No. 22-617

IN THE

Supreme Court of the United States

FRANCISZEK KRAZSZTOF BYSTRON,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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I. The Court Should Grant, Vacate, and Remand This Case In Light Of *Wilkinson*.

Given the Court's recent ruling in *Wilkinson v. Garland*, No. 22-666, the Court should grant, vacate, and remand this case. As in *Wilkinson*, the question presented here is whether the application of a statutory hardship standard is judicially reviewable as a mixed question of law and fact under 8 U.S.C. § 1252(a)(2)(D). *See* Pet. i. The Court's analysis in *Wilkinson* directly supports Mr. Bystron's argument that the extreme hardship determination in his case is reviewable.

In *Wilkinson*, the Court held that the exceptional and extremely unusual hardship determination under 8 U.S.C. § 1229b(b)(1)(D) was reviewable as a mixed question of law and fact, following the reasoning in *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020). Slip Op. 1-2. The Court noted that the hardship determination involves two steps: First, the immigration judge "must decide whether the noncitizen is eligible for cancellation under the relevant statutory criteria." *Id.* at 2. Only if the noncitizen is eligible does the immigration judge proceed to the second step, determining whether a favorable exercise of discretion is warranted. *See id.* As this Court explained, at the first step, the immigration judge must apply the statutory criterion of "exceptional and extremely unusual hardship" to the undisputed facts presented. Slip. Op. 7. Following *Guerrero-Lasprilla*, this Court held that the first step's hardship determination involves the "application of a legal standard to

undisputed or established facts" and is therefore reviewable under § 1252(a)(2)(D). *See* 589 U. S. at 227; Slip Op. 7.

That reasoning is equally applicable to this case: Like the exceptional and extremely unusual hardship provision in § 1229b(b)(1)(D), the extreme hardship provision in § 1182(h)(1)(B) involves "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 S. Ct. 1614, 1633 (2022) (Gorsuch, J., dissenting); *see also* Waiver of Criminal Grounds of Inadmissibility for Immigrants, 67 Fed. Reg. 78675, 78677 (2002) (explaining that the Attorney General's discretion does not extend to the threshold statutory showing of "extreme hardship"); Cert. Reply 5-6. First-step determinations applying the statutory § 1182(h)(1)(B) hardship standard to a set of undisputed facts are thus mixed questions of law and fact reviewable under § 1252(a)(2)(D), for the reasons this Court set out in *Wilkinson*. *See* Slip Op. 11-12.

Tellingly, the Third Circuit has treated both statutory hardship provisions similarly when analyzing whether judicial review is permitted. In *Cospito v. Attorney General of U.S.*, 539 F.3d 166 (3d Cir. 2008), for instance, the Third Circuit relied on precedent finding no jurisdiction to review hardship determinations under § 1229b(b)(1)(D)—precedent now overturned by this Court's decision in *Wilkinson*—to conclude that it lacked jurisdiction to review a hardship determination under § 1182(h)(1)(B). *See id.* at 170 (citing precedent that the "exceptional and extremely unusual hardship" determination "is a discretionary one").

Conversely, the Third Circuit has relied on precedent finding no jurisdiction to review hardship determinations under § 1182(h)(1)(B)—specifically, *Cospito*—to conclude that it lacked jurisdiction to review a hardship determination under § 1229b(b)(1)(D). *Hernandez-Morales v. Att'y Gen. United States*, 977 F.3d 247, 249 (3d Cir. 2020) (citing *Cospito*, 539 F.3d at 170). Especially given this interchangeable reliance on precedents addressing the § 1182(h)(1)(B) and § 1229b(b)(1)(D) hardship provisions, the Third Circuit should be given the opportunity to consider in the first instance how *Wilkinson* affects its answer to the question presented.

Nothing in *Wilkinson* prevents the Third Circuit from concluding that this Court's decision applies with full force to the § 1182(h)(1)(B) hardship determination. Although *Wilkinson* declined to read into § 1229b(b)(1)(D) certain additional language found in § 1182(h)(1)(B) and other statutory hardship provisions, *see* Slip Op. 14, the opinion did not draw any conclusions about the effect of that additional language in these other statutory contexts, since those issues were not presented. On remand, the Third Circuit will be better positioned to consider this issue with the benefit of full briefing by the parties.

The Court should therefore grant, vacate, and remand this case in light of *Wilkinson* to allow the Third Circuit to decide in the first instance how this Court's reasoning impacts the reviewability of the statutory hardship determination in § 1182(h)(1)(B).

CONCLUSION

For the foregoing reasons, the Court should grant, vacate, and remand this case in light of *Wilkinson*.

Respectfully submitted,

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