

Docket No. 26-5004

IN THE SUPREME COURT OF THE UNITED STATES

COOPER PRESCOTT,
PETITIONER,

v.

JONATHAN DAVIDSON,
ATTORNEY GENERAL OF THE UNITED STATES, et al.,
RESPONDENTS

**On Writ of Certiorari to the United States Court of Appeals
for the Fourteenth Circuit**

BRIEF FOR PETITIONER

DATE: January 26, 2026

Team Number 13

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QUESTIONS PRESENTED

1. Whether the Fourteenth Circuit Court of Appeals erred in holding that asylum status must be current to apply for adjustment of status to lawful permanent residence when the plain language and congressional intent behind 8 U.S.C. § 1159(b) does not support this holding.
2. Whether the Fourteenth Circuit Court of Appeals erred in holding that Petitioner does not have a constitutional right to effective assistance of counsel at a removal proceeding even when counsel's assistance renders the proceeding fundamentally unfair.

STATEMENT OF THE CASE

Cooper Prescott, a 25-year-old native citizen of Ostlandia, immigrated to the United States on an F-1 visa in August 2016 after receiving a scholarship to attend Westerbrook Academy. R. at 6, 14. After graduating from Westerbrook, Prescott enrolled at Hilltop College in 2018 and became a star walk-on for the basketball team, eventually leading them to the 2021 May Mania Tournament. R. at 10, 15. During his junior year at Hilltop, Prescott's family, who are members of the Sawu ethnic minority, were forced to flee Ostlandia to Jobreau due to ethnic conflict. R. at 11, 14. Following the displacement of his family, Prescott filed for affirmative asylum, which was granted by USCIS on August 12, 2019. R. at 6, 14, 15.

When Prescott's mother fell ill in Jobreau, Prescott urgently needed money for her medical care. R. at 11. In an act of desperation, he conspired with a fellow student to place a bet that he would exit a tournament game early, subsequently faking an injury during the game. R. at 10, 15. The winnings from this bet totaled approximately \$2,261 each and Prescott sent his half to his mother, who made a full recovery after receiving treatment that doctors stated was essential for her survival. R. at 11, 15. While his co-conspirator was acquitted of all charges at trial, Prescott accepted responsibility and pled guilty to one count of conspiracy to commit wire fraud on October 6, 2022. R. at 10, 15. In exchange for this plea, the government dropped a more serious charge of conspiracy to commit money laundering. R. at 4.

Two years later, the government initiated a new policy to disincentivize sports gambling and issued a Notice of Intent to Terminate Prescott's asylum status based

on his conviction for a crime involving moral turpitude. R. at 6, 15. Despite the Immigration Judge acknowledging that the wire fraud amount was less than \$5,000, well below the \$10,000 threshold for an aggravated felony, USCIS terminated his asylum status in October 2024. R. at 12, 15. Shortly thereafter, on October 30, 2024, the Department of Homeland Security served Mr. Prescott with a Notice to Appear for removal proceedings. R. at 6, 15.

In the following removal proceedings, Prescott applied for adjustment of status to lawful permanent residence under 8 U.S.C. § 1159(b). R. at 12, 16. Although he met nearly all statutory criteria, his attorney at the time, Sarah Webb, did not re-apply for asylum status before moving to adjust Prescott's status. R. at 12. The IJ and the Board of Immigration Appeals subsequently denied his application and ordered removal, holding that an applicant's asylum status must be current at the time of adjustment. R. at 13, 17, 21. Prescott appealed to the Fourteenth Circuit, arguing that the statute only requires that asylum was "granted" at some point in the past. R. at 24. Additionally, Prescott asserted a claim for ineffective assistance of counsel, arguing that his attorney's failure to re-apply for asylum deprived him of due process. R. at 28, 32. On October 27, 2025, the Fourteenth Circuit affirmed the removal order, ruling that the statute requires current status and that there is no constitutional right to effective assistance of counsel in removal proceedings. R. at 25, 29, 32. The Supreme Court of the United States granted certiorari on December 19, 2025. R. at 38.

SUMMARY OF THE ARGUMENT

This case concerns the statutory protections and due process rights owed to Cooper Prescott, a former asylee whose path to permanent residency was derailed by a single mistake and subsequent procedural errors.

The first issue addresses whether 8 U.S.C. § 1159(b) allows an individual who was previously granted asylum to adjust their status to lawful permanent resident even if their asylum status was later terminated, a question that turns on the plain meaning of the statute, particularly the words "granted," "any," and "status," and the congressional intent behind § 1159(b).

The plain language and congressional intent behind § 1159(b) support an interpretation that allows people with current and prior asylum status to apply to have their status adjusted. This Court has routinely held that statutory interpretation begins with the plain language of the statute. If the language of the statute is ambiguous, courts are to consider the congressional intent. The Court today is asked to interpret the meaning of "any alien granted asylum" within § 1159(b) and should find both the plain language and congressional intent support an interpretation that the statute allows those whose asylum status has been terminated to apply for status adjustment.

In looking at the plain language, the Fourteenth Circuit majority claims "granted" in the statute refers to an alien with current asylum status. However, "granted" is a past tense verb and can refer to someone who was granted asylum status, but has since had that status terminated. Additionally, the words "any" and "status" continue

to prove § 1159(b) does not require current asylum status. This Court has held, “any” is perhaps the most all-encompassing phrase Congress could use. The majority also erred by reading “status” as only referring to possessing asylum status. However, Prescott currently holds the status of non-LPR and is attempting to adjust that status to LPR.

If the Court finds the language of the statute is ambiguous, the Court should look to Congress’s intent, which can be seen in the structure and word choice of the statute. Specifically, the Court should take note of the non-termination requirement in § 1159(a) and the clear lack of such a requirement in § 1159(b). Additionally, Congress included other requirements of continuing status, such as § 1159(b)(3) that requires the alien to continue to be a refugee, but there is no explicit requirement that asylum status be current.

Congress was intentional in using the phrase “any alien granted asylum” rather than simply saying “asylee.” This specific word choice shows Congress’s intent to include those who have had their status terminated. The Court today must give credit to each word in the statute and interpret the statute to include those who have previously held asylum status.

The second issue examines whether the Fifth Amendment’s Due Process Clause guarantees a right to effective assistance of counsel in removal proceedings, particularly where an attorney’s performance is so deficient as to render the proceeding fundamentally unfair. There is a constitutional right to effective assistance of counsel in removal proceedings based on the Fifth Amendment’s Due

Process Clause, supported by majority circuit precedent and public policy. It is well established that noncitizens are entitled to due process protections in removal proceedings under the Fifth Amendment. Central to this guarantee is the requirement that proceedings be “fundamentally fair.” Accordingly, ineffective assistance of counsel violates the Fifth Amendment when it rises to a level that renders the hearing fundamentally unfair.

The Fourteenth Circuit’s ruling contradicts the overwhelming majority of circuit courts, which have long recognized that ineffective assistance claims in removal proceedings implicate due process. At a minimum, the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have acknowledged such a constitutional protection.

The Fifth Amendment applies even when counsel is privately retained. In removal proceedings, the government seeks to deprive a person of a substantial liberty interest and relies on the outcome of those proceedings to justify deportation in much the same way it relies on criminal judgments to justify imprisonment. This case therefore does not involve merely private conduct but an inherently governmental process. The Fourteenth Circuit’s focus on the private status of counsel is thus misplaced, as the constitutional harm arises from the fairness of the proceeding itself. This Court must look beyond a narrow textual reading of the Constitution and consider the extent to which removal proceedings resemble criminal prosecutions in both their complexity and consequences.

Finally, public policy and USCIS's stated objectives underscore the importance of maintaining an immigration system that is fair, adversarial, and consistent with constitutional guarantees. Recognizing a due process right to effective assistance of counsel upholds these goals by protecting the integrity and legitimacy of the removal process.

ARGUMENT

I. THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT BEHIND 8 U.S.C. § 1159(B) ALLOWS A NONCITIZEN WITHOUT CURRENT ASYLUM STATUS TO APPLY FOR LAWFUL PERMANENT RESIDENT STATUS.

The standard of review is *de novo*, as this is a question of law. The Fourteenth Circuit erred in finding a noncitizen whose asylum status had been terminated cannot be granted the status of lawful permanent resident (“LPR”). R. at 27.

8 U.S.C. § 1159 addresses the requirements for a noncitizen to adjust their status. Under § 1159(b), the Secretary of Homeland Security or the Attorney General has the discretion to “adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum.” The statute sets out five requirements that must be met for an alien to be considered for adjustment: the noncitizen must (1) apply for adjustment, (2) been physically present in the United States for at least one year after being granted asylum, (3) continue to be a refugee within the meaning of section 1101(a)(42)(A), (4) not be resettled in any foreign country, and (5) be admissible as an immigrant under this chapter at the time of examination for adjustment. 8 U.S.C. § 1159(b)(1)-(5). The appellate court found Prescott clearly satisfied the first four requirements. R. at 28. As to the fifth

requirement, the court stated Prescott is not precluded from adjusting his status. *Id.* Therefore, Prescott is able to adjust his status based on the five requirements. However, the question for the Court is whether Prescott may adjust his status when his asylum status has been terminated.

Both the plain language of the statute and the congressional intent behind the statute support an interpretation that allows a noncitizen who was once granted asylum status to apply for lawful permanent resident status. The question before the Court is whether the language “any alien granted asylum” requires asylum status to be current or includes those whose asylum status has been terminated. The Fourteenth Circuit majority held asylum status must be current under § 1159. R. at 29. However, the majority failed to ascribe “granted” in the statute its plain meaning, which is that of a past tense verb. Additionally, the majority failed to consider the plain meaning of the words “any,” “status,” and “adjust.” In the context of 8 U.S.C. § 1159(a) and (b), it is clear Congress intentionally left out the requirement that the asylum status be current as Congress plainly states some requirements must be present at the time of applying for LPR status. *See* 8 U.S.C. § 1159(a) (establishes a requirement that “admission has not been terminated”). When analyzing the many instances where Congress explicitly stated whether current status was a requirement, it becomes clear Congress did not intend for current asylum status to be a requirement under § 1159(b).

For these reasons, the Court today should hold asylum status does not have to be current under § 1159(b).

a. The plain language of 8 U.S.C. § 1159(b) allows noncitizens who have had their asylum status terminated to apply for LPR status.

This Court has held the starting point of statutory interpretation must always be the language of the statute. *Randall v. Loftsgaarden*, 478 U.S. 647, 656 (1986). When terms are undefined in the statute, a court is to look at the ordinary meaning of that term. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 62 (2011).

The language in question comes from 8 U.S.C. § 1159(b) which states the Secretary or Attorney General “may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum.” While the Fourteenth Circuit focused heavily on the meaning of “granted” in this statute, the Court today should look at the plain language and ordinary meaning of several terms; “granted,” “any,” and “status,” to hold § 1159(b) does not require asylum status to be current and reverse the lower court’s ruling.

i. The term “granted” is a past tense verb and does not require an alien to currently hold asylum status.

As the appellate court noted, circuits are split on whether “granted” requires current asylum status or includes asylum status that was once granted but terminated prior to status adjustment. R. at 27. Rather than looking at the plain meaning of the word “granted,” the Fourteenth Circuit claims the words “granted” and “status” together implies an alien must have a status at the time of adjustment. R. at 29. This approach fails to consider the ordinary meaning of “granted.”

As correctly noted by the Fourteenth Circuit dissent, “granted” is a past tense verb. Similarly, elected is a past tense verb. R. at 33. Therefore, one could say Barack Obama has been elected president and this statement would still be accurate since

Obama was once elected, even though Obama is not the current sitting president. Similarly, without a limiting phrase, “any alien granted asylum” includes both those who currently hold asylum status, and those who were once granted asylum status but have since had that status terminated.

ii. The use of “any” in § 1159(b) expands the phrase “alien granted asylum.”

The Fourteenth Circuit failed to address the expansive nature of the word “any” in § 1159(b). This Court has held courts “must give effect, if possible, to every clause and word of a statute.” *Parker Drilling Mgmt. Servs. V. Newton*, 587 U.S. 601, 611 (2019) (citing *Loughrin v. United States*, 573 U.S. 351, 358 (2014)). Under the Fourteenth Circuit’s interpretation, “any” is essentially read out of the statute.

In several cases, this Court has found the word “any” to be expansive and all-encompassing. *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008).

In *Ali*, this Court analyzed the phrase “any other law enforcement officer.” 552 U.S. at 219. In looking at the plain language, the Court stated “any” suggested a broad meaning and that the most natural reading of the phrase was that “any” included “law enforcement officers of whatever kind.” *Id.* at 220. Based on the structure of the sentence with “any” immediately before “other law enforcement officer,” it is clear “any” is intended to modify “other law enforcement officer.” *Id.* This Court also found Congress could not have chosen a “more all-encompassing phrase.” *Id.* at 221.

In *Gonzales*, this Court again analyzed the meaning of “any,” this time in the phrase “any other term of imprisonment.” 520 U.S. at 2. Once again, this Court read the word “any” to be an expansive term, especially in the absence of any limiting language. *Id.* at 5. In 18 U.S.C.S. § 924, Congress used the word “any” twice. *Id.* In the first instance, Congress explicitly included language to limit the phrase. *Id.* In the phrase “any other term of imprisonment,” however, the Court found Congress did not include any limiting language, and this phrase was only two sentences after the other. *Id.* Therefore, the Court held the use of “any” without any limiting language was an intentional choice by Congress and is meant to expand the phrase it modifies. *Id.*

Applying the reasoning from those two cases, the Court today should read “any” in § 1159(b) to expand the phrase “alien granted asylum,” and find the phrase includes those whose asylum status has been terminated. Similar to the situation in *Gonzales*, Congress uses the word “any” multiple times throughout § 1159. In contrast, in § 1159(a), Congress uses “any” followed by limiting language by stating “any alien who has been admitted... whose admission has not been terminated...” This section clearly shows Congress thought to add limiting language for when a status or admission has been terminated. In § 1159(b), however, there is no limiting language as Congress wrote “any alien granted asylum,” and does not include a limiter about asylum having not been terminated. Following the precedent set by this Court, the Court today should read “any” to expand the meaning of “alien granted

asylum” to include anyone who has been granted asylum, even if that status has been terminated.

iii. The Fourteenth Circuit erred in holding “status” within § 1159(b) refers only to current asylum status.

The Fourteenth Circuit errs in relying on *Cela v. Garland* to help interpret “status” in the statute. The court claims “status” and “adjust” in the statute mean Prescott must currently hold asylum status, and they rely on *Cela* which holds “status” is read out of the statute if asylum status does not have to be current. R. at 29. However, this analysis fails to consider that non-LPR is a status.

In *Cela v. Garland*, the Attorney General argues in 1980, when § 1159 was enacted, “status” meant a person’s legal standing. 75 F.4th 355, 363 (4th Cir. 2023). However, the Attorney General then goes to say the noncitizen in that case did not have a status because asylum status had been terminated. *Id.* This reading of “status” assumes the only options are possessing asylum status or not possessing asylum status. However, as the dissent in *Cela* notes, the “status” referred to in the statute is the status of a non-lawful permanent resident, which may be adjusted to a lawful permanent resident. *Id.* at 366. This interpretation fits with the dictionary meaning of “status” from 1980 as Prescott’s status that he seeks to be adjusted is his current status as a non-LPR.

The court in *Cela* also argues “adjust” in the statute means there must be a status to adjust, or else “adjust” is essentially read out of the statute. *Id.* at 365. However, with the understanding that non-LPR is a status, “adjust” is not read out of the statute as the status of non-LPR can be adjusted to LPR. The Attorney General also,

inadvertently, supports this interpretation of the words “status” and “adjust.” The Attorney General argues 8 U.S.C. § 1255(i) is an example where “Congress did not require an initial status for aliens to adjust their status to lawfully admitted permanent residence,” instead Congress started with the condition that an alien be physically present in the United States. *Id.* at 363. This interpretation of § 1255(i) contradicts the Attorney General’s earlier position that an alien had to possess an initial legal status in order for there to be a status to adjust. *Id.* Additionally, the heading of § 1255(i) is “Adjustment in status of certain aliens physically present in United States.” This goes to show status does not simply mean possessing current asylum status. Instead, status can mean being a non-LPR. Based on the interpretation of “status” referring to non-LPR, this Court should find the words “status” and “adjust” do not require asylum status to be current.

Based on the plain language of the statute and, specifically, the ordinary meanings of “granted,” “any,” and “status,” the Court today should find the statute does not require asylum status to be current.

b. The structure and language of § 1159 indicates Congress did not intend to require current asylum status for adjustment.

This Court has stated in situations of statutory interpretation, courts are to look not only at the language of the statute, but also “the specific context in which that language is used, and the broader context of the statute as a whole.” *Yates v. United States*, 574 U.S. 528, 537 (2015). In looking at the context of § 1159 as a whole, it is clear Congress knew how to impose continuing status requirements and simply did not write a requirement for continuing asylum status in § 1159(b). Congress’s intent

can be seen by analyzing the non-termination requirement of § 1159(a), and by analyzing the five requirements set out in § 1159(b), some of which require a continuing status.

i. Congress knew how to impose continuing status requirements and intentionally omitted a requirement for asylum status to be current under § 1159(b).

8 U.S.C. § 1159(a) is viewed as a parallel provision to § 1159(b). *Cela*, 75 F.4th at 367 (Harris, J., dissenting). For parallel provisions within the same statute, courts have held “where Congress includes particular language in one section of a statute but omits it in another... it is generally presumed that Congress acts intentionally and purposely.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)). Thus, the Court today should find the difference in language and requirements between § 1159(a) and § 1159(b) was intentional.

In § 1159(a)(1)(A), there is a clear requirement that an alien’s admission to the United States “has not been terminated.” This shows Congress is capable of, and does, impose continuing status requirements “expressly and unambiguously.” *Cela*, 75 F.4th at 367 (Harris, J., dissenting). In contrast, § 1159(b) simply says “any alien granted asylum,” then goes on to list five requirements, of which none require asylum status to be current. Additionally, § 1159(b) sets out continuing status requirements, but those requirements are the alien continues to be a refugee and is admissible at the time of examination for adjustment. Because Congress explicitly included different continuing status requirements in § 1159(b), this indicates that Congress thought about these status requirements and intentionally chose to omit a continuing

status requirement for asylum status. *Siwe v. Holder*, 742 F.3d 603, 609 (5th Cir. 2014). As the dissent in *Cela* notes, Congress was considering timing questions when writing this statute and the Court must assume the lack of a timing requirement attached to asylum status must have been a purposeful omission. *Cela*, 75 F.4th at 367 (Harris, J., dissenting). The Court should take into account the non-termination requirement in § 1159(a), the continuing status requirements in § 1159(b), and the lack of a continuing asylum status requirement in § 1159(b) to find Congress intentionally omitted this requirement and intended for those whose asylum status has been terminated to be able to adjust their status to LPR.

ii. Congress intentionally used “any alien granted asylum” rather than “asylee” to include those who have had their asylum status terminated.

Congress’s use of “any alien granted asylum” rather than “asylee” shows that Congress intended to allow people with current asylum status, as well as those who previously had asylum status, to have the opportunity to adjust their status. As the *Cela* dissent notes, “‘any alien granted asylum’ is not synonymous with the term ‘asylee.’” *Cela*, 75 F.4th at 366 (Harris, J., dissenting). By reading the statute to mean asylee, the majority failed to give meaning to the other words in the statute, which this Court has explicitly cautioned against.

Since the Court is directed to give meaning to every word in the statute and assuming Congress drafts with intent, the Court today should consider the reason Congress did not simply say “asylee.” If Congress had intended to require asylum status be current, it would have been much easier for Congress to say “asylee.” As noted by the court in *Ngwanya v. Ashcroft*, an asylee’s status can change if their

status is adjusted to LPR or asylee status is terminated. 302 F. Supp. 2d 1076, 1078 (D. Minn. 2004). Following this logic, asylee and an alien granted asylum status are not always the same thing in statutory interpretation. If Congress had intended for status adjustment to only be available to those with current asylum status, Congress would have said asylee. However, Congress took the time to consider those who are not current asylees and included those people in the language of the statute by including “any alien granted asylum.” Due to this language, the Court should find Congress intended to include current asylees and those who have had their asylum status terminated.

Due to the plain language of the statute and the context of § 1159, the Court today should hold asylum status does not have to be current in order for status to be adjusted to LPR.

II. THE FOURTEENTH CIRCUIT ERRED IN HOLDING THAT THERE IS NO CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT REMOVAL PROCEEDINGS.

The Fourteenth Circuit erred in affirming the Board of Immigrations Appeals (“BIA”) decision that Prescott does not have a constitutional right to effective assistance of counsel at his removal proceeding. Due process of law is a foundational principle of the American constitutional system. This Court has described due process as “the primary and indispensable foundation of individual freedom,” one that both defines individual rights and constrains the exercise of governmental power. *In re Gault*, 387 U.S. 1, 20 (1967). The Fifth and Fourteenth Amendments give this principle constitutional force by prohibiting the government from depriving any

person of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV, § 1.

Therefore, individuals in the United States, citizen or not, have a right to due process during a proceeding against them, which includes, among many other protections, the right to fundamental fairness. This right to fundamental fairness was violated when the BIA and the Fourteenth Circuit failed to recognize Prescott's ineffective assistance of counsel ("IAC") claim, which was brought due to an attorney error, which was the sole reason Prescott's order of removal was affirmed. Further, the Fourteenth Circuit failed to exercise a thorough, independent judicial review under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) to determine the best reading of 8 U.S. § 1159. Rather than independently determining the best reading of the statutory framework, the court improperly deferred to the BIA's restrictive reading, despite Prescott's full compliance with the procedural requirements of *Matter of Lozada*,¹⁹ I&N Dec. 637, 638 (BIA 1988). By failing to intervene, the Fourteenth Circuit effectively sanctioned a constitutional violation and an administrative interpretation that elevates procedural technicalities over the constitutional requirement of a fair hearing. The root of this constitutional question turns on fairness, and as the U.S. Citizenship and Immigration Services ("USCIS") 2023-2026 Strategic Plan states, "USCIS upholds America's promise as a nation of welcome and possibility with *fairness*, integrity, and respect for all we serve." U.S. Citizenship and Immigration Services. (2023, January 27). *USCIS FYs 2023-2026 Strategic Plan*. U.S. Department of Homeland Security.

a. An attorney's assistance that is so deficient as to render a proceeding fundamentally unfair is a violation of due process.

At issue is not whether attorney Sarah Webb was ineffective at the removal proceeding, but whether there is a broader constitutional right to effective assistance of counsel at a removal proceeding. Albeit, a brief discussion on what constitutes ineffective assistance of counsel is helpful in orienting the issue. To bring a claim for ineffective assistance of counsel in removal proceedings, a noncitizen must first satisfy the three procedural requirements established in *Matter of Lozada* and as laid out by the Fourteenth Circuit. The Fourteenth Circuit explicitly held that Prescott "satisfied the three *Lozada* requirements" and hence the procedural threshold has been cleared. R. at 32. Next, to establish a Fifth Amendment due process violation based on ineffective assistance of counsel in removal proceedings, a noncitizen must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance caused substantial prejudice. *Ahmed v. Mukasey*, 548 F.3d 768 (4th Cir. 2008); *Molina v. Holder*, 763 F.3d 1259 (10th Cir. 2014). Under the *Strickland v. Washington* standard, the first prong is satisfied when "counsel's representation fell below an objective standard of reasonableness." 466 U.S. 688 (1984). An attorney's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); see *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (concluding that counsel violated petitioner's due process rights by failing to file an application for relief for which the petitioner

was eligible.) The individual must show that competent counsel would have acted otherwise. *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994).

Substantial prejudice, the second element of an IAC due process claim, is established when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694 (1984). Here, the prejudice to Prescott is undeniable. The Immigration Judge's ("IJ") denial of the adjustment of status rested solely on a perceived defect in Prescott's legal standing, which was a defect that Ms. Webb failed to mitigate or explain. The record confirms that Prescott was a prime candidate for relief. The IJ correctly noted that his conviction involved only \$4,523.06, failing to meet the \$10,000 threshold for an aggravated felony and was therefore "not a bar to asylum." R. at 12. As a young, ambitious member of society, Prescott would have likely succeeded on the merits of his application but for the ineffectiveness of his counsel.

Therefore, Ms. Webb's performance was arguably ineffective due to her failure to research the statutory ambiguity of § 1159(b) or to raise the legal argument that status need not be current for adjustment, which left Prescott without a viable defense. This deficiency resulted in substantial prejudice, as it precluded Prescott's opportunity to adjust his status and remain in the United States. If Ms. Webb had provided the IJ with a researched, statutory basis for adjustment there is a reasonable probability the IJ would not have summarily denied the application for

lack of current status. Ms. Webb's failure to act as an advocate left the IJ with no choice but to rule against a defenseless respondent.

b. There is a constitutional right to effective assistance of counsel based on the Fifth Amendments due process clause.

While the Sixth Amendment's right to counsel is limited to "criminal prosecutions," courts have long held that noncitizens maintain a right to due process in removal proceedings under the Fifth Amendment. U.S. CONST. amend. VI.; *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that in the immigration context, it is well settled that noncitizens physically present in the United States are entitled to the protections of the Fifth Amendment's Due Process Clause). Central to this due process guarantee is the requirement that such proceedings be "fundamentally fair." *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003). Because removal hearings are initiated and controlled by the government, at a minimum, due process requires that those proceedings be conducted in a fundamentally fair manner.

Consequently, IAC violates the Fifth Amendment when it reaches a level that renders the hearing fundamentally *unfair*. For a noncitizen like Prescott, the complexity of immigration law, often described as second only to the Internal Revenue Code, renders the right to retain an attorney hollow if that attorney's performance is so deficient that it "shocks the conscience" or renders the proceeding a sham. *See Rochin v. California*, 342 U.S. 165, 169 (1952) (holding that due process encompasses those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "implicit in the concept of ordered

liberty"). Several theories and circuit precedents demonstrate how IAC claims can point to a violation of someone's due process rights.

i. The majority of circuits have recognized a Fifth Amendment claim for ineffective assistance of counsel at removal proceedings.

The Fourteenth Circuit erred in holding that there is no constitutional right that necessitates the recognition of an ineffective assistance of counsel claim. This ruling contradicts the majority of circuit courts, which have long recognized that such claims implicate the Fifth Amendment's guarantee of a fundamentally fair proceeding. *See Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007) (holding that aliens are entitled to due process and ineffective assistance of counsel in a removal proceeding may constitute a denial of due process if the proceeding is thereby rendered fundamentally unfair); *Perez*, 330 F.3d 97, 93 (2d Cir. 2003) (holding an aliens due process rights were violated by ineffective assistance of counsel); *Fadiga v. AG of the United States*, 488 F.3d, 142, 144 (3d Cir. 2007) (holding that the alien established a Fifth Amendment due process violation based on counsel's ineffective assistance); *Denko v. I.N.S.*, 351 F.3d 717, 723 (6th Cir. 2003) (similar); *Surganova v. Holder*, 612 F.3d 901, 907 (7th Cir. 2010) (similar); *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (similar); *Osei v. I.N.S.*, 305 F.3d 1205, 1208 (10th Cir. 2002) (similar); *Ponce Flores v. U.S. Att'y Gen.*, 64 F.4th 1208, 1218 (11th Cir. 2023) (similar).

The Fourteenth Circuit stated that they were “inclined to join the Eighth Circuit” in the position that there is no such constitutional right to effective assistance of counsel at a removal proceeding. R. at 31. But the court offered no principled explanation for rejecting the overwhelming majority of circuits that recognize such

claims as grounded in the Fifth Amendment’s guarantee of a fundamentally fair proceeding. Instead, its reasoning appears to rest on the absence of an explicit statutory right to effective counsel and a desire for intra-circuit uniformity. Neither justification withstands scrutiny. Due process protections do not depend on statutory provisions, and uniformity achieved by adopting a minority rule does not promote fairness or legitimacy. This Court should reverse and align the Fourteenth Circuit with the majority consensus that ineffective assistance of counsel can violate due process where it renders a removal proceeding fundamentally unfair.

ii. The Fifth Amendment applies to removal proceedings even in the case of a private attorney.

Although deportation is formally classified as a civil consequence, it is closely connected to the criminal justice system. Modern immigration laws often make removal a near-automatic result of certain criminal convictions, rendering removal proceedings more comparable to criminal trials than to post-conviction review. In removal proceedings, the government seeks to deprive a noncitizen of a significant liberty interest, such as the right to remain in the United States, and it relies on the outcome of those proceedings to justify deportation in much the same way it relies on criminal judgments to justify imprisonment. This Court’s reasoning in *Cuyler v. Sullivan* is illustrative of this point. There, this Court explained that when a defendant is denied effective assistance of counsel, “a serious risk of injustice infects the trial itself,” such that when the State secures a conviction through such a proceeding, “it is the State that unconstitutionally deprives the defendant of his liberty.” *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Similarly, when the government

obtains a removal order through a proceeding in which counsel's deficient performance renders the process fundamentally unfair, the resulting deprivation of liberty violates the requirements of due process. The Fourteenth Circuit held that because Prescott's attorney was not a state actor, there could be no deprivation of any Fifth Amendment right. R. at 30-31. However, in this case we are not just faced with a private attorney, but we are dealing with an inherently governmental process. *See Romero v. Bondi*, 150 F.4th at 340 (4th Cir. 2025) (“[T]he government acts by *conducting* the deportation proceeding.”) (emphasis in original). The Fourteenth Circuits' focus is therefore misplaced, and the issue arises not from the private attorney but from the removal proceeding itself, and from the government's decision to proceed with and affirm a hearing rendered fundamentally unfair by counsel's ineffectiveness. Hence, the real state action was the conducting of the removal proceeding and subsequent appeal itself.

Therefore, although the Fifth Amendment does not explicitly guarantee effective performance by privately retained counsel in removal proceedings, an attorney's performance that is so deficient and prejudicial as to affect the outcome of the case demands constitutional scrutiny. This Court must look beyond a narrow textual reading and consider the extent to which removal proceedings resemble criminal prosecutions in both complexity and consequence. The Constitution should not allow courts to protect ineffective representation or uphold fundamentally unfair procedural outcomes merely because counsel is labeled “private.”

iii. This Court could avoid creating a sweeping rule by limiting when IAC claims violate due process.

Petitioner is not asking this Court to adopt a sweeping rule under which every claim of ineffective assistance of counsel automatically constitutes a due process violation. As the Fourteenth Circuit itself acknowledged, a noncitizen must demonstrate actual prejudice resulting from counsel's ineffectiveness and show that the outcome of the proceeding likely would have been different but for that deficient performance. Recognizing a constitutional right to effective assistance of counsel under this framework would not weaken the strength of the immigration system. To the contrary, it would preserve high standards by requiring petitioners to satisfy a strict prejudice threshold before relief is considered.

To demonstrate a due process violation in an immigration proceeding, the noncitizen must show "(1) that a defect in the proceeding rendered it fundamentally unfair and (2) that the defect prejudiced the outcome of the case." *Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008); *Matter of D-*, 20 I&N Dec. 827, 831 (BIA 1994) (per curiam) (noting that an alien has been denied a fair hearing "only if he has been prejudiced by some deficiency so as to deprive him of due process"); *Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984) (similar). Turning to the first element of whether a defect in the proceeding rendered it fundamentally unfair, Prescott was denied a meaningful opportunity to present his case. His counsel's failure to reapply for asylum foreclosed the only procedural avenue through which he could seek adjustment of status, and the BIA subsequently refused to address that failure on either constitutional or administrative grounds.

The record reflects that had counsel timely reapplied for asylum, Prescott would have satisfied the statutory requirements for relief, and the court itself acknowledged that they saw no reason why Prescott could not be approved. Even assuming *arguendo* that asylum status need not be current to adjust status, competent counsel would not have risked Prescott's liberty on a contested legal question and shown up wholly unprepared to make any legal argument, and instead attempted to barter with the Judge to just let them all "go home happy". R. at 13. This combination of attorney error and governmental refusal to remedy that error rendered the proceeding fundamentally unfair. It is not fair that Prescott satisfies the criteria to remain in the United States, but because of his attorneys misunderstanding of the law in the Circuit he is being removed on a procedural error, when if someone in his shoes had a different attorney, they would not be.

To establish the second element of a due process violation, one must demonstrate prejudice. "[P]rejudice results when 'the performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings.'" *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). To satisfy the prejudice prong of the test, a noncitizen need not show that relief was guaranteed, but only that the procedural defect had the potential for affecting the outcome of the proceedings. *Romero*, 150 F.4th 332, 340 (quoting *Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008)). That standard is met where counsel's error results in the loss of an opportunity to seek relief that was plausibly available at the time of the proceeding. *See Rranci v. AG of the United States*, 540 F.3d 165, 174 (3d Cir. 2008) (highlighting the need for immigration

lawyers to perform research tailored to each client and to keep up with new developments in this fast-changing area of law).

Here, the record clearly establishes that Prescott was prejudiced by counsel's failure to reapply for asylum. The court acknowledged that, had Prescott reapplied, "we see no reason why he could not be approved," noting that he satisfied the statutory requirements for asylum relief. R. at 30. The court further recognized that, if asylum were granted, Prescott "would have few difficulties in adjusting his status to LPR." *Id.* The government nonetheless argues that Prescott failed to demonstrate prejudice because the BIA "simply did not rule in his favor." R. at 32. But that reasoning misstates the prejudice inquiry. Prejudice does not require proof that the agency would have granted relief; it requires only a showing that the defect meaningfully impaired the alien's ability to present his case. *Anim*, 535 F.3d at 256. Here, Prescott was categorically barred from presenting any claim for relief dependent on asylum status simply because prior counsel failed to advocate effectively on his behalf. Moreover, the prejudice was compounded when the BIA declined to consider Prescott's ineffective assistance claim despite acknowledging that it had administrative authority to do so. By refusing to assess prejudice or reopen proceedings, the BIA ensured that the consequences of counsel's error were never tested in an adversarial forum and foreclosed any opportunity to remedy the defect before removal.

Prescott's case fits within this narrowly tailored rule that there is a constitutional right to effective assistance of counsel where it can be proven that both prongs of the

Anim test have been met. Because removal proceedings are “inherently governmental”, the BIA’s refusal to meaningfully adjudicate a claim that directly affected Prescott’s ability to seek relief is a denial of an opportunity to be heard. Due process prohibits precisely this kind of arbitrary governmental decision-making.

iv. The BIA abused their discretion by refusing to hear Prescott’s ineffective assistance of counsel claim on administrative grounds.

Nearly a century ago, this Court established that issues capable of resolution without constitutional interpretation should first be examined through a non-constitutional lens. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936). Should this Court hesitate to recognize a constitutional right to the effective assistance of counsel in this context, it should be reinforced that both the BIA and Immigration Courts have the power to hear claims on administrative grounds as opposed to constitutional. Furthermore, the administrative authority clarified under *Loper Bright* offers an alternative framework for courts to provide remedies to individuals in Prescott’s position. Consequently, even absent a constitutional violation, the Fourteenth Circuit erred by failing to thoroughly address the availability of these administrative remedies.

The BIA’s administrative authority is firmly established. This Court’s precedent in *Afanwi v. Holder*, 558 U.S. 801 (2009), confirms that the BIA possesses inherent authority to hear ineffective assistance of counsel claims, independent of whether such claims are constitutionally compelled. Historically, the BIA has treated ineffective assistance of counsel as integral to the “fair hearing” required by the Immigration and Nationality Act (“INA”). *Matter of Lozada*, 19 I&N Dec. 637 (BIA

1988). Yet in Prescott’s case, the BIA abandoned that framework, treating a discretionary administrative remedy as if it were an impossibility.

Even when acting within its discretion, an agency must engage in reasoned decision-making. An agency acts arbitrarily when it fails to provide a reasoned explanation for its determination. *Jingshan Li v. Bondi*, 139 F.4th 1113, 1123 (9th Cir. 2025) (citing *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016)). While the BIA “need not write an exegesis on every contention,” it must “consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought...” *Lopez v. Ashcroft*, 366 F.3d 799, 807 (9th Cir. 2004).

Here, the BIA denied Prescott’s motion to reopen in a single paragraph, citing only two cases. That cursory analysis failed to address Prescott’s due process rights or to engage with the substantial body of circuit authority recognizing administrative remedies for ineffective assistance of counsel. The discretion of the BIA does not extend to tolerating violations of due process. By declining to grapple with the central legal issues presented, the BIA failed to demonstrate reasoned decision-making. Its denial was therefore an abuse of discretion and warrants remand.

c. Public policy indicates that asylum seekers should have access to effective attorneys at complex proceedings.

Immigration removal proceedings place extraordinarily high stakes on individuals who often lack the ability to protect their own interests without competent legal assistance. Deportation can result in permanent separation from family, loss of livelihood, exposure to violence or persecution, and, for those who entered the United

States as children like Prescott, is a banishment to a country they barely know. Although deportation is formally classified as a civil consequence, the severity and permanence of its effects call for heightened safeguards.

These concerns are magnified by the complexity of immigration law. The immigration code is dense, filled with interlinked statutes, regulations, waivers, and forms of relief that are inaccessible, and frankly incomprehensible, to laypersons. Even minor legal errors can foreclose otherwise valid claims and result in irreversible removal. Noncitizens depend almost entirely on their attorneys to identify and pursue available legal options. Yet the quality of representation in immigration proceedings is highly uneven. Many noncitizens receive inadequate assistance from overburdened or inexperienced attorneys. Errors by counsel can be imputed to the client, depriving the noncitizen of notice, appeal rights, or access to relief, with little opportunity for correction. When such mistakes are treated as the noncitizen's own, the fairness of the proceeding is fundamentally undermined.

Without recognition of a right to effective assistance of counsel, meaningful accountability is also an impracticality. Circuits who suggest people bring malpractice suits against their lawyers offer no realistic remedy for deported individuals, who often lack the ability to return to the United States to litigate claims and cannot be made whole for losses such as family separation, economic devastation, or exposure to harm abroad. At the same time, recognizing a right to effective assistance does not threaten the government's interest in enforcing immigration laws. The existing procedural safeguards already limits abuse by requiring

noncitizens to demonstrate both deficient performance and resulting prejudice. These standards ensure that relief is reserved for cases involving serious attorney error that meaningfully affected the outcome.

Taken together, if counsel's assistance is deficient, and prejudice can be shown, the individual has a constitutional right to challenge the effectiveness of their counsel in a removal proceeding. Here, the failure of prior counsel to reapply for asylum foreclosed Prescott's ability to seek relief for which the record reflects he was eligible, made worse by counsels failure to prepare any argument for why she did not file the reapplication during the removal proceeding, and the BIA's subsequent refusal to consider that defect on administrative grounds deprived him of a meaningful opportunity to be heard. Because the procedural error rendered the proceedings fundamentally unfair and prejudiced the outcome, Prescott has satisfied both prongs of the due process inquiry articulated in *Anim*. Accordingly, the Fourteenth Circuits ruling cannot stand and issue two should be reversed and remanded to allow Prescott to cure the defect in filing.

CONCLUSION

This Court should reverse the decision of the Fourteenth Circuit Court of Appeals and hold that (1) under section 1159(b), asylum status does not have to be current to apply for adjustment of status (2) there is a constitutional due process right to effective assistance of counsel when counsel's ineffectiveness renders the proceeding fundamentally unfair.