FILED
JUN 26 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 22-1038

In the Supreme Court of the United States

HECTOR GONZALEZ-RIVAS, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
LAUREN C. BINGHAM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 7
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Barton v. *Barr*, 140 S. Ct. 1442 (2020) 2
Guerrero-Lasprilla v. *Barr*, 140 S. Ct. 1062 (2020) 3, 7
Monreal, *In re*, 23 I. & N. Dec. 56 (B.I.A. 2001) 6
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 3

Statutes and regulations:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
§ 306(a)(2), 110 Stat. 3009-607 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(3) 2
8 U.S.C. 1182(a)(6)(A)(i) 4
8 U.S.C. 1229a(c)(4)(A) 2
8 U.S.C. 1229b(b)(1) 2, 4
8 U.S.C. 1229b(b)(1)(D) 4, 7
8 U.S.C. 1229c(b) 5
8 U.S.C. 1252(a)(1) 2
8 U.S.C. 1252(a)(2) 3
8 U.S.C. 1252(a)(2)(B) 3

Statutes and regulations—Continued: Page

8 U.S.C. 1252(a)(2)(B)(i) 6
8 U.S.C. 1252(a)(2)(D) 3, 7

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 3

8 C.F.R.:

Pt. 1003:

Section 1003.1(a)(1) 2
Section 1003.1(b) 2
Section 1003.10(b) 2
Section 1003.10(c) 2

Pt. 1240:

Section 1240.1(a)(1)(i)-(ii) 2
Section 1240.8(d) 2

In the Supreme Court of the United States

No. 22-1038

HECTOR GONZALEZ-RIVAS, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is published at 53 F.4th 1129. The decisions of the Board of Immigration Appeals (Pet. App. 5a-8a) and the immigration judge (Pet. App. 9a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2022. On February 10, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 21, 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 discretion, "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) 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 or BIA), 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, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to facilitate the prompt removal of noncitizens who are unlawfully pre-

---

[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)).

sent 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 Guatemala. Pet. App. 12a. He first entered the United States without inspection in 1986. *Ibid.* He departed the United States in 1995 to visit family, reentered the country without inspection in 1996, and has remained in the United States since that time. *Id.* at 12a-13a.

a. In 2013, 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. 9a-10a. He applied for cancellation of removal under Section 1229b(b)(1). *Id.* at 10a.

The IJ denied cancellation of removal and ordered petitioner removed. Pet. App. 21a. The IJ concluded that petitioner had not established that his removal would cause "exceptional and extremely unusual hardship" to any qualifying relative. 8 U.S.C. 1229b(b)(1)(D); see Pet. App. 16a-20a. Because petitioner failed to show the requisite hardship, the IJ did not address whether he also failed to satisfy the statutory criteria of continuous physical presence and good moral character. Pet. App. 20a.

At the time of his removal hearing, petitioner was 46 years old and had three qualifying relatives: his three U.S. citizen children, who were 19, 9, and 5 years old. Pet. App. 13a. Petitioner worked as an auto mechanic, and his wife was employed by a dry cleaner. *Id.* at 14a. The IJ noted that petitioner appeared to be a "loving, caring" father; that the children were healthy; that the younger two were doing well in school; and that the eldest was saving money to attend college. *Id.* at 13a-14a, 19a. The IJ found that the children would remain in the United States in the event of petitioner's removal. *Id.* at 18a-19a.

The IJ acknowledged the potential personal and financial hardships to petitioner's children but concluded that those hardships would not be "substantially different from or beyond that which would ordinarily be expected" to result from a family member's removal. Pet.

App. 19a. Petitioner testified that he did not believe that his wife could support the family on her existing wages, but the IJ found that petitioner had failed to provide objective evidence regarding household income and expenses. *Id.* at 17a-18a. The IJ also noted that, although petitioner's wife claimed that she could not afford childcare on her own, their youngest child would soon enter kindergarten and afterschool care would be available. *Ibid.* The IJ similarly observed that while petitioner and his son stated that the latter might have to defer college to help support the family, there was insufficient evidence that this would be necessary. *Id.* at 18a.

Petitioner also requested voluntary departure. See 8 U.S.C. 1229c(b) (establishing criteria for discretionary grant of post-conclusion voluntary departure). The IJ denied the request as a matter of discretion. Pet. App. 20a. The IJ noted that petitioner had previously used a fake name when he was arrested on three charges of driving under the influence. And although petitioner testified that he did not use the name again after that, the IJ concluded that this testimony was false because petitioner had in fact used the fake name when he was later arrested for domestic battery. The IJ denied voluntary departure in light of petitioner's "lack of candor" and his "criminal record." *Ibid.*

b. The Board dismissed petitioner's appeal. Pet. App. 5a-8a. It agreed that petitioner had failed to establish the requisite hardship for cancellation. *Id.* at 6a. The Board recognized that petitioner's children would suffer "significant emotional and financial hardship" following his removal. *Ibid.* But it agreed that petitioner had failed to show that such hardship would be "substantially different from, or beyond, that which

would normally be expected" from the removal of a close family member. *Ibid.* (quoting *In re Monreal*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001)). The Board also rejected petitioner's challenge to the IJ's discretionary denial of voluntary departure. *Id.* at 7a.

3. Petitioner sought review in the court of appeals, which dismissed his petition. Pet. App. 1a-4a. Petitioner challenged the Board's decision on the grounds that "(1) he has a Fifth Amendment due process right to the care, custody, and control of his minor children"; that "(2) the BIA should shift to a 'best interests' analysis that considers the adverse emotional and financial effects on children caused by the permanent separation of a removed parent"; and that "(3) the BIA abused its discretion or misapplied the hardship standard" by citing inapposite agency precedent. *Id.* at 3a.

The court of appeals rejected on the merits petitioner's request for the court to "direct the BIA to implement a new analytical standard for exceptional and extremely unusual hardship," observing that petitioner had "provided no authority" for that request. Pet. App. 3a. The court also rejected petitioner's claim that the Board had "misapplied the applicable hardship standard," noting that this was "a question of law which we may review," but determining that the Board's reliance on purportedly inapposite precedent was insufficient to show legal error. *Ibid.* Lastly, the court concluded that "[e]ven after *Guerrero Lasprilla*, the BIA's discretionary conclusion that the hardship to the children is not substantially beyond that typically caused by an alien's removal 'is precisely the discretionary determination that Congress shielded from our review'" under Section 1252(a)(2)(B)(i). *Id.* at 4a (citation omitted).

DISCUSSION

Petitioner contends (Pet. 19-24) 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). This case presents the same question as *Wilkinson* v. *Garland*, petition for cert. pending, No. 22-666 (filed Jan. 17, 2023).

As the government explains in its brief in response to the petition for a writ of certiorari in *Wilkinson*, the Eighth Circuit has correctly found that it lacks jurisdiction to review a claim that the agency erred in weighing the undisputed facts in making a hardship determination. See Gov't 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 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. Plenary review is not warranted. Petitioner asserted constitutional and purely legal challenges to the agency's hardship determination in the court of appeals in addition to challenging the agency's factual weighing, see Pet. App. 3a-4a, and the court resolved those constitutional and legal claims on the merits, *id.* at 3a; see p. 6, *supra*. The petition suggests that petitioner intends to reassert his purely legal arguments in this Court. Compare Pet. 10, 19 (contending that the agency relied on inapposite

---

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

precedent), with Pet. App. 3a-4a (holding that the Board's alleged reliance on inapposite precedent is "a question of law which we may review"). Petitioner's assertion of purely legal questions would complicate this Court's consideration of the issue actually in dispute. In contrast, the petition for a writ of certiorari in *Wilkinson* challenges only the application of the legal standard to the undisputed facts, and thus presents a more straightforward vehicle for resolving the question presented. See Gov't Br. at 15, *Wilkinson*, *supra* (No. 22-666).

This case is a poor vehicle for the additional reason that petitioner would be unlikely to obtain relief even if the Court reversed the court of appeals' jurisdictional determination. Because the IJ found petitioner ineligible for relief, she never reached the ultimate, discretionary decision to grant or deny cancellation. See Pet. App. 20a. But the fact that the IJ denied voluntary departure as a matter of discretion—based on petitioner's criminal record and lack of candor in his immigration proceedings, see *ibid.*—suggests that, even assuming the court of appeals were to find in his favor on the hardship question, the IJ would similarly deny cancellation as a matter of discretion on remand.

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.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
JOHN W. BLAKELEY
LAUREN C. BINGHAM
Attorneys

JUNE 2023