No. 14-60865

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SERGIO LUGO-RESENDEZ,
Petitioner,

v.

LORETTA E. LYNCH,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

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

Kristin Macleod-Ball
Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7520
(202) 742-5619 (fax)

Trina Realmuto
National Immigration Project of
the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495 (fax)

TABLE OF CONTENTS

I. INTRODUCTION AND STATEMENT OF AMICI CURIAE 1

II. STATEMENT OF RELEVANT FACTS 4

III. ARGUMENT 7

A. The Agency Erroneously Treated Petitioner's Motion as an Untimely Regulatory Motion Without Applying Equitable Tolling Principles to Determine the Critical Issue of Whether It Must Be Treated as a Timely Filed Statutory Motion 7

B. The Court Should Announce that the Motion to Reopen Deadline Is Non-Jurisdictional and Subject to Equitable Tolling 11

1. Supreme Court Case Law Demonstrates that the Motion to Reopen Deadline is Non-Jurisdictional and Subject to Tolling ... 12

2. The Solicitor General and Attorney General Recognize that the Reopening Deadline is Subject to Equitable Tolling 17

C. The Court Should Adopt the Supreme Court Standard for Determining Whether the Deadline for Filing a Motion to Reopen Should be Tolled in a Particular Case 19

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Avagyan v. Holder, 646 F.3d 672 (9th Cir. 2011) 22

Avila-Santoyo v. Att'y Gen., 713 F.3d 1357 (11th Cir. 2013) (en banc) 19

Bolieiro v. Holder, 731 F.3d 32 (1st Cir. 2013) 19

Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005) 19

Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414 (2012) 20

Dada v. Mukasey, 554 U.S. 1 (2008)..16

Enriquez-Gutierrez v. Holder, 612 F.3d 400 (5th Cir. 2010)....................................9

Garcia-Carias v. Holder, 697 F.3d 257 (5th Cir. 2012)............................ 1, 7, 8, 17

Gonzales v. Thomas, 547 U.S. 183 (2006) 10

Gordillo v. Holder, 640 F.3d 700 (6th Cir. 2011) 21

Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004)...19

Henderson v. Shinseki, 562 U.S. 428 (2011) 12, 13

Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005)................................19

Holland v. Florida, 560 U.S. 631 (2010)... passim

Huerta v. Gonzales, 443 F.3d 753 (10th Cir. 2006) 14

Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000)..19

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 13

INS v. Ventura, 537 U.S. 12 (2002) 10

Irigoyen-Briones v. Holder, 644 F.3d 943 (9th Cir. 2011)......................................14

Kucana v. Holder, 558 U.S. 233 (2010) 16

Kuusk v. Holder, 732 F.3d 302 (4th Cir. 2013) 19

Lari v. Holder, 697 F.3d 273 (5th Cir. 2012) 1, 7

Lawrence v. Florida, 549 U.S. 327 (2007) 21

Liadov v. Mukasey, 518 F.3d 1003 (8th Cir. 2008) 14

Lopez v. Gonzales, 549 U.S. 47 (2006) 5, 10

Lozano v. *Montoya Alvarez*, 134 S. Ct. 1224 (2014) 20, 21

Luna v. Holder, 637 F.3d 85 (2d Cir. 2011) 14

Manning v. Epps, 688 F.3d 177 (5th Cir. 2012) 21

Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010) 14

Mata v. Holder, 558 Fed. Appx. 366 (5th Cir. 2014) 11

Mathis v. Thaler, 616 F.3d 461 (5th Cir. 2010) 21

Matter of Compean, 24 I&N Dec. 710 (A.G. 2009) 18

Matter of Compean, 25 I&N Dec. 1 (A.G. 2009) 18

Mezo v. Holder, 615 F.3d 616 (6th Cir. 2010) 21

Navarro-Miranda v. Ashcroft, 330 F.3d 672 (5th Cir. 2003) 1, 8

Nken v. Holder, 556 U.S. 418 (2009) 10

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

Osborn v. Bank of U.S., 22 U.S. 738 (1824) 22

Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009) 1, 8

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 8, 20

Pervaiz v. Gonzales, 405 F.3d 488 (7th Cir. 2005) 19, 21

Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011)..14

Ramos-Bonilla v. Mukasey, 543 F.3d 216 (5th Cir. 2008) 11

Reyes Mata v. Lynch, 135 S. Ct. 2150 (2015) .... passim

Riley v. INS, 310 F.3d 1253 (10th Cir. 2002) 19

Ruiz-Turcios v. Att'y Gen., 717 F.3d 847 (11th Cir. 2013) 8, 21

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013)....................................17

Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947) 9

Singh v. Holder, 658 F.3d 879 (9th Cir. 2011) 8

Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc) 19

Union Pacific R.R. v. Brotherhood of Locomotive Engineers,
558 U.S. 67 (2009) 12, 13

United States v. Beggerly, 524 U.S. 38 (1998).. 15, 16

United States v. Brockamp, 519 U.S. 347 (1997) 15

United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001) 5

Voma v. Holder, 517 Fed. Appx. 253 (5th Cir. 2013) 11

Statutes

8 U.S.C. § 1101(a)(43)(B) 5, 6

8 U.S.C. § 1103(g)(2)..14

8 U.S.C. § 1227(a)(2)(A)(iii) 5

8 U.S.C. § 1229a(c)(6) 1

8 U.S.C. § 1229a(c)(7) .... passim

8 U.S.C. § 1229a(c)(7)(C)(i) .... passim

8 U.S.C. § 1252 13

Regulations

8 C.F.R. § 1003.2(a) 7

8 C.F.R. § 1003.2(d) 1,4, 7, 14

8 C.F.R. § 1003.23(b) 1, 7

8 C.F.R. § 1003.23(b)(1) 1, 7

8 C.F.R. § 1240.11(d) 5

8 C.F.R. § 1240.8(d) 5

Other Authorities

Black's Law Dictionary (10th ed. 2014) 22

Brief for the Respondent Supporting Reversal and Remand, *Reyes Mata*, 135 S. Ct. 2150 (No. 14-185) 18

I. INTRODUCTION AND STATEMENT OF AMICI CURIAE

Amici curiae proffer this brief to assist the Court in its consideration of whether the departure regulation at 8 C.F.R. § 1003.23(b) applies to the motion filed by Petitioner Sergio Lugo-Resendez.[1] Under this Court's case law, this regulation can bar adjudication of *regulatory* motions filed by noncitizens who have departed the United States (*see Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003)); however, the regulation is invalid, and thus does not apply to, *statutory* motions filed under 8 U.S.C. §§ 1229a(c)(6)&(7) (*see Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012)).[2] The Court must vacate and remand this case because, contrary to the agency's decision, whether the bar applies to Petitioner's motion to reopen– i.e. whether the motion is regulatory or statutory – does not simply depend on whether it was filed within the 90-day deadline set forth in the motion to reopen statute, 8 U.S.C. §

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici represent that no party's counsel authored this brief, in whole or in part, and that no party or their counsel, nor any other person or entity other than amici and their counsel, made a monetary contribution intended to fund the preparation or filing of this brief.

[2] The language of the departure bar in 8 C.F.R. § 1003.23(b)(1), governing motions to reopen before immigration judges, is identical to the language of the departure bar in 8 C.F.R. § 1003.2 (d), governing motions to reopen filed with the Board of Immigration Appeals. Amici disagree with the holdings in *Ovalles* and *Navarro-Miranda* but recognize the precedential nature of those decisions.

1229a(c)(7)(C)(i). Rather, motions filed outside the 90-day deadline, like Petitioner's, constitute statutory motions when there is a viable basis to equitably toll the statutory deadline.

In this case, the Board of Immigration Appeals (BIA or Board) erroneously affirmed without opinion the Immigration Judge's (IJ) conclusion that Petitioner had filed a regulatory motion. The agency did so without any analysis of whether the 90-day deadline should be equitably tolled and without any mention, let alone analysis, of prima facie evidence supporting tolling that was presented with the motion. These errors were critical because, where equitable tolling applies, a motion filed after the 90-day deadline is treated as a statutory motion, and therefore, not subject to the departure bar.

In cases arising in nine other circuits—that is, every other circuit that has addressed the issue—IJs and the BIA are duty bound to analyze whether the 90-day deadline should be equitably tolled under binding circuit law. However, this circuit has yet to issue a precedent decision addressing whether the deadline is subject to equitable tolling. Presumably, the Court is on the brink of doing so since the Supreme Court's decision in *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015) remanded the underlying motion to reopen case with instructions to this Court to decide this precise issue nearly a year ago.

Amici urge the Court to: (1) find that the 90-day deadline for filing a motion

to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7)(C)(i), is subject to equitable tolling where an individual demonstrates the existence of an extraordinary circumstance that prevented timely filing and due diligence in pursuing reopening consistent with Supreme Court and circuit case law; and (2) to remand this case to allow the agency to determine, in the first instance, whether Petitioner filed a statutory motion (i.e., a motion that warrants equitable tolling) and, if so, to adjudicate the merits of the motion.[3]

Amicus 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. Amicus the National Immigration Project of the National Lawyers Guild is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

Both organizations have a direct interest in ensuring that noncitizens are not prevented from exercising their statutory right to pursue motions to reopen. They previously appeared as amici before this Court and several other courts of appeals

---

[3] Should the Court articulate an equitable tolling test in *Mata v. Lynch*, No. 13-60253 (on remand from the Supreme Court) or another pending case prior to deciding the instant petition, Petitioner's case similarly would warrant remand to allow the agency to apply that test in the first instance.

in cases invalidating the regulatory departure bar, 8 C.F.R. § 1003.2(d), as applied to statutory motions. *See*, *e.g.*, *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc). In addition, both organizations previously appeared as amici curiae before the Supreme Court and other courts of appeals, including this Court, in cases involving equitable tolling of the motion to reopen deadline. *See Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015); *Lawrence v. Lynch*, No. 15-1834 (4th Cir. *motion to appear as amicus granted* Oct. 30, 2015); *Reyes Mata v. Lynch*, No. 13-60253 (5th Cir. *motion to appear as amicus granted* Sep. 24, 2015); *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847 (11th Cir. 2013).

II. STATEMENT OF RELEVANT FACTS

Petitioner is 55-years-old. He has extensive family and friends in the United States, including three U.S. citizen children, U.S. citizen parents, four U.S citizen sisters, and one U.S. citizen brother. Record on Appeal (ROA) 84, 88. Petitioner became a lawful permanent resident on August 21, 1973. ROA 32, 73. Petitioner pled guilty to felony possession of less than one gram of a controlled substance under Texas law on December 9, 2002. ROA 60-64. He received a suspended sentence of two years, was placed on community supervision for five years, and received a $500 fine. ROA 62. On February 21, 2003, the Department of

Homeland Security (DHS) charged Petitioner with deportability solely under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony, to wit, illicit trafficking in a controlled substance under 8 U.S.C. § 1101(a)(43)(B). ROA 99-100. On March 27, 2003, the immigration judge sustained the aggravated felony charge and issued a removal order; Petitioner appeared at his hearing *pro se*. ROA 90. Consistent with Petitioner's belief that he had been found deportable for an aggravated felony conviction that rendered him ineligible for cancellation of removal (ROA 73), Petitioner made no relief application and did not appeal. ROA 90. Petitioner's belief is consistent with the advice the IJ, by regulation, was required to provide him at the hearing.[4] However, no transcript of that hearing was made available in this case.[5] DHS subsequently removed Petitioner. ROA 73.

The Supreme Court issued its 8-1 decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), on December 5, 2006. The Court held that a state drug possession

---

[4] The IJ was obligated to inform Petitioner of eligibility for any form of relief for which he was eligible at the time of the hearing. *See* 8 C.F.R. § 1240.11(d) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d) [referencing relief applications]"). At the time of the hearing, Petitioner's conviction was considered an aggravated felony under Fifth Circuit law. *See United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001).

[5] Because he did not appeal, Petitioner's immigration court file did not contain a transcript of the proceeding, and Respondent did not order the preparation of any such transcript for the administrative record in this case.

offense must be punishable as a federal felony to qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). Thus, unbeknownst to Petitioner, *Lopez* nullified the sole ground of deportability of Petitioner's removal order.

In May 2014, upon learning of a case involving a "new law" that "made it possible" for "a man who was a lawful permanent resident who had a drug conviction" to "apply for cancellation of removal" "even though he already had been deported," Petitioner immediately asked his daughter to "find an immigration attorney in the United States" to ask whether it was possible for him to "come back to the United States legallyu [sic]." ROA 73-74. His daughter then visited Petitioner's counsel, Jodi Goodwin, who advised that he could file a motion to reopen to apply for cancellation of removal. ROA 53-54. Upon discovering this possibility, Petitioner "immediately gathered the money" and asked Ms. Goodwin to file the motion. ROA 74.

In July 2014, Ms. Goodwin filed a motion to reopen under 8 U.S.C. § 1229a(c)(7), the motion to reopen statute, which was as soon as practicable and less than 90 days after Petitioner learned of the *Lopez* decision. ROA 52-57 (motion); ROA 58-88 (exhibits in support of motion). In that motion, Petitioner identified the extraordinary circumstance of the *Lopez* decision and detailed his diligence in pursing reopening as soon as he learned that option was available. ROA 52-54. Petitioner's counsel expressly filed the motion to reopen under 8

U.S.C. § 1229a(c)(7), the motion to reopen statute. The motion does not request regulatory reopening; in fact, it does not even cite the regulation under which an immigration judge can reopen *sua sponte*, 8 C.F.R. § 1003.23(b)(1). ROA 52-57.

III. ARGUMENT

A. The Agency Erroneously Treated Petitioner's Motion as an Untimely Regulatory Motion Without Applying Equitable Tolling Principles to Determine the Critical Issue of Whether It Must Be Treated as a Timely Filed Statutory Motion.

Whether a motion is treated as regulatory or statutory in nature is critical to its adjudication. If a noncitizen who has been removed from the United States files a statutory motion to reopen – i.e., within the 90-day statutory deadline under 8 U.S.C. § 1229a(c)(7)(C)(i) or, as discussed below, if the 90-day deadline is equitably tolled – the agency may not refuse to adjudicate it based on the departure bar regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b). *See Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *cf. Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012). In contrast, if he files his motion after the 90-day deadline and only asks the agency to adjudicate it pursuant to its *sua sponte* reopening authority at 8 C.F.R. § 1003.2(a),[6] this Court has held that the departure bar regulation precludes the agency from exercising jurisdiction. *See Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003); *cf.*

---

[6] The IJ or the BIA may reopen proceedings *sua sponte* "at any time" pursuant to 8 C.F.R. §§ 1003.23(b)(1) (IJ); 1003.2(a) (BIA).

Garcia-Carias, 697 F.3d at 265 ("Given the fundamental difference between the regulatory *sua sponte* power and the aforementioned statutory right, we conclude that *Navarro-Miranda* and *Ovalles* do not govern our consideration of whether the departure regulation can limit Garcia's right to file a statutory motion to reopen."). Thus, whether the departure bar regulation applies to a motion filed by an individual who has been removed from the United States – i.e., whether the agency must adjudicate the merits – depends on the threshold question of whether the motion is treated as a filed pursuant to statutory or regulatory authority.

As stated above, a motion need *not* be filed within the 90-day statutory deadline to be statutory in nature. Motions to reopen are treated as timely filed pursuant to the statute if the movant establishes that he qualifies for equitable tolling of the filing deadline. *See*, *e.g.*, *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011).[7] As the Supreme Court has noted, "[p]utting the Fifth Circuit to the side, all appellate courts to have addressed the matter have held that the Board may sometimes equitably toll the time limit for an alien's motion to reopen." *Reyes Mata*, 135 S.

[7] If a deadline is subject to tolling, a court will first determine whether a litigant's circumstances warrant tolling in his or her particular case. *See*, *e.g.*, *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) ("We note that eligibility for equitable tolling is a threshold showing that must be made before the merits of the claim or claims underlying a motion to reopen can be considered."). If the individual is not able to show circumstances that prevented timely filing and due diligence, the statutory deadline will "bar[]" review of the underlying claim. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005); *see also infra* Section III.C.

Ct. at 2156, 2154 n.1 (citing decisions from nine courts of appeals); *see also infra* Section III.B.1 (application of Supreme Court case law demonstrates that the statutory reopening deadline is subject to equitable tolling); Section III.B.2 (the Solicitor General and Attorney General recognize that the deadline is subject to tolling).

Here, the IJ and BIA erred by failing to analyze Petitioner's claim and supporting evidence that he was entitled to equitable tolling of the filing deadline.[8] But for this failure, the agency would not have applied the departure bar, and instead would have reached the merits of the tolling claim Petitioner presented and thus could have reached the merits of Petitioner's motion.[9] Therefore, this Court

---

[8] As discussed in Section II, through his motion Petitioner demonstrated both the existence of extraordinary circumstances, i.e., the Supreme Court's decision in *Lopez*, and due diligence in that he actively investigated and pursued reopening immediately upon learning of a case with similar facts by activating his daughter to seek out an attorney on his behalf and gathering money to pay for the motion. *See* ROA 73-74 (Petitioner's declaration in support of motion to reopen), 52-56 (motion to reopen).

[9] Had it reached the merits, the agency would have had to terminate proceedings because the aggravated felony charge was the sole deportability ground charged in the Notice to Appear and the sole basis of the IJ's removability finding. However, the agency never reached the merits of the motion and thus, the merits are not before this Court. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947) (holding that "[courts] must judge the propriety of such action solely by the grounds invoked by the agency"); *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 407 (5th Cir. 2010) ("[S]ince the BIA is a division of the Executive Office for Immigration Review ("EOIR"), and a 'judicial judgment cannot be made to do service for an administrative judgment,' . . ., we may usually only affirm the BIA on the basis of its stated rationale for ordering an alien removed from the United States.") (internal citations and quotations omitted).

should remand the case to the agency to conduct an equitable tolling analysis (discussed below) in the first instance. *See INS v. Ventura*, 537 U.S. 12 (2002); *Gonzales v. Thomas*, 547 U.S. 183 (2006). Any other outcome would ignore the availability of equitable tolling of the motion to reopen deadline and the impact of tolling on the statutory nature of the motion. Such an outcome also would conflict with decisions of all courts of appeals to address the issue. *See infra* Section III.B.3. Furthermore, the Supreme Court suggested that it would grant certiorari in the future if the Fifth Circuit declines to recognize that the reopening deadline is subject to tolling. *See Reyes Mata*, 135 S. Ct. at 2156 ("Assuming the Fifth Circuit thinks otherwise [regarding the availability of equitable tolling of motion deadlines], that creates the kind of split of authority we typically think we need to resolve.").

//

In the alternative, if DHS charged a different ground of deportability in reopened or new removal proceedings, Petitioner nevertheless would remain eligible for cancellation of removal notwithstanding his deportation. *See Lopez*, 127 S. Ct. at 629 n.2. In *Lopez*, the Supreme Court expressly stated that Lopez's deportation did not render the case moot because he "can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that [he] had committed an aggravated felony." *Id*. at 68 n.2. Thus, a necessary implication of the Court's statement is that a noncitizen remains eligible for cancellation of removal, including establishing continuous physical presence, where the person's absence was caused by deportation. Although the Court in *Lopez* reviewed a case on direct appeal, that distinction is inapposite as reopening has the same effect of nullifying the final administrative order and restoring prior status. *Nken v. Holder,* 556 U.S. 418, 430 n.1 (2009).

B. The Court Should Announce that the Motion to Reopen Deadline Is Non-Jurisdictional and Subject to Equitable Tolling.

Through 8 U.S.C. § 1229a(c)(7), Congress provided noncitizens in removal proceedings with the statutory right to file a motion to reopen. The statute states that such motions "shall be filed within 90 days of the date of entry of a final administrative order of removal," subject to certain exceptions not at issue in this case. *See* § 1229a(c)(7)(C)(i). Where it is recognized, equitable tolling allows individuals to exercise their statutory right to pursue a motion to reopen more than 90 days after the entry of a removal order. *See supra* Section III.A.

In *Reyes Mata v. Lynch*, the Supreme Court vacated a decision of this Court dismissing a petition for review of a motion to reopen seeking equitable tolling. The Supreme Court instructed this Court to determine whether the motion to reopen deadline can be equitably tolled. *See Reyes Mata*, 135 S. Ct. at 2156 ("Of course, the Court of Appeals may reach whatever conclusion it thinks best as to the availability of equitable tolling . . . .").[10] In accordance with that instruction, this Court should join its sister circuits in holding that § 1229a(c)(7)(C)(i) is a non-jurisdictional deadline subject to equitable tolling.

---

[10] In practice, prior to the Supreme Court's *Mata* decision, this Court was prevented from addressing whether the 90-day motion to reopen deadline is subject to equitable tolling by its precedent decision in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). *See*, *e.g.*, *Mata v. Holder*, 558 Fed. Appx. 366, 367 (5th Cir. 2014), *reversed by Reyes Mata*, 135 S. Ct. 2150; *Voma v. Holder*, 517 Fed. Appx. 253, 254 (5th Cir. 2013).

1. Supreme Court Case Law Demonstrates that the Motion to Reopen Deadline is Non-Jurisdictional and Subject to Tolling.

The Supreme Court distinguishes subject-matter jurisdiction, which defines "a tribunal's power to hear a case," from claim-processing rules which "do[] not reduce the adjudicatory domain of a tribunal. . . ." *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 81 (2009) (internal quotation omitted). The distinction between jurisdictional and claim-processing rules "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Notably, jurisdictional rules are not subject to equitable tolling, whereas claim-processing rules generally are. *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (stating that the Court has "previously made clear" that a rebuttable presumption favoring equitable tolling is read into every federal statute of limitations) (citations omitted). These Supreme Court decisions compel the conclusion that the 90-day motion to reopen deadline is non-jurisdictional and, therefore, subject to equitable tolling.

In *Henderson*, the Supreme Court considered whether Congress provided a "clear" indication that the statutory deadline for filing a notice of appeal in the U.S. Court of Appeals for Veterans Claims is "jurisdictional." *Henderson*, 562 U.S. at 436. The Court relied on several factors to conclude that that deadline is not jurisdictional. Specifically, the Court noted the provision's absence of jurisdictional language in general, as compared to Congress's inclusion of

jurisdictional language elsewhere in the Veterans' Judicial Review Act; the provision's placement outside the judicial review section of the Act and in a subchapter entitled "Procedure"; and the canon that benefit provisions for members of the Armed Services are construed in the beneficiaries' favor. *Id*. at 438-41.

Similarly, in the reopening context, application of these factors demonstrates that Congress did not intend the motion to reopen filing deadline to be jurisdictional. The motion to reopen statute, 8 U.S.C. § 1229a(c)(7), is devoid of any jurisdictional language. This is especially noticeable when compared with the jurisdictional language in the judicial review provisions of the immigration statute, 8 U.S.C. § 1252. Additionally, noncitizens, like veterans, are entitled to favorable constructions of ambiguous statutes. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (applying the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]").

If *Henderson* leaves any doubt that the 90-day motion deadline is not jurisdictional, the Court's decisions in *Union Pacific* and *Holland* eliminate it. In *Union Pacific*, the Court rejected the National Railway Adjustment Board's (NRAB) jurisdictional classification of a procedural rule for exhausting the grievance procedures in a collective-bargaining agreement. *Union Pacific*, 558 U.S. at 86. The Court reasoned that "Congress alone controls the [NRAB's] jurisdiction," *id.* at 71, and "Congress gave the [NRAB] no authority to adopt rules

of jurisdictional dimension," *id.* at 83-84. Likewise here, Congress gave the Attorney General authority to issue regulations governing removal proceedings, including motions to reopen, but did not give the Attorney General authority "to adopt rules of jurisdictional dimension." *See* 8 U.S.C. § 1103(g)(2) (granting Attorney General authority to "establish such regulations, . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."). Just as Congress did not curtail jurisdiction in *Union Pacific* where a party failed to exhaust the grievance procedures, it similarly did not curtail jurisdiction before the BIA where a motion to reopen is not filed within 90 days. Therefore, this Court should reject construing § 1229a(c)(7)(C)(i) to contract the Board's jurisdiction.[11]

Recognizing tolling in the motion to reopen context finds further support in *Holland*. In that case, the Supreme Court found that a provision of the

---

[11] Indeed, several courts of appeals have rejected the immigration agency's efforts to contract its jurisdiction by improperly classifying its own claim-processing rules as jurisdictional. *See*, *e.g.*, *Pruidze v. Holder*, 632 F.3d 234, 237-39 (6th Cir. 2011) (holding that 8 C.F.R. § 1003.2(d) does not create a jurisdictional bar to the adjudication of motions filed by noncitizens outside of the U.S.); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593-95 (7th Cir. 2010) (same); *Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (same); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 947-49 (9th Cir. 2011) (rejecting the BIA's classification of the thirty-day deadline to appeal to the BIA as jurisdictional); *Liadov v. Mukasey*, 518 F.3d 1003, 1008 n.4 (8th Cir. 2008) (same); *Huerta v. Gonzales*, 443 F.3d 753, 755-56 (10th Cir. 2006) (same).

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishing a one year statute of limitations for filing a habeas petition is not jurisdictional and, thus, is subject to equitable tolling. *Holland*, 560 U.S. at 645. The Court distinguished the AEDPA statute from the provisions at issue in two cases where the Court had found that the statutes were not subject to equitable tolling. *Id*. at 646-48 (discussing *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998)). It noted that AEDPA "does not contain language that is 'unusually emphatic' nor does it 'reiterat[e]' its time limitation." *Holland*, 560 U.S. at 647. In addition, the limitation period "is not particularly long." *Id.* The same is true of the motion to reopen statute, which has a significantly shorter deadline than the one year in *Holland* and the language of which is neither emphatic nor repetitive. *See* 8 U.S.C. § 1229a(c)(7).

The Court also considered and rejected the proposition that the absence of an explicit reference to equitable tolling in the relevant statute was dispositive. Like the statute at issue in *Holland*, 8 U.S.C. § 1229a(c)(7) does not incorporate an express tolling provision. But the Court recognized that filing deadlines may incorporate equitable principles implicitly. *See Holland*, 560 U.S. at 645-49 (determining that tolling is applicable although the relevant statute "is silent as to equitable tolling"); *see also Brockamp*, 519 U.S. at 350 (noting that statutes can be "read as containing an implied 'equitable tolling' exception").

The *Holland* Court also found that the subject matter under consideration – habeas corpus – did not fall into a category of issues, such as tax collection and land claims (at issue in *Brockamp* and *Beggerly*) where tolling would be inappropriate. *See Holland*, 560 U.S. at 647 (finding that habeas corpus "pertains to an area of law where equity finds a comfortable home"). Similarly, there is nothing about the subject matter at issue here that makes tolling inappropriate. In fact, the remedial nature of motions to reopen suggests the opposite.

Finding that the 90-day deadline is non-jurisdictional and, therefore, subject to equitable tolling also is consistent with Supreme Court precedent recognizing motions to reopen as an integral part of the removal scheme Congress enacted. As the Supreme Court held in *Dada v. Mukasey*, "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition." 554 U.S. 1, 18 (2008). Such motions provide an "important safeguard," and the Supreme Court has admonished against any interpretation that would "nullify a procedure so intrinsic a part of the legislative scheme." *Dada*, 554 U.S. at 18-19 (quotation omitted); *see also Kucana v. Holder*, 558 U.S. 233, 242, 249-51 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions); *Reyes Mata*, 135 S. Ct. at 2153 (quoting *Dada*, 554 U.S. at 4-5, to recognize that each noncitizen ordered removed "'has *a right* to file one motion' with the IJ [Immigration Judge] or Board

to ‘reopen his or her removal proceedings.’”) (emphasis added).[12]

In proceedings involving this type of important safeguard, tolling is especially important when litigants involved may be ill equipped to file legal papers quickly. As Justice Sotomayer aptly stated:

> [W]ith respect to remedial statutes designed to protect the rights of unsophisticated claimants, . . . agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 830 (2013) (Sotomayer, J., concurring). Immigration cases often involve “unsophisticated claimants,” such as individuals without formal education, without knowledge of substantive immigration law or the procedural mechanisms for raising claims, who are largely pro se, and who face a language barrier.

In sum, application of Supreme Court precedent demonstrates that this Court should regard the 90-day deadline for filing motions to reopen as non-jurisdictional and subject to equitable tolling.

2. The Solicitor General and Attorney General Recognize that the Reopening Deadline is Subject to Equitable Tolling.

Prior statements from the offices of both the Solicitor General and the

---

[12] This Court has recognized that a noncitizen’s “ability to exercise his statutory right” to this important safeguard “is not contingent upon his presence in the United States.” *Garcia-Carias*, 697 F.3d at 264.

Attorney General provide further support for the availability of tolling in certain reopening cases.

Last year, before the Supreme Court, the Solicitor General "note[d] . . . that the time within which an alien may file a motion to reopen may be equitably tolled by the Board." *See* Brief for the Respondent Supporting Reversal and Remand at 37, *Reyes Mata*, 135 S. Ct. 2150 (No. 14-185). The Solicitor General argued that the Attorney General has the authority to "adopt[] tolling principles in [the motion to reopen] context." *Id*. at 39.

Moreover, in the only precedent agency decision to address equitable tolling of the motion to reopen statute, the Attorney General recognized that the reopening deadline is subject to equitable tolling. *See Matter of Compean*, 24 I&N Dec. 710, 732-33 (A.G. 2009), *vacated by Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) (stating that "the Board may exercise its discretion to allow tolling of the 90-day period").[13] Although the Attorney General subsequently vacated the decision for the issuance of regulations governing adjudication of ineffective assistance of counsel claims, *see Matter of Compean*, 25 I&N Dec. at 3-4, it is telling that the *only* precedent agency decision to address equitable tolling of the motion deadlines recognized Board authority to consider equitable tolling claims.

---

[13] In *Compean I*, the Attorney General set forth a stringent standard for adjudicating ineffective assistance of counsel claims. 24 I&N Dec. at 730-41. Nonetheless, he directed the Board to allow tolling of the motion deadline. *Id.* at 732.

3. Finding That the Deadline Is Subject to Equitable Tolling Is Consistent with the Decisions of Nine Courts of Appeals.

Finally, as the Supreme Court has recognized, finding that the motion to reopen deadline is a claim-processing rule subject to equitable tolling is consistent with the decision of every court of appeals to consider the issue. *Reyes Mata*, 135 S. Ct. at 2156; *see Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc).[14]

Thus, this Court should follow the other courts of appeals and recognize the availability of tolling.

C. The Court Should Adopt the Supreme Court Standard for Determining Whether the Deadline for Filing a Motion to Reopen Should Be Tolled in a Particular Case.

If the Court finds that tolling applies to the reopening deadline, as amici submit that it should, remand to the Board would be appropriate to determine

[14] While the First Circuit has yet to rule on the issue, it found "notabl[e]" that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen." *Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013).

whether Petitioner merits tolling based upon the specific circumstances presented in his motion to reopen. However, this Court should articulate the standard that the agency must use to evaluate equitable tolling claims in a particular case.

In so doing, the Court must apply "long-settled equitable tolling principles." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *see also Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (noting that tolling is "a long-established feature of American jurisprudence"). Although the application of equitable tolling to particular facts will require case-by-case adjudication, decisions of the Supreme Court, as well as those of other courts of appeals in the motion to reopen context, provide a consistent, underlying standard: tolling is appropriate where circumstances prevent the individual from timely filing and the individual pursued reopening with reasonable diligence after learning of the possibility of moving to reopen.

Over the last ten years, the Supreme Court repeatedly has articulated the standard for determining whether an individual is "entitled to equitable tolling." *Holland*, 560 U.S. at 649. Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also Lozano*, 134 S. Ct. at 1231-32 (same); *Credit Suisse Sec. (USA) LLC*, 132 S. Ct. at 1419 (same); *Lawrence v. Florida*, 549 U.S.

327, 336 (2007) (same); *cf. Manning v. Epps*, 688 F.3d 177, 183-84 (5th Cir. 2012) (applying *Holland* standard);[15] *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) (applying *Pace* standard to equitable tolling of motion to reopen deadline). By meeting this standard, a litigant "pauses the running of, or 'tolls,'" the relevant statute of limitations. *Lozano*, 134 S. Ct. at 1231; *see also Mezo v. Holder*, 615 F.3d 616, 622 (6th Cir. 2010) (noting that, where equitable tolling applied, "[t]he clock [on the motion to reopen deadline] would start again when [the noncitizen] discovered" the circumstance triggering tolling).

Supreme Court precedent also governs the analysis of due diligence in a particular case: an individual must pursue his claim with "reasonable diligence," but not "maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotations omitted). As courts of appeals have recognized, this requires an analysis of "whether the claimant could reasonably have been expected to have filed earlier," rather than "the length of the delay in filing." *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *see also Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (noting that "the mere passage of time—even a lot of time—before an alien files a motion to reopen does not necessarily mean she was not diligent" because "the

---

[15] This Court sometimes seemingly applies a different standard by requiring litigants seeking equitable tolling to demonstrate "rare and exceptional circumstances." *See Mathis v. Thaler*, 616 F.3d 461, 474-76 (5th Cir. 2010). Given the Supreme Court's repeated articulation of the equitable tolling standard over the past ten years, however, this Court's equitable tolling cases must be construed as applying an "extraordinary circumstances" standard.

analysis ultimately depends on all of the facts of the case, not just the chronological ones"); *Avagyan v. Holder*, 646 F.3d 672, 679, 682 n.9 (9th Cir. 2011) (requiring a "fact-intensive and case-specific" review of diligence, "assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances," rather than some "magic period of time").

In evaluating a particular claim for tolling of the motion to reopen deadline, the agency must apply these standards to the particular circumstances presented in the case. As its name suggests, the doctrine of equitable tolling is rooted in common law principles of equity, defined as "[t]he recourse to principles of justice to correct or supplement the law *as applied to particular circumstances*. . . ." Black's Law Dictionary, 3 (10th ed. 2014) (emphasis added). "Equity will look at the situation of all the parties, and will distinguish among the defendants, who can, and who cannot, comply with such decree, as, upon equitable principles, must be pronounced." *Osborn v. Bank of U.S.*, 22 U.S. 738, 747 (1824). Here, the Court should provide guidance to the IJ and BIA and articulate the availability of tolling of the reopening deadline and the applicable standards. Then, the agency can apply those standards to Petitioner's individualized circumstances, in keeping with the notions of justice and fairness that animate the doctrine of equitable tolling.

IV. CONCLUSION

The IJ and Board erred by simply treating Petitioner's motion as regulatory

in nature without analyzing whether the filing deadline merited equitable tolling and, thus, could be treated as statutory in nature. This Court should recognize that the deadline for filing motions to reopen set forth in 8 U.S.C. § 1229a(c)(7)(C)(i) is subject to equitable tolling. Consistent with Supreme Court case law, the Court also should articulate a test finding that tolling is appropriate where an individual has pursued his claim with reasonable diligence and was unable to timely file due to an extraordinary circumstance. Finally, the Court should remand this case to apply its newly-announced equitable tolling test in the first instance.

Dated: May 23, 2016

Respectfully submitted,

s/ *Kristin Macleod-Ball*

Kristin Macleod-Ball
Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7520
(202) 742-5619 (fax)
kmacleod-ball@immcouncil.org

s/ *Trina Realmuto*

Trina Realmuto
National Immigration Project of the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495 (fax)
trina@nationalimmigrationproject.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Kristin Macleod-Ball, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 23, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Kristin Macleod-Ball

Kristin Macleod-Ball
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7520

Date: May 23, 2016

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a) AND 5TH CIR. R. 32.3

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,017 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Times New Roman.

s/ Kristin Macleod-Ball

Kristin Macleod-Ball
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7520

Dated: May 23, 2016