No. 13-606

In the Supreme Court of the United States

KAMAL PATEL, AKA KAMALBHAI KANTI PATEL,
PETITIONER

v.

JEH JOHNSON, SECRETARY OF
HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an alien qualifies as a "national of the United States" because he has unilaterally declared his permanent allegiance to the United States and applied for United States citizenship. 8 U.S.C. 1101(a)(22).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 706 F.3d 370. The order of the district court (Pet. App. 19a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. A petition for rehearing was denied on June 18, 2013 (Pet. App. 1a). On September 6, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 16, 2013. On October 10, 2013, the Chief Justice further extended the time to November 15, 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. Petitioner, a federal inmate, is a permanent resident alien of the United States. Pet. App. 3a. In 1992, he pleaded guilty in the United States District Court for the Western District of Texas to conspiring to import heroin, in violation of 21 U.S.C. 952 and 963, and to witness tampering, in violation of 18 U.S.C. 1512(b)(1). He was sentenced in 1993 to a term of 293 months of imprisonment, to be followed by five years of supervised release. See 92-cr-00011 Docket entry (W.D. Tex. Mar. 4, 1993).

While in prison, petitioner was charged in the United States District Court for the Eastern District of North Carolina with conspiring to bribe a public official, in violation of 18 U.S.C. 371. He pleaded guilty and was sentenced in 2010 to an additional eight months of imprisonment, to be served following his earlier sentence. See 09-cr-00004 Docket entry No. 259 (E.D.N.C. Jan. 12, 2010).

Petitioner is scheduled to be released from prison on January 28, 2014. See Fed. Bureau of Prisons, *Find an Inmate*, http://www.bop.gov/Locate/ (last visited Jan. 17, 2014). The Department of Homeland Security, Immigration and Customs Enforcement, has filed an immigration detainer giving notice that it intends to seek custody of petitioner at the conclusion of his federal sentences.

On June 4, 2010, petitioner filed a civil suit under 8 U.S.C. 1503(a), seeking a declaratory judgment that he qualified as a "national" of the United States because he had applied for citizenship, sworn an oath of allegiance to the United States, and registered with the Selective Service System. Pet. App. 3a, 23a-28a. Petitioner alleged in his complaint that he had resided

in the United States since the age of 11 and had been a permanent resident of the United States for almost 25 years. *Id.* at 3a, 26a, ¶ 9. Petitioner also alleged that he had registered with the Selective Service System when he was 18 years old, sworn an oath of allegiance to the United States and sent evidence of his oath to various government officials, and applied for naturalization. *Id.* at 3a-4a, 26a ¶¶ 11-15. Petitioner did not claim that his application for naturalization had been approved or that he was a United States citizen based on other grounds. *Id.* at 3a-4a.

Petitioner further alleged in his complaint that, because the Bureau of Prisons classified him as an alien, he was ineligible for certain programs offered to prison inmates, including pre-release classes and community confinement programs. Pet. App. 4a, 27a ¶¶ 17-19.

2. The district court dismissed petitioner's complaint *sua sponte* for failure to state a claim on which relief may be granted, using the screening procedures for prisoner lawsuits set forth in 28 U.S.C. 1915A(a). Pet. App. 19a-21a. The court concluded that petitioner's claim failed because petitioner had no constitutional right to participate in the Bureau of Prisons' rehabilitative programs. *Id.* at 21a.

3. The court of appeals affirmed the dismissal. Pet. App. 2a-18a. While concluding that the district court had misconstrued petitioner's complaint by reading it to raise a constitutional challenge, *id.* at 4a-5a, the court of appeals found dismissal of the complaint was proper on alternative grounds. Petitioner's complaint, the court concluded, did not allege facts showing that he was entitled to a declaratory judgment of citizenship because none of the facts alleged

would qualify petitioner as a United States "national" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 10a.

The court of appeals reached this result based upon the definition of "national" adopted by the Board of Immigration Appeals (BIA). Under the BIA's definition, "nationality under the Act may be acquired only through birth or naturalization," Pet. App. 8a (quoting *In re Navas-Acosta*, 23 I. & N. Dec. 586, 588 (B.I.A. 2003)), and "may not be created through unilateral declarations of allegiance," *ibid.* Adhering to a prior Fourth Circuit decision involving the same issue, the court of appeals concluded that this construction of the term "national" was entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). See Pet. App. 8a-10a (following *Fernandez* v. *Keisler*, 502 F.3d 337 (2007), cert. denied, 555 U.S. 837 (2008)). *Fernandez* had concluded that the BIA's definition was supported by both the historical meaning of the term "national" and by the text and structure of the INA as a whole. 502 F.3d at 349-351. In petitioner's case, because it was undisputed that petitioner had not completed the naturalization procedures or been born a citizen, the court concluded that petitioner's complaint failed to state a valid claim to United States nationality. Pet. App. 10a.

The court of appeals concluded that its earlier decision in *United States* v. *Morin*, 80 F.3d 124 (4th Cir. 1996), did not compel a different result. Pet. App. 8a-12a. Indeed, the court explained, its prior decision in *Fernandez* had already rejected that contention. *Id.* at 8a-10a. *Morin* had held that a resident alien who had applied for citizenship qualified as a United States "national" under the INA. See *id.* at 6a. But *Morin*,

which involved the application of a sentencing enhancement to a criminal defendant, "did not so much as mention the BIA's interpretation" of the INA's definition. *Id.* at 8a. Nor had *Morin* held that its construction of the term "national" was the only permissible construction. *Id.* at 9a. Thus, the court concluded that although petitioner could satisfy the definition of "national" in *Morin*, under the Fourth Circuit's subsequent decision in *Fernandez*, petitioner could not "state a claim to be a United States national under *Morin* because [the court] must defer to the BIA's contrary, post-*Morin* interpretation of" the term "national." *Id.* at 10a.

Judge Davis dissented. Pet. App. 14a-18a. In addition to arguing that petitioner's case should have been remanded so that the district court could consider petitioner's nationality claim in the first instance, *id.* at 16a, Judge Davis expressed the view that *Morin* was binding precedent that could not be overruled by a three-judge panel, *id.* at 17a & n.3.

The Fourth Circuit denied rehearing and rehearing en banc. Pet. App. 1a.

ARGUMENT

The Fourth Circuit's decision does not warrant review by this Court. All the other courts of appeals to have considered the question agree with the Fourth Circuit in this case that an alien who has not been naturalized does not qualify as a United States "national" based on a mere application for citizenship or a unilateral declaration of allegiance. Moreover, there is a substantial question whether this case will become moot before any decision could be rendered by the Court. The petition for a writ of certiorari therefore should be denied.

1. There is a substantial question whether this case will be rendered moot by petitioner's release from custody on January 28, 2014. Under Article III of the Constitution, a plaintiff must allege not only a concrete injury caused by a defendant's conduct but also "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). These elements of "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted).

Section 1503(a) of Title 8 of the United States Code provides that if a person within the United States "claims a right or privilege as a national of the United States and is denied such right or privilege" by a federal department on the ground that he is not a national, he may institute an action against the head of such department, to seek a declaratory judgment that he is a national. The denial of a right or privilege petitioner asserted in this case was the denial of participation in certain prison programs. Pet. App. 27a ¶¶ 17-19. But any such denial, and any resulting injury, will end when he is released from custody upon completion of his sentence. See, *e.g.*, *Ayers* v. *Coughlin*, 780 F.2d 205, 210 (2d Cir. 1985) (finding moot a request for relief from solitary confinement when term of solitary confinement expired); *Austin* v. *INS*, 308 F. Supp. 2d 125, 127 (E.D.N.Y. 2004) (finding release from prison mooted a Section 1503 declaratory-judgment action brought by prisoner who, based on alienage, had been

denied access to rehabilitation programs while in prison).[1]

In addition, because the Bureau of Prisons will not be free to re-imprison petitioner after his release, petitioner's expected release does not constitute a mere voluntary cessation of challenged conduct that may be re-commenced at will, triggering an exception to mootness. See *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013); *Deakins* v. *Monaghan*, 484 U.S. 193, 200 n.4 (1988). And because it cannot be assumed that petitioner will again be incarcerated by the Bureau of Prisons, there is no "reasonable expectation

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[1] While petitioner may be subject to removal proceedings in the future based on his status as an alien, removal proceedings cannot support an action under Section 1503. Section 1503(a) permits a plaintiff to file suit to redress injuries from having been classified as an alien,

> except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding.

8 U.S.C. 1503(a). Claims of nationality in the context of removal must be adjudicated first by the BIA, and then reviewed in a court of appeals, rather than being adjudicated in a district court in the first instance. See *ibid.*; 8 U.S.C. 1252(a)(5) and (b)(9). As a result, an inmate released from prison and transferred to immigration custody for removal proceedings does not have an injury cognizable under Section 1503. See *Austin*, 308 F. Supp. 2d at 127 (dismissing Section 1503(a) action as moot though plaintiff had been transferred to immigration authorities for removal following release from prison); cf. 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.3.1 n.47, at 80 (3d ed. 2008) (compiling cases applying mootness doctrine when, due to intervening circumstances, the appropriate mechanism for plaintiff to obtain relief would be action under different statute).

that the same complaining party [will] be subjected to the same action again." See *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011) (brackets in original; citation omitted).

2. a. In any event, this petition does not warrant review. The court of appeals' conclusion that under the INA, an alien who applies for citizenship but does not complete the naturalization process is not a "national of the United States" accords with the holdings of all of the courts of appeals that have considered the issue. Pet. App. 3a, 10a; *Fernandez* v. *Keisler*, 502 F.3d 337, 351 (4th Cir. 2007) (noting that "every court of appeals to have addressed this issue has reached a similar conclusion to the BIA" on the nationality statute), cert. denied, 555 U.S. 837 (2008); *Lin* v. *United States*, 561 F.3d 502, 508 (D.C. Cir.), cert. denied, 558 U.S. 875 (2009); *Abou-Haidar* v. *Gonzales*, 437 F.3d 206, 207 (1st Cir. 2006); *Marquez-Almanzar* v. *INS*, 418 F.3d 210, 216-219 (2d Cir. 2005); *Salim* v. *Ashcroft*, 350 F.3d 307, 309-310 (3d Cir. 2003) (per curiam); *Omolo* v. *Gonzales*, 452 F.3d 404, 408-409 (5th Cir. 2006); *Perdomo-Padilla* v. *Ashcroft*, 333 F.3d 964, 971-972 (9th Cir. 2003), cert. denied, 540 U.S. 1104 (2004); *United States* v. *Jimenez-Alcala*, 353 F.3d 858, 860-862 (10th Cir. 2003); *Sebastian-Soler* v. *United States Att'y Gen.*, 409 F.3d 1280, 1285-1287 (11th Cir. 2005) (per curiam), cert. denied, 547 U.S. 1055 (2006). Those courts have held that "one can become a 'national' of the United States only by birth or by naturalization under the process set by Congress." *Abou-Haidar*, 437 F.3d at 207.

That conclusion is sound. The definition of "national" adopted by the BIA and accepted by the courts of appeals accords with historical usage, under which

the term "national" has long been a "term of art" used to refer to noncitizens born in certain territories of the United States. *Fernandez*, 502 F.3d at 349 (citation omitted); see *Marquez-Almanzar*, 418 F.3d at 218 (tracing history). The INA's text and structure support the same interpretation. The INA sets forth detailed procedures through which status as a "national" may be obtained, 8 U.S.C. 1421-1458, and additional procedures through which status as a "national" may be stripped, 8 U.S.C. 1481. Those procedures do not include a mere application for citizenship or unilateral declaration of allegiance. And it would undermine this statutory framework if aliens could acquire or re-obtain nationality, without complying with applicable procedures, simply by filing an application or taking an oath. See *Fernandez*, 502 F.3d at 350-351. Indeed, petitioner's interpretation of the statute would lead to the improbable result that, because nationals of the United States are not subject to removal, see 8 U.S.C. 1101(a)(3), 1229a(a)(1), an alien could immunize himself from removal simply by declaring his loyalty to the United States or seeking citizenship.

Petitioner contends that the construction of the term "national" adopted by the BIA and the courts of appeals is wrong because it renders portions of the definition of "national" in the INA "insignificant, if not wholly superfluous." Pet. 24 (citation omitted). That is not correct. The portion of the statute defining the term "national" to reach "a person who, though not a citizen of the United States, owes permanent allegiance to the United States," 8 U.S.C. 1101(a)(22), is not superfluous under the definition adopted by the BIA and the courts of appeals, because it includes

persons who are born in certain United States territories whose residents are not entitled to citizenship, in addition to children born to non-citizen national parents abroad. See Pet. App. 5a (discussing 8 U.S.C. 1408). "In the early years of the twentieth century," this category encompassed more "nationals" than the category sweeps in now, because at that time "[m]any of our insular possessions were not regarded as fully incorporated into the United States, and their inhabitants were not accorded full rights of citizenship." *Marquez-Almanzar*, 418 F.3d at 218 n.12. By contrast, the distinction between nationality and citizenship "has little practical impact today" because "the only remaining noncitizen nationals are residents of American Samoa and Swains Island." *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting). But there is no canon of construction that would suggest the meaning of the term "national" must change because it now encompasses fewer individuals.

Petitioner does not dispute the uniformity of the court of appeals' decisions concerning the scope of the term "national," but he suggests that review is warranted because several district court decisions have used more expansive definitions. Pet. 19-22. Any disagreement among district courts, however, can and should be resolved in the first instance by the courts of appeals.[2] Nor is this Court's intervention warrant-

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[2] Indeed, because of the increasing consensus among the courts of appeals, disagreement among district courts is abating. Two of the three decisions in the District of Columbia on which petitioner relies predated the decision of the court of appeals for the D.C. Circuit rejecting petitioner's construction of the term "national." Compare *Asemani* v. *Islamic Rep. of Iran,* 266 F. Supp. 2d 24, 26-

ed based on petitioner's contention that the government "manipulate[s] outcomes to suit its own case-specific preferences and thereby caus[es] vastly disparate treatment for similarly situated individuals." Pet. 17. Petitioner has identified only one case—*Morin*—in which the government advocated a definition of nationality different from the one adopted by the BIA and all of the courts of appeals that have considered this issue, and that was a criminal prosecution in which neither the prosecutor nor the court appears to have been aware of the BIA's longstanding interpretation of the term "national." See Pet. App. 8a, 12a (discussing *Morin*). A single case in which a prosecutor took an inconsistent position does not warrant this Court's intervention on a legal question that is now settled in the appellate courts. That is especially so because the Fourth Circuit, which rendered the decision in *Morin*, has since reached a contrary conclusion in *Fernandez*, on which the Fourth Circuit relied in this case.

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27 (D.D.C. 2003), and *Peterson* v. *Islamic Rep. of Iran*, 515 F. Supp. 2d 25, 39 n.4 (D.D.C. 2007), with *Lin*, 561 F.3d at 508. Since *Lin*, *Asemani* has been acknowledged to have been wrongly decided. See *Mohammadi* v. *Islamic Rep. of Iran*, 947 F. Supp. 2d 48, 64-67 (D.D.C. 2013).

The sole case petitioner cites employing a broader definition within the D.C. Circuit since *Lin*, and the sole district court case petitioner cites employing a broader definition outside the District of Columbia, were cases in which no adversarial pleadings were filed to contest the plaintiff's legal arguments, because no defendant appeared in the suits. See *Han Kim* v. *Democratic People's Rep. of Korea*, No. 09-648, 2013 WL 2901906 (D.D.C. June 14, 2013); *Saludes* v. *Republica de Cuba*, 577 F. Supp. 2d 1243 (S.D. Fla. 2008).

b. Petitioner also asserts (Pet. 9-22) that because the courts of appeals reached their uniform conclusions regarding the meaning of "national" through different reasoning—with the Fourth Circuit deferring to the BIA and other courts construing the statute without deference—this Court should grant certiorari to review whether the BIA's interpretation of Section 1101(a)(22) is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). But because litigants in all circuits are subject to the same legal rules as a result of the circuits' uniform holdings, the fact that the Fourth Circuit reached that conclusion in *Fernandez* and this case through different reasoning than other courts does not present a question warranting this Court's review. Indeed, this Court has previously declined to review whether the BIA's definition of "national" warrants *Chevron* deference in *Fernandez* itself. See *Fernandez* v. *Mukasey*, 555 U.S. 837 (2008) (No. 07-10774). There is no reason for a different disposition in this case.

In any event, the court of appeals was correct that the BIA's interpretation of the term "national" in the INA is entitled to *Chevron* deference. This Court has made clear that, in general, the *Chevron* framework applies to the BIA's interpretation of the INA. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Petitioner argues (Pet. 15-16) that 8 U.S.C. 1252(b)(5) and 1503 foreclose *Chevron*'s application to the definition of "national" by authorizing courts to decide nationality claims, but his reliance is misplaced. Section 1252(b)(5) directs that a "court shall decide the nationality claim" when a petitioner who has been ordered removed claims nationality. But while this

provision calls for courts to decide whether litigants qualify as United States nationals, it does not call for courts "to abandon [their] normal mode of inquiry—in which [they] interpret ambiguous provisions of the INA against a *Chevron* backdrop." *Fernandez*, 502 F.3d at 343. Similarly, while Section 1503 permits individuals to seek declaratory judgments concerning their status as United States nationals, it does not command less than ordinary deference to the BIA's construction of ambiguous terms. Accordingly, the court of appeals properly gave *Chevron* deference to the BIA's construction of the term "national."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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