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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BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project ("IRP") and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

Amicus has a longstanding interest in the jurisdictional issues in this case. In particular, ACLU IRP has developed expertise regarding judicial review, having litigated *INS v. St. Cyr*, 533 U.S. 289 (2001), as well as numerous jurisdictional cases addressing the scope of 8 U.S.C. § 1252(a)(2)(D), the statute at issue in this case, including *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam) (construing 8 U.S.C. § 1252(a)(2)(D)). In addition, the undersigned testified before Congress regarding the Bill that resulted in the enactment of § 1252(a)(2)(D).

SUMMARY OF ARGUMENT

I. The savings clause in § 1252(a)(2)(D) authorizes review of "constitutional claims and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for amicus states that all parties have consented to the filing of this brief.

questions of law"—and does not differentiate between types of legal questions. 8 U.S.C. § 1252(a)(2)(D). The statute thus covers all questions of law, including the application of law to undisputed historical facts. But the Court need not determine the full breadth of the savings clause to resolve this case. This case can be resolved more narrowly on three distinct grounds.

A. First, this Court's decisions for centuries have held that where, as here, a petitioner is not challenging the underlying historical facts, but asking whether those facts amount to "diligence," that is a "question of law." Thus, whatever the full scope of the savings clause, diligence falls within its ambit. That is all the Court need hold to resolve these consolidated cases.

B. Second, in both of these cases, the court below held that whether a particular set of undisputed facts constitutes diligence is a question of "fact." That is plainly wrong. Whether undisputed conduct is diligent cannot possibly be a pure question of historical fact. Accordingly, the Court can reverse and remand on this ground alone, permitting the Fifth Circuit to determine in the first instance whether diligence is the type of *legal* claim that is reviewable under the statute's savings clause.

C. Third, in both of these cases, the petitioners claim that the Board of Immigration Appeals ("BIA") applied the wrong legal standard. That is indisputably a legal question that can be reviewed under the savings clause, regardless of whether the savings clause also covers the *application* of the correct legal standard to the facts of petitioners' cases. For this reason too, there is no need for the Court to

decide broader questions regarding the scope of the savings clause's coverage, and in particular the extent to which the savings clause provides review over the application of law to undisputed historical facts.

II. If this Court proceeds to decide whether the savings clause covers claims beyond those at issue here, it should hold that the statute covers all legal claims, including those involving the application of law to undisputed historical facts. That conclusion is confirmed by the savings clause's plain text, which uses the unqualified term "questions of law"—a term this Court has explained covers both the interpretation and application of law. The statutory context, and in particular the manner in which Congress used the term "questions of law" in a neighboring provision of the same jurisdictional section of the Immigration and Nationality Act ("INA"), confirms that Congress intended the savings clause to encompass *all* legal claims and exclude only questions of fact. That reading of the text is further reinforced by the fact that Congress deleted the qualifier "pure" in an earlier version of the Bill that resulted in § 1252(a)(2)(D), leaving just "questions of law" in the enacted text. Indeed, the Conference Committee Report on the final Bill pointedly distinguishes between questions of law and questions of fact, instructing courts to review all legal elements of mixed questions, while dismissing only challenges to factual determinations.

III. Nothing in the statutory text Congress enacted indicates that it intended for courts to undertake a case-specific analysis of the history of habeas, much less the protections of the Suspension

Clause, when applying the savings clause. Consequently, there is also no need for this Court to engage in such analysis to resolve this case.

To the extent historical habeas practice is relevant to the construction of the statute, it is only in a very limited way: as the backdrop against which Congress legislated. The § 1252(a)(2)(D) savings clause provision was enacted in response to *St. Cyr*, so it was that decision's analysis of historical habeas that was before Congress. *St. Cyr* explained that the traditional scope of habeas review included both the "interpretation" and "application" of the law. Moreover, in the four years between *St. Cyr* and the enactment of the savings clause, the circuit courts had uniformly interpreted *St. Cyr* to mean that both "pure" legal claims *and* claims that turn on the application of law to fact were traditionally reviewable in habeas.

Regardless whether *St. Cyr* accurately described the scope of historic habeas review, Congress enacted § 1252(a)(2)(D) against the background of how *St. Cyr* understood this history (and how the circuits had uniformly understood *St. Cyr*). In other words, to the extent any history is relevant to construing the *statute* that Congress enacted, it is the understanding of that history that this Court articulated in *St. Cyr*, because that was the background against which Congress acted in 2005.

In any event, *St. Cyr* correctly concluded that traditional habeas review—from English common law, through the colonial period, to later immigration habeas cases—encompassed both pure and mixed questions (a conclusion that this Court reaffirmed in

Boumediene v. Bush, 553 U.S. 723, 779 (2008)). But the statute does not direct courts to engage in a case-by-case or issue-by-issue historical analysis; indeed, such a jurisdictional scheme would produce wasteful collateral litigation. Thus, whatever the history, the Court should construe the statute according to its terms, which encompass all legal claims.

ARGUMENT

I. THIS CASE CAN BE RESOLVED NARROWLY WITHOUT DETERMINING THE FULL SCOPE OF THE SAVINGS CLAUSE.

The savings clause at issue in this case authorizes review of "constitutional claims and questions of law," 8 U.S.C. § 1252(a)(2)(D), and does not differentiate between types of legal questions. The statute thus covers all questions of law, including the application of law to undisputed historical facts. *See infra* Section II. But the Court need not determine the full breadth of the savings clause to resolve this case for at least three independent reasons.

First, this Court has always treated "diligence" claims as "questions of law." That is sufficient to resolve this case, without deciding what other claims are covered by the savings clause. *See infra* Section A.

Second, even if diligence claims were not always a question of law, they are plainly not questions of fact. Thus, the Fifth Circuit erred in labeling diligence a question of "fact." The Court can therefore reverse and remand on this basis alone, and allow the

court of appeals to determine in the first instance whether diligence is the type of "question of law" that is reviewable under the savings clause. Because the Fifth Circuit labeled diligence a question of fact, it improperly pretermitted that analysis. *See infra* Section B.

Third, the Court can reverse the decisions below on the equally narrow ground that a court of appeals always has jurisdiction to determine the indisputably legal question raised by petitioners in these cases: whether the BIA applied the correct legal standard. *See infra* Section C.

A. For Centuries, This Court Has Treated Due Diligence As A Question Of Law.

First, the decision below can be reversed on the ground that diligence claims are questions of law. This Court has repeatedly held that is the case. Thus, whatever the proper analysis is for other issues, with regard to diligence the slate is far from clean, and the Court can simply adhere to its longstanding precedents and hold that the court of appeals therefore had jurisdiction over the issues in these cases.

A party seeking to equitably toll his claims must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The court below held that the diligence prong of this analysis presents a "factual question." *Guerrero-Lasprilla v. Sessions*, 737 F. App'x 230, 231 (5th Cir. 2018); *see also Ovalles v. Sessions*, 741 F. App'x 259, 261 (5th Cir. 2018). That

holding, however, cannot be squared with this Court's numerous contrary decisions.

Since the early days of the Republic, this Court has held that when the facts concerning a party's conduct are undisputed, whether that party acted diligently is a "question of law." *Rhett v. Poe*, 43 U.S. (2 How.) 457, 481 (1844) ("[W]henever the facts upon which the question of due diligence arises are ascertained and undisputed, due diligence becomes a question of law.").[2]

In *Bank of Columbia v. Lawrence*, 26 U.S. (1 Pet.) 578 (1828), for instance, this Court considered whether a bank acted diligently by sending a notice seeking payment to a borrower's outdated address and held that it was "well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law." *Id.* at 583; *see also Standard Oil Co. v. Van Etten*, 107 U.S. 325, 334 (1882) (holding "that what constitutes a reasonable time" where a sales account rendered becomes an account stated "is a question of law"). Further, the Court explained the importance of treating diligence as a legal question, reasoning that this approach is "best calculated to have fixed [and] uniform rules on the subject." *Lawrence*, 26 U.S. (1 Pet.) at 583.

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[2] Unremarkably, disputes regarding what steps a party actually took to vindicate its rights have always been treated as questions of fact. *See, e.g., McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 186 (1828) (holding that, in that case, relevant factual determinations had not been made). But no such disputes are presented here.

Similarly, in *Wollensak v. Reiher*, 115 U.S. 96 (1885), this Court held that whether a patent holder's delay in enforcing his claims "was reasonable . . . is [a question] for the court to determine." *Id.* at 101. Significantly, in reaching this holding, the Court rejected the argument that the Court should defer to the patent examiner's approval of an untimely reissuance of a patent, noting that "whether the patent-office has decided rightly . . . the question of diligence on the part of the patentee . . . is the very question for judicial review." *Id.*

Indeed, in case after case, this Court explained that diligence is a question of law. *See, e.g.*, *Mahn v. Harwood*, 112 U.S. 354, 360 (1884) (noting that "reasonable diligence" is a "question of law"); *Musson v. Lake*, 45 U.S. (4 How.) 262, 276 (1846) ("Due diligence is a question of law."); *Dickins v. Beal*, 35 U.S. (10 Pet.) 572, 581 (1836) ("When all the facts are ascertained, diligence is a question of law."); *President, Dirs. & Co. of Bank of Alexandria v. Swann*, 34 U.S. (9 Pet.) 33, 46 (1835) ("[W]hat shall constitute[] due diligence is a question of law."); *McLanahan*, 26 U.S. at 186 ("When, indeed, all the facts are given, and the inferences deducible therefrom, the question may resolve itself into a mere question of law."); Pet. Br. 47 & n.23.

The Court's more recent decisions likewise understand diligence as a question of law. In *Pace v. DiGuglielmo*, this Court considered the undisputed facts surrounding a habeas petitioner's conduct and concluded—without affording deference to the lower courts—that he had not acted diligently "[u]nder long-established [*legal*] principles." 544 U.S. at 419; *see*

also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (applying "equitable tolling *doctrine*" and holding that plaintiff did not act diligently) (emphasis added).

Notwithstanding the government's contrary suggestion, *Ovalles* BIO 7, 10, *Holland v. Florida*, 560 U.S. 631 (2010), provides further support for petitioners here. In *Holland*, this Court held that the statute of limitations for a federal prisoner to file a habeas petition was subject to equitable tolling. *Id.* at 634. After examining the undisputed factual record, the Court also held that the district court had erred in concluding that the petitioner failed to exercise due diligence, without affording the lower court any deference. *Id.* at 653.

The Court also remanded the case to the Eleventh Circuit to allow it to determine, in the first instance, whether the petitioner had satisfied the "extraordinary circumstances" prong of the equitable tolling test. *Id.* at 653-54 (noting that the extraordinary circumstances analysis can be fact-intensive). But this Court did not remand the case to the Eleventh Circuit because it viewed the issue as too factual for legal analysis; indeed, as noted, it *did* analyze the diligence prong as a question of law. Instead, the Court merely observed that "no lower court" had ever attempted to *apply* the correct extraordinary circumstances standard to the petitioner's case and it would be inappropriate for this Court to do so in the first instance. *Id.* (citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)) ("[T]his is a court of final review and not first view."). That routine refusal to

decide issues not addressed below in no way undermines this Court's longstanding precedents establishing that due diligence determinations are questions of law.

In light of this Court's longstanding authority treating diligence as a question of law, petitioners' claims are reviewable under the savings clause and there is no need for this Court to determine the provision's full scope. *See Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (interpreting a statutory phrase in the Age Discrimination in Employment Act "guided by [] prior decisions interpreting similar language in other antidiscrimination statutes"); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 446 (2008) (examining "pertinent interpretive history" of comparable statutes to determine if 42 U.S. § 1981 covered retaliation claims).

B. Alternatively, The Court Can Resolve This Case Based On The Fifth Circuit's Plainly Erroneous Holding That Diligence Is A Question Of Fact.

Second, the Court can also decide this case on narrower, case-specific grounds. Whether diligence is always a question of law, it is plainly not a pure question of *fact*. Yet that is what the Fifth Circuit incorrectly held.

The Fifth Circuit's decisions in these cases were patently wrong in concluding that "whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a *factual* question." *Guerrero-Lasprilla*, 737 F. App'x at 231 (emphasis added); *see also Ovalles*, 741 F. App'x

at 261. The Fifth Circuit did so, moreover, despite also explicitly acknowledging that petitioner Ovalles was asserting that the BIA "applied the wrong legal standard for tolling." *Ovalles*, 741 F. App'x at 261. The court of appeals thus apparently deemed *all* questions bearing on equitable tolling to be factual.

But petitioners in these cases have not challenged the underlying factual findings made by the Immigration Judge or BIA, nor does the government contend that petitioners did so. Indeed, the government suggests that petitioners are raising "fact-intensive" claims, which is just another way of saying that petitioners are raising *legal* claims that require (in the government's view) case-by-case application of law to fact. There is no dispute as to the historical facts in these cases; the only question concerns the legal significance of those facts, *i.e.*, whether they satisfy the legal standard for equitable tolling.

Whatever the proper characterization of a "diligence" claim, it is certainly not a factual question. The view of the Fifth Circuit—that anything having to do with tolling is a question of fact—is thus indefensible. That is enough to reverse the judgments below. On remand, the court of appeals can address in the first instance whether petitioners' claims raise the type of "questions of law" covered by the savings clause.

C. The Court Can Reverse On The Ground That A Claim That The BIA Applied The Wrong Legal Standard Is Necessarily A Question Of Law.

Third, the Court can reverse the Fifth Circuit on the equally straightforward ground that the *particular* claims raised by petitioners in these cases were pure legal questions, thereby obviating the need to decide whether (i) diligence should always be viewed as a question of law, or (ii) the savings clause covers mixed questions.

Both of these cases turned on pure legal questions in the court of appeals. Indeed, as already noted, the Fifth Circuit itself acknowledged that petitioner Ovalles was arguing that the BIA had "applied the wrong legal standard for tolling." *Id.*; *see* Pet. Br. 24 (quoting petitioner Ovalles's court of appeals briefing). Likewise, the heart of petitioner Guerrero-Lasprilla's argument was that until the Fifth Circuit decided *Lugo-Resendez v. Lynch*, 831 F.3d 337, 342 (5th Cir. 2016), "he could not have moved to reopen . . . because any prior-filed motion would have been procedurally barred" under Fifth Circuit precedent. *Guerrero-Lasprilla*, 737 F. App'x at 231. That, too, is a pure legal question: did Fifth Circuit law at that time permit a motion to reopen? *See* Pet. Br. 26-27.[3]

The court of appeals erred by failing to examine the *precise* arguments that petitioners advanced.

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[3] The fact that the petitioners raised pure legal claims regarding whether the BIA employed the proper legal standard may explain why the government did not raise jurisdiction before the court of appeals.

Indeed, the text of the savings clause instructs courts to look to the specific "question" that is "raised" by the petitioner. 8 U.S.C. § 1252(a)(2)(D). If that "question" is one "of law," the court has jurisdiction. *Id.* Thus, the court of appeals plainly erred, and this Court can reverse without reaching the broader question of the scope of § 1252(a)(2)(D).

II. THE SAVINGS CLAUSE PROVIDES REVIEW OVER ALL LEGAL CLAIMS.

Should the Court decide to go beyond what is necessary to resolve this case and to construe the savings clause more generally, it should hold that the term "questions of law" covers all legal claims, including the interpretation of law *and* the application of law to fact. The text, statutory context, and history of § 1252(a)(2)(D) all confirm that the savings clause is not limited to "pure" questions of law or to the amorphous subset of legal claims suggested by the government: legal claims that are not too "fact-intensive." *Ovalles* BIO 7.

1. The statute's text alone makes clear that § 1252(a)(2)(D) reaches all, not just some, legal claims. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) ("We begin, as always, with the text."). Congress used an unqualified term in enacting § 1252(a)(2)(D). It authorized review over "questions of law." It did not, for example, authorize review only over pure questions of law or questions of law that do not require the consideration of the particular facts at hand. Rather, it used the general term "questions of law."

It has not, "and cannot be, [this Court's] practice to restrict the unqualified language of a statute" based on ideas of the "particular evil" Congress had in mind, "even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan v. United States*, 522 U.S. 398, 403 (1998). Thus, in "the absence of any indication in the statutory text that Congress intended" to authorize review of only *some* legal claims, the statute makes *all* legal claims reviewable. *DePierre v. United States*, 564 U.S. 70, 85 (2011); *see id.* ("It is not for us to rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended.") (quoting *Lewis v. City of Chicago,* 560 U.S. 205, 215 (2010).

The term "question of law" has a long-settled meaning that encompasses various kinds of legal issues, including those at issue here. Black's Law Dictionary defines the term as "[a]n issue . . . concerning the *application* or interpretation of the law." *Question of law*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *see also* Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 425 (2012) (defining "application" as "[t]he process by which a decision-maker ascertains the legal category under which the facts at issue should be placed and hence the rule of law that is to govern them"); *accord St. Cyr*, 533 U.S. at 302 (explaining that "errors of law" include "the erroneous *application* or interpretation of statutes") (emphasis added). This makes sense because "[l]egal rules . . . acquire content only through application" to facts. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

2. The plain meaning of the text is reinforced by the surrounding subsections of the statute. In particular, 8 U.S.C. § 1252(b)(9) underscores that the term "questions of law" encompasses all legal questions, and excludes only factual issues. Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact.

This provision is a "zipper clause," the purpose of which "is to consolidate judicial review of immigration proceedings into one action in the court of appeals." *St. Cyr*, 533 U.S. at 313 (internal quotation marks omitted). The text and purpose of § 1252(b)(9) thus indicate that Congress understood "questions of law and fact" to cover the entire waterfront of issues presented in appealing a removal order. In seeking to consolidate review, Congress surely did not leave some third category of questions beyond the scope of § 1252(b)(9). Thus, Congress understood there to be only two categories of questions: "questions of law" and "questions of . . . fact." Every question that is not one "of fact" is a question of law for purposes of the

statute. And, as discussed above, there is no doubt that diligence is not a factual question.

When Congress subsequently used the same term—"questions of law"—in § 1252(a)(2)(D), it presumably had § 1252(b)(9) in mind and intended "questions of law" to have the same meaning in both subsections. *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."); *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) ("[W]e presume that Congress is aware of existing law when it passes legislation.") (internal quotation marks omitted); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (refusing to give the same word "two different meanings in the same section of [a] statute"). Thus, in § 1252(a)(2)(D), "questions of law" encompasses everything that is not a question of fact (or purely discretionary)—including the application of law to facts.

3. This Court has often used the term "mixed questions of law and fact" to refer to the application of law to undisputed facts. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). That turn of phrase could be interpreted to mean that such questions are not entirely, or "purely," legal. But, as the First Circuit has observed: "'Mixed question' is something of a misnomer; once the raw facts are determined . . . deciding which legal label to apply to those facts is[,] strictly speaking, a legal issue." *Bergersen v. Comm'r*, 109 F.3d 56, 61 (1st Cir. 1997).

The interpretation of a legal term is a quintessential legal question, and what set of facts satisfies a given term or standard is an important aspect of elaborating what the relevant law is. *See Ornelas*, 517 U.S. at 697. That, in fact, is the premise of a motion to dismiss under Fed. R. Civ. P. 12(b)(6): Whether a particular set of alleged facts establishes a claim *as a matter of law*. *See* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed.) ("[T]he motion to dismiss under [Rule 12(b)(6)] raises only an issue of law"). Motions to dismiss generally present a reviewable question of the application of law to fact, but the resolution of such motions cannot resolve questions of fact.

For this reason, this Court has long reviewed the application of law to facts under statutes that authorize judicial review only of legal questions. The Revenue Act of 1926, for example, granted jurisdiction to appellate courts only to determine if a decision by the Board of Tax Appeals was "not *in accordance with law*." *Bishoff v. Comm'r*, 27 F.2d 91, 92 (3d Cir. 1928) (quoting Revenue Act of 1926, 44 Stat. 110 § 1003(b)) (emphasis added). In *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 490-91 (1937), this Court then held that it had authority to decide whether the facts of a particular transaction rendered it taxable income within the meaning of the tax code. *Id.* at 491. The Court reasoned that this determination is a "conclusion of law or at least a determination of a mixed question of law and fact" and that, as such, "[i]t is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such

review, the court may substitute its judgment for that of the Board." *Id.*; *see also Bogardus v. Comm'r*, 302 U.S. 34, 38-39 (1937) ("[If] the conclusion of the Board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts. The ultimate determination, therefore, should be overturned as a matter of law.").

Further, the very terminology this Court uses—"pure" questions of law—itself underscores that the category of "questions of law" extends beyond what this Court has deemed "pure." Rather, "pure" and "mixed" questions represent types of legal questions this Court has distinguished for various purposes, including standards of appellate review. As this Court recently explained, the category of mixed questions may be usefully subdivided for purposes of determining an appropriate standard of review in terms of which court "is better suited to resolve" a particular question. *U.S. Bank*, 138 S. Ct. at 966. But that observation does not detract from the legal nature of all mixed questions; it merely points out that lower courts are better situated to do certain legal analysis.

Moreover, there is a "strong presumption that Congress intends judicial review of administrative action." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (citation omitted); *see also Kucana v. Holder*, 558 U.S. 233, 237 (2010). Thus, absent a contrary indication from Congress, mixed questions must fall within the statutory term "questions of law."

4. The drafting and legislative history of § 1252(a)(2)(D) strongly reinforces the conclusion that

the savings clause covers both the interpretation and application of law.

Congress specifically considered limiting § 1252(a)(2)(D)'s jurisdictional grant to a subset of "questions of law." An earlier version of the Bill which resulted in the enactment of § 1252(a)(2)(D) included the qualifier "pure" before the enacted text "questions of law," but Congress eliminated that word in the final version of the Act. *See* H.R. Conf. Rep. 109-72, at 175; Pet. Br. 33.

That choice represents a rejection of the idea that § 1252(a)(2)(D) provides jurisdiction only for pure questions of law. Congress legislated against this Court's longstanding practice of distinguishing "pure" legal questions from the application of law to fact. Its consideration and rejection of the "pure" modifier should therefore be understood as a recognition that Congress intended to provide review over *all* legal claims. *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."). Were the Court to construe the statute to reach only pure questions of law, the effect would be to rewrite the statute to adopt the choice Congress rejected.

The government may contend otherwise, pointing out that the Conference Committee Report on the final Bill states that the word "pure" was omitted because it was deemed "superfluous" and "add[ed] no meaning." H.R. Conf. Rep. 109-72, at 175. But that opaque comment does not undermine the import of Congress's choice to delete the qualifier "pure." *See*

Azar, 139 S. Ct. at 1814 ("[E]ven those of us who believe that clear legislative history can illuminate ambiguous text won't allow ambiguous legislative history to muddy clear statutory language.") (internal quotation marks omitted).

Moreover, other portions of the Conference Committee Report plainly support the broader reading of § 1252(a)(2)(D) by explaining: "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. In other words, the Report expressly contemplates that courts of appeals *will* exercise jurisdiction over so-called "mixed questions," providing only that they should not review "factual elements." In line with the text and context, the history of the savings clause confirms that it covers so-called mixed questions.

III. THE STATUTE DOES NOT REQUIRE COURTS TO CONSULT THE HISTORY OF HABEAS LAW TO DETERMINE IF A CLAIM IS REVIEWABLE.

Any construction of the savings clause that would require courts to consult historical habeas to determine their jurisdiction over routine immigration cases is unwarranted. As this Court has made clear, statutes must be interpreted according to their own terms—even when, as here, they are enacted in response to decisions of this Court. And nothing in the savings clause indicates an intent to incorporate historical habeas or track the analysis in *St. Cyr*. Thus, while *St. Cyr* addressed historical habeas in

examining the Suspension Clause, courts of appeals need not do so when applying § 1252(a)(2)(D).

But to the extent historical habeas is at all relevant to resolving this case, it is only in a very limited way. When Congress enacted § 1252(a)(2)(D), it did so against the backdrop of *St. Cyr*'s explication of historical habeas, as well as the decisions of the courts of appeals that followed. Right or wrong, that was the historical understanding before Congress when it adopted the savings clause, and so that is the understanding that controls here. And that understanding reinforces the statutory interpretation considerations noted above: Both *St. Cyr* and the lower courts were clear that historical habeas practice encompassed all legal claims, including application of law to undisputed facts. In any event, that historical understanding was correct: Habeas has always encompassed review of application of law to facts, including with regard to what the government might call "fact-intensive" questions.

1. For good reason, Congress did not require courts to undertake an issue-by-issue or case-by-case analysis of historical habeas to assess whether jurisdiction lies under § 1252(a)(2)(D) in a particular case. Such a rule would trigger extensive, complex litigation and analysis, often based on incomplete and indeterminate historical sources. As explained above, Congress's solution was simpler: All legal issues are reviewable under the statute.

When Congress wishes to instruct courts that a statute encompasses another body of law, it knows how to do so. Thus, for example, the Alien Tort Statute, 28 U.S.C. § 1350, provides jurisdiction over

violations of "the law of nations." This Court has explained that the statute thus directs courts considering its scope to look elsewhere, to "the general common law," and specifically "torts in violation of the law of nations." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018) (internal quotation marks omitted). Similarly, the All Writs Act, 28 U.S.C. § 1651(a), refers courts assessing whether a particular power falls within the statute's grant of authority to the body of law regarding what writs could be issued and under what circumstances. *See United States v. Hayman*, 342 U.S. 205, 222 n.35 (1952) (in determining reach of the statute, "we look first to the common law"); *see also, e.g.*, 22 U.S.C. § 288a(b) (granting designated international organizations "the same immunity from suit . . . as is enjoyed by foreign governments"); 28 U.S.C. § 1652 (designating the "laws of the several states" as the rules of decision for civil actions in federal courts sitting in diversity); 28 U.S.C. § 2674 (extending tort liability to the United States in accordance with "the law of the place where the act or omission occurred").

Unlike these kinds of statutes, nothing § 1252(a)(2)(D) indicates that Congress wanted courts to undertake a case-by-case analysis regarding whether a particular type of claim was historically cognizable in habeas. The statutory text does not refer to habeas, or history, or any other historical body of law. Rather, it simply uses a statutory term—"questions of law"—which is not limited to the exercise of authority by habeas courts, but is instead used in a large number of legal contexts.

The same principle applies when Congress legislates in response to a constitutional, or constitutional avoidance, decision rendered by this Court—as it did in enacting § 1252(a)(2)(D) in response to *St. Cyr*. Absent some strong indication, the Court will not assume that Congress simply intended to enact whatever is constitutional, collapsing statutory interpretation into constitutional analysis. Rather, the Court must construe statutes by their terms and then, in an appropriate case where the question is presented, determine whether the statute so interpreted is constitutional. *See, e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) (assessing constitutionality of statute enacted in response to prior Court decision striking down similar statute).[4]

This Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, is instructive in this regard. *Hobby Lobby* addressed, among other things, the interpretation of the Religious Freedom Restoration Act of 1993 ("RFRA"). 573 U.S. 682 (2014). RFRA was a clear-cut legislative response to a constitutional holding, namely this Court's more restrictive interpretation of the Free Exercise Clause in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See Hobby Lobby*, 573 U.S. at

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[4] Because there is no Suspension Clause issue properly presented in this case, the Court is not called on to decide what the Clause protects, but only what the statute means. Notably, however, a decision from this Court construing "questions of law" narrowly—reaching, for example, only "pure" legal questions—would likely engender numerous as-applied Suspension Clause challenges.

694 ("Congress responded to *Smith* by enacting RFRA."). Indeed, its rejection of *Smith* was "written into the statute itself." *Id.* at 746 (Ginsburg, J., dissenting) (citing 42 U.S.C. § 2000bb). And the legislative history was, at least in the dissent's view, "emphatic" that "RFRA's purpose was 'only to overturn the Supreme Court's decision in *Smith*.'" *Id.* at 747 (quoting relevant Senate report); *see also id.* at 749 (similar). All the same, this Court rejected the argument that RFRA's standard should have been interpreted to merely "codify this Court's pre-*Smith* Free Exercise Clause precedents." *Id.* at 713 (majority opinion). Rather, the Court examined the enacted text, as it does with all other statutes, to determine its meaning and scope. *Id.* at 714. And it rejected the idea that, without so indicating in the text, so too here, Congress had sought to simply incorporate this Court's prior Free Exercise Clause jurisprudence, rather than establishing Congress's own standard. As this Court explained in *Hobby Lobby*: "When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so." *Id.* (citing 28 U.S.C. § 2254(d)(1)).

2. Thus the Court need look no further than the statute itself, and should not direct the courts of appeals to delve into historical habeas. But, to the extent the Court deems the history of habeas relevant in determining the reach of the statute, it is relevant in only a very specific way: as the legal landscape in which Congress was legislating when it enacted the savings clause.

Congress adopted § 1252(a)(2)(D) in response to *St. Cyr*. *See* H.R. Conf. Rep. 109-72, at 174-75. And *St. Cyr* analyzed the history of habeas practice at length. Thus, assuming historic habeas bears on the construction of this statute at all, the question is not what review was actually available as a historical matter, but what *St. Cyr* found to be historically reviewable—as well as how the circuits interpreted *St. Cyr* in the years preceding the passage of the savings clause. When Congress adopted § 1252(a)(2)(D) it was reacting to *St. Cyr*'s understanding of historical habeas review.

St. Cyr's historical analysis underscores what the text, context, and drafting and legislative history demonstrate: The savings clause encompasses all questions of law. *St. Cyr* held that, in light of the grave Suspension Clause concerns raised by construing statutes to eliminate all review of certain legal challenges to removal orders, the statutes at issue there could and must be construed to allow for the continued availability of habeas corpus. 533 U.S. at 308-14. Congress responded by explicitly eliminating habeas corpus, but providing, as a substitute, judicial review in the courts of appeals.

Critically, *St. Cyr* does not suggest that historic habeas was limited to pure questions of law. It recognized that historically habeas "encompassed detentions based on errors of law, including the erroneous *application* or interpretation of statutes." *Id.* at 302 (emphasis added). Thus, while the Court understood the particular issue in *St. Cyr* to raise "a pure question of law," *id.* at 298, it explained that historic habeas reached beyond such questions to

include application of law to a set of facts—so-called "mixed questions." And the cases on which *St. Cyr* relied bear this out. The Court cited a number of cases in which habeas courts reviewed the application of law to facts, including in what the government might call "fact-intensive" cases. *See, e.g.*, *id*. at 306, 307 n.29 (citing *Gegiow v. Uhl,* 239 U.S. 3 (1915); *Delgadillo v. Carmichael*, 332 U.S. 388 (1947); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Kessler v. Strecker*, 307 U.S. 22 (1939); *Mahler* v. *Eby*, 264 U.S. 32 (1924)).

That *St. Cyr* understood habeas review to cover mixed questions was confirmed by uniform circuit cases reading the decision in that way. *See Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003) (citing *St. Cyr* and holding that habeas covers the "application" of the laws); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) (same); *Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (same); *Cadet v. Bulger*, 377 F.3d 1173, 1192 (11th Cir. 2004) (same).[5] These cases, along with *St. Cyr* itself, formed the legal landscape against which Congress enacted the savings clause.[6]

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[5] That this was the proper reading of *St. Cyr* was also confirmed by this Court, albeit after the savings clause was enacted. *Boumediene v. Bush* squarely relied on *St. Cyr* in deeming it "uncontroversial" that the minimum scope of habeas guaranteed by the Suspension Clause encompasses "'the erroneous application or interpretation' of relevant law." 553 U.S. at 779 (quoting *St. Cyr,* 533 U.S. at 302).

[6] The examples the Conference Committee Report gave of the types of claims that *St. Cyr* found were "historically

In short, to the extent historical habeas matters for purposes of construing § 1252(a)(2)(D), what matters is *St. Cyr*'s understanding of that history and the post-*St. Cyr* caselaw leading up to the enactment of the savings clause. Those cases underscored the statutory interpretation considerations set forth above, as they understood historical habeas review to cover the interpretation *and* application of the law. That, therefore, is the understanding that was before Congress when it legislated—and the way in which the history of habeas bears on the statute, if at all.

3. Finally, even if the Court were to consult habeas history independently of what it stated in *St.*

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reviewable"—namely "constitutional and statutory-construction questions," H.R. Conf. Rep. 109-72, at 175—were clearly a non-exhaustive list. There can be no debate, for example, that construction of a regulation would likewise fall within *St. Cyr*'s understanding of the scope of historical habeas (and within the plain meaning of the statutory text). *See, e.g.*, *Bridges*, 326 U.S. at 150-53 (granting habeas where evidence was admitted in violation of regulations); *see also St. Cyr*, 533 U.S. at 307 n.29 (citing *Bridges*). Rather, the Report reflects an understanding, in light of *St. Cyr*, only that historical habeas did not reach determinations of historical fact and the exercise of discretion, and that § 1252(a)(2)(D) would likewise exclude such questions.

Relatedly, the Report states that the ACLU "explained during the *St. Cyr* litigation" (in which it represented the noncitizen) that a "'question of law' is a question regarding the construction of a statute." H.R. Conf. Rep. 109-72, at 175. But the ACLU never took that position in *St. Cyr* (or elsewhere), and stated in *St. Cyr* that statutory construction issues are a *type* of legal question. Pet. for Writ of Cert. at 11, *Calcano-Martinez v. INS*, 533 U.S. 348 (No. 00-1011) (companion case to *St. Cyr*), 2000 WL 33979531 (addressing "non-constitutional legal claims (such as pure questions of statutory interpretation)") (emphasis omitted).

Cyr, that decision's historical analysis was correct. There is a long tradition of habeas courts considering the application of law to undisputed facts. Pet. Br. 37-38. As *St. Cyr* explained, during what is referred to as the "finality" period (when Congress made all administrative immigration decisions "final" and left only the constitutionally-required core of habeas), courts "generally did not review factual determinations made by the Executive" but "answered questions of law." 533 U.S. at 306. Those questions of law routinely included "mixed" questions, *i.e.*, the application of law to undisputed facts. *See, e.g.*, *Rowoldt v. Perfetto*, 355 U.S. 115 (1957); *Delgadillo*, 332 U.S. at 388; *Bridges*, 326 U.S. at 135; *Hansen v. Haff*, 291 U.S. 559 (1934); *Mahler*, 264 U.S. at 32.

Any suggestion that habeas courts reviewed only claims that were not "fact-intensive," *Ovalles* BIO 7, would be untenable. In *Hansen*, for example, a noncitizen was accused of having violated a statute barring entry "for the purpose of prostitution or for any other immoral purpose." 291 U.S. at 560. This Court examined the particular circumstances of her extramarital relationship, employment history, and travel outside the country, concluding, in part, that the particular facts of her case did not demonstrate that her entry into the country was "for the purpose of immoral sexual relations." *Id.* at 560-61, 562-63. Likewise, *Rowoldt* examined the "unchallenged" facts to determine whether a noncitizen was deportable as a past member of the Communist Party. 355 U.S. at 116, 120. He had concededly "joined the Communist Party," "paid dues, attended meetings," and been

employed in a Party bookstore. *Id.* at 116-18. This Court nonetheless carefully examined the precise circumstances, including the "motives that led him to join" the Party, his need for employment of some kind, and his age and long residence in the country, and held that the undisputed facts did not establish past membership within the meaning of the relevant statute. *Id.* at 118, 120-21.

* * *

In sum, Congress plainly appreciated that *St. Cyr* identified a serious constitutional problem with the elimination of all judicial review of removal orders, and it understood that the Court had examined historical habeas practice when analyzing this issue. But Congress did not respond by enacting a statute that incorporates the contours of historical habeas on specific issues. Rather, it established its own categories of reviewable claims—including "questions of law"—in its own judgment of what was both constitutional and good policy. Congress's use of general terms, and the absence of any contrary indication in the statute, demonstrates that the term "questions of law" must be understood to cover all legal issues.

That choice makes eminent sense. If Congress had required courts to decide, for each legal question or category of legal questions, whether habeas courts had historically reviewed the same issue or some analogous question, the result would have been a complex and difficult-to-administer jurisdictional statute. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (explaining that "administrative simplicity is a major virtue in a jurisdictional statute"). Before

courts could reach the merits of any legal issue, they would need to undertake a difficult and uncertain exploration of historical habeas caselaw, digging through the often scattered, incomplete, and partial materials that have survived the centuries. As *St. Cyr* explained, such an inquiry will often be "difficult" given "ambiguities" in the historical record when it comes to particular issues. 533 U.S. at 303-04. Indeed, this Court has warned against "the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer" to specific questions about the historical reach of habeas. *Boumediene*, 553 U.S. at 752. That inquiry may be appropriate to address Suspension Clause challenges; it is not, however, necessary in cases applying the savings clause.

This Court should therefore construe § 1252(a)(2)(D) without analyzing the contours of historical habeas practice. At most, to understand the legal landscape against which Congress legislated, the Court should consult *St. Cyr*'s understanding of historic habeas, as well as subsequent court of appeals decisions construing *St. Cyr*. But an interpretation of the savings clause that would require repeated journeys through habeas archives to determine jurisdiction over routine immigration appeals would needlessly expend judicial resources, contrary to the statutory text Congress enacted.

CONCLUSION

The Court should reverse the Fifth Circuit's jurisdictional ruling.

Respectfully submitted,

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