

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SITU KAMU WILKINSON, )  
 )  
Petitioner, )  
 )  
v. ) No. 22-666  
MERRICK B. GARLAND, )  
 )  
ATTORNEY GENERAL, )  
 )  
Respondent. )  
- - - - -

Pages: 1 through 104  
Place: Washington, D.C.  
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v. ) No. 22-666

MERRICK B. GARLAND, )

ATTORNEY GENERAL, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, November 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

JAIME A. SANTOS, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

COLLEEN SINZDAK, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 22-666, Wilkinson versus Garland.

Ms. Santos.

ORAL ARGUMENT OF JAIME A. SANTOS

ON BEHALF OF THE PETITIONER

MS. SANTOS: Mr. Chief Justice, and may it please the Court:

Non-citizens who have lived here for 10 years, have good moral character and a clean record, can seek immigration relief if their removal will cause exceptional and extremely unusual hardship to a U.S. family member. If the agency concludes that the facts don't satisfy that standard, the question here is whether courts have the power to review that decision.

They do. The INA limits review of denials of discretionary relief, but it permits review of questions of law. And as this Court held in Guerrero-Lasprilla, the statutory term "questions of law" includes the application of legal standards to settled facts. Even the

1 Board agrees that exceptional and extremely  
2 unusual hardship is a legal standard. So, under  
3 Guerrero-Lasprilla, the agency's application of  
4 that standard is reviewable.

5 The government argues that  
6 Guerrero-Lasprilla's holding applies only to  
7 common law standards and offers a different test  
8 for statutory standards. And while  
9 jurisdictional tests are supposed to be simple,  
10 the government's fashioned an elaborate and  
11 amorphous framework that won't provide clear  
12 answers.

13 First, courts should see whether the  
14 standard has a common law origin. If so, the  
15 government suggests it's probably reviewable but  
16 doesn't commit either way.

17 Next, courts should scour current and  
18 prior versions of the statute for any hint that  
19 Congress wanted the agency to have discretion,  
20 even if it later deleted the  
21 discretion-conferring language.

22 If that doesn't somehow answer the  
23 question, courts should ask whether the standard  
24 requires evaluation and fact-weighting. They  
25 should then traipse through any version of the

1 U.S. Code that -- that has ever existed looking  
2 for similarly worded standards and see if courts  
3 have ever labeled those discretionary.

4 Taking these factors together, courts  
5 can then deem the standard a discretionary  
6 one -- a reviewable mixed question or an  
7 unreviewable discretionary one. It would be bad  
8 enough if the government were urging this test  
9 only for cancellation, but courts would have to  
10 apply it to dozens of INA standards, including  
11 whether a non-citizen has been rehabilitated,  
12 subjected to extreme cruelty, or violated the  
13 terms of a visa. I tried making a complete list  
14 last week and stopped count at 75. In other  
15 words, the government's test promises a  
16 never-ending supply of judicial review cases for  
17 this Court's merits docket.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: We're allowed to  
20 certainly review questions of law, and, of  
21 course, the Court said that includes mixed  
22 questions of law. But, in -- in -- in some of  
23 these cases, if we're looking at fact-finding, I  
24 think we agree that's not reviewable. On the  
25 other hand, if we're looking at legal standards,

1 that is reviewable as they're applied to these  
2 facts.

3           How does that work in your case? I  
4 didn't understand it -- how it was work in  
5 some -- worked -- how it would work in some of  
6 the earlier cases. But if you could walk  
7 through how it would work here, how we would  
8 separate a review of a legal standard from a  
9 review of the facts in a case involving mixed  
10 questions of fact and law.

11           MS. SANTOS: Happy to walk you through  
12 that, Your Honor. So, here, we don't think that  
13 the -- the question of whether something is a  
14 challenge to a fact finding would really come up  
15 because the immigration judge credited all of  
16 the testimony and evidence that Mr. Wilkinson  
17 provided.

18           But, in a typic -- typical case, what  
19 would happen is a court would open up the blue  
20 brief, see if there are any challenges to  
21 findings of fact made by the IJ, and, if so, the  
22 court wouldn't review any of those. And if the  
23 only challenge is to the IJ's or the BIA's  
24 ultimate determination that the standard wasn't  
25 satisfied, that would be reviewable.

1           So, here, for example, Your Honor, our  
2           submission before the Third Circuit on remand  
3           would be that while the IJ credited all of the  
4           facts and evidence and while the IJ recited the  
5           right legal standard in a -- in a boilerplate  
6           section of its decision, it then, when applying  
7           the standard, disregarded all of the facts and  
8           factors that render this case exceptional and  
9           extremely unusual.

10           And I would point to, for example, the  
11           fact that Mr. Wilkinson's son, M, has a serious  
12           medical condition that places him in the  
13           hospital with some frequency, that his mother  
14           has depression that renders her unable to care  
15           for M for days a time, that M has learning and  
16           behavioral challenges that have been exacerbated  
17           by Mr. Wilkinson's detention, and -- and that  
18           Mr. Wilkinson is not only the sole financial  
19           provider for M but also has -- is his only male  
20           role model and has been a consistent support  
21           emotionally and a physical presence in his life.

22           CHIEF JUSTICE ROBERTS:   And how many  
23           --

24           MS. SANTOS:   And our --

25           CHIEF JUSTICE ROBERTS:   And -- and can



1 you tell us how many people have a similar list  
2 of hardships in the whole group of people who  
3 are subject to the same immigration laws as this  
4 individual was?

5 MS. SANTOS: I cannot, Your Honor. I  
6 think, in the immigration context, as in many  
7 contexts, there will be a lot of different facts  
8 that will be case --

9 CHIEF JUSTICE ROBERTS: Well, but the  
10 -- the statutory standard is exceptional and  
11 extremely unusual, not burdensome, not  
12 difficult, not very unfortunate. Unusual, which  
13 requires a comparative analysis.

14 And I don't see how doing the best you  
15 can to determine what that number is and given  
16 the size of it, I don't -- maybe it's 3 percent  
17 of the whole population, maybe it's 20,000  
18 people -- it seems to me that that -- it's hard  
19 to determine whether something's extremely and  
20 exceptionally unusual other than -- I mean, it's  
21 not a purely factual question.

22 The government talks a lot about  
23 discretion in determining what weight should be  
24 given the factors you mentioned compared to  
25 other determinations. Maybe somebody has a

1 particular physical impairment and the  
2 difficulties that they have encountered are as  
3 -- as challenging as the ones here. But which  
4 one do you categorize as -- does that make them  
5 both unusual?

6 MS. SANTOS: Well, Your Honor, we  
7 think that all of the -- the -- the points that  
8 you just raised, the fact that IJs see more of  
9 these cases, have more experience, all of that  
10 would probably cash out in the standard-of-  
11 review analysis. But it -- it just -- those  
12 types of practical considerations don't have  
13 anything to do with whether they are -- whether  
14 the -- the determinations are reviewable at all.

15 And I think that what courts would do  
16 when reviewing these types of determinations is  
17 something similar to what the -- what the Board  
18 does. It -- it would interpret the language.  
19 It might note, for example, that exceptional and  
20 extremely unusual hardship is a different  
21 standard than extreme hardship, which appears  
22 elsewhere in the statute. So it would look to  
23 text, it would look to precedent, it would look  
24 to ordinary dictionary definitions. And -- and  
25 that's exactly what the Board did --

1 CHIEF JUSTICE ROBERTS: Well --

2 MS. SANTOS: -- in Monreal-Aguinaga.

3 CHIEF JUSTICE ROBERTS: -- putting  
4 that aside, let's say they come up with a  
5 particular number. I mean, what percent of  
6 people with the same sort of challenging  
7 circumstances that you mentioned or similar --  
8 substantially similar ones are -- are there? Is  
9 it 1 percent? Is it 2 percent? And what  
10 constitutes extremely and exceptionally unusual?  
11 Those -- those are judgments that call for a  
12 high degree of discretion on the part of the  
13 immigration judges.

14 MS. SANTOS: Well, I -- I agree with  
15 Your Honor that -- that they require a -- a -- a  
16 degree of judgment and experience and common  
17 sense. But the standard does -- does not ask  
18 for a quantitative assessment. The standard, as  
19 interpreted in Monreal-Aguinaga, says that you  
20 -- the -- the hardship doesn't need to be  
21 overwhelming; it has to be substantially greater  
22 than is kind of incident to a -- a -- a family  
23 member leaving the country.

24 And so -- so those types of judgments  
25 might warrant a more deferential review. But it

1 wouldn't have anything to do --

2 JUSTICE KAVANAUGH: Are you  
3 acknowledging -- keep going, sorry.

4 MS. SANTOS: I was just going to say  
5 it wouldn't -- it has nothing to do with whether  
6 this qualifies as a question of law as the INA  
7 uses that term.

8 JUSTICE KAVANAUGH: Are you  
9 acknowledging that it would be a more  
10 deferential standard of review by the court of  
11 appeals then?

12 MS. SANTOS: I -- I think it likely  
13 would. After this Court's decision in  
14 Guerrero-Lasprilla, courts have generally  
15 reviewed due diligence determinations for abuse  
16 of discretion, and so --

17 JUSTICE KAVANAUGH: How -- how could  
18 it not be a deferential standard of review? I  
19 just want to --

20 MS. SANTOS: Well, I --

21 JUSTICE KAVANAUGH: -- I just want to  
22 make sure, because I think you're right, that it  
23 would likely be deferential, but what -- what  
24 would be the circumstances under which it  
25 couldn't be?

1 MS. SANTOS: So I am -- I am not going  
2 to push back on the fact that I -- I'm virtually  
3 certain it would be deferential. I think that  
4 virtually every court on our side of the split  
5 has agreed that it would be a -- a deferential  
6 standard of review, and I think all of those  
7 practical considerations go to that point.

8 But one thing that I think is  
9 critically important is that those practical  
10 considerations the Court said expressly in  
11 Guerrero-Lasprilla may be relevant to standard  
12 of review, but they're not relevant to whether  
13 there's judicial review at all.

14 And I think the reason for that is  
15 important. That's because standard of review  
16 and reviewability have just totally different  
17 frameworks. Reviewability looks at -- it's just  
18 purely an exercise in statutory construction.  
19 So you're looking at the canons of statutory  
20 interpretation.

21 But, when you're looking at standard  
22 of review, you use different decision-making  
23 criteria. So you'll look at for one thing is  
24 there a long and a consistent history of  
25 appellate practice. And then you'll look at the

1 practical considerations that might warrant  
2 giving more deference to one decision-maker or  
3 the other. But that just doesn't enter into the  
4 framework for looking at judicial review.

5 JUSTICE JACKSON: But don't we have a  
6 --

7 JUSTICE BARRETT: Would you concede --

8 JUSTICE KAGAN: But another way to  
9 think about the Chief Justice's question is to  
10 say that what he was talking about really does  
11 go to whether it's a legal question at all,  
12 including a mixed question, because, in a  
13 typical mixed question, you know, you look at  
14 the law and you look at the facts and then you  
15 look at the law again and you see how it all  
16 matches up.

17 But, in this question, you're not  
18 really looking at the law at all. I mean, you  
19 sort of say, okay, it says unusual and  
20 exceptional, but the -- the essential project is  
21 to look at one factual situation and compare it  
22 with many other factual situations.

23 And so, when you think of the  
24 essential project as that, it starts looking not  
25 like a legal question at all, not just -- so

1 separate out there are lots of legal questions  
2 that involve judgment and gray areas and all of  
3 that, but this, because of what it tells you to  
4 look at, which is compare this factual situation  
5 to many others you've seen, you -- you have --  
6 where is the law in that?

7 MS. SANTOS: Well, Your Honor, I would  
8 make two points to that. The first point is  
9 that I think that that was essentially the  
10 government's exact argument in  
11 Guerrero-Lasprilla, that due diligence  
12 determinations involve essentially no legal work  
13 and it's just the application of the standard to  
14 facts, and yet this Court still held that  
15 constitutes a question of law.

16 And I think it's because -- I think  
17 you might be getting caught a little -- caught  
18 up a little bit in the kind of colloquial use of  
19 the term "question of law." That term is kind  
20 of thrown out in -- in different contexts and  
21 used in different ways. But, here, we're  
22 talking about the specific statutory term that  
23 this Court interpreted to include the  
24 application of law to fact or a mixed question.

25 Mixed questions are sometimes reviewed

1 de novo, they're sometimes reviewed for clear  
2 error, they're sometimes reviewed for abuse of  
3 discretion, but they're still all mixed  
4 questions.

5           And I think that comparative analysis  
6 that Your Honor points to is very similar to  
7 extraordinary circumstances determinations under  
8 -- for untimely asylum petitions and due  
9 diligence. I think it's also similar to  
10 exceptional case determinations under the Patent  
11 Act and the Lanham Act. But that doesn't make  
12 it not a mixed question and it doesn't make it  
13 not reviewable.

14           JUSTICE BARRETT: Counsel --

15           JUSTICE ALITO: Isn't there this  
16 difference between the -- the standard in  
17 Guerrero-Lasprilla and the -- the situation  
18 here?

19           If you ask -- let's say you ask a  
20 person who is not a lawyer, an alien did not do  
21 -- did not do something within a certain period  
22 of time. Was that -- did that alien exercise  
23 due diligence?

24           I mean, the ordinary person who's not  
25 a lawyer would say, I can't answer that question



1 because it -- it's a legal question. It has to  
2 do with legal procedures.

3 But, if you ask an ordinary person,  
4 you set out a certain set of facts, so let's say  
5 I'm complaining about my workplace, it's cold,  
6 it's set at 63 degrees, there isn't any coffee  
7 machine, the boss is unfriendly, all my  
8 coworkers are obnoxious, and -- and you say am I  
9 experiencing --

10 (Laughter.)

11 JUSTICE ALITO: No, I'm not --

12 (Laughter.)

13 JUSTICE BARRETT: Okay.

14 (Laughter.)

15 JUSTICE ALITO: Any resemblance to any  
16 living character is purely -- purely accidental.

17 (Laughter.)

18 JUSTICE ALITO: Is that unusual or  
19 except -- am I suffering unusual and exceptional  
20 hardship? An ordinary person could answer that  
21 question and they could say, oh, come on, you  
22 know, that's work, suck it up, right?

23 So is that a -- is -- is that a  
24 difference between these two situations?

25 MS. SANTOS: Well, I think that there

1 is still, Your Honor -- first, that this is  
2 still a statutory term that Congress chose,  
3 right? So this is the standard that Congress  
4 set. So I think you'd still have to determine  
5 what Congress was intending to -- what -- what  
6 Congress meant when it -- when it used these  
7 specific terms. So that's still --

8 JUSTICE ALITO: It meant what the  
9 terms mean. These are ordinary terms. You can  
10 look them up in a dictionary.

11 MS. SANTOS: And that is --

12 JUSTICE ALITO: People don't even need  
13 to look them up in the dictionary.

14 MS. SANTOS: And -- and -- and that's  
15 essentially what the Court said in -- in other  
16 cases involving similar kind of common ordinary  
17 meaning terms like "exceptional case  
18 determinations" or -- or even "undue hardship"  
19 under Title VII, but it's still a -- an  
20 exercise -- still a legal exercise to apply that  
21 standard to the facts as found by the IJ.

22 JUSTICE JACKSON: But is it the type  
23 of legal exercise that Congress was intending?  
24 I mean, if we accept Justice Kagan's sort of  
25 framing of this as the essential project is the

1 comparison of these facts to other facts, I  
2 guess my question is, when we look at Congress's  
3 intent in this area, you know, it -- it's about  
4 the division of labor and to what extent did  
5 Congress intend for the court to be the one to  
6 make -- make that comparison. On what basis  
7 could the court be making that comparison?

8 And can't we say, given the clear  
9 jurisdiction-stripping provisions as later  
10 interpreted by Patel, that really Congress  
11 wanted the agency to be the one to do that kind  
12 of comparison and not the court?

13 MS. SANTOS: No, Your Honor, we can't,  
14 and I'll -- I'll explain why, and it has to do  
15 with the way that the -- structure of the  
16 statute works.

17 So every single determination in the  
18 INA that is specified as being discretionary, it  
19 all falls within the scope of Section  
20 1252(a)(2)(B). So that's the  
21 jurisdiction-stripping provision.

22 But what subparagraph (D) -- that's  
23 the limited review provision -- does is it  
24 trumps that designation. So it says nothing in  
25 subparagraph (B) or (C) or any other provision

1 of -- of this chapter shall be construed to  
2 preclude judicial review of questions of law.

3 JUSTICE JACKSON: I appreciate that.  
4 But I understood that the enactment history was  
5 such that Congress put that in in response to  
6 St. Cyr and the concern that if it did what it  
7 wanted to do, which was get the judiciary out of  
8 this and give it to the agency, that there might  
9 be constitutional problems.

10 And so Congress puts in this  
11 additional language that you're talking about  
12 but only to the extent that we have a  
13 constitutional question or -- and I take your  
14 point that it says questions of law, and we, you  
15 know, suggested in or held in a subsequent  
16 opinion that that includes mixed questions --  
17 but, if we read mixed questions to be so broad  
18 that it is essentially, you know, supplanting  
19 the agency's decision-making, I find it hard to  
20 make the statute make sense.

21 MS. SANTOS: Well, I think you can  
22 look to what the Court said in both  
23 Guerrero-Lasprilla and Patel about what would  
24 remain unreviewable after you apply the limited  
25 review provision and layer it on top of

1 subparagraph (B).

2           And what the Court said in  
3 Guerrero-Lasprilla is that the -- the limited  
4 review provision would still forbid appeals of  
5 findings of fact. And in Patel, the Court said  
6 the same thing. If we apply both statutes  
7 together, the -- major remaining category of  
8 determinations that are unreviewable are factual  
9 findings. There was just no --

10           JUSTICE JACKSON: I understand, but  
11 why would the -- why would Congress want it to  
12 be that way in the statute? Why would it have a  
13 statute that has the agency making the factual  
14 determinations and the ultimate cancellation  
15 decision, but the court swoops in to just  
16 review, you know, the agency's actual function  
17 with respect to determining eligibility?

18           MS. SANTOS: I think for a few  
19 reasons, Your Honor. Number one is, by doing  
20 so, the -- the -- by -- by enacting the limited  
21 review provision the way it did, it still cut  
22 out any judicial review of findings of fact,  
23 which, in many cases, in many cancellation  
24 cases, will completely control the -- the  
25 conclusion. You won't always have cases like

1 this one where the IJ credited all of the  
2 testimony and evidence that the non-citizen  
3 provided.

4 And I think the second reason is that  
5 by -- by enacting that provision, it got rid of  
6 an entire layer of habeas review. So district  
7 court habeas proceedings are still completely  
8 unavailable.

9 But the typical role of an appellate  
10 court to -- to review that application of the  
11 legal standard to facts, whether under a  
12 deferential standard or not, would still be  
13 maintained.

14 JUSTICE ALITO: Would you agree that  
15 --

16 JUSTICE BARRETT: Ms. Santos --

17 JUSTICE ALITO: Go ahead.

18 JUSTICE BARRETT: Ms. Santos, let me  
19 try to get at the questions that you've been  
20 asked in a different way.

21 What if we -- let's say that I  
22 theoretically agree with you that under  
23 Guerrero-Lasprilla, mixed questions, including  
24 of this sort, would be subject to judicial  
25 review.

1                   Wouldn't you say -- and I guess I'd  
2                   push back a little bit on your characterization  
3                   of Wilkinson's claims in particular below as  
4                   being of that variety because, you know, I  
5                   looked at the record.

6                   His claims, you know, the immigration  
7                   judge, he claimed that the immigration judge  
8                   wrongly speculated about the care and support  
9                   the child would receive if the Petitioner was  
10                  removed. They all read like weighing ones.

11                  He found, while Wilkinson does provide  
12                  emotional support, removing him would result in  
13                  minimal emotional hardship because his son  
14                  clearly has lived without Wilkinson's daily  
15                  presence for most of his life because the mother  
16                  had primary custody.

17                  So doesn't it seem like you're just  
18                  seeking or that your client was seeking a  
19                  reweighing of those facts and so that under  
20                  Patel, they really would be not subject to  
21                  review?

22                  MS. SANTOS: So all -- the -- the  
23                  specific factual points that you pointed to, I  
24                  agree with you. Those would be unreviewable.

25                  JUSTICE BARRETT: Okay.

1                   MS. SANTOS: But what would be  
2 reviewable is the ultimate determination of  
3 whether that satisfies the statutory standard.  
4 And it -- it -- it is often the case, for  
5 example, that -- that -- that, you know, when --  
6 when you're challenging -- potentially  
7 challenging the weighing of -- of various  
8 factors and facts, an agency or -- or a court of  
9 appeals can't just supplant its view of the --  
10 of the evidence for that of the agency. But,  
11 still, the ultimate question of whether those  
12 facts satisfy the standard remain a question of  
13 law.

14                   JUSTICE BARRETT: But it seems to me  
15 -- I mean, I've looked at some of these cases  
16 and the Sixth Circuit sides with you -- but,  
17 when it reviews these cases, it says that a lot  
18 of these claims about, well, you just didn't  
19 understand the strength of the emotional bond or  
20 you didn't accurately predict what life would be  
21 like for my child if I were deported or -- or  
22 removed or my spouse, what the court says is  
23 those kinds of things are factual.

24                   And I guess that's where I'm stuck  
25 because, even if I accept your argument as



1 flowing from Guerrero-Lasprilla, it's hard for  
2 me to see looking at these cases very many that  
3 aren't essentially factual challenges.

4 MS. SANTOS: Well, Your Honor, I -- I  
5 agree with you that all of those things you just  
6 pointed to, that you cited from the Sixth  
7 Circuit cases, those are unreviewable. And --  
8 and kind of weeding out unreviewable findings  
9 and fact are -- are things that appellate courts  
10 do all the time. They have to do so in every  
11 interlocutory appeal of a qualified immunity  
12 decision.

13 JUSTICE BARRETT: So would you accept  
14 then that there would probably be only a very  
15 narrow slice of cases that a ruling in your  
16 favor would make judicially reviewable and  
17 including potentially even Wilkinson's own?

18 MS. SANTOS: I -- I think it depends  
19 on what the Board does in any given case. I  
20 agree with Your Honor that if the IJ makes  
21 adverse factual findings or if all the non- --  
22 non-citizen is doing is challenging factual  
23 findings on appeal, those won't be viable  
24 claims. But what would be reviewable is the --  
25 the ultimate determination of whether -- whether

1 those facts satisfy the standard.

2           And, here, I'll just point out  
3 briefly, Your Honor, that I think the Third  
4 Circuit clearly understood Mr. Wilkinson's  
5 challenge as being one to that mixed question  
6 because it said -- and you can see this on page  
7 3a of the petition appendix -- that Mr.  
8 Wilkinson argues that the hardship his son faces  
9 is indeed exceptional, that's not reviewable  
10 because it's discretionary. The court did not  
11 say Mr. Wilkinson is challenging findings of  
12 fact, and under Patel, those findings of fact  
13 are unreviewable.

14           JUSTICE KAVANAUGH: Do you agree that  
15 credibility determinations are factual for these  
16 purposes and, therefore, unreviewable?

17           MS. SANTOS: Yes, Your Honor. We  
18 don't think that credibility determinations  
19 present mixed questions of law and fact, and  
20 that's because -- and just to kind of make sure  
21 we're all on the same page, the -- the statute  
22 that the government points to is one that says,  
23 considering the totality of the circumstances  
24 and all relevant factors, the finder of fact  
25 when determining credibility can consider -- and

1 then a non-exhaustive laundry list of factors.

2 That doesn't fall within the  
3 definition of a mixed question. A mixed  
4 question involves applying a standard to  
5 undisputed or settled facts and -- and  
6 determining whether the standard is satisfied.

7 JUSTICE SOTOMAYOR: Counsel, here, the  
8 BIA doesn't review the IJ's findings on -- on  
9 this being an exceptional case with deference.  
10 It reviews it de novo. So the BIA believes  
11 there's a legal standard, correct?

12 MS. SANTOS: Absolutely, Your Honor.  
13 And, in fact, when EOIR promulgated clear error  
14 review for the first time in 2002, it actually  
15 used exceptional and extremely unusual hardship  
16 as an example of something that wouldn't be  
17 reviewed for clear error because it's not a  
18 factual finding.

19 JUSTICE SOTOMAYOR: Is there any  
20 question that Justice Jackson has asked you or  
21 even Justice Barrett -- Justice Barrett is  
22 making the point, which is, unless we can  
23 distinguish Guerrero-Lasprilla, and I don't see  
24 how you can unless you buy the distinction the  
25 government makes between statutory and common

1 law findings, which makes no sense to me -- I  
2 think your brief does a good job of that --  
3 these are all arguments that were rejected in  
4 Guerrero-Lasprilla, right?

5 MS. SANTOS: Yes.

6 JUSTICE SOTOMAYOR: If Justice  
7 Jackson's unhappy with it, it has to overrule  
8 that case.

9 (Laughter.)

10 MS. SANTOS: I don't know that I want  
11 to get in the middle of this.

12 (Laughter.)

13 JUSTICE JACKSON: Well, no, can I --  
14 can I have --

15 JUSTICE SOTOMAYOR: Maybe -- maybe you  
16 don't want to. That was a beautiful -- that was  
17 a beautiful answer, by the way.

18 JUSTICE ALITO: Well, let me take you  
19 out --

20 JUSTICE JACKSON: Can I just --

21 JUSTICE ALITO: -- from the middle of  
22 it.

23 JUSTICE JACKSON: -- can I -- in my  
24 own defense here, can I -- can --

25 (Laughter.)

1                   JUSTICE JACKSON:  -- can I just ask,  
2           though, whether Guerrero-Lasprilla is helping us  
3           with a particular nuance that I see happening,  
4           right?  We've said in other scenarios that not  
5           all mixed questions are the same.  So, even if  
6           we assume that Guerrero, as I'll call it, says  
7           mixed questions count for questions of law, is  
8           it possible that there are certain kinds of  
9           mixed questions that Congress intended to  
10          include here and other kinds that it didn't?

11                   So my example is a scenario in which  
12          the defendant or the -- the petitioner is  
13          challenging the BIA's own rules with respect to  
14          how it applies this extreme and unusual  
15          hardship.  So you say in your brief the BIA has  
16          looked at the statute and it has come up with  
17          factors that it says the IJ should be applying  
18          when it does this.  If someone makes the claim  
19          that the BIA's factors are inconsistent with the  
20          statute insofar as they're applying it in this  
21          way in this case, I guess you could say that's a  
22          mixed question perhaps.  Maybe it's closer to  
23          the -- the question -- a pure question of law,  
24          but at least you're -- you're challenging the  
25          BIA's interpretation of the statute with respect

1 to the factors that it has created.

2 Justice Barrett has come up with a  
3 different kind of scenario where we agree on the  
4 facts of this case and we agree on the  
5 standards, the factors, that everybody's saying,  
6 hooray, BA -- BIA, you have it right with  
7 respect to what the IJ is supposed to be looking  
8 at, but the claim is that the IJ has not weighed  
9 these factors appropriately, that it has put  
10 more stock in a certain, you know, segment of it  
11 than another, and, the Court, we really think  
12 you should reweigh it differently.

13 Now that might be a mixed question  
14 too, but it seems to me that it's of a different  
15 variety. And if we could interpret Guerrero --  
16 Guerrero to be talking about the former and not  
17 the latter, maybe it doesn't have to be  
18 overruled.

19 MS. SANTOS: So I don't think there's  
20 any way to principally read Guerrero-Lasprilla  
21 that way.

22 JUSTICE JACKSON: Mm-hmm.

23 MS. SANTOS: And -- and I'll give you  
24 two reasons. Number one is because of the way  
25 that the case was litigated. The government's

1 view -- the government's argument in  
2 Guerrero-Lasprilla was that, for -- first, no  
3 mixed question should be considered questions of  
4 law.

5 May -- may I finish, Mr. Chief  
6 Justice?

7 CHIEF JUSTICE ROBERTS: Yes.

8 MS. SANTOS: And, second, that at the  
9 very least, super fact questions shouldn't be  
10 considered questions of law, and the Court  
11 rejected that, and in doing so, its opinion did  
12 not distinguish any particular mixed questions.  
13 And it drew from a variety of contexts,  
14 including constitutional mixed questions,  
15 statutory mixed questions, and common law mixed  
16 questions.

17 So I don't think there's any way to  
18 read Guerrero-Lasprilla narrowly given the way  
19 the Court wrote the opinion.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas?

23 Justice Alito?

24 JUSTICE ALITO: Do you agree that the  
25 -- the bottom-line judgment in every decision

1 made by a court or an administrative agency  
2 involves a mixed question of law and fact or  
3 perhaps a question of law?

4 MS. SANTOS: Your Honor, I believe  
5 that the -- that the application of any statute  
6 -- any legal standard to facts qualifies as a  
7 mixed question. It may sometimes be driven by a  
8 particular factual finding, but the application  
9 of law to fact, I think, is.

10 JUSTICE ALITO: And -- and that's what  
11 every judgment does, right? It applies the law  
12 to a particular set of facts.

13 MS. SANTOS: It -- I guess it depends  
14 on the way you -- you -- what you mean by the  
15 term "judgment," which I know is a whole issue  
16 in Patel, and I don't want to get caught up in  
17 that, but -- but, yes, I think that any  
18 conclusion about whether a statutory standard is  
19 satisfied is the application of law to fact, and  
20 that presents a mixed question.

21 JUSTICE ALITO: And 1252(a)(2)  
22 precludes reviewing judgments, so your argument  
23 is that although it precludes reviewing  
24 judgments, in fact, every judgment is reviewable  
25 because it's a mixed question of law and fact?



1 MS. SANTOS: Well, Your Honor, our  
2 position is that 1252(a)(2)(B)(i) precludes  
3 judicial review over any judgment regarding the  
4 granting of relief, but if you look up two  
5 lines, it says except as provided in  
6 subparagraph (D), and if you look down a couple  
7 paragraphs, it says nothing in subparagraph (B)  
8 shall be construed as precluding review of -- of  
9 questions of law.

10 So, yes, I think that the plain text  
11 of subparagraph (D) trumps a designation of --  
12 of a -- of a judgment as discretionary --

13 JUSTICE ALITO: It swallows up the  
14 exception completely.

15 MS. SANTOS: It -- it doesn't, Your  
16 Honor, because it still precludes the judicial  
17 review of questions of fact, as this Court said  
18 in Guerrero-Lasprilla and Patel, and it  
19 precludes any -- any first-line habeas review,  
20 any habeas review at -- at all, which removed an  
21 entire layer of judicial review.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Justice Thomas  
25 pointed out the very same arguments that Justice

1 Alito has made, and that was one of his  
2 criticisms of the majority opinion, wasn't it?

3 MS. SANTOS: It -- it was. It was  
4 that the -- the -- the majority opinion was  
5 categorical when it could have been narrow.

6 JUSTICE SOTOMAYOR: And I think  
7 Justice Thomas pointed out what Justice Jackson  
8 noted, that there are different kinds of mixed  
9 questions of law and fact and that the majority  
10 had ruled those -- that out as a reason.

11 MS. SANTOS: That's right, Your Honor.  
12 I also think even beyond -- I mean, I know that  
13 sometimes dissents are written broadly, but I do  
14 think that's an accurate categorization or -- or  
15 -- or characterization of what the majority  
16 decided.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?  
18 Justice Gorsuch?

19 JUSTICE GORSUCH: Can we agree that  
20 the ultimate discretionary decision rests with  
21 the Attorney General and is unreviewable too?

22 MS. SANTOS: It's unreviewable as a  
23 question of law, absolutely, because it doesn't  
24 involve the application of law to fact. It  
25 still would be subject -- subjected to

1 subparagraph (D), so any constitutional claims

2 --

3 JUSTICE GORSUCH: Sure.

4 MS. SANTOS: -- that may exist.

5 JUSTICE GORSUCH: Sure. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice

7 Kavanaugh?

8 JUSTICE KAVANAUGH: In response to  
9 Justice Jackson, when you said Guerrero rejected  
10 that kind of line-splitting of a mixed question  
11 from more factual mixed questions, one of the  
12 reasons we did that, I think, is because there  
13 would be, as your brief says, a morass trying to  
14 do that across the board and it would be years,  
15 if not decades, of litigation trying to resolve  
16 that question when, if you just do a deferential  
17 standard of review, you know, the -- the Board's  
18 going to get affirmed most of the time but not  
19 always but most of the time and you don't have  
20 this collateral litigation.

21 MS. SANTOS: Yes, that's right, Your  
22 Honor. And -- and I think that pushing --  
23 pushing this into the merits bucket doesn't mean  
24 that -- that we're just kind of repeating the  
25 same analysis.

1           I think standard-of-review analysis is  
2 actually way simpler than the government's  
3 framework. And, also, waiver rules would apply,  
4 and courts can always say something like, under  
5 any standard of review, I would still reverse or  
6 affirm. So we think it will be much simpler and  
7 more streamlined.

8           And, of course, there will be judicial  
9 review, which is really important, particularly  
10 in an immigration context, where an error can  
11 have disastrous consequences by -- by tearing  
12 apart families.

13           JUSTICE KAVANAUGH: Because I think we  
14 thought about that in Guerrero and decided it's  
15 not worth the candle, but, in any event, another  
16 question about the limits of your argument,  
17 which is -- and this follows Justice Gorsuch's  
18 question.

19           If the IJ said or the Board said we're  
20 going to assume arguendo eligibility, but as a  
21 matter of discretion -- exercising our  
22 discretion, we would deny cancellation of  
23 removal in any event, that determination would  
24 be unreviewable, correct?

25           MS. SANTOS: Correct, Your Honor.

1       There -- there -- this Court does have a  
2       precedent on point.  It's something like  
3       Rumsmanabad, I can't recall, but, yes, there is  
4       a specific precedent on point that says exactly  
5       that.

6                   JUSTICE KAVANAUGH:  Thank you.

7                   CHIEF JUSTICE ROBERTS:  Justice?

8                   JUSTICE BARRETT:  I too just have some  
9       questions about the limits of your argument.  
10      So, in our colloquy earlier, did I understand  
11      you correctly to say that even if this is a  
12      mixed question, even if -- even if in theory  
13      Guerrero-Lasprilla applies here, permitting  
14      judicial review of the application of law to  
15      facts, that there's still a category of claims  
16      that a non-citizen might press on review that  
17      really are purely factual?

18                  MS. SANTOS:  I -- I don't think that's  
19      what I was intending to say, Your Honor.

20                  JUSTICE BARRETT:  Oh.

21                  MS. SANTOS:  My -- my -- my argument  
22      was that if in -- in a court of appeals a  
23      non-citizen presses purely factual, you know,  
24      challenges findings of historical fact, those  
25      will be unreviewable and a court of appeals can

1 just say we aren't reviewing that, we have to --

2 JUSTICE BARRETT: Okay. That was my  
3 question.

4 MS. SANTOS: Oh, okay. Yes.

5 JUSTICE BARRETT: So you're -- you're  
6 saying --

7 MS. SANTOS: Yes.

8 JUSTICE BARRETT: Okay.

9 MS. SANTOS: My apologies if I -- if I  
10 misunderstood.

11 JUSTICE BARRETT: Okay.

12 MS. SANTOS: Definitely unreviewable  
13 under Patel.

14 JUSTICE BARRETT: Okay. But you are  
15 saying -- and I think this kind of came out when  
16 you were talking to Justice Jackson -- that  
17 while that -- the hypothetical that I just  
18 posed, you know, like, does your son have a  
19 mental illness or not, that that's an  
20 unreviewable fact?

21 MS. SANTOS: Right.

22 JUSTICE BARRETT: But you have said  
23 that the weighing of those facts, which one  
24 might be more important than others or, listen,  
25 I -- I accept that your son needs your emotional

1 support, you know, but I also accept that his  
2 grandmother cares for him, say, and so I just  
3 don't weigh it that heavily, is that a factual  
4 question or is that a mixed question?

5 MS. SANTOS: I -- I don't think that  
6 is a factual question. I think it has to go  
7 into the overall analysis whether the  
8 non-citizen established exceptional and  
9 extremely unusual harm. So I think that that --  
10 that, you know, weighing might be viewed very  
11 deferentially because of the proximity of the IJ  
12 to the facts and experience, but it wouldn't  
13 make it unreviewable.

14 And I think, here, for example, we  
15 might -- we would say, Your Honor, that the IJ  
16 really erroneously boiled the entire analysis  
17 down to economic detriment, which is not the way  
18 that you're supposed to apply the statutory  
19 provision.

20 But -- but those -- any type of  
21 weighing would certainly be viewed  
22 deferentially. I just don't think they'd be  
23 unreviewable because, if so --

24 JUSTICE BARRETT: Well, I guess I  
25 don't understand that. I mean, I agree with you

1 if -- if say the IJ said, listen, all that  
2 matters is economics, and we'd say, well, that  
3 was a miss -- a misunderstanding of what the  
4 hardship standard requires. I mean, I can see  
5 why that's a question of law.

6 But, when you're talking about the  
7 weighing, I mean, let's say, yeah, I credit your  
8 testimony that you have a strong emotional bond  
9 with your son and vice versa. I also have  
10 testimony here that I also credit that the  
11 grandmother cares for him -- I'm just making  
12 this up, I know it's not your case -- but that  
13 the -- the grandmother cares for him and there's  
14 a strong emotional support there, and so I just  
15 think given those two, you know, I -- I just  
16 don't think that the emotional support is  
17 enough of -- that the father provides is enough  
18 of a reason to say hardship.

19 But you're saying that's a legal  
20 question, that kind of weighing?

21 MS. SANTOS: I'm saying that that  
22 constitutes a question of law --

23 JUSTICE BARRETT: A mixed question.

24 MS. SANTOS: -- as interpreted by the  
25 INA or --



1 JUSTICE BARRETT: Oh, okay.

2 MS. SANTOS: -- as -- as the INA uses  
3 that term and that it would -- all of that would  
4 cash out under the standard-of-review analysis.

5 JUSTICE BARRETT: Okay. And then last  
6 question. You have said in response to Justice  
7 Kavanaugh's questions that the standard of  
8 review would be deferential, and you initially  
9 said abuse of discretion.

10 And so I just want to clarify, is that  
11 what your position would be?

12 MS. SANTOS: So there are various kind  
13 of articulations of deferential review. We  
14 haven't briefed that. And so I -- I suspect it  
15 would be abuse of discretion, but yes.

16 JUSTICE BARRETT: Okay. But you're  
17 not -- you're not making a commitment, you're  
18 saying you suspect, but maybe it's clear error?

19 MS. SANTOS: It -- it -- it might be.  
20 I mean, Your Honor, I -- I would just say that  
21 -- that that would I'm sure be briefed and has  
22 been briefed in other cases and we just haven't  
23 here, but I -- I do believe that it would be a  
24 deferential standard of review.

25 It's -- you know, when you kind of

1 layer the standard of review on to the  
2 administrative law context, there's lots of ways  
3 you could articulate what that standard is, but  
4 due diligence has been reviewed for abuse of  
5 discretion since Guerrero-Lasprilla.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9 JUSTICE JACKSON: So can I just go  
10 back to Justice Barrett's last hypothetical  
11 where we have a situation in which the IJ has  
12 looked at the factors and has said, I don't --  
13 you know, I understand and accept your  
14 credibility about the strength of your emotional  
15 bond, but I also have testimony about the  
16 grandmother caring for your son, and at the end  
17 of the day, my conclusion, based on weighing all  
18 of these different factors and considering the  
19 evidence, is not met, this particular element.  
20 You, I think, say that's reviewable.

21 I'd like to know what is the legal  
22 standard that I use as the court to review that  
23 determination and say yes, you're right, or no,  
24 you're wrong. Am I looking at what?

25 MS. SANTOS: Well, assuming that some

1 type -- like abuse of discretion-type review  
2 would apply --

3 JUSTICE JACKSON: Mm-hmm.

4 MS. SANTOS: -- you -- one might  
5 reverse if, for example, an IJ ignored  
6 particularly salient factors that the law deems  
7 relevant to the analysis.

8 JUSTICE JACKSON: What law? The B --  
9 the -- this is not in the statute.

10 MS. SANTOS: The legal standard.  
11 Sorry, the -- the legal standard in the statute,  
12 exceptional and extremely unusual hardship, that  
13 term has been interpreted by the --

14 JUSTICE JACKSON: By the?

15 MS. SANTOS: -- Board, by the Board --

16 JUSTICE JACKSON: Okay.

17 MS. SANTOS: -- in the precedential  
18 decision, Monreal- -- Monreal-Aguinaga, and so  
19 courts may look to that precedential decision  
20 for --

21 JUSTICE JACKSON: Does it matter --  
22 does it matter that this case has come to me  
23 through the Board, which presumably knows its  
24 own standard and has looked at this situation  
25 and said we have a precedent, the one you

1 described. We don't think that it precludes the  
2 IJ's determination, so we're affirming what the  
3 IJ has said about applying our own precedent to  
4 this circumstance?

5 MS. SANTOS: Well, Your Honor, I don't  
6 think that the fact that the Board affirmed  
7 makes it kind of extra special. I think  
8 especially here --

9 JUSTICE JACKSON: No, no, no, I'm just  
10 asking what the Court --

11 MS. SANTOS: Right.

12 JUSTICE JACKSON: -- is supposed to do  
13 because we don't have a body of law that is  
14 existing outside, I think, of what the BIA has  
15 interpreted this to mean. And so the Court --

16 MS. SANTOS: Right.

17 JUSTICE JACKSON: -- would have to  
18 say, I guess, BIA, you're wrong about your own  
19 view of whether your standard applies in this  
20 situation?

21 MS. SANTOS: Well, so the -- the Court  
22 would be first starting with a standard that  
23 Congress set, right, and then it could decide  
24 whether it agrees with how the Board has  
25 interpreted it.

1 JUSTICE JACKSON: But that's not the  
2 challenge.

3 MS. SANTOS: Right. That's not the  
4 challenge.

5 JUSTICE JACKSON: I agree with you  
6 that if that was the challenge, then I'm in --

7 MS. SANTOS: Yes.

8 JUSTICE JACKSON: -- a question-of-law  
9 world. We agree that the Board has interpreted  
10 correctly.

11 MS. SANTOS: Yes.

12 JUSTICE JACKSON: The question is,  
13 when the Board says our standard equals no  
14 extreme hardship in this particular case, what  
15 is the courts' basis for saying you're wrong?

16 MS. SANTOS: Well, under -- under, for  
17 example, abuse-of-discretion review, a -- a  
18 court could reverse if it had the definite and  
19 firm conviction that an error had been made, if  
20 it thought that -- that -- that the IJ and the  
21 Board had just really, really missed the mark in  
22 evaluating the facts under the -- under the  
23 appropriate legal standard.

24 I mean, I think that abuse of  
25 discretion -- even deferential review of mixed

1 questions exists to make sure that the agency is  
2 staying within the bounds of what Congress said.  
3 That's what this Court said in cases like Taylor  
4 versus United States, a Sentencing Act case.

5 JUSTICE JACKSON: Okay. Let me ask  
6 you one more question. In terms of the --  
7 Congress's intent -- and it's possible that you  
8 -- that -- that this had been handled in  
9 Guerrero, I was -- wasn't on the Court at that  
10 time, so I just want to be clear.

11 MS. SANTOS: Sure.

12 JUSTICE JACKSON: I'm interested in  
13 the sort of idea that what is left here is  
14 precluding questions of fact and habeas review,  
15 and it just strikes me as a really convoluted  
16 way for Congress in writing this statute to  
17 achieve that result.

18 They say several times no court shall  
19 have jurisdiction to review judgments in this  
20 area. And if really Congress just wanted to  
21 say, you can't review factual determinations of  
22 the agency, it seems to me there was a lot  
23 simpler way to go about that.

24 So can you just help me with my --

25 MS. SANTOS: Sure.

1 JUSTICE JACKSON: -- nagging concern  
2 that maybe this is not what Congress was  
3 intending?

4 MS. SANTOS: Happy to do so, Your  
5 Honor, and this was specifically addressed both  
6 in Guerrero-Lasprilla and Patel. And I think  
7 what the Court said is a couple things. Number  
8 one, that this provision, the limited review  
9 provision, applies to a whole bunch of  
10 provisions throughout the INA. So it applies to  
11 forms of relief under subsection (B). It  
12 applies to criminal alien final orders for  
13 removal under (C). It says it also applies to  
14 the entire rest of the INA.

15 So I think what the Court said is, you  
16 know, Congress was trying to loop in a whole  
17 bunch of different things and it -- and it --  
18 and it did it this way because it would apply to  
19 numerous different statutory provisions. And,  
20 yes, perhaps, it might make more sense in some  
21 situations to say we just forbid findings of  
22 fact, but then it may have to kind of go  
23 provision by provision and explain when that was  
24 the case.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Sinzdak?

4 ORAL ARGUMENT OF COLLEEN SINZDAK  
5 ON BEHALF OF THE RESPONDENT

6 MS. SINZDAK: Mr. Chief Justice, and  
7 may it please the Court:

8 The plain text of Section  
9 1252(a)(2)(B) and (D) requires courts to  
10 distinguish between reviewable constitutional  
11 claims and questions of law, which includes  
12 mixed questions, and any other judgment  
13 regarding the denial of non- -- of discretionary  
14 relief. And in Patel, this Court was very clear  
15 that "any" meant "any."

16 That included subjective and objective  
17 determinations. That included the  
18 quintessentially discretionary determination of  
19 the -- at the second step as to whether an  
20 eligible non-citizen is -- should receive  
21 cancellation of removal. But it also included  
22 credibility determinations, which the Court  
23 recognized required some objective fact-finding  
24 but also some exercise of discretion. And it  
25 included simply finding historical facts. This



1 non-citizen has been in the country for 11 years  
2 and meets the continuous presence requirement.

3 Now, in order to figure out whether  
4 any of those statutory determinations -- and all  
5 of the examples I just gave you are statutory  
6 determinations, they're made pursuant to a  
7 statute. In order to figure out whether those  
8 statutory determinations fall within the  
9 exception that permits judicial review of  
10 questions of law and constitutional claim --  
11 claims, the Court has to look at the statute and  
12 say: Okay, is this a statute that's asking for  
13 a legal conclusion, like fair use, or is this a  
14 statute that's saying find a fact or -- like in  
15 Pullman-Standard where we had intention to  
16 discriminate, pure question of fact, or is it a  
17 statute where the terminology is saying make a  
18 discretionary decision like in Williamsport Wire  
19 Rope, where we had the term "exceptional  
20 hardship" and the Court said that's requiring a  
21 -- a discretionary decision.

22 And the Court has to figure that out  
23 in order to honor the plain text of Section  
24 1252(a)(2)(B). It can't decide that it would be  
25 easier just to say all statutory determinations

1 are reviewable because that's not what the  
2 statutory text says.

3 And we think that if you apply the  
4 standard tools of -- statutory interpretation --  
5 that's text, history, and precedent, that's the  
6 complicated framework that I think my friend is  
7 referring to -- if you apply those tools, you'll  
8 figure out that exceptional and extremely  
9 unusual hardship, that is a factual  
10 determination and that's an exercise of agency  
11 discretion. That is not a legal conclusion.

12 I welcome the Court's questions.

13 JUSTICE SOTOMAYOR: So why does -- oh,  
14 I'm sorry. Go ahead.

15 CHIEF JUSTICE ROBERTS: No, go ahead.

16 JUSTICE SOTOMAYOR: So why does the  
17 BIA review it de novo?

18 MS. SINZDAK: Because the BIA reviews  
19 discretionary decisions de novo, so the de novo  
20 standard applies to discretionary factual  
21 findings.

22 JUSTICE SOTOMAYOR: And why do they  
23 set a standard at all?

24 MS. SINZDAK: Pardon?

25 JUSTICE SOTOMAYOR: Why don't they

1 just make it discretionary? They set a  
2 standard. They say to the IJs use this standard  
3 --

4 MS. SINZDAK: They did --

5 JUSTICE SOTOMAYOR: -- to measure the  
6 decision by. So it is not saying it's purely  
7 discretionary. It's saying we're setting a  
8 legal standard.

9 MS. SINZDAK: No, it's not purely  
10 discretionary in that the IJ could just decide  
11 based on anything that it wants. And in part --

12 JUSTICE SOTOMAYOR: Like the Attorney  
13 General can?

14 MS. SINZDAK: Pardon?

15 JUSTICE SOTOMAYOR: The Attorney  
16 General can.

17 MS. SINZDAK: Well, there's a  
18 statutory text and we freely admit that the  
19 interpretation of the statutory text is a  
20 question of law and that you can challenge that  
21 statutory text and say the Board has  
22 misunderstood the meaning of these statutory  
23 terms. But, of course, that's not the challenge  
24 that we have here.

25 Now that is what the Board has done.

1 It has said this is what we think the statutory  
2 text means. It means make a decision about  
3 whether you think this non-citizen's facts are  
4 substantially beyond what you would get in an  
5 ordinary case. So the BIA has said make that  
6 discretionary judgment, make that predictive and  
7 comparative judgment, and -- and that's it.  
8 That's -- there's no legal element to that  
9 conclusion.

10 So it's just a weighing of evidence.  
11 It's sort of -- it really reminds me of the  
12 credibility determination and the way that the  
13 Court talked about it in -- in Patel recently.

14 JUSTICE KAGAN: Well, Ms. -- Ms. --  
15 Ms. Sinzduk, it strikes me that everything that  
16 you just said is -- is pretty much a  
17 relitigation of the issue that was raised in  
18 Guerrero, that the government came in, basically  
19 made the same argument. The government said,  
20 you know, there are mixed questions and then  
21 there are mixed questions. There are mixed  
22 questions that are really super factual.

23 And we accepted that distinction when  
24 it came to standards of review in Lakeridge, but  
25 we specifically did not accept it when it came

1 to this question. We said, you know what, we  
2 don't really care if it's primarily factual. We  
3 don't really care if it involves a lot of  
4 judgment calls. We don't really care if you  
5 have to really kind of search for the legal  
6 standard in the inquiry. As long as there is  
7 that legal standard and as long as all the  
8 fact-finding that you do and all the  
9 fact-weighting that you do eventually has to  
10 satisfy that legal standard, and the question is  
11 whether it does, it's a mixed question and it's  
12 reviewable. That's how I read that decision.

13 You're just, you know, basically  
14 saying you don't like it.

15 MS. SINZDAK: No. To be clear, we  
16 accept the holding of Guerrero-Lasprilla, and we  
17 are not up here saying that mixed questions are  
18 unreviewable. So, if -- if we thought that the  
19 exceptional and extremely unusual hardship had a  
20 legal component, even if it was mixed in with  
21 the facts, then it would not be reviewable.

22 But what we are here saying is just  
23 because a statute is -- is -- a term is in a  
24 statute, that doesn't mean that it -- it  
25 establishes a legal standard in the sense that

1 Guerrero-Lasprilla was --

2 JUSTICE KAGAN: Well, here's the --  
3 here was the -- I mean, the question in Guerrero  
4 was this equitable tolling question, which is  
5 primarily a question of whether extraordinary  
6 circumstances prevent a litigant from doing what  
7 she should have done.

8 I mean, it's the exact same thing. Is  
9 -- are there extraordinary circumstances here?  
10 Well, we're going to, you know, think about  
11 facts a real lot. You know, what were those  
12 circumstances? And how extraordinary were they  
13 when they're compared to other circumstances  
14 that make it difficult to -- to do what the  
15 legal rules tell you you have to do?

16 I mean, I don't really see any  
17 distinction in the nature of the inquiry here.

18 MS. SINZDAK: I -- I -- I disagree.  
19 And I first just want to point out that there  
20 was no debate in Guerrero-Lasprilla that the  
21 Court was dealing with a mixed question. So  
22 what -- what concerns -- what constituted a  
23 mixed question wasn't before the Court.

24 But I'm not here disputing that due  
25 diligence is a mixed question, and the reason

1 for that is I think exactly what Justice Alito  
2 was speaking about earlier, which is that due  
3 diligence is a legal concept. It's a -- it's a  
4 creature of the law. It's a --

5 JUSTICE KAGAN: I mean, you can say  
6 that, but what it asks a -- a -- a fact -- what  
7 it asks a decision-maker to do is say how  
8 extraordinary were the circumstances that  
9 prevented you from following the rules.

10 And that's exactly the nature of the  
11 question here. How extraordinary are the  
12 circumstances that -- that -- that -- that --  
13 that -- that were involved in a particular case?

14 MS. SINZDAK: Now you are correct that  
15 there is some overlap and there are some similar  
16 things that adjudicators are being asked to do.  
17 I have to say what I find a little bit  
18 unsatisfying but it's just the facts here is  
19 that distinguishing questions of law from  
20 questions of fact and discretion is often a  
21 matter of history. So one of the things that  
22 the Court repeatedly has done is just said, is  
23 this the type of analysis that the courts have  
24 done? It is a question of law. And we see that  
25 in Teva. We see that in Oracle.

1                   Is this the sort of thing, question  
2                   that has been decided by juries or by fact  
3                   finders? Then it's not going to be --  
4                   considered a question of law.

5                   And I really do think that the common  
6                   law history of the due diligence inquiry that  
7                   this is something that had -- was a judge-made  
8                   inquiry that was always decided by judges,  
9                   elaborated by judges --

10                  JUSTICE KAGAN: That sounds very  
11                  complicated. I mean, Ms. Santos says there are  
12                  75 of these, and we're going to do that analysis  
13                  as to whether each of them is reviewable or not  
14                  reviewable? We're going to look into the  
15                  history, we're going to look into the source of  
16                  law, we're going to look into, you know, who  
17                  primarily has prerogative over this issue. It  
18                  seems like Guerrero, when it came down to it,  
19                  this is what Justice Kavanaugh said, is that is  
20                  not worth the candle.

21                  You know, of course, these are going  
22                  to be reviewed extremely deferentially, but if  
23                  there's a legal standard at issue, if the  
24                  conclusion that the Court comes to is in the end  
25                  do these set of facts as found, as weighed,



1 satisfy this legal standard, then the better  
2 course is just to call it a day and say it's  
3 reviewable and not have to go any further.

4 MS. SINZDAK: So I want to make a  
5 couple points here. The first is that you're  
6 going to have to perform what you're referring  
7 to as a complicated analysis, which I would  
8 refer to as simply statutory interpretation and  
9 what the Court does every time it decides a  
10 standard of review and -- and here's the --  
11 where I'm getting to -- you're going to have to  
12 perform this analysis under Petitioner's  
13 framework because Petitioner is saying the  
14 standard of review is going to turn on whether  
15 this is an exercise of discretion. I think  
16 she's saying abuse-of-discretion review. So  
17 it's going to -- to -- to turn on whether it's  
18 an exercise of discretion or it's a factual  
19 finding or it's a question of law.

20 And what we're saying is, look, that's  
21 not the right analysis because the -- the  
22 statute says, no, it has to be a question of law  
23 for it to be reviewable at all.

24 JUSTICE KAVANAUGH: Well --

25 MS. SINZDAK: But, if you think that,

1 oh, the government's framework is too  
2 complicated, I'm -- I just -- I don't think  
3 you're going to avoid it. You're just going to  
4 get these questions --

5 JUSTICE KAVANAUGH: Well, but --

6 MS. SINZDAK: -- in the  
7 standard-of-review framework.

8 JUSTICE KAVANAUGH: -- on the -- on  
9 the standard of review, there are lots of  
10 different framings you can put on it. It's --  
11 there are two main buckets, though, deferential  
12 or de novo, and I think what she was saying is  
13 it's going to be deferential.

14 MS. SINZDAK: I -- I'm not sure --

15 JUSTICE KAVANAUGH: And -- and so I  
16 don't know that, you know, you can frame it a  
17 lot of different ways, but, basically, as -- as  
18 counsel said, I think correctly, the usual  
19 analysis when you're doing these, and we've done  
20 a lot of these, is has the agency jumped the  
21 rails of reasonableness in how it determined  
22 whether a given set of facts constituted  
23 something extremely unusual.

24 MS. SINZDAK: I -- I think the -- the  
25 problem here is that questions of law are

1 reviewed de novo. That's sort of blackletter  
2 law. And, in fact, the Fourth Circuit has  
3 reviewed a number of these exceptional and  
4 extremely unusual circumstances findings de novo  
5 because they've said, well, we know the only --

6 JUSTICE KAVANAUGH: Well, that's not  
7 -- I mean, that's probably not correct to do it  
8 de novo in those circumstances, is what counsel  
9 acknowledged and I think correctly, like Judge  
10 Murphy said in the Sixth Circuit opinion, I  
11 think was, okay, it's reviewable, what changes,  
12 perhaps not much in terms of bottom line because  
13 it's going to be deferential review, right?

14 MS. SINZDAK: We -- we think the  
15 problem again is that the only thing that  
16 Congress made reviewable is a question of law.  
17 So, as long as you're talking --

18 JUSTICE KAVANAUGH: Well, can I stop  
19 --

20 MS. SINZDAK: Yeah.

21 JUSTICE KAVANAUGH: No, keep going  
22 actually.

23 (Laughter.)

24 MS. SINZDAK: No, and -- but -- so my  
25 point is that as soon as you're saying no, we're

1 reviewing something that's not a question of  
2 law, so de novo review is obviously not  
3 appropriate, I think you're in a little bit of  
4 trouble because it seems like actually now we're  
5 talking about discretion, we're talking about  
6 fact-finding.

7 JUSTICE KAVANAUGH: Well, this is now  
8 Groundhog Day from Guerrero because we talked  
9 about the history of St. Cyr and how the  
10 decision there recognized and the subsequent  
11 congressional history recognized that  
12 applications of law to fact would be considered  
13 questions of law even though I'm with you as a  
14 first principle, I might not have gone down that  
15 road that Congress did, but that was, I think,  
16 the clear understanding of what questions of law  
17 covered, and we said as much in Guerrero, so  
18 that kind of ended that discussion at least as I  
19 thought about it.

20 MS. SINZDAK: No, again, what Guerrero  
21 said is that when you have a mixed question, so  
22 that assumes that there is a legal component,  
23 but what you have to be pointing to is what is  
24 the legal question, and there isn't a legal  
25 question there.

1 JUSTICE KAVANAUGH: So --

2 MS. SINZDAK: And if I could just --

3 JUSTICE KAVANAUGH: So, if you -- if  
4 -- if it says the brief's due in 45 days except  
5 in unusual circumstances, is the "except in  
6 unusual circumstances" a -- does that not have a  
7 legal component?

8 MS. SINZDAK: That's a discretionary  
9 determination. I think that that is something  
10 where -- I mean, there's an inter- -- you have  
11 to interpret the terms that you would --

12 JUSTICE GORSUCH: But don't we hold --  
13 don't we hold all the time, courts of appeals,  
14 the lower court abused its discretion as a  
15 matter of law when it denied -- when it -- when  
16 it reaches a wrong judgment? Isn't that exactly  
17 what we say?

18 MS. SINZDAK: I -- I think that  
19 sometimes that is colloquially what the -- or --  
20 or less colloquially --

21 JUSTICE GORSUCH: Colloquially? I  
22 mean --

23 MS. SINZDAK: Yes. I think what that  
24 says is that is an --

25 JUSTICE GORSUCH: -- I mean, isn't

1 that exactly --

2 MS. SINZDAK: Pardon me. No. I  
3 should not have said colloquially.

4 JUSTICE GORSUCH: If I might just --

5 MS. SINZDAK: I agree.

6 JUSTICE GORSUCH: -- if I might just  
7 -- if I might just finish. Yeah. Okay, you  
8 agree.

9 MS. SINZDAK: No, I shouldn't have  
10 said colloquially. But I will say that what I  
11 should have said, which is correct, is that I  
12 think that they use that in order to say -- to  
13 say this is just a really unreasonable --

14 JUSTICE GORSUCH: Exact --

15 MS. SINZDAK: -- exercise of  
16 discretion.

17 JUSTICE GORSUCH: Exactly. We say as  
18 judges all the time that, yes, the district  
19 court has ample room of discretion and discovery  
20 in undue hardship, in due diligence, in lots of  
21 things, but there are boundaries set by law that  
22 they cannot exceed. The guardrails are wide,  
23 but they're there.

24 We don't say we disagree with this  
25 discretionary decision and we would have done it

1 differently. We say, when they've reached those  
2 boundaries, they've erred as a matter of law,  
3 right?

4 MS. SINZDAK: I -- yes, but I want to  
5 say you have to articulate what that boundary  
6 is. So, if Petitioner was here --

7 JUSTICE GORSUCH: Well, I just want to  
8 make sure I -- I heard the first part of the  
9 answer was yes?

10 (Laughter.)

11 MS. SINZDAK: The first part of the  
12 answer is if -- yes, because we have conceded if  
13 Petitioner says, as the -- the law says  
14 exceptional and unusual circumstances, and  
15 exceptional does not mean, for example, unique  
16 and, here, the agency has said it means unique.

17 That's an error of law. That's a  
18 misinterpretation of the statute. And that's a  
19 guardrail, you're right, that's a boundary. An  
20 agency cannot do something that the statute  
21 doesn't permit it to do. And if the statute --  
22 if -- if -- if they do and if a non-citizen says  
23 you have transgressed the boundaries that the  
24 statute sets, then that's a question of law.

25 JUSTICE BARRETT: Well --

1 MS. SINZDAK: It has to be colorable,  
2 of course.

3 JUSTICE BARRETT: But wait, wait,  
4 wait, like --

5 JUSTICE GORSUCH: It seems like they  
6 have to get --

7 JUSTICE BARRETT: -- transgress the --  
8 I'm sorry.

9 JUSTICE GORSUCH: Sorry, no, please.

10 JUSTICE BARRETT: If transgress the  
11 boundary -- I mean, you're saying you put the  
12 boundary in the wrong place by saying unique.  
13 But transgress the boundaries is I think what  
14 Justice Gorsuch is getting at, imagine the worst  
15 case possible. Let's say the non-citizen has  
16 one child who has cancer, there's no other  
17 relative in the country, they have no support  
18 network, he's the sole breadwinner. So let's  
19 just posit that that's -- that's a heartland  
20 case for hardship under the statute.

21 Couldn't it abuse -- couldn't the BIA  
22 or the IJ abuse its discretion in a way that  
23 transgresses the guardrails by saying no, that's  
24 not an exceptional and unusual circumstance?

25 MS. SINZDAK: No in the sense that we



1 think that when you're asking to reweigh or to  
2 redo the discretionary analysis --

3 JUSTICE BARRETT: It's not reweigh.  
4 It's not reweigh.

5 MS. SINZDAK: Well, so I -- I'm not  
6 sure that what you're positing is any different  
7 than in Patel, where the non-citizen was saying,  
8 look, this is an unreasonable determination of  
9 the facts. No reasonable adjudicator could have  
10 found that I wasn't credible.

11 JUSTICE BARRETT: No, in Patel, he's  
12 saying -- no, no, no, no. In Patel, he's saying  
13 you're wrong, you know, I was credible. That's  
14 different. That was one fact. This is saying  
15 here are guardrails, I'm entitled for my  
16 eligibility determination to say that I'm  
17 eligible if I can show hardship required by the  
18 statute, and I have shown something that by any  
19 measure would be extreme and unusual, and you  
20 have said applying that statutory standard to my  
21 circumstances, that it's not.

22 MS. SINZDAK: So I think there, if  
23 you're making it a legal question, if you're  
24 saying the term "exceptional and extremely  
25 unusual circumstances" --

1 JUSTICE BARRETT: No, no, no, no.  
2 They correctly -- didn't misstate the legal  
3 standard. Let's say, you know, states the  
4 standard correctly but just says this doesn't  
5 count.

6 MS. SINZDAK: Again, I think then you  
7 are talking about something like the Patel  
8 situation where you're saying no reasonable --  
9 no reasonable adjudicator who understood the law  
10 or who understood that -- that -- what  
11 credibility meant could have reached this  
12 conclusion.

13 And that is exactly what the  
14 petitioner in Patel was saying, and the Court  
15 still said no, it's a question of fact and so  
16 it's not reviewable.

17 And what we're saying is it's the same  
18 for questions of discretion. When the agency is  
19 being asked to make a comparative or a  
20 predictive judgment, that is something that was  
21 put off limits by --

22 JUSTICE GORSUCH: Counsel, if I -- if  
23 I might interject here, in -- in Patel, it  
24 was -- Mr. Patel sought to challenge the BIA's  
25 determination that he didn't intentionally

1 deceive state officials, and -- and the IJ found  
2 that he had, despite a lot of evidence that he  
3 hadn't, okay?

4 JUSTICE BARRETT: Hey now.

5 JUSTICE GORSUCH: Hey now. No, but  
6 that was --

7 JUSTICE BARRETT: Yes, you're right.

8 JUSTICE GORSUCH: -- you won. And --  
9 (Laughter.)

10 JUSTICE GORSUCH: -- I'm working with  
11 it. I'm working with it, right? And -- and,  
12 there, the Court said per my friend next door  
13 that -- that -- that that challenge, though --  
14 though Mr. Patel had lots of good facts  
15 suggesting he hadn't intentionally deceived  
16 state officials, couldn't be heard. Okay?

17 Here, in the example Justice Barrett  
18 just posited, there's no dispute about the  
19 facts. Okay? We have the -- the -- the child  
20 who has one potential caregiver in the world,  
21 okay, no one's arguing those aren't the facts.  
22 We're just arguing about the application of the  
23 law to those facts.

24 I think -- tell me where I'm wrong --  
25 where the BIA says, hmm, that's not

1 extraordinary, can't -- can a judge say, as one  
2 would with due diligence or undue hardship or  
3 many other standards that we use that are  
4 equally amorphous, say, yeah, there's a large  
5 room there, but there are guardrails and that  
6 this does or does not exceed those guardrails?

7 MS. SINZDAK: No.

8 JUSTICE GORSUCH: Not challenging  
9 facts, it's not Patel, it's -- it's this  
10 circumstance.

11 MS. SINZDAK: It's a discretionary  
12 determination. And we think that discretionary  
13 determinations are equally unreviewable, and we  
14 think that Petitioner concedes as much.

15 JUSTICE GORSUCH: Well, I thought we  
16 just said earlier that they are -- there are  
17 guardrails even for discretionary decisions  
18 under the law.

19 MS. SINZDAK: I -- I will never deny  
20 that there is -- if it's a question of law, if  
21 you're saying you misinterpreted the law, that  
22 is reviewable. But, if it is a question of  
23 discretion, you think that the agency didn't  
24 exercise its discretion in the way you think was  
25 appropriate --

1 JUSTICE KAGAN: Well, let me try it  
2 this way. Suppose that the -- the judge says --  
3 recites the legal standard and then has another  
4 sentence and said this means it has to be a  
5 one-in-a-billion case.

6 Now you would say that that's  
7 reviewable, and we could say no, the judge got  
8 it wrong, correct?

9 MS. SINZDAK: Because that's the wrong  
10 -- a misinterpretation of the statutory text,  
11 that's correct.

12 JUSTICE KAGAN: Yeah. So I think what  
13 Justice Barrett is suggesting is that the -- the  
14 judge is doing the exact same thing. The judge  
15 doesn't say this -- it has to be a one-in-a-  
16 billion case, but the judge is acting as though  
17 it has to be a one-in-a-billion case.

18 And what Justice Barrett is suggesting  
19 is, well, in that case, again, there's been a  
20 legal error. The Court has looked at some set  
21 of facts and reached a conclusion that is  
22 utterly inconsistent with the legal standard  
23 that is supposed to be applied.

24 MS. SINZDAK: So it's not a legal  
25 standard. I -- it's a --

1 JUSTICE KAGAN: The legal standard --

2 MS. SINZDAK: -- it's a statutory  
3 determination that the --

4 JUSTICE KAGAN: -- the legal standard  
5 is unusual and exceptional hardship.

6 MS. SINZDAK: That is the statutory  
7 terminology.

8 JUSTICE KAGAN: That's the legal  
9 standard.

10 (Laughter.)

11 MS. SINZDAK: That's right. That's  
12 the statutory requirement.

13 JUSTICE KAVANAUGH: She wants --

14 MS. SINZDAK: Let me not fight this.

15 JUSTICE KAVANAUGH: -- she -- she's  
16 not going to say.

17 MS. SINZDAK: Let me not fight you on  
18 this because I actually think --

19 JUSTICE BARRETT: Counsel, can --

20 MS. SINZDAK: -- I agree with you, and  
21 I do think the courts -- the courts who have  
22 appropriately recognized that this is a  
23 discretionary and factual determination, they  
24 say this is about substance; it's not about  
25 framing. So, if there is actually a good

1 argument that there is a legal error, however  
2 the Petitioner is -- is writing about it, then,  
3 yes, that legal error is reviewable.

4           What is not reviewable is the sort of  
5 claim that we have in this case, where the --  
6 the agency articulates the correct  
7 interpretation of the statute that the Board has  
8 already given it and then it explains all of the  
9 evidence, it explains the factual conclusions  
10 it's made, it explains the -- its discretionary  
11 judgment, so it explains the predictive and  
12 comparative analysis --

13           JUSTICE KAGAN: I -- I think what  
14 you're --

15           JUSTICE JACKSON: Counsel, can --

16           JUSTICE KAGAN: -- what you're doing,  
17 Ms. Sinzduk, is just basically, you know, trying  
18 to get away from the question, because, of  
19 course, there are all kinds of reasonable things  
20 that immigration judges do every day, and they  
21 mostly do them -- you know, it's like, you know,  
22 lots of facts and it's a hard question and it's  
23 a lot of judgment, and then, when we decide  
24 something, then, of course, a judge is going to  
25 leave it alone because it seems pretty

1 reasonable.

2 But Justice Barrett was suggesting  
3 that there are cases where, when the court looks  
4 at a set of facts and says that it does not  
5 satisfy what I'm going to insist upon calling  
6 the legal standard --

7 MS. SINZDAK: That's fine.

8 JUSTICE KAGAN: -- which is --

9 (Laughter.)

10 MS. SINZDAK: That's fine.

11 JUSTICE KAGAN: -- which is extremely  
12 unusual hardship, that that counts as a legal  
13 error because it says if the court just gets the  
14 standard wrong.

15 MS. SINZDAK: And I don't want to  
16 fight you on that. You're right, if it's a  
17 legal error, then it is reviewable.

18 JUSTICE JACKSON: But you are --

19 JUSTICE KAVANAUGH: Well, you're not  
20 -- you are fighting it.

21 MS. SINZDAK: It has to be a legal  
22 error.

23 JUSTICE JACKSON: But -- counsel, can  
24 I just -- can -- can I just -- I think, for me  
25 at least, the labels are getting confusing



1 because I kind of don't know what you mean when  
2 you say discretion or legal error. So can I  
3 just focus in on Justice Kagan's example to  
4 explain what I see as the distinction? And you  
5 can tell me if I'm wrong.

6 So, when the court -- the IJ says, I  
7 look at this statute, extreme and unusual, and I  
8 think that means that this has to be a  
9 one-in-a-billion case, the IG has stated a rule  
10 of interpretation, it's interpreting that  
11 language and it's now applying this rule, I'm  
12 looking for a one-in-a-billion case.

13 All right. You would agree that  
14 that's a legal question. If someone is claiming  
15 that that's the wrong rule, that it doesn't have  
16 to be a one-in-a-billion case, that we've got a  
17 legal dispute, correct?

18 MS. SINZDAK: Exactly. Correct.

19 JUSTICE JACKSON: All right. Is there  
20 a difference between that and a situation in  
21 which we accept that it -- the IG is correct in  
22 his rule. It has to be a one-in-a-billion case.  
23 But the IG in applying that rule looks at this  
24 constellation of facts that has been presented,  
25 finds the facts, and we all agree on the facts,

1 but the IG says, when I look at these 10  
2 different factors and things, I think this is  
3 not a one-in-a-billion case, all right?

4 And then the Petitioner says: I agree  
5 with his legal rule, I agree with all the 10  
6 facts that he's found, but I think, Court, this  
7 is a one-in-a-billion case. Decide.

8 Is that second thing the same kind of  
9 legal issue, is it presenting a legal issue? I  
10 hear you saying it's not. And so can you  
11 explain why not?

12 MS. SINZDAK: Right. That's an  
13 exercise of discretion. That's exactly our  
14 point. That is an exercise of discretion. Like  
15 when the -- the IJ says, you know, this  
16 non-citizen has satisfied the eligibility  
17 factors. Now I need to look at all of these  
18 facts and exercise my discretion to decide  
19 whether it -- I -- this is an appropriate case  
20 for cancellation of removal.

21 So it's the same thing.

22 JUSTICE SOTOMAYOR: So --

23 MS. SINZDAK: They're looking at --

24 JUSTICE SOTOMAYOR: -- counsel, why  
25 isn't it an -- a abuse of discretion in

1 concluding that this set of facts doesn't meet  
2 the legal standard? I mean, we have three  
3 critical facts: child dying of cancer, sole  
4 support for, no other family.

5 Are you willing to tell me on that  
6 record that that's not a one-in-a-million case?  
7 Isn't that an error of applying facts to -- to a  
8 legal standard? There's no discretion in that.

9 MS. SINZDAK: So I --

10 JUSTICE SOTOMAYOR: Well, it's an  
11 abuse.

12 MS. SINZDAK: -- I agree that if what  
13 the Court says is the Board obviously  
14 interpreted the statute to require a  
15 one-in-a-million case and that is a legal error,  
16 that's -- that's reviewable. What is not  
17 reviewable is the Board's application of  
18 discretion. So, when you talk about abuse of  
19 discretion, that --

20 JUSTICE SOTOMAYOR: But it's still an  
21 --

22 MS. SINZDAK: -- makes me nervous  
23 because that's taken off -- off limits.

24 JUSTICE JACKSON: Isn't the -- isn't  
25 the answer to Justice Sotomayor because we don't

1 have a basis in the law to make that  
2 determination? So I see, fine, one could say  
3 it's an abuse of discretion, but on what basis  
4 is the Court able to make that determination?  
5 What I think as Justice Jackson looks abusive?  
6 What am I pointing to to make that decision?

7 MS. SINZDAK: Yes. That's exactly  
8 right. So the statute entrusts that  
9 discretionary determination, that judgment call,  
10 that prediction about how much hardship will  
11 this particular non-citizen's relative likely  
12 face, how does that compare? Those are judgment  
13 calls. Those aren't -- those --

14 JUSTICE KAGAN: See, I just have more  
15 --

16 MS. SINZDAK: -- those questions  
17 aren't answered by legal principles.

18 JUSTICE KAGAN: -- confidence in  
19 Justice Jackson than maybe Justice Jackson has.

20 (Laughter.)

21 JUSTICE KAGAN: I mean, just think  
22 about those facts that Justice Barrett just gave  
23 you, and we don't have the capacity as judges to  
24 say, you know, that counts as an exceptional and  
25 extremely unusual hardship? Of course, we're

1 not going to do it very much, but on those  
2 facts, that a judge doesn't have the ability to  
3 say, you know, that immigration judge, we know  
4 that they're overworked, we know that they do a  
5 great job on 99 percent of the cases, but that  
6 judge just got it wrong.

7 MS. SINZDAK: That's the determination  
8 that Congress made in 1996 when it barred review  
9 of any decision --

10 JUSTICE KAGAN: The determination that  
11 Congress made --

12 MS. SINZDAK: -- regardless of a  
13 denial of discretionary relief.

14 JUSTICE KAGAN: -- was to give legal  
15 questions to judges. And -- and this is a  
16 question where -- where the -- the -- the  
17 fundamental inquiry is do those facts, as found,  
18 as weighed, meet the legal standard? And this  
19 judge got it wrong, this judge being in not this  
20 case but in Justice Barrett's hypothetical.

21 MS. SINZDAK: Again, if you can point  
22 to a legal error, so if you can say looking at  
23 these facts the judge must have misinterpreted  
24 the statute, must have said this is a  
25 one-in-a-million case, that's a legal error.

1 That's reviewable.

2 JUSTICE GORSUCH: Okay.

3 MS. SINZDAK: But when Congress --

4 JUSTICE KAVANAUGH: Do you agree --

5 JUSTICE GORSUCH: Why -- why isn't  
6 that exactly Justice Barrett's case? Because  
7 the BIA, for example, has said that the  
8 standard, high as it is, doesn't require it to  
9 be unconscionable. That's -- that's the BIA's  
10 own standard. It doesn't have to be the  
11 one-in-a-billion case. It's something less than  
12 that. And, here, we have in Justice Barrett's  
13 hypothetical basically the one-in-a-billion  
14 case, right? That -- let's assume that, okay?

15 And why -- why couldn't, again, a  
16 court say, as Justice Kagan keeps trying to ask,  
17 in those circumstances, you have effectively  
18 misread the legal standard?

19 MS. SINZDAK: I -- I think I keep  
20 trying to tell Justice Kagan that if -- it --  
21 that that is a legal error that is reviewable.  
22 So I'm not trying to fight you on this. I think  
23 our -- our brief is very clear --

24 JUSTICE GORSUCH: So --

25 MS. SINZDAK: -- this is Section (D)

1 -- where we say, if you can point to a legal  
2 error which raises a question of law, then  
3 review is permissible.

4 JUSTICE KAVANAUGH: But --

5 JUSTICE GORSUCH: So we all agree that  
6 a court can say it doesn't have to be a one in a  
7 billion, that this is -- this is on the nature  
8 of one in a billion, and -- and when the BIA  
9 denies relief, it erred.

10 MS. SINZDAK: I -- I'm a little bit  
11 confused. I'm going to keep saying, if you can  
12 look at the decision --

13 JUSTICE GORSUCH: Well, I don't -- I  
14 don't want to be confused, so let me -- let me  
15 -- let me try it again.

16 So we have Justice Barrett's case, the  
17 -- the -- the very, very unusual case, and the  
18 BIA says we think it should be more, more  
19 demanding than that. A court can say no. The  
20 -- the exceptional hardship standard isn't --  
21 isn't anything, one in a billion, this counts.

22 MS. SINZDAK: Oh, the -- the court can  
23 interpret the statutory terms "exceptional and  
24 extremely unusual hardship" --

25 JUSTICE GORSUCH: Yeah. And say --

1 MS. SINZDAK: -- and the BIA has done  
2 that and no one's questioning the -- the BIA's  
3 statutory interpretation. But, if there was a  
4 non-citizen here saying, you know, the -- the  
5 Board has consistently said substantially beyond  
6 ordinary, but it should be a different  
7 interpretation of the statute --

8 JUSTICE GORSUCH: No, no, no.

9 MS. SINZDAK: -- that's a legal  
10 question, that's reviewable.

11 JUSTICE GORSUCH: No, no. No, no. We  
12 -- we -- we have -- we have -- I -- I'm -- I'm  
13 positing we have the precedent we have. Whether  
14 the BIA's precedent's right is another question.  
15 But just that we have this fact pattern, and the  
16 BIA denies review because they're busy, they  
17 have a lot of cases, and they do do great work.  
18 No one's questioning -- or try to do great work.  
19 No one's questioning that. But they in this  
20 particular case deny relief.

21 MS. SINZDAK: If it's a factual error,  
22 it's unreviewable. If it's a discretionary error  
23 -- error, it's unreviewable. If the court can  
24 say yes --

25 JUSTICE GORSUCH: Alright.



1 JUSTICE KAVANAUGH: If it's a --

2 MS. SINZDAK: -- you're right, you've  
3 misinterpreted the statute, then it's  
4 reviewable.

5 JUSTICE KAVANAUGH: Does "questions of  
6 law" in the statute include application of law  
7 to fact?

8 MS. SINZDAK: It includes legal  
9 errors.

10 JUSTICE KAVANAUGH: Does it include  
11 application of law to fact?

12 MS. SINZDAK: Yes, and I'm explaining  
13 to you what that -- what that --

14 JUSTICE KAVANAUGH: Okay.

15 MS. SINZDAK: -- what that includes.  
16 It's a mixed question, right? So, if you look  
17 actually to where that comes from, it's coming  
18 from -- I've just forgotten the name of the  
19 case, the habeas corpus case where --

20 JUSTICE KAVANAUGH: St. Cyr, yeah.

21 MS. SINZDAK: And if you look -- in  
22 St. Cyr, if you look back at the application of  
23 law cases, what those were were exactly sort of  
24 what we've been positing here, where it was  
25 clear from the facts of the case that the -- the

1 -- the court had misinterpreted the statute.  
2 So, in that way, in that -- in those cases, it  
3 was actually like a bankruptcy --

4 JUSTICE KAVANAUGH: No, but I think  
5 what Justice Gorsuch is getting at is -- at  
6 least in my administrative law experience, abuse  
7 of discretion is probably a distracting term.  
8 Let's call it an unreasonable application of law  
9 to fact. That's something we did all the time.

10 Now unreasonable application of law to  
11 fact means wide discretion, but deference is not  
12 abdication is often said. And so there should  
13 not be abdication. There should be deference in  
14 the review of application of law to fact.

15 MS. SINZDAK: But Congress was doing  
16 something when it said that denials of  
17 discretionary relief, judgments involving --  
18 regarding denials of discretion are off limits.  
19 And if you're --

20 JUSTICE KAVANAUGH: Keep going.

21 MS. SINZDAK: If you're --

22 JUSTICE KAVANAUGH: No, don't keep  
23 going.

24 (Laughter.)

25 JUSTICE KAVANAUGH: I don't want to

1 get in trouble.

2 CHIEF JUSTICE ROBERTS: Why don't you  
3 finish your sentence.

4 MS. SINZDAK: Okay. What you're  
5 saying, I think, is sometimes the -- the --  
6 the -- an agency exercises its discretion in a  
7 way that just seems totally inappropriate.  
8 But -- but, again, what -- what Congress did was  
9 take off the table the review of discretionary  
10 determinations. It just took that wholly off  
11 limits.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: Well, I'm going to  
17 restate your argument or restate an argument  
18 that could perhaps work in your favor that is  
19 not the kind of argument that you as an advocate  
20 before the Court in the face of  
21 Guerrero-Lasprilla is probably much inclined to  
22 make, but one might say, look, all right, here's  
23 Guerrero-Lasprilla. It involved the application  
24 of a standard that only a lawyer can understand.

25 And it's not the kind of standard that

1 would be, for example, submitted to a jury  
2 without elaborate instructions or perhaps would  
3 not be submitted to a jury at all. And that's  
4 one way to read Guerrero-Lasprilla.

5           If you read it for all it's worth, as  
6 broadly as some of the questions suggest, it has  
7 the effect of making everything reviewable. And  
8 -- and that is a strange way to read a statute  
9 that begins by saying that judgments are not  
10 reviewable.

11           If -- so the test would be this, and  
12 it isn't really all that complicated. If what  
13 is involved in a particular case -- and, you  
14 know, you could say abuse of discretion and  
15 unreasonable application, but, look, anybody  
16 who's litigated cases or has seen what willful  
17 judges can do knows that if you allow that  
18 little toe in the door, an awful lot can be done  
19 with it. That might be right or wrong. Judges  
20 love judicial review. Congress was less  
21 enamored of it when it enacted this statute. It  
22 says no, no review at all, not abuse of  
23 discretion.

24           So the test could be restated as if it  
25 is the sort of thing that would be submitted to

1 a jury without special instructions. Because it  
2 involves ordinary terms like "exceptional and  
3 unusual hardship," that is not something that  
4 falls within the exception.

5 MS. SINZDAK: Yes. And I -- I -- I  
6 think that actually dovetails very neatly with  
7 what the Court already said in Pullman-Standard,  
8 where it said, you know, intention to  
9 discriminate, right, you can -- you -- that's a  
10 statutory requirement. You might say there  
11 could be questions about what that means. And  
12 the Court said it could have, Congress could  
13 have been trying to refer to some legal  
14 presumption, some legal concept of  
15 discrimination or intention to discriminate,  
16 but, instead, what it said: No, look, apply  
17 statutory construction. What actually Congress  
18 was telling us to do here was just to find out  
19 actual motive.

20 And, here, it's the same thing.  
21 Congress wasn't making this new legal concept,  
22 exceptional and extremely unusual hardship.  
23 Congress was saying: Agency, make a judgment  
24 call. Make a predictive and comparative  
25 judgment call about how the circumstances of

1 this non-citizen's case compare to those of  
2 other non-citizens.

3 JUSTICE ALITO: All right. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6 JUSTICE SOTOMAYOR: Something new,  
7 you're distinguishing Guerrero. That's what  
8 Justice Alito is saying, because that's not what  
9 Guerrero said. Guerrero said every mixed  
10 question of law and fact. And you're saying:  
11 No, it's not mixed at all because --

12 MS. SINZDAK: That's --

13 JUSTICE SOTOMAYOR: -- the standard is  
14 lawless. Basically, that's what you're saying,  
15 because you can't call a standard a standard,  
16 exceptional, due diligence, undue hardship, you  
17 can't put words on a piece of paper and call the  
18 words meaningless. They have to set a standard.

19 And once you set a standard, you're  
20 going to have to judge whether the facts fit  
21 that standard. Once you do that,  
22 Guerrero-Lasprilla said that's a mixed question  
23 of law that's reviewable by the Court. We may  
24 not like the number of cases that come up, but I  
25 think your other side is right that most of them

1 fail under the abuse of discretion or clear  
2 error standard.

3 Justice Barrett points out that the  
4 cases are rare, but they still exist, meaning  
5 that's why we have judicial review. It's rare  
6 that federal convictions are overturned. I  
7 think it's probably 5 percent or it was a very  
8 low number of federal convictions were ever  
9 overturned, yet we still permit review of them.

10 We permit review not for the majority  
11 of cases. We permit review for the exceptions.  
12 And so I don't know how we get to where you want  
13 us to go unless we reject our precedent --

14 MS. SINZDAK: So I think --

15 JUSTICE SOTOMAYOR: -- and we invite  
16 all of the complications that that precedent was  
17 trying to avoid.

18 MS. SINZDAK: So I think that  
19 Pullman-Standard, Williamsport Wire Rope, and  
20 Duberstein are all good examples of cases where  
21 you had a statute and it required some  
22 subsidiary fact-finding and then the adjudicator  
23 had to put those subsidiary facts together to  
24 make an ultimate determination that was -- that  
25 was exactly the statutory text. And in each of

1 those, it was not deemed a mixed question.

2 So, in each of those, it was deemed  
3 discretionary or factual. So I'm not asking the  
4 Court to make new law.

5 JUSTICE SOTOMAYOR: But it was still  
6 reviewable.

7 MS. SINZDAK: Pardon?

8 JUSTICE SOTOMAYOR: It was still  
9 reviewable.

10 MS. SINZDAK: Well --

11 JUSTICE SOTOMAYOR: It was still  
12 reviewable for whether it was unreasonable.

13 MS. SINZDAK: So, to be clear, in  
14 Williamsport Wire Rope, it was not reviewable.  
15 And, there, it just depends on --

16 JUSTICE SOTOMAYOR: Well --

17 MS. SINZDAK: -- whether there is a  
18 statutory review bar. And let me just address  
19 this. I agree that normally discretionary  
20 determinations are reviewed for abuse of  
21 discretion.

22 What I'm saying is that Section  
23 1252(a)(2)(B) took that off the table because it  
24 said discretionary determinations, they are  
25 unreviewable. Any judgment regarding the denial



1 of discretionary relief is unreviewable unless  
2 it involves a legal question.

3 But, when it doesn't, when it's an  
4 exercise of discretion, as it -- the Court said  
5 in Williamsport Wire Rope, which is also this  
6 Court's precedent, that exceptional hardship,  
7 that was a discretionary question, and  
8 discretionary questions we know under Patel, we  
9 know under the plain text are unreviewable.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?  
11 Justice Gorsuch?  
12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I do have a few  
14 questions. If the Court concludes that the BIA  
15 or the IJ misapplied Board precedent that  
16 existed, what's -- is that reviewable or not?

17 MS. SINZDAK: So the IJ is bound to  
18 follow Board precedent, so if the IJ has  
19 discarded Board precedent, that's a legal error.

20 JUSTICE KAVANAUGH: Okay. And then I  
21 agree with a lot of what Justice Alito said  
22 about going back to the beginning, but I think  
23 St. -- St. Cyr talked about what was available  
24 in habeas and said specifically that it's not  
25 only legal questions but the erroneous

1 application of statutes or interpretation. It  
2 distinguished those two things.

3 Then Guerrero picks up on that and  
4 says "English cases consistently  
5 demonstrate...", consistent with St. Cyr, "that  
6 the 'erroneous application of statutes' includes  
7 the misapplication of a legal standard to the  
8 facts of a particular case" and then says that  
9 Congress took up that suggestion and then, when  
10 it put questions of law in, included erroneous  
11 application of law to the facts of a particular  
12 case.

13 Do you disagree with any of that?

14 MS. SINZDAK: No. Again, when there's  
15 been a legal error and that all of the cases  
16 that you are talking about involve legal errors,  
17 then, yes, it's reviewable.

18 But, unless you're saying that the  
19 argument that someone was a -- the -- about  
20 whether someone was continuously present for 10  
21 years, that the determination that he was in the  
22 country for nine years rather than 10 --

23 JUSTICE KAVANAUGH: Right.

24 MS. SINZDAK: -- is -- well, that's an  
25 application of law to fact.

1 JUSTICE KAVANAUGH: Now, I agree with  
2 you on that.

3 MS. SINZDAK: So then we know -- then  
4 -- then --

5 JUSTICE KAVANAUGH: But I think you  
6 disagree what -- what -- I'm not going to  
7 belabor this part, but what a legal standard is.  
8 You're -- you're saying this is not a legal  
9 standard.

10 MS. SINZDAK: I -- I'm saying the  
11 statutory determination, just because it's a  
12 statutory determination, doesn't mean that its  
13 application presents a question of law. And I  
14 think that that's what this Court's precedents  
15 say.

16 Now I think that -- that that means  
17 that a legal standard is not synonymous with a  
18 -- with a statute. And I don't think Petitioner  
19 has explained to you how you can tell, once you  
20 have a statutory determination, which statutory  
21 determinations only require fact-finding, only  
22 require discretion, only require a mix of those  
23 two, and which -- present legal conclusions.

24 JUSTICE KAVANAUGH: Then --

25 MS. SINZDAK: It can't just be every

1 statutory determination is reviewable.

2 JUSTICE KAVANAUGH: Right. And then  
3 last one, you've emphasized repeatedly, I think  
4 correctly, that the statute's about discretion  
5 ultimately. And I agree with that, but that  
6 discretion is at the -- as I've understood it,  
7 is at the second step. So, after you determine  
8 whether someone's eligible for cancellation of  
9 removal, then the Board has complete discretion  
10 to say, you know what, you're eligible or I'll  
11 assume you're eligible, but you're not getting  
12 it. You're not getting it. And that is totally  
13 unreviewable. So that -- there's where --  
14 that's a huge amount of discretion for the  
15 Board. That's where the discretion is, not in  
16 doing the 10 years, extremely unusual. Those  
17 parts are the eligibility requirements. That's  
18 not as discretionary.

19 MS. SINZDAK: So, in Jong -- Jong Ha  
20 Wang --

21 JUSTICE KAVANAUGH: Yeah.

22 MS. SINZDAK: -- this Court said that  
23 when a court of appeals usurped the Board's  
24 right to determine what was an extreme hardship  
25 in that case -- that was before this change --

1 that that deprived the Board of a good portion  
2 of the discretion that had been vested in it.  
3 So I think this Court has already recognized  
4 that exceptional -- or extreme hardship, now  
5 exceptional and extremely unusual hardship,  
6 that's discretionary.

7 And I would also point to -- to -- to  
8 Octane, which recognizes that "exceptional" is a  
9 term that itself conveys discretion.

10 So I think just because there's  
11 discretion at the second step doesn't mean  
12 there's not also discretion at the first step.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: So let's posit that  
17 you lose. Sorry.

18 MS. SINZDAK: That's okay.

19 JUSTICE BARRETT: Just -- just  
20 hypothetically. It seems to me in looking at  
21 cases in the circuits that side with Petitioner  
22 that most of the challenges that come up really  
23 are to facts or, you know, challenges where the  
24 petitioner says, you know, he made -- the -- the  
25 BIA, the IJ was wrong to conclude that there

1 would not be significant hardship -- economic  
2 hardship down the road, for example. And the  
3 courts of appeals have said, well, that's  
4 speculation and, you know, that was within the  
5 IJ's authority to find that fact.

6           So, if you lost and if we said under  
7 Guerrero that mixed questions are reviewable and  
8 so the application of law to fact in the kind of  
9 hypothetical I gave would not be subject to the  
10 jurisdictional bar, do you agree that a lot of  
11 the questions will still be -- a lot of the  
12 cases will still be unreviewable on appeal  
13 because they will still essentially be factual  
14 challenges barred under Patel?

15           MS. SINZDAK: Absolutely. And to be  
16 clear, I think the government is -- is fine with  
17 a ruling that says where there is a legal error  
18 that is -- that is revealed through the Board's  
19 determination, that's reviewable.

20           What's not reviewable is -- I mean,  
21 you can call it fact-finding, you can call it  
22 discretion. I think, as we make this -- this  
23 point at, I believe, page 42 of our brief, that  
24 a lot of times in the administrative context,  
25 what counts as a fact is -- can look pretty

1 discretionary, like a credibility determination,  
2 highly subjective.

3           If the Court makes clear that those --  
4 those types of rulings are off limits, but legal  
5 errors are on -- on, we think that's a faithful  
6 application of the statute --

7           JUSTICE BARRETT: Well, I mean, no,  
8 no, no. I'm saying like -- I'm saying  
9 application of law to fact if, in fact, under  
10 Guerrero, that is not subject to the  
11 jurisdictional bar and so the claim is -- I  
12 think Justice Kagan was the one who said earlier  
13 we stipulate all of the facts are true, but you  
14 have misapplied the legal standard to this set  
15 of facts, thereby exceeding the guardrails,  
16 you've abused your discretion, say, let's say  
17 that that kind of a claim is reviewable. But  
18 claims that are purely factual challenges, like  
19 you did not appreciate the depth of my emotional  
20 bond, you know, with my son, that those kinds of  
21 things -- do you agree that a lot of the  
22 challenges really are of that nature?

23           And I'm asking the question because,  
24 in arguing all of this is discretionary, all of  
25 this is discretionary, and all of it is outside

1 the bar, that raises the question of whether, if  
2 you lose, does that mean that your position  
3 would lead to the conclusion that a lot of this  
4 stuff actually is reviewable?

5 MS. SINZDAK: I -- I agree, and I  
6 think this is a really important point. I  
7 think, if the Court is going to say facts are  
8 unreviewable, but there's some legal component,  
9 I think it's going to be very important for the  
10 Court to spell out what are the facts. And I'm  
11 -- I'm not sure, to be honest. I think the  
12 Court is saying that -- or I -- I -- I hear Your  
13 Honor to be saying that if it's a -- a  
14 prediction about the future, that might be -- be  
15 included. It has long been concluded as a fact,  
16 again, like forecasts about lost earning  
17 potential. That's a classic fact.

18 So I think the Court's going to need  
19 to say, like, a prediction. I think the Court  
20 should look at cases like Williamsport Wire Rope  
21 and say a comparison where you're looking at,  
22 you know, is this non-citizen going -- more  
23 likely than another to experience hardship, I  
24 think those are going to be facts.

25 But I do think that the Court is going



1 to need to be very careful to give the Court the  
2 -- the Board the guidance that it needs to say  
3 what is a fact. And I do think that we've given  
4 you sort of a framework of how the Court in the  
5 past has looked at that law/facts divide, and we  
6 -- we admit the Court has said there's not one  
7 principle, right? It's a framework. You've got  
8 to look at the history. You've got to look at  
9 different things.

10 But, yes, I mean, if the Court wants  
11 to say just apply that law -- that -- that  
12 law/facts divide and put all of the things like  
13 predictions, like comparisons on the fact side,  
14 we'd be very happy. We do think that the -- the  
15 -- the Court needs to give that kind of  
16 guidance.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20 JUSTICE JACKSON: Can you just say a  
21 little bit more about why your way of handling  
22 this isn't administratively terrible? Because  
23 there is --

24 (Laughter.)

25 JUSTICE JACKSON: No. So there --

1       there -- there was some back and forth with your  
2       friend on the other side suggesting that you've  
3       -- you're going to open up a can of worms and  
4       theirs is better.  So can you just speak to  
5       that?

6                   MS. SINZDAK:  So, first of all, I  
7       think this is the way that most courts are  
8       already handling a lot of these things.  So it's  
9       not going to open up a can of worms in that  
10      regard.

11                   The other thing that I'd say is this  
12      is just a matter of statutory construction, so  
13      you just need to look at whether we're dealing  
14      with a question of law.  And I actually think  
15      courts are -- are pretty experienced in knowing  
16      what questions of law look like.  This is,  
17      again, the standard-of-review analysis.  Every  
18      time they have to say am I dealing with a  
19      question of law, am I dealing with a mixed  
20      question, or am I dealing with, you know,  
21      something discretionary or factual?  And I don't  
22      think that's like a --

23                   JUSTICE JACKSON:  So they're going to  
24      -- you're saying they're going to have to answer  
25      that question anyway, even under --

1 MS. SINZDAK: Absolutely. Exactly.

2 JUSTICE JACKSON: -- the other side's  
3 test?

4 MS. SINZDAK: So that's -- that's the  
5 second point. And I'd also note that we've --  
6 we -- sort of talking to our lawyers who  
7 litigate these cases, exceptional and extremely  
8 unusual hardship, that's the big one. That's  
9 what comes up again and again. But, beyond  
10 this, they've pointed to maybe four or five  
11 things that are getting -- that -- that are  
12 getting litigated.

13 So I -- I think that maybe Petitioner  
14 has kind of gone through the law books and said  
15 what might I possibly make some kind of argument  
16 that this is a little bit mixy, mixed, a little  
17 bit legal. But that's not what's happening on  
18 the ground. We're talking about maybe like a  
19 few other -- other things, and I think, if this  
20 Court provides enough guidance as to how you  
21 distinguish between law and facts, how you  
22 distinguish between a mixed question and a  
23 question regarding discretion or fact, I think  
24 that's going to clear up any confusion that's  
25 left.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Rebuttal?

5 REBUTTAL ARGUMENT OF JAIME A. SANTOS  
6 ON BEHALF OF THE PETITIONER

7 MS. SANTOS: Thank you, Your Honor.

8 I have about 42 points I'd like to  
9 address on rebuttal, but I will settle for about  
10 five.

11 First, I think that my friend on the  
12 other side has mistakenly focused a lot of her  
13 argument on what Congress did in 1996. This  
14 case is about what Congress did in 2005 when it  
15 created an exception to Section 1250 --  
16 1252(a)(2)(B) and it -- it amended both  
17 (a)(2)(B) and (a)(2)(D) to make clear that the  
18 limited review provision trumps the designation  
19 of a particular determination as discretionary.

20 Second, Your Honor, I think all of my  
21 friend's arguments about this not being a legal  
22 standard really run smack into the Board's own  
23 understanding of what the -- the hardship  
24 determination is. The Board said itself no more  
25 than -- no less than a dozen times in its

1 precedential decision in Monreal-Aguinaga that  
2 this is a standard. It used its -- its  
3 purported authority under Chevron to interpret  
4 that standard using the canons of statutory  
5 construction that courts use day in and day out.  
6 And it said the meaning of that standard can be  
7 further given -- given -- shed light on it  
8 through case-by-case adjudication, which is all  
9 we're asking for federal courts to have the  
10 power to do.

11 I think that the -- the notion that  
12 it's not a legal standard just makes no sense.  
13 And I think the same is true with the notion  
14 that this is discretionary. Neither IJs nor the  
15 BIA understand themselves to have discretion  
16 when deciding whether someone is eligible for  
17 cancellation. And you can see this in cases  
18 like Monreal-Aguinaga, where the Board says  
19 things like, you know, if we only had  
20 discretion, we would absolutely -- grant  
21 cancellation, but Congress has put these  
22 constraints on us, so we don't have the power to  
23 do so.

24 Also, Your Honor, there was a -- a --  
25 a fair bit of discussion about the expertise

1 that the agency has that makes it well  
2 positioned to make these determinations I think  
3 in both sides of the argument. But the same  
4 could be said of every decision that immigration  
5 judges make, that patent ALJs make, that  
6 district judge make -- district judges make  
7 during sentencing. But appellate review is  
8 still a core and fundamentally important way  
9 that -- that appellate courts make sure that  
10 agencies and district courts stay within the  
11 guardrails, as -- as several Justices have  
12 mentioned.

13           And I think that's true even where  
14 appellate review involves deference. In cases  
15 where court -- courts adopt deferential review  
16 for mixed questions like *Cooter & Gell* and like  
17 *Village of Lakeridge*, the Court still takes  
18 pains to emphasize that if appellate -- if -- if  
19 district courts or agencies are -- are going  
20 outside the guardrails, that appellate courts  
21 will be able to intervene and correct  
22 misapplications of law, misunderstandings of  
23 law, and inconsistent applications of law.

24           And I think, in the context of  
25 immigration decisions, where the risk of error

1 could be enormous, judicial review is even more  
2 critical. And I would point you to the former  
3 IJ and BIA brief to talk about the -- that --  
4 that talks about the enormous resource  
5 constraints that the agency is under. These  
6 officials are doing their best every day, but  
7 when you have 3,000 backlogged cases on your  
8 docket, mistakes are going to happen.

9           And the -- the government's position  
10 incredibly is that as long as an IJ or the BIA  
11 just recites the right standard in a boilerplate  
12 section of its decision, it can go on to  
13 egregiously, arbitrarily, or completely  
14 inconsistently apply that decision and courts  
15 are powerless to intervene. I think that  
16 Guerrero-Lasprilla squarely rejected that  
17 extreme result, and -- and the government has  
18 pointed to no reason for a different result  
19 here.

20           Last, Your Honor, I -- I would point  
21 to the -- the history test that -- that my  
22 friend has pointed to. The government, I -- I  
23 think, spent a lot of time really praising this  
24 historical test, but the point of jurisdiction  
25 is that it should be decided quickly. You

1 shouldn't have to write or read a treatise to  
2 decide if you have power to hear a case.

3           And even if some kind of historical  
4 approach were appropriate, the government's test  
5 here wouldn't be it. In the standard-of-review  
6 context, courts look for a long and consistent  
7 application -- appellate practice over an entire  
8 genre or class of decisions.

9           They don't scour the U.S. Code to look  
10 for a single statute with one or two words in  
11 common and use that as a smoking gun for the way  
12 the -- the government tries to use a World War I  
13 era tax statute here. And even under -- and  
14 under the kind of standard-of-review-type  
15 analysis, the government certainly can't point  
16 to any long and consistent history of appellate  
17 practice.

18           At best, it has this 1919 tax statute,  
19 which wasn't reviewed. That -- that was  
20 exceptional circumstances. It points to  
21 exceptional case determinations of the Patent  
22 Act which were reviewed for abuse of discretion.  
23 And, of course, we have undue hardship under  
24 Title VII and under the bankruptcy code which is  
25 reviewed de novo. So, even under a



1 historical-type analysis test, the -- this case  
2 wouldn't even make any sense under it.

3           Finally, the -- the government's  
4 argument that -- that it wouldn't make any sense  
5 for the standard of review to be mismatched with  
6 judicial review is exactly the argument that the  
7 government made in Guerrero-Lasprilla and it's  
8 exactly what the majority's opinion expressly  
9 rejected. And I think that most of my friend's  
10 arguments today were -- were the same arguments  
11 the government made there.

12           Thank you, Your Honor.

13           CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15           The case is submitted.

16           (Whereupon, at 12:34 p.m., the case  
17 was submitted.)

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