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IN THE SUPREME COURT OF THE UNITED STATES

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DIVNA MASLENJAK, :

Petitioner : No. 16-309

v. :

UNITED STATES, :

Respondent. :

- - - - - x

Washington, D.C.
Wednesday, April 26, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:18 a.m.

APPEARANCES:

CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf of the Petitioner.

ROBERT A. PARKER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 16-309, Maslenjak v. United States.

Mr. Landau.

ORAL ARGUMENT OF CHRISTOPHER LANDAU

ON BEHALF OF THE PETITIONER

MR. LANDAU: Thank you, Mr. Chief Justice, and may it please the Court:

Section 1425(a) of the Federal Criminal Code authorizes the government to strip a naturalized American of citizenship if it was procured contrary to law. Our position in this case is simple. The words "procured contrary to law" require a causal link between the procurement of citizenship and the underlying violation of law. At the government's urging, the district court read such a causal link out of the statute, instructing the jury that it could convict if Petitioner obtained United States citizenship and violated at least one law governing naturalization. The instructions didn't require the government to prove that the underlying violation of law had any effect whatsoever on the naturalization decision. To the contrary --

1 JUSTICE SOTOMAYOR: Even -- even assuming I
2 bought your argument, that's a very broad statement, any
3 effect. How about a natural tendency to effect?

4 MR. LANDAU: Well, your Honor --

5 JUSTICE SOTOMAYOR: Because you can never
6 predict what will actually happen in the end. You can
7 only talk about what might happen.

8 MR. LANDAU: And we would be happy -- what
9 we asked for was a materiality standard, which I think
10 is very much along the lines, as Your Honor, just
11 suggested. What -- what's amazing here, and I think
12 what makes this case so extreme, we're really at one end
13 of the spectrum. The district court specifically
14 instructed the jury, and here I quote, "Even if you find
15 that a false statement did not influence the decision to
16 approve the defendant's naturalization, the government
17 need only prove that one of the defendant's statements
18 was false."

19 JUSTICE KENNEDY: Well, but -- but what
20 Justice Sotomayor said, in essence, means sometimes
21 we -- causality is known only after the fact. You can
22 have a statement that everyone thinks is immaterial,
23 it's subjectively immaterial, but it might have a causal
24 connection at the end of the day.

25 MR. LANDAU: Well, the government, if it

1 wants to strip an American of citizenship, which is
2 about the most grave thing it can do, probably short of
3 taking away someone's --

4 JUSTICE KENNEDY: I fully -- I fully
5 understand that.

6 MR. LANDAU: Right.

7 JUSTICE KENNEDY: But the idea of what's
8 material and what's immaterial, and -- and what's a
9 causal link and what is not in a sense can be understood
10 and analyzed only after the fact.

11 MR. LANDAU: Well, I think, Your Honor, the
12 government has the burden -- if it wants to show that
13 the Petitioner or the defendant procured citizenship
14 contrary to law, the government has to show, at the very
15 least, that, based on a false statement, that the false
16 statement was material.

17 Our basic submission --

18 JUSTICE GINSBURG: Can you explain why this
19 wouldn't be harmless area? You're arguing about
20 material or not, but why isn't this obviously material?
21 She lied about her husband's -- what he was doing in
22 Bosnia, right? She said he -- he was trying to avoid
23 military conscription when, in fact, he was in the
24 service and in -- in the unit that was committing
25 atrocities.

1 Under what circumstances would that be
2 immaterial?

3 MR. LANDAU: Your Honor, we would like a
4 chance to argue the materiality question to a jury,
5 which is the general decider of what is material under
6 this Court's decision in Gaudin. We -- we did not have
7 the chance, given prevailing Sixth Circuit law, which
8 said there was no materiality to contest this issue at
9 trial. And we very much --

10 JUSTICE ALITO: I -- I understand that.
11 What -- they were given refugee status based on
12 well-founded fear of persecution where and for what
13 reason?

14 MR. LANDAU: Well, this is the crux of the
15 dispute, Your Honor. The government's position was that
16 it was based on the fear of persecution by the Serbs
17 based on her husband's evasion of military service.

18 JUSTICE ALITO: Where? In -- in Bosnia?

19 MR. LANDAU: In Bosnia, yes.

20 JUSTICE ALITO: This is -- yes.

21 MR. LANDAU: Yes. And so this is now --
22 they're out of Bosnia. They're at the American Embassy
23 in Belgrade seeking refugee status.

24 JUSTICE ALITO: Right.

25 MR. LANDAU: And this was, in a sense, the

1 heart of the dispute at trial. And, in fact -- this, I
2 think, relates also to Justice Ginsburg's question --
3 the jury sent a note, but what was the refugee status
4 based on? We're a little bit confused because we see
5 here a document that says that it was apparently based
6 on ethnic persecution by the Muslims in Bosnia. So I
7 think this is really the heart of the factual dispute on
8 what was the refugee status based on. Was it based
9 on --

10 JUSTICE ALITO: We don't know which it was
11 based on?

12 MR. LANDAU: No. That's the -- that was the
13 hottest -- that was the -- that -- that's the key issue
14 that we would like to have an opportunity for our day in
15 court.

16 JUSTICE ALITO: Well, if -- I mean, if --
17 this isn't the issue that we -- that we took cert to
18 decide, but it does raise the question whether there's
19 really anything at stake here. I assume that every Serb
20 in Bosnia-Herzegovina is not entitled to asylum in the
21 United States.

22 MR. LANDAU: That's correct, Your Honor.

23 JUSTICE ALITO: So merely being a Serb there
24 where I think they're about 30 percent of the population
25 would not be --

1 MR. LANDAU: That is correct. No. And in
2 this case is -- if you read the -- the naturalization --
3 let's read the refugee application, which is at Pet.
4 App. 62a to 64a, you can see that -- that they were --
5 the -- the concern was their house was -- they -- they
6 got death threats. Their house, I think stones were
7 thrown at the window.

8 I mean, this was not just any particular
9 area. This was a majority Muslim area within Bosnia.
10 It was a -- Bosnia was a patchwork of ethnicities at
11 this point. And they were in a majority Muslim area,
12 and they had to flee Bosnia.

13 And I think this is really the crux of their
14 argument, that this is not -- that the -- the whole
15 issue about her husband's military service was really
16 not the basis for it. And this is what we would like
17 the chance to argue this before a properly-instructed
18 jury. We may win or we may lose on that. I mean,
19 that's the issue that we would like the opportunity for
20 our day in court on that issue, materiality, which is --

21 JUSTICE GINSBURG: Can you explain to me how
22 the good moral character works into this, because even
23 if it's immaterial, it is a lie. And there was more
24 than one lie in this application.

25 MR. LANDAU: The -- the good moral character

1 provision, Your Honor, which is 1101(f)(6), 8 U.S.C
2 1106(f)(6), is our friend in this case, because you're
3 absolutely right. We have conceded that she told a lie.
4 But 1101(f)(6) does not make every lie preclusive of
5 good moral character. It only makes a particular kind
6 of lie preclusive.

7 There's a list of things that preclude good
8 moral character, and among them is a lie for the purpose
9 of obtaining an immigration benefit. That was one of
10 the things that the government had to prove at trial.
11 And they charged her with that. And if, in fact, she
12 were convicted of that, that would preclude -- that
13 would disqualify her from naturalization, because you
14 cannot establish good moral character categorically if
15 you have told that lie for that purpose. But I think
16 that underscores, Your Honor, that Congress did not
17 intend to make every lie on the form per se
18 disqualifying.

19 To be sure, they may be relevant to good
20 moral character. But where Congress wanted to make a
21 particular kind of lie preclusive of good moral
22 character in 1101(f)(6), it did so specifically. And --
23 and so the applicant has the burden under Section
24 1427(a)(3) of proving good moral character.

25 And so, again, I think that section is our

1 friend here because it shows the anomaly of the
2 government's position that basically any lie
3 automatically makes you liable under Section 1015. It's
4 Section 1015, under their view of -- of Section 1425 as
5 a pure look-through statute to 1015, sucks up any
6 violation of 1015(a), which, again, has no materiality
7 there for them, has no materiality in 1425(a), and --

8 JUSTICE GORSUCH: Well, that's -- that's the
9 anomaly I'm stuck with, and maybe you can help me with,
10 Mr. Landau, is that 1425 doesn't contain an express
11 materiality provision. 1451 does, in one provision, one
12 clause, but not another.

13 MR. LANDAU: Right.

14 JUSTICE GORSUCH: And then some of the
15 predicate acts for 1425 do and others don't.

16 MR. LANDAU: Right.

17 JUSTICE GORSUCH: So it seems like,
18 linguistically, we have to do some somersaults to get
19 where you want to go, because no one would say that to
20 violate 1425, you have to prove, say, a material
21 genocide, right?

22 MR. LANDAU: I couldn't agree with you more,
23 Your Honor.

24 JUSTICE GORSUCH: Okay. So we have to -- it
25 would be material -- not only would we have to add the

1 word "material" to 1425 that isn't there, we'd have to
2 limit its impact to some predicate offenses and not
3 others.

4 MR. LANDAU: Your Honor, I --

5 JUSTICE GORSUCH: Statement-based ones, I
6 think your position is. That's a lot of linguistic
7 somersaults to add to a -- a statute, isn't it?

8 MR. LANDAU: I -- I don't think so at all,
9 Your Honor. I think -- I think you have to look --
10 again, I think the contrast with civil denaturalization
11 provision, 8 U.S.C 1451(a) is a very powerful point in
12 our favor.

13 JUSTICE GORSUCH: How is that? Because it
14 says illegally procure, and then it talks about material
15 misrepresentations in two separate clauses.

16 MR. LANDAU: Correct. And if -- if Your
17 Honor wanted to take a -- the most natural kind of
18 textual reading, you would say, okay, here in 1425, we
19 only have the general one, procured contrary to law. So
20 the most natural, pure, textual approach would be to
21 say, well, then, that shouldn't cover statement offenses
22 at all, because statement offenses were broken out and
23 that would render the statement offenses in 1451(a) it
24 referenced --

25 JUSTICE GORSUCH: Suppose Fedorenko's

1 interpreted the language "procure," and doing it
2 illegally, is anything in the course of the
3 proceeding --

4 MR. LANDAU: Well --

5 JUSTICE GORSUCH: -- right? So that's the
6 answer to that, isn't it?

7 MR. LANDAU: No. No. But I think -- I
8 think the point is, Your Honor, we -- nobody is fighting
9 that -- that Section 1425(a) is broader than statements.
10 But I think what you can't do is --

11 JUSTICE GORSUCH: Well, then -- then, that
12 concession right there answers my problem, doesn't it?

13 MR. LANDAU: I mean, it's -- I -- I might
14 have misspoken if I said -- 1425(a) includes -- it
15 includes bribery, it includes things to which the word
16 "material" wouldn't naturally apply, which I think
17 answers your question right there, in the sense that it
18 would have been nonsensical for Congress to put in a
19 general illegally-procured statute the word "material."
20 It just wouldn't fit there because it's a general one.

21 Where they use the word "material" in 1451,
22 that's because historically, 1451 has had illegally
23 procured, the kind of the catch-all, and a separate
24 statement one. But what you can't do is say 1425
25 applies -- is a general catch-all, but when it's applied

1 to statements, they're not material. I mean --

2 JUSTICE ALITO: Mr. Landau --

3 MR. LANDAU: -- it just doesn't make sense.

4 JUSTICE ALITO: -- hasn't the -- the
5 briefing in this case really clarified what the issue
6 is? And in a way, it seemed to me that what was being
7 debated in the district court was the wrong issue about
8 whether to charge the jury on materiality, because
9 materiality is not in this statute. But as you have
10 refined the argument, the issue is the meaning of the
11 term "procure" --

12 MR. LANDAU: That's absolutely --

13 JUSTICE ALITO: -- which may or may not mean
14 exactly the same thing as "materiality."

15 MR. LANDAU: I think you are absolutely
16 correct, Your Honor. And that's one of the things -- I
17 mean, it's the same issue we've been arguing all along.
18 I think you've put the point exactly right. I think we
19 have a textual basis for what had been a line of circuit
20 court decisions going our way, starting in *Puerta*, that
21 went our way based on policy concerns, which are very
22 powerful, but really didn't grapple with the text of the
23 statute. And I think --

24 JUSTICE ALITO: Within your brief, you, I --
25 I think, have possibly tried to read more into "procure"

1 than you can, because in a number of spots you seem --
2 you argued that it means "but for causation." Now, this
3 morning you have said that's not your argument. It's
4 not -- you don't have to prove that, but for the -- the
5 false statement in the immigration proceeding, the
6 person would not have been naturalized.

7 MR. LANDAU: Your Honor, our position in
8 this case was always relying on the line of circuit
9 precedent going our way was that it was materiality. I
10 think if you didn't -- I mean, if we hadn't -- but for
11 the way this case evolved where it was really based on
12 materiality, I think there is a good argument that the
13 most natural reading of procure contrary to law, goes
14 back to the general causation principles in our law,
15 which as this Court underscored just last week in
16 Goodyear, is but-for causation.

17 JUSTICE ALITO: Well, I -- I don't know
18 whether you can get that out of "procured." Let me give
19 you this example. Let's say there is a -- a municipal
20 ordinance that says that it is illegal to buy or sell a
21 scalped ticket within 200 feet of the entrance of a
22 stadium or a concert hall, and I buy -- knowingly buy a
23 scalped ticket within 199 feet of the entrance of this
24 facility.

25 Now, in order for me to have procured that

1 ticket contrary to law, would it be necessary to prove
2 that I couldn't have purchased this from another scalper
3 around the other side who was outside of the 200 feet,
4 or I couldn't have gotten a ticket if I had waited in
5 line at the box office?

6 MR. LANDAU: Your Honor, I think your
7 question points out some of the very difficult questions
8 of causation that -- that are really, you know,
9 implicated by the word "procure," and -- and on which
10 the Court, frankly, fractured in *Kungys*. And I think
11 those are difficult questions that really haven't been
12 briefed before you. I think our position here is
13 really, at the very least, it has to be material. That
14 you can't establish a causal link in this context, where
15 the statement doesn't even have the tendency.

16 If I could refer the Court to the definition
17 of materiality that was actually used by the majority
18 in -- in *Kungys*. This is at -- 485 U.S., at 772. A
19 statement with a natural tendency to produce the
20 conclusion that the applicant was qualified for
21 citizenship.

22 JUSTICE KAGAN: Yeah -- please, finish.

23 MR. LANDAU: I'm sorry, Your Honor.

24 That -- I mean, my point really was there is
25 some starch in the -- the standard of materiality, and

1 it really goes to qualifications for citizenship. The
2 judge -- the -- my friends on the other side seem to
3 have a pretty watered-down version of materiality.
4 Well, that anything that might launch an investigation
5 is per se --

6 JUSTICE KAGAN: Can I ask you, Mr. Landau --

7 MR. LANDAU: Sure.

8 JUSTICE KAGAN: -- about a -- a different
9 interpretation of the statute. Neither you nor the
10 government supports it, but it's raised briefly in the
11 government's -- in footnote 4 of the government's brief,
12 which is this idea that what we really should be doing
13 here is we should be interpreting 1425 in exactly the
14 same way that we interpret the civil statute, 1451,
15 which talks about illegally procuring something.

16 MR. LANDAU: Right.

17 JUSTICE KAGAN: And that both are limited to
18 failures to satisfy the prerequisites to naturalization.
19 And that's really what we should be thinking about when
20 we interpret that.

21 MR. LANDAU: I think that that -- you know,
22 I think that makes a lot of sense, that -- that this is
23 really -- that's what it's about. You're stripping
24 somebody of their citizenship. So you kind of think the
25 natural question is, were they qualified for the

1 citizenship in the first place. I found footnote 4 --

2 JUSTICE KAGAN: And that would, in this
3 case, presumably, be because of bad character; is that
4 right?

5 MR. LANDAU: Well, I mean, no, the -- well,
6 the government, I think, thinks a lot more than that. I
7 mean, they did not -- they tried to prove, but again, we
8 have a general verdict, so we don't know whether they
9 proved, that her lie was for the subjective purpose of
10 obtaining an immigration benefit. That's one way they
11 could try to prove -- that if they did prove that, we
12 would agree she would not be qualified. That -- there's
13 no question that there's a causal link there if you
14 could say the person wouldn't have been qualified. So
15 I'm --

16 JUSTICE SOTOMAYOR: I'm not sure this helps
17 you under our case law under Ginsberg and Ness, and that
18 line of cases --

19 MR. LANDAU: Right.

20 JUSTICE SOTOMAYOR: -- that the government
21 relies on. If it's a prerequisite to getting
22 citizenship, one of the -- their argument is that a
23 prerequisite is not telling a falsehood, an intentional
24 falsehood in your application.

25 MR. LANDAU: But so --

1 JUSTICE SOTOMAYOR: So how do you win, and
2 how do you get causation into that?

3 MR. LANDAU: But that is -- that is what I
4 was trying to get at before with 1101(f)(6), which goes
5 to the things that categorically preclude a finding of
6 good moral character, does not say any falsehood in the
7 application process is enough to disqualify you. It
8 says, any falsehood for the purpose of obtaining a
9 natural -- an immigration benefit.

10 If they prove that -- then I think this goes
11 back to Justice Kagan's question -- they would prove
12 that we were disqualified. And I think that line of
13 cases is very consistent with footnote 4.

14 JUSTICE GINSBURG: I hate to be --

15 MR. LANDAU: I find --

16 JUSTICE GINSBURG: -- inconcrete. Suppose
17 you're right and there is a materiality requirement that
18 says you should have an opportunity to present that to a
19 jury. On the facts that we have here, how could you
20 argue this is immaterial -- it is immaterial, these lies
21 were immaterial?

22 MR. LANDAU: Well, we would go back to -- we
23 would get a witness to talk about, you know, how her two
24 sisters got here, for instance, that -- that they were
25 victims of ethnic persecution by the Muslims in Bosnia,

1 and that she would have gotten the refugee status
2 regardless of the -- the point about the husband's
3 military service. That that was not the crux. That
4 there was -- this was, in a sense, the issue -- I think
5 the jury note on Pet. App. 90, really nicely points out
6 that the jury in this very case asked the judge a
7 question, what was her refugee status based on? Was it
8 based on fear of persecution by the Muslims, on ethnic
9 persecution, or was it based on fear of persecution by
10 the ethnic Serbs, based on his avoiding military
11 service.

12 We can see that that is a -- a fair question
13 to debate, but we would like an opportunity to debate
14 that in front of a jury that is properly instructed and
15 at least --

16 JUSTICE SOTOMAYOR: I'm sorry. I don't know
17 how you can do -- that answers only a part of the
18 materiality issue. If she lied to get her husband a
19 benefit, that's an immigration benefit that she was
20 seeking.

21 MR. LANDAU: Well, but --

22 JUSTICE SOTOMAYOR: She had to lie about his
23 military service, otherwise, he would have been
24 disqualified --

25 MR. LANDAU: Well, but they didn't do it.

1 JUSTICE SOTOMAYOR: -- from naturalization.

2 MR. LANDAU: They allege -- and this is
3 exactly right, Your Honor. That was one of the
4 predicate offenses they alleged here, that one was
5 Section 1015(a), which we discussed in our brief.

6 The other one is that she didn't have good
7 moral character, because she lied to obtain an
8 immigration benefit. But we have a general verdict
9 here. We have no finding here that the jury actually
10 agreed with the government that, in fact, she lied to
11 obtain an immigration benefit.

12 JUSTICE SOTOMAYOR: Is there any way they
13 could have found otherwise?

14 MR. LANDAU: Well, I -- I think --

15 JUSTICE SOTOMAYOR: I -- I understand there
16 are case laws.

17 MR. LANDAU: No. I mean, we don't know
18 why -- we don't know why she said that. That's -- you
19 know, one would have to speculate to say -- I mean,
20 people lie for many different reasons. They lie because
21 they are embarrassed about certain things or -- I mean,
22 I think it would be speculative to say, basically, as a
23 matter of law, we can say there is only reason she could
24 have lied. I -- you know, I don't think we're basically
25 in the practice of directing verdicts in criminal cases.

1 JUSTICE ALITO: Do you think this well --
2 this well-instructed jury would be entitled to hear
3 evidence about Srebrenica and about her husband's
4 military service?

5 MR. LANDAU: I think, you know, that that
6 raises some interesting questions. And I --

7 JUSTICE ALITO: I -- I don't know how well
8 you're going to do in front of this well-instructed --

9 MR. LANDAU: Well, yeah. And --

10 JUSTICE ALITO: -- jury.

11 MR. LANDAU: -- Your Honor, again, I am not
12 here to say that -- to predict --

13 JUSTICE ALITO: No, I -- I understand.

14 MR. LANDAU: -- that people are going to be
15 throwing roses in our path on remand. I do -- do not
16 deny that this could be a very tough row to hoe on
17 remand. What -- what I'm here to do is, basically, to
18 say, as far as this case has gone along, the Sixth
19 Circuit so far has thrown roses in the government's path
20 in the lower courts, to allow them specifically to get a
21 criminal conviction to strip her of her citizenship
22 without even proving that the statement is immaterial.

23 There's nothing -- you can come up with a
24 chart that goes from 1015(a), which they say has no
25 materiality, to 1425(a), which they say adds nothing, is

1 a pure look-through statute, and leads to the direct
2 consequence of denaturalization. So under their view,
3 any lie leads -- can lead to automatic denaturalization.
4 Congress could have come up with that regime, but it
5 didn't, because I think Congress recognizes that not all
6 lies are created equal. They come in different shapes
7 and sizes. And that's why when Congress wanted to make
8 one kind of lie particularly significant, it did so in
9 1101(f) (6) by saying it has to be a lie for the purpose
10 of obtaining an immigration benefit. If they prove that
11 lie, they are golden, then they actually -- then they
12 win.

13 The problem is, in this case, my client
14 could have been convicted without that finding. We just
15 don't know that. And so, again, I think part of the
16 problem is here, the government's fundamental conception
17 of 1425(a) is wrong. They really do look at it,
18 basically, as nothing more than a sentence enhancer for
19 the underlying convictions. But it is its own distinct
20 provision of the criminal code, with its own distinct
21 statute of limitations and its own very distinct
22 penalties. For instance, in 1015(a), the maximum
23 imprisonment term is 5 years. Under Section 1425(a),
24 you can go to prison for up to 25 years, plus automatic
25 denaturalization, which flows as a result of 1451(e).

1 So 14 -- you know, the -- the -- the essence
2 of that 14 -- that distinct 1425(a) crime is the
3 unlawful procurement. You're taking the unlawful
4 predicate act and you're using it to procure
5 citizenship.

6 And so our basic position is if the
7 government wants to strip you of citizenship, on the
8 ground that you were not qualified for citizenship that
9 was procured contrary to law, it's very important for
10 them to show that you would have been qualified if the
11 -- would have been disqualified if the truth had been
12 known.

13 And going back to your point, Justice Kagan,
14 just to round out on footnote 4. I found that footnote
15 incomprehensible because the government basically starts
16 out with talking about a standard we actually like,
17 which is the disqualification standard for -- for
18 causation, essentially. But then they go on to say,
19 well, that would have been met here. I think the most
20 they can say, is that could have been met here, and, you
21 know, they can't possibly prove that, as a matter of
22 law, that -- that this was the contested issue at trial.
23 So we're okay with the legal standard there, but the
24 inference they draw in the next sentence, I think they
25 used the wrong verb tense. That -- that -- that

1 particular footnote, I think, if you focus on that, that
2 can answer the case in a sense.

3 JUSTICE ALITO: But failing to meet the
4 qualifications for naturalization sounds to me like
5 but-for causation.

6 MR. LANDAU: Well --

7 JUSTICE ALITO: So is that your argument, or
8 is it something less than but-for?

9 MR. LANDAU: Well --

10 JUSTICE ALITO: I mean, you can say it
11 should be but-for but I -- I'll win if it's anything.

12 MR. LANDAU: Right.

13 JUSTICE ALITO: What is your -- do you have
14 a firm position or --

15 MR. LANDAU: We -- if we were starting this
16 on tabula rasa and we had not argued materiality below,
17 I would say that it's but-for. I think that is the best
18 interpretation of the statutes.

19 JUSTICE ALITO: Well, that's -- I mean,
20 that's awfully hard, because then you have to go back
21 and determine, even if somebody says something that has
22 a real potential to affect the naturalization decision,
23 you still would have to go back and show that in this
24 case it actually did make the difference.

25 MR. LANDAU: And, Your Honor, this was the

1 crux of the debate in the plurality opinion in Kungys
2 between Justice Scalia and Justice Stevens. And, I
3 mean, that's a very interesting debate.

4 But, actually, in the majority part of
5 Kungys in part 2(a) the majority there, the Court,
6 speaking through Justice Scalia, defined materiality, I
7 think in a way that is pretty darn close to but-for. It
8 said -- it -- it's not quite there, but it said: A
9 natural tendency to produce the conclusion that the
10 applicant was qualified for citizenship.

11 So, again, I think the real crux here is not
12 just might this have led to an investigation. It really
13 has to go to the qualifications for citizenship, because
14 that's what this whole thing is about. We're trying to
15 figure out, did we naturalize somebody who shouldn't
16 have been naturalized.

17 JUSTICE GORSUCH: Well, if that's the case,
18 how do we distinguish between 1425(a) and (b)? (a) says
19 that it has to be a procured contrary to law; (b) says,
20 you know, procured when it's not -- when you're not
21 entitled to it. It seems to me that (b) does the work
22 you're describing, that -- that the lie or the illegal
23 act has something to do with the underlying entitlement
24 as opposed to a lie or something illegal in the process
25 of.

1 Can you help me out with that?

2 MR. LANDAU: Yeah.

3 JUSTICE GORSUCH: I'm just stuck there.

4 MR. LANDAU: I mean, I -- I think again, you
5 know, (a) -- (a) is really about the procurement of
6 citizenship -- you know, that's an interesting point,
7 Your Honor. The government has never really drawn any
8 distinct between 1425(a) --

9 JUSTICE GORSUCH: You have to do something
10 different; right?

11 MR. LANDAU: Well --

12 JUSTICE GORSUCH: One would hope.

13 MR. LANDAU: But -- - but again, I think (a)
14 is clearly about, you know, they both use the words
15 "procure" or "obtain," and, again, you know -- I'm not
16 sure. I think on rebuttal, I'll address the difference
17 between (a) and (b), Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank --

19 MR. LANDAU: If there are no further
20 questions.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Parker.

23 ORAL ARGUMENT OF ROBERT A. PARKER

24 ON BEHALF OF THE RESPONDENT

25 MR. PARKER: Mr. Chief Justice, and may it

1 please the Court:

2 Naturalization is the highest privilege the
3 United States can bestow upon on individual. It
4 fundamentally changes the relationship between the
5 government and the individual. And Congress has
6 required that individuals who seek that high privilege
7 must scrupulously comply with every rule governing the
8 naturalization process.

9 CHIEF JUSTICE ROBERTS: But, scrupulously,
10 I -- I looked at -- on the naturalization form, there is
11 a question. It's Number 22. "Have you ever" -- and
12 they've got "ever" in bold point --

13 MR. PARKER: Uh-huh.

14 CHIEF JUSTICE ROBERTS: -- "committed,
15 assisted in committing, or attempted to commit a crime
16 or offense for which you were not arrested?"

17 Some time ago, outside the statute of
18 limitations, I drove 60 miles an hour in a
19 55-mile-an-hour zone.

20 (Laughter.)

21 MR. PARKER: I'm sorry to hear that.

22 CHIEF JUSTICE ROBERTS: I was -- I was not
23 arrested.

24 Now, you say that if I answer that question
25 no, 20 years after I was naturalized as a citizen, you

1 can knock on my door and say, guess what, you're not an
2 American citizen after all.

3 MR. PARKER: Well --

4 CHIEF JUSTICE ROBERTS: Is that right?

5 MR. PARKER: If -- well, I would say two
6 things. First, that is how the government would
7 interpret that, that it would require you to disclose
8 those sorts of offenses.

9 CHIEF JUSTICE ROBERTS: Oh, come on. You're
10 saying that on this form, you expect everyone to list
11 every time in which they drove over the speed limit --

12 MR. PARKER: No.

13 CHIEF JUSTICE ROBERTS: -- except when they
14 were arrested.

15 MR. PARKER: Well, what I think the -- what
16 I think that particular question demonstrates is -- and
17 I will readily acknowledge, number one, that is a very
18 broad question, and, number two, and I think that there
19 is a great deal of ambiguity in what exactly is meant by
20 "crime and offense." And --

21 CHIEF JUSTICE ROBERTS: Well, but just --
22 it's worse. If you look in Black's --

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: In Black's Law
25 Dictionary, I looked up what's an offense? And this is

1 what it says: It says it's a violation of the law, a
2 crime, often a minor one.

3 MR. PARKER: Uh-huh.

4 CHIEF JUSTICE ROBERTS: So you really are
5 looking for the listing of every time somebody drove
6 over the speed limit.

7 MR. PARKER: But here's -- here's what I
8 think is important, though: What you would have to show
9 to denaturalize someone, at least under Section 1425,
10 would be that, number one, they were aware that that is
11 what the question was asking for --

12 CHIEF JUSTICE ROBERTS: I knew --

13 MR. PARKER: -- they knew --

14 CHIEF JUSTICE ROBERTS: -- I drove over 55.

15 MR. PARKER: Right. You are aware that that
16 happened. You are aware that a truthful answer to that
17 question would require you to disclose that. And yet,
18 notwithstanding the fact that you had taken an oath to
19 truthfully answer that question, you chose to
20 deliberately lie. And if -- if all of those things
21 could be proved beyond a reasonable doubt -- and that's
22 an awful lot of ifs, and I think that --

23 CHIEF JUSTICE ROBERTS: No, it's not a lot
24 of ifs. I knew that I drove over 60.

25 MR. PARKER: Uh-huh.

1 CHIEF JUSTICE ROBERTS: Okay. I understand
2 the question. I saw that it even says "ever."

3 MR. PARKER: Uh-huh.

4 CHIEF JUSTICE ROBERTS: I researched it in
5 Black's Law Dictionary and it said an offense --

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: -- no matter how
8 minor. The conditions that you set forth were fully
9 satisfied, and I would say fully satisfied in
10 everybody's case who don't -- who drives at -- at -- at
11 any time. And your position is still, you answer that
12 question no, we can take away your citizenship.

13 MR. PARKER: If we can prove that you
14 deliberately lied in answering that question, then yes.
15 I think --

16 JUSTICE SOTOMAYOR: How about -- let me give
17 you another example. One of the requirements is that
18 you list any nickname that you've ever had.

19 MR. PARKER: Uh-huh.

20 JUSTICE SOTOMAYOR: All right? When I was a
21 child -- not me, but some imagined applicant --

22 (Laughter.)

23 JUSTICE SOTOMAYOR: I was very slight of
24 built -- I wasn't.

25 (Laughter.)

1 JUSTICE SOTOMAYOR: The applicant was. And
2 his buddies were calling him the F word in terms of
3 gender identity. He's not; never was. Or is and
4 disclosed it in another part of the application. But
5 that word embarrassed him, continues to embarrass him,
6 and it has no importance to the decision-making process.

7 Is that failure to disclose the use of a
8 childhood nickname that is embarrassing, that has no
9 relationship to anything whatsoever, could you prosecute
10 that person?

11 MR. PARKER: No -- well, I -- I think that
12 you may be overreading that particular question. I
13 think what the -- what that question is requesting are
14 names that you yourself have gone by. And the reason
15 that that is requested is because the FBI conducts a
16 background check on all of these individuals, and it
17 needs to know if there are other names that you may be
18 known by that would --

19 JUSTICE SOTOMAYOR: Exactly.

20 JUSTICE BREYER: There are. There are.

21 JUSTICE SOTOMAYOR: Exactly.

22 MR. PARKER: But I -- I mean, I don't mean
23 to -- to push back against that hypothetical. I only
24 think that what you're suggesting is that this is
25 something that other people called you in childhood, and

1 I don't think that that would be asked for in the
2 question, but --

3 JUSTICE BREYER: Oh, but that isn't the
4 point. The point is that I think, of all these
5 questions, the same thing.

6 MR. PARKER: Uh-huh.

7 JUSTICE BREYER: You've read the briefs.
8 The questions are unbelievably broad. All right. We
9 can think of 1,000 examples -- not 1,000, but maybe only
10 500 --

11 MR. PARKER: Uh-huh.

12 (Laughter.)

13 JUSTICE BREYER: -- of the kind that the
14 Chief Justice gave. And it's, to me, rather surprising
15 that the government of the United States thinks that
16 Congress is interpreting this statute and wanted it
17 interpreted in a way that would throw into doubt the
18 citizenship of vast percentages of all naturalized
19 citizens.

20 MR. PARKER: Well, I --

21 JUSTICE BREYER: I mean, isn't -- now, you
22 explain -- you explain to me why that isn't so.

23 MR. PARKER: I don't think that it would
24 throw into doubt -- I -- I --

25 JUSTICE BREYER: You want 15 more examples

1 such as the one that the Chief Justice gave?

2 MR. PARKER: Well, I --

3 JUSTICE BREYER: I'm truly shocked by the
4 one he gave, by the way.

5 (Laughter.)

6 JUSTICE BREYER: But -- but -- so -- so what
7 is the answer? You want to fight that? Do you want to
8 say, no, I don't have listed on the page in front of me
9 15 such examples and the briefs didn't list 23 and --
10 and we couldn't think of 100 others?

11 MR. PARKER: I think that we can -- look, I
12 -- I would readily agree with you that there are a
13 number of questions on this form that, taken in
14 isolation, would appear to be, if -- if you gave an
15 untruthful answer to one of those questions --

16 JUSTICE BREYER: It wasn't just --

17 MR. PARKER: -- it would be --

18 JUSTICE BREYER: -- the questions.

19 MR. PARKER: Yes.

20 JUSTICE BREYER: I walked into the
21 immigration hearing with a pocketknife in a government
22 building, a Boy Scout knife I carry on my key chain. By
23 the way, no one ever saw it. No one ever saw it.

24 MR. PARKER: Uh-huh.

25 JUSTICE BREYER: It was there the whole

1 time. And then I walked out. Okay? Subject to
2 deportation.

3 MR. PARKER: No, I --

4 JUSTICE BREYER: I knew there was. I knew I
5 wasn't supposed to do it, but I thought, oh, so what?
6 And there it's been on my key chain for 30 years.

7 MR. PARKER: No. I -- I actually think that
8 that would not -- I think there were -- there were a
9 couple of questions there. I could just very briefly
10 address the last one.

11 I don't think that the crime that you just
12 mentioned --

13 JUSTICE BREYER: Forget my last examples.

14 MR. PARKER: Okay.

15 JUSTICE BREYER: Look to the general
16 example, and you've read through the ones in the brief.

17 MR. PARKER: Uh-huh.

18 JUSTICE BREYER: I don't want to repeat it.
19 It's the same underlying question.

20 MR. PARKER: There are a number of answers
21 that could be given in the naturalization process that
22 could be false and might seem to be, in isolation,
23 immaterial, completely immaterial, for example. I mean,
24 you could, you know, lie about your weight, let's say.
25 You're embarrassed that you weigh 170 pounds and so you

1 claim that you weigh 150.

2 The point, though, is, Congress has
3 specifically attended to all false statements under oath
4 in these types of proceedings. It has specifically
5 provided that it is a crime to lie under oath in the
6 naturalization process, even about an immaterial matter,
7 and it has provided that certain of those immaterial
8 lies are categorical bars to naturalization.

9 JUSTICE KAGAN: Mr. Parker?

10 MR. PARKER: Yes.

11 JUSTICE KAGAN: Please, I'm sorry. Finish
12 up.

13 MR. PARKER: I -- I was just going to say
14 that there are a number of reasons why Congress did not
15 want to require that the government prove that a
16 particular lie is material or immaterial in this
17 context, and I -- I think it's important to understand
18 what those are.

19 The first is, when an individual lies,
20 even -- remember, this has to be a lie under oath after
21 you've sworn that you will tell the truth and you are
22 deliberately lying about something, it calls into
23 question the veracity of your other answers, and that is
24 very important in the naturalization process, for the
25 reason --

1 JUSTICE KAGAN: Okay. But isn't --

2 CHIEF JUSTICE ROBERTS: I'm sorry. Go
3 ahead.

4 JUSTICE KAGAN: And you'll be glad to know I
5 don't have another of these questions for you.

6 (Laughter.)

7 JUSTICE KAGAN: Although I am a little bit
8 horrified to know that every time I lie about my weight,
9 it has those kinds of consequences.

10 (Laughter.)

11 MR. PARKER: Only -- only under oath.

12 JUSTICE KAGAN: Yeah.

13 Can I just ask you -- can I ask you to take
14 you through a few parts of your brief?

15 MR. PARKER: Uh-huh.

16 JUSTICE KAGAN: Because I guess I felt a
17 little bit confused on reading what your standard is.

18 MR. PARKER: Uh-huh.

19 JUSTICE KAGAN: So on page 14, you say that
20 the question is whether Petitioner violated the law in
21 the course of procuring naturalization, in the course of
22 procuring naturalization. Then on page 9 and page 17,
23 you say that the question is whether a person procures
24 naturalization in a manner that violates very -- that
25 violates other laws.

1 Which are we talking about? Is it in the
2 course of or in a manner that violates other laws?

3 MR. PARKER: Well, I -- I -- my -- my
4 apologies if that wasn't clear. I think we're just
5 saying two ways of saying exactly the same thing, and
6 that is exactly how the jury was instructed in this
7 case.

8 JUSTICE KAGAN: Yeah. I mean, it seems sort
9 of different to me. "In the course of" is what creates
10 the hypotheticals that Justice Breyer was talking about,
11 about the penknife or the gun or something like that.

12 MR. PARKER: Uh-huh.

13 JUSTICE KAGAN: But what -- so what you're
14 saying -- but we -- you -- I can just choose, you -- you
15 can tell me, your standard is in a manner that violates
16 other laws.

17 MR. PARKER: Well, I think that's right.
18 And I think what that means is the same as what the --
19 the jury was instructed in this case. It has to be --

20 JUSTICE KAGAN: Okay. So then -- I mean, it
21 makes me want to say, okay, what does it mean to procure
22 naturalization in the manner that violates other laws.
23 And then you talk about that. And you talk about that
24 on -- this -- the -- this is the only time I found in
25 the brief where you actually suggest what it means to

1 procure naturalization in a way that -- in a manner that
2 violates other laws. And you say on page 18, what that
3 means is by violating those various laws. By violating
4 those various laws. And that made me think that's a
5 causal requirement.

6 MR. PARKER: No. I mean, what --

7 JUSTICE KAGAN: You procure
8 naturalization -- this is, again, on page 18 -- a person
9 who knowingly procures naturalization in an unlawful
10 manner, and then you clarify that that means by
11 violating the laws Congress has enacted. So when you
12 say that you procure naturalization by violating laws
13 Congress has enacted, all you're saying is that -- is
14 that the naturalization results from the violation of
15 those laws.

16 MR. PARKER: Well, I --

17 JUSTICE KAGAN: And I guess if that's not
18 what you meant to say -- and I don't mean to trick you
19 here --

20 MR. PARKER: Right.

21 JUSTICE KAGAN: -- if that's not what you
22 meant to say in this brief, although it suggests --
23 it -- it -- I think it is what you say, but if it's not
24 what you meant to say, well, how could it be anything
25 else?

1 MR. PARKER: Well, I -- I think it is not.
2 And my apologies if that sentence is unclear. I think
3 it's actually described in -- in more detail on the
4 preceding page, on page 17. Our -- our interpretation
5 of that provision is that it means that you have to
6 procure naturalization in violation of the laws that
7 govern the naturalization process. These are laws that
8 address naturalization and --

9 JUSTICE KAGAN: Well, number one, where is
10 that in the statute?

11 MR. PARKER: Well, I think that it is a
12 necessary construction of the -- of the phrase, "procure
13 contrary to law naturalization." So --

14 JUSTICE KAGAN: But it doesn't say the
15 statute. It just says contrary to law. It doesn't say
16 what laws. It doesn't say laws governing the
17 naturalization process. So that's -- that's one issue.

18 But -- but that's a different issue from the
19 one I'm talking about.

20 MR. PARKER: Uh-huh.

21 JUSTICE KAGAN: Whatever laws it is, whether
22 it's all laws or whether it's laws relating to the
23 naturalization process.

24 MR. PARKER: Uh-huh.

25 JUSTICE KAGAN: When you describe what you

1 mean when you say in a manner that violates the laws,
2 it's when you say, you say it's by -- you -- you procure
3 naturalization by violating the laws, you very
4 naturally -- I think it's a totally naturally --
5 natural --

6 MR. PARKER: Uh-huh.

7 JUSTICE KAGAN: -- construction of the
8 language, you very naturally say you got the
9 naturalization by violating those laws, meaning that the
10 naturalization is the result of those -- that violation.
11 Because what else could you mean when you say -- when
12 you -- when you have a naturalization and you have these
13 violation of laws?

14 MR. PARKER: Well, again --

15 JUSTICE KAGAN: Again, that the violation
16 led to the naturalization.

17 MR. PARKER: Well, again, I mean, just with
18 respect to the sentence that you're quoting, I think
19 what we were -- what we were saying is by violating the
20 laws, we were trying to describe what it means to act in
21 an unlawful manner. I don't think we were trying to say
22 that that means procurement of naturalization.

23 JUSTICE KAGAN: I know. I'm sort of
24 suggesting that in trying to describe that you ended up
25 using the Petitioner's formulation, and that seems quite

1 natural to me because I don't know what other
2 formulation you could use --

3 MR. PARKER: Well, I don't think --

4 JUSTICE KAGAN: -- to describe what it means
5 and say in a manner that violates those laws.

6 MR. PARKER: I don't think that it is
7 natural, and -- and let me explain why. The statute
8 says procure contrary to law naturalization. We know
9 what procure naturalization means. That means to obtain
10 naturalization. And then the phrase is "contrary to
11 law." Well, the question then is contrary to what laws?
12 I think that law has to be interpreted consistent with
13 the -- the two words that bookend that provision,
14 "procure" and "naturalization."

15 Now, I don't think --

16 JUSTICE GINSBURG: Can I -- can I ask you
17 this --

18 MR. PARKER: Yes.

19 JUSTICE GINSBURG: This may be a
20 simpleminded question, but how can an immaterial
21 statement procure naturalization?

22 MR. PARKER: I think that the -- the --

23 JUSTICE KAGAN: That's such a shorter
24 statement of my question. It's perfect.

25 (Laughter.)

1 MR. PARKER: I think the answer is, we at
2 least don't read the statute to require that the
3 statement be procuring the naturalization. We don't
4 read the statute to say that the violation has to
5 procure, and I think that this goes to a difference in
6 how we may be using the term "materiality" here.

7 The Petitioner is saying that it means that
8 the person has to have lied about a material matter,
9 meaning that a truthful answer would be more likely to
10 get them naturalization than an untruthful one. Or, as
11 Petitioner has also said several times, that it would be
12 the but-for cause of getting that naturalization.

13 But what Congress was concerned here with is
14 not what people lied about; rather, it was the fact that
15 they lied. And the lie itself --

16 JUSTICE ALITO: That's the same question.
17 It may be the same question in a -- in a different form.

18 Just give me a sentence that has this
19 pattern. Jane Doe procured something. Jane Doe
20 procured X contrary to law, where the thing that she
21 procured had no potential -- I'm sorry -- where the
22 thing that she did had no potential to help her get X.

23 MR. PARKER: Had no -- well --

24 JUSTICE ALITO: She -- she procured X
25 contrary to law, but the thing that she did had no

1 potential to help her get that thing.

2 MR. PARKER: If -- if what we are saying,
3 as -- as Petitioner has argued, is that it has to be
4 something that -- where you either could not get it, or
5 it would be much less likely to get it if you did Y
6 instead of X, I think one example might be, you know,
7 you -- you go to a gallery. You can procure the
8 painting that's in the gallery in one of two ways. You
9 can procure it unlawfully by stealing it, or you can
10 procure it lawfully by buying it. If you steal it, it's
11 entirely natural to say that you have procured the
12 painting contrary to law, even though, presuming that
13 you had the money, you could just as easily have
14 purchased it. And that, I think, is the difference.

15 JUSTICE ALITO: But the -- the thing -- the
16 thing that was done there, stealing the painting
17 certainly had the potential to help the thief get the
18 painting.

19 MR. PARKER: That's true. It was the means
20 by which they walked away with the painting. But I
21 don't think that it is -- that there was any causal
22 relationship there of the sort that we've been talking
23 about. Had we have been talking about --

24 JUSTICE BREYER: Well, what about, what sort
25 would you accept; that is, you've heard two right there.

1 Forget the word "materiality." From your point of view,
2 you don't. Okay? And I take it, but-for condition, you
3 don't. And I take it that proximate cause, you don't.

4 But what about had a tendency for -- to
5 affect a reasonable immigration officer in his judgment?
6 What about that?

7 MR. PARKER: Well --

8 JUSTICE BREYER: What about the one you just
9 used? It was a means towards getting. That's tougher
10 than you're usually accepting.

11 MR. PARKER: Well --

12 JUSTICE BREYER: But which ones -- well,
13 here I have about five -- would influence the decision?
14 It had the possibility or tendency to influence the
15 decision.

16 MR. PARKER: Uh-huh.

17 JUSTICE BREYER: You say all those are
18 wrong?

19 MR. PARKER: I think they are, but the
20 reason is that Congress has said that --

21 JUSTICE BREYER: Well, which one do you
22 accept?

23 MR. PARKER: I -- I don't think I would
24 accept any of them. I think that the problem here is
25 that Congress has said --

1 JUSTICE BREYER: Oh, I know -- I know you
2 say Congress said that. But the question, of course,
3 for us is whether Congress said that. And we have some
4 words. So I want to know if those words, in your mind,
5 are capable of any interpretation that suggests any kind
6 of tendency of the unlawful act to move an immigration
7 judge -- if not this one, some other one -- towards a
8 plus decision.

9 MR. PARKER: I -- I don't think so, because
10 Congress has said, for example, that even -- and -- and
11 this was the Court's decision in Kungys -- that even an
12 immaterial false statement about the most immaterial of
13 matters can be a categorical bar to the abilities --
14 ability of the person to be naturalized.

15 And the -- the point there is that it would
16 be very odd, I think, to read the statute to say that if
17 a person procures naturalization despite having done
18 that, that somehow that was not done contrary to law
19 because materiality or some -- some other formulation
20 would be required in addition in order to establish
21 that.

22 JUSTICE KAGAN: Well, Mr. Parker, let me --
23 let me try this another way. If you take this phrase,
24 which is a kind of a stilted phrase, because the
25 "contrary to law" comes in between. But -- but it --

1 all it really means is procure naturalization illegally.
2 Do you agree with that?

3 MR. PARKER: I think so.

4 JUSTICE KAGAN: Procure contrary to law and
5 naturalization, it's procure naturalization --

6 MR. PARKER: Yes, if you violated laws
7 governing naturalization, right.

8 JUSTICE KAGAN: So the idea that procuring
9 naturalization illegally somehow includes illegal acts
10 that have no effect on naturalization, or on procuring
11 naturalization, it's -- it's just not how we use
12 language.

13 How could it be that that is true?

14 MR. PARKER: But it's not. Well, my
15 disagreement there is that it is not that it has no
16 effect. The effect, though, is the fact that the person
17 lied. It is not what the person lied about.

18 JUSTICE KAGAN: But it has -- but it has no
19 effect on the decision to naturalize.

20 MR. PARKER: Whether a truthful answer would
21 have had an effect on the decision to naturalize versus
22 an untruthful one? I -- I think that Congress has said
23 quite clearly that that is not the relevant
24 consideration for purposes of these -- applying these
25 statutes.

1 JUSTICE KAGAN: Yes. And I guess what I'm
2 saying is that, how do you use that phrase in a statute
3 and not mean that there has to be a relationship between
4 the illegal acts and the procurement of naturalization?

5 MR. PARKER: Well, I think there does have
6 to be a relationship. I -- we don't dispute that. We
7 just don't --

8 JUSTICE KENNEDY: Will you tell us --

9 MR. PARKER: -- think that there is a causal
10 nexus.

11 JUSTICE KENNEDY: Will you tell us what that
12 relationship is?

13 MR. PARKER: That -- that relationship, in
14 our view, is that the laws have to be the laws governing
15 naturalization. And what that means is there are laws
16 governing who may be naturalized and there are laws
17 governing how they must do so.

18 JUSTICE GORSUCH: If that's true, though,
19 Mr. Parker, what do you do with 15 -- 1425(b)? What's
20 the difference between (a) and (b) on the government's
21 account? (a) says you -- you procure contrary to law,
22 naturalization; (b) says you procure naturalization
23 you're not entitled to.

24 MR. PARKER: Well, I think that the
25 reference to being entitled in subsection (b) reinforces

1 our point that "contrary to law" doesn't necessarily
2 mean that you weren't entitled to the naturalization.
3 It means that you violated the rules that Congress had
4 set forth governing who can be naturalized and how they
5 must do to.

6 JUSTICE GORSUCH: So (b) would be you
7 were -- you were not entitled to begin with, and (a) is
8 you may have been entitled, but you lied in the process
9 of.

10 MR. PARKER: I think that's a fair reading.
11 I mean, I would note that -- that (b) also sweeps more
12 broadly than (a), because it includes things like
13 obtaining a certificate of naturalization rather than
14 the actual procurement of naturalization.

15 I think --

16 JUSTICE SOTOMAYOR: Mr. Parker --

17 MR. PARKER: Yes.

18 JUSTICE SOTOMAYOR: The government -- the
19 Congress doesn't have the power to denaturalize someone.
20 At least so far we haven't let them do that as
21 punishment for a criminal act.

22 MR. PARKER: Uh-huh.

23 JUSTICE SOTOMAYOR: So how -- go back to
24 Justice Kagan's question about footnote 4 in your brief,
25 and your adversary's position that if it's a

1 prerequisite to naturalization -- that's what this
2 means -- that that's the only time Congress can deprive
3 you of citizenship is when something actually would have
4 barred you from getting it.

5 MR. PARKER: Well, the only point that we
6 were trying to make in that footnote --

7 JUSTICE SOTOMAYOR: I know the point you
8 were trying to make --

9 MR. PARKER: Yes.

10 JUSTICE SOTOMAYOR: -- but answer the point
11 he has made --

12 MR. PARKER: Yes. Well --

13 JUSTICE SOTOMAYOR: -- and the point I have
14 made, which is, if Congress doesn't have the power, ex
15 post facto, to denaturalize you, we're giving them this
16 power, should we be reading it narrowly or broadly?

17 MR. PARKER: Well, I don't think that there
18 is -- I think that it shouldn't necessarily be read
19 broadly, but I think that any fair reading of the
20 statute would include this. And let me just explain
21 what we think about eligibility because, frankly, I
22 think that it may be a way to get to the same point.

23 JUSTICE GINSBURG: May I --

24 MR. PARKER: Yes.

25 JUSTICE GINSBURG: -- ask you before that,

1 we've been concentrating on this statute. Is there any
2 other statute in the entire U.S. Criminal Code, any --
3 any false statement statute that is violated by an
4 immaterial false statement?

5 MR. PARKER: Yes. Section 1014 is --
6 criminalizes false statements made to a bank. And in
7 Wells, this Court held that it could be a completely
8 immaterial false statement.

9 CHIEF JUSTICE ROBERTS: I think
10 Justice Sotomayor has a question pending.

11 MR. PARKER: Yes. So let me just explain
12 for a moment how eligibility would work in this context.
13 Let's say that somebody makes a false statement in their
14 naturalization process, and that false statement is
15 discovered. One of two things will happen. Either the
16 false statement is of the sort that is mentioned in
17 Section 1101(f)(6), and therefore, is a categorical bar
18 to naturalization. You are immediately deemed
19 ineligible.

20 JUSTICE KAGAN: Is -- is that the false
21 statement for the purpose of obtaining an immigration
22 benefit?

23 MR. PARKER: Yes. And it can be an
24 immaterial one, yes.

25 JUSTICE KAGAN: Okay.

1 MR. PARKER: So that would be one.

2 If it is not that, let's say it's a -- it's
3 a violation of Section 1015, but it didn't involve oral
4 testimony, and in -- in Kungys, this Court held that --
5 that 1101(f)(6) requires oral testimony. Then what
6 happens is it would have to be analyzed under the
7 residual provision of 1101(f), which says, the fact that
8 we have enumerated certain grounds above does not mean
9 that those are exclusive, and there are other grounds on
10 which the person's good moral character may be denied.

11 What happens at that point is, either the
12 person could be denied because they are actually
13 ineligible based on that statement, or they could be
14 denied naturalization because, at every stage, the alien
15 bears the burden of persuasion, and it could be
16 concluded that they did not satisfy their burden of
17 establishing eligibility. What they have to do in order
18 to obtain naturalization, notwithstanding having made a
19 false statement, is do what -- what the regulations
20 refer to as demonstrating extenuating circumstances.

21 JUSTICE GINSBURG: Demonstrating --

22 MR. PARKER: This is a whole -- I'm sorry?

23 JUSTICE GINSBURG: Demonstrating what?

24 MR. PARKER: Extenuating circumstances. So
25 this would be a whole record evaluation by the agency of

1 all of the circumstances involved, and the alien bears
2 the burden of doing that.

3 JUSTICE SOTOMAYOR: In which of those
4 processes has there ever been the kind of immaterial
5 statement that the Chief Justice gave, lying about a
6 traffic ticket, where there's been no injury to anybody
7 and no claim of reckless driving, other than the
8 speeding?

9 MR. PARKER: Uh-huh.

10 JUSTICE SOTOMAYOR: Where has the agency
11 ever denied naturalization because of an -- an
12 immaterial statement?

13 MR. PARKER: I'm not aware of a particular
14 case in which that has occurred. These are not
15 published decisions, so I -- I couldn't say. But I
16 would note, however, that if the alien -- if that lie is
17 not discovered, and the alien manages to procure
18 naturalization notwithstanding it, the government's
19 position would be that at that point, that person has
20 procured naturalization in a circumstance in which they
21 are not eligible, because as a factual matter, they had
22 lied. And because they lied, they were then -- it was
23 incumbent upon them to show extenuating circumstances.
24 They did not do that, and so they would be ineligible.

25 I would also like to note, though, that --

1 JUSTICE BREYER: Your interpretation on that
2 interpretation, and on your interpretation of 1425, and
3 the words that say in 1451, "shall be deprived of his
4 citizenship." Given the seriousness of that, your
5 interpretation would raise a pretty serious
6 constitutional question, wouldn't it?

7 MR. PARKER: I don't think so.

8 JUSTICE BREYER: It's not a serious
9 constitutional question of whether an American citizen
10 can be -- have his citizenship taken away because 40
11 years before, he did not deliberately put on paper what
12 his nickname was or what -- or what his speeding record
13 was 30 years before that, which was, in fact, totally
14 immaterial. That's not a constitutional question?

15 MR. PARKER: Well, I -- I don't think so,
16 because Congress has, number one, specified that
17 immaterial false statements are grounds for denying
18 naturalization. But I also would note that -- I mean,
19 there are a few responses. One is, the criminal
20 provision, at least, has a 10-year statute of
21 limitations, so it wouldn't be 40.

22 But I -- I think that it's important to
23 remember that denaturalization is not, like, a lifetime
24 bar on -- on citizenship. All denaturalization does, is
25 it returns you to the status of a lawful permanent

1 resident. You then have to wait 5 years, and if after
2 the end of those 5 years, you can demonstrate that
3 you're -- that you're entitled to citizenship, you can
4 be renaturalized. It also doesn't --

5 CHIEF JUSTICE ROBERTS: I don't think this
6 is problem of -- of a constitutional statute, but it is
7 certainly a problem of prosecutorial abuse. If you take
8 the position that refusing to -- not answering about the
9 speeding ticket or the nickname is enough to subject
10 that person to denaturalization, the government will
11 have the opportunity to denaturalize anyone they want,
12 because everybody is going to have a situation where
13 they didn't put in something like that -- or at least
14 most people.

15 And then the government can decide, we are
16 going to denaturalize you for other reasons than what
17 might appear on your naturalization form, or we're not.
18 And that to me is -- is troublesome to give that
19 extraordinary power, which, essentially, is unlimited
20 power, at least in most cases, to the government.

21 MR. PARKER: Well, I --

22 CHIEF JUSTICE ROBERTS: That strikes me as
23 a serious problem.

24 MR. PARKER: I certainly understand your
25 concern, Mr. Chief Justice. All I can say is I -- I

1 don't think that the statute says anything that would
2 necessarily prevent denaturalization from occurring --

3 JUSTICE KENNEDY: But it --

4 MR. PARKER: -- but there are a number of
5 other --

6 JUSTICE KENNEDY: It -- it seems to me that
7 your argument is demeaning the -- the priceless value of
8 citizenship. You say, oh, he just restored her -- or
9 she could -- her former status. That's not what our
10 cases say. That's not what citizenship means.

11 MR. PARKER: I would --

12 JUSTICE KENNEDY: You're arguing for the
13 government of the United States, talking about what
14 citizenship is and ought to mean.

15 MR. PARKER: Right. And I -- well, we would
16 readily agree that it is a priceless treasure. We are
17 not disputing that at all. One of the consequences of
18 the priceless nature of citizenship, is that Congress
19 has surrounded it with a number of protections to ensure
20 that the individuals seeking it square every corner and
21 are absolutely and completely honest.

22 I do want to point out, though, that there
23 are a number of other protections built into the system,
24 that would prevent this sort of problems that the Chief
25 Justice has raised; and one of those is that we would

1 have to prove, beyond a reasonable doubt, that -- that
2 this was a deliberate lie. I think that convincing a --
3 a unanimous jury of that, is very difficult.

4 But I also would note that there are 780,000
5 naturalization petitions filed every year. It would be
6 an extraordinary undertaking to do what you're
7 suggesting. I don't want to --

8 JUSTICE GINSBURG: Before you finish, may --

9 MR. PARKER: Yes.

10 JUSTICE GINSBURG: -- I ask you one other
11 thing about the character of this statute. So we have
12 here for denaturalization, the parallel civil way to get
13 a person denaturalized --

14 MR. PARKER: Correct.

15 JUSTICE GINSBURG: -- and a criminal. In
16 other cases where there are parallel criminal penalties,
17 civil penalties, is there any other one where the
18 criminal disqualifications is easier to establish than
19 the civil one?

20 MR. PARKER: May I?

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. PARKER: I -- we would say no, because
23 we believe that the language "illegally procured" in the
24 civil provision is effectively synonymous with
25 procurement contrary to law. It would only be that in

1 the criminal provision, you have to satisfy the statute
2 of limitations and the beyond a reasonable doubt
3 standard and the mens rea requirement.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Five minutes, Mr. Landau.

7 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

8 ON BEHALF OF THE PETITIONER

9 MR. LANDAU: Thank you, Mr. Chief Justice.

10 I'd like to make three quick points, if I
11 might. First, to go back to Justice Gorsuch's questions
12 that he asked both sides about the relationship between
13 1425(a) and (b), I think they are largely overlapping.
14 It is true that the -- the -- (b) covers some more
15 things that (a) doesn't cover; (b) uses the language
16 "entitled."

17 That may inform exactly the nature of the
18 causal link that one would infer in (a), but I think it
19 doesn't in any way affect our central argument here,
20 which is there has to be some causal link that it's
21 absolutely -- you cannot procure something contrary to
22 law, based on an immaterial false statement, which, by
23 definition, is the kind of thing that doesn't even have
24 the tendency to do that.

25 Again, to go back to Kungys, the natural

1 tendency to produce the conclusion that the applicant
2 was qualified for citizenship.

3 Second, the -- the government said a number
4 of times, oh, yeah, this -- it's not a big deal. We --
5 you know, the government under Kungys, it said you don't
6 need material false statement. And -- and it said in
7 Wells also, that -- in response to another statute where
8 that was true.

9 In both Wells and Kungys -- and we make this
10 point in the 1015 section of our brief -- the -- the
11 Court made the point of addressing the concerns that
12 taking out materiality would open up the defendant to an
13 incredible array of sanctions based on something that --
14 you know, presumably, Congress doesn't mean to
15 criminalize minor offenses. But it said: There is a
16 purpose requirement in both of those, and that's what
17 gave the Court comfort in saying you didn't need
18 materiality in addition to that purpose requirement.

19 So it is not true when the government is
20 saying, oh, immaterial false statements are a basis for
21 denaturalization under 1101(f)(6). That is only -- and
22 as Kungys stressed -- because there is already a
23 for-the-purpose-of requirement in that same provision.

24 And the same exact thing is true on -- in
25 Wells, which is based on Kungys. The government has

1 identified no case in the history of American law where
2 this Court has upheld a statute without a materiality
3 requirement if there wasn't some functional equivalent
4 to materiality, such as a purpose requirement. And I
5 think some of the hypotheticals that were posed here
6 show just how drastic this would be, and how extreme the
7 government's position is here.

8 The third and final point I'd like to make,
9 is that I think, as some of Justice Kagan's questions
10 pointed out, the most natural way to read "procured
11 contrary to law," is to have it mean procured by means
12 of a violation of law. Contrary to law is an adverbial
13 phrase that modifies the way in which you procure it.

14 JUSTICE KENNEDY: Do you --

15 MR. LANDAU: If you --

16 JUSTICE KENNEDY: Do you read Wells as
17 having a causal requirement -- as being a causal
18 requirement.

19 MR. LANDAU: I think it's -- it's -- it
20 basically says for the purpose of --

21 JUSTICE KENNEDY: If the speaker knows the
22 falsity of what he says and intends to influence the
23 institution.

24 MR. LANDAU: Correct. I think that
25 that's -- basically, that's why I think it's

1 functionally the equivalent of materiality. So I think
2 the Court felt some comfort in Wells. The Court didn't
3 just say, oh, we -- we -- we are fine with -- you know,
4 we are dispensing with de minimis non curat lex. That
5 is the background norm against which all of our laws are
6 enacted, because we have to assume that this -- the --
7 the government -- you have to look at how the harshest
8 prosecutor in the land will apply this. And I think the
9 questioning today makes it chillingly clear that the
10 government's position in this case would subject all
11 naturalized Americans to potential denaturalization at
12 the hands of an aggressive prosecutor.

13 That is not what Congress intended. That is
14 not what is in the language of the statute. Nothing in
15 the statute compels this Court, that -- this would be
16 breaking entirely new ground, and we urge this Court no
17 to go there.

18 Thank you very much.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:17 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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