No. 22-734

In the Supreme Court of the United States

RAFAEL GOMEZ-VARGAS, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the agency's determination that the facts failed to satisfy the "exceptional and extremely unusual hardship" requirement for cancellation of removal, 8 U.S.C. 1229b(b)(1)(D), is subject to judicial review as a mixed question of law and fact under 8 U.S.C. 1252(a)(2)(D).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but 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 unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2022. On December 21, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari until February 2, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discre-

tion, "may" cancel the removal of a noncitizen who is found to be removable. 8 U.S.C. 1229b(b)(1).[1] To obtain cancellation of removal, the noncitizen bears the burden of proving both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); see 8 C.F.R. 1240.8(d).

To demonstrate that he is eligible for cancellation of removal, a noncitizen who is not a lawful permanent resident must establish that (i) he has been physically present in the United States for a continuous period of at least ten years; (ii) he has been a person of good moral character during that period; (iii) he has not been convicted of certain listed crimes; and (iv) "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. 1229b(b)(1).

An immigration judge (IJ) first rules on an application for cancellation of removal as part of determining whether a noncitizen is removable from the United States. See 8 C.F.R. 1003.10(b), 1240.1(a)(1)(i)-(ii). A noncitizen may appeal an adverse decision to the Board of Immigration Appeals (Board), which exercises delegated power from the Attorney General. 8 C.F.R. 1003.1(a)(1) and (b), 1003.10(c). The Board's decision is subject to judicial review under statutorily prescribed standards and limitations. 8 U.S.C. 1252(a)(1).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to facilitate the prompt removal of noncitizens who are un-

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

lawfully present in the United States by, among other things, limiting the scope of judicial review of the Executive Branch's discretionary determinations, including decisions denying cancellation of removal. *Id.* § 306(a)(2), 110 Stat. 3009-607; see generally *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484-487 (1999). As a result, Section 1252(a)(2)(B) provides that "no court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under section * * * 1229b * * * of this title, or (ii) any other decision or action of the Attorney General * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B).

In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310, Congress further amended Section 1252(a)(2) by adding a proviso in subparagraph (D). That proviso states that "[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) 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." 8 U.S.C. 1252(a)(2)(D). The Court has interpreted the proviso in subparagraph (D) to encompass mixed questions involving "the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1068 (2020).

2. Petitioner is a native and citizen of Mexico. Pet. App. 14a. He first entered the United States illegally in 1989. *Id.* at 16a. Following a 1996 arrest for public intoxication, he was voluntarily returned to Mexico, but he unlawfully reentered the United States two days later. *Ibid.*

a. In 2012, the Department of Homeland Security placed petitioner in removal proceedings, where he conceded inadmissibility under 8 U.S.C. 1182(a)(6)(A)(i) based on his presence in the United States without admission or parole. Pet. App. 14a. He applied for cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 14a-15a.

At the time of his removal hearing, petitioner was 46 years old and had three qualifying relatives for cancellation purposes: his three youngest children, who were 19, 17, and 8 years old. Pet. App. 14a, 16a, 25a. Both petitioner and his 19-year-old son testified in support of petitioner's cancellation application. *Id.* at 16a-20a.

The IJ denied cancellation and ordered petitioner removed. Pet. App. 13a-28a. The IJ determined that petitioner satisfied the first three statutory requirements for cancellation, namely, physical presence, good moral character, and the absence of disqualifying criminal convictions. *Id.* at 22a-23a. But the IJ concluded that petitioner had not established that his removal would cause "exceptional and extremely unusual hardship" to his children. *Id.* at 23a (capitalization and emphasis omitted); see *id.* at 23a-27a.

The IJ found that the children were healthy and would remain in the United States in the event of petitioner's removal. Pet. App. 17a, 26a. The IJ acknowledged that petitioner's 8-year-old daughter was "especially impacted" by his removal proceedings, which had prompted her to hide under her bed and refuse to eat. *Id.* at 26a. But the IJ also noted that petitioner had failed to show that his children would be unable to visit him in Mexico, or that he would be unable to speak with them daily by phone. *Id.* at 27a.

The IJ also noted the potential financial hardship to petitioner's children. Petitioner worked as a landscaper, Pet. App. 26a, and he did not believe that his wife would be able to work outside the home due to her lack of legal status and her childcare responsibilities, *id.* at 17a. Petitioner testified that his 19-year-old son anticipated attending college, but that he would not be able to do so without petitioner's financial support. *Ibid.* The IJ found, however, that petitioner had failed to provide evidence, beyond his own testimony, that he would be unable to find work in Mexico and support his family from there. *Id.* at 26a. The IJ also noted that petitioner's two older children could help to support their younger siblings. *Id.* at 25a, 26a.

Ultimately, while recognizing that petitioner's children would suffer hardship "on some level," the IJ concluded that such hardship would not be "'substantially beyond' that ordinarily associated with a person's departure from the United States." Pet. App. 25a (quoting *In re Monreal*, 23 I. & N. Dec. 56, 60 (B.I.A. 2001) (en banc)).

b. The Board dismissed petitioner's appeal. Pet. App. 8a-12a. It agreed with the IJ's finding that petitioner had failed to establish the requisite hardship. *Id.* at 9a. The Board observed that general economic harm, including a lower standard of living for qualifying relatives, is likely to occur in cases of removal to a comparatively poorer country and is not "exceptional and extremely unusual." *Id.* at 10a. The Board also rejected petitioner's claim that the IJ failed to consider the relevant evidence in the aggregate, noting that even if the IJ did not specifically mention particular items of documentary evidence, the IJ had noted that she considered all such evidence in making her decision. *Ibid.*

c. Petitioner sought review in the court of appeals, contending that the agency erred in weighing the facts in its hardship analysis. The court dismissed in relevant part for lack of jurisdiction. Pet. App. 1a-7a. Relying on this Court's recent decision in *Patel* v. *Garland*, 142 S. Ct. 1614 (2022), the court of appeals reasoned that Section 1252(a)(2)(B)(i) "prohibits review of *any* judgment *regarding* the granting of relief under § 1255 and the other enumerated provisions." Pet. App. 7a (quoting *Patel*, 142 S. Ct. at 1622). Observing that Section 1229b is one of the enumerated provisions, the court of appeals concluded that it lacks jurisdiction to review the agency's hardship finding. *Ibid.* (citing *Castillo-Gutierrez* v. *Garland*, 43 F.4th 477, 481 (5th Cir. 2022) (per curiam)).

DISCUSSION

Petitioner contends (Pet. 2-4) that whether the undisputed facts in a removal proceeding rise to the level of "exceptional and extremely unusual hardship," 8 U.S.C. 1229b(b)(1)(D), is a mixed question of law and fact reviewable under Section 1252(a)(2)(D). See *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062 (2020). Petitioner requests (Pet. 4, 12) that the Court hold his petition for a writ of certiorari and then dispose of it as appropriate in light of the Court's resolution of the petition in *Wilkinson* v. *Garland*, No. 22-666 (filed Jan. 17, 2023), which presents the same question.

As the government explains in its brief in response to the petition in *Wilkinson*, the Fifth Circuit has correctly found that it lacks jurisdiction over a claim that the agency erred in weighing the undisputed facts in making a hardship determination. See U.S. Br. at 6-12,

Wilkinson, *supra* (No. 22-666).[2] But the government also acknowledges that the question presented has divided the courts of appeals and is important and recurring, and therefore recommends that the Court grant further review in that case. *Id.* at 12-15. The government agrees that the petition for a writ of certiorari in this case should be held pending the Court's resolution of *Wilkinson* and then disposed of as appropriate.

Petitioner does not request plenary review, see Pet. 4, 12, and such review would be inappropriate in this case in any event. Petitioner did not preserve his jurisdictional arguments in the court of appeals. See generally Pet. C.A. Br.; see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting this Court's role as "a court of review, not of first view"). Moreover, the court of appeals below reasoned that it lacks jurisdiction over hardship determinations based on this Court's decision in *Patel*. See Pet. App. 7a. That reasoning reflects a slightly different analytical approach than the one traditionally taken by the government and other courts of appeals, which have focused on the discretionary, fact-intensive character of hardship determinations. See U.S. Br. at 7-11, 13-14, *Wilkinson*, *supra* (No. 22-666). In the government's view, it would be preferable for the Court to grant a petition (like the one in *Wilkinson*) arising from a circuit that has adopted the more common approach to the question presented.

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[2] The government has served a copy of its brief in *Wilkinson* on petitioner's counsel of record, who also represents the petitioner in *Wilkinson*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Wilkinson* v. *Garland*, No. 22-666 (filed Jan. 17, 2023), and then disposed of as appropriate.

Respectfully submitted.

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