No. _____

In the Supreme Court of the United States

RUBEN OVALLES,
Petitioner,

v.

MATTHEW G. WHITAKER
Acting United States Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following this Court's judgment in *Mata v. Lynch*, 135 S. Ct. 2150 (2015), the Fifth Circuit joined all of its sister circuits in holding that the statutory deadline for filing a motion to reopen a removal order is subject to equitable tolling. *Lugo-Resendez v. Lynch*, 831 F. 3d 337 (CA5 2016). In so doing, the Fifth Circuit adopted this Court's standard for equitable tolling from *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct 750 (2016).

Thereafter, the Fifth Circuit held that it lacked jurisdiction to review the merits of whether a movant (with criminal removability) pursued their rights diligently, thus further dividing a split between the courts of appeals. *Penalva v. Sessions*, 884 F. 3d 521 (CA5 2018). The question presented here is:

1. Whether the application of a legal standard to an undisputed set of facts is a question of law, or a pure question of fact that may be barred from judicial review.

Or, more specifically:

2. Whether the criminal alien bar, 8 U.S.C. §1252(a)(2)(C), tempered by §1252(a)(2)(D), prohibits a court from reviewing an agency decision finding that a movant lacked diligence for equitable tolling purposes, notwithstanding the lack of a factual dispute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruben Ovalles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth circuit in this case.

OPINIONS BELOW

The Fifth Circuit's panel opinion (App. A, *infra*, 1a-4a) is unpublished but reported at 741 Fed. Appx. 259. The underlying one-member panel decision of the Board of Immigration Appeals (BIA), on Ovalles' motion to reopen, is unreported but reproduced at App. B, *infra*, 5a-7a.

The Fifth Circuit's prior panel opinion from 2009 (App. C, *infra*, 8a-29a) is reported at 577 F. 3d 288. The underlying one-member panel decision of the BIA to that Fifth Circuit opinion, on Ovalles' first motion to reopen, is unreported but reproduced at App. D, *infra*, 30a-31a.

The BIA's original three-member panel opinion (App. E, *infra*, 32a-35a) erroneously reversing the Immigration Judge's grant of cancellation of removal is unreported but available at 2004 WL 880229.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2018. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of 8 U.S.C. § 1229a(c)(7), regarding general statutory motions to reopen, are reproduced at App. F, *infra*, 36a. As pertinent to this case, subparagraph (C)(i) establishes a 90-day deadline, from the date of a final administrative order of removal, for motions filed under subsection (c)(7).

The relevant jurisdictional provisions of 8 U.S.C. §§1252(a)(2)(C), (D) are reproduced at App. F, *infra*, 36a-37a. Subparagraph (C) creates a jurisdictional bar applicable to "any final order of removal against an alien who is removable by reason of having committed a criminal offense" triggering certain grounds of removability. But, subparagraph (D) provides a savings clause for constitutional claims and question of law.

STATEMENT OF THE CASE

This case is an attractive vehicle for the Court to clarify the standards for reviewing claims for equitable tolling of statutory deadlines. That is because the posture of this case frames the issue as the sole, dispositive question being presented to the Court.

Further, in deciding the issue the Court would in turn clarify the jurisdiction of the courts of appeals to review motions to reopen improperly entered removal orders. Reviewing this case would also serve the broader purpose of defining the outer limits of the criminal alien bar with respect to the application of a legal standard to an undisputed set of facts.

I. Legal Background

Since this Court's decision in *Mata v. Lynch*, 135 S. Ct. 2150 (2015), all the courts of appeals have recognized that the time limit for a motion to reopen filed under 8 U.S.C. §1229(c)(7) can be equitably tolled.[1] Further, the courts agree that the proper legal standard required to qualify for equitable tolling is a showing of: (1) due diligence in pursuing one's right; and (2) "that some extraordinary circumstance stood in the way and prevented a timely filing."[2]

The Immigration and Nationality Act provides for judicial review of denials of motions to reopen. 8 U.S.C. §§1252(a)(1), (b)(6). Yet, the same provision strips the courts of jurisdiction if the individual was convicted of a qualifying crime; this is known as the "criminal alien bar." 8 U.S.C. §1252(a)(2)(C). An exception within the same paragraph saves the court's jurisdiction from the "criminal alien bar," but only if the

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[1] *Neves v. Holder*, 613 F. 3d 30 (CA1 2010); *Iavorski v. INS*, 232 F. 3d 124 (CA2 2000); *Borges v. Gonzales*, 402 F. 3d 398 (CA3 2005); *Kuusk v. Holder*, 732 F. 3d 302 (CA4 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (CA5 2016); *Barry v. Mukasey*, 524 F. 3d 721 (CA6 2008); *Pervaiz v. Gonzales*, 405 F. 3d 488 (CA7 2005); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496 (CA8 2005) ; *Valeriano v. Gonzales*, 474 F. 3d 669 (CA9 2007); *Riley v. INS*, 310 F. 3d 1253 (CA10 2002); *Avila-Santoyo v. U. S. Att'y Gen.*, 713 F. 3d 1357 (CA11 2013).

[2] *Supra* n.1; *accord Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016); *Holland v. Florida*, 560 U. S. 631, 649 (2010) (to be entitled to equitable tolling, a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented a timely filing.").

individual is seeking judicial review of a "constitutional claim" or is presenting a "question of law" for review. 8 U.S.C. §1252(a)(2)(D).

The courts are in conflict regarding their ability to review denied claims for equitable tolling on statutory motions to reopen when review is sought by a criminal alien.

On one side of this conflict stands the Fifth and the Fourth circuit, who bar criminal aliens from judicial review under the criminal alien bar. These courts hold that equitable tolling is a "factual determination [as to whether] the petitioner ha[s] not exercised due diligence," and is therefore outside the consideration of U.S.C. §1252(a)(2)(D). *Penalva v. Sessions*, 884 F. 3d 521, 525 (CA5 2018) (citing *Lawrence v. Lynch*, 826 F. 3d 198, 203 (CA4 2016)).

On the opposite side of this conflict is the Ninth circuit which holds that review of equitable tolling claims presents "a mixed question of law and fact, requiring that [it] apply the legal standard for equitable tolling to established facts," and thus "[j]urisdiction therefore is proper under 8 U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F. 3d 993, 999 (CA9 2007); *accord Agonafer v. Sessions*, 859 F. 3d 1198, 1202 (CA9 2017). In holding so, the Ninth circuit explained: "Congress intended the term ["question of law"] as used in 8 U.S.C. § 1252(a)(2)(D) to include mixed questions of law and fact." *Id*., at 999 (citing *Ramadan v. Gonzales*, 479 F. 3d 646, 654 (CA9 2007)). The other courts to consider the issue have provided mixed results.

II. Factual and Procedural Background

The petitioner was admitted to the United States as a lawful permanent resident at the age of six in 1985. C.A. Admin. Rec. 73. He was placed into removal proceedings in 2003 after being convicted of attempted possession of drugs under Ohio law earlier that same year. C.A. Admin. Rec. 543-45. Based upon this conviction, the Department of Homeland Security (DHS) charged Ovalles as removable for having been convicted of a controlled substance violation under 8 U.S.C. §1227(a)(2)(B)(i), also alleging that the crime was an aggravated felony under 8 U.S.C. §1101(a)(43)(B). C.A. Admin. Rec. 544.

After the Immigration Judge held that Ovalles' crime was not an aggravated felony, thereby finding him to be statutorily eligible for cancellation of removal under 8 U.S.C. §1229b(a), the Immigration Judge granted him cancellation. App. E, *infra*, 32a-33a. But, the DHS appealed, and the BIA improperly held that Ovalles' crime was indeed an aggravated felony under its now-defunct precedent, *Matter of Yanez*, 23 I. & N. Dec. 390 (BIA 2002). App. E, *infra*, 33a-35a (available at 2004 WL 880229). Thus, the BIA vacated the Immigration Judge's grant of cancellation, and ordered Ovalles removed to the Dominican Republic. Ovalles has been seeking a method to return to the United States since his removal in 2004.

Less than three years after Ovalles' removal, this Court overruled the BIA's precedent on this issue—thereby establishing that the vacatur of the Immigra-

tion Judge's grant of cancellation was in error—in *Lopez v. Gonzales*, 549 U. S. 47 (2006). In response, Ovalles sought out counsel in the United States.

Ovalles' case was eventually taken up by the Post-Deportation Human Rights Project (Project) at Boston College which filed a motion to reopen for Ovalles in July 2007. C.A. Admin. Rec. 127-51. The BIA ultimately denied the motion in light of the departure bar regulation codified at 8 CFR §1003.2(d). App. D, *infra*, 30a-31a. Thereafter, Ovalles was represented by pro bono counsel from Holland & Knight LLP, and the Project before the Fifth Circuit on petition for review. His petition attacked the validity of the departure bar on multiple grounds. The court of appeals ultimately rejected his arguments in *Ovalles v. Holder*, 577 F. 3d 288 (CA5 2009). App. C, *infra*, 8a-29a.

Since then, several developments in the law have culminated into Ovalles' current petition before this Court. Various courts of appeals struck down the departure bar on different types of arguments. Additionally, the doctrine of equitable tolling began to develop amongst the courts of appeals.

As for the departure bar, some courts held that the departure bar was an unlawful abrogation of the agency's statutory jurisdiction. *Luna v. Holder*, 637 F. 3d 85, 100 (CA2 2011); *Pruidze v. Holder*, 632 F. 3d 234, 239 (CA6 2011); *Marin-Rodriguez v. Holder*, 612 F. 3d 591, 593 (CA7 2010). Other courts held that the departure bar regulation was in conflict with, and preempted by, the statute. *Jian Le Lin v. U.S. Att'y Gen.*, 681 F. 3d 1236 (CA11 2012); *Contreras-*

Bocanegra v. Holder, 678 F. 3d 811 (CA10 2012); *Prestol Espinal v. Att'y Gen.*, 653 F. 3d 213 (CA3 2011); *Coyt v. Holder*, 593 F. 3d 902 (CA9 2010); *William v. Gonzales*, 499 F. 3d 329 (CA4 2007) (initially disagreed with by the Fifth Circuit in *Ovalles v. Holder*).

Ultimately, the Fifth Circuit was the last court to join the fray with *Garcia-Carias v. Holder*, 697 F. 3d 257 (CA5 2012), when it held that the statute did indeed preempt the departure bar regulation with regard to statutory motions to reopen. But, rather than overrule its prior ruling in *Ovalles v. Holder*, the court of appeals distinguished it by characterizing Ovalles' motion to reopen in that case as untimely—a characterization later to be addressed by this Court.

Notably, the *Garcia-Carias* case stopped short of recognizing equitable tolling in the Fifth Circuit. That is because the Fifth Circuit had a doctrine of recharacterizing requests for statutory reopening with tolling of the 90-day deadline as actually being regulatory motions to reopen *sua sponte*—a doctrine that the court held tightly onto. *Mata v. Holder* (*Mata I*), 558 Fed. Appx. 366, 367 (CA5 2014); *Ramos-Bonilla v. Mukasey*, 543 F. 3d 216, 220 (CA5 2008) (*citing Jie Lin v. Mukasey*, 286 Fed. Appx. 148, 150 (CA5 2008) (per curiam) (unpublished)); *Joseph v. Holder*, 720 F. 3d 228, 231 (CA5 2013) (same).

However, this Court addressed the Fifth Circuit's recharacterization doctrine, and struck it down in *Mata v. Lynch*, 135 S. Ct. 2150 (2015). The Court then remanded the case to the court of appeals to determine whether equitable tolling was available in

light of its "practice of recharacterizing appeals like Mata's as challenges to the Board's *sua sponte* decisions and then declining to exercise jurisdiction over them [so as to] prevent[ ] [a] split from coming to light." *Id*., at 2156. The Court also made it clear that "the Fifth Circuit may not . . . wrap such a merits decision in jurisdictional garb so that [this Court] cannot address a possible division between that court and every other. *Id*.

Thereafter, the Fifth Circuit recognized equitable tolling of the 90-day deadline in *Lugo-Resendez v. Lynch*, 831 F. 3d 337 (CA5 2016). And again, the Fifth Circuit declined to overrule *Ovalles v. Holder* by distinguishing it on the basis that Ovalles' motion to reopen in that case was an untimely regulatory *sua sponte* motion—as the Fifth Circuit's now-defunct recharacterization compelled it to be. *Id*., at 341-43.

During all this time, Ovalles periodically reached out to counsel in the United States. C.A. Admin. Rec. 77-81. Following the decision in *Lugo-Resendez*—which Ovalles learned about independently during his own personal research, C.A. Admin. Rec. 83-86 (sworn declaration taken at U. S. embassy)—Ovalles reached out to his former counsel in the United States who ultimately put Ovalles in touch with the undersigned. After retaining new counsel, Ovalles filed a motion to reopen with the BIA seeking equitable tolling for the first time. C.A. Admin. Rec. 12-117.

But, the BIA denied Ovalles' first motion to reopen filed under the authority of 8 U.S.C. §1229a(c)(7) on the grounds that he lacked diligence. App. B, *in-*

fra, 5a-7a. And then, the Fifth Circuit declined to review Ovalles' petition for review on jurisdictional grounds in *Ovalles v. Sessions*, 741 Fed. Appx. 259 (CA5 2018). App. A, *infra*, 1a-4a.

REASONS FOR GRANTING THE WRIT

The issue presented in this case involves a true, genuine, and current conflict between the courts of appeals. The issue is of significant and substantial importance because it surrounds the statutory right for all non-citizens to file a motion to reopen. *See Mata*, 135 S. Ct., at 2153 ("An alien ordered to leave the country has a statutory right to file a motion to reopen his removal proceedings."). Moreover, the ability for the courts to retain their jurisdiction to review motions to reopen should not be jeopardized, for "the purpose of a motion to reopen is to ensure a proper and lawful disposition." *Dada v. Mukasey*, 554 U. S. 1, 18 (2008). This conflict is ripe for definitive resolution by this Court.

This case satisfies all the criteria for certiorari. First, the question presented has squarely divided the Fifth and Fourth Circuits from the Ninth Circuit such that the former courts currently lack the jurisdiction to review claims that are reviewable in the latter court. Second, the question presented is an important and recurring one. Several other circuits have yet to publish an opinion on the matter, but have already started to take conflicting sides through unpublished rulings. Third, this is an ideal case for deciding the question. This case arises from simple and undisputed facts, where the only question that

needed to be answered by the Fifth Circuit was whether the petitioner has been diligently seeking to assert his right to reopening.

I. There is a genuine conflict among the courts of appeals.

a. The Ninth Circuit exercises jurisdiction.

After a thorough analysis on the history of judicial review in the immigration context, the Ninth Circuit in *Ramadan v. Gonzales*, ruled that the phrase "question of law" as it is used in 8 U.S.C. §1252(a)(2)(D) includes review of mixed questions of law and fact—the application of statutes and regulations to undisputed facts. 479 F. 3d 646, 651–654 (CA9 2007). In a subsequent decision, the Ninth held that review of a denial of equitable tolling "falls within *Ramadan*'s ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts," to conclude that "[j]urisdiction therefore is proper under 8 U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F. 3d 993, 999 (CA9 2007).

In the Ninth circuit, a "criminal alien" may seek judicial review of the denial of his motion to reopen that sought equitable tolling.

b. The Fourth and Fifth Circuits do not exercise jurisdiction.

Taking a polar opposite stance on the issue is the Fifth circuit. The Fifth Circuit notes "that whether equitable tolling applies to a petitioner's motion to

reopen is a question of fact." *Penalva v. Sessions*, 884 F. 3d 521, 525 (CA5 2018). The Fifth circuit has made clear that it views the inquiry as being purely "fact-intensive." *Id*. Thus, the Fifth concludes that no questions of law or constitutional claims are involved, and that it is "barred from appellate review under 8 U.S.C. § 1252(a)(2)(C)." *Id*. In the Fifth Circuit, review is strictly prohibited even if the movant raises an accompanying question of law, as long as the movant's request for equitable tolling was denied by the BIA below.

The Fourth Circuit, similar to the Fifth, does not recognize equitable tolling as involving a mixed question of law and fact. The Fourth circuit explained its "jurisdiction does not extend to a simple disagreement with the Board's factual determination that [a movant] had not exercised due diligence." *Lawrence v. Lynch*, 826 F.3d 198, 203 (CA4 2016).

While movants in the Ninth Circuit can seek judicial review of their statutory right to a motion to reopen, similar movants cannot avail themselves of such protections in the Fifth and Fourth Circuits.

c. The other circuits have reached mixed results.

While it is clear that the above-mentioned courts are in genuine conflict with each another, several other courts of appeals are in need of this Court's guidance in order to avoid a deeper rift.

For example, the First circuit has held that "[a] determination that equitable tolling is appropriate

involves a mixed question of law and fact." *Niehoff v. Maynard*, 299 F. 3d 41, 47 (CA1 2002). As explained by the First Circuit, "[t]he term mixed question is something of a misnomer; once the raw facts are determined (and such determinations are normally reviewed only for clear error), deciding which legal label to apply to those facts is a normative issue—strictly speaking, *a legal issue*." *Id*. (emphasis added). Relying on these holdings, one would assume the First and the Ninth circuit would be on the same page. But, in 2006, the First Circuit issued its opinion *Boakai v. Gonzales*, holding that the answer as to whether "*Boakai*'s challenge to the BIA's decision not to grant such tolling presents a 'question of law' within the meaning of the REAL ID Act . . . is plainly no." 447 F. 3d 1, 4 (1st Cir. 2006). In fact, both the Fifth and Fourth Circuits cite to *Boakai* in support of their decision not to exercise jurisdiction. *Penalva*, 884 F. 3d, at 525; *Lawrence*, 826 F. 3d, at 203.

Notably, and subsequent to *Boakai*, in *Neves v. Holder*, 613 F. 3d 30 (CA1 2010), the First circuit appeared to back away from its holding in *Boakai*. Importantly, *Neves* was published after a remand from Court in *Neves v. Holder*, 560 U. S. 901 (2010) (mem.). On remand the First circuit recognized:

> [o]ur earlier opinion held that no legal or constitutional issues were raised by the BIA's determination that Neves's time- and number-barred motion to reopen was not subject to equitable tolling because of Neves's failure to show due diligence. On that basis, we held we were barred from exercising jurisdiction to review the BIA's decision. That holding, as *Kucana* makes clear, was erroneous.

Neves v. Holder, 613 F. 3d, at 35. The First circuit would go on to further state that "[s]everal of this circuit's earlier cases also relied on this erroneous premise." *Id*., at 35, n.3. The *Neves* holding seems to coincide with the Ninth's opinion that the courts have jurisdiction over equitable tolling claims made by criminal aliens.

The Second, Third, and Seventh Circuits have yet to publish a precedent opinion squarely on this issue. Nonetheless, these courts are assuming jurisdiction of denials of equitable tolling claims made by criminal aliens, and deciding the cases on the merits. *See Ramos-Braga v. Session*, 900 F. 3d 871 (CA7 2018); *Johnson v. Gonzales*, 478 F. 3d 795 (CA7 2007); *McCarty v. Sessions*, 730 Fed. Appx. 75 (CA2 2018); *Mercedes-Pichardo v. Mukasey*, 297 Fed. Appx. 49 (CA2 2008); *Green v. Att'y Gen. of U. S.*, 429 Fed. Appx. 147 (CA3 2011).

The only circuit that seems to agree with the Fourth, and the Fifth is the Tenth. In a recent unpublished decision, *Vue v. Whitaker*, 743 Fed. Appx. 910 (CA10 2018) (mem.), the petitioner argued for equitable tolling of the time limit to file a motion to reopen. The court dismissed the petition and stated, "to the extent [petitioner] is challenging the BIA's discretionary decision not to permit him to file a late motion to reopen, we also lack jurisdiction to review the decision." *Id*., at 911 (citation omitted).

In sum, it appears the First, Second, Third, Seventh, and the Ninth are in accordance that they have jurisdiction to review equitable tolling claims under 8

U.S.C. §1252(a)(2)(D), while the Fourth, Fifth, and Tenth believe they do not have that jurisdiction.

II. This case is an ideal vehicle for deciding the question presented.

Whether the review of a denial for equitable tolling involves a legal question can be readily answered in the affirmative.[3] This case illustrates the point.

In raising a claim for equitable tolling with the agency, Ovalles argued that he was precluded from filing his statutory motion to reopen due to prohibitive Fifth Circuit precedent. Before Petitioner was able to file his motion, he had to overcome two issues: (1) the departure bar; and (2) that the Fifth circuit was yet to accept equitable tolling. Both obstacles have been struck down by every circuit to consider them. The only remaining issue is the jurisdictional one—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. There are no other issues in this case that would obfuscate the Court's review of the issue.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

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[3] "Mixed questions are generally held to fall within the jurisdiction of the reviewing court even when the court's jurisdiction to review the facts themselves has been limited or eliminated." *Jean-Pierre v. U. S. Att'y Gen.*, 500 F. 3d 1315, 1321, n.4 (CA11 2007) (*citing Townsend v. Sain*, 372 U. S. 293, 309 n. 6 (1963)).

Respectfully submitted,

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