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Does It Really Matter?: Making the Case for a Materiality Requirement in False Claims to U.S. Citizenship Under the Immigration and Nationality Act

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Materiality plays an important role in limiting the reach of laws that penalize misrepresentations. Laws that include no materiality element punish any covered misrepresentation regardless of its relevance—like lying about hair color on a loan application. By contrast, laws that include a materiality element withhold punishment for immaterial misrepresentations of that kind—in other words, misrepresentations that have no tendency to affect the ultimate decision.

Our immigration laws make it a deportable offense for a noncitizen to "falsely represent" herself as a U.S. citizen for a purpose or benefit under the law. Although this law has been on the books for decades, a key question about its reach remains open: Does it include a materiality element? The Board of Immigration Appeals and three federal circuit courts have said "yes," holding that misrepresentations of U.S. citizenship must be material to trigger deportability. But in a recent panel decision adopted by the en banc court, the Eleventh Circuit said "no," holding that the unambiguous statutory text includes no materiality element.

This Article examines the history of these immigration statutes and demonstrates why the Eleventh Circuit's holding was wrong, although mainly for a reason no court has

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yet addressed: the common-law origins of the relevant statutory text. Under well-established principles of statutory construction, Congress is presumed to legislate with the understanding that common-law phrases carry their common-law meaning. At common law, the phrase "false representation" carried with it an implicit materiality element. Therefore, the immigration statutes at issue presumptively incorporate materiality because they penalize "false representations" of U.S. citizenship. This presumption is confirmed by other contextual clues. And, as this Article explains, ensuring fidelity to the statutes' implicit materiality element is especially important given the statutes' breadth and the draconian consequences that follow from the Eleventh Circuit's contrary holding.

INTRODUCTION

In 1996, Congress added a pair of provisions to the Immigration and Nationality Act (the "INA") that make noncitizens removable from the United States for falsely claiming U.S. citizenship.[1] These provisions are triggered when a noncitizen "falsely represents" herself as a U.S. citizen "for any purpose or benefit under . . . Federal or State law."[2]

Despite being on the books for nearly a quarter century, a critical question about these provisions has yet to be definitively answered: Do *immaterial* misrepresentations trigger this provision? Or, put differently, will a false representation of citizenship trigger these provisions even if citizenship status has no possible bearing on the purpose or benefit at issue?

The Eleventh Circuit said "yes."[3] In a panel opinion, the Eleventh Circuit held that the unambiguous language of the statute includes no materiality element.[4] And the court, sitting en banc in the same case, reaffirmed that holding.[5] As a result, noncitizens whose immigration cases arise in the Eleventh Circuit are deportable from the United States for making false representations of U.S. citizenship, even if those representations had no possible legal or practical impact.[6] That holding conflicts with a precedent decision of the Board of Immigration Appeals (the "BIA"), as well as the law of three other circuits.[7]

As this Article will demonstrate, the Eleventh Circuit was wrong—most obviously for a reason that no court has yet addressed:

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[1] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 344(a), 110 Stat. 3009-546, 3009-637 (codified at 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D)).

[2] 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D). This Article refers to these provisions together as the "false-citizenship provisions."

[3] *See* Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1332 (11th Cir. 2019), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020).

[4] *Patel*, 917 F.3d at 1332.

[5] *Patel*, 971 F.3d at 1284 ("We need not disturb the panel's ruling that the statute lacks a materiality element.").

[6] *See id.* at 1264–65 (discussing the dissent of one BIA member, which recognized that "Georgia extended driver's licenses to those with lawful status" and that the petitioner "did not need citizenship to obtain the license").

[7] *See infra* Part II.

the common-law origins of the false-citizenship provisions' text.[8] Specifically, these provisions use a variant of "false representation"—a term long understood to incorporate a materiality element at common law.[9] Under well-established principles of statutory construction, that common-law meaning is incorporated into the statute.[10] The Eleventh Circuit's contrary reasoning is unpersuasive, and the court was therefore wrong to hold that these important immigration provisions lack a materiality element.

Part I of this Article discusses the history of materiality under U.S. law, and Part II discusses the history of the INA's false-citizenship provisions and the jurisprudence establishing that the provisions contain an implicit materiality requirement. Part III summarizes the Eleventh Circuit's decision in *Patel v. United States Attorney General*[11] that the false-citizenship provisions do *not* contain a materiality requirement. Part IV concludes this Article by discussing the flaws in the Eleventh Circuit's reasoning and explaining its detrimental consequences.

I. A HISTORY OF MATERIALITY IN U.S. LAW AND WHY IT MATTERS

Materiality limitations have long played a role in common-law penalties for misrepresentations. For example, as early as the 17th century, British jurists recognized that the common-law crime of perjury requires, among other elements, that a false statement be *material* to the matter at issue.[12] As statutes gradually supplanted the common law, these materiality limitations were often preserved.[13] Many federal statutes thus incorporate a materiality element—from

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[8] *See infra* Part IV.

[9] *See infra* Part I.

[10] *See* LARRY M. EIG, CONG. RSCH. SERV., RL97589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3–7 (2014), https://fas.org/sgp/crs/misc/97-589.pdf (discussing how a term's "accepted meaning governs" when the term has "had an accepted and specialized meaning at common law").

[11] Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1332 (11th Cir. 2019), *aff'd en banc*, 971 F.3d 1258, 1284 (11th Cir. 2020).

[12] Kungys v. United States, 485 U.S. 759, 769 (1988).

[13] *Id.* at 769–70.

criminal perjury,[14] to securities law,[15] to tax law,[16] to mail and wire fraud.[17]

Immigration law is no exception; a variety of immigration provisions penalizing misrepresentations, including in the denaturalization and visa-application contexts,[18] have been understood to incorporate a materiality element.[19]

In its typical formulation, "a concealment of misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed."[20] While "[m]ateriality can be a subjective and nebulous standard,"[21] at base, the requirement ensures that only misrepresentations that actually mattered (or might have mattered) are penalized.

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[14] *See* United States v. Mandanici, 205 F.3d 519, 522–23 (2d Cir. 2000) (discussing 18 U.S.C. § 1001).

[15] *See* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37 (2011) (discussing 17 C.F.R. § 240.10b–5(b)).

[16] Kawashima v. Holder, 565 U.S. 478, 483–84 (2012) ("[A] violation of [26 U.S.C.] § 7206(1) include[s] . . . that the document in question was false as to a material matter, [and] that the defendant did not believe the document to be true and correct as to every material matter . . . ."); Boulware v. United States, 552 U.S. 421, 424 n.1 (2008) ("[P]rovision[] 26 U.S.C. § 7206(1)[] criminalizes the willful filing of a tax return believed to be materially false.").

[17] *See infra* Part IV.A.

[18] *See* Fedorenko v. United States, 449 U.S. 490, 507–08, 507 n.28 (1981) (discussing the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 and 8 U.S.C. § 1451(a)).

[19] *See Chapter 2 - Overview of Fraud and Willful Misrepresentation*, U.S. CITIZENSHIP & IMMIGR. SERV., (Mar. 30, 2021) https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2 ("[M]isrepresentation of a material fact may lead to . . . adverse immigration consequences.").

[20] Kungys v. United States, 485 U.S. 759, 770 (1988) (citing Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)). There are other formulations of "materiality" as well. *See, e.g.*, *id.* at 786–87 (Stevens, J., concurring) (describing "materiality" as "distinguish[ing] the trivial from the substantive"). For a discussion of various formulations of materiality and how differences in the formulations can affect a case's outcome, see Mary C. Stakun, Note, *Materiality in the Denaturalization Context:* Kungys v. United States, 23 CORNELL INT'L L.J. 161, 174–79 (1990) (describing the various approaches to materiality of the Justices in *Kungys* and illustrating how those approaches might lead to different outcomes).

[21] Timothy M. Todd, *The Pernicious Effect of Dubious Materiality*, 12 LIBERTY U. L. REV. 315, 324 (2018).

II. MATERIALITY AND THE INA'S FALSE-CITIZENSHIP PROVISIONS

Under U.S. immigration law, the Department of Homeland Security may place a noncitizen in removal proceedings if the noncitizen is either "inadmissible" or "deportable" under the INA.[22] The INA uses the term "inadmissible" to refer to noncitizens who have yet to be legally admitted to the United States.[23] In removal proceedings, these noncitizens are subject to "inadmissibility" grounds[24] and must prove that they are "admissible" to the United States.[25] In turn, the INA uses the term "deportable" to refer to noncitizens who *have* legally entered the United States but who are subject to deportation.[26] Unless they are granted discretionary relief, noncitizens who are inadmissible or deportable can be removed from the United States.[27]

In 1996, Congress added a pair of provisions to the INA that render inadmissible and deportable "[a]ny [noncitizen] who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under . . . Federal or State law."[28] These provisions were added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[29]—a statute enacted "to improve deterrence of illegal immigration into the United States . . . by improving the verification system for the

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[22] *See* Dakura v. Holder, 772 F.3d 994, 998 n.7 (4th Cir. 2014).

[23] *See* 8 U.S.C. § 1182 (inadmissibility grounds).

[24] *Id.*

[25] 8 U.S.C. § 1229a(c)(2)(A) (placing the burden of proof on the "applicant for admission" to prove "clearly and beyond doubt" that she is "not inadmissible under section 1182" of the INA).

[26] 8 U.S.C. § 1227 (deportability grounds).

[27] 8 U.S.C. § 1229a(c)(3)(A) (placing the burden of proof on the government to "establish[] by clear and convincing evidence that, in the case of a [noncitizen] who has been admitted to the United States, the [noncitizen] is deportable"). Notably, this Article uses the term "noncitizen" to replace the term "alien."

[28] IIRIRA, Pub. L. No. 104-208, § 344(a), 110 Stat. 3009-546, 3009-637 (codified at 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D)). Because the operative language of the false-citizenship provisions is identical, courts frequently interpret the provisions in tandem and rely on interpretations of one provision to interpret the other. *See* Dakura v. Holder, 772 F.3d 994, 999 (4th Cir. 2014); *see also, e.g.*, Ferrans v. Holder, 612 F.3d 528, 531 (6th Cir. 2010).

[29] IIRIRA § 334, 110 Stat. at 3009–637.

eligibility for employment."[30] Congress enacted the false-citizenship provisions to "prevent [noncitizens] from taking American jobs,"[31] to discourage noncitizens from "'abus[ing] . . . the welfare system' through fraudulent applications for public benefits,"[32] and to "'disincentiv[ize] falsely claiming citizenship' during the employment verification process."[33] Congress, in other words, enacted these provisions to prevent noncitizens from lying about their citizenship to obtain benefits they were ineligible to receive.

The federal courts and the BIA have both parsed these provisions' requirements.[34] One key aspect they have examined is what qualifies as a "purpose or benefit . . . under Federal or State law," thereby triggering inadmissibility or deportability.[35] Courts of appeals have determined that obtaining private-sector employment,[36] applying for a U.S. passport,[37] and obtaining entry into the United States[38] all qualify as a "purpose or benefit" under the false-citizenship provisions.

In 2010, the Sixth Circuit and Third Circuit issued opinions seemingly at odds on what counts as a "purpose or benefit."[39] In *Dwumaah v. United States Attorney General*, the Third Circuit held that a noncitizen was deportable under 8 U.S.C. § 1227(a)(3)(D) for

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[30] H.R. REP. No. 104–828, at 199 (1996); *see also* Castro v. U.S. Att'y Gen., 671 F.3d 356, 368–69 (3d Cir. 2012); Sandoval v. Holder, 641 F.3d 982, 985–86 (8th Cir. 2011).

[31] 142 CONG. REC. H11080 (daily ed. Sept. 25, 1996) (statement of Rep. Lamar Smith).

[32] *Id.*; *Castro*, 671 F.3d at 369 (quoting 142 CONG. REC. H11080 (daily ed. Sept. 25, 1996) (statement of Rep. Lamar Smith)).

[33] *Castro*, 671 F.3d at 369 (quoting 142 CONG. REC. 10,030 (1996)); 142 CONG. REC. S4017–18 (daily ed. Apr. 24, 1996) (statement of Sen. Alan Simpson).

[34] *See, e.g.*, Theodros v. Gonzales, 490 F.3d 396, 402 (5th Cir. 2007); Matter of Richmond, 26 I. & N. Dec. 779, 779 (B.I.A. 2016).

[35] 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D).

[36] *Theodros*, 490 F.3d at 402; Kechkar v. Gonzales, 500 F.3d 1080, 1083–84 (10th Cir. 2007); Naser v. Gonzales, 123 F. App'x. 624, 624–25 (5th Cir. 2005) (per curiam).

[37] Sowah v. Gonzales, 196 F. App'x. 576, 577 (9th Cir. 2006).

[38] Valadez–Munoz v. Holder, 623 F.3d 1304, 1306–07, 1309 (9th Cir. 2010); Valenzuela–Solari v. Mukasey, 551 F.3d 53, 54 (1st Cir. 2008); Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005).

[39] *Compare* Dwumaah v. U.S. Att'y Gen., 609 F.3d 586, 589 (3d Cir. 2010), *with* Hassan v. Holder, 604 F.3d 915, 928–29 (6th Cir. 2010).

falsely claiming U.S. citizenship on a federal student-loan application.[40] In contrast, the Sixth Circuit held in *Hassan v. Holder* that a noncitizen was *not* deportable for falsely claiming U.S. citizenship on a Small Business Administration ("SBA") loan application.[41]

The Third Circuit reconciled these seemingly conflicting holdings in *Castro v. United States Attorney General*.[42] Examining the loan applications at issue in *Dwumaah* and *Hassan*, the Third Circuit recognized one key difference: "the relevance of the applicant's citizenship status."[43] While U.S. citizenship was required to obtain the federal student loan at issue in *Dwumaah*, the opposite was true of the SBA loan at issue in *Hassan*.[44] The Third Circuit thus recognized that "the relevance of the [noncitizen]'s citizenship status" constrained the reach of the false-citizenship provisions.[45] Applying this analysis, the Third Circuit held that 8 U.S.C. § 1182(a)(6)(C)(ii) did not apply to a noncitizen who falsely told state police he was a U.S. citizen because "citizenship status had no bearing on the police department's handling of his arrest."[46]

In 2013, the Second Circuit joined the Third and Sixth Circuits in tackling the false-citizenship provisions' meaning. In *Richmond v. Holder*, the Second Circuit recognized that "the statutory language cannot be read so broadly that it fails to exclude anything,"[47] but "neither the parties, nor the BIA, nor the courts of appeals" had yet "ma[de] clear the precise basis on which certain kinds of misrepresentations can be said to fall outside the requirement's scope."[48] Specifically, the court concluded that *Hassan* and *Castro* had "left open the important question of whether the presence of a 'purpose or benefit' is determined objectively—based on whether

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[40] *Dwumaah*, 609 F.3d at 589.

[41] *Hassan*, 604 F.3d at 928–29.

[42] Castro v. U.S. Att'y Gen., 671 F.3d 356, 370–71 (3d Cir. 2012).

[43] *Id.* at 370.

[44] *Id.* Indeed, the Sixth Circuit itself recognized in *Hassan* that the government had not shown (1) "how, if at all, [the noncitizen]'s immigration status would affect [his] loan application" or (2) that the noncitizen's subjective purpose in making the false claim was to affect his ability to receive the loan. *Hassan*, 604 F.3d at 928–29.

[45] *Castro*, 671 F.3d at 370.

[46] *Id.* at 370–71.

[47] Richmond v. Holder, 714 F.3d 725, 729 (2d Cir. 2013).

[48] *Id.* at 730.

citizenship status would *actually* affect" the purpose or benefit, or "subjectively, based on the effect that a non-citizen *intends* his or her citizenship claim to have."[49] Because of the risk "that, in the absence of some clear limitation on what [the provision's scope] encompasses, the 'purpose or benefit' clause will itself serve no purpose, and provide no benefit, within the INA,"[50] the Second Circuit remanded to the BIA "to explain in the first instance" its understanding of the provision's requirements.[51]

The Second Circuit's remand prompted the BIA to issue *Matter of Richmond*, a precedential decision interpreting the false-citizenship inadmissibility provision.[52] In *Matter of Richmond*, the BIA examined federal-court decisions that had interpreted the false-citizenship provisions, including *Castro*, *Hassan*, and *Dwumaah*.[53] As the Third Circuit had done in *Castro*, the BIA recognized that "only in *Dwumaah* was citizenship status a prerequisite to the loan's approval—in other words, citizenship status actually affected the student loan application."[54]

Synthesizing these decisions, the BIA held that a noncitizen's false-citizenship claim must meet two requirements to trigger inadmissibility.[55] First, the noncitizen must have made the claim "with the subjective intent of achieving a purpose or obtaining a benefit . . . ."[56] "Second, the presence of a purpose or benefit must be determined objectively—that is, the United States citizenship must actually affect or matter to the purpose or benefit sought."[57] In other words, the false-citizenship claim must have been *material*.[58]

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 731 ("'[W]e cannot comfortably ascertain the proper outcome in this case in the absence of a set of standards' to use in applying the statute; yet 'were we to generate standards ourselves, we would be forced to start essentially from scratch' . . . . [T]he better practice . . . is to remand to the BIA." (quoting Liu v. Gonzales, 455 F.3d 106, 116 (2d Cir. 2006))).

[52] Matter of Richmond, 26 I. & N. Dec. 779, 783–89 (B.I.A. 2016).

[53] *Id.* at 785–86.

[54] *Id.* at 786.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 786–87.

[58] The BIA ultimately ruled that the noncitizen's false representation of U.S. citizenship satisfied both requirements, and ordered the noncitizen removed. *Id.*

III. THE ELEVENTH CIRCUIT'S DECISION IN *PATEL*

The Eleventh Circuit entered the interpretive fray in *Patel v. United States Attorney General*.[59] In *Patel*, the Eleventh Circuit rejected *Matter of Richmond*'s second requirement—that a false representation be *material*—as inconsistent with the statute's plain meaning.[60]

The lead petitioner in *Patel*, Pankajkumar Patel, had lived in the United States for over twenty years before he was placed in removal proceedings.[61] For much of this time, Mr. Patel lived in Georgia, and he had obtained several driver's licenses under Georgia law.[62] In 2008, Mr. Patel made a critical misstep when renewing his driver's license: He checked a box answering "Yes" to a question that asked whether he was a U.S. citizen.[63] This prompted the government to deny Mr. Patel's green-card application and to place him in removal proceedings.[64]

In removal proceedings, Mr. Patel raised two defenses to inadmissibility under § 1182(a)(6)(C)(ii)(I), tracking *Matter of Richmond*'s two-prong test.[65] First, Mr. Patel testified that he checked the U.S.-citizen box *by mistake*, and therefore lacked the subjective intent to misrepresent his citizenship.[66] Second, he argued that objectively, his misrepresentation was immaterial because he was eligible for a driver's license under Georgia law regardless of his citizenship.[67]

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at 789–90. On further review, the Second Circuit held that the BIA's interpretation of the statute was reasonable and entitled to deference. *See* Richmond v. Sessions, 697 F. App'x 106, 107 (2d Cir. 2017) (holding that, because "BIA's reading is a reasonable one and . . . the statute is ambiguous," Second Circuit would "refrain from replacing its reading with the one Richmond urges upon us").

[59] Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1332 (11th Cir. 2019), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020).

[60] *Id.*

[61] *Id.* at 1322.

[62] *Id.* at 1322–23.

[63] *Id.* at 1323.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* Under Georgia law at the time of Mr. Patel's misrepresentation, "an applicant who present[ed] in person valid documentary evidence of . . . other federal documentation verified by the United States Department of Homeland

The immigration judge and the BIA rejected both arguments. First, they disbelieved Mr. Patel's testimony that he had unwittingly checked the box, concluding instead that he had done so knowingly for the purpose of obtaining a Georgia driver's license.[68] Second, they held that the false representation was material because, in their view, Mr. Patel would not have received a license had he disclosed his actual immigration status.[69]

A three-judge panel of the Eleventh Circuit affirmed.[70] The court first held it lacked jurisdiction to consider Mr. Patel's argument that he lacked subjective intent.[71] The court did, however, reach the merits of Mr. Patel's second argument regarding materiality.[72]

Security to be valid documentary evidence of *lawful presence* in the United States under federal immigration law" was eligible "to be issued a temporary license, permit, or special identification card. *See* GA. CODE ANN. § 40-5-21.1(a) (2008) (emphasis added). Moreover, an Employment Authorization Document, which Mr. Patel held at the time, was sufficient to show such "lawful presence." *See Information for Non US Citizens*, GA. DEP'T OF DRIVER'S SERVS., https://web.archive.org/web/20081217105635/http://www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl (archived Dec. 17, 2008) (listing an employment authorization document as acceptable to "prove legal presence in the [United States]"); *Drivers from Other Nations*, GA. DEP'T OF DRIVER SERVS., https://web.archive.org/web/20080627010530/http://www.dds.ga.gov/drivers/DLdata.aspx?con=1747371440&ty=dl (archived Feb. 17, 2008) (stating that the Department of Driver Services would accept *any* valid document that authorizes a noncitizen to be present in the United States). That rule has since been codified in Georgia's regulations. *See* GA. COMP. R. & REGS. § 375-3-1-.02(3)(e) (2020) (noting that documents acceptable to establish identity of a customer seeking to renew a driver's license include an "[u]nexpired employment authorization document (EAD) issued by the DHS").

[68] *Patel*, 917 F.3d at 1323, 1327.

[69] *Id.* As noted, this holding appears to have been incorrect, given that Georgia allowed applicants in Mr. Patel's situation to obtain at least a temporary driver's license. *See supra* note 67. In fact, one BIA member dissented for exactly this reason, recognizing that Mr. Patel "did not need citizenship to obtain the license" given that he would have qualified for a license based on his status as a green-card applicant. *See Patel*, 917 F.3d at 1324; In re: Jyotsnaben P Patel Pankajkumar Somabhai Patel Nishantkumar Patel, 2017 WL 1045537, at *4 (BIA Jan. 17, 2017) (Wendtland, Board Member, dissenting).

[70] *Patel*, 917 F.3d at 1332.

[71] *Id.* at 1324. The court's holding turned on its interpretation of 8 U.S.C. § 1252(a)(2)(B)(i). *See id.* That jurisdictional issue is beyond the scope of this Article.

[72] *Id.* at 1325–32.

In a break with *Matter of Richmond* and the earlier circuit precedent on which that decision was based, the panel held that the false-citizenship provisions include "no materiality element."[73] The statute, the panel observed, penalizes "false representation[s]."[74] And a person "can make a false representation with the goal of obtaining a benefit, even if the false representation does not help them achieve that goal."[75] The court therefore reasoned that the statute's plain text unambiguously excludes a materiality element.[76]

The panel opinion bolstered this interpretation by relying on negative implication—the notion that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[77] The court observed that "Congress *did* include a materiality element in the immediately preceding subsection [8 U.S.C. § 1182(a)(6)(C)(i)], which says: 'Any [noncitizen] who, by fraud or willfully misrepresenting a *material* fact, seeks to procure . . . [an immigration benefit] is inadmissible.'"[78] From this, the panel inferred that Congress would have used the word "material" in the false-citizenship provision had it intended the provision to reach only *material* misrepresentations.[79]

The panel also found support for its holding in *Kungys v. United States*.[80] In *Kungys*, the Supreme Court analyzed 8 U.S.C. § 1101(f)(6), which provides that a person lacks "good moral character" and is ineligible for naturalization if he or she "has given false testimony for the purpose of obtaining any benefits under [immigration law]."[81] Like § 1182(a)(6)(C)(ii)(I), the false-testimony provision at issue in *Kungys* does not use the word "material."[82] And the *Kungys* Court held that the false-testimony provision "does not distinguish between material and immaterial

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73 *Id.* at 1328.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* (quoting Ela v. Destefano, 869 F.3d 1198, 1202 (11th Cir. 2017)).
78 *Id.* (emphasis added) (citing 8 U.S.C. § 1182(a)(6)(C)(i)).
79 *Id.* (citing *Destefano*, 869 F.3d at 1202).
80 *Id.* at 1329 (discussing Kungys v. United States, 485 U.S. 759, 779 (1988)).
81 *Id.* (citing 8 U.S.C. § 1101(f)(6)).
82 *Id.*

misrepresentations."[83] Observing that the texts of the two provisions are "strikingly similar," the Eleventh Circuit determined that *Kungys* supported the court's conclusion that § 1182(a)(6)(C)(ii)(I) also lacks a materiality requirement.[84]

The panel concluded by rejecting the BIA's materiality holding in *Matter of Richmond* as "flawed and unclear."[85] Moreover, the panel determined that a materiality requirement is not necessary to limit the statute's reach to ensure it is not "read so broadly that it fails to exclude anything."[86] Instead, the panel asserted that the statute's "under Federal or State law" language was enough to limit its reach: While "the text does not require that the purpose or benefit sought be one restricted or available only to citizens," the purpose or benefit still must arise under the law.[87] Thus, the Eleventh Circuit held that the false-citizenship provision "does not require that citizenship be material to the purpose or benefit sought."[88]

The Eleventh Circuit reheard *Patel* en banc, principally to decide a jurisdictional issue unrelated to the materiality question.[89] While the court vacated the panel opinion when it agreed to rehear the case en banc, the court's en banc opinion summarily adopted the panel opinion's holding on materiality.[90]

IV. WHY *PATEL* WAS WRONGLY DECIDED

As we will demonstrate below, the Eleventh Circuit's holding on materiality was wrong.[91] But that is so principally for a reason that neither the Eleventh Circuit nor any other court has yet considered: the common-law origins of the phrase "false representation." That phrase originates in the common law and carries with it a

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[83] *Kungys*, 485 U.S. at 779.

[84] *Patel*, 917 F.3d at 1329.

[85] *Id.* at 1331.

[86] *Id.* at 1332 (quoting Matter of Richmond, 26 I. & N. Dec. 779, 784 (B.I.A. 2016)).

[87] *Id.*

[88] *Id.*

[89] Patel v. U.S. Att'y Gen., 971 F.3d 1258, 1265 (11th Cir. 2020).

[90] *Id.* at 1284 ("We need not disturb the panel's ruling that the statute lacks a materiality element.").

[91] *See infra* Part IV.

materiality element.[92] Thus, even though the false-citizenship provisions do not use the word "material," they incorporate a materiality requirement by virtue of their use of common-law language.[93] When viewed against this backdrop, none of the Eleventh Circuit's justifications for rejecting materiality withstands scrutiny.

A. *The Common-Law Meaning of "False Representation" Carries a Materiality Element*

A well-established canon of statutory interpretation holds that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[94] Under this canon, a statute incorporates a materiality element if it uses language understood to include such an element at common law—even if the statute does not explicitly use the word "material."

The U.S. Supreme Court has held that the term "false representation"—or its equivalent "misrepresentation"[95]—is such a common-law term and, as a result, its usage "impl[ies] elements that the common law has defined [it] to include."[96] One of the common-law elements of a "false representation" is *materiality*;[97] thus, the Supreme Court and numerous circuit courts have repeatedly understood statutes that use the term "false representation" to contain a

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[92] *See supra* Part I; *infra* Part IV.A.

[93] *See infra* Part IV.A.

[94] Neder v. United States, 527 U.S. 1, 21 (1999); NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981).

[95] "False representation" and "misrepresentation" are synonyms. *See False Representation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term by way of cross reference to "misrepresentation"); *Misrepresentation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("misrepresentation" is "[a]lso termed *false representation*").

[96] Field v. Mans, 516 U.S. 59, 69 (1995). The inadmissibility and deportability grounds for false-citizenship representations were enacted just months after the Supreme Court's decision in *Field*. *See* IIRIRA, Pub. L. No. 104-208, § 344(a), 110 Stat. 3009-546, 3009-637. This proximity in time only strengthens the presumption that Congress meant to incorporate the common-law meaning of "false representation." *See id.*; *Field*, 516 U.S. at 69.

[97] United States v. Wells, 519 U.S. 482, 494 (1997) (a false "representation" can imply "a materiality element" (citing Kungys v. United States, 485 U.S. 759, 781 (1998))).

materiality requirement, even when they do not use the word "material."[98]

For example, in *Fedorenko v. United States*, the Supreme Court interpreted a provision in the Displaced Persons Act of 1948 (the "DPA"),[99] which rendered inadmissible any "person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States."[100] Although the statute did not explicitly use the word "material," the Court held that the "provision only applies to willful misrepresentations about *'material' facts*."[101] As the Court later explained, this "conclusion . . . was grounded in the word 'misrepresentation,' which has been held to [imply materiality] in many contexts," including at common law.[102]

The Supreme Court reached a similar conclusion in *Neder v. United States*, in which it interpreted the "federal mail fraud, wire fraud, and bank fraud statutes."[103] These statutes prohibit obtaining money or property "by means of false or fraudulent pretenses, representations, or promises."[104] And they make no mention of the word "material." Nevertheless, the Court held that "materiality of falsehood is an element" of these statutes, because of the common-law roots of the terms used in the statutes.[105]

Federal circuit courts, too, have recognized the common-law meaning of "false representation." For example, the Fair Debt Collection Practices Act prohibits debt collectors from using "any false, deceptive, or misleading representation" and identifies numerous

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[98] *See., e.g.*, Fedorenko v. United States, 449 U.S. 490, 507 (1981); Bryan v. Credit Control, LLC, 954 F.3d 576, 582 (2d Cir. 2020); Jensen v. Pressler & Pressler, 791 F.3d 413, 421 (3d Cir. 2015); Powell v. Palisades Acquisition XVI, LLC, 782 F.3d 119, 126 (4th Cir. 2014); Van Hoven v. Buckles & Buckles, P.L.C., 947 F.3d 889, 894 (6th Cir. 2020); Hahn v. Triumph P'ships LLC, 557 F.3d 755, 757 (7th Cir. 2009); Hill v. Accts. Receivable Servs., LLC, 888 F.3d 343, 346 (8th Cir. 2018); Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1033 (9th Cir. 2010).

[99] Displaced Persons Act ("DPA"), Pub. L. No. 80-774, 62 Stat. 1009, 1013 (1948).

[100] *Fedorenko*, 449 U.S. at 495, 507–08 (quoting DPA § 10, 62 Stat. at 1013).

[101] *Id.* at 507 (emphasis added).

[102] *Kungys*, 485 U.S. at 781.

[103] Neder v. United States, 527 U.S. 1, 25 (1999).

[104] 18 U.S.C. §§ 1341, 1343, 1344.

[105] *Neder*, 527 U.S. at 25.

"false representations" that violate the law.[106] These statutes do not use the word "material." Yet numerous circuits have held that a false statement must be material to be actionable under the statute.[107] This is in line with the well-established meaning of "false representation" in the common-law tort context.[108]

Because the false-citizenship provisions similarly use the language of "false representation," they too incorporate materiality. The Eleventh Circuit never grappled with this point in either the panel opinion or the en banc decision reaffirming the panel's holding.[109] Had it done so, the court would have recognized that, contrary to its decision, the false-citizenship provisions include a materiality element.

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[106] 15 U.S.C. § 1692e.

[107] *See, e.g.*, Bryan v. Credit Control, LLC, 954 F.3d 576, 582 (2d Cir. 2020) ("[W]e have held that . . . only material errors violate Section 1692e."); Jensen v. Pressler & Pressler, 791 F.3d 413, 421 (3d Cir. 2015) ("[A] false statement . . . must be *material* . . . ."); Powell v. Palisades Acquisition XVI, LLC, 782 F.3d 119, 126 (4th Cir. 2014) ("A logical corollary of the least sophisticated consumer test is that false, deceptive, and misleading statements must be *material* to be actionable."); Van Hoven v. Buckles & Buckles, P.L.C., 947 F.3d 889, 894 (6th Cir. 2020) ("One [requirement] is that a claim must turn on a *material* misstatement."); Hahn v. Triumph P'ships LLC, 557 F.3d 755, 757 (7th Cir. 2009) ("Materiality is an ordinary element of any federal claim based on a false or misleading statement."); Hill v. Accts. Receivable Servs., LLC, 888 F.3d 343, 346 (8th Cir. 2018) ("[A] false but non-material statement is not actionable."); Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1033 (9th Cir. 2010) ("[A] false or misleading statement is not actionable under § 1692e unless it is material.").

[108] *See, e.g.*, Christidis v. First Pa. Mortg. Tr., 717 F.2d 96, 99 (3d Cir. 1983) (describing "an action for false representation" as requiring demonstration of a "specific false representation of material facts" (quoting CHARLES C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 48 (2d ed. 1947))); Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997) (identifying the elements of "the common law tort of false representation" as including materiality concepts); *In re* Hardin, 458 F.2d 938, 940 (7th Cir. 1972) (recognizing that "[t]he Wisconsin common law of false representations, similar to that of most states," required a showing that the false representation was material to aggrieved party).

[109] *See* Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1332 (11th Cir. 2019), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020); *Patel*, 971 F.3d at 1284.

B. *The Eleventh Circuit's Reliance on Negative Implication Was Misplaced*

In holding that the false-citizenship provisions lack a materiality element, the Eleventh Circuit relied heavily on the negative-implication canon, which dictates that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[110]

As discussed in Part III, the court applied this canon by comparing the false-citizenship provision at 8 U.S.C. § 1182(a)(6)(C)(ii) to the neighboring generic-misrepresentation provision at § 1182(a)(6)(C)(i).[111] Unlike the false-citizenship provision, the generic-misrepresentation provision explicitly includes a materiality element by stating that any noncitizen "who, by fraud or willfully misrepresenting a *material* fact, seeks to procure . . . [an immigration benefit] is inadmissible."[112] Because it could not find "persuasive evidence to the contrary," the court reasoned that Congress's use of the word "material" in the generic-misrepresentation provision reflected its intent not to incorporate a materiality element into the false-citizenship provision.[113]

But the Eleventh Circuit was wrong to rely on negative implication because the Supreme Court has held that the common-law language canon takes precedence over the negative-implication canon.[114] As the Court has stated, negative implication is "weakest" when pitted against "common-law language at work in [a] statute."[115] In fact, the Court has expressly declined to apply the negative-implication canon to strip the words "false representation" or "misrepresentation" of their common-law materiality element because Congress's "drafting choice" not to enumerate the elements implied in common-law language does not "deprive" those

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[110] Ela v. Destefano, 869 F.3d 1198, 1202 (11th Cir. 2017) (quoting Duncan v. Walker, 533 U.S. 167, 173 (2001)); *Patel*, 917 F.3d at 1328.

[111] *See supra* Part III.

[112] 8 U.S.C. § 1182(a)(6)(C)(i) (emphasis added).

[113] *Patel*, 917 F.3d at 1328.

[114] *See* Field v. Mans, 516 U.S. 59, 75–76 (1995).

[115] *Id.* (rejecting the negative-implication inference because of the common-law language at play in 11 U.S.C. § 523(a)(2)).

common-law phrases "of a significance richer than the bare statement of their terms."[116]

The panel also wrongly relied on *Kungys*.[117] While the Supreme Court held that "false *testimony*" did not incorporate a materiality requirement, it explicitly noted that "false testimony" was *not* a common-law term.[118] Yet the Supreme Court has repeatedly recognized that the term "false *representation*" originates in the common law and carries a materiality requirement with it.[119] Accordingly, the Eleventh Circuit was wrong to hold that "false representation" excludes a materiality element.[120]

As discussed above, the Eleventh Circuit never addressed the meaning of "false representation" under the common law.[121] If it had, it would have recognized that the provisions' common-law language takes precedence over negative implication[122] and is "persuasive evidence" overriding any such negative implication.[123] Because "false representation" includes materiality, the Eleventh Circuit should have relied on "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses."[124] Thus, the Eleventh Circuit could not simply "infer from the absence of an express reference to materiality that Congress intended to drop that element" from § 1182(a)(6)(C)(ii)(I).[125] Instead, it should have "*presume[d]* that Congress intended to incorporate materiality 'unless the statute otherwise dictates.'"[126] Because nothing in § 1182(a)(6)(C)(ii)(I) "dictates" otherwise,[127] the statute must be construed to incorporate materiality, and the Eleventh Circuit was wrong to adopt a contrary reading.

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116 *Id.* at 69.
117 *Patel*, 917 F.3d at 1329.
118 Kungys v. United States, 485 U.S. 759, 781 (1988) (emphasis added).
119 *See supra* Part IV.A.
120 *See Patel*, 917 F.3d at 1329.
121 *Kungys*, 485 U.S. at 781.
122 *See* Field v. Mans, 516 U.S. 59, 75–76 (1995).
123 *See Patel*, 917 F.3d at 1328.
124 Neder v. United States, 527 U.S. 1, 23 (1999).
125 *Id.*
126 *Id.* (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)).
127 *Id.*

The Eleventh Circuit's reliance on the negative-implication canon is flawed for several other reasons.

First, although § 1182(a)(6)(C)(i) (the generic misrepresentation inadmissibility provision) and § 1182(a)(6)(C)(ii) (the false-citizenship inadmissibility provision) are adjacent in the U.S. Code, they were enacted more than forty years apart. The generic misrepresentation provision traces its roots to the Immigration and Nationality Act of 1952.[128] The false-citizenship provision, by contrast, was not enacted until 1996.[129] This four-decade gap erodes any negative-implication inference as "'negative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.'"[130]

The force of negative implication is further diminished because the language and structure of the two provisions are not closely parallel. As the Supreme Court has explained, the presumption "grows weaker with each difference in the formulation of the provisions under inspection."[131] Here, the generic misrepresentation provision, in relevant part, bears little resemblance to the false-citizenship

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[128] *See* Immigration and Nationality Act, Pub. L. No. 414, § 212(a)(6)(C)(i), 66 Stat. 163, 183 (1952) (rendering inadmissible "[a]ny [noncitizen] who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully mispresenting a material fact").

[129] *See* IIRIRA, Pub. L. No. 104-208, § 344(a), 110 Stat. 3009-546, 3009-637.

[130] Gomez-Perez v. Potter, 553 U.S. 474, 486 (2008) (quoting Lindh v. Murphy, 521 U.S. 320, 330 (1997)) (declining to apply presumption to provisions enacted seven years apart). Notably, Congress has *never* enacted a similar generic-misrepresentation provision to the deportability grounds of the INA. *See* 8 U.S.C. § 1227. Thus, the negative-implication argument cannot logically apply to the false-citizenship deportability provision at 8 U.S.C. § 1227(a)(3)(D). And because the false-citizenship deportability provision *was* enacted at the same time as the false-citizenship inadmissibility provision at § 1182(a)(6)(C)(ii), *see supra* notes 28–33 and accompanying text, the court's reliance on the negative-implication canon in this context is especially weak.

[131] Field v. Mans, 516 U.S. 59, 75–76 (explaining how the negative implication canon is "strong[est]" when applied to "contrasting statutory sections originally enacted simultaneously" and "weakest when it suggests results strangely at odds with other textual pointers, like . . . common-law language"); *see also* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 435–36 (2002) (stating that the case for "inference" from negative implication is "more persuasive" when "the [relevant] omission [is] the sole difference").

provision. In fact, given the phrasing of the false-citizenship provision, the word "material" cannot be inserted anywhere in a way that renders the provision both grammatically and semantically accurate. For example, the Eleventh Circuit suggested that Congress could have expressly incorporated materiality by inserting the word "material" before the phrase "purpose or benefit," so that the provision would read as follows: "Any [noncitizen] who falsely represents . . . himself or herself to be a citizen of the United States for any [*material*] purpose or benefit under this chapter . . . or any other Federal or State law is inadmissible."[132] But in that hypothetical formulation, the word "material" modifies the wrong concept; it is not the "*purpose or benefit*" under federal or state law that must be "material" but the *false representation of U.S. citizenship* that must be material to the purpose or benefit.[133] Because the two provisions are structurally dissimilar, the negative-implication canon's force is especially weak.[134]

For these reasons, the negative-implication canon is of little value in interpreting the false-citizenship provisions.

C. *The Context and Purpose of the False-Citizenship Provisions Support a Materiality Requirement*

The Eleventh Circuit's reliance on *Kungys* was based on a fundamental misunderstanding of the Supreme Court's decision. While

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[132] Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1328 (11th Cir. 2019) (quoting 8 U.S.C. § 1182(a)(6)(C)(ii)(I)), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020).

[133] *See id.* (emphasis added).

[134] Notably, while the panel highlighted the mismatch in use of the word "material" across subsections (a)(6)(C)(i) and (a)(6)(C)(ii)(I), it ignored a similar mismatch *within* subsection (a)(6)(C)(i) itself. By its plain terms, the generic-misrepresentation provision reaches *two* kinds of conduct: (1) "fraud," and (2) "willfully misrepresenting a material fact." 8 U.S.C. § 1182(a)(6)(C)(i). If negative implication overrides common-law language, then "fraud" would contain no materiality element because the word "material" does not modify "fraud." But "fraud" under the provision has long been held to incorporate a materiality element. *See* Ortiz-Bouchet v. U.S. Att'y Gen., 714 F.3d 1353, 1356 (11th Cir. 2013) (per curiam) ("[T]he BIA has held that fraud [under this provision] 'consist[s] of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party.'" (third alteration in original) (quoting Matter of G–G–, 7 I. & N. Dec. 161, 164 (B.I.A. 1956))). Thus, the panel's reasoning would lead to a construction of the generic-misrepresentation provision that is at odds with its longstanding meaning.

the Eleventh Circuit believed that *Kungys* "bolster[ed]" its reading of the false-citizenship provision,[135] in truth *Kungys* undermines it.

The false-testimony provision addressed in *Kungys* states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was . . . one who has given false testimony for the purpose of obtaining any benefits under this chapter."[136] In *Kungys*, the Supreme Court refused to read in a materiality requirement to this provision, in part because the provision was "part of a definition of what constitutes a lack of 'good moral character' for purposes of qualifying for immigration."[137] According to the Supreme Court, this language was very different from provisions previously found to contain an implicit materiality element.[138]

For example, provisions like the inadmissibility provision at issue in *Fedorenko* have the purpose "to punish and thereby deter misrepresentation in the immigration process."[139] A materiality limitation makes sense in a provision like this one, designed to punish and deter, especially considering the common-law meaning of the word "misrepresentation."[140] In contrast, the purpose of the false-testimony provision at issue in *Kungys* was to "identify lack of good moral character," which "appears to some degree whenever there is a subjective intent to deceive, no matter how immaterial the deception."[141] Thus, imposing a materiality requirement on the false-testimony provision made little sense. This was especially true considering the provision was sufficiently limited and applied only to "oral

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135 *Patel*, 917 F.3d at 1329.

136 8 U.S.C. § 1101(f), 1101(f)(6).

137 Kungys v. United States, 485 U.S. 759, 782 (1988).

138 *Id.* at 780–82.

139 *Id.* at 780, 782 (stating that the purpose of the provision at issue in *Fedorenko v. United States*, 449 U.S. 490 (1981), was "to prevent false pertinent data from being introduced into the naturalization process (and to correct the result of the proceedings where that has occurred)").

140 *Id.* at 781.

141 *Id.* at 780. Noncitizens are required to show "good moral character" as an explicit part of many immigration applications, including naturalization, *see* 8 U.S.C. § 1427(a), and cancellation of removal for non-lawful permanent residents, *see id.* § 1229b(b)(1)(B).

statements made under oath . . . with the subjective intent of obtaining immigration benefits."[142]

Contrary to the Eleventh Circuit's opinion, the false-citizenship provision at issue in *Patel* is more closely aligned with the inadmissibility provision in *Fedorenko* than the false-testimony provision in *Kungys*. Congress enacted the false-citizenship provisions to discourage noncitizens from evading employment-verification laws or "'abus[ing] . . . the welfare system' through fraudulent applications for public benefits."[143] Congress was, in other words, concerned with preventing noncitizens from making false citizenship-claims to obtain benefits they were ineligible to receive. This is precisely the sort of legislative purpose for which a materiality requirement is most appropriate.[144]

On the other hand, the provision is decidedly *unlike* the false-testimony provision at issue in *Kungys*. Not only does the false-citizenship provision—unlike the false-testimony provision—contain common-law language that traditionally requires materiality, but it has also been held to cover even noncitizens who *genuinely believe* they are U.S. citizens. In other words, the false-citizenship provision has been held to apply to noncitizens who—unlike those found to lack good moral character under the false-testimony provision—have engaged in no willful deception or any other morally culpable conduct.[145]

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[142] *Kungys*, 485 U.S. at 780.

[143] Castro v. U.S. Att'y Gen., 671 F.3d 356, 368–69 (3d Cir. 2012) (citing legislative history).

[144] *See Kungys*, 485 U.S. at 780, 782 (explaining that a materiality requirement makes sense for statutes enacted "to prevent false pertinent data from being introduced" or "to punish and thereby deter misrepresentation"). The Eleventh Circuit was therefore mistaken to suggest that "[a]pplying the statute even when citizenship is immaterial advances the legislation's purpose." *See* 917 F.3d at 1331. "No law pursues its purpose at all costs," *Rapanos v. United States*, 547 U.S. 715, 752 (2006), and the statutory context here suggests Congress was especially concerned with people claiming U.S. citizenship to obtain benefits *reserved for U.S. citizens*, *see supra* notes 28–33 and accompanying text.

[145] *See* Matter of Zhang, 27 I. & N. Dec. 569, 571 (B.I.A. 2019) (holding that a noncitizen "is not required to know that a claim to citizenship is false" to be found inadmissible or deportable under the false-citizenship provisions). The validity of the BIA's holding in *Zhang* is beyond the scope of this Article. But one key point deserves attention: There is a difference between knowledge that a

Accordingly, the statutory context and purpose strongly support the materiality element Congress included through its use of common-law language.

D. *Ambiguity in Immigration Statutes Must Be Resolved in Favor of Noncitizens*

The Eleventh Circuit should have resolved any remaining doubt as to whether the false-citizenship provisions incorporate a materiality element by applying the principle that removal statutes must be narrowly construed in favor of noncitizens.[146] This principle has special force when interpreting inadmissibility or deportability grounds that carry particularly harsh consequences.

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representation of U.S. citizenship was made *at all* and knowledge that such a representation was *false*. While the BIA in *Zhang* held that the latter is not required under the false-citizenship provision, the earlier unquestionably *is* required because the provision's plain language triggers inadmissibility only if made "*for*" some "purpose or benefit" under federal or state law. 8 U.S.C. § 1182(a)(6)(C)(ii) (emphasis added). Because "the word 'for' is a function used to indicate purpose, an intended goal, or the object of an activity," a person who *inadvertently* represents himself as a U.S. citizen falls outside the false-citizenship provision's reach—such a person cannot logically *intend* that his *accidental* citizenship representation serve a purpose or benefit. Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1328 (11th Cir. 2019), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020); *see also* Lawson v. Fortis Ins. Co., 301 F.3d 159, 165 (3d Cir. 2002) ("The word 'for' connotes intent.").

The Eleventh Circuit's panel opinion confused this distinction by suggesting that § 1182(a)(6)(C)(ii)(I) incorporates no knowledge requirement of any kind because, if it did, the narrow exception for certain noncitizens who "reasonably believed" they were U.S. citizens "would [be] render[ed] superfluous." *Patel*, 917 F.3d at 1326; *see* 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (exempting noncitizens whose parents are or were U.S. citizens, who "resided in the United States prior to attaining the age of 16," and who "reasonably believed at the time of making such representation that he or she was a citizen"). But that exception deals not with *inadvertent* representations of U.S. citizenship, but rather with *knowing* ones made without knowledge of their falsity. Thus, interpreting § 1182(a)(6)(C)(ii)(I) to require knowledge that a representation of U.S. citizenship was made *at all*, consistent with the provision's use of the word "for," would not render the § 1182(a)(6)(C)(ii)(II) exception surplusage.

[146] INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); *see also* INS v. St. Cyr, 533 U.S. 289, 320 (2001); Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (recognizing that "a court must exhaust all the 'traditional tools' of construction" before finding ambiguity (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))).

And the false-citizenship provisions are undoubtedly harsh—so harsh, in fact, they have been described as "the 'immigrant version of the death penalty.'"[147] Unlike many other removal grounds, the false-citizenship provisions are not waivable.[148] A noncitizen generally "is *not* required to know that a claim to citizenship is false" to trigger inadmissibility or deportability.[149] The only exception applies to noncitizens who (1) "permanently resided in the United States prior to attaining the age of 16," (2) have two U.S.-citizen parents, and (3) "reasonably believed . . . he or she was a citizen" when the false statement was made.[150] A noncitizen who does not fall under this narrow exception will be permanently barred from entering or re-entering the United States if they are found to be inadmissible or deportable under the false-citizenship provisions.[151] The provisions' unwaivable bar resembles the consequences of aggravated felony offenses like murder or drug trafficking.[152] Thus, without a materiality requirement, the false-citizenship provisions would "produce draconian results."[153]

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[147] Munoz-Avila v. Holder, 716 F.3d 976, 978 (7th Cir. 2013) (stating that 8 U.S.C. § 1182(a)(6)(C)(ii) "has been characterized as the 'immigrant version of the death penalty,' because [it] cannot be waived by the Attorney General and therefore operates as a permanent bar" (quoting Sandoval v. Holder, 641 F.3d 982, 984–85 (8th Cir. 2011))); *see also* Dakura v. Holder, 772 F.3d 994, 998 (4th Cir. 2014).

[148] *See* 8 U.S.C. § 1182(a)(6)(C)(iii) (authorizing waiver for clause (i), but not clause (ii)); § 1127(a)(1)(H) (same); § 1227(a)(3)(D); *see also Patel*, 917 F.3d at 1329; Godfrey v. Lynch, 811 F.3d 1013, 1019 (8th Cir. 2016) (recognizing that there is no waiver for falsely claiming U.S. citizenship to obtain a benefit under § 1182(a)(6)(C)(ii)).

[149] *Matter of Zhang*, 27 I. & N. Dec. at 571 (emphasis added).

[150] 8 U.S.C. §§ 1101(f), 1182(a)(6)(C)(ii)(II), 1227(a)(3)(D)(ii). This exception almost exclusively applies to foreign-born children who were adopted by U.S. citizens and did not realize they still needed to naturalize to become U.S. citizens. *Sandoval*, 641 F.3d at 986.

[151] *See Patel*, 917 F.3d at 1329; *Munoz-Avila*, 716 F.3d at 978; *Sandoval*, 641 F.3d at 984–85; *Dakura*, 772 F.3d at 998.

[152] *See* Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010) (stating that the designation "aggravated felony" under 8 U.S.C. § 1101(a)(43) consists of "a category of crimes singled out for the harshest deportation consequences").

[153] *See* Kungys v. United States, 485 U.S. 759, 780 (1988) (declining to read a materiality element into § 1101(f)(6) in part because "[a] literal reading of the statute does not produce draconian results").

The precedential BIA decision in *Matter of Zhang* illustrates the statute's breadth.[154] In that case, a noncitizen unlawfully obtained a Certificate of Naturalization from a former immigration officer, then used that Certificate to apply for a U.S. passport.[155] After he was placed in removal proceedings and charged as deportable under 8 U.S.C. § 1227(a)(3)(D), the noncitizen argued that he was not deportable because he believed he was a U.S. citizen when he obtained the Certificate of Naturalization and, thus, applied for the U.S. passport in good faith.[156] This argument required the BIA to decide whether a noncitizen's "false claim to United States citizenship must be made knowingly to render him or her removable."[157] The BIA determined that it did not.[158] Because the noncitizen had made the false claim of citizenship when applying for a U.S. passport (undeniably a "benefit" under federal law),[159] the BIA determined that he was deportable under the false-citizenship provision *regardless of whether he genuinely believed he was a U.S. citizen*.[160]

Without a materiality element, the false-citizenship provisions will thus lead to draconian outcomes. For example, imagine a person held a U.S. passport and genuinely believed he was a U.S. citizen. He obtained a New York driver's license and, on the application, he indicated that he was a U.S. citizen. Then, the U.S. government placed him in removal proceedings and charged him as removable for making a false claim of U.S. citizenship on his driver's license application after it discovered that the noncitizen was not, in fact, a U.S. citizen.[161] In New York, even undocumented immigrants are

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154 *Matter of Zhang*, 27 I. & N. Dec. at 572.

155 *Id.* at 569–70.

156 *Id.* at 570.

157 *Id.*

158 *Id.* at 572 ("[U]nder the plain language of that section, it is not necessary to show intent to establish that a[noncitizen] is deportable for making a false representation of United States citizenship. A[noncitizen] need only falsely claim to be a United States citizen for any purpose or benefit under the Act or any Federal or State law to be deportable.").

159 *See, e.g.*, Sowah v. Gonzales, 196 F. App'x 576, 577 (9th Cir. 2006).

160 *Id.*

161 While this example may sound far-fetched, the extraordinary complexities of naturalization law relating to the acquisition and derivation of U.S. citizenship at birth, among other things, make this concern all too real. *See* 8 U.S.C. §§ 1401–1409, 1431, 1433. To provide just one example, the U.S. government has

eligible for a driver's license,[162] so a materiality requirement would protect such a person from being deported for answering a wholly irrelevant citizenship question in a manner he believed to be truthful. Under the Eleventh Circuit's contrary reading, however, such a person would be deportable and *permanently* barred from residing in the United States based on an innocent mistake (indeed, for answering a question in a manner he genuinely believed to be truthful) that led to no benefit at all.

Thus, the Eleventh Circuit's assertion that the "under Federal or State law" language in the false-citizenship provisions adequately limits the provisions' reach is misguided.[163] That language limits only the type of "purpose or benefit" covered by the provisions: It must be a purpose or benefit provided under the law. But that language leaves open the reality that, under the Eleventh Circuit's reading, a noncitizen could be permanently removed from the United States for unknowingly making a false claim of U.S. citizenship for any type of purpose or benefit under the law—even if the noncitizen would have been eligible for the benefit regardless of their citizenship status. This does not comport with Congress's intent in enacting the false-citizenship provisions: "to address abuse in the employment verification process by [noncitizens], as well as the fraud and

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questioned the citizenship status of many persons who were birthed with the assistance of a midwife in the Rio Grande Valley of Texas, and the government has revoked passports or refused to issue passports to such persons, even absent any evidence of fraud or misrepresentation. *See, e.g.*, Martinez v. Sec'y of State, 652 F. App'x 758, 759–61 (11th Cir. 2016); Eva Garcia Mendoza, *Immigration Judge vs. Passport Agency – the Battle Over Mario's Citizenship Is Finally Over*, THINK IMMIG. BLOG (Jan. 28, 2020), https://thinkimmigration.org/blog/2020/01/28/immigration-judge-vs-passport-agency-the-battle-over-marios-citizenship-is-finally-over/; Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018, 6:18 PM), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html.

[162] *See* N.Y. VEH. & TRAFF. LAW §§ 201(f)(12), 502(c), 502(e).

[163] Patel v. U.S. Att'y Gen., 917 F.3d 1319, 1331 (11th Cir. 2019) (quoting Matter of Richmond, 26 I. & N. Dec. 779, 784 (B.I.A. 2016)), *aff'd en banc*, 971 F.3d 1258 (11th Cir. 2020).

abuse committed by illegal [noncitizens] to obtain public services and benefits that are limited to United States citizens."[164]

Accordingly, reading the false-citizenship provisions to include a materiality element, consistent with the Supreme Court's focus on common-law language the provisions deploy, adds an important limiting principle and accords with "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]."[165]

CONCLUSION

In holding that no materiality is required under the false-citizenship provisions, the Eleventh Circuit ignored the provisions' common-law language, broke with the provisions' precedential interpretations, and enabled the U.S. government to subject noncitizens to the "immigrant version of the death penalty"[166] for innocent conduct that results in no benefit to the noncitizen. While the Eleventh Circuit's decision in *Patel* is binding on immigration courts and BIA decisions within its jurisdiction, its weight is merely persuasive in other courts; for the reasons explained in this Article, other circuits can and should reject *Patel* when interpreting the false-citizenship provisions.[167]

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[164] *Matter of Richmond*, 26 I. & N. Dec. at 783 (citing legislative history of the false-citizenship provisions).

[165] INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

[166] Munoz-Avila v. Holder, 716 F.3d 976, 978 (7th Cir. 2013).

[167] Matter of Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("We are not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States. Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit." (first citing Ga. Dep't of Med. Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988); then citing Ry. Lab. Execs.' Ass'n v. I.C.C., 784 F.2d 959, 964 (9th Cir. 1986); and then citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985))).