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United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

October 26, 2026

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

JEANETTE VIZGUERRA-RAMIREZ,

Petitioner,

v.

No. 25-9559

TODD BLANCHE, United States Attorney
General,

Respondent.

Appeal from the Board of Immigration Appeals
(Petition for Review)

Mark Robert Barr, Lichter Immigration, Denver, Colorado (Laura L. Lichter with him on the briefs), for Petitioner.

Jacob (Yaakov) M. Roth, United States Department of Justice, Civil Division, Washington, District of Columbia (Holly M. Smith, Assistant Director and David J. Schor, Senior Litigation Counsel, United States Department of Justice, Civil Division, Washington, District of Columbia, on the brief), for Respondent.

Before **PHILLIPS**, **McHUGH**, and **EID**, Circuit Judges.

McHUGH, Circuit Judge.

Petitioner Jeanette Vizguerra-Ramirez seeks review of a July 24, 2013 reinstated order of removal from the United States. Ms. Vizguerra¹ argues that reinstatement was improper because she did not depart from the United States “under an order of removal” within the meaning of the reinstatement statute at 8 U.S.C. § 1231(a)(5). The Government asserts that we lack jurisdiction to review reinstated orders of removal² and that Ms. Vizguerra’s petition is untimely because it was not filed within thirty days after her reinstatement order became final, as required under 8 U.S.C. § 1252(b)(1).³ In response, Ms. Vizguerra contends that we do have jurisdiction to review reinstated orders of removal. And although Ms. Vizguerra recognizes that her petition for review is untimely, she argues that § 1252(b)(1)’s deadline should be equitably tolled because her request for withholding of removal remains pending. Our precedent previously instructed that withholding-only proceedings must have concluded before an order of removal became final within the meaning of § 1252(b)(1). But the Supreme Court abrogated that

¹ Petitioner refers to herself as Ms. Vizguerra throughout her briefing. We therefore take the same approach.

² The Government raised this jurisdictional argument in a motion to dismiss filed after full briefing and oral argument in this matter were complete. Ms. Vizguerra filed a response. Because jurisdiction can be challenged at any time, the argument is timely.

³ The Government raised this argument in a motion for summary disposition as well as in its response brief. Tenth Circuit Rule 27.3(A)(1)(b) allows a party to file a motion for “summary disposition because of a supervening change of law or mootness.” Because we are deciding this matter after full merits briefing and oral argument, we deny the Government’s motion for summary disposition as moot.

approach in *Riley v. Bondi*, 606 U.S. 259 (2025). Ms. Vizguerra filed her petition for review shortly after the Supreme Court’s decision in *Riley*.

Under controlling circuit precedent, we have jurisdiction to review Ms. Vizguerra’s reinstatement order as a final order of removal under § 1252. *See Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003). *Riley* emphasized that an order of removal must have the characteristics of either (1) finding that a noncitizen is removable or (2) ordering removal, pursuant to 8 U.S.C. § 1101(a)(47)(A). 606 U.S. at 267. Because reinstatement orders satisfy the plain-text definition of an order of removal under § 1101(a)(47)(A), *Riley* is not inconsistent with our jurisdiction to hear this matter. However, Ms. Vizguerra fails to demonstrate that extraordinary circumstances prevented timely filing of her petition. We therefore assume without deciding that the filing deadline in § 1252(b)(1) can be equitably tolled and dismiss Ms. Vizguerra’s petition as untimely based on a failure to demonstrate that she is entitled to equitable tolling.⁴

I. BACKGROUND

A. Legal Background

The Immigration and Nationality Act (“INA”) authorizes judicial review of “a final order of removal.” 8 U.S.C. § 1252(a)(1). An order of removal is statutorily defined

⁴ Ms. Vizguerra has filed a motion for a bifurcated decision, asking that we keep this case open for future challenges to her withholding-only proceedings if we conclude that she is entitled to equitable tolling but reject her arguments on the merits. Because we hold that Ms. Vizguerra is not entitled to equitable tolling, we reject this motion as moot.

as “the order of the special inquiry officer, or other such administrative officer . . . concluding that the [noncitizen] is deportable or ordering deportation.” *Id.*

§ 1101(a)(47)(A).⁵ We have previously held that “[a]n order reinstating a prior removal order is the functional equivalent of a final order of removal and, therefore, we have jurisdiction to review the reinstatement order” under § 1252(a)(1). *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 884 (10th Cir. 2005). When faced with a challenge to a reinstatement order, however, “our jurisdiction is limited to considering whether the reinstatement order was properly entered—we cannot consider the propriety of the underlying removal order.” *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063–64 (10th Cir. 2004).

A “petition for review must be filed not later than 30 days after the date of the final order of removal.” 8 U.S.C. § 1252(b)(1). The removal order “become[s] final upon the earlier of . . . (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the [noncitizen] is permitted to seek review of such order by the Board of Immigration Appeals.” *Id.* § 1101(a)(47)(B).

⁵ Section 1101(a)(47)(A) defines the term “order of deportation” rather than § 1252(a)(1)’s phrase “order of removal.” In 1996, Congress amended certain immigration statutes and replaced the phrase “order of deportation” with the phrase “order of removal” in “most, but not all, of the United States Code.” *Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1143 n.5 (10th Cir. 2007). In the context of the Immigration and Nationality Act, the phrases share the same meaning. *Id.*

Noncitizens may also challenge removal through withholding-only proceedings.⁶ A withholding of removal proceeding requires the Attorney General, subject to limited exceptions, to withhold removal to a particular country under 8 U.S.C. § 1231(b)(3)(A), if the noncitizen’s “life or freedom would be threatened in that country because of the [noncitizen’s] race, religion, nationality, membership in a particular social group, or political opinion.” The noncitizen might also receive protection under the Convention Against Torture, which prohibits removal to a particular country if the noncitizen proves it is more likely than not that the noncitizen will be tortured in that country. *See* 8 C.F.R. §§ 208.16–18. However, withholding of removal does not affect the validity of the order of removal. And because withholding of removal is country specific, nothing prevents a noncitizen from being removed “to a third country other than the country to which removal has been withheld.” *See id.* § 208.16(f); *Johnson v. Guzman Chavez*, 594 U.S. 523, 531–32 (2021).

Prior to 2025, the operative law in this court was that, where the noncitizen was pursuing withholding-only proceedings, an order of removal became final for purposes of § 1252(b)(1) “upon the conclusion of withholding-only proceedings,” not the order of removal. *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1140 (10th Cir. 2023). We first ruled on this question in 2015 in *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015). There, we reasoned that when a noncitizen pursues withholding-only

⁶ A withholding-only proceeding is “a proceeding at which the only issue is whether the [noncitizen] may be removed to his home country.” *Riley v. Bondi*, 606 U.S. 259, 265 (2025).

proceedings, the removal order “is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete.” *Id.* at 1185.

But this approach was abrogated by *Riley v. Bondi*, 606 U.S. 259 (2025). In that case, the Supreme Court looked to the statutory definition of an order of removal, which is defined as an order “concluding that the [noncitizen] is deportable or ordering deportation.” 8 U.S.C. § 1101(a)(47)(A). Thus, the Court reasoned that an order of removal “must have those same characteristics.” *Riley*, 606 U.S. at 267. After identifying the order meeting that statutory definition, the Court held that, notwithstanding any withholding-only proceedings, an order of removal becomes final at the earlier of (1) a determination by the Board of Immigration Appeals (“BIA”) affirming its order or (2) the expiration of the time to appeal the order of removal. *Id.* at 266–67.

Because determinations in withholding-only proceedings do not affect the validity of an order of removal, the Court reasoned that ongoing withholding-only proceedings do not prevent an order of removal from becoming final. *Id.* at 268–70.

B. Factual Background

Ms. Vizguerra is a citizen of Mexico, who arrived in the United States without inspection in December 1997. In 2009, Ms. Vizguerra was placed in removal proceedings. As a defense, Ms. Vizguerra applied for cancellation of removal based on the hardship that would befall her three U.S. citizen children. Alternatively, she requested a grant of voluntary departure in lieu of a removal order.

On November 18, 2011, the Immigration Judge (“IJ”) denied Ms. Vizguerra’s application for cancellation of removal, finding that she had not met the high standard of

showing that her removal would constitute an exceptional and extremely unusual hardship to her U.S. citizen children. But the IJ granted Ms. Vizguerra's alternative request for voluntary departure. She was therefore granted sixty days in which to voluntarily depart from the country in lieu of a removal order. On December 16, 2011, Ms. Vizguerra timely appealed the denial of her cancellation application to the BIA.

After learning that her mother was dying, Ms. Vizguerra traveled back to Mexico on September 8, 2012. Ms. Vizguerra's departure from the United States triggered an automatic withdrawal of her appeal to the BIA, pursuant to 8 C.F.R. § 1003.4.⁷ Ms. Vizguerra returned to the United States without inspection in April 2013. She was apprehended shortly after entry and charged with illegal entry under 8 U.S.C. § 1325(a)(1). On July 24, 2013, officials from the Department of Homeland Security ("DHS") issued a putative reinstatement order, reinstating a previous removal order. Ms. Vizguerra states that her removal was stayed on August 8, 2013. And she asserts that DHS granted numerous extensions of her stay of removal until the last one expired in 2024.⁸

On March 17, 2025, Ms. Vizguerra recounts that she was arrested by DHS and transported to the GEO Aurora ICE Processing Center, where she has remained in

⁷ "Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken." 8 C.F.R. § 1003.4.

⁸ The parties have not included the purported stay of removal or extensions of the stay in the record.

custody since. Following her detention, Ms. Vizguerra filed a petition for review challenging her reinstatement order. She also expressed fear of persecution or torture if she were to return to Mexico based on her history of criticizing abuses of power by the Mexican government. After withholding-only proceedings had been initiated, Ms. Vizguerra voluntarily withdrew her petition for review because, at the time, Tenth Circuit case law required withholding-only proceedings to conclude before she could seek review of the underlying reinstatement order. Ms. Vizguerra represents that her withholding-only proceedings remain ongoing.

Shortly after the Supreme Court's decision in *Riley*, Ms. Vizguerra filed the petition for review at issue here, challenging the reinstatement of her removal order. She argues that her reinstatement order was both procedurally and substantively defective because, among other defects, her grant of voluntary departure meant that she did not depart "under an order of removal" and is thus not subject to reinstatement under 8 U.S.C. § 1231(a)(5).⁹ The Government argues that the Supreme Court's reasoning in *Riley* overrules prior case law establishing our jurisdiction to review reinstatement of removal orders. Even if we retain jurisdiction after *Riley*, the Government maintains that Ms. Vizguerra's petition is untimely and must be dismissed. Although we disagree that

⁹ The reinstatement statute at § 1231(a)(5) provides that, "[i]f the Attorney General finds that [a noncitizen] has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5).

Riley overrules case law establishing our jurisdiction to review reinstatement orders, we agree that Ms. Vizguerra's petition must nonetheless be dismissed as untimely.

II. DISCUSSION

We begin with the Government's argument that *Riley* overruled prior case law establishing our jurisdiction to review reinstated orders of removal. After rejecting that argument, we proceed to Ms. Vizguerra's contention that § 1252(b)(1)'s deadline should be equitably tolled. Because we conclude that Ms. Vizguerra has failed to demonstrate extraordinary circumstances entitling her to equitable tolling, we do not address the merits of Ms. Vizguerra's case.

A. *Jurisdiction To Review Reinstatement Orders*

As a threshold matter, the Government argues that we lack jurisdiction to review the reinstatement of Ms. Vizguerra's removal order because "a reinstatement decision is not a final order of removal under 8 U.S.C. § 1252." Gov. Mot. Dismiss at 2. The Government maintains that our prior caselaw holding that we have jurisdiction to review reinstatement orders as the "functional equivalent" of an order of removal, *see Fernandez-Vargas*, 394 F.3d at 884, does not survive *Riley*. Although *Riley* did not involve a reinstatement order, the Government points to *Riley*'s emphasis on the definition of an order of removal, which must include a determination that a noncitizen is removable or order that noncitizen be removed. *See Riley*, 606 U.S. at 267; 8 U.S.C. § 1101(a)(47)(A). Thus, the Government contends that jurisdiction to review functional

equivalents does not survive *Riley*, which requires a strict application of the definition in § 1101(a)(47)(A).

“[I]t is well established that one panel cannot overrule the judgment of another panel of this court absent en banc reconsideration or a superseding contrary decision by the Supreme Court.” *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1229 (10th Cir. 2001) (internal quotation marks omitted). To justify a change in our precedent, a Supreme Court decision must “contradict[] or invalidate[] our prior analysis.” *Arostegui-Maldonado*, 75 F.4th at 1142 (quotation marks omitted), *abrogated on other grounds by Riley*, 606 U.S. 259. “Such a case must clearly overrule our precedent—indirect tension between our precedent and a later Supreme Court opinion is not enough.” *Id.* (internal quotation marks omitted).

When we first held that we had jurisdiction to review reinstatement orders, we joined every circuit to address the issue in holding that § 1252(a)(1) covered review of reinstatement orders. *See Duran-Hernandez*, 348 F.3d at 1162 n.3. Later decisions further explained that “[a]n order reinstating a prior removal order is the functional equivalent of a final order of removal,” and § 1252(a)(1) therefore established our jurisdiction to review them. *See Fernandez-Vargas*, 394 F.3d at 884.

Riley did not clearly overrule this approach.¹⁰ Section 1101(a)(47)(A) defines an order of removal by its function: an order “concluding that the [noncitizen] is deportable

¹⁰ We join the Third and Seventh Circuits in holding that *Riley* did not undermine circuit precedent holding that reinstatement orders are final orders of removal for purposes of judicial review. *See Laureano v. Att’y Gen. United States of Am.*, 177 F.4th 453, 457 & n.5 (3d Cir. 2026); *E.E.V. v. Blanche*, 180 F.4th 954, 965 (7th Cir. 2026). The

or ordering deportation.” *See* 8 U.S.C. § 1101(a)(47)(A). The Supreme Court in *Riley* emphasized this definition before stating that an order of removal “must have those same characteristics.” 606 U.S. at 267.

A reinstatement order has the “same characteristics” emphasized in *Riley*, *see id.*, and qualifies as an order of removal under a plain-text reading of the definition in § 1101(a)(47)(A). The reinstatement statute provides, “If the Attorney General finds that [a noncitizen] has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date.” 8 U.S.C. § 1231(a)(5). For reinstatement to apply, an immigration officer must determine that the following criteria are met: (1) the noncitizen was subject to a prior order of removal, (2) the noncitizen is the same person who was previously removed or departed voluntarily under an order of removal, and (3) the noncitizen unlawfully reentered the United States. 8 C.F.R. § 241.8(a). In issuing a reinstatement order, the immigration officer must therefore “conclud[e] that the [noncitizen] is deportable” under the terms of the reinstatement statute. *See* 8 U.S.C. § 1101(a)(47)(A). “If a noncitizen reenters the country legally—for example, with the

Ninth Circuit has likewise suggested in an unpublished order that *Riley* did not undermine its precedent holding that reinstatement orders are final orders of removal. *See Acosta-Tapia v. Bondi*, No. 25-2460, 2026 WL 115424, at *1 (9th Cir. Jan. 15, 2026) (“Under [*Riley*’s] reasoning, Acosta-Tapia’s reinstated removal order entered on November 18, 2022, is the qualifying order, because that order concluded that Acosta-Tapia is deportable and commanded his deportation.” (internal quotation marks omitted)). And since *Riley*, the Fourth Circuit has held that reinstatement orders are final orders of removal under § 1252(a)(1). *Navarro v. Blanche*, No. 23-1897, 2026 WL 2317835, at *5 (4th Cir. Aug. 11, 2026).

consent of the Attorney General,” then the prior order of removal cannot be reinstated. *E.E.V. v. Blanche*, 180 F.4th 954, 967 (7th Cir. 2026). And because a noncitizen subject to reinstatement “shall be removed from the United States by reinstating the prior order,” 8 C.F.R. § 241.8(a), the reinstatement order operates to “order[] deportation,”¹¹ *see* 8 U.S.C. § 1101(a)(47)(A).

Contesting this conclusion, the Government argues that, because the prior order of removal is simply reinstated, reinstatement is more akin to ministerial action and is not itself an order of removal. In support, it points to the different statutory treatment and procedures for reinstatement as opposed to “first-instance determinations of removability.” Gov. Mot. Dismiss at 6–7. However, the plain text of § 1101(a)(47)(A) remains consistent with our precedent holding that reinstatement orders are judicially reviewable as orders of removal under § 1252. The streamlined nature of reinstatement proceedings does not change this analysis. Nor do procedural differences between initial removal determinations and reinstatement clearly answer the jurisdictional question. Because *Riley* does not clearly override our binding precedent, we retain jurisdiction to review Ms. Vizguerra’s reinstatement order.

¹¹ Ms. Vizguerra’s reinstatement order demonstrates that it meets the definition in § 1101(a)(47)(A). The reinstatement order here declares, “Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with [8 U.S.C. § 1231(a)(5)].” CAR at 1.

B. Timeliness Under 8 U.S.C. § 1252(b)(1)

Under our previous approach as articulated in *Luna-Garcia*, Ms. Vizguerra’s petition for review would have been premature. But following the Supreme Court’s decision in *Riley*, Ms. Vizguerra’s petition should have been filed within thirty days of July 24, 2013—the date of her reinstatement order. Due to this change, Ms. Vizguerra asks us to hold that 8 U.S.C. § 1252(b)(1) is subject to equitable tolling and that she is entitled to tolling such that her petition for review may be treated as timely.

The Supreme Court had previously characterized a predecessor statute of § 1252(b)(1) as “mandatory and jurisdictional.” *See Stone v. I.N.S.*, 514 U.S. 386, 405 (1995) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). However, the Court in *Riley* clarified that § 1252(b)(1) is not jurisdictional and is instead a claims-processing rule. *Riley*, 606 U.S. at 275–77. The Court explained that *Stone* “used the term ‘jurisdictional’ loosely and did not ‘attend to the distinction between jurisdictional rules (as we understand them today) and nonjurisdictional but mandatory ones.’” *Id.* at 276 (brackets omitted) (quoting *Santos-Zacaria v. Garland*, 598 U.S. 411, 421 (2023)). The Court explained that it had determined several mandatory filing deadlines were not jurisdictional in recent years and that it had since “been more disciplined in [its] use of the term ‘jurisdictional.’” *Id.* at 275. Because § 1252(b)(1) is not jurisdictional, a petition for review could go forward if the government did not insist on holding noncitizens to § 1252(b)(1)’s thirty-day timeline. *Id.* at 277.

But the “fact that a time limit lacks jurisdictional force . . . does not render it malleable in every respect.” *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192 (2019).

There are three categories of filing deadlines: (1) jurisdictional deadlines, which cannot be tolled or waived; (2) “mandatory claims-processing deadlines, which are subject to equitable tolling unless properly raised by an opposing party, in which case they are unalterable”; and (3) “nonmandatory claims-processing deadlines, which are both subject to equitable tolling and flexible when raised by an opposing party.” *Nava-Capilla v. Bondi*, No. 24-9534, 2025 WL 1088136, at *2 (10th Cir. Apr. 11, 2025) (unpublished)¹² (quoting *Young v. SEC*, 956 F.3d 650, 654–55 (D.C. Cir. 2020)). Although mandatory rules can be waived or forfeited, *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 (2017), they are not susceptible to equitable tolling when properly raised by an opposing party. *Nutraceutical Corp.*, 586 U.S. at 192.

In holding that § 1252(b)(1) was a nonjurisdictional claims-processing rule, *Riley* did not expressly say whether § 1252(b)(1) was mandatory or nonmandatory. Since *Riley* was decided, three circuit courts have held that the deadline in § 1252(b)(1) is nonmandatory and subject to equitable tolling. *See Navarro v. Blanche*, No. 23-1897, 2026 WL 2317835, at *12 (4th Cir. Aug. 11, 2026); *Oxlaj-Perez v. Blanche*, 174 F.4th 516, 520 (6th Cir. 2026); *E.E.V.*, 180 F.4th at 979.

As the first circuit to substantively address this question, the Sixth Circuit noted that *Riley* had not applied the mandatory label to § 1252(b)(1) and had declined to answer the question. *Oxlaj-Perez*, 174 F.4th at 521. It then applied the “rebuttable presumption”

¹² We cite unpublished cases for their persuasive value only and do not treat them as binding authority. *See United States v. Ellis*, 23 F.4th 1228, 1238 n.6 (10th Cir. 2022).

that a statute of limitations is subject to equitable tolling based on background common law. *Id.* at 522. And it concluded that neither the text nor the structure of § 1252(b)(1) was sufficient to overcome this presumption. *Id.* at 522–26. The Seventh and Fourth Circuits followed similar reasoning. *See E.E.V.*, 180 F.4th at 973–79; *Navarro*, 2026 WL 2317835, at *8–12.

On the other hand, the Fifth Circuit appears to have gone the other way and held that “§ 1252(b)(1)’s thirty-day filing rule is a mandatory claim-processing rule that, if properly raised, must be enforced.”¹³ *Liao v. Bondi*, 162 F.4th 519, 524 (5th Cir. 2025). The Fifth Circuit reached this conclusion based primarily on *Riley*’s explanation of a prior lack of discipline distinguishing jurisdictional rules from nonjurisdictional but mandatory ones. *See id.* at 523–24. Still, the Fifth Circuit did not specifically address equitable tolling. And a more recent opinion—while stating only that “[e]quitable tolling is not appropriate in this case”—indicates that the Fifth Circuit may be undecided on whether the deadline in § 1252(b)(1) may be equitably tolled. *See Saravia Martinez v. Blanche*, No. 25-60400, 2026 WL 2225274, at *1 (5th Cir. Aug. 3, 2026); *id.* (Ho, J., concurring) (“As I’ve previously written, equitable tolling is unavailable under 8 U.S.C. § 1252(b)(1).”); *id.* at *6 (Higginson, J., dissenting) (“I would respectfully disagree with my colleague, Judge Ho, and agree with my colleagues in other circuits that have

¹³ The Ninth Circuit has also stated summarily in unpublished opinions that § 1252(b)(1) is mandatory in light of *Riley*. *See, e.g., Fuentes Aguilar De Perez v. Bondi*, No. 24-4605, 2025 WL 3657596, at *2 (9th Cir. Dec. 17, 2025) (referring to § 1252(b)(1) as “a mandatory claims-processing rule”).

concluded equitable tolling is available under § 1252(b)(1) Again, no circuit post-*Riley* has deemed equitable tolling unavailable under § 1252(b)(1), nor do we here.”).

Here, we need not resolve this conflict. Whether or not § 1252(b)(1) is subject to equitable tolling, Ms. Vizguerra cannot show that her failure to timely file a petition for review in 2013 was caused by an extraordinary circumstance beyond her control.

“Equitable tolling is a rare remedy to be applied in unusual circumstances.” *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015) (quotation marks omitted). Such a remedy is appropriate where “the movant shows (1) that she has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in her way and prevented timely filing.” *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1287 (10th Cir. 2022). The extraordinary-circumstances prong “is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.” *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 257 (2016) (emphasis in original). “[T]olling is appropriate when the defendant’s conduct rises to the level of active deception; where a plaintiff has been lulled into inaction by a defendant, and likewise, if a plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights.” *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1246 (10th Cir. 2012) (internal quotation marks omitted). But “‘a garden variety claim of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” *Holland v. Florida*, 560 U.S. 631, 651–52 (2010) (citations omitted) (first quoting *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 96 (1990); then quoting *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

The Supreme Court has not decided whether “binding precedent that is subsequently reversed” could merit tolling. *Menominee Indian Tribe of Wis.*, 577 U.S. at 258 & n.4. But mistaken inferences about what the law requires do not meet the elements of equitable tolling because they are not outside of the litigant’s control. *See id.* at 257–58 (declining to apply equitable tolling where a tribe mistakenly relied on a nonbinding district court decision, which concluded that presentment was unnecessary to participate in a class action, because its mistaken reliance “was not an obstacle beyond its control”).

Ms. Vizguerra argues that the change in our case law following *Riley*—where her petition was previously premature but is suddenly more than twelve years late—is an extraordinary circumstance that prevented her from timely filing her petition. And she maintains that she has diligently pursued her rights by promptly filing her petition for review within thirty days of *Riley*.

Had our *Luna-Garcia* decision predated her order of removal, Ms. Vizguerra might have a valid argument.¹⁴ But our case law did not preclude Ms. Vizguerra from filing a petition for review at the time that her order of removal was reinstated.

Ms. Vizguerra’s putative reinstatement order was issued on July 24, 2013—well before our 2015 decision in *Luna-Garcia* held as a matter of first impression that orders of removal were not final until completion of withholding-only proceedings. *See Luna-*

¹⁴ *See E.E.V.*, 180 F.4th at 980–81 (citing cases and discussing the appropriateness of equitable tolling where a party relies on binding precedent that is later overruled).

Garcia, 777 F.3d at 1183, 1186. Nor was there clear weight of authority from other jurisdictions holding the same at the time of Ms. Vizguerra’s reinstatement order.¹⁵

Thus, Ms. Vizguerra’s failure to timely file her petition was not in reliance on binding case law. Nor did our case law then bar her petition for review as premature.

Ms. Vizguerra argues that, at the time of her reinstatement order, we had implicitly accepted jurisdiction over petitions for review filed after the denial of withholding relief. To be sure, in one case predating Ms. Vizguerra’s reinstatement order, we stated that a petition for review following the denial of relief in withholding-only proceedings was “timely.” *See Neri-Garcia v. Holder*, 696 F.3d 1003, 1008 (10th Cir. 2012). And having considered § 1252(b)(1)’s time limit jurisdictional at the time of that order, *see Nahatchevska v. Ashcroft*, 317 F.3d 1226, 1227 (10th Cir. 2003) (per curiam), “we ha[d] an independent duty to examine our own jurisdiction,” *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). However, timeliness was not disputed in that case. Nor did timeliness form part of the panel’s analysis. “When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

¹⁵ In 2013, only the Ninth Circuit had definitively ruled that orders of removal were not final until withholding-only proceedings were complete. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012).

In sum, at the time of Ms. Vizguerra’s reinstatement order, we had not directly ruled on whether ongoing withholding-only proceedings rendered an order of removal nonfinal under § 1252(b)(1). There was no clear weight of authority from other jurisdictions.¹⁶ And we had not indicated that Ms. Vizguerra was precluded from filing

¹⁶ In a recent decision from the Fourth Circuit, the court concluded that the change in case law after *Riley* was an extraordinary circumstance beyond the petitioner’s control that entitled him to equitable tolling. *Navarro*, 2026 WL 2317835, at *12. There, the petitioner’s reinstatement order was issued in 2021, *id.* at *1, before the Fourth Circuit had first determined the effect of withholding-only proceedings on finality under § 1252, *see Tomas-Ramos v. Garland*, 24 F.4th 973, 980 n.3 (4th Cir. 2022) (“Because the streamlined process that governs reasonable fear determinations does not include an appeal to the Board of Immigration Appeals, the IJ’s ruling on review pursuant to § 208.31(g)(1) is the agency’s ‘final order’ for purposes of judicial review under 8 U.S.C. § 1252(a)(1).”); *cf. Martinez v. Garland*, 86 F.4th 561, 569 (4th Cir. 2023) (“[A]n alien’s initiation of withholding-only proceedings does not render non-final an otherwise ‘administratively final’ reinstated order of removal.”), *cert. granted, judgment vacated*, 145 S. Ct. 2836 (2025), *abrogated on other grounds by Riley*, 606 U.S. 259.

In holding that *Riley*’s change in case law was an extraordinary circumstance, the *Navarro* court reasoned that it had in past cases “reviewed petitions for review filed thirty days after the Board’s denial of withholding-only relief, even when the final order of removal had issued months earlier.” *Navarro*, 2026 WL 2317835, at *12. However, at the time of the reinstatement order in *Navarro*, the clear weight of authority from other circuits held that orders of removal did not become final until withholding-only proceedings had concluded. *See Garcia v. Sessions*, 856 F.3d 27, 35 (1st Cir. 2017); *Bonilla v. Sessions*, 891 F.3d 87, 90 n.4 (3d Cir. 2018); *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505–07 (5th Cir. 2016); *Martinez v. Larose*, 968 F.3d 555, 562–63 (6th Cir. 2020); *Ortiz-Alfaro*, 694 F.3d at 958; *Luna-Garcia*, 777 F.3d at 1183, 1186; *Jimenez-Morales v. U.S. Atty. Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). And the Fourth Circuit had strongly indicated that it was likely to join the weight of authority on this question. *See Guzman Chavez v. Hott*, 940 F.3d 867, 878, 880–81 (4th Cir. 2019) (citing *Luna-Garcia* and *Ortiz-Alfaro* with approval for its assessment of finality under § 1252 and “declin[ing] to graft a two-tiered system of finality onto immigration cases involving withholding-only proceedings” as a rationale to hold that an order of removal becomes administratively final for purposes of the detention provision in 8 U.S.C. § 1231 only after withholding-only proceedings conclude), *rev’d sub nom. Johnson v. Guzman Chavez*, 594 U.S. 523 (2021).

her petition for review immediately upon reinstatement.¹⁷ Any “mistaken reliance” on implicit practice was not a circumstance beyond Ms. Vizguerra’s control because nothing “stood in [her] way” to prevent her from filing her claims earlier. *See Menominee Indian Tribe of Wis.*, 577 U.S. at 256–57. Such a mistake is “fundamentally no different from ‘a garden variety claim of excusable neglect,’ . . . [a]nd it is quite different from relying on actually binding precedent that is subsequently reversed.” *Id.* at 257–58 (internal citations and quotation marks omitted).

As applied to Ms. Vizguerra, the change in our law is not an extraordinary circumstance that prevented her from timely filing her petition for review. Because Ms. Vizguerra has not shown that her circumstances warrant equitable tolling, we assume without deciding that § 1252(b)(1)’s filing deadline can be tolled but dismiss her petition

Because there was no clear weight of authority from other circuits at the time of Ms. Vizguerra’s reinstatement order in 2013, we need not decide whether that would have been an extraordinary circumstance for purposes of equitable tolling.

¹⁷ Judge Phillips, dissenting in part, would hold that equitable tolling is warranted here because this court previously stated that a petition was timely although it was filed after a denial of withholding of removal in *Neri-Garcia*. *See Neri-Garcia v. Holder*, 696 F.3d 1003, 1008 (10th Cir. 2012); *see also Navarro*, 2026 WL 2317835, at *12. The dissent maintains that the decision in *Neri-Garcia* sufficiently establishes that this court had a past practice of hearing petitions after withholding-only proceedings, even if there was no binding circuit precedent at the time instructing the court to do so. The dissent further contends that a change to past practice based on *Riley*’s change to the law, then, would be an extraordinary circumstance that justifies equitable tolling.

We express no position on whether a change to past practice (and not just circuit precedent) could justify equitable tolling in other circumstances. Here, however, our decision in *Neri-Garcia* is insufficient to establish that this court had a past practice of hearing petitions only after withholding-only proceedings concluded. As noted, in *Neri-Garcia* timeliness formed no part of the panel’s analysis. The court declines to rely on *Neri-Garcia* alone to conclude that such a practice existed at the time Ms. Vizguerra opted not to file a petition for review immediately upon reinstatement.

for review as untimely. In so concluding, we express no view as to whether noncitizens whose orders of removal became final after our decision in *Luna-Garcia* meet the requirements of equitable tolling.

III. CONCLUSION

We DISMISS Ms. Vizguerra’s petition for review as untimely. We GRANT Ms. Vizguerra’s motion to proceed in forma pauperis.

25-9559, *Vizguerra-Ramirez v. Blanche*

EID, J., concurring in part and concurring in the judgment.

I agree with the majority that Vizguerra has not shown that she warrants equitable tolling here and join Part II-B of the majority opinion in full. Because I also agree with the majority that *Riley v. Bondi*, 606 U.S. 259 (2025), is not sufficient to overrule our precedent holding that we have jurisdiction to review reinstatement orders, I concur in the judgment. However, I write separately to explain why I believe it would be appropriate for the full en banc court to reanalyze whether we have jurisdiction to review reinstatement orders under the approach dictated by *Riley*.

I.

Riley made it clear that an order of removal “must have th[e] same characteristics” as an order of deportation, and that an order of deportation “is defined as an order ‘concluding that the alien is deportable or ordering deportation.’” *Riley*, 606 U.S. at 267 (quoting 8 U.S.C. § 1101(a)(47)(A)). Our jurisdiction to review orders of removal comes from 8 U.S.C. § 1252. Because § 1252 only grants jurisdiction to review orders of removal, not reinstatement orders, we only have jurisdiction to review reinstatement orders if we find that these orders meet the definition of orders of removal from § 1101(a)(47)(A).

Current Tenth Circuit precedent clearly holds that we have jurisdiction to review reinstatement orders. *See Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 884 (10th

Cir. 2005). However, none of our precedents analyzed whether reinstatement orders are orders of removal under the definition in § 1101(a)(47)(A), as required by *Riley*.

We first held that § 1252 gives us the authority to review reinstatement orders as well as orders of removal in *Duran-Hernandez*. Because we found that “every circuit to address the question has found § 1252 to cover review of reinstatement orders,” we accordingly decided, with no additional analysis, to “follow the weight of authority in other circuits” and held that “we have jurisdiction to hear petitions for direct review of reinstatement orders under 8 U.S.C. § 1252.” *Duran-Hernandez*, 348 F.3d at 1162 n.3. We later held in *Fernandez-Vargas*—again, with no additional analysis—that “[a]n order reinstating a prior removal order is the functional equivalent of a final order of removal and, therefore, we have jurisdiction to review [a] reinstatement order.” 394 F.3d at 884.¹

¹ We also held in *Lorenzo v. Mukasey*, 508 F.3d 1278 (10th Cir. 2007), that the new clause added to § 1252 by the Real ID Act of 2005 “dispels any lingering doubts as to our jurisdiction to review reinstatement orders.” *Id.* at 1282; *see also* § 1252(a)(2)(D) (the “savings clause”) (“Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed . . . in accordance with this section.”).

This holding is the least in tension with *Riley* because it is rooted in the actual text of the statute. In the event that we did find that § 1252 grants jurisdiction to review reinstatement orders, the savings clause would suffice to supersede the ban on review of reinstatement orders in § 1231(a)(5). However, the savings clause is not an independent grant of authority. The clause itself even points to its own limits, as it applies explicitly to “a petition for review filed . . . *in accordance with this section.*” § 1252(a)(2)(D) (emphasis added). Since § 1252 only provides for review of orders of removal, the savings clause can only apply to reinstatement orders if we find that a reinstatement order is itself an order of removal. The savings clause therefore cannot by itself grant us authority to review reinstatement orders and cannot exempt us from

None of these cases defined what function an order of removal performs or explained how a reinstatement order performs that function. Nor did any of these cases engage with the statutory definition of an order of removal or analyze whether a reinstatement order fits this definition. *Riley* has made it clear that more analysis than exists in these cases is required to determine whether we have jurisdiction to review reinstatement orders.

However, it is not as clear that *Riley* sufficiently undermines our previous precedent to give us the authority to overturn this precedent without taking this case en banc. “Absent *en banc* consideration, we generally cannot overturn the decision of another panel of this court” but we can do so in limited cases if there is an intervening Supreme Court decision. *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (quotation omitted). We do not ask “whether an intervening Supreme Court case is on all fours with our precedent, but rather whether the subsequent Supreme Court decision *contradicts* or *invalidates* our prior analysis.” *Id.* at 1209–10 (emphasis in original). “Such a case must ‘clearly overrule’ our precedent—‘indirect’ ‘tension’ between our precedent and a later Supreme Court opinion is not enough.” *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023) (quoting *Speidell v. Internal Revenue Serv.*, 978 F.3d 731, 738–39 (10th Cir. 2020)).

the duty to independently analyze whether reinstatement orders meet the definition of orders of removal as required by *Riley*.

While *Riley*'s text-based analysis is clearly in tension with the conclusory statements that comprise our precedent on reinstatement orders up to this point, this tension is too indirect to allow us to overturn this precedent without going en banc. *Riley* provided direct guidance on how to define an order of removal, which would help courts approach the question of whether a reinstatement order constitutes an order of removal in the first instance. However, while *Riley*'s position on how to define orders of removal was clear, it was not the main holding of the case, and it involved a different context than the question we address here, since *Riley* did not address or even mention reinstatement orders. *See generally Riley*, 606 U.S. 259. At most, *Riley* has “seriously undermined [the] analytical structure” of our precedents holding that we have jurisdiction to review reinstatement orders, but it has not directly invalidated them. *Arostegui-Mandonado*, 75 F.4th at 1148 (Tymkovich, J., concurring). This is not enough to give us the authority to overrule circuit precedent.²

² The majority holds that *Riley* did not overrule our previous approach because “[§] 1101(a)(47)(A) defines an order of removal by its function” and *Riley* therefore “does not clearly overrule” our previous approach establishing jurisdiction based on the assertion that a reinstatement order is the functional equivalent of an order of removal. Maj. Op. at 11. While I agree with the majority that “*Riley* does not clearly override our binding precedent,” I would not go so far as to say that “the plain text of § 1101(a)(47)(A) remains consistent with our precedent holding that reinstatement orders are judicially reviewable as orders of removal under § 1252.” *Id.* at 13. Even conceding that reinstatement orders serve the same function as orders of removal, this does not mean reinstatement orders are themselves orders of removal. *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 196 (2d Cir. 2022) (“Neither § 1252 nor § 1101(a)(47) addresses the functional equivalent of an order of removal, or an order that gives effect to previously issued removal orders. An order is either a final order of removal or it is not.”), *abrogated in part on other grounds by Riley*, 606 U.S. 259;

II.

If we did take this case en banc, I would hold that we do not have jurisdiction to review reinstatement orders because reinstatement orders are not orders of removal.

I start with the statutory definition. Section 1101(a)(47)(A) defines orders of removal as orders “concluding that the alien is deportable or ordering deportation.” It is clear that reinstatement orders do not order deportation because they have no independent power, and § 1231(a)(5) makes it clear “the alien shall be removed under the *prior* order.” § 1231(a)(5) (emphasis added); *see also Laureano v. Att’y Gen. United States of Am.*, 177 F.4th 453, 473 (3d Cir. 2026) (Matey, J., dissenting) (arguing that a reinstatement decision “merely effectuates the original removal order” and “[s]ince there is no new command, there is no new order of removal” (internal quotation marks omitted)).

Whether a reinstatement order concludes an alien is deportable is a closer question. As part of the process for reinstating an order of removal, the Department of Homeland Security determines whether (1) “the alien has been subject to a prior order of removal”; (2) “the alien is in fact [the] alien who was previously removed [by the prior order]”; and (3) “the alien unlawfully reentered the United States.” 8 C.F.R. § 241.8(a) (2026). Assuming these three criteria are met, the “alien is subject

Ruiz-Perez v. Garland, 49 F.4th 972, 983 (5th Cir. 2022) (Oldham, J., dissenting) (arguing that referring to reinstatement orders “as the functional equivalent of a final order of removal” effectively “concede[s] that reinstatement decisions are not removal orders”).

to removal under this section.” *Id.* § 241.8(b). If we construe “subject to removal” as a synonym for “deportable,” this process could be seen as equivalent to “concluding that the alien is deportable.” § 1101(a)(47)(A).

However, the main determination has already been made by the initial order of deportation. The reinstatement order makes no new findings other than confirming that this is the person to whom the previous removal order applies. This does not fit the natural meaning of “conclude,” which suggests exercising judgment and reasoning. *See Conclude, Oxford English Dictionary* (2d ed. 1989) (defining conclude as “[t]o arrive by reasoning at a judgement or opinion; to come to a conclusion, draw an inference, infer, deduce”). Reinstatement orders require neither judgment nor reasoning. The outcome is predetermined based on whether the three criteria are met. Any meaningful conclusion was made during the initial removal process. *See E.E.V. v. Blanche*, 180 F.4th 954, 984 (7th Cir. 2026) (“There is no new rationale for removing the alien, who was removable then and is removable now.”).

The statutory context supports this interpretation. Reinstatement orders and removal orders are covered by different provisions. Removal under a reinstatement order is a streamlined process by design. There are no new proceedings and the order is not subject to being reopened or reviewed. *See* § 1231(a)(5); *see also Ruiz-Perez*, 49 F.4th at 982 (Oldham, J., dissenting) (“[A]s a matter of ordinary meaning, it would be odd for a reviewable removal order to come from a non-removal proceedings [sic].”). If Congress wanted reinstatement orders to be treated as

equivalent to removal orders, it could have structured this statutory scheme differently.

Accordingly, if we were to take this case en banc, I would hold, like several of my colleagues in other circuits, that reinstatement orders are not orders of removal and we therefore do not have jurisdiction over such orders.³

III.

For the foregoing reasons, I would hold that we have jurisdiction over reinstatement orders under our precedent and the intervening Supreme Court decisions have not sufficiently undermined this precedent to give us authority to overturn it without going en banc. I would not go further, and, unlike the majority, I would not hold that our previous precedent is “consistent” with the Supreme Court’s

³ While no circuit has yet ruled that a reinstatement order is not an order of removal, multiple judges have stated that they would hold a reinstatement order is not an order of removal and that § 1252 therefore does not grant jurisdiction to review reinstatement orders. *See Ruiz-Perez*, 49 F.4th at 980–85 (Oldham, J., dissenting); *Laureano*, 177 F.4th at 472–74 (Matey, J., dissenting); *E.E.V.*, 180 F.4th at 983–87 (Brennan J., dissenting); *Saravia Martinez v. Blanche*, No. 25-60400, 2026 WL 2225274, at *1 n.1 (5th Cir. Aug. 3, 2026) (Ho, J., concurring). Furthermore, of the circuits that have considered whether a reinstatement order constitutes an order of removal, none have considered this question en banc, which presented a barrier to the power of those panels to overturn their respective circuits’ prior precedent on whether reinstatement orders constitute orders of removal. *See Ruiz-Perez*, 49 F.4th at 976 (“[A] panel of this court would need to conclude that *Nasrallah* and *Johnson* unequivocally overrule[d] prior precedent before applying new jurisdictional rules to our review of reinstatement orders.” (internal quotation omitted)); *Laureano*, 177 F.4th at 457 (“[A]s we held in *United States v. Charleswell*, § 1252(a)(1)’s jurisdictional grant over final orders of removal extends to reinstated orders of removal.”); *E.E.V.*, 180 F.4th at 965 (holding that no intervening case “provides a sound reason, let alone a compelling one, to overrule circuit precedent and restrict judicial review in such cases”).

new guidance in *Riley*. Maj. Op. at 12. I therefore concur only in the judgment as to Part II.A.

No. 25-9559, Vizguerra-Ramirez v. Blanche

PHILLIPS, Circuit Judge, concurring in part and dissenting in part.

I concur with Judge McHugh’s opinion on our jurisdiction to review reinstatement orders, and I respectfully dissent from its holding on Ms. Vizguerra’s petition for review. The majority assumes without deciding that 8 U.S.C. § 1252(b)(1) allows for equitable tolling, then holds that Ms. Vizguerra hasn’t shown an “extraordinary circumstance” necessary to toll the deadline. I would hold otherwise, reach the merits, and vacate the reinstatement order.

I. Equitable Tolling

To receive equitable tolling, a petitioner must show (1) that “some extraordinary circumstance . . . prevented timely filing” and (2) that she has diligently pursued her rights. *Estrada-Cardona v. Garland*, 44 F.4th 1275, 1287 (10th Cir. 2022). The extraordinary-circumstance element applies only to “matters outside [the litigant’s] control.” *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 257 (2016). And a “mistake of law” within the litigant’s control isn’t an extraordinary circumstance. *See id.* at 257 n.3.

Ms. Vizguerra’s mistake of law was outside of her control because she wasn’t the only one who was mistaken. So were we, and so was the government.

Start with us. In *Neri-Garcia v. Holder*, we wrote that a petitioner in Ms. Vizguerra’s circumstances filed a “timely petition” after the BIA decided his

withholding claim. 696 F.3d 1003, 1008 (10th Cir. 2012). The majority is right that we confirmed this holding in *Luna-Garcia v. Holder*, long after Ms. Vizguerra received her reinstatement order. 777 F.3d 1182 (10th Cir. 2015). And though we said that the petitioner in *Luna-Garcia* presented “a question of first impression,” *id.* at 1183, at that time, the answer was clear. To start, *Ortiz–Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012), had held as much. *Luna-Garcia*, 777 F.3d at 1186. Nor did we shut our eyes to *Neri-Garcia*’s use of “timely petition” and other circuits that had “implicitly suggested” the same. 696 F.3d at 1008. *Luna-Garcia*, 777 F.3d at 1186. As in, we recognized that other circuits’ and our own past *practice* was to hear petitions after withholding-only proceedings.

And past practice should be enough for an extraordinary circumstance. The Fourth Circuit recently relied on its past practice—not reasoned holdings—to hold that *Riley*’s change of law was an extraordinary circumstance. *See Navarro v. Blanche*, No. 23-1897, 2026 WL 2317835, at *12 (4th Cir. Aug. 11, 2026). As did the Seventh Circuit. *See E.E.V. v. Blanche*, 180 F.4th 980–82 (7th Cir. 2026). As authority, that court cited an unpublished order and *Eke v. Mukasey*, 512 F.3d 372, 378 (7th Cir. 2008). *E.E.V.*, 180 F.4th at 980. But in *Luna-Garcia*, we pointed to *Eke* as a case that only “implicitly suggested” as much. *See Luna-Garcia*, 777 F.3d at 1186 (also citing *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008)). In sum, past practice was enough

for the Fourth and Seventh Circuits, and because of *Neri-Garcia*, it should be enough for us.

So while the majority calls Ms. Vizguerra’s decision not to appeal in 2013 “excusable neglect,” I’d call it reasonable reliance, and I’d hold that it clears the bar as an extraordinary circumstance.

Next, consider the government. It was Ms. Vizguerra’s opposing party, and as the majority points out, when an opposing party actively misleads a litigant, or lulls that litigant into inaction, that’s an extraordinary circumstance. *See Chance v. Zinke*, 898 F.3d 1025, 1035 (10th Cir. 2018). Well before Ms. Vizguerra received her administrative removal order, the government told us that such an order was unripe until the BIA concluded withholding-only proceedings. *G.S. v. Holder*, 373 F. App’x 836, 841–42 (10th Cir. 2010). It argued the same to other circuits, and it never lost the issue until 2022. *See Riley v. Bondi*, 606 U.S. 259, 266 (2025) (collecting cases); *see Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 187, 191 (2d Cir. 2022). To put it metaphorically—for years, the government told us, other courts, and litigants like Ms. Vizguerra: “you can’t appeal until the sun goes down.” Now it’s arguing, “Ms. Vizguerra needed to appeal before the sun came up.” I wouldn’t let it.

Turning to the diligence element of equitable tolling, Ms. Vizguerra need only show “reasonable”—not “maximum feasible”—diligence. *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations omitted). She promptly petitioned

within thirty days of *Riley*'s publication, so I would hold that she was reasonably diligent.

Next, I'd decide whether 8 U.S.C. § 1252(b)(1) permits equitable tolling. As the majority explains, there's possibly a circuit split, with *Oxlaj-Perez v. Blanche*, 174 F.4th 516 (6th Cir. 2026); *E.E.V.*, 180 F.4th 954; and *Navarro*, 2026 WL 2317835, on one side, and *Liao v. Bondi*, 162 F.4th 519 (5th Cir. 2025), on the other. I say "possibly" because the Fifth Circuit later "[a]ssum[ed] without deciding that § 1252(b)(1)'s deadline is subject to equitable tolling," before ruling that "Liao . . . forfeited such a claim." See Order Denying Petition for Rehearing, at 1 n.1, *Liao v. Bondi*, No. 25-60427, Dkt. No. 138-1 (Feb. 11, 2026); see also *Saravia Martinez v. Blanche*, No. 25-60400, 2026 WL 2225274 (5th Cir. Aug. 3, 2026) (discussing that circuit's uncertainty). I would follow the Fourth, Sixth, and Seventh Circuits' analysis.

II. Merits

Ms. Vizguerra argues that the government couldn't reinstate a removal order because there was no removal order to reinstate. I agree. By reinstating Ms. Vizguerra's order of removal when she wasn't subject to one before, DHS acted beyond its statutory authority.

Here's the text of the reinstatement provision:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, *under an order of removal*, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed. . . .

8 U.S.C. § 1231(a)(5) (emphasis added). Did Ms. Vizguerra depart voluntarily, “under an order of removal?” The government says yes—in 2009, Ms. Vizguerra went through removal proceedings in which an IJ denied her cancellation of removal but granted her voluntary departure.

But the voluntary-departure provision suggests that an order of voluntary departure isn’t an order of removal:

The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters *an order* granting voluntary departure *in lieu of removal*

8 U.S.C. § 1229c(b)(1) (emphasis added).

And DHS’s regulations imply that departing under a voluntary-departure order differs from departing under an order of removal. Those regulations require the IJ to enter, alongside the voluntary-departure order, “an alternate order [of] removal.” 8 C.F.R. § 1240.26(d). And that alternate order only kicks in after being triggered. For instance, “[i]f, prior to departing the United States, the alien . . . petition[s] for review . . . voluntary departure shall terminate . . . and the alternate order of removal . . . shall immediately take effect.” *Id.* § 1240.26(i); *see also id.* § 1240.26(c)(4).

Finally, Ms. Vizguerra’s order itself suggests that it’s not an order of removal: “If the respondent fails to comply . . . there will be an automatic order of removal to Mexico which will automatically be entered against her.”

R. at 27. Ms. Vizguerra’s order could trigger an order of removal; it’s not itself that order of removal.¹

But don’t take my word for it. Here’s Justice Scalia’s gloss: “Agree to depart voluntarily (within the specified period, of course) and . . . you will not suffer detention, you can depart at your own convenience rather than ours . . . and you will not suffer the *statutory restrictions upon reentry* that accompany involuntary departure.” *Dada v. Mukasey*, 554 U.S. 1, 24–25 (2008) (Scalia, J., dissenting) (emphasis added). What statutory restrictions accompany “involuntary departure,” i.e., removal? For one, reinstatement of removal.

The government points to *Gallo-Alvarez v. Ashcroft*, which held that § 1231(a)(5) applies even if the alien left through voluntary departure. 266 F.3d 1123, 1128–29 (9th Cir. 2001). *Gallo-Alvarez* says that the INA’s “plain language” shows that reinstatement “applies to aliens who are granted voluntary departure.” *Id.* at 1128. I’d agree, if “under an order of removal” weren’t blaring out at me in the statute. But it is.

Finally, I would reject the government’s argument that Ms. Vizguerra overstayed her voluntary-departure period. “The voluntary departure period typically does not begin to run until administrative appeals are concluded.”

¹ In *Monsalvo v. Bondi*, the Court assumed that the BIA’s order granting voluntary departure was an order of removal. 604 U.S. 712, 720 (2025). Ms. Vizguerra’s argument was not before the Court. In any event, the government hasn’t deployed *Monsalvo* or *Riley* to argue that leaving under a voluntary-departure order counts as leaving under an order of removal.

Dada, 554 U.S. at 10. Ms. Vizguerra's 60-day voluntary-departure period either began or resumed after she withdrew her appeal with the BIA by leaving the country.

For those reasons, I would grant the petition and vacate Ms. Vizguerra's reinstatement order. I respectfully concur in part and dissent in part from the majority's opinion.