No. 23-916



IN THE

# Supreme Court of the United States

FRANCO P. CLEMENT,

*Petitioner*,

v.

U.S. ATTORNEY GENERAL,

*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

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February 21, 2024

## QUESTION PRESENTED

It is well established that the Executive Branch has no jurisdiction to deport a U.S. citizen, see *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922), and that citizenship may not be abandoned absent a specific intent to relinquish it, *Vance* v. *Terrazas*, 444 U.S. 252, 261 (1980). Thus, this Court instructed, the assertion of American citizenship represents "a denial of an essential jurisdictional fact" in removal proceedings, and petitioners claiming citizenship are "entitled to a *judicial determination* of their claims that they are citizens of the United States." *Ng Fung Ho*, 259 U.S. at 284–85 (emphasis added). In keeping with these principles, Congress instructed that, when a petitioner defends against a final order of removal by asserting a claim of U.S. citizenship, the court of appeals "shall decide" the nationality claim. 8 U.S.C. § 1252(b)(5)(A).

In the decision below, the Eleventh Circuit held that the question of citizenship is not "jurisdictional" in a removal proceeding, and that Petitioner forfeited his citizenship claim when proceeding *pro se* before the Board of Immigration Appeals. It therefore ordered Petitioner removed from the United States without deciding the merits of his claim that he is—and for nearly forty years has been—an American citizen.

The question presented is:

When a petitioner challenges a final order of removal by asserting his U.S. citizenship in a timely petition for review, may a court of appeals reject the challenge and affirm the removal order on the ground that the petitioner waived or forfeited the citizenship claim in immigration proceedings?

## PARTIES TO THE PROCEEDING

Petitioner Franco P. Clement was the petitioner below.

Respondent U.S. Attorney General was the respondent below.

## RELATED PROCEEDINGS

- *Clement* v. *U.S. Attorney General*, No. 21-cv-13382, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered July 28, 2023.

- *Clement* v. *U.S. Attorney General*, No. 21-cv-13382, U.S. Court of Appeals for the Eleventh Circuit. Rehearing and rehearing en banc denied October 24, 2023.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The judgment of the Court of Appeals for the Eleventh Circuit is reported at 75 F.4th 1193 and reproduced at Appendix ("Pet. App.") 1a. The decision of the Board of Immigration Appeals ("BIA") granting Petitioner's motion to withdraw his appeal is reproduced at Pet. App. 21a. The decision of the Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc is unreported but reproduced at Pet. App. 23a.

## JURISDICTION

The Eleventh Circuit filed its published opinion denying the petition on July 28, 2023, Pet. App. at 1a, and denied the petitions for rehearing and rehearing en banc on October 24, 2023, *Id.* at 23a. On December 12, 2023, on Petitioner's application, Justice Thomas extended the time to file a petition for certiorari through and including February 21, 2024. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

Section 1252(b)(5) of the Immigration and Nationality Act ("INA") provides:

> **Treatment of nationality claims.**
>
> **(A) Court determination if no issue of fact**
>
> 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.
>
> **(B) Transfer if issue of fact**
>
> If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

8 U.S.C. 1252(b)(5).

Other relevant statutory provisions are reprinted in the Appendix at 24a–46a.

## STATEMENT OF THE CASE

A shockingly large number of American citizens are improperly swept into removal proceedings as part of the Executive Branch's attempts to enforce the immigration laws. See infra at 31–34. This case presents an important question concerning the interpretation of a provision of immigration law that protects against the deportation of American citizens and the unintentional relinquishment of American citizenship.

For more than a century, it has remained a bedrock principle of American law that the Executive Branch has no jurisdiction to deport a U.S. citizen. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *Agosto* v. *INS*, 436 U.S. 748, 753–54 (1978). An assertion of citizenship in a removal proceeding represents "a denial of an essential jurisdictional fact," *Ng Fung Ho*, 259 U.S. at 284, and courts are necessarily cautious not to allow citizenship to be abandoned absent a specific intent to relinquish it, *Vance* v. *Terrazas*, 444 U.S. 252, 261 (1980). That is one reason why this Court has placed "the burden of proving alienage" upon the government, *U.S. ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153 (1923), and why this Court has further held that petitioners claiming citizenship are "entitled to a judicial determination" of a U.S. citizenship claim, *Ng Fung Ho*, 259 U.S. at 284–85.

In recognition of these principles, Congress, too, mandated judicial review of citizenship claims. In 8 U.S.C. § 1252(b)(5)(A), Congress instructed that, when a petitioner defends against a final order of removal by asserting a claim of U.S. citizenship, the court of appeals "*shall decide* the nationality claim." Ibid. (emphasis added). Indeed, because citizenship is

"jurisdictional," *Ng Fung Ho*, 295 U.S. at 284, and because citizenship may not be abandoned absent a *specific intent* to relinquish it, *Vance*, 444 U.S. at 261, the courts of appeals had for decades uniformly held that the obligation to decide citizenship claims endured even if a petitioner waived or forfeited the claim in immigration proceedings.

In the decision below, however, the Eleventh Circuit split with this authority. It held that, by withdrawing an appeal to the BIA and accepting deportation, Petitioner forfeited his right to a decision affirming his status as a U.S. citizen, and, in effect, forfeited the citizenship he claims to possess. In doing so, the Eleventh Circuit held that this Court's precedent in *Ng Fung Ho*—that a court must decide citizenship claims because alienage is a jurisdictional prerequisite to removal—was effectively abrogated by *City of Arlington* v. *FCC*, 569 U.S. 290 (2013), a *Chevron* case having nothing to do with the issues here. *Id.* at 296 (discussing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). In effect, by disregarding this Court's binding precedent and ignoring the plain instruction of Congress, the Eleventh Circuit created a split with the First, Second, Third, Fifth, Ninth, Tenth, and D.C. Circuits.

## I. Legal Background

The Executive Branch is vested with the power to deport certain non-citizens in accordance with the laws proscribed by Congress, including those non-citizens who have been convicted of specific crimes. See generally 8 U.S.C. § 1227. But "[j]urisdiction in the executive to order deportation exists only if the person . . . is an alien." *Ng Fung Ho*, 259 U.S. at 284; see also *Vance*, 444 U.S. at 270 (holding that citizens cannot be expatriated unless they commit "an

expatriating act" with the "intent to relinquish citizenship"). To ensure that only non-citizens are subject to deportation, Congress provided for mandatory judicial review of all citizenship claims that arise in the course of removal proceedings. See 8 § 1252(b)(5) (directing that court of appeals "shall decide" the nationality claim).

## II. Factual Background and Procedural History

Petitioner was born in Liberia in 1971. Pet. App. at 2a. Shortly after he was born, Petitioner's father took legal custody. In 1979, Petitioner's father naturalized as a U.S. citizen. Ibid. Petitioner lawfully joined his father in the United States, and, when he was 15 years old, began to reside here permanently. Ibid.

In April 2020, 34 years after Petitioner began residing permanently in the United States, the Department of Homeland Security initiated removal proceedings against him, alleging, *inter alia*, that he is not a citizen of the United States, and that he is removable under the INA based on his convictions for two controlled substance offenses under state law and one federal mail fraud offense. *Id.* at 2a–3a.

In the immigration proceedings, Petitioner, then *pro se*, moved to terminate proceedings on the basis that he derived U.S. citizenship through his father in 1986. *Id.* at 3a. The Immigration Judge ("IJ") originally denied the motion on the basis that Petitioner failed to submit a decree of paternal legitimation. *Id.* at 4a. Petitioner cured that defect and submitted a Decree of Legitimation. Ibid. Construing Petitioner's *pro se* submission as a motion to reopen, the IJ denied the motion on April 30, 2021. *Id.* at 4a–5a.

Still *pro se*, Petitioner appealed to the BIA, but the BIA rejected his filing for failure to include a certificate of service. *Id.* at 5a. Although Petitioner mailed a corrected appeal on June 16, the BIA received that appeal out of time on June 21. Two weeks later, having endured an extended period of detention and still without counsel, Petitioner sent the following hand-written note to BIA: "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." Ibid. On August 31, 2021, the BIA deemed Petitioner's appeal withdrawn under 8 C.F.R. § 1003.4. Ibid. At no stage in these proceedings did Petitioner relinquish his U.S. citizenship.

Following the BIA's order, Petitioner was connected with an organization that offered to assist him in identifying pro bono counsel. Petitioner timely filed a *pro se* petition for review with the Eleventh Circuit on September 30, 2021, asserting that he was not removable because he is a citizen of the United States under a constitutional application of former 8 U.S.C. § 1432(a). Ibid. The undersigned counsel of record entered a notice of appearance as pro bono counsel for Petitioner on December 1, 2021.

That same day, the Eleventh Circuit asked the parties to address three "jurisdictional questions," namely: (1) "whether there exists a final order of removal such that this Court has jurisdiction over this petition for review," (2) "[t]o the extent that there exists a final order of removal, . . . whether Clement's appeal from it is timely," and (3) "to the extent there exists a final order of removal, and to the extent Clement's appeal from it is timely, . . . whether this Court has jurisdiction to review it."

On December 15, 2021, the government responded to the court's questions and moved to dismiss the petition for lack of jurisdiction. Specifically, the government argued that (1) the underlying order of the IJ is a final order of removal, but (2) Clement's petition for review was untimely, and (3) the court lacks jurisdiction because Petitioner failed to exhaust administrative remedies as required under 8 U.S.C. § 1252(d)(1).

Petitioner also responded to the court's questions and opposed the government's motion. Among other things, Petitioner (1) agreed with the government that the underlying order of the IJ is a final order of removal, but argued that (2) the petition for review was timely and (3) the court of appeals can and must decide the pending citizenship claim notwithstanding any failure to exhaust, because a favorable citizenship determination would strip the Executive Branch of jurisdiction to deport him.

The Eleventh Circuit denied the government's motion to dismiss on March 10, 2022, but the government reprised its jurisdictional arguments in its merits briefing. Specifically, the government argued that the petition for review was untimely and that Petitioner's failure to exhaust administrative remedies imposed a jurisdictional bar to judicial review of the citizenship claim.[1] The parties presented oral argument on April 26, 2023.

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[1] Two weeks before oral argument, the court of appeals ordered supplemental briefing to address whether the petition for review was untimely and, if so, whether a decision dismissing Petitioner's citizenship claim on that basis would violate the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. Petitioner responded that the court's refusal to decide the citizenship claim would raise serious Suspension Clause concerns.

On July 28, 2023, the Eleventh Circuit denied the petition for review without deciding whether Petitioner is a U.S. citizen. See Pet. App. at 10a–20a. In doing so, the court held that (1) the BIA's withdrawal order was a reviewable final order of removal, (2) that the petition for review from that final order was timely, but (3) that the court could not decide the merits of Petitioner's citizenship claim because he "abandoned his claims by withdrawing his appeal [to the BIA] and asking to be deported." Ibid.[2]

In reaching this conclusion, the Eleventh Circuit recognized this Court's holding in *Ng Fung Ho* that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien," ibid. (quoting *Ng Fung Ho*, 259 U.S. at 284–85), and it acknowledged that its "sister circuits have construed Section 1252(b)(5)(A) as a jurisdictional grant based on their belief that the Constitution guarantees judicial review of a citizenship claim," ibid. (citing *Dessouki* v. *Att'y Gen.*, 915 F.3d 964, 967 (3d Cir. 2019); *Joseph* v. *Holder*, 720 F.3d 228, 230 (5th Cir. 2013); *Anderson* v. *Holder*, 673 F.3d 1089, 1095 (9th Cir. 2012); *Duarte-Ceri* v. *Holder*, 630 F.3d 83, 87 (2d Cir. 2010)). Nonetheless, the court held that "[t]here are limits . . . on the Court's reasoning in *Ng Fung Ho* and its import for Section 1252(b)(5)(A)." Pet. App. at 12a.

Most fundamentally, the Eleventh Circuit held that the Executive Branch *can* deport an American

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[2] The Eleventh Circuit described Petitioner's conduct as both a "forfeiture" and a "waiver" of his right to judicial review, without drawing a distinction between the two. See generally Pet. App. at 12a–20a. This petition recognizes that the two doctrines are distinct, *see United States* v. *Olano*, 507 U.S. 725, 733 (1993), and for avoidance of doubt addresses both forfeiture and waiver as they have been construed by this Court.

citizen, so long as that citizen abandons his citizenship claim in proceedings before the agency. *Id.* at 13a–14a. It reasoned that this Court's decision in *City of Arlington*, 569 U.S. at 297—a case addressing *Chevron* deference that neither party raised in its briefs—impliedly overruled *Ng Fung Ho*'s longstanding rule that the Executive Branch has no jurisdiction to remove someone with a pending citizenship claim, because it eliminated the distinction between "jurisdictional" errors and other types of *ultra vires* agency action. *Id.* at 13a. In keeping with that analysis, the court further held that a petitioner's right "to judicial review of a citizenship claim is limited by a requirement that the person pursue the claim in an administrative forum," and that there is "no reason to think Congress precluded the forfeiture of citizenship claims through Section 1252(b)(5)(A)." *Id.* at 13a–14a.

On September 21, 2023, Petitioner moved for rehearing and rehearing en banc, arguing that the Eleventh Circuit's decision conflicts with this Court's decision in *Ng Fung Ho* and impermissibly treats Petitioner's withdrawal of his BIA appeal as an intentional relinquishment of citizenship itself. Petitioner also informed the Eleventh Circuit that its published decision created a circuit split with every other circuit that had previously addressed this issue. On October 24, 2023, the Eleventh Circuit denied Petitioner's motions. *Id.* at 23a.

## REASONS FOR GRANTING THE PETITION

### I. The Eleventh Circuit's Decision Creates a Circuit Split On The Question Presented.

The Eleventh Circuit's decision below disregards a century of Supreme Court precedent. As a result, it stands alone against contrary decisions by *seven* other

circuits, which uniformly hold that courts of appeals *must* decide citizenship claims presented in a petition for review, notwithstanding forfeiture or waiver before the agency.

As detailed below, four of these circuits—the First, Third, Fifth, and Ninth Circuits—have analyzed this issue in precisely the same context presented here, where a petitioner voluntarily waived or withdrew a citizenship claim before the IJ or BIA. And three other circuits—the Second, Tenth, and DC circuits—have affirmed the same substantive rule in closely related contexts. If left undisturbed, the Eleventh Circuit's novel approach risks creating confusion in an important, and hitherto clear, area of law.

### A. The Eleventh Circuit's Decision Squarely Conflicts with the Decisions of the First, Third, Fifth, and Ninth Circuits.

In denying the petition for review, the Eleventh Circuit held it could not decide Petitioner's claim that he is a citizen of the United States, reasoning that Petitioner "abandoned" the claim by withdrawing his appeal to the BIA and accepting deportation. The Eleventh Circuit is the only court of appeals to reach this conclusion, and its holding conflicts with directly on-point decisions from four circuits.

Consider first the Ninth Circuit's decision in *Rivera* v. *Ashcroft*, 394 F.3d 1129 (9th Cir. 2005). In that case, the Ninth Circuit held it was constitutionally and jurisdictionally *required* to decide a petitioner's claim to U.S. citizenship, even though the petitioner had previously waived appeal of the IJ's ruling and accepted deportation. *Id.* at 1136–37. Citing *Ng Fung Ho*, the court held that the

Executive Branch "has no authority to deport citizens," and that the "assertion of U.S. 'citizenship is thus a denial of an essential jurisdictional fact' in a deportation proceeding." *Id.* at 1136 (quoting *Ng Fung Ho*, 259 U.S. at 284). It further recognized that, "[b]ecause the deportation of 'one who so claims to be a citizen obviously deprives him of liberty,'" "the Fifth Amendment mandates that any person with a non-frivolous claim to American citizenship receive a judicial evaluation of that claim." Ibid. (quoting *Ng Fung Ho*, 259 U.S. at 284–85).

The Ninth Circuit then squarely rejected the government's assertion that the court could not decide the petitioner's citizenship claim on the ground that he "waived his right to appeal the IJ's ruling and was deported." Ibid. "If the government's analysis of this case were correct," the court reasoned, "it would be possible to unintentionally relinquish U.S. citizenship by waiving the right to appeal a deportation order." Ibid. That, the court held, was categorically impermissible. As the court explained, "[t]he citizenship defined by the [Fourteenth] Amendment is one 'which a citizen keeps unless he voluntarily relinquishes it.'" *Id.* at 1137 (quoting *Afroyim* v. *Rusk*, 387 U.S. 253, 262 (1967)). "Acceptance of deportation after an administrative hearing is not, in and of itself, proof that a person wishes to relinquish citizenship," ibid., as "[t]he Constitution does not permit American citizenship to be so easily shed," *id.* at 1136.

The Eleventh Circuit recognized that its application of a new "forfeiture rule" conflicted with *Rivera*, and therefore sought to distinguish *Rivera* on two grounds. Neither one makes a difference here.

The Eleventh Circuit first suggested that *Rivera* is distinguishable because it was decided before the

REAL ID Act eliminated habeas review of removal orders. Pet. App. at 17a–19a (discussing REAL ID Act, Pub. L. No. 109–13, 119 Stat. 231 (2005)); see also 8 U.S.C. § 1252(a)(5) (providing that a petition for review "shall be the sole and exclusive means for judicial review of an order of removal"). But the Ninth Circuit's decision in *Rivera* did not turn on the procedural avenue by which the citizenship claim came to the court. Instead, the decision hinged on the *jurisdictional* limits of the Executive's power to remove a citizen, and the Constitution's protections against the unintentional relinquishment of American citizenship. See *Rivera*, 394 F.3d at 1136–37.

Indeed, even after passage of the Real ID Act, the Ninth Circuit held that it remains "bound by the holding in *Rivera* that 'a non-frivolous claim to U.S. citizenship' gives a person a constitutional right to judicial review that may be obtained 'even after accepting deportation and waiving his right to appeal the IJ's decision.'" *Iasu* v. *Smith*, 511 F.3d 881, 891 (9th Cir. 2007); see also *Brown* v. *Holder*, 763 F.3d 1141, 1146–47 (9th Cir. 2014) ("Even if a petitioner, as here, *has waived his administrative appeals*, we may still examine his nonfrivolous claim to citizenship. Resolving a disputed claim of citizenship is necessary to any deportation proceeding, because the government is not permitted to deport citizens, and a claim of citizenship is thus a denial of an essential jurisdictional fact." (emphasis added.)).

The Eleventh Circuit next attempted to distinguish *Rivera* on the ground that the petitioner there "accepted deportation" and "agreed to waive his appeal" while Petitioner here "requested" deportation and "withdrew his appeal." Pet. App. at 18a–19a. But the Ninth Circuit's holding did not turn on such verbal

nuance—of dubious significance anyway—or the details of the purported waiver at issue. In fact, the Ninth Circuit has since made clear that the requirement of judicial review of citizenship claims is categorical: "[T]he Constitution 'mandates that any person with a non-frivolous claim to American citizenship receive a judicial evaluation of that claim.'" *Anderson*, 673 F.3d at 1095 (quoting *Rivera*, 394 F.3d at 1136). Therefore, according to the Ninth Circuit, "the plain language of § 1252(b)(5) not only permits but requires us to evaluate a claim to United States nationality upon a petition for review, even where our jurisdiction would otherwise be limited." *Id.* at 1096.

The First Circuit has held similarly. In *Robinson* v. *Garland*, the court considered the merits of a citizenship claim even though the petitioner had previously "conceded through counsel" that his claim was not viable, "waived [an] appeal," and "accepted an order of removal." 56 F.4th 192, 193 (1st Cir. 2022). Despite this direct and knowing waiver of the relevant claim, the court reached the merits of the petitioner's citizenship and, citing *Rivera*, reaffirmed that a petitioner cannot "relinquish citizenship by failing to appeal a deportation order." *Id.* at 194 (citing *Rivera*, 394 F.3d at 1136–37).

The Third Circuit has also analyzed the same question and reached the same result. In *Dessouki* v. *Attorney General*, the Third Circuit held that § 1252(b)(5)(A) "imposes a mandatory requirement" for federal court review of a citizenship claim. 915 F.3d at 966. The court emphasized that, under this Court's longstanding precedent, "[t]he Executive cannot deport a citizen," so "[a] 'claim of citizenship is thus a denial of an essential jurisdictional fact in a removal proceeding." Ibid. (quoting *Ng Fung Ho*, 259

U.S. at 284). As a result, the court held that it not only "can" review a citizenship claim, but that it "must do so," because any "contrary reading would raise serious constitutional concerns." *Id.* at 967.

In fact, after the Eleventh Circuit published its decision, the Third Circuit affirmed that the requirement for judicial review of a citizenship claim endures notwithstanding a petitioner's waiver of the claim in immigration proceedings. In *Steele* v. *Attorney General*, the court decided a citizenship claim even though the petitioner had previously "entered the United States on a visitor's visa, reported Panamanian citizenship, and conceded through counsel before the IJ to being a noncitizen." No. 21-3260, 2023 WL 5426741, at *2 (3d Cir. Aug. 23, 2023) (per curiam). The basis for that decision was the same as it would be for any other petition asserting a citizenship claim. "Because the government lacks authority to remove a person unless he or she is a noncitizen," the court "turn[s] first" to the citizenship claim. Ibid. (citing *Ng Fung Ho*, 259 U.S. at 284).

Finally, in *Bekou* v. *Holder*, the Fifth Circuit decided a petitioner's citizenship claim after expressly ruling that the petitioner had waived an appeal of the IJ's order. 363 F. App'x 288, 290 (5th Cir. 2010). In that case, the IJ found that the petitioner was not a U.S. citizen and was, therefore, removable. Ibid. The petitioner accepted that decision, stating "I don't want to appeal anything." Ibid. Although the petitioner subsequently changed his mind and appealed the IJ's order, the BIA dismissed the appeal for lack of jurisdiction due to the petitioner's prior waiver. Ibid. Finding the petitioner's waiver of his appeal to be "knowing and intelligent," the Fifth Circuit affirmed that the BIA lacked jurisdiction over the appeal. *Id.* at 291.

Nevertheless, the Fifth Circuit conducted its own analysis of the petitioner's citizenship claim under § 1252(b)(5). Ibid. In doing so, the court explained that courts of appeals are "directed to conduct a de novo determination . . . of an alien's claim of nationality," ibid. (quoting *Lopez* v. *Holder*, 563 F.3d 107, 110 (5th Cir. 2009)), and that they are "empowered" to decide these claims "[u]nder the plain words of 8 U.S.C. § 1252(b)(5)(A)," ibid. (quoting *Bustamante–Barrera* v. *Gonzales*, 447 F.3d 388, 393 (5th Cir. 2006)). The Fifth Circuit also recognized that "[t]he INA explicitly places the determination of nationality claims in the hands of the courts." Ibid. (quoting *Alwan* v. *Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004)).

The Fifth Circuit's decision in *Bekou* accords with numerous other decisions from that circuit determining that courts of appeals "always have jurisdiction" to decide citizenship claims. E.g., *Omolo* v. *Gonzales*, 452 F.3d 404, 407 (5th Cir. 2006). According to the Fifth Circuit, that is because "the question of [a petitioner's] citizenship is an essential jurisdictional fact" which, if proven, would invalidate the removal proceeding itself. *Joseph*, 720 F.3d at 230; *see also Lopez*, 563 F.3d at 110 ("Given that the question of nationality is vested in the court of appeals and may be decided solely under the procedure set forth in § 1252(b)(5) . . . , the BIA's decision is no longer relevant." (emphasis added)).[3]

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[3] Illustrating the profound departure from established law that the Eleventh Circuit's decision represents, the Eleventh Circuit split from itself. In an earlier unpublished decision, the Eleventh Circuit engaged in a de novo determination of a petitioner's citizenship claim even though the BIA found he "waived his right to appeal the IJ's order." *Claver* v. *U.S. Att'y Gen.*, 245 F. App'x

### B. The Eleventh Circuit's Decision Is Also Incompatible With the Decisions of the Second, Tenth, and D.C. Circuits.

Effectively joining the First, Third, Fifth, and Ninth Circuits, the Second, Tenth and D.C. Circuits have affirmed the same substantive rules—namely, that the Executive Branch has no jurisdiction to remove a U.S. citizen, that U.S. citizenship cannot be unintentionally forfeited in immigration proceedings, and that courts of appeals therefore have an unwavering obligation to decide citizenship claims presented in a petition for review. Although these cases arise in slightly different contexts, the decisions in these circuits are fundamentally incompatible with the Eleventh Circuit's analysis below.

Take, for example, the Second Circuit's decision in *Poole* v. *Mukasey*, 522 F.3d 259 (2d Cir. 2008). The petitioner there had filed an appeal to the BIA two days late, and the BIA "dismissed Poole's appeal as untimely" with "no reference to [his] claim of derivative citizenship." 522 F.3d at 262. On petition for review, the Second Circuit acknowledged that Poole's "failure to file a timely appeal with the BIA render[ed] [his] claims unexhausted," and therefore "dismiss[ed] for lack of jurisdiction all aspects of Poole's petition, *except his claim for derivative citizenship*." *Id.* at 264 (emphasis added). That claim, the court explained, "does not encounter a jurisdictional obstacle for lack of exhaustion." Ibid.

The Second Circuit grounded its analysis on the same principles underlying the decisions of the First,

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904, 905 n.2 (11th Cir. 2007). As the court then noted, § 1252(b)(5) "stat[es] that the court of appeals 'shall' decide a nationality claim where there is no genuine issue of material fact." Ibid.

Third, Fifth, and Ninth Circuits discussed above. As the court explained, "The Executive Branch may remove certain aliens but has no authority to remove citizens." Ibid. Citing this Court's holdings in *Ng Fung Ho* and *Vance*, as well as the Ninth Circuit's decision in *Rivera*, the Second Circuit held that the petitioner's assertion of U.S. citizenship was "a denial of an essential jurisdiction [sic] fact," ibid. (quoting *Ng Fung Ho*, 259 U.S. at 284), and affirmed that a petitioner cannot "unintentionally relinquish U.S. citizenship" in proceedings before the BIA, ibid. (quoting *Rivera*, 394 F.3d at 1136). Thus, while an untimely appeal to the BIA may preclude judicial review of most defenses, "[t]he Constitution does not permit American citizenship to be so easily shed." Ibid. (quoting *Rivera*, 394 F.3d at 1136).

The Tenth Circuit recently reached the same conclusion in a related context. In *Gonzalez-Alarcon* v. *Macias*, the court held that a petitioner was entitled to a judicial decision on his citizenship claim, even though he had twice been deported and the deadline for filing a petition for review had long expired. 884 F.3d 1266, 1268–69 (10th Cir. 2018). Like every other court of appeals save the Eleventh Circuit, the Tenth Circuit reiterated that because the government cannot deport a U.S. citizen, "[c]itizenship constitutes the denial of an essential jurisdictional fact in a deportation proceeding." *Id.* at 1272 (quoting *Shepherd* v. *Holder*, 678 F.3d 1171, 1175 (10th Cir. 2012)); see also *id.* at 1281 (Tymkovich, C.J., concurring) ("A court of appeals *always* retains jurisdiction to determine jurisdictional facts, such as whether an individual subject to deportation is a U.S. citizen."). Because "[c]itizenship cannot be relinquished through mere neglect," the Tenth Circuit held that the petitioner "must be granted some path

to advance his facially valid claim of citizenship in federal court." *Id.* at 1268–69 (citing *Afroyim*, 387 U.S. at 268).

Notably, for the petitioner in *Gonzalez-Alarcon*, that "path" for resolution of his citizenship claim was far from clear. The REAL ID Act barred habeas review of final orders of removal, 8 U.S.C. § 1252(a)(5), and further stripped the courts of appeals of jurisdiction to decide an untimely petition for review, *id.* § 1252(b)(1), (d)(1). "In the context of a citizenship claim," the court explained, "the lack of a failsafe provision [for judicial review] is troubling" and "poses a weighty Suspension Clause question." *Gonzalez-Alarcon*, 884 F.3d at 1277. To avoid the constitutional problem, the Tenth Circuit held that the petitioner *must* be permitted to challenge the "jurisdictional fact" of citizenship through a motion to reopen. *Id.* at 1279. "[E]ven if an IJ denies such a motion as procedurally improper, and even if the BIA upholds the denial, a court of appeals could still review the jurisdictional issue on direct appeal from that denial." *Id.* at 1279 (quoting *Iasu*, 511 F.3d at 893).

Finally, the D.C. Circuit is in accord. In a decision often cited by the other courts of appeals, the D.C. Circuit confirmed in *Frank* v. *Rogers* that the burden is on the government to establish jurisdiction over the person in removal proceedings. 253 F.2d 889, 891 (D.C. Cir. 1958). Citing *Ng Fung Ho*, the court summarized the import of this observation: "Until the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt." Ibid.

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Before the Eleventh Circuit published its decision on July 28, 2023, the courts of appeals were in accord on the question presented, and they consistently held that the federal courts have a jurisdictional and constitutional obligation to decide citizenship claims presented in a petition for review. The Eleventh Circuit's contrary decision—that courts of appeals "cannot" review citizenship claims waived or forfeited in immigration proceedings—injects a stark conflict into this otherwise uniform law. This Court should grant the petition for a writ of certiorari and resolve the circuit split before further confusion develops.

## II. The Eleventh Circuit's Decision Is Wrong.

While ignoring the congressional mandate to decide citizenship claims presented in a petition for review of a final order of removal, see § 1252(b)(5), the Eleventh Circuit's decision conflicts with this Court's holding in *Ng Fung Ho* and allows for the unintentional relinquishment of American citizenship. The decision is plainly wrong.

### A. The Eleventh Circuit's Decision Contradicts *Ng Fung Ho*.

In *Ng Fung Ho*, this Court held: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien." 259 U.S. at 284. It determined that a "claim of citizenship is thus a denial of an essential jurisdictional fact" in a removal proceeding. Ibid. It also reasoned that judicial proceedings are necessary under the Fifth Amendment because deportation of "one who so claims to be a citizen . . . deprives him of liberty . . . property[,] and life." *Id.* at 284–85. Thus, this Court concluded that a petitioner asserting a citizenship claim is "entitled to a judicial determination" of that claim. *Id.* at 285.

Subsequent decisions by this Court have consistently reaffirmed *Ng Fung Ho*'s holding that citizenship claims implicate the Executive's subject matter jurisdiction, and therefore require a judicial determination. See, e.g., *Bilokumsky*, 263 U.S. at 153 ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact."); *Kessler* v. *Strecker*, 307 U.S. 22, 35 (1939) ("[J]urisdiction in the executive to order deportation exists only if the person arrested is an alien."); *Estep* v. *United States*, 327 U.S. 114, 120 (1946) (noting that judicial review "may indeed be required by the Constitution"); *Agosto*, 436 U.S. at 753 (noting that a "judicial determination of citizenship claims is required"). For more than a century, this Court's adherence to *Ng Fung Ho* has never wavered.

Despite these clear precedents, the Eleventh Circuit decided—on its own initiative and without the benefit of briefing—that this Court's decision in *City of Arlington*, 569 U.S. at 297, impliedly overruled *Ng Fung Ho*'s holding that citizenship claims implicate the subject matter jurisdiction of the Executive Branch. Pet. App. at 14a. The court reasoned that, because *City of Arlington* collapsed the distinction between "jurisdictional errors" and "other kinds of errors by the Executive," *Ng Fung Ho* could no longer be read to mean what it said. Ibid. (quoting *City of Arlington*, 569 U.S. at 297–98). This is plainly incorrect.

First, *Ng Fung Ho* and decisions interpreting it demonstrate that this Court intended for citizenship questions to be considered apart from other errors that may arise in removal proceedings because citizenship questions go to the heart of the Executive's subject matter jurisdiction. In *Cromwell* v. *Benson*, this Court differentiated a finding of alienage from

other findings of fact made by the Executive because "the claim of citizenship 'is thus the denial of an essential jurisdiction fact' both in the statutory and constitutional sense." 285 U.S. 22, 60 (1932) (quoting *Ng Fung Ho*, 259 U.S. at 285); cf. *U.S. ex rel. Tisi* v. *Tod*, 264 U.S. 131, 132–33 (1924) (declining to consider evidentiary challenge to sedition charge because the issue was not, "like alienage, a jurisdictional fact") (citing *Ng Fung Ho*, 259 U.S. at 285). Indeed, *Ng Fung Ho* itself, by analogizing a claim of citizenship to a line of cases addressing the limited jurisdiction of military tribunals, clearly articulated that it viewed alienage to be a condition precedent to a removal proceeding—and not just another fact that the government must establish. See 259 U.S. at 284; see also *Solorio* v. *United States*, 483 U.S. 435, 439 (1987) ("[T]his Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

Accordingly, it is clear this Court meant what it said when it characterized the question of citizenship as "jurisdictional" in a removal proceeding. "Subject-matter jurisdiction properly comprehended . . . refers to a tribunal's 'power to hear a case,' a matter that 'can never be forfeited or waived.'" See *Union Pac. R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (discussing the jurisdiction of the National Labor Relations Board) (quoting *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006)). Because the citizenship question goes to the heart of the Executive's power to adjudicate the removal proceeding, "no consent" from Petitioner "could confer jurisdiction" on the agency "because to take such jurisdiction would constitute a plain violation of law." See *McClaughry* v. *Deming*,

186 U.S. 49, 66 (1902). It follows *a fortiori* that a petitioner cannot confer jurisdiction in the Executive by waiver or forfeiture.

Second, *City of Arlington*—which, again, neither Petitioner nor the government raised below—does not alter or detract from the holding in *Ng Fung Ho*. *City of Arlington* held that *Chevron* deference applies to an agency's interpretation of whether, under its enabling statute, it has jurisdiction to resolve a particular dispute. The Court reasoned that "the distinction between 'jurisdictional' and 'nonjurisdictional' *interpretations* is a mirage." *City of Arlington*, 569 U.S. at 297 (emphasis added). But that reasoning turned on the particulars of the *Chevron* doctrine, which requires deference to an agency's construction of an ambiguous statute. *Id.* at 296. Here, the BIA's denial of Petitioner's motion to reopen did not construe the INA at all—let alone § 1252(b)(5)(A)'s requirement that a court decide citizenship claims. *City of Arlington* has nothing to say on this issue.

For this reason, it comes as no surprise that the courts of appeals have continued to rely on *Ng Fung Ho* in the ten years since *City of Arlington* came down. See, e.g. *Dessouki*, 915 F.3d at 967 ("The Executive cannot deport a citizen. A 'claim of citizenship is thus a denial of an essential jurisdictional fact' in a removal proceeding." (quoting *Ng Fung Ho*, 259 U.S. at 284)); *Gonzalez-Alarcon*, 884 F.3d at 1276 (10th Cir.) ("[D]efendants lack authority to detain or remove United States citizens." (citing *Ng Fung Ho*, 259 U.S. at 284)); see also *Brown*, 763 F.3d at 1146–47 (9th Cir.) ("[The government is not permitted to deport citizens, and a claim of citizenship is thus a denial of an essential jurisdictional fact."). If *City of Arlington* truly marked a sea change in immigration law, surely *some* other court would have noticed.

Third, even if *City of Arlington* did cast doubt on *Ng Fung Ho* (which it plainly did *not*), the Eleventh Circuit had no authority to overrule this Court's binding precedent. As this Court reiterated just last year: "If a precedent of this Court has direct application in a case, . . . a lower court should follow the case which directly controls, 'leaving to this Court the prerogative of overruling its own decisions.'" *Mallory* v. *Norfolk So. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023) (quoting *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). *City of Arlington* was about *Chevron* deference, not the scope of the Executive Branch's power to deport an American citizen. The decision did not cite *Ng Fung Ho*, or *Union Pacific*, and it certainly did not overrule *sub silentio* a century of Supreme Court law mandating judicial review of citizenship claims and recognizing limits on agencies' subject matter jurisdiction.

* * * *

By finding that Petitioner forfeited the ability to challenge the Executive Branch's subject matter jurisdiction over his removal proceeding, the Eleventh Circuit's decision conflicts with binding Supreme Court precedent.

### B. The Eleventh Circuit's Decision Impermissibly Treats Petitioner's Withdrawal Motion as an Intentional Relinquishment of U.S. Citizenship.

In addition to creating a split with at least seven other circuits and purporting to overrule *Ng Fung Ho*, the Eleventh Circuit's decision impermissibly treats Petitioner's *pro se* note to the BIA withdrawing his appeal as an intentional relinquishment of U.S. citizenship. That ruling directly conflicts with this

Court's precedent, usurps the power of Congress, and contravenes core protections of citizenship the Constitution guarantees.

This Court has classified cases like Petitioner's as ones in which the petitioner claims that "he is, and for years has been, an American citizen." *Miller* v. *Albright*, 523 U.S. 420, 429 (1998). A favorable judgment on this petition for review "would confirm [Petitioner's] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." Ibid. Thus, by finding that Petitioner waived or forfeited his right to a declaration of citizenship, the Eleventh Circuit ultimately found that Petitioner waived or forfeited American citizenship *itself*. That cannot be.

American citizenship is durable. Congress has prescribed an exceedingly narrow and exhaustive list of the circumstances under which a U.S. citizen may relinquish it. See 8 U.S.C. § 1481(a)(1)–(7). A forfeiture of a citizenship claim before the BIA, even when combined with an acceptance of deportation, is not on that list.

Moreover, even if a person *does* perform one of the few expatriating acts enumerated in § 1481(a), a U.S. citizen cannot lose his citizenship absent an evidentiary finding that he *specifically* intended to relinquish it. *Vance*, 444 U.S. at 260–61. That is because, under the Fourteenth Amendment, "expatriation depends on the will on the citizen"—not the government's assessment of his conduct. *Id.* at 260. The Eleventh Circuit's holding would eliminate that requirement. There is *no* evidence establishing that Petitioner submitted his *pro se* withdrawal motion with the specific intent of relinquishing U.S. citizenship. And the fact that Petitioner took actions

that might be considered inconsistent with a claim of citizenship is not enough. See *id.* at 261 ("[T]he trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship."). It was simply untenable under this Court's precedents for the Eleventh Circuit to order Petitioner removed while denying *any* judicial forum for Petitioner to vindicate his citizenship claim.

Moreover, the decision below is incompatible with *Vance* even though this Court has recognized that distinctions can be made between "those who are citizens under the Fourteenth Amendment and individuals whose claim to citizenship rests on statute." *Gonzalez-Alarcon*, 884 F.3d at 1277 n.5 (10th Cir.) (discussing *Rogers* v. *Bellei*, 401 U.S. 815, 835 (1971)). Although Congress may impose conditions precedent and subsequent to citizenship on individuals in the latter category, "it strains credulity to suggest that Congress intended to impose, as a condition subsequent to citizenship, that an individual successfully resist removal after being incorrectly detained by an executive agency lacking jurisdiction over citizens." Ibid.

This unthinkable result only highlights why the Eleventh Circuit's decision stands alone amidst the contrary decisions of its sister circuits. While constitutional and statutory claims may be waived in other contexts, "[t]he Constitution does not permit American citizenship to be so easily shed." *Rivera*, 394 F.3d at 1136 (9th Cir.); see also *Gonzalez-Alarcon*, 884 F.3d at 1272 (10th Cir.) (same); *Poole*, 522 F.3d at 264 (2d. Cir.) (same).

### C. The Eleventh Circuit's Decision Ignores the Will of Congress.

This Court has repeatedly stated that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992). Thus, when "the words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98 (2003) (internal quotation marks and citation omitted). It is the court's "role . . . to interpret the language of the statute enacted by Congress" and it is Congress's job to write it. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

The text of § 1252(b)(5)(A) provides that "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) (emphasis added). The clear language of the statute accordingly obligates courts of appeals to decide nationality claims when presented in a petition for review. See, e.g., *Jennings* v. *Rodriguez*, 583 U.S. 281, 300 (2018) ("[T]he word 'shall' usually connotes a requirement."). And, as numerous courts of appeals have confirmed, that "obligation to decide entails the power to do so." E.g., *Dessouki*, 915 F.3d at 966 (3d Cir.); see also *Duarte-Ceri*, 630 F.3d at 87 (2d Cir.); *Anderson*, 673 F.3d at 1096 (9th Cir.); *Joseph*, 720 F.3d at 230 (5th Cir.).

The statutory context affirms this interpretation. Because § 106 of the REAL ID Act foreclosed habeas review, Congress was compelled to provide an "adequate and effective" substitute to avoid offending

the Suspension Clause.[4] See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (acknowledging that "some judicial intervention in deportation cases is unquestionably required by the Constitution" (citation omitted)); *id.* at 314 n.38 (noting "that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals"); *Agosto*, 436 U.S. at 753 ("[T]he Constitution requires that there be some provision for de novo judicial determination of claims to American citizenship in deportation proceedings."). As is clear from the text and structure of the Act, Congress provided that substitute remedy through § 1252(b)(5).

The Eleventh Circuit's holding, which categorically bars review of citizenship claims based on a Petitioner's forfeiture before the BIA, is incompatible with any reasonable construction of the statute. It removes the procedural safeguard that Congress provided for citizenship claims in § 1252(b)(5), and accordingly raises "serious Suspension Clause concerns." See *Gonzalez-Alarcon*, 884 F.3d at 1268. And it grafts an additional expatriating act into 8 U.S.C. § 1481, when the Constitution plainly grants to *Congress*—not the courts—the power to "establish an uniform Rule of Naturalization." Art. I. § 8, cl. 4; see also *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981) (requiring "strict compliance with the statutory conditions precedent to naturalization . . . [because] Congress

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[4] 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.

alone has the constitutional authority to prescribe rules for naturalization").

## III. The Question Presented Is Important Because It Bears on the Fundamental Right of Citizenship.

It is exceedingly important to ensure that citizenship claims are *always* reviewable on petitions for review of a final order of removal. Citizenship is unique; a person's "basic right for it is nothing less than the right to have rights." *Gonzalez-Alarcon*, 884 F.3d at 1277 (citation omitted). Accordingly, "[t]o deport one who so claims to be a citizen obviously deprives him of liberty, . . . [and] may result also in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho*, 259 U.S. at 284 (citation omitted).

Notwithstanding the importance of citizenship, a shocking number of U.S. citizens are swept up in removal proceedings. "[T]he mistaken detention and deportation of U.S. citizens is not unusual." Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 775 (2020); see 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");[5] Paige St. John & Joel Rubin, *ICE Held An American Man In Custody For 1,273 Days*, L.A. TIMES, Apr. 27, 2018 (reporting "hundreds" of cases "in which people were forced to prove they are Americans and sometimes spent months or even years in detention," and describing individual cases, including "a 10-year-old boy from the

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

San Francisco area whose attorney said he was held in a Texas detention center for two months").[6]

Several studies and estimates point to the possible scope of the mistaken detention and deportation of U.S. citizens:

- According to one study, between 2003 and 2010 an estimated 20,000 U.S. citizens were improperly detained or deported as aliens. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

- Between 2007 and 2015, ICE identified and released roughly 1,500 U.S. citizens who wrongfully spent time in immigration detention. *Litigating Citizenship*, *supra*, at 775.

- One study found that 8 percent of immigration detainees in New York City "had potential, not-yet-litigated claims to citizenship." Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1823 (2013).

ICE itself "does not know the extent to which its officers are taking enforcement actions against individuals who could be U.S. citizens." U.S. Gov't Accountability Office, *Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations*, July 2021.

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[6] *Available at* https://tinyurl.com/2drp6383. *See also, e.g.*, David J. Bier, *U.S. Citizens Targeted By ICE*, CATO INSTITUTE, Aug. 29, 2018 (estimating thousands of U.S. citizens targeted in Texas alone).

The courts have also grappled with these cases, further illustrating that they occur with some frequency. See, e.g., *Blanco Ayala* v. *United States*, 982 F.3d 209, 213 (4th Cir. 2020) (U.S. citizen deported and later returned to the United States, whereupon ICE reinstated his removal order and detained him for five months); *Jaen* v. *Sessions*, 899 F.3d 182, 190–91 (2d Cir. 2018) (Pooler, J., concurring) (individual determined to be a U.S. citizen after being "h[eld] . . . in immigration detention for nearly two years"); *Watson* v. *United States*, 865 F.3d 123, 136 (2d Cir. 2017) ("[T]here is no doubt that the government botched the investigation into Watson's assertion of citizenship, and that as a result a U.S. citizen was held for years in immigration detention and was nearly deported.").

For U.S. citizens who are wrongfully detained pursuant to removal proceedings, the rule articulated by the Eleventh Circuit removes a key layer of protection required by Congress, this Court, and the Constitution.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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