No. _____

In the
Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

MATTHEW WHITAKER
UNITED STATES ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The deadline to file a statutory motion to reopen under 8 U.S.C. § 1229a(c)(7) is subject to equitable tolling; all the courts of appeals are in agreement. But they are in conflict as to whether they have jurisdiction to review an agency's denial of a request for equitable tolling made by someone subject to the "criminal alien bar" pursuant to 8 U.S.C. § 1252(a)(2)(C).

The Fifth and Fourth Circuit say review of equitable tolling is a "question of fact" precluded from review under 8 U.S.C. § 1252(a)(2)(C). In contrast, the Ninth Circuit says equitable tolling is a "mixed question," i.e., "a question of law," which falls under the jurisdictional savings clause under 8 U.S.C. § 1252(a)(2)(D).

Therefore, the question presented is:

Is a request for equitable tolling, as it applies to statutory motions to reopen, judicially reviewable as a "question of law?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pedro Pablo Guerrero-Lasprilla, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *Guerrero-Lasprilla v. Sessions*, No. 17-60333 (5th Cir. September 12, 2018), is unreported, and reproduced at App. 1a.

The decision of the Board of Immigration Appeals (BIA) denying Petitioner's motion to reconsider, Pedro Pablo Guerrero-Lasprilla, A040-249-969 (BIA, July 14, 2017), is unreported, and reproduced at App. 5a.

The decision of the BIA's denial of Petitioner's appeal on his motion to reopen, Pedro Pablo Guerrero-Lasprilla, A040-249-969 (BIA, March 29, 2017), is unreported, and reproduced at App. 10a.

The order of the Immigration Judge denying Petitioner's motion to reopen, Pedro Pablo Guerrero-Lasprilla, A040-249-969 (Immigration Judge November 18, 2016), is unreported, and reproduced at App. 14a.

JURISDICTION

The judgment of the Fifth circuit was entered on September 12, 2018. App. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of 8 U.S.C. § 1229a(c)(7), regarding statutory motions to reopen, are reproduced at App. 20a.

8 U.S.C. § 1252(a)(2)(C), regarding the criminal alien bar, is reproduced at App. 20a.

8 U.S.C. § 1252(a)(2)(D), the jurisdictional saving clause, is reproduced at App. 21a.

STATEMENT

Petitioner sought judicial review of the BIA's denial of his motion to reopen. Petitioner's motion before the BIA sought to equitably toll the deadline for his statutory motion to reopen. The Fifth circuit dismissed Petitioner's case for lack of jurisdiction. App. 1a. Petitioner argued the court of appeals' jurisdiction is proper under 8 U.S.C. §§ 1252(a)(1), (a)(2)(D), and (b)(6).

a. Legal Background

Since this Court's decision in *Mata v. Lynch*, 135 S. Ct. 2150 (2015), all the courts of appeals have recognized that the time limit for a motion to reopen filed pursuant to 8 U.S.C. § 1229(c)(7) can be equitably tolled.[1] Further, the courts agree that the proper legal

[1] *See Da Silva Neves v. Holder*, 613 F. 3d 30 (1st Cir. 2010); *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); *Barry v. Mukasey*, 524 F. 3d 721 (6th Cir. 2008); *Pervaiz v. Gonzales*, 405 F. 3d 488 (7th Cir. 2005); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496 (8th Cir. 2005); *Valeriano v. Gonzales*, 474 F. 3d 669

standard required to qualify for equitable tolling is a showing of: (1) due diligence pursuing one's right; and (2) "that some extraordinary circumstance" stood in the way and prevented a timely filing."[2]

The Immigration and Nationality Act provides judicial review of denials of motions to reopen. *See* 8 U.S.C. §§ 1252(a)(1), (b)(6). Yet, the same provision strips jurisdiction if the individual was convicted of a qualifying crime; this is known as the "criminal alien bar." *See* 8 U.S.C. § 1252(a)(2)(C). A lone exception within the same provision saves the court's jurisdiction from the "criminal alien bar," but only if the individual is seeking judicial review of a "constitutional claim" or is presenting a "question of law" for review. 8 U.S.C. § 1252(a)(2)(D).

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

On one side of this conflict stands the Fifth and the Fourth circuit, who bar criminal aliens from judicial review under the "criminal alien bar." These courts find that equitable tolling is a "factual determination that the petitioner had not exercised due diligence," therefore outside the consideration of U.S.C. §

(9th Cir. 2007); *Riley v. INS*, 310 F. 3d 1253 (10th Cir. 2002); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F. 3d 1357 (11th Cir. 2013).

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

1252(a)(2)(D). *Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018) (citing *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016)).

On the opposite side of this conflict is the Ninth circuit, who says review for equitable tolling is "a mixed question of law and fact, requiring that we apply the legal standard for equitable tolling to established facts. Jurisdiction therefore is proper under 8 U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007); *see also Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017). In holding so, the Ninth circuit explained: "Congress intended the term ["question of law"] as used in 8 U.S.C. § 1252(a)(2)(D) to include mixed questions of law and fact. *Ghahremani v. Gonzales*, 498 F.3d at 999 (citing *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007)).

b. Factual and Procedural Background

Petitioner entered the United States on March 3, 1986 as lawful permanent resident. C.A. Admin. Rec. 150.

On October 20, 1988, Petitioner was convicted in the United States District Court in the Southern District of Florida for conspiracy to possess with intent to distribute at least 50 grams of cocaine under 21 U.S.C. § 846, and possession with intent to distribute at least 50 grams of cocaine under 21 U.S.C. § 841(a)(1). C.A. Admin. Rec. 141. For these convictions, Petitioner was sentenced to 12 years imprisonment. *Id.*

On July 29, 1998, removal proceedings were initiated against Petitioner in Oakdale, Louisiana. C.A. Admin Rec. 149. Given Petitioner's conviction, the

Department of Homeland Security (the Department) sought his removal under 8 U.S.C. § 1227(a)(2)(A)(iii), as an aggravated felon. *Id.*

At the time of his removal proceedings, the Court had not decided *INS v. St. Cyr*, 533 U.S. 289 (2001), *Judulang v. Holder*, 565 U.S. 42 (2011), or *Vartelas v. Holder*, 566 U.S. 257 (2012)—when read together, clarified that relief was available to Petitioner under 8 U.S.C. § 1182(c) (repealed 1996). Because Petitioner was not allowed to apply for relief from removal in 1998, he was ordered removed to Colombia on September 22, 1998. C.A. Admin Rec. 140.

i. **Motion to Reopen: Proceedings before the Immigration Judge and** BIA

On September 6, 2016, 18 years after his removal order, the Petitioner, residing in Colombia, filed his motion to reopen with the Immigration Judge. C.A. Admin Rec. 71. Petitioner submitted his motion to reopen "pursuant to INA § 240(c)(7) [8 U.S.C. § 1229a(c)(7)] in light of the Board of Immigration Appeals' decision: *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014); and the Fifth circuit's decision: *Lugo-Resendez v. Lynch*, [831 F.3d 337 (5th Cir. 2016)]." C.A. Admin. Rec. 76.[3] Petitioner argued, although the

[3] In *Matter of Abdelghany*, the BIA brought its interpretation of former 8 U.S.C. § 1182(c) in line with this Court's decisions in *Judulang v. Holder*, *Vartelas v. Holder*, and *INS v. St. Cyr*. The BIA's decision created uniformity as to the eligibility of individuals for 8 U.S.C. § 1182(c). Pertinent to Petitioner's case, the BIA held that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable by virtue of a conviction entered before April 24, 1996, remains eligible to apply for 8 U.S.C. §

Board's 2014 *Matter of Abdelghany* clarified his right to seek relief from removal under former 8 U.S.C. § 1182(c), it was not until the Fifth circuit's decision in *Lugo-Resendez* on July 28, 2016 that clarified his right to file a statutory motion to reopen. C.A. Admin. Rec. 77–83. The immigration judge received the motion to reopen within 40 days of *Lugo-Resendez* being published. C.A. Admin. Rec. 71; *see also* 8 U.S.C. § 1229a(c)(7).

In denying Petitioner's motion to reopen, the immigration judge held: "The [c]ourt must deny Respondent's motion because it is not timely." Appx. 17a; C.A. Admin. Rec. 44. The immigration judge did not consider *Lugo-Resendez* as precedent establishing equitable tolling in the Fifth circuit, and held that Petitioner should have filed the motion in 2014, when the BIA issued *Matter of Abdelghany*. Appx. 18a; C.A. Admin. Rec. 45.

Petitioner timely appealed the immigration judge's decision with the BIA. C.A. Admin Rec. 27. Petitioner argued to the BIA that the immigration judge erred in failing to consider *Lugo-Resendez* as precedent establishing equitable tolling on statutory motions to reopen. C.A. Admin. Rec. 21–22.

1182(c) in removal proceedings, unless: . . . the individual has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996. *Matter of Abdelghany*, 26 I&N Dec. at 272.

In *Lugo-Resendez v. Lynch*, the Fifth circuit created a uniform ruling among the court of appeals in holding "that the deadline for filing a motion to reopen under [INA §240(c)(7)] is subject to equitable tolling." 831 F.3d at 344.

The BIA denied Petitioner's appeal on March 29, 2017. C.A. Admin. Rec. 10. The BIA held that "nothing prohibited the respondent from filing a motion to reopen before *Lugo-Resendez*. On the contrary, *Lugo-Resendez* merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent." Appx. 12a; C.A. Admin Rec. 11.

ii. The Court of Appeals' Decision

Petitioner timely filed his petition for review with the Fifth circuit. Because both, the immigration judge and the BIA, held that no legal precedent prevented Petitioner from filing his motion to reopen before *Lugo-Resendez*, Petitioner presented the following issue for review: "Could [Petitioner] have filed his motion before [the Fifth Circuit's] holding in *Lugo-Resendez* ?" Initial Br. at 1.

On September 12, 2018, the Fifth circuit dismissed Petitioner's request for judicial review. In doing so, held: "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. *See Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018). Because Guerrero was removable on account of criminal convictions that 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 the requisite diligence to warrant equitable tolling." App. 3a–4a.

REASONS FOR GRANTING THE WRIT

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

This case satisfies all the criteria for certiorari. First, the question presented has squarely divided the Fifth and Fourth Circuit from the Ninth Circuit—courts without jurisdiction of denials of motions to reopen that seek equitable tolling made by criminal aliens, and the court with jurisdiction to review such claims. Second, the question presented is an important and recurring one. Several other circuits have yet to publish an opinion on the matter, but have already started to take conflicting sides through unpublished rulings. Third, and last, this is an ideal case for deciding the question. This case arises from simple and undisputed facts, where the only question that needed to be answered by the Fifth Circuit was whether its legal precedent stood in Petitioner's way from filing his motion to reopen earlier. This case presents the perfect example in showing that review of equitable tolling is a mixed question involving law and fact.

I. Genuine conflict among the courts of appeals.

a. Ninth Circuit exercises jurisdiction

After a thorough analysis on the history of judicial review in the immigration context, the Ninth circuit in *Ramadan v. Gonzales*, ruled that the phrase "question of law" as it is used in 8 U.S.C. § 1252(a)(2)(D) includes review of mixed questions of law and fact—the application of statutes and regulations to undisputed facts. 479 F.3d 646, 651–654 (9th Cir. 2007). In a subsequent decision, the Ninth held that review of the denial for equitable tolling "falls within *Ramadan*'s ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts. Jurisdiction therefore is proper under 8 § U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F.3d at 999.

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

b. Fourth and Fifth Circuit do not exercise jurisdiction

Taking a polar opposite stance on the issue is the Fifth circuit. The Fifth circuit notes "that whether equitable tolling applies to a petitioner's motion to reopen is a question of fact." *Penalva v. Sessions*, 884 F.3d at 525. The Fifth circuit has made clear that the inquiry is purely "fact-intensive." *Id.* And because no question of law or constitutional claim are involved, the court is "barred by appellate review under 8 U.S.C. § 1252(a)(2)(C)." *Id.* In the Fifth circuit review is strictly prohibited even if the individual raises a

question of law, as long as he is requesting equitable tolling.

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

While individuals in the Ninth circuit can seek judicial review of their statutory right to a motion to reopen, the same individuals cannot avail themselves of such protections in the Fifth and Fourth circuit.

c. The other circuits

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

For example, the First circuit held that "[a] determination that equitable tolling is appropriate involves a mixed question of law and fact." *Niehoff v. Maynard*, 299 F.3d 41, 47 (1st Cir. 2002). "The term mixed question is something of a misnomer; once the raw facts are determined (and such determinations are normally reviewed only for clear error), deciding which legal label to apply to those facts is a normative issue—strictly speaking, *a legal issue*." *Id.* (emphasis added). Relying on these holdings, one would assume the First and the Ninth circuit would be on the same page. But in 2006, the First circuit issued its opinion *Boakai v. Gonzales*, holding the answer as to whether "*Boakai*'s challenge to the BIA's decision not grant such tolling presents a 'question of law' within the meaning of the

REAL ID Act . . . is plainly no." 447 F.3d 1, 4 (1st Cir. 2006). Truth be told, both the Fifth and the Fourth circuit cite to *Boakai* in support of their decision not to exercise jurisdiction. *See Penalva v. Session*, 884 F.3d at 525; *see Lawrence v. Lynch*, 826 F.3d at 203.

Interestingly, and subsequent to *Boakai*, in *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010) the First circuit appeared to back away from its holding in *Boakai*. It is important to note, *Neves* was published after having been remanded by this Court. *See Neves v. Holder*, 560 U.S. 901 (2010). On remand the First circuit recognized: "[o]ur earlier opinion held that no legal or constitutional issues were raised by the BIA's determination that Neves's time- and number-barred motion to reopen was not subject to equitable tolling because of Neves's failure to show due diligence. On that basis, we held we were barred from exercising jurisdiction to review the BIA's decision. That holding, as *Kucana* makes clear, was erroneous." *Neves v. Holder*, 613 F.3d at 35. The First circuit would go on further state that "[s]everal of this circuit's earlier cases also relied on this erroneous premise. *Id.* at n.3. The *Neves* holding seems to coincide with the Ninth's opinion that the courts have jurisdiction over equitable tolling claims made by "criminal aliens."

The Second, Third, and Seventh circuit have yet to publish an opinion squarely on this issue, nonetheless, these courts are assuming jurisdiction of denials of equitable tolling claims made by "criminal aliens," and deciding the cases on the merits. *See Ramos-Braga v. Session*, 900 F.3d 871 (7th Cir. 2018); *Johnson v. Gonzales*, 478 F.3d 795 (7th Cir. 2007); *McCarty v. Sessions*, 730 Fed. Appx. 75 (2d Cir. 2018); *Mercedes-Pichardo v. Mukasey*, 297 Fed. Appx. 49 (2d Cir. 2008);

Green v. Attorney Gen., 429 Fed. Appx. 147 (3d Cir. 2011).

The only circuit that seems to agree with the Fourth and the Fifth, is the Tenth. In a recent unpublished decision, *Vue v. Whitaker*, No. 18-9517, 2018 WL 6200322 (10th Cir. 2018), the petitioner argued for equitable tolling of the time limit to file a motion to reopen. The court dismissed the petition and stated, "to the extent [petitioner] is challenging the BIA's discretionary decision not to permit him to file a late motion to reopen, we also lack jurisdiction to review the decision." *Id.* at *1.

Thus, it appears the First, Second, Third, Seventh, and the Ninth are in accordance that they have jurisdiction to review equitable tolling claims under 8 U.S.C. § 1252(a)(2)(D), while the Fourth, Fifth, and Tenth believe they do not have jurisdiction.

II. This case is an ideal vehicle for deciding the Question.

Whether the review of a denial for equitable tolling involves a legal question, i.e., "a question of law," can be readily answered in the affirmative. This case illustrates the point.

In raising a claim for equitable tolling with the agency, Petitioner argued that he was precluded from filing his statutory motion to reopen due to prohibitive Fifth circuit precedent. Before Petitioner was able to file his motion, he had to overcome two issues: (1) the "departure bar;" and (2) the Fifth circuit was yet to accept equitable tolling.

The "departure bar," as found in 8 C.F.R. §§ 1003.2(d), and 1003.23(b)(1), is a regulatory provision

that bars individuals from pursuing a motion to reopen after departure from the United States. In 2012, the Fifth circuit struck down the "departure bar" as it applies to statutory motions to reopen, but continues to apply it to *sua sponte* motions to reopen. *See Carias v. Att'y Gen.*, 697 F.3d 257 (5th Cir. 2012). Despite this step-forward, Petitioner was still precluded from filing his motion from outside the United States because the Fifth circuit used to treat a request for equitable tolling as an invitation for the agency to exercise its discretion under its *sua sponte* authority. *See Mata v. Lynch*, 135 S. Ct at 2154; *see also Ramos-Bonilla v. Mukasey*, 543 F.3d 215, 220 (5th Cir. 2008). Therefore, the departure bar was still active given Petitioner's circumstances. In 2015, this Court in *Mata*, held such action by the Fifth circuit to recharacterize claims to preclude their availability for review to be in error. *See Mata v. Lynch*, 135 S. Ct. at 2156. In remanding the case back to the Fifth circuit, this Court provided the following caveat, "the court of appeals may reach whatever conclusion it thinks best as to the availability of equitable tolling; we express no opinion on that matter." *Id.*

Finally, on July 28, 2016, the Fifth circuit published *Lugo-Resendez*, where as a matter of first impression held that "the deadline for filing a motion to reopen under § 1229(c)(7) is subject to equitable tolling." 831 F.3d at 344. Upon learning of the Fifth circuit's decision, Petitioner filed his motion to reopen within 40 days of the decision being published

Despite his diligence, the immigration judge and the BIA held that equitable tolling does not apply in his case because nothing prevented Petitioner from

filing his motion prior to *Lugo-Resendez*. *See* Appx. 17a and 12a.

On petition for review, Petitioner asked the court of appeals to review the legal reasoning behind the BIA's decision on denying his claim for equitable tolling—a pure question of law. Petitioner argued that case law prevented him from filing his motion earlier. The facts were never in dispute. Had Petitioner been ordered removed in the Ninth circuit, or maybe even the First, he would have been allowed to seek judicial review of the BIA's clearly erroneous legal assessment. Unfortunately, he was removed in the Fifth circuit, where claims for equable tolling are unreviewable for cases like his.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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