No. 18-1015

In the Supreme Court of the United States

RUBEN OVALLES, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
W. MANNING EVANS
Attorneys

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

QUESTION PRESENTED

Whether the court of appeals correctly dismissed a petition for review of petitioner's untimely motion to reopen removal proceedings on the ground that the court lacked jurisdiction to review the Board of Immigration Appeals' determination that petitioner did not act with sufficient diligence to warrant equitable tolling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

In the Supreme Court of the United States

No. 18-1015

RUBEN OVALLES, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE REPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 741 Fed. Appx. 259. The decision of the Board of Immigration Appeals (Pet. App. 5a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2018. A petition for a writ of certiorari was filed on January 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was removed from the United States in 2004 based on an Ohio controlled-substance conviction. Pet. App. 2a. He moved to reopen his removal proceeding in 2007. *Ibid.* The Board of Immigration Appeals (Board) denied his motion, and the court of appeals denied a petition for review. *Id.* at 9a; 577 F.3d 288, 291.

Petitioner again moved to reopen his removal proceeding in 2017. The Board again denied his motion, and the court of appeals dismissed his petition for review for lack of jurisdiction. Pet. App. 2a-4a.

1. Petitioner, a native and citizen of the Dominican Republic, immigrated to the United States in 1985 and later became a lawful permanent resident. Pet. App. 9a. In 2003, he was convicted of attempted heroin possession in violation of Ohio law and was sentenced to five years' probation. *Ibid.*; see Administrative Record 153-154. Based on that offense, the Board ordered petitioner removed "pursuant to 8 U.S.C. § 1227(a)(2)(B)(i)," Pet. App. 2a, which provides in relevant part that an alien convicted of a state crime "relating to a controlled substance * * * is deportable," 8 U.S.C. 1227(a)(2)(B)(i). The Board "found that [petitioner's] drug conviction was also an aggravated felony," Pet. App. 2a, which provided an additional basis for removal, 8 U.S.C. 1227(a)(2)(A)(iii), and also made petitioner ineligible for cancellation of removal, see 8 U.S.C. 1229b(a)(3). Petitioner was removed from the United States in 2004. Pet. App. 10a.

2. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien "may file one motion to reopen" removal proceedings. 8 U.S.C. 1229a(c)(7)(A). Such a motion to reopen must be "filed within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. 1229a(c)(7)(C)(i), although most circuits have concluded that the 90-day time limit is subject to equitable tolling, see *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 & n.1 (2015); *Lugo-Resendez* v. *Lynch*, 831 F.3d 337, 343-344 (5th Cir. 2016). If the Board denies a motion to reopen, a court of appeals typically has jurisdiction to review the denial. See 8 U.S.C. 1252(a)(1) and (b)(6); *Mata*, 135 S. Ct. at 2154. Under 8 U.S.C. 1252(a)(2)(C),

however, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain crimes, including controlled-substance offenses. That limitation "shall [not] be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

3. In 2007, three years after his removal from the United States, petitioner moved to reopen his proceedings. Petitioner conceded that his motion to reopen was untimely given the 90-day deadline set by 8 U.S.C. 1229a(c)(7)(C)(i). Pet. App. 6a, 20a, 28a-29a. Petitioner contended (*id.* at 10a), however, that the Board should exercise its discretion to reopen his proceedings *sua sponte*, 8 C.F.R. 1003.2(a), in light of this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47, 50 (2006), which concluded that a state felony drug offense is not an "aggravated felony" under the INA if the federal drug laws make the relevant conduct a misdemeanor. Because petitioner's Ohio conviction for attempted heroin possession would have been a federal misdemeanor, he would not have been subject to removal for committing an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii), and would have been eligible for cancellation of removal, 8 U.S.C. 1229b(a)(3), under *Lopez*. *Lopez*, however, did not affect petitioner's removability under 8 U.S.C. 1227(a)(2)(B)(i), which (as noted above) makes an alien "deportable" for any state conviction "relating to a controlled substance." See *Moncrieffe* v. *Holder*, 569 U.S. 184, 204 (2013) (confirming that "even a misdemeanor [state drug conviction] will still render a noncitizen deportable as a controlled substances offender" under Section 1227(a)(2)(B)(i)).

The Board denied petitioner's motion to reopen based on 8 C.F.R. 1003.2(d), which barred consideration of motions to reopen by aliens who had departed the

United States. See Pet. App. 2a, 10a, 30a-31a. The Fifth Circuit denied a petition for review, concluding that the departure bar could be validly enforced against petitioner. *Id.* at 8a-29a; see 577 F.3d at 288.

4. In March 2017, nearly 13 years after his removal, petitioner filed a second motion to reopen, again seeking to have the ruling in *Lopez* applied to his case. Pet. App. 2a-3a. The Board denied the motion as exceeding the one-motion limit on motions to reopen, 8 U.S.C. 1229a(c)(7)(A), and as untimely under the 90-day filing deadline, 8 U.S.C. 1229a(c)(7)(C)(i). Pet. App. 5a.

The Board rejected petitioner's contention that he was eligible for equitable tolling. The Board noted that a Fifth Circuit decision recognizing that equitable tolling is available for motions to reopen, *Lugo-Resendez*, 831 F.3d at 342-343, had "explicitly distinguished [petitioner's] case" because petitioner, "through counsel," had "conceded * * * the untimeliness of his motion to reopen" and thereby forfeited his right to invoke equitable tolling, Pet. App. 5a-6a. Separately, the Board concluded, petitioner could not satisfy the equitable-tolling requirement that he had been "pursuing his rights diligently," *Lugo-Resendez*, 831 F.3d at 344 (citations omitted), given that he had "waited approximately 8 months" after *Lugo-Resendez* to file the new motion, Pet. App. 6a. The Board added that petitioner had not "demonstrated an exceptional situation warranting sua sponte reopening" of his proceedings. *Ibid.*

5. Petitioner filed a petition for review contending that the Board had "abused its discretion in failing to apply equitable tolling," in particular by "determining that he had not exercised due diligence" in seeking relief. Pet. App. 3a. The court of appeals dismissed the

petition for lack of jurisdiction in an unpublished per curiam opinion. *Id.* at 1a-4a. The court explained (*id.* at 3a) that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction to review the denial of a motion to reopen filed by an alien removed under 8 U.S.C. 1227(a)(2)(B)—as petitioner was—unless the petition for review raises "constitutional claims or questions of law." Pet. App. 3a (citations omitted). Relying on circuit precedent, the court explained that "[w]hether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question," rather than a question of law. *Id.* at 4a (citing *Penalva* v. *Sessions*, 884 F.3d 521, 526 (5th Cir. 2018)). Because 8 U.S.C. 1252(a)(2)(C) bars jurisdiction to review factual questions raised by aliens convicted of controlled-substance offenses like petitioner's, the court dismissed the petition for lack of jurisdiction. Pet. App. 4a; see *ibid.* (explaining that petitioner "raised an unreviewable fact question, and his arguments amount to no more than his disagreement with the application of the equitable tolling standard").[*]

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction over the "factual question" whether petitioner "acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling." Pet. App. 4a. That conclusion follows from this Court's understanding of the inherently factual nature of the due-diligence inquiry, and other courts of appeals that

[*] The court of appeals has issued similar non-precedential decisions in *Guerrero-Lasprilla* v. *Sessions*, 737 Fed. Appx. 230 (5th Cir. 2018) (per curiam), petition for cert. pending, No. 18-776 (filed Dec. 10, 2018), and 12/27/18 Order, *Angeles* v. *Whitaker*, No. 18-60715, (5th Cir.), petition for cert. pending, No. 18-1255 (filed Mar. 27, 2019).

have addressed the question have reached the same result. Contrary to petitioner's assertion (Pet. 10), the Ninth Circuit's approach to this question does not squarely conflict with the Fifth Circuit's. And in any event, this case is an unsuitable vehicle for further review because petitioner's equitable-tolling claim would fail for multiple alternative reasons.

1. Under 8 U.S.C. 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in," *inter alia*, Section 1227(a)(2)(B), which includes petitioner's controlled-substance offense. Section 1252(a)(2)(D), however, provides that the jurisdictional bar in Section 1252(a)(2)(C) does not "preclud[e] review of constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) thus "operates as a savings clause for 'constitutional claims or questions of law' raised by criminal aliens." *Penalva* v. *Sessions*, 884 F.3d 521, 524 (5th Cir. 2018) (quoting 8 U.S.C. 1252(a)(2)(D)); accord, *e.g.*, *Ghahremani* v. *Gonzales*, 498 F.3d 993, 998 (9th Cir. 2007) (explaining that, under Section 1252(a)(2)(D), "appellate courts * * * retain jurisdiction to review constitutional claims and questions of law regardless of the underlying offense").

Here, there is no dispute that petitioner was removed based in part on his commission of a controlled-substance offense, Pet. App. 2a, and that Section 1252(a)(2)(C) therefore bars jurisdiction over his petition for review unless his claim falls within Section 1252(a)(2)(D)'s exception preserving review of "questions of law," 8 U.S.C. 1252(a)(2)(D). The court of appeals correctly concluded that "[w]hether an alien acted diligently in attempting

to reopen removal proceedings for purposes of equitable tolling," Pet. App. 4a, is not a "question[] of law" preserved for review under 8 U.S.C. 1252(a)(2)(D), but rather "a factual question" that is not reviewable in light of the jurisdictional bar in Section 1252(a)(2)(C), Pet. App. 4a.

This Court has described equitable tolling as a "fact-intensive inquiry." *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (citation and internal quotation marks omitted). The Court has accordingly directed lower courts to determine whether litigants are "entitle[d] * * * to equitable tolling" based on "the facts in th[e] record." *Ibid.*; see *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) (remanding for the district court "to decide whether, on the facts of her case, [the plaintiff was] entitled to equitable tolling"); cf. *Lawrence* v. *Florida*, 549 U.S. 327, 337 (2007) (concluding that lower court "correctly declined to equitably toll the limitations period in the factual circumstances of [the] case"). The Court has applied that fact-based understanding to both the "diligence" and "extraordinary circumstances" prongs of the equitable tolling inquiry. See *Holland*, 560 U.S. at 653-654. And in a related context, the Court has described the "'due diligence' requirement" that a plaintiff must satisfy to toll a limitations period based on fraudulent concealment as a "fact-based question." *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 196 (1997).

The Fifth Circuit's treatment of the diligence component of the equitable-tolling inquiry as "a factual question" follows from the approach taken by this Court. Pet. App. 4a. The Fifth Circuit articulated that position in *Penalva*, *supra*, explaining that "the doctrine of 'equitable tolling does not lend itself to bright-

line rules,'" and that "'[c]ourts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.'" 884 F.3d at 525 (citation omitted; brackets in original); see *ibid.* (explaining that equitable tolling requires a "fact-intensive determination") (citation omitted). More specifically, the court of appeals relied on decisions from other circuits concluding that the due-diligence component of equitable tolling presented a factual question that did not fall within Section 1252(a)(2)(D)'s exception preserving review of a "question of law." *Ibid.*; see *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006) (explaining that a "factual determination that [the plaintiff] had not exercised due diligence" was not a "'question of law'" reviewable under Section 1252(a)(2)(D)); see also *Lawrence* v. *Lynch*, 826 F.3d 198, 203 (4th Cir. 2016) (similar); cf. *Patel* v. *Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (characterizing challenge to a due-diligence determination as a "factual disagreement"). The consensus underlying those decisions is correct.

2. Petitioner does not offer any sustained argument that the approach to the due-diligence component of equitable tolling taken by the decision below and the courts of appeals on which it relied is incorrect. He instead contends (Pet. 10) that a conflict exists between that approach and what he asserts is the Ninth Circuit's position that "a 'criminal alien' may seek judicial review of the denial of his motion to reopen that sought equitable tolling." That contention is flawed for multiple reasons.

As an initial matter, the broad conflict that petitioner suggests does not exist. The decision below did not address whether "a 'criminal alien' may seek judicial review of the denial of his motion to reopen that sought

equitable tolling." Pet. 10. The decision below addressed only one component of the equitable-tolling inquiry—whether the Board "incorrectly decided the reasonable diligence question"—and concluded that that particular component presented a "factual question" that was not reviewable under Section 1252(a)(2)(D). Pet. App. 3a-4a.

Moreover, to the extent the Fifth Circuit and the Ninth Circuit have addressed the reviewability of a due-diligence inquiry in particular, their decisions do not squarely conflict. The Ninth Circuit construes the "questions of law" preserved for review by 8 U.S.C. 1252(a)(2)(D) "to include mixed questions of law and fact," which it defines as questions "[w]here the relevant facts are undisputed." *Ghahremani*, 498 F.3d at 998; see *Ramadan* v. *Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007) (per curiam). In *Ghahremani*, the Ninth Circuit determined that a dispute over an alien's due diligence would be reviewable under Section 1252(a)(2)(D) "so long as the relevant facts are undisputed." 498 F.3d at 999. The Fifth Circuit has not addressed the significance of factual disputes (or the absence of such disputes) for the jurisdictional inquiry, and thus it has not taken any position that squarely conflicts with the Ninth Circuit's. And while the Fifth Circuit has described due diligence as a "factual question," Pet. App. 4a, the court has indicated that it will review some "factual" determinations in connection with legal rulings under its Section 1252(a)(2)(D) jurisdiction. See *Diaz* v. *Sessions*, 894 F.3d 222, 227 (5th Cir. 2018) (explaining that the court "may review factual disputes that are necessary * * * to review a constitutional claim or question of law"); *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 234 (5th Cir. 2009) (concluding that whether an agency properly ap-

plied law to facts in determining eligibility for discretionary relief raised a question reviewable under Section 1252(a)(2)(D)); see also Pet. App. 4a (citing *Diaz*).

3. In any event, the unpublished per curiam decision below would be an unsuitable vehicle for this Court to review the question presented for multiple reasons.

First, even if the court of appeals had jurisdiction to review the question of due diligence, petitioner would not satisfy that requirement. Petitioner filed the motion to reopen at issue nearly 13 years after he was removed from the United States, more than eight years after the denial of his first motion to reopen, and "approximately 8 months after the Fifth Circuit" decision that he contends gave him an opportunity to obtain relief. Pet. App. 6a; see *Lugo-Resendez* v. *Lynch*, 831 F.3d 337, 344 (5th Cir. 2016). Petitioner provides no sound basis to question the Board's conclusion that he failed to show reasonable diligence, so his motion would fail even if it was considered. Cf. *Gao* v. *Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (rejecting claim of diligence based on motion to reopen filed 76 days after discovery of ground for filing motion where "petitioner has failed to point to any circumstances that made this the abnormal case").

Second, even if petitioner could demonstrate diligence, equitable tolling requires that he also show "that some extraordinary circumstance stood in his way." *Lugo-Resendez*, 831 F.3d at 344; accord *Holland*, 560 U.S. at 649. Petitioner suggests (Pet. 7-8, 14) that such an extraordinary circumstance existed because Fifth Circuit decisions did not expressly permit equitable tolling of the statutory time limit to file a motion to reopen before the decision in *Lugo-Resendez*. But *Lugo-Resendez* overruled no prior case precluding equitable tolling,

and the Fifth Circuit's treatment of equitable tolling requests before 2016 was not firmly established. See *Mata* v. *Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015). Thus, nothing prohibited petitioner from filing a motion to reopen before *Lugo-Resendez*, and he cannot demonstrate the extraordinary circumstance that would be required to establish a basis for equitable tolling. Cf. Pet. App. 6a (Board concluding that petitioner "has not demonstrated an exceptional situation warranting sua sponte reopening").

Third, even if petitioner could establish due diligence and an extraordinary circumstance, the Board separately denied equitable tolling on the additional ground that petitioner had conceded that his prior motion to reopen was untimely, thereby foreclosing the possibility that the present motion could be timely based on equitable tolling. Pet. App. 6a. Indeed, the Fifth Circuit case that forms the foundation of petitioner's equitable tolling argument, *Lugo-Resendez*, expressly described petitioner's case as distinct from one in which an alien sought to file a timely motion by invoking equitable tolling. 831 F.3d at 342-343. Although the court of appeals did not address that separate basis given by the Board for denying equitable tolling, it constitutes an additional reason why petitioner cannot obtain relief and further review is unwarranted.

Finally, even if petitioner overcame the obstacles noted above and succeeded in obtaining equitable tolling, he would be a poor candidate, on a motion to reopen, to obtain cancellation of removal. Both reopening and cancellation of removal are discretionary. 8 U.S.C. 1229b(b)(1); see *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2109 (2018); *Dada* v. *Mukasey*, 554 U.S. 1, 12 (2008). Petitioner has been living outside the United States for

15 years since his removal in 2004, see Pet. App. 2a, and he provides no basis to suggest that the Board would exercise its discretion to grant him cancellation of removal. A decision in petitioner's favor on the timeliness issue would thus likely have few practical consequences for the ultimate disposition of his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
W. MANNING EVANS
Attorneys

MAY 2019