No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as *amicus* before federal courts to argue that the motion to reopen filing deadlines are non-jurisdictional and subject to equitable tolling and to address other issues relating to individuals' ability to reopen their removal cases.

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a national non-profit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and all advocates seeking to advance the rights of noncitizens. Through litigation, advocacy, publications and continuing legal education efforts, the National Immigration Project has been promoting these objectives for more than forty years. Members of the organization rely on the availability of motions to reopen and, accordingly, the National Immigration Project frequently appears as *amicus* before the federal courts in related litigation, provides assistance to attorneys, and provides trainings on these motions. Through this work, the National Immigration Project is acutely aware of the need for equitable tolling of the statutory deadline for filing motions to reopen and has a strong interest in ensuring that the statute is correctly interpreted to give noncitizens the full benefit of this important statutory right.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to assist the Court in assessing two aspects of the equitable tolling doctrine as it applies to motions to reopen

immigration proceedings. First, *Amici* illustrate why filing a motion to reopen based on an ineffective assistance of counsel claim can take a considerable length of time past the 90-day statutory filing deadline for motions to reopen. The Board of Immigration Appeals in *Matter of Lozada,* 19 I. & N. Dec. 637 (BIA 1988), established strict procedural requirements for ineffective assistance of counsel motions. Compliance with these requirements includes communication with prior counsel – which is often fraught with difficulties including the filing of a complaint with a bar disciplinary authority in most cases – as well as time-consuming efforts to obtain and analyze a complete record of the immigrant's case. As a result, it is at times impossible to file a motion to reopen based on ineffective assistance of counsel until months or longer after the 90-day deadline passes.

Second, *Amici* submit for the Court's consideration a sample of case examples describing immigrants who had the misfortune of receiving ineffective assistance of counsel or were otherwise prevented from immediately pursuing their cases, then had their motions to reopen denied by the agency for untimeliness. These individuals were ultimately saved by federal Courts of Appeals which recognized the applicability of equitable tolling to their circumstances. Had these immigrants been subject to the Fifth Circuit's restrictive and mistaken understanding of jurisdiction to review equitable tolling decisions, they never would have had their days in court, depriving them of opportunities to thrive and contribute as lawful residents or citizens of the United States.

ARGUMENT

I. Compliance with the Board of Immigration Appeals' procedural requirements for establishing an ineffective assistance of counsel claim can be onerous and lengthy, resulting in delayed filing of motions to reopen despite – and, indeed, because of – due diligence.

Ineffective assistance of counsel (IAC) often cannot be addressed quickly and efficiently within or shortly after the 90-day motion to reopen period in 8 U.S.C. § 1229a(c)(7)(C)(i), because numerous factual and legal barriers confront immigrants like Mr. Mata who seek to present IAC claims.

Immigrants are often unaware of their attorney's ineffective assistance until months or years after it occurred. This Court has recognized that "[i]mmigration law can be complex, and is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *see INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 195 (1991) (describing "complex regime of immigration law"); *Ardestani v. INS,* 502 U.S. 129, 138 (1991) (discussing "the complexity of immigration procedures and the enormity of the interests at stake").[2] In this context, identifying IAC is often a

[2] *See also Castro O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. . . . A lawyer is often the only person who could thread the labyrinth."); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("We have had occasion to note the striking resemblance between some of the laws we are called upon to

similarly complicated endeavor. Noncitizens' inability to represent themselves effectively in the "labyrinth that only a lawyer could navigate," *Avagyan v. Holder,* 646 F.3d 672, 679 (9th Cir. 2011), and the difficulty of obtaining a complete record of proceedings to review with competent counsel, mean that putting forward an IAC claim will sometimes take far longer than the 90 days permitted for a motion to reopen.

To perfect an IAC claim in a motion to reopen, a respondent in immigration proceedings must address the criteria set out in *Matter of Lozada,* 19 I. & N. Dec. 637 (BIA 1988). This Board of Immigration Appeals (BIA) decision requires the movant to: (1) submit an affidavit setting forth the terms of agreement with counsel alleged to be ineffective, along with that counsel's representations to the immigrant; (2) inform counsel about the alleged ineffective assistance and give counsel an opportunity to respond; and (3) reflect in the motion whether a bar complaint has been filed and, if not, why not.

A number of circuits, including the Fifth Circuit, require strict adherence to the requirements of *Lozada.* Failure to comply with all the *Lozada* requirements is sufficient to deny the immigrant's motion. *See, e.g.*, *Hernandez-Ortiz v. Holder*, 741 F.3d 644, 648 (5th Cir. 2014) (denying petition for review where *pro se* respondent filed a bar complaint against prior incompetent counsel but did not give that counsel an opportunity to respond before

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interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").

making IAC claim); *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012) (respondent required to give lawyer an opportunity to respond despite lawyer having left the country).

These legal and practical obstacles are even more difficult when a noncitizen moves to reopen based on IAC without representation. *Cf.* U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook* F1 (Apr. 2014) (in fiscal year 2013, 41% of immigration respondents were unrepresented). *Lozada*'s procedural requirements apply even to unsophisticated *pro se* respondents who have left their original, ineffective attorneys but have not been able to retain new counsel. Merely discovering that ineffective assistance occurred and that the BIA has established procedures for pursuing relief is a tremendous – sometimes insurmountable – challenge for *pro se* respondents, especially those in immigration detention facilities.

In addition to these procedural hurdles, a movant must demonstrate that competent counsel would have acted otherwise and that the inadequacy of counsel's performance prejudiced the proceedings' outcome. *Lozada*, 19 I. & N. Dec. at 640. In requiring this showing of prejudice, the BIA has rejected an "inherent prejudice" standard. *See Matter of Assaad*, 23 I. & N. Dec. 553, 561-62 (BIA 2003), *appeal dismissed for lack of jurisdiction sub nom. Assaad v. Ashcroft,* 378 F.3d 471 (5th Cir. 2004).

The first step in discovering whether an individual received ineffective assistance is typically Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests to obtain all prior written and audio files

concerning the immigrant's case, requests that often must be filed with more than one of the various immigration agencies. Incompetent or predatory prior counsel frequently will not or cannot provide the appropriate information. Simply getting the results of FOIA requests for the immigration files, which are critical to determining whether prior counsel was ineffective, may take many months.[3]

After receiving the files, new counsel must review the court records, including all hearing transcripts, to determine whether prior counsel was ineffective such that an IAC motion can ethically be filed. She must then consult with her client and often perform additional research and investigation that were not done previously. Counsel then must prepare a detailed affidavit informing prior counsel of the alleged ineffectiveness, provide an opportunity to respond, and usually file a complaint with the appropriate bar disciplinary authority.

Given the challenges of discovering ineffective assistance and in light of the strict *Lozada* requirements, it is unsurprising that an immigrant's efforts to file a motion to reopen for IAC, even with the greatest diligence, may take months or even longer. *See, e.g.*, *Gordillo v. Holder*, 640 F.3d 700, 704-06 (6th Cir. 2011) (discussed *infra*) (filing deadline was equitably tolled and court concluded

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[3] *See generally* Department of Homeland Security Privacy Office, *2014 Annual Report to Congress* 35 (Sept. 30, 2014) ("In FY 2013 . . . the backlog increased from 28,553 to 51,761 due in part to the record-setting number of requests received. Components that process requests seeking immigration-related records (e.g., copies of the alien file, entry/exit records, detention, and deportation records) have the largest backlogs in the Department, . . . comprising 95 percent of the total DHS backlog.").

that due diligence existed, or could be found by the agency on remand, despite five-year delay in seeking reopening; immigrant asked three lawyers and a "*notario*" and was never told he qualified for relief); *Mezo v. Holder*, 615 F.3d 616, 621-22 (6th Cir. 2010) (where lawyer misled client about timely filing BIA appeal, ten-month delay before motion to reopen was filed did not show lack of due diligence); *Ghahremani v. Gonzales*, 498 F.3d 993, 999-1001 (9th Cir. 2007) (equitable tolling applied where respondent exercised due diligence over two-and-a-half years in hiring several lawyers).

In sum, determining whether there is a viable IAC claim and complying with the agency's requirements for establishing the claim take significant time. Competent counsel or the *pro se* immigrant must obtain files from often-hostile prior counsel, as well as the Executive Office for Immigration Review's court record and the immigrant's "Alien File" through a backlogged FOIA process. Only then may new counsel or the immigrant himself or herself comprehensively reassess the case and, usually, engage state bar disciplinary authorities. These time-consuming steps do not allow for shortcuts; if they are executed improperly, the immigrant risks rejection of the IAC claim before its merits are ever considered.

II. Federal court review of adverse agency decisions on equitable tolling is indispensable to ensure that immigrants are not deprived of their day in court by ineffective assistance of counsel or other extraordinary factors beyond their control.

Amici represent and support thousands of immigration lawyers who are committed to zealous and forthright representation of their clients, whose family lives, employment opportunities, and even personal safety depend on the outcome of immigration proceedings. Unfortunately there is a parallel cohort of incompetent or malevolent immigration practitioners, some of whom defraud their clients and/or engage in the unauthorized practice of law. *See, e.g.*, U.S. Citizenship and Immigration Services ("USCIS"), *The Wrong Help Can Hurt: Beware of Immigration Scams* (May 2011).

The following accounts[4] of immigrants who were harmed by ineffective assistance of counsel or other extraordinary circumstances beyond their control, and subsequently denied equitable tolling by the BIA to reopen their cases, illustrate how crucial federal court review is. These individuals' hopes for a life in the United States with their families often depend on Article III review to ensure their day in court. Had the Fifth Circuit's approach eschewing review of the agency's equitable tolling

[4] These accounts are drawn from federal court and agency decisions as well as correspondence between *Amici* and counsel or former counsel for the immigrants involved. All documentation is on file with counsel for *Amici* and available at the Court's request.

determinations applied, none of these people would have prevailed.

a. *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005)

In addition to motions to reopen governed by the 90-day filing deadline, equitable tolling matters for motions to reopen proceedings in which removal orders were entered *in absentia*. Reopening is justified where "the alien demonstrates that the failure to appear was because of exceptional circumstances." *See* 8 U.S.C. § 1229a(b)(5)(C)(i) (setting 180-day deadline). The requisite "exceptional circumstances" may include inaccurate advice from counsel concerning the need to appear at a scheduled hearing. *See Matter of Grijalva-Barrera*, 21 I. & N. Dec. 472, 474 (BIA 1996).

Jose Borges had a straightforward case, as far as immigration matters go. Recently married to a U.S. citizen, Mr. Borges had a clear path to pursue lawful permanent resident (LPR) status when he was scheduled for a hearing before an immigration judge (IJ) in February 1998. For competent immigration counsel, his case should have been routine.

Mr. Borges, however, retained an "immigration services company" called Entra America. At Entra, he met with a supposed "paralegal," who explained that an attorney at the firm would represent him. According to her, the attorney would help Mr. Borges apply for adjustment of status, which is the process for obtaining LPR status from within the United States.

When Mr. Borges inquired about his hearing, the paralegal told him – allegedly at the attorney's

direction – that he need not (and should not) appear for his hearing because an adjustment of status application had been filed on his behalf. Mr. Borges followed his attorney's ostensible instructions. Yet when he failed to appear for his hearing, he was ordered removed *in absentia*.

Mr. Borges' attorney did eventually submit a visa petition and adjustment of status application. By that point, with a removal order outstanding, Mr. Borges was no longer eligible to adjust. The adjustment application prepared and filed by his attorney failed to disclose the removal order. Apparently unaware of the order, the former Immigration and Naturalization Service (INS) granted Mr. Borges employment authorization and scheduled an interview, leading Mr. Borges to believe that the *in absentia* order was no longer operative.

Mr. Borges' mistaken belief was reinforced when in April 1998 he went to the Entra office with an INS letter requesting that he report for deportation. The "paralegal" wrongly stated that the adjustment application had "taken care of" the *in absentia* order, adding that the attorney would have the order officially vacated by filing a motion to reopen. *Borges*, 402 F.3d at 402.

Counsel did file a motion to reopen in late April, but it provided no explanation for Mr. Borges' failure to appear at his hearing. The IJ denied the motion, but the decision was served only on the attorney, who failed to inform Mr. Borges.

When it came time for Mr. Borges and his wife to attend their INS interview, Entra sent a different attorney to accompany them. This attorney advised Mr. Borges not to mention his removal order during the interview. The INS granted Mr. Borges'

adjustment application, and he believed his case was resolved.

Two months later, Mr. Borges – still awaiting the arrival of his "green card" – contacted Entra to confirm that he could travel to Venezuela to visit his sick mother. Only then did he learn from the second Entra attorney that he still had an outstanding removal order.

Mr. Borges, with the second attorney, informed the INS officer who conducted the interview about the removal order. At the same time, the attorney told Mr. Borges that he would file another motion to reopen. He never did. Instead, he asked the government to join in a motion to reopen. Mr. Borges contacted the second attorney regularly over the next two years and was repeatedly told falsely that a new motion to reopen was before the IJ.

Despite these assurances, Mr. Borges eventually sought new representation and learned that there was no pending motion. His new attorney filed a second motion to reopen the *in absentia* order in January 2003, within 180 days of when Mr. Borges learned the truth about what representation he had received from his previous attorneys. The IJ denied the motion as untimely and non-compliant with *Lozada*, and the BIA affirmed (noting that an affidavit submitted by the original attorney denying wrongdoing had "the ring of truth"). *In re Jose A. Borges*, A73-591-940, 2004 WL 848509, *2 (BIA Mar. 1, 2004).

Shortly before the BIA issued its decision, Mr. Borges was arrested by Immigration and Customs Enforcement (ICE). He was detained for more than a year, primarily at the Queens Detention Facility in

Jamaica, New York. Mr. Borges had never been incarcerated and experienced a serious deterioration in mental health. He twice attempted suicide and was confined to a secure psychiatric institution for a period of three months for treatment of depression and anxiety attacks.

Mr. Borges' new attorney continued to seek reopening. In the course of pursuing disciplinary proceedings against prior counsel, Mr. Borges' attorney discovered that the lawyer had submitted altered records regarding Mr. Borges' representation to the New York Bar Disciplinary Committee, in order to make it seem like he, rather than the Entra "paralegal," worked on the case.

At the Third Circuit, the court vacated the BIA's ruling and remanded, holding that the filing deadline is subject to equitable tolling in cases of fraud. Shortly after the court's opinion, Mr. Borges was released from detention. The BIA applied equitable tolling and reopened the case. On remand, the IJ vacated the removal order and allowed Mr. Borges to pursue adjustment of status with USCIS.

Mr. Borges also filed a malpractice claim against the attorneys and consultant who originally represented him. In 2012, a jury awarded him more than $1 million in damages for his lost wages and pain and suffering, as well as legal fees. *See Borges v. Placeres*, 986 N.Y.S.2d 298 (N.Y. App. Term 2014), *aff'd* 123 A.D.3d 611 (N.Y. App. Div. 2014).

Mr. Borges became an LPR in 2006. He attended classes at night, earning an MBA from Rutgers University in 2011, and now works as an engineering manager for medical devices. In 2012, he became a U.S. citizen.

b. *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008)

Garfield L. Aris, an immigrant from Jamaica, entered the United States as a lawful permanent resident in 1986 at the age of twelve. As recounted by the Second Circuit, "[t]he offense that triggered Aris' deportation proceedings was a relatively minor drug offense. Deporting Aris would separate him from his mother, daughter, step-daughter and wife and deliver him to a country where he has spent virtually no time since emigrating at the age of twelve and has no social or familial connections." 517 F.3d at 597 n.4 (internal citation and quotation marks omitted). His wife, children, and mother are all U.S. citizens.

After Mr. Aris was placed in deportation proceedings following his conviction, he hired a lawyer. At a hearing in April 1994, an IJ granted Mr. Aris permission to apply for discretionary relief from deportation under former 8 U.S.C. § 1182(c), (called "212(c) relief"). As Mr. Aris's lawyer conceded his deportability, the discretionary waiver was his only hope to avoid deportation and maintain his LPR status. The IJ ordered that Mr. Aris's relief application be filed by the close of business, and set a hearing for May 2, 1995.

Despite the IJ's instruction, counsel never filed a 212(c) application.[5] When Mr. Aris called his lawyer's office on the morning of May 2, 1995 to ask

[5] The Second Circuit stated that Mr. Aris "would seem to have a compelling case for § 212(c) relief in light of the social and humane considerations of his case." *Id.* at 597 n.4. The court noted that counsel's failure to file a relief application "in and of itself likely constitutes ineffective assistance of counsel in light of the equities of Aris's case." *Id.* at 597.

where he should meet him for the hearing that day, a firm paralegal erroneously advised him "something to the effect that the firm calendar did not indicate any hearing scheduled for that day and that no attorneys were available to speak with him." 517 F.3d at 598. Mr. Aris relied on the paralegal's representation that no hearing was set for that day and did not appear.

After speaking with Mr. Aris, the firm paralegal phoned the immigration court and learned that, in fact, there *was* a hearing that day. The paralegal telephonically requested that the hearing be adjourned, but was told to call again later in the afternoon because the IJ was on the bench. By the time the paralegal contacted the court as instructed, it was too late: Mr. Aris had already been ordered deported *in absentia*.

Neither the paralegal nor Mr. Aris's attorney made any effort to contact him. In fact, the law firm took no steps *at all* to attempt to remedy their error until Mr. Aris came into the firm's offices with a "bag-and-baggage" letter stating that the immigration authorities were ready to deport him. The attorney told Mr. Aris that "he would take care of everything," *id.* at 598, but never admitted the paralegal's mistake or revealed the *in absentia* order.

Counsel then filed a motion to reopen with the IJ seeking to rescind the *in absentia* deportation order. An affidavit accompanying the motion mentioned the calendaring error to explain *counsel's* failure to appear for the hearing. But neither the affidavit nor the motion acknowledged that the paralegal's mistake was responsible for Mr. Aris's failure to appear. The IJ denied the motion, and the

BIA affirmed. No one from the law firm contacted Mr. Aris to let him know about these decisions.

Mr. Aris had no idea that he was ordered deported *in absentia* until immigration agents arrested him at his home on June 1, 2005. In fact, the previous year, Mr. Aris had gone to an immigration attorney to discuss how he could become a U.S. citizen. After his arrest, Mr. Aris spent nine months in detention, depriving his family of their principal breadwinner. His wife and stepdaughter (both U.S. citizens) were evicted from their apartment and forced to move into a homeless shelter.

Mr. Aris's family paid a substantial sum to new counsel who further botched his case, "fil[ing] a number of factually erroneous and legally flawed submissions on his behalf." *Id.* None of the submissions mentioned prior counsel's erroneous information regarding Mr. Aris's court hearing – the very "exceptional circumstance" which formed the basis for reopening. Indeed, the boilerplate papers nowhere even stated that Mr. Aris was seeking to reopen an *in absentia* deportation order.

By late 2005, Mr. Aris's family became concerned about new counsel's treatment of his case and began to seek legal advice elsewhere. A non-profit organization referred the case to Cleary Gottlieb Steen & Hamilton. Lawyers from the firm met with Mr. Aris in detention and agreed to represent him *pro bono*.

His new attorneys "promptly investigated the various errors committed by Aris's prior counsel." *Id.* These attorneys worked diligently over the course of six months to obtain the documentary evidence necessary to reconstruct and definitively establish

the ineffective assistance rendered by prior counsel. With this evidence in hand, the firm filed disciplinary complaints against both of Mr. Aris's prior attorneys.

After waiting for both prior counsel to respond to the complaints, Mr. Aris's attorneys filed a motion to reopen with the BIA, for the first time explaining that prior counsel's wrong advice accounted for Mr. Aris's failure to appear for his May 2, 1995 hearing. The motion asked the BIA for equitable tolling of the 180-day filing deadline due to prior counsel's ineffective assistance.

The BIA denied the motion, stating that it had "already addressed the circumstances of [Mr. Aris's] failure to appear" in a prior ruling. *Id.* at 599. Yet it was impossible for the BIA to have considered the previously unsubmitted evidence that Mr. Aris failed to appear for his hearing because of prior counsel's wrong advice.

Recognizing the BIA's mistake, the Second Circuit reversed. The court noted that "Mr. Aris's prior attorneys failed spectacularly to honor their professional obligation to him and to the legal system they were duty-bound to serve," and remanded the case. An IJ granted Mr. Aris section 212(c) relief on June 14, 2010.

c. *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011)

Cancellation of removal for non-permanent residents is a currently available form of relief with certain prerequisites, including continuous physical presence in the United States for at least 10 years, good moral character, and a U.S. citizen or lawful

permanent resident spouse, parent, or child who would suffer exceptional and extremely unusual hardship as a result of the noncitizen's deportation. *See* 8 U.S.C. § 1229b(b). When Daniel Ortega appeared before an IJ in 2009, he was a strong candidate for cancellation. His two U.S. citizen children suffered from numerous medical conditions: lupus, a heart defect, a potentially cancerous eye tumor, recurrent bronchitis and asthma attacks, and severe clinical depression.

Although Mr. Ortega's attorney knew about these myriad conditions, he omitted mention of them in the cancellation application, and advised Mr. Ortega that "unless his children were on their death beds, medical evidence was not worth submitting." 640 F.3d at 816. This advice was egregiously flawed, because the children's serious medical conditions were critical to establishing that Mr. Ortega's removal would inflict exceptional and extremely unusual hardship on a qualifying relative. *See Matter of Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63 (BIA 2001) (factors relevant to hardship analysis include "health [and] circumstances" of the qualifying relative); *cf. Mendez v. Holder*, 566 F.3d 316, 322-23 (2d Cir. 2009) (IJ's failure properly to consider evidence regarding medical conditions of U.S. citizen children was reversible error).

The IJ denied Mr. Ortega's cancellation application solely on account of his failure to establish hardship to a qualifying relative, and the BIA affirmed.

After the BIA's ruling, Mr. Ortega enlisted the services of a "*notario*," who prepared a *pro se* petition for review and filed it with the Eighth Circuit Court of Appeals. *See generally* American Bar Association

Commission on Immigration, *Fight Notario Fraud* (undated), *available at* http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html. While the petition argued ineffective assistance of prior counsel for failing to include evidence of the children's medical conditions, the "*notario*" neither filed a motion to reopen with the BIA nor complied with *Lozada*'s procedural requirements. The petition for review was unsuccessful.

In the meantime, Mr. Ortega secured a genuine attorney who filed a procedurally proper motion to reopen with the BIA based on ineffective assistance of counsel. The motion, which was filed just over five months after the BIA's decision, argued that it was timely based on equitable tolling.

After Mr. Ortega moved to reopen his case, ICE nevertheless deported him. Another petition for review ensued to challenge the government's successful argument to the BIA that Mr. Ortega's departure had ended his case. The Eighth Circuit disagreed and on remand the BIA concluded that equitable tolling should apply. The BIA returned Mr. Ortega's case to the IJ to reconsider his cancellation application in light of the evidence omitted by prior counsel.

ICE paroled Mr. Ortega back into the United States from Guatemala. *See* 8 U.S.C. § 1182(d)(5). The parole rendered Mr. Ortega eligible to adjust to LPR status through his U.S. citizen son, who had turned twenty-one. *See id.* § 1255(a) (authorizing adjustment for noncitizens "paroled into the United States"). The IJ terminated proceedings so Mr. Ortega could apply affirmatively for adjustment of status. In November 2014, the Department of

Homeland Security approved the adjustment application, and Mr. Ortega is now a lawful permanent resident.

d. *Mendez-Vargas v. Holder*, 436 F. App'x 733 (9th Cir. 2011)

Hector Mendez–Vargas and his wife Isabel have a U.S. citizen daughter, Mirian, born with Down's Syndrome. Their daughter's condition should have given Mr. Mendez a strong chance of avoiding deportation through cancellation of removal. To prevail, he needed to show that his removal to Mexico would cause Mirian exceptional and extremely unusual hardship. *See* 8 U.S.C. § 1229b(b)(1)(D). An IJ set a hearing on Mr. Mendez's cancellation application for May 2002.

Mr. Mendez's lawyer never told him that the purpose of the hearing was to decide his eligibility for cancellation, nor did he explain what such a hearing would entail. At no point prior to or during the hearing did counsel submit any evidence regarding the nature of medical and social services in Mexico for children with Down's Syndrome, the cost of such services, or the family's likely ability to afford them. Indeed, counsel called no witnesses besides Mr. Mendez and submitted no documentation relevant to Mirian's potential hardship.

During the hearing, Mr. Mendez managed to offer some general testimony regarding his daughter's condition and the availability of medical care in Mexico. But while the IJ accepted that Mirian's Down's Syndrome was "exceptional," the complete lack of documentary evidence to establish the nature and availability of treatment was deemed

fatal to establishing her *future* potential hardship. *See Figueroa v. Mukasey*, 543 F.3d 487, 497 (9th Cir. 2008) (the cancellation hardship inquiry is a "future-oriented analysis, not an analysis of [a qualifying relative's] present conditions"). The BIA affirmed the IJ's removal order.

After bungling the administrative proceedings, counsel charged Mr. Mendez an additional $5,200 to file a petition for review with the Ninth Circuit. *See Mendez-Vargas v. Gonzales*, 158 F. App'x 876 (9th Cir. 2005). The court admonished counsel for failing to respond to a government motion to dismiss, and ordered the parties to brief the question of whether the IJ should have raised the issue of ineffective assistance *sua sponte*.

Counsel was given a final opportunity to rectify the harm his ineffective assistance had inflicted on Mr. Mendez when the government's attorney offered to consider filing a joint motion to reopen with the BIA if Mr. Mendez's counsel could show what information he would submit to support cancellation. Counsel never told Mr. Mendez about this offer, nor did he bother to respond. The Ninth Circuit summarily dismissed the petition for review.

In the midst of making preparations to depart the country, Mr. Mendez conferred with a new attorney on February 10, 2006. After the government declined to join in a motion to reopen, replacement counsel filed a motion to reopen with the BIA requesting equitable tolling based on ineffective assistance. The BIA denied the motion, concluding that the prior attorney caused no prejudice. The Ninth Circuit reversed and remanded.

On remand, after reviewing the evidence and testimony provided by new counsel, the IJ stated an intention to grant Mr. Mendez cancellation of removal and is waiting to issue formal approval after the annual limit of cancellation grants resets. *See* 8 U.S.C. § 1229b(e)(1).

e. *Gordillo v. Holder*, 640 F.3d 700 (6th Cir. 2011)

When Josue Gordillo and Leslie Castellanos appeared before an IJ in the late 1990s, they qualified for special-rule suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act (NACARA), a discretionary form of relief then available for certain noncitizens with good moral character whose deportation would result in extreme hardship to a U.S. citizen or LPR close family member.[6] Their lawyer, however, never told the couple that they were eligible for suspension, nor did he file an application for NACARA relief before the immigration court. The IJ ordered them deported in January 1999.

In December 2002, the BIA affirmed the deportations, but the lawyer never informed the couple that a final order was entered. They only learned about the order after receiving a notice that

[6] Although Congress replaced suspension of deportation with cancellation of removal in 1996, it later acted to allow certain Central American immigrants like Mr. Gordillo and Ms. Castellanos to apply for suspension under the more generous pre-1996 criteria. *See* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(a), 111 Stat. 2193, 2196-98 (1997).

their work permit extensions were denied, eighteen months after the BIA's decision.

Dismayed and concerned about their lawyer's failure to inform them of the BIA's decision, the couple consulted two other attorneys and a "*notario*" regarding their case. None told them of their eligibility for suspension, and so they did not believe there was anything else that they could do.

When ICE arrested Mr. Gordillo on August 7, 2008, the couple, in desperation, consulted with yet another lawyer who finally provided them with competent advice about their eligibility for suspension. This discovery did not prevent Mr. Gordillo's deportation from the United States to Guatemala.

In compliance with *Matter of Lozada*, the couple filed a grievance against the attorney who represented them before the IJ, and moved to reopen their case based on ineffective assistance. The BIA denied the motion and declined to apply equitable tolling because it concluded that the couple was not diligent in seeking competent counsel.

The Sixth Circuit reversed, rejecting the BIA's claim that the couple should have "divine[d]" their prior counsel's ineffectiveness from a footnote in the IJ's decision. Though the footnote on which the BIA relied "di[d] say that a complicated-sounding motion was 'not timely filed,'" the court held it unreasonable "to expect an alien to pluck those three words . . . from the thousands of words in the order, and then divine from them that her lawyer overlooked a winning argument on her behalf." 640 F.3d at 704.

The court decided instead that the "appropriate time" to charge the couple with knowledge of their initial lawyer's ineffectiveness

was when they learned that he failed to inform them of the BIA's denial of their appeal eighteen months prior. The couple was diligent from that point forward, according to the court, because they "first took prompt action to pursue their rights, and only later gave up after repeatedly being told they did not have any." *Id.* at 705. The court noted that "[t]he mere passage of time . . . does not necessarily mean [they were] not diligent." *Id.*

On remand, the BIA accepted that equitable tolling was warranted for the entire period relevant to the couple's motion to reopen, and sent the cases back to the IJ. Ms. Castellanos and Mr. Gordillo were both granted suspension of deportation, in 2013 and 2015 respectively. In 2014, Mr. Gordillo had returned from Guatemala after six years of separation from his family.

Both are now lawful permanent residents. Ms. Castellanos works in international business and volunteers to teach English to Spanish-speaking adults. Mr. Gordillo is completing a nursing program and plans to work in health care. They live with their two U.S. citizen sons, aged 10 and 15, one of whom is an accomplished gymnast while the other studies in a gifted program at his elementary school.

f. *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008)

Equitable tolling also applies to circumstances that do not involve ineffective assistance of counsel. Simeon Gaberov is a native of Bulgaria who arrived in the United States on a visitor's visa in June 1990. *See* 516 F.3d at 529. He affirmatively filed an asylum application in September of that year based on

persecution suffered at the hands of the Communist Party in Bulgaria. *Id.* The former INS placed him in removal proceedings. An IJ denied Mr. Gaberov asylum and he timely filed an appeal with the BIA. The BIA affirmed the IJ's denial. *Id.* However, neither Mr. Gaberov nor his new attorney received notice of the decision. The only mail Mr. Gaberov's attorney received from the BIA was a cover letter with a decision in another person's case. *Id. at* 593.

Upon receiving this misaddressed decision, Mr. Gaberov contacted the BIA and was told that his case was still pending. His attorney went to the local USCIS office, which informed Mr. Gaberov that he could not be deported because the decision did not refer to him. *Id.*

In December 2002, Mr. Gaberov married a U.S. citizen, who filed a visa petition on his behalf. In June 2005, the couple appeared for an interview with USCIS where Mr. Gaberov presented the notice his attorney had received from the BIA. The immigration officer told the couple that it appeared that the BIA entered a decision in Mr. Gaberov's case but it was not binding because Mr. Gaberov did not receive adequate notice. The officer proceeded to determine that Mr. Gaberov's marriage was bona fide and approved the visa petition. However, later that month Mr. Gaberov received a "bag-and-baggage" letter ordering him to appear packed and ready for deportation. *Id.*

In April 2006, after a stay of removal from the agency, Mr. Gaberov filed a motion to reopen with the BIA arguing that he never received proper notice of its decision. The BIA denied him relief because it determined that Mr. Gaberov *was* on notice of the BIA's decision and that he did not exercise due

diligence in checking the status of his appeal. *Id.* at 593-94.

The Seventh Circuit overturned the BIA's decision and held that Mr. Gaberov was entitled to equitable tolling. The court determined that it was not clear that Mr. Gaberov was on notice of the BIA's decision and that the steps he took to make the agency aware of its mistake constituted due diligence. *Id.* at 595-96.

Mr. Gaberov is now a lawful permanent resident living with his U.S. citizen wife and spending time with his LPR son and grandchildren.

While all six cases recounted in this brief have unique features, the common thread is that a federal appellate court corrected the BIA's misapplication of equitable tolling. Without federal jurisdiction to review the agency's treatment of a venerable legal principle, none of these immigrants would have had a full and fair day in court.

As evocative as these cases are of lives rescued by correct applications of equitable tolling, the untold cases of immigrants deported from within the Fifth Circuit for lack of judicial review also speak loudly. To ensure that all courts guard against erroneous denials of reopening based on ineffective assistance of counsel or other extraordinary circumstances beyond their control, this Court should end the Fifth Circuit's outlier status in this vital precinct of immigration law.

CONCLUSION

Amici respectfully urge the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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