No. 22-666

IN THE
Supreme Court of the United States

SITU KAMU WILKINSON,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court's holding in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), is clear and easily administrable: the application of a legal standard to established facts—*i.e.*, a mixed question of law and fact—is a "question[] of law" subject to judicial review under the INA's Limited Review Provision. That holding makes this an easy case. "[E]xceptional and extremely unusual hardship" is a legal standard just like the due-diligence standard at issue in *Guerrero-Lasprilla*, so the agency's decision about whether the established facts satisfy this standard is a reviewable "question[] of law."

The government seeks to avoid *Guerrero-Lasprilla* by dividing the application of law to fact into two buckets: (1) applications that the government calls "discretionary," and thus unreviewable, because they require the agency to use judgment, discernment and evaluation, and analyze and weigh facts, and (2) other applications it calls "reviewable mixed questions." But the government cannot reconcile that position with *Guerrero-Lasprilla*'s categorical interpretation of the Limited Review Provision as covering *all* applications of legal standards to established facts. Nor is the government's view reconcilable with *Guerrero-Lasprilla*'s holding that the application of the due-diligence standard poses a reviewable mixed question. After all, "due diligence" requires as much "discretion" (in the sense the government uses that term) as "exceptional and extremely unusual hardship." The government's only attempt to distinguish the standard in this case from the one in *Guerrero-Lasprilla* is that the due-diligence standard is

"judge-made" while the hardship standard "originated from Congress." That distinction is specious. No court has ever suggested that the origin of a legal standard has anything to do with its status as a mixed question, much less its reviewability.

More broadly, the government fails to offer any principled distinction between a "discretionary" determination and a "reviewable mixed question." The characteristics the government associates with "discretion" (judgment, discernment, evaluation, and analyzing and weighing facts) simply *describe* mixed questions, rather than *differentiate* them. And the government does not offer any workable basis to decide which applications of statutory standards involve "discretion." Instead, the government offers an indeterminate, multi-faceted, totality-of-the-circumstances framework that would require courts to consider every INA standard's genesis, evaluate its characteristics, analyze its history, and explore whether it contains language in common with any statute, from any point in time, that courts have reviewed deferentially or not at all—irrespective of whether the historical analog was related in subject matter, used by Congress as a reference point, enacted during a similar time frame, or still in effect when Congress enacted the INA. There's not a lot to like about such a vague and unpredictable test generally. But in the context of a jurisdictional rule, where the need for clarity and simplicity is paramount, this messy and unpredictable methodology is intolerable.

The government's approach is irreconcilable with *Guerrero-Lasprilla* and would result in protracted litigation over the reviewability of countless INA standards, creating a morass that courts (including

this one) would be stuck in for decades. The Court should reject the government's approach, follow *Guerrero-Lasprilla*'s bright jurisdictional line, and reverse the judgment below.

ARGUMENT

I. This case is controlled by *Guerrero-Lasprilla*.

Guerrero-Lasprilla and *Patel v. Garland*, 142 S. Ct. 1614 (2022), establish two clear rules. Findings of fact in any order underlying the denial of discretionary relief are unreviewable. *Id.* at 1623. But the agency's "application of a legal standard" *to* those facts is reviewable. *Guerrero-Lasprilla*, 140 S. Ct. at 1068. That is so even for mixed questions that require the agency to analyze and weigh established facts in applying a legal standard, including whether a noncitizen failed to demonstrate "due diligence" to equitably toll the deadline for a discretionary motion to reopen. *Id.*

There is no coherent distinction between the due-diligence standard in *Guerrero-Lasprilla* and the hardship standard here. Both underlie ultimately discretionary decisions. Both involve "administrative decision[s] regarding whether to relieve a party from a statutory mandate." Gov't Br. 25. And both require a non-mechanical evaluation of whether established facts satisfy a legal standard.

So the government offers an incoherent distinction: *Guerrero-Lasprilla* involved a *judicially created* legal standard, whereas this case involves a *congressionally created* one. Gov't Br. 16-17, 35-36. Thus, the government contends, *Guerrero-Lasprilla*'s holding is irrelevant to whether the agency's application of

statutory standards is a "question[] of law" reviewable under the Limited Review Provision. That common-law/statutory distinction conflicts with *Guerrero-Lasprilla* and is at odds with the well-established understanding of what falls into the category of "mixed questions" that this Court deemed reviewable in *Guerrero-Lasprilla*.

1. The government's common-law/statutory distinction is irreconcilable with *Guerrero-Lasprilla*. There, the government asked the Court, as a backup position, to at least hold that only *some* applications of law to fact ("primarily legal" ones) are "questions of law." Gov't Br. at 31-34, *Guerrero-Lasprilla*, *supra*. This Court declined, holding without qualification that *any* application of a legal standard to established facts—*i.e.*, any mixed question—is a "question[] of law." 140 S. Ct. at 1068-1073. The dissent even criticized the majority for not reaching a due-diligence-specific holding and instead "categorically proclaim[ing] that federal courts may review immigration judges' applications of *any* legal standard to established facts." *Id.* at 1073-1074 (Thomas, J., dissenting). The government's attempt to limit the case to common-law standards conflicts with what every Justice recognized the case to hold.

The Court's reasoning also made clear that it understood "questions of law" to encompass applications of *statutory* standards. The Court interpreted "questions of law" in the Limited Review Provision "to have the same meaning" as "questions of law" in the nearby zipper clause, § 1252(b)(9). 140 S. Ct. at 1070. And, as this Court noted, "questions of law" in the zipper clause includes the "application of a *statutory provision*." *Id.* (brackets omitted; emphasis add-

ed) (quoting § 1252(b)(9)). Just as the zipper clause supported interpreting "questions of law" to encompass "mixed questions" in *Guerrero-Lasprilla*, it makes clear that "mixed questions" includes the application of a *statutory* standard. Similarly, this Court emphasized that the Limited Review Provision was enacted to permit (at a minimum) the type of review "traditionally available in a habeas proceeding," which (as this Court repeatedly noted) included "the erroneous *application* or interpretation of statutes." *Guerrero-Lasprilla*, 140 S. Ct. at 1071 (citation omitted). This Court's reasoning is thus flatly inconsistent with the government's common-law/statutory distinction. *See also* IJ Br. 7.

The government's briefing also made clear that it understood that *Guerrero-Lasprilla* would control the application of *statutory* standards: it specifically warned that if the Court rejected the government's position, numerous *statutory* determinations—including those underlying denials of cancellation of removal—would become reviewable because they "involve a legal standard" applied to "the particular facts of a case." Gov't Br. at 32-33, *Guerrero-Lasprilla*, *supra*. The government was right.

2. More broadly, the government identifies no basis for using a standard's common-law or statutory origin as controlling on its status as a mixed question. Mixed questions have long been defined to include the application of "statutory" standards, not just common-law ones—including in the cases *Guerrero-Lasprilla* cited when describing "mixed questions." 140 S. Ct. at 1069 (citing *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966

(2018); *Pullman-Standard v. Swint*, 456 U.S. 273, 289-290 n.19 (1982)).

The government (at 35-36) cites *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), but *Google* did not draw this distinction. It *noted* fair use's common-law origin. *Id.* at 1197, 1199-1200. But it did so when explaining why the application of the fair-use standard to facts found by the jury involved "primarily legal" work most appropriate for a judge, reviewed *de novo*. *Id.* at 1199-1200. It did not suggest that fair use's common-law origin somehow makes fair use more of a "legal standard" than if the concept had originated in a statute. Similarly, *Miller v. Fenton*, noted that an "unbroken line of cases" *had long recognized* that the voluntariness of a confession is a "mixed question"; it did not hold that voluntariness is a mixed question *because of* its history of judicial application, as the government suggests (at 35-36). 474 U.S. 104, 112 (1985) (brackets and citation omitted).

There simply is no principled way to read *Guerrero-Lasprilla*'s categorical holding as relevant only to the application of *judge-made* legal standards. If due diligence is a reviewable mixed question, so too is the statutory hardship standard.

II. The government's attempt to divide applications of statutory legal standards into reviewable and nonreviewable buckets is unpersuasive.

Putting aside the government's inability to credibly distinguish the due-diligence and hardship standards, the government's position rests on untenable distinctions between "discretionary" (unreviewable)

determinations and "reviewable mixed questions." That purported distinction fails—and with it the government's entire argument.

According to the government, judicial determinations can be categorized as factual, legal (including mixed questions), or discretionary. The application of a statutory standard to settled facts, the government contends, sometimes presents a reviewable "mixed question" but other times involves unreviewable "factfinding" or "discretionary" decisionmaking. Gov't Br. 17-18.

As to factfinding, all agree that factual findings underlying denials of discretionary relief are unreviewable, as *Patel* squarely held. 142 S. Ct. at 1623. Mr. Wilkinson does not dispute that there are cases in which factfinding will be dispositive and there will be nothing left to review—as in *Patel*.[1]

As to "discretionary" decisionmaking, the government contends there is an identifiable class of decisions that involve the application of statutory standards to established facts but nonetheless are not "reviewable mixed question[s]." Gov't Br. 10. Thus, the government says, for every statutory standard the agency applies, courts must determine which bucket the application falls into—nonreviewable discretionary determinations or reviewable mixed questions.

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[1] The government's cursory suggestion (at 44) that the hardship requirement may be purely "factual" is underdeveloped and was not raised below or in the government's certiorari-stage brief. Sup. Ct. R. 15.2. It is also contradicted by published Board decisions, which review hardship determinations *de novo*, *see, e.g.*, *Matter of Gamero*, 25 I. & N. Dec. 164, 165 (B.I.A. 2010), even though factual findings are reviewed for clear error, 8 C.F.R. § 1003.1(d)(3)(i). *See* IJ Br. 3; AILA Br. 6.

Gov't Br. 17-18. But the government offers no principled basis to decide which standards go in which bucket—just an improvisational approach that is so unworkable and unpredictable it will inevitably lead to collateral litigation about the reviewability of every statutory standard subject to an INA jurisdiction-stripping provision, occupying courts (including this one) with dozens of judicial-review cases in the coming decades.

A. The government's distinction between "discretionary" applications of legal standards and "reviewable mixed questions" is illusory.

"[D]iscretion" is a word with "radically different" meanings. *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 59 (2d Cir. 1979) (Friendly, J.). As Judge Easterbrook put it: "There is discretion and then there is discretion." *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831 (7th Cir. 1985).

The ordinary meaning—true discretion or "free choice" discretion—refers to decisions made "free from the constraints which characteristically attach whenever legal rules enter the decisionmaking process." *McLane Co. v. EEOC*, 581 U.S. 72, 83 (2017) (brackets omitted); *see also Discretion*, Black's Law Dictionary 585 (11th ed. 2019) ("management exercised without constraint" and "the power of free decision-making"). That is what this Court meant by "discretionary decisions" in several cases the government cites (at 22). *See, e.g.*, *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (enforcement discretion); *Berkovitz v. United States*, 486 U.S. 531, 536-537 (1988) (actions that are a "matter of choice").

When agencies exercise true discretion, their decision does not pose a mixed question of law and fact because there generally is no legal standard to apply. *Jay v. Boyd*, 351 U.S. 345, 353-354 (1956); *cf. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (decision "discretionary" when there is "no meaningful standard" to govern the agency's decision (citation omitted)). So, for instance, when the agency denies cancellation to an eligible noncitizen, courts generally cannot override that choice, because the agency's decision was not governed by any legal standard at all. *See Jay*, 351 U.S. at 354-358; IJ Br. 5.

Courts sometimes also use the term "discretion" more broadly, to refer to situations "where the trial judge's decision," while not unconstrained, "is given 'an unusual amount of insulation from appellate revision' for functional reasons." *McLane*, 581 U.S. at 83 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 637 (1971)); *e.g.*, *id.* at 82 (evidentiary relevance determinations, decision to quash or enforce subpoena); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014) (statutory attorney-fees determinations). These decisions are sometimes called "discretionary" by virtue of the deferential standard of review appellate courts decide to apply. A district court deciding whether a piece of evidence is relevant, for example, has "discretion" only in the sense that its decision is reviewed deferentially—that decision is still a prototypical mixed question. 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5166.1 (2d ed. 2012). Used in this way, the label "discretion" is somewhat of a "misnomer," *Patel v. U.S. Attorney General*, 971 F.3d

1258, 1278 (11th Cir. 2020) (en banc), *aff'd*, 142 S. Ct. 1614 (2022).

The government does not articulate how, precisely, it is using the term "discretion," but its position plainly is not that unreviewable "discretionary" decisions are limited to those involving true discretion. After all, when the agency makes hardship determinations, it is not acting "free from … constraints." *McLane*, 581 U.S. at 83. As the Board recognizes, *see* p. 22, *infra*, the agency can only decide whether the established facts meet the statutory standard, properly understood.

The government's position therefore necessarily relies on the second, broader use of the term "discretionary" as the dividing line between what it calls "discretionary" applications of law to fact and applications that it calls "reviewable mixed questions." But the government's own attempt to make that discretionary-versus-mixed distinction shows how illusory it is. The government characterizes the "hallmarks" of discretionary determinations as the agency's use of judgment, discernment, evaluation, and comparison, and the necessity of analyzing and weighing facts. Gov't Br. 21-22. These "hallmarks" offer no *distinction from* a mixed question—they just *describe* a mixed question.

Indeed, in *Guerrero-Lasprilla* the government told this Court that "virtually everything that you can call an exercise of discretion you can also describe as involving the application of law to fact." Oral Arg. Tr. 56. That is exactly right if one uses "discretion" as the government does, and it shows why it is impossible to divide the application of a legal standard to established facts into separate "discretionary" and

"mixed question" buckets. On the government's view, many prototypical mixed questions would not be mixed questions at all. Probable cause, fair use, claim construction, excessive force, punitive damages, undue hardship, and, of course, due diligence are all classic mixed questions even though they involve the type of judgment and balancing that, according to the government, should put them in a separate, "discretionary" bucket. *See* Pet'r Br. 28-29, 45, 48-49.[2]

The government's use of "comparative analysis" as a hallmark of "discretion" is a perfect example of the government's illusory distinction. The government contends that courts "cannot meaningfully judge the validity of a comparative evaluation" conducted by the agency, which makes applications of statutory standards requiring comparative evaluations "discretionary." Gov't Br. 26; *see id.* at 11, 30-31.[3] But many "mixed questions" involve comparative evaluation. Take equitable tolling—it requires a showing of "extraordinary circumstances" facing the immigrant,

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[2] The government brushes aside constitutional determinations because of courts' role in protecting constitutional rights. Gov't Br. 36. That is why constitutional mixed questions are reviewed *de novo*, *Lakeridge*, 138 S. Ct. at 967 n.4; it does not transform them into something other than mixed questions. *See Ornelas v. United States*, 517 U.S. 690, 696-697 (1996) ("the issue is whether the facts satisfy the relevant statutory *or constitutional* standard" (brackets omitted; emphasis added)).

[3] The government's reliance on *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551 (1928) to make this point is misplaced. There, a comparative analysis by reviewing courts was literally impossible because the statute required a comparative evaluation of specific datasets that were only in the agency's possession and were not available to the reviewing court. 277 U.S. at 559-561.

which is a classic comparative evaluation, and one considered a mixed question. *See Nkomo v. Attorney General*, 986 F.3d 268, 272-273 (3d Cir. 2021). The same is true of the "atypical and significant hardship" standard governing whether conditions of confinement violate due process, *see Sandin v. Conner*, 515 U.S. 472, 484 (1995), and of Title VII's "undue hardship" standard, which requires courts to evaluate hardship to an employer in light of the nature, size, and operating costs of the business's operations, accounting for "all relevant factors in the case at hand"—a factual and comparative analysis. *Groff v. DeJoy*, 143 S. Ct. 2279, 2295 (2023).

B. The government's reviewability framework is unpredictable and unworkable.

The government's illusory distinction between "discretionary" and "mixed" questions is perhaps most evident from the government's method for figuring out which applications fall in which category. The government offers a Frankenstein-like approach, assembling a host of seemingly unrelated and complex inquiries that must somehow be balanced together to decide whether the court should even get to the merits of the parties' dispute.

Courts start, according to the government, by examining whether the legal standard being applied appears in a statute or comes from common law. If the latter, the agency's application of that standard to settled facts is apparently always reviewable. Gov't Br. 11, 35-36. If the former, courts must consider a host of additional factors.

First, courts should consider whether the legal standard was *originally* judge-made before being codified by Congress. Gov't Br. 35-36.

Second, courts should consider whether the statute's history suggests that Congress *ever* assigned "discretion" to the agency—even if, as here, the relevant language has since been excised from the statute. Gov't Br. 20-21, 26-29; *see* p. 24, *infra*.

Third, courts should look for a statutory analog that contains similar wording, and then analyze whether courts have reviewed the application of that statute *de novo*, for clear error, for abuse of discretion, or not at all. And when perusing current and former versions of the U.S. Code in search of an analog, courts are not limited to provisions that cover the same general subject matter, were enacted around the same time period, or were in effect when the statutory standard in question was enacted. Here, for example, the government's "particularly instructive" and "directly on point" statutory analog is a tax provision intended to "raise[] … sums for the World War I effort"[4] that was on the books for two years: from 1919[5] to 1921.[6] Gov't Br. 22, 25 (citing *Williamsport*, 277 U.S. 551).

Fourth, courts should analyze whether the statutory standard has the "hallmarks" of discretionary determinations, like making "subjective judgments,"

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[4] IRS, *Historical Highlights of the IRS*, https://www.irs.gov/newsroom/historical-highlights-of-the-irs (updated Oct. 23, 2023).

[5] Revenue Act of 1918, 40 Stat. 1057, §§ 327, 328 (enacted February 24, 1919).

[6] Revenue Act of 1921, 42 Stat. 227, § 1400 (enacted November 23, 1921).

weighing and analyzing facts, and comparing the litigant to others similarly situated. Gov't Br. 21-23.

Then, based on a totality-of-the-circumstances evaluation of all these factors (and perhaps others—the government does not say its factors are exhaustive), courts can deem the application of the statutory standard a "mixed question" (and hence a "question of law" under § 1252(a)(2)(D)) if it is amenable to judicial review, or "discretionary" if judicial review seems inappropriate. Gov't Br. 17-23.

This Court should reject this know-it-when-you-see-it approach for a host of reasons.

1. The government's approach runs right over the well-established rule favoring clear jurisdictional lines. *Guerrero-Lasprilla* offers a clear path to determine whether agency decisions are reviewable, and as this Court has recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The government does not attempt to suggest that its test is simple or clear. Instead, it blithely asserts (at 46-47) that courts are "up to the task" of working this all out. But as the opening brief explained (at 38-39), and the government ignores, courts that have tried similar approaches have reached wildly inconsistent results about the reviewability of various statutory decisions. If the Court adopts the government's unwieldy framework, those inconsistencies will multiply, keeping courts occupied with jurisdictional disputes about countless INA provisions for decades—precisely the outcome the clear-lines canon exists to prevent.

2. The government's argument places central importance on the fact-intensive nature of the statutory standard—including the need to "weigh[] and analyz[e] … subsidiary facts." Gov't Br. 21 (citation omitted). And it relies almost entirely on standard-of-review cases, like *Lakeridge*, *Pullman-Standard*, and *Highmark*, that decided to review the application of particular legal standards deferentially because of the nature of the issue and considerations of relative institutional competencies. Gov't Br. 17-23. If an appellate court typically reviews the application of a legal standard with deference, the government seems to suggest that in the immigration context, courts should review a supposedly similar determination *not at all*.

The government tried this tactic in *Guerrero-Lasprilla,* relying on the same standard-of-review cases and the "primarily factual" nature of the due-diligence inquiry, but this Court rejected it. 140 S. Ct. at 1069. The appropriate *standard* of review is often based on these types of "practical considerations," the Court observed, but the *existence* of review should not be. *Id.* Indeed, in cases electing deferential review for a mixed question, the Court has made a point of saying that clear-error and abuse-of-discretion review still permit appellate intervention if a standard is being applied inconsistently or in a way that suggests a misapprehension of what the legal standard requires. *See Lakeridge*, 138 S. Ct. at 968 n.7; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). That is impossible when the practical considerations that warrant *deferential* review are used to *foreclose* review. Moreover, in judicial-review cases the clear-jurisdictional-lines canon and

presumption of reviewability play important roles. Not so in standard-of-review cases.

3. The government's proposed framework also relies heavily on other statutes that have no relation to immigration. Courts "normally presume that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019). But no similar principle governs the interpretation of wholly *unrelated* statutes. *See Russello v. United States*, 464 U.S. 16, 25 (1983).

The government's reliance on tax and patent statutes exemplifies this problem. Take *Williamsport*: the case does not, as the government suggests (at 10, 22-23, 25-26), stand broadly for the proposition that determinations of "exceptional hardship" are inherently discretionary and unreviewable. Instead, *Williamsport*'s holding was specific to the unusual wartime tax scheme Congress enacted and repealed more than a century ago.

The statute required the Commissioner of Revenue to make certain findings when deciding whether to award a company with a tax benefit—including the existence of "abnormal conditions affecting" the company, the potential for "an exceptional hardship" relative to "similarly circumstanced" peers, and "gross disproportion" between the tax imposed with and without the benefit. 277 U.S. at 555 n.1, 558. But Congress did not require the Commissioner to provide a reasoned decision, "embody the results of his deliberation in findings of fact," or even produce the data upon which he was required to make the empirical "computation" on which he based his decision. *Id.* at 559-560.

This Court held that Congress had, in these specific circumstances, conferred "power discretionary in character" on the Commissioner over every aspect of the special-tax-assessment determination. *Id.* at 559. That was not because these concepts are *inherently* discretionary. After all, courts review similar concepts all the time. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (whether officer acting under "similar circumstances" violated Constitution); *Graham v. Florida*, 560 U.S. 48, 60 (2010) (whether sentence is "grossly disproportionate"); *Seaboard Air Line Ry. v. United States*, 254 U.S. 57, 62 (1920) (whether railroad services were provided "under substantially similar circumstances and conditions"). Under the unique tax scheme in *Williamsport*, however, reviewing courts lacked not only "special knowledge" and "specific experience," but also the "ready access to the information necessary to enable them to arrive at a proper conclusion" because the Commissioner was not required to produce the data underlying his determination. 277 U.S. at 562, 564-565.

Not one of the 153 cases (total) that have cited *Williamsport* in the past 95 years has done so for the broad proposition that "exceptional hardship" statutory requirements are inherently unreviewable. And there is certainly no indication that when Congress included a hardship requirement in the INA in 1952—more than *three decades after* the tax statute was repealed—it was aware of *Williamsport*, let alone intended to draw meaning from the wartime tax statute. *See* p. 13, *supra.*

The government's reliance on cases interpreting the Patent Act's "exceptional cases" standard for fee

shifting, 35 U.S.C. § 285, is similarly misplaced. Gov't Br. 18, 20-21, 25. Again, the government offers no reason to think Congress drew meaning from a patent statute in enacting the INA. In any event, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.* simply rejected the Federal Circuit's inflexible *legal standard* for awarding attorney fees, 572 U.S. 545, 554-555 (2014). And *Highmark* held that district courts' attorney-fee decisions should be reviewed for abuse of discretion due to practical considerations. 572 U.S. at 564. As *Guerrero-Lasprilla* recognized, these pragmatic concerns are relevant to standards of review, but irrelevant to reviewability. 140 S. Ct. at 1069.

Under the government's approach, it will always be possible for each side to find *some* historical analog that vaguely supports its position, as shown by the government's embrace of a century-old tax statute and a patent attorney-fee provision, but breezy dismissal of hardship provisions in Title VII and the Bankruptcy Code. Gov't Br. 37-38. Courts will be left with the impossible task of determining *which* analog is most apt. And they will have to repeat this inquiry for *every* legal standard in the INA—*e.g.*, "good moral character,"[7] "extreme cruelty,"[8] a marriage entered "in good faith,"[9] a crime committed

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[7] 8 U.S.C. § 1229b(b)(1)(B). This Court has said that the statutory "good moral character" requirement, "with all its many specific components," is an "objective legal criteri[on]." *Maslenjak v. United States*, 582 U.S. 335, 347 (2017). But the government *still* maintained in its certiorari-stage brief (at 9) that this requirement is "discretionary" and therefore unreviewable.

[8] 8 U.S.C. § 1186a(c)(4)(C)-(D).

[9] *Id.* § 1186a(c)(4)(B)-(C).

"solely to assist, aid, or support the alien's spouse."[10] Even if courts *could* competently apply the government's test to each of these standards, that does not make the test simple, much less make the answer remotely clear or predictable. If the rule disfavoring complex jurisdictional tests has any force, surely it forecloses the government's framework here.

4. The government's approach is also inconsistent with the narrow way Congress used the term "discretion" in the INA. Section 1252(a)(2)(B) identifies the decisions Congress considered discretionary: five forms of relief that are matters of administrative grace, § 1252(a)(2)(B)(i), and decisions that the statute expressly "specifie[s]" as being "in the discretion of the Attorney General," § 1252(a)(2)(B)(ii). Where Congress wanted something to be viewed as "discretionary," then, it "specified" it. Plainly, Congress did not want courts wandering through the INA deeming statutory determinations "discretionary" based on some broader conception of the term. But that is what the government's freewheeling framework requires.

Worse yet, requiring courts to go through this rigmarole in order to label some statutory standards "discretionary" is a fool's errand. The INA does not make "discretionary" decisions judicially off limits. As the government previously explained, "that's just not how this statute works." Oral Arg. Tr. 56, *Guerrero-Lasprilla*, *supra*. The text of § 1252(a)(2)(B) and § 1252(a)(2)(D), each cross-referencing the other, makes clear that even for determinations Congress specified as "discretionary" under § 1252(a)(2)(B), the

[10] 8 U.S.C. § 1182(d)(12)(B).

Limited Review Provision preserves review of "questions of law," including mixed questions. It does not matter whether a statutory standard can be labeled "discretionary." What matters is whether the noncitizen challenges the agency's application of a statutory standard to established facts. If so, it is reviewable.

5. The government's proposed framework ignores the presumption of reviewability. The government argues (at 46) that the presumption is irrelevant because this Court "rejected its application in similar circumstances in *Patel*." That is incorrect. *Patel* held that the government's and petitioner's interpretations of a *different* statutory provision, § 1252(a)(2)(B)(i), were contrary to its plain text and thus their reliance on the presumption was misplaced. 142 S. Ct. at 1627. But this Court has already held that the presumption of review plays a critical role in determining what types of questions fall within the "statutory term 'questions of law'" in § 1252(a)(2)(D). *Guerrero-Lasprilla*, 140 S. Ct. at 1069-1070. This case, too, is about what questions fall within the same statutory term, and so the presumption applies equally here.

III. A challenge to the application of the statutory hardship standard to settled facts is a mixed question of law and fact.

The government's arguments that are specific to the hardship standard lack merit.

A. Applying the hardship standard to *settled* facts does not require *finding* facts.

The government contends (at 23) that where "the noncitizen is … asserting that the agency erred in

applying its understanding to his case," that constitutes a challenge to the agency's "factfinding." This makes no sense: by definition, a party seeking review of a mixed question is not seeking to *unsettle* the facts.

Here, for example, the immigration judge credited Mr. Wilkinson's evidence and testimony, Pet.App.21a-24a, but held that this evidence did not "rise[]" to the statutory standard. Pet.App.29a. Mr. Wilkinson's challenge is to whether the facts as found satisfy the statute. Pet'r C.A. Br. 15-21. *Patel* thus raises no bar to review.[11]

B. Hardship determinations involve no unreviewable exercise of "discretion."

The government identifies no true "discretion" exercised by the agency in making hardship determinations—just the application of the statutory standard to the facts as found. As noted above, the agency does not have free "choice" when determining whether the statutory hardship standard is satisfied—those eligibility determinations are "governed by specific statutory standards" that the agency is compelled to follow. *Jay*, 351 U.S. at 353.[12] This Court's decision in *INS v. Phinpathya*, 464 U.S. 183 (1984), addressing a prior version of the statute, underscores

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[11] The government's suggestion (at 30-31) that Mr. Wilkinson did not challenge the application of law to fact is contradicted by its acquiescence brief (at 15).

[12] The government contends (at 43) that *Jay* is "consistent with the discretionary nature of the hardship determination." But the passage it cites addressed the noncitizen's challenge to the process for deciding whether to grant suspension-of-deportation as a matter of grace *after* eligibility was determined; the Court did not characterize the *statutory* hardship requirement as discretionary. 351 U.S. at 353-361.

the point. As the Court noted, in contrast to the broad grant of discretion to grant or deny cancellation, the "strict threshold criteria" were included "specifically *to restrict the opportunity* for discretionary action." *Id.* at 195 (emphasis added). Immigration judges and the Board have no "choice" to use a different framework or to find a noncitizen eligible for cancellation even if the facts fail to satisfy the hardship standard.

Here, for example, because the immigration judge concluded that the hardship standard was not satisfied, he said he would not "determine[e] whether or not to exercise [his] discretion" to grant cancellation. Pet.App.29a. And the agency often laments its *lack of discretion* in making eligibility determinations, explaining that it "would grant such relief in the exercise of discretion" if it had that choice. Pet'r Br. 47; *see also* IJ Br. 5-6; AILA Br. 5. Tellingly, the government does not cite any Board decision describing the hardship determination as discretionary or indicating that agency officials understand themselves to be exercising discretion when applying the statutory hardship standard. *See Gamero*, 25 I. & N. at 165 (describing hardship determination as the "application of the pertinent legal standards"); IJ Br. 5.

The government's contention (at 42) that *Patel* rejected eligibility/relief as a relevant dividing line misses the point. *Patel* rejected eligibility/relief as a dividing line for deciding whether a decision is a "judgment regarding" the denial of discretionary relief. 142 S. Ct. at 1625. But even a "judgment regarding" the denial of discretionary relief is reviewable if the noncitizen raises a "question[] of law" under the Limited Review Provision. Under *Guerrero-*

Lasprilla, hardship determinations *are* "questions of law," and are therefore reviewable. That is perfectly consistent with *Patel*.

C. The statutory history does not support the government.

The government contends that the cancellation statute's history demonstrates that Congress in 1952 provided an unreviewable grant of discretion to the agency that persists to this day. Gov't Br. 26-29. This argument ignores that for decades before Congress stripped (and then partially restored) jurisdiction over denials of discretionary relief, courts *did* "review … whether the Attorney General … properly applied the statutory standards for denying a request for suspension of deportation." *INS v. Chadha*, 462 U.S. 919, 957 n.22 (1983) (quotation marks and emphasis omitted). Far from treating the hardship requirement as an unreviewable exercise of discretion, courts recognized that it "require[d] a legal determination of a traditional sort, the contents of which are explicated by an orderly history of administrative practice and judicial review and interpretation." *Chadha v. INS*, 634 F.2d 408, 426 (9th Cir. 1980) (Kennedy, J.), *aff'd*, 462 U.S. 919 (1983).

In arguing otherwise, the government cites *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), and *Phinpathya*, 464 U.S. 183. But *Wang* did not hold that hardship determinations are "for the agency, not the courts." Gov't Br. 27. It simply rejected the Ninth Circuit's *legal* interpretation and admonished the Ninth Circuit for failing to extend sufficient deference to the Attorney General "simply because it may prefer another interpretation of the statute." 450 U.S. at 144. In effect, the Court was applying *Chev-*

ron deference before it formally existed. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 & n.13 (1984) (citing *Wang*). And *Phinpathya* simply reiterated that *Wang* "rejected a relaxed standard for evaluating the 'extreme hardship' requirement." 464 U.S. at 195.

Because *Wang* did not address jurisdiction, lower courts unsurprisingly did not read the decision to foreclose judicial review. They continued to review hardship determinations in the years that followed. *See, e.g.*, *Blanco v. INS*, 68 F.3d 642, 647 (2d Cir. 1995); *Hernandez-Patino v. INS.*, 831 F.2d 750, 752 (7th Cir. 1987); *Antoine-Dorcelli v. INS*, 703 F.2d 19, 22 (1st Cir. 1983).

In any event, the government's argument hinges largely on language in the 1952 statute providing that suspension of deportation was available to a "person whose deportation would, *in the opinion of the Attorney General*, result in exceptional and extremely unusual hardship." Gov't Br. 26. But Congress omitted that language in the 1996 cancellation statute. The government contends (at 45) that the excised language was simply "rendered redundant by the simultaneous inclusion of Section 1252(a)(2)(B)(i)'s broad bar on judicial review of denials of discretionary relief." This is pure speculation—and implausible speculation, given that Congress retained similar language in provisions governing other forms of "discretionary relief" designated in § 1252(a)(2)(B)(i). *See* 8 U.S.C. §§ 1182(h)(1)(B), 1182(i)(1), 1255(*l*).

Moreover, by 1996 this Court had explicitly referred to the suspension eligibility requirements as "specific statutory standards" distinct from the ulti-

mate "discretionary determination" to grant or deny relief as "a matter of grace." *Jay*, 351 U.S. at 353-354. The INA likewise distinguishes "eligibility requirements" from the ultimate "exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). At a minimum, "the absence of any reference to discretion" in § 1229b(b)(1)(D) "undercuts the Government's efforts to read it in." *Patel*, 142 S. Ct. at 1624.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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