No. 22-666

IN THE

Supreme Court of the United States

SITU KAMU WILKINSON,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), the Attorney General has discretion to cancel removal of a nonpermanent resident, but only if the nonpermanent resident satisfies four eligibility criteria. The fourth criterion is "that removal would result in exceptional and extremely unusual hardship" to the applicant's immediate family member who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D).

The INA specifies that federal courts can review "questions of law" that arise in removal proceedings, 8 U.S.C. § 1252(a)(2)(D), while otherwise stripping federal courts of jurisdiction to review cancellation-of-removal determinations, *id.* § 1252(a)(2)(B)(i). This Court recently held, in interpreting § 1252(a)(2)(D), that the "statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts"—that is, a "mixed question of law and fact." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068-1069 (2020).

The question presented is whether the agency's determination that a given set of facts does not meet the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under § 1252(a)(2)(D).

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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INTRODUCTION

This case involves a straightforward application of this Court's recent decision in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020). That case, like this one, involved 8 U.S.C. § 1252(a)(2)(D), which preserves the jurisdiction of federal courts to review "questions of law" even if another statutory provision "limits or eliminates judicial review" of the relevant agency decision. The question in *Guerrero-Lasprilla* was "whether the phrase 'questions of law' … includes the application of a legal standard to undisputed or established facts." 140 S. Ct. at 1067. This Court unequivocally held that this statutory phrase *does* encompass such a "mixed question of law and fact." *Id.* at 1069. And the two dissenting Justices acknowledged that the Court's holding was categorical. *See id.* at 1074 (Thomas, J., dissenting) ("[T]he Court categorically proclaims that federal courts may review immigration judges' applications of *any* legal standard to established facts…."). Applying that rule, the Court held that whether a given set of facts establishes "due diligence for equitable tolling purposes" is a "question[] of law" over which federal courts retain jurisdiction. *Id.* at 1068 (majority opinion).

The question in this case involves eligibility for cancellation of removal, not eligibility for equitable tolling, but the relevant legal principles are the same. Cancellation of removal is one of the most important forms of immigration relief—it is often the only means to prevent the enormous hardship that the removal of deserving noncitizens will impose on their families in the United States. To be eligible for

cancellation of removal, a noncitizen must establish that her removal would "result in exceptional and extremely unusual hardship" to an immediate family member who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D). The question in this case is whether the agency's determination that an established set of facts meets the statute's "exceptional and extremely unusual hardship" standard is a "question[] of law" that courts can review under § 1252(a)(2)(D).

Under *Guerrero-Lasprilla*, the answer to that question is plainly yes: "the statutory phrase 'questions of law'" in § 1252(a)(2)(D) "includes the application of a legal standard to undisputed or established facts." 140 S. Ct. at 1068. And the statute's cancellation provision establishes a legal standard for eligibility that the agency must apply and an applicant must meet: "exceptional and extremely unusual hardship" to a qualifying U.S. relative. Whether a specific set of "undisputed or established facts" meets this legal standard is precisely the type of question that *Guerrero-Lasprilla* holds is a "question[] of law" that federal courts can review. That should be the end of the matter.

The government nevertheless insists that the question presented in this case is somehow distinguishable from *Guerrero-Lasprilla*, and some courts of appeals have agreed. The basic thrust of the government's argument, as adopted by some courts, is that the "exceptional and extremely unusual hardship" standard is not actually a "legal" standard but something else. The government and courts of appeals have struggled to explain what that something else is, throwing around words like "fact-intensive," "sub-

jective," and "discretionary." But the basic point seems to be that, at a gestalt level, whether a given set of facts constitutes "exceptional and extremely unusual hardship" requires too much parsing of case-specific facts to be "legal."

That argument is irreconcilable with *Guerrero-Lasprilla*. After all, in *Guerrero-Lasprilla*, this Court held not only that mixed questions of law and fact are reviewable "questions of law" but also that the "due diligence" requirement for equitable tolling is a "legal standard" such that a federal court can review the agency's decision that an established set of facts failed to meet that standard. That was true even though the question of whether a noncitizen exercised "due diligence" is about as fact-intensive as it gets. What matters under *Guerrero-Lasprilla*, then, is not how deeply the reviewing court must wade into established, case-specific facts. What matters is a simpler question: does the inquiry involve *finding* facts, or does it involve determining whether *established* facts meet the applicable legal standard? The second inquiry is reviewable; the first is not. Given that holding, there is no way to coherently view the due-diligence standard at issue in *Guerrero-Lasprilla* as a legal standard but the hardship standard here as something different.

Moreover, even if it were theoretically possible to consider the due diligence standard "legal" but the hardship standard somehow non-legal, interpreting "questions of law" to require such abstract distinctions violates the "rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11 (2015). Indeed, the courts of appeals that currently try to distinguish

between "legal" standards and some other type of "subjective" or "discretionary" standard have issued incompatible and disjointed decisions about whether federal courts have jurisdiction to review agency decisions concerning, for instance, whether a given set of facts establishes "extreme cruelty," "extreme hardship," or "good moral character." Far from creating the "clear boundaries" this Court looks for in interpreting jurisdictional statutes, the government's approach would lead to a morass in which the federal courts would be tied up in years, if not decades, of disputes about which of the many statutory standards in the INA meet some vague test for being truly "legal" standards as opposed to something else.

Neither the statute nor this Court's decision in *Guerrero-Lasprilla* permits this uncertainty and confusion. And because this Court presumes that agency determinations are reviewable absent clear and convincing evidence to the contrary, the statute would have to *compel* this confusion to foreclose judicial review of hardship determinations. Nothing in the statute does so. *Guerrero-Lasprilla*'s straightforward holding controls here, and this Court should reverse.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-4a) is unreported; it is available at 2022 WL 4298337. The decisions of the Board of Immigration Appeals (Pet. App. 5a-6a) and the immigration judge (Pet. App. 7a-55a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2022. After an extension, the petition for a writ of certiorari was timely filed on January 17, 2023, and granted on June 30, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides:

> 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) provides in relevant part:

> **(B) Denials of discretionary relief**
>
> Notwithstanding any other provision of law * * * 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 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title * * * *
>
> **(D) Judicial review of certain legal claims**
>
> Nothing in subparagraph (B) * * * 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.

The full text of § 1229b(b)(1) and § 1252(a)(2), together with other relevant statutes, is reproduced in the Petition Appendix.

STATEMENT

A. Statutory framework

1. Cancellation of removal

For many decades, Congress has authorized the Attorney General[1] to allow noncitizens who have long resided in the United States and have immedi-

[1] The Attorney General has delegated this statutory authority to immigration judges and the Board of Immigration Appeals. *See* 8 C.F.R. §§ 1003.1, 1003.10.

ate family members who are U.S. citizens or lawful permanent residents to remain in this country even if they are otherwise removable. This form of relief, currently called cancellation of removal, is among the most important in the immigration laws. Often it is the only way to allow the most deserving noncitizens to remain in this country and prevent the enormous hardship that their removal will impose on their families.

a. Congress passed the predecessor to the cancellation statute during World War II following criticism from Immigration and Naturalization Service (INS) officials about the discretionary relief available under then-existing law. *See* S. Rep. No. 81-1515, at 595-596 (1950). As the INS officials explained, U.S. immigration laws permitted discretionary relief only to those seeking admission to the United States, and not to those who had already long resided here. *Id.* There had been "a large number of cases" involving noncitizens "who were in the United States in an illegal status" who "had established family ties here." *Id.* Some critics of the then-existing legal structure believed that "deport[ing] these aliens would result in a serious economic detriment to [their] family," *id.* at 600—a particularly harsh result given that "in many cases the only ground for deportation was a technical charge." *Id.* at 596. They observed that it would work "an extreme hardship to compel aliens to return abroad merely for the purpose of obtaining an immigration visa." *Id.*

Congress provided a remedy called suspension of deportation. *Id.* The original provision, passed in 1940, stated that the Attorney General "may … suspend deportation" of certain noncitizens. Alien Reg-

istration Act, 1940, Pub. L. No. 76-670, ch. 439, § 20, 54 Stat. 670, 672. But the Attorney General could exercise that discretion only if the applicant satisfied enumerated eligibility criteria: the applicant had to "prove[] good moral character for the preceding five years," and the Attorney General had to "find[] that [the applicant's] deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." *Id.*

Dating back to the 1940s, then, the relevant inquiry involved two steps. A noncitizen had to demonstrate first that he was "eligible for suspension of deportation" and second that "his case merit[ed] favorable discretion[]." S. Rep. No. 81-1515, at 598; *see also id.* at 600. The second, discretionary determination could be based on a wide variety of unenumerated factors, such as the noncitizen's employment record, home life, record of run-ins with law enforcement, "and other pertinent facts that the course of the investigation may suggest." *Id.* at 598.

This two-step path was not unusual. It reflected a broader and "traditional[] … distinction" in the law "between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr*, 533 U.S. 289, 307 (2001). "Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307-308 (quoting *Jay v. Boyd*, 351 U.S. 345, 353-354 (1956)).

b. In the decades that followed, Congress amended the suspension statute on several occasions, changing the eligibility criteria but maintaining the same two-part structure as the 1940 statute.

In 1948, for example, Congress revised the statute to allow the Attorney General to suspend the deportation of noncitizens who had resided in the United States for more than seven years and showed good moral character. Act of July 1, 1948, Pub. L. No. 80-863, ch. 783, 62 Stat. 1206. For those who met the seven-year-residency requirement, no showing of hardship was necessary, but suspensions for a period of more than six months were contingent on congressional approval, *id.*—a requirement that ultimately proved "not workable" in practice and was later removed. *INS v. Chadha*, 462 U.S. 919, 933-934 (1983).

Congress overhauled the suspension statute as part of the passage of the INA in 1952, creating five categories of eligible noncitizens. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214-216. For each category, Congress imposed eligibility requirements regarding continuous physical presence in the United States, moral character, and hardship, and established various mechanisms of congressional oversight. *Id.* Most relevant here, in each category the noncitizen was required to be a "person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship" to the noncitizen or a qualifying U.S. relative. *Id.*

Next, in 1962, Congress streamlined the suspension provision into two classes of eligible noncitizens. Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76

Stat. 1247, 1247-1248. For both classes, eligibility for suspension required continuous physical presence in the United States for a specified period, good moral character, and hardship, and exercises of discretion to cancel removal were subject to congressional oversight. Notably, Congress assigned different hardship requirements to the two classes of eligible noncitizens. Applicants who had been convicted of specified criminal offenses were required to be "person[s] whose deportation would, in the opinion of the Attorney General, result in *exceptional and extremely unusual hardship*" to the applicant or to a qualifying U.S. relative. *Id.* at 1248 (emphasis added). All other applicants had to be "person[s] whose deportation would, in the opinion of the Attorney General, result in *extreme hardship*" to the applicant or to a qualifying U.S. relative. *Id.* at 1247-1248 (emphasis added).

c. In 1996, Congress enacted the current form of relief—called cancellation of removal—in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-594, 3009-615. *See* 8 U.S.C. § 1229b(a)-(b). The statute now authorizes the Attorney General to cancel removal for "certain permanent residents" (§ 1229b(a)) and "certain nonpermanent residents" (§ 1229b(b)) who are otherwise removable. This case is about the latter subparagraph.

As was true of the various iterations of the previous suspension statute, the current cancellation statute permits applicants who satisfy eligibility criteria to be considered for cancellation of removal, which the Attorney General has discretion to grant. In other words, "[t]o be eligible for" discretionary re-

lief at all, "a noncitizen must" first "show that he satisfies various threshold requirements established by Congress." *Patel v. Garland*, 142 S. Ct. 1614, 1619 (2022). Only if those statutory criteria have been met does "an eligible noncitizen" have the opportunity to "persuade the immigration judge that he merits a favorable exercise of discretion." *Id.* And IIRIRA imposed a statutory cap on the number of noncitizens who can actually have discretion exercised in their favor—a maximum of 4,000 noncitizens each fiscal year. 8 U.S.C. § 1229b(e).

The current cancellation statute contains four distinct eligibility criteria for nonpermanent residents seeking relief. The applicant must establish (1) continuous presence in the United States for the prior ten years; (2) "good moral character" during that same period; (3) no convictions for specified criminal offenses; and (4) "that removal would result in 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)(A)-(D). This case concerns the fourth requirement.

d. The Board of Immigration Appeals has, through formal adjudication in a precedential decision, interpreted the meaning of the statutory term "exceptional and extremely unusual hardship" to "clarify its meaning" and provide guidance to immigration judges and the Board. *See In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 58-60, 63 (2001). In doing so, the Board used the traditional tools of statutory interpretation: the statute's text and history, dictionary definitions of statutory terms, and precedent. *Id.* at 58-63.

After consulting these sources, the Board concluded that the statutory hardship standard requires an applicant to demonstrate hardship that is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country," though the hardship need not be so great as to be "unconscionable." *Id.* at 60, 62.

After examining precedent, the Board then identified factors that adjudicators should consider in determining whether an applicant satisfies the statutory hardship standard. Those factors include "the ages, health, and circumstances of qualifying [U.S.] relatives." *Id.* at 63. For example, the Board noted that "an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case." *Id.* And "[a]nother strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school." *Id.*

The Board also instructed that "all hardship factors should be considered in the aggregate," rather than individually. *Id.* at 64.

2. The INA's jurisdictional provisions

Federal courts of appeals generally have jurisdiction to hear petitions for review of "final order[s] of removal." 8 U.S.C. § 1252(a)(1). But Congress has imposed certain limitations on that jurisdiction. *Id.* § 1252(a)(2).

As relevant here, Congress has stripped federal courts of jurisdiction to review certain denials of discretionary relief from removal, including "any judgment regarding the granting of relief under section … 1229b," the cancellation statute. *Id.*

§ 1252(a)(2)(B)(i). But this bar on judicial review "has an important qualification." *Patel*, 142 S. Ct. at 1619. "Nothing in subparagraph (B)," the statute clarifies, "shall be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D).

This Court has dubbed § 1252(a)(2)(D) the "Limited Review Provision." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1071 (2020). And this Court has held that "the statutory term 'questions of law'" in the Limited Review Provision includes not only "pure" questions of law but also mixed questions of law and fact, *i.e.*, "the application of a legal standard to established facts." *Id.* at 1070, 1072.

B. Agency proceedings

Petitioner Situ Wilkinson was born in Trinidad and Tobago. Pet. App. 12a. In early 2003, police came to his house, beat him, threatened him at gunpoint, and robbed him. Pet. App. 15a-16a. When he tried to complain to authorities, officers again attacked him, fired gunshots past his ear, and threatened to kill him if he pursued his complaint. Pet. App. 16a-17a. Mr. Wilkinson went into hiding, then fled to the United States a few weeks later on a tourist visa. Pet. App. 12a, 17a. Scared to return to Trinidad and Tobago, he has lived here ever since. Pet. App. 2a, 17a-18a. Although Mr. Wilkinson overstayed his visa, he did not commit an immigration crime such as unlawful entry or reentry, and he has no criminal convictions.

Mr. Wilkinson "built a life here" and in 2013 had a son, M., with his then-girlfriend Kenyatta Watson. Pet. App. 2a, 13a. Both M. and Ms. Watson are U.S.

citizens. Pet. App. 12a, 58a. M. has significant health problems, including severe asthma that triggers sudden attacks that send M. to the hospital several times a year despite ongoing treatment and medication. Pet. App. 19a, 27a.

Before being detained, Mr. Wilkinson lived in Pennsylvania, where he worked to provide a living for himself and financial assistance to M. and Ms. Watson, who moved to New Jersey when M. was two years old to live with Ms. Watson's mother. Pet. App. 13a. Mr. Wilkinson sent almost half of his earnings to M. and Ms. Watson. Pet. App. 12a-13a. "In his community, he helped his neighbors with free home repairs, roof repairs, and moving groceries for the elderly." Pet. App. 15a. Each weekend, Mr. Wilkinson took public transportation down to New Jersey to be with M. and Ms. Watson. Pet. App. 13a; A.R. 128, 130-131.

In July 2019, Mr. Wilkinson was working on repairs in a house when police arrested him after finding drugs inside the house. Pet. App. 14a. Mr. Wilkinson did not own or live in the house; instead, he had been working for the owner of the house for about a month at the time of his arrest. Pet. App. 15a. He protested that "the drugs were not his, and that he was in the wrong place at the wrong time." Pet. App. 14a-15a. The charges were ultimately withdrawn,[2] but when Mr. Wilkinson appeared in a Pennsylvania courthouse to contest them, he was arrested and detained by federal immigration officials, Pet. App. 9a.

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[2] *See* Docket, *Pennsylvania v. Wilkinson*, No. CP-23-CR-0005850-2019 (Pa. Ct. C.P. Del. Cnty.).

The Department of Homeland Security (DHS) charged Mr. Wilkinson as removable for overstaying his visa, and Mr. Wilkinson applied for cancellation of removal. Pet App. 9a-10a. He argued that his removal would cause exceptional and extremely unusual hardship to his son, who was just six years old at the time Mr. Wilkinson was detained. Pet. App. 13a, 26a.

An immigration judge held a hearing on Mr. Wilkinson's application. Mr. Wilkinson testified to his close relationship with M., his role as the income provider for M. and M.'s mother, and M.'s significant health issues, including his asthma attacks and visits to the hospital. Pet. App. 13a-14a. Ms. Watson testified that Mr. Wilkinson "provides everything for [M.]": "He provides his clothing. He provides his living arrangements and he provides transportation for me to get him back and forth to school. He provides parenting skills. He provides it all." A.R. 240-241. Ms. Watson does not work and suffers from depression, which frequently would cause her to drop M. off at her mother's house "and leave him for days because she needed a break" from parenting. Pet. App. 20a-21a.

Witnesses also testified about the hardship that M. was already suffering due to Mr. Wilkinson's absence while in immigration detention. Mr. Wilkinson testified that M.'s first-grade teacher reported that M. was "in a daze" because of his father's situation and recommended counseling. Pet. App. 13a, 57a. But Ms. Watson, who herself suffers from depression, would not allow M. to receive counseling. Pet. App. 19a, 62a-63a. Mr. Wilkinson explained that he disagreed with that decision but had no realistic ability

to ensure his son receives therapy from immigration detention, much less from outside the country. Pet. App. 13a, 57a.

M.'s grandmother, Tracy Collins, likewise testified that M. had been "acting out, and breaking things" because of his father's detention. Pet. App. 21a. She also expressed concern about Ms. Watson's ability to care for M. Ms. Collins fears M. will "be lost" without Mr. Wilkinson, whom she described as "an awesome parent." A.R. 282, 285-286, 288. Mr. Wilkinson and Ms. Watson expressed similar fears, noting that M. needs a "father figure," Pet. App. 14a, and has no "other male role models," Pet. App. 19a-20a. As someone whose own father was killed when he was just eight years old, Mr. Wilkinson testified that he worries M. will be "lost to the streets" without a father figure. Pet. App. 14a.

The immigration judge found that Mr. Wilkinson, Ms. Watson, and Ms. Collins all testified candidly and credibly. Pet. App. 23a-24a. Because DHS had conceded that Mr. Wilkinson satisfied the first three statutory criteria for cancellation of removal, there was only one disputed issue concerning his eligibility: whether the established facts satisfied § 1229b(b)(1)(D)'s hardship standard. Pet. App. 25a-26a. As to that question, the immigration judge concluded that the facts did not satisfy the standard for "exceptional and extremely unusual hardship because they did not "rise[] to such a level." Pet. App. 29a. The immigration judge therefore denied cancellation of removal. Pet. App. 29a, 54a.

The Board affirmed without opinion by order of a single temporary appellate immigration judge. Pet. App. 5a-6a & n.1. The immigration judge's decision

is therefore "the final agency determination." Pet. App. 6a; *see* 8 C.F.R. § 1003.1(e)(4)(ii).

C. Third Circuit proceedings

Mr. Wilkinson petitioned for review in the Third Circuit, arguing that the court had jurisdiction to review the agency's hardship determination as a mixed question of law and fact. The court of appeals summarily dismissed that portion of the petition for lack of jurisdiction, citing its prior published decision in *Hernandez-Morales v. Attorney General*, 977 F.3d 247 (3d Cir. 2020). Pet. App. 3a. In *Hernandez-Morales*, the Third Circuit rejected the argument that the agency's hardship determination was reviewable as a mixed question of law and fact, concluding that the ultimate hardship determination "is a discretionary judgment call." *Id.* at 249.

This Court granted certiorari.

SUMMARY OF ARGUMENT

To be eligible for cancellation of removal, an applicant must establish that his "removal would result in exceptional and extremely unusual hardship" to a qualifying U.S. family member. 8 U.S.C. § 1229b(b)(1)(D). Federal courts have jurisdiction to review the Board's determination about whether the settled or undisputed facts satisfy that statutory standard. This conclusion directly follows from this Court's recent decision in *Guerrero-Lasprilla v. Barr*, which held that this "statutory term 'questions of law' includes the application of a legal standard to established facts," *i.e.*, a "mixed question of law and fact." 140 S. Ct. 1062, 1069, 1072 (2020).

That holding was guided by the "well-settled and strong presumption" of judicial review of agency action. *Id.* at 1069 (quotation marks omitted). It was also in harmony with the rule favoring clear jurisdictional boundary lines, which allow courts and litigants to predictably discern whether a federal court will have power to resolve a particular issue. Consistent with these canons of statutory construction, this Court in *Guerrero-Lasprilla* rejected two interpretations of the Limited Review Provision advanced by the government. One would have foreclosed judicial review of *any* mixed questions, and the other would have foreclosed judicial review of mixed questions that are "primarily factual," such as the agency's determination that a noncitizen failed to establish "due diligence" to equitably toll the deadline for moving to reopen a final order of removal. Rather than adopt either of these interpretations, this Court categorically held that the agency's application of a legal standard to established or undisputed facts is "a question[] of law" under the Limited Review Provision that is reviewable in federal court.

That straightforward holding controls the outcome here. The statute's text and agency practice both make clear that the cancellation statute's hardship provision establishes a legal standard—"exceptional and extremely unusual hardship"—that immigration judges apply to the facts of each case. That determination constitutes a mixed question of law and fact that federal courts have jurisdiction to review.

Courts that have reached a contrary conclusion, and the government in its certiorari-stage briefing, have reasoned that the hardship determination is "fact-intensive," "subjective," or "discretionary" be-

cause the statutory hardship standard is not susceptible to mechanical application. Instead, it requires an adjudicator to consider and weigh multiple factors, context, and the facts established by the applicant. Thus, they say, the hardship determination must be something other than a legal or mixed question. That reasoning is irreconcilable with *Guerrero-Lasprilla*, which involved a legal standard ("due diligence") that is at least as fact-intensive and non-mechanical as the hardship standard. And even if that were not the case, carving out hardship determinations from *Guerrero-Lasprilla*'s bright-line rule because they are more fact-intensive, subjective, or discretionary than due-diligence determinations would invite nonstop litigation over the jurisdictional status of every legal standard underlying the myriad matters covered by an INA jurisdiction-stripping provision. That messy outcome is exactly what the rule favoring clear jurisdictional lines is intended to prevent.

In any event, it is simply wrong to characterize the hardship determination as "subjective" or "discretionary." The cancellation statute sets forth an objective standard, which the Board has further interpreted in precedential opinions to guide decisionmaking by agency adjudicators. Nothing in the statute, agency regulations, or any Board precedents suggests that immigration judges should be making hardship determinations based on their own subjective views about what degree of hardship warrants a noncitizen being eligible for cancellation.

Nor is the hardship determination "discretionary." There *is* a discretionary component to cancellation decisions: the ultimate decision whether to grant

cancellation to applicants who have proven they have satisfied the statutory eligibility criteria. But the eligibility criteria themselves are not discretionary, and agency adjudicators do not treat them that way. Instead, they treat the hardship standard as what it is—a legal standard that must be applied to the facts of each case to determine whether an applicant is eligible for cancellation. Just like the due-diligence standard and countless other legal standards—from qualified immunity to fair use—the application of the hardship standard to the established facts is a mixed question of law and fact. And under *Guerrero-Lasprilla*, that means it is reviewable.

ARGUMENT

The INA's Limited Review Provision permits federal courts to review the Board's application of the statutory hardship standard to established facts.

The INA preserves the jurisdiction of federal courts to review "constitutional claims or questions of law" with respect to agency determinations that are otherwise unreviewable. 8 U.S.C. § 1252(a)(2)(D). And "the statutory term 'questions of law' includes the application of a legal standard to established facts." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020). Thus, consistent with the ordinary presumption favoring judicial review, federal courts are not barred from reviewing the Board's application of a legal standard to established facts. That holding is controlling here. The cancellation-of-removal statute sets forth a legal standard—"exceptional and extremely unusual hardship"—that must be applied to the facts of each case. Under *Guerrero-Lasprilla*,

then, the Board's application of the hardship standard to undisputed or established facts falls squarely within "the statutory term 'questions of law'" and is reviewable in federal court. 140 S. Ct. at 1072.

A. Two canons of statutory construction guide this Court's review of the INA's jurisdictional provisions.

Because this case concerns a jurisdictional provision, two canons of statutory construction come into play.

Presumption of judicial review of agency action.— The first relevant canon is the "well-settled and strong presumption" of judicial review of agency action. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quotation marks omitted). "Separation-of-powers concerns" lie at the heart of this presumption. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (2000) (Thomas, J., dissenting) ("Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights."). The presumption "guard[s] against arbitrary government," ensuring that "no one person, group, or branch may hold all the keys of power over a private person's liberty or property"—at least not unless Congress speaks clearly to the contrary. *Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1383-1384 (2020) (Gorsuch, J., dissenting) (citation omitted).

The presumption is likewise grounded in the practical understanding that Congress rarely "mean[s] to prohibit all judicial review." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 672 (1986) (citation

omitted). "Absent [judicial] review," an agency's "compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 488 (2015). And this Court "know[s]—and know[s] that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 489.

Congress also "legislates with knowledge of [this Court's] basic rules of statutory construction," including the presumption of judicial review. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Accordingly, "the [government] bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." *Mach Mining*, 575 U.S. at 486 (quotation marks and brackets omitted). To overcome the presumption, the government must provide "'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (citation omitted). If it does not—if the statute "is reasonably susceptible to divergent interpretation"—this Court adopts a reading "that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Id.* (quotation marks omitted).

Rule favoring clear jurisdictional boundary lines.—The second centrally important canon of statutory construction is the "rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11 (2015). This canon recognizes that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Bright lines assure

litigants of uniformity and predictability about whether a particular tribunal may hear a given dispute. *Id.* at 94-95; *see Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982) (adopting an interpretation that would avoid "the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat"). In contrast, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate" jurisdiction, rather than the merits. *Hertz*, 559 U.S. at 94. And because jurisdictional lines "mark the bounds of a court's adjudicatory authority," *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (quotation marks omitted), courts likewise "benefit from straightforward rules under which they can readily assure themselves of their power to hear a case," *Hertz*, 559 U.S. at 94.

B. This Court has interpreted the Limited Review Provision to preserve judicial review of the Board's application of a legal standard to established facts.

Consistent with these interpretive principles, this Court held just a few Terms ago that the Limited Review Provision permits judicial review over the agency's application of a legal standard to established or undisputed facts. *Guerrero-Lasprilla*, 140 S. Ct. at 1068-1069. The case arose in the context of discretionary requests to reopen final orders of removal. The petitioners sought judicial review of the Board's conclusion that they failed to satisfy the "due diligence" standard required to establish equitable tolling of the statutory deadline to request reopening. *Id.* at 1067-1068.

Guerrero-Lasprilla involved effectively the same statutory provisions as in this case: § 1252(a)(2)(C), an analogous provision to § 1252(a)(2)(B)(i) that strips federal courts of jurisdiction over final orders of removal against noncitizens who are removable due to their criminal history, and § 1252(a)(2)(D), the Limited Revision Provision at issue here. 140 S. Ct. at 1067.

The government offered two alternative ways to interpret the Limited Review Provision to preclude judicial review of the agency's application of the due-diligence standard to established facts—and this Court rejected both. First, the government suggested a categorical holding that the statutory term "questions of law" is limited to "pure" questions of law, not "mixed questions of law and fact," *i.e.*, "the application of a legal standard to the particular facts of a case." Gov't Br. at 15-16, 19-31, *Guerrero-Lasprilla*, *supra* (Nos. 18-776, 18-1015). Under that rule, the government argued, courts would have jurisdiction to review whether the Board announced the correct "statutory interpretation" or "legal standard," but they would not have jurisdiction to review "the application of that legal standard to the particular facts of the case." *Id.* at 27.

In the alternative, the government suggested a case-by-case analysis to determine whether a court has jurisdiction over mixed questions of law and fact depending on whether the mixed question is more factual or more legal. *Id.* at 31-34. Under that test, the government argued that an agency's due-diligence determination should be unreviewable because it is "primarily factual": it requires an adjudicator to "put himself in the shoes of the litigant,"

"immerse himself in the facts and history of the case," "immerse himself in the circumstances of the litigant," and balance all of the "case-specific historical factors" against each other, considering them as a whole. *Id.* at 34-35 (quotation marks and brackets omitted).

The government warned that a holding that *every* mixed question of law and fact is a "question of law" under the Limited Review Provision would require judicial review of *any* agency determination about whether a noncitizen meets a statutory requirement, including determinations that are primarily factual or that involve denials of discretionary relief. *Id.* at 32-33. To illustrate the point, the government pointed to denials of discretionary relief referenced in § 1252(a)(2)(B)—the subparagraph at issue in this case—and agency determinations about whether an applicant satisfied a statutory eligibility criterion for the agency to exercise discretion to consider an untimely asylum application. *Id.* at 32-33. The government argued that no matter how factual these determinations might be and even if they relate to an ultimately discretionary agency decision, they would fall like dominoes into judicial review if the Court failed to adopt the government's position. *Id.*

After analyzing the statute's text, structure, and history, this Court rejected both of the government's proposed interpretations. The Court acknowledged that the more-factual or more-legal nature of a mixed question may be relevant "in determining the proper standard for appellate review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069. But in evaluating the *availability* of judicial review, the Court interpreted the Limited Review Provision categorically: § 1252(a)(2)(D)'s

"statutory term 'questions of law' includes the application of a legal standard to established facts." *Id.* at 1072; *id.* at 1074 (Thomas, J., dissenting) ("[T]he Court categorically proclaims that federal courts may review immigration judges' applications of *any* legal standard to established facts in criminal aliens' removal proceedings.").

The Court explained that the government's interpretation "would forbid review of any Board decision applying a properly stated legal standard, irrespective of how mistaken that application might be." *Id.* at 1073. As long as the agency "recit[ed] the standard correctly," it "would be free to apply it in a manner directly contrary to well-established law." *Id.* And that, the Court said, would be contrary to the text and history of the Limited Review Provision, particularly in light of the presumption of reviewability. *See id.* at 1070, 1073. The Court also recognized the serious line-drawing problems with the government's approach: The Court explained that "the nature and rationale" of allowing courts of appeals jurisdiction "to review certain 'categori[es]' of applications" of law to fact but not others was "unclear" and inconsistent with the Limited Review Provision. *Id.*

Finally, the Court noted that its categorical interpretation would not leave the INA's jurisdiction-stripping provisions without force. Those provisions would "still forbid appeals of factual determinations—an important category in the removal context." *Id.* And the Court went on to squarely hold just that in *Patel v. Garland*, 142 S. Ct. 1614, 1623 (2022).

C. *Guerrero-Lasprilla* is controlling: the application of § 1229b(b)(1)(D)'s hardship standard to established facts is a mixed question subject to judicial review.

Guerrero-Lasprilla settles the question presented here. Just like the due-diligence question in *Guerrero-Lasprilla*, the statutory-hardship question here involves the application of a legal standard to settled facts—a classic mixed question of law and fact reviewable under § 1252(a)(2)(D). To be sure, this inquiry requires an evaluation of the historical facts (as found by the immigration judge) to determine whether they satisfy the statutory standard. But that is true of *all* mixed questions. It was certainly as true (if not more so) of the due-diligence inquiry in *Guerrero-Lasprilla*. Indeed, the dissent and the government's briefing in that case emphasized this point repeatedly. *See Guerrero-Lasprilla*, 140 S. Ct. at 1074, 1076 (Thomas, J., dissenting); *supra* pp. 23-26. Under *Guerrero-Lasprilla*'s holding, what matters is not how deeply the inquiry requires the reviewing court to wade into the settled facts. What matters is the more straightforward question of whether the inquiry involves *finding* facts (not reviewable) or applying a legal standard to *established* facts (reviewable). 140 S. Ct. at 1069, 1072-1073; *see also Patel*, 142 S. Ct. at 1623.

1. Consider first the text of the hardship provision. The statute sets forth a specific legal criterion, which supplements a well-understood legal concept ("hardship") with modifiers that carry additional specific meaning ("exceptional and extremely unusual"),[3] and

[3] *See, e.g.*, *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023) (discussing statutory term "hardship" in Title VII); *Octane Fitness, LLC*

limits that concept to a specific universe of individuals (family members who are U.S. citizens or lawful permanent residents). 8 U.S.C. § 1229b(b)(1)(D). This statutory language provides a legal standard that noncitizens must satisfy and the agency must apply when determining if a noncitizen is eligible for cancellation of removal.

True, application of the hardship statute is not necessarily susceptible to mechanical resolution. But the same is true of "due diligence" for equitable tolling——a quintessentially "equitable, often fact-intensive inquiry," *Guerrero-Lasprilla*, 140 S. Ct. at 1074 (Thomas, J., dissenting) (quotation marks omitted). Many other legal or mixed questions likewise require an adjudicator to consider context, multiple factors, and case-specific facts. This Court even provided several examples in *Guerrero-Lasprilla*: "Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" *Id.* at 1068. "Did a Government official's alleged conduct violate clearly established law?" *Id.* Or take "probable cause" and "reasonable suspicion," which are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Even so, whether the "historical facts … amount to reasonable suspicion or to probable cause" is still the application of a

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v. ICON Health & Fitness, Inc., 572 U.S. 545, 553-554 (2014) (meaning of "exceptional" in the Patent Act); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Scalia, J., joined by Rehnquist, C.J.) (meaning of "unusual" for Eighth Amendment purposes); *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari) (cataloguing civil rights laws using the "undue hardship" standard).

"legal standard" to the facts, *i.e.*, it is "a mixed question of law and fact." *Id.* at 696-697.

The same is true of the Copyright Act's fair-use requirement, which "set[s] forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances," to often numerous "subsidiary factual questions." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197, 1200 (2021). Yet the "ultimate question whether those facts showed a 'fair use'" still involves the application of law to facts—a "mixed question of law and fact." *Id.* at 1199 (citation omitted). Similarly, a district court's determination of the meaning of patent claims may involve numerous subsidiary factual issues—including factual issues that "may be close to dispositive." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 333, (2015). But the "ultimate interpretation" of patent claim terms is still a "legal conclusion." *Id.* at 332.

Section 1229b(b)(1)'s hardship requirement is of a piece with each of these examples.

2. The Board, which reviews immigration judges' hardship determinations in the first instance, agrees that the cancellation statute provides a legal standard that must be applied to the facts of each case—the very definition of a mixed question of law and fact, and one that the agency reviews *de novo*. In a published decision, the Board offered a precedential interpretation of what it repeatedly referred to as a statutory "standard" to "clarify its meaning" and provide "guidance" to immigration judges and future Board panels tasked with applying this standard to the facts of a particular case. *See In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 60, 63 (2001). The

agency concluded that the statute sets forth a particular standard—one that requires an applicant to establish hardship that is "'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country," but not hardship that would rise to an "unconscionable" level. *Id.* at 61-62; *see also In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 470 (B.I.A. 2002) ("[T]he hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief."). The agency offered numerous "factors to consider" in assessing whether a noncitizen has met the statutory hardship standard, instructing adjudicators about how to evaluate the age, health, and circumstances of qualifying relatives, and further clarified that "all hardship factors should be considered in the aggregate," rather than individually. *Monreal-Aguinaga*, 23 I. & N. Dec. at 63-64.

The Board understood that it was engaging in the interpretation of a statutory legal standard. Indeed, it expressly relied on its purported authority to interpret the INA's text under *Chevron*, *id.* at 58, and it based its analysis on the traditional tools of statutory construction, including the statutory text and history, dictionaries from the time of enactment, and judicial and agency precedents, *id.* at 58-62.

The agency's own practice therefore confirms that § 1229b(b)(1)(D)'s hardship requirement has all the tell-tale signs of a legal standard that agency adjudicators must apply to the facts of each case—a mixed question of law and fact that falls within the statutory term "questions of law." And the agency agrees with this characterization. Board decisions repeat-

edly refer to an immigration judge's hardship determination as a mixed question or even as a question of law that the Board reviews *de novo*. *See Singh v. Rosen*, 984 F.3d 1142, 1151 (6th Cir. 2021) ("[T]he Board's own precedent treats this hardship decision as a legal question …."); *see, e.g.*, *In re V-K-*, 24 I. & N. Dec. 500, 501-502 (B.I.A. 2008) (referring to an immigration judge's hardship eligibility determination as a "mixed question[] of fact and law" reviewed *de novo*), *overruled in unrelated part by In re Z-Z-O-*, 26 I. & N. Dec. 586, 586 (B.I.A. 2015); *Z-Z-O-*, 26 I. & N. Dec. at 591 (describing the immigration judge's hardship determination as "a matter of law" reviewed *de novo* (quoting *Waldron v Holder*, 688 F.3d 354, 361 (8th Cir. 2012))).[4]

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If this Court's holding in *Guerrero-Lasprilla* means anything, it must mean that the agency's application of the statutory hardship standard to established or undisputed facts is a mixed question of law and fact—just like the agency's application of the "due diligence" standard to established or undisputed facts. And because mixed questions of law and fact are included in the statutory term "questions of law," *Guerrero-Lasprilla*, 140 S. Ct. at 1069, the answer to

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[4] *See also, e.g.*, *Eleazar Vargas-Eja Maria Angeles Garcia Vargas*, 2004 WL 2374700, at *1 (B.I.A. Aug. 9, 2004) ("[W]hether the facts give rise to a showing of 'exceptional and extremely unusual hardship' is a matter of law which may be reviewed de novo." (citation omitted)); *Teresa Araceli Pena De Vela*, 2005 WL 1104528, at *1 n.1 (B.I.A. Jan. 19, 2005) (same); *Luis Saul Loera Lujan*, 2004 WL 2374696, at *1 n.1 (B.I.A. Aug. 9, 2004) (same); *Heriberto Sanchez Sanchez*, 2004 WL 1398679, at *1 n.1 (B.I.A. Apr. 21, 2004) (same).

the question presented here directly follows: federal courts have jurisdiction to review the Board's application of the statutory hardship standard to settled or undisputed facts.

D. The contrary reasoning adopted by some courts and advanced by the government is unpersuasive.

Some courts have held that they lack jurisdiction to review challenges to hardship determinations (or, more precisely, to review *some aspects* of hardship determinations, depending on what the agency's reasoning was and how the arguments are framed on appeal). But their reasoning cannot be squared with the text of § 1252(a)(2)(D), this Court's decision in *Guerrero-Lasprilla*, or the presumption of judicial review and the canon favoring clear jurisdictional lines. These decisions also misunderstand the cancellation statute's structure and the nature of the hardship inquiry. They provide no principled or coherent basis for excluding the statutory hardship standard from *Guerrero-Lasprilla*'s bright-line holding.

1. The reasoning adopted by courts that decline to review agency hardship determinations cannot be squared with *Guerrero-Lasprilla*.

a. Courts that have held they lack jurisdiction over the agency's application of the hardship standard to established facts have characterized the hardship

criterion as too "fact-based,"[5] "subjective,"[6] or "discretionary"[7] to be subject to judicial review.

Although the labels vary, the thrust of these decisions is basically the same: applying the statutory hardship standard to established facts does not mechanically and automatically lead to an obvious result. Instead, an adjudicator must exercise some judgment in applying the legal standard to the established facts. *See Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003) ("[W]e hold that the hardship issue is a matter of discretion. There is no algorithm for determining when a hardship is 'exceptional and extremely unusual.'"); *accord Galeano-Romero*, 968 F.3d at 1183; *Hernandez-Morales*, 977 F.3d at 249 ('weighing hardship factors is a discretionary judgment call"); *cf. Martinez v. Clark*, 36 F.4th 1219, 1227-1228 (9th Cir. 2022) ("A 'prototypical' example [of a 'discretionary' determination] is one that is 'fact-intensive' and requires 'equities to be weighed.'" (citation and brackets omitted)).

The government leaned heavily into this argument in its certiorari-stage brief, using these same labels and emphasizing that an agency adjudicator must delve into and weigh the facts of the case at issue to determine whether the statutory hardship standard is satisfied. Br. for Respondent 7-9. The government's reasoning and that of the courts that have fol-

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[5] *See, e.g.*, *Ponce Flores v. U.S. Attorney General*, 64 F.4th 1208, 1222 (11th Cir. 2023).

[6] *See, e.g.*, *Flores-Alonso v. U.S. Attorney General*, 36 F.4th 1095, 1100 (11th Cir. 2022); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003).

[7] *See, e.g.*, *Galeano-Romero v. Barr*, 968 F.3d 1176, 1181-1183 (10th Cir. 2020).

lowed it cannot be squared with *Guerrero-Lasprilla*. That case, after all, involved the question of whether a noncitizen satisfied the due diligence standard for equitable tolling—an incredibly "fact-intensive" question, as the government emphasized at length. Gov't Br. at 35-36, *Guerrero-Lasprilla*, *supra*. That question is just as focused on case-specific facts than the hardship question at issue here, if not more so. *See Guerrero-Lasprilla*, 140 S. Ct. at 1074 (Thomas, J., dissenting) ("To determine whether a litigant has exercised due diligence, judges must conduct what this Court has characterized as an equitable, often fact-intensive inquiry, considering in detail the unique facts of each case to decide whether a litigant's efforts were reasonable in light of his circumstances." (quotation marks omitted)); *Singh*, 984 F.3d at 1153 ("the application of the due-diligence standard in [*Guerrero-Lasprilla*] is no less subjective than the application of the hardship standard in this one"); *accord Gonzalez Galvan v. Garland*, 6 F.4th 552, 560 (4th Cir. 2021).[8]

Using the "discretionary" label to characterize the hardship inquiry also does not distinguish this inquiry from *Guerrero-Lasprilla*. *Guerrero-Lasprilla* involved multiple layers of "discretionary" relief—the petitioners sought "discretionary relief" from remov-

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[8] Many of the post-*Guerrero-Lasprilla* cases simply apply pre-*Guerrero-Lasprilla* precedent without analyzing *Guerrero-Lasprilla* or its impact on the reviewability question. *See* Br. for Respondent 13-14; *see, e.g.*, *Aguilar-Osorio v. Garland*, 991 F.3d 997, 999 (9th Cir. 2021) (holding that the court lacked jurisdiction to review hardship determinations without mentioning *Guerrero-Lasprilla); Castillo-Gutierrez v. Garland*, 43 F.4th 477, 481 (5th Cir. 2022) (same); *Flores-Alonso*, 36 F.4th at 1100 (same).

al, 140 S. Ct. at 1067, through a procedural mechanism (a motion to reopen) that is itself discretionary, *Dada v. Mukasey*, 554 U.S. 1, 12 (2008), *cited in Guerrero-Lasprilla*, 140 S. Ct. at 1067. That did not allow the government to shield from judicial review its application of the *legal* due-diligence standard to settled or undisputed facts.

Moreover, *all* of the decisions that fall within § 1252(a)(2)(B)'s jurisdiction-stripping language have discretionary components, and yet the Limited Review Provision expressly applies notwithstanding subparagraph (B). *See* 8 U.S.C. § 1252(a)(2)(B) ("except as provided in subparagraph (D) …"); *id.* § 1252(a)(2)(D) ("Nothing in paragraph (B) or (C), … which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law …."). So whether one labels a determination "discretionary" or not, if the issue raised on appeal is a constitutional question or a question of law (which includes mixed questions of law and fact), it is reviewable under § 1252(a)(2)(D). *See Garcia-Pascual v. Garland*, 62 F.4th 1096, 1103-1104 (8th Cir. 2023) (Arnold, J., concurring) (explaining that § 1252(a)(2)(D) "specifically allows us to consider constitutional questions and questions of law, even when a decision is a discretionary one"), *cert. filed*, No. 23-44 (July 14, 2023). Section 1252(a)(2)(D) contains a fact/law distinction, *Patel*, 142 S. Ct. at 1623, not a discretionary/non-discretionary distinction.

Particularly in light of the "well-settled" and "strong" presumption of judicial review of agency action, labeling the statutory hardship standard "fact-intensive" or "subjective" or "discretionary" does not

demonstrate the "clear and convincing evidence" required to "dislodge the presumption." *Kucana*, 558 U.S. at 252. And it certainly does not provide a principled ground to create an enormous exception to the clear boundary line established in *Guerrero-Lasprilla*—a case involving a question at least as fact-intensive, subjective, and discretionary as some courts and the government characterize the hardship standard to be. Regardless of how the hardship inquiry is labeled, it requires the application of a statutory standard to historical facts. Under *Guerrero-Lasprilla*, that application is reviewable under the Limited Review Provision.

b. Even if it were possible to distinguish the hardship inquiry as somehow *more* fact-intensive, subjective, or discretionary than the due-diligence inquiry, that would be an ill-advised reason to depart from *Guerraro-Lasprilla*'s bright-line holding. The consequence would be disputes in every circuit over the jurisdictional status of countless statutory standards in the INA and gamesmanship by applicants and the government attempting to frame the issues on appeal just the right way to obtain or foreclose judicial review. Nothing in the statute requires such a chaotic result.

"Jurisdictional rules should be clear." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring). Consistent with this principle, *Guerrero-Lasprilla* established a clear jurisdictional boundary: If the issue on appeal involves the application of a legal standard to settled or undisputed facts, it is reviewable under § 1252(a)(2)(D). 140 S. Ct. at 1072. If the issue on appeal involves *finding* facts, it is not reviewable.

Id. at 1073; *Patel*, 142 S. Ct. at 1623. Even the two dissenting Justices in *Guerrero-Lasprilla* recognized this to be the scope of the majority's decision, noting that the majority had "categorically" held that "federal courts may review immigration judges' applications of *any* legal standard to established facts." *Guerrero-Lasprilla*, 140 S. Ct. at 1074 (Thomas, J., dissenting); *id.* at 1076 (noting that under the majority's categorical rule, courts would be foreclosed from reviewing "only pure questions of fact").

The arguments advanced by the government and adopted by some courts of appeals attempt to muddle that clear line by carving out statutory standards that can be categorized as "fact-intensive," "subjective," "discretionary," or imbued with "judgment." Effectively, the government is trying to do what the respondent tried to do in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers & Participating Employers*—"relitigate" a bright-line jurisdictional rule by carving out exceptions implicitly rejected by the Court's earlier decision. 571 U.S. 177, 185-186 (2014). The Court rejected that effort in *Haluch*, noting that it would compromise "operational consistency and predictability" in the application of the relevant jurisdictional provision. *Id.* The same is true here. Hinging federal-court jurisdiction on whether the relevant agency determination is sufficiently or insufficiently fact-intensive, subjective, algorithmic, or discretionary would require courts to draw a new jurisdictional boundary line for every statutory or regulatory criterion that is reached by an INA jurisdiction-stripping provision.

Even as to only one of these characteristics—whether the inquiry is more "factual" or more "legal"—this Court has repeatedly recognized that the dividing line is "difficult[]," [9] "vexing," [10] "elusive," [11] and "slippery." [12] Adding equally ambiguous qualifiers to the mix produces an even more "vague and obscure boundary that would result in both needless litigation" over countless provisions in the INA and "uncalled-for dismissal[s]" of immigration appeals. *Direct Mktg.*, 575 U.S. at 14 (quotation marks omitted). This type of rule should be "avoided in the area of subject-matter jurisdiction wherever possible." *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring).

Decisions from circuits that have followed this amorphous approach tell the tale; they have "le[d] to strange results," as vague and complicated jurisdictional tests often do. *Hertz*, 559 U.S. at 94. For example, the Ninth and Eleventh Circuits have held that whether a noncitizen's family member would suffer "exceptional and extremely unusual hardship" under § 1229b(b)(1) is an unreviewable discretionary judgment, [13] but whether a victim of domestic violence suffered "extreme cruelty" under § 1229b(b)(2) *is* reviewable. [14] The First Circuit, though, has held

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[9] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990).

[10] *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

[11] *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

[12] *Thompson v. Keohane*, 516 U.S. 99, 99 (1995).

[13] *Martinez*, 36 F.4th at 1228 (citing *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009)); *Flores-Alonso*, 36 F.4th at 1100.

[14] *Santos v. Holder*, 573 F. App'x 634 (9th Cir. 2014) (citing *Hernandez v. Ashcroft*, 345 F.3d 824, 833-835 (9th Cir. 2003));

that the "extreme cruelty" determination is *not* reviewable because it lacks "an objective legal standard,"[15] but whether a noncitizen would suffer "extreme hardship" under § 1186a(c)(4) *is* reviewable because "objective regulatory criteria" render the determination "non-discretionary."[16] Meanwhile, in the Eighth Circuit, whether an applicant has shown "exceptional and extremely unusual hardship" is an unreviewable discretionary judgment,[17] but whether an applicant has shown "good moral character" to establish eligibility for cancellation of removal *is* reviewable as a question of law.[18]

As these cases show, the government's approach would give litigants and courts no clarity about which INA provisions are reviewable and which are not. Countless pages of briefing and judicial opinions would be consumed by the issue, "eating up time and money as the parties litigate, not the merits of their claims," but the even more complicated threshold jurisdictional question. *Hertz*, 559 U.S. at 94. And this Court could expect dozens of future cases in the years to come litigating the reviewability of each eligibility criterion underlying the many matters covered by § 1252(a)(2) (not to mention other jurisdiction-stripping provisions in the INA).

Ruiz v. U.S. Attorney General, 73 F.4th 852, 856 (11th Cir. 2023).

[15] *Twum v. Barr*, 930 F.3d 10, 19-20 (1st Cir. 2019) (citation omitted).

[16] *Id.* at 19 (quoting *Gitau v. Sessions*, 878 F.3d 429, 434 (1st Cir. 2017)).

[17] *Garcia-Pascual*, 62 F.4th at 1103.

[18] *Hernandez v. Garland*, 28 F.4th 917, 921 (8th Cir. 2022).

The canon favoring clear jurisdictional rules exists specifically to prevent this outcome. A rule that invites widespread division over fine distinctions is almost never the right jurisdictional rule to adopt. And that is particularly true where the rule relies on these razor-thin distinctions to foreclose judicial review of agency decisionmaking. Vague characterizations like "subjective" and "fact-intensive" do not provide the clear and convincing evidence necessary to overcome the strong and well-settled presumption of reviewability.

There is also another significant line-drawing problem with the arguments advanced by the government and adopted by some courts of appeals: even after a circuit decides which side of the fuzzy dividing line a particular agency determination falls on, it still would not be clear whether *the challenge being raised* is reviewable in any given appeal. That is because courts acknowledge that even if a particular determination (like hardship) is "discretionary" or "subjective," it still is not *always* unreviewable. *See Galeano-Romero*, 968 F.3d at 1184 (providing three examples of challenges to hardship determinations that are judicially reviewable even if the application of the hardship standard to the established facts is not). For example, courts are still free to evaluate whether the agency used the right legal standard in making the determination even if they lack jurisdiction to determine whether the agency correctly applied that standard to the facts. *See id.*; *Mendez-Castro*, 552 F.3d at 979; Br. for Respondent 7.

The problem here is that the line between an application of an erroneous legal standard and an erroneous application of the right legal standard is any-

thing but clear. That is because courts (and agencies) constantly interpret the law as they apply it. Indeed, this is a "fundamental principle[]": "Every application of a text to particular circumstances entails interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012) (capitalization altered); *see also, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). The Board has noted this principle itself, explaining that it publishes decisions with "examples and discussion … in varying factual settings" because that is "the best manner in which to provide content to the phrase 'exceptional and extremely unusual hardship' in the context of applications for cancellation of removal under the present law." *Monreal-Aguinaga*, 23 I. & N. Dec. at 61 n.2.

Under the government's proposed rule, then, an egregiously erroneous misapplication of law to fact may be reviewable (because it suggests that the agency in fact applied the wrong standard rather than simply misapplied the right one), whereas an application of law to facts that is erroneous but not egregiously so would remain unreviewable. Attempting to determine where one line ends and the next begins is a daunting task at best, and it is precisely the type of vague boundary that vexed this Court at argument in *Guerrero-Lasprilla*, after which the Court rejected the government's proposed approach as "unclear." 140 S. Ct. at 1073.

Unsurprisingly, the government's vague dividing line encourages gamesmanship and confusion—precisely the outcome the clear-jurisdictional-lines

canon is meant to prevent. *See Hertz*, 559 U.S. at 94. The parties spend much of their appellate briefing trying to artfully frame the issues in a way that will allow them to obtain or preclude judicial review, forcing courts to perform mental gymnastics to determine which type of challenge they are confronting and justify why they have or do not have jurisdiction in any given case. *See, e.g.*, *Tacuri-Tacuri v. Garland*, 998 F.3d 466, 472 (1st Cir. 2021) ("It is not obvious to us whether Tacuri's arguments go only to his quibbling with the [Board's] take on the facts of his case (as the government contends) or to his assertion that the [Board] erred as a matter of law by applying a more demanding standard for Tacuri to meet than that identified in the caselaw."); *Alvarado v. Holder*, 743 F.3d 271, 276 (1st Cir. 2014) (similar); *Romero-Torres*, 327 F.3d at 890 (explaining that when evaluating cancellation's "good moral character" eligibility criterion, the court "had jurisdiction to decide whether the applicant fell into per se exclusion categories, such as habitual drunkenness or conviction of a felony" but "lacked jurisdiction to consider the question apart from these categories" because "good moral character is almost necessarily a subjective question" (citation omitted)). And it is only after at least initially examining the merits that a court could determine whether it has jurisdiction to examine the merits in the first place. That is not a clear jurisdictional boundary. It is barely a jurisdictional boundary at all.

2. The hardship inquiry is neither "subjective" nor "discretionary."

Even putting aside the problems with hinging the jurisdictional question on labels like "subjective" and

"discretionary," courts' use of these labels demonstrates a fundamental misunderstanding of the nature of the hardship inquiry. The statutory hardship standard is neither subjective nor discretionary, and so even if there were some principled basis to carve out those types of determinations from *Guerrero-Lasprilla*'s holding, it would not apply here.

a. The hardship inquiry is not "subjective." Nothing in the statute, agency regulations, or any Board precedents suggests that agency adjudicators should be making hardship determinations based on their own subjective views about what degree of hardship should be sufficient to render applicants eligible for cancellation. To the contrary, the statute specifies a legal standard, and the Board has provided a precedential interpretation of that standard that controls how immigration judges and future Board panels apply the statutory standard to the facts of each case. *Monreal-Aguinaga*, 23 I. & N. Dec. at 58. Precedential rulings like these are published "to promote the uniform and fair enforcement of the immigration laws." *In re Castillo-Perez*, 27 I. & N. Dec. 664, 669 (Att'y Gen. 2019) (addressing the application of the cancellation statute's "good moral character" requirement to the facts of a particular case). Put simply, an immigration judge has no authority to apply her own "subjective" judgment as to what constitutes hardship if that judgment differs from the governing standard in the statute or Board precedents.

Nor would Congress have understood itself to have incorporated a "subjective" hardship requirement in the cancellation statute. When Congress enacted the hardship provision at issue here, this statutory

standard "had a long … history" that informed its meaning. *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022). The "exceptional and extremely unusual hardship" standard applied to various categories of noncitizens seeking suspension of deportation beginning with the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 214-216. The Board interpreted the standard using a five-factor test shortly thereafter, *see In re S-*, 5 I. & N. Dec. 409 (B.I.A. 1953), and "simultaneously" issued four other published decisions that "applied the standard in varying factual circumstances," *Monreal-Aguinaga*, 23 I. & N. Dec. at 56, 61 n.2. The courts and agency then applied and further developed the legal meaning of this standard for decades. *E.g.*, *In re Pena-Diaz*, 20 I. & N. Dec. 841, 846 (B.I.A. 1994); *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993); *Brown v. INS*, 775 F.2d 383, 388-389 (D.C. Cir. 1985).

Courts and the agency likewise routinely applied similar hardship criteria, such as the pre-1996 requirement that noncitizens without serious criminal violations establish "extreme hardship" to themselves or a qualifying U.S. relative. 8 U.S.C. § 1254(a)(1) (1994). As then-Judge Kennedy explained, this criterion "*requires a legal determination of a traditional sort*, the contents of which are explicated by an orderly history of administrative practice and judicial review and interpretation." *Chadha v. INS*, 634 F.2d 408, 426 (9th Cir. 1980) (Kennedy, J.) (emphasis added), *aff'd on other grounds*, 462 U.S. 919. Nothing about these types of hardship determinations is "subjective."

Nor is "hardship" considered subjective or hopelessly uncertain in other statutory contexts. The Sixth Circuit, for example, noted that bankruptcy laws "prohibit a debtor from obtaining a discharge of certain student-loan debts unless the debts impose an 'undue hardship' on the debtor." *Singh*, 984 F.3d at 1152. But no one would "say that whether undue hardship exists is so subjective as to make it a discretionary call for the bankruptcy court." *Id.* Instead, courts treat the question "as a mixed question of law and fact (whether the debtor's circumstances rise to the level of the required hardship) subject to de novo review." *Id.* Shortly after this Court's decision in *Guerrero-Lasprilla*, the Fifth Circuit likewise observed that "[c]ourts have not found the question of whether 'undue hardship' exists to be so subjective an inquiry." *Trejo v. Garland*, 3 F.4th 760, 772 (2021), *abrogated in unrelated part on other grounds*, *Patel*, 142 S. Ct. 1619.[19] Rather, they "have explicitly treated the question as a 'mixed question' subject to *de novo* review—the exact sort of issue *Guerrero-Lasprilla* contemplated." *Id.* The same is true of § 1229b(b)(1)'s hardship standard.

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[19] Although the Fifth Circuit originally adopted the position advanced by Mr. Wilkinson, it subsequently reversed course in *Castillo-Gutierrez*, holding that this Court's decision in *Patel* abrogated *Trejo*'s holding that hardship determinations are a mixed question reviewable under § 1252(a)(2)(D). 43 F.4th at 481. But *Patel* was about judicial review of *factual* findings. It had nothing to do with applying a statutory standard to settled or undisputed facts. 142 S. Ct. at 1623. *Patel* abrogated only *Trejo*'s alternative holding that agency determinations related to eligibility criteria (whether factual, legal, or mixed questions) are not subject to § 1252(a)(2)(B)(i)'s jurisdiction-stripping provision to begin with. *See Patel*, 142 S. Ct. at 1622-1623; *Trejo*, 3 F.4th at 766-767.

b. Labeling the hardship requirement "discretionary" is perhaps even more misguided than labeling it "subjective."

First, as this Court has repeatedly explained, cancellation or suspension of removal has long been divided into two distinct steps of agency decisionmaking. First, the agency determines whether an applicant is eligible to be considered for relief—a determination that "is governed by specific statutory standards." *Jay v. Boyd*, 351 U.S. 345, 353 (1956). Second, the agency makes the discretionary decision whether to actually grant relief—a decision that is "a matter of grace." *Id.* at 354; *see also Barton v. Barr*, 140 S. Ct. 1442, 1445 (2020) (describing the "strict eligibility requirements" that a noncitizen must satisfy to be eligible for cancellation, after which "the immigration judge has discretion to (but is not required to) cancel removal"); *Pereida v. Wilkinson*, 141 S. Ct. 754, 760 (2021) (distinguishing the two phases).

As other courts have recognized, then, "[a]ll eligibility determinations are 'non-discretionary." *Patel v. U.S. Attorney General*, 971 F.3d 1258, 1276 (11th Cir. 2020) (en banc), *aff'd*, 142 S. Ct. 1614 (2022).[20] "Although the ultimate decision whether to grant cancellation of removal is discretionary in nature,

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[20] The Eleventh Circuit addressed this very issue at length, including the import of *Guerrero-Lasprilla*, in its *en banc* decision in *Patel* that this Court affirmed. 971 F.3d at 1276-1280. Yet an Eleventh Circuit panel subsequently (and summarily) concluded that it could not review an agency's hardship determination, and did so without even mentioning *Guerrero-Lasprilla* or the court's prior *en banc* decision in *Patel*. *See Flores-Alonso*, 36 F.4th 1095.

the four statutory eligibility requirements do not speak of discretion." *Gonzalez Galvan*, 6 F.4th at 560); *see also Singh*, 984 F.3d at 1151. And the hardship requirement is undisputedly one of the statutory eligibility criteria.

Consistent with this statutory structure, immigration judges and the Board do not view the hardship requirement as "discretionary." In many cases, the agency will not reach the ultimate discretionary decision to grant or deny relief, but will instead resolve the question at the eligibility stage as a matter of law. *See, e.g.*, Pet. App. 29a; *Tobar-Bautista v. Sessions*, 710 F. App'x 506, 507 (2d Cir. 2018). Other times, the agency goes out of its way to announce that it *would have* granted relief as a matter of discretion if only its hands were not tied by the statutory hardship requirement. *See, e.g.*, *Monreal-Aguinaga*, 23 I. & N. Dec. at 65 ("We have no doubt if the respondent were eligible for cancellation of removal, we would grant such relief in the exercise of discretion."); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 322 (B.I.A. 2002); *Garcia-Pascual*, 62 F.4th at 1100; *Gonzalez Galvan*, 6 F.4th at 556.

Second, even putting aside the structural mismatch, there is good reason not to put too much stock in some courts' characterization of hardship determinations as "discretionary": the term appears to be used rather arbitrarily. Sometimes it is used as an antonym for "purely legal,"[21] sometimes as a syno-

[21] *See Romero-Torres*, 327 F.3d at 890 ("We retain jurisdiction to review the purely legal and hence non-discretionary question whether the applicant's adult daughter qualifies as a child for purposes of the exceptional and extremely unusual hardship requirement." (quotation marks and brackets omitted)).

nym for "subjective,"[22] and other times as shorthand for a determination that is not subject to algorithmic resolution.[23] In *Martinez v. Clark*, for example, the Ninth Circuit described the "'prototypical' example" of a "discretionary" determination as "one that is 'fact-intensive' and requires 'equities to be weighed.'" 36 F.4th at 1227-1228 (brackets and citation omitted). But as explained previously, the same is true of *many* mixed questions of law and fact, including the "due diligence" determination. *See supra* pp. 34-35. But no one would describe the due-diligence requirement as "discretionary"; the government certainly did not describe it that way in *Guerrero-Lasprilla*.

The examples abound even beyond those already described. Take the Fourth Amendment's "excessive force" doctrine. As this Court has noted, the reasonableness standard "is not capable of precise definition or mechanical application," and "its proper application requires careful attention to the facts and circumstances of each particular case." *Graham v.*

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[22] *See Romero-Torres*, 327 F.3d at 891 ("[A]n inquiry is discretionary where it is a subjective question that depends on the value judgment of the person or entity examining the issue." (quotation marks omitted); *Martinez*, 36 F.4th at 1227 ("The touchstone of a 'discretionary' determination is that it's 'subjective.'").

[23] *Morales Ventura*, 348 F.3d at 1262 ("[W]e hold that the hardship issue is a matter of discretion. There is no algorithm for determining when a hardship is 'exceptional and extremely unusual.'"); *accord Galeano-Romero*, 968 F.3d at 1183; *Hernandez-Morales*, 977 F.3d at 249 ('weighing hardship factors is a discretionary judgment call"); *Valenzuela Alcantar v. INS*, 309 F.3d 946, 949 (6th Cir. 2002) (hardship determination is "'discretionary,' demanding an exercise of judgment over and above mere ascertainment of facts").

Connor, 490 U.S. 386, 396 (1989) (citation omitted). Once the "relevant set of facts" have been found, however, the ultimate question—whether the party's "actions have risen to a level warranting deadly force"—"is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). The same is true of the standard for determining whether punitive damages are "grossly excessive"—an "inherently imprecise" standard that is not "marked by a simple mathematical formula." *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 434-435 (2001) (citations omitted). Still, "whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts," which is a legal question reviewed "de novo." *Id.* at 435 (citation omitted). None of these mixed questions could reasonably be considered "discretionary," and there is no reason to treat the hardship determination any differently. The use of this label to characterize the hardship determination, then, seems to simply be "a misnomer." *Patel*, 971 F.3d at 1278.

Congress has ways to indicate that it intends a particular agency determination to be discretionary. As noted previously, for example, § 1229b(b)(1) itself provides that the Attorney General "may" cancel removal if the eligibility requirements are met—classic discretionary language. *See Kucana*, 558 U.S. at 247 n.13. And a neighboring cancellation provision (applicable to domestic-violence victims) provides that "the weight to be given" to the credible evidence provided by the application is "within the sole discretion of the Attorney General." 8 U.S.C. § 1229b(b)(2)(D). Given the existence of discretionary language in neighboring provisions, the absence of this type of language in the hardship provision "undercuts the

Government's efforts to read it in." *Patel*, 142 S. Ct. at 1624.

Finally, the use of the label "discretionary" to characterize hardship determinations may simply be a relic of either outdated caselaw or no-longer-existing statutory or regulatory provisions. Many of these characterizations originated during a time when courts thought that mixed questions of law and fact were unreviewable, and they "rested on logic treating the [hardship] conclusion as resolving a mixed question." *Singh*, 984 F.3d at 1153. That logic no longer holds following *Guerrero-Lasprilla*. And as other courts have noted, the discretionary/non-discretionary dividing line adopted by many courts initially arose based on no-longer-existing statutory language and transitional administrative rules that predated both the enactment of the Limited Review Provision and *Guerrero-Lasprilla*. *See Patel*, 971 F.3d at 1277 & n.23; *Trejo*, 3 F.4th at 770-771; *Singh*, 984 F.3d at 1152-1153.

Indeed, if anything, the § 1229b(b)(1) hardship standard has moved *away* from being discretionary. In the 1952 version of the statute, Congress added language affording greater latitude to the agency in making hardship determinations: it required the noncitizen to be "a person whose deportation would, *in the opinion of the Attorney General*, result in exceptional and extremely unusual hardship to" a qualifying U.S. relative. INA § 244(a), 66 Stat. 163, 214-216 (1952) (emphasis added). Other provisions in the INA have contained similar language when referring to hardship determinations, and some still do to this day. *See, e.g.*, 8 U.S.C. § 1182(h)(1)(B) ("to the satisfaction of the Attorney General"); *id.*

§ 1182(a)(9)(B)(v) (same); *id.* § 1255(*l*)(1), (*l*)(1)(C)(ii) ("in the opinion of the Secretary of Homeland Security").

As part of the passage of IIRIRA in 1996, however, Congress excised this type of "in the opinion of the Attorney General" language in enacting the new cancellation statute that replaced the prior suspension statute. *See* § 1229b(b)(1)(D). But even after the language changed, courts "nevertheless continued to treat the [hardship] decision as discretionary without acknowledging this important textual change." *Singh*, 984 F.3d at 1152-1153; *Trejo*, 3 F.4th at 771.

The Third Circuit is a perfect example. The court below held that it lacked jurisdiction to review the agency's hardship determination here because "that decision is discretionary." Pet. App. 3a. But if one traces the history, the "discretionary" concept in the Third Circuit originated from a Ninth Circuit decision, *Kalaw v. INS*, which labeled hardship determinations as "discretionary" based *solely* on the no-longer-existing, pre-IIRIRA language that the court said "commit[ted] the determination to 'the opinion of the Attorney General.'" 133 F.3d 1147, 1152 (1997) (citation omitted), *cited in Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003), *cited in Hernandez-Morales*, 977 F.3d at 249, *cited in* Pet. App. 3a. The Third Circuit relied on that characterization without even mentioning that the "in the opinion of the Attorney General" language the Ninth Circuit relied on had been excised from the statute, and it has continued to label the hardship determination "discretionary" ever since. In other words, the use of the term "discretionary" to describe the hard-

ship determination may simply be the result of "inertia." *Trejo*, 3 F.4th at 771.

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Simply labeling the statutory hardship standard "subjective" or "discretionary" does not make it so. Nor does it make the application of that standard to established facts unreviewable, just as labeling the application of the due-diligence standard to established facts "primarily factual" did not render it unreviewable in *Guerrero-Lasprilla*. What matters under *Guerrero-Lasprilla* is whether the question involves finding facts or applying a legal standard to established facts. The question here involves the latter, and so it is reviewable under § 1252(a)(2)(D).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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