No. 12-11503

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DARWIN GILBERTO RUIZ-TURCIOS,

Petitioner,

v.

ERIC H. HOLDER,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Review from a Final 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'S PETITION FOR REHEARING EN BANC

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
(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)

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

I, Beth Werlin, attorney for *Amicus Curiae*, the American Immigration Council, certify that the American Immigration Council is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

January 2, 2013 s/ Beth Werlin

I, Trina Realmuto, attorney for *Amicus Curiae*, the National Immigration Project of the National Lawyers Guild, certify that the National Immigration Project is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

January 2, 2013 s/ Trina Realmuto

CERTIFICATE OF INTERESTED PARTIES

I, Beth Werlin, attorney for *Amicus Curiae*, certify that, in addition to those parties who have already been disclosed, the following parties have an interest in the outcome of the appeal:

- Trina Realmuto, attorney for *Amicus Curiae* National Immigration Project of the National Lawyers Guild
- Beth Werlin, attorney for *Amicus Curiae* American Immigration Council

January 2, 2013 s/ Beth Werlin

CIRCUIT RULE 35-5(c) STATEMENT

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the Supreme Court's decision in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), and that consideration by the full Court is necessary to secure and maintain uniformity of the decisions of this Court.

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance, over which the courts of appeals are divided:

Whether the 90-day deadline for filing a motion to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7)(C)(i), is a mandatory jurisdictional rule or a claim processing rule subject to equitable tolling.

s/ Beth Werlin

s/ Trina Realmuto

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

CERTIFICATE OF INTERESTED PARTIES ii

CIRCUIT RULE 35-5(c) STATEMENT iii

TABLE OF CITATIONS v

STATEMENT OF INTEREST. 1

INTRODUCTION AND STATEMENT OF THE ISSUE 1

REASONS FOR GRANTING THE PETITION 3

A. This Court's Decision in *Abdi* Cannot Be Reconciled With Supreme Court Precedent. 3

B. The Department of Justice Already Has Adopted Equitable Exceptions to the Motion to Reopen Deadline and Previously Has Endorsed Equitable Tolling of the Motion Deadline. 9

C. Whether the Motion Filing Deadline Is a Jurisdictional Rule Carries Considerable Practical Importance for Noncitizens, Immigration Judges and the BIA 11

1. Equitable tolling of the motion to reopen deadline affords noncitizens facing removal a critical opportunity to present their claims and to exercise their appeal rights. 11

2. Equitable tolling of the motion to reopen deadline affords the BIA and Immigration Judges a manageable mechanism to help ensure that motions "safeguard" the lawfulness of removal proceedings 14

CONCLUSION. 15

TABLE OF CITATIONS

Page

Cases

**Abdi v. Attorney General*, 430 F.3d 1138 (11th Cir. 2005) .... passim

Avagyan v. Holder, 646 F.3d 672 (9th Cir. 2011) 13

Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005) 2

Dada v. Mukasey, 554 U.S. 1 (2008) 3, 7, 15

Gordillo v. Holder, 640 F.3d 700 (6th Cir. 2011) 13

Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004)...2

**Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) .... passim

**Holland v. Florida*, 130 S. Ct. 2549 (2010)... passim

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

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

In re Balmeo, 2009 WL 3250432 (BIA Sep. 28, 2009) (unpublished) 14

In re Chang, 2004 WL 2952096 (BIA Nov. 17, 2004) (unpublished)....................15

In re Khan, 2007 WL 2074553 (BIA Jun. 15, 2007) (unpublished) 14, 15

In re Palomares-Quintero, 2008 WL 1924626 (BIA Apr. 11, 2008) (unpublished) 15

In re Rodriguez Rodriguez, 2007 WL 2074548 (BIA Jun. 15, 2007) (unpublished) 14, 15

TABLE OF CITATIONS
(continued)

In re Torres, 2007 WL 3318671 (BIA Sep. 21, 2007) (unpublished).....................15

In re Turk, 2010 WL 4500915 (BIA Oct. 19, 2010) (unpublished) 14

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 5

INS v. Doherty, 502 U.S. 314 (1992)...8

Irigoyen-Briones v. Holder, 644 F.3d 943 (9th Cir. 2011).....................................10

Jian Le Lin v. United States AG, 681 F.3d 1236 (11th Cir. 2012) 7, 8

Kucana v. Holder, 130 S. Ct. 827 (2010) 7

Liadov v. Mukasey, 518 F.3d 1003 (8th Cir. 2008) 10

Lopez v. INS, 184 F.3d 1097 (9th Cir. 1999)..14

Luna v. Holder, 637 F.3d 85 (2d Cir. 2011) 10

Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010) 10

Matter of Compean, 24 I&N Dec. 710 (A.G. 2009), vacated by *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) 10, 11, 14

Matter of Compean, 25 I&N Dec. 1 (A.G. 2009)..11

Matter of Vasquez-Muniz, 23 I&N Dec. 207 (BIA 2002) 10

Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998) 10

Ortega-Marroquin v. Holder, 640 F.3d 814 (8th Cir. 2011)....................................2

TABLE OF CITATIONS
(continued)

Pervaiz v. Gonzales, 405 F.3d 488 (7th Cir. 2005) 2

Prestol Espinal v. AG of the United States, 653 F.3d 213 (3d Cir. 2011)..................7

Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011)...10

Riley v. INS, 310 F.3d 1253 (10th Cir. 2002) 2

Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002) 12

Singh v. Ashcroft, 367 F.3d 1182 (9th Cir. 2004)..12

**Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).. 2, 3, 5, 10

United States v. Beggerly, 524 U.S. 38 (1998)...6

United States v. Brockamp, 519 U.S. 347 (1997) 6

Statutes

8 U.S.C. § 1103(g)(2)...5

*8 U.S.C. § 1229a(c)(7) 4, 6, 8

8 U.S.C. § 1229a(c)(7)(C)(i) .... iii, 2

8 U.S.C. § 1252 4

Regulations

8 C.F.R. § 1003.2(a)...9

8 C.F.R. § 1003.2(c)(3)(iii) 9

TABLE OF CITATIONS
(continued)

8 C.F.R. § 1003.2(d) 7

8 C.F.R. § 1003.23(b)(1) 9

8 C.F.R. § 1003.23(b)(4)(iv) 9

8 C.F.R. § 3.2 (1987) 8

STATEMENT OF INTEREST

The American Immigration Council (AIC) is a non-profit organization established to increase public understanding of immigration law and policy and to advance constitutional and other legal rights of noncitizens in the United States. AIC works to ensure a fair and just process for noncitizens facing removal. The National Immigration Project of the National Lawyers Guild (NIPNLG) 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.

AIC and NIPNLG have pursued litigation challenging the regulatory bars to motions to reopen after deportation from the United States and have sought to protect access to judicial review of motions to reopen. They have written practice advisories and provided technical assistance on related issues. Through this work, AIC and NIPNLG are acutely aware of the problems noncitizens confront when they are pursuing their right to seek reopening.

INTRODUCTION AND STATEMENT OF THE ISSUE

At issue in this petition is whether the Court should convene an en banc court to review its decision in *Abdi v. Attorney General*, 430 F.3d 1138 (11th Cir. 2005) in light of superseding Supreme Court case law and seven contrary circuit

court decisions.[1] In *Abdi*, the Court held that the 90-day deadline for filing a motion to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7)(C)(i), is "mandatory and jurisdictional, and therefore, it is not subject to equitable tolling." *Id.* at 1150. This finding conflicts with at least three subsequent Supreme Court decisions distinguishing between jurisdictional rules governing a tribunal's adjudicatory capacity and those which are merely claim-processing rules. *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009). These decisions compel the conclusion that the 90-day motion to reopen deadline is not jurisdictional and may be equitably tolled.

Further, the Department of Justice already recognizes equitable exceptions to the 90-day statutory deadline for motions to reopen and has promulgated regulatory exceptions to the filing deadline. Recognizing such exceptions is inconsistent with characterizing the motion deadline as jurisdictional. In addition, whether the 90-day deadline is jurisdictional has considerable practical importance for noncitizens as well as the Board of Immigration Appeals (BIA or Board) and immigration courts, the entities charged with adjudicating motions. For noncitizens, equitable

---

[1] *See*, *e.g.*, *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002).

tolling of the motion to reopen deadline allows full presentation of their defense against removal, which is particularly crucial in cases where improper actions by attorneys have prevented immigration judges or the BIA from hearing those claims in the original proceedings. For the BIA and immigration judges, equitable tolling advances the purpose of a motion to reopen, i.e., "to ensure a proper and lawful disposition" of a removal case, *see Dada v. Mukasey*, 554 U.S. 1, 18 (2008). Given that the BIA and immigration judges routinely engage in an equitable tolling analysis in cases arising in seven circuits, they are well-suited to adjudicate such claims and this Court's recognition of equitable tolling would not overly burden them.

REASONS FOR GRANTING THE PETITION

A. This Court's Decision in *Abdi* Cannot Be Reconciled With Supreme Court Precedent.

This Court's decision in *Abdi* – finding that the 90-day deadline for filing a motion to reopen is a jurisdictional rule – cannot be reconciled with recent Supreme Court decisions distinguishing between jurisdictional rules and claim processing rules. Subject-matter jurisdiction is about "the power to hear a case," whereas a claim-processing rule "does not reduce the adjudicatory domain of a tribunal . . . ." *Union Pacific*, 130 S. Ct. at 596 (internal quotation omitted). Jurisdictional rules are not subject to equitable tolling, whereas claim processing rules generally are. *Holland*, 130 S. Ct. at 2560 (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).

In *Henderson*, the Supreme Court considered whether Congress provided a "clear" indication that the statutory deadline for filing a notice of appeal in the Veteran's Court is "jurisdictional." *Henderson*, 131 S. Ct. at 1203. The Court relied on several factors relevant here 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 1204-06.

In this case, 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 contained in a separate section 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 alien").

If *Henderson* leaves any doubt that the 90-day motion deadline is not jurisdictional, the Court's decisions in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, *supra*, and *Holland v. Florida*, *supra*, 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*, 130 S. Ct. at 599. The Court reasoned that "Congress alone controls the [NRAB's] jurisdiction," *id.* at 590, and "Congress gave the [NRAB] no authority to adopt rules of jurisdictional dimension," *id.* at 597. Similarly 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."). Thus, 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 immigration court or the BIA where a motion to reopen is not filed within 90 days.

The analysis in *Holland* also bears on the issue now before the Court. In that case, the Supreme Court found that a provision of the 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*, 130 S. Ct. at 2560. 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 2560-61 (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." *Id.* at 2561. 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 *Holland* Court also found that the subject matter – 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*, 130 S. Ct. at 2561 (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.

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). Further, the Supreme Court admonished 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*, 130 S. Ct. 827, 834, 838-39 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions). Thus, when this Court invalidated the departure bar regulation to motions to reopen (8 C.F.R. § 1003.2(d)) last year, it emphasized the significance of Congress's codification of the motion to reopen in 1996 and that the statute "guarantees an alien the right to file one motion to reopen." *See Jian Le Lin v. United States AG*, 681 F.3d 1236, 1240-41 (11th Cir. 2012); *see also Prestol Espinal v. AG of the United States*, 653 F.3d 213, 219 (3d Cir. 2011) (finding that the Supreme Court's "repeated emphasis [in *Dada*] on the statutory right to file a motion to reopen, and the effort of the Court to avoid abrogating that right (even in the face of another *statutory* provision which conflicted), inform our analysis.").

The statutory right to pursue reopening and the Supreme Court's view of the motion as an "important safeguard," *Dada*, 554 U.S. at 18, contrasts with this

Court's characterization of the motion to reopen as "disfavored." *Abdi*, 430 F.3d at 1149. The Court relied on *INS v. Doherty*, finding, "[m]otions to reopen are disfavored, especially in a removal proceeding, 'where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'" *Abdi*, 430 F.3d at 1149 (quoting *Doherty*, 502 U.S. 314, 323 (1992)). But that language pertained to the pre-1996 regulatory motion,[2] not the statutory motion. The Court concluded,

> There is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derives solely form the regulations promulgated by the Attorney General. [citation omitted] The regulation with which we deal here, 8 C.F.R. § 3.2 (1987), is couched solely in negative terms; it requires that under certain circumstances a motion to reopen be denied, but does not specify under which it shall be granted…

Doherty, 502 U.S. at 322.

In contrast, under current law, the statutory right is not couched in "negative terms," but distinctly sets forth the right to file a motion to reopen. 8 U.S.C. § 1229a(c)(7). Moreover, because, as this Court has recognized, individuals may pursue their motions after being deported, *Jian Le Lin v. United States AG*, *supra*,

[2] The regulation at issue in *Doherty* said,

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . .

8 C.F.R. § 3.2 (1987).

concerns about delaying deportation are no longer relevant.[3]

In sum, application of Supreme Court precedent demonstrates that this Court should not regard the 90-day deadline for filing motions to reopen as jurisdictional. Thus, the Court should convene an en banc panel to reconsider its decision in *Abdi*.

B. The Department of Justice Already Has Adopted Equitable Exceptions to the Motion to Reopen Deadline and Previously Has Endorsed Equitable Tolling of the Motion Deadline.

The agency itself has recognized the importance and remedial nature of motions to reopen and thus has adopted rules governing the adjudication of motions to reopen that provide equitable exceptions to the statutory requirements – exceptions that are inconsistent with classifying the motion deadline as jurisdictional. For example, by regulation, the immigration judges and the BIA may excuse the 90-day filing deadline and sua sponte reopen a case at any time, 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1); they also may excuse a late filing where the parties jointly file the motion, 8 C.F.R. §§ 1003.2(c)(3)(iii) and 1003.23(b)(4)(iv). The BIA, relying on its sua sponte regulatory authority, also declares itself competent to adjudicate motions to reopen filed out-of-time in cases involving "exceptional circumstances," such as a significant development of the

[3] Regardless, even if there were potential concerns about delaying deportation, such concerns could not justify depriving individuals of a statutory right to pursue reopening, especially given how integral such motions are to the legislative scheme. *Cf. Holland*, 130 S. Ct. at 2562 (rejecting an argument that equitable tolling undermines AEDPA's "basic purpose" because "AEDPA seeks to eliminate delays in the federal habeas review process").

law. *See*, *e.g.*, *Matter of Vasquez-Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening sua sponte given the "importance of the matter" and a new circuit court interpretation of crime of violence different from the BIA's interpretation); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (reopening sua sponte in the "interest of justice" where there was a statutory change in the definition of "refugee"). If the 90-day deadline truly were jurisdictional such that the BIA lacked "the power to hear," *Union Pacific*, 130 S. Ct. at 596 (internal quotation omitted), the motion, the BIA could not allow adjudication of any late filed motions.[4]

Furthermore, in the only precedent agency decision to address equitable tolling of the motion statute, former Attorney General Michael Mukasey found that the 90-day deadline is subject to equitable tolling. *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). In this decision, the Attorney General set forth a stringent standard

---

[4] Several courts have rejected similar BIA "jurisdictional" classifications where the BIA created exceptions via regulation or decision. *See*, *e.g.*, *Pruidze v. Holder*, 632 F.3d 234, 237-39 (6th Cir. 2011) (Sutton, J.) (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) (Easterbrook, J.) (same); *Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (Pooler, J.) (same); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011) (Kleinfeld, J.) (rejecting the BIA's classification of the thirty-day appeal deadline as jurisdictional, reasoning "the agency sua sponte decides to exercise its authority where the reasons for lateness are 'extraordinary' . . . something it could not do if the time limit was jurisdictional.") (internal footnote omitted); *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).

for adjudicating ineffective assistance of counsel claims. *Id.* at 730-41. Nonetheless, the Attorney General directed the Board to allow tolling of the motion deadline. *Id.* at 732. 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 1,[5] 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.

C. Whether the Motion Filing Deadline Is a Jurisdictional Rule Carries Considerable Practical Importance for Noncitizens, Immigration Judges and the BIA.

1. Equitable tolling of the motion to reopen deadline affords noncitizens facing removal a critical opportunity to present their claims and to exercise their appeal rights.

Whether a rule is jurisdictional or is a claim processing rule "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 131 S. Ct. at 1202. Equitable tolling of the motion to reopen deadline allows noncitizens to fully present their claims for relief, which is particularly crucial after improper actions by attorneys have prevented immigration judges from hearing those claims in the original proceedings, *see*, *e.g.*, *Rodriguez-Lariz v. INS*,

---

[5] The Attorney General determined that instead of reforming the process for bringing ineffective assistance of counsel claims through adjudication, the "preferable administrative process … is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated." *Id.* at 3. Accordingly, he directed the Executive Office for Immigration Review to initiate a rulemaking process. *Id.*at 3-4.

282 F.3d 1218 (9th Cir. 2002), or prevented noncitizens from exercising their appeal rights, *see*, *e.g.*, *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004).

Rodriguez-Lariz involved a married couple with two U.S. citizen children who were "taken advantage of by an unscrupulous immigration consultant who persuaded [them] to pay relatively large sums of money in exchange for faulty and ineffective representation and lied to them about his own defaults." *Rodriguez-Lariz*, 282 F.3d at 1225. The consultant charged the couple several thousand dollars to help them apply for legal permanent residency. *Id*. at 1220-22. After the asylum office denied their application and removal proceedings commenced, the consultant and attorneys working with him missed the deadline for filing the couple's application for suspension of deportation; failed to meet with or prepare the couple for their hearings; misled the couple as to the status of their application; and filed motions and appeals which failed to address the reason for the denial of the application. *Id*. at 1221-22. After learning of these actions, the couple retained a new attorney who filed a motion to reopen within a month of taking on representation, but after the 90-day deadline had passed. *Id.* at 1225. Absent the application of equitable tolling, neither the immigration judge nor the Board would have had the opportunity to hear the merits of the couple's suspension application.

In other cases, attorneys hired to navigate the complex immigration system simply fail to recognize that their clients are eligible for a particular form of relief;

their clients, who have trusted the attorneys' expertise, do not learn of their eligibility for relief until their cases are complete and the motion to reopen deadline has passed. *See Gordillo v. Holder*, 640 F.3d 700 (6th Cir. 2011); *see also Avagyan v. Holder*, 646 F.3d 672, 675-76 (9th Cir. 2011) (applying equitable tolling where *notario* and an individual who held himself out to be an attorney failed to inform client of eligibility for adjustment of status in immigration court).

In *Gordillo*, a married couple with two U.S. citizen children was eligible for relief under the Nicaraguan Adjustment and Central American Relief Act of 1997. 640 F.3d at 701. However, their original attorney failed to recognize this eligibility. *Id*. Upon learning that they had been ordered deported and had lost their appeal, the couple sought additional advice, but two more attorneys and a *notario* with whom the couple consulted also failed to inform them of their eligibility for relief. *Id*. at 704-05. By the time the couple located a knowledgeable attorney, they had long lost their opportunity to file a timely motion to reopen. *Id*. at 706.

Thus, absent equitable tolling, noncitizens with clear eligibility for relief from removal would not have the opportunity to present the merits of their claims simply because they were unfortunate enough to have attorneys who failed to fulfill their professional obligations.

//

2. Equitable tolling of the motion to reopen deadline affords the BIA and Immigration Judges a manageable mechanism to help ensure that motions "safeguard" the lawfulness of removal proceedings.

The immigration courts and the BIA are well-suited to assess whether the 90-day deadline merits equitable tolling in particular cases.[6] As a practical matter, Immigration Judges and the BIA routinely engage in this analysis in cases arising within the jurisdiction of the seven circuits that expressly have recognized the doctrine's application to motions to reopen.[7] Immigration Judges and the BIA can provide determinations on the record as to whether the deadline warrants tolling.

The Board has applied equitable tolling where, as in this case, an attorney did not file a timely application for relief. *See In re Rodriguez Rodriguez*, 2007

---

[6] Even in the now-vacated *Compean* decision, the Attorney General was able to set forth a manageable and familiar test for the Board to assess whether to toll:

> [T]he Board should evaluate due diligence on a case-by-case basis, taking into account the circumstances of the case and the reasons offered for any delay. The Board should perform this evaluation by determining objectively when a reasonable person should have discovered the possibility that he had been victimized by the lawyer's deficient performance, and when a reasonable person would have taken steps to cure it following discovery.

24 I&N Dec. at 733.

[7] Immigration Judges and the BIA have evaluated equitable tolling claims in the context of motions to reopen for over 13 years, since the Ninth Circuit first recognized the doctrine's application. *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (finding the 180-day deadline for motion to reopen in absentia orders subject to equitable tolling). *See*, *e.g.*, *In re Turk*, 2010 WL 4500915 (BIA Oct. 19, 2010) (unpublished); *In re Balmeo*, 2009 WL 3250432 (BIA Sep. 28, 2009) (unpublished); *In re Rodriguez Rodriguez*, 2007 WL 2074548 (BIA Jun. 15, 2007) (unpublished); *In re Khan*, 2007 WL 2074553 (BIA Jun. 15, 2007) (unpublished).

WL 2074548 (BIA Jun. 15, 2007) (unpublished); *In re Khan*, 2007 WL 2074553 (BIA Jun. 15, 2007) (unpublished). Among other reasons, the Board also has found that equitable tolling is appropriate where attorneys have failed to file briefs, *see*, *e.g.*, *In re Torres*, 2007 WL 3318671 (BIA Sep. 21, 2007) (unpublished), did not recognize that their clients were eligible for particular forms of relief, *see*, *e.g.*, *In re Palomares-Quintero*, 2008 WL 1924626 (BIA Apr. 11, 2008) (unpublished) or misled noncitizens about the status of their cases, *see*, *e.g.*, *In re Chang*, 2004 WL 2952096 (BIA Nov. 17, 2004) (unpublished).

Since no new administrative framework need be created, any burden associated with requiring Immigration Judges and the BIA to consider whether the deadline merits tolling pales in comparison to unlawful, and potentially disastrous, consequences of foreclosing review of a motion to reopen. Especially given the Supreme Court's characterization of such motions as "important safeguards," recognition of equitable tolling would be both manageable and critical to ensuring that noncitizens are not unfairly and unlawfully deprived of the opportunity to present their removal cases, including their claims for relief. *Dada*, 554 U.S. at 18.

CONCLUSION

For the foregoing reasons, the Court should convene an en banc court to reconsider its decision in *Abdi*.

Dated: January 2, 2013

Respectfully submitted,

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7522
(202) 742-5619 (fax)
bwerlin@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 hereby certify that on January 2, 2013, a true and correct copy of the foregoing Brief of the American Immigration Council and the National Immigration Project of the National Lawyers Guild as *Amici Curiae* In Support of Petitioner was served on all counsel of record in this appeal via CM/ECF and to the following via regular mail:

Michael Kimberly
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006

Dara S. Smith
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

January 2, 2013

s/ Beth Werlin

Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
202-507-7522
bwerlin@immcouncil.org