No. 18-776

# In the Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
*Petitioner,*

v.

WILLIAM P. BARR, Attorney General,
*Respondent.*

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

In the Ninth Circuit, a dispute over whether an alien has shown diligence for equitable tolling is reviewable under 8 U.S.C. § 1252(a)(2)(D) "so long as the relevant facts are undisputed." BIO 10–11 (citing *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007)). It is uncontested that petitioner's facts are undisputed, and was argued accordingly before the Fifth Circuit. Pet. COA Reply Br. 5–8. Therefore, under Ninth Circuit case law, both parties must agree 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, who 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 (5th Cir. 2018). Under the Fifth Circuit's jurisprudence "a decision by the [agency] on the first prong [diligence] is factual and may not be disturbed." *Diaz v. Sessions*, 894 F.3d 222, 227 (5th Cir. 2018).

Depending on which court of appeals a petition for review on equitable tolling is filed determines if a petitioner will have judicial review. Despite this irrefutable point, the government opposes certiorari by arguing "the broad conflict that petitioner suggests does not exist." BIO 10. The government's position must be

discarded for good reason—the Fifth Circuit's jurisprudence on equitable tolling is squarely in conflict with the Ninth Circuit's.

The government defends the Fifth Circuit's position. BIO 8 ("whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is *not* a question of law preserved for review under § 1252(a)(2)(D), but rather a factual question that is not reviewable in light of the jurisdictional bar in § 1252(a)(2)(C)." (emphasis added). This position contradicts the Ninth Circuit's application of the mix question theory on "questions of law."

It is petitioner's contention that the Ninth Circuit's approach is the correct approach. Section § 1252(a)(2)(D)'s reference to "questions of law" includes "mixed questions," so to allow review of denials of equitable tolling in the courts of appeals. This Court's previous decisions support this position. The Court in *Kungys* held a "factual evidentiary showing" can involve interpretation of substantive laws, which in turn creates a legal question." *Kungys v. U.S.*, 485 U.S. 759, 772 (1988) (internal citation omitted). And in *Pullman-Standard v. Swint* the Court recognized conclusions on mixed questions of law and fact are independently reviewable by an appellate court. 456 U.S. 273, 289 n.19 (1982). Lastly, petitions for review are alternatives to writ of habeas petitions, which provided aliens with judicial review of constitutional issues and errors of law. Under U.S. Const. Art. 1, § 9, cl.2, the privileges under a writ of habeas "shall not be suspended," but congress may provide aliens with a substitute remedy, e.g., a petition

for review, as long as that substitute provides the same scope of review as a writ of habeas. *Swain v. Pressely*, 430 U.S. 372, 381–82 (1977).

The government's arguments exemplify the appropriateness of this case for certiorari. The government argues "[e]ven if petitioner could demonstrate diligence in filing his motion to reopen after the Fifth Circuit's decision in *Lugo-Resendez*, he nevertheless waited more than two years after the Board's decision in *Abdelghany*," thus failing to meet the other requirement for equitable tolling—that an extraordinary circumstance stood in his way. BIO 11. But petitioner's contention has always been that the Board's holding in *Abdelghany*, 26 I&N Dec. 254 (BIA 2014), did not overrule the Fifth Circuit's practice of failing to recognize equitable tolling on statutory motions to reopen. It was *Lugo-Resendez*, 831 F.3d 337 (5th Cir. 2016) that overruled their practice, and so removed the "extraordinary circumstance" standing in petitioner's way. Petitioner was diligent in filing his motion within 40-days of *Lugo-Resendez*' publication, which is the moment diligence is measured.

Whether it was Board's decision or the Fifth Circuit's decision that provided petitioner the legal ability to file the motion to reopen is a legal question reviewable by the courts of appeals. Petitioner's case is a perfect example of when an "often fact-intensive inquiry" can turn on a mixed question of law and fact. *Holland v. Florida*, 560 U.S. 631, 654 (2010); *Cf. Kungys*, 485 U.S. 759, 772 (1988) ("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.") (quoting *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir. 1983).

Finally, the government's remaining arguments descend into ad hominem attacks. *See* BIO 12 ("[E]ven if Petitioner succeeded in obtaining equitable tolling, he would be an especially poor candidate . . . to obtain relief from removal. . . . [He] would be extremely unlikely to receive discretionary relief from removal.). The government's opinion stems from their limited knowledge of the facts of this case, surmised only from the decisions below. But petitioner filed several discretionary documents—not available for review at this stage—with his motion to reopen to overcome the governments' non grata stigma. Regardless, these documents were not considered below given the erroneous denial of equitable tolling.

For these reasons we humbly request the Court to grant certiorari.

### A. The Fifth Circuit's approach on the due diligence standard for equitable tolling conflicts with that of the Ninth Circuit's.

The case law arising from the Fifth Circuit is well developed and conflicts with the Ninth Circuit's regarding the "jurisdictional significance of the presence of undisputed facts." BIO at 11. Yet, the government is under the impression that the Fifth and Ninth Circuit

are not in conflict because the Fifth Circuit "has not taken any position that squarely conflicts with the Ninth Circuit's." *Ibid*. The government's contention is flawed; Petitioner's case is emblematic of the government's misapprehension.

Petitioner argued to the Fifth Circuit that it had jurisdiction given the facts were undisputed and the question being presented for review involved the agency's interpretation of case decisions, laws, and regulations. Pet. COA Reply Br. at 6. Petitioner further provided case law from other courts of appeals in support of the court's jurisdiction. *Ibid*. Nonetheless, citing to their own decision in *Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018), the Fifth Circuit explained it had no jurisdiction over the claim—

> Our court determined recently that, whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question. Because Guerrero was removable on account of criminal convictions qualified as aggravated felonies as well as violations of laws relating to controlled substances, we lack jurisdiction to consider the factual question of whether he acted with requisite diligence to warrant equitable tolling.

Appx. A, 3a–4a (COA opinion). In ignoring petitioner's argument, the Fifth Circuit was crystal clear of their position—diligence is a per se factual inquiry.

Yet, the Ninth Circuit exercises its jurisdiction under § 1252(a)(2)(D) to review an alien's diligence "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 (9th Cir. 2017). The Ninth Circuit interprets the "questions of law" portion of § 1252(a)(2)(D) "to include mixed questions of law and fact," which they defined as questions "[w]here the relevant facts are undisputed. *Id*. at 998; *see Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007). This is contrary to the Fifth Circuit's treatment of § 1252(a)(2)(D).

The Fifth Circuit—as it did in petitioner's case and two other cases pending petitions for certiorari[1]—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 diligence is per se barred under § 1252(a)(2)(C) as a "question of fact." See *Penalva*, 884 F.3d at 525.

In its mistaken belief that the Fifth Circuit has not foreclosed on the issue whether the "due diligence is per se a factual question," the government is optimistic the Fifth Circuit will clarify its position in the future. See BIO at 11. 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 for § 1252(a)(2)(D). This is a recurring

[1] *Ovalles v. Barr*, 741 Fed. Appx 259 (5th Cir. 2018), petition for cert. pending, No. 18-1015 (filed Jan. 29, 2019); *Angeles v. Barr*, Order, No. 18-60715 (5th Cir. 2018), petition for cert. pending, No. 18-1255 (filed Mar. 27, 2019).

issue, evinced by the other two cases pending before this Court.[2]

Second, the government's optimism mistakenly stems from the Fifth Circuit's decision *Diaz v. Sessions*, 894 F.3d 222, 227 (5th Cir. 2018), where the court stated it "may review factual disputes that are necessary to review a . . . question of law." But the court made this determination regarding the "extraordinary circumstance" prong for equitable tolling. The court was clear its holding was exclusive to the "extraordinary circumstance" requirement. Also, *Diaz* was decided a couple of months after *Penalva* and nowhere in the decision does the court attempt to shy away from its rigid ruling in *Penalva*. In fact, only a few lines above the quote the government uses as a silver lining, the Fifth Circuit, relying on *Penalva*, pellucidly stated: "[w]hether a litigant diligently pursued her rights is a question of fact. Thus, a decision by the BIA on the first prong is factual and may not be disturbed." *Diaz*, 894 F.3d at 226 (internal citations omitted).

The division between the Fifth and Ninth Circuit is well-developed. The conflict is clear, it is serious, and affects a question of statutory importance. The conflict also affects the country's two largest states by population—California and Texas. "Deportation is a penalty—at times most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326

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[2] *Supra* n. 1

U.S. 135, 154 (1945); *see Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

The Court's guidance is needed.

### B. The Fifth Circuit's overly rigid per se approach is difficult to reconcile with general equitable principles.

Applying the Fifth Circuit's per se approach imposes the rigid proposition that review of an alien's diligence never involves a legal question; in turn it eliminates equitable tolling relief for an entire class of aliens—those subject to § 1252(a)(2)(C). The Fifth Circuit's approach on diligence is overly rigid and contrary to the Court's "tradition" on the "exercise of a court's equity powers." *Holland*, 560 U.S. at 649 (citation and internal quotation marks omitted).

> We have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute rules, which if strictly applied, threaten the evils of archaic rigidity. The flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all relief necessary to correct particular injustices. . . . And given equity's resistance to rigid rules, we cannot . . . require[e] a per se approach in this context.

*Id*. at 650–651. The government cites to this Court's decision in *Holland* as to argue against the Ninth Circuit's position on the judicial review of diligence. *See* BIO at 8 (citing to *Holland*, 560 U.S. at 654) ("This Court has described equitable tolling as a 'fact-intensive inquiry.'"). But this is an incomplete description of what the Court stated. In *Holland*, the Court's full description of equitable tolling was that it is an "*often* fact-intensive inquiry." *Holland*, 560 U.S. at 654 (emphasis added). Indeed, equitable tolling usually involves a fact-intensive analysis, but sometimes the facts are not in dispute.

The government cites to other decisions where the Court mentions equitable tolling as a "fact-based" question. BIO at 8–9 (citing to *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Lawrence v. Florida*, 549 U.S. 327 (2007); *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997)). But these cases are out of place; they either addressed the principals of equitable tolling in passing, while answering a separate question, or the case involved disputed facts. *See Kwai Fun Wong*, 135 S. Ct. 1625 (answering whether the time limitations under Federal Tort Claims Act were non-jurisdictional for purpose of applying equitable tolling); *Lawrence*, 549 U.S. 327 (holding that a petition for certiorari before this Court does not toll the statute of limitations under 28 § 2244(d)(2); the fact whether petitioner was legally incompetent was in dispute); *Klehr*, 521 U.S. 179, 193 (requesting the Court to review "a highly fact based" conclusion regarding disputed facts of knowledge).

The Court has yet to have an opportunity to answer the question presented here. There is sufficient case law from this Court to support the Ninth Circuit's approach over the Fifth Circuit's.

### C. This case is an appropriate vehicle to resolve the question presented.

Petitioner presents a scenario where his facts are not in dispute, but only the legal significance of regulations and case law are at question. To say this is not a legal question reviewable under § 1252(a)(2)(D) is wrong.

The government argues the Board correctly denied petitioner's due diligence argument. The Board found petitioner's diligence is measured from the Board's 2014 *Abdelghany* decision, and not from the Fifth Circuit's 2016 *Lugo-Resendez* decision, as argued by petitioner. Therefore, according to the Board petitioner's 2016 motion to reopen was not diligently filed. The dispute was strictly a legal question the Fifth Circuit could have answered. The Fifth Circuit stripped itself of proper jurisdiction. For the government to use the Board's unreviewed decision against petitioner's is irrelevant to the question at hand.

The government's conspicuous description of petitioner's case as an unpublished per curium decision is equally irrelevant. The Fifth Circuit applied its well-developed case law against petitioner; case law that conflicts with other circuits. What should be considered is if this Court is being presented with "a question of importance not heretofore considered by this

Court, and over which the Circuits are divided." *Lehman v. Lycoming country Children's Servs. Agency*, 458 U.S. 502, 507 (1987). The grant of certiorari is warranted here because "on account of the importance of the federal question[] raised and asserted conflicts in the circuits." *United B'hood of Carpenters v. United States*, 330 U.S. 395, 400 (1947).

Finally, the government argues "even if petitioner succeeded in obtaining equitable tolling, he would be an especially poor candidate, on a motion to reopen, to obtain relief from removal under former § 212(c) of the INA." BIO at 12. Again, irrelevant to what is important here. The government's argument is irrelevant because it addresses an issue subsequent to the question presented here. The Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision, notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. *See, e.g. Dep't of Transp. V. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving for remand alternative grounds); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 245, 260 (2009) (same).

In any event, the grant of a waiver under former § 212(c) would consider all of petitioner's equities in the aggregate, including those accumulated today. Petitioner presented several discretionary documents in prelude for the immigration judge's consideration should his case be reopened. Neither the immigration judge nor the Board ever considered the weight of

these documents. Therefore, the government's position regarding petitioner's candidacy for approval is neither here nor there.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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