No. 18-776

In the Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
W. MANNING EVANS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed a petition for review of petitioner's untimely motion to reopen removal proceedings on the ground that the court lacked jurisdiction to consider whether petitioner acted with sufficient diligence to warrant equitable tolling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 18-776

PEDRO PABLO GUERRERO-LASPRILLA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 737 Fed. Appx. 230. The decisions of the Board of Immigration Appeals dismissing petitioner's appeal (Pet. App. 10a-13a) and denying reconsideration (Pet. App. 5a-9a) are unreported. The decision of the immigration judge denying petitioner's motion to reopen (Pet. App. 14a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2018. A petition for a writ of certiorari was filed on December 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was admitted to the United States in 1986, convicted of a drug-trafficking conspiracy in 1988, and

removed from the country after completion of his sentence in 1998. Pet. App. 2a, 6a. In 2016, nearly 18 years after his removal, he moved to reopen his removal proceedings on the ground that he was eligible for discretionary relief. *Ibid.* An immigration judge (IJ) denied his motion as untimely and rejected petitioner's claim that he was entitled to equitable tolling. *Ibid.* The Board of Immigration Appeals (Board) affirmed. *Ibid.* The court of appeals dismissed a petition for review for lack of jurisdiction. *Id.* at 1a-4a.

1. Petitioner, a native and citizen of Colombia, was admitted to the United States as an immigrant in 1986. Pet. App. 15a. In 1988, he was tried in federal court and found guilty by a jury of possession with intent to distribute and conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and 846 (1988). Pet. App. 15a-16a; see *United States* v. *Guerrero*, 935 F.2d 189, 192, 194 (11th Cir. 1991) (describing petitioner's offenses involving more than 50 kilograms of cocaine base valued at approximately $1 million). The district court sentenced him to 12 years of imprisonment. *Guerrero*, 935 F.2d at 192. In 1998, following service of his sentence, he was removed from the United States on the basis of his aggravated-felony convictions. See 8 U.S.C. 1227(a)(2)(A)(iii) (1994); 8 U.S.C. 1101(a)(43)(B) (1994) (defining drug-trafficking offenses as aggravated felonies); Pet. App. 2a.

2. For decades, Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (repealed 1996), authorized certain permanent resident aliens domiciled in the United States for at least seven consecutive years to apply for discretionary relief from exclusion or deportation. See *Judulang* v. *Holder*, 565 U.S. 42, 46-47 (2011); *INS* v. *St. Cyr*, 533 U.S. 289, 294-296

(2001). Congress repealed Section 212(c) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which created cancellation of removal as a new discretionary remedy, see *Judulang*, 565 U.S. at 48; *St. Cyr*, 533 U.S. at 297. In *St. Cyr*, this Court determined that "the broader relief afforded by § 212(c) must remain available, on the same terms as before, to an alien whose removal is based on a guilty plea entered before § 212(c)'s repeal," because such aliens likely relied on the prospect of Section 212(c) relief in deciding to plead guilty. *Judulang*, 565 U.S. at 48; see *St. Cyr*, 533 U.S. at 323-325. The Department of Justice initially concluded that Section 212(c) relief would remain retroactively available only for aliens convicted by plea. See 69 Fed. Reg. 57,826, 57,828 (Sept. 28, 2004). But after this Court's decision in *Vartelas* v. *Holder*, 566 U.S. 257 (2012), which stated that "the presumption against retroactive application of statutes does not require a showing of detrimental reliance," *id.* at 273, the Board determined in 2014 that retroactive Section 212(c) relief would be equally available to aliens (like petitioner) who were convicted after a trial, *In re Abdelghany*, 26 I. & N. Dec. 254, 268-269.

3. Under the INA, an alien "may file one motion to reopen" removal proceedings. 8 U.S.C. 1229a(c)(7)(A). A motion to reopen must be "filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). Every circuit that has addressed the question, however, has concluded that the 90-day "statutory time limit to file a motion to reopen" is subject to equitable tolling. *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 & n.1 (2015) (citing circuits other than the

Fifth Circuit); see *Lugo-Resendez* v. *Lynch*, 831 F.3d 337, 343-344 (5th Cir. 2016). A court of appeals typically has jurisdiction to review the denial of a motion to reopen, including when "the Board denies a motion to reopen because it is untimely." *Mata*, 135 S. Ct. at 2154; see 8 U.S.C. 1252(a)(1) and (b)(6). Under 8 U.S.C. 1252(a)(2)(C), however, "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain crimes, including aggravated felonies. That limitation "shall [not] be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

4. In September 2016, nearly 18 years after his removal, petitioner filed a motion to reopen his proceedings on the claim that he was eligible for discretionary relief under former Section 212(c). Pet. App. 16a-18a. The IJ denied petitioner's motion as "untimely" because it was not "filed within 90 days of a final * * * order of removal." *Id.* at 17a; see 8 U.S.C. 1229a(c)(7)(C)(i). The IJ rejected petitioner's argument that he was entitled to equitable tolling because "his eligibility of relief was explained in 2014" by the Board in *Abdelghany*. Pet. App. 18a. The IJ explained that petitioner 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 after he became aware that he may be eligible for relief" in 2014. *Ibid.* The IJ also declined to exercise its discretion to reopen petitioner's proceeding *sua sponte*. *Id.* at 17a-18a.

5. Petitioner appealed to the Board, which affirmed the IJ's decision. Pet. App. 10a-13a. The Board explained that a "litigant is entitled to equitable tolling of

a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 11a (quoting *Lugo-Resendez*, 831 F.3d at 344). The Board agreed with the IJ that petitioner had "not demonstrated an extraordinary circumstance * * * following the issuance of [*In re*] *Abdelghany*" in 2014. *Ibid.* The Board observed that *Abdelghany* "told" petitioner that he "was no longer ineligible to apply for a waiver of inadmissibility under former section 212(c)," but that petitioner "chose not to file a motion to reopen these proceedings in order to seek such relief" for more than two years. *Id.* at 11a-12a.

The Board rejected petitioner's contentions that "the untimeliness of his motion should be excused because * * * binding Fifth Circuit court precedent * * * prevented him from filing an untimely motion to reopen" before the Fifth Circuit's July 2016 decision in *Lugo-Resendez*, and that he "exercised reasonable diligence in pursuing his claim for relief because he filed his motion to reopen on September 6, 2016." Pet. App. 12a. The Board explained that "nothing prohibited [petitioner] from filing a motion to reopen before *Lugo-Resendez*." *Ibid.* "On the contrary," the Board stated, "*Lugo-Resendez* merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent." *Ibid.* The Board added that the IJ "also properly determined that [petitioner's] case does not present exceptional circumstances that warrant" reopening his proceeding *sua sponte*. *Id.* at 13a.

6. The Board denied petitioner's motion for reconsideration. Pet. App. 5a-9a. The Board reiterated the grounds for its initial decision and added that it would

not exercise its discretion to reopen petitioner's case because, *inter alia*, it does "not ordinarily reopen long completed proceedings to re-adjudicate cases based on a change of law," there "is a recognized public interest in finality in immigration proceedings," petitioner's "drug convictions are very serious," and petitioner "has not shown th[at] equitable tolling [i]s justified to essentially restart his case." *Id.* at 8a-9a.

7. Petitioner filed a timely petition for review of the Board's initial decision, but not its denial of reconsideration. The court of appeals dismissed for lack of jurisdiction in an unpublished per curiam opinion. Pet. App. 1a-4a. The court framed the question as "whether [petitioner] acted with the required diligence to warrant equitable tolling," and concluded that it "lack[ed] jurisdiction" to consider that contention. *Id.* at 1a-2a. The court explained that it had "determined recently that[] whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question." *Id.* at 3a (citing *Penalva* v. *Sessions*, 884 F.3d 521, 525 (5th Cir. 2018)). Given that Section 1252(a)(2)(C) bars judicial review of removal orders against aliens convicted of "aggravated felonies," *id.* at 4a, and that 8 U.S.C. 1252(a)(2)(D) creates an exception only for "constitutional claims or questions of law," the court determined that it "lack[ed] jurisdiction to consider the factual question of whether [petitioner] acted with the requisite diligence to warrant equitable tolling," Pet. App. 4a. The court added that its decision on this issue was "dispositive of the * * * petition for

review," so it did not need to consider any other contentions. *Ibid.*[*]

ARGUMENT

The court of appeals correctly determined that it lacked jurisdiction over the "factual question" of whether petitioner "acted with the requisite diligence to warrant equitable tolling." Pet. App. 4a. That conclusion follows from this Court's understanding of the inherently factual nature of the due-diligence inquiry, and other courts of appeals that have addressed the question have reached the same result. Contrary to petitioner's assertion (Pet. 9), the Ninth Circuit's approach to the question does not squarely conflict with the Fifth Circuit's. And in any event, this case is an unsuitable vehicle for further review because petitioner—a convicted drug trafficker who spent most of his time in the United States in federal prison and who has not lived in this country for more than 20 years—would be highly unlikely to obtain either equitable tolling or discretionary relief under former Section 212(c). The Court's resolution of the question presented in this case would therefore have little practical significance.

1. Under 8 U.S.C. 1252(a)(2)(C), "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 * * * [8 U.S.C.] 1227(a)(2)(A)(iii)," the aggravated-felony provision that includes petitioner's drug-trafficking offenses. Section 1252(a)(2)(D), however, provides that the jurisdictional bar in Section 1252(a)(2)(C) does not "preclud[e] review

[*] The court of appeals issued a similar non-precedential decision in *Ovalles* v. *Sessions*, 741 Fed. Appx. 259 (5th Cir. 2018) (per curiam), petition for cert. pending, No. 18-1015 (filed Jan. 29, 2019).

of constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) thus "operates as a savings clause for 'constitutional claims or questions of law' raised by criminal aliens." *Penalva* v. *Sessions*, 884 F.3d 521, 524 (5th Cir. 2018) (quoting 8 U.S.C. 1252(a)(2)(D)); accord, *e.g.*, *Ghahremani* v. *Gonzales*, 498 F.3d 993, 998 (9th Cir. 2007) (explaining that, under Section 1252(a)(2)(D), "appellate courts * * * retain jurisdiction to review constitutional claims and questions of law regardless of the underlying offense").

Here, there is no dispute that petitioner was removed based on his commission of aggravated felonies, Pet. App. 2a, and that Section 1252(a)(2)(C) therefore bars jurisdiction over his petition for review unless his claim falls within Section 1252(a)(2)(D)'s exception preserving review of "questions of law," 8 U.S.C. 1252(a)(2)(D). The court of appeals correctly concluded that "whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling," Pet. App. 3a, is not a "question[] of law" preserved for review under 8 U.S.C. 1252(a)(2)(D), but rather "a factual question" that is not reviewable in light of the jurisdictional bar in Section 1252(a)(2)(C), Pet. App. 3a.

This Court has described equitable tolling as a "fact-intensive inquiry." *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (citation and internal quotation marks omitted). The Court has accordingly directed lower courts to determine whether litigants are "entitle[d] * * * to equitable tolling" based on "the facts in th[e] record." *Ibid.*; see *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) (remanding for the district court "to decide whether, on the facts of her case, [the plaintiff]

is entitled to equitable tolling"); cf. *Lawrence* v. *Florida*, 549 U.S. 327, 337 (2007) (concluding that lower court "correctly declined to equitably toll the limitations period in the factual circumstances of [the] case"). The Court has applied that fact-based understanding to both the "diligence" and "extraordinary circumstance" prongs of the equitable tolling inquiry. *Holland*, 560 U.S. at 653. And in a related context, the Court has described the "'due diligence' requirement" that a plaintiff must satisfy to toll a limitations period based on fraudulent concealment as a "fact-based question." *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 196 (1997).

The Fifth Circuit's treatment of the diligence component of the equitable-tolling inquiry as "a factual question" follows from the approach taken by this Court. Pet. App. 3a. The Fifth Circuit articulated that position in *Penalva*, *supra*, explaining that "the doctrine of equitable tolling does not lend itself to bright-line rules," and that "[c]ourts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." 884 F.3d at 525 (citation and internal quotation marks omitted; brackets in original); see *ibid.* (explaining that equitable tolling requires a "fact-intensive determination") (citation omitted). More specifically, the court of appeals relied on decisions from other circuits concluding that the due-diligence component of equitable tolling presented a factual question that does not fall within Section 1252(a)(2)(D)'s exception preserving review of a "question of law." *Ibid.*; see *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006) (explaining that a "factual determination that [the plaintiff] had not exercised due diligence" was not a "'question of law'" reviewable under Section 1252(a)(2)(D)); see also *Lawrence* v. *Lynch*, 826 F.3d

198, 203 (4th Cir. 2016) (similar); cf. *Patel* v. *Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (characterizing challenge to a due-diligence determination as a "factual disagreement"). The consensus underlying those decisions is correct.

2. Petitioner does not offer any sustained argument that the approach to the due-diligence component of equitable tolling taken by the decision below is incorrect. He instead contends (Pet. 9) that a conflict exists between that approach and Ninth Circuit's asserted position that "a 'criminal alien' may seek judicial review of the denial of his motion to reopen that sought equitable tolling." That contention is flawed for multiple reasons.

As an initial matter, the broad conflict that petitioner suggests does not exist. The decision below did not address whether "a 'criminal alien' may seek judicial review of the denial of his motion to reopen that sought equitable tolling." Pet. 9. The decision below addressed only one component of the equitable-tolling inquiry—whether the alien "acted with the requisite diligence"—and concluded here that particular component presented a "factual question" that was not reviewable under Section 1252(a)(2)(D). Pet. App. 3a-4a.

Moreover, to the extent the Fifth Circuit and the Ninth Circuit have addressed the reviewability of a due-diligence inquiry in particular, their decisions do not squarely conflict. The Ninth Circuit construes the "questions of law" preserved for review by 8 U.S.C. 1252(a)(2)(D) "to include mixed questions of law and fact," which it defined as questions "[w]here the relevant facts are undisputed." *Ghahremani*, 498 F.3d at 998; see *Ramadan* v. *Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007) (per curiam). In *Ghahremani*, the Ninth Cir-

cuit determined that a dispute over an alien's due diligence would be reviewable under Section 1252(a)(2)(D) "so long as the relevant facts are undisputed." 498 F.3d at 999. The Fifth Circuit has not specifically addressed the jurisdictional significance of the presence of undisputed facts, and thus it has not taken any position that squarely conflicts with the Ninth Circuit's. And while the Fifth Circuit has described due diligence as a "factual question," Pet. App. 3a-4a, the court has indicated that it will review some "factual" determinations in connection with legal rulings under its Section 1252(a)(2)(D) jurisdiction. See *Diaz* v. *Sessions*, 894 F.3d 222, 227 (5th Cir. 2018) (explaining that the court "may review factual disputes that are necessary * * * to review a constitutional claim or question of law"); *Alvarado de Rodriguez* v. *Holder*, 585 F.3d 227, 234 (5th Cir. 2009) (concluding that whether an agency properly applied law to facts in determining eligibility for discretionary relief raised a question reviewable under Section 1252(a)(2)(D)).

3. In any event, the Fifth Circuit's unpublished per curiam decision would be an unsuitable vehicle for this Court to review the question presented. Even 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*. In addition, equitable tolling requires not only a showing of diligence, but also a showing "that some extraordinary circumstance stood in [petitioner's] way." Pet. App. 11a (quoting *Lugo-Resendez* v. *Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); accord *Holland*, 560 U.S. at 649. As the Board explained, "nothing prohibited [petitioner] from filing a motion to reopen before *Lugo-Resendez*," which

"merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent." Pet. App. 12a. The Board's reasoning on that issue is correct and provides an independent basis to support its decision.

Finally, 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 Section 212(c) of the INA. Both reopening and relief under former Section 212(c) are discretionary, and relief under former Section 212(c) is available only to resident aliens domiciled in the United States for at least seven consecutive years. See *Judulang* v. *Holder*, 565 U.S. 42, 46-47 (2011). The Board concluded in denying reconsideration—which petitioner did not challenge in the court of appeals—that *Abdelghany* "does not authorize the reopening of a final order of removal so that a respondent may apply for relief from removal eighteen years after his order of removal was effectuated." Pet. App. 8a. Petitioner was admitted to this country in 1986, convicted of a drug-trafficking conspiracy in 1988, and removed after completing his sentence in 1998. Petitioner thus spent the majority of his time in the United States in a federal prison for committing "very serious" drug crimes, and he has not lived in this country for more than two decades. Pet. App. 8a. Any applicant with that profile would be extremely unlikely to receive discretionary relief from removal. A decision in petitioner's favor on the timeliness issue would thus likely have no practical consequences for the ultimate disposition of his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
W. MANNING EVANS
Attorneys

MARCH 2019