No. 23-916

In the Supreme Court of the United States

FRANCO P. CLEMENT, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner waived his claim to U.S. citizenship by withdrawing his appeal before the Board of Immigration Appeals and asking to be deported.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation, and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 75 F.4th 1193. The order of the Board of Immigration Appeals (Pet. App. 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2023. A petition for rehearing was denied on October 24, 2023 (Pet. App. 23a). On December 12, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 21, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, petitioner was born in Liberia. Administrative Record (A.R.) 88. In 1986, he was admitted to the United States as a lawful permanent resident. A.R. 97.

In the years that followed, he was convicted of various offenses: possessing a controlled substance with intent to distribute and possessing cocaine with intent to distribute, in violation of New Jersey law; possessing a controlled substance with intent to sell or deliver, in violation of North Carolina law; and mail fraud, in violation of federal law. *Ibid.*

In March 2020, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. A.R. 95-99. DHS charged that petitioner was a noncitizen subject to removal on the grounds that he had been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct; convicted of an aggravated felony; and convicted of a violation of law relating to a controlled substance. A.R. 97; see 8 U.S.C. 1227(a)(2)(A)(ii), (A)(iii), and (B)(i).[1] Petitioner moved to terminate his removal proceedings on the ground that, while he was a minor, he had purportedly acquired U.S. citizenship through the naturalization of his parents. A.R. 85-86.

In June 2020, an immigration judge (IJ) denied petitioner's motion to terminate. A.R. 84-87. The IJ found that petitioner's "foreign birth" created a "rebuttable presumption of alienage" and that petitioner had not met his burden of "prov[ing] his citizenship by a preponderance of the evidence." A.R. 85; see A.R. 87. The IJ identified the applicable law as the "law in effect at the time of the act which citizenship is based upon," A.R. 86—which, in petitioner's case, was 8 U.S.C. 1432(a) (1988), repealed by the Child Citizenship Act of 2000,

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

Pub. L. No. 106-395, §§ 103-104, 114 Stat. 1632-1633. Former Section 1432(a) provided as follows:

> A child born outside of the United States of alien parents * * * becomes a citizen of the United States upon fulfillment of the following conditions:
>
> (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 unmarried and 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) (1988).

The IJ noted that petitioner's father had become a naturalized U.S. citizen in 1979 when petitioner was seven years old. A.R. 86. The IJ found, however, that petitioner was "born out of wedlock, and legitimization of [him] as his father's child was never formally established"; that petitioner's father "did not have legal cus-

tody of [petitioner] when [he] was a child"; and that petitioner's parents "were not legally separated." *Ibid.* Given those facts, the IJ determined that petitioner would have been able to acquire U.S. citizenship under former Section 1432(a) only if his mother had become a naturalized citizen before his 18th birthday. A.R. 86-87; see 8 U.S.C. 1432(a)(3) and (4) (1988). And the IJ concluded that because petitioner's mother did not become a naturalized citizen until 1996, when petitioner was 24 years old, petitioner was "precluded from acquiring derivative citizenship." A.R. 87.

The IJ therefore found petitioner removable as charged and ordered his removal to Liberia. A.R. 45-47. Petitioner waived appeal to the Board of Immigration Appeals (Board), rendering the removal order final. A.R. 46; see 8 C.F.R. 1003.39.

2. In April 2021—more than nine months later—petitioner submitted new evidence, including a decree issued by a Liberian court in 1971 legitimizing petitioner as his father's child. A.R. 29, 37. An IJ construed petitioner's submission as a motion to reopen his removal proceedings. A.R. 29. The IJ then denied the motion as untimely because it was filed more than 90 days after entry of the final removal order. A.R. 30; see 8 U.S.C. 1229a(c)(7)(C)(i). The IJ also declined to exercise his discretion to reopen the proceedings *sua sponte*. A.R. 30-31. The IJ explained that notwithstanding the new evidence showing that petitioner had been "legitimized" as his father's son, petitioner could have acquired U.S. citizenship under former Section 1432(a) only if his mother had become a naturalized citizen before his 18th birthday. A.R. 32; see 8 U.S.C. 1432(a)(1) and (4) (1988) (requiring the naturalization of both parents while the child is under the age of 18). And the IJ reaffirmed that

because petitioner's mother had not become a naturalized citizen before that date, petitioner was "precluded from acquiring derivative citizenship from his parents." A.R. 32.

Petitioner filed a notice of appeal, which the Board rejected for lack of a certificate of service. A.R. 5. Petitioner then filed a second notice of appeal, which the Board received on June 21, 2021. A.R. 7. On July 5, 2021, petitioner moved to withdraw his appeal, stating that he would "like to * * * give up and be deported." A.R. 5. In August 2021, the Board issued an order granting petitioner's motion. Pet. App. 22a.

3. Despite having asked to "be deported," A.R. 5, petitioner filed a petition for review in the court of appeals, seeking to "appeal[] the denial of his claim of derivative citizenship he raised before the Immigration Court," C.A. Doc. 1, at 2 (Sept. 30, 2021).

The court of appeals denied the petition for review. Pet. App. 1a-19a. After concluding that it had jurisdiction to review the Board's order granting his motion to withdraw, *id.* at 8a, the court held that petitioner had "waived any right to have th[e] [c]ourt determine his citizenship claim," *id.* at 17a. In the court's view, "[t]he problem" was "not that [petitioner] did not raise his citizenship claim before the Board," but that "he voluntarily ended the proceedings and explicitly asked to be deported." *Id.* at 16a; see *id.* at 16a n.1 (distinguishing petitioner's "affirmative acceptance" of the IJ's decision from a mere "failure to exhaust"). Petitioner's "request to be deported," the court found, "prove[d] that [he] fully understood the consequences of his decision to abandon the process." *Id.* at 17a. And because his request to "be deported [wa]s fundamentally inconsistent with the exercise of a right to judicial review," *ibid.*, the

court declined to "entertain the merits" of his citizenship claim, *id.* at 5a.

4. The court of appeals denied rehearing en banc. Pet. App. 23a.

ARGUMENT

Petitioner contends (Pet. 19-28) that the court of appeals erred in determining that he waived his claim to U.S. citizenship by withdrawing his appeal before the Board and asking to be deported. The court of appeals' determination is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle for further review because petitioner would not be entitled to a declaration of U.S. citizenship even if a court resolved the merits of his citizenship claim. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly treated petitioner's request to withdraw his administrative appeal and be deported as a waiver of his claim to U.S. citizenship. Pet. App. 10a-19a.

a. A waiver is the "intentional relinquishment or abandonment of a known right." *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (citation omitted). Here, after the IJ rejected petitioner's claim to be "a U.S. citizen who cannot be lawfully removed," A.R. 30, petitioner initially appealed to the Board but later moved to withdraw his appeal, stating that he wished to "give up and be deported," A.R. 5. As the court of appeals correctly recognized, petitioner's "request to withdraw his appeal and be deported [wa]s fundamentally inconsistent with the exercise of a right to judicial review." Pet. App. 17a. And "his request to be deported * * * prove[d] that [he] fully understood the consequences of his decision to abandon the process." *Ibid.* Thus, by "voluntarily end[ing]

the proceedings and explicitly ask[ing] to be deported," *id.* at 16a, petitioner intentionally relinquished or abandoned his claim to U.S. citizenship. The court therefore correctly deemed that claim "waived." *Id.* at 17a.[2]

b. Petitioner's counterarguments lack merit. Relying on this Court's statement in *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922), that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien," *id.* at 284, petitioner contends that a "claim of citizenship" is "jurisdictional" in the sense that it can never be waived or forfeited, Pet. 19 (quoting *Ng Fung Ho*, 259 U.S. at 284). But "[j]urisdiction, this Court has observed, is a word of many, too many, meanings." *Wilkins* v. *United States*, 598 U.S. 152, 156 (2023) (citation omitted). In *Ng Fung Ho*, the word refers simply to the Executive's "statutory authority" to order deportation. *City of Arlington* v. *FCC*, 569 U.S. 290, 296-297 (2013); see *id.* at 297-298 ("Because the question * * * is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"). And like other claims that an agency has exceeded its statutory authority, claims of citizenship are subject to ordinary principles of waiver. After

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[2] Although the court of appeals at various points described petitioner's request to withdraw his appeal and be deported as a "forfeiture[]," Pet. App. 16a, the court also understood petitioner's request to constitute a "waive[r]" of his citizenship claim, *id.* at 17a. Indeed, petitioner himself acknowledges (Pet. 23) that the court treated his request as "an intentional relinquishment." And although he asserts that his relinquishment was "unintentional," Pet. 3; see Pet. 24-25, that factbound assertion lacks merit and does not warrant this Court's review. Cf. *Vance* v. *Terrazas*, 444 U.S. 252, 260 (1980) (recognizing that "an intent to relinquish citizenship" can be "expressed in words" or "found as a fair inference from proved conduct").

all, when a person "seeks to obtain the privileges and benefits of citizenship," he bears "the burden" to "show his eligibility for citizenship in every respect." *Berenyi* v. *District Dir., INS*, 385 U.S. 630, 637 (1967).

Contrary to petitioner's contention (Pet. 26-27), 8 U.S.C. 1252(b)(5)(A) does not suggest otherwise. It provides: "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. 1252(b)(5)(A). Yet, as the court of appeals observed, Section 1252(b)(5)(A) "is silent as to whether a person may waive or forfeit the right to judicial review of a citizenship claim." Pet. App. 14a. And where, as here, there is no genuine issue of material fact that the person "g[a]ve up" on his citizenship claim and asked to "be deported," A.R. 5, nothing in Section 1252(b)(5)(A) precludes the court of appeals from "decid[ing]" the previously advanced claim of citizenship by deeming it waived, 8 U.S.C. 1252(b)(5)(A).

Petitioner's view that citizenship claims can never be waived or forfeited also finds no support in 8 U.S.C. 1481(a), which identifies various expatriating acts—acts by which a "person who is a national of the United States * * * shall lose his nationality." 8 U.S.C. 1481(a). Petitioner observes (Pet. 24) that Section 1481(a)'s list of expatriating acts does not include waiver or forfeiture in removal proceedings. But the question raised by petitioner's citizenship claim is not whether petitioner *expatriated*; it is whether he was ever a citizen of the United States *in the first place*. See *Berenyi*, 385 U.S. at 636-637 (distinguishing the government "seek[ing] to strip a person of citizenship already acquired" from a

person "seek[ing] to obtain the privileges and benefits of citizenship" in the first place). It is therefore immaterial whether petitioner's request to withdraw his appeal and be deported appears on Section 1481(a)'s list of expatriating acts.

Finally, petitioner errs in asserting (Pet. 27) that the decision below raises Suspension Clause concerns. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2. As the Court recognized in *DHS* v. *Thuraissigiam*, 591 U.S. 103 (2020), the writ of habeas corpus at the time of the adoption of the Constitution "simply provided a means of contesting the lawfulness of restraint and securing release" from unlawful detention. *Id.* at 117. Petitioner is not in detention. See Gov't C.A. Supp. Br. 1 n.1 (noting that petitioner "was released from immigration custody on April 14, 2022"); Pet. C.A. Br. 9 (stating that petitioner "currently resides in Newark, New Jersey"). Accordingly, petitioner does not seek "simple release." *Thuraissigiam*, 591 U.S. at 119 (citation omitted). Instead, like the respondent in *Thuraissigiam*, petitioner seeks authorization "to remain lawfully in the United States" or "administrative or judicial review leading to that result." *Id.* at 119-120. And as the Court in *Thuraissigiam* held, such relief "falls outside the scope of the writ as it was understood when the Constitution was adopted." *Id.* at 119. The court of appeals' determination that petitioner waived his right to such relief therefore does not implicate the Suspension Clause.

2. Contrary to petitioner's assertion (Pet. 9-19), the decision below does not conflict with the decision of another court of appeals. None of the other circuits' deci-

sions that petitioner cites (*ibid.*) considered the effect of an intentional relinquishment or abandonment of a claim to U.S. citizenship.

In *Robinson* v. *Garland*, 56 F.4th 192 (1st Cir. 2022), for example, the respondent in removal proceedings initially "conceded" before an IJ that "'derivative citizenship is not a possibility,'" but later asserted a "derivative U.S. citizenship" claim in an untimely appeal before the Board. *Id.* at 193. *Robinson* thus involved, at most, "a missed filing deadline or failure to exhaust an argument"—not a "decision to abandon the process." Pet. App. 17a. Accordingly, the First Circuit did not consider whether Robinson had intentionally relinquished or abandoned his citizenship claim. See *Robinson*, 56 F.4th at 194.

The Second Circuit's decision in *Poole* v. *Mukasey*, 522 F.3d 259 (2008), likewise involved an "untimely" appeal before the Board—not an intentional relinquishment or abandonment of a claim to U.S. citizenship. *Id.* at 262. Thus, although the court addressed the application of 8 U.S.C. 1252(d)(1)'s exhaustion requirement—a provision not at issue here, see Pet. App. 16a n.1 (declining to decide "whether a petition with a citizenship claim must satisfy Section 1252(d)(1)'s exhaustion requirement")—the case did not present any issue of waiver. See *Poole*, 522 F.3d at 264.

The Third Circuit similarly did not consider any issue of waiver in *Dessouki* v. *Attorney General*, 915 F.3d 964 (2019). The court in that case held that it had jurisdiction under 8 U.S.C. 1252(b)(5)(A) to consider a citizenship claim. *Dessouki*, 915 F.3d at 966. But given that the applicant had pursued "the same" citizenship claim "[f]or years," including before immigration judges and the Board, the court had no occasion to consider whether

he had intentionally relinquished or abandoned that claim. *Ibid.*; see *Steele* v. *Attorney Gen.*, No. 21-3260, 2023 WL 5426741, at *1-*2 (3d Cir. Aug. 23, 2023) (per curiam) (similarly lacking any occasion to consider the issue of waiver).

The intentional relinquishment or abandonment of a citizenship claim was also not at issue in the Fifth Circuit's unpublished decision in *Bekou* v. *Holder*, 363 Fed. Appx. 288 (2010) (per curiam). Although the respondent in those removal proceedings initially waived an appeal from the immigration judge to the Board, the court of appeals considered his citizenship claim. *Id.* at 290-292. Unlike here, however, Bekou did not withdraw his pending administrative appeal or affirmatively ask to be deported. See Pet. App. 18a-19a (distinguishing "merely waiv[ing]" an appeal from "withdraw[ing]" an appeal and "ask[ing] to be deported"). In fact, he "filed a timely appeal" to the Board after having initially waived one. *Bekou*, 363 Fed. Appx. at 290. The Fifth Circuit therefore did not consider whether he had intentionally relinquished or abandoned his citizenship claim. In any event, the Fifth Circuit's unpublished decision in *Bekou* is nonprecedential, so it cannot create any conflict warranting this Court's review. See 5th Cir. R. 47.5.4.

The Ninth Circuit's decision in *Rivera* v. *Ashcroft*, 394 F.3d 1129 (2005), is likewise inapposite. The petitioner in *Rivera* "merely waived his appeal of the [IJ's] original order of removal"; he "did not withdraw his appeal or ask to be deported." Pet. App. 18a-19a; see *Rivera*, 394 F.3d at 1133, 1137. The Ninth Circuit therefore considered only whether an individual could "*unintentionally* relinquish U.S. citizenship by waiving the right to appeal a deportation order." *Rivera*, 394 F.3d at 1136 (emphasis added). The Ninth Circuit did not consider the

effect of an *intentional* relinquishment or abandonment of a citizenship claim, as occurred here. See Pet. App. 16a-17a. Moreover, Rivera "did not petition for review from a deportation proceeding; instead, he filed a petition for a writ of habeas corpus after his deportation proceedings concluded." *Id.* at 18a. As a result, his "actions during the administrative removal proceedings were not directly related to" his case before the Ninth Circuit. *Ibid.* And because Congress has since eliminated habeas jurisdiction in that context, any conflict between the decision below and *Rivera* would lack ongoing significance anyway. *Ibid.*; see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A), 119 Stat. 310.

Gonzalez-Alarcon v. *Macias*, 884 F.3d 1266 (10th Cir. 2018), also did not involve the intentional relinquishment or abandonment of a citizenship claim. The Tenth Circuit in that case held that Section 1252(d)(1) "does not require that a claim of citizenship be exhausted." *Id.* at 1273. But Section 1252(d)(1)'s exhaustion requirement is not at issue here, see Pet. App. 16a n.1, and the Tenth Circuit did not address whether a citizenship claim could be waived, see *Gonzalez-Alarcon*, 884 F.3d at 1272-1273.

Frank v. *Rogers*, 253 F.2d 889 (D.C. Cir. 1958), likewise did not address that issue. The D.C. Circuit in that case quoted this Court's statement in *Ng Fung Ho* that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien." *Id.* at 890 (quoting *Ng Fung Ho*, 259 U.S. 284). But as explained above, that statement does not imply that a citizenship claim cannot be waived, see pp. 7-8, *supra*, and the D.C. Circuit in *Frank* did not address any issue of waiver.[3]

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[3] Petitioner also cites (Pet. 15 n.3) the Eleventh Circuit's decision in *Claver* v. *U.S. Attorney General*, 245 Fed. Appx. 904 (2007) (per

3. In any event, this case would be a poor vehicle for further review because petitioner would not be entitled to a declaration of U.S. citizenship even if a court were to resolve the merits of his citizenship claim. In his first counseled filing in the court of appeals, petitioner stated that he would argue on the merits that "the IJ and [the Board] had no jurisdiction to deport him because he is entitled to derivative citizenship under former [Section] 1432(a), and, if he is not so entitled, that the application of the statute violates his rights under the Fifth Amendment's Equal Protection [component]." Pet. C.A. Resp. to Jurisdictional Question 9. In his opening brief, however, petitioner abandoned any contention that he was entitled to U.S. citizenship under former Section 1432(a) and argued only that the statute violated the Fifth Amendment. See Pet. C.A. Br. 3.

Accordingly, even if a court were to reach the merits of petitioner's equal-protection challenge and conclude that the statute violated the Fifth Amendment, petitioner would still not be entitled to "a declaration that he is a U.S. citizen as a judicial remedy." Pet. App. 2a. "When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 73 (2017) (brackets, citations, and

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curiam). But that unpublished decision is nonprecedential, see 11th Cir. R. 36-2, and any intra-circuit conflict with the decision below would not itself warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, the noncitizen in *Claver*, unlike petitioner here, did not withdraw his appeal before the Board or ask to be deported. 245 Fed. Appx. at 905.

internal quotation marks omitted). And in the particular context here, the extension of benefits—which would entail the "'conferral of citizenship on a basis other than that prescribed by Congress'"—would not be "an appropriate remedy for any equal protection violation." *Id.* at 78 (Thomas, J., concurring in the judgment in part) (citation omitted); see *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988) (holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers"). Because petitioner would not be entitled to a declaration of U.S. citizenship in any event, further review is unwarranted. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not review to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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