No. 03-1482

In the Supreme Court of the United States

MARIE-THERESE HALIM ASSA'AD-FALTAS, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an alien who resided illegally in the United States, briefly departed the country, and then was temporarily paroled into the United States pending resolution of her application for legalization was properly subject to exclusion proceedings after her application for legalization was denied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 332 F.3d 1321. The decisions of the immigration judge (Pet. App. 37a-40a, 46a-54a, 56a-59a) and the Board of Immigration Appeals (Pet. App. 41a-45a, 55a, 60a-63a, 64a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 5, 2003. A petition for rehearing was denied on September 26, 2003 (Pet. App. 68a). On November 25, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 9, 2004. On December 18, 2003, Justice Kennedy further extended the time to file to and including January 20, 2004. On January 14, 2004, Justice Kennedy again extended the time

within which to file a petition for a writ of certiorari to and including February 23, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, Congress enacted the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359, which established a program for the legalization of illegal aliens who had resided in the United States for a significant period of time. To qualify for legalization, an alien had to satisfy four requirements: (1) the filing of a timely application by May 5, 1988; (2) continuous unlawful residence in the United States since January 1982; (3) continuous physical presence since November 1986; and (4) admissibility as an immigrant. 8 U.S.C. 1255a(a).

Congress provided a narrow exception to the physical presence requirement by directing that "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States for the purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States." 8 U.S.C. 1255a(a)(3)(B). The Attorney General, by regulation, interpreted an absence to be "brief, casual, and innocent" only if the alien obtained advance parole before leaving the United States or if the departure was out of the alien's control. 8 C.F.R. 245a.2(b)(6). "Advance parole" consists of the Attorney General's regulatory pre-authorization for an alien to be paroled into the United States upon arrival at the border without the appropriate visa or other documents necessary to enter lawfully. 8 C.F.R. 212.5(f).

The grant of "advance parole" is one manner in which the Attorney General or, since March 1, 2003, the Secretary of Homeland Security, may exercise his longstanding discretion under the Immigration and Nationality Act,

8 U.S.C. 1101 *et seq.*, to parole into the United States aliens who have been detained at the border and are seeking admission.[1] Such parole may be granted "temporarily under such conditions as [the Attorney General or, now, the Secretary] may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see generally *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary), the purposes of the alien's immigration parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

The Board of Immigration Appeals (Board) has interpreted the statutory exception to the continuous physical presence requirement for "brief, casual, and innocent absences" as only preserving the alien's eligibility for legalization under the Immigration Reform and Control Act, and not as a substantive redefinition of an entry into the United States for other immigration purposes. *In re Singh*, 21 I. & N. Dec. 427, 434-435 & n.8 (1996) (en banc). An applicant who otherwise met the Immigration and Reform

[1] On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

Control Act's eligibility requirements thus could be granted temporary lawful resident status despite the brief absence. An alien who attained temporary lawful resident status would then be entitled, among other things, to apply for permanent lawful resident status, 8 U.S.C. 1255a(b)(1), and to travel briefly abroad, 8 U.S.C. 1255a(b)(3)(A). Unlike mere applicants for legalization, those who have attained temporary lawful resident status are permitted "to return to the United States after such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status," without affecting their eligibility for lawful permanent resident status. 8 U.S.C. 1255a(b)(1)(B)(ii) and (3)(A).

Congress directed that decisions concerning a legalization application would be subject to a "single level of administrative appellate review." 8 U.S.C. 1255a(f)(3). That appeal is made to a specially constituted Administrative Appeals Unit. An immigration judge lacks jurisdiction in either deportation or exclusion proceedings to review directly the denial of an application for legalization. 8 C.F.R. 245a.2(p); *In re Singh*, 21 I. & N. Dec. at 433. Judicial review of a denial of legalization can be obtained only upon review of a final order of deportation. No judicial review of the legalization decision is available on review of a final order of exclusion. 8 U.S.C. 1255a(f)(4); *Espinoza-Gutierrez* v. *Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996).[2]

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[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, altered the statutory nomenclature used to refer to the different categories of aliens and the procedures for their return or removal. Previously, aliens who were seeking admission into the United States in the first instance, but were ineligible to enter or remain, were denominated "excludable" aliens and were subject to administrative "exclusion" proceedings. See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182, 1252 (1994). Aliens who already had entered the

2. Petitioner is a native and citizen of Egypt. She first entered the United States in 1979 on an exchange visa to study for a medical degree. Pet. App. 1a. Although the visa authorized petitioner to stay in the United States only until May 1982, she remained until September 1983, before returning to Egypt. She entered the United States again three months later on a visitor visa, which authorized her to stay for only six months, but she has remained in the United States for the last 20 years. See *ibid.* In May 1988, petitioner applied for amnesty and temporary resident status under 8 U.S.C. 1255a. While her application was pending, petitioner obtained authorization for advance parole, which permitted her to depart temporarily to Canada. Upon her return, she was paroled into the United States. Pet. App. 2a.

Following her parole into the United States, petitioner's application for legalization was denied because she had violated the admissibility conditions imposed on her original exchange visa, which disqualified her from the requested relief. It also was denied because petitioner was not unlawfully present in the United States on January 1, 1982, which is the date triggering entitlement to legalization under Section 1255a. Pet. App. 1a-2a, 66a-67a. The Ad-

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United States, whether legally or illegally, but were ineligible to remain were referred to as "deportable" aliens subject to "deportation" procedures. See 8 U.S.C. 1227, 1251 (1994). Now, under IIRIRA, the term "inadmissible" alien refers both to excludable aliens and those who have entered illegally. 8 U.S.C. 1182(a)(6). The administrative proceeding conducted to determine whether any alien, whether lawfully admitted or inadmissible, can reside within the United States is now denominated a "removal" proceeding. 8 U.S.C. 1229a.

ministrative Appeals Unit affirmed the denial of legalization. *Id.* at 66a-67a.[3]

Following the denial of her application for legalization, the government placed petitioner in exclusion proceedings.[4] The government contended that she was excludable based on her attempted entry from Canada without valid travel or entry documents. Pet. App. 3a. The immigration judge initially terminated the exclusion proceedings on the ground that petitioner's brief departure to Canada did not alter her status as an alien resident within the United States, which would subject her to deportation rather than exclusion proceedings. *Id.* at 37a-40a.

The Board reversed and remanded that decision based on the immigration judge's misapplication of and reliance upon a superseded regulatory scheme. Pet. App. 41a-45a. The Board explained that the regulations applicable to petitioner expressly provided that an alien returning under a grant of advance parole would be paroled into the United

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[3] Petitioner's repeated applications for adjustment of status have likewise been denied based on her violations of the immigration laws. Pet. App. 2a-3a.

[4] This case falls within IIRIRA's transitional rules because petitioner was placed in exclusion proceedings before April 1, 1997, and the final order in her case was entered after October 30, 1996. Pet. App. 4a; IIRIRA § 309(c)(4)(C), 110 Stat. 3009-626. IIRIRA made significant amendments to the Immigration and Nationality Act, including a provision creating new judicial review provisions, which are codified at 8 U.S.C. 1252 *et seq.* Those provisions apply only in cases, unlike the present case, where the alien's administrative proceedings commenced on or after April 1, 1997. See IIRIRA §§ 306(c)(1), 309(a) and (c), 110 Stat. 3009-610, 3009-625. For cases still covered by the predecessor judicial review provisions, IIRIRA established "transition rules" for judicial review which apply where the alien's final deportation or exclusion order was issued on or after October 31, 1996. See IIRIRA § 309(c)(4), 110 Stat. 3009-626.

States and would not be entitled to deportation proceedings if it was later determined that she could not remain. Instead, the alien would be placed in exclusion proceedings. *Id.* at 44a. The Board further noted that petitioner was fully aware of the change in her legal status to that of an excludable alien and, indeed, that petitioner herself had moved to terminate the deportation proceedings because of her "changed" status. *Id.* at 45a.

On remand, the immigration judge ruled that petitioner was excludable as charged, but granted her a month in which to apply for relief from exclusion. Pet. App. 46a-54a. Eight months later, the immigration judge entered a final order of exclusion based on petitioner's failure to apply for any available relief. *Id.* at 56a-59a. While petitioner had sought review in the exclusion proceeding of the denial of her applications for legalization and adjustment of status, the immigration judge ruled that it lacked jurisdiction to review those decisions. *Id.* at 58a-59a.

The Board affirmed. Pet. App. 60a-63a. The Board held that aliens who are expressly paroled into the United States, through the advance parole scheme, are subject to exclusion rather than deportation proceedings. The Board also agreed that petitioner had identified no other legally cognizable ground for relief from exclusion. *Id.* at 61a-63a.

3. The court of appeals denied the petition for review. Pet. App. 1a-26a. As relevant here, the court rejected petitioner's argument that the statutory exception for "brief, casual, and innocent" departures that preserves an alien's eligibility for legalization, 8 U.S.C. 1255a(a)(3)(B), also altered the substantive immigration character of her entry into the United States from Canada. The court explained that the plain language of the relevant statutory provision "expressly limits the effect" of the brief departure exception to the "*purposes of subparagraph (A)*"—that is, to

applications for legalization. Pet. App. 10a. That qualification on the definition of continuous physical presence expressly goes no further, the court reasoned, and thus "does not affect the generally applicable definition of what constitutes an 'entry' into the United States under former [8 U.S.C. 1101(a)(13)]." Pet. App. 12a.

The court further found that the plain import of Section 1255a(a)(3)(B) comports with the overall structure of Section 1255a. The court noted that Congress had elsewhere directed that those whose legalization applications are granted and who are accorded temporary protected status may return to the United States after "brief and casual trips abroad" without affecting their legal status. Pet. App. 11a, 14a (citing 8 U.S.C. 1255a(b)(1)(B)(ii) and (3)(A)). In the court's view, that statutory provision demonstrated that, when Congress wishes to ensure that a brief absence did not affect *either* the alien's immigration status *or* his eligibility for an immigration benefit, the statute says "so explicitly." Pet. App. 15a.

Although the court deemed the statutory text to be "unambiguous," Pet. App. 19a, the court further noted that, if the text were ambiguous, it would defer to the Board's reasonable interpretation of the provision as referring only to eligibility for legalization and not otherwise altering the alien's legal status. *Id.* at 22a-24a.

The court acknowledged that the Ninth Circuit had reached a different result in *Espinoza-Gutierrez* v. *Smith*, 94 F.3d 1270 (1996), but it declined to follow that court's analysis for two reasons. First, the court believed that the Ninth Circuit placed erroneous reliance on *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). In *Rosenberg*, this Court held that a lawful *permanent* resident's return to the United States after a "brief, casual, and innocent" departure did not constitute an attempted entry subjecting the alien to

exclusion rather than deportation proceedings. The Court explained that such a fleeting absence could not reasonably have been "inten[ded] * * * as meaningfully interruptive of the alien's permanent residence," which is what the statutory definition of "entry" required. *Id.* at 462.

The court of appeals here explained that *Fleuti* construed a specific statutory definition of "entry" that created a narrow exception for lawful permanent residents to the otherwise broad rule that an entry was "any coming of an alien into the United States." Pet. App. 13a-14a (emphasis omitted). The court reasoned that Congress's adoption of similarly worded factors in a different statutory provision for the narrow purpose of preserving eligibility for an immigration benefit could not reasonably be understood as creating a broad exception to the definition of entry by illegal aliens. *Id.* at 14a.

Second, the court of appeals found that the Ninth Circuit's approach "under-estimates the degree to which the statutory structure sheds light on Congressional intent," noting that other provisions "address[] eligibility for adjustment of status separately from the extension of immigration benefits," and "extend[] escalating immigration benefits to aliens who are able to demonstrate satisfaction of increasingly restrictive eligibility requirements." Pet. App. 14a-15a. The court thus declined to adopt a reading of the law that would provide "[m]ere applicants for adjustment to temporary resident status" a "broader right to travel than * * * temporary residents." *Id.* at 16a-17a.

ARGUMENT

Petitioner argues (Pet. 19-22) that this Court's review is necessary to resolve conflicts between the court of appeals' decision here and the Ninth Circuit's decision in *Espinoza-Gutierrez* v. *Smith*, 94 F.3d 1270 (1996), and the

Fourth Circuit's decision in *Joshi* v. *District Director, INS*, 720 F.2d 799 (1983). That argument is without merit.

First, although there may be some tension between the court's decision here and *Espinoza-Gutierrez*, the latter case is distinguishable from the case at hand. As the Board explained (Pet. App. 61a), Espinoza-Gutierrez left the United States without obtaining advance parole and thus was not paroled upon his return. See 94 F.3d at 1271. The court's decision that Espinoza-Gutierrez could not be subjected to exclusion proceedings thus did not address the legal implications for an alien's status of an express request by the alien for and the alien's receipt of parolee status, which is what occurred in petitioner's case. Indeed, the Ninth Circuit's decision left unaddressed the regulatory scheme's application to aliens who "may prefer to have advance permission from the INS knowing that there will not be any immigration concerns upon their return." *Id.* at 1277 n.4.

Furthermore, while the Ninth Circuit found the relevant statutory language to be ambiguous, that court, unlike the court of appeals here (Pet. App. 22a-23a), did not discuss or consider the Board's interpretation of the "brief, casual, and innocent" provision in *In re Singh*, 21 I. & N. Dec. 427, 434-435 & n.8 (1996) (en banc), as limited to preserving eligibility for temporary resident status. See Pet. App. 23a n.24 ("The *Espinoza-Gutierrez* court was apparently unaware of the *Singh* decision."). Because the Board's interpretation is entitled to substantial deference, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999), the Ninth Circuit might reconsider its position in a future case, in the unlikely event that such a case were again to arise. See also *INS* v. *Phinpathya*, 464 U.S. 183, 194-195 (1984) (noting that *Fleuti* involved a lawful permanent resident

and suggesting that the decision's rationale does not extend to entries by illegal aliens).

Second, the assertion of a conflict with the Fourth Circuit's decision in *Joshi*, *supra*, is even less substantial. *Joshi* held that a brief departure did not affect an alien's eligibility for adjustment of status. 720 F.2d at 801-802. But that decision was based upon a now-superseded regulatory scheme that expressly directed that the adjustment of status application be "adjudicated without regard to the departure and absence" of the alien. *Id.* at 802 (citing 8 C.F.R. 245.2(a)(3) (1982)). The statutory and regulatory scheme at issue here lacks such expansive language.

Third, and in any event, the alleged conflicts and the question presented are of no prospective importance. The application period for the legalization program established by the Immigration Reform and Control Act of 1986 closed on May 5, 1988. The prospect of any meaningful number of additional cases like petitioner's arising at this late date is remote.

In addition, in 1996, Congress replaced the statutory definition of "entry" applicable to petitioner's case with an entirely new statutory scheme that eliminates the focus on the alien's intent to interrupt his residence, which is what gave rise to *Fleuti*. Current law replaces the term "entry" with the terms "admission" and "admitted," which are defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 301, 110 Stat. 3009-575. The question of whether petitioner's brief absence amounted to an "entry" under a now-supplanted statutory definition thus lacks prospective legal significance. See *Tineo* v. *Ashcroft*, 350 F.3d 382, 385-386, 391-394 (3d Cir. 2003) (1996 law did not

carry forward the statutory language that gave life to the *Fleuti* entry exception); see also *Tapia* v. *Ashcroft*, 351 F.3d 795, 799 & n.6 (7th Cir. 2003) (same).

Finally, petitioner is legally disqualified for legalization under the Immigration Reform and Control Act in any event, due to the incontestable fact that she was not illegally present in the United States on January 1, 1982. Compare 8 U.S.C. 1255a(a)(2) (requiring continuous illegal presence since January 1, 1982), with Pet. App. 1a (petitioner's authorized stay did not expire until May 1982), 67a (petitioner was "clearly in authorized J-1 status on January 1, 1982"). Thus, the opportunity for her to obtain judicial review of the denial of legalization following a deportation proceeding could not, as a matter of law, have any effect on the outcome of her case. Because further review raises no prospect of altering petitioner's excludability, it is time for the "extensive procedural history" (Pet. App. 46a) of her 15-year resistance to removal, which has included the uniform rejection of her claims by the Fourth, Sixth, and Eleventh Circuits (*id.* at 1a-26a, 31a-36a, 65a), to end.[5]

[5] While petitioner remains ineligible for legalization, in September 2003, the Department of Homeland Security granted a waiver of petitioner's violation of the homestay condition on her original exchange visa. That waiver made her statutorily eligible for adjustment of status. Whether petitioner's status will be adjusted is currently the subject of mediation efforts in her pending Fourth Circuit appeal, in *Fares* v. *INS*, No. 03-1907. That appeal arises from a district court judgment dismissing petitioner's *Bivens* action against various government officials.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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