Nos. 18-776, 18-1015

In the Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

RUBEN OVALLES,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY

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REPLY BRIEF FOR PETITIONERS

In providing judicial review over "questions of law," Congress empowered federal courts to evaluate the agency's legal work, as distinct from its factual findings. The application of a legal standard to settled historical facts is legal work and thus reviewable.

The government's contrary construction of Section 1252(a)(2)(D) would render judicial review a mirage. If courts are forbidden to evaluate the "application of a legal standard" (Gov't Br. 16), then all a court may do is address whether the agency identified the proper legal boilerplate. Whether the agency actually used that standard in practice would be unreviewable. That is judicial review in form, but not substance. Even the government appears unwilling to commit to the implications of its argument.

The government's back-up position is that, before a court may assert Section 1252(a)(2)(D) jurisdiction, it must first apply the more-fact-or-more-law filter. For good reason, the Court has called this analysis "difficult," "vexing," "elusive," and "slippery." See Pet'r Br. 43-44. This framework (often referenced in the briefs by a citation to *Lakeridge*) is a mismatch for delineating the scope of judicial review. Rather, courts are equipped to identify and address legal questions; they do so daily in common settings, like Rule 12(b)(6) motions. Jurisdictional rules, moreover, should be clear and easy to apply. But the government's argument would obligate courts to make fact-law distinctions for countless different issues, creating endless confusion.

Judicial review is a crucial check on agency power. See Pet'r Br. 19-21. If the text of Section 1252(a)(2)(D) can sensibly be read to authorize review, it must be. Properly construed, Section 1252(a)(2)(D) provides judicial review for petitioners' claims.

A. The government would eviscerate meaningful judicial review.

1. The government asserts that a court cannot review the "application of a legal standard to the particular facts of a case." Gov't Br. 16. If that were so, courts could review only whether the Board intoned the right words when stating the legal standard, and not whether the Board actually *used* the proper standard to resolve a case.

Likely recognizing that this result is untenable, the government curiously agrees that courts should "have jurisdiction to review a claim that the Board actually used the wrong legal standard." Gov't Br. 49. The government fails to explain how this squares with its principal argument. It does not. If review extends beyond whether the Board has correctly stated the legal rule, a court is necessarily reviewing whether the agency has properly *applied* the (correctly-stated) rule to particular facts.

This approach is well-recognized in the courts of appeals: "Common sense as well as the weight of authority requires that we determine whether the [Board] *applied* the correct legal standard, not simply whether it *stated* the correct legal standard." *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 235 (5th Cir. 2009) (quoting *Kabba* v. *Mukasey*, 530 F.3d 1239, 1245 (10th Cir. 2008)). See also Pet'r Br. 39-42.

If the government means what it says, it has given up the game, conceding that courts *may* review the application of law to fact.

2. The government's admission, moreover, guts its separate assertion that "[t]he line dividing purely legal questions from all others is a clear boundary." Gov't Br. 48. Having recognized that courts may review more than whether the Board wrote down the correct legal

rule, the government cannot identify the boundary to its approach.

Our construction, by contrast, establishes a clear rule: When the Saving Clause applies, a court may not review the agency's findings of historical fact, but it may address the legal significance of those historical facts. This approach has proved workable in several contexts (see Pet'r Br. 38-39), including to resolve Rule 12(b)(6) motions to dismiss (see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 674 (2009)).

3. As we demonstrated (Pet'r Br. 39-42), *every* circuit has exercised jurisdiction via the Saving Clause to review the application of law to fact. This is not, as the government implies (at 18-19), a Ninth Circuit idiosyncrasy. The government's off-hand response to circuit practice (at 48) pales in the face of the numerous decisions we proffered.

At bottom, circuits have used the rule we urge for years, time shows it eminently workable, and it accords with the statute's text and purpose. There is no reason for the Court to upend this settled law.

B. The Saving Clause provides judicial review over the application of law to settled historical fact.

1. *The statutory text accommodates application of law to fact.*

a. When an agency applies law to fact, it engages in legal work. The legal aspects of the agency's decision are thus reviewable as "questions of law" within the meaning of the Saving Clause.

"Every application of a text to particular circumstances entails interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012). That follows, Justice Scalia explained (*ibid.*), from *Marbury* v. *Madison*: "Those who

apply the rule to particular cases, must of necessity expound and interpret that rule." 5 U.S. 137, 177 (1803).

The government responds (at 40) that this principle "merely" identifies "that every mixed question has a legal component—namely, identification of the correct 'legal test.'" If by "merely" the government means "only," it is flatly wrong. When a court does legal work, identifying the correct legal test is the first step. But, to finish its legal work, it must *apply* a legal rule to "particular circumstances," and doing that, as *Marbury* understood, requires *interpreting* the legal rule. Application is interpretation.

A "question of law" thus includes the "application or interpretation of the law." *Question of Law*, Black's Law Dictionary (8th ed. 2004). The government's observation (at 41) that *Black's* also notes that a "question of law" is an "issue to be decided by the judge" is beside the point.

The government (at 40) talks past the qualified immunity cases. Interlocutory appeals are expressly limited to "question[s] of law," which—the Court has repeatedly held—includes application of law to fact. Pet'r Br. 30. This is yet more confirmation that the application of law to fact is legal work. The government responds that this framework "distinguish[es]" issues that are "immediately appealable." Gov't Br. 40. That is true, but entirely non-responsive to our point.

The government also has no answer to *Townsend* v. *Sain*, 372 U.S. 293 (1963). The Court there held that, because a federal court may not "defer" to a state court's "findings of law," the court must "*apply* the applicable federal law to the state court fact findings independently." *Id*. at 318 (emphasis added). That is, the task of application is legal.

b. The government's principal argument is that, in other contexts, the Court (not Congress) has identified a three-part "typology"—legal questions, factual questions, and mixed questions. Gov't Br. 19-21. The government concludes that, by not mentioning the latter two, Congress excluded both from the Saving Clause. *Id*. at 21.

That argument is disproved by Congress's frequent use of a *two*-part "typology"—legal questions and factual questions—in ways that unmistakably encompass mixed questions.

The REAL ID Act alone makes the point. Section 106(a)(2)—a close neighbor to Section 106(a)(1), which enacted the Saving Clause—provides that, save for enumerated exceptions, "no court shall have jurisdiction, by habeas corpus * * *, to review * * * questions of law or fact." 8 U.S.C. § 1252(b)(9). This statutory provision (called the "zipper clause") consolidates all issues arising in removal cases. *INS* v. *St. Cyr*, 533 U.S. 289, 313 (2001). It surely covers mixed questions—or else a litigant could escape Section 1252 by asserting a mixed question in habeas.

In the REAL ID Act, Congress thus covered the waterfront through reference to two categories—legal questions and factual questions—not three. And this is hardly unique. Both inside[1] and outside[2] immigration law, Congress uses these two categories to cover all issues that may arise, including mixed questions.

c. The government asserts (at 31-34, 41-42) that "questions of law" cannot incorporate mixed questions

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[1] 8 U.S.C. § 1535(a)(3) (addressing "questions of law" and "a finding of fact"—not mixed questions).

[2] See, *e.g.*, 28 U.S.C. § 1332(d)(11)(B)(i) ("questions of law or fact"); 50 U.S.C. § 4109.

that are, on balance, more heavily factual. But questions are "mixed" precisely because they require application of a legal standard. The "application" part is a *legal* task, no matter the balance between the components of the inquiry. Indeed, it is one that the Court has described as "*purely* legal." *Mitchell* v. *Forsyth*, 472 U.S. 511, 529 n.9 (1985). The question is "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982).

2. Effectuating the Saving Clause's manifest purpose requires our construction.

The government agrees (at 27-29, 42) that, to "provide an adequate substitute," Congress sought to retain the scope of judicial review then available in habeas. H.R. Conf. Rep. 109-72, at 175. See Pet'r Br. 31-38. That purpose is accomplished only if the Saving Clause reaches the application of law to fact.

a. The government disregards our first argument—the state of the law in 2005. See Pet'r Br. 31-33. In 2003 and 2004, immediately following *St. Cyr*, the Second, Third, Ninth, and Eleventh Circuits each held that individuals may challenge the application of law to fact in district court habeas proceedings. *Ibid*.

Through the Saving Clause, Congress did not "change the scope of review that criminal aliens currently receive." H.R. Conf. Rep. 109-72, at 175. The existing law—including the unanimous views among the circuits as to the reviewability of mixed questions—was intentionally maintained.

And, as all agree, Congress sought to end district court habeas actions challenging removal orders and "channel[] review to the courts of appeals." H.R. Conf. Rep. 109-72, at 174. To do so, the Saving Clause *had* to create a vehicle for challenges to the application of law

to fact, or else habeas jurisdiction would have remained available for mixed questions.

As the government acknowledges, the Court assumes that, "'when Congress enacts statutes, it is aware of relevant judicial precedent.'" Gov't Br. 23 (quoting *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010)). Here, however, the Court need not assume: The Conference Report states that Congress evaluated what "every circuit court has held" with respect to what "courts of appeals retain jurisdiction to review" as well as what issues "are reviewable only in the district courts" in the period "after St. Cyr." H.R. Conf. Rep. 109-72, at 174.

b. The enactment history further confirms our construction. Earlier drafts of the legislation included the phrase "pure questions of law." Pet'r Br. 33. After the ACLU objected to the term "pure," Congress removed it. *Id*. at 33 n.9. That Congress first used—but then rejected—the term "pure" is no accident. *Id*. at 34.

The best the government offers (at 26, 41) is a snippet from the Conference Report asserting that the term "pure" was superfluous. See H.R. Conf. Rep. 109-72, at 175. This is unpersuasive.

First, what Congress actually *did*—remove the word "pure" from earlier drafts—is far more probative than a legislative report. See *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). If the language were meaningless, it is unlikely that the ACLU would have objected to it, or that Congress would have excised it.

Second, the government is wrong on its own terms. The Conference Report confirms that "mixed question[s]" *are* within the Saving Clause: "When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements."

H.R. Conf. Rep. 109-72, at 175. The government responds (at 41) with its three-part typology argument, which we have debunked. See page 5, *supra*. Likewise, the government's focus on whether a question entails "primarily factual work" is misplaced. See pages 21-22, *infra*.

Third, the Report also describes what is outside the Saving Clause: "non-constitutional, non-legal claims." H.R. Conf. Rep. 109-72, at 175. Because mixed claims have, by definition, a factual *and* a legal component—that is why they are called mixed questions—they cannot be described as "non-legal claims."

c. *St. Cyr* held that habeas extends to "errors of law, including the *erroneous application* or interpretation of statutes." 533 U.S. at 302 (emphasis added). The government responds (at 42) that "'application' in that sentence does not refer to the application of law to fact," but rather the "purely legal question of a statute's coverage or scope." That is incorrect. A statute's "interpretation" refers to its "coverage or scope." An "erroneous application" of a statute, by contrast, refers to its application to specific facts. The lower courts unanimously understood *St. Cyr* this way. See Pet'r Br. 31-33.[3]

St. Cyr also held that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" 533 U.S. at 301. In 1789, habeas courts reviewed the application of law to fact. Pet'r Br. 34-38. See also Habeas Scholars Br. 10-14. Leading evidence includes:

- *King* v. *Rudd*, 98 Eng. Rep. 1114, 1117 (K.B. 1775): Lord Mansfield, after identifying "the

[3] *St. Cyr* referenced a "pure question of law" because that was the litigant's specific challenge in that case. 533 U.S. at 298.

general rules," proceeded to address how "the present case is applicable to them."

- *King* v. *Pedley*, 168 Eng. Rep. 265, 265-266 (K.B. 1784): The court applied the legal rule to the facts, concluding that the individual had "answered fully."
- *King* v. *Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761): Lord Mansfield applied the law to the facts, that the restrained individual was "very sensible, and very cool and dispassionate."

The government (at 45-46) buries these decisions (and several more) in a string cite. Its response is that, in these cases, the King's Bench identified the legal rule at issue. True, but the critical point is that the court proceeded to *apply* the rule to specific facts. In 1789, there is no serious doubt that habeas courts applied law to fact. To this, the government has no response.

What is more, a habeas court does not merely announce general propositions of law, it also *orders individuals released* if their detention violates those principles. See*, e.g.*, Richard H. Fallon et al., *Hart & Wechsler's the Federal Courts and the Federal System* 1193 (7th ed. 2015) ("If * * * justification [for detention] cannot be made, the court will order the discharge of the petitioner."). That function cannot be undertaken without applying law to fact.

Contrary to the government's assertion (at 44), our brief specifically incorporated "the same constitutional reasons identified by the Court in *St. Cyr*" (Pet'r Br. 34), which led to the constitutional avoidance holding. To be sure, petitioners—presently located outside the United States—do not have the same claim to constitutional habeas protections as most individuals who invoke the Saving Clause. But, because the Saving

Clause is designed to (and indeed must) be coextensive with the habeas right identified in *St. Cyr*, it is necessarily informed by the scope of the Suspension Clause. In fact, most Saving Clause litigants are in the United States, and thus protected by the Suspension Clause. See, *e.g.*, Pet'r Br. 39-42 (Saving Clause cases); cf. *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) ("[S]tatutory language given a limiting construction in one context must be interpreted consistently in other contexts.").

3. The whole code confirms our reading.

The government's focus (at 21-26) on unrelated statutes is unavailing. Congress has elsewhere used "questions of law" to include mixed questions, the government's interpretive theory has weak inferential value, and its evidence lacks force.

a. Congress has used the term "question of law" to cover mixed questions.

In 46 U.S.C. § 70504(a), Congress provided that, for offenses under the Maritime Drug Law Enforcement Act (MDLEA), "[j]urisdictional issues" would be "determined solely by the trial judge" as "preliminary questions of law." The MDLEA establishes a series of legal rules delineating what vessels are "subject to the jurisdiction of the United States." 46 U.S.C. § 70502(c)(1). To resolve what Congress labeled a "question[] of law," a court will consider, for example, whether a specific vehicle qualifies as "stateless" or whether it "was registered in any nation." *United States* v. *Prado*, 933 F.3d 121, 129-130 (2d Cir. 2019). As used in this statute, "questions of law" *must* include the application of law to fact, or the provision would be unintelligible. This law is especially probative, given that it was enacted by the same Congress as the REAL ID Act. See Pub. L. No. 109-304, § 10(2).

The Judiciary Act of 1789 provides that the "Attorney General shall give his advice and opinion on questions of law when required by the President." 28 U.S.C. § 511. DOJ's Office of Legal Counsel has accordingly advised "on some of the weightiest matters in our public life," from "the president's authority to direct the use of military force without congressional approval" in Libya "to the president's power to institute a blockade of Cuba." *Citizens for Responsibility & Ethics in Washington* v. *United States Dep't of Justice*, 846 F.3d 1235, 1238 (D.C. Cir. 2017) (citing OLC memoranda). Section 511 surely authorizes the Attorney General to apply law to specific facts.

Moreover, if the Court adopted the government's reasoning, it would effectively construe many other statutes. See, *e.g.*, 29 U.S.C. § 210(a); *id.* § 3247(a)(3); 33 U.S.C. § 520; 41 U.S.C. § 7107. And, in so doing, it would overturn existing law. See *Emerald Maint., Inc.* v. *United States*, 925 F.2d 1425, 1428 (Fed. Cir. 1991) (applying law to fact).

b. The premise of the government's argument (at 21)—that *any* statute appearing *anywhere* in the U.S. Code is "context" for understanding the Saving Clause—is dubious. Even within the same statute, "the presumption of consistent usage readily yields to context." *Utility Air Regulatory Grp.* v. *E.P.A.*, 573 U.S. 302, 320 (2014). On "several" occasions, the Court has held that the same language in the same act has different meanings. *Yates* v. *United States*, 574 U.S. 528, 537-538 (2015) (plurality) (identifying examples).

And the government lacks fidelity to its quest for consistent usage. When confronted with the Court's decision in *Bank of Columbia* v. *Lawrence*, 26 U.S. 578 (1828)—see Pet'r Br. 46-47—the government's interest in consistency quickly fades: We are told that *Bank of Columbia* used "the phrase 'question of law' in a sense

different than Section 1252(a)(2)(D)." Gov't Br. 50. The government even resists (at 41) the dictionary definition of "question of law," suggesting perforce that the term has multiple meanings.

c. The government's evidence is not probative, and some supports our position.

i. The government's focus (at 22-24) on 28 U.S.C. § 1254(2) does not move the needle. The MDLEA was contemporaneous with the REAL ID Act. By contrast, in 2005, Section 1254(2) was an anachronism. See *United States* v. *Seale*, 558 U.S. 985, 985 (2009) (Stevens, J.) (last certification in 1981).

In any event, the Court's construction of Section 1254(2) stemmed from its particular purpose—not the statute's text.

Section 1254(2) authorizes the Court to provide "instructions" to a "court of appeals" regarding "any question of law." 28 U.S.C. § 1254(2). The purpose of Section 1254(2) is to aid in "the progress of the cause" proceeding in the lower court, not to resolve "the whole cause." *White* v. *Turk*, 37 U.S. 238, 239 (1838). The Court thus repeatedly explained that a "whole case" cannot "be sent up by certificate." *Chicago, Burlington & Quincy Ry.* v. *Williams*, 205 U.S. 444, 452 (1907). The Court found "a question of mixed law and fact" outside the scope of Section 1254(2) because it would resolve the entire "issue to be determined," effectively fashioning "the final judgment." *Id*. at 453.

Three motivations—none textual—drove this result. The first was constitutional: the Court feared that reaching the final judgment "would, if sanctioned, convert this [C]ourt into one of original jurisdiction in questions of law, instead of being, as the constitution intended it to be, an appellate court to revise the decisions of inferior tribunals." *Jewell* v. *Knight*, 123 U.S.

426, 433 (1887) (quotation omitted). Second, courts sometimes certified questions involving assumed but unestablished facts, inviting the Court to issue "hypothetical and speculative" decisions. *Webster* v. *Cooper*, 51 U.S. 54, 55 (1850). Third, permitting lower courts "to transfer an entire cause * * *[] before a final judgment" would improperly allow the "same case" to "again be brought up after a final decision," with "all the delays and expense incident to a repeated revision of the same cause." *United States* v. *Bailey*, 34 U.S. 267, 273 (1835) (Marshall, C.J.).

These considerations are irrelevant to Section 1252(a)(2)(D).

Section 1254(2) does, however, confirm that efforts to police a fine line between "pure" legal questions and their application are doomed to fail. The government relies (at 22) on *United States* v. *Mayer*, 235 U.S. 55 (1914). Yet, in holding that a writ of prohibition "was the appropriate remedy," the Court applied law to facts, including that the defendant "was still insisting upon his rights as plaintiff in error." *Id*. at 71-72.

Mayer is hardly unique. In scores of certified cases, the Court applied law to fact. See, *e.g.*, *Illinois Cent. R. Co.* v. *Behrens*, 233 U.S. 473, 478 (1914) ("Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute."); *United States* v. *Pridgeon*, 153 U.S. 48, 59 (1894) (examining whether "the indictment" "show[ed] affirmatively that the district court" lacked "jurisdiction of the offense for which Pridgeon was convicted").

ii. AEDPA does not use the term "questions of law" and thus sheds no light on the Saving Clause. See

Gov't Br. 24-25. Our point is that "questions of law" as used here incorporates both interpretation and application. In AEDPA, Congress discussed these constituent elements separately because it assigned different standards of review. That does not undermine the conclusion that "questions of law" encapsulates application of law to fact.

iii. The Veterans' Judicial Review Act (Gov't Br. 25-26) supports our construction. The VJRA provides jurisdiction for "questions of law," and then excludes jurisdiction to review "a factual determination," or "a law * * * as applied to the facts of a particular case." 38 U.S.C. § 7292(d). If the term "questions of law" already excluded the application of law to fact, the specific carve-out for mixed questions would be surplusage. See *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017) (surplusage canon). The VJRA indicates that the term "questions of law" *includes* the application of law to fact—which is why Congress had to specifically exclude it.

Judicial interpretation of the VJRA also confirms the lack of meaningful distinction between *interpreting* and *applying* a legal standard. The Federal Circuit has long held that, "[w]hen * * * the material facts are undisputed 'and the adoption of a particular legal standard would dictate the outcome of a veteran's claim,'" "'the application of law to undisputed fact [is] a question of law.'" *Scott* v. *Wilkie*, 920 F.3d 1375, 1378 (Fed. Cir. 2019).

4. The government's additional contentions lack merit.

The government objects (at 32-33) that our construction could lead to judicial review of decisions committed to agency discretion, in contradiction of 8 U.S.C. § 1252(a)(2)(B). Not so. There is judicial review

of legal questions regarding *eligibility* for discretionary determinations—but not review over the agency's exercise of that discretion. See, *e.g.*, *Iliev* v. *Holder*, 613 F.3d 1019, 1023 (10th Cir. 2010) (Gorsuch, J.). The government's complaint (at 33) that the Ninth Circuit has improperly deemed one question non-discretionary is not at issue here. If the government's contention has merit, the remedy is to correct that misimpression, not to misconstrue Section 1252(a)(2)(D).

Nor is there a standard of review mismatch. See Gov't Br. 34. Factual findings are non-reviewable, and legal determinations are reviewed *de novo*. That is how review presently occurs, in hundreds of cases each year, without issue. See, *e.g.*, Pet'r Br. 39-42.

C. The Court should not require fact-law determinations for the dozens of different questions that arise under Section 1252(a)(2)(D).

1. *The Saving Clause does not require the rough approximation of* Lakeridge.

The Court should not apply the *Lakeridge* framework for two reasons (Pet'r Br. 44-46)—neither of which the government addresses.

First, this framework has not been—and should not be—used for delineating the scope of judicial review.

Throughout the law, courts parse legal issues from factual ones. See Pet'r Br. 38-39. Indeed, courts "have long found it possible to separate factual from legal matters" (*Teva Pharm. USA* v. *Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015))—a proposition the government itself (at 48) invokes.

In some circumstances, however, legal and factual tasks are grouped together in a single issue, and the question is whether the issue is more appropriately al-

located to the judge or jury. *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1680 (2019). In that distinct context, courts assess whether the issue is more factual or more legal on the whole and assign decision-making responsibility for it accordingly. *Ibid*. But the question is which decision-maker should resolve *all* elements of the issue, *both* legal *and* factual. A similar question arises with respect to standards of appellate review: Sometimes district courts are the more appropriate adjudicators than the courts of appeals for certain questions that combine legal and factual work, warranting a deferential standard of review. *Lakeridge*, 138 S. Ct. at 967. In these contexts, asking which aspect of the issue predominates is sensible.

That inquiry is out of place with respect to Section 1252(a)(2)(D). Who is the "better" adjudicator for issues combining legal and factual work is not a question for the courts, as Congress has supplied the answer. Section 1252(a)(2) directs that there is judicial review over the agency's legal work, but no review of the agency's fact-finding. And when issues implicate both kinds of work, courts must simply refrain from review of the factual elements of the issue. As we have said—and the government agrees (at 48)—courts know how to identify and evaluate the legal elements of an issue. *Lakeridge*'s "difficult," "vexing," "elusive," and "slippery" framework—designed to solve a problem not present here—is best left on the shelf.

Lakeridge recognizes that it is not suited to delineate the scope of judicial review. As the Court explained, when an issue leans factual—triggering deferential review—there is still "some role for appellate courts." *Lakeridge*, 138 S. Ct. at 968 n.7. See also Pet'r Br. 44-45. Especially in light of the strong presumption in favor of judicial review of agency action (*id*. at 19-21), the Court should not extend *Lakeridge*, which presupposes

the *existence* of appellate jurisdiction, to this new and different jurisdiction-*stripping* context.

Second, applying *Lakeridge* would gut the predictability essential to jurisdictional statutes. See Pet'r Br. 21-22, 45-46. Mass confusion would result, as all the circuits would have to undertake this vexing more-factual-or-more-legal analysis for dozens of different issues that currently arise under Section 1252(a)(2)(D), including:

- Whether an individual was previously subjected to torture or persecution. *Gourdet* v. *Holder*, 587 F.3d 1, 6 (1st Cir. 2009).
- Whether an individual qualifies as a "public official" for purposes of a CAT claim. *Kamara* v. *Attorney Gen. of U.S.*, 420 F.3d 202, 215 (3d Cir. 2005).
- Whether an alien has shown official acquiescence to torture. *Morales-Morales* v. *Barr*, 933 F.3d 456, 465 (5th Cir. 2019).
- Whether an alien qualifies as a member of a "particular social group." *Constanza* v. *Holder*, 647 F.3d 749, 753-754 (8th Cir. 2011).
- Whether res judicata applies to a particular case. *Channer* v. *Department of Homeland Sec.*, 527 F.3d 275, 279 (2d Cir. 2008).
- Whether an individual has "been battered or subjected to extreme cruelty by a spouse." *Rosario* v. *Holder*, 627 F.3d 58, 60 (2d Cir. 2010).
- Whether an alien's conduct qualifies as "material support." *Jabateh* v. *Lynch*, 845 F.3d 332, 340 (7th Cir. 2017).

- Whether an individual entered into a "good faith" marriage. *Upatcha* v. *Sessions*, 849 F.3d 181, 185 (4th Cir. 2017).
- Whether an immigration judge is biased. *Johns* v. *Holder*, 678 F.3d 404, 408 (6th Cir. 2012).
- Whether an asylum application was timely. *Lumataw* v. *Holder*, 582 F.3d 78, 86 (1st Cir. 2009).
- Whether a pardon was "full and unconditional." *Castillo* v. *U.S. Atty. Gen.*, 756 F.3d 1268, 1272 (11th Cir. 2014).

The government's position would inject enormous confusion and complexity into the administration of a jurisdictional statute invoked several hundreds of times each year. And this Court would be forced to police disagreements among the circuits, as they march through application of *Lakeridge* to dozens of different issues.

For its part, the government fails to identify a single decision—*not one*—that has used a *Lakeridge*-style framework to resolve the jurisdictional breadth of Section 1252(a)(2)(D). This case should not be the first.

2. The Court has conclusively held that reasonable diligence is a question of law.

If *Lakeridge* nonetheless governs, equitable tolling is more legal than factual. See Pet'r Br. 46-52.[4]

[4] The government is mistaken (at 34) that these cases involve solely reasonable diligence. For Guerrero-Lasprilla, the issue is whether *Lugo-Resendez* is an extraordinary circumstance, triggering the period relevant to reasonable diligence. Pet'r Br. 26-27.

a. The government's principal argument—that, to undertake a reasonable diligence inquiry, "the decision-maker must * * * put himself in the shoes of the litigant" (Gov't Br. 35)—cannot resolve the question. Assessing whether a police officer has "probable cause" to arrest obligates an adjudicator to "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003). But that analysis is legal. *Ornelas* v. *United States*, 517 U.S. 690, 698 (1996). Although interpreting a patent claim requires stepping into the shoes of a reasonable "person of ordinary skill in the art" (*Phillips* v. *AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005)), the task is legal. *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

b. An established "historical" tradition governs. *Lakeridge*, 138 S. Ct. at 967 n.3.

Bank of Columbia held that, when facts are "undisputed," "diligence" is a "question of law." 26 U.S. at 583. The government offers no reason (at 50) to distinguish the reasonable diligence at issue there from equitable tolling. It would be strange to so finely parse the fact/law distinction such that a single standard—reasonable diligence—may alternate between factual or legal depending on its surrounding. The government observes (at 50) that the issue in *Bank of Columbia* was allocating between judge and jury. But the fact-law filter that the government urges the Court to apply is the same test used to allocate issues between judge and jury.

Bank of Columbia is illustrative of settled law, and the ACLU cited several more authorities to the same effect, all of which the government disregards. See ACLU Br. 7-8. What qualifies as a "reasonable time"

for an individual to make an objection to an "account rendered" is "a question of law." *Standard Oil Co.* v. *Van Etten*, 107 U.S. 325, 333-334 (1882). See also, *e.g.*, *Musson* v. *Lake*, 45 U.S. 262, 276 (1846) ("Due diligence is a question of law."); *Rhett* v. *Poe*, 43 U.S. 457, 481 (1844) (When facts are settled, "due diligence becomes a question of law."); *Dickins* v. *Beal*, 35 U.S. 572, 581 (1836); *Bank of Alexandria* v. *Swann*, 34 U.S. 33, 46 (1835).

c. The Court's recent holdings confirm the conclusive historical evidence. In *Menominee Indian Tribe*, *Young*, *Pace*, *Irwin*, and *Baldwin County*, the Court treated equitable tolling as principally a legal determination. See Pet'r Br. 47; see also ACLU Br. 8-10. In *Menominee Indian Tribe*, the Court engaged in a comprehensive, de novo exploration of whether the Tribe's "circumstances" met the equitable tolling "standard." 136 S. Ct. 750, 756-757 (2016). Deferential review would have been obligatory if the issue were one of fact. *Ibid*. So too in *Pace* v. *DiGuglielmo*, 544 U.S. 408, 419 (2005). The government offers no meaningful response. See Gov't Br. 51.

Although the Court has observed that applications of the "due diligence" standard may be "fact-based" (*Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 196 (1997); see Gov't Br. 36),[5] *all* mixed questions are, by definition, "fact-based." The Court has even deemed certain "fact-intensive, mixed questions" legal. *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999).

The substantial weight of authority in the lower courts—including the Second, Third, Fourth, Fifth,

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[5] The government's reliance on *Klehr*—which addressed "fraudulent concealment," not equitable tolling—lays bare its efforts to distinguish *Bank of Columbia*.

Sixth, Eighth, Ninth, Eleventh, D.C., and Federal Circuits—further confirms that equitable tolling is mostly legal work. Pet'r Br. 48-51. In contrast to the twenty-eight circuit cases we cite (*ibid.*), the government musters just two, both of which apply abuse-of-discretion review without analysis. Gov't Br. 51. The government observes that our cases involve "other contexts." *Ibid*. True, but irrelevant. If the Court applies *Lakeridge* to Section 1252(a)(2)(D), it certainly should not adopt immigration-specific rules divorced from how equitable tolling is treated everywhere else.

The government's attempt to distinguish then-Judge Alito's opinion in *Brinson* v. *Vaughn*, 398 F.3d 225, 231 (3d Cir. 2005), is revealing. *Brinson*, the government contends, addressed the extraordinary circumstances prong of equitable tolling, not reasonable diligence. Gov't Br. 51-52. On that logic, Section 1252(a)(2)(D) would supply jurisdiction to Guerrero-Lasprilla's petition addressing whether *Lugo-Resendez* is an extraordinary circumstance, but not to Ovalles's contention that he acted diligently. Turning judicial review on such thinly-sliced distinctions is unworkable.

d. This great weight of precedent exists for good reason: When two litigants assert practically identical tolling claims, the answer should be consistent. The interest in "uniformity" (*Albrecht*, 139 S. Ct. at 1680) is paramount in immigration law. See Pet'r Br. 51.

The government is wrong to contend that equitable tolling arises in circumstances that "resist useful generalization." Gov't Br. 52. Questions like whether *Lugo-Resendez* is an extraordinary circumstance will impact many—and the answer should be the same for all. As for diligence, the implications of one's conduct—including the length of delay, and the affirmative steps

taken that tend to suggest (or negate) diligence—will offer guidance in future cases.[6]

D. Petitioners challenge the governing legal standard.

Because petitioners challenge the governing legal standard, their petitions necessarily raise a "question of law." See Pet'r Br. 22-27. The Court's grant of a broad question "does not bind [it] to issue a sweeping ruling when a narrow one will do." *McWilliams* v. *Dunn*, 137 S. Ct. 1790, 1800 (2017).

1. Below, Ovalles raised a substantial challenge to the governing legal standard. See Pet'r Br. 23-26. The government responds that the lower court addressed this argument, notwithstanding its clear statement that the petition, in whole, was "DISMISSED for lack of jurisdiction." *Ovalles* Pet. App. 4a. The court should be taken at its word. The single, conclusory statement that "the BIA [did not] appl[y] an incorrect standard" (*ibid.*) did not meaningfully engage Ovalles's argument. This question is squarely within the scope of Ovalles's petition for certiorari, which asks "[w]hether the review of a denial for equitable tolling involves a legal question." *Ovalles* Pet. 14.

2. The government does not contest (at 54-55) that Guerrero-Lasprilla's argument is a question of law. See Pet'r Br. 26-27. If anything, it appears to acknowledge (at 55) that whether *Lugo-Resendez* is an extraordinary circumstance *is* a legal question. This is also within the

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[6] Even the Board rejects the assertion that equitable tolling is "primarily factual." The Board may "not engage in de novo review of findings of fact determined by an immigration judge." 8 C.F.R. § 1003.1(d)(3)(i). But it reviews whether "equitable tolling of the reopening deadline is appropriate" "de novo." *In re Sergio Lugo-Resendez*, 2017 WL 8787197, at *3 (B.I.A. 2017).

scope of the broad question Guerrero-Lasprilla presented. *Guerrero-Lasprilla* Pet. i.

Respectfully submitted.

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