No. 18-1015

In the Supreme Court of the United States

RUBEN OVALLES,
Petitioner,

v.

WILLIAM P. BARR
United States Attorney General,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

MARK ANDREW PRADA
Counsel of Record
MARIO R. URIZAR
Prada Urizar, PLLC
3191 Coral Way, Ste. 607
Miami, FL 33145
(786) 238-2222
mprada@pradaurizar.com

PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Petitioner Ruben Ovalles respectfully replies to the Attorney General's brief in opposition to a grant of certiorari in this case. Ovalles does so in order to address new points raised in the opposition brief, and to clarify certain facts in the record for purposes of accuracy.

I. This case is a suitable vehicle for certiorari because Ovalles was *granted* cancellation of removal, and he meets the test for tolling.

Contrary to the position of the Attorney General, this case is indeed a suitable vehicle for certiorari based on the facts of Ovalles' case. This is in addition to the fact that the court of appeals' decision rested solely upon the jurisdictional question that Ovalles wishes to present to the Court.

First, it was suggested that Ovalles "would be a poor candidate, on a motion to reopen, to obtain cancellation of removal," and that "he provides no basis to suggest that the Board would exercise its discretion to grant him cancellation." (Resp. BIO 11-12.) These contentions are misplaced because Ovalles was originally *granted* cancellation by the Immigration Judge in 2004 before the BIA vacated the grant of relief on nondiscretionary grounds. (Pet. App. 32a-35a.) In fact, the DHS never contested the grant of relief on discretionary grounds.

Further, the Attorney General has properly conceded that the BIA erred in vacating the grant of relief by holding that Ovalles was an aggravated felon. (Resp. BIO 3) ("Because petitioner's Ohio conviction for attempted heroin possession would have been a federal misdemeanor, he would not have been subject to removal for committing an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii), and would have been eligible for cancellation for removal, 8 U.S.C. 1229b(a)(3), under *Lopez* [*v. Gonzales*, 549 U. S. 47 (2006)]."). Thus, a grant of Ovalles' motion to reopen would require no further proceedings before the agency. Ovalles would simply be restored to his former status as a lawful permanent resident, and then be allowed to return to his family.

Second, Ovalles has indeed made out a strong case for tolling. As previously explained, despite being in a foreign country, Ovalles has vigorously sought to remedy his situation by staying abreast of circuit case law, and responding in kind. (Pet. for Cert. 5-9.) Ovalles proffers that he has sufficiently shown his diligence in his petition for certiorari.

But, it may be prudent to point out that this Court has held that "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U. S. 631, 653 (2010) (citations and quotation marks omitted). The point may best be made by reference to the Attorney General's argument to the court of appeals below:

Although Petitioner now asserts in his brief to the Court that he "exhausted all appeals" in his first motion to reopen (Pet. Br. at 23), he did not seek rehearing en banc from this Court or certiorari in the Supreme Court of this Court's 2009 decision.

* * *

To be sure, since at least 2008, this Court's practice had been to construe an alien's request for equitable tolling "as an invitation for the [Board] to exercise its discretion to reopen the removal proceeding sua sponte" and to "dismiss such a recharacterized request for lack of jurisdiction." *Lugo-Resendez*, 831 F.3d at 343 (internal quotation marks omitted). As Petitioner notes (Pet. Br. 17-18, 19 n.8), the Supreme Court's decision in *Mata v. Lynch*, put an end to that practice and required the Court to assert jurisdiction over petitions raising equitable tolling claims. *See* 135 S. Ct. 2150, 2156 (2015). And even before *Mata*, nothing precluded Petitioner from trying to distinguish his case and urging the Board to find that he is entitled to equitable tolling of the motion filing deadline. *See Lugo-Resendez*, 831 F.3d at 342-43; *Garcia-Carias*, 697 F.3d at 260, 263-65.

The potential uphill climb that Petitioner might have faced prior to *Lugo-Resendez* does not justify or excuse his decision not to make an equitable tolling claim in his first motion to reopen. Petitioner seemingly ignores the fact that if he had sought equitable tolling in connection with his first motion, his might actually have been the

> case that shifted the legal landscape in the Fifth Circuit in his favor.

(Resp. Br. 6, 12-13 (CA5 Sept. 7, 2017).)

In other words, the Attorney General's position below was that tolling is only available to those who seek to convince courts to overturn their own precedents. Such a position can only be described as demanding maximum feasible diligence—which is the wrong standard. Ovalles was reasonably diligent.

Last, the Attorney General suggests that Ovalles "cannot demonstrate the extraordinary circumstance that would be required to establish a basis for equitable tolling." (Resp. BIO 11) (citing BIA ruling on sua sponte reopening). But, neither the BIA nor the court of appeals said a thing about the extraordinary circumstance prong.

Also, the BIA's decision on sua sponte reopening has no bearing on a request for tolling. Whereas this Court has "expressly characterized equitable tolling's two components as 'elements,' not merely factors of indeterminate or commensurable weight," *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016) (citation omitted), sua sponte reopening has no standard. *E.g.*, *Lenis v. U.S. Atty. Gen.*, 525 F. 3d 1291, 1293 (CA11 2008) (agreeing with ten circuits that there is no meaningful standard for the review of a motion to reopen sua sponte). Thus, whether Fifth Circuit case law disallowing an equitable tolling request amounts to an extraordinary circumstance has never been at issue in this case.

II. There indeed is a direct conflict regarding whether diligence is a reviewable mixed question of law and fact.

Depending on which court of appeals hears a petition for review on equitable tolling, a petitioner like Ovalles will or will not have judicial review. Despite this irrefutable point, the government opposes certiorari by arguing "the broad conflict that petitioner suggests does not exist." (Resp. BIO 10.) Ovalles contends that this is incorrect.

In the Ninth Circuit, a dispute over whether an alien has shown due diligence for equitable tolling is reviewable under 8 U.S.C. §1252(a)(2)(D) "so long as the relevant facts are undisputed." Resp. BIO 9 (*citing Ghahremani v. Gonzales*, 498 F. 3d 993, 999 (CA9 2007)). It is uncontested that petitioner's facts are undisputed, as was argued before the court of appeals. (Pet. Br. 22 (CA5 Aug. 8, 2017); Pet. Reply Br. 2 (CA5 Sept. 21, 2017).) Therefore, applying the case law from the Ninth Circuit, both parties must agree that the court of appeals would have taken jurisdiction over the petition for review if filed in the Ninth Circuit.

Yet, the petition was filed in the Fifth Circuit which refused to exercise jurisdiction. In the Fifth Circuit, the same dispute is unreviewable under that court's per se bar that diligence is always "a question of fact." *Penalva v. Sessions*, 884 F. 3d 521, 525 (CA5 2018). Contrary to the Attorney General's suggestion (Resp. BIO 9), the Fifth Circuit's jurisprudence provides that "a decision by the [agency] on the first prong [due diligence] is factual and may not be dis-

turbed." *Diaz v. Sessions*, 894 F. 3d 222, 227 (CA5 2018).

Specifically, the Ninth Circuit holds that it has jurisdiction under §1252(a)(2)(D) to review an alien's due diligence under the equitable tolling standard "so long as the relevant facts are undisputed," "even if our inquiry would entail reviewing an inherently factual dispute." *Ghahremani*, 498 F. 3d, at 999; *Agonafer v. Sessions*, 859 F. 3d 1198, 1202 (CA9 2017). This is because the Ninth Circuit construes the "questions of law" phrase of §1252(a)(2)(D) "to include mixed questions of law and fact," which is defined as questions "[w]here the relevant facts are undisputed." *Id*., at 998; *accord Ramadan v. Gonzales*, 479 F. 3d 646, 654 (CA9 2007). Contrary to this position is the Fifth Circuit's treatment of §1252(a)(2)(D).

The Fifth Circuit, as it did in Ovalles' case, disregards the "mixed questions of law and fact" theory as part of §1252(a)(2)(D)'s "questions of law" DNA. Instead the court says review of an alien's due diligence is per se barred under §1252(a)(2)(C) as a "question of fact." *Penalva*, 884 F. 3d, at 525.

In its misplaced belief that the Fifth Circuit has not "addressed the significance of factual disputes (or the absence of such disputes)," the Attorney General remains optimistic that the Fifth Circuit will clarify its position in the future. (Resp. BIO 9.) First, petitioner's case shows the Fifth Circuit has already considered the argument and decided against applying the "mixed questions of law and fact" approach in §1252(a)(2)(D). (Pet. Reply Br. 1-3 (CA5 Sept. 21, 2017)) (arguing mixed question of law and fact).

Second, the Attorney General's optimism mistakenly stems from the Fifth Circuit's decision in *Diaz* where the court stated it "may review factual disputes that are necessary to review a . . . question of law." 894 F. 3d, at 227. But, the court made this determination regarding the other requirement for tolling, i.e., whether there was an extraordinary circumstance preventing a movant from seeking relief at an earlier time. The court was clear that its holding was exclusive to the "extraordinary circumstance" requirement:

> Thus, a decision by the BIA on the first prong is factual and may not be disturbed (at least barring an error in the legal standard applied). Here, however, the BIA made no finding on the first prong. Instead, it concluded that Diaz had not shown IAC and therefore could not satisfy the second prong of extraordinary circumstances that stood in the way of timely filing.

Id., at 226-27 (citation omitted).

The division between the Fifth and Ninth Circuit is well-developed. Their plain descriptions of diligence issues as being either mixed questions, or pure questions of fact leave no room for ambiguity. In one circuit, there will be jurisdiction to review the type of challenge that Ovalles seeks to bring. In the other, there shall be no such jurisdiction. The conflict is clear. And, it affects a question of jurisdictional importance that has implications of broader significance for the interplay between §§1252(a)(2)(C), and (D) in many other types of immigration cases.

III. The Ninth Circuit's approach is the correct approach.

Although this goes to the merits question, the Attorney General has made an issue of Ovalles not making "argument that the approach to the due-diligence component of equitable tolling taken by the decision below and the court of appeals on which it relied is incorrect." (Resp. BIO 8.) As argued to the court of appeals, the issue of diligence is reviewable as a question of law when the facts are not in dispute. (Pet. Reply Br. 1-3 (CA5 Sept. 21, 2017).)

This Court has previously held that courts review the application of law to undisputed facts de novo in an immigration case relating to denaturalization:

> Although the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe it is proper to treat the issue of materiality as a legal question.

Kungys v. United States, 485 U. S. 759, 772 (1988) (citations and punctuation omitted).

Ultimately, the true issue is whether question of law jurisdiction under 8 U.S.C. §1252(a)(2)(D) includes situations where a legal standard must be applied to an undisputed set of facts, often referred to as a mixed question of law and fact. It must be remembered that petitions for review of removal orders are simply habeas petitions litigated through an alternative procedure that is adequate and effective for

such review. For example, when Congress completed eliminated judicial review of removal order in the 1917 Immigration Act, this Court held:

> Read against this background of a quarter of a century of consistent judicial interpretation, s 19 of the 1917 Immigration Act, 39 Stat. 890 clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled. . . . Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of s 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus

Heikkila v. Barber, 345 U. S. 229, 234–35 (1953) (citations and footnotes omitted).

Further, even though review of a removal order can be channeled into a petition for review proceeding, such review must be co-extensive with habeas review. In reliance on precedent of this Court, the Eleventh Circuit has explained:

> The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended." U.S. Const. art. I, § 9, cl. 2. The Supreme Court has held that, "the substitution of a collateral remedy which is neither inadequate nor

> ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 1230, 51 L.Ed.2d 411 (1977). If a substitute remedy provides the same scope of review as a habeas remedy, it is adequate and effective. *Id.* at 381–82, 97 S.Ct. at 1229–30. "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 314 n. 38, 121 S.Ct. 2271, 2287 150 L.Ed.2d 347 (2001). "Habeas review available in § 2241 petitions by aliens challenging removal orders" includes constitutional issues and errors of law, but "does not include review of administrative fact findings or the exercise of discretion." *Cadet v. Bulger*, 377 F.3d 1173, 1184 (11th Cir. 2004).

Alexandre v. U.S. Atty. Gen., 452 F. 3d 1204, 1205–06 (CA11 2006).

Returning to the Ninth Circuit's approach, that court concluded that diligence was a reviewable mixed question by relying on its earlier precedent in *Ramadan v. Gonzales*, 479 F. 3d 646 (CA9 2007), where the court "analyzed the breadth of 'question of law' and held that Congress intended the term as used in 8 U.S.C. § 1252(a)(2)(D) to include mixed questions of law and fact." *Ghahremani*, 498 F. 3d, at 998. The logic was that "*Ramadan* makes clear . . . that even if our inquiry would entail reviewing an inherently factual dispute, appellate jurisdiction is preserved under 8 U.S.C. § 1252(a)(2)(D) so long as

the relevant facts are undisputed," and that review of diligence for tolling purposes "presents such a situation." *Id.*, at 998–99.

On the other side of the country, the Eleventh Circuit followed *Ramadan* to hold that "whether a particular course of conduct amounts to torture under the Convention Against Torture and the accompanying legislation is a legal one." *Jean-Pierre v. U.S. Atty. Gen.*, 500 F. 3d 1315, 1316 (CA11 2007) (footnote and punctuation omitted). The reasoning was that:

> Questions of law, as it is used in the REAL ID Act, extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.

Id., at 1322 (*citing Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F. 3d 315, 326–27 (CA2 2006)).

Further, this rationale squarely lines up with this Court's ruling that habeas review for aliens extends to the application of law to the specifics of a case:

> In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens. It enabled them to challenge Executive and private detention in civil cases as well as criminal. Moreover, 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.

INS v. St. Cyr, 533 U. S. 289, 301–02 (2001).

In sum, there is a strong likelihood that the Fifth Circuit has erred in holding that the issue of whether an alien has been diligent in seeking a motion to reopen—on a set of facts not in dispute—is an unreviewable question of fact when the movant is an alien deportable on criminal grounds, such as the attempted possession of a controlled substance.

CONCLUSION

The Court should grant Ovalles' petition for a writ of certiorari.

Respectfully submitted,

MARK ANDREW PRADA
Counsel of Record
MARIO R. URIZAR
Prada Urizar, PLLC
3191 Coral Way, Ste. 607
Miami, FL 33145
(786) 238-2222
mprada@pradaurizar.com

PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

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