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No.

In the Supreme Court of the United States

HECTOR GONZALEZ-RIVAS

Petitioner,

v.

MERRICK GARLAND, U.S. Attorney General,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Attorney General may cancel the removal of noncitizens who demonstrate, among other things, that their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D). If the statutory eligibility standards are met, the Attorney General "may," in his discretion, cancel the noncitizen's removal. *Id.* § 1229b(b)(1).

Section 1252(a)(2)(b) precludes judicial review over discretionary denials of relief, except as provided in Section 1252(a)(2)(D), which restores review over "constitutional claims and questions of law." 8 U.S.C. § 1252(a)(2)(B), D). In *Guerrero-Lasprilla* v. *Barr*, this Court held that "the application of law to undisputed or established facts" is a "question of law" reviewable under section 1252(a)(2)(D). 140 S. Ct. 1062, 1069 (2020).

Following *Guerrero-Lasprilla*, the courts of appeals have intractably divided as to whether the BIA's ultimate hardship determination based on undisputed facts is a mixed question of law and fact reviewable under Section 1252(a)(2)(D) or a discretionary judgment insulated from judicial review by Section 1252(a)(2)(B).

The question presented is:

Whether the conclusion that undisputed facts do not satisfy the "exceptional and extremely unusual hardship" standard is a reviewable "question of law" under Section 1252(a)(2)(D).

RELATED PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hector Gonzalez Rivas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 53 F.4th 1129 and is reproduced in the appendix at 1a-4a. The decisions of the Board of Immigration Appeals (App., *infra*, 5a-8a) and the immigration judge (*id.* at 9a-21a) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 23, 2022. On February 10, 2023, Justice Kavanaugh extended the time to file a petition for certiorari to April 21, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) states:

> 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—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(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)(B) states, in relevant part:

Notwithstanding any other provision of law (statutory or nonstatutory), * * * 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 * * * 1229b * * * of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(D) states:

Nothing 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 filed with an appropriate court of appeals in accordance with this section.

STATEMENT

This case presents a frequently recurring question that has deeply divided the courts of appeals: whether 8 U.S.C. § 1252(a)(2)(D) provides for judicial review over the immigration agency's application of law to fact in the context of the "exceptional and extremely unusual hardship" determination under 8 U.S.C. § 1229b(b)(1)(D).

Agency adjudication in the United States is "prolific." Nicholas R. Bednar, *The Public Administration of Justice*, 44 Cardozo L. Rev. (forthcoming 2023) (manuscript at 1). Despite "massive workloads" and often "insufficient resources," administrative courts render decisions with serious civil and criminal consequences at a rate that eclipses the federal courts. *Id.* at 1-2. Nowhere is this burden so pronounced as at the Executive Office of Immigration Review, where individual judges have active caseloads of over 3,000 cases and can hear upwards of 80 cases in a day. *Burgeoning Immigration Judge Workloads*, TRAC (May 23, 2019), perma.cc/2MHE-ZHB7; Eric Katz, *'Conveyer Belt' Justice: An Inside Look at Immigration Courts*, Gov't Exec. (Jan. 22, 2019), perma.cc/89YD-7S6H.

Indeed, the "tremendous pressure" to spend the entire day hearing cases has left immigration judges with almost no time to "review dockets, submissions, [or] case law" in any individual removal case. *Reforming the Immigration System*, Am. Bar Ass'n 19 (Mar. 2019). As one immigration judge has reflected, the immigration courts are like "doing death penalty cases in a traffic court setting." Bednar, *supra*, at 3. When it comes to questions of law, however, Congress has guaranteed that agency decisions will be subject to

oversight by Article III courts. *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1068 (2020); 8 U.S.C. § 1252(a)(2)(D).

In 2016, Hector Gonzalez Rivas applied for one form of discretionary relief: cancellation of removal based on the extreme hardship to his young U.S. citizen children were he to be removed from the United States and forever separated from them. 8 U.S.C. § 1229b(b)(1). Although the BIA found that the "respondent has a loving relationship with his children and supports his family financially through his work as a self-employed auto mechanic business owner," "recognize[d] the importance of [petitioner's] presence in his children's daily lives," and "acknowledge[d] that they will suffer significant emotional and financial hardship following his removal," the BIA ultimately concluded that all these established facts did not satisfy the "requisite level of hardship" "beyond that typically caused by [a noncitizen's] removal." App., *infra*, at 6a-7a.

Gonzalez Rivas petitioned for review in the Eighth Circuit, arguing that the agency had misapplied the relevant hardship standard, a quintessential "question of law" under this Court's decision in *Guerrero-Lasprilla*. But the Eighth Circuit, joining a now 4-4 circuit split, held that the "hardship" analysis is "discretionary" and, thus, the court lacks jurisdiction to review whether the BIA misapplied the hardship standard to undisputed facts. App., *infra*, at 2a-4a.

This was wrong, both as a matter of text and this Court's precedents. As this Court made clear in *Guerrero-Lasprilla*, Congress expressly provided federal courts jurisdiction over questions of law that arise in

discretionary relief proceedings—including the "application of law to undisputed * * * facts." 140 S. Ct. 1062, 1068 (2020); see 8 U.S.C. § 1252(a)(2)(D). The application of the statutory hardship standard to uncontested facts is a bread-and-butter example of a reviewable question of mixed law and fact.

Because cancellation of removal is a frequently invoked form of relief, and because the issues addressed in these adjudications are of extraordinary significance—to the noncitizens and their families and to the effectuation of Congress's chosen immigration policies—this Court's resolution of the scope of federal court jurisdiction is imperative. The Court should grant review of the question presented.

A. Legal Background

1. Since 1940, Congress has granted the Attorney General the power to confer lawful status on certain removable noncitizens whose deportation would cause substantial hardship to their family members in the United States. Cong. Rsch. Serv., *Suspension of Deportation* 1 (Sept. 16, 1997). Through multiple overhauls of the nation's immigration system, Congress has always retained this crucial form of relief as a safeguard for family units with deep ties to the United States. See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 143; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Originally called "suspension of deportation" and now "cancellation of removal," the basic grant of authority has remained the same: The Attorney General (typically acting through an immigration judge or the BIA) has discretion to "cancel removal" and "adjust

the status" of an otherwise removable noncitizen who meets the statutory eligibility requirements. 8 U.S.C. § 1229b(b)(1).

Eligibility for cancellation of removal is available to a noncitizen who establishes (a) continuous physical presence in the United States for at least 10 years; (b) good moral character; (c) absence of a disqualifying conviction; and (d) "exceptional and extremely unusual hardship" to a family member who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1). Because the granting of cancellation of removal is a discretionary form of relief (*Torres* v. *Lynch*, 578 U.S. 452, 454 (2016)), a noncitizen must—beyond establishing eligibility—also "establish" that she "merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A)(ii). This two-part burden is repeated in the statute's implementing regulations: The noncitizen must "establish[] [1] that he or she is eligible for any requested benefit or privilege and [2] that it should be granted in the exercise of discretion." 8 C.F.R. § 1240.8(d).

2. Congress provided meaningful judicial oversight of the immigration agency's decision. A noncitizen who has been issued a final order of removal has the right to petition for judicial review, subject to certain statutory limits on the scope of that review. 8 U.S.C. § 1252(a).

Specifically, Congress precluded federal courts from reviewing denials of discretionary relief—including denial of cancellation of removal—"except as provided in subparagraph (D)." 8 U.S.C. § 1252(a)(2)(B). Through subparagraph (D), Congress expressly reserved to the federal courts jurisdiction to review

"constitutional claims or questions of law" that arise as part of a claim for discretionary relief. *Id.* § 1252(a)(2)(D).

In *Guerrero-Lasprilla*, this Court clarified that the phrase "questions of law" in Section 1252(a)(2)(D) encompasses "the application of a legal standard to undisputed * * * facts." 140 S. Ct. at 1068. In view of the statutory text and history and the longstanding "presumption favoring judicial review of administrative action," the Court recognized that Congress intended to preserve judicial review over mixed questions of law and fact—those questions that call for applying the law to settled fact. *Id.* at 1069-70. Were it otherwise, the Court explained, the BIA would "be free to apply [a legal standard] in a manner directly contrary to well-established law" as long as it "recit[ed] the standard correctly." *Id.* at 1073. Such an "extreme result[]" was irreconcilable with the statute's text and purpose. *Ibid.*

In contrast to questions of law, federal courts may not review the "factual findings that underlie a denial of [discretionary] relief." *Patel*, 142 S. Ct. at 1618. Under *Patel*, factual findings underlying a denial of discretionary relief fall within Section 1252(a)(2)'s jurisdictional bar, and Section 1252(a)(2)(D) "does not preserve review of questions of fact." *Id.* at 1619.

B. Factual Background

Petitioner has lived in the United States since 1986. App., *infra*, at 12a. He and his wife have been married 21 years, and he is a "loving, caring[]" father of three U.S. citizen children, the youngest of whom is in grade school. *Ibid.* He owns and operates his own business—an auto mechanic shop—that supports his

family; petitioner's wife works an unset schedule at a dry cleaners. App., *infra*, at 14a, 17a. Petitioner is particularly close with his youngest daughter and became emotional and unable to testify when asked about her in court. A.R. 148. As the IJ found, his children will be "emotionally impacted by not having him in their lives." App., *infra*, at 19a.

Petitioner has a criminal history. He was arrested in 1997 for petit theft, and in 2011 he pleaded no contest to a domestic battery charge. App., *infra*, at 16a. Before 2006, he was arrested four times for DUIs, three of which resulted in convictions many years later when petitioner sought to resolve the matters. App., *infra*, at 16a.

In 2006, petitioner stopped drinking. A.R. 160. He "want[s] to teach [his children] that it's not good to drink" and to make sure they do not "make the same mistakes that [he] made." A.R. 161. He instead refocused his energy into growing his business, integrating into a church community, and supporting his children. App., *infra*, at 13a-15a, 16a. A.R. 161.

C. Proceedings Below

1. In December 2013, after petitioner had been living in the United States for 27 years, DHS commenced removal proceedings against him. App., *infra*, at 19a; A.R. 537. Petitioner conceded removability and applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1) based on the hardship to his U.S. citizen children. App., *infra*, at 16a; A.R. 365, 525.

Gonzalez Rivas received his individual merits hearing on April 6, 2017, in front of Immigration Judge (IJ) Kathleen Pepper. A.R. 130. He testified about his close relationship with his children and the

hardship to his family, becoming visibly distressed and unable to testify when asked about his youngest daughter. App., *infra*, A.R. 148.

By the time of decision on petitioner's request for cancellation of removal, IJ Pepper was no longer available. App., *infra*, at 21a. As a result, Assistant Chief Immigration Judge (ACIJ) Nancy Paul issued the decision denying cancellation of removal on the basis of the written record alone, without having heard the testimony live. *Ibid.*

The ACIJ denied cancellation of removal. Under the heading "Findings of Fact," the ACIJ made certain "findings of fact" "[b]ased upon the testimonial and documentary evidence." App., *infra*, at 12a. Then, under a separate section entitled "Analysis and Conclusions of Law," the ACIJ found that petitioner "has not established that his removal from the United States to Guatemala would result in exceptional or extremely unusual hardship to his qualifying relatives." *Id.* at 16a-17a.

2. Gonzalez Rivas appealed to the BIA, arguing that the IJ had failed to analyze the hardship to petitioner's children in light of relevant case law. App., *infra*, at 6a-7a.

In a decision by a single administrative judge, the BIA upheld the ACIJ's decision with its own fact findings. App., *infra*, at 6a-8a.

The BIA acknowledged that petitioner's family would be separated if he were deported, with his children remaining in the United States with his wife, and that he "supports his family financially." App., *infra*, at 6a-8a. It also acknowledged the close "loving relationship" he has with his children, the

"importance of [petitioner's] presence in his children's daily lives," and the "significant emotional and financial hardship [to his children] following his removal." *Ibid.* The BIA nevertheless determined that Gonzalez Rivas had not "demonstrated the requisite level of hardship to a qualifying relative." App., *infra*, at 7a.

In articulating the legal standard petitioner needed to meet to show the circumstances were "exceptional," the BIA relied on two cases—*Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) and *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002)—that did not address the standard applicable to separation of a child from their parent. App., *infra*, at 7a. In both cases, the undisputed evidence was that the children would be *accompanying* their departing relative. *Matter of Pilch*, 21 I&N Dec. at 632; *Mater of Andazola*, 23 I&N Dec. at 326. Neither case assessed the hardship analysis when removal would result undisputedly in separating children from a father with whom they have an emotionally close and financially dependent relationship. Nonetheless, relying on the standards in *Pilch* and *Andazola*, the BIA found inadequate hardship from separating petitioner from his children and, thus, upheld the denial of cancellation of removal. App., *infra*, at 8a.

3. Gonzalez Rivas timely petitioned for review in the Eighth Circuit. But the court dismissed his petition, holding that it lacked jurisdiction to review the BIA's discretionary determination as to whether petitioner met the hardship standard. App., *infra*, at 2a-4a.

The court of appeals recognized that it had jurisdiction to decide constitutional claims and questions

of law (including mixed questions of law) under section 1252(a)(2)(D) and *Guerrero-Lasprilla*. App., *infra*, at 2a-3a. But it concluded nevertheless that it was barred from reviewing Gonzalez Rivas's claim by characterizing as "discretionary" the BIA's conclusion that the hardship to petitioner's children did not meet the requisite standard (*i.e.*, "hardship * * * substantially beyond that typically caused by an alien's removal"). App, *infra*, at 4a. In the court of appeals' telling, whether undisputed facts satisfy the statutory "hardship" standard is a "discretionary" or factual finding that "Congress shielded from [its] review." App., *infra*, at 4a (quoting *Rodriguez* v. *Barr*, 952 F.3d 984, 990 (8th Cir. 2020)).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari: The circuits are squarely divided; this petition presents a suitable vehicle for resolving this important and oft-recurring question; and the decision below is wrong.

A. The circuits are squarely divided.

The courts of appeals are divided on the question of whether Section 1252(a)(2)(D) supplies judicial review to the BIA's "exceptional and extremely unusual hardship" determination. Following this Court's decision in *Guerrero-Lasprilla*—which held that "the phrase 'questions of law' in [section 1252(a)(2)(D)] includes the application of a legal standard to undisputed or established facts" (140 S. Ct. at 1067)—the courts of appeals began re-examining their approach to hardship determinations, with four circuits now expressly agreeing that the application of the hardship standard to settled facts is a reviewable "mixed question[] of law and fact." Four circuits, however, have

now expressly rejected this interpretation of 1252(a)(2)(D) and *Guerrero-Lasprilla*, holding that hardship determinations are unreviewable "discretionary" determinations.

This circuit split is widely recognized, with the courts of appeals themselves acknowledging their sister circuits' views but nevertheless adhering to divergent paths. See, *e.g.*, *Reyes-Lopez* v. *Att'y Gen. United States*, 2022 WL 1552996 (3d Cir. 2022) (expressly recognizing that its position conflicts with that of "sister courts"); *Singh* v. *Rosen*, 984 F.3d 1142, 1149 (6th Cir. 2021) (recognizing circuit conflict); *Gonzalez Galvan* v. *Garland*, 6 F.4th 552, 560 (4th Cir. 2021) (same). This Court's intervention is warranted to resolve this deeply entrenched split among the circuits.

1. Four circuits—the **Fourth**, **Sixth**, **Seventh**, and **Eleventh Circuits**—have held that whether undisputed facts satisfy the hardship standard may be reviewed as a "question of law" under section 1252(a)(2)(D).

The **Fourth Circuit** has clearly held that "this statutory standard of 'exceptional and extremely unusual hardship' presents a mixed question of law and fact, which [courts of appeals] retain jurisdiction to review under the Supreme Court's recent decision in *Guerrero-Lasprilla v. Barr*." *Gonzalez Galvan* v. *Garland*, 6 F.4th 552, 555 (4th Cir. 2021). Following this Court's decision in *Patel*, the Fourth Circuit has maintained its holding: "we may not disturb 'the IJ's factual findings related to the hardship determination,' and we assess only whether 'the IJ erred in holding that [the] evidence failed as a matter of law to satisfy the statutory standard of exceptional and extremely

unusual hardship." *Garcia Gonzalez* v. *Garland*, 2022 WL 3210162, at *1 (4th Cir. 2022) (citing *Patel*, 142 S. Ct. at 1627).

The **Sixth Circuit** has similarly held that *Guerrero-Lasprilla* "makes clear that [courts] may review [such] hardship argument[s]." *Singh* v. *Rosen*, 984 F.3d 1142, 1145 (6th Cir. 2021). After comprehensively reviewing the statutory text, the statutory structure, the statutory history, and relevant precedents, the court held that the BIA's application of the statutory hardship standard to an immigrant's facts qualifies as a mixed question under *Guerrero-Lasprilla*. See *id.* at 1150-1154. Following *Patel*, the Sixth Circuit has continued to adhere to its holding that "the Board's conclusion that the historical facts did not rise to the required level of 'hardship' resolved a mixed question of law and fact that we have jurisdiction to review." *Hernandez* v. *Garland*, 59 F.4th 762, 763 (6th Cir. 2023).

The **Seventh Circuit** noted emphatically that it has jurisdiction to review the question whether "the Board's decision that those [undisputed] facts did not amount to 'hardship' under the statute." *Arreola-Ochoa* v. *Garland*, 34 F.4th 603, 610 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 492. It recently reaffirmed that position in *Cruz-Velasco v. Garland*, 58 F.4th 900 (7th Cir. 2023), roundly rejecting the government's argument that *Patel* foreclosed the court from applying *Guerrero-Lasprilla*'s mixed-questions framework in the context of Section 1252(a)(2)(B)(i). *Id.* at 904. The court reconciled *Patel* and *Guerrero-Lasprilla*: The former forecloses "judicial review of factfinding,"

while the latter directs judicial review of "application of a legal standard to *undisputed* facts." *Id.*

The **Eleventh Circuit,** in the en banc decision that this Court affirmed in *Patel*, recognized that "[a]pplicants who have been denied a form of discretionary relief enumerated in [Section] 1252(a)(2)(B)(i) can still obtain review of constitutional and legal challenges to the denial of that relief, including review of mixed questions of law and fact." *Patel* v. *U.S. Att'y General*, 971 F.3d 1258, 1275-1276 (11th Cir. 2020) (en banc) (holding that the question presented raised a factual question), *aff'd sub nom.*, 142 S. Ct. 1614 (2022). The en banc court rejected the notion that the eligibility criteria for cancellation of removal—including hardship—are "discretionary" and per se outside section 1252(a)(2)(D). *Id.* at 1278-1280. Instead, factual determinations are outside the scope of review, while mixed questions of law and fact remain reviewable. *Ibid.*; see also *Cuauhtenango-Alvarado* v. *U.S. Att'y Gen.*, 85 Fed. 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.").

2. On the other hand, four circuits—the **Third, Fifth, Eighth,** and **Tenth Circuits**—hold that whether a given set of undisputed facts satisfies the hardship standard is unreviewable.

In the **Tenth Circuit**'s view, a decision whether a noncitizen's facts amount to "hardship" sufficient for cancellation of removal is a "matter[] left to the [BIA]'s discretion" and thus barred from review under § 1252(a)(2)(B). *Galeano-Romero* v. *Barr*, 968 F.3d

1176, 1183 (10th Cir. 2020). Contrary to how the Fourth, Sixth, and Seventh Circuits would later interpret *Guerrero-Lasprilla*, the Tenth Circuit clung to pre-*Guerrero-Lasprilla* precedent to contend that hardship determinations "do not raise 'questions of law' for purposes of § 1252(a)(2)(D), even if framed as a challenge to the application of a legal standard to established facts under *Guerrero-Lasprilla*." *Id.* at 1184. Even as its sister circuits reconsidered their rules under *Guerrero-Lasprilla*, the Tenth Circuit has maintained its view 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.'" *Herrera* v. *Garland*, 2022 WL 16631167, at *3 (10th Cir. Nov. 2, 2022). As a result, the court continues to dismiss petitions for review raising the hardship determination.

The **Third Circuit** has similarly held that "whether hardship is 'exceptional and extremely unusual' 'is a quintessential discretionary judgment' over which we lack jurisdiction." *Hernandez-Morales* v. *Att'y Gen. United States*, 977 F.3d 247, 249 (3d Cir. 2020). In the Third Circuit's view, any "disagreement about weighing hardship factors is a discretionary judgment call, not a legal question." *Ibid.* (citing *Galeano-Romero*, 968 F.3d at 1182-1184). Following *Patel*, the court has reiterated its view that it lacks jurisdiction to review the fully "discretionary" hardship determinations. See *Juarez-Vargas* v. *Att'y Gen. United States*, 2022 WL 17984473 (3d Cir. Dec. 29, 2022).

Despite originally siding with the Fourth, Sixth, Seventh, and Eleventh Circuits (*see Trejo* v. *Garland*,

3 F.4th 760, 766-777 (5th Cir. 2021)), the **Fifth Circuit** reversed course and held its precedent abrogated by *Patel*. See *Castillo-Gutierrez* v. *Garland*, 43 F.4th 477 (5th Cir. 2022). According to the Fifth Circuit, *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)." *Id.* at 481.

The **Eighth Circuit**, in the decision below, has now likewise held that "exceptional and extremely unusual hardship" determinations are "precisely the discretionary [factual finding] that Congress shielded from [its] review." App., *infra*, at 4a (quoting *Rodriguez* v. *Barr*, 952 F.3d 984, 990 (8th Cir. 2020)). The Court invoked similar recent decisions from the Fifth and Tenth Circuits. App., *infra*, at 4a (citing *Castillo-Gutierrez* v. *Garland*, 43 F.4th 477, 481 (5th Cir. 2022); *Galeano-Romero*, 968 F.3d at 1182-1183).

B. This petition presents an attractive vehicle for resolving this frequently recurring, important issue.

1. The question presented in this case is pervasive, frequently recurring, and important. This petition has so far only presented the tip of iceberg of cases affected by the circuit split. We have identified nearly fifty additional cases over the past three years addressing this question—and this is likely just a fraction of the total cases in which this question has arisen.[1]

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[1] See, *e.g.*, *Lemos-Rodriguez* v. *Att'y Gen. United States*, 2023 WL 2770819 (3d Cir. 2023); *Beltran-Leon* v. *Att'y Gen. of United States*, 2023 WL 355688 (3d Cir. 2023); *Vaswani* v. *Att'y Gen. of*

United States, 2022 WL 16947931 (3d Cir. 2022); *Reyes-Lopez* v. *Att'y Gen. United States*, 2022 WL 1552996 (3d Cir. 2022); *Morales* v. *Att'y Gen. of United States*, 2022 WL 385544 (3d Cir. 2022); *Amagua-Zapata* v. *Att'y Gen. United States*, 2022 WL 278373 (3d Cir. 2022); *Mateo-Diego* v. *Att'y Gen. of United States*, 2021 WL 3028125 (3d Cir. 2021); *Saavedra Santos* v. *Att'y Gen. of United States*, 847 F. App'x 156 (3d Cir. 2021); *Betancourt-Santiago* v. *Att'y Gen. United States*, 848 F. App'x 502 (3d Cir. 2021); *Ramirez-Aguilar* v. *Att'y Gen. of United States*, 844 F. App'x 597 (3d Cir. 2021); *Mejia-Espinoza* v. *Att'y Gen. of United States*, 846 F. App'x 140 (3d Cir. 2021); *Gaspar* v. *Garland*, 2023 WL 2758348 (4th Cir. 2023); *Gonzalez Vega* v. *Garland*, 2022 WL 16835645 (4th Cir. 2022); *Martinez* v. *Garland*, 2022 WL 16757926 (4th Cir. 2022); *Lorenzana-Guerra* v. *Garland*, 2022 WL 4129259 (4th Cir. 2022); *Palacios* v. *Garland*, 2022 WL 1768850 (4th Cir. 2022); *Espinoza* v. *Garland*, 2022 WL 1684499 (4th Cir. 2022); *Badillo-Perez* v. *Garland*, 2022 WL 1090253 (4th Cir. 2022); *Barrera* v. *Garland*, 2021 WL 5755078 (4th Cir. 2021); *Ramirez* v. *Garland*, 2021 WL 5563963 (4th Cir. 2021); *Contreras-Carrillo* v. *Garland*, 2021 WL 4958768 (4th Cir. 2021); *Pena-Lopez* v. *Garland*, 33 F.4th 798 (5th Cir. 2022); *Guillen-Perez* v. *Garland*, 2022 WL 4594604 (5th Cir. 2022); *Juarez* v. *Garland*, 2022 WL 3282228 (5th Cir. 2022); *Edou* v. *Garland*, 2022 WL 2702057 (5th Cir. 2022); *Aguirre-Cano* v. *Garland*, 2022 WL 2208396 (5th Cir. 2022); *Esquivel-Muniz* v. *Garland*, 2022 WL 2073835 (5th Cir. 2022); *de la Cruz-Flores* v. *Garland*, 2022 WL 2903445 (6th Cir. 2022); *Francisco-Diego* v. *Garland*, 2022 WL 1741657 (6th Cir. 2022); *Lopez-Mejia* v. *Garland*, 2022 WL 1561353 (6th Cir. 2022); *Cano-Morales* v. *Garland*, 2022 WL 304953 (6th Cir. 2022); *Velasquez-Perez* v. *Garland*, 854 F. App'x 40 (6th Cir. 2021); *Martinez-Baez* v. *Wilkinson*, 986 F.3d 966 (7th Cir. 2021); *Perez-Bujdud* v. *Garland*, 855 F. App'x 305 (7th Cir. 2021); *Valdez* v. *Garland*, 2023 WL 2620248 (10th Cir. 2023); *Munoz-Morales* v. *Garland*, 2023 WL 2147327 (10th Cir. 2023); *Cervantes-Soberano* v. *Garland*, 2022 WL 5237757 (10th Cir. 2022); *Conde-Sanchez* v. *Garland*, 2022 WL 17581786 (10th Cir. 2022); *Cervantes-Soberano* v. *Garland*, 2022 WL 5237757 (10th Cir. 2022).

The slew of petitions for review in the courts of appeals implicating this jurisdictional question is unlikely to subside, given the prevalence of requests for cancellation of removal at the immigration-court level. Between January 20, 2017, and September 30, 2020, 60,588 noncitizens applied for cancellation of removal under 8 U.S.C. § 1229b. See Beyond Asylum: Deportation Relief During the Trump Administration, TRAC (Oct. 29, 2020), perma.cc/46N5-4BVM. This represents 6.5% of the nearly 400,000 noncitizens who sought relief in this period and is the second most common form of relief sought (after asylum). *Id.*

The question presented is also extremely important independent of its prevalence. For noncitizens, the opportunity to present their claims in an Article III court stands as the final beacon of hope that they might overcome erroneous agency rulings and avoid being unduly removed from this country. Whether Congress intended to preclude jurisdiction over those claims is self-evidently "an important question of law." *INS* v. *St Cyr*, 533 U.S. 289, 293 (2001). Indeed, the impact of such a decision on the individual and on his or her family members who otherwise would experience "exceptional and extremely unusual hardship" is ineffable.

2. This case presents a suitable vehicle to resolve the question presented. There are no subsidiary issues to complicate or interfere with the Court's analysis in this case. The only ground for the BIA's denial of cancellation of removal was its conclusion that the hardship prong was not met. App., *infra*, at 7a-8a. And the court of appeals thought it lacked jurisdiction to review that ultimate conclusion. App., *infra*, at 3a-

4a. The issue is preserved cleanly for the Court's review.

The answer to the question presented is likely to be outcome-determinative. Had the court of appeals not found its power to review the hardship question lacking, it is reasonably likely petitioner would have received a favorable decision. The BIA found that petitioner "has a loving relationship with his children and supports his family financially through his work as a self-employed auto mechanic business owner," "recognize[d] the importance of [petitioner's] presence in his children's daily lives," and acknowledge that they will suffer significant emotional and financial hardship following his removal." App., *infra*, at 6a. Because his children "are in good health, and have no learning disabilities or mental health issues," however, the BIA concluded that petitioner had not met the statutory hardship standard for separating family members by citing two cases that have nothing to do with separating children from a father who is heavily involved in their lives. App., *infra*, at 6a-7a (citing *Matter of Pilch*, 21 I&N Dec. at 631; *Matter of Andazola*, 23 I&N Dec. at 323). Had the court of appeals reviewed the BIA's application of the legal standard to the undisputed facts, the court may very well have found that the application of the hardship standard to the unique combination of emotional and financial impacts here compelled a favorable conclusion on hardship.

C. The decision below is wrong.

The court of appeals was wrong to hold that federal courts lack jurisdiction to review a conclusion as

to whether the applicant's settled facts meet the statutory extreme-hardship standard.

1. Section 1252(a)(2)(B) provides that "except as provided in subparagraph (D) * * *, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b." Section 1252(a)(2)(D), in turn, provides that courts may "review [] constitutional claims or questions of law."

In *Guerrero-Lasprilla*, the Court held that "questions of law" in section 1252(a)(2)(D) includes mixed questions of law and fact that turn on the proper "application of a legal standard to undisputed or established facts." 140 S. Ct. at 1067. The Court reaffirmed the basic rule of *Guerrero-Lasprilla* in *Patel* and held that, taken together, Section 1252(a)(2)(B) and Section 1252(a)(2)(D) preclude judicial "review [of] facts found as part of discretionary-relief proceedings * * * enumerated in § 1252(a)(2)(B)(i)." 142 S. Ct. at 1627. *Guerrero-Lasprilla* and *Patel* thus draw the line between what *is* reviewable—"questions of law," including those involving application of the law to settled facts—and what is *not* reviewable—factual determinations.

2. Whether an applicant's undisputed facts meet the extreme-hardship standard is a paradigmatic example of "application of a legal standard to undisputed or established facts." 140 S. Ct. at 1067.

Section 1229b(b)(1) sets up a two-part analysis for cancellation of removal. *First*, the IJ must find that the removable noncitizen is *eligible*—i.e., "(A) has been physically present in the United States for a continuous period of not less than 10 years"; "(B) has been

a person of good moral character during such period"; "(C) has not been convicted of [certain] offense[s]"; and (D) that "removal would result in exceptional and extremely unusual hardship to the [noncitizen'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)(A)-(D). *Second*, the IJ must then decide the noncitizen warrants a favorable exercise discretion—he "*may* cancel removal of, and adjust [] the status" of the noncitizen. *Id.* § 1229b(b)(1) (emphasis added). This is precisely what the regulations direct the IJs to do: the noncitizen must "establish[] that he or she is eligible for any requested benefit or privilege *and* that it should be granted in the exercise of discretion." 8 C.F.R. § 1240.8(d) (emphasis added).

The hardship inquiry is part of the eligibility determination and is separate and apart from the IJ's decision whether the noncitizen warrants a favorable exercise of discretion. See *Singh*, 984 F.3d at 1150-1151; *Patel*, 971 F.3d at 1267-1268. Although the facts that inform each determination may overlap, these are two discrete analyses, and only one is expressly "discretionary." Of course, that "courts lack jurisdiction over one matter (the [discretionary] decision) does not affect their jurisdiction over another (the decision on the alien's request)." *Mata* v. *Lynch*, 576 U.S. 143, 148 (2015). Whether the statutory hardship standard is met on undisputed facts—just like whether the petitioner has shown "due diligence" for purposes of equitable tolling on undisputed facts—is a straightforward "application of a legal standard to established facts" that can be reviewed, even if the final

discretionary judgment cannot be. *Guerrero-Lasprilla*, 140 S. Ct. at 1072.

This reading is the only one that accords with the statutory text and purpose of section 1252(a)(2)(D), with *Guerrero-Lasprilla*, and with the strong "presumption of reviewability" of executive determinations. *Guerrero-Lasprilla*, 140 S. Ct. at 1069; see also *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019).

3. The courts of appeals that have decided otherwise have characterized the hardship determination as a purely "discretionary" decision that evades section 1252(a)(2)(D). But that cannot be squared with the statutory text. The statutory text does not preclude review of "discretionary" as opposed to "nondiscretionary" decisions. Instead, section 1252(a)(2)(B) precludes review over "any judgment regarding the granting of relief under section … 1229b" "*except as provided in [section 1252(a)(2)(D)]*" for "questions of law." (emphasis added). Nothing in section 1252(a)(2)(B) overrides section 1252(a)(2)(D); on the contrary, they are meant to operate together.

Nor does anything in Section 1229b(b)(1) render "discretionary" a finding of "hardship." Only after the noncitizen "establishes that removal would result in exceptional and extremely unusual hardship" to a qualifying relative does the agency render a discretionary determination whether to grant cancellation of removal. "[O]ne must distinguish the Board's final discretionary decision whether to *grant cancellation of removal* (a decision that falls within § 1252(a)(2)(B)) from its earlier eligibility decision whether the *immigrant has shown hardship* (a decision that falls within § 1252(a)(2)(D))." *Singh*, 984 F.3d at 1151. That "the

statutory standards for eligibility are less specific" may "give[] an immigration judge more leeway in interpreting and applying the law. But qualitative standards such as 'good moral character' or 'exceptional and extremely unusual hardship' are not in themselves discretionary decisions." *Patel*, 971 F.3d at 1278. That much follows from *Guerrero-Lasprilla*. "Due diligence" is a qualitative standard, yet this Court held that application of the standard to settled facts is a reviewable "question of law." Whether settled facts demonstrate "exceptional and extremely unusual hardship" is likewise a reviewable "question of law."

Illustrating the weakness of its position, the Eighth Circuit has separately held that it has "jurisdiction to review the BIA's finding on" one of the other eligibility criteria—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). There is no principled basis for concluding that the application of law to settled fact is reviewable for *some* of the eligibility criteria but not others. That application of the more objective standards (e.g., ten years' residency) to the settled facts may be easier does not mean the qualitative standards (such as hardship) must be unreviewable. See *Singh*, 984 F.3d at 1151-1152 ("Would anyone say that the Board has discretion to decide whether an immigrant has been in this country for the required ten years?").

In reaching its decision that the hardship determination is "discretionary," the Tenth Circuit distinguished *Guerrero-Lasprilla* on the ground that the case addressed the intersection of section

1252(a)(2)(D) and 1252(a)(2)*(C)*, but not section 1252(a)(2)*(B)*. 968 F.3d at 1184 n.9. But both sections 1252(a)(2)(C) *and* 1252(a)(2)(B) preclude review "except as provided in [section 1252(a)(2)(D)]." *Guerrero-Lasprilla* was a construction of section 1252(a)(2)(D)'s "questions of law" provision. That same statutory subsection surely does not mean two entirely different things based on which other statutory provision has incorporated it. Accord *Singh*, 984 F.3d at 1153.

At bottom, the decision below, invoking circuit precedent that predates *Guerrero-Lasprilla*, mistakes a qualitative legal standard with a "discretionary" one. Whether the undisputed facts of petitioner's case demonstrate an exceptional and extremely unusual hardship to his children is not a "discretionary" decision; it is a textbook request that the court review "the application of a legal standard to undisputed or established facts"—a "question of law." *Guerrero-Lasprilla*, 140 S. Ct. at 1067. The court of appeals' conclusion that it could not review whether petitioner's settled facts meet the statutory standard was wrong and warrants this Court's review and correction.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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