No. 19-1363

In the Supreme Court of the United States

CARLOS ENRIQUE URRUTIA ROBLES, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
DAWN S. CONRAD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly denied a petition for review of a Board of Immigration Appeals decision declining to grant discretionary cancellation of removal to petitioner based on his history of driving under the influence of alcohol and the serious injuries his most recent drunk-driving violation had caused to an innocent pedestrian.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

Urrutia Robles v. *Barr*, 19-cv-1063 (Nov. 22, 2019)

United States Court of Appeals (8th Cir.):

Urrutia Robles v. *Barr*, 18-2601 (Oct. 8, 2019)

Urrutia Robles v. *Barr*, 18-3202 (Oct. 8, 2019)

Urrutia Robles v. *Barr*, 20-1504 (filed Mar. 10, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 940 F.3d 420. The decisions of the Board of Immigration Appeals (Pet. App. 11a-18a) and the immigration judge (Pet. App. 19a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2019. A petition for rehearing was denied on January 9, 2020 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on June 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, the Attorney General may, in certain circumstances, cancel the removal of an alien determined to be removable. See 8 U.S.C. 1229b. An alien

seeking cancellation of removal must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); 8 U.S.C. 1229b(b); 8 C.F.R. 1240.8(d); see, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been physically present in the United States for a continuous period of at least ten years; (2) have been a person of good moral character during that period; (3) have not been convicted of certain designated crimes; and (4) establish that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1).

An alien who establishes he is statutorily eligible for cancellation of removal must further establish that he warrants a favorable exercise of the Attorney General's discretion. This discretion to grant cancellation from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yang*, 519 U.S. 26, 30 (1996) (citation omitted). Whether an applicant warrants a favorable exercise of discretion depends on a balancing of "the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented [o]n his * * * behalf to determine whether the granting of . . . relief appears in the best interest of this country." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citation omitted).

b. An application for cancellation of removal is ordinarily considered in the first instance by an immigration

judge (IJ) in the context of removal proceedings. See 8 U.S.C. 1229a(a)(1). An IJ's determination is subject to review before the Board of Immigration Appeals (Board). See 8 C.F.R. 1003.1(b)(3).

Board regulations specify that, in adjudicating such appeals, "findings of fact * * * shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous," but that "[t]he Board may review questions of law, discretion, and judgment * * * *de novo*." 8 C.F.R. 1003.1(d)(3)(i)-(ii). The Board has held that an IJ's predictive findings of what may or may not occur in the future are findings of fact, subject to the clearly erroneous standard of review. *In re Z-Z-O-*, 26 I. & N. Dec. 586, 590 (B.I.A. 2015).

c. The courts of appeals have jurisdiction to review constitutional claims or questions of law that arise in the course of adjudicating applications for cancellation of removal. 8 U.S.C. 1252(a)(2)(D). Congress, however, has not authorized the courts of appeals to review the Board's discretionary determination that an alien does not warrant such relief. To the contrary, Section 1252(a)(2)(B)(i) provides that "[n]otwithstanding any other provision of law * * * , no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b," the provision governing cancellation of removal. 8 U.S.C. 1252(a)(2)(B)(i).

2. a. Petitioner is a native and citizen of Mexico. Pet. App. 2a. Petitioner entered the United States in 1983 without inspection. *Id.* at 19a-22a. In 1996, he was convicted of driving while intoxicated in violation of Minnesota Statute § 169.121 (1996), and sentenced to serve sixty days in jail and two years of probation. 18-3202 Administrative Record (A.R.) 575. In 2003, petitioner

was charged with domestic assault and ultimately convicted of disorderly conduct. Pet. App. 23a. In 2004, petitioner was convicted of driving while intoxicated, and sentenced to a suspended term of one year in jail, as well as two years of probation. A.R. 592.

Petitioner's most recent alcohol-related arrest occurred in 2017, when he was charged with Criminal "Vehicular Operation—Great Bodily Harm—Under Influence Alcohol," in violation of Minnesota Statute § 609.2113.1(2)(i) (2017). A.R. 511 (emphasis omitted). According to state-court filings that petitioner has not disputed, petitioner was driving with a blood-alcohol level above the legal limit and struck a pedestrian who was crossing the street. Pet. App. 23a, 27a-28a; A.R. 511. The victim was knocked unconscious, and suffered fractured bones and a significant traumatic brain injury. Pet. App. 27a. She required emergency surgery to relieve pressure on the brain and extensive rehabilitation. *Ibid.*

b. The Department of Homeland Security (DHS) initiated removal proceedings against petitioner following his arrest. Pet. App. 19a; A.R. 895. Petitioner conceded removability under 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without admission or parole, but applied for cancellation of removal before the IJ. Pet. App. 19a-20a.

On July 11, 2017, the IJ issued an oral decision granting petitioner's application for cancellation of removal. Pet. App. 19a-29a. The IJ determined that petitioner's application met the statutory eligibility requirements for obtaining cancellation of removal and that there were no statutory bars to relief. *Id.* at 25a-27a. The IJ then considered the discretionary question of whether relief was warranted. *Id.* at 27a-29a. The IJ identified

"significant negative factors" that the IJ found "troubling." *Id.* at 27a. Those adverse factors concerned petitioner's issues with alcohol, his criminal record dating to 1996, and the 2017 charge, for which the IJ found "substantial evidence," of having committed the "serious offense" of vehicular operation causing great bodily harm to a pedestrian while under the influence of alcohol. *Id.* at 27a-28a. The IJ observed that in light of petitioner's two prior convictions for driving under the influence of alcohol, the IJ was "very concerned" with the 2017 charge. *Id.* at 27a.

The IJ weighed those factors against the positive factors reflected in the record. Pet. App. 28a-29a. In particular, the IJ pointed to petitioner's approximately 24-year residence in the United States; the "hardship to his [United-States-citizen] children if he is removed"; his wife's current inability to work due to a medical issue; his "significant" ties to the community and service to his church; his being a hard worker who speaks English; his payment of taxes; and the fact that he "appears committed to resolving his problems with alcohol." *Ibid.* After balancing those positive and negative factors, the IJ concluded that petitioner merited "a favorable exercise of discretion" and therefore granted his application for cancellation of removal. *Id.* at 29a.

c. DHS appealed to the Board, which vacated the IJ's grant of cancellation of removal. Pet. App. 14a-18a. The Board explained that it was reviewing the IJ's factual findings for clear error, but applying a de novo standard to the question of whether discretionary relief was warranted. *Id.* at 14a-15a (citing 8 C.F.R. 1003.1(d)(3)). In balancing the relevant considerations, the Board observed that in cases where "adverse factors are present," the applicant "may need to offset

these by a showing of unusual or even outstanding equities." *Id.* at 15a-16a (citation and internal quotations omitted). The Board identified the positive discretionary factors in this case as including petitioner's lengthy residence in the United States; his provision of a stable home for three United-States-citizen children; the learning disability of his 16-year-old son, who was receiving special-education services in school and whose disability might be exacerbated if petitioner is removed from the United States; petitioner's "significant ties to his community" and his leadership in his church; his work ethic, as demonstrated by his learning of English and working his way from dishwasher to manager; and his payment of taxes. *Id.* at 16a-17a.

Against those positive factors, the Board weighed the significant "negative factors," including petitioner's "serious history of driving under the influence of alcohol," which included his 1996 and 2004 convictions, as well as his March 2017 arrest for criminal vehicular operation causing great bodily harm under the influence of alcohol. Pet. App. 17a. The Board stated that petitioner "ha[d] not shown that he ha[d] been rehabilitated." *Ibid.* The Board also pointed to a "discharge summary" petitioner received from an alcohol-treatment program he had enrolled in at his doctor's urging in 2016. *Id.* at 17a-18a. The discharge summary, which the IJ had not discussed, specifically noted that petitioner "had 'not made a decision on whether to quit drinking or not'" at the time of his discharge. *Id.* at 18a (citation omitted). The Board observed that, "[d]espite his history of DUI convictions and his doctor's concerns for his health, at the end of the program [petitioner] still had not made a decision whether to stop drinking," and that "[n]ine months later" his failure to make such a

commitment resulted in his driving "under the influence of alcohol and seriously injur[ing] a pedestrian." *Ibid.* Weighing all of those factors together, the Board concluded that petitioner's "repeated incidents of driving under the influence of alcohol and his lack of rehabilitation are simply too serious to warrant relief in the exercise of discretion." *Ibid.*

d. Petitioner filed a petition for review of the Board's decision in the court of appeals. See 18-2601 C.A. Doc. 1 (July 27, 2018). While that petition was pending, petitioner filed a timely motion to reopen with the Board. Pet. App. 11a. In the motion, he contended that new evidence—including his recent completion of rehabilitation programs that he claimed demonstrated "a serious commitment to his rehabilitation and sobriety"—warranted a reversal of the Board's decision. A.R. 11-12.

The Board denied petitioner's motion. Pet. App. 11a. The Board acknowledged petitioner's attempts at rehabilitation and the other positive equities reflected in his support letters. *Id.* at 12a. But upon balancing the positive and negative factors and considering the totality of the circumstances, the Board concluded that those considerations "would [not] change the result in his case." *Ibid.* "His proffered evidence, indicating, inter alia, his resolve to live a sober life, is insufficient to overcome the recency and seriousness of his criminal record." *Ibid.* The Board therefore denied petitioner's motion to reopen. *Id.* at 13a.

Petitioner filed a second petition for review, which the court of appeals consolidated with his first. See Pet. App. 2a.

3. a. On the petitions for review, the court of appeals concluded that the Board, in reversing the IJ's

discretionary grant of cancellation of removal, had not failed to show proper respect to the IJ's factual findings. Pet. App. 4a. It concluded, rather, that the Board had simply placed "greater weight on evidence not discussed in the IJ's decision" when performing its own balancing to make the discretionary decision about whether cancellation of removal was warranted. *Id.* at 4a-5a. The court noted that the Board did not evaluate any evidence not in the record before the IJ. *Id.* at 5a. "It simply weighed and evaluated that evidence and came to a different conclusion regarding" application of the Attorney General's discretion, which the Board reviews de novo. *Ibid.* (citing 8 C.F.R. 1003.1(d)(3)). Because petitioner did not present a colorable question of law, the majority concluded that petitioner really challenged the discretionary determination of the Board, which the court lacked jurisdiction to review. *Ibid.*

Separately, the court of appeals also determined that the Board did not abuse its discretion in denying petitioner's motion to reopen on the ground that his new evidence would not "likely change the result in the case." Pet. App. 7a.

b. Judge Kelly dissented. Pet. App. 8a. She would have held that the Board improperly disregarded the IJ's finding that petitioner "appears committed to resolving his problems with alcohol." *Id.* at 9a. In particular, she stated that the Board had contradicted that finding, "whether directly or implicitly," when it stated that petitioner "'has not shown that he has been rehabilitated'" and that he "'still had not made a decision whether to stop drinking.'" *Ibid.* Accordingly, she would have remanded the case to the Board to review the IJ's findings for clear error or remand for further fact-finding by the IJ, if necessary. *Ibid.*

c. The court of appeals denied petitioner's petition for rehearing and rehearing en banc. Pet. App. 30a-31a.

ARGUMENT

The court of appeals correctly concluded that the Board was entitled to place greater weight on petitioner's negative factors in performing a de novo assessment of whether he warranted cancellation of removal as a matter of discretion. Contrary to petitioner's contentions (Pet. 9-10, 12), the Board did not override or displace the IJ's finding that petitioner appeared to be committed to resolving his problems with alcohol. The Board instead concluded that petitioner had not shown that he had been rehabilitated. Pet. App 18a. The Board relied in particular on petitioner's failure to accomplish rehabilitation after his discharge from a treatment program in 2016, which resulted in substantial injuries to an innocent pedestrian, and made discretionary relief inappropriate. *Ibid.* The Eighth Circuit's decision declining to set aside that judgment does not conflict with any decision of this Court or any other court of appeals. In any event, this case would be a poor candidate for further review because the Board has already acknowledged petitioner's recent attempts at rehabilitation and nevertheless declined to reopen the proceedings on two occasions, concluding that his resolve to live a sober life does not outweigh the seriousness of his criminal record. See Pet. 11 n.4; Pet. App. 11a-12a. Accordingly, certiorari is not warranted.

1. The Board permissibly reweighed the applicable positive and negative factors in reversing the IJ's discretionary determination.

As discussed, see p. 3, *supra*, the Board performs a de novo review of any discretionary determination

whether to grant relief, including cancellation of removal. 8 C.F.R. 1003.1(d)(3)(ii). In doing so, the Board accepts all factual findings made by the IJ unless they are clearly erroneous, see 8 C.F.R. 1003.1(d)(3)(i), but is free to evaluate the implications and significance of those findings for its discretionary determination differently than did the IJ. See *Waldron* v. *Holder*, 688 F.3d 354, 361 (8th Cir. 2012) (explaining that "the BIA has the discretion to weigh the IJ's factual findings differently than the IJ").

The Board engaged in that permissible reassessment of the relative weight of various factors here. It acknowledged the positive factors that the IJ had found warranted a favorable exercise of discretion. See Pet. App. 16a-17a. But it concluded that those positive factors were outweighed by the negative factors, including petitioner's history of alcohol-related offenses. See *id.* at 17a-18a. In particular, the Board noted that petitioner had attended an alcohol treatment program in 2016, but "at the end of the program * * * still had not made a decision whether to stop drinking." *Id.* at 18a. "Nine months later, [petitioner] again drove under the influence of alcohol and seriously injured a pedestrian who suffered a brain injury and a fractured leg." *Ibid.* In the Board's view, petitioner's demonstrated "lack of rehabilitation," along with his "repeated incidents of driving under the influence of alcohol," were "simply too serious to warrant relief in the exercise of discretion." *Ibid.*

2. Petitioner argues (Pet. 12) that the Board impermissibly "displace[d]" the IJ's factual findings in order to reach that conclusion. In doing so, he appears to embrace Judge Kelly's contention, in dissent, that the

Board's decision either "directly or implicitly" contradicted the IJ's finding that petitioner "'appears committed to resolving his problems with alcohol.'" Pet. App. 9a. Those contentions are incorrect.

The Board did not reject the IJ's finding that, as of the time of petitioner's removal proceedings, petitioner "appear[ed] committed to" resolving his problems with alcohol. Pet. App. 28a. Instead, it simply attributed greater weight to petitioner's failure to demonstrate that he had actually achieved rehabilitation. If petitioner had made the decision to stop drinking after enrolling in the 2016 treatment program (after multiple prior alcohol-related offenses), he would not have caused serious injuries to a pedestrian (necessitating brain surgery and extensive medical care) while driving under the influence nine months later. See *id.* at 17a-18a. The IJ had concluded that the harm petitioner's prior failure to achieve rehabilitation had caused was outweighed by, among other things, his apparent commitment to resolving his alcohol problem. The Board disagreed, noting his failure to show he had been rehabilitated and concluding that petitioner's offenses were "simply too serious" to be overcome in the balancing. *Id.* at 18a.

That reweighing represented a permissible exercise of the Board's authority. See, *e.g.*, *Noble* v. *Keisler*, 505 F.3d 73, 78 (2d Cir. 2007) ("The role of the BIA was to consider [the alien's] rehabilitation, which the IJ had examined, and weigh it with and against other relevant factor[s] in order to render an informed discretionary decision as to whether [the alien] should be permitted to stay.") (footnote omitted); *Guevara* v. *Gonzales*, 472 F.3d 972, 975 (7th Cir.) (holding that the "relative weight of [the alien's] rehabilitation in the balancing

process is not 'factfinding' subject to the clearly erroneous standard of review; it is a matter of discretion and judgment and is subject to de novo review by the [Board]"), cert. denied, 552 U.S. 811 (2007); *Landestoy Nunez* v. *Attorney General of the U.S.*, 781 Fed. Appx. 123, 126 (3d Cir. 2019) (noting that the Board is free to reweigh the IJ's comments regarding rehabilitation together with the other equitable factors in determining whether an alien merits cancellation of removal). And nothing about the Board's disagreement with the IJ over the "serious[ness]" of the earlier incidents, Pet. App. 18a, called into question the IJ's finding about petitioner's apparent commitment to resolving his alcohol problem.[1]

3. Because the court of appeals concluded that the Board did not engage in improper fact-finding in this case, the court's decision sustaining the Board's decision does not conflict with its prior decision in *Waldron*, *supra*, as petitioner asserts (Pet. 14-16).

In *Waldron*, the Eighth Circuit held that the Board may not disregard an IJ's factual findings and "supplant them with its own, absent a finding of clear error." 688

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[1] Judge Kelly, in dissent, suggested that the Board's statement that petitioner "still had not made a decision whether to stop drinking" was inconsistent with the IJ's finding that petitioner "appears committed to resolving his problems with alcohol." Pet. App. 9a. But the Board's statement was that "*at the end of the* [*2016 treatment*] *program* [petitioner] still had not made a decision whether to stop drinking." *Id.* at 18a (emphasis added). The italicized portion of that statement, which Judge Kelly omitted, eliminates any inconsistency with the IJ's finding about what petitioner appeared committed to at the time of the IJ's decision in 2017. And the Board was correct in stating that petitioner had not made a decision to stop drinking in 2016, or at least not one that stuck: petitioner *did* continue drinking, with tragic results.

F.3d at 361. The court noted that "there is a difference between weighing the factual findings of the IJ and reweighing the underlying evidence and testimony behind those factual findings to reach new factual conclusions," *ibid.*, concluding that the Board had impermissibly engaged in the latter sort of reweighing of the evidence. Here, however, the Board did not disregard the IJ's factual findings and replace them with its own, but simply reweighed the positive and negative factors to determine de novo whether petitioner warranted a favorable exercise of the Attorney General's discretion. See Pet. App 15a-18a; pp. 9-12, *supra*.

In any event, even if the court of appeals' decision here did conflict with its earlier decision in *Waldron*, as petitioner contends (Pet. 14-16), such an intra-circuit conflict ordinarily would not warrant this Court's review. See Sup. Ct. R. 10; see also *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Petitioner identifies nothing in this case that would warrant a departure from the Court's ordinary practice in that respect. And petitioner nowhere directly asserts a conflict between the decision below and the decision of any other court of appeals.[2]

4. Even if petitioner had established error in the decision below and the issue otherwise rose to the level

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[2] To the extent petitioner's citation to decisions in other circuits that "properly defer to immigration judge factual findings, including predictive factual findings," Pet. 16; see *id.* at 16 n.8, is intended to suggest such a conflict, that suggestion is incorrect because, as explained in the text, the Board did not displace the IJ's factual findings here.

that would warrant review by this Court in an appropriate case, further review in this case would be unwarranted. Since its initial decision in petitioner's proceedings, the Board has twice denied his motions to reopen seeking to introduce new evidence of his rehabilitation. See Pet. App. 11a-13a; Pet. 11 n.4. In denying petitioner's first and timely motion to reopen, the Board acknowledged petitioner's "recent attempts at rehabilitation and his other positive equities as noted in his letters of support." Pet. App. 12a. However, the Board concluded that the new evidence indicating "his resolve to live a sober life" was "insufficient to overcome the recency and seriousness of his criminal record." *Ibid.* That determination makes clear that even if the Board's original decision could be understood to have displaced the IJ's factual findings about rehabilitation, but see pp. 9-12, *supra*, the Board would arrive at the same result based on a straightforward weighing that fully accounts for all of petitioner's evidence of rehabilitation. For that reason, too, certiorari is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
DAWN S. CONRAD
Attorneys

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