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 THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Other Authorities

BRIEF FOR THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The American Immigration Lawyers Association ("AILA") is a national nonprofit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the United States district courts, courts of appeals, and this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Cancellation of removal relief under 8 U.S.C. § 1229b(b)(1) plays a vital role protecting noncitizens who have spent a decade or more building lives and strong family ties in the United States. Often,

[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

cancellation of removal is the *only* way that law-abiding noncitizens with important family and community connections in the United States can avoid a deportation that would devastate the lives of their closest family members and ruin all they've worked to accomplish together.

The ultimate discretion to cancel removal lies with the Attorney General. But the linchpin of most cancellation of removal determinations is the threshold eligibility requirement at issue in this case. As part of demonstrating eligibility for cancellation of removal, noncitizens must show the impact their removal would have on their American family. Specifically, a noncitizen must demonstrate that their removal "would result in exceptional and extremely unusual hardship to [a] spouse, parent, or child, who is a citizen of the United States or" a lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D).

Section 1229b(b)(1)(D)'s hardship determination is a classic example of a "mixed question of law and fact" that this Court unequivocally deemed reviewable by the courts of appeals in *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020). Indeed, immigration judges ("IJs") and the Board of Immigration Appeals ("BIA") consistently treat the hardship determination as precisely the type of legal question that federal courts are tasked with reviewing day in, day out. IJs first evaluate the historical facts based on documentary evidence and testimony provided by a noncitizen, and then determine whether those established facts satisfy the applicable legal standard. IJs do so by looking to BIA precedent interpreting the statutory language and applying that precedent to the facts before them—a very familiar legal analysis.

Federal courts retain jurisdiction to review an agency's determination whether a given set of facts meets the statutory standard of "exceptional and extremely unusual hardship." AILA respectfully submits this brief to highlight for the Court the critical importance of that judicial review. Without it, noncitizens with strong claims that their deportation will cause significant hardship to U.S. citizen family members will have no recourse if the immigration agency erroneously concludes that they fail to meet this threshold requirement for relief.

Even more troubling, perhaps, is the risk of inconsistent determinations by the agency without that judicial review. Courts of appeals ensure that IJs and the BIA correctly and uniformly apply their precedent concerning what constitutes "exceptional and extremely unusual hardship." Judicial review is necessary to minimize discrepancies in how this statutory standard is applied to established facts in the immigration courts, and to ensure that noncitizens seeking to care for their families here in the United States receive fair review of their applications no matter which IJ adjudicates their claim.

AILA members see these cases on a daily basis. The personal accounts described below—many of them about the clients of AILA members and their relatives—illustrate the crucial role that federal courts play in correcting agency error and ensuring that the agency takes a uniform and considered approach to cancellation of removal adjudications, which so dramatically impact the lives of many families.

This Court should reverse the decision below to ensure that noncitizens like Mr. Wilkinson are afforded the appellate review they are entitled to under the statute.

ARGUMENT

I. The Hardship Analysis Presents A Legal Question Appellate Courts Are Well-Equipped To Review—And A Critical One Often Determinative Of Deportation.

1. The agency tasked with interpreting immigration statutes treats the hardship determination as a legal analysis, not a discretionary judgment. The agency's analysis—both at the IJ and BIA level—demonstrates that answering the question whether certain facts rise to the level of "exceptional and extremely unusual hardship" involves a classic application of legal standards to established facts.

IJs apply a two-step process when evaluating cancellation of removal applications under 8 U.S.C. § 1229b(b)(1). First, the IJ determines whether an applicant satisfies the four threshold eligibility requirements: continuous physical presence in the United States for ten years, good moral character, no convictions of specified offenses, and a showing that "removal would result in exceptional and extremely unusual hardship to [his or her] spouse, parent, or child, who is a citizen of the United States" or a lawful permanent resident. *Ibid.* Only if these four eligibility requirements are met can the IJ make the discretionary determination to grant cancellation of removal. *Ibid.*; *Santiago* v. *Barr*, 832 F. App'x 74, 76 (2d Cir. 2020) (describing cancellation of removal as "a two-step process" (quoting *Rodriguez* v. *Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (per curiam)).

The analysis whether an applicant's circumstances meet the fourth eligibility

requirement—referred to as the hardship determination—is central to nearly every cancellation of removal case. And this threshold analysis is *not* one that IJs treat as a matter of discretion. To the contrary, many IJs regularly state that they *would have* exercised their discretion to grant relief if only the hardship criterion were met. See, *e.g.*, *Garcia-Pascual* v. *Garland*, 62 F.4th 1096, 1100 (8th Cir. 2023) (IJ indicated that if noncitizen met hardship requirement, IJ would have exercised discretion to grant cancellation of removal); *Gonzalez Galvan* v. *Garland*, 6 F.4th 552, 556 (4th Cir. 2021) (same).

Rather than make discretionary judgments, IJs engage in a traditional legal analysis. To determine whether a noncitizen has established the requisite hardship showing, an IJ first makes factual and credibility determinations based on the evidence and testimony presented at the removal hearing. Relevant facts may include who the applicant's relatives are, whether those relatives qualify under the statute as U.S. citizens or lawful permanent residents who are the applicant's "spouse, parent, or child," and the likely impact of the applicant's removal on any qualifying relatives. See *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63 (BIA 2001) (explaining the facts immigration courts should consider when adjudicating a cancellation of removal application). Next, the IJ must determine whether the established facts give rise to the necessary "exceptional and extremely unusual hardship" by looking to case law from the BIA interpreting and applying that statutory language. See *id.* at 58-63 (interpreting statutory text to establish standards for how immigration courts are to determine hardship).

The hardship criterion can also be dispositive once a case reaches the BIA. The BIA can and does reverse an IJ's grant of cancellation of removal solely because

it determines that the IJ misapplied the legal standard for assessing hardship. See, *e.g.*, *De La Vega* v. *Gonzales*, 436 F.3d 141, 143 (2d Cir. 2006). Appellate review is all the more important in these cases because, if the IJ or BIA mistakenly interprets or applies the legal standard for hardship, then it truly is the difference between deportation and not.

The BIA also recognizes that reviewing a hardship determination involves applying a specific statutory standard to established facts. *Monreal-Aguinaga,* 23 I. & N. Dec. at 59. The BIA reviews the hardship determination de novo and appropriately treats the question whether the statutory standard has been satisfied as either a mixed question or a matter of law. See, *e.g.*, *In re Eleazar Vargas*, 2004 WL 2374700, at *1 (BIA 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."); 67 Fed. Reg. 54878, 54890 (Aug. 26, 2002) (differentiating between BIA's ability to review for clear error an IJ's finding of facts supporting a noncitizen's hardship claim and ability to review de novo the legal question "[w]hether those facts, as determined by the immigration judge and found not to be clearly erroneous, amount to 'exceptional and extremely unusual hardship'").

IJs' and the BIA's own treatment of the hardship determination—whereby they apply a statutory standard to established or undisputed facts to determine eligibility for the requested relief—makes clear that this is precisely the type of "mixed question of law and fact" that the appellate courts may review under *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020).

2. The Government argued in its certiorari-stage brief that judicial review is inappropriate because the hardship determination is fact-intensive. Resp. Br. 7. But appellate courts are perfectly capable of reviewing "mixed questions of law and fact" in immigration cases, such as the hardship determination, while giving all due deference to the factfinder's role below. For instance, in the Fourth Circuit, the court, in recognition of its "limited jurisdiction," does "not review the IJ's factual findings related to the hardship determination." *Gonzalez Galvan*, 6 F.4th at 561. It therefore "accept[s] as true the IJ's settled factual findings" but "review[s] de novo the application of those facts to the statutory legal standard." *Ibid.*

That approach is consistent with how appellate courts review mixed questions of law and fact in other immigration contexts after *Guerrero-Lasprilla*. In *Alzaben* v. *Garland*, for example, the First Circuit held that it had jurisdiction to review whether a noncitizen "entered into his marriage in good faith" because it was a mixed question of law and fact that "requires applying a statutory standard to evidence." 66 F.4th 1, 7 (1st Cir. 2023). The court recognized that it could not review "[w]holly factual issues" raised by a petition, but that did not preclude it from reviewing "whether settled facts satisfy a legal standard." *Ibid.* (quoting *Guerrero-Lasprilla*, 140 S. Ct. at 1068).

Similarly, in *Akrawi* v. *Garland*, the Sixth Circuit was asked to evaluate whether a petitioner committed a "particularly serious crime" that would disqualify him from withholding of removal relief. The court declined to review the BIA's resolution of the "purely factual question" of which specific crime the petitioner committed, but the court *did* exercise jurisdiction to review the question whether that crime qualified as a

"particularly serious crime" under the applicable statute, as that determination involved "the application of law to fact." No. 21-4071, 2023 WL 2293532, at *7 (6th Cir. Mar. 1, 2023) (internal quotation marks omitted).

And, of course, in *Guerrero-Lasprilla* itself, this Court recognized that the courts of appeals have jurisdiction over the mixed question of law and fact presented in reviewing whether the immigration courts correctly applied the equitable tolling due diligence standard to undisputed or established facts. 140 S. Ct. at 1068. There is no basis for this Court or the appellate courts to treat review of the hardship determination—which plainly involves applying a statutory standard to established facts—any differently.

II. Judicial Review Of The Hardship Determination Ensures Fair Adjudication Of Cancellation Of Removal Applications And Uniform Application Of Immigration Laws.

Time and again, appellate courts have stepped in to prevent the erroneous deportation of individuals who were eligible for cancellation of removal based on the exceptional and extremely unusual hardship their U.S. family members—typically children—would face upon their deportation.

The personal accounts below unfortunately are merely illustrative of the various ways the agency makes mistakes in adjudicating cancellation of removal applications. These cases highlight the critical role that the courts of appeals play not only in correcting agency mistakes concerning the hardship determination, but also in ensuring that the BIA consistently applies its precedent to noncitizens' cancellation of removal applications.

Consistent treatment of immigration cases is essential to make sure noncitizens receive fair adjudication of their claims, and federal courts play a vital role in ensuring that uniformity. See *Renteria-Gonzalez* v. *I.N.S.*, 322 F.3d 804, 814 (5th Cir. 2002) (emphasizing the importance of "uniformity of federal law and consistency in enforcement of the immigration laws"); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) ("In the immigration context, * * * the need for national uniformity is paramount, as the power to regulate immigration is unquestionably exclusively a federal power." (internal quotation marks omitted)), overruled on other grounds by *Ceron* v. *Holder*, 747 F.3d 773 (9th Cir. 2014); see also *Mach Mining, LLC* v. *E.E.O.C.*, 575 U.S. 480, 488-489 (2015) (emphasizing the need for appellate review because "[a]bsent such review, * * * compliance with the law would rest in the [agency's] hands alone," and this Court and "Congress know[] * * * that legal lapses and violations occur").

1. Courts of appeals serve a critical role in correcting agency error in cases where U.S. citizen children would face exceptional and extremely unusual hardship upon deportation of a noncitizen parent—in particular where the parent facing deportation is the primary or sole caregiver or breadwinner. Often, these parents face deportation to countries where they would not have the support systems necessary to provide for their children.

The courts' ability to correct the agency's erroneous application of the hardship standard in this context has saved numerous American children whose noncitizen parents were eligible for cancellation relief from suffering due to their parents' wrongful deportation. What's more, the courts have done so while staying in their lane as reviewing courts, conducting an appropriate review of the agency's

application of law to fact without inappropriately stepping into the agency's factfinder role.

Ms. Patricia Cuauhtenango-Alvarado's case is one such case. *Cuauhtenango-Alvarado* v. *Att'y Gen.*, 855 F. App'x 559 (11th Cir. 2021) (per curiam). Ms. Cuauhtenango-Alvarado, a native and citizen of Mexico, came to the United States in 2001. *Id.* at 559. At the time of her cancellation of removal proceedings in 2011, she was a single mom to two U.S. citizen children, ages 8 and 11 years old. Her youngest child suffered from severe communication problems and could only communicate with his mother and siblings. *Id.* at 559-560. He was receiving speech therapy to help him with his disability. *Id.* at 560.

Ms. Cuauhtenango-Alvarado argued that her removal would result in exceptional and extremely unusual hardship for her two children. 855 F. App'x at 560. As a single mother, because the children's father was not present in their lives, she would have to take her U.S.-born children—neither of whom could speak, read, or write in Spanish—with her to Mexico if deported. *Id.* at 559. But in Mexico, Ms. Cuauhtenango-Alvarado would have no support system whatsoever, which would significantly impact her ability to care for her children while also working. She could not live with her family, as she had previously been sexually abused as a minor by the step-father who still lived with her mother in Mexico. *Ibid.* On top of that, the region in Mexico where Ms. Cuauhtenango-Alvarado was from was very dangerous, with documented extrajudicial killings, enforced disappearances, torture, and mistreatment of people with disabilities. *Id.* at 560. Plus, she had never worked in Mexico as an adult, making her poorly situated to find new work upon removal, and making it unlikely she could adequately support her young children. *Id.* at 561.

Despite all this, the IJ denied Ms. Cuauhtenango-Alvarado's petition for cancellation of removal on the basis that she had not satisfied the threshold eligibility requirement of showing that her children would suffer exceptional and extremely unusual hardship upon her removal. 855 F. App'x at 560. The IJ relied on prior BIA case law to conclude that "the circumstances [Ms. Cuauhtenango-Alvarado] faced upon removal were not substantially different than what would normally be expected upon removal to a less-developed country." *Ibid.* The BIA affirmed. *Ibid.*

But the IJ's holding was at odds with prior BIA decisions in analogous cases, and the court of appeals had to step in to correct the agency's misapplication of its own precedent. Fortunately for Ms. Cuauhtenango-Alvarado and her children, at the time her case was heard, the Eleventh Circuit treated the decision whether "a given set of facts amounts to 'exceptional and extremely unusual hardship'" as "a mixed question of law and fact which [it was] empowered to review." 855 F. App'x at 560.

The Eleventh Circuit explained that Ms. Cuauhtenango-Alvarado's "situation is remarkably similar" to that of the noncitizen to whom the BIA granted cancellation of removal in *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 470 (BIA 2002): a single mother who was the sole provider for multiple U.S. citizen children who did not speak, write, or read Spanish, and had no family support in Mexico. 855 F. App'x at 561.

The Eleventh Circuit also compared the undisputed facts of Ms. Cuauhtenango-Alvarado's case to the facts of the case that the IJ had relied on in denying her application for relief, *In re Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002). The Eleventh Circuit found the IJ's reliance on that case misplaced,

as the noncitizen there had a co-parent who helped provide for the U.S. citizen children. 855 F. App'x at 561. Because there was no dispute that Ms. Cuauhtenango-Alvarado was the *sole* support for her children, the Eleventh Circuit found her case to be much more similar to *In re Gonzalez-Recinas*. Accordingly, the court found that Ms. Cuauhtenango-Alvarado had satisfied the hardship requirement under the BIA's case law. *Ibid.* And because no other criteria for cancellation of removal was disputed, Ms. Cuauhtenango-Alvarado was eligible for cancellation of removal. *Ibid.*

The Third Circuit corrected a very similar agency error in *Moran-Hernandez* v. *Att'y Gen.*, 294 F. App'x 726 (3d Cir. 2008) (per curiam), after the BIA incorrectly determined that Ms. Onilda Moran-Hernandez, a native of Guatemala, was ineligible for cancellation of removal because she had not demonstrated that her U.S. citizen children would face exceptional and extremely unusual hardship upon her removal.

Ms. Moran-Hernandez had been living in the United States for more than a decade, and during that time she started a family that included two U.S. citizen children, who were four and six at the time of her removal hearing. 294 F. App'x at 727. The father of her children, also Guatemalan, had been providing financial support to the family, but he had been removed from the United States about six months earlier. *Ibid.* So, at the time of Ms. Moran-Hernandez's hearing, she was the sole financial support for her children. *Ibid.*

Ms. Moran-Hernandez testified at her removal hearing that, if she were deported, her children would have to accompany her to Guatemala, which had just been devastated by a tropical storm. 294 F. App'x at 727. Although the children's father was there, he had

recently remarried, so Ms. Moran-Hernandez would not be able to live with him. *Ibid.* (Indeed, the tropical storm had rendered his home uninhabitable at the time of the hearing, along with destroying the tomato farm where he worked, impacting his ability to assist his children. *Ibid.*) Instead, she and her children would have to live in the home of her deceased mother, which did not have running water or a bathroom and had also been badly damaged by the same tropical storm. *Ibid.*

On top of that, Ms. Moran-Hernandez had been working hard as a housekeeper in the United States to prioritize the education of her children. 294 F. App'x at 727. In the rural area of Guatemala where Ms. Moran-Hernandez was from, public education for children ended at sixth grade, and she was determined to ensure that her U.S.-born children would receive more education than she had received, so they could hopefully avoid a life of poverty. *Ibid.* Her return to Guatemala—and in particular a Guatemala dealing with the aftermath of a natural disaster—would virtually ensure that would not happen for her children.

The IJ granted Ms. Moran-Hernandez cancellation of removal, comparing her case to the facts of the same two BIA cases considered in *Cuauhtenango-Alvarado*, 855 F. App'x 559: *In re Gonzales-Recina* and *In re Andazola-Rivas.* The IJ found that Ms. Moran-Hernandez was more similarly situated to the noncitizen in *In re Gonzalez Recinas*, because, if deported, she "would be on her own with little or no ability to feed and house her children." *Moran-Hernandez*, 294 F. App'x at 728.

The BIA disagreed on appeal, focusing on the fact that Ms. Moran-Hernandez had accumulated assets in the United States that could aid her transition to Guatemala, and that she had at least some family

members, including the father of her children, to provide support on her arrival. 294 F. App'x at 728.

Ms. Moran-Hernandez petitioned the Third Circuit for review. Fortunately, the Third Circuit recognized at that time (though it no longer does) that it had jurisdiction to review the BIA's "application of the law to uncontested facts." 294 F. App'x at 729. It held that the BIA "misapplied its precedent to uncontested facts" because it failed to account for the impact of the tropical storm on Ms. Moran-Hernandez's ability to provide for her U.S. citizen children. *Id.* at 730. Notably, the impacts of the storm were facts that were established before the agency—including through "[u]ncontested evidence" that the storm severely affected Guatemala's food supply, shelter, and sanitary conditions. *Id.* at 730-731. Because the BIA "ignored its own requirement" in its case law to consider "how a *severely* lower standard of living caused by an extremely unusual event might affect the qualifying relatives," the Third Circuit reversed the BIA's decision and reinstated that of the IJ. *Id.* at 731.

Had the Third Circuit and Eleventh Circuit not offered available avenues of relief for Ms. Cuauhtenango-Alvarado and Ms. Moran-Hernandez, they would have been deported to Mexico and Guatemala, respectively, notwithstanding that they were both eligible for cancellation of removal under the BIA's own precedent.[2]

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[2] Moreover, although the Third Circuit correctly exercised its jurisdiction to review the "application of the law to uncontested fact" in *Moran-Hernandez*, the opinion demonstrates the murky waters that courts of appeals have to navigate under the Government's proposed jurisdictional line. The Third Circuit remarked in *Moran-Hernandez* that it would *not* have

Other petitioners for cancellation of removal have not been so fortunate, however, finding themselves with no path to seek correction of agency errors that ultimately led to their deportation, to the detriment of their children. Mr. Ubaidullah Radiowala, for example, had his petition for review of the denial of his cancellation of removal application incorrectly dismissed by the circuit court for lack of jurisdiction over the exceptional and extremely unusual hardship determination. *Radiowala* v. *Att'y Gen.*, 930 F.3d 577, 579 (3d Cir. 2019). Mr. Radiowala fled India more than twenty years ago to escape gang violence. *Id.* at 579-580. He came to the United States legally by way of a visitor visa, along with his wife and two young children. *Id.* at 580. He pursued the American dream, starting at a low-paying job to support his family. He went on to own a successful distribution company for beauty products and over-the-counter drugs. *Ibid.* He also had two additional children, both U.S. citizens, one of whom was still in high school at the time of his

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jurisdiction if the BIA had denied Ms. Moran-Hernandez's application based "solely on a discretionary determination that she failed to establish her removal would result in" the requisite hardship for her children. 294 F. App'x at 729. Only because the BIA "failed to consider the factors it set forth in its precedent," did the Third Circuit frame this as a reviewable question of law. *Ibid.* But the Sixth Circuit ruled in another pre-*Guerrero-Lasprilla* case, *Quevedo* v. *Barr*, 766 F. App'x 345, 348 (6th Cir. 2019), that it can review denial of cancellation claims that require "evaluation of whether the BIA adhered to legal standards" but *not* "when the claim can be evaluated only by engaging in head-to-head comparisons between the facts of the petitioner's case and those of precedential decisions." If courts of appeals are left with a rule that the hardship determination is generally unreviewable, they face the "daunting task," Pet. Br. 41, of having to parse their jurisdiction in each case based on how a petition for review frames the issues presented, and whether the alleged errors in the BIA's analysis somehow cross the line into a "departure" from BIA precedent.

deportation proceedings. *Id.* at 581. The other three children were in college and were pursuing their own financial independence. *Ibid.*

At the time of his removal hearing, though, Mr. Radiowala was still the sole provider for his wife and four children, including fully supporting his high school daughter and paying college tuition for his older children. 930 F.3d at 581. If deported to India, he would lose his business, and there would be no way for his children to continue their education in the United States. *Ibid.* The IJ and BIA, however, ruled that his U.S. citizen children would not face sufficient hardship upon their father's deportation to satisfy the hardship standard. *Ibid.* The Third Circuit—whose precedent now forecloses review of the agency's hardship determination—held that, "despite what [Mr.] Radiowala has accomplished and how much his family currently depends on him," the BIA's determination "cannot be reviewed by a court." *Id.* at 582.

Mr. Jesus Castillo-Gutierrez hit a similar roadblock, unable to seek judicial review of an agency determination that severely impacted his American son. *Castillo-Gutierrez* v. *Garland*, 43 F.4th 477 (5th Cir. 2022) (per curiam). Mr. Castillo-Gutierrez sought cancellation of removal because he needed to stay in the United States to manage his sixteen-year-old son's chronic medical condition. *Id.* at 478. Mr. Castillo-Gutierrez's son, a U.S. citizen, required regular doctor visits to treat his hemophilia, including periodic follow ups, and, most critically, an annual infusion of a drug called "Factor VIII" that cost about $3,000 each time. *Ibid.* Mr. Castillo-Gutierrez testified that, if he were removed to Mexico, he would be unable to continue paying for Factor VIII, and he was not aware of any other family members who could do so. *Ibid.*

The IJ determined that Mr. Castillo-Gutierrez's deportation would not cause exceptional and extremely unusual hardship to his son. 43 F.4th at 478-479. The BIA affirmed. *Ibid.* Mr. Castillo-Gutierrez petitioned the Fifth Circuit for review but, in an abrupt about face from circuit precedent, the Fifth Circuit determined that it no longer had jurisdiction to review the agency's hardship determination after this Court's decision in *Patel* v. *Garland*, 142 S. Ct. 1614 (2022). *Id.* at 481. That reasoning is wrong, and its effect is to deprive petitioners like Mr. Castillo-Gutierrez whose U.S. citizen children require complex medical care from obtaining judicial review of the IJs' and BIA's application of the hardship standard to the facts of their cases.

2. Noncitizens also provide critical financial and emotional support for family members beyond their children, including to their parents, spouses, and siblings. Appellate review is essential to ensure that the immigration courts correctly and uniformly interpret the law surrounding what facts constitute exceptional and extremely unusual hardship for those relatives. These cases arise less frequently than cases in which a noncitizen claims his or her children will suffer undue hardship, and the law in this area is thus less developed. Appellate review is particularly important to ensure uniform standards in the absence of robust case law.

For example, in *In re A-L-P-*,[3] the BIA correctly held that a noncitizen was eligible for cancellation of removal because his deportation would cause exceptional and extremely unusual hardship to his U.S. citizen spouse and two U.S. citizen children. His spouse, in particular, was "under great emotional and

[3] BIA (May 17, 2019) (on file with counsel).

economic stress" because of her husband's removal proceedings, which had already led to his loss of income and physical availability, "triggering an outbreak of alopecia and exacerbating her Major Depression and Anxiety Disorders." To make matters worse, she was unable to treat her medical conditions because she could not afford health insurance. One of the family's children also had been diagnosed with major depressive disorder, in part due to his father's removal proceedings. The BIA concluded that the "extraordinary severity" of the emotional hardships facing the noncitizen's spouse upon her husband's deportation were sufficient to satisfy Section 1229b(b)(1)(D).

Similarly, in *In re H-B-G-*,[4] the BIA held that the hardship requirement was satisfied, and that the noncitizen was thus eligible for cancellation of removal, where his deportation would inflict hardship on several qualifying U.S. relatives, including his spouse and daughter, and also three young grandchildren. The grandchildren's father had been deported and the children had been abandoned by their mother. They had also suffered physical abuse from a past boyfriend of their mother who burned two of the children with a crack cocaine pipe. All three children suffered from nightmares from their abuse and neglect and were in therapy. The noncitizen and his wife had been in the process of trying to adopt their grandchildren, who had been living with them for more than three years. Though Section 1229b(b)(1)(D) does not list grandchildren as qualifying relatives, the BIA explained that it was permitted to consider how any resulting hardship to the grandchildren would affect a qualifying relative, such as the noncitizen's wife. The BIA concluded that her being left solely responsible to care for "three

[4] BIA (Apr. 25, 2019) (on file with counsel).

young children who have suffered abuse and neglect and have exhibited emotional issues as a result" would subject her to hardship "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country."

The BIA reached the correct legal outcomes in those cases based on its precedent. But where the BIA fails to apply its precedent adequately, appellate review is essential. Mr. Jorge Becerra Ortiz's case highlights the risks of inconsistent application of the statutory standard absent judicial review. Mr. Becerra Ortiz sought cancellation of removal in part because his mother, a lawful permanent resident, would face exceptional and extremely unusual hardship upon his removal. *Ortiz* v. *Garland*, No. 21-60667, 2022 WL 17415000, at *1 (5th Cir. Dec. 5, 2022) (per curiam). Mr. Becerra Ortiz, who had been in the United States since he was approximately three years old, lived in the United States with his mother and five siblings.[5] He provided economic and emotional support for all of them. His mother and brother were lawful permanent residents, and his other siblings were U.S. citizens. Mr. Becerra Ortiz's stepfather had routinely physically abused his mother (in addition to Mr. Becerra Ortiz himself) when Mr. Becerra Ortiz was a child. Mr. Becerra Ortiz's mother testified that she was concerned about Mr. Becerra Ortiz's possible removal, causing her panic attacks and anxiety. Her other children also struggled with medical conditions. One had a heart murmur and anxiety and was in therapy for panic attacks. Another

[5] The facts of Mr. Becerra Ortiz's case are taken largely from the IJ's decision on August 25, 2020 (File: A201-125-006), and the BIA's decisions on August 4, 2021, and November 2, 2021. These decisions are on file with counsel and can also be found in the appendix to Mr. Becerra Ortiz's petition for a writ of certiorari (No. 23-26).

had severe depression and anxiety. And yet another had a history of self-harm.

Notwithstanding the emotional stress that would be inflicted on his family members by his deportation, which was comparable to the hardship that the BIA held satisfied the statutory standard in the cases above, the IJ determined that Mr. Becerra Ortiz failed to establish his eligibility for cancellation of removal. It found that only his mother was a qualifying relative and so only considered his siblings' hardship insofar as it impacted his mother. Though the IJ acknowledged the heightened emotional, financial, and mental hardship his mother would face, it determined that the hardship did not rise to an exceptional and extremely unusual level. The BIA affirmed the IJ's decision. Mr. Becerra Ortiz later submitted additional evidence to the BIA that his sisters recently disclosed long-term sexual abuses by their mother's boyfriend, and additional evidence of the family's emotional and financial hardships in light of that revelation. Though the BIA determined that the new evidence was "certainly tragic," it denied reopening because it did not believe Mr. Becerra Ortiz's application for cancellation of removal was likely to be successful if reopened.

When Mr. Becerra Ortiz petitioned the Fifth Circuit for review, the court flatly declined to consider whether Mr. Becerra Ortiz's mother would suffer the required hardship under its current precedent that such review is beyond the court's jurisdiction. 2022 WL 17415000, at *1.

CONCLUSION

The personal accounts shared herein are merely examples of the types of fact patterns the immigration courts face on a daily basis. As these cases and others demonstrate, the hardship determination is the

deciding factor in many cancellation of removal cases. This threshold determination alone is the difference between whether a noncitizen with significant family ties in the United States will be deported or will be able to continue providing for and supporting their U.S. citizen family members. Stripping the appellate courts of jurisdiction to review the immigration courts' determinations whether the statutory eligibility requirement has been met would leave thousands of families without any meaningful review of the immigration courts' life-changing cancellation of removal determinations.

That is not what Congress intended when it expressly reserved appellate review of questions of law under 8 U.S.C. § 1252(a)(2)(D). And it is certainly not what this Court intended when it held that Section 1252(a)(2)(D) allows appellate courts to review mixed questions of law and fact as well. *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020). The determination whether certain facts satisfy the "exceptional and extremely unusual hardship" standard is squarely one that involves the application of a statutory standard and legal precedent to the facts of each case—not a purely factual decision nor a discretionary one. And the review of such decisions falls within the expertise of the appellate courts, who are perfectly capable of reviewing the immigration courts' and BIA's application of the legal standard without infringing on their fact-finding role.

The judgment of the Third Circuit should be reversed.

Respectfully submitted.

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