Nos. 18-776 and 18-1015

In the Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

RUBEN OVALLES, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a determination that an alien did not exercise reasonable diligence under the facts of a particular case for purposes of equitable tolling of the statutory deadline for filing a motion to reopen is a "question[] of law" under 8 U.S.C. 1252(a)(2)(D).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. La.):

Ovalles v. *Ashcroft*, No. 04-cv-766 (Aug. 13, 2004)

United States Court of Appeals (5th Cir.):

Ovalles v. *Holder*, No. 07-60836 (July 27, 2009)

Guerrero-Lasprilla v. *Sessions*, No. 17-60333 (Sept. 12, 2018)

Ovalles v. *Sessions*, No. 17-60438 (Oct. 31, 2018)

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OPINIONS BELOW

The opinion of the court of appeals in *Guerrero-Lasprilla* v. *Holder*, No. 18-776 (*Guerrero-Lasprilla* Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 737 Fed. Appx. 230. The decisions of the Board of Immigration Appeals dismissing Guerrero-Lasprilla's appeal (*Guerrero-Lasprilla* Pet. App. 10a-13a) and denying reconsideration (*Guerrero-Lasprilla* Pet. App. 5a-9a) are unreported. The decision of the immigration judge denying Guerrero-Lasprilla's

motion to reopen (*Guerrero-Lasprilla* Pet. App. 14a-19a) is unreported.

The opinion of the court of appeals in *Ovalles* v. *Holder*, No. 18-1015 (*Ovalles* Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 741 Fed. Appx. 259. A prior opinion of the court of appeals (*Ovalles* Pet. App. 8a-29a) is reported at 577 F.3d 288. The decisions of the Board of Immigration Appeals denying Ovalles's motion to reopen (*Ovalles* Pet. App. 5a-7a), declining to reopen his removal proceedings sua sponte (*Ovalles* Pet. App. 30a-31a), and ordering his removal (*Ovalles* Pet. App. 32a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Guerrero-Lasprilla* was entered on September 12, 2018. A petition for a writ of certiorari was filed on December 10, 2018, and was granted on June 24, 2019.

The judgment of the court of appeals in *Ovalles* was entered on October 31, 2018. A petition for a writ of certiorari was filed on January 29, 2019, and was granted on June 24, 2019, limited to Question 2 presented by the petition.

The cases were consolidated for briefing and oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-28a.

STATEMENT

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "set[s] out the process for removing aliens from the country." *Mata* v. *Lynch*, 135 S. Ct.

2150, 2153 (2015); see 8 U.S.C. 1229a. "An immigration judge (IJ) conducts the initial proceedings." *Mata*, 135 S. Ct. at 2153; see 8 U.S.C. 1229a(a)(1). If the IJ "decides that the alien is removable and orders the alien to be removed," the alien may appeal that decision to the Board of Immigration Appeals (Board). 8 U.S.C. 1229a(c)(5); see *Mata*, 135 S. Ct. at 2153; 8 C.F.R. 1003.1(b), 1003.38. If the Board affirms (and the case is not referred to the Attorney General), the removal order becomes administratively "final." 8 C.F.R. 1003.1(d)(7); see 8 U.S.C. 1101(a)(47)(B); 8 C.F.R. 1003.39, 1241.1.

Under the INA, an alien ordered removed "may file one motion to reopen" his removal proceedings with either the IJ or the Board, whichever last rendered a decision in the matter. 8 U.S.C. 1229a(c)(7)(A); see 8 C.F.R. 1003.2(c), 1003.23(b). "A motion to reopen is a form of procedural relief" that asks the IJ or the Board to revisit a final removal order "'in light of newly discovered evidence or a change in circumstances.'" *Dada* v. *Mukasey*, 554 U.S. 1, 12 (2008) (citation omitted); see *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010) (describing a motion to reopen as "a procedural device"). The INA requires that a motion to reopen "state the new facts that will be proven at a hearing to be held if the motion is granted," and that the motion "be supported by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B).

The INA also requires (subject to exceptions not relevant here) that a motion to reopen "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 this Court has "express[ed] no opinion as to whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen," *Mata*, 135 S. Ct. at 2155 n.3, "all appellate courts to have addressed the

matter have held that the Board may sometimes equitably toll the time limit for an alien's motion to reopen," *id.* at 2156; see *Lugo-Resendez* v. *Lynch*, 831 F.3d 337, 343-344 (5th Cir. 2016).

Regulations promulgated by the Attorney General provide that "[t]he decision to grant or deny a motion to reopen * * * is within the discretion of" the IJ or the Board. 8 C.F.R. 1003.2(a), 1003.23(b)(1)(iv). Those regulations also provide that, "separate and apart from acting on the alien's motion," the IJ and the Board may reopen proceedings on their "'own motion'—or, in Latin, *sua sponte*—at any time." *Mata*, 135 S. Ct. at 2153 (citation omitted); see 8 C.F.R. 1003.2(a), 1003.23(b)(1). Accordingly, if an alien fails to file a timely motion to reopen pursuant to Section 1229a(c)(7), he may suggest that the IJ or the Board reopen proceedings sua sponte. The Board has explained, however, that an exercise of its sua sponte authority beyond the time for filing a motion to reopen will be justified only in "truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (1999) (en banc).

2. As a general matter, the INA, "in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review 'final order[s] of removal.'" *Mata*, 135 S. Ct. at 2154 (quoting 8 U.S.C. 1252(a)(1)) (brackets in original); see 28 U.S.C. 2342. "That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen * * * such orders." *Mata*, 135 S. Ct. at 2154 (citing 8 U.S.C. 1252(b)(6)).

The INA limits the scope of judicial review in cases involving "criminal aliens," *Kucana*, 558 U.S. at 246—aliens removable by reason of having committed certain criminal offenses, including aggravated felonies and

controlled-substance offenses. 8 U.S.C. 1252(a)(2)(C)-(D). Although Section 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [such] a criminal offense," 8 U.S.C. 1252(a)(2)(C), Section 1252(a)(2)(D) provides that "[n]othing" in Section 1252(a)(2)(C) "shall be construed as precluding review of constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D); see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a)(1)(A), 119 Stat. 310.

B. *Ovalles*

1. In 1985, petitioner Ovalles, a native and citizen of the Dominican Republic, was admitted to the United States as a lawful permanent resident. *Ovalles* Administrative Record (*Ovalles* A.R.) 397, 415, 540. In 2003, following a guilty plea, he was convicted of attempted possession of heroin, in violation of Ohio law, and was sentenced to five years of probation. *Id.* at 484-485.

Two months after his conviction, the Department of Homeland Security (DHS) served Ovalles with a notice to appear for removal proceedings. *Ovalles* A.R. 539-541. DHS charged that Ovalles was subject to removal on two grounds—that he had been convicted of a violation of a law relating to a controlled substance, 8 U.S.C. 1227(a)(2)(B)(i); and that he had been convicted of an aggravated felony (namely, illicit trafficking in a controlled substance), 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii). *Ovalles* A.R. 540.

Removal proceedings were held in Louisiana. *Ovalles* A.R. 466-468. The IJ sustained the first ground of removability but not the second, concluding that Ovalles's Ohio drug offense did not qualify as an aggravated felony. *Id.* at 302. The IJ then granted Ovalles's

application for cancellation of removal, a form of discretionary relief. *Id.* at 397.

In 2004, the Board vacated the IJ's decision and ordered Ovalles removed to the Dominican Republic. *Ovalles* Pet. App. 32a-35a. The Board determined that the IJ had erred in concluding that Ovalles's Ohio drug offense did not qualify as an aggravated felony. *Id.* at 35a. The Board further determined that because Ovalles "has been convicted of an aggravated felony, he is statutorily ineligible for cancellation of removal." *Ibid.* The following month, Ovalles was removed to the Dominican Republic, where he continues to reside. *Id.* at 10a; J.A. 75.

2. In 2007, Ovalles filed a motion asking the Board to sua sponte reopen his removal proceedings. *Ovalles* A.R. 129-141. Ovalles contended that sua sponte reopening was warranted in light of this Court's intervening decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006). *Ovalles* A.R. 129-130, 137-138. In *Lopez*, this Court held that "conduct made a felony under state law but a misdemeanor under the Controlled Substances Act [(CSA)]" does not satisfy the relevant part of the INA's definition of "aggravated felony." 549 U.S. at 50. Ovalles contended that his Ohio drug offense did not qualify as an "aggravated felony" under *Lopez* because the CSA classifies "simple drug possession" as a misdemeanor. *Ovalles* A.R. 130. Ovalles thus argued that the Board erred in deeming him ineligible for cancellation of removal. *Id.* at 138.

The Board declined to reopen the proceedings sua sponte. *Ovalles* Pet. App. 30a-31a. The Board observed that Ovalles had been "removed from the United States following [the Board's] previous order." *Id.* at 30a. The Board then explained that the "post-departure bar"

codified at 8 C.F.R. 1003.2(d) "prohibits the filing of motions to reopen by removed aliens who have departed the United States." *Ovalles* Pet. App. 30a-31a. That regulation, the Board concluded, precluded consideration of Ovalles's request for sua sponte reopening. *Id.* at 31a.

In 2009, the Fifth Circuit denied Ovalles's petition for review. *Ovalles* Pet. App. 8a-29a. The court held that the post-departure bar could be validly enforced against an alien seeking sua sponte reopening under the regulations. *Id.* at 20a. The court, however, left open the question whether the post-departure bar could be validly enforced against an alien who had timely filed a motion to reopen pursuant to Section 1229a(c)(7). *Id.* at 19a-20a.

3. In 2017—nearly 13 years after his removal order had become final—Ovalles filed a motion to reopen pursuant to Section 1229a(c)(7), again seeking to obtain the benefit of *Lopez*. J.A. 35, 47-52. Ovalles argued that the circumstances of his case warranted equitable tolling of the 90-day time limit for filing such a motion. J.A. 61-63. Ovalles acknowledged that in 2012, the Fifth Circuit had decided the question left open in its prior opinion in his case and held that the post-departure bar could *not* be validly enforced against an alien seeking reopening pursuant to Section 1229a(c)(7). J.A. 57-58 (discussing *Garcia-Carias* v. *Holder*, 697 F.3d 257 (5th Cir. 2012)). Ovalles contended, however, that if he had filed a motion to reopen pursuant to Section 1229a(c)(7) at that time, the Fifth Circuit would have recharacterized any request for equitable tolling as a request for the Board to exercise its discretion to reopen the proceedings sua sponte, J.A. 55-56, 58—a request that would then have faced the "hurdle of the departure

bar," J.A. 57. Ovalles argued that it was not until *Mata*, *supra* (a 2015 decision), that this Court rejected the Fifth Circuit's practice of recharacterizing requests for equitable tolling, J.A. 55-57, and not until *Lugo-Resendez*, *supra* (a 2016 decision) that the Fifth Circuit held that the 90-day time limit could be equitably tolled, J.A. 57, 58-59.

Ovalles also contended that he had acted "diligently in seeking relief" from the Board's decision. J.A. 61. He asserted that, after the Fifth Circuit denied his petition for review in 2009, he contacted attorneys once every couple years—in 2010, in 2012, and in 2014—to check on any new developments relevant to his case. J.A. 76. Ovalles stated that "[n]othing came about from those talks." *Ibid.* But he asserted that in December 2016, while researching a different issue on the Internet, he "stumble[d] across" the Fifth Circuit's decision in *Lugo-Resendez*, *ibid.*, which had been issued five months earlier, in July 2016. After contacting an attorney, J.A. 76-77, Ovalles filed his motion to reopen in March 2017, J.A. 35-40.

The Board denied the motion to reopen. *Ovalles* Pet. App. 5a-7a. The Board described *Lugo-Resendez* as "observing that equitable tolling of the time limit [on motions to reopen] is predicated on an alien pursuing [his] claim with reasonable diligence." *Id.* at 6a. The Board found that Ovalles had "not demonstrated the requisite due diligence to warrant equitable tolling, where he waited approximately 8 months after the Fifth Circuit issued *Lugo-Resendez* * * * to file his current motion." *Ibid.*

4. The court of appeals dismissed Ovalles's petition for review. *Ovalles* Pet. App. 1a-4a. The court ex-

plained that "because Ovalles was determined to be removable under § 1227(a)(2)(B)(i)," it "lack[ed] jurisdiction" under Section 1252(a)(2)(C) and (D) "to review his claims other than for questions of law or constitutional claims." *Id.* at 3a-4a. The court rejected Ovalles's contention that the Board "applied the wrong legal standard for tolling." *Id.* at 4a. The court noted Ovalles's acknowledgement that its decision in *Lugo-Resendez* set forth the relevant "legal standard," and it found "[n]othing in the record" to "indicate[] that the [Board] applied an incorrect standard." *Ibid.* The court concluded that Ovalles's "arguments amount to no more than his disagreement with the application of the equitable tolling standard," and it held that it lacked jurisdiction to review that disagreement. *Ibid.* 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," which the INA makes "unreviewable." *Ibid.* (citing *Penalva* v. *Sessions*, 884 F.3d 521, 526 (5th Cir. 2018)). The court thus rejected Ovalles's contention that "the diligence issue" is "a mixed question of law and fact reviewable as a legal question." *Ibid.*

C. *Guerrero-Lasprilla*

1. In 1986, petitioner Guerrero-Lasprilla, a native and citizen of Colombia, was admitted to the United States as a lawful permanent resident. *Guerrero-Lasprilla* Administrative Record (*Guerrero-Lasprilla* A.R.) 94, 146. In 1988, following a jury trial, he was convicted of possession with intent to distribute, and conspiracy to possess with intent to distribute, cocaine base, in violation of 21 U.S.C. 841(a)(1) and 846. *Guerrero-Lasprilla* A.R. 138, 146; see *United States* v. *Guerrero*, 935 F.2d 189,

192, 194 (11th Cir. 1991) (describing the offenses as involving more than 50 kilograms of cocaine base valued at approximately $1 million). The district court sentenced him to 12 years of imprisonment. *Guerrero*, 935 F.2d at 192.

In 1998, the Immigration and Naturalization Service (INS) served Guerrero-Lasprilla with a notice to appear for removal proceedings in Louisiana. J.A. 33-34. The INS charged that Guerrero-Lasprilla was subject to removal because he had been convicted of an aggravated felony—namely, illicit trafficking in a controlled substance. J.A. 33; see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii). The IJ ordered Guerrero-Lasprilla removed to Colombia. *Guerrero-Lasprilla* A.R. 137. Guerrero-Lasprilla did not appeal that order, *Guerrero-Lasprilla* Pet. App. 6a, and in December 1998, he departed from the United States to Colombia, where he has lived ever since, *Guerrero-Lasprilla* A.R. 94, 108.

2. In 2016—18 years after his removal order had become final—Guerrero-Lasprilla filed a motion to reopen his removal proceedings. J.A. 5-20. Guerrero-Lasprilla argued that the IJ should reopen his case to allow him to apply for discretionary relief under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). J.A. 11-12. Section 212(c) had authorized certain permanent resident aliens domiciled in the United States for at least seven consecutive years to apply for discretionary relief from exclusion or deportation. See *Judulang* v. *Holder*, 565 U.S. 42, 46-47 (2011); *INS* v. *St. Cyr*, 533 U.S. 289, 294-296 (2001). But in 1996, Congress restricted the availability of Section 212(c) relief, see Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, and then

repealed Section 212(c) altogether, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597. Guerrero-Lasprilla argued that he "was unable to apply for relief at the time of his proceedings," which took place two years after Section 212(c)'s repeal. J.A. 11. But he argued that developments since then regarding the effect of that repeal made him newly eligible for Section 212(c) relief. J.A. 11-12.

Guerrero-Lasprilla also argued that the INA's 90-day time limit for filing a motion to reopen should be equitably tolled in light of the circumstances of his case. J.A. 17. Guerrero-Lasprilla submitted a letter explaining those circumstances. J.A. 21-24. In that letter, he stated that, at the time of his removal proceedings, "countless attorneys" had told him that he was "not eligible for relief." J.A. 21. He asserted hearing the same thing in 2001, following this Court's decision in *St. Cyr*. J.A. 22. That decision had held that, despite Section 212(c)'s repeal in 1996, the relief afforded by that provision "must remain available, on the same terms as before, to an alien whose removal is based on a guilty plea entered before § 212(c)'s repeal," because such aliens likely relied on the prospect of Section 212(c) relief in deciding to plead guilty. *Judulang*, 565 U.S. at 48; see *St. Cyr*, 533 U.S. at 323-325. Guerrero-Lasprilla stated that "numerous attorneys" had told him that he could not benefit from *St. Cyr* because he had been convicted of illicit trafficking following a trial, not a guilty plea. J.A. 22.

Guerrero-Lasprilla acknowledged that, "[o]ver the years, as [his and his family's] hopes died, so did the frequency of [their] calls and consults with attorneys." J.A. 22. Guerrero-Lasprilla stated (*ibid.*) that it was not

until June 16, 2016, that his mother learned from a "new attorney" about *Matter of Abdelghany*, 26 I. & N. Dec. 254 (B.I.A. 2014)—a decision the Board had rendered more than two years earlier. In *Abdelghany*, the Board agreed with various courts of appeals—including the Fifth Circuit, see *Carranza-De Salinas* v. *Holder*, 700 F.3d 768, 773-775 (2012)—that Section 212(c) relief must be equally available to aliens convicted following a trial as to aliens convicted following a guilty plea. *Abdelghany*, 26 I. & N. Dec. at 268.

Guerrero-Lasprilla asserted that, despite learning about *Abdelghany* in June 2016, he did not file a motion to reopen at that time, because his attorney told him that the Fifth Circuit "had yet to accept equitable tolling for a statutory motion to reopen," J.A. 22-23, and that, as an alien who had departed the country, he was "barred" by regulation from seeking sua sponte reopening, J.A. 22. Guerrero-Lasprilla understood, however, that "[his attorney] and other attorneys were currently before the [Fifth] Circuit" in other cases "trying to convince [that court] to allow for equitable tolling as many other circuits ha[d] already." J.A. 23.

Guerrero-Lasprilla stated that on August 17, 2016, his attorney informed him that, on July 28, 2016, the Fifth Circuit in *Lugo-Resendez* had held that the 90-day time limit for filing a motion to reopen may be equitably tolled. J.A. 23. Two weeks after that call, Guerrero-Lasprilla mailed his motion to reopen, see *Guerrero-Lasprilla* A.R. 82, which the immigration court received on September 6, 2016, see *id.* at 68; *Guerrero-Lasprilla* Pet. App. 16a.

3. The IJ denied the motion to reopen as untimely. *Guerrero-Lasprilla* Pet. App. 14a-19a. The IJ determined that the motion was not "filed within 90 days of a

final administrative order of removal," *id.* at 17a, and that Guerrero-Lasprilla was "not entitled to equitable tolling," *id.* at 18a. The IJ noted that Guerrero-Lasprilla's "eligibility [for] relief was explained in 2014" in *Abdelghany*, but that Guerrero-Lasprilla "waited two years" following that decision to file his motion. *Ibid.* The IJ found that Guerrero-Lasprilla had "not presented evidence that he had been diligently pursuing his rights or that some extraordinary circumstance prevented him from filing for relief for another two years after he became aware that he may be eligible for relief." *Ibid.* The IJ also declined to exercise her discretion to reopen the proceedings sua sponte. *Id.* at 17a.

4. a. The Board dismissed Guerrero-Lasprilla's appeal. *Guerrero-Lasprilla* Pet. App. 10a-13a. The Board explained that a "litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 11a (quoting *Lugo-Resendez*, 831 F.3d at 344). The Board observed that, despite having been "told of his eligibility for a [Section] 212(c) waiver under *Matter of Abdelghany*," Guerrero-Lasprilla "chose not to file a motion to reopen these proceedings in order to seek such relief" until 2016. *Id.* at 12a.

The Board then rejected Guerrero-Lasprilla's contentions that, prior to *Lugo-Resendez*, "binding Fifth Circuit court precedent" constituted an "extraordinary circumstance" preventing him from filing a motion to reopen, and that "he exercised reasonable diligence in pursuing his claim for relief because he filed his motion to reopen on September 6, 2016." *Guerrero-Lasprilla*

Pet. App. 12a. The Board found that "nothing prohibited [him] from filing a motion to reopen before *Lugo-Resendez*." *Ibid.* "On the contrary," the Board explained, "*Lugo-Resendez* merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent." *Ibid.* The Board also found that the IJ had "properly determined that [Guerrero-Lasprilla's] case does not present exceptional circumstances that warrant" reopening his proceedings sua sponte. *Id.* at 13a.

b. The Board denied Guerrero-Lasprilla's motion for reconsideration. *Guerrero-Lasprilla* Pet. App. 5a-9a. It emphasized that it does "not ordinarily reopen long completed proceedings to re-adjudicate cases based on a change of law," and that Guerrero-Lasprilla "had a full and fair opportunity" in his removal proceedings to "mak[e] arguments that later proved successful in cases like *Matter of Abdelghany*." *Id.* at 8a.

5. The Fifth Circuit dismissed Guerrero-Lasprilla's petition for review of the Board's denial of his motion to reopen. *Guerrero-Lasprilla* Pet. App. 1a-4a. The court observed that the IJ had concluded that Guerrero-Lasprilla "had not shown he diligently pursued his rights, given that he waited two years to file his motion to reopen after his right to seek § 212(c) relief was explained in 2014 by *Matter of Abdelghany*." *Id.* at 2a. The court also observed that the Board had "adopted and affirmed the IJ's denial of the motion to reopen," "[l]argely echoing the IJ's conclusions." *Ibid.* The court explained, however, that it had "determined recently" in *Penalva*, 884 F.3d at 525, that "whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question." *Guerrero-Lasprilla* Pet. App. 3a. The court

further explained that because Guerrero-Lasprilla "was removable on account of criminal convictions that qualified as aggravated felonies," it lacked jurisdiction under Section 1252(a)(2)(C) to consider such a "factual question." *Id.* at 3a-4a. The court therefore dismissed the petition for review for lack of jurisdiction. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

Under the INA, judicial review of a final order of removal entered against a criminal alien is limited to "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Petitioners are criminal aliens who sought to reopen their removal proceedings long after the statutory deadline for seeking reopening had expired. The Fifth Circuit correctly held that it lacked jurisdiction to review the Board's determinations that petitioners were not entitled to equitable tolling of that deadline, because whether petitioners had exercised reasonable diligence in pursuing their rights is not a "question[] of law" reviewable under Section 1252(a)(2)(D).

A. The phrase "questions of law" in Section 1252(a)(2)(D) encompasses questions of law only—not questions of fact or mixed questions of law and fact. Congress enacted Section 1252(a)(2)(D) against the background of a well-established understanding that questions of law are distinct from those other two types of questions. Indeed, this Court has long interpreted the phrase "question of law" in another jurisdictional statute to refer only to pure questions of law, not to mixed questions of law and fact. When Congress used the phrase "questions of law" in Section 1252(a)(2)(D), Congress presumably intended it to have the same meaning.

That understanding finds additional support in the history and purpose of Section 1252(a)(2)(D). The relevant Conference Report demonstrates that the phrase "questions of law" was understood to encompass only pure questions of law. And Congress enacted Section 1252(a)(2)(D) to avoid the constitutional concerns identified by this Court in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which rested on the lack of a judicial forum for criminal aliens to obtain review of pure questions of law.

Whether petitioners exercised reasonable diligence for purposes of equitable tolling of the deadline for filing a motion to reopen is not a pure question of law. Rather, it is a mixed question of law and fact, involving the application of a legal standard to the particular facts of a case. It therefore is not a "question[] of law" under Section 1252(a)(2)(D).

B. Even if the phrase "questions of law" encompassed some mixed questions, it could not reasonably be interpreted to encompass whether petitioners exercised reasonable diligence for purposes of equitable tolling. Mixed questions are either primarily legal or primarily factual. And construing "questions of law" to reach *all* mixed questions—including primarily factual ones—would stretch the text beyond what it can reasonably bear.

The mixed question at issue here is primarily factual. Deciding whether a litigant has pursued his rights reasonably diligently requires the decision-maker to become immersed in the facts and procedural history of the case as well as the circumstances of the litigant. And it requires relatively little legal work, beyond setting forth the standard of reasonable diligence. Because the mixed question at issue here is not purely or

even primarily legal, it is not a "question[] of law" under Section 1252(a)(2)(D).

C. Petitioners contend that the phrase "questions of law" encompasses all mixed questions, including primarily factual ones. But that construction cannot be squared with the text, context, history, or purpose of Section 1252(a)(2)(D). And it would be more difficult to administer than a construction limiting "questions of law" to purely legal questions.

Petitioners also contend that, even if the phrase "questions of law" does not encompass primarily factual mixed questions, the mixed question at issue here is primarily legal. But reasonable diligence requires a fact-intensive inquiry, and there is no historical tradition of treating that inquiry for equitable-tolling purposes as a legal issue.

D. Petitioners urge the Court to resolve these cases on the case-specific ground that the Fifth Circuit should have exercised jurisdiction because, in their view, they are challenging the legal standard used by the Board (a pure question of law), not the Board's application of a legal standard to the facts (a mixed question). But that is not how petitioners framed their challenges in their certiorari petitions, and the case-specific ground each now raises is not properly before the Court and does not warrant review.

ARGUMENT

WHETHER PETITIONERS EXERCISED REASONABLE DILIGENCE FOR PURPOSES OF EQUITABLE TOLLING OF THE DEADLINE FOR FILING A MOTION TO REOPEN IS NOT A "QUESTION OF LAW" UNDER 8 U.S.C. 1252(a)(2)(D)

In cases involving criminal aliens, see 8 U.S.C. 1252(a)(2)(C), the INA limits the scope of any judicial

review of a final removal order to "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D). This Court granted review in these cases in light of a conflict among the courts of appeals on the meaning of the phrase "questions of law" in Section 1252(a)(2)(D). See *Guerrero-Lasprilla* Pet. i, 3-4, 9-10; *Ovalles* Pet. i, 4, 10-11, 14. The conflict arises here in the context of equitable tolling—and in particular, the determination whether an alien exercised reasonable diligence in pursuing reopening. See *ibid.* Whereas the Fourth and Fifth Circuits hold that the application of the reasonable-diligence standard to established facts does not present a "question of law" reviewable under Section 1252(a)(2)(D), see *Lawrence* v. *Lynch*, 826 F.3d 198, 203 (4th Cir. 2016); *Penalva* v. *Sessions*, 884 F.3d 521, 525 (5th Cir. 2018), the Ninth Circuit holds that it does, see *Ghahremani* v. *Gonzales*, 498 F.3d 993, 998-999 (2007).

This Court should reject the Ninth Circuit's construction of the statute. The application of a legal standard to established facts is not a "question of law," but rather a mixed question of law and fact. And even if "questions of law" could be construed to encompass *some* mixed questions—*i.e.*, those primarily legal in nature—the determination whether an alien exercised reasonable diligence for purposes of equitable tolling of the statutory deadline in the circumstances of a particular case is not a mixed question of that type, because the inquiry is primarily factual. Accordingly, the judgments of the Fifth Circuit in these cases should be affirmed.

A. The Phrase "Questions Of Law" In Section 1252(a)(2)(D) Does Not Encompass Mixed Questions Of Law And Fact

In cases concerning final removal orders entered against criminal aliens, Section 1252(a)(2)(D) preserves judicial review only of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). The Ninth Circuit has construed that provision to preserve judicial review of "a constitutional claim, a question of law, *or a mixed question of law and fact*," which it has held includes the "appl[ication] [of] the legal standard for equitable tolling to established facts." *Ghahremani*, 498 F.3d at 998-999 (emphasis added). That construction cannot be squared with the text, context, history, or purpose of Section 1252(a)(2)(D).

1. The text of Section 1252(a)(2)(D) makes no reference to "mixed questions of law and fact." It references only "constitutional claims" and "questions of law." 8 U.S.C. 1252(a)(2)(D). In the Ninth Circuit's view, "'questions of law'" include "mixed questions of law and fact." *Ghahremani*, 498 F.3d at 998 (citation omitted). But those two types of questions have long been understood to be distinct.

For over a hundred years, this Court's precedents have distinguished (1) questions of law from both (2) questions of fact and (3) mixed questions of law and fact. See, *e.g.*, *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018) (distinguishing a "mixed question" from a "purely legal" question and a "purely factual" question); *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985) (discussing "the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact'"); *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985) (distinguishing "questions of 'fact' from 'mixed questions of law and fact'"); *Pullman-Standard* v.

Swint, 456 U.S. 273, 288 (1982) (distinguishing a "pure question of fact" from both a "question of law" and a "mixed question of law and fact"); *Jewell* v. *Knight*, 123 U.S. 426, 432 (1887) (distinguishing "questions of law only" from "questions of fact, or of mixed law and fact"); *Waterville* v. *Van Slyke*, 116 U.S. 699, 704 (1886) (distinguishing "propositions of law" from "mixed propositions of law and fact").

Under that well-established typology, questions of law concern the "test" or "standard" to be used in deciding a case. *Lakeridge*, 138 S. Ct. at 965. Examples include the "definition of intentional discrimination" under Title VII, *Pullman-Standard*, 456 U.S. at 287; and the "standard of relevance" for evidence sought in a subpoena, *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017).

Questions of fact, by contrast, concern "who did what, when or where, how or why." *Lakeridge*, 138 S. Ct. at 966. They encompass "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Thompson* v. *Keohane*, 516 U.S. 99, 110 (1995) (citation and internal quotation marks omitted). Examples include the "intent" behind a particular employment practice, *Pullman-Standard*, 456 U.S. at 287; and "what a person knew at a given point in time," *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 498 (1984).

Finally, "mixed questions of law and fact" are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is * * * whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S. at 289 n.19. Thus, while mixed questions have

both a legal and a factual component, their defining feature is "the application of" the one to the other, *Thompson*, 516 U.S. at 110 (citation omitted)—as when, for instance, a court applies the "requirements of the Constitution" to the "circumstances" of a "challenged confession," *Miller*, 474 U.S. at 112; or decides "whether, 'under the circumstances,' [a] sale [of goods] was fraudulent," *Jewell*, 123 U.S. at 435.

When Congress enacted Section 1252(a)(2)(D), it did so against the background of this "body of learning," *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). It presumably understood the differences between the three categories of questions. *Ibid.* And it chose to make reviewable (alongside "constitutional claims") only one of those categories—"questions of law." 8 U.S.C. 1252(a)(2)(D).

The natural inference, then, is that "Congress mean[t] to incorporate the established meaning of th[at] term[]." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); see *Morissette*, 342 U.S. at 263 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word."). And given the standard breakdown of questions into three categories, it is fair to infer that the two categories "not mentioned"—mixed questions and questions of fact—"were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

2. The text of other statutes—which form part of Section 1252(a)(2)(D)'s context—bolsters that inference. See *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991) (explaining that a statutory term should be construed "to contain that permissible

meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

a. The phrase "question of law" likewise appears in 28 U.S.C. 1254(2), which authorizes courts of appeals to certify "any question of law in any civil or criminal case" to this Court for decision. This Court has construed Section 1254(2)—and its predecessor statutes dating to 1891, see Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828; Act of Mar. 3, 1911, ch. 231, § 239, 36 Stat. 1157; Act of Feb. 13, 1925, ch. 229, § 239, 43 Stat. 938—to refer to "questions of law and not mixed questions of law and fact." *Pflueger* v. *Sherman*, 293 U.S. 55, 57-58 (1934) (per curiam); see *United States* v. *Seale*, 558 U.S. 985, 985 (2009) (Stevens, J., respecting the dismissal of the certified question) (arguing that the Court should have accepted a certified case presenting a "pure question of law"); *United States* v. *Mayer*, 235 U.S. 55, 66 (1914) ("It is a familiar rule that this court can not be required through a certificate under [the statute] to pass upon questions of fact, or mixed questions of law and fact."). Indeed, the Court has historically dismissed certifications because they presented mixed questions. See, *e.g.*, *Pflueger*, 293 U.S. at 57-58; *Hallowell* v. *United States*, 209 U.S. 101, 107 (1908); *Chicago, Burlington & Quincy Ry. Co.* v. *Williams*, 205 U.S. 444, 452-454 (1907).

In *Chicago, Burlington & Quincy Railway*, for example, the Eighth Circuit certified to this Court a question about the validity of a contract to transport cattle on a train. The "uncontradicted" evidence, 205 U.S. at 449 (statement of the case), established that the contract permitted the owner of the cattle to ride with the cattle for free, but exempted the railroad from liability for any injuries "while riding on the cattle train," *id.* at

450. After the owner was injured during the ride, he sued the railroad, alleging "negligence" in "the operation of [the] cattle train." *Id.* at 445. The question certified by the Eighth Circuit set forth the established facts and then asked, "is [the owner's] contract that the railroad company shall not be liable to him for such injury or damage valid?" *Id.* at 451.

In an opinion by Justice Harlan, this Court held that it was "without jurisdiction to answer the question certified." *Chicago, Burlington & Quincy Ry.*, 205 U.S. at 454. The Court explained that the certificate "brings to [the Court] a question of mixed law and fact and, substantially, all the circumstances connected with the issue to be determined." *Id.* at 453. "It does not present," the Court continued, "a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises," *ibid.*; rather, "[i]t is, obviously, as if the court had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case," *id.* at 454. Having determined that the certified question was not a question of law, *id.* at 452-453, the Court dismissed the certificate, *id.* at 454.

Like 28 U.S.C. 1254(2), Section 1252(a)(2)(D) concerns the jurisdiction of an appellate court to review "questions of law." Congress presumably was aware of this Court's precedent interpreting Section 1254(2) when it enacted Section 1252(a)(2)(D). See *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). And when Congress used the phrase "questions of law" in Section 1252(a)(2)(D), it presumably "intended that text to have the same meaning in both statutes," *Smith* v. *City of*

Jackson, 544 U.S. 228, 233 (2005) (plurality opinion)—as referring to "questions of law only, and not questions of fact, or of mixed law and fact," *Chicago, Burlington & Quincy Ry.*, 205 U.S. at 452 (citation omitted).

b. Other statutes show that Congress knows how to refer specifically to mixed questions when it wishes to do so. For example, 28 U.S.C. 2254(d), as amended by AEDPA, provides that a habeas petition filed by a state prisoner "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim":

> (1) resulted in a decision that was contrary to, *or involved an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Ibid. (emphasis added).

When Congress enacted that provision in 1996, it did so against the backdrop of judicial disagreement over whether a federal habeas court should give deference to a state court's resolution of "mixed questions"—that is, a "'state court's application of law to the specific facts'" of the prisoner's case. *Williams* v. *Taylor*, 529 U.S. 362, 400 (2000) (opinion of O'Connor, J.) (citation omitted). Some Justices had expressed the view that mixed questions should be reviewed under a "deferential" standard of "reasonableness," *id.* at 400-401, while others had expressed the view that "federal habeas courts had a duty to evaluate such questions independently," *id.* at 401.

Congress resolved that disagreement in AEDPA by addressing mixed questions in Section 2254(d)(1)'s "unreasonable application" clause. *Williams*, 529 U.S. at 407 (opinion of the Court). By referring to a state court's "application of[] * * * law," 28 U.S.C. 2254(d)(1), Congress made clear that it was addressing—and requiring deference to—a state court's resolution of a mixed question, see *Williams*, 529 U.S. at 406-408, 111. AEDPA thus shows that Congress "kn[ows] how" to refer specifically to mixed questions, but "chose not to do so" in Section 1252(a)(2)(D). *DHS* v. *MacLean*, 135 S. Ct. 913, 921 (2015).

The Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105, shows the same. That Act grants the Federal Circuit jurisdiction to review decisions of the United States Court of Appeals for Veterans Claims. 38 U.S.C. 7292. The Act provides that, in conducting such review, the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. 7292(d)(1). The Act further provides that, "[e]xcept to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation *as applied to the facts of a particular case*." 38 U.S.C. 7292(d)(2) (emphasis added); see, *e.g.*, *Conley* v. *Peake*, 543 F.3d 1301, 1304 (Fed. Cir. 2008) (explaining that, under the Act, the Federal Circuit may review "the adoption of a particular legal standard," but not "'an application of law to the particular facts'") (citation omitted); *Leonard* v. *Gober*, 223 F.3d 1374, 1376 (Fed. Cir. 2000) (holding that Section 7292(d)(2) bars review of "the application of the law of equitable tolling to the facts of the case").

The Veterans' Judicial Review Act thus distinguishes "questions of law," 38 U.S.C. 7292(d)(1), from both "factual" questions and mixed questions, 38 U.S.C. 7292(d)(2)(A)-(B). And like AEDPA, the Act shows that when Congress wants to address mixed questions as a category, it knows how to do so—by referring to the "appli[cation]" of "law" "to the facts of a particular case." 38 U.S.C. 7292(d)(2)(B). Because Section 1252(a)(2)(D) contains no similar language and refers only to "questions of law" (and "constitutional claims"), Congress presumably did not intend to provide for judicial review of mixed questions of law and fact in that Section.

3. The history of Section 1252(a)(2)(D) also supports the conclusion that the phrase "questions of law" does not encompass mixed questions of law and fact. Specifically addressing that phrase, the relevant Conference Report explained that, although "prior versions" of the proposed section had contained the phrase "pure question of law," "the word 'pure'" was "deleted" from "the final version" "because it is superfluous": "The word 'pure' adds no meaning." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (Conf. Report).

"Questions of law" were thus understood to be "pure" questions of law, such as "a question regarding the construction of a statute." Conf. Rep. 175. And although Congress did not include the word "pure" in the final version of Section 1252(a)(2)(D), it likewise did not include that word in Section 1254(2) or Section 7292(d)(1)—two other statutes in which the phrase "question(s) of law" has been understood to refer only to pure questions of law. See pp. 22-24, 25-26, *supra*. Congress therefore was fully justified in deeming the word "pure" superfluous, and its decision not to include

the word in Section 1252(a)(2)(D) makes its use of the phrase "question(s) of law" consistent across those statutes.

The Conference Report further stated that "[w]hen 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." Conf. Report 175. That means that a court would have jurisdiction under Section 1252(a)(2)(D) to review whether the statutory interpretation or other comparable legal standard the Board used was correct —a "pure" question of law. *Ibid.* But it does not mean that a court would have jurisdiction to review the application of that legal standard to the particular facts of the case. See *Lakeridge*, 138 S. Ct. at 965 (identifying the "component parts" of a mixed question). Thus, although the Conference Report recognized a court's jurisdiction to review the "legal elements" of a mixed question, it did not recognize jurisdiction to review any elements beyond those. Conf. Report 175.

4. The genesis and purpose of Section 1252(a)(2)(D) confirm that the phrase "questions of law" refers to questions of law only, not mixed questions of law and fact. Congress enacted Section 1252(a)(2)(D) to avoid constitutional concerns raised by this Court in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). And because those concerns rested on the lack of a judicial forum for pure questions of law, Section 1252(a)(2)(D) should be understood as providing a judicial forum only for such questions, in addition to constitutional claims.

a. The respondent in *St. Cyr* was an alien who had pleaded guilty to a controlled-substance offense and then been charged with being removable under the INA. 533 U.S. at 293. Removal proceedings against

him were initiated following the 1996 enactment of AEDPA and IIRIRA, which the Attorney General interpreted as having eliminated her power to grant discretionary relief under former Section 212(c) in cases like the respondent's. *Ibid.* The respondent filed a habeas petition under 28 U.S.C. 2241 in federal district court, 533 U.S. at 292-293, challenging that "statutory interpretation," *id.* at 298. His petition raised a "pure question of law," *ibid.*: whether "the restrictions on discretionary relief from deportation contained in the 1996 statutes * * * apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment," *id.* at 293.

The government argued that, "as a result of other amendments adopted in AEDPA and IIRIRA," there was "no judicial forum available to decide whether th[o]se statutes did, in fact, deprive [the Attorney General] of the power to grant such relief" to the respondent. *St. Cyr*, 533 U.S. at 297. This Court rejected that contention. *Ibid.* It reasoned that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution,'" *id.* at 300 (citation omitted), because at a minimum, the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, "protects the writ 'as it existed in 1789,'" 533 U.S. at 301 (citation omitted). After finding "substantial evidence to support the proposition that pure questions of law * * * could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus," the Court concluded that "a serious Suspension Clause issue would be presented if [it] were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its

exercise." *Id.* at 304-305. Applying the canon of constitutional avoidance, the Court therefore construed the 1996 statutes as not having repealed "habeas jurisdiction under § 2241" to consider the respondent's statutory-construction argument. *Id.* at 314. The Court noted, however, that "Congress could, without raising any constitutional questions," repeal such habeas jurisdiction in the district courts if it "provide[d] an adequate substitute through the courts of appeals." *Id.* at 314 n.38.

In 2005, Congress accepted that invitation. Conf. Report 173-174. It amended the INA to remove any doubt that it had repealed habeas jurisdiction under Section 2241 for criminal aliens like the respondent in *St. Cyr*. REAL ID Act § 106(a)(1)(A), 119 Stat. 310. At the same time, Congress sought to provide an adequate substitute that would avoid the constitutional concerns the Court had identified in *St. Cyr*. Conf. Report 175. It thus enacted Section 1252(a)(2)(D), which preserves a judicial forum for criminal aliens to raise "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

b. There is no indication that, in enacting Section 1252(a)(2)(D), Congress sought to go beyond what was necessary to avoid the constitutional doubts identified in *St. Cyr*. Congress's broader goal, dating to its enactment of AEDPA and IIRIRA in 1996, was to "streamline immigration proceedings," particularly in cases involving criminal aliens. Conf. Report 172. Providing criminal aliens broader judicial review than contemplated under *St. Cyr* would come at the cost of further delaying their removal and undermining that broader goal. See *id.* at 173 ("Among the many problems caused

by *St. Cyr*, the most significant is that this decision allows criminal aliens to delay their expulsion from the United States for years.").

The question, then, is what Congress thought was necessary under *St. Cyr* to avoid constitutional doubts concerning judicial review of final removal orders entered, as in *St. Cyr*, in full removal proceedings under 8 U.S.C. 1229a.[1] *St. Cyr* itself had involved a criminal alien seeking to raise a "pure question of law." 533 U.S. at 298. The respondent in *St. Cyr* had identified only "a very limited class of claims," consisting of "constitutional claims or claims that the Attorney General had misconstrued the statute," as historically reviewable in habeas courts. Oral Arg. Tr. at 28, *St. Cyr*, *supra* (No. 00-767); see Conf. Report 175 ("As the ACLU explained during the *St. Cyr* litigation, a 'question of law' is a question regarding the construction of a statute."). And the Court in its opinion had likewise referred only to "pure questions of law" in summarizing the evidence on what could historically be reviewed. *St. Cyr*, 533 U.S. at 305; see *id.* at 298, 300, 308, 314 n.38.

St. Cyr thus plainly indicated that Congress could provide a substitute for habeas jurisdiction that would avoid constitutional doubts in that setting if it provided a judicial forum for pure questions of law, along with constitutional claims. And because Congress's purpose was to avoid the constitutional doubts identified in *St. Cyr*, Section 1252(a)(2)(D) is properly construed to track *St. Cyr*'s focus on pure questions of law. The phrase "questions of law" in Section 1252(a)(2)(D)

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[1] The distinct question of the constitutionality of limitations on habeas corpus review of final removal orders entered in expedited removal proceedings is presented in *DHS* v. *Thuraissigiam*, cert. granted, No. 19-161 (Oct. 18, 2019).

therefore does not encompass mixed questions of law and fact. And because whether petitioners exercised reasonable diligence under the particular facts of their cases presents such a mixed question, the Fifth Circuit correctly declined to review that question.

B. Even If The Phrase "Questions Of Law" Encompassed Some Mixed Questions, It Could Not Reasonably Be Construed To Encompass The Primarily Factual Mixed Question Here

Even if the phrase "questions of law" in Section 1252(a)(2)(D) encompassed some mixed questions of law and fact, it could not reasonably be interpreted to extend beyond mixed questions that are primarily legal. Because whether an alien exercised reasonable diligence for purposes of equitable tolling is not a mixed question of that type, but rather is primarily factual, it is not a "question[] of law" reviewable under Section 1252(a)(2)(D).

1. "Questions of law" cannot reasonably be construed to encompass mixed questions that are primarily factual

"Mixed questions are not all alike." *Lakeridge*, 138 S. Ct. at 967. Some "entail[] primarily legal * * * work." *Ibid.* That is, they "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Ibid.* Other mixed questions "entail[] primarily * * * factual work." *Ibid.* That is, they "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what [this Court has] called 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Ibid.* (citation omitted).

As explained above, the phrase "questions of law" in Section 1252(a)(2)(D) is best construed to include "questions of law only." *Chicago, Burlington & Quincy Ry.*, 205 U.S. at 452 (citation omitted); see pp. 19-31, *supra*. But if "questions of law" were given a broader construction, it should not extend beyond mixed questions that are "primarily legal," *Lakeridge*, 138 S. Ct. at 967. That is so for three reasons.

First, construing "questions of law" to reach *all* mixed questions—including primarily factual ones—would stretch the text beyond what it can reasonably bear. By definition, answering a mixed question that is primarily factual entails more "factual work" than "legal" work. *Ibid.* Given that such a mixed question is more on the "fact" side than the "law" side of the line, classifying such a mixed question as a "question of law" would deny that phrase its ordinary, commonsense meaning.

Second, construing "questions of law" to extend even to those mixed questions that are primarily factual would undermine the structure of the INA. A neighboring provision, Section 1252(a)(2)(B), provides that "no court shall have jurisdiction to review" certain denials of discretionary relief, "except as provided in [Section 1252(a)(2)(D)]," 8 U.S.C. 1252(a)(2)(B)—that is, except insofar as an alien raises "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D). Though discretionary, such denials often involve a legal standard articulated in the context of the particular facts of a case. Thus, if "questions of law" were construed to reach all mixed questions—including primarily factual ones—the exception in Section 1252(a)(2)(D) would threaten to swallow Section 1252(a)(2)(B)'s rule.

For example, the INA generally requires that an asylum application be filed "within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. 1158(a)(2)(B). The INA provides, however, that an asylum application "*may* be considered, notwithstanding [the time limit], if the alien demonstrates *to the satisfaction of the Attorney General* either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified." 8 U.S.C. 1158(a)(2)(D) (emphases added). Every court of appeals to have considered the issue—except the Ninth Circuit—has held that whether an alien has demonstrated changed or extraordinary circumstances is a discretionary determination, not a question of law, under the INA. See *Al Ramahi* v. *Holder*, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013) (citing cases).

Under Ninth Circuit precedent, however, every "mixed question of law and fact" is a "question of law" that Section 1252(a)(2)(D) makes reviewable. *Ghahremani*, 498 F.3d at 998. The Ninth Circuit therefore has held that the Attorney General's application of the standard for changed or extraordinary circumstances to the facts of a particular case is a reviewable "question of law," see *Husyev* v. *Mukasey*, 528 F.3d 1172, 1176-1181 (2008); *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-657 (2007) (per curiam)—even though the decision not to consider an untimely asylum application is a discretionary one under the statute. That outcome collapses the distinction between discretionary determinations and questions of law in the statutory scheme.

Third, construing "questions of law" to reach all mixed questions would create mismatches with the applicable standard of review. When an issue is a "question[] of law" under Section 1252(a)(2)(D), a court usually reviews the issue de novo, as it does any question of law, although with deference to the Attorney General's interpretation under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999). See, *e.g.*, *Husyev*, 528 F.3d at 1177 ("We review *de novo* questions of law."). This Court has explained, however, that de novo review is typically appropriate only for mixed questions that are primarily legal; by contrast, a deferential standard is typically appropriate for mixed questions that are primarily factual. *Lakeridge*, 138 S. Ct. at 967, 969. Treating primarily factual mixed questions as "questions of law" would therefore require courts to either apply a de novo standard to fact-intensive questions that they would typically review under an abuse-of-discretion or substantial-evidence standard, see, *e.g.*, *Husyev*, 528 F.3d at 1181-1182; *Ghahremani*, 498 F.3d at 999-1000, or apply those highly deferential standards to issues that they regard as "questions of law," see, *e.g.*, *Al Ramahi*, 725 F.3d at 1138—resulting in a mismatch either way.

2. The mixed question at issue here is primarily factual

The mixed question at issue here concerns one of the prerequisites for equitable tolling of the deadline for filing a motion to reopen with the IJ or the Board. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005). These cases involve the first element, which has been understood to require "reasonable diligence, not maximum feasible

diligence." *Holland* v. *Florida*, 560 U.S. 631, 653 (2010) (citations and internal quotation marks omitted). Application of that standard to the facts of a particular case is a mixed question of law and fact. See *Lakeridge*, 138 S. Ct. at 966. And it is a mixed question that is primarily factual, not legal.

That conclusion flows from the "nature" of the inquiry itself. *Lakeridge*, 138 S. Ct. at 966. To determine whether a litigant has been pursuing his rights reasonably diligently, the decision-maker must, in effect, put himself in the shoes of the litigant. See *Menominee Indian Tribe of Wis.* v. *United States*, 136 S. Ct. 750, 756 (2016) (explaining that the "diligence prong" focuses on "those affairs within the litigant's control"). As an initial matter, the decision-maker must immerse himself in the facts and history of the case—understanding the nature of the litigant's claims and what the litigant aims to achieve—and do so in the context of the sometimes complex procedural framework. See, *e.g.*, *Pace*, 544 U.S. at 418-419 (discussing the nature of the litigant's claims). The decision-maker also must immerse himself in the circumstances of the litigant—understanding what measures were available, when those measures became available, and why the litigant did not pursue them earlier. See, *e.g.*, *Holland*, 560 U.S. at 653 (discussing the litigant's efforts to contact his attorney and obtain relief); *Pace*, 544 U.S. at 419 n.9 (discussing whether the litigant's "allegedly 'new' evidence" was actually "new at all"). And after gaining a grasp of all of those "case-specific historical facts," the decision-maker must "consider[] them as a whole" and "balance[] them one against another," *Lakeridge*, 138 S. Ct. at 968, to make the ultimate determination whether, in pursuing his rights, the litigant has been reasonably diligent.

The inquiry thus entails "primarily * * * factual work." *Lakeridge*, 138 S. Ct. at 967. Understanding the "affairs within the litigant's control" and whether the litigant acted reasonably in controlling them, *Menominee*, 136 S. Ct. at 756, entails "marshal[ing] and weigh-[ing] evidence" as well as "mak[ing] credibility judgments," *Lakeridge*, 138 S. Ct. at 967. And given those fact-intensive tasks, the decision-maker best suited to conduct the inquiry will naturally be the one with "the closest and the deepest understanding of the record" and the governing procedural framework—here, the IJ or the Board. *Id.* at 968.

Indeed, the Court has previously described the "proper[] appli[cation] [of] the 'due diligence' requirement" in a case involving equitable tolling as a "fact-based question." *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 196 (1997); cf. *Holland*, 560 U.S. at 654 (similarly describing the extraordinary-circumstances prong as a "'fact-intensive' inquiry") (citation omitted). The Court in *Klehr* thus declined to examine the lower court's resolution of it. 521 U.S. at 196; see also *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] is entitled to equitable tolling").

Moreover, in cases in which Section 1252(a)(2)(C) does not preclude judicial review, courts of appeals review a determination by the Board that an alien has not exercised reasonable diligence for purposes of equitable tolling of the deadline to file a motion to reopen for abuse of discretion—a deferential standard that reflects the primarily factual nature of the issue. See *Pineda* v. *Whitaker*, 908 F.3d 836, 842 (1st Cir. 2018); *Cekic* v. *INS*, 435 F.3d 167, 171-172 (2d Cir. 2006);

Alzaarir v. *Attorney Gen. of the U.S.*, 639 F.3d 86, 91 (3d Cir. 2011) (per curiam); *Gonzalez-Cantu* v. *Sessions*, 866 F.3d 302, 304 (5th Cir. 2017); *Mezo* v. *Holder*, 615 F.3d 616, 622 (6th Cir. 2010); *El-Gazawy* v. *Holder*, 690 F.3d 852, 860 (7th Cir. 2012); *Mwangi* v. *Barr*, 934 F.3d 818, 821 (8th Cir. 2019); *Avagyan* v. *Holder*, 646 F.3d 672, 678 (9th Cir. 2011); *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833, 838 (10th Cir. 2005).

That is not to say that determining whether a litigant exercised reasonable diligence under a particular set of facts entails no legal work. But as compared to the degree of factual work involved, the legal work is "[p]recious little." *Lakeridge*, 138 S. Ct. at 968. The decision-maker, of course, starts with the legal standard of reasonable diligence. But in deciding cases under that standard, the decision-maker is not so much "developing auxiliary legal principles" for every case as he is applying the same legal principle to new and different factual situations. *Id.* at 967. Like whether "a litigant's tardiness" in demanding a jury trial is excusable—which this Court referenced in *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988) (citation omitted), as an issue "not amenable to regulation by rule," *id.* at 561—whether a litigant's diligence has been reasonable for equitable-tolling purposes is a "multifarious" question, "little susceptible * * * of useful generalization," *id.* at 562. And because reasonable diligence in this context cannot be reduced to "a neat set of legal rules," *McLane*, 137 S. Ct. at 1167 (citation omitted), there is little more that a decision-maker can do than "state the requirement" of reasonable diligence and then "do the fact-intensive job of exploring whether, in a particular case, it [was satisfied]," *Lakeridge*, 138 S. Ct. at 968.

Judicial decisions determining whether a litigant has exercised reasonable diligence confirm as much. When, for example, this Court addressed the issue in *Holland*, it set forth the "reasonable diligence" standard and then proceeded directly to the particular facts of the case. 560 U.S. at 653 (citation omitted). Likewise, in *Ghahremani*, the Ninth Circuit identified the relevant time period for the "due diligence" inquiry and then engaged in a fact-intensive examination of whether the alien exercised due diligence during that period. 498 F.3d at 999-1000. Neither of those decisions "tried to elaborate on the established idea" of reasonable diligence or suggested any "need to further develop 'norms and criteria'" to flesh out the concept. *Lakeridge*, 138 S. Ct. at 968 (citation omitted). Indeed, the Court in *Holland* emphasized, in discussing equitable doctrines more generally, "the need * * * for avoiding 'mechanical rules'" that would stand in the way of correcting "'injustices'" in "specific circumstances, often hard to predict in advance." 560 U.S. at 650 (citations omitted).

The mixed question at issue here therefore is primarily factual, as opposed to legal. And because it is not a question that is purely or even primarily legal, it is not a "question[] of law" under Section 1252(a)(2)(D).

C. Petitioners' Counterarguments Lack Merit

Petitioners contend (Br. 27-46) that the phrase "questions of law" in Section 1252(a)(2)(D) encompasses all mixed questions of law and fact, including primarily factual ones. In the alternative, they contend (Br. 46-52) that, even if the phrase "questions of law" does not encompass primarily factual mixed questions, the mixed question at issue here is primarily legal. Neither contention has merit.

1. Petitioners' contention that the phrase "questions of law" encompasses all mixed questions, including primarily factual ones, lacks merit

a. Petitioners assert (Br. 28-31) that the statutory text compels the conclusion that all mixed questions are "questions of law." In support of that assertion, petitioners rely (*ibid.*) on various cases and secondary materials that they contend treat mixed questions as questions of law. Petitioners' reliance on those sources is misplaced.

Bogardus v. *Commissioner*, 302 U.S. 34 (1937), for example, involved statutory language broader than the language at issue here. The statute in that case authorized a court "to modify or to reverse" a decision of the Board of Tax Appeals if the decision was "not in accordance with law." Revenue Act of 1926, ch. 27, Tit. X, § 1003(b), 44 Stat. 110; see Pet. Br. 29 & n.7. In addition to authorizing review of "conclusion[s] of law" and "mixed question[s] of law and fact," that language permitted courts to disregard factual findings not "supported by substantial evidence," *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 490-491 (1937)—which no one contends would be permissible under Section 1252(a)(2)(D).

Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373 (1941), is likewise inapposite. In two prior decisions, the Court had explained that a "stipulation" as to "the legal effect of admitted facts" is "obviously inoperative," "since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917); see *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law."). *Nelson* cited those prior decisions in stating that "[t]he effect of admitted

facts is a question of law." 312 U.S. at 376. That statement thus is properly understood as simply reaffirming the unremarkable proposition that, while parties can stipulate to the facts, they cannot stipulate to the law, which is for the Court to decide. That general jurisprudential point has no bearing on the correct interpretation of the statutory phrase "questions of law."

The qualified-immunity decisions on which petitioners rely (Br. 30) are also not relevant. Those decisions use the term "legal question" "in the sense in which the term was used in *Mitchell*, the decision that first held that a pretrial order rejecting a claim of qualified immunity is immediately appealable." *Plumhoff* v. *Rickard*, 572 U.S. 765, 772-773 (2014); see *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). And *Mitchell* used the term to distinguish the immediately appealable legal issue of "'whether the facts alleged * * * support a claim of violation of clearly established law'" from the non-appealable evidentiary issue of "what factual [disputes] are 'genuine.'" *Johnson* v. *Jones*, 515 U.S. 304, 313 (1995) (citations omitted). That distinction has no bearing on the meaning of the statutory language here.

Nor do petitioners' remaining citations support their textual argument. This Court's decisions in *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944), and *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963), stand merely for the proposition that mixed questions are different from questions of fact—a proposition no one disputes. The principle that "[e]very application of a text to particular circumstances entails interpretation," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012) (emphasis omitted), establishes merely that every mixed question has a legal component—namely, identification of the correct

"legal test." *Lakeridge*, 138 S. Ct. at 965. And when petitioners' dictionary definition of "question of law" (Br. 28) is quoted in full, it is clear that it concerns the line between issues for the judge and issues for the jury—a line not relevant here. See *Black's Law Dictionary* 1503 (11th ed. 2019) (providing, as one of several definitions of "question of law," "[*a*]*n issue to be decided by the judge*, concerning the application or interpretation of the law <a jury cannot decide questions of law, which are reserved for the court>") (emphasis added).

b. Petitioners' reliance (Br. 33-34) on the history of Section 1252(a)(2)(D) is also misplaced. Petitioners contend that, when the relevant Conference Report stated that a court would have jurisdiction to review the "legal elements" of a "mixed question," Conf. Report 175, it meant that a court would be able to review any "application of law to settled fact," Pet. Br. 33. A mixed question, however, has three "component parts": law, fact, and the application of the one to the other. *Lakeridge*, 138 S. Ct. at 965; see *id.* at 965-966. The Conference Report's use of the phrase "legal elements" refers only to the first, purely legal part. Conf. Report 175. The Report itself makes that clear just a few sentences earlier, where it explains that the statute's meaning would be the same if it referred to "pure" questions of law and that "a 'question of law' is a question regarding the construction of a statute." *Ibid.* The Report's explanation that "pure" was deleted only because it was "superfluous," *ibid.*, also defeats petitioners' attempt (Br. 33-34) to attribute substantive meaning to that change.

At a minimum, the Conference Report makes clear that the phrase "questions of law" does not encompass *all* applications of law to fact. The Report's statement

that a "mixed question of law and fact" is reviewable only "to the extent there are legal elements" indicates that any application of law to fact that entails primarily factual work would be unreviewable. Conf. Report 175. After all, if the "application" component of a mixed question were primarily factual, one would be hard-pressed to describe it as a "legal element[]," *ibid.*

c. Petitioners' purpose-based arguments (Br. 31-38) fare no better.

i. Petitioners acknowledge (Br. 31) that Congress enacted Section 1252(a)(2)(D) in response to *St. Cyr*. They contend (Br. 32), however, that Congress did so on the understanding that "*St. Cyr* identified the application of law to fact as one principal role of the writ of habeas corpus." The basis for that contention is a single sentence in *St. Cyr*, which stated that issuance of the writ historically "encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." 533 U.S. at 302.

But "application" in that sentence does not refer to the application of law to fact. Rather, it refers to the purely legal question of a statute's coverage or scope (*i.e.*, its application). Indeed, earlier in the same opinion, the Court itself had framed the "pure question of law" at the heart of the case as one of statutory application, *St. Cyr*, 533 U.S. at 298: whether "the restrictions on discretionary relief from deportation contained in the 1996 statutes * * * *apply* to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment," *id.* at 293 (emphasis added); see also, *e.g.*, *Seale*, 558 U.S. at 985 (Stevens, J., respecting the dismissal of the certified question) (identifying the "pure question of law" as "what statute of limitations *applies* to a prosecution under 18 U.S.C.

§ 1201 commenced in 2007 for a kidnaping offense that occurred in 1964") (emphasis added).[2] That is presumably the type of question the Court had in mind when it referred later in its opinion to the "application or interpretation of statutes." *St. Cyr*, 533 U.S. at 302; see *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (quoting the same).

Moreover, each of the decisions the Court cited in the footnote accompanying that sentence appears, like *St. Cyr* itself, to have involved a purely legal question regarding a statute's coverage or scope. *St. Cyr*, 533 U.S. at 302 & n.18; see *Hollingshead's Case*, 91 Eng. Rep. 307, 307 (K.B. 1702) (interpreting "the words of the statute"); *King* v. *Nathan*, 93 Eng. Rep. 914 (K.B. 1730) (interpreting "the words of the Act"); *United States* v. *Bainbridge*, 24 F. Cas. 946, 951 (C.C.D. Mass. 1816) (No. 14,497) (addressing "whether the laws of the United States authorized the enlistment of minors into the navy, without the consent of their fathers"); *Ex parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558). *Ex Parte Randolph*, for example, involved the purely legal question: "To what persons does the word officer, as used in [the statute], *apply*?" 20 F. Cas. at 255 (Marshall, C. J., on circuit) (emphasis added). And when the Court in *St. Cyr* summarized the historical evidence three paragraphs later, it referred only to "support [for] the proposition that *pure* questions of law

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[2] Petitioners themselves use "application" to refer to the purely legal question of a statute's coverage or scope. See Pet. Br. 52 ("If the Court addresses all of the *applications* of the Saving Clause, the Court should hold that, when historical facts are undisputed, the legal significance of those facts is a 'question[] of law.'") (emphasis added; brackets in original).

* * * could have been answered in 1789" by a habeas court. 533 U.S. at 305 (emphasis added).

In any event, *St. Cyr* references "*errors of law*, including the erroneous application or interpretation of statutes." 533 U.S. at 302 (emphasis added). Even if that language could be read to encompass some errors in the application of law to fact, it cannot reasonably be read to encompass such errors that are primarily factual.

ii. Petitioners also rely (Br. 34-38) on other decisions, besides *St. Cyr*, in an effort to show that the scope of habeas in 1789 included review of mixed questions. Petitioners, however, do not challenge the constitutionality of Section 1252(a)(2)(D) under the Suspension Clause; nor do they squarely invoke the canon of constitutional avoidance. Absent any constitutional issue, the cases petitioners cite are relevant only insofar as they shed light on Congress's "purpose." Pet. Br. 31. And there is no indication that Congress was actually familiar with the details of those cases when it enacted Section 1252(a)(2)(D). Although Congress sought to "permit judicial review over those issues that were historically reviewable on habeas," Conf. Report 175, the Conference Report did not cite any research Congress or its committees had conducted into what was historically reviewable, see *id.* at 172-176. Rather, it relied on this Court's understanding of the historical evidence in *St. Cyr*. *See id.* at 173 (describing *St. Cyr* as concerned about the need for a judicial forum for "pure questions of law"); *id.* at 175 (describing the "issues that were historically reviewable" as "constitutional and statutory-construction questions"). This Court therefore need not go beyond *St. Cyr* to discern Congress's purpose in enacting Section 1252(a)(2)(D). Because *St. Cyr* indicated

that judicial review of constitutional claims and pure questions of law would be an adequate substitute for habeas jurisdiction to review a final removal order entered under 8 U.S.C. 1229a, that is presumably the scope of review Congress sought to provide. See Conf. Report 175; pp. 27-31, *supra*.

In any event, the cases petitioners cite do not establish that the claims they assert here—claims filed by aliens who have already departed the United States, challenging the denial of equitable tolling with respect to a time limit for filing a motion to reopen their removal proceedings—were historically reviewable in habeas. Indeed, many of the habeas cases petitioners cite arose in contexts far removed from the type of proceedings and relief sought here. See *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) ("foreigner" "kept in custody" "against her consent"); *King* v. *Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761) (woman confined to a "private mad-house"); *Richard Good's Case*, 96 Eng. Rep. 137, 137 (K.B. 1760) ("ship-carpenter" "impressed to serve as a mariner"); *King of the Earl of Ailsbury*, 90 Eng. Rep. 567, 567 (K.B. 1702) (bail for a prisoner "committed for treason"); *Archer's Case*, 91 Eng. Rep. 1348, 1348 (K.B. 1701) (daughter abused by her father). Although those cases show the breadth of the subject matter historically covered by habeas, see *St. Cyr*, 533 U.S. at 302-303, they do not shed much light on the scope of review in cases such as petitioners'. Nor does *King* v. *Delaval*, 97 Eng. Rep. 913 (K.B. 1763), shed any light; the decision in that case on which petitioners rely (Br. 35) was issued after habeas had already been granted to free the victim from the custody of private individuals, 97 Eng. Rep. at 914, and the decision concerned a separate issue of the sufficiency of "a motion

for an information" against those individuals for "conspiracy," *id.* at 915.

Moreover, most of the cases petitioners cite *did* involve what appear to be purely legal questions of statutory interpretation. See *Delgadillo* v. *Carmichael*, 332 U.S. 388, 390 (1947) (interpreting "'entry' within the meaning of the Act"); *Bridges* v. *Wixon*, 326 U.S. 135, 143 (1945) (interpreting "the meaning of 'affiliation' as used in the statute"); *Hansen* v. *Haff*, 291 U.S. 559, 562 (1934) (interpreting the meaning of "any other immoral purpose" in the statute); *Ex parte Randolph*, 20 F. Cas. at 255 (statute applies to "regularly appointed officers who are required to give official bonds"); *King* v. *Pedley*, 168 Eng. Rep. 265, 265-266 (K.B. 1784) (statute did not authorize bankruptcy commissioners to commit a bankrupt to prison for answers they viewed as "satisfactory"); *King* v. *Rudd*, 98 Eng. Rep. 1114, 1116 (K.B. 1775) (statutes were "confined" to "particular offences only, of which forgery is not one"); *Nathan*, 93 Eng. Rep. at 914 ("the words of the Act" required that interrogatories be given to the bankrupt before he is examined); *King* v. *Hawkins*, 92 Eng. Rep. 849, 849 (K.B. 1715) ("taking away a deer, tho' not kill'd, is within the Act, and it cannot receive that construction of being taken in toils, for it is taking away quite"); *Hollingshead's Case*, 91 Eng. Rep. at 307 ("the words of the statute" invalidated bankruptcy commissioners' warrant); *Clapham's Case*, 79 Eng. Rep. 669, 670 (K.B. 1627) ("proceedings were * * * not warranted by the statute"); *Gardener's Case*, 78 Eng. Rep. 1048, 1048 (K.B. 1600) ("a dagg was an hand-gun within the statute").[3]

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[3] Petitioners' reliance (Br. 37) on this Court's decisions "evaluating habeas corpus claims in immigration matters" is misplaced for the additional reason that none of those decisions relied specifically

The courts decided those cases on the basis of their statutory interpretation and the facts of the case. Similarly, under the INA, if a court of appeals were to decide a question of law in an alien's favor under Section 1252(a)(2)(D), the alien would likewise receive the benefit of that statutory interpretation or comparable legal ruling, in the particular facts of his case, on remand to the agency. The cases petitioners cite involving purely legal questions therefore do not cast doubt on the adequacy of the procedure Congress enacted as a substitute for habeas jurisdiction—let alone establish that Congress intended to permit judicial review of mixed questions under Section 1252(a)(2)(D).

d. Petitioners' attempt (Br. 19-22, 43-46) to find support in two canons of statutory construction likewise fails. First, petitioners invoke the "strong presumption that Congress intends judicial review of administrative action." Pet. Br. 19 (citation omitted). But that presumption "may be overcome by clear and convincing indications, drawn from specific language, specific legislative history, and inferences of intent drawn from the statutory scheme as a whole, that Congress intended to bar review." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2140 (2016) (citation and internal quotation marks omitted). That standard is met here by Congress's express and categorical preclusion of review in Section 1252(a)(2)(C), subject only to the precisely drawn and narrow exception for "questions of law" (and "constitutional claims") in Section 1252(a)(2)(D), as well as by

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on the Suspension Clause. See *St. Cyr*, 533 U.S. at 339 (Scalia, J., dissenting) (explaining that such decisions "pertain[] not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter").

Section 1252(a)(2)(D)'s context and history. See pp. 19-38, *supra*.

Second, petitioners invoke the "rule favoring clear boundaries in the interpretation of jurisdictional statutes." Pet. Br. 21 (quoting *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1131 (2015)). But interpreting "questions of law" to reach "questions of law only, and not questions of fact, or of mixed law and fact," *Chicago, Burlington & Quincy Ry.*, 205 U.S. at 452 (citation omitted), best respects that rule. The line dividing purely legal questions from all others is a clear boundary. See *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015) ("Courts of appeals have long found it possible to separate factual from legal matters."). And it is a familiar boundary, which this Court has long enforced under Section 1254(2), see pp. 22-24, *supra*, and which—contrary to petitioners' contention (Br. 39-40)—several circuits are already enforcing under Section 1252(a)(2)(D), see *Khozhaynova* v. *Holder*, 641 F.3d 187, 192 (6th Cir. 2011); *Viracacha* v. *Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008); *Shepherd* v. *Holder*, 678 F.3d 1171, 1179 (10th Cir. 2012).

Petitioners would draw the boundary elsewhere: between questions of law and mixed questions, on the one hand, and questions of fact, on the other. As this Court has observed, however, "it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact." *Williams*, 529 U.S. at 408; see *Wainwright*, 469 U.S. at 429 (explaining that "[i]t will not always be easy to separate" the two). These cases illustrate that difficulty. Under petitioners' interpretation, a court would have to decide whether reasonable diligence in this context is a primarily factual application of law or a question of fact (as the Fifth Circuit labeled it,

Penalva, 884 F.3d at 525)—an inquiry reminiscent of the one courts once undertook in distinguishing "ultimate" facts from "subsidiary" ones. *Pullman-Standard*, 456 U.S. at 287. If "questions of law" is construed to encompass only purely legal questions, by contrast, whether a question was purely factual, as opposed to only primarily so, would not matter; either way, it would not be a "question of law."

e. Finally, petitioners express concern (Br. 41) that limiting judicial review to purely legal errors would allow the Board to evade review simply by "typ[ing] into its opinions a proper statement of law." A court of appeals, however, would have jurisdiction to review a claim that the Board actually used the wrong legal standard. Indeed, courts have reviewed such claims as "questions of law" under Section 1252(a)(2)(D). See, *e.g.*, *Ovalles* Pet. App. 4a; *Iliev* v. *Holder*, 613 F.3d 1019, 1022, 1025-1026 (10th Cir. 2010) (Gorsuch, J.).

By contrast, petitioners' interpretation would have the consequence of permitting criminal aliens to seek judicial review of claims alleging merely that the Board reached the wrong result despite applying the correct legal standard. Indeed, under petitioners' interpretation, criminal aliens would be permitted to pursue all of the same claims as noncriminal aliens, with the only difference being that criminal aliens would not be able to challenge the Board's purely factual findings, 8 U.S.C. 1252(a)(2)(C)-(D), whereas noncriminal aliens would be able to challenge them under the highly deferential substantial-evidence standard, 8 U.S.C. 1252(b)(4)(B). If that narrow difference were all that Congress intended, there would have been a more straightforward way of achieving it than by eliminating judicial review of any final order of removal against a criminal alien,

8 U.S.C. 1252(a)(2)(C), and then restoring judicial review only for "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D).

2. Petitioners' contention that the mixed question at issue here is primarily legal lacks merit

Petitioners contend (Br. 46-52) that, even if the phrase "questions of law" does not encompass all mixed questions, it covers at least the mixed question at issue here because, petitioners assert, whether an alien exercised reasonable diligence for equitable-tolling purposes is a primarily legal issue. That contention is mistaken.

a. Petitioners err in asserting (Br. 46) that this Court "has long understood that equitable tolling is ultimately a question of law." *Bank of Columbia* v. *Lawrence*, 26 U.S. (1 Pet.) 578 (1828), on which petitioners principally rely (Br. 46-47), did not involve equitable tolling. Rather, that case involved the "due diligence" requirement of a doctrine governing notice of nonpayment to the endorser of a promissory note. *Bank of Columbia*, 26 U.S. (1 Pet.) at 582. Moreover, when the Court in that case stated that "what shall constitute due diligence is a question of law," the Court meant merely that the question is one for the judge, not the jury. *Id.* at 583; see *id.* at 583-584 (proceeding to decide the question and to reverse the jury's verdict). The Court was thus using the phrase "question of law" in a sense different than Section 1252(a)(2)(D).

Downey v. *Hicks*, 55 U.S. (14 How.) 240 (1853), likewise did not involve equitable tolling. And in any event, the sentence about reasonable diligence on which petitioners rely (Br. 47) comes not from the Court's opinion, but rather from the summary of the parties' arguments preceding the opinion. 55 U.S. (14 How.) at 244.

As for the decisions petitioners cite (Br. 47) that do involve equitable tolling, none describes a determination regarding reasonable diligence as a question of law. And contrary to petitioners' contention (*ibid.*), how this Court has conducted the inquiry only confirms that it entails primarily factual work. See *Holland*, 560 U.S. at 653; *Pace*, 544 U.S. at 418-419.

b. Citing decisions mainly from the Sixth, Ninth, and Eleventh Circuits, petitioners argue (Br. 47-50 & nn.25-27) that the courts of appeals "often" review equitable-tolling determinations de novo. The decisions petitioners cite, however, arise in various other contexts not at issue here. When it comes to the determination that is at issue here—a determination by the Board that an alien has not exercised reasonable diligence for purposes of equitable tolling of the motion-to-reopen deadline—courts apply a deferential abuse-of-discretion standard, when Section 1252(a)(2)(C) does not preclude review. See pp. 36-37, *supra*. And even in the other contexts petitioners identify, courts often apply a deferential standard. See, *e.g.*, *A.Q.C. ex rel. Castillo* v. *United States*, 656 F.3d 135, 144 (2d Cir. 2011) (reviewing reasonable-diligence determination under the Federal Tort Claims Act for abuse of discretion); *San Martin* v. *McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011) (reviewing diligence in the habeas context for clear error). Petitioners thus err in contending that there is a "'historical tradition' of treating equitable tolling as a legal issue." Pet. Br. 51 (citation omitted).

Petitioners also cite (Br. 48) then-Judge Alito's opinion for the Third Circuit in *Brinson* v. *Vaughn*, 398 F.3d 225 (2005). That opinion, however, did not address the standard for reviewing a reasonable-diligence determination—the only determination at issue here.

And although the opinion expressed the view that a determination concerning the existence of extraordinary circumstances should be reviewed de novo, it did not resolve the question. *Id.* at 231.

c. Finally, petitioners contend that treating a reasonable-diligence inquiry as a question of law would "produce greater uniformity." Pet. Br. 51 (citation omitted). But as explained above, reasonable diligence requires a fact-intensive inquiry that turns on circumstances that often resist useful generalization. See pp. 34-38, *supra*. Accordingly, appellate review "will not much clarify legal principles or provide guidance to other courts [or the agency] resolving other disputes." *Lakeridge*, 138 S. Ct. at 968. In any event, greater uniformity can be achieved through judicial review in cases not involving criminal aliens. Section 1252(a)(2)(C) does not limit judicial review of the Board's equitable-tolling rulings in those cases. See pp. 36-37, *supra*.

Contrary to petitioners' assertion (Br. 51), there is nothing inconsistent in the Board's decisions in their own cases. Guerrero-Lasprilla filed his motion to reopen a little over a month following *Lugo-Resendez* v. *Lynch*, 831 F.3d 337 (5th Cir. 2016), see p. 12, *supra*, and the Board determined that he had not exercised reasonable diligence because "nothing prohibited [him] from filing a motion to reopen before *Lugo-Resendez*." *Guerrero-Lasprilla* Pet. App. 12a. By contrast, Ovalles filed his motion to reopen approximately eight months following *Lugo-Resendez*. *Ovalles* Pet. App. 6a. He therefore had not exercised reasonable diligence, *regardless of whether* he was prohibited from filing a motion to reopen before *Lugo-Resendez*. See *ibid.* Thus,

although the Board addressed whether anything prohibited the alien from filing before *Lugo-Resendez* in *Guerrero-Lasprilla*, it had no need to do so in *Ovalles*.

D. Petitioners' Case-Specific Grounds For Resolving These Cases Are Not Properly Before The Court

Petitioners contend that this Court need not "address the full reach of Section 1252(a)(2)(D)" because there is a "narrow[er]" ground on which to resolve these cases, Pet. Br. 2—namely, that the Fifth Circuit erred in not exercising jurisdiction because petitioners' challenges are to "the governing legal standard" (a pure question of law), not the application of a legal standard to particular facts (a mixed question), *id.* at 22 (emphasis omitted). That case-specific ground, however, is not properly before this Court and does not warrant review in either case.

1. In *Ovalles*, the Fifth Circuit reviewed—and rejected—Ovalles's contention that the Board "applied the wrong legal standard for tolling," finding "[n]othing in the record [that] indicates that the [Board] applied an incorrect standard." *Ovalles* Pet. App. 4a. The Fifth Circuit noted Ovalles's separate contention that the Board "incorrectly decided the reasonable diligence question." *Ibid.* But that contention "amount[ed] to no more than his disagreement with the application of the equitable tolling standard," and the court found that it raised "an unreviewable fact question." *Ibid.*

Although the Fifth Circuit rejected one contention on the merits and found the other unreviewable, it did not state that Ovalles's petition for review was denied in part and dismissed in part, but rather stated only that the "petition is dismissed for lack of jurisdiction." *Ovalles* Pet. App. 4a (capitalization omitted). Nevertheless, the opinion makes clear that the court reviewed

Ovalles's challenge to the legal standard and rejected it on the merits. *Ibid.*

Ovalles thus errs in asserting (Br. 22) that "the court of appeals should have exercised jurisdiction over" his contention that the Board applied the wrong legal standard. The court did exercise jurisdiction over that contention and rejected it. In his certiorari petition, Ovalles did not challenge that rejection. Instead, he sought review of the distinct "jurisdictional" question "whether a court of appeals can review the application of a legal standard to an undisputed set of facts in light of the criminal alien bar." *Ovalles* Pet. 14.

Ovalles's contention that the Board applied the wrong legal standard therefore is not properly before this Court. And even if it were, the issue would not be whether the Fifth Circuit should have exercised jurisdiction over it, but rather whether the court erred in rejecting it on the merits—a case-specific question implicating no conflict.

2. In *Guerrero-Lasprilla*, the Fifth Circuit dismissed his petition for review on the ground that the court "lack[ed] jurisdiction to consider the factual question of whether he acted with the requisite diligence to warrant equitable tolling." *Guerrero-Lasprilla* Pet. App. 4a. In his certiorari petition, Guerrero-Lasprilla noted that, in the Fifth Circuit, he had challenged the Board's "legal assessment" of whether "case law prevented him from filing his motion [to reopen] earlier." *Guerrero-Lasprilla* Pet. 14; see *ibid.* (describing the Board's "legal reasoning" as presenting a "pure question of law"). He did not, however, frame his challenge as one about the correct legal standard. Rather, he argued that his case "presents the perfect example in

showing that review of equitable tolling is a mixed question involving law and fact." *Id.* at 8.

Because Guerrero-Lasprilla framed his case at the petition stage as one involving a mixed question, his contention (Br. 2, 22) that he is challenging the governing legal standard is not properly before this Court. And recharacterized in that way, his case would not implicate the conflict that he asked this Court to resolve in his certiorari petition. See Pet. Br. 25 (acknowledging that "the Fourth Circuit has held that the Saving Clause provides jurisdiction to consider these claims"); *Lawrence*, 826 F.3d at 203 (recognizing that "[w]hether the Board applied the correct standard is a question of law"); *Penalva*, 884 F.3d at 525 (emphasizing that the criminal alien had "not allege[d] that the [Board] applied the wrong legal standard").

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of

witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the

reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or

(2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a

State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for

relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies

or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

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[1] So in original.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

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[2] So in original. A closing parenthesis probably should appear.

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

2. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an

order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), 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 section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title

28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court

may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitu-

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[1] See References in Text note below.

tional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney

General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the

alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.