanent resident alien had asserted that he was a U.S. national under the Fourth Circuit's earlier decision in *Morin*. "Just like the Mexican citizen in *Morin*," the Fourth Circuit explained, "Fernandez has applied for U.S. citizenship." *Fernandez*, 502 F.3d at 342. The Government responded in *Fernandez* that the BIA had authoritatively construed the term "national" in § 1101(a)(22) to require completion of the naturalization process, not just an application for citizenship. *See Fernandez*, 502 F.3d at 339-40. In other words, the Government argued in *Fernandez* that the Fourth Circuit should abandon its own prior test set forth in *Morin*—even though the Government itself had originally urged the adoption of that test. The *Fernandez* court agreed with the Government's new position and so deferred to the BIA's interpretation of § 1101(a)(22).

The Fourth Circuit arrived at that outlier result by creating an unprecedented clear statement rule: under *Fernandez*, only a clear indication of congressional intent is capable of overcoming the general presumption in favor of applying *Chevron* deference. *See id.* at 344 ("For us to remove our *Chevron* glasses in interpreting the INA, the statutory language must make clear that Congress desired such unfettered re-

view."). Applying that novel clear statement rule, the *Fernandez* court concluded that *Chevron* deference was warranted. *See id.* ("We do not believe § 1252(b)(5) clearly calls for such a retreat from our mode of review.").

The panel decision below confirms that the Fourth Circuit has self-consciously created a circuit conflict regarding the applicability of *Chevron* to nationality cases. As the decision below explained, the Fifth and Ninth Circuits have "declined to afford *Chevron* deference to the BIA's interpretation of the INA in nationality claims." Pet. App. 9a n.1. In *Fernandez* and the decision below, however, the Fourth Circuit has relied on *Chevron* deference to override its own prior interpretation of § 1101(a)(22), the key INA provision bearing on nationality.

Notably, the decision below was unanimous that the *Chevron* question was outcome determinative. *See* Pet. App 10a. If the BIA had not received *Chevron* deference, then Mr. Patel would have prevailed below based on circuit precedent. The *Chevron* issue thus dictates the effective meaning of U.S. nationality status in the Fourth Circuit.

C. The Court Below Erred By Applying *Chevron* Deference In Nationality Cases

The decision below entrenches the short side of a circuit split and should be reversed.

It is axiomatic that courts should accord an administrative agency *Chevron* deference only if Congress has delegated authority to the agency to clarify a statutory ambiguity. *See United States v. Mead Corp.*, 533 U.S. 218 (2001). Applying that well-settled approach, numerous courts have recognized that "the BIA's interpretation is not entitled to *Chev-*

ron deference, because in the removal context Congress has placed "determination of nationality claims solely in the hands" of the courts. *Perdomo-Padilla*, 333 F.3d at 967. Here, the plain terms of the INA explicitly direct that a "court shall decide the nationality claim" and that "[t]he petitioner may have such nationality claim decided only as provided in this paragraph." 8 U.S.C.A. § 1252(b)(5)(A) & (C). Thus, *Chevron* deference should not apply in nationality cases that fall within the scope of § 1252(b)(5)(A).

Chevron deference is especially inappropriate in this case because Mr. Patel is seeking a determination of his nationality under § 1503, and that provision reiterates that the courts—and not the BIA—have sole interpretive authority as to the scope of U.S. nationality. *See* 8 U.S.C. § 1503 (authorizing any person aggrieved by an agency's nationality determination to obtain "a judgment declaring him to be a national of the United States" under 28 U.S.C. § 2201); *see also* 28 U.S.C. § 2201 (authorizing the "court[s] of the United States . . . [to] declare the rights and other legal relations of . . . [the] interested party seeking such declaration"). As noted, the Fourth Circuit was able to overlook these statutory provisions only by fashioning a totally unprecedented clear statement rule that requires unmistakable evidence of legislative intent to rescind *Chevron* deference. But, under the logic of *Chevron* and *Mead*, even in the absence of such unmistakable evidence, the text of the INA should preclude judicial deference to the BIA's administrative interpretation.

D. The United States Itself Has Taken Divergent Positions On Whether Deference Is Appropriate

Certiorari is also warranted because the United States has taken divergent positions on whether courts should defer to the BIA's longstanding interpretation of the meaning of U.S. nationality, depending on whether doing so is in the Government's own interests. This very case provides perhaps the best example of that disturbing pattern of behavior, as the dissenting opinion below emphasized. *See* Pet. App. 17a n.3. In *Morin*, it was in the Government's advantage to argue—in a federal criminal prosecution—that a particular individual was a U.S. national. In Mr. Patel's case and many others, by contrast, the Government prefers to deny nationality status, even to persons who clearly satisfy the tests that the Government itself has advocated for in other cases.

As Judge Davis wrote below, "there is something odious in the government arguing (in *Fernandez* and the case at bar) *the opposite of what it argued* in *Morin*, when it suited the government's purpose." Pet. App. 7a n.1. This issue has long evaded review, allowing the Government to manipulate outcomes to suit its own case-specific preferences and thereby causing vastly disparate treatment for similarly situated individuals. This Court should bring uniformity to this important area by granting certiorari.

E. This Case Affords An Ideal Vehicle To Resolve Whether Deference Applies

This case pose a pure question of law and so offers an ideal vehicle for this Court's review. The decision below affirmed a dismissal of Mr. Patel's complaint, while accepting the alleged facts as true. There are

no material contested facts, and no alternative grounds for decision.

Moreover, there is no dispute that the *Chevron* question presented in this case is outcome determinative here and in all similar cases in the Fourth Circuit. As the decision below explained, the Fourth Circuit's earlier decision in *Morin* clearly adopted Mr. Patel's view of U.S. nationality, whereby someone can demonstrate permanent allegiance to the United States through an application for citizenship. And the majority below acknowledged that Mr. Patel "would state a claim under *Morin*'s interpretation of § 1101(a)(22)(B)." Pet. App. 6a. Therefore, Mr. Patel—and all similarly situated persons his jurisdiction—would prevail upon this Court's rejection of the Fourth Circuit's outlier view on the applicability of *Chevron* to nationality cases.

* * * *

In sum, the decision below entrenched a well-recognized division of authority over an important question of law that affects core personal rights, and entitlement to benefits. Further, the panel decision's resolution of that disputed legal question is outcome determinative, both in the present case and in future Fourth Circuit cases involving nationality claims. Certiorari is warranted.

II. UNCERTAINTY OVER THE MEANING OF U.S. NATIONALITY CAUSES CONFUSION AND INCONSISTENT JUDGMENTS

The Court should also grant certiorari because this case presents another important and recurring legal issue—namely, the legitimate means of establishing U.S. nationality, including in cases brought under the Foreign Sovereign Immunities Act ("FSIA"). As ex-

plained below, federal statutes including the FSIA adopt by cross-reference the very definition of "national" contained in § 1101(a)(22) and at issue in this case. However, courts have arrived at varying interpretations of that critically important statutory term.

A. In A Variety of Contexts, Courts Disagree Over the Meaning of U.S. Nationality

The meaning of U.S. nationality has arisen in numerous contexts. In the employment context, for example, courts have followed *Morin* and construed U.S. nationality under § 1101(a)(22) to encompass applicants for U.S. citizenship. *See, e.g.*, *Shekoyan v. Sibley Int'l*, 217 F. Supp. 2d 59 (D.D.C. 2002) ("[C]ourts have found an application for citizenship to be 'the most compelling evidence of permanent allegiance to the United States short of citizenship itself'" (quoting *Morin*, 80 F.3d at 126), *aff'd* 409 F.3d 414 (D.C. Cir. 2005).

In addition, when construing the FSIA, federal courts have regularly adopted the interpretation of U.S. nationality that is advanced by Mr. Patel and that has previously been adopted by the Fourth Circuit. The FSIA provides a private cause of action to any United States national who is injured by an act of state-sponsored terrorism. *See* 28 U.S.C. § 1605A(c). That private cause of action is available to any "national of the United States," and the FSIA specifically cross-references the definition of "national" codified at 8 U.S.C. § 1101(a)(22). *See* 28 U.S.C. § 1605A(h)(5) ("[T]he term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))"). Thus, the scope of the FSIA cause of action expressly incorporates by reference

the INA's definition of national: either "a citizen of the United States or [] a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *See* 28 U.S.C. § 1605A(h)(5); 8 U.S.C. § 1101(a)(22).

FSIA decisions have frequently adopted the understanding of U.S. nationality advanced by Mr. Patel and adopted by the Fourth Circuit in *Morin*. That is, courts applying the FSIA have often asked whether an individual had in fact "demonstrated . . . permanent allegiance to the United States," and recognized that "an application for citizenship is the most compelling evidence of permanent allegiance . . . short of citizenship itself." *See Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24, 26-27 (D.D.C. 2003). For example, in *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 39 n.4 (D.D.C. 2007), the court found that a non-citizen who, as a condition of joining the armed forces, "t[ook] an oath to defend and uphold the Constitution" had thus demonstrated his allegiance to the United States. *Id.*

In another example, a federal court held that a FSIA plaintiff may demonstrate her status as a national "based on the length of time that she ha[s] resided in the United States, [by] statements in . . . affidavit[s], and [by] application for United States citizenship." *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1252 (S.D. Fla. 2008). Thus, a litigant who "has resided in the United States [for eight years], applied for United States citizenship [one year prior], and sworn that she has owed allegiance to the United States since [residing there]" qualifies as a national under the FSIA. *Id.*

Further, the most recent decision on the proper interpretation U.S. nationality in the FSIA context determined that a "Permanent Resident [who] began the application process to become a naturalized American citizen with the intention of remaining in th[e] country" qualified as a national under the FSIA. *Han Kim v. Democratic People's Republic of Korea*, 2013 WL 2901906, at *11 (D.D.C. 2013).

Despite the many decisions discussed above in which federal courts have adopted Mr. Patel's interpretation of U.S. nationality, some FSIA decisions have embraced narrower views. In particular two relatively recent decisions appear to have adopted the BIA's view that only persons who complete the naturalization process can acquire U.S. national status after birth. *See Estate of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, 2013 WL 351610, at *4 (D.D.C. 2013); *Mohammadi v. Islamic Republic of Iran*, 2013 WL 2370594, at *10-11 (D.D.C. 2013). Again, however, that approach is inconsistent with both earlier and later decisions. *See supra*.

Further, a number of federal courts of appeals have held that U.S. nationality can be conferred only through naturalization or birth in a small number of special locations, such as American Samoa. *See Sebastian-Soler*, 409 F.3d at 1285; *Padilla v. Ashcroft*, 333 F.3d at 972; *see also Abou-Haidar v. Gonzales*, 437 F.3d 206, 207 (1st Cir. 2006); *Omolo v. Gonzales*, 452 F.3d 404, 409 (5th Cir. 2006); *Salim v. Ashcroft*, 350 F.3d 307, 310 (3d Cir. 2003). These decisions expressly disagreed with the Fourth Circuit's decision in *Morin*, which held that U.S. nationality could be acquired through an application for citizenship. *See Morin*, 80 F.3d at 126. As already noted, the decision

below distinguished *Morin* by deferring under *Chevron* to the new litigation position of the United States. *See supra* pp. 6-7, 14-17.

The role of U.S. nationality in FSIA jurisprudence underscores the tremendous practical importance of the question presented in this case. Indeed, several of the decisions adopting a broad view of the meaning of U.S. nationality in the FSIA context explicitly rely on *Morin*, and those decisions would be cast into doubt in the event that *Chevron* deference applies in this context. And, on the other hand, several decisions taking a narrower view of the FSIA have adverted to decisions relying on the BIA's supposedly authoritative interpretation. The divergent standards for determining U.S. nationality in FSIA cases are particularly troubling given that terrorism-related cases have historically "dominate[d]" FSIA litigation. Aryeh S. Portnoy, *The Foreign Sovereign Immunities Act: 2008 Year in Review*, 16 L. & BUS. REV. AM. 179, 199 (2010). Clearly, resolution of the question presented is of great importance—not just for immigrants like Mr. Patel who are subject to deportation, but also for many other persons who rely on the legally central concept of U.S. nationality.

That the questions presented have such important implications, including in the area of FSIA litigation, only confirms that certiorari is warranted.

B. By Its Plain Terms, § 1101(a)(22) Affords Nationality To Persons Who Owe Permanent Allegiance To The United States

The narrow interpretation of U.S. nationality adopted in the decision below defies the plain language of 8 U.S.C. § 1101(a)(22) and should therefore be reversed.

When interpreting statutes, this Court affords meaning and weight to every statutory term. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Under § 1101(a)(22), a "national of the United States" is defined to be *either* a U.S. citizen *or* "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). In *Morin*, the Fourth Circuit read this language according to its terms and therefore assessed an individual's U.S. nationality by asking whether the individual had exhibited the requisite "permanent allegiance to the United States." *Id.* As *Morin* explained: "a 'national of the United States' may also be 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'" *Morin*, 80 F.3d at 126 (quoting 8 U.S.C. § 1101(a)(22)). Putting that principle into practice, *Morin* reasoned that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *Id.* *Morin* therefore held that an individual "was indeed 'a national of the United States'" because, as "a permanent resident alien of the United States," he "had applied for United States citizenship." *Id.*

The BIA has adopted a contrary interpretation, whereby an individual can become a U.S. national only through birth (by being born in American Samoa, Swains Island, or to non-citizen national parents abroad) or through completion of the naturalization procedure. *See In re Navas-Acosta*, 23 I. & N. Dec. 586, 588 (BIA 2003); *Matter of Tuitasi*, 15 I. & N. Dec. 102, 103 (BIA 1974). In the decision below

and in *Fernandez*, the Fourth Circuit deferred to that interpretation. *See* Pet. App. 8a; *Fernandez*, 502 F.3d at 343-47. Yet the agency's interpretation is indefensible on its face and, in fact, exhibits the very tendencies toward stinginess that prompted Congress to withdraw interpretive authority from the BIA in nationality cases. *See supra* pp. 16-17. The plain language of § 1101(a)(22) does not speak in terms of geography or formal procedures. Instead, it defines a national to include persons with "permanent allegiance to the United States." § 1101(a)(22).

The BIA's narrow reading also creates purposeless superfluity in the definition of U.S. nationality. Again, § 1101(a)(22) encompasses citizens and persons with "permanent allegiance to the United States." The statute's broad inclusion of persons with "permanent allegiance" is inexplicable if Congress's only intention was to encompass persons who have been naturalized or born in specific territories. So, on the BIA's view, the phrase "permanent allegiance" in § 1101(a)(22) is not read according to its plain meaning, but is instead rendered "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Mr. Patel's reading, by contrast, gives each statutory term its due.

The BIA and the decision below have offered just one textual reason in favor of reading § 1101(a)(22) more narrowly than its own terms would suggest, but that reason is erroneous. According to the BIA and the decision below, separate provisions of the INA provide mechanisms for nationalization at birth and through the naturalization process. *See* §§ 1401-09, 1421-59. But that availability of nationality status through birth and naturalization in no way eradi-

cates the separate font of nationality status established at § 1101(a)(22). The *expressio unius* canon of construction does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), and that the canon can in any event be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion," *United States v. Vonn*, 535 U.S. 55, 65 (2002). *See generally Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013). Here, there is no "unnamed possibility" to view as excluded. Instead, Congress has specifically provided for a separate avenue toward nationality status in § 1101(a)(22), and that provision is more than enough "indicatio[n]" that Congress's separate provision for nationality through birth and naturalization was "not meant to signal any exclusion."

The BIA's argument is actually self-refuting. As the BIA correctly notes, separate provisions of the INA provide mechanisms for nationalization at birth and through naturalization. *See* §§ 1401-09, 1421-59. Thus, the BIA's view is that the reference to "permanent allegiance" in § 1101(a)(22) becomes redundant with the separate naturalizations provisions. Yet it has always been this Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U. S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U. S. 147, 152 (1882)). This Court has therefore been "reluctan[t] to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 698 (1995). In failing to appreciate that "cardinal principle" of construction, *Williams v. Taylor*, 529 U.S. 362, 404 (2000), the BIA

renders half of § 1101(a)(22) redundant. Thus, consideration of the separate naturalization provisions strongly supports Mr. Patel's interpretation of § 1101(a)(22), while dooming the BIA's.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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