Nos. 09-1981 & 10-1488
(consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID LIVINGSTON JOHNSON,

Petitioner-Appellant,

v.

J.D. WHITEHEAD, Warden, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AND
ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A030-171-936

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

In this consolidated appeal and petition for review, Petitioner-Appellant David Livingston Johnson ("Johnson"), seeks review of: (1) the District Court's May 14, 2009, order dismissing his habeas corpus petition for lack of subject-matter jurisdiction, see Joint Appendix ("JA") 6, 117-25; and (2) the Board of Immigration Appeals' ("Board") April 20, 2010, order dismissing his appeal of the immigration judge's decision denying his motion to terminate, finding him

removable, and ordering him removed from the United States. JA 260-63 (Board's decision); see JA 140-45 (immigration judge's decision).

As discussed infra, the Court lacks jurisdiction to review of the District Court's dismissal of Johnson's habeas corpus petition because Johnson's nationality claim can only be considered pursuant to a petition for review of a final order of removal. See Immigration and Nationality Act ("INA") §§ 242(b)(5), (b)(9), 360(a), 8 U.S.C. §§ 1252(b)(5), (b)(9), 1503(a). Alternatively, the Court lacks jurisdiction because, as the District Court properly found, Johnson failed to exhaust his administrative remedies.

The Board exercised jurisdiction over Johnson's appeal pursuant to 8 C.F.R. §§ 1003.1(b)(3) and 1240.15, which grant it appellate jurisdiction over decisions of immigration judges in removal proceedings. The Court's jurisdiction over a petition for review of a final order of the Board arises under INA section 242(a), 8 U.S.C. § 1252(a), as amended by the REAL ID Act, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231, 310 (May 11, 2005).

Where, as here, an alien has been ordered removed based on certain enumerated crimes, including aggravated felonies and controlled substance offenses, INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C); INA §§ 237(a)(2)(A)(iii), 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B), this Court's jurisdiction is limited to reviewing

legal questions and constitutional claims. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D); see Saintha v. Mukasey, 516 F.3d 243, 248 (4th Cir. 2008). The Court, however, retains jurisdiction to determine its jurisdiction. Jahed v. Acri, 468 F.3d 230, 233 (4th Cir. 2006). Furthermore, as will be discussed infra, the Court has jurisdiction to consider Johnson's claim that he is a citizen of the United States. INA § 242(b)(5), 8 U.S.C. § 1252(b)(5). The petition for review was timely filed, and venue is proper. INA §§ 242(b)(1), (2), 8 U.S.C. §§ 1252(b)(1), (2); see JA 140-45, 260-63.

STATEMENT OF THE ISSUES

I. Whether the Court has jurisdiction to review Johnson's appeal of the District Court's decision or, alternatively, whether the District Court properly found it was without jurisdiction to consider Johnson's habeas corpus petition.

II. Whether Johnson established that he derived United States citizenship through the naturalization of his father where he failed to establish that his parents were legally separated, as required by the statute.

III. Whether INA section 321(a)(3) deprives Johnson of his equal protection rights where the statute is supported by a rational basis.

IV. Whether, assuming res judicata was generally applicable, the Board properly concluded that res judicata did not limit DHS from relitigating Johnson's

alienage where he committed additional removable offenses after the immigration judge terminated his deportation proceedings in 1998.

STATEMENT OF THE CASE AND THE FACTS

I. BACKGROUND

Johnson, a native of Jamaica born in 1965, was admitted to the United States as a lawful permanent resident ("LPR"), on October 1, 1972. JA 57, 130; see Supplemental Joint Appendix ("Supp. JA") 1.[1] On December 26, 1973, Johnson's father, Ronald Johnson, acquired United States citizenship through naturalization.[2] JA 88.

While in the United States, Johnson has been convicted of multiple criminal offenses. On January 27, 1989, Johnson was convicted in the United States District Court for the Northern District of Texas, of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1), and sentenced to five years of incarceration. JA 57; see Supp. JA 2-5 (conviction

[1] The Joint Appendix does not include certain pages from the certified administrative record cited by Respondent in this brief. Accordingly, Respondent has moved to file a Supplemental Joint Appendix concurrently with his brief.

[2] In his brief, Johnson asserts as fact that he is a derivative United States citizen. See, e.g., Petitioner's Amended Brief ("Pet. Br.") at 2. That "fact," however, is contested, as whether Johnson derived United States citizenship through his father's 1973 naturalization is the principal issue before this Court.

records). On May 1, 1989, Johnson was convicted in the 282d Judicial District of Dallas County, Texas, of: (1) unlawful possession of a controlled substance, to wit, cocaine; and (2) aggravated assault. JA 57; see Supp. JA 6-14 (conviction records). For each of these offenses, Johnson was sentenced to ten years' imprisonment. JA 57; see Supp JA 6, 10.

On August 21, 1992, the former Immigration and Naturalization Service ("INS") issued Johnson an Order to Show Cause ("OSC"), charging him as deportable from the United States based on his firearms conviction.[3] See JA 89. On October 6, 1992, the immigration judge terminated Johnson's deportation proceeding without prejudice. See id. The immigration judge's order did not state the reason for termination. See id.

On June 21, 1996, the INS issued another OSC, charging Johnson as deportable on account of his 1989 cocaine possession and firearms convictions. See JA 89. Johnson, through his attorney, filed with the immigration judge a motion to terminate the deportation proceedings because, he argued, he derived citizenship in the United States automatically when his father was naturalized in

[3] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security ("DHS"), pursuant to sections 441 and 471 of the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

1973. JA 15-16. Over the INS's opposition, see JA 19, the immigration judge issued an order on February 9, 1998, terminating Johnson's deportation proceedings. JA 31. Upon the form order, the immigration judge stated that Johnson "appears to be a U.S. citizen by father's natz [naturalization]." Id.

On December 16, 1996 – more than a year before Johnson's deportation proceedings were terminated – Johnson filed with the INS a Form N-600 Application for Certificate of Citizenship, claiming that he derived United States citizenship pursuant to former INA section 321(a)(3), 8 U.S.C. § 1432(a)(3) (1999) (repealed)). JA 89; see Supp. JA 21-22. With his application, Johnson submitted a copy of a document dated July 12, 1996, and purportedly signed by his mother, Joan Francis, in which she stated she "voluntarily gave his father Ronald Johnson, custody of David from the year 1965." JA 89. On April 5, 2000, the INS denied Johnson's Form N-600 application because he had failed to establish derivative citizenship. Supp. JA 15-16. Specifically, the INS concluded that Johnson, whose parents had never married, could not show that his parents had legally separated, as was required to confer him with derivative citizenship since only one parent had naturalized in the United States. Supp. JA 16; see INA § 321(a)(3), 8 U.S.C. § 1432(a)(3). Johnson did not appeal the INS's denial of his Form N-600 to the Administrative Appeals Unit ("AAU").

Johnson was subsequently convicted of an additional federal offense. On January 28, 2002, Johnson was convicted in the United States District Court for the Southern District of New York, for the offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and sentenced to 108 months of incarceration. JA 57; see Supp JA 17-22.

II. JOHNSON'S HABEAS CORPUS PETITION

On July 18, 2008, Johnson filed in the United States District Court of Maryland a petition for writ of habeas corpus. See JA 4. As relevant here, Johnson claimed that he was a United States citizen and was not, therefore, subject to the jurisdiction of the INS or the immigration courts.[4] JA 42-45. The Government opposed the habeas petition. See JA 5. On May 14, 2009, the District Court dismissed Johnson's habeas petition. JA 122-25. To the extent Johnson sought declaratory relief claiming he attained derivative citizenship through his father's 1973 naturalization, the District Court determined it was without jurisdiction to provide relief under either 28 U.S.C. §§ 2241 or 2201. JA 124. The District Court noted that a citizenship claim may be pursued in one of two ways. Id. First, a person may affirmatively seek proof of citizenship by filing an

[4] Johnson also raised issues related to his detention, but those issues have been waived here because Johnson has not pursued them in either his appeal or his petition for review.

application (Form N-600) with DHS's Citizenship and Immigration Services ("CIS"), which, if denied, can be appealed to the AAU, and if the AAU affirms, the person can then seek a judicial declaration of citizenship. Id. (citing INA §§ 341(a), 360, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. §§ 103.3, 341.6[5]). Second, an individual in removal proceedings may claim citizenship as a defense, and if that claim is rejected by the immigration judge and Board, it may be considered by the Courts of Appeals pursuant to a properly filed petition for review. JA 124 (citing INA § 242(b), 8 U.S.C. § 1252(b)).

The District Court noted that Johnson filed a Form N-600, which was denied in April 2000, but he did not appeal that denial to the AAU. JA 124. Consequently, the District Court found it lacked jurisdiction over Johnson's citizenship claim because he failed to exhaust his administrative remedies. Id. (citing United States v. Breyer, 41 F.3d 884, 891-92 (3d Cir. 1994)).[6]

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[5] The District Court erroneously cited 8 C.F.R. § "341.68." JA 124. There is no such subsection in the Code of Federal Regulations. However, it appears from the context of the District Court's decision that the reference was to 8 C.F.R. § 341.6.

[6] In a footnote, the District Court noted that Johnson was not without judicial recourse, as he could seek judicial review in this Court of the Board's consideration of his citizenship claim. JA 125 n.12.

On August 27, 2009, Johnson filed a notice of appeal of the District Court's decision. JA 255; see Johnson v. Whitehead, Docket No. 09-1981 (4th Cir.). This Court subsequently placed Johnson's appeal in abeyance pending the Board's issuance of a decision in Johnson's removal proceedings. See Johnson v. Whitehead, Docket No. 09-1981 (4th Cir.). On May 12, 2010, upon Johnson's filing of a petition for review of the Board's dismissal of his appeal, see Johnson v. Holder, Docket No. 10-1488 (4th Cir.), this Court consolidated Johnson's appeal with his petition for review.

III. JOHNSON'S REMOVAL PROCEEDINGS

On January 8, 2009, the DHS initiated Johnson's removal proceedings and served him with a Notice to Appear ("NTA"), alleging that he was a Jamaican citizen convicted of the crimes described above, and charging him as removable pursuant to: (1) INA section 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C), as an alien who, after admission, was convicted of a firearms offense; (2) INA section 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien who, after admission, was convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct; (3) INA section 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), as an alien who, after admission, was convicted of violating a law relating to a controlled substance, other than a single offense involving

possession for one's own use of thirty grams or less of marijuana; and (4) INA section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who, after admission, has been convicted of an aggravated felony as defined in INA section 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), namely, a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment ordered was at least one year. JA 57-58.

Before the immigration judge, Johnson, through counsel, denied that he was a citizen of Jamaica but admitted the remaining factual allegations in the NTA. Supp. JA 23. Johnson also denied the charges of removability because he contended he was a United States citizen and thus not removable. Supp. JA 23-24. Johnson subsequently filed a motion to terminate his removal proceedings, arguing primarily that the Government was barred, by res judicata, from relitigating his citizenship, as the immigration judge in 1998 had determined he was a United States citizen. JA 65-72; see JA 68-69 (citing Medina v. INS, 993 F.2d 499, 504 (5th Cir. 1993)).

Opposing Johnson's motion, DHS contended that res judicata did not apply to Johnson's case because the 1998 immigration judge never determined that Johnson was a United States citizen. JA 87-99. Specifically, DHS noted that the immigration judge had merely indicated that Johnson "appear[ed]" to be a United

States citizen; he never actually determined that Johnson is a United States citizen. JA 90-91. DHS also argued that the immigration judge's speculation that Johnson may be a United States citizen was wrong as a matter of law because Johnson could not prove, as was required under INA section 321(a)(3), that his parents were legally separated because they had never been married in the first place. JA 93-99; see JA 97 (citing cases).

In reply, Johnson argued that the 1998 order "was a valid, final, and prejudicial order[,]" and that res judicata should apply. JA 103-06. Alternatively, he argued that he qualified for derivative citizenship pursuant to the plain language of INA section 321(a)(3), and that a different reading of the statute would violate his equal protection rights. JA 107-10.

A. The Immigration Judge's May 21, 2009, Order Denying Johnson's Motion To Terminate His Proceedings

On May 21, 2009, in a written decision, the immigration judge denied Johnson's motion to terminate his proceedings. JA 129-35. The immigration judge found the facts of Johnson's case distinguishable from those in Medina, 993 F.2d 499 (Fifth Circuit found res judicata prevented Government from challenging respondent's citizenship in new proceedings where the Government had earlier conceded that the respondent qualified as a United States citizen and the immigration judge had ordered him admitted as a United States citizen), because

the Government, in Johnson's case, never conceded United States citizenship, and because the immigration judge's 1998 termination order made no formal finding with respect to Johnson's citizenship.

Additionally, the immigration judge found that Johnson was not a derivative United States citizen pursuant to the statute. JA 132-33. Because Johnson's mother was alive at the time of Johnson's eighteenth birthday and she never naturalized as a United States citizen, the only way Johnson could have obtained derivative United States citizenship was if his father naturalized following a legal separation of Johnson's parents. JA 133 (citing INA § 321(a), 8 U.S.C. § 1432(a)). The immigration judge determined that "legal separation" under INA section 321(a) required "a judicially recognized marital separation and, by implication, a marriage." JA 133 (citing Afeta v. Gonzales, 467 F.3d 402 (4th Cir. 2006)). Because Johnson's parents were never married, the immigration judge found they could not have been legally separated within the meaning of the statute, and Johnson, therefore, could not have derived United States citizenship by way of his father's naturalization. JA 133.

The immigration judge further found that the Government was not precluded under the principles of res judicata from relitigating Johnson's alienage because the earlier immigration judge's "ambivalent language" in his 1998 order left open the

possibility of future immigration proceedings against Johnson. JA 133. Alternatively, even if res judicata applied generally to Johnson's claim of alienage, the immigration judge would still deny Johnson's motion for the reasons given by the Third Circuit in Duvall v. Att'y Gen. of the United States, 436 F.3d 382 (3d Cir. 2006). JA 134. In Duvall, an individual's removal proceedings were terminated by the immigration judge after the government failed to meet its burden of establishing alienage, and the immigration judge later terminated a subsequent removal proceeding on the grounds that the Government was barred under collateral estoppel from establishing alienage. Id. The Third Circuit, however, found res judicata inapplicable because, inter alia, the alien's commission of additional crimes after her first proceedings were terminated indicated that her presence in the United States was contrary to Congressional intent, and the "'continued application of the doctrine of collateral estoppel was unwarranted.'" Id. (quoting Duvall, 436 F.3d at 392).

Here, Johnson's removal proceedings were terminated on February 9, 1998, and he was convicted of unlawful possession of a firearm by a convicted felon on January 24, 2002, nearly four years later. JA 134-35. Accordingly, as in Duvall, the immigration judge found the application of res judicata in this case contrary to

congressional intent, and she denied Johnson's motion to terminate proceedings. JA 135.

B. The Immigration Judge's May 28, 2009, Decision

On May 28, 2009, the immigration judge issued an oral decision, incorporating her May 21, 2009, decision denying Johnson's motion to terminate, and ordering Johnson removed to Jamaica. JA 140-45. Specifically, the immigration judge found that DHS had met its burden of proving Johnson's alienage, and that he was removable as charged. JA 143.

C. The Board's April 20, 2010, Decision

On July 1, 2009, Johnson filed a notice of appeal with the Board.[7] Supp. JA 27; see JA 149-51 (notice of appeal), 159-75 (Johnson's brief to the Board); see also JA 243-45 (DHS's motion for summary affirmance), 249-51 (Johnson's response to DHS's motion).

On April 20, 2010, in a three-member decision, the Board agreed that Johnson's removal proceedings were not barred by res judicata, and it dismissed his appeal. JA 260-63. The Board initially noted that Johnson's prior deportation case did "not reflect a formal finding of citizenship[,]" but rather "the government's

[7] Johnson first submitted a notice of appeal on June 25, 2009, but the Board rejected it for lacking proof of service on the opposing party. Supp. JA 25. The Board accepted Johnson's appeal upon certification. See JA 260 n.2.

failure to prove alienage, and that [Johnson] appeared to have derived citizenship." JA 262. The Immigration judge's 1998 order was not res judicata as to the issue of citizenship in general, and at best reflected a failure by the government to establish alienage by "clear, unequivocal, and convincing evidence." Id. In this case, the Board noted, Johnson would continue to bear the burden in any context where he sought a benefit, and Johnson would be left "in an indeterminate status as to citizenship if res judicata applied" – he "could not be removed from the United States while he would not have the benefits of citizenship." Id.

The Board, however, stated that it need not resolve this issue because it agreed with the immigration judge's alternative ruling, in reliance on Duvall, that even if res judicata were otherwise operative, the doctrine was inapplicable here because Johnson was later correctly found to be an alien who had committed additional serious crimes rendering him removable. JA 262. In Duvall, the Board found, the Third Circuit determined that the doctrines of res judicata and collateral estoppel were not constitutionally mandated and should be applied only if consistent with the underlying statutory purpose. Id. While these doctrines are generally applicable to immigration proceedings, the Third Circuit held that to "'apply the doctrine in a case such as this, where a clearly deportable alien continues to commit criminal acts after initial proceedings are terminated, would

frustrate' the goal of several recent overhauls of the INA to 'ensure and expedite the removal of aliens convicted of serious crimes.'" JA 262-63 (quoting Duvall, 436 F.3d at 391). The Board found the same true here, in that Johnson, subsequent to his earlier proceedings, committed and was convicted of a serious criminal offense that rendered him removable. JA 263.

Under these circumstances, the Board agreed with the Third Circuit that it would "contravene the purpose of the [INA] to rigidly apply the doctrine of res judicata and 'effectively preclude the INS from ever relitigating the issue of alienage or ever securing removal, despite the alien's ongoing criminal conduct.'" JA 263 (quoting Duvall, 436 F.3d at 391); see JA 263 (citing Alvear-Velez v. Mukasey, 540 F.3d 672, 679-81 (7th Cir. 2008) (declining to apply res judicata where doing so "would frustrate Congress' policy decisions"). Further, the Board found it apparent that Johnson is not a United States citizen, "the conferral of which is not one of our duties as we have no naturalization power by statute, regulation or mistaken adjudication."[8] JA 263.

[8] "In this regard," the Board noted, "Congress set rules for the acquisition of citizenship by aliens, and the public policy established by Congress should not be defeated by an Immigration Judge's error stemming from an incomplete record." JA 263 (citing INS v. Pangilinan, 486 U.S. 875 (1988)).

Finally, the Board found no merit in Johnson's contention that reading a marriage requirement into INA section 321(a) violates equal protection because it discriminates against children born-out-of-wedlock. JA 263. The Board noted that it and the federal courts have long held that demonstrating a "legal separation" under INA section 321(a) requires an alien to first demonstrate a legal marriage. Id. (citing In re H-, 3 I. & N. Dec. 742 (BIA 1949); Barthelemy v. Ashcroft, 329 F.3d 1062 (9th Cir. 2003); Brissett v. Ashcroft, 363 F.3d 130 (2d Cir. 2004); Nehme v. INS, 252 F.3d 415 (5th Cir. 2001)).

For these reasons, the Board dismissed Johnson's appeal. This petition for review, which was consolidated with Johnson's appeal of the district court's dismissal of his habeas petition, followed.

SUMMARY OF ARGUMENT

The Court has jurisdiction to consider Johnson's claim that he is a United States citizen, but only pursuant to his petition for review of the Board's final order of removal. The Court should dismiss Johnson's appeal of the District Court's order for lack of jurisdiction or, alternatively, affirm the District Court's determination that it lacked jurisdiction over Johnson's habeas petition because he failed to exhaust his administrative remedies.

Johnson did not derive United States citizenship via his father's 1973 naturalization because Johnson's parents, who were never married, did not have a "legal separation," as was required for Johnson to establish automatic citizenship where both his parents are living, but only one of them naturalized. Additionally, the "legal separation" requirement does not violate Johnson's equal protection rights because it is supported by a rational basis.

Moreover, the Board properly determined that res judicata, to the extent it was operative, did not apply to limit relitigation of Johnson's nationality. A contrary determination would allow Johnson, who is an alien removable by having committed serious criminal offenses, to remain in the United States indefinitely, which would be contrary to congressional intent.

For these reasons, the Court should deny this petition for review.

ARGUMENT

I. THE COURT SHOULD DISMISS JOHNSON'S APPEAL OF THE DISTRICT COURT'S DECISION AND CONSIDER HIS NATIONALITY CLAIM PURSUANT ONLY TO HIS PETITION FOR REVIEW OF THE BOARD'S DECISION

Congress has given this Court authority to consider nationality claims pursuant to a properly filed petition for review of a final order of removal. 8 U.S.C. § 1252(b)(5). Thus, in this case, the Court is authorized to consider Johnson's claim that he is a United States citizen to the extent that issue has arisen

in his petition for review of the Board's decision. However, the Court lacks jurisdiction to consider Johnson's nationality to the extent that issue has arisen in his appeal of the District Court's decision. Section 360 of the INA provides that a person may bring suit for a judicial declaration of United States nationality where a person is denied a right or privilege of a United States national by the federal government. 8 U.S.C. § 1503; see Dragenice v. Ridge, 389 F.3d 92, 98 (4th Cir. 2004). However, "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 . . . ." 8 U.S.C. § 1503. Because the issue of Johnson's nationality arose in connection with his deportation proceedings, Johnson should not have been permitted to bring an action before the District Court, and this Court should also find itself without jurisdiction to consider his claim pursuant to his appeal of the District Court's decision. See Ortega v. Holder, 592 F.3d 738, 744-46 (7th Cir. 2010); Rios-Valenzuela v. DHS, 506 F.3d 393, 398-401 (5th Cir. 2007).

This Court's decision in Dragenice should be distinguished. In that case, which was issued before the REAL ID Act's effective date, this Court held that the federal courts could consider a nationality claim properly raised in a habeas petition where, because of the then-in-effect restrictions on the courts of appeals

jurisdiction over claims raised by criminal aliens, the courts of appeals would not have had authority to consider the nationality claim. 389 F.3d at 98-100. The REAL ID Act, however, added INA section 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), which gives the courts of appeals jurisdiction to consider constitutional claims and questions of law raised in a petition for review notwithstanding any other jurisdictional limitations. REAL ID Act § 106. In other words, despite the applicability of 8 U.S.C. § 1252(a)(2)(C) in this case limiting the Court's jurisdiction, the Court is fully authorized to consider the legal question of whether Johnson is a United States citizen, but it can do so only pursuant to Johnson's petition for review of the Board's decision. See INA §§ 242(a)(2)(D), (b)(5), 8 U.S.C. §§ 1252(a)(2)(D), (b)(5). Thus, the reasons the Fourth Circuit reached its conclusion in Dragenice are no longer operative, and the Court should find that decision inapplicable here. See Jordon v. Att'y Gen. of the United States, 424 F.3d 320, 326-27 (3d Cir. 2005) (concluding that problem recognized in Dragenice, and causing Fourth Circuit to find habeas jurisdiction over nationality claims, was eliminated by the REAL ID Act amendments).

In any event, the district court and this Court were further without jurisdiction to consider Johnson's appeal pursuant to INA section 242(b)(9), which provides that all questions of law and fact "arising from any action taken or

proceeding brought to removal an alien from the United States . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). The statute further provides that, "[e]xcept as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 or Title 28, or any other habeas provision . . . , to review such an order or such question of law or fact." Id. Because Johnson's nationality presents a legal question arising from his removal proceedings, any review of that question must be considered only pursuant to a properly filed petition for review. To hold otherwise could potentially permit the district court to decide an alien's nationality before the court of appeals has had opportunity to do so, despite the fact that the INA specifically provides that citizenship is an issue to be decided by the circuit court (where there are no genuine issues of material fact). See INA § 242(b)(5), 8 U.S.C. § 1252(b)(5).

Even assuming the Court has jurisdiction to review Johnson's appeal, the District Court properly dismissed Johnson's habeas corpus petition because Johnson failed to exhaust his administrative remedies by appealing the INS's denial of his Form N-600 to the AAU. See JA 124-25. Before an individual can bring an action under 8 U.S.C. § 1503(a), there must be a "final administrative denial[.]" See JA 124. The District Court, accordingly, properly found that it lacked

jurisdiction to consider Johnson's petition because he had not exhausted his administrative remedies and obtained a final administrative denial. See Breyer, 41 F.3d at 891-92 (requiring exhaustion); see also Rios-Valenzuela, 506 F.3d at 397 n.4 (describing procedure for seeking review of denial of Form N-600; noting that a person must exhaust the agency procedures by filing an appeal with the AAU before he can seek a judicial declaration of citizenship under 8 U.S.C. § 1503(a)).

Thus, for the foregoing reasons, the Court should dismiss Johnson's appeal of the District Court's order for lack of jurisdiction or, alternatively, affirm the District Court's determination that it lacked jurisdiction over Johnson's habeas petition.

II. STANDARD OF REVIEW IN PETITION FOR REVIEW

The Court determines its subject matter jurisdiction de novo. Mapoy v. Carroll, 185 F.3d 224, 227 (4th Cir. 1999). Although the Court lacks jurisdiction to review a final order of removal against an alien who is removable because he committed certain criminal acts, the Court has limited jurisdiction under 8 U.S.C. § 1252(a)(2)(D), to determine whether Johnson is an alien pursuant to INA section 242(b)(5), 8 U.S.C. § 1252(b)(5), as amended by the REAL ID Act, provided there

is no genuine issue of material fact.[9] Jahed, 468 F.3d at 233-34. Here, there is no material dispute over the factual bases for Johnson's claim. The only issue is whether Johnson acquired United States citizenship as a matter of law, or whether he should be deemed to have acquired such citizenship by res judicata. Where no genuine issue of material fact exists, the Court exercises de novo review with respect to questions of statutory review and defers to the agency's reasonable interpretation of ambiguous statutory provisions, including statutory provisions relating to Johnson's nationality claim. Saintha, 516 F.3d at 251; see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)); Fernandez v. Keisler, 502 F.3d 337, 344-47 (4th Cir. 2007); Afeta, 467 F.3d at 404.

[9] Johnson only contests the Board's determination that he is not a United States citizen. See, e.g., Pet. Br. at 5-7. He does not challenge the Board's determination that his criminal convictions would render him removable if he is alien. See id. If the Court were to conclude that there are genuine issues of material fact about Johnson's nationality, the Court must transfer the proceeding to the district court for a new hearing on the nationality claim. INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B); see Jahed, 468 F.3d at 233-34.

III. JOHNSON IS NOT A UNITED STATES CITIZEN

A. Because His Parents Were Never Legally Separated, Johnson Did Not Automatically Derive United States Citizenship When His Father Naturalized

A person may acquire United States citizenship either through birth or naturalization. See Miller v. Albright, 523 U.S. 420, 423 (1998) (quoting United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898)). It is within Congress' enumerated powers "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Congress has "'exclusive constitutional power' over nationalization, and therefore citizenship may be conferred upon foreign-born persons only by act of Congress." Jahed, 468 F.3d at 234 (quoting Pangilinan, 486 U.S. at 882). Johnson asserts that he derived United States citizenship via his father's naturalization in 1973 under former INA section 321(a), 8 U.S.C. § 1432(a). Pet. Br. at 23-24. Prior to its repeal in 2000, INA section 321(a) specified that the following situations conveyed automatic citizenship on children born outside the United States to alien parents:

> (1) The naturalization of both parents; or
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

> (4) Such naturalization takes place while such child is under the age of eighteen years; and
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

8 U.S.C. § 1432(a) (emphasis added); see Afeta, 467 F.3d at 404.

Although the burden is on DHS to establish alienage, since Johnson was born abroad, he "is presumed to be an alien and bears the burden of establishing [his] claim to United States citizenship by a preponderance of credible evidence." In re Baires-Larios, 24 I. & N. Dec. 467, 468 (BIA 2008); see Walker v. Holder, 589 F.3d 12, 18 (1st Cir. 2009). Further, "[b]ecause citizenship confers 'privileges and benefits' [that] 'once granted, cannot lightly be taken away,' any doubts" as to Johnson's citizenship "should be resolved in favor of the United States government and against" Johnson. Walker, 589 F.3d at 18-19 (quoting Berenyi v. INS, 385 U.S. 630, 637 (1967)).

Because Johnson resided with his father at the time of his father's naturalization, which occurred prior to Johnson's eighteenth birthday, he meets the conditions set forth in INA sections 321(a)(4) and (5), 8 U.S.C. §§ 1432(a)(4) and (5). Whether he derived citizenship, therefore, depends on whether Johnson has

satisfied the criteria of either INA sections 321(a)(1), (2), or (3), 8 U.S.C. §§ 1432(a)(1), (2), or (3).

As an initial matter, it is uncontested that former INA sections 321(a)(1) and (2) did not confer derivative citizenship on Johnson since only one of his parents naturalized before his eighteenth birthday, and neither parent is deceased. See Pet. Br. at 4, 6. Accordingly, Johnson contends that he satisfied the criteria of former INA section 321(a)(3), asserting that his parents should be deemed to have "legally separated" at the time of his father's naturalization based on his mother's relinquishment of her "custodial rights and severed familial ties." Pet. Br. at 23-24. However, because Johnson's parents never married, they did not take the requisite "formal judicial steps" to end their marriage, and thus were never "legally separated" under INA section 321(a)(3). See Afeta, 467 F.3d at 404-08 (finding reasonable Board's interpretation of INA section 321(a)(3)'s legal separation provision as "requiring that the minor alien's parents have taken formal judicial steps to end their marriage at the time of naturalization").

The INA does not define the term "legal separation." In In re H-, the Board endorsed the view that "legal separation" means "either a limited or absolute divorce obtained through judicial proceeding[,]" and it held, accordingly, that parents who never married "could not have been legally separated." 3 I. & N.

Dec. 742, 743-44 (C.O. 1949). Every court to consider the issue has agreed. In Wedderburn v. INS, the Seventh Circuit noted that "domestic relations law in the United States treats 'legal separation' as the judicial suspension or dissolution of a marriage." 215 F.3d 795, 799 (7th Cir. 2000). After considering the divorce and separation laws of all fifty states, the Fifth Circuit found it clear that the term "legal separation" is "uniformly understood to mean judicial separation." Nehme v. INS, 252 F.3d 415, 426 (5th Cir. 2001) (emphasis in original); see id. at 425-26 ("Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, judicial alteration of the marital relationship" (emphasis in original)). Indeed, the Court found that adopting a definition of "legal separation" that did not contemplate a judicial decree "would lead to an absurd result: every husband and wife who are voluntarily apart from one another under legal circumstances would be 'legally separated.'" Id. at 426. This interpretation, the Court felt, left "no real meaning for the word 'legal,'" and would be "at odds with a common sense understanding of legal separation." Id.; see also Brissett, 363 F.3d at 134 ("Because couples can informally separate without legally altering their relationship, including an informal separation within the provision's terms would effectively eviscerate the force of the term 'legal' from the statute"). This Court has

agreed that the Board's interpretation is reasonable. See Afeta, 467 F.3d at 405 (Board reasonably concluded that written Separation Agreement, which was not filed with or adopted by any court during the relevant time period, was not a formal judicial document, and thus did not evidence a "legal separation" of alien's parents).

Furthermore, in cases such as this where the alien's parents never married, the Courts have universally agreed that such aliens had not established that their parents had a "legal separation" under INA section 321(a)(3). See Lewis v. Gonzales, 481 F.3d 125, 130 (2d Cir. 2007); Barthelemy, 329 F.3d at 1065 ("we hold that Barthelemy does not enjoy derivative citizenship under the first clause of § 321(a)(3) because his natural parents never married and thus could not legally separate" (emphasis in original)); Wedderburn, 215 F.3d at 797-99; see also H-, 3 I. & N. Dec. at 744 (marriage is a prerequisite to "legal separation"). Additionally, as the Second Circuit found, "because the second clause of [INA section 321(a)(3)] explicitly provides for the circumstance in which 'the child is born out of wedlock,' [the Court] cannot interpret the first clause to silently recognize the same circumstance, and moreover, to do so by excusing the express requirement of a legal separation." Lewis, 481 F.3d at 130.

Moreover, the Board's interpretation of "legal separation" in INA section 321(a)(3) is a "principled one" as it gives "respect to the rights of an alien parent who may not wish his child to become a U.S. citizen." Lewis, 481 F.3d at 130-31. As the Second Circuit noted in Lewis, derivative citizenship is automatic when certain conditions are met, and naturalization is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship." Id. at 431; see Wedderburn, 215 F.3d at 800. Section 321(a)(3) "recognizes that either parent – naturalized or alien – may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." Lewis, 481 F.3d at 131; see Brissett, 363 F.3d at 134; Barthelemy, 329 F.3d at 1065 ("If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien's parental rights could be effectively extinguished"). Accordingly, with few exceptions, the naturalization of both parents is required in order to confer automatic citizenship on a child.[10] See Lewis, 481 F.3d at 131; see also Nehme, 252 F.3d at 424 (discussing Congress's intent in enacting INA section 321(a)). As noted supra, in the exception

[10] The exceptions – where one parent is dead, where the parents have legally separated and the child is in the custody of the naturalized parent, and where the custodial mother naturalizes and the father has not bothered to legitimate the child – all cover circumstances where the alien parent has been removed, or removed themself, from the child's life to some significant degree, such that their parental rights receive less respect. Lewis, 481 F.3d at 131; Wedderburn, 215 F.3d at 800.

applicable here, an alien must establish that his parents were legally separated, i.e., had their marriage relationship altered by a formal judicial act, in order to qualify for derivative citizenship under INA section 321(a)(3).

Importantly, Johnson did not "slip[] through some crack in our immigration law[,]" Lewis, 481 F.3d at 132, as his father could have applied to naturalize him as of right via INA section 322, which allows a single, naturalized, and custodial parent to "apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically." 8 U.S.C. § 1433; see Nehme, 252 F.3d at 430 n. 18; Wedderburn, 215 F.3d at 800; see also Lewis, 481 F.3d at 132 (8 U.S.C. § 1433 "imposes only modest requirements, none of which mandates a legal separation"). Johnson, as a lawful permanent resident, also could have sought naturalization on his own account. Furthermore, Johnson's argument that the particular circumstances of his case show that his naturalization is consistent with Congress' intent is besides the point. See Pet. Br. at 25-27. Section 321(a) provides circumstances where citizenship is automatically derived; the statute does not permit looking past its requirements to the equitable factors in any given case. As noted, there was nothing preventing Johnson from seeking naturalization pursuant to INA section 322.

Johnson argues that his father's custody of him was sufficient to establish his entitlement to derivative citizenship, but he is mistaken. See Pet. Br. at 23-24, 27. The language of the statute provides that the naturalization of the parent having custody of the child automatically provides the child citizenship only if there has also been a "legal separation of the parents[.]" INA § 321(a)(3), 8 U.S.C. § 1432(a)(3). So, assuming arguendo, that Johnson's mother surrendered her custodial rights as Johnson contends,[11] and that such a surrender of her rights established that Johnson's father had legal custody of his son at the time he naturalized, Johnson has failed to establish the legal separation of his parents, as is required by the plain language of the statute. See Lewis, 481 F.3d at 130. Indeed,

[11] The Joint Appendix includes a copy of the letter purportedly written and signed by Joan Francis, Johnson's mother. See JA 289. However, the letter and certain other materials in the Joint Appendix, were not part of the certified administrative record. See, e.g. JA 11 (1992 termination order); 23-27 (transcript from 1998 deportation hearing); 289 (Francis's letter); 293 (Ronald Johnson's naturalization certificate). Because the Court, in reviewing the Board's removal order, is limited to considering only the administrative record on which removal was based, it cannot consider Francis's letter, or these other materials, directly. See INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A); Lendo v. Gonzales, 493 F.3d 439, 443 n.3 (4th Cir. 2007). Instead, the Court must rely on other record evidence indicating that Francis signed a statement giving Johnson's father custody rights. See AR 214; JA 162. In any event, the letter is not conclusive evidence of anything. Although Francis allegedly gave up custody of Johnson in 1965 – the year he was born – she did not sign the letter in the Joint Appendix until July 12, 1996, well after Johnson's eighteenth birthday. See JA 289. Johnson has presented no contemporaneous evidence manifesting the custody arrangement between his parents. Moreover, the letter Johnson submitted was insufficient to establish the requisite "legal separation" between Johnson's parents.

Johnson's interpretation of INA section 321(a)(3) as requiring only a grant of legal custody would render the words "when there has been a legal separation of the parents" superfluous. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (explaining that it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous").

B. The Board's Interpretation Of INA Section 321(a)(3) Does Not Violate Johnson's Equal Protection Rights

Johnson also argues that the Board's interpretation of INA section 321(a)(3) as mandating a marriage before there can be a "legal separation" violates his rights under the equal protection component of the Fifth Amendment's due process clause. Pet. Br. at 23-29. He is wrong. Johnson mistakenly argues that the Court must examine INA section 321(a)(3) under the intermediate scrutiny standard because the law, as interpreted by the Board, "discriminates between marital and non-marital children." Pet. Br. at 24. However, because Congress has plenary power over immigration and naturalization, the Court must uphold the constitutionality of INA section 321(a) if a "facially legitimate and bona fide reason" supports the distinction made by the statute. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (emphasizing that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"); see Midi v.

Holder, 566 F.3d 132, 137 (4th Cir. 2009); Barthelemy, 329 F.3d at 1065. This Court and others have equated this standard of review with rational basis review. See Appiah v. U.S. INS, 202 F.3d 704, 709-10 (4th Cir. 2000); see also Colaianni v. INS, 490 F.3d 185, 187-88 (2d Cir. 2007) (rational basis review applies to equal protection challenge to former INA sections 320-322, 8 U.S.C. §§ 1431-33); Barthelemy, 329 F.3d at 1065-66 (rational basis review applies to question of whether INA section 321(a) violates equal protection); Wedderburn, 215 F.3d at 800 (same). Under the rational basis standard, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis of the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); see Orquera v. Ashcroft, 357 F.3d 413, 425 (4th Cir. 2003)).

The Seventh and Ninth Circuits have both found that INA section 321(a) is supported by a rational basis. The Seventh Circuit recognized that INA section 321(a)(3) requires proof of both "legal custody" and "legal separation," and that Congress was entirely rational in so providing. The Court explained:

> [A situation involving] legal custody in the naturalizing parent, but not legal separation of the parents . . . can come about when one parent has been deemed unfit to have custody, perhaps because of mental or medical conditions, or is physically unable to have custody (perhaps because of incarceration). Often these

> conditions will pass, and the parents will resume living together with joint custody of the child. Congress rationally could conclude that as long as the marriage continues the citizenship of the children should not change automatically with the citizenship of a single parent.

Wedderburn, 215 F.3d at 800 (emphasis added); see Barthelemy, 329 F.3d at 1065-67 (the "legal separation requirement helps protect the parental rights of the alien parent, and is therefore consistent with the statutory scheme").

Additionally, obtaining United States citizenship through naturalization means disavowing one's original citizenship. INA § 337, 8 U.S.C. § 1448(a)(2). A parent may prefer to have their child retain his or her original citizenship as this decision may impact, for example, military service and tax obligations. Accordingly, the statute rationally and properly "limits automatic changes to situations in which the other parent has been removed from the picture – either by death or by 'legal separation.'" Wedderburn, 215 F.3d at 800; see Nehme, 252 F.3d at 425; see also Barthelemy, 329 F.3d at 1067 ("Perhaps Congress should have carved out an additional route to citizenship for petitioner such as Barthelemy whose fathers have naturalized and have custody over their children but who never married the natural mother of their children. But certainly § 321(a) as drafted

passes rational basis review."). Thus, for these reasons, this Court should similarly conclude that section 321(a) does not violate Johnson's equal protection rights.

C. Assuming Res Judicata Applies Generally, The Board Properly Concluded That It Should Not Apply To Limit DHS From Relitigating Johnson's Alienage Because He Is An Alien Who Committed Additional Removable Offenses

In its decision, the Board suggested that res judicata did not apply to the issue of Johnson's citizenship based on the 1998 termination order, but the Board explicitly stated that it "need not resolve this particular issue[.]" JA 262. Instead, the Board rested its decision on its agreement with the immigration judge's alternative ruling that, even if res judicata did apply generally, it was inapplicable in Johnson's case because he was later found to be an alien who committed additional serious crimes. Id. (citing Duvall, 436 F.3d 382). In his brief, however, Johnson argues as if the Board had actually decided both that res judicata was operative in general, and that he had not met the elementary requirements for its application. See Pet. Br. at 8-16. Because the Board did not "resolve" these issues in its decision, the Court cannot consider them here in the first instance. Gonzales v. Thomas, 547 U.S. 183, 183-87 (2006) (agency should be given opportunity, in first instance, to make legal determinations entrusted to it by Congress); INS v. Ventura, 537 U.S. 12, 16 (2002); see Hussain v. Gonzales, 477 F.3d 153, 157-58 (4th Cir. 2007). Moreover, as will be shown infra, the Board's alternative grounds

were a proper basis for declining to apply res judicata in this case. If the Court concludes otherwise (i.e., it disagrees with the Board's conclusion that applying res judicata here would contravene the purpose of the INA), it must then remand this case to the Board so it can decide in the first instance the extent res judicata applies and whether Johnson has established that the immigration judge's 1998 termination implicated res judicata. Ventura, 537 U.S. at 16.

Although the scope of res judicata before the Board is not specifically before the Court, a short discussion of its role in administrative proceedings may be helpful. The application of res judicata in civil administrative proceedings is committed to agency discretion, and unless its application is inconsistent with the Constitution or the INA, or inexplicably departs from the agency's practice, the agency's rules regarding res judicata and their application in a particular case are not subject to modification by a reviewing court. Courts have applied principles of preclusion in their own proceedings as a matter of "judicial policy" and, in doing so, have developed the common law doctrine of res judicata as a procedural rule to prevent the relitigation of a claim in court that has previously been resolved against a litigant in an earlier litigation. See Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107-08 (1991); see also Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 91 (1954) (doctrine of collateral estoppel was

"established as a procedure for carrying out the public policy of avoiding repetitious litigation"). The existence of common law rules of preclusion for federal court proceedings, however, does not speak to whether executive branch agencies must follow the same rules of preclusion in their own administrative proceedings.

It is a basic tenet of administrative law that "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge the[] multitudinous duties" that Congress has entrusted to their care. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44 (1978) (internal quotations omitted). The "formulation of [such] procedures" is thus generally "left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments" because implicit in such statutory grants of authority is "the congressional determination that administrative agencies . . . will be in a better position than federal courts . . . to design procedural rules adapted to the particularities of the . . . tasks of the agency involved." Id. at 524-25. In other words, when Congress entrusts executive agencies with the responsibility to conduct their own proceedings, "Congress intend[s] that the discretion of [these] agencies and not that of the courts be exercised in determining" whether to provide any procedural rights beyond

those that Congress expressly granted in statute.[12] Id. at 546. Thus, the Supreme Court has made clear that the "limited judicial responsibility" of a federal court engaged in "review of administrative procedural rule[s]" is merely "to insur[e] consistency with governing statutes and the demands of the Constitution." FCC v. Schreiber, 381 U.S. 279, 290-91 (1965). If an agency's procedures satisfy these requirements, they are not subject to modification on review.

Applying these principles illustrates that the common law preclusion rules that federal courts have developed for federal court proceedings cannot be imposed upon agencies by reviewing courts. The basic point that federal courts may act in a common law fashion to develop preclusion rules for their own proceedings, but may not generally impose those rules upon other types of tribunals, is further illustrated by the fact that state courts formulate their own versions of common law preclusion for state court proceedings. Indeed, the Supreme Court has decided (as a matter of federal common law) that the preclusive effect of a diversity judgment issued by a federal court is determined by reference to the state common law preclusion rules of the state in which the diversity court sat. See Semtek Int'l Inc.

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[12] This principle applies whether the agency's procedural rules are adopted as regulations or as byproducts of case-by-case adjudication. Cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion"); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (same).

v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001). Like state courts, federal agencies have broad authority to develop their own rules of preclusion appropriate for their own proceedings, which may parallel or diverge from the judiciary's common law formulations of the doctrine. So long as the agency's rule is consistent with the Constitution and relevant statutory provisions, it is not subject to modification by a reviewing court.[13]

Here, the Board, citing Duvall, 436 F.3d 382, concluded that res judicata, to the extent it was operative, was inapplicable because Johnson was later found to be

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[13] In the context of federal court proceedings, this Court has held that a party seeking to rely on collateral estoppel must establish: (1) that the issue is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue's determination was a "critical and necessary" part of the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom collateral estoppel is asserted "had a full and fair opportunity" to litigate the issue in the prior proceeding. Collins v. Pond Creek Mining Co., 468 F.3d 213, 217 (4th Cir. 2006). Here, the immigration judge found that the issue of Johnson's citizenship had not been actually determined in the prior proceeding, see JA 133-34, but the Board, although suggesting its agreement on that point, did not rely on that determination in finding res judicata not applicable. JA 262-63 ("we note the prior deportation case does not reflect a formal finding of citizenship"). In any event, the immigration judge's 1998 termination order did not actually decide that Johnson was a United States citizen, as the immigration judge merely concluded that the former INS had not met its burden of proving Johnson's nationality by clear, unequivocal, and convincing evidence, and that it "appear[ed]" he may have derived citizenship through his father. See JA 133-34, 262; AR 213-14; INA § 242B(c)(1), 8 U.S.C. § 1252b(c)(1) (1994); see also Rios-Valenzuela, 506 F.3d at 396-97 (in removal proceedings, "if the immigration judge accepts the citizenship defense, she terminates the removal proceedings without deciding citizenship").

an alien who had committed serious crimes rendering him removable. JA 262-63. In Duvall, the Third Circuit found that the doctrines of res judicata and collateral estoppel are not constitutionally mandated, and they should be applied only if consistent with the structure and purpose of the statutory scheme.[14] 436 F.3d at 387; see JA 262. The Court observed that collateral estoppel was "borne of equity," and is therefore flexible, "bending to satisfy its underlying purpose in light of the nature of the proceedings." Duvall, 436 F.3d at 390-91 (citation omitted). For example, collateral estoppel will not preclude relitigation of an issue when there is a "clear and convincing need for a new determination of the issue . . . because of the potential adverse impact of the determination on the public interest." Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 288 F.3d 519, 525 n.3 (3d Cir. 2002) (quoting Restatement (Second) of Judgments § 28). Thus, the Third Circuit concluded, "[c]ollateral estoppel in the administrative context must be informed by considerations of agency structure and legislative policy." Duvall, 436 F.3d at 391 (citations omitted); see Alvear-Velez, 540 F.3d at 677 ("we have applied res judicata much more flexibly in the administrative context"); see also Grose v. Cohen, 406 F.2d 823, 824-25 (4th Cir. 1969) ("[r]es judicata of

[14] The doctrines of claim preclusion and issue preclusion are collectively referred to as res judicata. See Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008).

administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings"). Similarly, this Court has held that "[a]pplication of the [res judicata] doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, but practical reasons may exist for refusing to apply it." Grose, 406 F.2d at 825; see id. ("when traditional concepts or res judicata do not work well, they should be relaxed or qualified to prevent injustice").

Utilizing these principles, the Third Circuit held that applying the doctrine of res judicata to preclude relitigation of alienage "where a clearly deportable alien continues to commit criminal acts after initial proceedings are terminated" would frustrate the statutory purpose. Duvall, 436 F.3d at 391; see id. (noting that a "primary goal" of the 1996 and 2005 amendments to the INA was to "ensure and expedite the removal of aliens convicted of serious crimes"); see also Alvear-Velez, 540 F.3d at 680 (applying res judicata would "frustrate Congress' policy decision that aliens convicted of sexual abuse of a minor merit removal regardless of when their convictions occurred"). In Duvall, the immigration judge in 1993 terminated proceedings when the INS found itself unable to satisfy its burden of proving alienage after Duvall refused to answer questions about her birthplace, and where other available evidence regarding alienage was inadmissible under local

rules. 436 F.3d at 384-85, 392. After the 1993 termination, Duvall continued her criminal exploits, and she was again placed into removal proceedings in 2001. Id. at 385. The immigration judge held that the INS was collaterally estopped from relitigating the issue of alienage, but the Board reversed. Id. The Third Circuit concluded that applying collateral estoppel "would effectively preclude the INS from ever relitigating the issue of alienage or ever securing removal, despite the alien's ongoing criminal conduct." Id. at 391; see JA 263. The alien could "flout any rule or commit any offense without fear of deportation." Duvall, 436 F.3d at 391. Such "prospective immunization," the Court held, was "plainly contrary to congressional intent." Id. The bar against relitigation, the Court determined, "must drop when the alien continues to commit criminal acts after initial immigration proceedings." Id.

In Johnson's case, the Board agreed with the Third Circuit's reasoning and conclusions, and ultimately held that res judicata should not apply here. JA 262-63. As in Duvall, 436 F.3d at 392, the immigration judge who earlier terminated Johnson's deportation proceedings did not find that Johnson was a citizen. See JA 31. He stated only that Johnson "appears to be [a] U.S. citizen" based on his father's naturalization, without addressing the statutory requirements

of derivative citizenship.[15] Id. In light of: (1) the government's then-burden of proving alienage by clear, unequivocal, and convincing evidence, 8 U.S.C. § 1252b(c)(1); (2) the fact that the immigration judge was without any authority to confer citizenship, JA 263; and (3) Johnson's failure, for the reasons discussed supra, to establish that he attained derivative citizenship, it follows that the 1998 termination of Johnson's deportation proceedings had limited collateral effect. See JA 263. Like Duvall, Johnson's subsequent convictions demonstrated that his continued presence in this country "contravened congressional intent and that continued application of the doctrine of collateral estoppel was unwarranted." See Duvall, 436 F.3d at 392; JA 263.

Johnson argues that Duvall does not apply here because, in that case, the earlier termination of proceedings was caused by a "procedural litigation error." Pet. Br. at 16-18. However, he is mistaken in believing that the Third Circuit's holding applies only to cases where proceedings were terminated by a procedural error. While Duvall's earlier deportation proceedings were terminated because of a litigation error by DHS, the Third Circuit's analysis and reasoning for finding res judicata inapplicable applies with equal force to the facts of Johnson's case. See Duvall, 436 F.3d at 391-92. As noted, Johnson, like Duvall, was not a United

[15] Similarly, Johnson did not address the specific statutory requirements for derivative citizenship in his 1997 motion to terminate. See JA 15-16.

States citizen and he had committed additional criminal offenses that rendered him removable from the United States.

Johnson also argues that claim preclusion bars relitigation of the third charge of removability in the NTA. Pet. Br. at 12-14; see JA 57 (charging Johnson with removability for having been convicted of violating a controlled substances law or regulation). Whether the Board properly concluded that Johnson is removable for having violated a law relating to a controlled substance, however, is immaterial in this case because Johnson does not challenge (aside from arguing that he is a United States citizen) the Board's determination that he is removable pursuant to the other three grounds of removability. See JA 57. Significantly, Johnson's 2002 conviction would, independently, render him removable from the United States. See Negrete-Rodriguez v. Mukasey, 518 F.3d 497 (7th Cir. 2008). In any event, pursuant to Duvall's reasoning, the agency properly considered whether Johnson was removable for having violated a law relating to a controlled substance.

Johnson also argues that the Board erred in permitting DHS to initiate new removal proceedings against him in 2009, rather than reopening his earlier terminated deportation proceedings. See Pet. Br. at 20-23. However, this Court is without jurisdiction to consider this argument because Johnson has failed to exhaust his administrative remedies by raising it to the Board. See JA 149-51,

159-75. Pursuant to INA section 242(d)(1), this Court can "review a final order of removal only if the alien has exhausted al administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). It is well established that an "alien must raise each argument to the BIA before we have jurisdiction to consider it." Gandziami-Mickhou v. Gonzales, 445 F.3d 351, 359 n.2 (4th Cir. 2006). "The exhaustion doctrine embodies a policy of respect for administrative agencies, which allows them to carry out their responsibilities and to discover and correct their own errors." Kurfees v.INS, 275 F.3d 332, 336 (4th Cir. 2001) (internal citations omitted). Here, because Johnson failed to argue before the Board that the DHS should have sought reopening rather than initiating new removal proceedings, he failed to exhaust his administrative remedies, and this Court, consequently, is without subject-matter jurisdiction over his argument. In any event, Johnson's reliance on the Ninth Circuit's decision in Bravo-Pedroza v. Gonzales, 475 F.3d 1358, 1360 (9th Cir. 2007), is inapposite, as here DHS initiated Johnson's removal proceedings based in part on criminal conduct rendering Johnson removable committed after the termination of his earlier deportation proceedings. See JA 57. In a similar case, the Ninth Circuit recently limited the scope of Bravo-Pedroza, holding that res judicata does not prevent the government from using a previous conviction in connection with a second removal proceeding based on its necessary

combination with a newly-arising conviction. Poblete Mendoza v. Holder, 606 F.3d 1137, 1140-41 (9th Cir. 2010).

CONCLUSION

For the foregoing reasons, the Court should dismiss Johnson's appeal of the District Court's decision or, alternatively, affirm the District Court, and deny this petition for review of the Board's decision.

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BRIEF FORMAT CERTIFICATION
PURSUANT TO FOURTH CIRCUIT RULE 32(e)(4)

Pursuant to Fourth Circuit Local Rule 32(e)(4), I certify that the "Brief For Respondent" is proportionally spaced, has a typeface of Times New Roman at 14-point size, and contains 10,625 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2010, I electronically filed this Brief for Respondent with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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