

No. 21-817

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**In the Supreme Court of the United States**

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JESUS HUMBERTO LEON-LEON, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

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**MEMORANDUM FOR THE RESPONDENT**

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Petitioner contends (Pet. 16-21) that the court of appeals erred in dismissing for lack of jurisdiction his petition for review of the Board of Immigration Appeals' decision denying discretionary relief from removal.<sup>1</sup> The agency denied petitioner's request for cancellation of removal on the ground that he was statutorily ineligible because he had failed to show that his "removal would result in exceptional and extremely unusual hardship" to his United-States-citizen children. 8 U.S.C. 1229b(b)(1)(D); see Pet. App. 5a-11a. The court of appeals relied on circuit precedent holding that Section 1252(a)(2)(B)(i), which precludes judicial review of "any judgment regarding the granting of relief under" Section 1229b and other provisions, 8 U.S.C. 1252(a)(2)(B)(i), bars review of any discretionary determination under-

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<sup>1</sup> As petitioner notes (Pet. I n.1), this case presents the same question as *Bahena-Brito v. Garland*, No. 21-557 (filed Oct. 14, 2021).

lying the enumerated forms of relief, including the determination of exceptional and extremely unusual hardship. Pet. App. 2a. The court held that, because the hardship determination is discretionary, it does not fall within subparagraph (D)’s carveout for judicial review of “constitutional claims or questions of law.” 8 U.S.C. 1252(a)(2)(D); see Pet. App. 2a-3a.

In *Patel v. Garland*, No. 20-979 (argued Dec. 6, 2021), this Court has granted a petition for a writ of certiorari to interpret the scope of the jurisdictional bar in Section 1252(a)(2)(B)(i). The petitioners in *Patel* contend that the jurisdictional bar applies only to the Executive’s ultimate, discretionary decision to grant or deny one of the forms of relief that are enumerated in Section 1252(a)(2)(B)(i), and does not prevent courts from reviewing the applicability of underlying eligibility criteria, including the hardship determination at issue here. See Pet. Br. at 19-20, *Patel, supra* (No. 20-979). If the Court adopts the petitioners’ position in *Patel*, it would likely be appropriate to grant, vacate, and remand the judgment below in this case, which relied on Section 1252(a)(2)(B)(i) to bar review of an eligibility determination. If the Court rejects the petitioners’ position in *Patel*, its interpretation of the proper scope of Section 1252(a)(2)(B)(i) still may materially affect the rationale underlying the judgment of the court of appeals in this case.

Petitioner contends (Pet. 25) that “*Patel* is unlikely to affect this case,” but that prediction apparently relies on his assumption (Pet. 26) that the lower courts will “narrowly” construe any holding in *Patel*, as petitioner says multiple circuits did with this Court’s holding in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020). See Pet. 4-5, 11-16 (discussing circuit caselaw). But, when a

purported disagreement in the courts of appeals could be affected by a new decision from this Court, it would ordinarily allow the courts of appeals to apply the intervening decision in the first instance, rather than grant plenary review that might have proved premature or unnecessary. Petitioner therefore concedes (Pet. 26) that “if the Court has any doubt about the potential effect of *Patel* on this case, it should hold it for *Patel*.”

The petition for a writ of certiorari should accordingly be held pending the Court’s decision in *Patel* and then disposed of as appropriate in light of that decision.<sup>2</sup>

Respectfully submitted.

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*Solicitor General*

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<sup>2</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.