

No. 22-734

FILED

MAY 30 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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

**REPLY BRIEF FOR PETITIONER**

RICARDO E. VIELLEDENT  
VIELLEDENT &  
ASSOCIATES, P.L.L.C.  
6006 N. Mesa Street  
Suite 700  
El Paso, TX 79912

JAIME A. SANTOS  
*Counsel of Record*  
GOODWIN PROCTER LLP  
1900 N Street, NW  
Washington, DC 20036  
(202) 346-4000  
*jsantos@goodwinlaw.com*

BRANDON RICHES  
ANDERSON IMMIGRATION  
LAW GROUP  
P.O. BOX 666  
Gulfport, MS 39502

DAVID J. ZIMMER  
JESSE LEMPEL  
GOODWIN PROCTER LLP  
100 Northern Avenue  
Boston, MA 02210

May 30, 2023

*Counsel for Petitioner*



The government agrees that Mr. Gomez-Vargas's petition should be held pending this Court's disposition of the petition for a writ of certiorari in *Wilkinson v. Garland*, No. 22-666 (filed Jan. 17, 2023). As the government's brief in this case acknowledges and its brief in *Wilkinson* explains, there is an entrenched circuit split on the question presented—whether the application of the exceptional-hardship standard in 8 U.S.C. § 1229b(b)(1)(D) to a set of undisputed facts is judicially reviewable under the INA's Limited Review Provision, 8 U.S.C. § 1252(a)(2)(D). See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (holding that “the application of a legal standard to undisputed or established facts” is a “question of law” reviewable under § 1252(a)(2)(D)).

This question is important to the government and noncitizens seeking relief alike, and the issue arises with such frequency that there are already numerous petitions pending raising the same issue, with no end in sight to the steady stream that will continue to accumulate.<sup>1</sup> Given that there is an acknowledged cir-

---

<sup>1</sup> See, e.g., *Becerra Ortiz v. Garland*, No. 22A985 (granting extension until June 14, 2023 to file petition for a writ of certiorari presenting this question); *Osorio v. Garland*, No. 22-9559, 2023 WL 3066678 (10th Cir. Apr. 25, 2023) (dismissing appeal for lack of jurisdiction to review the application of exceptional-hardship standard to undisputed facts under existing Tenth Circuit precedent); *Garcia-Pascual v. Garland*, 62 F.4th 1096 (8th Cir. 2023) (same, under existing Eighth Circuit precedent); *id.* at 1103 (Arnold, J., concurring) (agreeing that circuit precedent compelled dismissal but expressing the view that *Guerrero-Lasprilla* “makes clear that we have jurisdiction to review this mixed question of law and fact”). As the government notes in its response brief in *Wilkinson* (at 14 n.3), the Ninth Circuit was considering en banc a case in which it might address the

cuit split on the question presented—the government agrees that there are at least three circuits on each side of the split—there is no possibility that the split will go away without this Court’s intervention.

Because the government agrees that the petition in *Wilkinson* is a suitable vehicle to address the question presented, this Court should grant that petition and hold the petition in this case pending the disposition of the petition in *Wilkinson*. In the alternative, if the Court believes that its consideration of the question presented would benefit from having multiple factual contexts before it, the Court could grant both petitions and consolidate the two cases for merits briefing and argument.<sup>2</sup>

The reply brief filed by the petitioner in *Wilkinson* explains why the government’s arguments on the merits of the question presented are unpersuasive. Because the government does not provide a merits analysis in its brief in this case, Mr. Gomez-Vargas submits this reply solely to address the Government’s erroneous assertion (at 7) that Mr. Gomez-

---

question presented. *De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282 (9th Cir. 2022). The Ninth Circuit has since suspended those proceedings at the government’s request and is holding the case in abeyance pending this Court’s disposition of the petition in this case. See *De La Rose-Rodriguez v. Garland*, No. 20-71923 (9th Cir. May 17, 2023), ECF No. 82.

<sup>2</sup> The government suggests (at 7) that it would be sub-optimal to grant the petition in this case because the Fifth Circuit takes “a slightly different analytical approach” than other courts that have held that the hardship determination is unreviewable. But this Court’s review is *de novo* and the rule that this Court ultimately adopts must be applied uniformly throughout all of the circuits. Thus, the government’s apparent disagreement with the Fifth Circuit’s reasoning should have no impact on whether this petition is granted (or held pending *Wilkinson*).



Vargas did not preserve his argument regarding the question presented in the court below. The argument was clearly preserved.

When Mr. Gomez-Vargas's petition for review was pending before the Fifth Circuit, the government moved to dismiss for lack of jurisdiction before Mr. Gomez-Vargas filed his principal brief. *See generally* Resp. C.A. Mot. to Dismiss, ECF No. 10. Mr. Gomez-Vargas's response to the government's motion to dismiss made the same argument presented by his petition here. *See generally* Pet. C.A. Response to Mot. to Dismiss, ECF No. 11. Specifically, he argued that his "case is no different from *Guerrero-Lasprilla*" with respect to jurisdiction because the hardship question that was the subject of his petition for review raises a "question of law" under 8 U.S.C. § 1252(a)(2)(D): "whether, given the undisputed facts of his case, the Board incorrectly applied the exceptional and extremely unusual hardship standard." *Id.* at 4.

The Fifth Circuit then issued an order stating that the Government's motion to dismiss for lack of jurisdiction would be "carried with the case." ECF No. 18 (5th Cir. July 15, 2020). Because the parties fully briefed the jurisdictional question presented by this petition in connection with the government's motion to dismiss, which was carried with the case, there was no need to repeat this jurisdictional argument in Mr. Gomez-Vargas's subsequent brief on the merits. Petitioner's argument regarding the question presented was thus preserved.

In any event, because the Fifth Circuit clearly passed upon this question in the decision below, *see* Pet. App. 6a-7a, this Court may grant review even if

Petitioner had not preserved this argument. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992) (explaining that this Court may grant “review of an issue not pressed [below] so long as it has been passed upon”); *see also Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

### 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. In the alternative, if the Court wishes to have multiple factual contexts before it when evaluating the question presented, it should grant both petitions and consolidate them for briefing and argument on the merits.

Respectfully submitted.

RICARDO E. VIELLEDENT  
VIELLEDENT &  
ASSOCIATES, P.L.L.C.  
6006 N. Mesa Street  
Suite 700  
El Paso, TX 79912

BRANDON RICHES  
ANDERSON IMMIGRATION  
LAW GROUP  
P.O. Box 666  
Gulfport, MS 39502

May 30, 2023

JAIME A. SANTOS  
*Counsel of Record*  
GOODWIN PROCTER LLP  
1900 N Street, NW  
Washington, DC 20036  
(202) 346-4000  
*jsantos@goodwinlaw.com*

DAVID J. ZIMMER  
JESSE LEMPEL  
GOODWIN PROCTER LLP  
100 Northern Avenue  
Boston, MA 02210

*Counsel for Petitioner*