No. 22-666

IN THE

Supreme Court of the United States

SITU KAMU WILKINSON,

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

REPLY BRIEF FOR PETITIONER

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The government agrees that the petition for a writ of certiorari should be granted. As the government's brief explains, there is an entrenched circuit split on the question presented—whether the application of the exceptional-hardship standard in 8 U.S.C. § 1229b(b)(1)(D) to a set of undisputed facts is judicially reviewable under the INA's Limited Review Provision, 8 U.S.C. § 1252(a)(2)(D). *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (holding that "the application of a legal standard to undisputed or established facts" is a "question[] of law" reviewable under § 1252(a)(2)(D)).

This question is important to the government and noncitizens seeking relief alike, and the issue arises with such frequency that there are already numerous petitions pending raising the same issue, with no end in sight to the steady stream that will continue to accumulate.[1] Given that there is an acknowledged cir-

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[1] *See, e.g.*, *Becerra Ortiz v. Garland*, No. 22A985 (granting extension until June 14, 2023 to file a petition for a writ of certiorari presenting this question); *Osorio v. Garland*, 2023 WL 3066678 (10th Cir. Apr. 25, 2023) (dismissing appeal for lack of jurisdiction to review the application of the exceptional-hardship standard to undisputed facts under existing Tenth Circuit precedent); *Garcia-Pascual v. Garland*, 62 F.4th 1096 (8th Cir. 2023) (same, under existing Eighth Circuit precedent); *id.* at 1103 (Arnold, J., concurring) (agreeing that circuit precedent compelled dismissal but expressing the view that *Guerrero-Lasprilla* "makes clear that we have jurisdiction to review this mixed question of law and fact"). As the government notes (at 14 n.3), the Ninth Circuit was considering en banc a case in which it might address the question presented. *De La Rosa-Rodriguez* v. *Garland*, 49 F.4th 1282 (9th Cir. 2022). The Ninth Circuit has since suspended those proceedings at the government's request and is holding the case in abeyance pending this

cuit split on the question presented—the parties agree that there are at least three circuits on each side of the split, even if they disagree about the precise breakdown of the split—there is no possibility that the split will go away without this Court's intervention. And the government agrees that this petition presents a clean and suitable vehicle for this Court to resolve this important question. This Court's review is therefore warranted.

The government's brief largely focuses on the merits. Although a more extensive discussion is appropriate at the merits stage, the arguments advanced in the government's brief are unpersuasive.

1. The government's primary argument is that courts can review whether the agency used the right legal standard in evaluating the hardship criterion, but the "fact-intensive" task of applying the hardship standard to the undisputed facts of any particular case falls outside of the INA's Limited Review Provision. This is the same argument the government made in *Guerrero-Lasprilla*, and this Court rejected it.

In *Guerrero-Lasprilla*, this Court considered whether the application of "the equitable tolling due diligence standard to the 'undisputed' (or established) facts" was a judicially reviewable "question of law." 140 S. Ct. at 1068. As here, the government argued that this question was too "factual" to fall within the Limited Review Provision. Br. for Respondent 31, *Guerrero-Lasprilla*, *supra* (Nos. 18-776

Court's disposition of the petition in this case. *See De La Rose-Rodriguez v. Garland*, No. 20-71923 (9th Cir. May 17, 2023), ECF No. 82.

& 18-1015). In making the due-diligence determination, the relevant agency decisionmaker has "to become immersed in the facts and procedural history of the case as well as the circumstances of the litigant," consider all of the "case-specific historical facts," and weigh those facts "one against another to make the ultimate determination whether, in pursuing his rights, the litigant has been reasonably diligent." *Id.* at 16, 35 (citation omitted). And because that inquiry "entails primarily factual work," the government said that it was not subject to judicial review. *Id.* at 51. The only aspect of the inquiry subject to judicial review, the government argued, was whether the "legal standard the Board used was correct"—the same argument the government makes here. *Id.* at 27.

This Court decisively rejected that argument, holding that "interpreting the Limited Review Provision to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard"—a result that was contrary to the Limited Review Provision's text and history, and contrary to the strong presumption of reviewability that applies to administrative actions. *Guerrero-Lasprilla*, 140 S. Ct. at 1070. Accordingly, the Court held that "the statutory term 'questions of law'" in the Limited Review Provision "includes the application of a legal standard to established facts"—even in the context of what the government argued was a heavily factual due-diligence determination. *Id.* at 1072.

The government offers no way to distinguish this case from *Guerrero-Lasprilla* aside from breezily suggesting (at 12) that that case "has nothing to do

with the question presented here." The government contends that nothing in *Guerrero-Lasprilla* forecloses the existence of a "third category" of "discretionary" decisions that are not subject to judicial review, and in the government's view, the fact-intensive application of the statutory hardship standard to undisputed facts fits the bill. *Id.*

It is unclear what the government means when it says that the hardship inquiry is "discretionary"—*Guerrero-Lasprilla* did not contemplate this third category of non-factual, non-legal questions, and the government did not argue that any such category existed in its briefing in that case. If the government means to emphasize that the inquiry involves consideration of numerous contextual factors, some of which are qualitative, or that the inquiry involves an evaluation of case-specific facts, then that is surely true—but the same was true of the due-diligence standard in *Guerrero-Lasprilla*, and that did not make the inquiry "discretionary." It made the inquiry a mixed question of law and fact that falls within the INA's Limited Review Provision.[2]

To be sure, there is a discretionary component to the broader cancellation-of-removal determination—no one is entitled to cancellation as a matter of course. But the discretionary component—the agen-

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[2] As courts have recognized, the relevant statutory language is not "so amorphous as to turn this factor into a standardless discretionary call under the Administrative Procedure Act." *Singh v. Rosen*, 984 F.3d 1142, 1152 (6th Cir. 2021) (citing *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370-372 (2018)). The category of cases in which there is truly no legal standard to apply is "quite narrowly" construed, and the government does not argue that this is one of "those rare circumstances." *Weyerhaeuser*, 139 S. Ct. at 370 (citation omitted).

cy's exercise of discretion to grant or deny cancellation—applies *after* an agency adjudicator determines whether the noncitizen is *statutorily eligible* for that discretion to be exercised. *See* 8 U.S.C. §§ 1229b(b)(1), 1229a(c)(4)(A); *Pereida v. Wilkinson*, 141 S. Ct. 754, 759 (2021). The agency does not, however, have discretion with respect to the hardship requirement—once the relevant facts have been found, the hardship requirement is either satisfied or it is not. As the Sixth Circuit has recognized in rejecting the government's arguments, the INA provides that the Attorney General "may cancel removal" if the four statutory criteria are met, but "the statute does not use the word 'may' when delineating the eligibility requirements." *Singh v. Rosen*, 984 F.3d 1142, 1151 (6th Cir. 2021). "Simply put, the plain text does not leave the hardship decision (as compared to the final cancellation-of-removal decision) to agency 'discretion.'" *Id.*

The government also invokes the "good moral character" eligibility criterion as a reason to adopt the view that these eligibility criteria can be as discretionary as the final cancellation decision. Br. for Respondent 9. As the government notes, some courts have held that the application of the "good moral character" criterion is unreviewable. *Id.* (citing pre-*Guerrero-Lasprilla* cases from the First and Ninth Circuits). But the government omits that other courts have reached precisely the opposite conclusion, holding that, in light of *Guerrero-Lasprilla*, "the question whether the historical facts show that an immigrant lacks 'good moral character' ... qualifies as a mixed question" that is subject to judicial review. *Hernandez v. Garland*, 59 F.4th 762, 763 (6th Cir. 2023); *see also Cruz-Velasco v. Garland*, 58 F.4th

900, 903 (7th Cir. 2023). Unsurprisingly, the circuit split on that issue seems to roughly mirror the circuit split on the question presented here—which only underscores the need for this Court's review. Granting review in this case and resolving the question presented will no doubt inform—if not be dispositive of—the related "good moral character" question on which the circuits are likewise split.

Indeed, the Board's own application of the hardship requirement demonstrates its non-discretionary nature. The Board has often noted its lack of discretion with respect to the hardship requirement, commenting that if a noncitizen "were eligible for cancellation of removal, we would grant such relief in the exercise of discretion," but that it had no discretion to do so because of its determination that the established facts did not satisfy the statutory hardship requirement. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001); *see also, e.g.*, *Garcia-Pascual v. Garland*, 62 F.4th 1096, 1100 (8th Cir. 2023); *Gonzalez Galvan v. Garland*, 6 F.4th 552, 556 (4th Cir. 2021); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 322 (B.I.A. 2002); *In re Loera Lujan*, 2004 WL. 2374696, at *1 (B.I.A. Aug. 9, 2004).

2. The government also argues (at 10-11) that the history of this criterion shows that Congress wanted to insulate the hardship determination from judicial review by vesting discretion in the Attorney General. But when Congress wants to vest the Attorney General with discretion in making a hardship determination, it knows how to do so. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (stating, in the context of discretionary waiver of inadmissibility, that "extreme hardship" must be "established to the satisfaction of

the Attorney General" and "[n]o court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause"); *id.* § 1182(i) (similar). The cancellation-of-removal statute does not contain similar "to the satisfaction of the Attorney General" language, "[a]nd courts presume that Congress acts intentionally when it uses different language across similar provisions." *Singh*, 984 F.3d at 1152 (deeming these differences in language material to the reviewability of hardship determinations under § 1229b(b)(1)(D)).

Furthermore, a prior version of the cancellation-of-removal statute *did* contain language similar to § 1182(a)(9)(B)(v)—providing that hardship had to be found "in the opinion of the Attorney General"—but Congress removed that language in 1996 with the enactment of IIRIRA. Pet. 24-25 (discussing history of cancellation-of-removal statute). Ultimately, then, Congress decided on an objective standard rather than one that is focused on the Attorney General's subjective evaluation of hardship.

In response to this history, the government suggests (at 11) that it is unlikely that Congress wanted to expand judicial review in a statute (IIRIRA) aimed at narrowing the class of individuals eligible for cancellation. But the question of judicial review is different from the nature of the hardship requirement (*i.e.*, whether it is an objective legal standard or a more discretionary judgment call). The latter question is informed by IIRIRA's change in statutory language. But the reviewability of that determination is the result of the Congress's decision to incorporate the Limited Review Provision into the INA through

the Real ID Act of 2005[3]—a statute that unquestionably expanded the jurisdiction of the courts of appeals to directly review issues previously precluded by IIRIRA. *See Elia v. Gonzales*, 431 F.3d 268, 272 (6th Cir. 2005). Thus, if Congress's "implicit[] inten[t]" were relevant to the question of judicial review, Br. for Respondent 11, it would be the implicit intent of Congress in 2005—a Congress that unquestionably *did* seek to expand judicial review beyond what the 1996 Congress may have intended. *See Guerrero-Lasprilla*, 140 S. Ct. at 1071-1072; *Patel v. Garland*, 142 S. Ct. 1614, 1623 (2022).

In any event, it would be improper to override the plain text of the statute based on the government's musings about Congress's intent in 1996, or based on the overall purpose of that statutory overhaul. The government's argument at best points to statutory ambiguity, and the "well-settled" and "strong presumption" favoring judicial review of administrative action requires any ambiguity to be resolved in favor of Mr. Wilkinson. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quotation marks omitted). The government surprisingly does not even mention this presumption, let alone account for the role that the presumption plays in the government's merits arguments.

Further discussion of the merits is more appropriately deferred to the merits stage of the case. The Court should grant certiorari and resolve this important case, as both parties request.

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[3] Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 302, 310; *see Kucana v. Holder*, 558 U.S. 233, 239 n.1 (2010).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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