No. 12-846

In the Supreme Court of the United States

ELIAS JIMENEZ-GALICIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

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

QUESTION PRESENTED

Section 203(b) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2198, provides that "the Attorney General may, under [8 U.S.C. 1229b,] cancel removal of" an alien present in the United States unlawfully if he concludes, *inter alia*, that the alien "has been a person of good moral character" throughout a specified period. 8 U.S.C. 1101 note. The question presented is whether the Attorney General's determination that an alien has not been a person of good moral character is subject to judicial review under 8 U.S.C. 1252(a)(2), which permits review of a "judgment regarding the granting of relief under section * * * 1229b" only insofar as the alien raises "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(B)(i) and (D).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulation and rules:

In the Supreme Court of the United States

No. 12-846

ELIAS JIMENEZ-GALICIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 690 F.3d 1207. The opinions of the Board of Immigration Appeals (Pet. App. 19a-21a) and the immigration judge (Pet. App. 23a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2012. On November 7, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 10, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under 8 U.S.C. 1229b(b), the Attorney General has the authority to cancel the removal of an alien unlawfully present in the United States. Before he may do

so, however, the Attorney General must find that the alien has been present in the United States for a continuous period of ten years before applying for cancellation, "has been a person of good moral character during such period," has not been convicted of certain offenses, and has "establishe[d] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). Even if the Attorney General concludes that those prerequisites are met, the ultimate cancellation decision is discretionary.

Section 203(b) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, 111 Stat. 2198 (8 U.S.C. 1101 note), establishes more lenient eligibility requirements for cancellation of removal for some aliens from certain nations, including El Salvador (*e.g.*, a residency requirement of only seven years). But as with Section 1229b's general cancellation provision, the Attorney General must conclude that the alien "has been a person of good moral character" during the residency period. NACARA § 203(b), 111 Stat. 2198.

The definitional provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101, lists eight categories of aliens who are deemed per se to lack good moral character, such as "habitual drunkard[s]" and aliens who have been convicted of two or more gambling offenses during the relevant period. 8 U.S.C. 1101(f). If the Attorney General finds that an alien falls into one of those per se categories, he has no discretion to conclude that the alien has been a person of good moral character. But Section 1101(f) provides that "[t]he fact that any person is not within any of [those] classes shall not

preclude a finding that for other reasons such person is or was not of good moral character."

b. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to expedite the removal of aliens who are unlawfully present in the United States. To advance that objective, the statute limits the scope of judicial review of the Attorney General's cancellation decisions and other discretionary determinations. As relevant here, Section 1252(a)(2)(B) of Title 8 contains two clauses providing that no court shall have jurisdiction to review—

> (i) any judgment regarding the granting of relief under section * * * 1229b * * * of this title, or
>
> (ii) any other decision or action of the Attorney General * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General.

The phrase "this subchapter" in clause (ii) refers to 8 U.S.C. 1151-1381. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

Largely in response to this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which stated that a statute "entirely preclud[ing] review of a pure question of law by any court would give rise to substantial constitutional questions," *id.* at 300, Congress amended Section 1252(a)(2) in 2005 by adding Subparagraph (D). That subparagraph provides that "[n]othing in subparagraph (B) * * * which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). The objective of the provision was to preserve judicial review of "constitutional and statutory-construction questions"

but "not discretionary or factual questions." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess., 175 (2005) (Conference Report).

2. a. Petitioner, a citizen of El Salvador, entered the United States in 1990. Pet. App. 25a. Since that time, he has been convicted twice for driving under the influence of alcohol and twice for driving with a suspended license. *Id.* at 25a-26a. He has also been arrested several times and, as of January 2009, had criminal charges pending against him both for driving under the influence and driving with a suspended license. *Ibid.* In September 2006, the Department of Homeland Security charged him with being removable from the United States as an alien not in possession of a valid nonimmigrant visa or other documentation entitling him to be lawfully present in this country. See 8 U.S.C. 1182(a)(7)(B)(i); Pet. App. 2a.

In removal proceedings before an immigration judge (IJ), petitioner conceded that he is removable but requested that his removal be cancelled under Section 203(b) of NACARA. The IJ denied petitioner's request, concluding, based on petitioner's extensive criminal history, that he lacks "good moral character." Pet. App. 23a-28a. The IJ credited positive aspects of petitioner's life, including that he owns a business and claims to attend church regularly. *Id.* at 28a. But balancing those positive factors against petitioner's criminal history, the IJ found that petitioner does not have the requisite good moral character.

b. The Board of Immigration Appeals affirmed. Pet. App. 19a-21a.[1] Reviewing the IJ's determination de

[1] The Attorney General has delegated authority to the Board to adjudicate appeals of removal decisions. See 8 C.F.R. 1003.1; *Kucana* v. *Holder*, 558 U.S. 233, 239 (2010).

novo and considering the same positive and negative factors, the Board agreed that petitioner "failed to satisfy the good moral character requirement for [Section 203(b)] cancellation of removal." *Id.* at 20a. It rejected petitioner's argument that his alleged alcohol dependency constitutes a "psychiatric diagnosis," such that "the alcohol-related convictions do not lack a moral character." *Id.* at 21a. The Board observed that no such diagnosis was made on the record and that in any event such a diagnosis would not "excuse the decision to drive while intoxicated." *Ibid.* Moreover, it explained, "several of [petitioner's] other convictions and arrests [did] not involve drinking." *Ibid.*

3. Petitioner sought judicial review of the Board's order of removal in the court of appeals, arguing that "the IJ and the [Board] * * * fail[ed] to review the record as a whole" and that the Board "failed to consider his * * * alcohol dependency as a factor in deciding that he lacked good moral character." Pet. App. 7a.

a. The court of appeals sua sponte requested briefing on two related jurisdictional questions: whether Section 1252(a)(2)(B) "limits the Court's jurisdiction over this petition for review" and, if so, "whether the specific constitutional challenges or questions of law, if any, raised by petitioner, are reviewable" under Section 1252(a)(2)(D). In response, petitioner conceded that his petition for review was subject to clause (i) of Section 1252(a)(2)(B) because it challenged the Board's denial of his request for cancellation of removal. See Pet. C.A. Br. ix. But he argued that the Court retained jurisdiction to consider the purported "question of law" that he raised: that the Board had not adhered to its own precedent in failing to give due consideration to his alleged alcohol dependency. *Id.* at x, 14. The government

agreed with petitioner that under Section 1252(a)(2)(D) the court of appeals had jurisdiction to review "constitutional claims or questions of law," but argued that petitioner had raised no such claims. Gov't C.A. Br. 3, 10.

b. The court of appeals dismissed the petition for review for lack of jurisdiction under clause (i) of Section 1252(a)(2)(B). Pet. App. 1a-18a. The court agreed with petitioner's submission that it could "review no discretionary determinations about cancellation of removal, except those discretionary determinations about which [p]etitioner presents a genuine constitutional claim or question of law." *Id.* at 4a. But it held that petitioner's objection to the determination that he lacks good moral character "raises no actual questions of law or constitutional claims." *Ibid.* The Board, it observed, had not found that petitioner satisfied one of the "per se categories" set forth in Section 1101(f)—a determination that might be subject to judicial review—but rather had determined under Section 1101(f)'s "catchall provision" that petitioner does not have good moral character "'for other reasons.'" *Id.* at 5a-6a (quoting 8 U.S.C. 1101(f)). A decision under that provision, the court explained, "is discretionary" because "whether a person lacks good moral character 'for other reasons' is a matter of judgment not tightly controlled by formula or by hard rules." *Id.* at 6a.

The court of appeals "look[ed] hard at Petitioner's actual arguments" to determine whether they raised a question of law, but ultimately concluded that "what Petitioner labels as legal arguments are, in fact and at most, quarrels with the [Board's] exercise of discretion"—*i.e.*, objections to the Board's "weighing and balancing of imponderables that bear on a decision about 'good character.'" Pet. App. 7a-8a. Although petitioner

had attempted to frame his claim that the Board and the IJ had failed to review the record as a whole as a legal argument that they had not followed Board precedent, the court of appeals found that argument meritless in light of the record before the agency: "[T]he [Board] reviewed the record as a whole," and "the IJ was presented with no evidence of * * * Petitioner's purported alcohol dependency." *Id.* at 7a. Similarly, the court of appeals rejected petitioner's argument that the Board had committed a legal error by failing even to consider his "unevidenced alcohol dependency as a factor," observing that "the Board considered and expressly rejected the idea that Petitioner's alcohol dependency (if any) outweighed the material parts of Petitioner's criminal history." *Ibid.*

c. Judge Barkett dissented. Pet. App. 8a-18a. As a threshold matter, she disagreed with the parties and the majority that clause (i) of Section 1252(a)(2)(B) was the relevant jurisdictional provision. Because that clause uses the term "judgment," she argued, it pertains only to the ultimate decision to deny cancellation to an eligible alien, not to the determination of whether an alien is eligible for cancellation. *Id.* at 9a, 10a-13a. She therefore believed that the jurisdictional issue should be analyzed under clause (ii), which applies to any "decision or action of the Attorney General" not listed in clause (i), "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Under that clause, she contended, the Board's determination that petitioner lacks good moral character is not a determination that is "specified under this subchapter to be in the discretion of the Attorney General," *ibid.*, because "Congress did not specify in the statutory provisions governing cancel-

lation of removal nor in the statutory definition of 'good moral character' that the determination of one's good moral character is within the Attorney General's discretion." Pet. App. 15a.

ARGUMENT

The court of appeals correctly dismissed petitioner's challenge to the Board's determination that he lacks good moral character and is therefore ineligible for cancellation of removal. Clause (i) of Section 1252(a)(2)(B) precludes judicial review of any judgment denying cancellation of removal under Section 1229b except insofar as Section 1252(b)(2)(D) allows for review of "constitutional claims or questions of law," and petitioner does not contend at this stage that he has raised such claims. Petitioner, moreover, expressly forfeited below his new argument that clause (i) does not apply to moral-character determinations. In response to the court of appeals' request for briefing on jurisdiction, he agreed that clause (i) applied to his petition and that judicial review was limited to the "questions of law" that he allegedly raised. See Pet. C.A. Br. ix-x. He should not be permitted to advance the contrary argument for the first time before this Court.

Even if the argument had been preserved, petitioner errs in contending that the decision below conflicts with *Kucana* v. *Holder*, 558 U.S. 233 (2010), which construed a different clause of Section 1252(a)(2)(B)—clause (ii)—and held only that a decision made discretionary by regulation rather than by the INA itself does not fall within that clause. Nor does this case implicate any division of authority among the circuits. The only decision that petitioner cites holding that a holistic assessment of an alien's moral character is reviewable, *Ikenokwalu-White* v. *INS*, 316 F.3d 798, 801 (8th Cir.

2003), construed a differently worded jurisdictional statute that is not at issue here—one of IIRIRA's "transitional rules" that applied only to certain aliens placed in removal proceedings before April 1, 1997. Finally, even if the question presented merited this Court's review, this case would not be a suitable vehicle for addressing it because the court of appeals, in the course of its jurisdictional analysis, effectively rejected the only merits arguments that petitioner raised. Further review is therefore not warranted.

1. a. The court of appeals correctly dismissed the petition for lack of jurisdiction. Clause (i) of Section 1252(a)(2)(B) provides that a court lacks jurisdiction to review "any judgment regarding the granting of relief under section * * * 1229b." In the decision that petitioner challenges, the Board determined that petitioner could not be granted the relief of cancellation of removal because he lacks good moral character. Pet. App. 21a, 28a. That determination was a "judgment regarding the granting of relief under section * * * 1229b." 8 U.S.C. 1252(a)(2)(B)(i).[2]

Subparagraph (D) of Section 1252(a)(2), however, establishes that courts retain jurisdiction to review "constitutional claims or questions of law." Accordingly, if petitioner had challenged the Board's decision on the

---

[2] Petitioner sought relief under Section 203(b) of NACARA, which is codified at the note to 8 U.S.C. 1101. But that provision states that "the Attorney General may, *under section* [*1229b*,] cancel removal" of an alien made eligible by Section 203(b). 8 U.S.C. 1101 note (IIRIRA § 309(f)(1)) (emphasis added). Accordingly, the denial of petitioner's request was a "judgment regarding the granting of relief *under section * * * 1229b*." 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added). See, *e.g.*, *Gonzalez-Ruano* v. *Holder*, 662 F.3d 59, 63 (1st Cir. 2011).

ground that the Board had violated the Constitution or had misconstrued a statutory provision, the court would have had jurisdiction to resolve his claim. See Pet. App. 7a; see also Conference Report 175 ("As the ACLU explained during the *St. Cyr* litigation, a 'question of law' is a question regarding the construction of a statute."). But he did not do so. Rather, as the court of appeals explained, petitioner presented only "garden-variety abuse of discretion arguments about how the [Board] weighed the facts in the record." Pet. App. 7a (internal quotation marks and citation omitted); see Pet. C.A. Br. 11 ("[T]he Immigration Court completely failed to consider the Petitioner's manifest alcoholic dependency disease as a factor * * * which outweighs the negative factors present in the instant case."); *id.* at 13 ("[H]is disease must be taken account as a factor to be weighed."); *id.* at 15 ("The Immigration Court had to consider the Petitioner's alcohol dependency when considering whether or not to exercise favorable discretion."). Under its plain text, Section 1252(a)(2) precludes that sort of review. See also Conference Report 175 ("The purpose * * * is to permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or factual questions.").

b. Echoing the dissent below, petitioner argues (Pet. 14-16) that clause (i) of Section 1252(a)(2)(B) applies only to the Board's final decision that an eligible alien should not be granted cancellation of removal, not to a determination that an alien fails to satisfy an antecedent condition. He further argues (Pet. 16-19) that clause (ii) does not bar the court of appeals' exercise of jurisdiction over his petition because no statutory provision express-

ly states that the moral-character determination is a discretionary one. *Id.* at 16-18.

i. Petitioner's argument was not raised below, and therefore this Court should not consider it. In response to the court of appeals' request for briefing on jurisdiction, petitioner agreed that clause (i) "divests this Honorable Court of the authority to review * * * discretionary determinations concerning special rule cancellation of removal under § 203 of NACARA" and stated that the court had jurisdiction only over the "question of law" raised in his petition—*i.e.*, that the Board failed to adhere to its precedent by declining to give adequate consideration to his purported alcohol dependency. Pet. C.A. Br. ix-x. Petitioner never raised the argument that clause (i) is wholly inapplicable to moral-character determinations, and he made no argument about clause (ii). And as petitioner concedes, the court of appeals "*assumed* []with minimal discussion" that Section 1252(a)(2)(B)(i) applied—undoubtedly because no party had argued otherwise. Pet. 14-15 (emphasis added). This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). This Court should adhere to that rule here.

ii. Petitioner's argument is in any event incorrect. Petitioner points to no statutory basis for drawing a distinction between discretionary and fact-based determinations relevant to eligibility and the ultimate discretionary decision to deny cancellation to an eligible alien. A Board decision to deny a request for cancellation based on its assessment that an alien lacks good moral character is just as much a "judgment regarding the

granting of relief under section * * * 1229b" as a decision to deny cancellation as a matter of discretion even if all eligibility criteria are satisfied. 8 U.S.C. 1252(a)(2)(B)(i).

It does not appear that any court of appeals has adopted petitioner's interpretation of clause (i) in a published opinion. Indeed, nearly every court of appeals has held that clause (i) bars judicial review of the Board's determination that an alien does not meet the separate eligibility criterion that removal will cause "exceptional and extremely unusual hardship" to a family member, 8 U.S.C. 1229b(b)(1)(D)—an interpretation incompatible with petitioner's reading of the statute. See *Parvez* v. *Keisler*, 506 F.3d 93, 96 (1st Cir. 2007); *De La Vega* v. *Gonzales*, 436 F.3d 141, 143-144 (2d Cir. 2006); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003); *Santos* v. *Holder*, 482 Fed. Appx. 842, 843 (4th Cir. 2012) (per curiam); *Rueda* v. *Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004) (per curiam); *Singh* v. *Holder*, 448 Fed. Appx. 619, 621-622 (7th Cir. 2011); *Zacarias-Velasquez* v. *Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Vilchiz-Soto* v. *Holder*, 688 F.3d 642, 644 (9th Cir. 2012); *Alzainati* v. *Holder*, 568 F.3d 844, 849 (10th Cir. 2009); *Alhuay* v. *United States Att'y Gen.*, 661 F.3d 534, 549-550 (11th Cir. 2011); but see *Jose* v. *Holder*, 478 Fed. Appx. 312, 314 (6th Cir. 2012) (per curiam) (stating that clause (ii) bars review of "unusual hardship" determinations).

To be sure, some challenges to the Board's determination that an alien is ineligible for cancellation will raise a question of statutory construction and therefore be subject to judicial review under Subparagraph (D)—for example, a claim challenging the Board's interpretation of the statutory term "gambling offenses" in Section

1101(f)(5). Cf. Pet. 16 n.8 (noting that the Eleventh Circuit has held that "non-discretionary legal determinations as to statutory eligibility for discretionary relief" are reviewable) (quoting *Alvarado* v. *Attorney General*, 610 F.3d 1311, 1314 (2010)). And others might raise constitutional issues. See Pet. 23 (hypothesizing that an alien might be deemed to lack good moral character for reading unpopular books). But nothing in the text of Section 1252(a)(2)(B)(i) suggests that factual or discretionary determinations that an alien does not meet an eligibility criterion that calls for a weighing of competing facts and circumstances fall outside of that provision. Indeed, if, as petitioner contends, both clauses of Section 1252(a)(2)(B) apply only to ultimate discretionary decisions to deny requested relief, there would have been no reason for Congress to exempt challenges raising "questions of law," given that discretionary decisions do not involve questions of statutory interpretation.

iii. In any event, even if, as petitioner argues, the Board's moral-character determination were properly analyzed under clause (ii) of Section 1252(a)(2)(B), the result would be no different. Clause (ii) is a residual provision that applies to discretionary decisions not specifically encompassed within clause (i). It generally excludes from judicial review "any other decision or action of the Attorney General * * * the authority for which is specified in this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Assuming that a determination that an alien is ineligible for removal because he lacks good moral character does not fall under clause (i), it would satisfy this provision. Section 1229b(b)(1)(B) gives the Attorney General the discretionary authority to determine whether an alien has good moral character. Although the statute does

not use any variant of the word "discretion," the discretionary nature of the decision is obvious: Because the statute "does not define 'good moral character'" apart from the per se categories, "the decision whether an alien has the required character reflects an exercise of administrative discretion." *Portillo-Rendon* v. *Holder*, 662 F.3d 815, 817 (7th Cir. 2011) (emphasis omitted). A challenge to that determination is a challenge to the Board's exercise of discretion, not "a dispute about the meaning of a legal text." *Ibid.*

Petitioner alternatively argues that a determination that an alien lacks the good moral character that is a condition for cancellation of removal, even if discretionary, is not made pursuant to "authority * * * specified under *this subchapter* [*i.e.*, 8 U.S.C. 1151-1381]" within the meaning of clause (ii). Pet. 18. Petitioner believes that the Attorney General's authority to make a holistic moral-character assessment arises from Section 1101(f), contained in the INA's definitional provision, which is located in a different subchapter. But that is not the provision that gives the Attorney General the requisite discretion. Rather, the Attorney General's authority to cancel an alien's removal is conferred by Section 1229b, which is located in the specified subchapter. Section 1101(f) merely defines the circumstances in which the Attorney General *must* find that a petitioner lacks "good moral character" and clarifies that the listing of those particular categories does not "preclude a finding that for other reasons such person is or was not of good moral character." The relevant "authority," however, is located in Section 1229b(b)(1).[3]

---

[3] Petitioner has not expressly argued, either in his petition for certiorari or in the court of appeals, that because Section 203 of NACARA is codified as a note to Section 1101, the Board's decision

2. Petitioner erroneously argues (Pet. 14-19) that the decision below conflicts with this Court's holding in *Kucana*, *supra*, a case that he did not cite in his court of appeals brief. *Kucana* held that clause (ii) of Section 1252(a)(2)(B) does not bar judicial review of decisions made discretionary only by regulation, not by statute. See *id.* at 237, 252-253. The Court construed the "words 'specified under this subchapter'" in clause (ii) to "refer to statutory, but not to regulatory, specifications." *Id.* at 237. Because the decision of the court of appeals in this case did not rely on clause (ii) or involve any regulatory provisions, *Kucana*'s holding has no application here.

Petitioner nevertheless posits two conflicts with *Kucana*. First, petitioner contends (Pet. 15) that *Kucana* construed clause (i) to apply only to ultimate determinations denying an eligible alien's application for cancellation of removal, not to discretionary determinations that an alien does not meet an eligibility criterion. But *Kucana* had no occasion to consider that question. Although the Court, adopting the argument of the Government, emphasized that each of the statutory provisions enumerated in clause (i) provides that the ultimate decision whether to grant relief is "entrusted to the Attorney General's discretion," the Court's point was that the discretion was conferred by statute rather than by regulation. 558 U.S. at 246. *Kucana* did not address wheth-

---

was not made pursuant to "authority * * * specified under this subchapter." For the reasons explained above, see n.2, *supra*, the Board's decision was made under Section 1229b. But to the extent that the Court believes that a genuine question exists on that narrow issue, it would render this case an inadequate vehicle to resolve questions about jurisdiction over Section 1229b cancellation decisions.

er discretionary assessments underlying eligibility determinations for cancellation of removal are also encompassed within clause (i). And as discussed above, nearly every court of appeals has held that clause (i) applies to discretionary eligibility determinations. See p.12, *supra*.

Second, petitioner argues (Pet. 16-18) that under *Kucana* a holistic determination that an alien lacks good moral character is not "discretionary" because no statutory provision expressly states that the determination lies within the Attorney General's discretion. But unlike clause (ii) of Section 1252(a)(2)(B), clause (i)—the provision that the court of appeals construed and applied here—does not contain any requirement that the discretionary nature of the decision be specified by statute. Rather, the only requirement is that the alien challenge a "judgment regarding the granting of relief under section * * * 1229b." For the reasons discussed above, that requirement is met here.

Even assuming that clause (ii) were at issue, *Kucana* did not consider whether a statutory provision could confer discretion on the Attorney General without using a variant of the word "discretion." Here, the fact that Congress has generally declined to limit the "reasons" that the Attorney General may deem an alien to lack good moral character, 8 U.S.C. 1101(f), indicates that Section 1229b generally confers on the Attorney General the discretion to make that determination. See *Portillo-Rendon*, 662 F.3d at 817.

3. Petitioner also errs in contending that that this case implicates a conflict among the circuits. See Pet. 9-14. Even as petitioner describes the cited cases, the alleged division of authority almost exclusively concerns whether a determination that an alien lacks good moral

character under one of the per se categories set forth in Section 1101(f) is reviewable. This case would not be a suitable vehicle to consider that question, because the Board did not hold that petitioner lacks good moral character on the basis of one of Section 1101(f)'s per se categories and the court of appeals expressly acknowledged that it might have jurisdiction to review a per se determination. See Pet. App. 5a-6a. Every court of appeals to consider the different question presented in this case has agreed with the decision below that Section 1252(a)(2)(B)(i) bars judicial review of the Board's holistic determination that an alien lacks good moral character (except insofar as the alien raises "constitutional claims" or "questions of law").[4]

---

[4] Moreover, it does not appear that a genuine circuit conflict currently exists even with respect to the per se categories. The First Circuit has held that "[b]ecause a finding of lack of good moral character is *required*, under 8 U.S.C. § 1101(f), for aliens belonging to certain per se categories, a determination that an alien may not receive cancellation of removal relief because he belongs to any of those statutorily-defined categories presents a non-discretionary determination which [courts] would be able to review for substantial evidence." *Restrepo* v. *Holder*, 676 F.3d 10, 15 (1st Cir. 2012) (internal quotation marks and citation omitted). The Fourth and Ninth Circuits appear to have adopted that view as well. See *Jean* v. *Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Moran* v. *Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005), overruled on other grounds by *Sanchez* v. *Holder*, 560 F.3d 1028 (9th Cir. 2009). But contrary to petitioner's contention (Pet. 11), the Sixth and Seventh Circuit decisions that he cites did not not hold that determinations that an alien falls under one of the per se categories are unreviewable. See *Portillo-Rendon*, 662 F.3d at 817; *Mateo* v. *Gonzales*, 217 Fed. Appx. 476, 479, 481 (6th Cir. 2007). Petitioner cites unpublished decisions in the Third and Tenth Circuits holding that a determination that an alien lacks "good moral character" under a per se category is unreviewable, see *Herrera-Ceja* v. *Gonzales*, 172 Fed. Appx. 865, 866-867 (10th Cir. 2006), cert. dismissed, 549 U.S. 1162 (2007); *Fall* v. *Attorney Gen.*, 326 Fed. Appx.

Petitioner cites only one decision concluding that a court has jurisdiction to review a holistic determination that an alien lacks good moral character. See Pet. 9-10 (citing *Ikenokwalu-White*, *supra*). But as petitioner acknowledges in a footnote (Pet. 9 n.4), that decision interpreted a different statutory provision—one of IIRIRA's "transitional rules" that governed judicial review of deportation orders issued after October 31, 1996, for aliens placed in deportation proceedings before April 1, 1997. See 316 F.3d at 801 (citing IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626, 8 U.S.C. 1101 note). And as petitioner further acknowledges (Pet. 9 n.4), "[t]he Eighth Circuit does not appear to have addressed the issue of judicial review of a [holistic] good moral character determination" under Sections 1252(a)(2)(B) and (D)—the provisions that apply in this case.

Once it does consider that issue, the Eighth Circuit might well reach the same conclusion as every other circuit to consider the question under the currently operative statutory language, despite its prior decision under the transitional rules. Those rules provided that "there shall be no appeal of any discretionary decision under," *inter alia*, 8 U.S.C. 1254 (1994), which permitted the Attorney General to suspend deportation on specified grounds and included the "good moral character" requirement. IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626; see 8 U.S.C. 1254(a) (1994). The Eighth Circuit believed that "the determination that an alien has failed to establish good moral character under the catchall provision of

---

111, 114-115 (3d Cir. 2009), but those decisions lack precedential force in those circuits, see 10th Cir. R. 32.1, 3d Cir. I.O.P. 5.7. And as petitioner notes (Pet. 13 n.7), a contrary decision exists in the Third Circuit. See *Fatunmbi* v. *Attorney Gen.*, 78 Fed. Appx. 814, 816 (2003).

Section 1101(f) is, like the per se categories, a question of applying the law to the facts" and that such a decision was not "discretionary" under the transitional rules. 316 F.3d at 803. But clause (i) of Section 1252(a)(2)(B) does not use the word "discretionary"; rather, it provides that "*any* judgment regarding the granting of relief under section * * * 1229b" is not subject to judicial review. 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added). And although Subparagraph (D) contains exceptions for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), it does not include an exception for "applying the law to the facts," *Ikenokwalu-White*, 316 F.3d at 803. See Conference Report 175 ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements.").

Accordingly, it is by no means clear that the Eighth Circuit would reach the same decision under the statutory language that the court of appeals construed and applied below. And, in fact, the Eighth Circuit has already rejected petitioner's construction of clause (i) in holding that it lacks jurisdiction to review the Board's finding that an alien does not meet the "unusual hardship" eligibility criterion. See *Zacarias-Velasquez*, 509 F.3d at 434; p.12, *supra*. This Court's review would not be warranted at least until there is a division of authority over the meaning of the currently operative statutory text.[5]

Petitioner also adverts (Pet. 10) to two decisions of the Second Circuit, but he concedes that the Second

---

[5] Petitioner also cites (Pet. 23) *Flores* v. *Holder*, 699 F.3d 998 (8th Cir. 2012), but the moral-character determination reviewed in that case was made under one of the per se categories. See *id.* at 1004. That decision therefore does not conflict with the decision below.

Circuit has "avoided expressly holding that it has jurisdiction to review moral character determinations" outside of the per se categories if the alien does not raise any "constitutional claims or questions of law." In *Sumbundu* v. *Holder*, 602 F.3d 47 (2d Cir. 2010), for example, the court stated that "we expressly leave that question * * * open, and assume *arguendo* that whatever jurisdiction we have is limited to errors of law and to plausible constitutional claims." *Id.* at 54. That holding does not conflict with the decision below.[6] In fact, as petitioner concedes (Pet. 10 n.5), the most recent Second Circuit decision on the issue, which was unpublished, stated that a holistic assessment of an alien's moral character is unreviewable. See *Lima* v. *Holder*, 449 Fed. Appx. 75, 76 (2011).

4. Despite the general agreement in the courts of appeals regarding the non-reviewability under Section 1252(a)(2)(B)(i) of holistic determinations that an alien lacks good moral character, petitioner urges (Pet. 19-24) the Court to grant review because the issue is so important that it warrants review even in the absence of a circuit conflict. Petitioner is incorrect. He concedes that the Board's ultimate denial of cancellation of removal as a matter of discretion is unreviewable. See Pet. 15-16. But that question involves an inquiry similar to the determination whether an alien has good moral character under the totality of the circumstances: The

---

[6] Petitioner errs in contending (Pet. 10) that *Sumbundu* asserted that "it would be 'incongruent' to treat moral character determinations under the per se category differently from those made under the catchall provision." The only "incongru[ity]" that the court of appeals posited was interpreting the statute to make holistic moral-character determinations unreviewable even for constitutional or legal errors. See 602 F.3d at 55.

Board "weigh[s] the favorable and adverse factors to determine whether, on balance, the 'totality of the evidence before [it]' indicates that the 'respondent has adequately demonstrated that he warrants a favorable exercise of discretion and a grant of cancellation of removal.'" *In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 204 (B.I.A. 2001) (en banc). In reality, therefore, most aliens who the Board determines lack good moral character would ultimately be denied cancellation, and the Board's determination would not be subject to further review.

Petitioner's fear (Pet. 20-21) that the Board might insulate its decisions from judicial review by masking per se moral-character determinations as holistic findings misunderstands the role of the per se categories in the statutory scheme. Congress understood that the Board would have discretion to make moral-character findings and that its decision would not be subject to judicial review. The purpose of the per se categories is merely to *curtail* the Board's discretion to *grant* cancellation by making certain negative characteristics of an alien dispositive; the per se categories matter only for those aliens who the Board would otherwise deem to have good moral character. The Board accordingly has no incentive to mask a per se determination as a discretionary one.[7]

---

[7] Petitioner now contends (Pet. 20) that "both the IJ and the BIA decisions were unclear" as to whether they determined that petitioner lacks good moral character under a per se category or based on a holistic determination. In his brief in the court of appeals, however, petitioner conceded that the IJ had made that determination under the "catchall" provision of Section 1101(f), not a per se category. See Pet. C.A. Br. 9.

5. In any event, this case would be a poor vehicle through which to address the reviewability of the Board's holistic assessment that an alien lacks the good moral character necessary for cancellation of removal, even putting to one side petitioner's forfeiture below of the arguments made in his certiorari petition, see p.11, *supra*. In light of the factual analysis that the IJ and the Board have already conducted, in which they concluded that petitioner lacks good moral character due to his troubling history of driving under the influence of alcohol and other offenses, see Pet. App. 25a-26a, it is highly unlikely that the court of appeals would reverse the Board's finding that petitioner lacks good moral character.

Indeed, petitioner's appellate arguments relied entirely on the Board's failure to consider his "purported alcohol dependency," but the court of appeals expressly held, in the course of concluding that petitioner had raised no "question of law," that "the IJ was presented with no evidence" of petitioner's alleged dependency. Pet. App. 7a. The court also rejected petitioner's claim that the Board had "failed to consider his unevidenced alcohol dependency as a factor," explaining that "the [Board] considered and expressly rejected the idea that Petitioner's alcohol dependency (if any) outweighed the material parts of Petitioner's criminal history." *Ibid.* Thus, given that the court of appeals has already effectively rejected petitioner's merits arguments as part of its jurisdictional analysis, this is not a suitable vehicle for the court to resolve the question presented.

Moreover, even if the court of appeals were to reverse the Board's finding that petitioner lacks good moral character, the Board could ultimately exercise its discretion to deny cancellation of removal—a determina-

tion that even petitioner concedes is unreviewable under Section 1252(a)(2)(B)(i). Petitioner has failed to supply any reason that the Board's balancing of factors under that discretionary analysis would produce a different result than its determination that he lacks good moral character. See *Sotelo-Sotelo*, 23 I. & N. Dec. at 204.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

MAY 2013