No. 23-916

IN THE

Supreme Court of the United States

FRANCO P. CLEMENT,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Government does not contest the importance of the question presented. Nor could it. As a result of the decision below, Petitioner's request to withdraw an administrative appeal—a request made when uncounseled and detained—irrevocably strips him of the American citizenship he claims to possess. Petitioner will be deported without any opportunity, now or later, for any federal court to adjudicate his claim that he is, in fact, a U.S. citizen.

The Government fares no better on the other Rule 10 factors. It principally avoids them by focusing on the merits, defending the Eleventh Circuit's holding that persons trapped in deportation proceedings may waive a claim of U.S. citizenship—no matter how valid—without ever appearing before an Article III court. But this position contradicts the First, Third, Fifth, and Ninth Circuits, all of which hold that a person may defend against removal by asserting citizenship in a petition for review, regardless of whether that claim was waived before the agency. It is also incompatible with the Second, Tenth, and D.C. Circuits, which affirm the unwavering obligation of federal courts to decide citizenship claims presented in that posture. Simply put, had Petitioner asserted his U.S. citizenship in any of these circuits, his claim would have been decided on the merits.

Beyond the split, the Government's argument is deeply flawed. It all but ignores this Court's binding precedent in *Ng Fung Ho* v. *White*, which holds that the Executive Branch has no jurisdiction to deport a citizen, and that petitioners claiming citizenship are "entitled to a *judicial determination* of their claims that they are citizens of the United States." 259 U.S. 276, 284 (1922) (emphasis added). Unable to

distinguish it, the Government treats *Ng Fung Ho* as though it has been overruled *sub silentio* by *City of Arlington* v. *FCC*, 569 U.S. 290 (2013), a *Chevron* case that has nothing to do with *Ng Fung Ho* or the issues here.

The Government likewise cannot reconcile the Eleventh Circuit's decision with this Court's instruction in *Vance* v. *Terrazas*, 444 U.S. 252 (1980), or the plain language of 8 U.S.C. § 1252(b)(5). *Vance* holds that American citizenship may not be abandoned absent a *specific intent* to relinquish it. *Vance*, 444 U.S. at 261. The Government articulates no basis to treat a waiver of an *administrative appeal* as an intentional relinquishment of *citizenship itself*—particularly where courts of appeals have specifically rejected the argument. And the Government's statutory argument is even further afield. Congress commanded in § 1252(b)(5) that the courts of appeals "shall decide" citizenship claims presented in a petition for review. Nothing in that statutory command—which is directed at *the courts*—is contingent on a petitioner's actions before *the agency*.

The Government assures the Court that it need not weigh in on the threshold question here because Petitioner—so says the Government—would probably lose on his citizenship claim anyway. But that (incorrect) contention is irrelevant. The question presented is squarely before the Court and worthy of review. Whether Petitioner would win or lose on remand does not lessen the suitability of this case as a vehicle to decide whether Petitioner is entitled to an adjudication of his claim in the first place.

The Court should grant the petition for a writ of certiorari.

I. There Is a Clear Circuit Split on the Question Presented.

The Eleventh Circuit's ruling conflicts with at least seven circuits holding that the courts of appeals *must* decide citizenship claims, notwithstanding waiver or forfeiture before the agency. In its attempt to blur this obvious circuit split—one which the Eleventh Circuit itself acknowledged, see Pet. App. 11a & 17a—the Government mischaracterizes the decisions Petitioner cites and draws an untenable distinction between a "waiver" of appeal and a "withdrawal" of one. These arguments are meritless.

A. The First, Third, Fifth, and Ninth Circuits Hold that Citizenship Claims Cannot Be Waived in Agency Proceedings.

The Eleventh Circuit held that it could not decide Petitioner's timely claim of U.S. citizenship because he waived the right to judicial review in proceedings before the Board of Immigration Appeals ("BIA"). Pet. App. 19a. In this case, that waiver supposedly occurred when petitioner withdrew his appeal to the BIA. After receiving an order from the BIA rejecting his appeal as defectively served, Petitioner hand-wrote in the margin of that order: "I will like to withdraw Appeal to the B.I.A. And give up and be deported. I do not want to be in detention Anymore." Pet. App. 5a.

As Petitioner explained in his opening brief, the First, Third, Fifth, and Ninth Circuits have specifically held that *a claim of citizenship cannot be waived* in proceedings before the agency, and thus would have decided Petitioner's claim on the merits.

The Government attempts to distinguish these decisions on the ground that only the Eleventh Circuit

considered a waiver effected by a motion to withdraw and a request for deportation. Opp. 10–11. But a waiver is a waiver. Like the Eleventh Circuit, each of these circuits addressed whether the court may (or must) decide a citizenship claim notwithstanding a petitioner's *waiver* of that claim in agency proceedings.

Take *Rivera* v. *Ashcroft*, 394 F.3d 1129 (9th Cir. 2005). There, the Ninth Circuit held that, pursuant to *Ng Fung Ho* and *Vance*, it was constitutionally and jurisdictionally *required* to adjudicate Rivera's citizenship, even though he "accept[ed] deportation and waiv[ed] his appeal" of the Immigration Judge's ("IJ") denial of his citizenship claim. *Id.* at 1137.

The Government asserts that the "Ninth Circuit . . . considered only whether an individual could 'unintentionally relinquish U.S. citizenship by waiving the right to appeal a deportation order,'" Opp. 11 (emphasis omitted) (quoting *Rivera*, 394 F.3d at 1136), while the Eleventh Circuit considered "an intentional relinquishment or abandonment of a citizenship claim," *id.* at 11–12 (emphasis omitted). This word salad is meaningless.

Indeed, it is almost impossible to decipher the distinction the Government is trying to draw. As the Government acknowledges, a "waiver" is "an intentional relinquishment or abandonment of a known right." Opp. 6 (citation omitted). In the Ninth Circuit, Rivera "agreed to waive his appeal" of the IJ's decision rejecting his citizenship claim, and he accepted deportation because "he believed he would have to remain in INS custody while his appeal was pending." *Rivera*, 394 F.3d at 1133.

There is no material difference between Rivera's agreement to "waive" an agency appeal and

Petitioner's decision to "withdraw" an agency appeal, and yet the two circuits reached directly conflicting results. In the Ninth Circuit, judicial review of the citizenship claim is *mandatory*; in the Eleventh Circuit, judicial review is *barred*.

The Government also attempts to distinguish *Rivera* on the basis that the decision predated the REAL ID Act of 2005 and therefore involved a petition for habeas corpus. Opp. 12. But *Rivera*'s holding did not turn on the procedural avenue by which the citizenship claim arrived in federal court, and the Government ignores that the Ninth Circuit has applied *Rivera* in post-REAL ID Act cases involving petitions for review. See *Iasu* v. *Smith*, 511 F.3d 881, 891 (9th Cir. 2007) (holding that "a person [has] a constitutional right to judicial review that may be obtained 'even after accepting deportation and waiving his right to appeal the IJ's decision.'" (quoting *Rivera*, 394 F.3d at 1137)); *Brown* v. *Holder*, 763 F.3d 1141, 1146–47 (9th Cir. 2014) (holding that, "because the government is not permitted to deport citizens," petitioner's waiver of his citizenship claim before the agency was irrelevant).

The Government's attempts to distinguish the decisions of the other circuits fare no better.

In *Bekou* v. *Holder*, the Fifth Circuit adjudicated Bekou's citizenship claim after expressly ruling that he had waived his right to appeal the IJ's order. 363 Fed. App'x 288 (5th Cir. 2010) (per curiam). Without basis, the Government again suggests that Bekou's "waiver" of an administrative appeal was somehow materially different from Petitioner's "withdrawal" of one. Opp. 11. Again, the Government's contention makes no sense. The Fifth Circuit specifically held that Bekou's waiver of his right to appeal his

citizenship claim was "knowing and intelligent" and that the BIA accordingly "lacked jurisdiction" to consider it. *Bekou*, 363 F. App'x at 290–91. Nonetheless, the court held that "[t]he INA explicitly places the determination of nationality claims in the hands of the courts," and therefore decided Bekou's claim anyway. *Id.* at 291–92 (quoting *Alwan* v. *Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004)); see also *Joseph* v. *Holder*, 720 F.3d 228, 230 (5th Cir. 2013) (holding that citizenship is an "essential jurisdictional fact" in removal proceedings).

In *Robinson* v. *Garland*, the First Circuit likewise adjudicated petitioner's citizenship notwithstanding a clear and unequivocal waiver of that claim before the agency. 56 F.4th 192, 193 (1st Cir. 2022) (citing *Rivera*, 394 F.3d at 1136–37). As the court explained, Robinson not only "conceded through counsel" that "derivative citizenship [was] not a possibility"—conduct that itself may qualify as an intentional relinquishment of a citizenship claim—but he also "*accepted an order of removal* from the [IJ] . . . and *waived appeal* to the [BIA]." Ibid. (emphasis added). The Government's suggestion that *Robinson* "involved, at most, 'a missed filing deadline or failure to exhaust an argument,'" Opp. 10 (quoting Pet. App. 17a), grossly misreads the case.

The Government's attempts to wave away the Third Circuit's decisions are similarly unavailing. The Government proclaims that, in *Steele* v. *Attorney General*, the Third Circuit was "lacking any occasion to consider the issue of waiver." Opp. 11. But Steele "entered the United States on a *visitor's* visa, reported *Panamanian* citizenship, and conceded through counsel before the IJ to being a *noncitizen*." 2023 WL 5426741, at *2 (3d Cir. Aug. 23, 2023) (per curiam) (emphasis added). Any *one* of those acts qualify as a

waiver of Steele's citizenship claim, but the Third Circuit reached the merits—not because it failed to identify Steele's waiver, but because *Ng Fung Ho* required a decision on that claim regardless. Ibid. ("Because the government lacks authority to remove a person unless he or she is a noncitizen, see *Ng Fung Ho*[, 259 U.S. at 284], we turn first to Steele's assertion of U.S. citizenship."); see also *Dessouki v. Attorney General*, 915 F.3d 964, 966–67 (3d Cir. 2019) (holding that § 1252(b)(5)(A) "imposes a mandatory requirement" for federal court review of a citizenship claim).

In short, the First, Third, Fifth, and Ninth Circuits hold that courts of appeals *must* decide citizenship claims presented in a petition for review, even if a petitioner deliberately waives that claim in proceedings before the agency. That is the opposite of the Eleventh Circuit's holding.

B. The Second, Tenth, and D.C. Circuits Similarly Hold That Courts Must Decide Citizenship Claims.

The Second, Tenth, and D.C. Circuits have affirmed the same substantive rules that anchor the decisions of the circuits discussed above.

As detailed in Petitioner's opening brief, these circuits all hold (i) that the Executive has no jurisdiction to remove a citizen, (ii) that citizenship cannot be unintentionally forfeited in removal proceedings, and (iii) that courts of appeals therefore have an unwavering obligation to decide citizenship claims presented in a petition for review. See, e.g., *Poole* v. *Mukasey*, 522 F.3d 259, 264 (2d Cir. 2008) (holding that citizenship is "jurisdictional" in removal proceedings and that the Constitution does not allow

citizenship to be "unintentionally relinquish[ed]" in agency proceedings (quoting *Rivera*, 394 F.3d at 1136)); *Gonzalez-Alarcon* v. *Macias*, 884 F.3d 1266, 1268–69, 1272 (10th Cir. 2018) (holding that the Executive cannot remove citizens and "citizenship cannot be relinquished" by failing to contest removal); *Frank* v. *Rogers*, 253 F.2d 889, 891 (D.C. Cir. 1958) (holding that citizenship is "jurisdictional," and that "[u]ntil the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt").

While these three circuits do not address "waiver" specifically, their holdings are fundamentally incompatible with the decision below. There can be no doubt that, had Petitioner brought his citizenship claim in any of these jurisdictions, he would have been entitled to a decision on the merits.

II. The Eleventh Circuit's Decision Is Wrong.

The Government's merits' position is also wrong. Like the Eleventh Circuit, the Government disregards this Court's binding precedents in *Ng Fung Ho* and *Vance* and fails to reconcile its proposed rule with 8 U.S.C. § 1252(b)(5). Review by this Court is warranted to clarify the confusion the Eleventh Circuit created.

First, the Government boldly claims it has the power to deport a U.S. citizen, and that this Court's decision in *Ng Fung Ho*, 259 U.S. at 284, no longer stands in its way. Opp. 7. But *Ng Fung Ho* holds that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien," 259 U.S. at 284, and seven courts of appeals have construed this language to mandate judicial review of citizenship claims. Citing *City of Arlington*, 569 U.S. at 296–97, the Government asserts that *Ng Fung Ho* is not about "jurisdiction," but rather an agency's

"statutory authority" to order the deportation of citizens. Ibid. And like any other claim that an agency has exceeded its "statutory authority," the Government posits that "claims of citizenship are subject to ordinary principles of waiver." Ibid.

But *Ng Fung Ho*—and the cases interpreting it—make clear that the boundaries on the Executive's authority to remove citizens are not merely statutory. As this Court clarified in *Cromwell* v. *Benson*, "the claim of citizenship 'is [a] denial of an essential jurisdictional fact' *both in the statutory and constitutional sense*." 285 U.S. 22, 60 (1932) (quoting *Ng Fung Ho*, 259 U.S. at 285) (emphasis added). Thus, "the *Constitution* requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." *Agosto* v. *INS*, 436 U.S. 748, 753–54 (1978) (emphasis added).

City of Arlington, a case about *Chevron* deference, did not implicitly overrule this longstanding rule. Rather, *City of Arlington* simply held that *Chevron* deference applies to an agency's interpretation of its governing statute, even if the statutory provision the agency interpreted is jurisdictional. See generally 569 U.S. at 297. But the Eleventh Circuit was not tasked with determining whether the BIA or the IJ properly interpreted its governing statute. The only statute at issue here is § 1252(b)(5), which requires *courts*—not agencies—to decide citizenship claims in petitions for review. The BIA and the IJ did not (and could not) interpret that statute. *City of Arlington* has no role to play.

Second, the Government does not address this Court's instruction in *Vance* that citizenship may not be abandoned absent a *specific intent* to relinquish it.

Vance, 444 U.S. at 261. Nor does the Government reconcile its position with 8 U.S.C. § 1481(a)(1)–(7), which contains a narrow and exhaustive list of circumstances in which citizenship may be relinquished. According to the Government, neither authority poses problems here because (i) Petitioner's waiver of an *administrative appeal* qualifies as an intentional relinquishment of *citizenship itself*, Opp. 7 & n.2, and (ii) the decision below does not "strip [Petitioner] of citizenship already acquired" so the protections against expatriation that Congress enacted through § 1481(a) do not apply, *id.* at 8 (quoting *Berenyi* v. *District Dir., INA*, 385 U.S. 630, 637 (1967)).

Both arguments fail. The Eleventh Circuit did not make any factual finding that Petitioner withdrew his appeal with the specific intent to abandon citizenship. See *Vance*, 444 U.S. at 261. And the Government misstates the standard for review of a derivative citizenship claim like Petitioner's. While an order granting *naturalization* would confer *new* "privileges and benefits" not previously held, see *Berenyi*, 385 U.S. at 636–37, a declaration of *derivative citizenship* would "confirm [Petitioner's] pre-existing citizenship rather than grant h[im] rights that []he does not now possess," *Miller* v. *Albright*, 523 U.S. 420, 432 (1998). As in *Miller*, Petitioner claims he is a citizen today. The decision below has accordingly "strip[ped] [him] of citizenship already acquired," and cannot be justified under § 1481(a).

Finally, the Government's interpretation of § 1252(b)(5) is also wrong. Congress commanded there that the courts of appeals "shall decide" citizenship claims presented in a petition for review. While the Government argues that this provision "is silent as to whether a person may waive or forfeit the

right to judicial review of a citizenship claim," Opp. 8 (quoting Pet. App. 14a), nothing in that statutory command—which is directed at *the courts*—depends on a petitioner's actions before *the agency*.

III. The Question Presented Is Important and Warrants the Court's Immediate Review.

The question presented is extremely important. As a result of the decision below, Petitioner's pro se request to withdraw an administrative appeal and escape detention has irrevocably stripped him of the citizenship he claims to possess. Absent this Court's intervention, Petitioner will be deported from the country and he will have no opportunity—now or in the future—for any federal court to adjudicate his citizenship claim.

And the consequences of this ruling are not limited to Petitioner. Thousands of U.S. citizens are routinely swept into removal proceedings as part of the Executive's efforts to enforce the immigration laws. See, e.g., Eyder Peralta, *You Say You're An American, But What If You Had To Prove It Or Be Deported?*, NPR, Dec. 22, 2016 (reporting research "that in 2010 alone, more than 4,000 U.S. citizens were detained or deported").[1] Under the Eleventh Circuit's ruling, every one of them that fails to successfully prosecute an agency appeal may be stripped of citizenship and left without recourse to any judicial remedy. That result is fundamentally inconsistent with the protections of citizenship that Congress, this Court, and the Constitution provide.

Given all this, the Government's contention that Petitioner may not ultimately prevail on his claim of

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[1] Available at https://tinyurl.com/2s388auw.

citizenship does not matter. The question presented is squarely before the Court and worthy of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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