

Docket No. 26-5004

IN THE SUPREME COURT OF THE UNITED STATES

***COOPER PRESCOTT,
PETITIONER,***

v.

***JONATHAN DAVDSON, ATTORNEY GENERAL OF THE UNITED STATES,
RESPONDENT.***

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

BRIEF FOR RESPONDENT

DATE: January 26, 2026

Team Number 18

TABLE OF CONTENTS

QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. PRESCOTT CANNOT RECEIVE LAWFUL PERMANENT RESIDENT STATUS UNDER § 1159(b).	5
A. The Text of § 1159(b) Unambiguously Requires Current Asylum Status.	5
1. “Status” in § 1159(b) Implicates a Present State or Condition.	6
2. “Adjust” in § 1159(b) Requires Holding Present Asylum Status.	8
3. “Granted” in § 1159(b) Describes a Present State.	9
B. The Legislative Purpose and Statutory Framework of § 1159(b) Affirm Congress’s Intent to Require Current Asylum Status.	11
1. Prescott Does Not Qualify for Congress’s Narrow Exception to § 1159(b).	11
2. Congress Intended Termination of Asylum Status to Have Meaningful Consequences.	12
II. PRESCOTT DID NOT HAVE A CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN HIS REMOVAL PROCEEDING.	14
A. Prescott Did Not Possess a Constitutional Right to Effective Assistance of Counsel in His Removal Proceedings.	15
1. Noncitizens Do Not Possess A Protected Liberty Interest Under the INA Because The Statute Grants The Attorney General Unfettered Discretion.	17
2. There Was No Nexus Between Webb’s Representation of Prescott and the State, So He Does Not Have a Claim for Ineffective Assistance of Counsel.	19
3. Prescott Would Not Have a Valid Ineffective Assistance of Counsel Claim Even in Jurisdictions that Recognize Such a Right.	20
B. The BIA Properly Exercised Its Discretion When It Declined to Review Prescott’s Ineffective Assistance of Counsel Claim.	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Afanwi v. Holder</i> , 558 U.S. 801 (2009)	24
<i>Biden v. Texas</i> , 597 U.S. 785 (2022)	18
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020)	6
<i>Castillo-Perez v. I.N.S.</i> , 212 F.3d 518 (9th Cir. 2000)	15
<i>Cela v. Garland</i> , 75 F.4th 355 (4th Cir. 2023)	<i>passim</i>
<i>Contreras v. Attorney General of the United States</i> , 665 F.3d 578 (3d Cir. 2012).....	17
<i>Doe v. Sessions</i> , 709 Fed. Appx. 63 (2d Cir. 2017)	14, 22
<i>Flores v. United States AG</i> , 64 F.4th 1208 (11th Cir. 2023).....	16, 18
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698 (1893)	16
<i>Griffin v Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982)	13
<i>Henson v. Santander Consumer USA Inc.</i> , 582 U.S. 79 (2017).....	9
<i>Holloway v. United States</i> , 119 U.S. 966 (1999)	13
<i>Hopkins v. Saunders</i> , 199 F.3d 968 (8th Cir. 1999).....	17
<i>Huicochea-Gomez v. I.N.S.</i> , 237 F.3d 696 (6th Cir. 2001)	20
<i>I.N.S. v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	11
<i>I.N.S. v. Stevic</i> , 467 U.S. 407 (1984).....	11
<i>Jackson v. Metro. Edison Co.</i> , 419 U.S. 345 (1974)	16, 19
<i>Jeudy v. United States AG</i> , 762 Fed. Appx. 594 (11th Cir. 2019).....	14, 22
<i>Jezierski v. Mukasey</i> , 543 F.3d 886 (7th Cir. 2008)	21
<i>King v. Burwell</i> , 576 U.S. 473 (2015)	12
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019)	7
<i>LeBlanc v. I.N.S.</i> , 715 F.2d 685 (1st Cir. 1983)	23
<i>Loper Bright Enterprises v Raimondo</i> , 603 U.S. 369 (2024)	7
<i>Lozada v. I.N.S.</i> , 857 F.2d 10 (1st. Cir. 1988).....	23
<i>Magallanes-Damian v. I.N.S.</i> , 783 F.2d 931 (9th Cir. 1986)	21, 23
<i>Mahmood v. Sessions</i> , 849 F.3d 187 (4th Cir. 2017).....	8
<i>Maravilla v. Ashcroft</i> , 381 F.3d 855 (9th Cir. 2004).....	21
<i>Matter of Lozada</i> , 19 I.&N. Dec. 637 (BIA 1988)	15
<i>Matter of Melgar</i> , 28 I.&N. Dec. 169 (BIA 2020)	24
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	14
<i>Mohammed v. Gonzales</i> , 400 F.3d 785 (9th Cir. 2005).....	3, 25
<i>Morales Apolinar v. Mukasey</i> , 514 F.3d 893 (9th Cir. 2008).....	21
<i>Nativi-Gomez v. Ashcroft</i> , 344 F.3d 805 (8th Cir. 2003).....	18, 24, 25
<i>Nehad v. Mukasey</i> , 535 F.3d 962 (9th Cir. 2008).....	15, 16
<i>Obleshchenko v. Ashcroft</i> , 392 F.3d 970 (8th Cir. 2004).....	15, 16, 19
<i>Ramirez-Durazo v. I.N.S.</i> 794 F.2d 491 (9th Cir. 1986)	21, 22
<i>Romero v. Bondi</i> , 150 F.4th 332 (4th Cir. 2025)	24
<i>Sako v. Gonzales</i> , 434 F.3d 857 (6th Cir. 2006)	17, 21
<i>Siwe v. Holder</i> , 742 F.3d 603 (5th Cir. 2014)	7, 9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	20, 21

<i>Stroe v. I.N.S.</i> , 256 F.3d 498 (7th Cir. 2001)	19
<i>Turner v. Rodgers</i> , 564 U.S. 431 (2011)	15
<i>Unicolors, Inc., v H&M Hennes & Mauritz, L.P.</i> , 595 U.S. 178 (2022)	10
<i>United States v. Castillo-Martiniz</i> , 16 F.4th 906 (1st Cir. 2021)	17, 21
<i>United States v. Herrera-Pagoada</i> , 14 F.4th 311 (4th Cir. 2021)	17, 18
<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	7
<i>Van Buren v. United States</i> , 593 U.S. 374 (2021)	5
<i>Wassily v. Bondi</i> , 150 F.4th 100 (2d Cir. 2025)	<i>passim</i>

Statutes

18 U.S.C. § 1349	1
18 U.S.C. § 1956(h)	1
8 U.S.C. § 1159(b)	<i>passim</i>
8 U.S.C. § 1227(a)(2)(A)(i)	2, 22
8 U.S.C. § 1427	13
Pub. L. No. 101-649, § 104(d), 104 Stat. 4978, 4985 (1990)	12

Other Authorities

<i>Status</i> , Black’s Law Dictionary (5th ed, 1979)	6
<i>Status</i> , Webster’s New Collegiate Dictionary (1977)	6
U.S. Const. amend. V	1
U.S. Const. amend. VI	15

QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1159(b) requires a noncitizen to have current asylum status at the time of adjustment to lawful permanent resident status.
2. Whether the Fifth Amendment’s Due Process Clause guarantees a right to effective assistance of counsel in removal proceedings, such that ineffective representation by retained counsel may provide the basis to remand the case and reopen the removal order.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Petitioner Cooper Prescott is a citizen of the country Ostlandia, and he entered the United States on August 1, 2016. R. at 6. After enrolling in Hilltop College, Prescott filed for—and was granted—affirmative asylum status on August 12, 2019. R. at 14–15. In 2022, Prescott was charged with conspiracy to commit wire fraud pursuant to 18 U.S.C. § 1349 and Conspiracy to commit money laundering pursuant to 18 U.S.C. § 1956(h). R. at 4. On October 6, 2022, Prescott pled guilty to the wire fraud charge in the United States District Court for the District of New Lincoln. R. at 4-5, 15. During these criminal proceedings, Prescott was represented by his private attorney, Sarah Webb. R. at 5.

On September 27, 2024, U.S. Citizenship and Immigration Services (“USCIS”) issued Prescott a Notice of Intent to Terminate (“NOIT”) his asylum status as part of a government initiative to disincentivize illicit sports gambling. R. at 15. The NOIT explained that the basis for Prescott’s termination of asylum status was his conviction of a crime involving moral turpitude, which carries a

sentence of one year or longer and occurred within five years of being admitted to the United States. *Id.* USCIS gave Prescott thirty days to respond to the NOIT. *Id.* Prescott continued to retain Webb during this period and timely responded. R. at 8, 15. The asylum office determined that the grounds for termination were established by a preponderance of the evidence, and issued Prescott a Notice to Appear (“NTA”) and a Notice of Termination. R. at 15.

On October 30, 2024, the Department of Homeland Security served Prescott with the NTA, which charged him as deportable under 8 U.S.C. § 1227(a)(2)(A)(i) for the same reasons his asylum status was terminated. R. at 6. Webb continued representing Prescott at his removal hearing on December 20, 2024, nearly two months after he received his NTA. R. at 8. During the hearing, Prescott sought an adjustment of status to lawful permanent resident. R. at 12–13. The immigration judge found that Prescott was in the United States without lawful status and held that § 1159(b) requires a noncitizen seeking adjustment of status to have present asylum status, which Prescott did not. R. at 12. As a result, the immigration judge sustained Prescott’s charge of deportability. R. at 15. After this hearing, Prescott retained new counsel, Denise Bailey, for his appeal. R. at 21.

II. PROCEDURAL HISTORY

Prescott appealed the immigration judge’s decision to the Board of Immigration Appeals (“BIA”) on two grounds. First, Prescott contested his removability, arguing that § 1159(b) does not require present asylum status to adjust to lawful permanent resident status. R. at 19. Second, Prescott asserted that

his previous attorney, Webb, provided ineffective assistance of counsel by failing to file a *de novo* asylum application after his asylum status was terminated. *Id.* On March 6, 2025, the BIA dismissed Prescott’s appeal. R. at 23. The BIA held that Prescott is not eligible to apply for adjustment because § 1159(b) requires present asylum status to apply for an adjustment to lawful permanent resident status. *Id.* Additionally, the BIA rejected Prescott’s argument on constitutional grounds, finding that the extraordinary remedy of reopening the case was not warranted. *Id.*

On March 6, 2025, Prescott filed a notice of appeal with the United States Court of Appeals for the Fourteenth Circuit. R. at 25. On October 27, 2025, the Fourteenth Circuit affirmed the BIA’s findings. R. at 25. Notably, the court affirmed the second issue on different grounds, finding that noncitizens in asylum removal proceedings do not have a right to effective assistance of counsel. R. at 29. On November 7, 2025, Prescott applied for a writ of certiorari, and it was granted by this Court on December 19, 2025. R. at 37–38.

STANDARD OF REVIEW

Courts review the BIA’s determinations of legal conclusions, including those regarding statutory construction and constitutional questions, *de novo*. *Cela v. Garland*, 75 F.4th 355, 360 (4th Cir. 2023); *Wassily v. Bondi*, 150 F.4th 100, 105 (2d Cir. 2025); *see also Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005).

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit’s ruling and hold that (1) Prescott is not eligible to apply for adjustment of status because § 1159(b) requires present asylum status to apply for an adjustment to lawful permanent resident

status and (2) he has no constitutional right to effective assistance of counsel in his removal proceeding.

Section 1159(b) does not provide Prescott a pathway to lawful permanent resident status because he lacks current asylum status. First, a plain reading of § 1159(b) requires that a noncitizen have asylum status at the time of adjustment to lawful permanent resident status. The word “status” in § 1159(b) refers to a present legal condition, not a past status. The word “adjust” assumes that there exists a status to modify, as something that does not exist cannot be adjusted. Furthermore, under this Court’s precedent, the word “granted” can function as an adjective describing a present state rather than a past event. Second, § 1159(b)’s legislative purpose and statutory framework confirm Congress’s intent to require current asylum status. Congress specifically articulated an exception to § 1159(b), and this exception does not apply to noncitizens in Prescott’s situation. Furthermore, Congress intended loss of asylum status to have meaningful consequences; permitting a noncitizen with terminated asylum status to adjust to lawful permanent resident status would undermine Congress’s intent.

Additionally, Prescott did not have a constitutional right to effective assistance of counsel in his removal proceeding. First, when the adjustment of status is purely discretionary, no deprivation of liberty triggers due process protection. Noncitizens do not possess a protected liberty interest, as § 1159(b) provides the Attorney General unfettered discretion over adjustment of status decisions. Second, there was no nexus between Webb’s representation and the

State; Prescott does not have a cognizable claim for ineffective assistance of counsel. The Due Process Clause only protects against state action, and a private attorney's conduct cannot form the basis of a constitutional claim. Third, even in jurisdictions that recognize such a right, Prescott would not have a valid ineffective assistance of counsel claim, as he cannot show Webb's failure to file a *de novo* asylum application prejudiced the fundamental fairness of his proceeding. Thus, the BIA properly exercised its discretion when it declined to review Prescott's ineffective assistance of counsel claim.

ARGUMENT

I. PRESCOTT CANNOT RECEIVE LAWFUL PERMANENT RESIDENT STATUS UNDER § 1159(b).

Prescott cannot receive an adjustment to his lawful permanent resident status under § 1159(b) because he does not have current asylum status. This interpretation is supported by the plain meaning of § 1159(b). In addition, the legislative purpose and statutory framework of § 1159(b) affirm Congress's intention to require noncitizens to have current asylum status to adjust to lawful permanent resident status. Therefore, this Court should affirm the Fourteenth Circuit's decision and find that § 1159(b) requires present asylum status to be eligible for an adjustment to lawful permanent resident status.

A. The Text of § 1159(b) Unambiguously Requires Current Asylum Status.

Under the plain text of § 1159(b), current asylum status is required for adjustment to lawful permanent resident status. Statutory interpretation begins by looking at the text. *See Van Buren v. United States*, 593 U.S. 374, 381 (2021). The

relevant statutory text of § 1159(b) states that the “Attorney General . . . may adjust to the status of a[] [noncitizen] lawfully admitted for permanent residence the status of any [noncitizen] granted asylum.” 8 U.S.C. § 1159(b). The presence of three terms—status, granted, and adjust—indicate that Congress requires a noncitizen to possess current asylum status to apply for an adjustment to lawful permanent resident status. *Cela*, 75 F.4th at 363; *Wassily*, 150 F.4th at 106–07. Under widely accepted canons of construction, the plain meaning of § 1159(b) requires a noncitizen to possess current asylum status to adjust to lawful permanent resident status.

1. “*Status*” in § 1159(b) Implicates a Present State or Condition.

Under § 1159(b), “status” refers to a noncitizen’s present immigration status. Courts must interpret the language of the statute according to its ordinary meaning at the time of the statute’s enactment. *See Bostock v. Clayton County*, 590 U.S. 644, 654 (2020). When Congress enacted § 1159(b) through the Refugee Act of 1980, the term “status” was defined as a person’s legal standing, or his “state or condition.” *Status*, Black’s Law Dictionary (5th ed, 1979); *Cela* 75 F.4th at 363. Status was also defined as “the condition of a person or thing in the eyes of the law.” *Status*, Webster’s New Collegiate Dictionary (1977). In addition, both the Second and Fourth Circuits recognize that the ordinary meaning of status indicates a present legal condition. *Wassily*, 150 F.4th at 107; *Cela*, 75 F.4th at 364. In *Wassily v. Bondi*, the Second Circuit emphasized that a “more natural reading” of “the status of any [noncitizen] granted asylum” is that a noncitizen must presently be granted

asylum to adjust to lawful permanent resident status. 150 F.4th at 106-07. The Second Circuit observed that it would be peculiar to state that someone has the present legal condition of being granted asylum, even though that asylum status was then terminated. *Wassily*, 150 F.4th at 106. Therefore, status means a person’s *present* state or condition.

According to the rule against surplusage, any interpretation of § 1159(b) requires giving the word “status” meaning. Statutes are not to be read with empty terms, but rather with the intent to give meaning to every word. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (recognizing the long tradition of this Court applying the rule against surplusage). Following this rule, the Fourth Circuit in *Cela v. Garland* highlighted that without implicating a present condition, the phrase “the status of” in § 1159(b) serves no purpose. 75 F.4th at 363.¹ Otherwise, the phrases “any [noncitizen] granted asylum” and “status of any [noncitizen] granted asylum” would have the same meaning and, therefore, render “status” surplusage. *Id.* In *Siwe v. Holder*, the Fifth Circuit failed to address this canon, not considering how its interpretation rendered “status” superfluous. 742 F.3d 603, 608 (5th Cir. 2014). Under the reading in *Siwe*, the two phrases would mean the same thing, and thus, be a result that the surplusage canon counsels against. The

¹ This Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), does not undermine *Cela*’s interpretation of § 1159(b). Although the Fourth Circuit decided *Cela* before *Loper Bright*, its reasoning remains legitimate, as it stopped at step one of the test laid out in *Kisor v. Wilkie*, 588 U.S. 558 (2019) (stating that courts must exhaust “all the ‘traditional tools’ of construction” . . . and to look to the agency only if the statute is “genuinely ambiguous.”); see *Cela*, 75 F.4th at 364. The Fourth Circuit independently conducted a thorough statutory analysis and concluded that § 1159(b) unambiguously precludes adjustment to lawful permanent resident status for noncitizens with terminated asylum status. *Cela*, 75 F.4th at 365. Since the Fourth Circuit found no ambiguity in the statute, the court never reached the deference then required by step two. *Id.*

interpretation adopted by the Second and Fourth Circuits gives meaning to every word in the statute by requiring present asylum status to apply for adjustment. Thus, it is the correct interpretation.

Like the petitioners in *Wassily* and *Cela*, Prescott lacks an asylum status to adjust and is therefore ineligible for adjustment. R. at 15; *Wassily*, 150 F.4th at 102; *Cela* 75 F.4th at 358. Both *Wassily* and *Cela* had no asylum status at the time of their applications because their status had been terminated. *Wassily*, 150 F. 4th at 103; *Cela* 75 F.4th 355 at 358. Thus, they were not eligible for an adjustment. *Wassily*, 150 F. 4th at 109; *Cela* 75 F.4th 355 at 365. Similarly, Prescott applied for an adjustment of status after USCIS terminated his asylum status. R. at 12. As the immigration judge noted, Prescott was “no longer considered an asylee at the commencement of these removal proceedings.” R. at 16. Therefore, Prescott is ineligible for an adjustment to lawful permanent resident status.

2. “Adjust” in § 1159(b) Requires Holding Present Asylum Status.

The word “adjust” further demonstrates that Congress requires a noncitizen seeking adjustment under § 1159(b) to have current asylum status. Section 1159(b) outlines an adjustment process between two circumstances: from a noncitizen with asylum to a noncitizen lawfully admitted for permanent residence. *Mahmood v. Sessions*, 849 F.3d 187, 191 (4th Cir. 2017); see *Cela*, 75 F.4th at 365. The word “adjust” necessitates that there be something to change; one cannot adjust something that does not exist. *Cela*, 75 F.4th at 365. As the Fourth Circuit explained in *Cela*, “it is hard to understand how a [noncitizen] can adjust his or her

status without a cognizable status in the first place.” *Id.* If Congress did not intend to require an existing status, it “would have used verbs such as apply, petition, or request instead of adjust.” *Id.* Here, Prescott lacked current asylum status at the time of his application to be a lawful permanent resident. R. at 15. Hence, he had no cognizable status that could be adjusted.

3. “Granted” in § 1159(b) Describes a Present State.

The word “granted” in § 1159(b) describes a present state, not a past event. In *Henson v. Santander Consumer USA Inc.*, this Court stated that “past participles like ‘owed’ are routinely used as adjectives to describe the present state of a thing.” 582 U.S. 79, 83-84 (2017). The Fourth Circuit applies this principle in *Cela*, concluding that the phrase “granted asylum” describes one who presently holds asylum status, not someone who was granted asylum status but no longer holds it. 75 F.4th at 363. The Second Circuit in *Wassily* reached the same conclusion, finding that “granted” indicates a present condition. *Wassily*, 150 F. 4th at 106. The Fifth Circuit is the only circuit to hold that the plain language of the statute “does not require [a noncitizen] to maintain asylum status to apply for an adjustment of status.” *Siwe*, 742 F.3d at 608. However, the Fifth Circuit reached this conclusion by arguing that the statute was silent on if present status was required. *Id.* Critically, “the Fifth Circuit did not have the benefit of the *Henson* court’s explanation that a past participle—such as “granted” in § 1159(b)—can be used as a past-tense verb or as an adjective describing a present state.” *Cela*, 75 F.4th at 365 n.11. Thus, the Fourteenth Circuit correctly applied *Henson* when it held that

Prescott was ineligible for status adjustment because he no longer held asylum status. R. at 27.

Moreover, § 1158(c) provides additional support that the term “granted” in § 1159(b) refers to present status. Uncertainty about a statutory term can be resolved by referencing that same term in “nearby statutory provisions.” *Unicolors, Inc., v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 185 (2022). The Second Circuit applied this principle in *Wassily*, concluding that § 1159(b)’s reference to “the status of any [noncitizen] granted asylum” must be read consistently with § 1158(c)’s references to “a [noncitizen] granted asylum” and “asylum granted under § 1158(b).” 150 F.4th at 107, 109 (referring to §§ 1158(c)(1)–(2)). Section 1158(c) uses “granted” to refer to presently existing asylum status. *Id.* Section 1158(c)(1) describes the benefits that are available to “a noncitizen granted asylum,” including work authorization and the ability to travel abroad, while § 1158(c)(2) and (3) address the consequences when granted asylum status is terminated, including removal. *Id.* §§ 1158(c)(1)–(3). Across §§ 1158(c)(1)–(3), asylum “granted” refers to current asylum status. *Wassily*, 150 F.4th at 109. Thus, § 1159(b)’s reference to “the status of a noncitizen granted asylum” should be interpreted to also require current asylum status. *Id.* Referencing nearby statutory provisions shows that the term “granted” requires that Prescott possess present asylum status to adjust his status to lawful permanent resident.

**B. The Legislative Purpose and Statutory Framework of § 1159(b)
Affirm Congress’s Intent to Require Current Asylum Status.**

Both the legislative purpose of § 1159(b) and the framework of the Immigration and Nationality Act (“INA”) support that a noncitizen’s loss of current asylum status precludes adjustment of his status to lawful permanent resident. When Congress amended the INA and enacted § 1159(b), it sought to “regularize the procedures governing the admissions of refugees into the United States.” *I.N.S. v. Stevic*, 467 U.S. 407, 409, 425 (1984). Permitting those without current asylum status to be eligible for adjustment of status undermines Congress’s effort to standardize immigration procedures. This statutory framework confirms Congress’s intent to require current asylum status.

1. Prescott Does Not Qualify for Congress’s Narrow Exception to § 1159(b).

The Immigration Act of 1990 supports a reading of § 1159(b) that requires current asylum status. Under the *expressio unius* canon of construction, the inclusion in a statute of one thing implies the exclusion of others. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely . . .”). The Immigration Act of 1990 added a statutory note to § 1159(b) titled “Adjustment of Certain Former Asylees” that narrowly permitted *some* noncitizens to apply for a status adjustment under § 1159(b), even if their status had been terminated.² Here,

² This Act provided that § 1159(b) “shall also apply to a [noncitizen] . . . who was granted asylum before the date of the enactment of this Act (regardless of whether or not such asylum has been

expressio unius commands that because Congress expressly addressed particular noncitizens without current asylum status, § 1159(b) requires current status.

Wassily, 150 F.4th at 109. Otherwise, the statutory note would be redundant to the requirements of § 1159(b). *Id.* The legislative record reflects that this exception was motivated by concerns about political regime changes in other countries that could prevent noncitizens granted asylum status from adjusting their statuses. *Wassily*, 150 F.4th at 109 n.15. Prescott’s asylum status was terminated as a result of his criminal conviction for a crime involving moral turpitude—not because of changed circumstances in his country of origin. R. at 15. Congress did not create an exception for individuals in Prescott’s situation, thus he must have present asylum status to adjust to lawful permanent resident status.

2. Congress Intended Termination of Asylum Status to Have Meaningful Consequences.

Congress intended for noncitizens like Prescott to lose the benefit of adjusting to lawful permanent resident status after asylum status is terminated. Statutes must be interpreted in light of their structure and purpose; courts should avoid readings that would undermine the statutory scheme Congress created. *See King v. Burwell*, 576 U.S. 473, 498 (“[W]e must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.”); *Holloway v. United States*, 119 U.S. 966,

terminated under section 208(b) of the [INA].” Pub. L. No. 101-649, § 104(d), 104 Stat. 4978, 4985 (1990). Moreover, the statutory note applies to a noncitizen “who is no longer a refugee because of a change in circumstances in a foreign state” but otherwise “was (or would be) qualified for adjustment of status under Section 209(b).” *Id.*

970 (1999) (noting that when interpreting a statute, courts should consider “its placement and purpose in the statutory scheme”). Courts should also avoid interpretations that will “produce a result demonstrably at odds with the intentions of [Congress].” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Section 1427 details the pathway for noncitizens to adjust their status from lawful permanent resident to citizen. 8 U.S.C. § 1427; *see Wassily* 150 F.4th at 109. Section 1158(c)(2) stipulates the grounds for termination of asylum status. 8 U.S.C. § 1158(c)(2). Here, to fulfill Congress’s intention in drafting § 1427 and § 1158(c)(2), § 1159(b) must be read to prevent noncitizens with terminated asylum status from shifting to lawful permanent resident status. As § 1427 requires lawful permanent resident status, the loss of asylum status precludes participation in its pathway to citizenship. Therefore, to maintain the meaningful consequences that Congress intended to come with loss of status, § 1159(b) must require current status. Holding otherwise would erroneously permit noncitizens like Prescott, who have lost their status as a result of disciplinary action, to nonetheless participate in the pathway to citizenship § 1427 provides. This would undermine Congress’s intent that terminated asylum status have meaningful consequences.

In line with Congress’s intent to create meaningful consequences for termination of asylum status, Prescott’s loss of asylum status due to his criminal conviction should make him ineligible for an adjustment of status. Asylum does not confer a right to remain permanently in the United States. 8 U.S.C. § 1158(c)(2). This status can be terminated on specific grounds, such as convictions of

particularly serious crimes. 8 U.S.C. §§ 1158(c)(2)(B), (b)(2)(A)(ii). Courts have found wire fraud and conspiracy to commit wire fraud to be particularly serious crimes. *See Doe v. Sessions*, 709 Fed. Appx. 63, 67–68 (2d Cir. 2017); *Jeudy v. United States AG*, 762 Fed. Appx. 594, 598–99 (11th Cir. 2019) (discussing opinion of the Board of Immigration Appeals). Interpreting § 1159(b) to permit adjustment without current asylum status would sever any meaningful consequence from the termination of asylum status; a noncitizen with terminated asylum status could adjust to lawful permanent resident status as if the termination never occurred. Here, Prescott was charged with conspiracy to commit wire fraud, pled guilty, was convicted, and lawfully had his asylum status terminated as a result. R. at 4–5, 15–16. Congress intended for noncitizens who commit serious crimes to suffer meaningful consequences as a result of losing asylum status. This Court should not permit Prescott to adjust his status to lawful permanent residence because it would undermine the intent of Congress and the plain text of the statute.

II. PRESCOTT DID NOT HAVE A CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN HIS REMOVAL PROCEEDING.

Prescott did not have a constitutional right to effective assistance of counsel in his removal proceeding, and thus, his case should not be reopened. The right in some circumstances to effective assistance of counsel flows from the right to counsel under the Fifth and Sixth Amendments. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (holding that “the right to counsel is the right to the effective assistance of counsel”). This right is restrained by context and precedent, which make clear that it does not exist in all proceedings. *See Turner v. Rodgers*, 564 U.S.

431, 446 (2011) (explaining that the Due Process Clause does not always require the provision of counsel in civil proceedings).

The right to effective assistance of counsel does not apply to Prescott's removal proceedings for two reasons. First, in removal proceedings, there is no right to counsel under the Sixth Amendment, and there is no right to effective assistance of counsel under the Fifth Amendment, absent extraordinary circumstances. *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Obleshchenko v. Ashcroft*, 392 F.3d 970, 972 (8th Cir. 2004). Second, the BIA did not need to reach administrative review under the *Lozada* framework because Prescott could not show that, but for Webb's error, he would have prevailed. *See Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (citing *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988)). Consequently, this Court should affirm the Fourteenth Circuit's decision and hold that Prescott had no right to effective assistance of counsel in his removal proceeding. Holding otherwise would pave the way for unnecessary delays of lawful removals and open the floodgates to frivolous claims of ineffective assistance of counsel.

A. Prescott Did Not Possess a Constitutional Right to Effective Assistance of Counsel in His Removal Proceedings.

Prescott did not have a constitutional right to effective assistance of counsel in his removal proceedings under the Fifth or Sixth Amendments. The Sixth Amendment guarantees the right to counsel in criminal prosecutions. U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The Sixth Amendment's right to counsel does not attach to removal proceedings because they

are not criminal prosecutions. *See Nehad*, 535 F.3d at 967 (“[L]itigants in removal proceedings have no Sixth Amendment right to counsel.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. . . .”). As a result, Prescott had no right to effective counsel under the Sixth Amendment.

The Fifth Amendment also does not provide a right to effective assistance of counsel in removal proceedings. This Court has only recognized a Fifth Amendment right to effective assistance of counsel in civil proceedings in two circumstances: when a protected liberty interest is at stake, or when there is a “sufficiently close nexus” between the state and the challenged action. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351–58 (1974). Removal proceedings do not affect a protected liberty interest because they are discretionary under the INA. *See Flores v. United States AG*, 64 F.4th 1208, 1213 (11th Cir. 2023). Thus, there is no right to effective assistance of counsel under the Fifth Amendment in removal proceedings generally. In addition, because there was no state action here, Prescott does not have a cognizable claim for ineffective assistance of counsel. *See Obleshchenko*, 392 F.3d at 971. Thus, Prescott had no right to effective assistance of counsel under the Fifth Amendment in his removal proceeding.

Even if the Court recognizes a right to effective assistance of counsel in removal proceedings, Prescott’s right to effective assistance of counsel would not have been violated. While several courts of appeals hold that there is not a right under the Fifth Amendment to effective assistance of counsel in removal

proceedings, some courts hold otherwise. *See Contreras v. Attorney General of the United States*, 665 F.3d 578, 584 n.3 (3d Cir. 2012) (noting that the Fourth and Eighth Circuits do not recognize this right, but several others do). Most courts of appeals that recognize the right to effective counsel in removal proceedings have limited it to a narrow circumstance: if a petitioner can prove that his attorney's performance fell below an objective standard of reasonableness and prejudiced the fundamental fairness of the removal proceeding. *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006).

1. Noncitizens Do Not Possess A Protected Liberty Interest Under the INA Because The Statute Grants The Attorney General Unfettered Discretion.

Prescott's request to reopen his case should be denied as there is no right to effective assistance of counsel in removal proceedings. When an individual's protected liberty interests are not at stake in a proceeding, the individual does not have a right to effective assistance of counsel under the Due Process Clause. *See Hopkins v. Saunders*, 199 F.3d 968, 975 (8th Cir. 1999); *United States v. Herrera-Pagoada*, 14 F.4th 311, 320 (4th Cir. 2021) ("[T]o advance a due process claim, [a noncitizen] must first establish that he had a property or liberty interest at stake."); *see also United States v. Castillo-Martiniz*, 16 F.4th 906, 917 (1st Cir. 2021) (finding the noncitizen sought a benefit by remaining in the country; his removal proceedings did not implicate his liberty interests). Noncitizens in removal proceedings do not have protected liberty interests at stake, so this Court should find that they have no constitutional right to effective assistance of counsel.

A noncitizen does not possess a protected liberty interest in a removal proceeding because the proceedings are governed under a discretionary statute which grants the Attorney General (AG) boundless discretion. When a liberty or property interest is “statutorily created” and “subject to the unfettered discretion of a governmental authority,” the Due Process Clause is not implicated, because there is no guarantee relief will be granted. *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); see *United States v Herrera-Pagoada* 14 F.4th 311 (4th Cir. 2021) (an “act of grace” resting in the unfettered discretion of a governmental authority is “not a right protected by the Constitution”); *Flores v. United States AG*, 64 F.4th 1208, 1213 (11th Cir. 2023) (noting that “‘the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest’ and thus cannot deprive a [noncitizen] of due process under the Fifth Amendment”).

The interest at stake in removal proceedings is subject to the AG’s unfettered discretion under § 1159(b) and thus is not a protected liberty interest under the Due Process Clause. The word “may” in a statute does not just suggest discretion, it demands it. *Biden v. Texas*, 597 U.S. 785, 802–03 (2022). Section 1159(b) states that the AG in his “discretion . . . *may* adjust to the status of [a noncitizen] lawfully admitted for permanent residence the status of any [noncitizen] granted asylum.” 8 U.S.C. § 1159(b) (emphasis added). The word “may” is not modified or restricted anywhere in § 1159(b), indicating unfettered discretion. Because adjustment of status in § 1159(b) is discretionary, noncitizens have no right to effective assistance of counsel under the Due Process Clause.

2. *There Was No Nexus Between Webb’s Representation of Prescott and the State, So He Does Not Have a Claim for Ineffective Assistance of Counsel.*

A noncitizen’s private legal representation in removal proceedings does not implicate the Due Process Clause because the Clause only protects individuals against state action. *See Obleshchenko*, 392 F.3d at 971. State action exists when there is a “sufficiently close nexus between the State and the challenged action.” *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351–58 (1974). A private attorney is not a state actor. *Obleshchenko*, 392 F.3d at 971–72. Therefore, the actions of a private attorney cannot be the basis for a claim of ineffective assistance of counsel under the Fifth Amendment. *Id.* (explaining that it is “difficult to see how an individual, such as [a private] attorney, who is not a state actor, can deprive anyone of due process rights”).

Here, there is no nexus between Prescott’s private attorney, Webb, and the State. R. at 5. The failure to file a *de novo* asylum claim was the result of Webb’s inaction; there was no state attorney involved in Prescott’s representation. R. at 5. Webb explicitly stated that she did not file the application because she thought it was not necessary. R. at 12. The State played no part in this decision. R. at 12. Should Prescott desire to seek redress, the proper avenue is a malpractice suit against Webb. *See Stroe v. I.N.S.*, 256 F.3d 498, 500–01 (7th Cir. 2001) (noting that a noncitizen may pursue a malpractice action but does not hold “a right to continue litigating against the original adversary [INS]”). Since there is no nexus between

Prescott's private representation and the State, Prescott has no constitutional claim of ineffective assistance to counsel in his removal proceeding.

3. *Prescott Would Not Have a Valid Ineffective Assistance of Counsel Claim Even in Jurisdictions that Recognize Such a Right.*

Even if this Court were to recognize a right to effective assistance of counsel in removal proceedings, the proceedings here would not warrant a reopening of Prescott's case. In jurisdictions that recognize a right to effective assistance of counsel in removal proceedings, the right is only violated when counsel's conduct prejudices the fundamental fairness of the removal proceeding. *See Huicochea-Gomez v. I.N.S.*, 237 F.3d 696, 698 (6th Cir. 2001) (recognizing a noncitizen seeking relief under the Fifth Amendment must prove that their counsel's conduct prejudiced the fundamental fairness of their removal proceeding). Prescott fails to meet this standard. Prescott received adequate representation from Webb that did not prejudice the fundamental fairness of his proceedings. Therefore, should this Court find a constitutional right to effective assistance of counsel in removal proceedings, Prescott still does not have a right to reopen his case.

Prescott cannot prove that Webb's representation was unreasonable and prejudiced the fundamental fairness of the removal proceedings. In *Strickland v. Washington*, the Court established a two-pronged test to determine a violation of the right to effective assistance of counsel. 466 U.S. 668, 669 (1984). Under *Strickland*, one must prove: (i) an attorney's ineffective performance; and (ii) the attorney's ineffective performance prejudiced the proceedings. *Id.* An attorney's

performance is ineffective if it falls below an objective standard of reasonableness. *Id.*; see *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (the first question is “if competent counsel would have acted otherwise.”). Prejudice exists if there is “a reasonable probability that, *but for* counsel’s unprofessional errors, the result of the proceeding would have been different.” See *Strickland*, 466 U.S. at 669; *Morales Apolinar v. Mukasey*, 514 F.3d 893 at 898 (9th Cir. 2008) (finding that prejudice requires showing that deficient performance “may have affected the outcome of the proceedings . . .”).

Courts have modified *Strickland* in the context of removal proceedings. *United States v. Castillo-Martinez*, 16 F.4th 906, 917 (1st Cir. 2021). To succeed on an ineffective assistance of counsel claim in a removal proceeding, the performance of the noncitizen’s attorney must be so egregious that it is “fundamentally unfair” and prevents the noncitizen “from reasonably presenting his case.” *Magallanes-Damian v. I.N.S.*, 783 F.2d 931, 933 (9th Cir. 1986). These proceedings generally turn on whether a noncitizen can prove the prejudice prong of the *Strickland* test, because “prejudice” is tied to fundamental fairness. *Jezierski v. Mukasey*, 543 F.3d 886, 889 (7th Cir. 2008). Courts have found no prejudice in cases where counsel failed to file a brief to the BIA when nothing in the brief “would have affected the outcome of the proceeding.” See *Ramirez-Durazo v. I.N.S.* 794 F.2d 491, 501 (9th Cir. 1986); see also *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) (“[A noncitizen] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States.”). For example,

in *Ramirez-Durazo*, the Ninth Circuit ruled that a noncitizen failed to establish prejudice, and therefore had no claim for ineffective assistance of counsel. 794 F.2d at 501. It found the only significant deficiency of his attorney's representation during his removal proceedings was the failure to file a brief to the BIA. *Id.* Since there were other sufficient grounds for Ramirez-Durazo's removal, his attorney's failure to file the brief was immaterial. *Id.*

Similarly, even if Prescott's attorney had filed a *de novo* asylum application and Prescott was approved for asylum status, this would not have affected the outcome of the removal proceeding. Like in *Ramirez-Durazo*, other grounds were sufficient for removal. The DHS initiated Prescott's removal proceedings because he was convicted of conspiracy to commit wire fraud within the first five years of him being admitted to the country, and this charge had a sentence of greater than one year. R. at 15; 8 U.S.C. § 1227(a)(2)(A)(i). Because conspiracy to commit wire fraud is recognized as a serious crime by courts, Prescott likely would not be eligible for a grant of asylum, rendering a new application futile. *See Doe*, 709 Fed. Appx. at 67–68; *Jeudy*, 762 Fed. Appx. at 598–99 (discussing an opinion of the Board of Immigration Appeals). Further heightening the possibility of removal, his asylum status was terminated under a new government initiative to disincentivize illicit sports gambling. R. at 15. These facts informed the determination of the BIA, irrespective of his attorney's performance. R. at 15. Thus, Webb's failure to file an asylum application was not the *but for* cause of Prescott's removal because the other factors were more than sufficient.

Additionally, courts have found no prejudice exists in removal proceedings when an attorney has made unwise “tactical decisions” that later prove detrimental to the client. *See Magallanes-Damian v. I.N.S.* 783 F.2d 931 (9th Cir. 1986); *LeBlanc v. I.N.S.*, 715 F.2d 685, 694 (1st Cir. 1983) (“It is not unusual or egregious for counsel to make tactical decisions that ultimately fizzle and redound to the client's detriment.”). In the present case, Webb’s decision to apply for adjustment of status to lawful permanent resident, rather than applying for a *de novo* asylum application, was a tactical decision, and therefore not unfairly prejudicial to Prescott’s proceeding. The government had just terminated Prescott’s asylum status; a reasonable attorney could infer that the government was unlikely to grant him asylum again. R. at 12. In addition, Webb stated that immigration regulations were unclear as to whether asylum status needed to be current to be eligible for an adjustment of status at the proceeding. *Id.* Thus, it is likely Webb erred on the side of caution by not submitting what she believed would have been a frivolous *de novo* asylum application.

B. The BIA Properly Exercised Its Discretion When It Declined to Review Prescott’s Ineffective Assistance of Counsel Claim.

Prescott argues that the BIA must still reopen his case on administrative grounds because he satisfied the *Lozada* requirements. R. at 32. Prescott asserts that by completing all three steps of the *Lozada* requirements, he was entitled to administrative review of his ineffective assistance of counsel claim. R. at 32; *see Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988). However, even if the *Lozada* requirements were met, before the BIA reopens his case, Prescott must show a

reasonable probability that but for his attorney's error, he would have prevailed in his removal proceeding. *Matter of Melgar*, 28 I.&N. Dec. 169, 170 (BIA 2020).

Reopening a removal case is not a remedy provided merely because a better attorney "might have obtained a [more] favorable result." *Id.* Prescott's argument should be rejected for two reasons: (i) the BIA is not legally required to review claims of ineffective assistance of counsel on administrative grounds; and (ii) even if the BIA were to conduct an administrative review, Prescott's claim would still fail, because he cannot show a reasonable probability that he would have prevailed on the claim but for his attorney's error.

The BIA is not legally required to review Prescott's claim on administrative grounds. If there is no constitutional basis for an ineffective assistance of counsel claim, the *Lozada* framework is moot. *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 807 (8th Cir. 2003) (explaining that whether a noncitizen satisfies the *Lozada* requirements is a moot question if the noncitizens has failed to establish a due process violation [under the Fifth Amendment's Due Process Clause]). The *Lozada* framework does not create a new basis for ineffective assistance of counsel; if there is such a claim it must still be based in the Fifth Amendment's Due Process Clause. *Id.* Prescott does not have a due process claim here. *See supra* Part II.A.1.

Therefore, because there is no constitutional basis for Prescott's claims, the BIA does not need to address the claim under the *Lozada* administrative path. *See Romero v. Bondi*, 150 F.4th 332, 350 n.2 (4th Cir. 2025); *Afanwi v. Holder*, 558 U.S. 801, 801 (2009).

Even if the BIA were to conduct an administrative review, Prescott's claim would still fail because he cannot prove his removal proceeding was fundamentally unfair. Courts have found that the BIA's only requirement when reviewing an ineffective assistance of counsel claim is to ensure that there was fundamental fairness in the removal proceedings. *See Mohammed*, 400 F.3d at 791. If the BIA determines that there was not fundamental fairness in the proceedings, it may decline to reopen the case, irrespective of whether the *Lozada* requirements have been fulfilled. *Id.*; *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 807 (8th Cir. 2003). Here, the BIA determined there was no fundamental unfairness in Prescott's removal proceedings. R. at 21. Prescott cannot prove that his attorney's failure to file a *de novo* asylum application resulted in fundamental unfairness in his removal proceedings. *See supra* Part II.A.3. The BIA had sufficient independent grounds to make its determination. Thus, the BIA did not abuse its discretion when it declined to reopen Prescott's case. Allowing Prescott to reopen his case would only allow him to delay his removal and would end in the same result—the denial of his claim.

CONCLUSION

For the aforementioned reasons, this Court should affirm the Fourteenth Circuit's decision and find that § 1159(b) requires present asylum status to adjust to lawful permanent resident status and that there is no constitutional right to effective assistance of counsel in removal proceedings.