Nos. 18-776, 18-1015

IN THE

Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

RUBEN OVALLES,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASYLUM SEEKER ADVOCACY PROJECT, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, IMMIGRANT JUSTICE IDAHO, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL JUSTICE FOR OUR NEIGHBORS, NORTHWEST IMMIGRANT RIGHTS PROJECT, REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are nonprofit organizations that advocate for and on behalf of immigrants. Amici have a direct interest in ensuring that judicial review is meaningfully available to noncitizens facing removal.

The American Immigration Council ("the Council") is a nonprofit 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 in litigation related to motions to reopen, including to argue that the motion to reopen deadline is subject to equitable tolling. The Council has a keen appreciation of the importance of judicial review over agency decisions and has a strong interest in ensuring that agency adjudications do not prevent noncitizens from pursuing their opportunity to ensure the correct and lawful disposition of removal proceedings.

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 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;

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

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

The Asylum Seeker Advocacy Project ("ASAP") sees a future where the United States welcomes individuals who come to our borders fleeing violence. ASAP works alongside asylum seekers to make this vision a reality. ASAP's model has three components: online community support, emergency legal aid, and nationwide systemic reform. ASAP represents individuals who have arrived at the Mexico-U.S. border to seek asylum, regardless of where they are currently located. As part of that work, ASAP regularly prepares cases at immigration courts, the BIA, and U.S. Courts of Appeals.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 40,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents nondetained immigrants in removal proceedings. The Bronx Defenders' removal

defense practice extends to motions to reopen, appeals and motions before the BIA, and petitions for review.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled, advised, or represented more than 10,000 clients in immigration matters including deportation defense, affirmative applications, and advisals. Since 2013, BDS has represented more than 1,200 detained immigrants through the New York Immigrant Family Unity Project.

The Capital Area Immigrants' Rights Coalition ("CAIR Coalition") is the only nonprofit, legal services organization dedicated to providing legal services to immigrant adults and children detained and facing removal proceedings throughout Virginia and Maryland. CAIR Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights presentations, impact and advocacy work, and the training of attorneys representing immigrants. CAIR Coalition also secures pro bono legal counsel for immigration detainees and provides in-house pro bono representation for detained adults and children.

Immigrant Justice Idaho ("IJI") is Idaho's only Free Legal Service Provider and Referral Service recognized by the Department of Justice. IJI fills a colossal gap in Idaho's immigration services by providing free and low-cost removal defense to low income individuals who appear before Idaho's immigration court. IJI also provides accessible, timely and culturally ap-

propriate education on immigration law and policy to vulnerable communities, the general public and technical skills trainings for lawyers and law students.

The National Immigrant Justice Center ("NIJC") is a nonprofit organization accredited by the BIA since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other noncitizens facing removal and family separation. NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education.

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a national nonprofit 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 review of equitable tolling of the statutory deadline for motions to reopen and has a strong interest in ensuring that the statute is cor-

rectly interpreted to give noncitizens the full benefit of this important statutory right.

National Justice for Our Neighbors ("JFON") was established by the United Methodist Committee On Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Annandale, Virginia, which supports 18 sites nationwide. Those 18 sites collectively operate in 14 states and Washington, D.C., and include over 40 clinics. JFON advocates for interpretations of federal immigration law that protect vulnerable immigrants and refugees.

The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born. With over 35 attorneys and legal workers, NWIRP provides direct representation to low-income immigrants in removal proceedings. NWIRP has filed numerous motions to reopen to correct inaccurate outcomes in removal proceedings and has a direct interest in the outcome of this case.

The Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a BIA-recognized, nonprofit, legal services agency with ten offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, community engagement, advocacy, policy, and litigation. RAICES regularly represents detained and

nondetained unaccompanied minors, adults, and families, asylum seekers, and victims of domestic violence, trafficking, and other crimes.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to assist the Court in assessing the importance of judicial review over issues related to equitable tolling of the statutory deadline for filing motions to reopen removal proceedings. Judicial review of decisions whether to toll the deadline for motions to reopen is critical to protect the rights of immigrants who were unduly prevented from seeking to reopen their cases due to circumstances beyond their control. Absent access to equitable tolling, noncitizens with compelling claims based on newly available evidence will face removal without any adjudicator considering the merits of those claims. The situations addressed in this brief demonstrate that, where federal courts of appeals have exercised their jurisdiction and corrected the agency's wrongful denial of equitable tolling, deserving movants have been able to correct errors in the prior proceeding and pursue relief from removal. But courts that refuse even to consider such requests for review—including the Fifth Circuit in these cases—incorrectly allow the agency's wrongful denials of equitable tolling to remain in place and deny noncitizens any opportunity to apply for relief from removal. The Court should remand these cases to the Fifth Circuit with instructions to review the merits of the agency's equitable tolling determinations.

ARGUMENT

FEDERAL COURT REVIEW OF EQUITABLE TOLLING DECISIONS IS CRUCIAL TO ENSURE THAT IMMIGRANTS ARE NOT DEPRIVED OF THEIR STATUTORY RIGHT TO MOVE TO REOPEN A REMOVAL PROCEEDING

Throughout the long history of equitable tolling, federal courts have been asked to review many diverse legal questions arising under the doctrine. *See, e.g.*, *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (reviewing whether circuit court's standard for attorney misconduct justified equitable tolling); *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 430 (1965) (reviewing whether pursuit of state law action that was ultimately dismissed due to improper venue justified tolling); *Bauserman* v. *Blunt*, 147 U.S. 647, 651-653 (1893) (reviewing whether limitations period continued to run during debtor's absence from the state, which "depend[ed] upon the local law of Kansas" and the Court's construction thereof); *Amy* v. *City of Watertown*, 130 U.S. 320, 326 (1889) (reviewing whether opposing party's evasion of service of process could justify tolling of the limitations period). Federal court review of these legal questions has been essential to ensuring the fair and uniform application of the doctrine of equitable tolling.

After this Court ruled that courts of appeals can review rejections of untimely motions to reopen removal proceedings where an individual sought equitable tolling, *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154-2155 (2015), the Fifth Circuit joined the other nine circuits to have addressed the issue in ruling that the 90-day deadline to submit a statutory motion to reopen removal proceedings pursuant to 8 U.S.C. § 1229a(c)(7) is subject to equitable tolling. *See Lugo-Resendez* v. *Lynch*,

831 F.3d 337, 344 (5th Cir. 2016). Judicial review of agency decisions denying equitable tolling of the deadline for statutory motions to reopen has proven critical to ensuring that immigrants are not deprived of their statutory right to reopen removal proceedings due to extraordinary circumstances beyond their control despite having diligently pursued their rights. The situations summarized in this brief demonstrate that this frequently involves review of legal questions—an important task that the federal courts must be allowed to perform in *all* cases. Some are cases in which a federal court exercised its jurisdiction, and the removal proceedings were ultimately reopened. One follows the course presented in these cases: the Fifth Circuit refused to accept jurisdiction to review an equitable tolling claim, despite the existence of a question of law, such that the harm done by the agency's denial of equitable tolling continued unreviewed by any Article III court.[2]

The Court should vacate and remand so that the Fifth Circuit can consider the merits of Petitioners' legal arguments as to why the Board of Immigration Appeals ("BIA") erred in denying equitable tolling.

A. *Ogunfuye* v. *Barr*, 764 F. App'x 444 (5th Cir. 2019)

Juliana Adenike Ogunfuye was admitted to the United States as a lawful permanent resident in November 1980 at the age of 17. Nearly ten years later, in October 1990, she was convicted of theft and forgery for writing two fraudulent checks. 764 F. App'x at 444

[2] These accounts are taken from federal court and agency decisions and pleadings, as well as correspondence between amici and counsel or former counsel for the individuals involved.

(per curiam). She was sentenced to five years' confinement, but that sentence was suspended, and she never served any time in jail; she completed her probation early in 1994.

In 1991, an immigration judge determined Ms. Ogunfuye's convictions did not render her deportable and terminated deportation proceedings against her. In the years following her 1990 conviction, she graduated from nursing school, earned her license and began her career as a nurse, and raised her two U.S. citizen children.

Over 12 years after her convictions, in 2003, Ms. Ogunfuye applied for naturalization. At her interview for that application, she received a Notice to Appear charging her as removable based on the same two convictions from 1990.

In October 2004, Ms. Ogunfuye applied for a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1995), and for cancellation of removal under 8 U.S.C. § 1229b(a). The immigration judge pretermitted both applications, finding that she could not benefit from the continued availability of Section 212(c) relief under *INS* v. *St. Cyr*, 533 U.S. 289 (2001), because she had been convicted by jury verdict, not by guilty plea. The immigration judge further found her ineligible for cancellation of removal due to the 1990 convictions.

The remainder of the case proceeded, and the final merits hearing was continued five times. *See Ogunfuye* v. *Holder*, 610 F.3d 303, 305 (5th Cir. 2010). During one such continuance, the immigration judge instructed Ms. Ogunfuye's attorney to file all applications for relief and obtain biometrics by February 23, 2007. The day before that deadline, her attorney asked for yet another

continuance. Although the immigration judge denied the continuance, the judge gave Ms. Ogunfuye's attorney an additional month to submit the application for relief and biometrics. Despite this additional time, at the final merits hearing, in May 2007, Ms. Ogunfuye's attorney explained that, due to the attorney's own oversight, the biometrics had not been taken. *Id.*

The immigration judge ruled that the applications for relief had been abandoned because of the attorney's failure to obtain the biometrics. 764 F. App'x at 444. Ms. Ogunfuye appealed the decision to the BIA, but the BIA affirmed the immigration judge's order. Ms. Ogunfuye's attorney then appealed the BIA decision to the Fifth Circuit, which denied the petition, although it recognized that attorney error had caused the failure to comply with the biometrics requirement. *See Ogunfuye*, 610 F.3d at 306-307. Ms. Ogunfuye was then removed to Nigeria. 764 F. App'x at 444.

Ms. Ogunfuye never gave up on her case, but rather continued to seek legal assistance regarding her eligibility to return to the United States.

In February 2014, the BIA decided that a person otherwise eligible for relief under Section 212(c) could apply for such relief regardless of whether the conviction resulted from a plea agreement or a trial. *Matter of Abdelghany*, 26 I. & N. Dec. 254, 268-269 (BIA 2014). While in Nigeria, Ms. Ogunfuye consulted with yet another attorney in November 2016 and learned of the change in law for the first time. And, for the first time, she learned that there was a basis for a claim for ineffective assistance of counsel against her former attorneys.

Ms. Ogunfuye promptly filed state bar complaints against her former attorneys, and then filed a motion to

reopen her removal proceeding in the BIA based on her eligibility for Section 212(c) relief. In her motion, she argued that the deadline for her motion to reopen warranted equitable tolling due to the ineffective assistance of her original counsel and the change in law and that she had acted diligently in pursuing her rights.

The BIA denied her motion to reopen as time-barred. 764 F. App'x at 444. The BIA found that Ms. Ogunfuye should have known of any ineffectiveness of her former counsel once she was held removable for failing to complete her biometrics. The Fifth Circuit held that it lacked jurisdiction to review the basis for the BIA's refusal to equitably toll the deadline because it was a question of fact, subject to the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(C). *Id.* at 445.[3]

In so holding, the Fifth Circuit failed to address a critical legal question: whether the BIA correctly applied the legal standard of equitable tolling (*i.e.*, extraordinary circumstances and due diligence) to the undisputed facts. Notably, the government did not dispute any of the facts that Ms. Ogunfuye presented to establish diligence and extraordinary circumstances; instead it argued that those facts failed to meet the legal standard for entitlement to equitable tolling.

Despite the lack of any factual dispute between the parties, the Fifth Circuit ruled that it lacked jurisdiction and simply accepted the BIA's erroneous application of the equitable tolling standard. That decision denied Ms. Ogunfuye the opportunity to have the BIA adjudicate her motion, unhindered by ineffective counsel

[3] The Fifth Circuit separately stated that it could address whether the BIA had incorrectly ignored the Fifth Circuit's precedent holding that a change in law could serve as the basis for equitable tolling. 764 F. App'x at 446.

and with the benefit of correctly interpreted law. Without her day in court, Ms. Ogunfuye was forced to remain in a country she left as a minor, separated from her family members, all of whom are U.S. citizens. She had to give up her home and her career as a nurse and has missed the graduations of her two U.S. citizen children and the birth of her grandchild. She has been unable to care for her aging U.S. citizen parents and was not in Texas when her father died in 2012. Had the Fifth Circuit considered her appeal on the merits, the BIA's equitable tolling ruling would have been highly vulnerable due to her attorneys' ineffective assistance. And had the case been reopened, it is highly likely, given her family ties, the nonviolent nature of the convictions, and her rehabilitation, that the immigration judge ultimately would have granted her application for relief from removal under Section 212(c).

B. *Martinez Del Cid* v. *Lynch*, 652 F. App'x 521 (9th Cir. 2016)

Ingrid Martinez Del Cid, a Guatemalan citizen, arrived in the United States in November 1991 when she was 16 years old. While living in the United States, Ms. Martinez Del Cid married and had three U.S. citizen children. She worked as a caregiver in a nursing home.

In 1998, Ms. Martinez Del Cid travelled to Mexico to visit her sick mother-in-law. When she tried to return to the United States, she was stopped at the border. An asylum officer determined that she had a credible fear of returning to Guatemala. Ms. Martinez Del Cid was paroled a few months later and kept the immigration court in San Diego apprised of her address. Her case moved at a glacial pace.

A decade later, in August 2008, at the San Francisco District Office of the Citizenship & Immigration Service, a Department of Homeland Security ("DHS") officer personally served her with a Notice to Appear charging her with removability from the United States. Though the San Francisco Immigration Court then mailed her a notice stating that her hearing would take place on October 29, 2008, she did not receive it despite having provided the immigration court with her correct address. When Ms. Martinez Del Cid did not appear, an immigration judge ordered her removed in absentia. She did not receive notice of that decision either.

Ms. Martinez Del Cid did not learn that she had been ordered removed until early 2010. After DHS officers visited her home, on February 25, 2010, Ms. Martinez Del Cid consulted with an attorney. She learned of her removal order for the first time at that meeting.

The attorney subsequently filed a motion to rescind the *in absentia* order, solely on the basis that the DHS officer who had served her with the Notice to Appear had misled Ms. Martinez Del Cid into believing that she was not eligible for any form of relief. That motion was plainly inadequate; the attorney failed to (1) submit any evidence or affidavits in support of the motion; or (2) assert that Ms. Martinez Del Cid had not received the mailed notice. *See* 652 F. App'x at 523 (holding that Ms. Martinez Del Cid's attorney had erred by "'filing a worthless motion' that 'wasted [Martinez Del Cid's] one opportunity to reopen [her] case'" (alterations in original)). The immigration court denied the motion because it lacked the requisite supporting evidence demonstrating why Ms. Martinez Del Cid had failed to appear.

Her attorney appealed the denial to the BIA and submitted an identical brief, still unsupported by any

evidence. The BIA denied the appeal on January 5, 2012, and the Ninth Circuit affirmed, holding that Ms. Martinez Del Cid had not submitted necessary evidence in support of certain claims and had not administratively exhausted other claims. *See Martinez Del Cid* v. *Holder*, 489 F. App'x 196, 197 (9th Cir. 2012).

Within one month of her former attorney's withdrawal, Ms. Martinez Del Cid consulted with a new attorney and filed a motion to reopen based on ineffective assistance of her former counsel. 652 F. App'x at 523. Her motion included the requisite sworn affidavits from Ms. Martinez Del Cid and her current attorney, as well as a complaint filed against her former attorney with the State Bar of California. *See id.* at 524. The motion explained that her former attorney had submitted erroneous and insufficient filings and that she had diligently participated in her case *without ever suspecting her former attorney's wrongdoing.* Nevertheless, the BIA denied the motion on March 22, 2013, holding, *inter alia*, that the motion was untimely and not subject to equitable tolling because Ms. Martinez Del Cid's actions were insufficient to comply with the procedural requirements for ineffective assistance of counsel claims in immigration court. Specifically, the BIA faulted her for not serving a copy of the affidavit setting forth her ineffective assistance claim on her former attorney, although her motion contained other evidence that the former attorney was aware of the claim.

Ms. Martinez Del Cid appealed, and the Ninth Circuit—exercising its jurisdiction to review the denial of equitable tolling—remanded. 652 F. App'x at 524. The court held that Ms. Martinez Del Cid had demonstrated that equitable tolling of the motion to reopen deadline was warranted and that she had complied with the BIA's procedural requirements laid out in *Matter of*

Lozada, 19 I. & N. Dec. 637 (BIA 1988) (history omitted), for presenting a claim of ineffective assistance of counsel. 652 F. App'x at 523-524. The BIA had erred by adding an additional evidentiary requirement (*i.e.*, a showing that the affidavit had been presented to her former attorney) without notice to Ms. Martinez Del Cid of this new supposed requirement. *Id.*

The Ninth Circuit's review of the BIA's equitable tolling decision thus hinged on a legal question: whether the BIA had correctly applied its precedent setting forth the procedural requirements for making an ineffective assistance claim or whether the agency improperly created an additional evidentiary requirement. Identifying the requirements for an ineffective assistance claim is a pure question of law, based solely on the BIA's interpretation of *Matter of Lozada*. *See* 652 F. App'x at 524. Federal court review of these types of legal questions is crucial to ensure that noncitizens are afforded the full benefit of the statutory right to move to reopen removal proceedings.

On remand, the case was administratively closed. Ms. Martinez Del Cid remains a productive member of her community, where she raises her three U.S. citizen children and works as a caregiver in a nursing home.

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

Simeon Gaberov arrived in the United States in June 1990 and applied for asylum based on persecution by the Communist party in his native Bulgaria. 516 F.3d at 592. Mr. Gaberov and a colleague had attempted to unionize to oppose mistreatment of workers in a government owned factory. *Id.* They were transferred

to different cities and fired, and his colleague was found dead soon after. *Id.*

In 1998, the immigration judge denied Mr. Gaberov's asylum application. 516 F.3d at 592. The BIA affirmed that denial without opinion in 2002. *Id.* The BIA claimed to have mailed notice of that decision to Mr. Gaberov's attorney, but Mr. Gaberov and his attorney both stated that the only communication they received was a cover letter that came with a decision in another case. *Id.* at 593. Mr. Gaberov's attorney contacted the BIA upon receipt of that mailing but was informed that Mr. Gaberov's appeal was still pending. *Id.* The attorney and Mr. Gaberov also went to the U.S. Citizenship and Immigration Services office in Chicago, where DHS officers informed them that Mr. Gaberov was not deportable. *Id.* at 593, 596.

Later in 2002, Mr. Gaberov married Stefka Milkova, a U.S. citizen. 516 F.3d at 593. Mr. Gaberov also had a close relationship to his son, a lawful permanent resident, as well as his daughter-in-law and his U.S. citizen grandchildren. *Id.* Since arriving in the United States, Mr. Gaberov ran his own construction business, paid taxes, and never had any run-ins with law enforcement. *Id.*

Ms. Milkova filed a petition for an immigrant visa (Form I-130) for her husband that, if granted, would have entitled Mr. Gaberov to apply to adjust his status to lawful permanent resident. 516 F.3d at 593. The couple appeared before a U.S. Citizenship and Immigration Services officer for adjudication of the petition in 2005. *Id.* The officer informed Mr. Gaberov that, although the BIA had issued a decision in his prior asylum case, the decision was not binding because he had received insufficient notice of it. *Id.* The immigration

officer granted Ms. Milkova's petition for an immigrant visa for Mr. Gaberov. *Id.*

Later that same month, Mr. Gaberov was ordered to report for deportation. 516 F.3d at 593. He did so twice, but DHS officers granted him a stay of deportation based on his evidence of deficient notice of the BIA decision. *Id.*

Mr. Gaberov then hired a new attorney and filed a motion to reopen with the BIA. 516 F.3d at 593. The motion argued that the deadline for moving to reopen should be tolled because Mr. Gaberov never received notice of the BIA's decision and, thus, could not have sought reopening within 90 days of its issuance. The motion further explained that Mr. Gaberov acted diligently in that he followed up on the faulty notice when he received it and asked about it again during the I-130 interview. The BIA refused to apply equitable tolling and denied the motion to reopen as untimely. *Id.* The BIA made no mention of the defective notice. *Id.* In response to Mr. Gaberov's subsequent motion to reconsider, the BIA stated that equitable tolling was not available without an affidavit from counsel averring nonreceipt of the notice, and because Mr. Gaberov failed to establish due diligence, under the Seventh Circuit's precedent, in ascertaining his appeal's status. *Id.* at 593-594.

The Seventh Circuit exercised appellate jurisdiction and reversed and remanded the BIA decision, concluding that Mr. Gaberov had demonstrated that equitable tolling was warranted. 516 F.3d at 597. It held that affidavits, while helpful, were not required to show deficient notice where Mr. Gaberov had provided other documentary evidence in support of his claim. *Id.* at 595. It also held that diligence was shown where Mr.

Gaberov had been informed numerous times that he was not deportable and that his appeal was still pending. *Id.* at 596.

The Seventh Circuit's review of the BIA's equitable tolling decision turned on legal questions: (1) whether, as a legal matter, affidavits were necessary to show deficient notice, and (2) whether prior Seventh Circuit precedent dictated a finding that Mr. Gaberov had not pursued his claims with due diligence. *See* 516 F.3d at 595-596. Review of these types of questions requires not an analysis of disputed facts, but application of legal and evidentiary standards. Federal courts are uniquely well-suited to ensure the fair and uniform application of such legal standards.

Mr. Gaberov is now a lawful permanent resident living with his U.S. citizen wife. He is retired and plays a major role in the lives of his son and grandchildren.

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

Leslie M. Castellanos, a citizen of Guatemala, first entered the United States in January 1990 to study hotel and business administration. 640 F.3d at 701. She left the country in December 1991, and when she returned five months later, she overstayed her visa. *Id.* Ms. Castellanos' husband, Josue Gordillo, also a citizen of Guatemala, entered the United States in June 1990. *Id.* The couple has two U.S. citizen children. *Id.* at 702.

The couple hired an attorney and applied for asylum and withholding of removal in October 1995. 640 F.3d at 701. Ms. Castellanos and Mr. Gordillo were eligible for suspension of removal under the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA"), Pub. L. No. 105-100, 111 Stat. 2160. *Id.*

However, the couple's attorney never referenced this statute in his briefing before the agency. *Id.* As a result, the immigration judge denied the couple's application and the BIA affirmed that decision in December 2002. *Id.*

Ms. Castellanos and Mr. Gordillo did not learn of the BIA's decision until July 2004, because their attorney never notified them of it. 640 F.3d at 701. Instead, they learned of the BIA's decision when DHS refused to renew their work authorizations. *Id.* The couple then consulted two other attorneys and a "notario," all of whom incorrectly informed them that they had no legal basis for relief. *Id.* at 702, 704.

Four years after the BIA decision, Mr. Gordillo was arrested and taken into custody. 640 F.3d at 702. Ms. Castellanos was not taken into custody because of the hardship that would have caused the couple's two children. *Id.* Ms. Castellanos quickly consulted a new attorney, who for the first time informed her of the couple's eligibility for relief under NACARA. *Id.* Through their new counsel, the couple promptly filed a grievance against their first attorney with the State Bar of Ohio, sent a copy of that grievance to their first attorney, and filed a motion to reopen their case before the BIA. *Id.* In the meantime, Mr. Gordillo was removed to Guatemala. *Id.*

The BIA denied the couple's motion to reopen on October 21, 2008. 640 F.3d at 702. It reasoned that, because the couple had not shown their entitlement to relief under NACARA, they could not show that their former attorney had been ineffective, and therefore were not entitled to equitable tolling of the motion to reopen deadline. *Id.* In a decision on the couple's subsequent motion to reconsider, the BIA refused to reo-

pen because Ms. Castellanos had not shown the diligence necessary to warrant equitable tolling. *Id.* The couple appealed to the Sixth Circuit. *Id.*

The Sixth Circuit reversed the BIA's ruling, holding that the couple was entitled to equitable tolling from when they learned of the BIA's denial of their appeal to when they filed their motion to reopen. 640 F.3d at 704-705. It held that the BIA had erred in concluding that the couple should have known of their former lawyer's ineffectiveness. *Id.* at 704. It further held that the couple had been diligent following discovery of their attorney's error. *Id.* at 704-706. Because the BIA had not addressed whether the couple had been diligent between the denial of their appeal to the BIA in 2002 and their discovery of that denial in 2004, the Sixth Circuit remanded for the BIA to make that determination. *Id.* at 706.

The Sixth Circuit's decision thus turned on whether the BIA had correctly applied the legal standard of equitable tolling to the undisputed facts before it. It determined that the BIA had not correctly applied that standard. But without the Sixth Circuit's review, Ms. Castellanos and Mr. Gordillo would have been left without any avenue for relief from the BIA's erroneous determination.

On remand, the BIA concluded that equitable tolling was warranted for all of 2002 through 2008 and remanded the cases to the immigration judge. Both Ms. Castellanos and Mr. Gordillo were granted suspension of deportation and became lawful permanent residents.

In 2014, after six years in Guatemala, Mr. Gordillo returned to the United States and was reunited with his family. The family now lives in California. Ms. Castellanos has a certification in medical interpreting and

volunteers to help translate in schools and hospitals in California. Mr. Gordillo has finished his nursing degree and plans to take the necessary tests to gain his California nursing license. Their two U.S. citizen sons are also thriving: the 15-year-old is attending high school, and the 18-year-old received a gymnastics scholarship and is starting his first year of college this month.

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

Hector Mendez-Vargas arrived in the United States in February 1990. 436 F. App'x at 734. In September 1999, Mr. Mendez-Vargas and his partner (now wife) Isabel Mejia had a daughter, Mirian. *Id.* Mirian, a U.S. citizen, was born with Down's Syndrome. *Id.* She thus relies heavily on the emotional, physical, and financial support that her father provides.

Mr. Mendez-Vargas' removal proceedings commenced in 2001, when Mirian was only two years old. *See* 436 F. App'x at 734. He sought cancellation of his removal pursuant to 8 U.S.C. § 1229b(b)(1), which required that he demonstrate, *inter alia*, "that removal would result in exceptional and extremely unusual hardship" to his U.S. citizen child. 8 U.S.C. § 1229b(b)(1)(D).

Mr. Mendez-Vargas hired an attorney to represent him in the removal proceedings. *See* 436 F. App'x at 734. However, leading up to his May 2002 merits hearing, his attorney never explained that the purpose of the hearing was to determine his eligibility for cancellation of removal. *Id.* Nor did his attorney counsel him that he was required to submit evidence to the immigration court in support of his application for cancellation of removal. *See id.* As a result, his attorney only

introduced Mr. Mendez-Vargas' own testimony regarding the expense and difficulty of obtaining medical assistance in Mexico. *Id.* The attorney, to whom Mr. Mendez-Vargas had already paid $5,200, did not submit any other evidence bearing on the hardship that Mirian would endure should her father be removed to Mexico. *Id.*

The immigration judge denied Mr. Mendez-Vargas' application for cancellation for removal and ordered him removed. 436 F. App'x at 734. The immigration judge accepted that Mirian's Down's Syndrome was exceptional, but cited several evidentiary deficiencies that the judge believed were fatal to establishing eligibility for cancellation. *Id.* The BIA affirmed the immigration judge's removal order. *Id.*

Mr. Mendez-Vargas' attorney then charged him an additional $5,200 to file a petition for review with the Ninth Circuit. 436 F. App'x at 734. The court deemed this petition "meritless," and admonished Mr. Mendez-Vargas' attorney when he failed to respond to the government's motion to dismiss the petition. *Id.* The Ninth Circuit ordered the parties to brief whether the immigration judge should have *sua sponte* raised the issue of ineffective assistance of counsel. *Id.* Mr. Mendez-Vargas' attorney failed to inform him of these developments. *Id.*

The government's counsel offered to consider jointly moving the BIA for reopening if Mr. Mendez-Vargas' attorney provided the information he would use to support cancellation. 436 F. App'x at 734-735. Mr. Mendez-Vargas' attorney not only never replied to the government's request, but also failed to inform Mr. Mendez-Vargas of the offer. *Id.* at 735.

Instead, Mr. Mendez-Vargas' attorney informed him only that the petition for review was denied, and then misinformed him as to the date on which his period to depart the United States voluntarily would expire. 436 F. App'x at 735.

Mr. Mendez-Vargas prepared to leave the United States. 436 F. App'x at 735. He consulted with a new attorney on February 10, 2006, just before he believed he had to leave. *Id.* His new attorney promptly requested his file from his prior attorney, but it was not received until July 2006. *Id.* Within three months of receiving the file, Mr. Mendez-Vargas' new attorney: (1) filed a complaint with the state bar against the former attorney; (2) attempted to negotiate a joint motion to reopen, which government counsel agreed to consider; and (3) gathered a substantial amount of evidence in support of a report she submitted to government counsel. *Id.* When government counsel refused to join in a motion to reopen, new counsel submitted a motion to reopen on Mr. Mendez-Vargas' behalf within a month. *Id.* The motion explained that prior counsel failed to introduce evidence regarding the availability and cost of medical care for Mirian in Mexico.

The BIA denied the motion to reopen because the motion had not established substantial prejudice that affected the outcome of the removal proceedings, and because the motion was untimely and not eligible for equitable tolling. 436 F. App'x at 735. Mr. Mendez-Vargas' new attorney filed a petition for review in the Ninth Circuit. *Id.*

The Ninth Circuit remanded. 436 F. App'x at 737. The court held that Mr. Mendez-Vargas was entitled to equitable tolling where he had no way to know that his first attorney had inadequately represented him until

he met with his new attorney. *Id.* at 736. The Ninth Circuit further tolled the limitations period during the time the government was considering a joint motion to reopen. *Id.* Because the limitations period was tolled, the motion to reopen was timely. *Id.* Ultimately, the court concluded that Mr. Mendez-Vargas was "prevented from reasonably presenting his case by the ineffective assistance of his former counsel." *Id.* at 737.

The decision of the Ninth Circuit hinged on whether the BIA had correctly applied the Ninth Circuit's precedent regarding the legal standard for equitable tolling. In determining whether Mr. Mendez-Vargas had met the legal standard for equitable tolling, the court determined that "[u]nder [its] precedent" the entire period of time from the attorney's error and inadequate representation, through Mr. Mendez-Vargas's discovery of it and compliance with procedural requirements, must be equitably tolled. 436 F. App'x at 736. The court went on to hold that, based on its precedent, the motion to reopen deadline was tolled during the time when the government was considering joining the motion to reopen. *Id.* Without federal court review of these legal standards, the BIA's incorrect application would have been left unchanged.

On remand, Mr. Mendez-Vargas was finally able to present his case. The immigration judge granted him cancellation of removal on August 11, 2016. His daughter was able to benefit from the treatment she received in the United States, with the support of her parents, and has made great strides. She remains unable to work or care for herself, however, and lives with Mr. Mendez-Vargas and his wife.

All of these cases highlight both the need for federal court review of the BIA's application of the doctrine

of equitable tolling, which often involves questions of law, and the fact that federal courts are well suited to conduct these reviews. Where the court of appeals exercised its jurisdiction, it was able to correct the errors of the BIA and give the noncitizen petitioners their day in court—which ultimately resulted in meaningful relief. By contrast, the Fifth Circuit's refusal to do likewise means that Ms. Ogunfuye remains separated from her U.S. citizen family, her job, and the community she built in the over two decades she lawfully resided in the United States, without being given the chance to fully argue her case.

CONCLUSION

The judgments of the court of appeals should be vacated and the cases remanded for further proceedings.

Respectfully submitted.

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