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No. 23-686

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The question presented implicates a square and growing circuit split on an important question of law that a divided Fourth Circuit panel got wrong. The government's arguments against certiorari are limited and unpersuasive. The conflict stands undisputed. The merits arguments only highlight the need for the Court's intervention. And all agree this is a clean vehicle. The Court should grant review.

ARGUMENT

A. There Is An Undisputed And Growing Split On An Important Question

The government concedes there is a conflict between the Fourth and Fifth Circuits on the question presented. BIO8, 14. The government acknowledges that two appeals presenting the same question were just argued together in the Second Circuit (on May 22, 2024). BIO15.[1] And the government does not dispute that, as a result, the acknowledged split will only deepen in the coming months. Pet.12-13. Most critically, the government does not contest the importance of the question presented. Pet.24-27. That all counsels strongly in favor of a grant.

The government's efforts to minimize the split do not undermine the case for review. The government notes that no court has "considered the question en banc." BIO15. Not for lack of trying; the Fourth Circuit denied en banc review in this case. Pet.App.92a. And the government says the Fifth

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[1] *See* Oral Argument, *Wassily v. Garland* & *Velasquez Arreaga v. Garland* (2d Cir.) (Nos. 22-6247, 23-6289), https://ww3.ca2.uscourts.gov/decisions/isysquery/8155f9c4-ed2d-477d-9197-e7456ac4135e/2/doc/23-6289.mp3.

Circuit did not have "the benefit of . . . the Fourth Circuit's analysis in this case." BIO15. Sure, but that's how every circuit split works: One court goes first, then another disagrees.

The government further notes that the Fifth Circuit did not have the benefit of a precedential Board of Immigration Appeals (BIA) decision or full briefing by the government. *Id.* But the Fifth Circuit resolved the question at *Chevron* step one, *see Siwe v. Holder*, 742 F.3d 603, 612 (5th Cir. 2014), and the oral argument focused primarily on the statutory interpretation question.[2] That the government in *Siwe* had difficulty defending the BIA's decision based on the plain language of the statute is a reason to grant review, not deny it. *See id.* at 611-12 (rejecting government's argument that BIA's "expertise" made it "best suited to analyze and rule on 'the plain language of the statute'"); *Siwe* Resp. Br. 44-45 (No. 12-60546), 2013 WL 8635416 (suggesting BIA "should reconsider whether the language of the statute as a whole" supports its eligibility determination).

Finally, to the extent the government suggests the Court should wait for the Second Circuit decisions, it provides no compelling reason to delay. BIO15-16. The arguments on all sides of the debate have been fully aired by the fractured decisions below and the contrary decision in *Siwe*. This textbook question of statutory interpretation is ripe for the Court's review. *See, e.g., Cantero v. Bank of Am., N.A.*, 144 S. Ct. 324 (2023) (granting review based on 1-1 split with third

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[2] *See Siwe* Oral Argument (No. 12-60546), https://www.ca5.uscourts.gov/OralArgRecordings/12/12-60546_12-4-2013.wma.

case pending on appeal); *Cantero* Cert. Pet. 11-14, (No. 22-529), 2022 WL 17646779.

B. The Fourth Circuit Majority Got It Wrong

The vast majority of the government's cert-stage opposition is spent arguing the merits. BIO8-14. In the government's view, the Fourth Circuit and BIA majorities are right, and the Fifth Circuit, Fourth Circuit dissent, and BIA dissent are wrong. The government's merits arguments are no reason to deny review—and they fail on their own terms.

1. Starting with the prefatory clause, the government argues that "granted asylum" refers only to present asylum status. BIO8-10. Nothing in the prefatory clause says that.

The government begins with something of a syllogism: (i) Section 1159(b) envisions "adjustment from one status to another"; (ii) "the only two statuses mentioned in the statute are the status of a noncitizen '*granted asylum*' and the status" of LPR; and so (iii) Congress plainly "contemplated an adjustment from the initial status of *asylee* to the new status of" LPR. BIO9 (citation omitted) (emphasis added). But that just begs the question: Does "any alien granted asylum" mean "a person who continues to be an asylee" or "a person who was once 'granted asylum'"?

The government points to three appellate court decisions that, it says, have construed "'any alien granted asylum'" to mean "asylee." BIO9-10 (citation omitted). But as the government acknowledges, all were "in other contexts." BIO9. And none provides support.

In *Ali v. Barr*, the Fifth Circuit considered whether an asylee who adjusts to LPR status still has asylum protections post-adjustment. 951 F.3d 275,

280 (5th Cir. 2020). That the court used the term "asylee" as shorthand is hardly compelling; after all, the Fifth Circuit *agrees* with petitioner on the question presented. *See Siwe*, 742 F.3d at 612. *Mahmood v. Sessions* addressed the same question as *Ali*, and does not even suggest Section 1159(b) is limited to current asylees. 849 F.3d 187, 191 (4th Cir. 2017). (Of course, the Fourth Circuit ultimately held as much in the decision below, but that is why the Court's review is needed.) That leaves the Ninth Circuit's decision in *Robleto-Pastora v. Holder*, which addressed whether LPRs may "re-adjust" to LPR status and which, like *Ali*, mentioned "asylee" status only in passing. 591 F.3d 1051, 1060 (9th Cir.), *cert. denied*, 562 U.S. 841 (2010). As *Siwe* held, this too does not bear on the question presented. *See* 742 F.3d at 611; *see also Bare v. Barr*, 975 F.3d 952, 975 (9th Cir. 2020) (confirming Ninth Circuit "ha[s] not considered whether a former asylee can apply for adjustment of status").

The government next repeats the Fourth Circuit majority's argument that, unless "status" means present "asylum status," it does no work. BIO10 (citing Pet.App.16a). As the petition explained—but the government ignores—the word "status" has a clear role to play, however construed. Pet.20. It does the simple but important work of identifying the thing being adjusted. *Id.* And that remains true whether the requisite status is "'asylum status,'" the "status of having once been 'granted asylum,'" or "'non-LPR status.'" *Id.* (citation omitted).

Tellingly, the government does not defend the other half of the Fourth Circuit's reasoning: that "status" must be "cognizable" or "lawful" to qualify as a "status" at all. Pet.App.16a. Which makes sense.

With the exception of the decision below, the circuits are uniform in concluding that the term "status" "encompasses both lawful *and unlawful* legal conditions." *Tula-Rubio v. Lynch*, 787 F.3d 288, 295 (5th Cir. 2015); *see Saldivar v. Sessions*, 877 F.3d 812, 819 (9th Cir. 2017) ("[A] status is a status, be it lawful or unlawful."); *Adams v. Holder*, 692 F.3d 91, 97 (2d Cir. 2012) (similar); *see also* Pet.22-23.

The government finally claims the word "any" "has nothing to say" here. BIO11-12. But the dispute is over the meaning of the phrase "any alien granted asylum." Petitioner argues that "alien granted asylum" is expansive and includes anyone who was once granted asylum; the government urges the narrower view that an "alien granted asylum" is only someone with a present grant of asylum. That the expansive word "any" modifies the key phrase in dispute is plainly relevant.

2. Moving to the rest of Section 1159, the government identifies nothing that supports its preferred reading. Petitioner, in contrast, identified several contextual clues showing that "any alien granted asylum" means any person who was once "granted asylum." Pet.15-19. The government's responses are unpersuasive.

a. Most conspicuously, the government has little to say about the three explicit continuing-status requirements in Section 1159. Pet.16-17. All the government offers is that its reading is "not foreclose[d]," since it is possible to read "any alien granted asylum" as one of "various . . . timing requirements" expressed in "multiple different ways, even in separate subsections of" Section 1159. BIO12. That is, to the government, there are *four* supposedly similar "timing requirements" in Section 1159:

- Section 1159(a)(1)(A) requires that a refugee's status "has not been terminated."
- Section 1159(b)(3) requires that noncitizens granted asylum "continue[] to be a refugee."
- Section 1159(b)(5) requires that noncitizens granted asylum be "admissible . . . at the time of examination for adjustment."
- Section 1159(b) allows adjustment of "the status of any alien granted asylum."

One of these is not like the others. And for "a Congress downright preoccupied with the timing question," this "can only be understood as a purposeful" distinction. Pet.App.21a (Harris, J., concurring in part and dissenting in part).

b. The government contends there is nothing to glean from Section 1159(b)(2)'s "clear[]" reference "to a past event" because "the auxiliary verb 'being'" makes "after being granted asylum" a "past-tense verb" there. BIO11. But the Department of Justice's own regulations interpret Section 1159(b) to be available for "any alien *who has been granted asylum*." 8 C.F.R. § 1209.2(a)(1) (emphasis added). And the government does not claim an auxiliary verb is *necessary* to make a participle past-tense. *Henson v. Santander Consumer USA Inc.* found the presence of such a verb irrelevant, equating "is owed" in one part of a statute with "owed" in another. 582 U.S. 79, 85 (2017). Common usage also refutes such a rule. A benefit for "any person exposed to" certain toxins, for example, surely would not require continuing exposure. *Cf.* 38 U.S.C. § 1112(c)(1) (addressing "radiation-exposed veteran[s]").

c. As for Section 1159(c), the government notes that its reading does not make the subsection superfluous. BIO13. True. But it remains "odd" to strip the Attorney General of discretion in *many* cases where Congress seems to have intended there to be waiver authority. Pet.App.22a (Harris, J., concurring in part and dissenting in part). And it is especially odd to do so when "humanitarian purposes," "family unity," or other "public interest[s]" counsel in favor of adjustment. 8 U.S.C. § 1159(c).

The government notes that an Immigration Judge (IJ) could always sequence termination and adjustment to preserve the Attorney General's discretion on this front. BIO13. This workaround is presumably intended to mitigate the harsh and untoward results that flow from a categorical bar. Pet.24-26. But that just shows how arbitrary the government's position is. On one hand, the government says Congress intended to categorically bar adjustment for every noncitizen whose asylum is terminated. BIO8-9. On the other, it says IJs can always evade that bar with a simple timing decision. BIO13. The better answer is to recognize that Congress did not intend termination to be a categorical bar on adjustment eligibility in the first place.

3. The government's only contextual arguments rest on two subsections of the neighboring Section 1158.

The government begins with Section 1158(a)(1). BIO10. That provision allows noncitizens to apply for asylum "irrespective of [their] status." 8 U.S.C. § 1158(a)(1). This, the Government claims (at 10), shows that Section 1159(b) could have used similar language—allowing adjustment "irrespective" of "particular initial status." But Section 1159(b) does

not allow adjustment "irrespective of status." It instead explicitly imposes two unmistakable continuing-status rules: that an adjustment applicant (1) "continues to be a refugee" and (2) remains "admissible . . . at the time of examination for adjustment." *Id.* § 1159(b)(3), (5). The question is whether, by allowing adjustment for "any alien granted asylum," Congress imposed yet *another* timing-based status rule requiring present asylum status—without expressly saying so.

The government next turns to Section 1158(c)(1). Section 1158(c)(1)'s provision of benefits to "an alien granted asylum" does not apply post-termination and so, the government argues, Section 1159(b) must also use the phrase "granted asylum" to require "present [asylum] status." BIO10-11. The government's conclusion does not follow from its premise. For one thing, the government ignores that Section 1159(b) uses the expansive term "*any* alien granted asylum," whereas Section 1158(c)(1) applies only to "*an* alien granted asylum." *See* Pet.14, 20-21, 23. But perhaps more importantly, all agree that Congress used the phrase "granted asylum" in Section 1159(b) itself to refer to a past event rather than a present condition. 8 U.S.C. § 1159(b)(2); *see* BIO11; *supra* at 6. Which is just to say that "granted asylum" *can* be used both ways. The question is whether "granted asylum" in Section 1159(b)'s prefatory clause refers to a past event or a present condition. Context is what answers that question. *See supra* at 5-7.

4. The government also disputes the import of a statutory note enacted by a later Congress. BIO13-14; Pet.19. The core aim of this statutory note was to override the "continues to be a refugee" requirement in Section 1159(b)(3), for certain noncitizens who

stood to lose refugee status due to changing country conditions. Congress did so by stating that, for those "granted asylum" before 1990, Section 1159(b) was still available even if one were "no longer a refugee"—so long as the noncitizen "was (or would be) qualified for adjustment of status" under Section 1159(b) "*but for* paragraphs (2) and (3) thereof." Immigration Act of 1990, Pub. L. No. 101-649, § 104(d)(1)(B)-(C), 104 Stat. 4978, 4985-96 (emphasis added). There is no "but for" language suggesting a similar exception was needed for those whose asylum was terminated.

The "regardless of" parenthetical is belt-and-suspenders. It simply confirms Congress's preexisting belief that noncitizens "granted asylum" include those whose asylum was later terminated. *Cf. Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1498 (2022) (A "parenthetical" is "typically used to convey an 'aside' or 'afterthought.'" (quoting Bryan A. Garner, *Modern English Usage* 1020 (4th ed. 2016))).[3]

5. That just leaves *Chevron*—a case nowhere to be found in the government's brief in opposition. The BIA found the statute ambiguous. Pet.App.30a. The government continues to argue in other cases that the statute is ambiguous. *See* Resp. Br. 22, 25, *Wassily v. Garland*, No. 22-6247 (2d Cir. filed Apr. 4, 2023), ECF No. 38.1 (arguing that Section 1159 is an "ambiguous statute" that is "silent on termination"). And here the

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[3] The Department of Justice's summary of its own implementing regulations did not mention any special exception for former asylees, describing the additional regulatory language as relating only to noncitizens who "are no longer refugees." *See Adjustment Procedures for Aliens Granted Asylum*, 57 Fed. Reg. 42,883, 42,883 (Sept. 17, 1992).

court of appeals held, in the alternative, that it would defer to the BIA under *Chevron*. BIO8; Pet.28-29.

The government does not defend that alternative holding in this Court. That means two things. First, the only question before the Court is the best reading of the statutory language. *See HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) ("declin[ing] to consider whether any deference might be due" because "'the government [wa]s not invoking *Chevron*'" (citation omitted)). Second, if there is ambiguity, it should be resolved in petitioner's favor. *See INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001).

C. The Government Raises No Vehicle Issues

This case is a clean vehicle for review and the government does not argue otherwise. Pet.27-30.

The government briefly suggests that a favorable decision by this Court is "unlikely to affect the outcome of this case" because, in its view, the Attorney General is unlikely to adjust petitioner's status given his prior convictions. BIO16.[4] But the reality is that the Attorney General has granted adjustment under Section 1159(b) even to noncitizens, like petitioner, convicted of "particularly serious crimes." *Wassily*, a case discussed in the petition and ignored by the government, is a prime

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4 Although the BIA found that petitioner was convicted of a particularly serious crime for purposes of withholding of removal, it never discussed whether—let alone found that—petitioner posed a danger to the community. Pet.App.38a-40a; *see Annor v. Garland*, 95 F.4th 820, 829-30 (4th Cir. 2024) (vacating "particularly serious crime" determination because the BIA failed to explain why conviction rendered the noncitizen a "danger to the community").

example: An IJ terminated asylum based on a conviction for a particularly serious crime but then found that humanitarian interests favored both a waiver of inadmissibility and adjustment of status. Pet.26 (discussing Pet.App.121a-27a). And in *Siwe* itself, Mr. Siwe's brother had been "convicted in the same scheme" but nonetheless had "been granted a change of status to that of a lawful permanent resident." *See Siwe* Pet'r Br. 10 (No. 12-60546), 2012 WL 10933206; *see also, e.g., Matter of H-N-*, 22 I. & N. Dec. 1039, 1045 & n.5 (B.I.A. 1999) (similar); *cf. Matter of K-A-*, 23 I. & N. Dec. 661, 662-63 (B.I.A. 2004) (IJ adjusted status even though government had moved to terminate asylum and noncitizen had "conceded that she was removable as charged").

More fundamentally, the question presented addresses a threshold eligibility rule antecedent to any eventual exercise of discretion. The government does not dispute that the question impacts those whose asylum is terminated through no fault of their own—including a principal asylee's spouse and children. Pet.24-25. And it does not defend the harsh and untoward consequences that would flow from the categorical rule it advocates. Review is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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