No. 12-998

In the Supreme Court of the United States

PETER CHIKA ECHE, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Naturalization Clause of the Constitution applies of its own force to the Commonwealth of the Northern Mariana Islands, an unincorporated territory of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 694 F.3d 1026. The order of the district court (Pet. App. 14-35) is reported at 742 F. Supp. 2d 1136. The decision of United States Citizenship and Immigration Services (Pet. App. 36-53) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. On November 26, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 24, 2013. On January 22, 2013, Justice Kennedy further extended the time to February 8, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution "contemplates two sources of citizenship, and two only,—birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Under the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.* The Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization." Art. I, § 8, Cl. 4. A person born outside of the United States thus acquires citizenship only as provided by an Act of Congress. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971).

2. a. Under the doctrine of territorial incorporation, "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Boumediene* v. *Bush*, 553 U.S. 723, 757 (2008). In the *Insular Cases*, this Court held that unincorporated territories are "to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." *Dorr* v. *United States*, 195 U.S. 138, 143 (1904). In general, federal legislation applicable to unincorporated territories is "subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 44 (1890); see *Boumediene*, 553 U.S. at 758.

b. In 1976, Congress approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (Covenant), Pub. L. No. 94-241, 90 Stat. 263. Under the Cov-

enant, the Commonwealth is established as "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America." § 101, 90 Stat. 264. Because it is not "surely destined for statehood," *Boumediene*, 553 U.S. at 757, the Commonwealth is an unincorporated territory of the United States, see *Saipan Stevedore Co.* v. *Director, OWCP*, 133 F.3d 717, 720 (9th Cir. 1998). For that reason, the Constitution does not apply in full in the Commonwealth, as the Covenant recognizes. See § 102, 90 Stat. 264 ("[T]his Covenant * * * together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands."); see also § 501, 90 Stat. 267 (extending specified provisions of the Constitution to the Commonwealth).

3. a. Under the Covenant, the Commonwealth "retained nearly exclusive control over immigration to the territory." Pet. App. 2; see § 503(a), 90 Stat. 268 (making generally inapplicable to the Commonwealth "the immigration and naturalization laws of the United States"); see also 8 U.S.C. 1101(a)(38) (2006) (not including the Northern Mariana Islands in the definition of "United States" when "used in a geographic sense" in the Immigration and Nationality Act). However, the Covenant made applicable "all of the provisions" of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, "to aliens who are 'immediate relatives' * * * of United States citizens who are permanently residing in the Northern Mariana Islands." § 506(c), 90 Stat. 269. For purposes of applying the Immigration and Nationality Act to those aliens, "the Northern Mariana Islands will

be deemed to be a part of the United States." § 506(a), 90 Stat. 269.

The Immigration and Nationality Act imposes residency and presence requirements for naturalization. To be eligible for naturalization, a person admitted to the United States as a lawful permanent resident must have continuously resided "within the United States for at least five years" immediately preceding the naturalization application and must have been "physically present" in the United States for "at least half of that time." 8 U.S.C. 1427(a); see 8 C.F.R. 316.2. Because Section 506(c) of the Covenant makes Section 1427(a) applicable to aliens who are immediate relatives of United States citizens permanently residing in the Commonwealth, and because Section 506(a) of the Covenant treats the Northern Mariana Islands as part of the United States for purposes of that provision, the Covenant "enable[s] 'immediate relatives' of permanent residents of the Northern Mariana Islands * * * to become naturalized United States citizens" based on their residency and presence in the Commonwealth. S. Rep. No. 433, 94th Cong., 1st Sess. 79 (1975).

b. In 2008, Congress enacted the Consolidated Natural Resources Act of 2008 (CNRA), Pub. L. No. 110-229, 122 Stat. 754, which added provisions to the Covenant making the Immigration and Nationality Act generally applicable to the Commonwealth, and making the Commonwealth part of the United States for purposes of the immigration statute. § 702 and (j)(1)-(3), 122 Stat. 854-855, 866-867. To allow for an "orderly phasing-in of Federal responsibilities over immigration in the Commonwealth," § 701(a)(1)(B), 122 Stat. 854, the CNRA created a transition period, to begin on the "transition program effective date," § 702(a), 122 Stat. 854-855. See

8 C.F.R. 2.1 (defining "[t]ransition program effective date" as "November 28, 2009"); 74 Fed. Reg. 55,094 (Oct. 27, 2009).

The CNRA made the amendments to the Immigration and Nationality Act effective on that date, Pub. L. No. 110-229, § 705(b), 122 Stat. 867. The CNRA also provided that none of the amendments it made to the Immigration and Nationality Act "shall be construed to make any residence or presence in the Commonwealth before the transition program effective date * * * residence or presence in the United States." § 705(c), 122 Stat. 867. The CNRA provided, however, that presence in the Commonwealth "before, on, or after the date of enactment of this Act" will qualify as presence in the United States "for the purpose only of determining whether an alien lawfully admitted for permanent residence * * * has abandoned or lost such status by reason of absence from the United States." *Ibid.*; see *Khodagholian* v. *Ashcroft*, 335 F.3d 1003, 1006-1007 (9th Cir. 2003) (explaining that a lawful permanent resident who leaves the United States for more than a temporary visit abroad may be deemed to have abandoned his permanent resident status).

4. a. Petitioners are lawful permanent residents of the United States who moved to the Commonwealth before the transition program effective date. Pet. App. 4. During the period at issue, neither petitioner had an immediate family member who was a United States citizen living in the Commonwealth. *Ibid.* Petitioners filed naturalization applications, relying on their residency in the Commonwealth to satisfy the five-year requirement in 8 U.S.C. 1427(a). Pet. App. 4. United States Citizenship and Immigration Services rejected their applications, explaining that because petitioners

had no immediate family member who was a United States citizen and permanent resident in the Commonwealth, petitioners' own residency in the Commonwealth before the transition program effective date could not count toward the naturalization residency requirement. *Id.* at 4-5; see *id.* at 45-53.

Petitioners did not "request a hearing before an immigration officer." 8 U.S.C. 1447(a); Pet. App. 19 ("[N]either [petitioner] formally appealed the initial denial of their naturalization applications to a hearing officer."). Instead, petitioners filed suit, seeking judicial review of the agency's decision. *Id.* at 14-15. Petitioners invoked 8 U.S.C. 1447(b) as the basis for the district court's jurisdiction. Pet. App. 16. The district court held that Section 1447(b) did not apply here because that provision does not authorize judicial review of denials of a naturalization application. *Id.* at 16. Instead, Section 1447(b) provides for judicial consideration of a naturalization application only if the agency fails to make a determination within 120 days of the date on which the agency conducted a naturalization examination. *Id.* at 16-17; see 8 U.S.C. 1446(b).

The district court nevertheless concluded that it had jurisdiction under 8 U.S.C. 1421(c), which authorizes a person whose application for naturalization is denied to seek judicial review "after a hearing before an immigration officer under section 1447(a) of this Title." See Pet. App. 18-23. The district court recognized that petitioners had not sought review by a hearing officer of the denial of their applications. *Id.* at 19, 21. The court also recognized that the "procedure set forth in the applicable statutes is the applicant's exclusive means of obtaining naturalization." *Id.* at 18. Because "[a] person may only be naturalized as a citizen of the United States in

the manner and under the conditions prescribed [by statute] and not otherwise," 8 U.S.C. 1421(d), the district court understood that "an applicant must exhaust his administrative remedies as provided in the applicable statutory scheme prior to bringing suit," Pet. App. 18. But, the district court concluded, petitioners' informal communications with the agency and the agency's reiteration of its decisions gave the agency "the opportunity to exercise its expertise and to correct any errors made in [petitioners'] naturalization proceedings." *Id.* at 22. That satisfied "the purpose of requiring exhaustion of administrative remedies," *id.* at 21, the district court held, and established the court's jurisdiction under 8 U.S.C. 1421(c), Pet. App. 22-23.

b. Turning to the merits, the district court upheld the agency's denial of petitioners' naturalization applications. Petitioners argued that under Section 705(c) of the CNRA, their residence in the Commonwealth "before, on, or after the date of enactment of th[e] Act" counted towards the residency requirement for naturalization. Pet. App. 30. The district court rejected that argument as inconsistent with the "plain language" of Section 705(c), which states that "an alien's presence in the Commonwealth 'before, on, or after' the CNRA's enactment counts as presence in the United States 'for the purpose only of determining whether an alien lawfully admitted for permanent residence . . . has abandoned or lost such status by reason of absence from the United States.'" *Id.* at 32 (quoting § 705(c), 122 Stat. 867).

5. Petitioners appealed. The court of appeals affirmed the district court's jurisdictional ruling because it concluded that the statutory requirement of exhaustion of administrative remedies is not jurisdictional. Pet.

App. 5-6. In the court's view, that "is because the statutory provision for review of the agency's denial of naturalization applications is permissive, rather than mandatory." *Id.* at 5 (observing that 8 U.S.C. 1421(c) provides that an applicant "may seek [judicial] review" of the denial of a naturalization application). The court of appeals held that the permissive authorization to seek judicial review "does not contain the sweeping and direct jurisdictional mandate that the Supreme Court and we have required before concluding an exhaustion requirement is jurisdictional." *Id.* at 5-6 (citation and internal quotation marks omitted).

The court of appeals also affirmed the district court's determination on the merits. Pet. App. 6-13. Petitioner's "principal argument on appeal" was that Section 705(c) of the CNRA "was intended to prevent only temporary guest workers from counting their residence" in the Commonwealth as residence in the United States. *Id.* at 8. But, the court concluded, "[t]he statute does not say that." *Ibid.* Rather, it "has blanket language" that "does not distinguish between temporary guest workers and" lawful permanent residents. *Ibid.*

The court of appeals also rejected petitioners' argument that Section 705(c) should be interpreted to permit lawful permanent residents to count residency in the Commonwealth toward the naturalization residency requirement as a matter of constitutional avoidance. Pet. App. 10. The Naturalization Clause of the United States Constitution authorizes Congress "[t]o establish an uniform Rule of Naturalization." Art. I, § 8, Cl. 4. In petitioner's view, that Clause requires "naturalization law [in the Commonwealth] to have been the same as that in the States at all times." Pet. App. 10. The court of appeals rejected that argument because the Com-

monwealth "is not an incorporated territory." *Id.* at 11. While "[t]he Covenant extends certain clauses of the United States Constitution" to the Commonwealth, "the Naturalization Clause is not among them." *Ibid.* (citing Covenant § 501, 90 Stat. 267).

In addition, the court of appeals noted, the "Naturalization Clause has a geographic limitation: it applies 'throughout the United States.'" Pet. App. 12 (quoting U.S. Const. Art. I, § 8, Cl. 4); see *The Federalist No. 42*, at 286-287 (James Madison) (Jacob E. Cooke ed., 1961) ("The new Constitution * * * authoriz[es] the general government to establish an uniform rule of naturalization throughout the United States."). In one of the *Insular Cases*, this Court construed that same geographic limitation in the Revenue Clause as "not includ[ing] the unincorporated territory of Puerto Rico." *Ibid.* (discussing *Downes* v. *Bidwell*, 182 U.S. 244 (1901)). Accordingly, because the Naturalization Clause does not apply to the Commonwealth of its own accord, the court of appeals concluded, that Clause does not require Congress to enact uniform naturalization legislation applicable to that unincorporated territory. *Id.* at 13.

ARGUMENT

The court of appeals correctly held that the Naturalization Clause does not apply of its own force to the Commonwealth of the Northern Mariana Islands, an unincorporated territory of the United States. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. In addition, this case would be a poor vehicle for consideration of the question presented because the district court lacked jurisdiction over this suit. In any event, the question presented is of limited continuing significance. No further review is warranted.

1. The court of appeals correctly held that the Naturalization Clause did not limit Congress's authority to enact a naturalization law tailored to the special circumstances of the Commonwealth.

a. In his opinion concurring in the judgment in *Downes* v. *Bidwell*, 182 U.S. 244, 287-344 (1901), Justice White first articulated "the doctrine that the United States could acquire territory without incorporating it into the Nation, and that unincorporated territory was not subject to all the provisions of the Constitution." *Torres* v. *Commonwealth of Puerto Rico*, 442 U.S. 465, 469 (1979). That doctrine was premised on the Constitution's grant of authority to Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2, and the understanding "that full application of the Constitution to all territory under the control of the United States would create such severe practical difficulties under certain circumstances as to prohibit the United States from exercising its constitutional power to occupy and acquire new lands," *Torres*, 442 U.S. at 469. The full Court adopted the doctrine in the *Insular Cases*, which collectively stand for the proposition that "guaranties of certain fundamental personal rights declared in the Constitution" extend of their own force to unincorporated territories, *Boumediene* v. *Bush*, 553 U.S. 723, 758 (2008) (quoting *Balzac* v. *Puerto Rico*, 258 U.S. 298, 312 (1922)), but other constitutional provisions apply to unincorporated territories only as provided by Congress, *Torres*, 442 U.S. at 470.

Applying that doctrine, this Court has held inapplicable, of their own force, to unincorporated territories: the Sixth Amendment right to jury trial, *Balzac*, 258

U.S. at 304-305 and *Dorr* v. *United States*, 195 U.S. 138 (1904); the Fifth Amendment requirement of indictment by grand jury, *Ocampo* v. *United States*, 234 U.S. 91 (1914); and the Revenue Clause, Art. I, § 8, Cl. 1, *Downes, supra*. By contrast, this Court "has held or otherwise indicated," *Torres*, 442 U.S. at 470, that certain rights do apply to unincorporated territories: the First Amendment Speech Clause, *Balzac*, 258 U.S. at 314; the Due Process Clause of either the Fifth or Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-669, n.5 (1974); and the equal protection guarantee of the Fifth or Fourteenth Amendment, *Examining Bd.* v. *Flores de Otero*, 426 U.S. 572, 599-601 (1976).

b. Naturalization—the conferral of United States citizenship on an alien—is not a "personal right[] declared in the Constitution," let alone a "fundamental" right of an alien. *Balzac*, 258 U.S. at 312; see *Tutun* v. *United States*, 270 U.S. 568, 578 (1926) ("[T]he Constitution does not confer upon aliens the right to naturalization."). Because the Commonwealth is not an incorporated territory, the Naturalization Clause does not apply of its own force to it. For that reason, Congress was not limited by the requirement that it apply a "uniform" rule, U.S. Const. Art. I, § 8, Cl. 4, when enacting legislation regulating the naturalization of aliens residing in the Commonwealth. See S. Rep. No. 433, 94th Cong., 1st Sess., 79 (1975) ("This provision [Section 506(c)] is enacted under Article IV, Section 3, Clause 2 of the Constitution [the Territory Clause] and therefore need not comply with the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution.")

As the court of appeals recognized (Pet. App. 12), this Court's decision in *Downes* further supports the conclu-

sion that the Naturalization Clause does not apply of its own force to the Commonwealth. In *Downes*, the Court was "asked to hold" that when Puerto Rico became a territory of the United States, "it became a part of the *United States* within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States.'" 182 U.S. at 249 (opinion of Brown, J.) (quoting U.S. Const. Art. I, § 8, Cl. 1). The Court declined that invitation, concluding that the phrase "throughout the United States" does not include unincorporated territories. See *id.* at 342 (White, J., concurring in the judgment) (constitutional requirement that federal taxation be uniform throughout the United States not applicable to unincorporated Territory of Puerto Rico); *id.* at 287 (opinion of Brown, J.) (same); *id.* at 345 (opinion of Gray, J.) (concurring in the judgment "and in substance agreeing with the opinion of Mr. Justice White").

Like the Revenue Clause, the Naturalization Clause limits Congress's authority to enact legislation by requiring naturalization laws to be "uniform * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. The court of appeals correctly concluded that the Commonwealth, as an unincorporated territory, is not part of the United States for purposes of the Naturalization Clause and that the Clause's uniformity requirement is inapplicable to naturalization legislation governing the Commonwealth. The Covenant expressly embodies that very understanding. § 506(a), 90 Stat. 269 ("the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act * * * only" to the extent that that Act is made applicable by the Covenant).

2. a. In petitioners' view (Pet. 21), the court of appeals' holding that "[t]he Naturalization Clause does not apply of its own force" to the Commonwealth, Pet. App. 12, is inconsistent with the Court's description of the *Insular Cases* in *Boumediene*, see 553 U.S. at 756-759. But nothing in *Boumediene* calls into question the court of appeals' determination that the Naturalization Clause's uniformity requirement does not apply to congressional enactments governing the Commonwealth.

As noted above, see pp. 10-11, *supra*, Justice White's concurring opinion in *Downes* is the source of the doctrine that, by virtue of Congress's authority under the Territory Clause, the Constitution does not apply in full of its own force to unincorporated territories acquired by the United States. Justice White explained that "the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States." *Downes*, 182 U.S. at 293. Undertaking that inquiry, *id.* at 298-344, Justice White concluded that the Territory of Puerto Rico, while "subject to the sovereignty of" the United States, "was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Id.* at 341-342. "As a necessary consequence" of Puerto Rico's unincorporated status, he concluded, federal tax law applicable to Puerto Rico is "not * * * controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just re-

ferred to was not applicable to Congress in legislating for Porto Rico." *Id.* at 342.[1]

Thus, Justice White reached the same conclusion as the other Justices in the majority in *Downes*: a constitutional provision requiring Congress to enact rules that are "uniform" "throughout the United States" did not apply to an unincorporated territory. The Naturalization Clause authorizes Congress to enact "an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Because the geographic limitations in the Revenue and Naturalization Clauses are identically worded, *Downes*—including Justice White's opinion—confirms that the uniformity provision of the Naturalization Clause does not apply in the Commonwealth. Because *Boumediene* discusses *Downes* and Justice White's concurring opinion in *Downes* without calling into question the result in that case (see 553 U.S. at 756, 758), *Boumediene* similarly does not call into question the Ninth Circuit's directly parallel ruling in this case under the Naturalization Clause. And because the Naturalization Clause contains the express textual reference to "throughout the United States," and does not confer personal rights on aliens, the court of appeals' ruling does not involve any question concerning the application to unincorporated territories of other provisions of the Constitution that do not contain that textual reference or do confer personal rights.

Furthermore, there is particular reason to recognize flexibility on the part of Congress with respect to the naturalization of aliens residing in territories Congress

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[1] Accordingly, petitioners are mistaken in suggesting (Pet. 21) that Justice White rejected the conclusion that the Revenue Clause's uniformity requirement does not apply to unincorporated territories.

has not incorporated into the United States. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893); see 2 *The Records of the Federal Convention of 1787*, at 238 (Max Farrand ed., 1911) (remarks of Gouverneur Morris) ("[E]very Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted."). Deciding who should be admitted to U.S. citizenship involves fundamental questions of who should be entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad.

The power to confer or deny citizenship to aliens is also an aspect of the power to exclude aliens from the Nation, which "is an incident of every independent nation." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaunessy* v. *United States ex rel. Mezi*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

b. Petitioners contend (Pet. 4-5, 18) that the Ninth and the D.C. Circuits "are in conflict" (Pet. 18) concerning the test to be used to determine whether a constitutional provision applies to an unincorporated territory. According to petitioners, "[t]he Ninth Circuit adheres to the 'fundamental rights' approach," Pet. 5 (citing *Commonwealth of the N. Mariana Islands* v. *Atalig*, 723

F.2d 682, 690 (9th Cir.), cert. denied, 467 U.S. 1244 (1984)), while the D.C. Circuit supposedly rejects that approach in favor of a functional assessment, *ibid.* (citing *King* v. *Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975)). But there is no conflict. Instead, the Ninth Circuit expressly has adopted the approach employed by the D.C. Circuit in *King* to determine which constitutional rights are sufficiently fundamental to apply of their own force in unincorporated territories. See *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1461 (1990) ("In our view, *King* sets forth a workable standard for finding a delicate balance between local diversity and constitutional command."), cert. denied, 506 U.S. 1027 (1992).

c. In any event, this case would present a poor vehicle for considering whether the Naturalization Clause applies of its own force in the Commonwealth, because the district court lacked jurisdiction over petitioners' suit as a consequence of petitioners' failure to exhaust administrative remedies.[2]

Where Congress by statute requires exhaustion of administrative remedies prior to suit, "exhaustion is required." *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992). In *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), for example, this Court construed a provision of the Social Security Act as requiring the exhaustion of administrative remedies as a precondition to the district

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[2] Petitioners contend that "[t]he government has waived its exhaustion objection by failing to file a notice of cross-appeal." Pet. 26. That argument is mistaken. As demonstrated in the text, the statutory exhaustion requirement governs the district court's "adjudicatory authority" and so goes to the court's subject matter jurisdiction. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). "Subject-matter jurisdiction can never be waived or forfeited." *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012).

court's review of agency action. One provision of the statute authorized judicial review: "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action." 42 U.S.C. 405(g). Another provision "prevent[s] review of decisions of the Secretary save as provided in the Act." *Salfi*, 422 U.S. at 757; see 42 U.S.C. 405(h) ("No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided."); see *ibid.* (expressly precluding suit under 28 U.S.C. 1331). This Court therefore interpreted the requirement of administrative exhaustion as a prerequisite to the courts' exercise of jurisdiction. *Salfi*, 422 U.S. at 763, 764 (the requirement of "a final decision of the Secretary made after a hearing" is "central to the requisite grant of subject-matter jurisdiction").

The statute providing for jurisdiction to review denials of naturalization applications, 8 U.S.C. 1421, is structurally congruent. It contains a provision authorizing judicial review after administrative appeal of the denial of a naturalization application: "A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek [judicial] review of such denial." 8 U.S.C. 1421(c). Another provision makes clear that a person seeking naturalization may challenge an adverse decision only as authorized by the statute. That provision, entitled "Sole procedure," states: "A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." 8 U.S.C. 1421(d). As in *Salfi*, the requirement of admin-

istrative exhaustion is "central to the requisite grant of subject-matter jurisdiction." 422 U.S. at 764; see 8 C.F.R. 336.9(d) (denial of a naturalization application "shall not be subject to judicial review until the applicant has exhausted those administrative remedies available to the applicant"); see also *Escaler* v. *United States Citizenship & Immigration Servs.*, 582 F.3d 288, 292 (2d Cir. 2009) (holding that exhaustion requirement in 8 U.S.C. 1421 "is mandatory").

Neither petitioner "formally appealed the initial denial of their naturalization applications to a hearing officer." Pet. App. 19; see *id.* at 21 ("[Petitioners] did not follow the procedure outlined in the statutes and regulations."). The district court believed that it could nevertheless excuse petitioners' failure to administratively appeal the denial of their naturalization applications because their subsequent informal inquiries gave the agency "the opportunity to exercise its expertise and to correct any errors made." *Id.* at 22; see also Pet. 28-29. But if a "statute does mandate exhaustion, a court cannot excuse it." *Avocados Plus Inc.* v. *Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004); see *ibid.* (statutorily required exhaustion "is rooted * * * in Congress' power to control the jurisdiction of the federal courts"). For its part, the court of appeals believed that 8 U.S.C. 1421 "does not contain the sweeping and direct jurisdictional mandate that the Supreme Court and we have required before concluding that an exhaustion requirement is jurisdictional." Pet. App. 5-6 (internal quotation marks omitted). But that, too, is mistaken. The provision at issue here has the same structural features as the statute at issue in *Salfi*, which made administrative exhaustion a prerequisite to the district court's jurisdiction.

d. Finally, the question presented is of limited continuing significance. To be eligible for naturalization, a person admitted to the United States as a lawful permanent resident must have continuously resided "within the United States for at least five years." 8 U.S.C. 1427(a). The CNRA makes the Commonwealth part of the United States for purposes of that residency requirement. § 702(a), (j)(1) and (2), 122 Stat. 854-855, 866. That change in the law took place on November 28, 2009. § 705(b), 122 Stat. 867; 8 C.F.R. 2.1; 74 Fed. Reg. 55,094 (Oct. 27, 2009). By November 28, 2014, any person admitted to the United States as a lawful permanent alien who has continuously resided in the Commonwealth for the prior five years will be able to seek naturalization based entirely on that residency. For that reason, the question presented, which was of limited significance to begin with, is of increasingly diminishing importance and does not merit this Court's consideration for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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