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No. 23-686

In the Supreme Court of the United States

TIGER CELA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
ANDREW C. MACLACHLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a noncitizen who was granted asylum, but whose asylum status was later terminated, may adjust under 8 U.S.C. 1159 to the status of an alien lawfully admitted for permanent residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 75 F.4th 355. The decision of the Board of Immigration Appeals (Pet. App. 24a-60a) is reported at 28 I. & N. Dec. 472. The decisions of the immigration judge (Pet. App. 61a-83a, 84a-89a, 90a-91a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2023. A petition for rehearing en banc was denied on September 25, 2023 (Pet. App. 92a). The petition for a writ of certiorari was filed on December 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Asylum is a form of discretionary relief under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 8 U.S.C. 1158. As a general matter, asylum protects a noncitizen from removal, creates a path to lawful permanent residence and U.S. citizenship, enables the noncitizen to work, and enables the noncitizen's family members to seek lawful immigration status derivatively. See 8 U.S.C. 1158-1159.*

Under the INA, a noncitizen generally must satisfy three criteria to obtain asylum: First, the noncitizen must show that he qualifies as a "refugee"—*i.e.*, that he is outside his country of nationality and is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on a protected trait. See 8 U.S.C. 1101(a)(42), 1158(b)(1)(A). Second, the noncitizen must show that he does not fall within a disqualifying exception. See 8 U.S.C. 1158(a)(2) and (b)(2). And third, the noncitizen must demonstrate that he merits a favorable exercise of the discretion to grant asylum. See 8 U.S.C. 1158(b)(1)(A).

Asylum status may be terminated for various reasons, including if the noncitizen has been "convicted by a final judgment of a particularly serious crime" and the Attorney General determines that the crime "constitutes a danger to the community of the United States." 8 U.S.C. 1158(b)(2)(A)(ii); see 8 U.S.C. 1158(c)(2); 8 C.F.R. 208.24, 1208.24; see also Pet. App. 9a.

The Secretary of Homeland Security or the Attorney General, in his discretion and subject to additional regulations, may adjust the status of "any alien granted

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

asylum" to that of a lawful permanent resident. 8 U.S.C. 1159(b). To be eligible for adjustment of status under the statute, the noncitizen must (1) apply for adjustment of status; (2) have at least one year of physical presence in the United States after being granted asylum; (3) continue to be a refugee or a spouse or child of a refugee; (4) not be firmly resettled in any foreign country; and (5) be admissible as an immigrant or qualify for a waiver of inadmissibility described in 8 U.S.C. 1159(c). 8 U.S.C. 1159(b); see 8 C.F.R. 209.2, 1209.2. Section 1159(c), in turn, provides that certain grounds of inadmissibility are inapplicable and authorizes the Secretary or Attorney General to waive certain other portions of Section 1182 for humanitarian purposes, to assure family unity, or in the public interest. 8 U.S.C. 1159(c).

2. a. Petitioner entered the United States in 2001 and was ordered removed to Albania in 2008. Pet. App. 1a. He returned to Albania in 2008 and lived there until 2012, when his father was granted asylum in the United States. *Ibid.* Because petitioner was a minor when his father filed for asylum, he was eligible for derivative asylum status. See 8 U.S.C. 1158(b)(3)(B). Petitioner thus lawfully reentered the United States with derivative asylum status in 2012. Pet. App. 2a. In 2016, petitioner was convicted of federal bank fraud and aggravated identity theft and was sentenced to 44 months in prison. *Ibid.*

b. Based on those convictions, the Department of Homeland Security commenced removal proceedings against petitioner and moved to terminate his asylum status. Pet. App. 2a. The immigration judge (IJ) granted the motion to terminate petitioner's asylum status. *Id.* at 90a. At a subsequent removal hearing,

petitioner conceded he was removable under 8 U.S.C. 1227(a)(2)(A)(ii) and (iii) based on his convictions, which were for an aggravated felony and crimes involving moral turpitude. See Pet. App. 85a-86a. He nevertheless applied to adjust his status to that of a lawful permanent resident under 8 U.S.C. 1159(b) and for a waiver of his inadmissibility under 8 U.S.C. 1159(c). Pet. App. 86a. In addition, he sought withholding of removal under 8 U.S.C. 1231(b)(3) and protection under the Convention Against Torture. See Pet. App. 86a.

The IJ denied each of petitioner's requests. Pet. App. 84a-89a. As relevant here, with respect to petitioner's request for adjustment of status, the IJ concluded that petitioner was ineligible under Section 1159(b) because his asylee status had been terminated. *Id.* at 87a-88a. The IJ likewise determined that because petitioner was no longer an asylee, he was not eligible for a waiver of inadmissibility. *Id.* at 88a. After denying petitioner's motion for reconsideration, the IJ ordered petitioner removed to Albania. *Id.* at 61a-83a.

3. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (Board), which dismissed the appeal in a precedential decision. Pet. App. 24a-60a. With respect to petitioner's argument regarding his eligibility for adjustment of status, the Board first concluded that the "text and legislative history" of Section 1159(b) "do not reveal whether Congress clearly intended adjustment of status under this provision to be available to respondents whose asylee status has been terminated." *Id.* at 29a. The Board found that the phrase "'the status of any alien granted asylum'" in Section 1159(b) could be interpreted either as a "past tense verb," rendering an applicant eligible if "at any time in the past, he or she was granted asylum," or as a "past

participle" adjective meant to "describ[e] an applicant's present status." *Ibid.* The Board therefore concluded that Section 1159(b) is "ambiguous as to whether a respondent may apply for adjustment of status under that section after his or her asylee status has been terminated." *Id.* at 30a.

After considering the statutory language, along with "the governing regulation, [the Board's] past precedents, and the overall statutory context," the Board interpreted the statute to require that an applicant possess a current asylee "status" when he seeks to adjust his status under that provision. Pet. App. 31a; see *id.* at 31a-36a. Because petitioner's status as an asylee had been terminated before his application for adjustment of status, the Board reasoned that he was ineligible to adjust to lawful-permanent-resident status under Section 1159(b). *Id.* at 32a-33a, 36a.

The Board acknowledged that the Fifth Circuit in *Siwe* v. *Holder*, 742 F.3d 603 (2014), had held that the plain language of Section 1159(b) does not expressly require a noncitizen to maintain asylee status to apply for an adjustment of status. Pet. App. 36a. The Board, however, disagreed with the Fifth Circuit for several reasons. *Id.* at 36a-38a. First, the Fifth Circuit's conclusion that "granted" is past tense did not have the benefit of this Court's explanation in *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017), that such past participles "are routinely used as adjectives to describe the present state of a thing." Pet. App. 37a (quoting *Henson*, 582 U.S. at 84). Second, the Board disagreed with the inference the Fifth Circuit drew by comparing the absence of a nontermination criterion in Section 1159(b) with the presence of such a criterion with respect to refugee status in Section 1159(a). *Ibid.*

The Board explained that the result of the Fifth Circuit's interpretation would be to "provide unique relief to [noncitizens] whose asylee status has been terminated, while precluding such relief for similarly situated [noncitizens] whose refugee status has been terminated," which would "contraven[e] Congress' intention to give 'asylees and refugees a similar status under the law.'" *Ibid.* (brackets and citation omitted). Finally, the Board disagreed with the Fifth Circuit's concern that the government's reading of Section 1159(b) would render inoperative Section 1159(c)'s provision of a discretionary waiver of certain criminal grounds of removability for certain applicants for adjustment of status. *Id.* at 37a-38a. The Board explained that because an IJ may defer ruling on a motion to terminate pending consideration of an application for adjustment of status, a waiver under Section 1159(c) may still be granted. *Id.* at 38a.

One member of the Board panel dissented in relevant part. Pet. App. 45a-60a. In the dissenting member's view, the text of Section 1159(b) unambiguously establishes that "any alien granted asylum" may pursue adjustment of status even if his asylum status had later been terminated. *Id.* at 46a, 56a, 59a.

4. Petitioner sought review in the court of appeals, which denied his petition. Pet. App. 1a-23a.

a. The court of appeals first considered whether the petition was moot because petitioner had complied with the removal order and returned to Albania after filing his petition. Pet. App. 5a-7a. The court concluded that the petition was not moot because petitioner continued to ask the court to vacate the Board's decision that he is ineligible for relief so his application for adjustment of status could be considered on the merits. *Id.* at 6a-7a. The court recognized, however, that petitioner's return

to Albania might provide an alternative basis for denying petitioner's application on the merits. *Id.* at 6a.

Turning to Section 1159(b), the court of appeals "utilize[d] all [the] interpretive tools to discern" Section 1159(b)'s meaning, holding that it unambiguously precludes adjusting the status of a noncitizen whose asylum status has been terminated. Pet. App. 14a. The court focused on the ordinary meaning of the word "'status,'" which "signals a present condition," and "'adjust,'" which "suggests a move from one current status to another." *Id.* at 16a. The court observed that without adopting that interpretation, the phrase "'the status of'" and the word "'adjust'" would "do[] no work." *Ibid.* Were Congress providing for a noncitizen to obtain status as a lawful permanent resident without currently being an asylee, it "would have used verbs such as apply, petition or request instead of adjust." *Ibid.*

The court of appeals acknowledged petitioner's argument that Section 1159(b), unlike Section 1159(a), does not have a nontermination requirement. Pet. App. 15a. But the court concluded that "the words in the actual provision at issue—§ 1159(b)—overcome that argument." *Ibid.* The court also saw "no inconsistency" between its interpretation of Section 1159(b) and the government's express authorization to waive certain grounds of inadmissibility in Section 1159(c). *Id.* at 15a n.10. The court explained that Section 1159(c) is not surplusage because "[s]ome asylees would still need to seek a waiver," and even with respect to those who may be subject to motions to terminate their asylum status, "an IJ could elect to defer ruling on" such motions pending consideration of applications for adjustment of status. *Ibid.*

The court of appeals further reasoned that even if the statute were considered ambiguous, the Board's interpretation "is at least reasonable" and therefore warrants deference. Pet. App. 17a-18a.

b. Judge Harris concurred in part and dissented in part. Pet. App. 18a-23a. Judge Harris agreed with the majority's mootness analysis, but viewed the "best interpretation" of Section 1159(b) differently. *Id.* at 18a. Although noting that the statute "is not a model of clarity," based on the "broader statutory context," Judge Harris came to the conclusion that "Congress did not intend to limit eligibility for adjustment of status under § 1159(b) to current asylees." *Id.* at 18a-19a, 20a.

c. Petitioner sought rehearing en banc, which the court summarily denied. Pet. App. 92a.

ARGUMENT

Petitioner contends (Pet. 17-30) that the court of appeals erred when it determined that 8 U.S.C. 1159(b) bars noncitizens whose asylum status has been terminated from adjusting their status. The court's decision is correct and does not warrant further review. Al-though the court below disagreed with the Fifth Circuit, that disagreement is underdeveloped. The Fifth Circuit did not have the benefit of the Board's precedential decision, much less the Fourth Circuit's. In any event, the question presented is unlikely to be outcome-determinative here, given that the undisputedly serious nature of petitioner's crimes would make unlikely any exercise of discretion permitting his adjustment of status. The petition should be denied.

1. Section 1159(b) permits the Secretary of Homeland Security or the Attorney General to "adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," when

certain conditions are met. 8 U.S.C. 1159(b). As the court of appeals correctly held, that statutory language unambiguously authorizes adjustment of status only for a noncitizen who currently has asylum status.

a. Section 1159(b)'s reference to a noncitizen "granted asylum" plainly functions as an adjective that is used to describe the present status that a noncitizen must possess. See *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017) ("Past participles * * * are routinely used as adjectives to describe the present state of a thing."). The statute sets out a process by which the "status of any alien granted asylum" may be "adjust[ed] to" lawful-permanent-resident status. 8 U.S.C. 1159(b). That phrasing contemplates the adjustment from one status to another. And the only two statuses mentioned in the statute are the status of a noncitizen "granted asylum" and the status of a "lawful permanent residen[t]." *Ibid.* The most straightforward reading of that text thus indicates that Congress contemplated an adjustment from the initial status of asylee to the new status of lawful permanent resident. Pet. App. 16a. Accordingly, multiple courts of appeals have construed the statutory language in that way when applying it in other contexts. See *Ali* v. *Barr*, 951 F.3d 275, 280 (5th Cir. 2020) ("The key statutory provision at issue here says the Attorney General 'may adjust' an asylee 'to the status of an alien lawfully admitted for permanent residence' if the asylee meets certain requirements.") (quoting 8 U.S.C. 1159(b)); *Mahmood* v. *Sessions*, 849 F.3d 187, 191 (4th Cir. 2017) ("Th[e] text [of Section 1159(b)] thus contemplates two statuses—an 'alien granted asylum' and an 'alien lawfully admitted for permanent residence.'"); *Robleto-Pastora* v. *Holder*, 591 F.3d 1051, 1060 (9th Cir.) ("By its own terms, sec-

tion [1159(b)] applies to *asylees* seeking to adjust status to that of [lawful permanent residents]."), cert. denied, 562 U.S. 841 (2010).

As the court of appeals recognized, without reading the statute to refer to the asylum status of a noncitizen, it is unclear what work the reference to the noncitizen's initial "status" would do. Pet. App. 16a. If Congress had intended to permit any noncitizen previously granted asylum to be eligible to become a lawful permanent resident, there would have been no need to refer to the noncitizen's initial (irrelevant) status at all. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (rejecting statutory interpretation that would render a word "insignificant, if not wholly superfluous"). Indeed, when Congress does not want to condition something on the possession of a particular initial status, it has said so explicitly. In 8 U.S.C. 1158(a)(1), for example, Congress provided that "[a]ny alien who is physically present in the United States * * * irrespective of such alien's status, may apply for asylum."

Section 1158 also shows that Congress has elsewhere used the phrase "alien granted asylum" to refer to the noncitizen's present status. Under the heading "[a]sylum status," Section 1158(c) provides certain benefits for "an alien granted asylum," including protection from removal to the noncitizen's country of nationality, and authorization to work in the United States and to travel abroad with prior consent of the Attorney General. 8 U.S.C. 1158(c)(1). But the statute expressly states that "[a]sylum granted * * * does not convey a right to remain permanently in the United States, and may be terminated"—and the noncitizen may be removed—under certain circumstances. 8 U.S.C. 1158(c)(2). The termination of that status has consequences, including

the termination of the benefits associated with the status. Pet. App. 35a; see, *e.g.*, 8 C.F.R. 1208.24(c) (requiring notice to noncitizen that termination of asylum ends employment authorization); cf. *Ali*, 951 F.3d at 280 (discussing the relevance of different benefits and burdens being associated with different statuses). Using similar language, Section 1159(b) sets forth an additional benefit for "any alien granted asylum"—the ability to apply for adjustment of status—that likewise should be understood as terminating along with asylum status.

b. Petitioner's contrary arguments are unpersuasive. Although he acknowledges (Pet. 14) that "'granted' can also be used as an adjective denoting a present status," he asserts (Pet. 15) that it is being used in the past tense here because Section 1159(b)(2) uses similar language in requiring that a noncitizen have been "physically present in the United States for at last one year after being granted asylum," which clearly refers to a "completed, historical event." But what makes clear that Section 1159(b)(2) refers to a past event is the use of the auxiliary verb "being" together with "granted," making it a past-tense verb and not an adjective. The relevant prefatory language in Section 1159(b), by contrast, does not include the verb "being" and is not subject to the same reading.

Petitioner's focus on the "expansive meaning" of the word "any" in the phrase "any alien granted asylum" is likewise misplaced. Pet. 14. (citations and internal quotation marks omitted). Regardless of how expansive "any" is, it cannot expand the plain meaning of the term it modifies. Section 1159(b) refers either to any noncitizen granted asylum who currently maintains that status or to any noncitizen granted asylum regardless of

his present status. The use of "any" has nothing to say about which interpretation is correct.

Petitioner emphasizes (Pet. 15) that Section 1159(b) does not expressly state that the asylum status must still be in effect, whereas other provisions do so with respect to other statuses. See 8 U.S.C. 1159(b)(3) (applicant must "continue[] to be a refugee"); 8 U.S.C. 1159(b)(5) (applicant must be admissible "at the time of examination for adjustment of such alien"); 8 U.S.C. 1159(a) (refugee "whose admission has not been terminated" may be eligible to be regarded as lawfully admitted for permanent residence). But Section 1159(b) also does not state that adjustment of status is available irrespective of the noncitizen's current status, though Congress has elsewhere made that specification. 8 U.S.C. 1158(a); see p. 10, *supra*.

Regardless, the other provisions that petitioner identifies as imposing continuing requirements do not consistently use any single formulation. Congress could therefore sensibly choose to achieve a similar result in Section 1159(b) by including statutory language permitting the adjustment from the initial status of the noncitizen "granted asylum" to the new status of lawful permanent resident. The fact that Congress used various distinct timing requirements in multiple different ways, even in separate subsections of the same section, does not foreclose reading each of them as a timing requirement. See *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 51-52 (2024) (explaining that Congress's use of "different and arguably even more obvious terms" in other statutory provisions did not make the provision at issue "any less clear"); see also Pet. App. 15a n.10.

Nor can petitioner find support for his interpretation in Section 1159(c). That provision allows the Attorney General to "waive" the requirement that noncitizens continue to be admissible when they apply for adjustment of status. 8 U.S.C. 1159(c). Petitioner claims (Pet. 18-19) that because the grounds for termination of asylum "substantially overlap with the grounds for inadmissibility," the waiver authority "would be gutted" if termination of asylum prevented an adjustment of status. But, as the court of appeals and the Board explained, Section 1159(c) retains significant effect under the government's reading. Pet. App. 15a n.10, 37a-38a. It continues to apply to noncitizens who lack admissibility for reasons that do not overlap with the grounds for termination, see, *e.g.*, 8 U.S.C. 1182(a)(1) (health-related grounds); 8 U.S.C. 1182(a)(3)(D) (membership in totalitarian party); 8 U.S.C. 1182(a)(9)(A) (noncitizens who were previously removed or departed while under an order of removal). And even with respect to a noncitizen whose asylum status is subject to termination, a decision to terminate is itself discretionary, and an IJ could decline to terminate the noncitizen's asylum status or could "defer ruling on a motion to terminate asylee status pending consideration of an application for adjustment under § 1159(b)." Pet. App. 15a n.10. In either circumstance, the waiver authority could continue to be exercised in appropriate cases.

Finally, petitioner cites (Pet. 19) Congress's later-enacted exemption of some former asylees from a then-existing numerical cap on applications for adjustment of status in the Immigration Act of 1990, Pub. L. No. 101-649, § 104(d), 104 Stat. 4985-4986. The relevant provision added a statutory note to Section 1159, entitled "Adjustment of Certain Former Asylees." *Ibid.* (capi-

talization altered). The provision permitted adjustment of status for specified noncitizens who were "granted asylum before" November 29, 1990, "regardless of whether or not such asylum has been terminated." *Ibid.* Petitioner claims (Pet. 19) that the statutory note confirms that Section 1159(b) likewise applies even when asylum has been terminated. But in fact, that legislation supports the opposite conclusion: In creating the limited exception in 1990, Congress did not view the reference to a noncitizen "granted asylum" alone as sufficient to indicate that the statute would apply regardless of current status. Instead, Congress saw some need to include express language stating that the statute would apply even if asylum had been terminated. And at the same time, Congress chose not to amend the general rule for adjustment of status in Section 1159(b) itself. Because Congress used that particular language only when describing the narrow exception for "certain former asylees" and omitted it in Section 1159(b), it is appropriate to "presume[] that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

2. Petitioner argues (Pet. 10-13) that this Court should grant review because the decision below creates a conflict with the Fifth Circuit. That shallow and recent disagreement does not warrant the Court's review at this time.

Before the Board issued its precedential decision interpreting Section 1159(b), the Fifth Circuit had already held that the statute permits adjustment of status after a noncitizen's asylum status has been terminated. *Siwe* v. *Holder*, 742 F.3d 603, 607-612 (2014). The Board's decision on review in that case had not "'fully

address[ed]'" the noncitizen's argument, and instead upheld the determination that the noncitizen was not eligible for an adjustment of status without "further explain[ing] its reasoning." *Id.* at 607 & n.19. As a result, in *Siwe*, the government moved for a remand to permit the Board to address the issue in the first instance and did not develop any statutory-interpretation arguments in its brief. *Id.* at 607. Although the Fifth Circuit noted that "neither the [Board] nor any other circuit has dealt with this *precise* legal issue under analogous facts," the court declined to remand the case. *Ibid.* Instead, focusing on the word "granted," and reading it in the past tense, the court concluded that "[n]owhere in [Section 1159(b)] does Congress require that an alien's asylum, once granted, still must be in effect at the time he applies for adjustment of status." *Id.* at 608. The court viewed that conclusion as being supported by the inclusion of other "continuing-status requirements" in Section 1159, and by its belief that an alternative construction "would obviate the need for the waiver mechanism set out in Section [1159(c)]." *Id.* at 608-609.

The decision below is only the second of a court of appeals to give meaningful consideration to the question presented. The earlier Fifth Circuit panel's decision was rendered without the benefit of the Board's precedential decision or of the Fourth Circuit's analysis in this case. Nor, since the disagreement developed, has either court considered the question en banc. As petitioner notes (Pet. 12), the same question is pending before the Second Circuit, which will hear oral argument in two cases in tandem on May 22, 2024. See *Wassily* v. *Garland*, No. 22-6247; *Velasquez Arreaga* v. *Garland*, No. 23-6289. Those cases may well result in additional reasoned decisions made with the benefit of the analysis

of the Board and the other circuits. At this point, however, the shallow conflict between two circuits is underdeveloped, and this Court's review would be premature.

3. Review is also unwarranted because a decision in petitioner's favor on the question presented is unlikely to affect the outcome of this case. Petitioner does not dispute that his convictions are for particularly serious crimes (Pet. 25; Pet. App. 38a-40a), such that the IJ already exercised discretion to terminate petitioner's asylum. Under those circumstances, the IJ would be unlikely to grant a discretionary waiver under Section 1159(c) or otherwise to exercise discretion to adjust petitioner's status. Cf. *In re Nemis*, 28 I. & N. Dec. 250, 259-260 (B.I.A. 2021) (denying cancellation of removal for a noncitizen convicted of fraud after balancing the crime with the noncitizen's "significant positive factors," including "significant family ties in the United States" and "contributions to the community"). This Court's resources are better spent on cases in which its judgment is likely to change the result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
MELISSA NEIMAN-KELTING
ANDREW C. MACLACHLAN
Attorneys

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