No. 22-666

In the Supreme Court of the United States

SITU KAMU WILKINSON, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the agency's determination that a noncitizen has not "establishe[d]" the "exceptional and extremely unusual hardship" necessary to qualify for cancellation of removal under 8 U.S.C. 1229b(b)(1)(D) is subject to judicial review as a mixed question of law and fact under 8 U.S.C. 1252(a)(2)(D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but 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 unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2022. On December 12, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 17, 2023, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (1952) (8 U.S.C. 1101 *et seq.*), "[t]he Attorney General may cancel removal" of a noncitizen who is inadmissible or deportable from the United States if the noncitizen "(A) has been physically present in the United States for a continuous period of not less than 10 years"; "(B) has been a person of good moral character during such period"; "(C) has not been convicted of" certain listed crimes; 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. 1229b(b)(1).[1]

The current form of the cancellation-of-removal provision was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. But a provision permitting discretionary relief from removal has been included in the INA since it was first enacted in 1952. See § 244, 66 Stat. 214-217. The 1952 version provided that "the Attorney General may, in his discretion, suspend deportation" of a noncitizen who, among other things, "is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to

[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

the alien or to his spouse, parent or child, who is a citizen or" a lawful permanent resident. INA § 244(a)(1)-(5), 66 Stat. 214-216.

In 1962, Congress amended the hardship requirement, retaining the language specifying that a hardship assessment should reflect "the opinion of the Attorney General," but making the "exceptional and extremely unusual hardship" requirement applicable only to noncitizens convicted of certain crimes. 8 U.S.C. 1254(a)(2) (1964); see Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1248. Other noncitizens seeking suspension of deportation were required to prove that their "deportation would, in the opinion of the Attorney General, result in extreme hardship" to themselves or an immediate family member. 8 U.S.C. 1254(a)(1) (1964).

Three decades later, in IIRIRA, Congress adopted the current version of the statute, which renamed the form of relief "cancellation of removal." 110 Stat. 3009-594 (capitalization and emphasis omitted). Congress also eliminated the language specifying that the cancellation-of-removal determination should be made "in [the Attorney General's] discretion" and that the hardship determination should reflect the Attorney General's "opinion." 110 Stat. 3009-615. But Congress reinstated, for most applicants, the requirement to establish that removal would result in "exceptional and extremely unusual hardship." *Ibid.*

In addition to those substantive changes to the standards for cancellation of removal, IIRIRA also "repealed the [INA's] old judicial-review scheme * * * and instituted a new (and significantly more restrictive one) in 8 U.S.C. § 1252." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). The revised judicial-review framework included a new pro-

vision, 8 U.S.C. 1252(a)(2)(B), which barred judicial review of "denials of discretionary relief." IIRIRA § 306(a)(2), 110 Stat. 3009-607 to 3009-612 (capitalization and emphasis omitted). Section 1252(a)(2)(B)(i) stated that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" certain enumerated statutes, including the one governing cancellation of removal. *Ibid.*

In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310, Congress made no further changes to the substantive cancellation-of-removal provision, but it did amend the judicial-review framework in Section 1252(a)(2) by adding a proviso in subparagraph (D), which states that "[n]othing in subparagraph (B) or (C), or in any other provision of [the INA] (other than this section) 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." 8 U.S.C. 1252(a)(2)(D).

b. Under the current statutory framework, an immigration judge (IJ) first rules on a noncitizen's application for cancellation of removal as part of the noncitizen's removal proceedings. See 8 C.F.R. 1003.10(b), 1240.1(a)(1)(i) and (ii). The noncitizen bears the burden of proving both that he is statutorily eligible and that he ultimately warrants relief. 8 U.S.C. 1229a(c)(4)(A); see 8 C.F.R. 1240.8(d). If the IJ finds that the noncitizen has failed to meet his burden, he may appeal to the Board of Immigration Appeals (Board), which exercises delegated power from the Attorney General. 8 C.F.R. 1003.1(a)(1) and (b), 1003.10(c). While a noncitizen who is dissatisfied with a Board decision may generally file a petition for review in the court of appeals under 8 U.S.C. 1252(a)(1), the court is precluded from exercis-

ing jurisdiction over "any judgment regarding" cancellation of removal, 8 U.S.C. 1252(a)(2)(B)(i), unless the noncitizen's petition presents "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

2. Petitioner is a native and citizen of Trinidad and Tobago. Pet. App. 2a. He was admitted to the United States on a visitor visa, failed to depart under the terms of the visa in 2003, and then remained in the United States without authorization. *Id.* at 2a, 9a, 12a. In 2019, petitioner was arrested and charged with drug crimes under Pennsylvania law. *Id.* at 9a.

a. While the drug charges were pending, petitioner was taken into immigration custody and placed in removal proceedings on the ground that he had remained in the United States longer than permitted. Pet. App. 9a.[2] Petitioner conceded his removability but applied for cancellation of removal under Section 1229b(b)(1) and other forms of relief and protection. *Id.* at 9a-10a. In support of his application for cancellation of removal, petitioner testified before the IJ, *id.* at 12a-15a, as did the mother of petitioner's then-seven-year-old son "M," and M's maternal grandmother. See *id.* at 18a-21a.

The IJ determined that petitioner satisfied the first three statutory requirements for cancellation of removal: ten years of continuous physical presence in the United States, good moral character, and absence of a relevant criminal record. Pet. App. 25a-26a. The IJ then addressed whether petitioner's removal would cause "exceptional and extremely unusual hardship to his U.S. citizen child." *Id.* at 26a.

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[2] Petitioner represents (Br. 14) that the drug charges have since been withdrawn.

The IJ explained that, "[t]o establish exceptional and extremely unusual hardship, the applicant must demonstrate that a qualifying relative would suffer hardship that is substantially different from or beyond that which would ordinarily be expected to result from their removal, but need not show that such hardship would be 'unconscionable.'" Pet. App. 26a (quoting *In re Monreal*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (en banc)).

The IJ made a series of findings regarding how petitioner's departure would affect M. The IJ found that, if petitioner were removed, M would remain in the United States with his mother. Pet. App. 27a-28a. The IJ further found that M has eczema and asthma, and that the asthma qualifies as "a serious medical condition" because it "requires use of an asthma pump and medications, [M] regularly goes to the hospital for treatment, and he has been to the emergency room at least twice." *Id.* at 27a. In addition, the IJ determined that, since petitioner's detention, M had "been feeling sad, acting up, and breaking things," and that M had been having difficulty focusing in school, but that his mother had declined "for now" his teacher's recommendation to obtain counseling. *Ibid.*

The IJ also found that petitioner "provide[s] emotional and sometimes personal care" to M, but that M "clearly has lived without [petitioner's] daily presence for most of his life." Pet. App. 27a-28a. The IJ observed that petitioner had lived with M for only the first two years of the boy's life and three months in 2020 (when M was six). *Id.* at 28a; see *id.* at 13a. At all other times, M's mother had custody of him, although petitioner visited "regularly every weekend and was involved in his son's life." *Id.* at 28a. The IJ further found that M's mother had been his "primary caretaker * * * for the

past five years" and that she had focused on M's care "in lieu of working regularly." *Ibid.* The IJ conceded that it would "be difficult" for M's mother to balance working and childcare, but the IJ found that M's mother is "able to work" and that "[h]er burden can be mitigated by the support she has from her mother, * * * who has helped care for [M] in the past and can continue to help." *Ibid.*

As to financial hardship, the IJ found that M and his mother "may suffer some" if petitioner is removed because petitioner had been providing $1200 a month in support "without a formal or legal arrangement in place." Pet. App. 28a. The IJ recognized that "the level of financial support would not be the same" if petitioner were removed to Trinidad and Tobago, given the "differences in income and cost of living between the two countries." *Id.* at 28a-29a. But the IJ found that petitioner had "not provided any evidence that he would be unable to secure employment in Trinidad and Tobago, or be unable to provide for his family in the United States by sending funds from Trinidad and Tobago." *Id.* at 28a.

Then,"[b]ased on the aggregate of the factors that the [IJ] ha[d] weighed," the IJ "f[ound] that the loss of [petitioner's] income is not beyond the ordinary hardship that would be expected when a close family member leaves this country." Pet. App. 29a. Further, the IJ expressly declined to "find that [petitioner's] removal would cause emotional hardship to his family beyond that which would normally be expected from the removal of a parent and provider." *Ibid.* Therefore, the IJ also declined to "find that the evidence of hardship presented in this case rises to" the level of "'exceptional

and extremely unusual hardship.'" *Ibid.* (quoting 8 U.S.C. 1229b(b)(1)).

b. The Board affirmed the IJ's decision without opinion. Pet. App. 5a-6a & n.1.

c. Petitioner sought review in the court of appeals, contending that the IJ should have found that M "would suffer exceptional and extremely unusual hardship upon the petitioner's removal." Pet. C.A. Br. 14 (capitalization and emphasis omitted). Petitioner's opening brief began with a paragraph asserting that—even though the IJ said his decision was "based on the aggregate of the factors"—the IJ had in fact "expressly" and erroneously "narrowed down the hardship determination to the [p]etitioner's financial support." *Id.* at 16. The brief then moved on to the crux of petitioner's argument: the assertion that the IJ had erred in finding that petitioner's removal would not "cause emotional hardship to his family beyond that which would normally be expected." *Ibid.* Petitioner deemed that finding "conclusory" to the extent that it relied on: "[a] misunderstanding [of] the depth of the emotional relationship between [p]etitioner and his [c]hild"; "[s]peculation about care and support" that M "would receive if [p]etitioner is removed"; and "[a] misunderstanding of [M's] uncommon and difficult situation, in light of his family's unwillingness to provide him access to care for his mental health needs." *Id.* at 16-17.

In support of those claims, petitioner provided an account of his relationship with M that allegedly "establishe[d] that the depth of [p]etitioner's relationship with his [c]hild is exceptional," such that his removal "would cause" M "suffering beyond that which would ordinarily be expected." Pet. C.A. Br. 18. Petitioner also challenged the IJ's conclusion that M's mother would be

able to support M financially, suggesting that "nothing in the record indicat[es] [that she] would be able and willing to work and provide for the [c]hild." *Ibid.* And petitioner alleged that the IJ failed to recognize that M's situation is "extremely unusual" because M's mother "is unwilling to help the [c]hild access care for his mental health needs" and "most children do not have to suffer from their parent's knowing unwillingness to seek counseling for them." *Id.* at 20-21.

d. The court of appeals dismissed petitioner's challenge to the agency's determination that he had failed to establish the hardship requisite for cancellation of removal. Pet. App. 1a-4a. The court held that it lacked jurisdiction under Section 1252(a)(2)(B)(i) to review the merits of petitioner's claim because the hardship "decision is discretionary." *Id.* at 3a (citing *Patel* v. *Garland*, 596 U.S. 328, 338 (2022), and *Hernandez-Morales* v. *Attorney Gen.*, 977 F.3d 247, 249 (3d Cir. 2020)).

SUMMARY OF ARGUMENT

Under 8 U.S.C. 1252(a)(2), a court is precluded from reviewing "any judgment regarding the" denial of cancellation of removal, 8 U.S.C. 1252(a)(2)(B)(i), unless the challenge falls into Section 1252(a)(2)(D)'s "precise" exception for "constitutional claims and questions of law," *Patel* v. *Garland*, 596 U.S. 328, 339 (2022). In *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062 (2020), the Court held that Section 1252(a)(2)(D)'s exception for "questions of law" permits a court to review a "mixed question of law and fact" that arises from a noncitizen's challenge to the agency's "application of a legal standard to undisputed or established facts." *Id.* at 1067, 1069 (citation omitted).

Petitioner errs in asserting that *Guerrero-Lasprilla* permits judicial review of his challenge to the determi-

nation that he was ineligible for cancellation of removal because he did not "establish[]" that his removal will cause the "exceptional and extremely unusual hardship" required by 8 U.S.C. 1229b(b)(1)(D). In petitioner's view, *Guerrero-Lasprilla* "controls," Pet. Br. 4, because its holding means that a noncitizen presents a reviewable mixed question whenever he challenges the agency's determination that he has failed to satisfy a statutory requirement. But petitioner's broad reading of *Guerrero-Lasprilla* is foreclosed by *Patel* and this Court's other precedents recognizing that many statutory determinations present "pure question[s] of fact," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982), or "questions of administrative discretion," *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 559 (1928), rather than "mixed question[s] of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal" standard, *Pullman-Standard*, 456 U.S. at 289.

In assessing whether a particular statutory determination is factual, discretionary, or legal, this Court typically looks to its past treatment of similar issues, the statute's text and history, and whether the statutory determination has the defining characteristics of factfinding and discretionary decisionmaking. Each of those factors demonstrates that the "exceptional and extremely unusual hardship" determination presents unreviewable questions of fact and administrative discretion, not "questions of law" reviewable under the proviso in Section 1252(a)(2)(D). This Court has long treated statutory "exceptional" circumstances determinations as discretionary. See, *e.g.*, *Williamsport Wire Rope*, 277 U.S. at 559. Section 1229b(b)(1)(D)'s text and history establish that the "exceptional and extremely

unusual hardship" determination is entrusted to the discretion of the Attorney General and his delegees, rather than the courts. And deciding whether the statutory requirement is satisfied involves the sort of weighing of evidence and comparative analysis that are the hallmarks of factual and discretionary determinations.

Although the "exceptional and extremely unusual hardship" determination is factual and discretionary, courts may still review genuinely legal challenges such as a plausible claim that the agency misinterpreted the statute or failed to apply the understanding of the statute reflected in its precedents. But a noncitizen may not obtain review of the agency's factual and discretionary judgment that the evidence he presented is insufficient to establish the requisite hardship by describing that alleged error as "legal" or by including a frivolous legal claim alongside his non-legal challenge.

Petitioner's arguments to the contrary lack merit. Petitioner contends that his challenge to the statutory hardship determination resembles the challenge to the agency's application of the due-diligence requirement that was at issue in *Guerrero-Lasprilla*, but the due-diligence standard was not a statutory one. It arose from the doctrine of equitable tolling, and because equitable tolling is a judge-made, judge-applied doctrine, it was undisputed in *Guerrero-Lasprilla* that due diligence was a legal standard and that its application presented a mixed question of law and fact. By contrast, the INA's "exceptional and extremely unusual hardship" requirement for cancellation of removal originated from Congress and has long been applied by the agency. Petitioner has offered no examples of similar statutory determinations that present a mixed question.

Petitioner's other arguments are similarly unavailing. This Court's decision in *Patel* already rejected petitioner's contention that all eligibility determinations are necessarily nondiscretionary and reviewable because the statutory scheme calls for an unreviewable exercise of discretion only after the agency determines that the eligibility requirements are met. 596 U.S. at 343-344. *Patel* similarly forecloses petitioner's attempt to rely on the presumption in favor of judicial review to narrow the scope of Section 1252(a)(2)(B)(i)'s express bar on judicial review. *Id.* at 347. And petitioner's contention that the government's approach is unworkable because courts will be unable to distinguish reviewable questions of law and mixed questions from unreviewable questions of fact and administrative discretion rings hollow: Courts routinely make finer distinctions in determining the standard of review for district court and agency decisions, and many of the circuits are already applying the government's approach to hardship determinations under Section 1229b(b)(1)(D).

ARGUMENT

PETITIONER'S CHALLENGE TO THE AGENCY'S "EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP" DETERMINATION IS UNREVIEWABLE

In *Patel* v. *Garland*, 596 U.S. 328 (2022), this Court held that 8 U.S.C. 1252(a)(2)(B)(i) makes the agency judgments underlying a denial of discretionary relief unreviewable except to the extent that a challenge presents "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D). Petitioner seeks to limit the scope of that holding by asserting that every statutory determination presents a reviewable "question[] of law" under this Court's earlier decision in *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062 (2020). But *Guerrero-*

Lasprilla held only that a court may review a mixed question of law and fact that arises when a noncitizen challenges the agency's application of a legal standard to settled facts. Many statutory determinations do not present such a mixed question because they require the agency to find facts and exercise its discretion, rather than requiring the kind of application of a legal standard to settled facts that *Guerrero-Lasprilla* found reviewable.

The agency's determination that a noncitizen has not "establishe[d]" that his removal will cause the "exceptional and extremely unusual hardship" required for cancellation of removal, 8 U.S.C. 1229b(b)(1)(D), bears the hallmarks of a statutory determination that presents questions of fact and discretion—not questions of law. Section 1252(a)(2)(B)(i) therefore deprives the courts of jurisdiction to review petitioner's challenge to the agency's finding that he did not satisfy the INA's hardship requirement.

A. Under Section 1252(a)(2), A Determination Is Unreviewable If It Involves Factfinding And An Exercise Of Discretion Rather Than Application Of A Legal Standard

In Section 1252(a)(2)(B) and (D), Congress has permitted judicial review of "questions of law" but precluded review of "[d]enials of discretionary relief," including denials of cancellation of removal under Section 1229b. 8 U.S.C. 1252(a)(2)(B)(i) and (D) (emphasis omitted). Last year in *Patel*, this Court held that the broad language of Section 1252(a)(2)(B)(i) bars a court from exercising jurisdiction over "'any and all decisions relating to the granting or denying' of discretionary relief" under the enumerated statutes. 596 U.S. at 337 (citation omitted).

In reaching that holding, the Court rejected Patel's contention that Section 1252(a)(2)(B)(i) merely precludes review of the IJ's ultimate "decision whether to grant relief to an applicant eligible to receive it." *Patel*, 596 U.S. at 338. And the Court similarly rejected the government's invitation to "narrow the field" of unreviewable determinations by interpreting the term "judgment" to "refer[] exclusively to a 'discretionary' decision," *id.* at 340-341 (citation omitted), such as "the determination that a noncitizen's removal would not result in exceptional and extremely unusual hardship" for a U.S.-citizen or lawful-permanent-resident relative, *id.* at 337. The Court held that neither Patel's nor the government's interpretation was faithful to Section "1252(a)(2)(B)(i)'s text and context," which made clear that the statute bars the review of "*any* judgment *regarding* the granting of relief" under the enumerated statutes, "not just discretionary judgments or the last-in-time judgment." *Id.* at 338.

As the Court in *Patel* acknowledged, Section 1252(a)(2)(D) creates a "precise" exception to that otherwise categorical bar, 596 U.S. at 339, by preserving judicial review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). In *Guerrero-Lasprilla*, the Court held that the exception for "questions of law" permits review of the "mixed question of law and fact" presented by a noncitizen's contention that the agency erroneously applied "a legal standard to undisputed or established facts." 140 S. Ct. at 1067.

Notwithstanding *Guerrero-Lasprilla*, some challenges to statutory determinations continue to fall outside Section 1252(a)(2)(D)'s exception for "questions of law." In some sense every statutory determination constitutes an application of law (the statute) to fact (the

circumstances of the noncitizen's case), but this Court has long recognized that certain categories of statutory determinations do not present a mixed question because the statutory determinations constitute "finding[s] of fact," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982), or the exercise of "administrative discretion," *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 560 (1928). Thus, in *Pullman-Standard*, this Court held that whether an employer had an "intention to discriminate" under 42 U.S.C. 2000e-2(h) of Title VII presents a "pure question of fact" rather than a "question of law" or a "mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent." 456 U.S. at 287, 289. And in *Williamsport Wire Rope*, the Court held that a statutory determination presented unreviewable "questions of administrative discretion" where it permitted the Commissioner of Internal Revenue to grant tax relief to a company that would otherwise face "'exceptional hardship.'" 277 U.S. at 559 (citation omitted).

The Court's opinion in *Patel* itself recognized two examples of statutory determinations that are subject to Section 1252(a)(2)(B)(i)'s bar on judicial review. First, in holding that Section 1252(a)(2)(B)(i) precludes review of discretionary and nondiscretionary "factual findings," the Court cited "credibility determination[s]" as a paradigmatic example of unreviewable factual findings, 596 U.S. at 341, even though findings of credibility under the INA are typically made pursuant to the statutory standards set out in 8 U.S.C. 1158(b)(1)(B)(iii) and 1229a(c)(4)(C). Second, the Court observed that it was undisputed that Section 1252(a)(2)(B)(i) bars review of the agency's ultimate "discretionary judgment" to

grant or deny relief to an eligible noncitizen under an enumerated statute, *Patel*, 596 U.S. at 338, even though the agency's judgment might readily be described as a statutory determination that relief is unwarranted.

Even apart from those examples in *Patel*, many statutory determinations under the INA clearly constitute findings of fact or exercises of discretion rather than the sort of application of law to fact that gave rise to a mixed question in *Guerrero-Lasprilla*. Where, for example, a noncitizen challenges the agency's finding that he has been in the country for less than ten years, that is plainly a challenge to a finding of fact. The noncitizen cannot evade Section 1252(a)(2)(B)(i)'s judicial-review bar by repackaging his claim as a challenge to the agency's statutory determination that he has not met the continuous-physical-presence requirement for cancellation of removal. 8 U.S.C. 1229b(b)(1)(A).

Guerrero-Lasprilla did not hold otherwise because it did not involve a challenge to a statutory determination. Instead, *Guerrero-Lasprilla* concerned two noncitizens' challenges to the application of the "equitable tolling due diligence standard." 140 S. Ct. at 1068. Because equitable tolling is a "judicial doctrine" that "is typically applied by courts," *Arellano* v. *McDonough*, 598 U.S. 1, 7 n.1 (2023), neither the parties nor the Court questioned the premise that an equitable tolling determination presents an "application of a legal standard to settled facts" of the sort traditionally described as a "'mixed question of law and fact.'" *Guerrero-Lasprilla*, 140 S. Ct. at 1068-1069 (citation omitted). But *Guerrero-Lasprilla* did not address the circumstances in which a statutory determination would similarly require the "application of a legal standard," still less did it suggest that *every* statutory determination

presents a "mixed question of law and fact" that is reviewable under Section 1252(a)(2)(D). To the contrary, *Guerrero-Lasprilla* expressly recognized that Section 1252(a)(2)(D) "forbid[s] appeals of factual determinations—an important category in the removal context." *Id.* at 1073. And the prevailing petitioners had freely conceded that their position would not lead to "judicial review of decisions committed to agency discretion." Reply Br. at 14, *Guerrero-Lasprilla, supra* (No. 18-776).

Accordingly, in a case like this, the availability of judicial review depends on whether a statutory determination should be categorized as a reviewable "application of a legal standard to established facts," *Guerrero-Lasprilla*, 140 S. Ct. at 1072, or whether it should instead be categorized as unreviewable because it constitutes a factual finding, an exercise of administrative discretion, or some combination of the two.

B. The Court's Precedents Provide A Framework For Distinguishing Reviewable Determinations Of Law From Unreviewable Determinations That Are Factual And Discretionary

Identifying statutory determinations that qualify as unreviewable factual findings or discretionary judgments under Section 1252(a)(2)(B)(i) presents a familiar task for appellate courts. They often draw similar distinctions among legal, factual, discretionary, and mixed questions in order to determine the appropriate standard of review where a party challenges an agency's or district court's application of a statute to the facts of a specific case. See, *e.g.*, *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1779 n.19 (2019) (recognizing that "abuse of discretion" standard applies to agency's overall conclusion regarding Social Security benefits, but "'substantial evidence'" standard applies "'as to any fact'") (citation

omitted); *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (holding that district court's "discretion[ary]" determination regarding attorney's fees should be reviewed for abuse of discretion).

Indeed, in many ways, a court's task under Section 1252(a)(2)(D) is easier than determining the correct standard of review. In the standard-of-review context, a court must categorize a determination as factual, legal, discretionary, or mixed, because each label has different consequences for the standard of review. See *Highmark*, 572 U.S. at 563 (describing distinct standards for factual, legal, and discretionary determinations); *U.S. Bank Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (explaining that the standard of review for a mixed question will vary depending on whether it is more factual or legal).

By contrast, the salient distinction under Section 1252(a)(2)(D) is between "questions of law" (including mixed questions) on the one hand, and everything else on the other. It is therefore unnecessary for courts to undertake the sometimes daunting task of distinguishing between factual and discretionary determinations. See *Patel*, 596 U.S. at 340 (finding the government's proposed line between factual and discretionary determinations to be "subtle, to say the least"). So long as the agency judgment in question requires some combination of factfinding and discretion, rather than the application of a legal standard to established facts, the determination is unreviewable in light of Section 1252(a)(2)(B)(i).

This Court's precedents mark a well-worn path for identifying the discretionary and factual determinations that differ from questions of law.

1. At the outset, a court must frame its analysis at the appropriate level of specificity. This Court recently explained that, when confronted with a seemingly mixed question of fact and law, a court "should try to break such a question into its separate factual and legal parts." *Google LLC* v. *Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021). Accordingly, a court should not classify a challenge to a statutory determination as a mixed question simply because, before applying a statute, an agency must generally interpret the text to decide what it requires. Whether the agency correctly interpreted the statute is a "legal" question, but it should be "separate[d]" out, *ibid.*, in cases where a party is not challenging the agency's understanding of the statutory text. Where the party is instead asserting that the agency erred in applying an established interpretation of the statute to the facts of his case, the relevant inquiry is what additional work the agency was required to perform in applying the statute.

2. Once the question is properly framed, the court of appeals should look to text and history to decide whether in applying the statute the agency was required to make a finding of fact, to exercise its discretion, or to apply a legal standard.

In some cases, the answer will be supplied by precedents establishing the historical treatment of analogous statutory requirements. In *Pullman-Standard*, for example, the Court held that the "intention to discriminate" requirement presented a "pure question of fact" based on the well-established practice of "[t]reating issues of intent as factual matters for the trier of fact." 456 U.S. at 288. *Pullman-Standard* observed that the Court had previously found that questions of intent were factual in cases involving the application of the Tax

Code's "gift" provision and the antitrust statutes. *Ibid.*; see *Commissioner* v. *Duberstein*, 363 U.S. 278, 299 (1960) (deeming both the ultimate question of whether something is a "gift" and the subsidiary question of the intent of the giver questions of fact); *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) (considering intent in the antitrust context). Because the intent requirements were deemed factual in those cases, the Court held that the "intention to discriminate" requirement under Title VII should also be deemed factual. *Pullman-Standard*, 456 U.S. at 289.

In other instances, the text and history of the statute itself are dispositive. Thus, in *Octane Fitness, LLC* v. *Icon Health & Fitness, Inc.*, 572 U.S. 545 (2014), the Court relied on conventional tools of statutory interpretation in holding that the "exceptional case" requirement in the Patent Act's provision for attorney's fees should be decided through a "case-by-case exercise of" the district court's "discretion," rather than the application of a legal test. *Id.* at 553-554. In reaching that holding, the Court explained that, when Congress first enacted the attorney's fees provision, it had provided "that a court 'may *in its discretion* award reasonable attorney's fees to the prevailing party.'" *Id.* at 548 (citation omitted; emphasis added). Congress later dropped the express reference to "discretion," providing instead that a court may award fees "'in exceptional cases.'" *Id.* at 549 (citation omitted). But the Court held that the decision whether to award fees is still a "discretionary inquiry" for the district court, *id.* at 557, which is to be reviewed only under an "abuse of discretion" standard, *Highmark*, 572 U.S. at 563 (discussing *Octane Fitness*). The Court explained that Congress's use of the term "'exceptional'" was sufficient to convey

the discretionary nature of the determination and permits district courts to award fees based on a "totality of the circumstances" assessment that a particular case is "one that stands out from others." *Octane Fitness*, 572 U.S. at 554.

3. If text and history are silent on the issue, the Court has explained that there is no single "rule or principle that will unerringly distinguish a factual finding" or a matter of discretion "from a legal conclusion." *Pullman-Standard*, 456 U.S. at 288. But the Court's cases offer some general guidelines regarding the hallmarks of factual and discretionary determinations, as compared to legal conclusions.

As explained in *Patel*, factual determinations are generally produced through the "exercise of evaluating conflicting evidence to make a judgment about what happened." 596 U.S. at 341. Some findings of fact concern "'basic' or 'historical' fact[s]—addressing questions of who did what, when or where, how or why." *Village of Lakeridge*, 138 S. Ct. at 966 (citation omitted). But other factual determinations concern the future, rather than the past, and require the adjudicator to make highly subjective judgments such as the extent to which an injury has harmed a worker's earning potential. See *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 140-141 (1997) (remanding for further "findings of fact" on that issue). Many other findings of fact are likewise predicated on the "weigh[ing]" and analyzing of a variety of subsidiary facts. *Duberstein*, 363 U.S. at 289. Thus, in *Duberstein*, the Court explained that a finding as to whether something qualifies as a "gift" under the Tax Code requires the factfinder to consider the "totality of the facts" through the lens of "practical human experience." *Ibid.* And in *Patel*, the Court recognized

that, while credibility involves a finding of fact, "[i]t is easily described as an 'opinion or evaluation' formed 'by discerning and comparing' the evidence presented." 596 U.S. at 341.

Discretionary determinations typically demand the same kind of weighing and evaluating of evidence that characterizes a finding of fact, but this Court has held that, in addition, a discretionary determination generally requires an agency "to exercise its specialized, experienced judgment," often by weighing policy considerations or making comparisons across a vast array of those subject to the statute (such as all of the firms in a particular industry). *Moog Indus. Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); see *Hiatt* v. *Brown*, 339 U.S. 103, 108 (1950) (holding that the determination of the "availability" of military personnel under an Article of War should be "understood to depend upon a discretionary" —and unreviewable—determination by the Executive); cf. *Berkovitz* v. *United States*, 486 U.S. 531, 536, 537 (1988) (holding that a federal employee's conduct falls within the "discretionary function" exception of the Federal Tort Claims Act where it "involves an element of judgment or choice * * * based on considerations of public policy").

This Court's decision in *Williamsport Wire Rope*, *supra*, is particularly instructive. In that case, a corporation sought judicial review of a denial of a form of tax relief that the Commissioner of Internal Revenue was empowered to grant if assessing the tax would otherwise "work . . . an exceptional hardship" on the corporate taxpayer. 277 U.S. at 558 (citation omitted). The Court held that judicial review of the denial was unavailable because the statute required the Commissioner to exercise power that was necessarily "discretionary in

character." *Id.* at 559. The Court explained that Congress had authorized the Commissioner to resolve "questions of administrative discretion" when it empowered him to decide questions such as "[w]hether * * * there [we]re 'abnormal conditions'" and whether the assessment "would work 'exceptional hardship.'" *Ibid.* Among other things, the Court recognized that the "conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof," *ibid.*, and that those considerations involved "facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters," *id.* at 561.

C. A Determination That A Noncitizen Has Failed To Establish "Exceptional And Extremely Unusual Hardship" Is Generally Unreviewable

Under the framework described in Part B, *supra*, the determination by an IJ or the Board that a noncitizen has failed to "establish[] that removal would result in exceptional and extremely unusual hardship" to a qualifying relative, 8 U.S.C. 1229b(b)(1)(D), does not present a mixed question of law and fact. Where, as here, the noncitizen is not challenging the agency's understanding of the statute and is instead asserting that the agency erred in applying its understanding to his case, the noncitizen is challenging the agency's factfinding and its exercise of discretion. The noncitizen is not challenging the kind of agency application of a "legal standard to established facts" that is subject to review under Section 1252(a)(2)(D)'s exception for "questions of law." *Guerrero-Lasprilla*, 140 S. Ct. at 1068-1069.

1. At the outset, this case involves the reviewability of a challenge to the agency's determination that a noncitizen has failed to satisfy the "exceptional and ex-

tremely unusual hardship" requirement. It does not involve the reviewability of a claim that the agency has misinterpreted the statutory text or failed to apply its established interpretation to the facts of a particular case. The Board "clarif[ied]" the "meaning" of the "'exceptional and extremely unusual hardship'" requirement more than 20 years ago in a trio of precedential opinions. *In re Monreal*, 23 I. & N. Dec. 56, 60-65 (B.I.A. 2001); see *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 470 (B.I.A. 2002); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 322 (B.I.A. 2002). Those decisions set out factors that are relevant to the analysis and establish that satisfying the statute generally requires evidence of "hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *In re Monreal*, 23 I. & N. Dec. at 65. The IJ quoted and applied those Board decisions in this case, Pet. App. 26a-27a, and petitioner does not allege otherwise or contend that the Board has misinterpreted the statute's requirements.

Properly framed, the question is thus whether the agency's determination, under its uncontested understanding of the "exceptional and extremely unusual hardship" requirement, that petitioner had not established such a hardship involved the application of a legal standard to established facts, or whether it instead required the agency to find facts and exercise discretion.

2. a. Text and history establish that the INA's "exceptional and extremely unusual hardship" determination is in the category of decisions that require factfinding and an exercise of discretion. As in *Pullman-Standard*, this Court's treatment of analogous statutes is all but dispositive because the Court has previously

found that "exceptional" circumstances requirements demand a discretionary determination from the factfinder rather than the application of a legal standard. In *Octane Fitness*, for instance, the Court held that the Federal Circuit had erred in imposing a legal test for identifying "'exceptional cases'" warranting attorney's fees under the Patent Act because the "exceptional case" determination instead requires the district court's exercise of "case-by-case" discretion. 572 U.S. at 554.

Williamsport Wire Rope is even more directly on point. Like Section 1229b(b)(1)(D), the text of the tax-relief provision in *Williamsport Wire Rope* made relief depend in part on a finding of "exceptional hardship," and the statute bore other similarities to the INA's cancellation-of-removal provision. In both instances, Congress called for an administrative decision regarding whether to relieve a party from a statutory mandate—removal in this case, and an assessment on excess profits and war profits in *Williamsport Wire Rope*. And Congress made eligibility for discretionary relief in both provisions turn on an administrative finding that the harm the statute would inflict on a particular party is not only different from that felt by most others to whom the statute applies, but "exceptional[ly]" so.

The conclusion in *Williamsport Wire Rope* that the tax statute conferred unreviewable, discretionary authority on the IRS applies equally to Section 1229b(b)(1)(D). As the Court explained, such an "exceptional hardship" determination depends on administrative factfinding, not only with respect to the individual or entity before the agency, but with respect to "facts concerning the situation of a large group" of other parties. *Williamsport Wire Rope*, 277 U.S. at 561. Further, the ultimate question of how those parties' circum-

stances compare must be resolved according to "administrative discretion," rather than a legal principle. *Id.* at 559. Put simply, courts cannot meaningfully judge the validity of a comparative determination of that kind because, unlike an agency administering a statutory framework, they lack "wide knowledge and experience with the class of problems concerned." *Id.* at 558; see *id.* at 561.

b. The statutory history of the INA's hardship requirement further demonstrates that it involves an exercise of administrative discretion, rather than the application of a legal rule susceptible to judicial amendment and oversight.

When Congress enacted the "exceptional and extremely unusual hardship" requirement as part of the INA in 1952, it made clear that whether the hardship requirement was satisfied was a discretionary determination to be made by the Attorney General and his delegees. The 1952 statute provided that suspension of deportation was available only to a "person whose deportation would, *in the opinion of the Attorney General*, result in exceptional and extremely unusual hardship to" the person himself or a qualifying U.S.-citizen or lawful-permanent-resident relative. INA § 244(a)(1)-(5), 66 Stat. 214-216 (emphasis added). By specifying that the hardship determination should represent the Attorney General's "opinion," Congress made clear that the assessment was discretionary and not amenable to judicial second guessing. After all, courts could hardly claim to know the Attorney General's "opinion" better than he did.

In a series of cases in the 1980s, this Court confirmed that the hardship requirement entails a discretionary determination rather than a question for judicial reso-

lution. In 1962, Congress had amended the hardship requirement, retaining the "opinion" language, but allowing most noncitizens to make a lesser showing of "extreme hardship." 8 U.S.C. 1254(a)(2) (1964); see p. 3, *supra*. In *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam), the Court held that assessing whether the "extreme hardship" requirement was met was a discretionary determination for the agency, not the courts.

Jong Ha Wang reversed a court of appeals' decision that had interpreted the "extreme hardship" requirement leniently and "strongly indicated that the [the noncitizens] should prevail" on remand to the Board. 450 U.S. at 145. This Court held that, "[i]n taking this course," the court of appeals "extended its 'writ beyond its proper scope and deprived the Attorney General of a substantial portion of the discretion which [the suspension-of-deportation statute] vests in him.'" *Ibid.* (citation omitted). The Court further observed that "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so," and that the court of appeals' decision had improperly "'shift[ed] the administration of hardship deportation cases from the Immigration and Naturalization Service to th[e court of appeals].'" *Id.* at 145, 146 (citation omitted).

Three years later, in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), the Court reiterated that the chief problem with the court of appeals' broad interpretation of the extreme-hardship standard in *Jong Ha Wang* was that it "impermissibly shift[ed] discretionary authority from INS to the courts." *Id.* at 195.[3] And in *INS* v. *Hector*,

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[3] The courts of appeals similarly recognized the import of *Jong Ha Wang*, reviewing "extreme hardship" determinations only for

479 U.S. 85 (1986), a case concerning the meaning of the term "child" in the "extreme hardship" provision, the Court described the Board's conclusion that a niece is not a "'child" within the meaning of the statute as "a legal matter," but it described the Board's determination that the noncitizen's separation from her nieces "would not constitute extreme hardship" as "a factual matter." *Id.* at 86-87.

Those cases were the backdrop when IIRIRA expressly barred courts from reviewing the agency's factual and discretionary determinations regarding cancellation of removal. See pp. 3-4, *supra*. As this Court has explained, "the theme" of IIRIRA was the "protect[ion of] the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). Consistent with that theme, Congress introduced a new provision, Section 1252(a)(2)(B), making "any judgments regarding" cancellation of removal and other forms of discretionary relief unreviewable in the courts of appeals. At the same time, Congress amended the cancellation-of-removal provision to excise the now-redundant instructions that the ultimate decision whether to grant relief should be "in [the Attorney General's] discretion," and that the hardship determi-

"'abuse of discretion,'" and explaining that any substantive review was "strictly limited." *Hernandez-Cordero* v. *INS*, 819 F.2d 558, 560-561 (5th Cir. 1987) (citation omitted); see, *e.g.*, *Liu* v. *United States Dep't of Justice*, 13 F.3d 1175, 1176-1177 (8th Cir. 1994) (applying "limited 'abuse of discretion' standard") (citation omitted); *Turri* v. *INS*, 997 F.2d 1306, 1308 & n.2 (10th Cir. 1993) (rejecting contention that "extreme hardship is a question of law" and undertaking only "limited" "abuse of discretion" review); *Ramirez-Durazo* v. *INS*, 794 F.2d 491, 499 (9th Cir. 1986) (finding case was "devoid of those unique extenuating circumstances necessary" to satisfy the abuse-of-discretion standard).

nation should reflect his "opinion." See p. 3, *supra*. Congress further increased the level of hardship that most noncitizens would need to establish, reinstating the "exceptional and extremely unusual hardship" requirement from the original INA. See p. 3, *supra*.

Although Congress has since carved out a "precise" exception for challenges that present "constitutional claims or questions of law" in Section 1252(a)(2)(D), *Patel*, 596 U.S. at 339, it has not altered the statute's basic command that cancellation-of-removal determinations, including the underlying determination about "exceptional and extremely unusual hardship," require an exercise of discretion by the Attorney General and his delegees, rather than the application of a legal standard pronounced and policed by the courts. See *Octane Fitness*, 572 U.S. at 548-549, 553-554 (recognizing that the history of the Patent Act's "exceptional cases" requirement, which formerly included an express reference to "discretion," suggests that enforcing the requirement involves an exercise of discretion rather than the application of a legal test).

3. Even if history and precedent did not resolve the issue, the nature of the "exceptional and extremely unusual hardship" requirement demonstrates that it necessarily requires the agency to make factual findings and discretionary determinations—not to engage in the sort of application of law to fact that presents a reviewable mixed question under Section 1252(a)(2)(D).

Determining whether a noncitizen's removal will impose exceptional and extremely unusual hardship requires the sort of "weigh[ing]" and analyzing of conflicting evidence that characterizes factual and discretionary determinations. *Duberstein*, 363 U.S. at 289. Further, after making factual findings about the current

and potential future circumstances of a noncitizen's qualifying family member, the IJ must compare the hardship that the family member is likely to face with that which is likely to be experienced by the family members of other noncitizens facing removal. That is precisely the sort of comparative analysis that the Court has deemed squarely within the discretion of a factfinder. *Williamsport Wire Rope*, 277 U.S. at 561.

Petitioner's own brief before the court of appeals demonstrates that challenges to the "exceptional and extremely unusual hardship" determination present questions of fact and discretion, not questions of law. Petitioner's objection to the IJ's hardship determination focused on the assertion that the IJ had erred in finding that petitioner's "removal would [not] cause emotional hardship to his family beyond that which would normally be expected from the removal of a parent and provider." Pet. C.A. Br. 16 (brackets in original; citation omitted). In support of that claim, petitioner asserted that the IJ had failed to appreciate the "depth" of his relationship with his son and the "uncommon and difficult situation" his son would experience because of the child's mental and physical problems and because the child's mother had refused to permit the child to see a counselor for the time being. *Id.* at 16-17; see *id.* at 16-21. In addition, petitioner challenged the accuracy of the IJ's conclusion that his son's mother would be "able and willing to work and provide for the [c]hild." *Id.* at 18.

Petitioner's arguments therefore challenged the agency's findings of fact regarding his family circumstances and questioned the validity of the IJ's subjective assessment that his family's circumstances were not sufficiently "uncommon" to warrant relief. The ar-

guments did not rely on legal standards or principles, nor did they seek review of the sort of legal issues that judges are particularly suited to consider. To the contrary, assessing the merits of petitioner's contentions would largely require the court of appeals to make a comparative assessment about how unusual petitioner's circumstances are based on the transcripts of the testimony of petitioner and his son's mother and grandmother, not only without the benefit of having heard that testimony itself, but also without the wide breadth of experience that IJs can develop in the course of addressing many similar cases. See *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985) (recognizing that determinations are particularly likely to be factual, rather than legal, where they rest on considerations of "demeanor and credibility that are peculiarly within" the "province" of the factfinder). The resulting decision would not answer any "questions of law." 8 U.S.C. 1252(a)(2)(D). Instead, it would impermissibly usurp the agency's exclusive role in making factual and discretionary "judgment[s] regarding" cancellation of removal. 8 U.S.C. 1252(a)(2)(B)(i).

D. Plausible Legal Challenges To Hardship Determinations Remain Subject To Judicial Review

Recognizing that the "exceptional and extremely unusual hardship" determination is factual and discretionary does not foreclose judicial review of a genuinely legal challenge to a denial of cancellation of removal. The text of Section 1252(a)(2)(D) plainly permits a court to review a petition that presents a "constitutional" challenge to a hardship determination, such as a claim that the agency failed to adhere to the requirements of the Due Process Clause. Section 1252(a)(2)(D) also permits judicial review when a petition asks the court to resolve

"questions of law," such as whether the Board announced the correct understanding of the statutory text in its earlier precedential opinions, or whether the IJ correctly recognized that the Board's understanding of the statute controls the analysis. See *Galeano-Romero* v. *Barr*, 968 F.3d 1176, 1184 (10th Cir. 2020) (recognizing that, while hardship determinations are generally unreviewable, courts may consider claims that the Board engrafted an additional requirement onto the statutory text or otherwise misinterpreted it, as well as allegations that the agency failed to adhere to its precedents and regulations); *Hernandez-Morales* v. *Attorney Gen.*, 977 F.3d 247, 249 (3d Cir. 2020) (concluding that "a disagreement about weighing hardship factors is a discretionary judgment call, not a legal question," but acknowledging that the agency would commit reviewable legal error by applying " 'an impermissible factor' at odds with § 1229b(b)(1)(D)") (citation omitted).[4]

A noncitizen may not, however, obtain review of a challenge to the agency's factual and discretionary determination about "exceptional and extremely unusual hardship" by "dress[ing] up [the] claim with legal or constitutional clothing." *Ponce Flores* v. *U.S. Att'y Gen.*, 64 F.4th 1208, 1217 (11th Cir. 2023) (citation omitted). Thus, several courts of appeals have appropriately held that a noncitizen cannot obtain review by asserting that the agency committed a legal error in "fail[ing] to consider all the hardship factors in the aggregate," *id.*

[4] The Fifth Circuit has suggested that it has a narrower view of what is reviewable, stating that *Patel* "categorically foreclose[s] review of hardship determinations." *Perez* v. *Garland*, 67 F.4th 254, 257 (2023). But *Patel* should not be read so broadly because it recognized that Section 1252(a)(2)(D) "preserves review" of "legal and constitutional questions." 596 U.S. at 339.

at 1222, "failing to adequately consider certain factors," or failing to recognize that the noncitizen's evidentiary showing was sufficient to satisfy the statute, *Garcia-Pascual* v. *Garland*, 62 F.4th 1096, 1102-1103 (8th Cir. 2023) (citation omitted), petition for cert. pending, No. 23-44 (filed July 14, 2023). Each of those allegations is, at bottom, an assertion that the agency erred in weighing the evidence or exercising its discretion—and therefore the sort of challenge that is foreclosed by Section 1252(a)(2)(B)(i). See *Patel*, 596 U.S. at 341 (recognizing that the IJ arrived at the unreviewable judgments in that case by "weigh[ing]" the evidence and forming an "'opinion or evaluation'").

Similarly, a noncitizen may not obtain review by adding a frivolous or conclusory legal challenge. Such tactics are prohibited by the principle that "wholly insubstantial and frivolous" claims cannot satisfy even the minimal "federal controversy" requirements for invoking the jurisdiction of the federal courts. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). For example, petitioner's brief in the court of appeals included the conclusory assertion that the IJ focused only on financial harm, thereby excluding other factors that the Board has deemed relevant to the hardship analysis. Pet. C.A. Br. 15. But that argument does not trigger judicial review under Section 1252(a)(2)(D) because it is not colorable. The IJ's decision expressly addressed a number of other asserted harms, such as the emotional and physical health of petitioner's child and the ability of the child's mother to provide care. See Pet. App. 28a-29a.

Moreover, even when a petition includes a colorable claim of legal error, that does not open the door to judicial review of the agency's factual and discretionary determinations. Section 1252(a)(2)(D) permits the court

to resolve "questions of law." If the court determines that the agency got those questions wrong, the court must remand to the agency for a new hardship determination free from the legal defects, rather than finding facts and exercising its own discretion to decide whether the hardship requirement has been satisfied. See *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (noting the "obvious importance in the immigration context" for the principle that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands"); *Pullman-Standard*, 456 U.S. at 292 (holding that the court of appeals erred in deciding factual question itself after correcting legal error that infected the district court's factfinding).

Finally, a noncitizen cannot evade the judicial-review bar in Section 1252(a)(2)(B)(i) by couching a challenge to the agency's hardship determination or its underlying findings as an allegation that no reasonable adjudicator could have decided the hardship question in the way the agency did. In some contexts, this Court has described a factfinder's unreasonable disposition of a factual question as prompting a "judgment as a matter of law," *Amgen Inc.* v. *Sanofi*, 598 U.S. 594, 604 (2023), but the decision in *Patel* deemed the review of factual determinations to be categorically off-limits without recognizing any exception for allegedly unreasonable factual dispositions. See 596 U.S. at 361 n.3 (Gorsuch, J., dissenting) (faulting the majority for finding Patel's claim unreviewable even though he alleged that "no 'reasonable adjudicator' could have adopted" the agency's factual determinations) (citation omitted). That makes sense because Section 1252(a)(2)(B)(i) would be superfluous if it required a court to leave the agency's factual

and discretionary determinations undisturbed only when the court found them "reasonable." Section 1252(b)(4)(B) already makes *all* of the Board's factual findings "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." Section 1252(a)(2)(B)(i) would not provide special protection for discretionary denials of relief if it permitted courts to engage in the same form of reasonableness review.

E. Petitioner's Arguments To The Contrary Lack Merit

1. Guerrero-Lasprilla *does not control this case*

Much of petitioner's argument is devoted to the proposition that *Guerrero-Lasprilla* "controls the outcome here." Pet. Br. 18; see *id.* at 27-32. But that contention is incorrect because *Guerrero-Lasprilla* did not address when a statute should be understood as requiring the application of a legal standard to settled facts. It established only that judicial review is available when a statute *does* require such an application. *Guerrero-Lasprilla* had no reason to address the circumstances in which a statutory determination requires the application of a legal standard because the case did not involve a challenge to an application of a statute at all. It instead involved a challenge to the application of the "due diligence" standard that is part of the doctrine of equitable tolling. 140 S. Ct. at 1068. That distinction makes all the difference. Unlike a determination about exceptional and extremely unusual hardship, the determinations required under the doctrine of equitable tolling have the characteristics of legal standards.

a. This Court has repeatedly recognized that a challenge presents a "question of law" where the allegedly erroneous determination involves a requirement that "was originally * * * fashioned by judges," *Google LLC*, 141 S. Ct. at 1199-1200, or where the standard has

a long history of judicial application, *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). In *Google LLC*, for example, the Court held that "fair use" under the Copyright Act presents a question of law because the concept "originat[ed] in the courts," 141 S. Ct. at 1196, and—consistent with its "judge-made origins," *id.* at 1197—judicial "interpretations provide general guidance for future cases," *id.* at 1200. The Court has similarly recognized that many constitutional determinations that are fact-intensive nonetheless present questions of law suitable for judicial resolution because of the courts' firmly established role "as expositors of the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984). The Court has therefore explained that even an apparently factual inquiry like the voluntariness of a defendant's confession has a "unique legal dimension" because it requires courts to "look[] to" constitutional principles, *Miller*, 474 U.S. at 116, and the Judiciary has traditionally played an important role in "protecting" criminal defendants' constitutional rights, *id.* at 118.

Like the "fair use" standard in *Google LLC*, the equitable tolling at issue in *Guerrero-Lasprilla* originated from "common-law adjudicatory principles." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014). And like "fair use" and many fact-intensive constitutional inquiries, the doctrine of equitable tolling has "a long history of judicial application." *Holland* v. *Florida*, 560 U.S. 631, 651 (2010). Accordingly, the government's brief in *Guerrero-Lasprilla* readily acknowledged that applying the due-diligence standard when evaluating equitable tolling required an "application of a legal standard to the particular facts of a case." Gov't Br. at 16, *Guerrero-Lasprilla*, *supra* (No. 18-776).

Here, by contrast, the INA's "exceptional and extremely unusual hardship" requirement has neither of the features that made a determination about due diligence turn on a question of law. As petitioner acknowledges (Br. 7-11), the INA's hardship requirement originated with Congress, which imposed the "exceptional and extremely unusual hardship" requirement when it first enacted the INA. Nor is there a long history of judicial application because, at the outset, Congress made clear that the determination about hardship should reflect the "opinion" of the Attorney General. See pp. 26-29, *supra*. And when this Court considered the Ninth Circuit's attempt to wrest application of the hardship standard from the agency, it condemned that inappropriate attempt to "'shift the administration of hardship deportation cases from the [agency] to'" the Judiciary. *Jong Ha Wang*, 450 U.S. at 146 (citation omitted).

b. Petitioner's efforts (Br. 28-29, 34-35) to analogize the "exceptional and extremely unusual hardship" determination to other questions that this Court has deemed to be legal are also unsuccessful. Other than inapt analogies to "fair use" and various constitutional standards, petitioner primarily relies on courts' treatment of the "undue hardship" requirements in Title VII and the Bankruptcy Code. Br. 27 n.1, 50 (citations omitted). That comparison is unpersuasive because those statutory provisions refer to "*undue* hardship" rather than "*exceptional and extremely unusual* hardship." They therefore provide less direct analogues than the tax provision in *Williamsport Wire Rope*, particularly because the term "undue" does not require the sort of comparative evaluation of many members of a "large group" that is demanded by the phrase "exceptional and extremely unusual," and which *Williamsport Wire*

Rope found significant when characterizing an "exceptional hardship" determination as discretionary.

Moreover, courts' classifications of "undue hardship" requirements in other statutes as questions of law do not suggest that something about the term "hardship" alone connotes a question of law because the courts of appeals have recognized that other hardship determinations constitute findings of fact or "'purely discretionary decisions.'" *Karlin* v. *Reed*, 584 F. 2d 365, 367 (10th Cir. 1978); see *ibid.* (describing courts' treatment of hardship determinations in connection with military staffing as discretionary); see also, *e.g.*, *McWright* v. *Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) (Rehabilitation Act); *Kimbro* v. *Atlantic Richfield Co.*, 889 F.2d 869, 877 (9th Cir. 1989) (state law). And even in the Title VII and bankruptcy context, courts have recognized that elements of the "undue hardship" determination present questions of fact. See, *e.g.*, *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013) (holding that district court erred in granting summary judgment on "undue hardship" under Title VII because the determination presented questions of fact that should have been put before a jury); *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005) (recognizing that "factual underpinnings" of a bankruptcy court's "legal conclusion" regarding "undue hardship" are reviewed for clear error). Thus, even if petitioner's analogy were apt, it would not suggest that every challenge to the agency's hardship determination is reviewable.

c. Petitioner is similarly mistaken in his assertion (Br. 27-31) that the "exceptional and extremely unusual hardship" requirement must be a legal standard because the Board has interpreted its meaning in a precedential decision. The fact that a statute is susceptible

to interpretation does not mean that applying the statute will present a mixed question. If it did, then every application of a statute would present a mixed question because every statute requires some interpretation. See Antonin Scalia & Bryan A. Garner, *Reading Law* 53 (2012) ("[I]f you seem to meet an utterance which doesn't have to be interpreted, that is because you have interpreted it already.") (citation omitted).

In *Pullman-Standard*, for example, this Court had to engage in statutory interpretation to decide that Title VII's "intention to discriminate" requirement was satisfied through a finding of "actual motive," but the Court nonetheless held that the ultimate finding was one of fact. 456 U.S. at 289-290. Once the Court had interpreted the statute, the only work left to be done was factual. The same reasoning applies with respect to the "exceptional and extremely unusual hardship" requirement. The Board has "clarif[ied] [the] meaning" of the statutory provision in *In re Monreal*, 23 I. & N. Dec. at 60, and subsequent precedential decisions. When determining whether a noncitizen has satisfied the Board's understanding of the provision in a particular case, an IJ need only find the facts and then exercise the agency's discretion.

d. Petitioner is likewise incorrect in suggesting (Pet. 31) that the Board's precedents have purported to announce a legal standard. To the contrary, *Monreal* expressly found that, while it would be possible to provide "guidance as to th[e] [statutory] term's meaning, * * * each case must be assessed and decided on its own facts." 23 I. & N. Dec. at 63. The Board's efforts in *Monreal* and subsequent decisions to provide "guidance" to IJs charged with making case-by-case hardship determinations are better understood as seeking to

ensure that agency adjudicators perform a discretionary task with some consistency than as the announcement of a legal standard.

Petitioner does not cite any Board decisions to the contrary. Petitioner suggests (Br. 31) that *In re V-K-*, 24 I. & N. Dec. 500 (B.I.A. 2008) deemed the "exceptional and extremely unusual hardship" requirement to be a legal one. But that decision did not concern the hardship inquiry and referenced it only in explaining that the "'clearly erroneous'" standard does not apply to determinations like "exceptional and extremely unusual hardship" because the regulations delineating the Board's powers specifically permit the Board to engage in *de novo* review of "'questions of law, discretion, and judgment.'" *Id.* at 501 (quoting 8 C.F.R. 1003.1(d)(3)(i) and (ii)). Because the regulations permit the Board to review both legal *and* discretionary determinations *de novo*, *V-K-*'s discussion of the standard of review did not need to be precise about which of those categories applied to the "exceptional and extremely unusual hardship" determination.

Petitioner also cites (Br. 31) the Board's decision in *In re Z-Z-O-*, 26 I. & N. Dec. 586 (B.I.A. 2015). But that is even further afield. *Z-Z-O-* is not a case about hardship, and the "matter of law" language that petitioner quotes comes only in a parenthetical citation explaining the holding of an Eighth Circuit decision. *Id.* at 591 (citation omitted). Petitioner's remaining citations similarly involve the Board's descriptions—in nonprecedential opinions—of governing circuit law rather than articulations of the Board's own view that the "exceptional and extremely unusual hardship" determination should be considered a legal one. See Pet. Br. 31 n.4.

2. The "exceptional and extremely unusual hardship" determination is subjective and discretionary

Petitioner also contends (Br. 42-52) that the "exceptional and extremely unusual hardship" determination is neither subjective nor discretionary. That assertion is erroneous for several reasons.

a. As a threshold matter, petitioner's focus (Br. 43-44) on whether the hardship determination is subjective misunderstands the relevant inquiry, which asks whether a determination presents a "question[] of law" as opposed to a question of fact or discretion, rather than whether the determination is better described as subjective or objective. Indeed, *Patel* rejected the government's effort to make the "subjective" nature of a particular determination relevant to the question of whether judicial review of that determination is barred by Section 1252(a)(2)(B)(i). 596 U.S. at 340-342 (citation omitted).

In any event, petitioner's counterintuitive assertion (Br. 42) that the hardship determination is not subjective appears to be based primarily on the observation (Br. 43-44) that the IJ's opinion on the matter is not dispositive because the IJ is bound to adhere to the Board's guidance. But that suggests only that it is *the Board's* subjective judgment that is dispositive, rather than the IJ's. It does not suggest that whether a qualifying family member is likely to experience "exceptional and extremely unusual hardship" is a question with a single, readily ascertainable answer, such that it might be deemed objective. And, more importantly, the Board's oversight role within the agency does not establish that the statute or some other governing legal principle dictates a particular result in each case, as would be nec-

essary for the hardship determination to present a "question[] of law" under Section 1252(a)(2)(D).

b. Petitioner also errs in asserting (Pet. 46-47) that the hardship determination is not discretionary. He contends (*ibid.*) that the cancellation-of-removal statute can be neatly divided into the agency's ultimate decision to grant or deny relief, which is discretionary and unreviewable, and the agency's judgments regarding whether the statutory eligibility criteria are met, which are nondiscretionary and reviewable. But the petitioner in *Patel* made an analogous argument that Section 1252(a)(2)(B)(i) merely renders the agency's ultimate denial of relief unreviewable, leaving the underlying eligibility determinations untouched, and the Court squarely rejected that argument. 596 U.S. at 343. Further, petitioner's assertion that eligibility determinations are necessarily nondiscretionary is inconsistent with the terms in which *Patel* rejected the government's argument that Section 1252(a)(2)(B)(i) should be interpreted to bar review of discretionary, but not nondiscretionary, eligibility determinations. Far from suggesting that the government was wrong to describe any of the eligibility determinations as discretionary, *Patel* held that the government's error was in attempting to limit the judicial-review bar to "discretionary judgments," rather than recognizing that it covers purely factual findings too. *Id.* at 341 (citation omitted).

This Court's earlier decision in *Jay* v. *Boyd*, 351 U.S. 345 (1956), is not to the contrary. As petitioner observes, that case describes the agency's ultimate decision as to whether to grant suspension of deportation as "a matter of grace," while describing the eligibility for such relief as being "governed by specific statutory standards." Pet. Br. 46 (quoting *Jay*, 351 U.S. at 353,

354). But *Jay* did not involve a challenge to an eligibility determination, and the Court did not address what process was required for resolving threshold questions about eligibility. See 351 U.S. at 353. While the Court "assume[d] a statutory right to a full hearing on [eligibility] issues," *ibid.*, it did not suggest that whether those requirements were satisfied was a question of law rather than discretion. To the contrary, the Court observed that, because Congress "could not readily make exception for cases *of unusual hardship* or extenuating circumstances, those matters were left to the consideration *and discretion* of the Attorney General." *Id.* at 361 (emphasis added). *Jay* is therefore consistent with the discretionary nature of the hardship determination rather than a refutation of it.

c. Petitioner also suggests that (Br. 47) that there is no readily identifiable category of "discretionary" determinations that fall outside Section 1252(a)(2)(D), suggesting that the term "discretionary" is used "arbitrarily." To the extent petitioner is asserting that the law generally does not recognize an independent category of discretionary determinations, that is incorrect. This Court has recognized that category in explaining that district court determinations can be divided into "questions of law," "questions of fact," and "matters of discretion," *Highmark*, 572 U.S. at 563 (citation omitted). And the Court has identified a number of important determinations that qualify as discretionary, such as criminal sentences. See, *e.g.*, *Concepcion* v. *United States*, 142 S. Ct. 2389, 2398-2401 (2022) (discussing the "discretion" that the sentencing laws grant district courts).

In the administrative context, too, cases like *Williamsport Wire Rope* routinely recognize a category of

discretionary agency judgments. Indeed, the Court has explained that the Administrative Procedure Act not only recognizes a category of discretionary agency decisions, but it breaks those decisions into two further subcategories: unreviewable determinations that are "committed to agency discretion" under 5 U.S.C. 701(a), and reviewable determinations that are subject to the "abuse of discretion" standard under 5 U.S.C. 706. *Weyerhauser Co.* v. *U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). While the APA's distinction between those two subcategories is irrelevant under Section 1252(a)(2)(B)(i), which makes all discretionary determinations unreviewable, the fact that the APA refers to and draws distinctions between various forms of discretionary agency determinations belies petitioner's suggestion that the term "discretionary" lacks any real meaning.

Further, it would not help petitioner if he were correct that there is no discrete category of discretionary determinations. If all determinations must be categorized as factual or legal, the "exceptional and extremely unusual hardship" requirement would be "factual." This Court recognized as much with respect to the "extreme hardship" determination at issue in *Hector.* See 479 U.S. at 86. More generally, this Court has observed that in the administrative context, the term "fact" should not be understood "in the narrow, literal sense" because it also covers a wide variety of determinations that would not qualify as "facts" in common parlance, such as "findings [of] valuation, which are based upon judgment and prediction," and "determinations of policy." *SEC* v. *Central-Ill. Sec. Corp.*, 338 U.S. 96, 126-127 (1949). The INA's "exceptional and extremely unu-

sual hardship" determination readily fits within that understanding of "factual" judgments.

d. Finally, petitioner errs in contending (Br. 50-51) that IIRIRA's changes to the cancellation-of-removal statute demonstrate that the "exceptional and extremely unusual hardship" determination is not discretionary. Petitioner observes that IIRIRA removed the language specifying that the hardship should be assessed "in the opinion of the Attorney General," a change that petitioner interprets (Br. 50) as reflecting a "move[] *away*" from language that could have been read to render the determination discretionary. In fact, IIRIRA removed that phrase along with another express reference to the Attorney General's "discretion" in Section 1229b because those references were rendered redundant by the simultaneous inclusion of Section 1252(a)(2)(B)(i)'s broad bar on judicial review of denials of discretionary relief. See pp. 28-29, *supra*.

3. Canons of statutory construction do not call for a different result

Petitioner contends (Br. 21) that "two canons of statutory construction" favor his result, citing the presumption in favor of judicial review and the preference for making jurisdictional boundaries clear. It is not readily apparent, however, what statute petitioner believes the Court should interpret through the lens of those canons. Petitioner never suggests that the Court should read Section 1252(a)(2)(D) to permit review of factual or discretionary determinations—an argument that *Patel* squarely forecloses. Petitioner may therefore mean that the Court should interpret the "exceptional and extremely unusual hardship" requirement in a manner that makes the statutory determination present a question of law. If so, that is hardly an orthodox use of the

canons, which are generally applied to explain a court's choice of one interpretation of a term over another, rather than to transform factual or discretionary determinations into legal ones. Regardless, neither canon can carry the day here.

a. The presumption of judicial review cannot be of assistance because this Court recently rejected its application in similar circumstances in *Patel*. In that case, the Court explained that petitioner and the government could not use the presumption to narrow the category of cases subject to Section 1252(a)(2)(B)(i) because the presumption cannot be used to overcome the "plain meaning" of the express bar on judicial review in what "is after all, a jurisdiction-stripping statute." *Patel*, 596 U.S. at 347. The same reasoning applies here. Section 1252(a)(2)(B)(i) bars the review of "any judgment regarding" cancellation of removal that does not present a "constitutional claim[] or question[] of law." 8 U.S.C. 1252(a)(2)(B)(i) and (D). Hardship determinations present neither. Accordingly, they are unreviewable, and the presumption has no role to play.

b. Petitioner's resort (Br. 36-42) to the preference for clear jurisdictional boundaries is also unavailing. Petitioner suggests that courts will be unable to distinguish the statutory determinations that present "questions of law" from those that do not, or that courts will become confused in attempting to discern whether a noncitizen has brought a permissible legal challenge to what is otherwise a discretionary or factual determination. But courts draw such distinctions every time they determine the appropriate standard of review on appeal. See pp. 17-18, *supra*. And this Court recently rejected an analogous argument that the courts of appeals are not "up to the task" of distinguishing legal and fac-

tual issues. *Dupree* v. *Younger*, 598 U.S. 729, 738 (2023). In *Dupree*, the Court held that a challenge to "purely legal issues resolved at summary judgment" does not need to be renewed in a post-trial motion, although a challenge to factual issues does have to be reraised. *Ibid.* The Court observed that the courts of appeals "'have long found it possible to separate factual from legal matters,'" and that "the virtues of bright-line rules" did not outweigh the costs in that case. *Ibid.* (quoting *Teva Pharms. USA, Inc.* v. *Sandoz, Inc.*, 574 U.S. 318, 328 (2015)).

The same is true here. Many courts of appeals already apply the rule that petitioner opposes.[5] In fact, until *Guerrero-Lasprilla*, it was the rule in every circuit. See Br. in Opp. 11-12 (citing cases). Further, any benefit of the allegedly "bright-line rule" that petitioner advocates, which would seemingly make every statutory determination reviewable, cannot justify overriding the express limitation on judicial review imposed by Section 1252(a)(2)(B)(i).

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[5] See, *e.g.*, *Ponce Flores*, 64 F.4th at 1217 (11th Cir.); *Gonzalez-Rivas* v. *Garland*, 53 F.4th 1129, 1132 (8th Cir. 2022); *Aguilar-Osorio* v. *Garland*, 991 F.3d 997, 999 (9th Cir. 2021) (per curiam); *Hernandez-Morales*, 977 F.3d at 249 (3d Cir.); *Galeano-Romero*, 968 F.3d at 1184 (10th Cir.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1229b provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

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.

(2) Special rule for battered spouse or child

(A) Authority

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 demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the

alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the

alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration

Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may

parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period

in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall

apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

2. 8 U.S.C. 1252(a) provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by rea-

son of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) 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.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).