

No. 25-842

In the
Supreme Court of the United States

TAMER S. WASSILY,
Petitioner,

v.

TODD BLANCHE, ACTING ATTORNEY GENERAL,
Respondent.

BYRON E. VELASQUEZ ARREAGA,
Petitioner,

v.

TODD BLANCHE, ACTING ATTORNEY GENERAL,
Respondent.

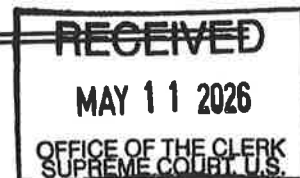
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Cela v. Garland</i> , 75 F.4th 355 (4th Cir. 2023), <i>cert.</i> <i>denied</i> , 144 S. Ct. 2657 (2024).....	1, 5
<i>Florida Department of Revenue v. Piccadilly</i> <i>Cafeterias, Inc.</i> , 554 U.S. 33 (2008).....	3
<i>Henson v. Santander Consumer USA Inc.</i> , 582 U.S. 79 (2017).....	3
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	5
<i>INS v. Errico</i> , 385 U.S. 214 (1966).....	5
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	5
<i>Siwe v. Holder</i> , 742 F.3d 603 (5th Cir. 2014).....	1, 5
<i>Vartelas v. Holder</i> , 566 U.S. 257 (2012).....	4

STATUTES AND REGULATIONS

8 U.S.C. § 1158(a)(1)	4
8 U.S.C. § 1158(c)(2)	4
8 U.S.C. § 1158(c)(3)	4

TABLE OF AUTHORITIES—Continued

	Page(s)
8 U.S.C. § 1159(a)(1)(A)	3
8 U.S.C. § 1159(b).....	1, 4
8 U.S.C. § 1159(b)(3)	3, 4
8 U.S.C. § 1159(b)(5)	4
8 U.S.C. § 1252(b)(3)	2
8 C.F.R. § 208.24(a).....	4
8 C.F.R. § 208.24(c)	4
8 C.F.R. § 208.24(e)	4
8 C.F.R. § 208.24(f).....	4
8 C.F.R. § 1240.11(a)(1)	5
8 C.F.R. § 1245.2(a)(1)(i).....	5

INTRODUCTION

The government agrees with petitioners that the question presented implicates a square circuit split on an important question of law that warrants this Court's review. The Court should grant certiorari.

ARGUMENT

1. The government acknowledges that “the decision below implicates a circuit conflict that warrants this Court’s review.” Resp. 14. On one side of the split, the Fifth Circuit unanimously held that 8 U.S.C. § 1159(b) unambiguously *permits* noncitizens whose asylum has been terminated to adjust to lawful permanent resident (LPR) status. *See* Resp. 15-16 (discussing *Siwe v. Holder*, 742 F.3d 603, 606-11 (5th Cir. 2014)). On the other side, divided panels of the Fourth and Second Circuits have held that Section 1159(b) unambiguously *precludes* the Attorney General from adjusting the status of noncitizens whose asylum has been terminated. *See* Resp. 14-15 (discussing *Cela v. Garland*, 75 F.4th 355, 363-65 (4th Cir. 2023) (majority), *cert. denied*, 144 S. Ct. 2657 (2024)); *see also Cela*, 75 F.4th at 366-68 (Harris, J., concurring in part and dissenting in part); Pet. App. 1a-18a (majority); *id.* at 19a-30a (Robinson, J., dissenting). Undisputably, then, “the courts of appeals are divided on the issue.” Resp. 8.

The government also explains that “[t]he existing circuit conflict is unlikely to dissipate without this Court’s intervention.” *Id.* at 16. As to the Fifth Circuit, the Board of Immigration Appeals “will continue to apply *Siwe*’s holding in all cases presenting the issue within [its] jurisdiction.” *Id.* And because only noncitizens can file petitions for review from the Board’s decisions, the “government

will have few—if any—meaningful opportunities to seek en banc review” of *Siwe*. *Id.* (citing 8 U.S.C. § 1252(b)(3)); *see* Pet. 14 (same). As to the Second and Fourth Circuits, both courts recently denied rehearing en banc on this question. *See* Pet. App. App. 31a-32a; Order Denying Reh’g En Banc, *Cela v. Garland*, No. 22-1322 (4th Cir. Sept. 25, 2023), ECF No. 67. All agree that, absent this Court’s review, the conflict will remain entrenched.

2. As the government further explains, this petition presents “a suitable vehicle for resolving . . . an important and recurring legal question.” Resp. 8; *see id.* at 16 (similar). The “[r]esolution of the question [presented] was the sole basis” of the decision below. *Id.* at 16. The government acknowledges that resolution of the question was outcome-determinative for Wassily. *Id.*; *see* Pet. 6-7, 31. And all agree there is no jurisdictional problem, preservation issue, or other obstacle to review.

The government also agrees the question presented is an “important and recurring” question of law. Resp. 8. The government does not contest the consequences of termination for principal asylees’ spouses and children. *See* Pet. 27. It does not dispute that noncitizens can lose their asylum for a host of reasons, including those outside of the noncitizen’s control. *See id.* at 27-28. And it does not deny that the decision below creates an incentive for the government to push for early termination. *See id.* at 29-30. That all further counsels in favor of review.

3. Having joined petitioners in urging that the Court grant certiorari, the government spends most of its response on the merits. Resp. 8-14. The petition anticipated and responded to most of the arguments. *See* Pet. 20-21 (addressing Section 1159(c)); *id.* at 22-

23 (addressing the “status” reference); *id.* at 23-24 (addressing other uses of “granted asylum” in Sections 1158 and 1159); *id.* at 24-25 (addressing the 1990 statutory note); *id.* at 30 (addressing the sequencing oddity); *see generally id.* at 15-26. And petitioners will of course thoroughly brief the merits at the merits stage if the Court grants review. For now, petitioners briefly respond to three points.

First, the government makes the grammatical observation that “[p]ast participles” are “routinely used as adjectives to describe the present state of a thing.” Resp. 8-9 (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017)). Sure, but they also frequently “indicat[e] past or completed action.” *Fla. Dep’t of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008); *see id.* at 39-41 (finding “more natural” reading of “plan confirmed” to refer to a plan “that has been confirmed in the past”). That is why the “larger statutory landscape” and “contextual clues” matter. *Henson*, 582 U.S. at 85-86.

Second, when it comes to context, the government has conspicuously little to say about the three explicit continuing-status requirements in Section 1159. *See* Pet. 17-18. 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 in Section 1159 that are expressed in “multiple different ways.” Resp. 13. But line them up, and Section 1159(b)’s prefatory clause sticks out like a sore thumb:

- Section 1159(a)(1)(A) requires that a refugee’s status “has not been terminated.”
- Section 1159(b)(3) requires that a noncitizen granted asylum “continues to be a refugee.”

- Section 1159(b)(5) requires that a noncitizen granted asylum be “admissible . . . at the time of examination for adjustment.”
- Section 1159(b) allows adjustment of “the status of any alien granted asylum.”

That is not just a “different way[]” to say the same thing; it is a different language entirely.

The government argues, on the flip side, that if Congress did not want a continuing status requirement, it could have explicitly stated that adjustment of status is available “irrespective of [the] alien’s current status.” Resp. 10 (quoting 8 U.S.C. § 1158(a)(1)); *see also id.* at 12-13. But Section 1159(b) does not allow adjustment “irrespective of status.” It imposes two continuing-status requirements. *See* 8 U.S.C. § 1159(b)(3), (5). The question is whether, by allowing adjustment for “any alien granted asylum,” Congress imposed yet *another* continuing-status rule—without expressly saying so.

Third, the government argues the rule of lenity “has no application” because “Section 1159(b) is not a deportation statute.” Resp. 14. But that ignores the consequence of denying adjustment of status in these circumstances: deportation (or, in today’s parlance, removal).^{*} The factual predicate to the question presented is that asylum has been terminated, which means there are, or will be, removal proceedings. *See* 8 U.S.C. § 1158(c)(2)-(3); 8 C.F.R. § 208.24(a), (c), (e)-(f). And the adjustment of status determination will

^{*} In 1996, “Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as ‘removal.’” *Vartelas v. Holder*, 566 U.S. 257, 262 (2012).

be made during those removal proceedings. See 8 C.F.R. § 1240.11(a)(1) (“In a removal proceeding, an alien may apply to the immigration judge for . . . adjustment of status . . .”); *id.* § 1245.2(a)(1)(i) (immigration judge “hearing the [removal] proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status”). That is how the issue has always arisen in these cases. See *Pet. App. 3a* (government “moved to reopen Wassily’s removal proceedings”); *id.* at 6a (government “commenced removal proceedings” against Velasquez Arreaga); *Cela*, 75 F.4th at 358 (government “began removal proceedings”); *Siwe*, 742 F.3d at 604 (“government instituted removal proceedings”).

Since the alternatives facing the noncitizen are either (i) the “drastic measure’ of deportation or removal,” *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citation omitted), or (ii) adjustment of status, the rule of lenity applies. When the question is whether a statute “saves [a noncitizen] from deportation,” any “doubt should be resolved in favor of the alien.” *INS v. Errico*, 385 U.S. 214, 215, 225 (1966) (citation omitted); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423, 449 (1987) (category of “deportation statutes” subject to lenity includes provision where noncitizens “can seek relief” from deportation). So if ambiguity persists, lenity applies.

* * *

In the end, Section 1159(b)’s text, context, and history make clear that any noncitizen granted asylum can adjust to LPR status even after termination. And the government’s arguments to the contrary do not withstand scrutiny. But most importantly at this stage—and as all agree—the

Court should grant review to resolve the entrenched circuit split and decide the merits after full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

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