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

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QUESTION PRESENTED

Whether, in view of 8 U.S.C. § 1252(a)(2)(C) and (D), courts of appeals possess jurisdiction to review an alien's contention that the agency applied the wrong legal standard—and misapplied that standard to the undisputed facts—when addressing a request for equitable tolling of the statutory deadline for reopening.

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OPINIONS BELOW

1. With respect to *Guerrero-Lasprilla* v. *Barr*, the Fifth Circuit's opinion (*Guerrero-Lasprilla* Pet. App. 1a-4a) is available at 737 Fed. App'x 230. The decision of the Board of Immigration Appeals (BIA or Board) denying petitioner Pedro Pablo Guerrero-Lasprilla's appeal on his motion to reopen (*Guerrero-Lasprilla* Pet. App. 10a-13a) is unreported, as is the order denying his request for reconsideration (*id*. at 5a-9a). The order of the immigration judge denying Guerrero-Lasprilla's motion to reopen (*id*. at 14a-19a) is unreported.

2. With respect to *Ovalles* v. *Barr*, the Fifth Circuit's opinion (*Ovalles* Pet. App. 1a-4a) is available at 741 Fed. App'x 259. The underlying single-member panel decision of the Board denying petitioner Ruben Ovalles's motion to reopen (*Ovalles* Pet. App. 5a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Guerrero-Lasprilla* was entered on September 12, 2018. *Guerrero-Lasprilla* Pet. App. 1a. The judgment of the court of appeals in *Ovalles* was entered on October 31, 2018. *Ovalles* Pet. App. 1a. The Court granted timely petitions for certiorari on June 24, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 8 U.S.C § 1229a(c)(7), regarding motions to reopen, are reproduced at App., *infra*, 1a.

The relevant portions of 8 U.S.C. § 1252(a)(2)(C) and (D) are reproduced at App., *infra*, 2a.

INTRODUCTION

The REAL ID Act's Saving Clause, 8 U.S.C. § 1252-(a)(2)(D), provides for judicial review of "questions of law." This case concerns whether petitioners' challenges to decisions by the Board of Immigration Appeals (BIA or Board) fall within its scope.

Petitioners sought to reopen their removal orders; to that end, they requested equitable tolling of the statutory deadline for reopening. The Board denied each petitioner's request. Petitioners then filed petitions for review with the Fifth Circuit, arguing that the Board applied the wrong legal standard to evaluate equitable tolling. Rather than addressing those arguments on the merits, the court of appeals held that it lacked jurisdiction. The court reasoned that petitioners raised questions of fact, not of law, and thus the petitions for review were outside the scope of the Saving Clause. That conclusion is wrong.

To begin with, these cases can be resolved on a narrow and straightforward ground. No matter how the Saving Clause may apply elsewhere, it authorizes judicial review of petitioners' arguments that the Board used the wrong legal standard to evaluate their claims. The Court need not decide how Section 1252(a)(2)(D) applies in all cases to determine that *these* challenges fall squarely within its ambit.

If the Court does address the full reach of Section 1252(a)(2)(D), it should conclude that courts of appeals have jurisdiction to review not only the legal standard the Board uses, but also how the Board applies that standard to the settled facts of a case. By contrast, the Saving Clause does not provide for judicial review over the Board's determination of historical facts.

The statutory text compels this construction of the Saving Clause, which also reflects the statutory pur-

pose: to create a substitute for habeas actions by aliens. Moreover, interpreting the Saving Clause this way accords with the fundamental principles that the Court construes jurisdictional statutes in favor of judicial review and to avoid complexities. And this construction of the Saving Clause has been time tested in hundreds of cases in the lower courts, as virtually every circuit currently embraces it.

If the courts of appeals were limited to reviewing whether the BIA identified the proper legal standard—but not whether it correctly applied that standard to the facts before it—judicial review would be meaningless. Courts could consider only whether the agency intoned the right words or resorted to the right boilerplate, and not whether the agency actually employed the proper standard in practice. It is for good reason, therefore, that no court has consistently applied such a narrow view of the Saving Clause.

The Fifth Circuit should have exercised jurisdiction over petitioners' claims. The Court should hold that judicial review is available and remand for consideration of the merits of petitioners' legal arguments.

STATEMENT

A. Legal background.

1. Motions to reopen.

a. "A motion to reopen is a form of procedural relief that 'asks the Board [of Immigration Appeals] to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.'" *Dada* v. *Mukasey*, 554 U.S. 1, 12 (2008). This "important safeguard" in the removal process (*id*. at 18) provides "a procedural device serving to ensure that aliens are getting a fair chance to have their claims heard" (*Kucana* v. *Holder*, 558 U.S. 233, 248 (2010)).

Motions to reopen pre-date the BIA and were part of the BIA's regulatory structure at its inception. *Dada*, 554 U.S. at 12. In 1996, Congress amended the Immigration and Nationality Act (INA) to provide for reopening, "transform[ing] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien." *Dada*, 554 U.S. at 14. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-593 (IIRIRA).

Subject to exceptions not applicable here, a noncitizen typically must file a motion to reopen "within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(C)(i). See also 8 C.F.R. §§ 1003.2 (reopening before BIA), 1003.23 (reopening before the immigration court). In addition, "the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings 'on its own motion'—or, in Latin, *sua sponte*—at any time." *Mata* v. *Lynch*, 135 S. Ct. 2150, 2153 (2015) (citing 8 C.F.R. § 1003.2(a)).

The Board's denial of a motion to reopen is reviewable in the same way as a final order of removal. See *Mata*, 135 S. Ct. at 2154 (citing 8 U.S.C. § 1252(b)(6)). Such review has a long pedigree; "[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." *Kucana*, 558 U.S. at 242. See also *Dada*, 554 U.S. at 12-13 (collecting cases).

In *Kucana*, the Court held that Section 1252(a)(2)(B), which strips jurisdiction for decisions committed to agency discretion, does not bar judicial review of the denial of a motion to reopen. 558 U.S. at 253. Rather, the Court held, that provision applies only

to statutory grants of discretion, not discretion purportedly conferred by regulation. *Id*. at 243-252.

b. In the wake of *Kucana*, all the federal appellate courts—save the Fifth Circuit—concluded that there is jurisdiction to review a noncitizen's request for "equitable tolling of the statutory time limit to file a motion to reopen a removal proceeding." *Mata*, 135 S. Ct. at 2154 & n.1. The Fifth Circuit, however, construed requests for equitable tolling as pleas for the agency to exercise its *sua sponte* authority to reopen and not as a request for statutory reopening under Section 1229a-(c)(7). *Id*. at 2155-2156. Additionally, the Fifth Circuit concluded that "courts have no jurisdiction to review the BIA's refusal to exercise its *sua sponte* power to reopen cases." *Id*. at 2154. The effect was to prevent appellate review over the BIA's denial of a movant's request for equitable tolling. *Id*. at 2155. In *Mata*, the Court rejected that practice, holding that the courts of appeals must assert jurisdiction and "address[] the equitable tolling question." *Id*. at 2156.

Although *Mata* "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" (135 S. Ct. at 2155 n.3), the courts of appeals uniformly have concluded that Section 1229a(c)(7)(C)(i)'s time limitation is subject to equitable tolling.[1] And "the gov-

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[1] See *Iavorski* v. *INS*, 232 F.3d 124 (2d Cir. 2000); *Borges* v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Kuusk* v. *Holder*, 732 F.3d 302 (4th Cir. 2013); *Lugo-Resendez* v. *Lynch*, 831 F.3d 337 (5th Cir. 2016); *Harchenko* v. *INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz* v. *Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Socop-Gonzalez* v. *INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Riley* v. *INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo* v. *Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc). See also *Bolieiro* v. *Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (finding "notabl[e]" that "every circuit that has

ernment agrees * * * that the time within which an alien may file a motion to reopen may be equitably tolled by the Board." U.S. Br. 37-40, *Mata* v. *Holder*, No. 14-185.

2. Judicial review of removal proceedings.

Until 1952, "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court." *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001). Under the original INA, noncitizens could seek declaratory relief from deportation orders in the district courts, pursuant to the Administrative Procedure Act. See *id.* at 306 n.26; *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955).

In 1961, Congress amended the INA to withdraw jurisdiction from district courts, vesting initial review in the appellate courts. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 106(a), 75 Stat. 650, 651 (formerly codified at 8 U.S.C. § 1105a(a)) (repealed 1996). Congress provided, however, that "any alien held in custody pursuant to an order of deportation may obtain judicial review * * * by habeas corpus proceedings." *Id.* § 106(a)(9), 75 Stat. 652. This two-pronged framework for judicial review persisted for more than three decades until 1996, when Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

AEDPA eliminated the 1961 Act's express carveout for habeas. See AEDPA § 401(a), 110 Stat. 1268. And Section 440(a) of AEDPA, the precursor to Section 1252(a)(2)(C), limited judicial review of final removal orders of aliens with certain criminal histories:

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addressed the issue thus far has held that equitable tolling applies to * * * limits to filing motions to reopen").

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

110 Stat. 1276-1277.

That same year, Congress enacted IIRIRA, which expanded AEDPA's preclusion of review over deportation orders. Pub. L. No. 104-208, § 306, 110 Stat. 3009-607 to 3009-608 (codified at 8 U.S.C. § 1252 (2000)). As relevant here, IIRIRA recodified Section 440(a) of AEDPA at 8 U.S.C. § 1252(a)(2)(C). See *ibid.*

The Court subsequently held that district courts retained jurisdiction under the general habeas corpus statute, 28 U.S.C. § 2241, to entertain challenges to certain removal orders. *St. Cyr*, 533 U.S. at 298-314. It reasoned that, "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." *Id*. at 304-305. The Court specifically observed that habeas has long been used to address "the erroneous *application* or interpretation of statutes." *Id*. at 302 (emphasis added). Thus, while the jurisdiction-stripping provision of Section 1252(a)(2)(C) remained on the books, noncitizens were able to use habeas actions as an alternative means to obtain judicial review over their removal orders.

In 2005, Congress enacted the REAL ID Act. See Pub. L. No. 109-13, 119 Stat. 302. In the amended Sec-

tion 1252(a)(2)(C), Congress clarified that it removed habeas review as a mechanism for aliens with certain criminal histories to challenge removal orders. *Id*. § 106(a)(1)(A)(ii), 119 Stat. 310. Simultaneously, Congress adopted what is generally referred to as the REAL ID Act's Saving Clause. *Id*. § 106(a)(1)(A)(iii) (codified at 8 U.S.C. § 1252(a)(2)(D)). The clause preserves judicial review "of constitutional claims or questions of law," notwithstanding any of the jurisdiction-stripping provisions contained in the INA.

B. Factual background and proceedings below.

1. Ruben Ovalles.

a. Petitioner Ruben Ovalles was admitted to the United States in 1985 at age six, as a lawful permanent resident. *Ovalles* Pet. App. 9a; JA79.

In 2003, Ovalles was convicted of attempted drug possession under Ohio law. *Ovalles* Pet. App. 9a. He was sentenced to a term of probation only. *Id*. at 33a. The government later charged Ovalles with removability under 8 U.S.C. §§ 1227(a)(2)(B)(i) (controlled substance violation) and 1227(a)(2)(A)(iii) (aggravated felony). *Id*. at 9a.

The immigration judge concluded that Ovalles's crime was not an aggravated felony, rendering him eligible for statutory cancellation of removal under 8 U.S.C. § 1229b(a). *Ovalles* Pet. App. 9a. The judge granted Ovalles cancellation based on his "work history and familial connections in the United States," allowing him to remain in the country. *Ibid*.

The government appealed. Applying *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (2002), the Board found that Ovalles's crime was an aggravated felony, vacated the immigration judge's grant of cancellation, and ordered Ovalles removed. *Ovalles* Pet. App. 32a-35a.

b. Less than three years later, this Court overturned *Matter of Yanez-Garcia* in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006). There, the Court held that a state felony drug offense is not an "aggravated felony" under the INA when the relevant conduct is only a misdemeanor under federal drug laws. *Id*. at 60. *Lopez* thus rendered Ovalles eligible for cancellation, which the immigration judge had previously granted. See *Ovalles* Opp. 3 (acknowledging that *Lopez* rendered Ovalles eligible for cancellation).

Ovalles requested reopening of the Board's decision. See *Ovalles* Pet. App. 30a-31a. The Board denied his motion under the so-called "departure bar," a regulation that purports to prohibit the Board from adjudicating motions to reopen filed by noncitizens who are no longer in the United States. See *ibid*. (citing 8 C.F.R. § 1003.2(d)).

The Fifth Circuit rejected Ovalles's appeal. *Ovalles* Pet. App. 8a-29a. Consistent with its practice (later rejected by *Mata*), the court concluded that Ovalles had no statutory "right to have his facially and concededly untimely motion heard by the BIA." *Id*. at 20a. Because, in accordance with then-governing circuit law, Ovalles's reopening request was not deemed pursuant to Section 1229a(c)(7), the court had no occasion to consider whether the regulatory departure bar was consistent with Section 1229a(c)(7)'s statutory text. *Ibid*. Since then, the law has changed dramatically.

Several courts of appeals invalidated the regulatory departure bar, concluding that it is incompatible with Section 1229a(c)(7). In view of this authority, the Fifth Circuit later held "that Section 1229a(c)(7) unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States." *Garcia-Carias* v. *Holder*, 697 F.3d 257, 263

(5th Cir. 2012). *Garcia-Carias* expressly distinguished its earlier decision in *Ovalles*, claiming that Ovalles relied on "the Board's regulatory power to reopen or reconsider sua sponte," not on a statutory motion to reopen. *Id*. at 265.

Mata, however, rejected the Fifth Circuit's practice of characterizing a movant's request for tolling as a plea for the agency to exercise its *sua sponte* authority, rather than as a statutory motion to reopen. See page 5, *supra*. Subsequently, in *Lugo-Resendez*, the Fifth Circuit held for the first time that "the deadline for filing a motion to reopen under [Section] 1229a(c)(7) is subject to equitable tolling." 831 F.3d at 343-345. Now, because a request for equitable tolling is properly viewed as a motion under Section 1229a(c)(7) in the Fifth Circuit, *Garcia-Carias* precludes application of the departure bar to Ovalles. That is, taking *Garcia-Carias* and *Lugo-Resendez* together, the basis for the Fifth Circuit's earlier decision in *Ovalles*, applying the departure bar to petitioner, is incorrect.

c. Throughout this time, Ovalles routinely contacted counsel in the United States regarding his eligibility for reopening relief. See JA64-73. He became aware of *Lugo-Resendez* in December 2016 (JA74-77), and soon thereafter, in March 2017, he filed a motion to reopen with the BIA (JA35-63).

The Board denied Ovalles relief. *Ovalles* Pet. App. 5a-7a. In addressing equitable tolling, the BIA determined that the relevant period for measuring Ovalles's diligence began the day *Lugo-Resendez* issued, not when Ovalles reasonably learned of the decision. *Id*. at 6a. Deeming Ovalles to have "waited approximately 8 months"—the period between the issuance of *Lugo-Resendez* and Ovalles's filing—the Board found that he

"has not demonstrated the requisite due diligence." *Ibid*.

Ovalles filed a petition for review with the Fifth Circuit. In opposing the petition, the government focused solely on the merits of his claim, and did not assert that the court lacked jurisdiction. See *Ovalles* Gov't C.A. Br. 9-24. The court of appeals nonetheless dismissed his petition for lack of jurisdiction. *Ovalles* Pet. App. 1a-4a. Although the court recognized that it had "jurisdiction to review the denial of a motion to reopen seeking equitable tolling of the 90-day deadline" pursuant to *Mata*, the court concluded that Section 1252(a)(2)(C) stripped it of that jurisdiction. *Ovalles* Pet. App. 3a. The court held that the Saving Clause in Section 1252(a)(2)(D) did not apply because the BIA's resolution of "diligence" was "an unreviewable fact question." *Id.* at 4a.

2. Pedro Guerrero-Lasprilla.

a. Petitioner Pedro Pablo Guerrero-Lasprilla entered the United States in 1986 as a lawful permanent resident. JA34. In 1988, he was convicted after a trial for possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1)) and a related conspiracy charge (21 U.S.C. § 846). JA34. In 1998, the government removed Guerrero-Lasprilla as an aggravated felon. JA33 (citing 8 U.S.C. § 1227(a)(2)(A)(iii)).

b. Since Guerrero-Lasprilla's removal, there have been two key legal developments.

First, the law governing now-repealed INA § 212(c) has fundamentally changed.

At the time of Guerrero-Lasprilla's conviction, former INA § 212(c) rendered certain lawful permanent residents eligible for discretionary relief from deportation. See *Judulang* v. *Holder*, 565 U.S. 42, 46-47 (2011). But prior to Guerrero-Lasprilla's removal pro-

ceedings, Congress repealed Section 212(c). See IIRIRA, § 304(b), 110 Stat. 3009-597. The government deemed the repeal to have retroactive effect, barring relief for previously-eligible individuals whose removal proceedings occurred after Section 212(c)'s repeal. *St. Cyr*, 533 U.S. at 293. Thus, at the time of Guerrero-Lasprilla's removal, he was ineligible for Section 212(c) relief.

In *St. Cyr*, however, the Court held that Section 212(c) relief remains available for individuals who, prior to the statute's repeal, had pleaded guilty to an offense. 533 U.S. at 323-325; see also *Judulang*, 565 U.S. at 48. Focusing on detrimental reliance, the government subsequently limited Section 212(c) relief to only those individuals who had pleaded guilty, denying eligibility for those (like Guerrero-Lasprilla) who were convicted at a trial. See 69 Fed. Reg. 57,826, 57,828 (Sept. 28, 2004).

Later, the Court determined that the presumption against retroactive application is not contingent on detrimental reliance. See *Vartelas* v. *Holder*, 566 U.S. 257 (2012). As a result, in 2014, the BIA held that Section 212(c) remains available for certain individuals who were convicted following a trial. *Matter of Abdelghany*, 26 I&N Dec. 254, 268-269, 272 (BIA 2014). The government acknowledges that Guerrero-Lasprilla is now eligible for Section 212(c) relief. See *Guerrero-Lasprilla* Opp. 2-3.

Second, the law governing motions to reopen has changed significantly.

As we described, the Fifth Circuit previously recharacterized requests for equitable tolling of the statutory deadline to reopen as requests that the agency exercise its *sua sponte* reopening authority. See *Mata*, 135 S. Ct. at 2155-2156; *Ramos-Bonilla* v. *Mukasey*,

543 F.3d 216, 220 (5th Cir. 2008). *Mata* rejected this practice. 135 S. Ct. at 2155.

Mata did not, however, resolve whether equitable tolling was available at all. 135 S. Ct. at 2155 n.3. Following *Mata*, equitable tolling for statutory reopening remained unavailable in the Fifth Circuit. See, *e.g.*, *Silverio-Da Silva* v. *Boente*, 675 Fed. App'x 487, 487 (5th Cir. 2017) ("Citing our decision in *Ramos-Bonilla* * * *, the IJ held that equitable tolling was not available to toll the § 1229a(c)(7)(C)(i) deadline."). The Fifth Circuit subsequently "change[d] binding precedent" (*id.* at 488) in *Lugo-Resendez*, holding that "the deadline for filing a motion to reopen under [Section] 1229a(c)(7) is subject to equitable tolling." 831 F.3d at 343-345.[2]

c. On August 31, 2016, less than forty days following the decision in *Lugo-Resendez*, Guerrero-Lasprilla filed a statutory motion to reopen his removal order. See JA5, JA10. He contended that *Matter of Abdelghany* and *Lugo-Resendez* together rendered him eligible to request relief via reopening under repealed INA § 212(c). *Ibid.*

The immigration judge denied the request as untimely. *Guerrero-Lasprilla* Pet. App. 17a-18a. Because the motion was received more than 90 days after the date of his underlying removal order, the immigration judge concluded that Guerrero-Lasprilla had to demonstrate that equitable tolling applies. *Ibid.* The immigration judge held that the BIA's 2014 decision in *Matter of Abdelghany* removed the obstacle for Guerrero-Lasprilla to request relief, and thus this date was the

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[2] See also *Sylejmani* v. *Barr*, 768 Fed. App'x 212, 218 (5th Cir. 2019) ("It was not until our holding in *Lugo-Resendez* * * * that we established that the BIA must apply equitable tolling principles to § 1229a(c)(7)'s deadline.").

relevant starting point for assessing his diligence. *Id*. at 18a. The judge concluded 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," following the issuance of *Matter of Abdelghany*. *Ibid*. The immigration judge did not consider Guerrero-Lasprilla's argument (JA12-20) that the diligence analysis should begin with the Fifth Circuit's issuance of *Lugo-Resendez*.

The Board affirmed. *Guerrero-Lasprilla* Pet. App. 10a-13a. It reasoned that "nothing prohibited [Guerrero-Lasprilla] from filing a motion to reopen before *Lugo-Resendez." Id*. at 12a. The Board thus "disagree[d]" with Guerrero-Lasprilla's contention that diligence should be measured from the issuance of *Lugo-Resendez*. *Ibid*.

The court of appeals dismissed Guerrero-Lasprilla's petition for review for lack of jurisdiction, holding 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-4a (citing *Penalva* v. *Sessions*, 884 F.3d 521, 525 (5th Cir. 2018)). Ultimately, the court found that, because of 8 U.S.C. § 1252(a)(2)(C), it lacked "jurisdiction to consider the factual question of whether he acted with the requisite diligence to warrant equitable tolling." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals should have exercised jurisdiction over petitioners' claims.

A. In determining the reach of judicial review over agency action, the Court applies two powerful presumptions. *First*, the Court interprets jurisdictional statutes with the "strong presumption that Congress

intends judicial review of administrative action." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019). To the extent that a statute can be read as supplying jurisdiction, it should be. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995).

Second, the Court prefers constructions that render "judicial administration of a jurisdictional statute * * * as simple as possible." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010). So long as it is consistent with the statutory text, the Court construes jurisdictional statutes to maximize "clarity" and to minimize collateral litigation over jurisdiction. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017).

B. This case may be resolved on narrow grounds. In providing jurisdiction over "questions of law," the REAL ID Act's Saving Clause necessarily reaches arguments that the Board applied the wrong legal standard. 8 U.S.C. § 1252(a)(2)(D); see *Iliev* v. *Holder*, 613 F.3d 1019, 1022 (10th Cir. 2010) (Gorsuch, J.) (by virtue of the Saving Clause, courts of appeals "possess jurisdiction to review [a noncitizen's] petition to the extent it contends the BIA applied an incorrect legal rule to his case").

This straightforward point compels the conclusion that the court of appeals has jurisdiction to review these cases.

Ovalles's principal contention is that the BIA failed to apply the "reasonable diligence" standard to his request to reopen, and instead improperly applied the "maximum feasible diligence" test. *Holland* v. *Florida*, 560 U.S. 631, 653 (2010). The Board erred, Ovalles maintains, because it failed to assess the factors specific to him. See *Gordillo* v. *Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (holding that equitable tolling obligates

the BIA to "look beyond the mere passage of time," considering "all of the facts of the case, not just the chronological ones").

Guerrero-Lasprilla, meanwhile, contests whether binding precedent prior to the Fifth Circuit's decision in *Lugo-Resendez* qualified as an "obstacle" to relief. That turns on an analysis of the state of the law—a quintessential legal question.

These are "questions of law" over which the court of appeals had jurisdiction. The Fifth Circuit's dismissal of the petitions for review was error.

The merits of petitioners' arguments in favor of equitable tolling are not before the Court; these issues are properly left for remand. See *Mata*, 135 S. Ct. at 2156-2157.

C. If there is any doubt on this score, the Court should address the full reach of Section 1252(a)(2)(D) and conclude that the Saving Clause supplies jurisdiction over arguments that the Board misapplied a legal standard to settled facts. These claims are within the Saving Clause because petitioners challenge the Board's legal conclusions, not its findings of historical fact.

First, the statutory text compels this result. The phrase "questions of law" encompasses the application of law to fact. A "question of law" is an issue "concerning the application or interpretation of the law." *Question of Law*, Black's Law Dictionary (8th ed. 2004). As this Court has said, "[t]he effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 376 (1941). At least in this context, law interpretation is inseparable from law application.

Second, Congress's manifest purpose requires this construction. Through the REAL ID Act, Congress created a substitute for habeas corpus jurisdiction, in ac-

cord with the Court's decision in *St. Cyr*. See H.R. Conf. Rep. 109-72, at 174-175 (2005). In the interim between *St. Cyr* and the REAL ID Act, the courts of appeals uniformly reviewed application of law to fact in immigration habeas cases. Congress preserved that scope of review, while moving it to the appellate courts.

Additionally, in seeking to maintain the scope of habeas relief identified in *St. Cyr*, Congress necessarily provided for jurisdiction of the application of law to fact. It is "uncontroversial * * * that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the *erroneous application* or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302). English habeas corpus practice prior to 1789 confirms that application of law to fact was within the ambit of judicial review. That tradition continued into American habeas doctrine, and courts regularly applied legal standards to settled facts in immigration habeas proceedings.

Third, this construction of the Saving Clause—broadly applied in the lower courts and used repeatedly each year—is readily administered. "Courts of appeals have long found it possible to separate factual from legal matters." *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015). What is more, the jurisdictional inquiry cannot be limited to whether the agency has articulated the proper standard, exclusive of *how* that standard is applied in practice. If all a court could review is whether the BIA typed the right standard into its decision—that is, if it used the right boilerplate—Section 1252(a)(2)(D)'s grant of jurisdiction would be all form and no substance. The grant of jurisdiction Congress expressly bestowed is not so meaningless.

D. The Court should not graft onto the Saving Clause the separate and "vexing" analysis (*Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982)) it uses in other settings to broadly characterize mixed questions of law and fact. To determine whether a mixed question is to be resolved by judge or jury—or to select the standard of review on appeal—the Court endeavors to divine whether the question "entails primarily legal or factual work." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). This analysis is not appropriate here.

To begin with, it is not needed. Courts can and do routinely distinguish the legal and factual components of an integrated issue, both in Saving Clause appeals and elsewhere. In this context, mixed questions need not be treated in broad generalities.

The *Village at Lakeridge* framework, moreover, fails to address the proper question—whether there is *any* role for the federal courts to review agency action. Here, the strong presumption in favor of judicial review over federal agencies (*Smith*, 139 S. Ct. at 1776) displaces the *Village at Lakeridge* analysis.

What is more, this framework would inject substantial complication into the preliminary question of jurisdiction. It would obligate the lower courts to march through dozens of different issues implicated in immigration appeals, characterizing each one as more legal or more factual. Courts would be besieged with litigation over the scope of jurisdiction. The most natural understanding of the Saving Clause's text does not require such mass confusion.

If the Court nonetheless takes this approach, equitable tolling is more legal than factual. Historically, the Court has long held that application of a diligence standard to undisputed facts is a legal inquiry. See,

e.g., *Bank of Columbia* v. *Lawrence*, 26 U.S. (1 Pet.) 578, 583 (1828). And the Court's recent equitable tolling cases confirm that this is principally a legal question. This outcome accords, moreover, with the approach broadly taken by the appellate courts. Cf. *Brinson* v. *Vaughn*, 398 F.3d 225, 231 (3d Cir. 2005) (Alito, J.) ("[W]here * * * the relevant facts are not disputed, a District Court's decision on the question whether a case is sufficiently 'extraordinary' to justify equitable tolling should be reviewed de novo.").

ARGUMENT

A. The Court construes jurisdictional statutes in favor of judicial review and simplicity.

In considering the scope of judicial review over agency action, the Court applies two powerful presumptions. First, the Court resolves any ambiguity concerning the scope of review in favor of jurisdiction. Second, the Court interprets jurisdictional rules simply, bringing clarity—not confusion—to courts and litigants.

1. There is a "well-settled" (*Reno* v. *Catholic Social Servs.*, *Inc.*, 509 U.S. 43, 63-64 (1993)) and "strong presumption that Congress intends judicial review of administrative action" (*Smith*, 139 S. Ct. at 1776 (quoting *Bowen* v. *Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986))). See also *Mach Mining, LLC* v. *E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) (same); *United States* v. *Nourse*, 34 U.S. 8, 28-29 (1835) (Marshall, C.J.).

When a statute is "reasonably susceptible to divergent interpretation," the Court will typically "adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de*

Martinez, 515 U.S. at 434. That is to say, "[i]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part).

While the presumption of judicial review is "rebuttable," "the burden for rebutting it is 'heavy.'" *Smith*, 139 S. Ct. at 1776-1777 (quoting *Mach Mining*, 135 S. Ct. at 1651). It "takes 'clear and convincing evidence' to dislodge the presumption" in favor of judicial review. *Kucana*, 558 U.S. at 252 (quoting *Catholic Social Services, Inc.*, 509 U.S. at 64).

This presumption stems, in significant part, from separation-of-powers principles. As the Court has held, "[s]eparation-of-powers concerns" caution "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237. Broadly guaranteeing judicial review "enforces the limits that Congress has imposed on the agency's power," which serves "to buttress * * * Congress's objectives." *Cuozzo Speed Techs.*, 136 S. Ct. at 2151 (Alito, J., concurring in part and dissenting in part).

As a practical matter, broad judicial review is imperative. Section 1252(a)(2)(D)'s Saving Clause is implicated not just in reopening requests like these; it also provides the floor for judicial review of all removal decisions in the first instance, including removal of asylum-seekers contending that they are likely to be tortured or killed if deported. Judicial review is especially important in these circumstances, where an agency makes decisions that may carry life-and-death consequences. See, *e.g.*, *Ardestani* v. *INS*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting) ("The alien's stake in [a deportation] proceeding is * * * sometimes

life or death in the asylum context[.]"); *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (noting "the importance of judicial review in an area [asylum] where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death"); *id.* at 433 (Reinhardt and Hawkins, JJ., concurring) ("[J]udicial review of asylum cases may mean the difference between life and death for refugees from tyranny or from religious or racial persecution."); Maria Sacchetti & Carolyn Van Houten, *Death Is Waiting for Him*, Wash. Post (Dec. 6, 2018) (recounting circumstances of Santos Chirino, who was murdered in Honduras following removal there).[3]

2. The Court's cases also favor constructions that render "judicial administration of a jurisdictional statute * * * as simple as possible." *Hertz Corp.*, 559 U.S. at 80. Indeed, "clarity" (*Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. at 1321) and "administrative simplicity" are "major virtue[s] in a jurisdictional statute" (*Hertz Corp.*, 559 U.S. at 94). See also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1578 (2016). The Court accordingly has recognized a "rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1131 (2015).

"Complex jurisdictional tests" are disfavored because they "complicate a case, eating up time and money as the parties litigate" collateral questions of jurisdiction. *Hertz Corp.*, 559 U.S. at 94. Additionally, "[j]udicial resources * * * are at stake," as "courts bene-

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[3] The Court has also long construed "ambiguities in deportation statutes in the alien's favor." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1176 (2012).

fit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid*.

For these reasons, as Justice Scalia explained, "vague boundar[ies]" are "to be avoided in the area of subject-matter jurisdiction wherever possible." *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment). It is important to litigants and the courts alike that the "boundary between judicial power and nullity * * * be a bright line, so that very little thought is required to enable judges to keep inside it." *Ibid*. (quotation omitted).

B. The court of appeals erred because petitioners challenge the governing legal standard.

In the sections that follow, we explain the meaning of the phrase "questions of law" as it appears in Section 1252(a)(2)(D). See pages 27-42, *infra*. We also address (though, as we explain, do not believe relevant) whether the ultimate equitable tolling inquiry would be deemed more legal or factual, in settings where a court must choose one or the other. See pages 42-52, *infra*.

These cases, however, may be resolved on a narrower ground. Petitioners contended before the court of appeals that the Board applied the wrong legal standard. Regardless of what Section 1252(a)(2)(D) means as a whole, petitioners' arguments are squarely within its ambit. As then-Judge Gorsuch explained in construing the Saving Clause, courts of appeals "possess jurisdiction to review [an alien's] petition to the extent it contends the BIA applied an incorrect legal rule to his case." *Iliev*, 613 F.3d at 1022. That is precisely what petitioners contend here, and the court of appeals should have exercised jurisdiction over their claims.

"Equitable tolling"—"a long-established feature of American jurisprudence"—"pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014). See also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) (To invoke equitable tolling, a party typically must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."). As to the first element, "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653. The second element requires showing an "external obstacle," which in turn must be "both extraordinary *and* beyond [the litigant's] control." *Menominee Indian Tribe of Wisc.* v. *United States*, 136 S. Ct. 750, 756 (2016).

1. For Ovalles, the underlying issue is whether the Board actually applied the "reasonable diligence" standard, or whether the Board incorrectly applied a maximum feasible diligence test. See *Holland*, 560 U.S. at 653. Here, the Board accepted *Lugo-Resendez* as the starting point for measuring Ovalles's diligence. See *Ovalles* Pet. App. 6a. But it found that tolling is unavailable because Ovalles "waited approximately 8 months" prior to requesting reopening. *Ibid*.

The problem with this approach is that the Board wholly declined to consider how the circumstances specific to Ovalles—his presence in a foreign country, his regular consultations with U.S. counsel, and his speed in seeking reopening once he learned of *Lugo-Resendez* (see page 10, *supra*)—weighed on the diligence analysis. As Ovalles argued below, "[t]he BIA's conclusory analysis does not take into account all the efforts that Ovalles has taken over the years. Nor did the BIA con-

sider how quickly [he] found counsel in the United States, all the way from the Dominican Republic using a computer at an internet café, and then filed his motion to reopen." *Ovalles* C.A. Br. 24.

This was a challenge to the legal standard that the Board used. As Ovalles argued to the court of appeals, the Board failed "to apply [the] correct legal standard." *Ovalles* C.A. Br. 24. Its mistake, he contended, was "decid[ing] to apply a bright-line rule of its own creation where it counts the days between the change of law—in this case, the publication of *Lugo-Resendez*—and the filing of the motion [to] reopen." *Ibid*. As Ovalles reiterated in reply: "the BIA adopted a bright-line rule that cares not for the facts of an individual movant's circumstances—thereby applying an erroneous legal standard akin to a maximum feasible diligence standard." *Ovalles* C.A. Reply 4. In sum, the legal question is whether the Board may adopt a bright-line standard turning solely on the issuance of a new decision, or whether it must consider the facts specific to the individual.[4]

Although the merits of this claim are not before the Court, it bears mention that Ovalles's legal argument is a substantial one. The Sixth Circuit, for example, has taken Ovalles's approach to the legal standard, explaining that "the mere passage of time—even a lot of time—before an alien files a motion to reopen does not necessarily mean she was not diligent." *Gordillo*, 640 F.3d at 705. For the Board to use the correct legal standard, the Sixth Circuit observed, it must "look be-

[4] On this score, the government did not disagree below. In the court of appeals, the government addressed Ovalles's petition for review solely on the merits; it did not argue that the court lacked jurisdiction. See *Ovalles* Gov't C.A. Br. 9-24.

yond the mere passage of time," considering "all of the facts of the case, not just the chronological ones." *Ibid*. Ovalles advances the same argument here—that, by focusing solely on time (and by counting that time from the issuance of *Lugo-Resendez* rather than when Ovalles reasonably learned of it), the Board did not properly identify the "reasonable diligence" test.[5]

In fact, outside the Saving Clause context, the Fifth Circuit itself has endorsed this proposition. In identifying that the Board "must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate," the court—in a published opinion—instructed the Board to "give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions." *Lugo-Resendez*, 831 F.3d at 344-345. Ovalles' argument is that the Board did not actually adopt the *Lugo-Resendez* standard in resolving his case.

These are *legal* arguments that the court of appeals should have addressed on the merits. Indeed, the Fourth Circuit has held that the Saving Clause provides jurisdiction to consider these claims. See *Lawrence* v. *Lynch*, 826 F.3d 198, 203 (4th Cir. 2016). There, the court considered the noncitizen's argument that "the Board applied a heightened diligence standard that required absolute diligence rather than rea-

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[5] See also *Pervaiz* v. *Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) ("[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier."); *Mendoza* v. *Lynch*, 646 Fed. App'x 458, 463-464 (6th Cir. 2016).

sonable diligence and therefore committed an error of law." *Id*. at 204. In denying the noncitizen's petition for review, it noted that the Board "adequately undertook the individualized inquiry that [the alien] contends was missing." *Id*. at 205. The court of appeals here should have exercised jurisdiction over this same kind of legal claim.

To be clear, the question is not whether Ovalles is *correct* in asserting that the Board applied the wrong standard—that is a merits question for remand. See *Mata*, 135 S. Ct. at 2156-2157. The only issue here is whether the Fifth Circuit should have resolved the challenge on the merits. It should have, and the court's dismissal for lack of jurisdiction was error.

2. For Guerrero-Lasprilla, the principal disputed question is whether the governing law, prior to the Fifth Circuit's decision in *Lugo-Resendez*, qualified as an obstacle to relief. See *Guerrero-Lasprilla* Pet. App. 12a. Put slightly differently, the legal test is whether pre-*Lugo-Resendez* law "stood in [Guerrero-Lasprilla's] way." *Holland*, 560 U.S. at 649.

Below, Guerrero-Lasprilla argued that the BIA "erred in downplaying the importance [of] that ruling and failing to give it proper weight." *Guerrero-Lasprilla* C.A. Br. 4. The Board's core mistake was to "ignore[] that *Lugo-Resendez* has effectively abrogated" prior case law that had precluded Guerrero-Lasprilla from seeking reopening earlier. *Id*. at 7 (emphasis omitted).

This question—which requires assessing the status of Fifth Circuit and BIA precedent—is a legal one. It requires appraisal of the status of prevailing law prior to *Lugo-Resendez*, and an assessment of whether that law presented an "obstacle" to relief. *Menominee Indian Tribe*, 136 S. Ct. at 756. And, whatever the answer

to that question, it must be the same for all litigants in similar circumstances.[6]

* * *

In sum, petitioners challenge the equitable tolling standard that the Board used and the Board's understanding of the legal landscape prior to *Lugo-Resendez*. Section 1252(a)(2)(D) confers jurisdiction on the Fifth Circuit to address these legal questions. That is all the Court needs to decide; on remand, the court of appeals may assess the merits of petitioners' legal claims regarding equitable tolling.

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

If petitioners' challenges are deemed to focus on the application of the legal standard to the facts of their cases, the Saving Clause continues to supply jurisdiction.

The best reading of the Saving Clause—and the one that is "as simple as possible" (*Hertz Corp.*, 559 U.S. at 80)—is that courts have jurisdiction to resolve the application of a legal standard to settled historical facts. This construction follows from the statute's text and purpose, and it reflects a common-sense approach to the scope of judicial review, as "[c]ourts of appeals have long found it possible to separate factual from legal matters." *Teva Pharm.*, 135 S. Ct. at 839.

This interpretation, moreover, gives effect to the "strong presumption that Congress intends judicial re-

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[6] In fact, the Board took a contradictory stance as to the effect of *Lugo-Resendez* in these two cases. For Ovalles, it agreed that diligence *is* measured from *Lugo-Resendez*. *Ovalles* Pet. App. 6a. Because such blatant inconsistency should not be possible, this is properly deemed a question of law.

view of administrative action" (*Smith*, 139 S. Ct. at 1776), and it supplies the "clear boundar[y]" that a jurisdictional rule demands (*Brohl*, 135 S. Ct. at 1131). This construction has governed for more than a decade in circuits across the country, confirming that it is readily administered.

Petitioners do not dispute any finding of historical fact by the Board. Their claims are within the ambit of the Saving Clause.

1. The statutory text compels this conclusion.

The Saving Clause provides courts of appeals jurisdiction to "review * * * questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). When a court resolves the legal significance of undisputed historical facts, it reviews a "question[] of law." Properly understood, the Saving Clause authorizes courts "to examine the application of an undisputed fact pattern to a legal standard." *Castillo* v. *U.S. Att'y Gen.*, 756 F.3d 1268, 1272 (11th Cir. 2014) (quotation omitted). See also, *e.g.*, *Gourdet* v. *Holder*, 587 F.3d 1, 5 (1st Cir. 2009); *Nguyen* v. *Mukasey*, 522 F.3d 853, 854-855 (8th Cir. 2008); *Husyev* v. *Mukasey*, 528 F.3d 1172, 1179 (9th Cir. 2008).

As the Court has stated in plain terms, "[t]he effect of admitted facts is a question of law." *Nelson*, 312 U.S. at 376. The leading legal dictionary, contemporaneous with enactment of the REAL ID Act, is in accord—a "question of law" is an issue "concerning the application *or* interpretation of the law." *Question of Law*, Black's Law Dictionary (8th ed. 2004) (emphasis added); accord *Question of Law*, Black's Law Dictionary (11th ed. 2019). This definition reflects common sense. It is impossible to divorce the interpretation of law from its application. When the historical facts are set-

tled, resolving their legal significance can either be described as interpreting the law itself, or as applying the law to the facts.

Justice Scalia and Bryan Garner identified this as their first "fundamental principle[]" of interpretation: "Every application of a text to particular circumstances entails interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012) (capitalization altered). This understanding—that application *is* interpretation—is foundational. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

The Court's decision in *Bogardus* v. *Comm'r of Internal Revenue*, 302 U.S. 34, 39 (1937), confirms that judicial review of an issue of "law" extends to application. There, the courts had jurisdiction over decisions from the Board of Tax Appeals to assess whether the decision is "in accordance with law." *Bishoff* v. *Comm'r of Internal Revenue*, 27 F.2d 91, 92 (3d Cir. 1928) (quoting Revenue Act of 1926, 44 Stat. 110 § 1003(b)).[7] In *Bogardus*, the Court held that a "determination of a mixed question of law and fact" is "subject to judicial review" under this provision. 302 U.S. at 39. Applying law to established facts is therefore within the ambit of a jurisdictional provision authorizing courts to review "law." *Ibid*. See also *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *Helvering* v. *Rankin*, 295 U.S. 123, 131 (1935). *Bogardus* should control here.

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[7] See Pet'r Br., *Bogardus* v. *Comm'r of Internal Revenue*, No. 37-15, 1937 WL 40821, at *1 (identifying the Revenue Act of 1926 as supplying jurisdiction).

The Court's use of the phrase "question of law" has repeatedly evinced the same understanding. For example, a Section 1983 defendant may bring an interlocutory appeal from the denial of a motion for qualified immunity so long as it "presents a question of law." *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994); see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (interlocutory appeals rest on a "question of law"). Included within such a "question of law" is the application of law to the facts (or factual allegations) of the particular case. That is, "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief." *Ibid*. Time and again, the Court has entertained interlocutory appeals addressing the *application* of constitutional safeguards; a litigant "raise[s] legal issues," the Court holds, when addressing how a constitutional standard applies to specific facts. *Plumhoff* v. *Rickard*, 572 U.S. 765, 773 (2014). See also *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) ("The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him.").

In the immigration context itself, the Court has distinguished between a "subsidiary fact" (what actually happened) and an "ultimate fact[]" relating to the relevance of the historical events to the legal standard. *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944). As the Court explained, "[f]inding so-called ultimate 'facts' more clearly implies the application of standards of law." *Ibid*. In *Baumgartner*, the standard of proof to satisfy denaturalization was clear and convincing evidence, and "[t]he Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could in-

dependently assess." *Pullman-Standard*, 456 U.S. at 286 n.16. See also *United States* v. *Gaudin*, 515 U.S. 506, 514 (1995) (distinguishing the tasks of "determin[ing] the facts" and "apply[ing] the law to those facts").

More broadly, the Court has explained that "'issues of fact' * * * refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963), overruled on other grounds by *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992). "So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense." *Ibid*. *Applying* law to fact is a legal task. *Id*. at 318 ("Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently.").

2. The statute's purpose confirms that it provides for judicial review of the application of law to settled fact.

In enacting Section 1252(a)(2)(D), Congress acknowledged that it sought to create a substitute for habeas corpus jurisdiction, in accordance with the Court's decision in *St. Cyr*. See H.R. Conf. Rep. 109-72, at 174-175. The manifest purpose of the Saving Clause is accomplished only by holding that it preserves jurisdiction for the application of law to fact.

a. In adopting the REAL ID Act, Congress did not intend to "change the scope of review that criminal aliens currently receive" under *St. Cyr*. H.R. Conf. Rep. 109-72, at 175. And *St. Cyr* specifically recognized that,

historically, "the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including *the erroneous application* or interpretation of statutes." 533 U.S. at 302 (emphasis added). On its face, therefore, *St. Cyr* identified the application of law to fact as one principal role of the writ of habeas corpus.

At the time of the REAL ID Act's adoption, the lower courts understood *St. Cyr* exactly this way. As the Third Circuit put it, "[a] district court's *habeas* jurisdiction encompasses review of the BIA's application of legal principles to undisputed facts." *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003). When a movant "alleges misapplication of a legal principle to undisputed facts of record," his claim "falls within the scope of *habeas* jurisdiction." *Ibid*.

The Second Circuit likewise held that, "[i]n *St. Cyr*, the Supreme Court recognized that the Suspension Clause requires habeas review of claims based upon the erroneous application of statutes." *Wang* v. *Ashcroft*, 320 F.3d 130, 142-143 (2d Cir. 2003). For this reason, an "argument on appeal challenging the BIA's application of the particular facts in this case to the relevant law falls within the permissible scope of habeas review." *Id*. at 143. This understanding was widely shared. See, *e.g.*, *Cadet* v. *Bulger*, 377 F.3d 1173, 1192 (11th Cir. 2004) ("[W]e have [Section] 2241 jurisdiction to review [an alien's] claims that the district court misapplied immigration law to the facts of what happens in Haitian prisons."); *Singh* v. *Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003).

Because Congress intended to retain the scope of jurisdiction identified by *St. Cyr* (H.R. Conf. Rep. 109-72, at 175), the uniform views of the appellate courts constitute powerful evidence of the scope of the Saving

Clause. If Congress had intended to *restrict* judicial review to less than the prevailing legal standard, Congress would have done so with clarity. It did not.

b. The REAL ID Act's history further confirms our construction. The Conference Report specifies how courts should resolved mixed questions: "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.[8] Congress therefore contemplated that courts would review the application of law to settled fact.

The enactment history also provides support. Though preliminary drafts of the statute limited jurisdiction to a "pure question of law," Congress specifically removed the limiting term "pure." H.R. Conf. Rep. 109-72 at 175.[9] Congress's deletion of this language must be given effect; the statute cannot now be limited

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[8] Similarly, Deputy Assistant Attorney General Jonathan Cohn testified: "A mixed question of law is in effect a question with two parts. There is *the legal part of the application* and the factual part. The legal part, of course, is reviewable, like all questions of law under this H.R. 418." *Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomm. on Immigration, Border Sec. and Citizenship and Subcomm. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 24 (2005) ("2005 Hearing") (emphasis added).

[9] In arguing that judicial review must encompass the application of law to fact, the ACLU's written testimony to Congress criticized the inclusion of the term "pure" in the draft legislation. 2005 Hearing at 128-129 & n.xiv (written testimony of Lee Gelernt, Sr. Staff Counsel, ACLU). To be sure, the Conference Report identifies the earlier draft's use of "pure" as "superfluous," contending that "[t]he word 'pure' adds no meaning." H.R. Conf. Rep. 109-72 at 175. But the Conference Report is unambiguous; it indicates that legal aspects of "mixed question[s]" are reviewable. *Ibid*.

to so-called "pure" questions of law. See *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *INS* v. *Cardoza–Fonseca*, 480 U.S. 421, 442-443 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'").

c. Additionally, the reach of habeas corpus to the application of law to fact was well-established at all relevant times. It is "uncontroversial * * * that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779. Thus, in intending that the Saving Clause would reach "those issues that were historically reviewable on habeas" (H.R. Conf. Rep. 109-72 at 175), Congress supplied jurisdiction to review the agency's application of law to settled historical facts. This issue "could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." *St. Cyr*, 533 U.S. at 305. Indeed, if the Saving Clause did not encompass the full scope of issues reviewable at common law, Congress's stripping of federal jurisdictional would falter for precisely the same constitutional reasons identified by the Court in *St. Cyr*.

First, applying legal standards to the particulars of a case was standard fare in common-law habeas actions.

In *King* v. *Rudd*, 98 Eng. Rep. 1114 (K.B. 1775), Lord Mansfield, on habeas corpus, identified the legal principle: "[W]here accomplices having made a full and

fair confession of the whole truth, are in consequence thereof admitted evidence for the Crown, and that evidence is afterwards made use of to convict the other offenders," the confessing accomplices "have an equitable title to a recommendation for the King's mercy." *Id*. at 1116. Lord Mansfield then continued: "Those being the general rules, let us see how far the present case is applicable to them, or in any degree falls within the reason of them." *Id*. at 1117. To apply the legal standard to the facts at issue, Lord Mansfield evaluated the information given by the accomplice and held that she had not "made a fair and full disclosure of all that she knew," and was therefore ineligible for relief. *Id*. at 1118.

In *King* v. *Pedley*, 168 Eng. Rep. 265 (K.B. 1784), a debtor had been committed to custody by the Commissioners of Bankrupts for failure to answer, to the Commissioners' satisfaction, questions regarding the disposition of his property. As a broad legal matter, the Commissioners could not detain an individual who "sw[o]r[e] fully and roundly"; if a debtor answered questions fully but untruthfully, he could have been charged with perjury, but not imprisoned for failure to respond. *Id*. at 266. The court applied this rule, holding—after hearing a description of the answers given by the debtor—that "he has answered fully, and the Commissioners cannot commit him for false swearing." *Ibid*.

In *King* v. *Delaval*, 97 Eng. Rep. 913 (K.B. 1763), a music-master sold the apprenticeship contract of a young woman to a wealthy man who had "debauched" her. Identifying the governing principles of "decency and morality," Lord Mansfield proceeded to apply that legal standard to the facts before the court, concluding that the conduct at issue was "notoriously and grossly against public decency and good manners." *Ibid*. In

King v. *Turlington*, 97 Eng. Rep. 741 (K.B. 1761), acting via habeas, the court ordered an inspection of an individual confined to an asylum, determining whether she was properly committed per the governing standard; the investigating doctor opined by affidavit that "he found her to be very sensible, and very cool and dispassionate." *Ibid*. Based on these facts, Lord Mansfield specifically directed further investigation pursuant to a writ of habeas corpus. *Ibid*. See also *Archer's Case*, 91 Eng. Rep. 1348 (K.B. 1701) (examining individual to determine condition of treatment by her father); *Case of The Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810) (directing investigation into the circumstances of an individual allegedly held in slavery conditions, so that the court could apply governing legal standards to the facts found).

In *Hollingshead's Case*, 91 Eng. Rep. 307 (K.B. 1702), the court considered on habeas a commitment warrant in a debtor's case. The court applied the governing statute to the warrant itself, holding that the warrant was invalid for failure to track the statutory provisions. *Ibid*. See also *King* v. *Nathan*, 93 Eng. Rep. 914 (K.B. 1730) (similarly applying statutory requirements to specific commitment warrant issued). In *Richard Good's Case*, the court concluded that a shipcarpenter unattached to a vessel was ineligible for impressment, and it proceeded to apply that holding to the petitioner's facts, evaluating an affidavit and granting a writ of habeas corpus. 96 Eng. Rep. 137 (K.B. 1760).

These are just a sampling of the pre-1789 habeas cases that applied law to fact. Cases with similar applications are ubiquitous. See also *King* v. *Hawkins*, 92 Eng. Rep. 849 (K.B. 1715) (addressing whether evidence satisfied offense of having taken a deer); *King* v. *The Earl of Ailsbury*, 90 Eng. Rep. 567 (K.B. 1702)

(granting bail by virtue of the "power which the Court hath at the common law" because of prisoner's poor health); *Clapham's Case*, 79 Eng. Rep. 669 (C.P. 1627) (applying statutory requirement of an "utter barrister" to the circumstances of the case); *Gardener's Case*, 78 Eng. Rep. 1048 (K.B. 1600) (considering whether a "dagg," a certain kind of firearm, "was [a] hand-gun within the [applicable] statute"); Sir John Eardley Wilmot, *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 43 (1758) ("The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law, where the facts are disclosed and admitted.").

Second, this tradition continued past 1789, with American courts applying law to fact in the habeas context. In *Ex parte Randolph*, for example, Chief Justice Marshall applied the legal understanding of an "officer" to a soldier's particular factual circumstances. 20 F. Cas. 242, 254-256 (C.C.D. Va. 1833). See also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 135 (1807) (reviewing evidence, including depositions, to determine if there was "sufficient evidence of [petitioners'] levying war against the United States" to justify detention).

Third, when evaluating habeas corpus claims in immigration matters—a well-settled practice (see *St. Cyr*, 533 U.S. at 306-307)—courts regularly applied law to fact. In *Bridges* v. *Wixon*, 326 U.S. 135 (1945), for example, the Court considered not only the legal meaning of being "affiliated" with the Communist party; the Court proceeded to "turn to the facts of this case," applying that legal construction. *Id*. at 145-149. In *Tod* v. *Waldman*, 266 U.S. 113, 119-120 (1924), the Court considered whether immigration authorities properly applied the "public charge" standard to the facts, criticizing the absence of certain factual findings. And in *Hansen* v. *Haff*, 291 U.S. 559, 562-563 (1934), the

Court not only construed the meaning of "immoral purpose," but applied it to the specific facts of the case. See also, *e.g.*, *Delgadillo* v. *Carmichael*, 332 U.S. 388, 390-391 (1947) (construing the meaning of "entry" into the United States and applying it to a shipwrecked seaman); *Chin Yow* v. *United States*, 208 U.S. 8, 11 (1908) ("[I]f the writ is granted, the first issue to be tried is the truth of the allegations last mentioned."); *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888) (affirming district court's decision to review, under habeas, legal relevance of new evidence of alien's eligibility to remain in the country).

When Congress sought to preserve the traditional scope of habeas corpus review in the Saving Clause, it necessarily included the application of law to settled fact.

3. As consistent practice demonstrates, this approach is readily administered.

a. Not only is this construction of the Saving Clause true to the text, but it is simple and readily administered. "Courts of appeals have long found it possible to separate factual from legal matters." *Teva Pharm.*, 135 S. Ct. at 839.

For example, Federal Rule of Civil Procedure 52(a) requires deference to a trial court's factual findings. "But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). District courts, on pre-trial motions, routinely apply legal standards to factual allegations (then assumed true)—all without addressing the veracity of the factual contentions.

In the Fourth Amendment context, courts address application of law to fact de novo, while "review[ing] findings of historical fact only for clear error." *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). And, in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 560 (1985), the Court observed that "[f]air use is a mixed question of law and fact." In circumstances where the factfinder had rendered factual conclusions, the appellate court was then free to apply the fair use test to those facts—precisely because the task was a legal one. *Ibid*.

Courts are well suited to distinguish—and, under Section 1252(a)(2)(C), to decline to review—questions of historical fact resolved by the BIA.

b. This construction of Section 1252(a)(2)(D) is the prevailing standard today. Courts routinely hold that, so long as a challenge is not to the BIA's factual determinations or exercise of discretion, Section 1252(a)(2)(D) supplies jurisdiction. This approach is applied frequently in the First[10], Second,[11] Third,[12]

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[10] See, *e.g.*, *Gourdet*, 587 F.3d at 5 ("The government has agreed that we have jurisdiction under the REAL ID Act * * * to review the issue of whether an undisputed or adjudicated course of conduct constitutes 'torture' because this issue raises a question of law."); *Lumataw* v. *Holder*, 582 F.3d 78, 85-86 (1st Cir. 2009).

[11] See, *e.g.*, *Rosario* v. *Holder*, 627 F.3d 58, 62 (2d Cir. 2010) (holding that agency actions are reviewable where, among other reasons, the agency "uses an erroneous legal standard" or "the BIA's underlying factual determination is 'flawed by an error of law'"); *Mendez* v. *Holder*, 566 F.3d 316, 323 (2d Cir. 2009); *Channer* v. *Dep't of Homeland Sec.*, 527 F.3d 275, 279 (2d Cir. 2008).

[12] See, *e.g.*, *Singh* v. *Gonzales*, 432 F.3d 533, 541 (3d Cir. 2006) (Saving Clause provides for "review of the BIA's application of law to undisputed fact"); *Kamara* v. *Att'y Gen.,* 420 F.3d 202, 211 (3d Cir. 2005).

Fourth,[13] Fifth,[14] Sixth,[15] Seventh,[16] Eighth,[17] Ninth,[18] Tenth, [19] and Eleventh[20] Circuits. Any holding otherwise would upset what is now broadly settled practice.

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[13] See, *e.g.*, *Upatcha* v. *Sessions*, 849 F.3d 181, 185 (4th Cir. 2017) ("[F]or jurisdictional purposes, the ultimate determination of whether credited evidence meets the statutory standard for good faith marriage is a question of law, reviewable by the courts under 8 U.S.C. § 1252(a)(2)(D)."); *Zambrano* v. *Sessions*, 878 F.3d 84, 87 (4th Cir. 2017); *Jean* v. *Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006).

[14] See, *e.g.*, *Morales-Morales* v. *Barr*, __ F.3d __, 2019 WL 3642875, at *6 (5th Cir. 2019); *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 234 (5th Cir. 2009) ("[U[nder the REAL ID Act, the 'predicate legal question of whether the IJ properly applied the law to the facts in determining the alien's eligibility for discretionary relief' is a question of law properly raised in a petition for review.").

[15] See, *e.g.*, *Toyi* v. *Lynch*, 644 Fed. App'x 644, 648 (6th Cir. 2016) (To qualify for the Saving Clause, "such matters or claims must consist of nondiscretionary legal issues of statutory interpretation or mixed questions of law and fact so long as the facts are undisputed.").

[16] See, *e.g.*, *Jabateh* v. *Lynch*, 845 F.3d 332, 340 (7th Cir. 2017) (describing as a "quintessential legal error" the contention that an alien's "actions * * * met the legal definition of 'material support'"); *Benaouicha* v. *Holder*, 600 F.3d 795, 796 n.1 (7th Cir. 2010).

[17] See, *e.g.*, *Sanchez-Velasco* v. *Holder*, 593 F.3d 733, 735 (8th Cir. 2010) (Section 1252(a)(2)(D) provides for judicial review of "the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility" for relief.); *Nguyen*, 522 F.3d at 854-855.

[18] See, *e.g.*, *Dhital* v. *Mukasey*, 532 F.3d 1044, 1049 (9th Cir. 2008) (collecting cases); *Husyev*, 528 F.3d at 1179 (holding that "how the statute and regulation apply" to undisputed facts "presents a question of law"); *Ghahremani* v. *Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007).

c. Jurisdiction under Section 1252(a)(2)(D) should not be limited to merely whether the BIA has stated the proper legal standard. No matter the standard that the BIA puts down on paper, Congress conferred jurisdiction to review how that standard is applied in practice—to ensure that the BIA does not say one thing and do something else. Otherwise, so long as an agency uses the right boilerplate—that is, so long as it types into its opinions a proper statement of law—the agency would be free from judicial review even if it proceeds to ignore the substantive meaning of that standard when applying it to facts. That cannot be what the Saving Clause contemplates, as it would render judicial review a charade.

The Seventh Circuit's case law illustrates the point. That court purports to exclude from the Saving Clause "challenges to an IJ's application of the law to the facts of a case when the grounds for relief sought are discretionary." *Adame* v. *Holder*, 762 F.3d 667, 672 (7th Cir. 2014).

But, notwithstanding *Adame*, the Seventh Circuit regularly considers not just the BIA's identification of the standard but also *how* that standard is applied to the facts of a case. In *Jabateh* v. *Lynch*, 845 F.3d 332,

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[19] See, *e.g.*, *Brue* v. *Gonzales*, 464 F.3d 1227, 1231 (10th Cir. 2006) ("[W]e have jurisdiction to review this as a question of law because the facts are undisputed and resolution turns on interpretation of the applicable statutory section"); *Abiodun* v. *Gonzales*, 461 F.3d 1210, 1215-1216 (10th Cir. 2006).

[20] See, *e.g.*, *Castillo*, 756 F.3d at 1272 (explaining that Section 1252(a)(2)(D) allows courts "to examine the application of an undisputed fact pattern to a legal standard" (quotation omitted)); *Perez-Guerrero* v. *U.S. Att'y Gen.*, 717 F.3d 1224, 1231 (11th Cir. 2013); *Bedoya-Melendez* v. *U.S. Att'y. Gen.*, 680 F.3d 1321, 1324 (11th Cir. 2012); *Jean-Pierre* v. *U.S. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

340 (7th Cir. 2017), for example, the court described as a "quintessential legal error" the contention that an alien's "actions * * * met the legal definition of 'material support.'"[21] Relatedly, the Seventh Circuit addresses under the "question of law" rubric claims that the BIA failed to properly analyze the evidence before it. An alien's "allegation that the BIA ignored the evidence she presented" is, for example, "a good faith claim of legal error" subject to review pursuant to the Saving Clause. *Champion* v. *Holder*, 626 F.3d 952, 956 (7th Cir. 2010).[22]

Even the Seventh Circuit—which purports to limit the Saving Clause to "pure" questions of law—nonetheless provides, in practice, for review of the agency's application of law to fact. If judicial review were any less, it would be hollow—judicial review in form, but not in substance.

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[21] See also, *e.g.*, *Sanchez* v. *Sessions*, 894 F.3d 858, 864 (7th Cir. 2018) ("[W]e cannot be confident [the Board] applied the correct prejudice standard in a manner consistent with our precedents."); *Kiorkis* v. *Holder*, 634 F.3d 924, 931 n.2 (7th Cir. 2011) ("We have jurisdiction over these issues as an appellant's allegation that a court applied the incorrect legal standard falls squarely within the 'questions of law' exception to section 1252(a)(2)(C)'s jurisdictional restrictions."); *Benaouicha*, 600 F.3d at 796 n.1; *Joseph* v. *Holder*, 579 F.3d 827, 830 (7th Cir. 2009); *Huang* v. *Mukasey*, 534 F.3d 618, 620 (7th Cir. 2008); *Tariq* v. *Keisler*, 505 F.3d 650, 656 (7th Cir. 2007).

[22] See also, *e.g.*, *Arej* v. *Sessions*, 852 F.3d 665, 667 (7th Cir. 2017) ("[I]t was a serious legal error for the Board to have ignored [the alien's] evidence."); *Iglesias* v. *Mukasey*, 540 F.3d 528, 531 (7th Cir. 2008) (same); *Noorani* v. *Holder*, 501 Fed. App'x 567, 572 (7th Cir. 2013).

D. The Saving Clause does not require bespoke jurisdictional analyses.

Faithful adherence to the text of the Saving Clause yields a straightforward result: Courts may review application of law to fact, but not disputes about historical fact. This simple test is broadly applicable and readily administered. The Court should not adopt the standard identified in *Village at Lakeridge* and other cases, under which it is necessary to categorize mixed questions as "principally" legal or "principally" factual. Using that approach here would substantially complicate administration of the Saving Clause and require significant and confusing collateral litigation about jurisdiction for each of the dozens of issues that arise in removal proceedings. If the Court nonetheless adopts this approach, it should hold that equitable tolling is more legal than factual.

1. The Court should not mandate individual jurisdictional assessments for each issue arising in immigration law.

As we have described, when reviewing removal orders pursuant to the Saving Clause, courts of appeals routinely separate legal analysis from the Board's assessment of historical fact. That approach is correct.

In other settings, the legal and factual elements of a mixed question cannot be so neatly sorted. This often occurs when determining whether an issue that requires application of law to fact is one for judge or jury (see *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668 (2019)) or identifying the governing appellate standard of review for a district court's decision on a mixed question (see *Vill. at Lakeridge, LLC*, 138 S. Ct. at 968). To make these broad determinations, courts consider whether the question at issue "entails primarily legal or factual work" (*id*. at 967)—an in-

quiry the Court has repeatedly called "difficult[]" (*Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 401 (1990)), "vexing" (*Pullman-Standard*, 456 U.S. at 288), "elusive" (*Miller* v. *Fenton*, 474 U.S. 104, 113 (1985)), and "slippery" (*Thompson* v. *Keohane*, 516 U.S. 99 (1995)).

The Court should not adopt this sort of analysis for the Saving Clause.

As we have said, jurisdictional statutes are construed with the "strong presumption that Congress intends judicial review of administrative action." *Smith*, 139 S. Ct. at 1776. That critical issue is not present when, for example, the Court determines the governing standard of review. In the standard-of-review context, the Court considers, in significant part, whether the question at issue better resides in the "domain" of the trial or appellate courts. *Vill. at Lakeridge, LLC*, 138 S. Ct. at 966. That is to say, the Court decides whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988). The functional competencies of the courts help indicate where the issue "primarily" "belongs." *Vill. at Lakeridge, LLC*, 138 S. Ct. at 968.

But, regardless of the standard of review selected, *there still is judicial review*. When a deferential standard of review applies, it remains a *court* (the trial court) that decides the issue in the first instance. Additionally, there is still appellate review; deeming an issue more heavily factual, and selecting abuse-of-discretion review, "still leaves some role for appellate courts." *Vill. at Lakeridge, LLC*, 138 S. Ct. at 968 n.7. Indeed, "[t]he abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error." *Highmark Inc.* v. *Allcare*

Health Mgmt. Sys., Inc., 572 U.S. 559, 563 n.2 (2014). See also *Cooter & Gell*, 496 U.S. at 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). In sum, the *Village at Lakeridge* framework is designed to identify which court is better suited to principally resolve a particular issue—not whether Congress has provided judicial review over agency action.

The question here, of course, is whether there is *any* judicial review over an agency's decision. Because the Saving Clause can be read to supply judicial review of the application of law to fact, it should be. See *Gutierrez de Martinez*, 515 U.S. at 434. Standards adopted in different settings for different purposes should not be used here—especially when doing so runs afoul of the statute's straightforward text.

Adoption of the *Village at Lakeridge* framework would also violate the principle that "judicial administration of a jurisdictional statute" should be "as simple as possible." *Hertz Corp.*, 559 U.S. at 80. In view of the statutory text—and the capacity of courts to avoid reviewing questions of historical fact—it is unnecessary to engraft the "vexing" (*Pullman-Standard*, 456 U.S. at 288) standards used elsewhere onto a jurisdictional statute. In the fourteen years since the REAL ID Act was enacted, the lower courts have generally not used this framework in the context of Section 1252(a)(2)(D), and there is no reason to do so now.

Applying *Village at Lakeridge* to the Saving Clause would spawn collateral litigation about jurisdiction in case after case. Courts would be obligated to make these fact/law distinctions as to the dozens of different issues that arise in removal proceedings. This approach would create the sort of "[c]omplex jurisdiction-

al test[]" the Court actively avoids. *Hertz Corp.*, 559 U.S. at 94. And the conflicts among circuits that would undoubtedly emerge would keep this Court occupied for years, as litigants march through each of the myriad issues that pervade immigration appeals.

In sum, when the criminal bar of Section 1252(a)(2)(C) applies, courts lack jurisdiction to review the BIA's findings of historical fact. But, under Section 1252(a)(2)(D), the courts have jurisdiction to resolve the application of legal standards to settled facts. This straightforward principle—broadly applied now in the courts of appeals—provides the correct, clear, and administrable rule governing the scope of judicial review.

2. In all events, equitable tolling is more legal than factual.

If the Court nonetheless construes Section 1252(a)(2)(D) as requiring individualized characterization of each issue that arises before the BIA, petitioners still prevail. When the historical facts are undisputed, resolution of equitable tolling is more legal than factual.

a. The Court has long understood that equitable tolling is ultimately a question of law, which is a "historical tradition" that resolves the proper treatment of the issue. *Vill. at Lakeridge, LLC*, 138 S. Ct. at 967 n.3. Indeed, courts applying equitable tolling "must be governed by rules and precedents no less than the courts of law." *Holland*, 560 U.S. at 649.

For nearly two centuries, the Court has held that reasonable diligence—one element of equitable tolling, and an issue specially implicated here—is a question of law. In *Bank of Columbia* v. *Lawrence*, 26 U.S. (1 Pet.) 578, 583 (1828), the Court addressed the diligence inquiry as it relates to providing notice to the endorser of a note: "It seems at this day to be well settled, that

when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law." Likewise, in *Downey* v. *Hicks*, 55 U.S. 240, 244 (1852), addressing a litigant's "diligence" in seeking payment of a debt, the Court held that whether "diligence is reasonable[] is a question of law, (the facts of the case being ascertained,) to be decided by the Judge, and not by the jury."[23]

The Court's recent cases confirm that tolling is ultimately a question of law. In *Menominee Indian Tribe*, the Court conducted an independent tolling analysis, without any regard for the conclusions below. 136 S. Ct. at 756-757. So too in *Young* v. *United States*, 535 U.S. 43, 50 (2002), where the Court independently analyzed the applicability of tolling. And in *Pace*, the Court held, with no deference to the lower courts' conclusions, that the litigant failed to satisfy the diligence requirement of tolling. *Pace*, 544 U.S. at 418-419. See also *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (denying applicability of tolling by applying legal standard against the factual circumstances, without regard for decisions below); *Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147 (1984) (addressing tolling without deference to holding below). The Court's recent practice confirms what has always been true—equitable tolling is predominately a question of law.

b. When forced to characterize it as primarily legal or factual, the circuits often hold that equitable tolling

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[23] Similarly, in construing what constitutes "reasonable cause" for failing to timely file a tax return (see 26 U.S.C. § 6651(a)), the Court holds that "[w]hether the elements that constitute 'reasonable cause' are *present* in a given situation is a question of fact, but what elements *must* be present to constitute 'reasonable cause' is a question of law." *United States* v. *Boyle*, 469 U.S. 241, 249 n.8 (1985).

skews more legal, especially when the facts are not at issue. As the Fourth Circuit succinctly summarized: "to the extent a challenge to the denial of tolling 'is not to the existence of certain facts, but instead rests on whether those facts demonstrate a failure to bring a timely claim, resolution of this challenge turns on questions of law which are reviewed *de novo*." *Cruz* v. *Maypa*, 773 F.3d 138, 143 (4th Cir. 2014) (alterations omitted).

As then-Judge Alito wrote for the Third Circuit, the court was "inclined to believe that where * * * the relevant facts are not disputed, a District Court's decision on the question whether a case is sufficiently 'extraordinary' to justify equitable tolling should be reviewed de novo." *Brinson*, 398 F.3d at 231. "Three factors point in this direction." *Ibid*. *First*, the factfinder "does not have any comparative advantage in deciding whether particular circumstances are extraordinary enough to warrant the application of the doctrine." *Ibid*. *Second*, reversal on tolling grounds "will not lead to a retrial or any other comparably burdensome proceedings." *Ibid*. And, *third*, "de novo review leads to greater uniformity in the application of the doctrine and better serves the goal of ensuring that the doctrine is indeed used 'sparingly.'" *Ibid*.[24]

In the habeas context, for example, courts often "review the district court's application of equitable tolling de novo, as the question is 'solely one of law.'" *Helton* v. *Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th

[24] Although the court in *Brinson* did not purport to "resolve this question" (398 F.3d at 231), the Third Circuit has since understood *Brinson* to adopt a *de novo* standard of review. See, *e.g.*, *Munchinski* v. *Wilson*, 694 F.3d 308, 329 (3d Cir. 2012); *Taylor* v. *Horn*, 504 F.3d 416, 427 n.6 (3d Cir. 2007).

Cir. 2001).[25] Likewise, in the context of a statutory deadline, when "the facts" relevant to "tolling are not disputed," the issue is "a question of law" subject to de novo review. *Valenzuela* v. *Kraft, Inc.*, 801 F.2d 1170, 1172 (9th Cir. 1986).[26] When addressing contract or

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[25] See also, *e.g.*, *Solomon* v. *United States*, 467 F.3d 928, 932 (6th Cir. 2006) ("This Court reviews a district court's decision on the issue of equitable tolling de novo where the facts are undisputed."); *Dunlap* v. *United States*, 250 F.3d 1001, 1007 n.2 (6th Cir. 2001) ("[W]here the facts are undisputed or the district court rules as a matter of law that equitable tolling is unavailable, we apply the de novo standard of review to a district court's refusal to apply the doctrine of equitable tolling; in all other cases, we apply the abuse of discretion standard."); *English* v. *United States*, 840 F.3d 957, 958 (8th Cir. 2016) ("We review a denial of equitable tolling de novo, but review underlying fact findings for clear error."); *Spitsyn* v. *Moore*, 345 F.3d 796, 799 (9th Cir. 2003) ("If the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is also reviewed de novo."); *Miles* v. *Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999) ("[W]here, as here, the facts are undisputed as to the question of equitable tolling, we review de novo."); *McCloud* v. *Hooks*, 560 F.3d 1223, 1227 (11th Cir. 2009) ("This Court reviews de novo the district court's application of equitable tolling of federal habeas corpus statute's limitations period.").

[26] See also, *e.g.*, *Arctic Slope Native Ass'n, Ltd.* v. *Sebelius*, 699 F.3d 1289, 1294 (Fed. Cir. 2012) ("Where, as here, the facts are undisputed, a determination of whether the criteria for equitable tolling have been met presents a question of law that we review de novo."); *Chavez* v. *Carranza*, 559 F.3d 486, 493 (6th Cir. 2009); *Rose* v. *Dole*, 945 F.2d 1331, 1334 (6th Cir. 1991) ("[T]he application of the doctrine of equitable tolling * * * is a question of law."); *O'Donnell* v. *Vencor, Inc.*, 465 F.3d 1063, 1066 (9th Cir. 2006) ("Because the facts here are undisputed, we review de novo whether to apply equitable tolling."); *Justice* v. *United States*, 6 F.3d 1474, 1478 (11th Cir. 1993) ("Whether the doctrine of equitable tolling saves a cause of action otherwise barred by the statute of limitations is a question of law which we consider *de novo*.");

tort disputes, courts similarly understand equitable tolling to involve questions of law.[27] This remains true with respect to "the diligence standard required for equitable tolling"; "[t]he application of the diligence standard to the undisputed facts * * * presents a question of law." *Former Employees of Sonoco Prod. Co.* v. *Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

Although the Fifth Circuit holds that the reasonable diligence aspect of tolling "is a factual question" in the immigration context (*Guerrero-Lasprilla* Pet. App. 3a; *Ovalles* Pet. App. 3a; *Penalva* v. *Sessions*, 884 F.3d 521, 523 (5th Cir. 2018)), it simultaneously agrees that the "extraordinary circumstance" analysis can have legal elements—*and* that those legal aspects are within the scope of the Saving Clause. See *Diaz* v. *Sessions*, 894 F.3d 222, 227 (5th Cir. 2018).

Elsewhere, the Fifth Circuit has held that it "review[s] de novo underlying questions of law, such as * * * whether equitable tolling applies." *Newby* v. *Enron Corp.*, 542 F.3d 463, 468 (5th Cir. 2008). See also *Maciel* v. *City of Fort Worth Drug Task Force*, 472 Fed. App'x 314, 315 (5th Cir. 2012) ("[W]hether equitable tolling applies is a question of law."); *Patton* v. *Gonzales*, 197 Fed. App'x 309, 312 (5th Cir. 2006) ("We also review the district court's determination on the ap-

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Miranda v. *B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992).

[27] See also, *e.g.*, *Booth* v. *Carnival Corp.*, 522 F.3d 1148, 1149 (11th Cir. 2008) ("[T]he question of whether equitable tolling applies is a legal one subject to de novo review."); *In re U.S. Lines, Inc.*, 318 F.3d 432, 435 (2d Cir. 2003) (law is reviewed de novo; factual findings are reviewed for abuse of discretion). So too in criminal cases—courts "employ de novo review when a district court holds * * * that the facts cannot justify equitable tolling as a matter of law." *United States* v. *Saro*, 252 F.3d 449, 455 n.9 (D.C. Cir. 2001).

plicability of equitable tolling de novo."); *In re Double J Operating Co., Inc.*, 37 Fed. App'x 91 (5th Cir. 2002) ("[W]hether equitable tolling applies to the undisputed facts of this case present questions of law for the court."); *Rashidi* v. *Am. President Lines*, 96 F.3d 124, 126 (5th Cir. 1996) ("[W]e review de novo a district court's decision regarding tolling of limitations.").

3. Beyond the "historical tradition" of treating equitable tolling as a legal issue (*Vill. at Lakeridge*, 138 S. Ct. at 967 n.3), other considerations confirm that the inquiry is more legal than factual.

Treating a question as one of law will "produce greater uniformity among courts; and greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of federal agency action." *Albrecht*, 139 S. Ct. at 1680. See also *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996) (relying on "the importance of uniformity" in holding claim construction is legal in nature).

That is certainly the case here—the Board's application of tolling should be consistent when addressing the same circumstances. These cases are illustrative. Here, with respect to Guerrero-Lasprilla, the BIA concluded that the Fifth Circuit's decision in *Lugo-Resendez* did not remove a barrier, and thus its issuance had no bearing on the equitable tolling analysis. See *Guerrero-Lasprilla* Pet. App. 12a. Yet, as to Ovalles, the BIA appears to agree that *Lugo-Resendez* removed a barrier to relief and is the starting point for addressing Ovalles's diligence. See *Ovalles* Pet. App. 6a.

For questions like these, it is essential that the BIA be consistent; it would be inappropriate for the agency to hold in one case that *Lugo-Resendez* is relevant to equitable tolling, while deeming it irrelevant else-

where. That would render the immigration system a game of chance—not a procedure governed by law. If two aliens' requests for reopening rely on indistinguishable historical facts, they should receive the same result with respect to equitable tolling. This is certainly a circumstance where "greater uniformity" is a "virtue" with respect to "federal agency action." *Albrecht*, 139 S. Ct. at 1680.

What is more, the legal standard of "equitable tolling" "acquire[s] content" principally through judicial "application." *Ornelas*, 517 U.S. at 697. As the Court instructed, "given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Holland*, 560 U.S. at 651. That the Court recognizes tolling as a doctrine that builds on precedent is proof positive that it is ultimately a question of law.

* * *

Petitioners' claims challenge the legal standards used by the Board. They therefore present textbook "questions of law" that fall within the scope of Section 1252(a)(2)(D). In this respect, these are straightforward cases.

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." That construction is true to the statute's text, it is simple and manageable, it captures Congress's purpose, and it ensures judicial review over agency decisions that carry enormous practical import. Any other interpretation would substantially complicate the administration of a routinely invoked jurisdictional statute.

CONCLUSION

The Court should reverse and remand for further proceedings.

Respectfully submitted.

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APPENDIX

8 U.S.C. § 1229a provides, in relevant part:

Removal proceedings

* * *

(c) Decision and burden of proof

* * *

(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.

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8 U.S.C. § 1252 provides, in relevant part:

Judicial review of orders of removal

(a) Applicable Provisions

* * *

(2) Matters not subject to judicial review

* * *

(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.

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