22-734

No.

IN THE

Supreme Court of the United States

RAFAEL GOMEZ-VARGAS,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, the Attorney General has discretion to cancel removal of non-permanent residents who satisfy four eligibility criteria, including "that removal would result in exceptional and extremely unusual hardship" to the applicant's immediate family member who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D).

Congress stripped courts of jurisdiction to review cancellation-of-removal determinations, 8 U.S.C. § 1252(a)(2)(B)(i), but expressly preserved their jurisdiction to review "questions of law." *Id.* § 1252(a)(2)(D). And as this Court has already held, this "statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts"—that is, a "mixed question of law and fact." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068-69 (2020).

The question presented is whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under § 1252(a)(2)(D), as four circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and three other circuits have concluded.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Gomez-Vargas v. Merrick Garland, U.S. Attorney General, No. 20-60429 (Oct. 5, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rafael Gomez-Vargas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-7a) is unreported; it is available at 2022 WL 5149586. The decisions of the Board of Immigration Appeals (Pet. App. 8a-12a) and the immigration judge (Pet. App. 13a-28a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2022. On December 21, 2022, Justice Alito extended the time to file this petition to February 2, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> * * *
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a cit-

izen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252(a)(2) provides in relevant part:

> **(B) Denials of discretionary relief**
>
> Notwithstanding any other provision of law * * * and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title * * * *
>
> **(D) Judicial review of certain legal claims**
>
> Nothing in subparagraph (B) * * * which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

The full text of Sections 1229b(1) and 1252(a)(2), together with other relevant statutes, is reproduced in the Appendix, *infra*, at 29a-38a.

INTRODUCTION

This petition concerns an important issue of immigration law: an acknowledged circuit split regarding the scope of the jurisdiction-stripping statute barring review of certain agency determinations, except for "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(B)(i), (D). Specifically, the courts of appeals are divided as to whether they have jurisdic-

tion to review the Board of Immigration Appeals' ("BIA" or "Board") application of the statutory hardship standard to undisputed facts. *See De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1290-91 (9th Cir. 2022) (surveying "this circuit split").

For many decades, Congress has allowed the Attorney General to cancel removal if a noncitizen can show that it would cause exceptional hardship. In today's version of this statute, the Attorney General may (in his discretion) cancel removal only if the noncitizen satisfies four threshold eligibility requirements, the last of which is that removal would cause "exceptional and extremely unusual hardship" to immediate family members who are either U.S. citizens or lawful permanent residents. 8 U.S.C. § 1229b(b)(1). The question presented is whether courts have jurisdiction to review the BIA's conclusion that a given set of established facts does not rise to this level of hardship.

This circuit conflict follows this Court's decision in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), which held that courts retain jurisdiction to review the agency's "application of a legal standard to undisputed or established facts"—that is, a "mixed question of law and fact." *Id.* at 1068-69. After *Guerrero-Lasprilla*, several courts of appeals—the Fifth, Sixth, and Eleventh Circuits—overruled their prior precedents, which had held that the agency's ultimate hardship determination was unreviewable. These circuits concluded that the agency's hardship determinations fall squarely within the definition of mixed questions that *Guerrero-Lasprilla* said are reviewable. The Fourth and Seventh Circuits have held the same. But other circuits—notably, the

Third, Eighth, and Tenth—found ways to distinguish *Guerrero-Lasprilla* and adhere to their precedents treating the agency's hardship determination as a matter of discretion rather than a question of law. The Fifth Circuit has since reversed its post-*Guerrero-Lasprilla* precedent based on an overreading of dicta in *Patel v. Garland*, 142 S. Ct. 1614 (2022)—a case that decided nothing about the hardship issue or about mixed questions of law and fact. The upshot is that at least four circuits (the Third, Fifth, Eighth, and Tenth Circuits) now hold that the agency's hardship determination is not a reviewable question of law, whereas at least four other circuits (the Fourth, Sixth, Seventh, and Eleventh Circuits) hold that it is reviewable as a mixed question of law and fact.

This petition presents the same question as the petition in *Wilkinson v. Garland*, No. 22-666. For the reasons given in the petition in *Wilkinson*, the holding of the court below is wrong (as are the similar holdings of the Third, Eighth, and Tenth Circuits), the question presented is important and frequently recurring as the already-entrenched split demonstrates, and this Court should grant certiorari to resolve this circuit conflict. *See* Pet. 21-33, *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023). The petition in *Wilkinson* offers a suitable vehicle in which to address the question presented. The Court should therefore hold the petition in this case pending the disposition in *Wilkinson*, then resolve this petition as appropriate in light of that disposition.

STATEMENT

A. Legal background.

1. The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, originally granted the Attorney General the "discretion" to "suspend deportation" of certain otherwise deportable noncitizens when "deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his" immediate relatives who are U.S. citizens or lawful permanent residents. *Id.* § 244(a)(1)-(5), 66 Stat. 214-16 (codified at 8 U.S.C. § 1254(a)(1)-(5) (1958)). This "suspension of deportation [was] a matter of grace to cover cases of unusual hardship." *Jay v. Boyd*, 351 U.S. 345, 354 n.16 (1956). As a Congressional report explained, suspension of deportation was authorized by the Immigration Act of 1917 to protect "aliens of long residence and family ties in the United States," whose removal "would result in a serious economic detriment to the[ir] family." S. Rep. No. 81-1515, at 600 (1950).

Congress has most recently modified this provision with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-594.[1] In its current form, the hardship statute provides that the "Attorney General may cancel removal" and adjust the status of non-permanent residents "if"—and *only if*—four threshold eligibility criteria are met. 8

[1] Before 1996, immigration law distinguished between "exclusion" and "deportation" proceedings, but current law employs "a unified procedure, known as a 'removal proceeding,' for exclusions and deportations alike." *Judulang v. Holder*, 565 U.S. 42, 45-46 (2011).

U.S.C. § 1229b(b)(1). The first three are that the applicant has been present in the country for the prior ten years, has had "good moral character" during the relevant period, and has not been convicted of specified criminal offenses. *Id.* § 1229b(b)(1)(A)-(C). The fourth requirement is that the applicant "establishes that removal would result in exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. *Id.* § 1229b(b)(1)(D).

Section 1229b(b)(1) thus demands certain threshold showings as predicates to the ultimate discretionary choice whether to cancel removal. *See Patel v. Garland*, 142 S. Ct. 1614, 1619 (2022) ("To be eligible for" discretionary relief from removal, "a noncitizen must show that he satisfies various threshold requirements established by Congress."). Indeed, the statute divides the burdens of proof shouldered by the applicant into two distinct showings: that she "satisfies the applicable eligibility requirements" *and* that she "merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). It follows that "even an eligible noncitizen must persuade the immigration judge that he merits a favorable exercise of discretion." *Patel*, 142 S. Ct. at 1619.

2. While courts generally have jurisdiction to hear petitions for review of "final order[s] of removal," 8 U.S.C. § 1252(a)(1), Congress has stripped jurisdiction over certain matters, *id.* § 1252(a)(2). As relevant here, the statute divests courts of jurisdiction to review "any judgment regarding the granting of relief under section ... 1229b," which governs cancellation of removal. *Id.* § 1252(a)(2)(B).

This Court confronted a predecessor of these jurisdiction-stripping provisions in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* gave the statute a narrow construction that preserved judicial review in habeas corpus proceedings to avoid the "serious constitutional questions" that would arise from eliminating such review. *Id.* at 314. In a footnote, *St. Cyr* remarked that "Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas review] through the courts of appeals." *Id.* at 314 n.38. "Congress took up this suggestion" by enacting subparagraph (D), which this Court has dubbed the "Limited Review Provision." *Guerrero-Lasprilla*, 140 S. Ct. at 1071.

The Limited Review Provision states, as relevant here, that "[n]othing in subparagraph (B) ... which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). Thus, while "Congress has sharply circumscribed judicial review of the discretionary-relief process," the Limited Review Provision stakes out "an important qualification" to ensure judicial review of legal and constitutional questions. *Patel*, 142 S. Ct. at 1619.

In *Guerrero-Lasprilla*, this Court held that the Board of Immigration Appeals' "application of law to undisputed or established facts"—*i.e.*, a "mixed question of law and fact"—"is a 'questio[n] of law' within the meaning of § 1252(a)(2)(D)." 140 S. Ct. at 1069 (brackets in original). Accordingly, the Court reversed the Fifth Circuit's decision that it lacked jurisdiction to review whether the BIA incorrectly determined that a given set of undisputed facts did not

satisfy the due diligence standard for equitable tolling purposes. *Id.* at 1068.

B. Proceedings below.

1. Petitioner Rafael Gomez-Vargas is a father of five children—all born in Texas—and has lived in this country for over thirty years (first arriving as a teenager in 1989), though he was born in Mexico. Pet. App. 14a, 16a. He is the sole breadwinner for his wife and three youngest children living at the family home in Texas. *Id.* 3a. His youngest daughter, J., was eight years old at the time of the immigration court's decision, and the other children who lived at home were seventeen (Daisy) and nineteen (Rafael Jr.). *Id.* 16a. Daisy is serving in the United States military. *Id.* 5a-6a, 11a. Mr. Gomez-Vargas has worked as a newspaper deliveryman and a crop harvester in agricultural fields, and he is currently a landscaper. *Id.* 16a. His wife has a tumor in her chest that has confounded her doctors. *Id.* 17a. She has never worked outside the home. *Id.*

In 2012, the Department of Homeland Security initiated removal proceedings against Mr. Gomez-Vargas, and he conceded removability. *Id.* 14a. In 2014, Mr. Gomez-Vargas applied for cancellation of removal under § 1229b(b)(1), and he filed an amended application in 2017. *Id.* 15a.

At the hearing before the immigration judge, Mr. Gomez-Vargas testified "that his removal to Mexico would have a significant detrimental impact on his children," including the loss of the family's home in Texas because no one will be able to pay the property taxes. *Id.* 18a. He testified that his youngest daughter has been most affected by the removal proceed-

ings—for six months she would hide underneath the bed and frequently refuse to eat. *Id.* Rafael Jr., then a high school senior in the top ten percent of his class, testified at the hearing that he will attend Texas A&M University and relies on his father's financial support to attend college. *Id.* 20a.

In June 2018, the immigration court credited the testimonies of both Mr. Gomez-Vargas and his son. *Id.* 21a. The immigration court also found that Mr. Gomez-Vargas satisfied the first three statutory eligibility criteria for cancellation of removal under § 1229b(a)—physical presence in the United States for a continuous period of not less than 10 years immediately preceding the application, good moral character during the relevant period, and no disqualifying criminal convictions. *Id.* 22a-23a. With respect to the hardship criterion, the immigration court found that Mr. Gomez-Vargas "presented testimony and other credible and relevant evidence in support of the argument that his children ... would suffer hardship if [he] is removed." *Id.* 25a.

Nevertheless, the immigration court concluded that the facts found did not rise to the level of exceptional hardship to his children and, solely on that basis, denied his application. *Id.* 26a-27a. He appealed this decision, and in May 2020 the BIA "adopt[ed] and affirm[ed]" the immigration court's decision. *Id.* 8a-9a.

2. Mr. Gomez-Vargas petitioned for review in the Fifth Circuit. In 2021, after the case was briefed, the Fifth Circuit stayed proceedings pending this Court's decision in *Patel*. After *Patel* was decided, the court below issued an unpublished decision that dismissed the portion of the petition challenging the BIA's

hardship determination for lack of jurisdiction, citing *Patel* and the Fifth Circuit's subsequent decision in *Castillo-Gutierrez v. Garland*, 43 F.4th 477, 481 (5th Cir. 2022) (per curiam). *See* Pet. App. 6a-7a.

ARGUMENT

1. This petition presents the same question as the petition in *Wilkinson v. Garland*, No. 22-666. Like the Third Circuit in *Wilkinson*, the court below held that it lacked jurisdiction to review the BIA's conclusion that a given set of undisputed facts does not rise to the statutory hardship standard. *See* Pet. App. 6a; Pet. 11-12, *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023). As explained in the petition in *Wilkinson*, the courts of appeals are deeply divided over whether courts have jurisdiction to review the BIA's application of the statute's hardship standard to undisputed facts. Pet. 15-21, *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023) (discussing acknowledged circuit split).

In addition to the six circuits discussed in the *Wilkinson* petition, two other circuits have recently staked out positions on either side of this circuit split. The Seventh Circuit has held that when the facts "are not disputed," the court has jurisdiction to review "whether the Board's decision that those facts did not amount to 'hardship' under the statute was a reasonable application of the hardship standard." *Arreola-Ochoa v. Garland*, 34 F.4th 603, 610 (7th Cir. 2022); *see also Cruz-Velasco v. Garland*, __ F.4th __, 2023 WL 369413, at *2-3 (7th Cir. Jan. 24, 2023) (explaining that "nothing in *Patel* requires a different result"). In contrast, the Eighth Circuit has held that, "[e]ven after *Guerrero Lasprilla*, the BIA's dis-

cretionary conclusion that the hardship to the children is not substantially beyond that typically caused by an alien's removal is precisely the discretionary determination that Congress shielded from our review." *Gonzalez-Rivas v. Garland*, 53 F.4th 1129, 1132 (8th Cir. 2022) (quotation marks and citation omitted).

2. For the reasons given in the petition in *Wilkinson*, the holding of the court below is wrong (as are the similar holdings of the Third, Eighth, and Tenth Circuits), the question presented is important and frequently recurring, and this Court should grant certiorari to resolve this entrenched circuit conflict. *See* Pet. 21-33, *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023).

The petition in *Wilkinson* offers a suitable vehicle in which to address the question presented. The Court should therefore hold the petition in this case pending the disposition in *Wilkinson*, then resolve this petition as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition in *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023), and any further proceedings in this Court, and then resolved as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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