22-666
No.

IN THE
Supreme Court of the United States

SITU KAMU WILKINSON,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third 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 three circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and two 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 Third Circuit:

Wilkinson v. Attorney General of the United States, No. 21-3166 (Sept. 19, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Situ Wilkinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-4a) is unreported; it is available at 2022 WL 4298337. The decisions of the Board of Immigration Appeals (Pet. App. 5a-6a) and the immigration judge (Pet. App. 7a-55a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2022. On December 12, 2022, Justice Alito extended the time to file this petition to January 17, 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 citizen 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 64a-73a.

INTRODUCTION

This petition concerns an important issue of immigration law: an acknowledged three-to-three 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 jurisdiction to review the Board of Immigration Appeals' ("BIA" or "Board") application of the statu-

tory hardship standard to the undisputed facts of a particular case. *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 comes on the heels of 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 Circuit has held the same. But other circuits—notably, the Third 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 three circuits (the Third, Fifth, and Tenth Circuits) now hold that the agency's hardship determination is not a reviewable question of law, whereas at least three other circuits (the Fourth, Sixth, and Eleventh Circuits) hold that it is reviewable as a mixed question of law and fact.

This Court should grant certiorari to resolve this circuit split. This conflict is entrenched and highly unlikely to resolve itself absent this Court's intervention, given the fault lines that emerged after *Guerrero-Lasprilla*. And judicial review of the agency's hardship determination is critical. The hardship issue is often dispositive to the overall decision whether to cancel removal. The agency's factual findings underlying the hardship determination are unreviewable. *See Patel,* 142 S. Ct. at 1627. If the agency's application of the *legal standard* to the facts is also unreviewable, then there will be no meaningful judicial review of this crucial decision that dramatically impacts the lives of many noncitizens and their U.S. citizen or green-card-holding families. If Mr. Wilkinson had initially been detained in Florida (where he is now being held), he would have been able to make his case to an Article III court; because he was detained in Pennsylvania, though, he could not. That is irrational and fundamentally unfair.

Denying jurisdiction over the agency's hardship determination also allows the agency to deflect political accountability for its decision. The agency has the ultimate discretion to deny cancellation of removal for virtually any reason, even when the applicant meets the statutory eligibility criteria. But the agency rarely assumes that responsibility. Far more often, it will not reach the ultimate discretionary choice and will instead deny cancellation based on an applicant's purported failure to satisfy the hardship requirement. Worse still, the agency sometimes states expressly that it *would* have granted relief as a matter of discretion but that its hands are tied by the statute's non-discretionary hardship criterion. The agency can thus deflect accountability for denying relief, even as several courts of appeals then claim that they cannot review this decision because it was a discretionary decision by the agency all along. This is not how good government is supposed to run, and this Court should put a stop to it. This case is the perfect vehicle to do so.

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 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 discre-

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[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).

tionary choice whether to cancel removal. *See Patel*, 142 S. Ct. at 1619 ("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 BIA's "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 Situ Wilkinson is a native of Trinidad and Tobago, where in 2003 he was beaten, robbed, and threatened by local police. Pet. App. 2a. After he lodged a formal complaint, "police surrounded him on the street" and "an officer called Bruiser hit him in his neck with his gun and fired two gunshots near his ear," then threatened to kill him if he did not stop complaining. *Id.* 44a. Mr. Wilkinson

fled to the United States a few weeks later on a tourist visa, which he overstayed. *Id.* 2a.

Mr. Wilkinson "built a life here and fathered a U.S.-citizen son," M., who is now nine years old and was in first grade at the time of the immigration court's decision in 2021. *Id.* 2a, 13a. Mr. Wilkinson lived with his son for the first two years of the boy's life and for several months in 2020; even when not living with M., Mr. Wilkinson has continued to provide for him financially and (before being detained) would spend every weekend with him and his mother, Kenyetta Watson, who is also a U.S. citizen. *Id.* 28a, 58a.[2] Ms. Watson suffers from depression. *Id.* 21a. Mr. Wilkinson is the family's sole breadwinner; both Ms. Watson and M. "survived on this income from [Mr. Wilkinson]." *Id.* 28a.

M. is regularly hospitalized for asthma—roughly four to five times per year. *Id.* 19a, 27a. Mr. Wilkinson would help M. with his inhaler and medications and "knew his regimen well," always making "sure he took his allergy medicine, his asthma pumps and his Albuterol machine." *Id.* 21a, 60a. M. also has an unusual form of eczema that causes frequent severe flare-ups and "requires parental attention and support with bathing due to this condition." *Id.* 19a.

Mr. Wilkinson has no criminal convictions or pending criminal charges. In 2019, he was arrested by Pennsylvania police searching for drugs in a house where he happened to be working as a contractor. *Id.* 14a-15a. Mr. Wilkinson was charged with state drug offenses but maintained that he was simply in

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[2] The record contains various spellings of Ms. Watson's first name. This petition uses Kenyetta.

the wrong place at the wrong time. *Id.* The immigration judge found Mr. Wilkinson to be credible, *id.* 23a, and the Pennsylvania charges have since been dropped.[3] Nevertheless, in 2020 agents of the U.S. Immigration and Customs Enforcement encountered Mr. Wilkinson at a Pennsylvania courthouse and took him into federal custody. *Id.* 9a. Mr. Wilkinson is currently detained at the Baker County Detention Center near Jacksonville, Florida.

If Mr. Wilkinson is removed, M. would remain in this country, separated from his father. *Id.* 27a. Mr. Wilkinson and M. are especially close. *Id.* 14a. Since Mr. Wilkinson's detention, he talks on the phone with M. every other day, and whenever M. "hangs up the phone with his dad, he just cries and he just says that he wants him to come home." *Id.* 63a.

M. has been "struggling" since his father's detention. *Id.* 27a. He has been acting out and breaking things, and he told his mother that "he is sad because he cannot see his father and does not want him sent to a different country." *Id.* 27a, 19a. His first-grade teacher said that he was "in a daze" and recommended counseling, but Ms. Watson thought that was not "a good idea" because she did not want to "put[] him through talking to people that we didn't really know." *Id.* 13a, 19a, 62a-63a. Mr. Wilkinson strongly disagrees with that decision but has no realistic ability to ensure his son receives therapy from detention, much less from outside the country. *Id.* 13a, 57a. M. has no "other male role models" aside from his father. *Id.* 19a. Mr. Wilkinson—whose own father was killed when he was just eight—testified

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[3] *See* Docket, *Pennsylvania v. Wilkinson*, No. CP-23-CR-0005850-2019 (Pa. Ct. C.P. Del. Cnty.).

that he is very close with his son and worries that the child would be "lost to the streets" without a father figure. *Id.* 14a.

2. In November 2020, the Department of Homeland Security charged Mr. Wilkinson with removability, which he conceded. *Id.* 9a. But, as relevant here, Mr. Wilkinson applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1). *Id.* 10a. Mr. Wilkinson testified at the hearing before the immigration court; as did M.'s mother, Ms. Watson, and Ms. Watson's mother, Tracy Collins. *Id.* 12a. The immigration court found that all three witnesses testified candidly and credibly, and it "credit[ed] the testimonies in full." *Id.* 23a-24a.

In May 2021, the immigration court found that Mr. Wilkinson met the first three statutory eligibility criteria—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.* 26a.

Turning to the decisive question of hardship to M., the immigration court found that the boy's "asthma is a serious medical condition" and "he regularly goes to the hospital for treatment" due to "asthma attacks." *Id.* 27a. The immigration court also found that Mr. Wilkinson "provide[s] emotional and sometimes personal care to his son," and that he "provided $1,200 each month to Ms. Watson for [M.'s] expenses, without a formal or legal arrangement in place"; this was the family's sole income, and Ms. Watson "and [M.] survived on this income." *Id.* 27a-28a. Finally, the immigration court found that M. "has been feeling sad, acting up, and breaking things" since his

father's detention, and that "his teachers have told his mother that he may benefit from counseling," but she has declined to arrange for any counseling for M. *Id.* 27a.

Nevertheless, the immigration court concluded that the facts found did not satisfy the exceptional-hardship "standard of eligibility for cancellation of removal" because they did not "rise[] to such a level." *Id.* 29a. Solely on this basis, the immigration court denied Mr. Wilkinson's application for cancellation of removal under § 1229b(b)(1) and did "not reach determining whether or not to exercise its discretion to grant the application for cancellation of removal." *Id.* 29a, 54a. He appealed, but in October 2021 the BIA affirmed without opinion by order of a single temporary appellate immigration judge. *Id.* 6a. The immigration court's opinion is therefore "the final agency determination." *Id.*; *see* 8 C.F.R. § 1003.1(e)(4)(ii).

3. Mr. Wilkinson then petitioned for review in the Third Circuit, arguing (as relevant here) that the court had jurisdiction to review the agency's hardship determination as a mixed question of law and fact. In an unpublished opinion, the court summarily dismissed the portion of the petition challenging the immigration court's hardship determination for lack of jurisdiction. Pet. App. 3a. Based on its binding precedent in *Hernandez-Morales v. Att'y Gen.*, 977 F.3d 247 (3d Cir. 2020), the court held that the agency's hardship decision is discretionary and therefore unreviewable. Pet. App. 3a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the acknowledged circuit split over an important question of immigration law: whether the agency's determination that a given set of established facts does not rise to the statutory level of exceptional hardship is reviewable as a mixed question of law and fact. The courts of appeals are deeply divided in the wake of this Court's decision in *Guerrero-Lasprilla*. Before *Guerrero-Lasprilla*, nearly every circuit had held that the Board's hardship determination was "discretionary" and therefore unreviewable. *See* 14A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3664 (4th ed. Apr. 2022 update). But after *Guerrero-Lasprilla*, "a circuit split emerged on whether courts of appeals have jurisdiction to review hardship determinations in cancellation of removal cases." *Id.*; *see De La Rosa-Rodriguez*, 49 F.4th at 1290-91 (surveying "this circuit split"). Following a straightforward application of *Guerrero-Lasprilla*, three circuits have held that the agency's application of the hardship standard to settled facts is reviewable. But three other circuits have disagreed, either by attempting to distinguish *Guerrero-Lasprilla* (unpersuasively) or by latching onto a passage of *Patel* that—properly read—provides no support for these circuits' strained interpretation of the statute's text or *Guerrero-Lasprilla*.

Judicial review of the agency's hardship determination is important because that issue is often dispositive to the overall cancellation of removal decision. Indeed, in several of the leading BIA cases on cancellation of removal due to hardship, the Board expressly stated that "if the respondent were eligible

for cancellation of removal, we would grant such relief in the exercise of discretion"—but nonetheless found that the applicant was ineligible because the evidence did not "rise[] to the high level of hardship required" by the statute. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001); *see In re Andazola-Rivas*, 23 I. & N. Dec. 319, 322 (B.I.A. 2002) (similar). In many other cases, as in the present case, the agency simply "does not reach determining whether or not to exercise its discretion to grant the application for cancellation of removal" because it concludes that the applicant has not made the predicate showing of exceptional and extremely unusual hardship to his qualifying relatives. Pet. App. 29a. Because agency hardship determinations are frequently dispositive, they dramatically impact the lives of many thousands of applicants each year—and also the lives of their immediate family members, who are U.S. citizens or green-card holders. This Court should decide whether this crucial agency decision can escape all meaningful judicial review.

From an administrative-law perspective, the question presented also warrants this Court's review to ensure that the agency cannot deflect political accountability. Congress expressly assigned the ultimate decision whether to cancel removal to the discretion of the Attorney General (now delegated to the agency, *see* 8 C.F.R. § 1240.1(a)(1)(ii)), but not the applicant's threshold eligibility for such discretionary relief. When the agency takes up the cancellation decision as a matter of its own discretion, the lines of accountability are clear. That accountability is thwarted, however, when the agency can deflect responsibility for the outcome. Most egregiously, the agency can (and does) announce that it *would have*

granted relief as a matter of discretion but that its hands are tied by the statute's hardship requirement—while, in many circuits, the court of appeals refuses to review the hardship issue on the grounds that the agency's decision *was* a matter of discretion after all. The approach of the court below (and several other circuits) creates pernicious "opportunities for finger-pointing" of this sort that blur "the lines of accountability" between the political branches. *Gundy v. United States*, 139 S. Ct. 2116, 2134-35 (2019) (Gorsuch, J., dissenting).

This case is an ideal vehicle to resolve the circuit conflict. Mr. Wilkinson has preserved the question presented in the court of appeals. The record is clear that Mr. Wilkinson is otherwise eligible for discretionary cancellation of removal, and the relevant facts are not in dispute. The established facts, as found by the agency, make out a strong case for cancellation under the statute: Mr. Wilkinson is the sole breadwinner for his young U.S.-citizen son (as well as the child's mother, also a U.S. citizen) who is reliant on his father to provide care for the child's serious medical condition and escalating psychological needs.

I. The courts of appeals are divided over the reviewability of the agency's ultimate hardship determination.

The circuits are deeply divided about whether the application of the exceptional-hardship standard to established facts is judicially reviewable as a mixed question of law and fact. All that the circuits agree on is that they are split. *See, e.g.*, *De La Rosa-Rodriguez*, 49 F.4th at 1290-91 (canvassing "this cir-

cuit split"); *Gonzalez Galvan v. Garland*, 6 F.4th 552, 559 & n.7 (4th Cir. 2021) (discussing conflicting opinions of five other circuits before taking a side); *Singh v. Rosen*, 984 F.3d 1142, 1150 (6th Cir. 2021) ("With respect to our colleagues on the Third and Tenth Circuits, we see things more like the Eleventh Circuit."); *Herrera v. Garland*, 2022 WL 16631167, at *3 & n.2 (10th Cir. Nov. 2, 2022) (discussing "several other circuit decisions" at odds with Tenth Circuit precedent); *Reyes-Lopez v. Att'y Gen. of U.S.*, 2022 WL 1552996, at *3 & n.4 (3d Cir. May 17, 2022) (contrasting Third Circuit precedent with that of other circuits). The Court should take this opportunity to resolve the conflict.

1. Three circuits have held that courts have jurisdiction over the application of the INA's exceptional-hardship standard to settled facts based on a straightforward application of this Court's decision in *Guerrero-Lasprilla*.

The Sixth Circuit's history is exemplary. Before this Court's decision in *Guerrero-Lasprilla*, the Sixth Circuit had held that it lacked jurisdiction to review the Board's hardship determination so long as the Board "articulated the proper standard." *Ettienne v. Holder*, 659 F.3d 513, 519 (6th Cir. 2011). The court explained that it was barred from "engaging in head-to-head comparisons between the facts of the petitioner's case and those of [the Board's] precedential decisions," which involves "discretionary weighing required to make individualized determinations" rather than pure questions of law. *Id.* at 518.

In light of the clear holding of *Guerrero-Lasprilla*, however, the Sixth Circuit recognized that courts have jurisdiction to "review the Board's ultimate

hardship conclusion" because the "Board's conclusion resolves a mixed question about whether the facts found by the immigration judge rise to the level of hardship required by the legal test. It does not resolve a discretionary question." *Singh*, 984 F.3d at 1150.

The Eleventh Circuit's history is similar. That court had long held that "the exceptional and extremely unusual hardship determination is a discretionary decision not subject to review." *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) (per curiam). Then, in its en banc decision that this Court affirmed (on other grounds) in *Patel*, the Eleventh Circuit overruled *Gonzalez-Oropeza* and explained that "qualitative standards such as 'good moral character' or 'exceptional and extremely unusual hardship' are not in themselves discretionary decisions" but, rather, require simply "applying the law to a set of facts." *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1278 (11th Cir. 2020) (en banc); *see also Cuauhtenango-Alvarado v. U.S. Att'y Gen.*, 855 F. App'x 559, 560 (11th Cir. 2021) (per curiam) ("Whether or not a given set of facts amounts to 'exceptional and extremely unusual hardship' is a mixed question of law and fact which we are empowered to review.").

The Fourth Circuit, too, has held in the aftermath of *Guerrero-Lasprilla* that the "statutory standard of 'exceptional and extremely unusual hardship' presents a mixed question of law and fact, which we retain jurisdiction to review." *Gonzalez Galvan*, 6 F.4th at 555. The Fourth Circuit explained that "the language of Section 1229b(b)(1) is plain and unambiguous. Although the ultimate decision whether to

grant cancellation of removal is discretionary in nature, the four statutory eligibility requirements do not speak of discretion." *Id.* at 560.

2. Three circuits have squarely disagreed. In conflict with the Fourth, Sixth, and Eleventh Circuits, the Tenth Circuit held that it lacks jurisdiction over "the cancellation-of-removal hardship decision ... even if framed as a challenge to the application of a legal standard to established facts under *Guerrero-Lasprilla*." *Galeano-Romero v. Barr*, 968 F.3d 1176, 1183-84 (10th Cir. 2020). The Tenth Circuit adopted the view that the exceptional-hardship determination could not qualify as a mixed question of law and fact as described in *Guerrero-Lasprilla* because "there is no algorithm for determining when a hardship is 'exceptional and extremely unusual.'" *Id.* at 1183 (brackets and quotation marks omitted). It distinguished the due-diligence standard at issue in *Guerrero-Lasprilla* as somehow fundamentally different than the exceptional-hardship standard at issue here. *Id.* at 1184 n.9.

The Third Circuit has taken a similar approach, holding that "whether hardship is 'exceptional and extremely unusual' 'is a quintessential discretionary judgment' over which we lack jurisdiction." *Hernandez-Morales v. Att'y Gen. U.S.*, 977 F.3d 247, 249 (3d Cir. 2020) (citation omitted). The Third Circuit addressed, and rejected, the argument that it could review the agency's hardship determination as a mixed question of law and fact under *Guerrero-Lasprilla*. *Id.* Citing the Tenth Circuit's more fulsome discussion in *Galeano-Romero*, 968 F.3d at 1182-84, the Third Circuit stated that challenging the agency's ultimate hardship determination boils down to "a

disagreement about weighing hardship factors," which "is a discretionary judgment call, not a legal question." *Id.*; *see also Mejia-Espinoza v. Att'y Gen. U.S.*, 846 F. App'x 140, 143-44 & n.5 (3d Cir. 2021) (similar); *Reyes-Lopez*, 2022 WL 1552996, at *3 n.4 (noting that *Hernandez-Morales* "postdates and distinguishes *Guerrero-Lasprilla*").

In the Fifth Circuit, it has been a roller-coaster ride following *Guerrero-Lasprilla*. The Fifth Circuit initially agreed with the Sixth and Eleventh Circuits that "*Guerrero-Lasprilla* effectively overruled [its] prior decisions holding that [the agency's] hardship determination is" an unreviewable "matter of discretion." *Trejo v. Garland*, 3 F.4th 760, 769-71 (5th Cir. 2021). Accordingly, the Fifth Circuit held that it had jurisdiction to review "whether the previously found events that would occur to the alien's relatives if the alien were removed amount to exceptional and extremely unusual hardship." *Id.* at 773. But that holding was not long for this world. After this Court's decision in *Patel*, another Fifth Circuit panel held that *Patel* both "abrogated" *Trejo* and compelled the conclusion that the Board's determination whether "a citizen would face exceptional and extremely unusual hardship is an authoritative decision which falls within the scope of § 1252(a)(2)(B)(i) and is beyond our review." *Castillo-Gutierrez v. Garland*, 43 F.4th 477, 481 (5th Cir. 2022) (per curiam). As explained below, however, *Patel* has nothing to do with this issue.

3. The upshot of this clear circuit conflict: If Mr. Wilkinson had been initially detained in Ohio, Virginia, or Florida (where he has since been transferred), he could have obtained judicial review of the

agency's erroneous application of the hardship standard to the facts of his family's situation. Because he was detained in Pennsylvania, however, the agency's analysis of this legal question evades any judicial review. Only this Court can alleviate the inevitable inequities caused by the circuits' disparate approaches to jurisdiction over the agency's hardship determination.

And this established circuit conflict will not resolve without this Court's intervention. Two of the circuits that most frequently encounter immigration law issues—the Fifth and Eleventh—have dug into opposing positions regarding the question presented. The entire Eleventh Circuit, sitting en banc, articulated its judicial-review interpretation in a decision that was affirmed by this Court in *Patel*. That court, therefore, is exceedingly unlikely to abandon its view. The Fifth Circuit arrived at the contrary view by overruling its short-lived *Trejo* decision in *Patel*'s wake. There is no realistic prospect that the Fifth Circuit will revert to its pre-*Patel*, post-*Guerrero-Lasprilla* precedent absent further guidance from this Court.

Similarly, the Fourth and Sixth Circuits are highly unlikely to reverse course. They each reached their conclusions after extensive analysis of the Third and Tenth Circuits' contrary reasoning, which they expressly rejected. *See Gonzalez Galvan*, 6 F.4th at 559-60; *Singh*, 984 F.3d at 1150-54. Nor are the Third and Tenth Circuits likely to jettison their opposing case law. Both courts have acknowledged the circuit split while adhering to their own precedents. *See Herrera*, 2022 WL 16631167, at *3 & n.2; *Reyes-Lopez*, 2022 WL 1552996, at *3 & n.4.

Given this entrenched disagreement, it is inevitable that this Court will eventually have to resolve the question presented in this case. The Court should do so here.

II. The decision below (along with the holdings of the Fifth and Tenth Circuits) is wrong.

The statute's text, structure, and history, as well as this Court's precedents, make clear that the agency's application of the hardship standard to a given set of settled facts is subject to judicial review as a question of law under § 1252(a)(2)(D).

1. The statute's text speaks plainly. The INA distinguishes between two kinds of burdens an applicant for cancellation of removal must shoulder: (1) showing that she "satisfies the applicable eligibility requirements" *and* (2) that she "merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). Indeed, courts have long "recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307. "Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307-08 (quoting *Jay*, 351 U.S. at 353-54). Thus, to "be eligible" for relief from removal, "a noncitizen must show that he satisfies various threshold requirements established by Congress" *and* "that he merits a favorable exercise of discretion." *Patel*, 142 S. Ct. at 1619.

Cancellation of removal under § 1229b(b)(1) fits this pattern. The first question is whether a noncitizen is *eligible* for cancellation (through satisfaction of a statutory standard, including an exceptional-hardship determination). 8 U.S.C. § 1229b(b)(1). The second is whether the noncitizen *should be granted* cancellation as a matter of discretion. *Id.* (the "Attorney General *may* cancel removal" (emphasis added)); *see, e.g.*, *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) ("This Court has 'repeatedly observed' that 'the word "may" *clearly* connotes discretion.'" (citation omitted)). Notably, the statute "does not say ... that the Attorney General 'may' find the required hardship." *Singh*, 984 F.3d at 1151; *see Gonzalez Galvan*, 6 F.4th at 560 (stating that the "plain and unambiguous" language of the statute indicates that "[a]lthough the ultimate decision whether to grant cancellation of removal is discretionary in nature, the four statutory eligibility requirements do not speak of discretion"). A straightforward reading of the statute thus reveals that "[t]he threshold eligibility determinations ... are not discretionary decisions." *Patel*, 971 F.3d at 1278.

The circuits that have concluded otherwise have done so only by collapsing the distinction between the statute's two steps. The Third Circuit, for instance, describes the agency's application of the hardship standard to settled facts as "a quintessential discretionary judgment." *Hernandez-Morales*, 977 F.3d at 249 (citation omitted). The Tenth Circuit similarly reasons that "the application of [the hardship] standard is discretionary." *Galeano-Romero*, 968 F.3d at 1183. But these holdings fly in the face of the statute's text, which assigns only the second-

step cancellation decision to the Attorney General's discretion, not the first-step eligibility determination.

The statute's plain language thus demonstrates that the hardship determination is a legal predicate for, rather than a part of, the agency's exercise of discretion to cancel removal.

2. The structure of § 1229b(b)(1) further suggests, as the Sixth Circuit explained in *Singh*, that the hardship showing is a reviewable eligibility requirement, not a discretionary judgment. The hardship showing is set forth in subparagraph (D), following three other enumerated eligibility requirements: physical presence in the United States for ten years, "good moral character" during that period, and no disqualifying criminal convictions. *Id.* § 1229b(b)(1)(A)-(C). There is no serious argument that courts lack jurisdiction to review the agency's determinations as to whether a set of facts satisfies these eligibility criteria (with only the "good moral character" requirement even possibly in dispute). *See Singh*, 984 F.3d at 1151-52; *Patel*, 971 F.3d at 1278 (explaining that all of the "threshold eligibility determinations ... are not discretionary decisions").[4] The statute's structure indicates that the hardship showing is of a piece with the three other eligibility criteria.

Moreover, the contrast between the text of § 1229b(b)(1)(D) and a similar, but distinct, hardship provision that by its plain text is entirely a matter of

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[4] The Eighth Circuit has held that it has "jurisdiction to review the BIA's finding on moral character because it is a matter of applying the law to the facts." *Hernandez v. Garland*, 28 F.4th 917, 921 (8th Cir. 2022).

discretionary judgment is telling. In the context of discretionary waiver of inadmissibility, the statute provides that "extreme hardship" must be "established *to the satisfaction of the Attorney General*" and "[n]o court shall have jurisdiction to review" this determination. 8 U.S.C. § 1182(a)(9)(B)(v) (emphasis added). Congress did not use similar language in § 1229b(b)(1)(D)—opting instead for the satisfaction of an objective legal standard. This strongly suggests that the cancellation-of-removal hardship finding is not entrusted to the agency's subjective discretion but rather is an eligibility determination susceptible of review. *See Singh*, 984 F.3d at 1152; *Mendez v. Holder*, 566 F.3d 316, 321 (2d Cir. 2009) (per curiam). Likewise, in IIRIRA of 1996 Congress provided that certain benefits for "battered aliens" depend on factual findings made "*in the opinion of the Attorney General, which opinion is not subject to review by any court.*" 110 Stat. 3009-670-71 (emphasis added). The hardship provision conspicuously lacks any similar language. This Court "must give effect to, not nullify, Congress' choice to include limiting language in some provisions but not others." *Gallardo ex rel. Vassallo v. Marstiller*, 142 S. Ct. 1751, 1759 (2022); *see Patel*, 142 S. Ct. at 1624 (drawing similar inference from "the absence of any reference to discretion in § 1252(a)(2)(B)(i)" in contrast to explicit references to discretion "elsewhere in the immigration code").

3. The statute's history confirms this reading. The two predecessors of § 1229b(b)(1) both provided that hardship had to be found "in the opinion of the Attorney General." Pub. L. No. 82-414, 66 Stat. 163, 214-16 (1952); Pub. L. No. 87-885, 76 Stat. 1247, 1248 (1962); *see Jay*, 351 U.S. at 351 (discussing original version of hardship statute); *INS v. Jong Ha*

Wang, 450 U.S. 139, 144-45 (1981) (per curiam) (discussing amended version of hardship statute). But Congress excised that language in 1996 with IIRIRA. *See* 110 Stat. 3009-594.

Indeed, with IIRIRA, Congress overhauled the cancellation-of-removal hardship statute. The immediate predecessor to § 1229b(b)(1)(D) authorized discretionary suspension of deportation when that deportation would, "in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child." *Jong Ha Wang*, 450 U.S. at 140 (quoting 8 U.S.C. § 1254(a)(1) (1976)). In addition, the physical presence requirement was seven years, and there were no specified disqualifying criminal convictions. *See id.* Congress completely reworked this statute in 1996 by (1) changing the physical presence requirement to ten years; (2) adding a list of disqualifying criminal convictions; (3) augmenting the "extreme hardship" standard to "exceptional and extremely unusual hardship"; (4) allowing consideration solely of the family members' hardship, not the noncitizen's; and (5) striking the words "in the opinion of the Attorney General." *See* § 1229b(b)(1). In short, "Congress carefully reexamined and entirely rewrote" this statute, which strongly suggests that deleting the phrase placing the hardship determination in the Attorney General's opinion "reflects the deliberate choice of Congress." *Union Bank v. Wolas*, 502 U.S. 151, 160 (1991). The statute's history thus indicates that Congress did *not* intend to assign the hardship determination to the agency's discretion.[5]

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[5] After 1996, the courts of appeals failed to appreciate the statute's new language. *See Mendez*, 566 F.3d at 321; *Singh*, 984

4. The reasoning provided by the circuits that have reached a contrary conclusion is unpersuasive. The most thorough defense of the view that courts lack jurisdiction to review the agency's hardship determination is found in the Tenth Circuit's opinion in *Galeano-Romero*, 968 F.3d 1176. There, the Tenth Circuit held that it "lack[ed] jurisdiction to review the Board's discretionary decision, based on the facts of the case, whether an alien's spouse will suffer an exceptional and extremely unusual hardship ... even if framed as a challenge to the application of a legal standard to established facts under *Guerrero-Lasprilla*." *Id.* at 1182-84. But that court's reasoning ignores the statute's text, structure, and history (as just discussed)—and is also unpersuasive on its own terms.

First, the Tenth Circuit observed that the Limited Review Provision of subsection (D) must "interconnect and ... work harmoniously" with the jurisdictional bar in subsection (B), and the court could not "interpret subsection (D)'s 'questions of law' provision so expansively that subsection (B) becomes superfluous, a nullity." *Id.* at 1183. But, as this Court recently emphasized in *Patel*, Congress did leave a "major ... category" of questions within subsection (B)'s rule barring jurisdiction: "questions of fact." 142 S. Ct. at 1623. After *Patel*, subsection (B) is surely not a nullity because courts are categorically barred from reviewing the agency's "factfinding." *Id.* That bar remains untouched and substantial, regardless of whether a court may review the agency's ap-

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F.3d at 1152 (amended language was disregarded "by accident"); *Trejo*, 3 F.4th at 771 (courts of appeals ignored new language by "inertia").

plication of the hardship standard to the settled facts that it found. Indeed, the notion that this kind of mixed question of law and fact would render the jurisdictional bar a nullity was a position advanced by the *dissent* in *Guerrero-Lasprilla*, 140 S. Ct. at 1074 (Thomas, J., dissenting) ("the majority effectively nullifies a jurisdiction-stripping statute").

Second, the Tenth Circuit reasoned that "the determination of whether the requisite hardship exists is discretionary because there is no algorithm for determining when a hardship is 'exceptional and extremely unusual.'" *Galeano-Romero*, 968 F.3d at 1183 (brackets, quotation marks, and citation omitted). But many legal standards are not susceptible to algorithmic analysis—including the "due diligence" standard that this Court addressed in *Guerrero-Lasprilla*. *See Singh*, 984 F.3d at 1153 ("the application of the due-diligence standard in" *Guerrero-Lasprilla* "is no less subjective than the application of the hardship standard"). And, as the Sixth Circuit noted, hardship standards are "commonly" found in statutes and treated by reviewing courts as mixed questions of law and fact. *Id.* at 1152 (discussing "undue hardship" standard for discharge of student-loan debt under 11 U.S.C. § 523(a)(8)); *cf. Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (cataloguing civil rights statutes that employ an "undue hardship" standard). Although the Tenth Circuit *stated* that the hardship question is somehow fundamentally different than the diligence question, it provided no explanation for that statement, nor is any difference self-evident.

Finally, the Tenth Circuit suggested that *Guerrero-Lasprilla* is distinguishable because it "concerned § 1252(a)(2)(C)—not § 1252(a)(2)(B)." *Galeano-Romero*, 968 F.3d at 1184 n.9. This, too, is a distinction without a difference. As this Court explained in *Patel*, there is simply no reason "why the bar in subparagraph (B) should be read differently from subparagraph (C)'s prohibition on reviewing final orders of removal for certain criminal offenses." 142 S. Ct. at 1625. *Guerrero-Lasprilla*'s holding that a mixed question of law and fact is reviewable as a question of law is no less applicable to subparagraph (B) than to subparagraph (C).

5. The Fifth Circuit has cited *Patel* in reaching a contrary decision. But *Patel* was about factual findings, not mixed questions, and it had nothing to do with the hardship issue. *Patel* in no way undermines the straightforward application of *Guerrero-Lasprilla* here. In fact, the Eleventh Circuit's en banc decision in *Patel* explained that the hardship determination is reviewable as a mixed question, and this Court affirmed that decision without addressing the hardship issue. And yet, the Fifth Circuit held that this Court's decision in "*Patel* makes clear that the BIA's determination that a citizen would face exceptional and extremely unusual hardship is an authoritative decision which falls within the scope of § 1252(a)(2)(B)(i) and is beyond our review." *Castillo-Gutierrez*, 43 F.4th at 481. But *Patel* says nothing of the sort. The Fifth Circuit (and the court below) cited a passage of *Patel* that summarizes *the Government's* argument in that case that "the determination that a noncitizen's removal would not result in exceptional and extremely unusual hardship for a spouse, parent, or child involves discretion (which

makes it an unreviewable 'judgment')." 142 S. Ct. at 1622. The Court, however, *rejected* the Government's interpretation of the jurisdiction-stripping statute, and said nothing further about the hardship issue at all. *See id.* Contrary to the Fifth Circuit's belief, *Patel* did not hold or imply anything as to whether the hardship determination was an unreviewable decision.

III. This Court should grant certiorari on this important and frequently recurring issue.

The circuit conflict at issue in this case is important and frequently recurring. Satisfying the legal standard for exceptional and extremely unusual hardship (a predicate for discretionary relief) is anything but an academic victory—it is often dispositive of the entire cancellation-of-removal determination, as immigration judges and the Board expressly acknowledge. As demonstrated by the dozens of cases in which the issue has arisen in recent years, it is also frequently recurring. And this case provides an excellent vehicle for resolving the conflict and giving much-needed clarity to lower courts.

A. The question presented is important and frequently recurring.

1. Applications for cancellation of removal under § 1229b(b)(1) frequently stand or fall on the agency's hardship determination. To be sure, the agency *could* deny an application as a matter of discretion without making an eligibility determination. *See Patel*, 142 S. Ct. at 1619 ("[I]f the judge decides that denial would be appropriate regardless of eligibility, the judge need not address eligibility at all." (citing

INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (per curiam))). But that rarely happens.

Far more often, the agency will deny the petition strictly on ineligibility grounds. In many of these cases, as here, the agency will find the applicant ineligible for relief due to the absence of exceptional hardship and will then decline to "reach determining whether or not to exercise its discretion to grant the application for cancellation of removal." Pet. App. 29a; *see, e.g.*, *De La Rosa-Rodriguez*, 49 F.4th at 1286 ("The BIA did not address the ... decision to deny cancellation in the exercise of his discretion."); *Trejo*, 3 F.4th at 766 (similar); *Hernandez-Morales*, 977 F.3d at 248 (similar); *Jimenez v. Sessions*, 682 F. App'x 586, 586-87 (9th Cir. 2017) (noting that the Board "did not rely" on "denial as a matter of discretion"). In other cases, the Board has stated expressly that "if the respondent were eligible for cancellation of removal, we would grant such relief in the exercise of discretion"—but found the applicant ineligible because the evidence did not "rise[] to the high level of hardship required" by the statute. *In re Monreal-Aguinaga*, 23 I. & N. Dec. at 65; *see In re Andazola-Rivas*, 23 I. & N. Dec. at 322 (similar); *In re Loera Lujan*, 2004 WL. 2374696, at *1 (B.I.A. Aug. 9, 2004) ("if the issue before us was one simply of discretion, we certainly would rule in the respondent's behalf"), *aff'd*, *Lujan v. Lynch*, 615 F. App'x 874 (9th Cir. 2015). This is what happened in *Gonzalez Galvan*, the Fourth Circuit case discussed above: the immigration judge expressly "indicated that if [the applicant] had met all the statutory eligibility requirements, including that of 'exceptional and extremely unusual hardship,' the [immigration judge] would

have exercised his discretion to grant the request for cancellation of removal." 6 F.4th at 556.

Thus, in this context, the exceptional-hardship determination is anything but academic. This Court should not allow the agency's often-dispositive legal analysis to escape meaningful judicial review in numerous circuits.

2. Of course, the question presented is also of extraordinary qualitative importance. When the agency denies relief because it misapplied the hardship standard, the consequences for the applicant and his family are severe. Only a select class of noncitizens could possibly avail themselves of cancellation of removal—those who are deeply embedded in the social fabric of this country because they have been here at least the previous ten years, have good moral character and no disqualifying criminal convictions, and have a spouse, child, or parent who is a U.S. citizen or green-card holder. These families will often be torn apart by an erroneous denial of relief on hardship grounds. And, when the statutory standard is met, the U.S.-citizen or green-card-holding family members will suffer exceptional hardship because of the removal. For good reason, Congress has long recognized that there should be an avenue for discretionary relief from removal in cases of this sort. And Congress also deliberately preserved jurisdiction over all questions of law (including mixed questions). Foreclosing judicial review of the agency's hardship determination thus upsets the careful balance struck by Congress and inflicts incalculable personal harm on many noncitizens with particularly strong ties to this country and on their U.S.-citizen or permanent-resident spouses, children, and parents.

3. The question presented is also important from a separation-of-powers perspective: Allowing courts to abdicate judicial review over an agency's hardship determination permits the agency to deflect accountability for its decisions. As numerous members of this Court have emphasized, "a fundamental precondition of accountability in administration" is "the degree to which the public can understand the sources and levers of bureaucratic action." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001). In that vein, "the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting); *see Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.").

When courts abdicate jurisdiction to review the agency's hardship determination because it is supposedly the agency's discretionary choice, a serious accountability deficit takes shape. To be sure, the agency (and, by extension, the President) can be held accountable for decisions that are genuinely in its discretion, including the ultimate cancellation of removal decision when the eligibility criteria are met. But the agency often does not get that far. In many cases, as in this case, the agency simply resolves the matter at the eligibility stage by concluding that the hardship standard has not been satisfied. Pet. App. 29a. Even worse, as discussed above, the agency sometimes goes out of its way to announce that it

would exercise its discretion to cancel removal but is prohibited from doing so because the requisite *legal standard* for hardship was not established. *See, e.g.*, *Gonzalez Galvan*, 6 F.4th at 556; *In re Monreal-Aguinaga*, 23 I. & N. Dec. at 65; *In re Andazola-Rivas*, 23 I. & N. Dec. at 322; *In re Loera Lujan*, 2004 WL. 2374696, at *1. Nonetheless, in several circuits, these *legal* determinations are unreviewable because the courts of appeals treat them as discretionary—despite the agency's contrary pronouncements. This is a textbook example of creating "opportunities for finger-pointing" between the political branches that undermine accountability. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Granting certiorari will offer this Court a prime opportunity to sharpen the lines of accountability by distinguishing between the agency's ultimate discretionary choice and its legal analysis of the threshold eligibility criteria, including hardship, just as Congress intended.

4. The question presented is also important because it frequently recurs. In fact, it has arisen in dozens of cases since *Guerrero-Lasprilla* was decided in 2020. Given the frequency with which courts confront this issue, clarity from this Court is urgently needed. Moreover, the prevalence of the issue aggravates the concerns of inequitable treatment arising from the circuit split—with judicial review available in some circuits but not in others. This is hardly an issue that pops up only now and then.

B. This case is an ideal vehicle to resolve the circuit conflict.

In the court below, Mr. Wilkinson explicitly preserved the argument that the agency's hardship de-

termination was reviewable as a mixed question of law and fact under *Guerrero-Lasprilla*. And the relevant facts are undisputed. But the Third Circuit, following its own precedent, dismissed this aspect of the petition for want of jurisdiction because it held that the agency's hardship determination was an unreviewable discretionary decision, not a question of law. Pet. App. 3a. Accordingly, this case squarely presents the question raised by this petition, and there are no barriers to this Court's resolution of the question presented.

Mr. Wilkinson also has a strong case that the agency should cancel his removal. He is the sole breadwinner for his young son, who is a U.S. citizen (and for the boy's mother, also a citizen). *Id.* 27a-28a, 59a. The immigration court found that this child has a "serious medical condition" because he is regularly hospitalized for asthma attacks, and that his psychological stability is deteriorating but his mother refuses to seek the help recommended by his teachers. *Id.* 27a. This case therefore presents precisely the type of exceptional circumstances in which the agency should be permitted to entertain cancellation of removal in its discretion. But the agency should not be permitted to avoid making this discretionary choice altogether on the basis of a legally erroneous decision that the settled facts of Mr. Wilkinson's family situation do not rise to the statutory hardship standard.

* * * * *

Had Mr. Wilkinson been detained in Florida (where he is currently being held), Ohio, or Virginia, the agency's erroneous hardship analysis would have been subject to judicial review. But he was detained

in Pennsylvania, and the court below, in direct conflict with three other circuits, mistakenly believed that it lacked jurisdiction. The fate of American families should not hang upon a game of geographical chance. This Court should resolve this important and entrenched circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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