No. 22-617

IN THE

Supreme Court of the United States

FRANCISZEK KRAZSZTOF BYSTRON,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the Petition demonstrates, the courts of appeals are deeply and intractably divided over whether 8 U.S.C. § 1252(a)(2)(D) permits courts to review challenges to statutory hardship determinations. Notwithstanding this Court's clear direction in *Guerrero-Lasprilla v. Barr*, which explained that judicially reviewable "questions of law" include "the application of a legal standard to undisputed ... facts," the lower courts remain divided. 140 S. Ct. 1062, 1067 (2020). Three courts of appeals correctly hold that federal courts can review hardship determinations; five say the opposite.

Importantly, the government admits as much. In *Wilkinson v. Garland*, another case involving hardship standards for obtaining immigration relief, the government recognizes the circuit split and agrees that this Court's intervention is needed. *See* Resp. at 6, *Wilkinson v. Garland*, No. 22-666 (U.S. May 12, 2023). The Court should take up the question, and this case is an especially suitable vehicle for doing so—it is one of the rare cases in which the resolution of this question is undisputedly case-dispositive. Pet. 7-8; *infra* 4. It often is unclear whether the agency rejected a claim because the hardship applicant failed to satisfy the statutory hardship standard (which is reviewable), or if instead the agency discretionarily denied relief (which is not). Here, however, the IJ expressly and unequivocally stated he would have exercised his discretion to grant Mr. Bystron relief if Bystron had satisfied the statutory hardship standard. Pet. App. 21a. Thus, this case offers a

clean opportunity to resolve the jurisdictional question.

The government's arguments against granting review in this case are meritless. *Infra* 4-9. Principally, the government contends that this case does not implicate the acknowledged circuit split because it involves a slightly different statutory hardship standard—"extreme hardship" under 8 U.S.C. § 1182(h)(1)(B), rather than "exceptional and extremely unusual hardship" under 8 U.S.C. § 1229b(b)(1). But that is a distinction without a difference for purposes of the question presented. The government admits that the two hardship provisions "employ similar language." BIO 12. More importantly, they both are subject to the same jurisdiction-conferring provision for "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). And insofar as the underlying hardship provisions differ, that is more reason, not less, to grant review: The lower courts need clarity about the application of § 1252(a)(2)(D) to both hardship provisions.

The Court should grant the petition, whether solely in this case or in conjunction with one of the petitions involving the § 1229b(b)(1) hardship standard. *See* BIO 13 n.3 (listing other pending petitions). Alternatively, and at a minimum, given the close relationship between the statutory hardship provisions and the identical way in which the § 1252(a)(2)(D)'s jurisdictional exception applies to them both, the Court should hold this petition pending disposition of those other petitions.

I. This Case Implicates An Acknowledged Conflict Of Authority.

As the government acknowledges, the circuits are sharply divided over whether the application of a statutory hardship standard is judicially reviewable as a mixed question of law and fact under § 1252(a)(2)(D). BIO 12; Resp. at 6, *Wilkinson v. Garland*; *see* Pet. 10-12.

The Fourth, Sixth, and Seventh Circuits correctly hold that the BIA's hardship determination is reviewable, reasoning that whether an applicant meets a legal hardship standard is "separate and distinct from the [BIA's] ultimate discretionary determination" whether to grant or deny relief.[1] In direct contrast, the Third, Fifth, Eighth, Tenth, and Eleventh Circuits hold such hardship determinations wholly unreviewable.[2]

Not only is the conflict square; it is acknowledged and entrenched. Courts on both sides of the divide have acknowledged the division of authority and explained why they will continue adhering to their own views. *See, e.g.*, *Gonzalez Galvan*, 6 F.4th

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[1] *Gonzalez Galvan v. Garland*, 6 F.4th 552, 560 (4th Cir. 2021); *Singh v. Rosen*, 984 F.3d 1142, 1154 (6th Cir. 2021); *Arreola-Ochoa v. Garland*, 34 F.4th 603, 610 (7th Cir. 2022).

[2] *See Hernandez-Morales v. Att'y Gen. U.S.*, 977 F.3d 247, 249 (3d Cir. 2020); *Castillo-Gutierrez v. Garland*, 43 F.4th 477, 481 (5th Cir. 2022); *Gonzalez-Rivas v. Garland*, 53 F.4th 1129, 1131 (8th Cir. 2022); *Galeano-Romero v. Barr*, 968 F.3d 1176, 1182-83 & n.8 (10th Cir. 2020); *Ponce Flores v. U.S. Att'y Gen.*, 64 F.4th 1208, 1222 (11th Cir. 2023).

at 559-60; *Singh*, 984 F.3d at 1150-54; *Herrera v. Garland*, No. 21-9596, 2022 WL 16631167, at *3 & n.2 (10th Cir. Nov. 2, 2022); *Reyes-Lopez v. Att'y Gen. U.S.*, No. 21-2200, 2022 WL 1552996, at *3 & n.4 (3d Cir. May 17, 2022).

II. Contrary To The Government's Arguments, This Case Is An Unusually Good Vehicle For Considering This Question.

A. This is an uncommonly good case for resolving the question presented. That is because the IJ concluded unambiguously that he would have exercised discretion to grant relief in this case if the hardship standard had been satisfied. Pet. App. 21a. Thus, unlike in the many cases where the agency could still decline to grant relief despite a finding of hardship, the agency's discretion is no barrier to relief because we already know that the decision ultimately would come out in Mr. Bystron's favor.[3]

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[3] As for the hardship determination itself, the BIA acknowledged several hardship factors but did not purport to factor in a consideration the BIA has deemed relevant to the extreme hardship determination: whether the noncitizen has any other means of securing legal entry into the United States in the future. C.A. Doc. 10, at 16-17 (Dec. 21, 2020); *see In re Pilch*, 21 I. & N. Dec. 627, 630 (B.I.A. 1996). Had the Third Circuit reviewed the BIA's application of the extreme hardship standard, it may well have considered the facts sufficient in the aggregate to satisfy the standard. Further, after the BIA denied relief, new details emerged regarding the deteriorating mental health of Mr. Bystron's children in response to their father's potential removal. Administrative Record (A.R.) 12-14, 28. Although the BIA refused to reopen the proceeding to take

B. The government contends that review should be denied because this case does not implicate the acknowledged division of authority. The government is mistaken.

Its argument is that the cases in the split involve the "exceptional and extremely unusual hardship" standard set forth in 8 U.S.C. § 1229b(b)(1), while this case implicates the "extreme hardship" standard in 8 U.S.C. § 1182(h)(1)(B). BIO 13-14. But that makes no difference for purposes of the jurisdictional question presented. As the government acknowledges, the provisions "employ similar language." BIO 12. More fundamentally, the question presented is not the meaning of the underlying hardship provisions. Rather, the question is the scope of judicial review permitted by the intersection of the "Limited Review Provision," § 1252(a)(2)(B)(i), which forecloses review of "any judgment regarding the granting of relief," and § 1252(a)(2)(D), which authorizes review of "constitutional claims or questions of law."

Indeed, § 1252(a)(2)(B)(i) enumerates the sections to which it applies—and it includes both hardship provisions. Further, both hardship provisions, like all of the provisions listed in subsection (B)(i), "have one thing in common: a two-step structure in which the Attorney General makes a statutory determination, followed by a step-two discretionary decision whether to grant relief." *Patel v. Garland*, 142

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those additional facts into account, *see* Pet. App. 6a, if the Court were to grant review, those facts could be considered on remand.

S. Ct. 1614, 1633 (2022) (Gorsuch, J., dissenting); *see I.N.S. v. St. Cyr*, 533 U.S. 289, 307 (2001) (recognizing "a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand").

Ultimately, both provisions are identically subject to the judicial review provision that is directly at issue here: the exception for "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). In short, whether a hardship determination constitutes a "mixed question of law and fact" under *Guerrero-Lasprilla* does not turn on the precise hardship standard at issue.

In a further effort to distinguish the § 1182(h)(1)(B) "extreme hardship" standard from the § 1229b(b)(1) "exceptional and extremely unusual hardship" standard, the government notes that, under the former provision, hardship must be established "to the satisfaction of the Attorney General." BIO 12-13. This, the government suggests, may add an additional discretionary component to the "extreme hardship" standard (although the government itself believes this language "is not dispositive"). BIO 12. The government correctly notes (BIO 12-13) that some circuits distinguish between the two hardship standards in applying the jurisdictional provision, while other circuits treat both hardship standards the same. *Compare Singh v. Rosen*, 984 F.3d 1142, 1152 (6th Cir. 2021) (jurisdiction over exceptional and extremely unusual hardship standard but suggesting no jurisdiction over extreme hardship standard), *with Cospito v. Att'y Gen. U.S.*, 539 F.3d 166, 170 (3d Cir. 2008) (relying on exceptional and ex-

tremely unusual hardship caselaw to determine there is also no jurisdiction over extreme hardship determination); *see also, e.g.*, *Eritsian v. U.S. Att'y Gen.*, 837 F. App'x 670, 680 (11th Cir. 2020) (applying same standard to both hardship determinations).

That divergence in the lower courts is proof positive that review is warranted in *this* case. If (as the government urges) the Court grants review only in *Wilkinson*—and thus addresses the applicability of the Limited Review Provision only to the § 1229b(b)(1) hardship standard—uncertainty will remain in courts like the Sixth Circuit about how the jurisdictional provision applies to the § 1182(h)(1)(B) hardship standard. The Court may benefit from addressing the jurisdictional question presented in the context of both of the underlying hardship standards. It would be an efficient use of judicial resources, and would provide greater clarity to lower courts, for the Court to grant review in this case in order to address these related provisions together—as has been this Court's practice in other similar circumstances. *See, e.g.*, *Ortiz v. United States*, 138 S. Ct. 2165, 2172 n.2 (2018) (granting and consolidating review of petitions in multiple related cases). At an absolute minimum, given the close relationship between these questions, the Court hold this case pending resolution of *Wilkinson* and related petitions.

C. The government's suggestion of forfeiture is equally misplaced. BIO 15. The government cannot dispute that the Third Circuit expressly resolved the jurisdictional question presented and clearly articulated its rationale for doing so. Pet. App. 2a-4a. The

jurisdictional issue came into play because the government itself expressly raised this argument in response to Mr. Bystron's Third Circuit brief seeking review of the agency's extreme hardship determination. C.A. Doc. 17, at 13-19 (Jan. 21, 2021). While Mr. Bystron's brief to the panel had not preemptively addressed the government's potential jurisdictional attack, it expressly asserted that the Third Circuit had jurisdiction to review the BIA's extreme hardship determination. *See* C.A. Doc. 10, at 2 (Dec. 21, 2020). The jurisdictional issue thus was sufficiently teed up in the court of appeals. And because the Third Circuit passed upon the jurisdictional issue, this is not a case where "[n]o court has yet ruled" or where this Court would "be the first to do so." *Kiyemba v. Obama*, 559 U.S. 131, 131 (2010). The issue was pressed and passed upon below, and indeed is the sole basis for the court of appeals' decision.

D. Finally, the government's feigned confusion about the Petition's arguments is no basis for denying review. BIO 8-9. The petition is crystal clear that Mr. Bystron seeks certiorari on whether hardship determinations are "[m]ixed questions of law and fact" under *Guerrero-Lasprilla* and constitute "a preliminary step ... undertaken before the agency is authorized to exercise discretion." Pet. 9-10. The Petition points to additional missteps in the Third Circuit's reasoning, such as its apparent conflation of the extreme hardship standard and the exceptional and extremely unusual hardship standard, but that simply underscores how closely bound up the Third Circuit perceived the two standards to be. *Supra* 6-7. The key legal question was passed upon below; it is

squarely presented here; and it richly merits review now and in this case.

III. Review Is Additionally Warranted Because The Decision Below Is Contrary To This Court's Authority.

In the decision below, the Third Circuit concluded that the BIA's determination (that Mr. Bystron did not meet the extreme hardship standard) is a discretionary factual one over which courts lack jurisdiction. That conclusion is flatly at odds with this Court's decision in *Guerrero-Lasprilla*. The extreme hardship determination (like the exceptional and extremely unusual hardship determination) is a mixed question of law and fact that is subject to judicial review.

Guerrero-Lasprilla held that "questions of law" subject to judicial review under § 1252(a)(2)(D) include mixed questions of law and fact; such questions turn on the proper "application of a legal standard to undisputed or established facts." 140 S. Ct. at 1067. At issue there was the "due diligence" standard for purposes of equitable tolling under the INA, a mixed question of law and fact that involves applying the undisputed or established facts to the legal standard of "due diligence." *Id.* at 1068. Likewise here, the extreme hardship determination is also a classic mixed question of law and fact. It simply asks whether the undisputed or established facts satisfy the legal standard.

The text and structure of the statute compel that conclusion. As explained above (at 5-6), to be eligible

for relief from removal, a noncitizen must demonstrate (1) "that he satisfies various threshold requirements established by Congress," and (2) "that he merits a favorable exercise of discretion." *Patel*, 142 S. Ct. at 1619. Here, the statute establishes a two-part framework for determining whether a noncitizen is entitled to relief from removal. First, a noncitizen must make a threshold determination of eligibility for relief by satisfying a legal, statutory standard (here, extreme hardship). 8 U.S.C. § 1182(h)(1)(B). Second, once that standard is met, the agency must make a discretionary decision whether to grant relief from removal. *Id.* § 1182(h). The government and courts alike have recognized the distinction § 1182(h) draws between the threshold "extreme hardship" determination and the ultimate exercise of discretion. *See, e.g.*, 67 Fed. Reg. 78677 (2002) ("Satisfying one of the statutory standards for determining an [applicant's] threshold eligibility for seeking a waiver is only the first part of the waiver process. Even after the waiver applicant has met the required showing of 'extreme hardship,' ... the law also provides ... that the Attorney General has the discretion whether to grant affirmatively the requested relief."); *Reyes-Cornejo v. Holder*, 734 F.3d 636, 647 (7th Cir. 2013); *Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008).[4]

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[4] As noted, the IJ properly recognized how this two-part framework operates, explaining that he had discretion to grant relief from removal by waiving Mr. Bystron's inadmissibility, but only if Mr. Bystron satisfied the threshold legal determination of eligibility for such relief by demonstrating extreme hardship. *Supra* 4; Pet. App. 21a.

Under this two-part framework, the latter question leaves nothing to review beyond the agency's inherently unreviewable discretion. In sharp contrast, the former question (*i.e.*, the hardship question), is a paradigmatic application of a statutorily designated legal standard to undisputed facts—in other words, what *Guerrero-Lasprilla* held to be a reviewable mixed question of law and fact. And while courts may "lack jurisdiction over one matter" (the ultimate exercise of discretion), that "does not affect their jurisdiction over another" (the threshold eligibility determination). *Mata v. Lynch*, 576 U.S. 143, 148 (2015).

The government insists that the extreme hardship standard is purely discretionary. BIO 9-10. But that position simply cannot be squared with *Guerrero-Lasprilla*, which plainly addressed the reviewability of mixed questions. More important for present purposes, the government takes the same substantive position in *Wilkinson* but nonetheless agrees that certiorari is warranted, given the division of authority on this question. That rationale for certiorari applies equally here. *Supra* 3.

IV. This Petition Raises An Important And Frequently Recurring Issue.

This case presents a much-needed opportunity for the Court to reaffirm that eligibility for an extreme hardship waiver is a legal question subject to judicial review. As the cases cited above illustrate, *supra* 3-4, whether courts can review hardship determinations is a question that frequently recurs.

This also is a question of surpassing importance for the people to whom it applies. Because a waiver of inadmissibility can be granted solely on the basis of extreme hardship, *see* 8 U.S.C. § 1182(h)(1)(B), this agency determination can determine whether an applicant may remain in the United States or if they—and their family—will be forced to leave. And applications for extreme hardship waivers are very often denied on eligibility rather than discretionary grounds. *See, e.g.*, *Rodrigues-Nascimento v. Gonzales*, 485 F.3d 60, 61 (1st Cir. 2007); *Pena-Lopez v. Garland*, 33 F.4th 798, 802 (5th Cir. 2022); *Macharia v. Garland*, No. 21-60157, 2022 WL 3971587, at *1 (5th Cir. Aug. 31, 2022). As Congress recognized when it enacted the § 1182(h) waiver provision, removing a spouse or parent from the United States can cause extreme hardship for U.S. citizen relatives. Yet five circuits effectively hold that, so long as the BIA intones the extreme hardship standard, it may "apply [that standard] in a manner directly contrary to well-established law." *Guerrero-Lasprilla*, 140 S. Ct. at 1073. That complete denial of judicial review is flatly at odds with the fundamental importance of this question.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, plenary review should be granted. Alternatively, and at a minimum, the Court should hold this case pending its disposition of *Wilkinson v. Garland* (No. 22-666) and the similar pending petitions.

Respectfully submitted,

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