No. _____

In the
Supreme Court of the United States

TIGER CELA,
Petitioner,

v.

MERRICK B. GARLAND, U.S. Attorney General,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The asylum laws offer protection against removal for certain noncitizens in this country who suffered past persecution or reasonably fear future persecution in their country of nationality. For those "granted asylum," the immigration laws also provide a pathway to obtain lawful permanent resident (LPR) status. Under 8 U.S.C. § 1159(b), the government "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," if certain statutory criteria are satisfied. The question presented is:

Whether noncitizens who were "granted asylum," but whose asylum was later terminated, are eligible for adjustment to LPR status under Section 1159(b) (as the Fifth Circuit held), or whether they are categorically ineligible (as the Fourth Circuit held)?

PARTIES TO THE PROCEEDING

Petitioner in this Court and in the court of appeals is Tiger Cela.

Respondent in this Court and in the court of appeals is Merrick B. Garland, Attorney General.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Cela v. Garland, No. 22-1322, United States Court of Appeals for the Fourth Circuit, judgment entered July 28, 2023 (75 F.4th 355), rehearing denied September 25, 2023.

Matter of T-C-A, File No. A079-092-024, Board of Immigration Appeals, interim decision entered February 24, 2022 (28 I. & N. Dec. 472).

Matter of Cela, File No. A079-092-024, United States Department of Justice, Executive Office for Immigration Review, final order of removal entered February 26, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tiger Cela respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals (App. 1a-23a) is reported at 75 F.4th 355, and the court of appeals' denial of rehearing en banc (App. 92a) is unreported. The decision of the Board of Immigration Appeals (App. 24a-60a) is reported at 28 I. & N. Dec. 472. The decisions of the immigration judge (App. 61a-91a) are unreported.

JURISDICTION

The court of appeals entered judgment on July 28, 2023. App. 1a-23a. On September 25, 2023, the court of appeals denied petitioner's timely petition for rehearing en banc. App 92a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the petition appendix. App. 93a-114a.

INTRODUCTION

Section 1159(b) of Title 8 of the United States Code provides that the Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum."[1] The question presented is an important one for

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[1] Although the Secretary of the Department of Homeland Security also has authority to adjust, this petition uses "Attorney General" as shorthand.

noncitizens who were granted asylum: whether the Attorney General has discretion to adjust their status to lawful permanent resident (LPR) after their asylum has been terminated. That question has divided the courts of appeals. It has divided the Board of Immigration Appeals (BIA). And with a Second Circuit appeal pending, the circuit conflict is likely to deepen further in the coming months.

In a split decision, the Fourth Circuit diverged from the Fifth Circuit and held that the Attorney General has no such discretion. Termination of asylum, the court of appeals concluded, is a categorical bar to LPR adjustment under Section 1159(b). That decision is wrong. A noncitizen once "granted asylum" is eligible for adjustment to LPR status, assuming the other express statutory criteria are satisfied. Unlike in neighboring provisions, there is no requirement that an applicant "continue[] to be" an asylee, or that his asylum "has not been terminated." And it is well-settled that lawful status is not a prerequisite for adjustment. The Fourth Circuit's decision to the contrary cannot be squared with the statutory text, context, or purpose.

Further review is needed to resolve the conflict, give effect to the statutory text, and return discretion to the Attorney General. It is also needed to prevent perverse consequences. The Fourth Circuit's decision will harm noncitizens who have lost asylum through no fault of their own and those who still fear persecution. It will harm innocent spouses and children whose status is "derivative." And it will harm all those who, but for termination, would have been worthy of waivers for humanitarian, family-unity, or public-interest reasons. The Court's review is warranted.

STATEMENT OF THE CASE

1. Section 1159 addresses adjustment to LPR status for refugees. 8 U.S.C. § 1159. Subsection (a) involves refugees admitted to the country under Section 1157 ("refugees"). *Id.* § 1159(a). Subsection (b) involves refugees granted asylum while in the country, under Section 1158 ("asylees"). *Id.* § 1159(b).

To qualify for asylum, a noncitizen must show past persecution or a well-founded fear of future persecution on account of a protected ground. *Id.* §§ 1158(b)(1), 1101(a)(42)(A). Spouses and children of asylees may also receive protection as "derivative" asylees. *Id.* § 1158(b)(3)(A).

Adjustment to LPR status is available for both refugees and asylees, but the preconditions differ. Under Section 1159(a)(1), refugees can be considered for adjustment to LPR status if (A) their admission "has not been terminated"; (B) they have been "physically present in the United States for at least one year"; and (C) they have not already acquired LPR status. *Id.* § 1159(a)(1). If refugees meet each of these preconditions and are found to be admissible (subject to certain waivers of inadmissibility discussed below), they "shall . . . be regarded" as LPRs. *Id.* § 1159(a)(2).

Under Section 1159(b), the Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," if certain other preconditions are met. *Id.* § 1159(b). Specifically, the noncitizen must (1) have applied for adjustment; (2) have "been physically present in the United States for at least one year after being granted asylum"; (3) "continue[] to be a refugee" or the child or spouse of a refugee; (4) have not firmly

resettled in a foreign country; and (5) otherwise be admissible "at the time of examination for adjustment"—unless subsection (c) provides an exception. *Id.* Subsection (c), in turn, allows the Attorney General to grant waivers of certain grounds of inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 1159(c).

Refugee status and asylum can both be terminated but, again, for different reasons. For a refugee, there is only one ground for termination: "if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) . . . at the time of the alien's admission." *Id.* § 1157(c)(4). Asylum, in contrast, may be terminated for many different reasons—most of which turn on a change in circumstances arising after the initial grant of asylum. *See id.* § 1158(c)(2). These include a change in the conditions in a noncitizen's home country, an intervening bilateral agreement between the United States and another country, the noncitizen acquiring a new nationality, or the noncitizen being convicted of a "particularly serious crime," defined to include any "aggravated felony." *Id.* § 1158(b)(2)(A), (b)(2)(B)(i), (c)(2)(A)-(D); *see Padilla v. Kentucky*, 559 U.S. 356, 377-79 (2010) (Alito, J., concurring in the judgment) (noting that the term "'aggravated felony'" includes misdemeanors (citation omitted)). When a principal asylee's asylum is terminated, any spouse or child with derivative asylum loses their asylum as well. 8 C.F.R. § 1208.24(d).

2. Petitioner is a citizen of Albania who was granted asylum as a derivative of his father. App. 1a-2a. In 2016, petitioner was convicted of federal bank fraud and aggravated identity theft. *Id.* at 2a.

a. In August 2019, the Department of Homeland Security (DHS) began removal proceedings. *Id.* at 2a & n.1. As part of those proceedings, DHS moved to terminate petitioner's asylum. *Id.* at 2a & n.2; *see* CA4 AR 936-39, ECF No. 10-3. Two days later, and without giving petitioner a chance to respond, an immigration judge (IJ) granted the motion. App. 2a, 90a. Among other things, petitioner applied to adjust to LPR status. *Id.* at 2a. But months later, the same IJ held that the prior termination decision precluded adjustment to LPR status. *Id.* at 88a. For that reason alone, the IJ denied the adjustment application and ordered petitioner removed. *Id.* at 82a, 88a.

b. In a split, published decision, the Board of Immigration Appeals (BIA) affirmed. *Id.* at 24a-60a.

The majority found Section 1159(b) "ambiguous" as to whether termination of asylum precludes adjustment. *Id.* at 30a. To resolve that perceived ambiguity, the majority turned to "overall statutory context," the implementing regulation, and prior BIA precedent. *Id.* at 30a-31a (citing 8 C.F.R. § 1209.2(a)). Focusing primarily on the word "status," the majority declared it a "'term of art'" requiring "'some form of *lawful status*,'" and concluded that it referred only to an applicant with "lawful asylee status at the time of adjustment." *Id.* at 32a (citations omitted). The majority further reasoned that if Congress "had intended any respondent granted asylum in the past to be eligible for adjustment of status[,] . . . it could have simply stated that a respondent must be 'any alien granted asylum' and omitted the term 'status' from the phrase." *Id.* at 34a. And because IJs "have discretion to defer ruling on a motion to terminate a respondent's asylee status," the majority believed its

"interpretation would not vitiate the waiver" authority in Section 1159(c). *Id.* at 36a.

For those reasons, the majority concluded that an applicant whose asylum has been terminated is ineligible for adjustment under Section 1159(b). *Id.* In so holding, the majority acknowledged that the Fifth Circuit had "reached a contrary conclusion in *Siwe v. Holder*, 742 F.3d 603, 612 (5th Cir. 2014)." *Id.* But the majority "respectfully disagree[d]" with the Fifth Circuit. *Id.* at 36a-38a.

The dissent, on the other hand, agreed with the Fifth Circuit. *Id.* at 45a-60a. Finding the statute unambiguous, the dissent explained that "[t]he phrase 'any alien granted asylum' is not synonymous with the term 'asylee,'" and that "the status of an 'asylee' is not the same as the status of being an 'alien granted asylum.'" *Id.* at 46a-47a. As the dissent explained, Section 1159(b) "d[oes] not specify that [a] noncitizen must remain in asylee status to be eligible for adjustment." *Id.* at 46a. That missing specification is particularly notable, the dissent continued, because neighboring provisions *do* impose explicit continuing-status requirements. *Id.* at 47a-48a, 50a (citing 8 U.S.C. § 1159(a)(1)(A), (b)(3)). Nor was the dissent persuaded that an IJ's discretion to defer termination would give Section 1159(c)'s waiver provision a meaningful role to play. *Id.* at 50a & n.3.

3. In another split decision, the Fourth Circuit affirmed. *Id.* at 1a-23a.

a. The majority agreed with the BIA's ultimate conclusion but staked out a third position: Section 1159(b) *unambiguously* precludes adjustment after termination of asylum. *See id.* at 14a-17a.

To reach that conclusion, the majority focused on two words—"status" and "adjust." *Id.* at 16a-17a. The majority first concluded that the word "'status' signals a present condition." *Id.* at 16a. The majority next explained that the word "adjust" signals a "move from one current status to another." *Id.* Because the majority found it "hard to understand how an alien can adjust his or her status without a cognizable status in the first place," it believed the use of the word "adjust" must require an "existing status." *Id.* And because petitioner "had no *asylum* status at the time he applied to become a lawful permanent resident," the majority concluded, "he had nothing from which he could adjust." *Id.* (emphasis added).

In a footnote, the majority acknowledged that, unlike Section 1159(b)'s prefatory clause, several neighboring provisions include explicit continuing-status requirements. *See id.* at 15a n.10. But it chalked this discrepancy up to Congress "not [being] perfectly consistent in" how it "emphasized timing." *Id.* The majority also recognized that its reading would intrude on the Attorney General's discretion to grant waivers under Section 1159(c), but concluded that it would not render that provision pure "surplusage" and that "an IJ could" simply "elect to defer ruling" on termination. *Id.*

Also in a footnote, the majority acknowledged that it reached a "different conclusion" than the Fifth Circuit. *Id.* at 17a n.11 (discussing *Siwe*, 742 F.3d 603). It simply noted that the Fifth Circuit did not "have the benefit of" this Court's "explanation" in *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017), that "[p]ast participles" can be "used as adjectives to describe the present state of things." *Id.*

Finally, and in the alternative, the majority concluded by holding that if Section 1159(b) were ambiguous, it would defer to the BIA's "reasonable interpretation" of the statute under *Chevron*. *Id.* at 17a-18a (discussing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

b. Judge Harris dissented in relevant part. The dissent agreed with the Fifth Circuit and the BIA dissent that Section 1159(b) unambiguously does not preclude adjustment to LPR status for noncitizens whose asylum has been terminated. App. 18a-23a.

Beginning with the language of Section 1159(b)'s prefatory clause, the dissent noted that the phrase "any alien granted asylum," "standing alone," arguably "answers th[e] question in favor of eligibility." *Id.* at 19a. Had Congress "intended to require *current* asylum status," the dissent explained, it could have used the term "asylee." *Id.* But instead Congress used "'granted asylum,' past tense." *Id.*

Looking to the "broader statutory context," the dissent reached the same conclusion. *Id.* at 19a-22a. "[U]nlike the majority," the dissent did not believe the word "status" suggests otherwise because Congress appeared to be referring to "*non-LPR status*." *Id.* at 19a-20a. And "two features of the statutory context" make that especially clear. *Id.* at 20a. "First and most important," the dissent explained, "when Congress intended to impose a continuing-status requirement in § 1159, it did so expressly and unambiguously." *Id.* Section 1159(a) and two paragraphs in Section 1159(b) show that Congress not only "knew how to say . . . that a noncitizen once granted asylum would remain eligible for adjustment only if he 'continue[s] to be' an asylee" or if his asylum "'has not been terminated'"—it was "downright

preoccupied with the timing question." *Id.* at 21a (citations omitted). The absence of such a requirement in Section 1159(b)'s prefatory clause, the dissent concluded, can therefore "only be understood as a purposeful omission." *Id.*

Although that alone was enough, "if more were required," the dissent found it at the "intersection of § 1159(b)'s threshold eligibility requirement" and "§ 1159(c)'s waiver provision." *Id.* The majority's interpretation may have fallen short of rendering Section 1159(c) "surplusage." *Id.* at 22a. But the dissent found it "surely" "odd" to think that the same criminal convictions would "exclude [petitioner] from eligibility for adjustment of status (because he is no longer an asylee under § 1159(b))"—even though they "need *not* exclude him from eligibility (because they may be waived under § 1159(c))." *Id.*

c. The court of appeals was unanimous on one point: petitioner did not moot his case by voluntarily complying with his order of removal and returning to Albania. *Id.* at 5a-7a (Maj. Op.); *id.* at 18a (Harris, J., concurring in part and dissenting in part).

Respondent had argued that the petition for review was moot because petitioner was in Albania, not "outside" his country of nationality, and so no longer a "refugee" under Section 1159(b)(3). *Id.* at 5a. But that question, the court of appeals explained, goes to the merits of whether adjustment would be available on remand. *Id.* at 6a-7a. It has nothing to do with whether the court could grant the requested relief: vacatur of the BIA's decision finding petitioner categorically ineligible for adjustment. *Id.*

4. Petitioner filed a timely petition for rehearing en banc, which the Fourth Circuit denied. *Id.* at 92a.

REASONS FOR GRANTING THE WRIT

This case presents the recurring question whether noncitizens who have been "granted asylum," but whose asylum was later terminated, remain eligible for adjustment to LPR status. In a split decision, the Fourth Circuit expressly departed from the Fifth Circuit on that question. Even the BIA panel split. And further percolation will only deepen the conflict.

The Fourth Circuit also got the answer to the question presented wrong. Text, context, and purpose make clear that Congress knew how to impose a continuing-asylum requirement, but declined to do so here. And the error is an important one. The Fourth Circuit's decision means near-certain removal not only for noncitizens whose grants of asylum have been terminated—but also for their innocent spouses and children. And this case presents an ideal vehicle. The Court's review is warranted.

I. The Fourth Circuit's Decision Creates A Circuit Split

The question presented has divided the courts of appeals and the BIA into three camps. Section 1159(b) either (i) unambiguously *permits* adjustment to LPR status for noncitizens whose asylum has been terminated (Fifth Circuit, Fourth Circuit dissent, BIA dissent), (ii) unambiguously *precludes* such adjustment for noncitizens whose asylum has been terminated (Fourth Circuit majority), or (iii) is ambiguous as to whether adjustment is permitted for these noncitizens (BIA majority). The arguments on all three sides of the debate have been thoroughly aired, and further percolation will only deepen the conflict. The Court's review is needed to resolve it.

A. There Is A Conflict Between The Fourth And Fifth Circuits

In *Siwe v. Holder*, the Fifth Circuit unanimously held that Section 1159(b) unambiguously permits adjustment to LPR status for noncitizens whose asylum has been terminated. 742 F.3d 603, 606-12 (5th Cir. 2014). The Fifth Circuit relied on the plain meaning of "'any alien granted asylum,'" alongside the "continuing-status requirements" in Section 1159(a)(1)(A) and (b)(3), which together show that "Congress knows how to impose a continuing-status requirement when it wishes to do so." *Id.* at 608-09. It also noted that an alternative reading would undermine "Congress's careful balancing of interests" in Section 1159(c)'s waiver authorization. *Id.* at 609.

The Fourth Circuit has now held the exact opposite: Section 1159(b) unambiguously *precludes* the Attorney General from adjusting the status of noncitizens whose asylum has been terminated. App. 16a. All three judges acknowledged the disagreement. *See id.* at 11a, 17a n.11 (Maj. Op.); *id.* at 18a (Harris, J., concurring in part and dissenting in part). So did the BIA. *Id.* at 36a-38a (BIA majority); *id.* at 54a (BIA dissent). With the Fourth Circuit's denial of rehearing en banc, the conflict is firmly entrenched.

In a footnote, the panel majority suggested that the Fifth Circuit might have reached a different conclusion if it "ha[d] the benefit of" this Court's decision in *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79 (2017). App. 17a n.11. But *Henson* is far afield. In a case about the Fair Debt Collection Practices Act, this Court noted that "[p]ast participles" are "routinely used as adjectives to describe the present state of a thing," 582 U.S. at 84—

a grammatical observation of which the *Siwe* panel was no doubt aware. And *Henson* itself looked to the "larger statutory landscape" and "contextual clues" to determine how Congress had, in fact, used a particular participle—exactly what the dissent did here. *Compare id.* at 85-86, *with* App. 19a-22a (Harris, J., concurring in part and dissenting in part). The Fifth Circuit would not (and could not) overturn circuit precedent on so thin a reed. *See Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 591 (5th Cir. 2019) (overruling must be "unequivocally directed by controlling Supreme Court precedent" (citation omitted)). So the split will remain entrenched without this Court's intervention.

B. Further Percolation Will Only Deepen The Split

Further percolation on the question presented will do more harm than good. The two courts of appeals' decisions have thoroughly aired both sides of the statutory interpretation issue. And another appeal raising the same question presented is currently pending before the Second Circuit, though oral argument has not been scheduled. *See Wassily v. Garland*, No. 22-6247 (2d Cir. filed May 20, 2022). In *Wassily*, the IJ terminated the petitioner's asylum but nonetheless found that he was eligible for adjustment to LPR status. App. 121a-27a. The BIA reversed after reaffirming—based solely on its precedential decision in petitioner Cela's case—that termination is a categorical bar to adjustment. *Id.* at 117a-18a (citing *Matter of T-C-A*, 28 I. & N. Dec. 472 (B.I.A. 2022), reproduced at App. 24a-60a). However the Second Circuit decides that appeal, the conflict will only deepen—in one direction or the other.

In the meantime, uncertainty and confusion will persist. Other courts of appeals have noted or addressed the question presented—albeit only in passing. *See, e.g.*, *Ishmael v. Att'y Gen.*, 77 F.4th 175, 179-80 (3d Cir. 2023) (holding that petitioner met "the statutory requirements to apply for adjustment of status," and that the earlier "terminat[ion of] his grant of asylum" was proper); *Bare v. Barr*, 975 F.3d 952, 966-67 (9th Cir. 2020) (noting the issue and citing *Siwe*, but leaving the question undecided); *Sharashidze v. Gonzale*s, 480 F.3d 566, 568 (7th Cir. 2007) (stating, in dicta, that those with "terminated asylee status" are "no longer eligible" for adjustment of status under Section 1159(b)).

And the panel majority's reasoning threatens more confusion. One of its key assumptions is that the Attorney General cannot "adjust" an applicant's "status" if the applicant has no "cognizable," or "lawful," status in the first place. App. 16a. That assumption is not only wrong (*see infra* at 21-23), it creates considerable tension with decisions of other circuits. The Fifth Circuit, for example, has held that the phrase "'any status' naturally encompasses" those with "an unlawful status." *Tula-Rubio v. Lynch*, 787 F.3d 288, 294 (5th Cir. 2015). Other courts of appeals have the same understanding. *See Saldivar v. Sessions*, 877 F.3d 812, 819 (9th Cir. 2017) ("[A] status is a status, be it lawful or unlawful.").

This Court's intervention is needed now to resolve the conflict and address the confusion.

II. The Fourth Circuit's Decision Is Wrong

Section 1159(b)'s prefatory clause allows the Attorney General to "adjust to the status of an alien lawfully admitted for permanent residence the status

of any alien granted asylum," if five other criteria are met. 8 U.S.C. § 1159(b). The question presented is whether the Attorney General may adjust the status of noncitizens who were "granted asylum," but whose asylum has since been terminated. The text, context, and purpose of Section 1159(b) make clear that the answer to that question is yes. The Fourth Circuit's contrary reasoning does not withstand scrutiny.

A. Section 1159(b) Does Not Impose A Continuing-Asylum Requirement

1. Section 1159(b)'s prefatory clause is written using expansive and backwards-looking terms. The Attorney General may adjust the status of "*any* alien *granted* asylum." 8 U.S.C. § 1159(b) (emphases added). "Read naturally, the word 'any' has an expansive meaning . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). And "granted," when used as a past-tense verb, refers to something that happened in the past. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (emphasizing "backward-looking language" in construing past-tense statutory terms).

While "granted" can also be used as an adjective denoting a present status, *see Henson*, 582 U.S. at 84, that depends on context, *see infra* at 15-19. And even if used in the present sense, that still would not determine *what* present status is required: present "asylee" status or the status of having once been "granted asylum." App. 20a (Harris, J., concurring in part and dissenting in part).

Perhaps even more notable, though, is what Section 1159(b)'s prefatory clause does *not* say. "Nowhere in this section does Congress require that an alien's asylum, once granted, still must be in effect at the time he applies for adjustment of status." *Siwe*, 742 F.3d at 608. Congress could have allowed the Attorney General to adjust the status of "any asylee." *See* App. 19a (Harris, J., concurring in part and dissenting in part). Or "any alien with asylum status." Or "any alien who continues to have asylum." Congress instead used the phrase "any alien granted asylum." And courts should not "read[] words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

2. "There is a case to be made that the phrase 'any alien granted asylum,' standing alone, answers [the question presented] in favor of eligibility." App. 19a (Harris, J., concurring in part and dissenting in part); *id.* at 46a, 59a (BIA dissent finding the same language "unambiguous and controlling"). But, of course, the prefatory clause does not stand alone. And what follows are several conditions that further confirm the phrase's ordinary meaning.

The remainder of Section 1159(b) makes clear that "granted" is being used in the past tense. *See Henson*, 582 U.S. at 85 (looking to "neighboring provisions" to determine whether a word was being used in past or present tense). Section 1159(b)(2) provides, for example, that an applicant for adjustment of status must have been "physically present in the United States for at least one year after being granted asylum." 8 U.S.C. § 1159(b)(2). In this paragraph, "granted asylum" can only refer to a completed, historical event—the point at which the noncitizen received a grant of asylum—not a continuing, present

status. And "identical words . . . in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). This parallel usage in the very same subsection of the relevant statute thus suggests that the phrase "granted asylum," as used in Section 1159(b)'s prefatory clause, also requires only a grant of asylum in the past—not continuing-asylum status.

Section 1159(b) also imposes two *express* continuing-status rules unrelated to asylum status. Section 1159(b)(3) requires that an applicant "continue[] to be a refugee within the meaning of Section 1101(a)(42)(A)" when seeking adjustment. 8 U.S.C. § 1159(b)(3). And Section 1159(b)(5) requires that the applicant remain "admissible . . . at the time of examination for adjustment." *Id.* § 1159(b)(5). These explicit continuing-status requirements make the absence of anything similar in Section 1159(b)'s prefatory clause especially "conspicuous[]." *Siwe*, 742 F.3d at 608; *see Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (courts assume that "Congress acts intentionally and purposely" when using language in one section of a statute and omitting it elsewhere (citation omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (same). Congress clearly knew how to require that a noncitizen "continue[] to be" an asylee or remain an asylee "at the time of examination for adjustment." It chose not to require either here.

3. The neighboring statutory provisions resolve any lingering doubt.

a. The immediately preceding subsection, Section 1159(a), governs LPR adjustment for refugees and was enacted at the same time as Section 1159(b). *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105-06. Just like paragraphs (3) and (5)

in subsection (b), subsection (a) imposes its own explicit continuing-status requirement. It allows the Attorney General to adjust a refugee's status only if his admission as a refugee "has not been terminated." 8 U.S.C. § 1159(a)(1)(A). Congress could have done the same in subsection (b). That is, it could have allowed asylees to adjust status only if their asylum "has not been terminated." It did not. For "a Congress downright preoccupied with the timing question," this "can only be understood as a purposeful omission." App. 21a (Harris, J., concurring in part and dissenting in part).

Congress had good reasons for treating refugees and asylees differently when it comes to termination. The Attorney General may terminate asylum for a host of reasons—several of which rest entirely outside an asylee's control. A "fundamental change in circumstances" in the noncitizen's country of origin, for example, may lead to termination of asylum. *See* 8 U.S.C. § 1158(b)(1)(A), (c)(2)(A). Or a treaty might allow removal to a third country where the noncitizen could receive asylum (or equivalent protections). *See id.* § 1158(c)(2)(C). Even for those whose termination was a result of criminal convictions, *see id.* § 1158(b)(2), (c)(2)(B), such convictions have nothing to do with their fear of persecution in their home country, if forced to return. And many of these former asylees and their derivative spouses and children may have established strong ties to the United States over a long period of time.

Refugees, on the other hand, are subject to a different adjustment scheme. They must present themselves for LPR adjustment within one year of arriving in the United States. *Id.* § 1159(a)(1), (2). And unlike asylees, there is only one ground for

termination of refugee status: "The refugee status of any alien . . . may be terminated by the Attorney General . . . if the Attorney General determines that the alien *was not in fact a refugee* within the meaning of section 1101(a)(42) . . . at the time of the alien's admission." *Id.* § 1157(c)(4) (emphasis added). So when a refugee's status is terminated, he (i) will have been present in the United States for, at most, a single year, and (ii) would have never been properly considered a refugee in the first place—meaning he *never* faced a likelihood of persecution in his home country and was *never* properly admitted to this country. Congress could have reasonably decided that such refugees should not be able to adjust to LPR status, while leaving the Attorney General with discretion to adjust to LPR status the status of former asylees who feared (and may still fear) persecution, and who spent years building a life in this country—as well as those granted asylum as derivative asylees.

b. Subsection 1159(c) points in the same direction.

Section 1159(b)(5) requires that noncitizens continue to be "admissible" when they apply for adjustment to LPR status. *Id.* § 1159(b)(5). But Congress also created an "except[ion]" in subsection (c), which provides that the Attorney General may "waive" this admissibility requirement in certain cases "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 1159(c). The grounds for termination of asylum, however, substantially overlap with the grounds for inadmissibility. *Compare id.* § 1182(a), *with id.* § 1158(c)(2). So if termination of asylum were a categorical bar to adjustment, the Attorney General's waiver authority would be gutted in any case

involving termination. No matter the "public interest," no matter the need to "assure family unity," no matter how grave the "humanitarian purpose[]," waiver would be unavailable because termination would be dispositive. If nothing else, it is certainly "odd" to think Congress would, in Section 1159(b), substantially "undermin[e] the discretion that [it] clearly sought to vest in the agency head" in Section 1159(c). App. 22a (Harris, J., concurring in part and dissenting in part).

4. Later enactments confirm what text and context make clear: there is no continuing-asylum requirement. In 1990, Congress exempted certain noncitizens from a then-existing numerical cap on adjustment applications. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 104(c)-(d), 104 Stat. 4978, 4985-86. In doing so, Congress permitted adjustment as long as the noncitizen had been "granted asylum"—and clarified that this applied "regardless of whether or not such asylum has been terminated." *Id.* § 104(d), 104 Stat. at 4985. This later Congress thus understood that noncitizens whose asylum "has been terminated" were still "granted asylum"—and, as such, still eligible for adjustment.

B. The Fourth Circuit's Reasoning To The Contrary Is Flawed

The court of appeals had no meaningful response to this textual and contextual evidence. It brushed off the express continuing-status requirements in Section 1159 as examples of Congress "not [being] perfectly consistent." App. 15a n.10. It incorrectly described the 1990 amendments as mere "legislative history." *Id.* at 11a. And it discounted the intrusion on the Attorney General's discretion in Section 1159(c)

because that provision had not been rendered complete "surplusage." *Id.* at 15a n.10. The court of appeals instead relied exclusively on two terms in Section 1159(b)—"status" and "adjust"—to find that the statute unambiguously imposes a continuing-asylum requirement. *Id.* at 14a-17a. Neither term can bear that weight.

1. Let's begin with "status." The majority noted that the "ordinary meaning of 'status' signals a present condition," and that the reference to adjustment of status therefore implies a focus on the noncitizen's present "*asylum* status." *Id.* at 16a (emphasis added). But as the dissent explained, this just begs the question: is the relevant "status" "asylum status," or something else—like "non-LPR status," or the status of having once been "granted asylum." *Id.* at 19a-20a (Harris, J., concurring in part and dissenting in part) (emphasis omitted).

The majority then reasoned that, unless "status" refers to "present" asylum status, the phrase "the status of" would "do[] no work." *Id.* at 16a. But that's just wrong. It would have been grammatically awkward, and likely incorrect, to omit the word "status" and allow the Attorney General to adjust to "the status of an alien lawfully admitted for permanent residence . . . any alien granted asylum." The thing being adjusted, after all, is the noncitizen's *status*—not the noncitizen himself.

And other textual cues suggest that the word "status" here refers to something other than "asylum status." Congress's use of the word "any" in "the status of *any* alien granted asylum" dissociates a noncitizen's "status" from whether he was "granted asylum." While it might make sense to say that a noncitizen has the "status" of "*an* alien granted

asylum," it makes no sense to say that he has the "status" of "*any* alien granted asylum." Tellingly, respondent's briefing below routinely elided the word "any" when quoting Section 1159(b), often referring to "the 'status of [an] alien granted asylum.'" *See* CA4 Resp. Br. 2, 3, 9, 20, 25-26, 32, ECF No. 30 (alteration in original). But that is not what the statute says. The actual statutory phrase "any alien granted asylum," naturally read, instead describes "any" noncitizens who share a common historical fact: they were once *granted* asylum, whether or not they currently have "asylum status" or are "asylees."

2. The court of appeals also erred in its heavy reliance on the word "adjust." It held that "Congress's use of 'adjust' suggests a requirement of an existing," "cognizable status" from which to "adjust"—and that, with no "asylum status," petitioner held no such "cognizable status." App. 16a. That reasoning misunderstands the law. Under the Immigration and Nationality Act (INA), noncitizens do not need a "cognizable status" to adjust to LPR status; the Attorney General may adjust their status from unlawful status—or from no status at all.

Consider, for example, Sections 1255a, 1255b, and 1255 of the INA. Each allows certain noncitizens to "adjust" their "status" to LPR status. But each also disclaims any lawful-status rule. Section 1255a(a)(2)(A) allows the Attorney General to "adjust the status" of certain noncitizens—including those with "unlawful status." 8 U.S.C. § 1255a(a)(2)(A); *see Cardoza-Fonseca*, 480 U.S. at 426 n.3 (recognizing that, under this provision, a noncitizen with "unlawful status" may "have his or her status adjusted" to another status). Likewise, Section 1255b(a) allows "adjustment of . . . status" for some

noncitizens who entered the country but "failed to maintain a status" at all. 8 U.S.C. § 1255b(a). And while Section 1255(c)(2) generally bars certain noncitizens from adjusting to LPR status if they have an "unlawful immigration status," it provides an exception for any "immediate relative" of a U.S. citizen—even if they have an "unlawful . . . status." *Id.* § 1255(c)(2). Congress has thus allowed noncitizens with "unlawful" or even no "status" to adjust to LPR status.

That is no accident. Over half a century ago, Congress expressly rejected a continuing-lawful-status requirement. Under the 1952 INA, the Attorney General could only grant adjustment to someone who was "lawfully admitted" and who was "continuing to maintain that status." INA, Pub. L. No. 82-414, § 245(a), 66 Stat. 163, 217 (1952). But the 1952 Act was immediately criticized because, among other things, "this new adjustment of status may be granted only to an alien lawfully admitted . . . who is continuing to maintain that status," thereby excluding the "great number" of noncitizens "whose present status is irregular, for one reason or another," and so cannot meet such "rigidly limited conditions." *Whom Shall We Welcome: Report of the President's Commission on Immigration and Nationalization* 210-11 (1953). In 1958, Congress responded by eliminating these "rigidly limited conditions," and permitting adjustment for any noncitizen admitted as a "bona fide nonimmigrant." Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 699, 699.

Consistent with that history, several courts of appeals have recognized that the term "status," as used in the INA, "encompasses both lawful *and unlawful* legal conditions." *Tula-Rubio*, 787 F.3d at

295; *see Saldivar*, 877 F.3d at 815-19 (similar). Both *Tula-Rubio* and *Saldivar* addressed whether a noncitizen without lawful status may still qualify, for purposes of cancellation of removal, as being "admitted in any status." *Tula-Rubio*, 787 F.3d at 290-91 (quoting 8 U.S.C. § 1229b(a)(2)); *see Saldivar*, 877 F.3d at 813 (same). Each found it "plain" that such noncitizens do have a "status"—even if that status is "unlawful." *Tula-Rubio*, 787 F.3d at 293, 294 n.5; *see Saldivar*, 877 F.3d at 813. They reasoned that the "'expansive'" term "any" must be "broadly" construed. *E.g.*, *Tula-Rubio*, 787 F.3d at 293-94 (citation omitted). And other portions of the INA—including Section 1255(a)'s adjustment provision—in fact use "'status'" to "encompass[] both lawful *and unlawful* legal conditions." *Id.* at 295 (citing 8 U.S.C. § 1255(a), (c)). So "it matters not whether [one's] status under the immigration law . . . was lawful or unlawful." *Id.* at 295-96; *see Saldivar*, 877 F.3d at 817 (same). In either case, the noncitizen does have a "status" as far as the INA is concerned.

Properly understood, then, former asylees are in the same position as other noncitizens without lawful status. Petitioner's *asylum* has been terminated, but he still has a status from which he can adjust. Whether described as "unlawful status," the status of having been "granted asylum," or "non-LPR status," the point is the same. Congress allows the Attorney General to "adjust" a noncitizen's status to LPR status—regardless whether the noncitizen's status was "cognizable" (App. 16a) to begin with. Accordingly, the word "adjust" can no more support reading a continuing-asylum requirement into Section 1159(b) than the word "status."

III. The Question Presented Is Important And This Case Is An Ideal Vehicle

The question presented is important. Without this Court's review, the court of appeals' decision will lead to significant and anomalous consequences. And this case presents an ideal vehicle to decide the question.

A. The Question Presented Is Important

1. The question presented affects all noncitizens whose asylum has been terminated. Under the Fourth Circuit's rule, they will be categorically ineligible for adjustment to LPR status under Section 1159(b) regardless of their circumstances. Unless they happen to be married to a U.S. citizen or LPR, they likely will lack any other basis to adjust to LPR status. And because the most common basis for terminating asylum often precludes the grant of withholding of removal, *compare* 8 U.S.C. § 1158(b)(2), (c)(2)(B), *with id.* § 1231(b)(3)(B), those noncitizens will likely face removal to the same countries from which they fled or fear persecution. That is, the termination of asylum will often foreclose adjustment and virtually ensure removal.

There are many reasons to think these harsh consequences are neither necessary nor intended.

First, the impact is not limited to the noncitizen whose asylum was terminated. Termination automatically extends to principal asylees' spouses and children. *See* 8 C.F.R. § 1208.24(d) (principal asylee's termination "shall result in termination of" derivative asylee's status). In 2021, these derivative asylees accounted for nearly 20% of the noncitizens granted asylum. Ryan Baugh, *Refugees and Asylees: 2021* at 1, *Annual Flow Report* (Off. Immigr. Stat.) Sept. 2022, https://www.dhs.gov/sites/default/

files/2022-10/2022_0920_plcy_refugees_and_asylees_fy2021.pdf. If the decision below stands, these innocent spouses and children—through no fault of their own—will be precluded from adjusting to LPR status and will likely face removal.

Second, many grounds for termination of asylum are outside the control of an asylee. Asylum can be terminated, for example, due to a change in the conditions in a noncitizen's home country or an intervening bilateral agreement between the United States and another country. *See* 8 U.S.C. § 1158(c)(2)(A), (C). Noncitizens whose asylum was terminated for these reasons will be ineligible for adjustment to LPR status too.

Third, even if a noncitizen's asylum is terminated because he committed a crime, *see id.* § 1158(c)(2)(B), discretion to adjust to LPR status in appropriate circumstances remains important. For one thing, even relatively minor criminal conduct may support termination on this ground. Although termination is limited to convictions for "particularly serious crime[s]," *id.* § 1158(b)(2)(A)(ii), the definition of a "particularly serious crime," for purposes of asylum termination, includes any "aggravated felony," *id.* § 1158(b)(2)(B)(i). And the "'aggravated felony'" category is both notoriously capacious—paradoxically including "'misdemeanors'"—and often "not clear." *Padilla v. Kentucky*, 559 U.S. 356, 377-79 (2010) (Alito, J., concurring in the judgment) (citations omitted); *see United States v. Pacheco*, 225 F.3d 148, 149-50, 153-54 (2d Cir. 2000) (reluctantly concluding that a misdemeanor conviction for stealing a $10 video game, with a one-year suspended sentence, qualified as an "aggravated felony"), *cert. denied*, 533 U.S. 904 (2001).

But even in cases involving truly "serious" criminal conduct, adjustment still has an important role to play. Take the facts of the *Wassily* case, currently before the Second Circuit. There, even though an IJ terminated Wassily's asylum as a result of his criminal conviction, the same IJ found termination to have no bearing on his "well-founded fear of persecution"—and, accordingly, concluded that it "d[id] not impact his eligibility for adjustment of status." App. 121a-22a. Citing humanitarian concerns, and Wassily and his family's decades-long residence in the United States, the IJ waived inadmissibility under Section 1159(c) and granted adjustment. *Id.* at 123a-27a. The BIA reversed only after holding—based on its prior decision in petitioner Cela's case—that termination bars adjustment in all cases. *Id.* at 117a-18a. That categorical prohibition was dispositive of the outcome.

2. The Fourth Circuit's rule also gives outsized and arbitrary importance to matters of timing.

Outside removal proceedings, applications to adjust status can take years to be processed and decided. USCIS, *Historical National Median Processing Time (in Months) for All USCIS for Select Forms By Fiscal Year* (Sept. 30, 2023), https://egov.uscis.gov/processing-times/historic-pt (median time of 22.9 months to process an asylee's application to adjust to LPR status). If asylum is terminated after the application is filed but before it is granted, an asylee (or derivative asylee) subject to the Fourth Circuit's categorical rule is out of luck.

Once in removal proceedings, the consequences of timing become even more stark: a categorical rule gives the government extraordinary and essentially

unreviewable discretion to sequence adjudication of termination motions and adjustment applications.

Consider the following scenario: a noncitizen granted asylum is placed in removal proceedings. He applies to the IJ for adjustment of status under Section 1159(b) as a defense to removal. DHS, in turn, asks the IJ to terminate the noncitizen's asylum under Section 1158(c)(2). In this scenario, the BIA has explained that an IJ has discretion to decide the termination motion before the application for adjustment. *See Matter of V-X-*, 26 I. & N. Dec. 147, 149 n.1 (B.I.A. 2013) (citing *Matter of K-A-*, 23 I. & N. Dec. 661, 664-66 (B.I.A. 2004)).

Under the Fifth Circuit's rule in *Siwe*, that discretion is unremarkable: either way, the IJ will have to address both termination and adjustment. In the Fourth Circuit, the sequencing is dispositive. An IJ's decision on termination controls the availability of LPR adjustment. This gives DHS a compelling reason to push for early termination—and overworked IJs a compelling incentive to accede to such requests and take the complex, discretionary adjustment question off the table. That is what happened here: the IJ terminated petitioner's asylum just two days after the government sought termination, and before petitioner had a chance to respond or request adjustment. *See* App. 2a, 90a; CA4 AR 936-99, ECF No. 10-3.

B. This Case Is An Ideal Vehicle

1. Whether termination of asylum categorically precludes adjustment under Section 1159(b) was the sole merits issue decided below, and the only reason given for denying the petition for review. *See* App. 1a. The court of appeals' split decision gave that question

careful attention, *see id.* at 1a-23a, as did the BIA's similarly divided decision, *see id.* at 24a-60a.

2. There are no alternative grounds for affirming the denial of, or dismissing, the petition for review.

a. The court of appeals' majority decision included one alternative holding: even if the statute were ambiguous, it would defer to the BIA under *Chevron*. *Id.* at 17a-18a. But that is just part of the same question of statutory interpretation covered by the question presented. And the many flaws in this alternative holding—even beyond the fact that the statute is not ambiguous—only further highlight the need for this Court's review.

To state the obvious, this Court is currently considering whether to overrule *Chevron*. *See Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.); *Relentless, Inc. v. Dep't of Comm.*, No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023) (mem.). If *Chevron* is overruled, any alternative holding premised on that doctrine could not be sustained. But even if *Chevron* survives in one form or another, there is another "'traditional tool[]' of construction" that should resolve any ambiguity in petitioner's favor before resorting to agency deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). As this Court has long held, "ambiguities in deportation statutes" should be construed "in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001) (citation omitted). The Court has recognized but not resolved questions about the relationship between this pro-immigrant canon and *Chevron*. *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397-98 (2017). If the statutory interpretation analysis goes

this far (which is unlikely), the Court could choose to resolve that question too.

b. The Fourth Circuit found no jurisdictional bar requiring dismissal. App. 6a-7a; *id.* at 18a (Harris, J., concurring in part and dissenting in part). That was correct.

Respondent had argued that petitioner mooted his petition for review by complying with the order of removal and returning to Albania. *Id.* at 5a-6a. The argument was premised on Section 1159(b)(3), which requires that petitioner continue to be a "'refugee'" which, in turn, requires that he continue to reside "outside" of Albania. *Id.* (quoting 8 U.S.C. § 1159(b)(3)). But as all three judges on the Fourth Circuit panel agreed, that is a merits question—not a jurisdictional bar. And regardless, respondent is wrong on the merits.

Respondent's argument, in essence, was that the agency could have denied adjustment under Section 1159(b)(3). But that is a merits question not before the Court. That was not the basis for the BIA's decision, and it is black-letter law that a court cannot affirm agency action on grounds not reached—let alone decided—by the agency. *See, e.g.*, *Calcutt v. FDIC*, 143 S. Ct. 1317, 1318 (2023) (per curiam) ("It is a 'simple but fundamental rule of administrative law' that reviewing courts 'must judge the propriety of [agency] action solely by the grounds invoked by the agency.'" (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))). If termination of petitioner's asylum does not preclude adjustment, this Court may correct that error, vacate the agency's decision ordering removal, and remand. That is "effectual relief." *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted); *Nken v. Holder*, 556 U.S. 418, 435

(2009) ("Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.").

And while this would only be an issue on remand, respondent is wrong on the merits too. Whether or not petitioner continues to be a "refugee" in his own right, there is no dispute that his *father* (whose asylum status formed the original basis for petitioner's derivative asylum) so qualifies. App. 5a-6a, 65a-66a. And Section 1159(b)(3) permits adjustment for a "refugee . . . *or* a . . . *child* of such refugee." 8 U.S.C. § 1159(b)(3) (emphasis added). So petitioner remains eligible for LPR adjustment, but for the Fourth Circuit's error.[2]

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[2] Section 1101(b)(1) defines a "child" as an unmarried person "under twenty-one years of age," 8 U.S.C. § 1101(b)(1), but noncitizens who were granted derivative asylum before turning 21 are still "classified as a child for purposes of . . . section 1159(b)(3)" even if they later "attained 21 years of age," *id.* § 1158(b)(3)(B) (titled "[c]ontinued classification of certain aliens as children").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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