No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying petitioner's request for equitable tolling of the 90-day deadline for filing a motion to reopen on account of alleged ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 558 Fed. Appx. 366. The decisions of the Board of Immigration Appeals denying reconsideration and reopening (Pet. App. 4-5, 6-9) are unreported. The prior decision of the immigration judge ordering petitioner removed (Pet. App. 10-23) and the Board's dismissal of the administrative appeal of that decision are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2014. A petition for rehearing was denied on May 16, 2014 (Pet. App. 24-25). The petition for a writ of certiorari was filed on August 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) permits an alien who is ordered removed from the United States to file a motion to reopen the removal proceedings based on previously unavailable material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the case. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). An alien is entitled to file only one such motion, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJ and the Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ); see also *INS* v. *Doherty*, 502 U.S. 314, 323-324 (1992).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or the Board that his case

should be reopened sua sponte. The IJ or the Board may exercise discretion to reopen a case sua sponte at any time. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. a. Petitioner, a native and citizen of Mexico, entered the United States on an unknown date without being admitted or paroled. Pet. App. 1; Administrative Record (A.R.) 562. In August 2010, he was charged with assault on a family member under Texas Penal Code Ann. § 22.01(a)(1) (West 2011), for striking and grabbing a woman with whom he was then having a "dating relationship." Pet. App. 12; A.R. 523 (information), 526-527 (judgment of conviction). Petitioner pled guilty to the assault charge in September 2010, during a proceeding in which the court also concluded, under Article 42.013 of the Texas Code of Criminal Procedure, that his offense involved "family violence." Pet. App. 12-13; A.R. 526-527; see Tex. Code Crim. Proc. Ann. art. 42.013 (West 2006).

The day after his conviction, the Department of Homeland Security served petitioner with a Notice to Appear charging him with being subject to removal under 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 11; A.R. 562-563. At a hearing before the IJ on January 24, 2011, petitioner conceded

that he was removable as charged. A.R. 196 (hearing transcript).

Petitioner submitted an application for cancellation of removal, a form of discretionary relief available for certain unlawfully present aliens. Pet. App. 11; A.R. 196-197; see 8 U.S.C. 1229b(b). In general, to be eligible for cancellation of removal, such an alien must demonstrate that (1) he has been physically present in the United States for at least ten years immediately preceding the application; (2) he has been a person "of good moral character" during that period; (3) he has not been convicted of an offense under 8 U.S.C. 1182(a)(2), 1227(a)(2), or (a)(3); and (4) he "establishes that removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child [who is a United States citizen or lawfully admitted alien]." 8 U.S.C. 1229b(b)(1)(A)-(D).

b. On August 24, 2011, the IJ denied petitioner's application for cancellation of removal and ordered him removed to Mexico on the conceded charge. Pet. App. 10-20. The IJ concluded that petitioner's assault offense constituted an offense under 8 U.S.C. 1227(a)(2)(A)(i), thereby rendering him ineligible for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C). Pet. App. 14-18.

Section 1227(a)(2)(A) encompasses prior convictions for any "crime involving moral turpitude" for which a sentence of one year or longer may be imposed. 8 U.S.C. 1227(a)(2)(A)(i)(I) and (II). Analyzing the statute of conviction under the framework of *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), the IJ determined that the Texas statute under which petitioner was convicted, Tex. Penal Code Ann. § 22.01(a)(1) (West 2011), is a "divisible" statute that

includes both "offenses that would be considered crimes involving moral turpitude, as well as offenses that would not." Pet. App. 14-17. The IJ accordingly applied the modified categorical analysis required by *Silva-Trevino* and noted that (1) the state criminal court had made an explicit finding of "family violence"; (2) petitioner had unlawfully, intentionally, and knowingly injured a person with whom he was in a dating relationship; and (3) under the relevant Texas law, that person is regarded as a family member. *Id.* at 16. Based on those findings, the IJ concluded that petitioner's offense was "morally reprehensible and necessarily involve[d] turpitude and misconduct, and thus is a crime involving moral turpitude." *Id.* at 16-17. Finally, the IJ determined that petitioner's crime of conviction carried a possible sentence of one year or more in prison. *Id.* at 17-18.

Because the IJ determined that petitioner was ineligible for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C), the IJ denied petitioner's application for that relief and ordered that he be removed to Mexico. Pet. App. 17-19.

c. In September 2011, petitioner filed a timely Notice of Administrative Appeal with the Board. A.R. 173-175. The form on which petitioner filed that notice contained an explicit warning instructing him to "clearly explain the specific facts and law on which you base your appeal of the [IJ's] decision" and noting that "[t]he Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing." A.R. 174. Despite this warning, petitioner failed to explain the factual and legal basis of his appeal and instead simply asserted that the IJ had

erred in denying his application for cancellation of removal and finding that he had been convicted of a crime involving moral turpitude. *Ibid.*

Petitioner also checked a box on the form indicating that he would be filing a brief in support of his appeal. A.R. 174. In October 2011, petitioner received a notice from the Board informing him that he had until November 10, 2011 to submit his brief. A.R. 168-169. The notice informed petitioner that "[i]f you fail to file the brief or statement within the time set for filing in this briefing schedule, the Board may summarily dismiss your appeal." A.R. 168. Despite the notice, petitioner failed to file any brief. A.R. 139.

The Board summarily dismissed petitioner's appeal in September 2012. A.R. 139; see 8 C.F.R. 1003.1(d)(2)(i)(A) and (E). The Board's decision explained that (1) petitioner's Notice of Appeal did not inform the Board of the bases for his challenge to the IJ's decision, and (2) although petitioner checked the box indicating that he would be filing a brief, he failed to file the brief despite being expressly warned that failure to file a brief could result in summary dismissal. A.R. 139. Petitioner did not seek judicial review of that decision.

3. a. Petitioner was served with a copy of the Board's decision dismissing his appeal immediately upon its issuance on September 21, 2012. A.R. 138-139. At that point, he had 90 days—until December 20, 2012—in which to file a motion to reopen his case with the Board. 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). By October 15, 2012, petitioner had consulted with new attorneys regarding his case, at least two of whom told him that his prior counsel had performed ineffectively in failing to file an

administrative brief. A.R. 118-119. Nonetheless, petitioner did not file a timely motion to reopen during the 90-day period.

On January 14, 2013—over three weeks after the 90-day period had expired—petitioner sought to reopen his case. Pet. App. 6-8; A.R. 88-95. In that motion, petitioner alleged that he met the requirements for establishing a claim of ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988). Pet. App. 7-8; A.R. 92-95. He did not, however, make any argument as to why his conviction was not for a crime involving moral turpitude; nor did he file any proposed appellate brief challenging that determination by the IJ. Pet. App. 8. Several weeks later, petitioner did file a supplemental memorandum addressing *Esparza-Rodriguez* v. *Holder*, 699 F.3d 821 (5th Cir. 2012), which had been decided after the Board issued the final order in his case. Pet. App. 8 n.1. That decision upheld the Board's application of the modified categorical approach to a related Texas criminal statute. *Esparza-Rodriguez*, 699 F.3d at 823-826; see Pet. App. 8 n.1.

The Board denied petitioner's motion to reopen in March 2013. Pet. App. 6-9. The Board noted that the motion was untimely, but it further stated that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." *Id.* at 7 (citing *Lozada*, 19 I. & N. Dec. at 637). The Board then rejected petitioner's assertion of ineffective assistance of counsel. *Id.* at 7-8. The Board held that petitioner had failed to establish any prejudice from his former counsel's failure to file a brief in support of the administrative appeal. *Ibid.* The Board noted that even in his motion to reopen, petitioner did not offer any ar-

gument as to why or how the IJ erred in denying his application for cancellation of removal, and that petitioner had failed to file any proposed brief challenging the underlying decision of the IJ. *Id.* at 8 & n.1. The Board also looked to the decision of the IJ and concluded that the IJ had "properly applied the modified categorical approach and examined the record of conviction to find that [petitioner] assaulted a family member (as defined) causing bodily injury." *Id.* at 7-8. On that basis, the Board concluded that the conviction was for a crime involving moral turpitude, and that the IJ therefore correctly determined that petitioner was ineligible for cancellation of removal on that basis. *Id.* at 8.

The Board then went on to find that petitioner would have been ineligible for cancellation of removal for a second, independent reason—his inability to establish any "exceptional and extremely unusual hardship" to a qualifying family member, as required by 8 U.S.C. 1229b(b)(1)(D). Pet. App. 8-9. The Board thus concluded that, "aside from [petitioner's] ineligibility due to his conviction [for a crime involving moral turpitude], the motion to reopen does not document that he is eligible for the relief sought." *Id.* at 9. In light of those considerations, the Board found that "[petitioner's] motion does not demonstrate an exceptional situation that would warrant reopening as an exercise of discretion." *Ibid.* (citing *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)).

b. Petitioner filed a timely petition for review of the Board's decision with the court of appeals on April 18, 2013. The next day, petitioner filed with the Board a timely motion to reconsider its denial of his motion to reopen. Pet. App. 4; A.R. 10-15. In an attempt to

address one aspect of the Board's conclusion that he could not establish prejudice, petitioner attached a proposed appellate brief to his motion to reconsider. Pet. App. 5; A.R. 20-31. The substance of that motion, however, was largely a reiteration of the ineffective-assistance-of-counsel claim that petitioner had made in his motion to reopen. See A.R. 12-15, 91-95. Although petitioner's motion criticized the Board's conclusion that he had failed to establish prejudice from the failure to file an administrative brief, it did not assert any specific errors of fact or law in the Board's prior decision. See A.R. 12-15; 8 U.S.C. 1229a(c)(6)(C) (specifying required contents for motions to reconsider).

The Board denied the motion to reconsider on June 27, 2013. Pet. App. 4-5. Its decision emphasized that petitioner had failed to specify any errors of law or fact in its prior decision. *Ibid.* The Board construed petitioner's request for reconsideration as a motion to reopen, insofar as it submitted new evidence, *i.e.*, the proposed appellate brief, and it denied the motion as time- and number-barred. *Id.* at 5. Additionally, the Board found no reason why the brief could not have been proffered with the first motion to reopen. *Ibid.* The Board also discerned no grounds for sua sponte reopening. *Ibid.*

4. Petitioner filed a timely petition for review of the Board's decision denying his motion for reconsideration. The court of appeals considered that petition together with his earlier petition seeking review of the Board's denial of his motion to reopen.

In his brief to the court of appeals, petitioner argued that the Board should have equitably tolled the 90-day deadline for filing a motion to reopen based on

ineffective assistance of counsel. Pet. C.A. Br. 5-15. He acknowledged circuit precedent holding that a request for equitable tolling on that basis must be treated as a request that the Board exercise its sua sponte authority to reopen proceedings, and that the denial of sua sponte reopening is not subject to judicial review. *Id.* at 7 (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). Petitioner argued, however, that this precedent was contrary to intervening Supreme Court precedent and the decisions of other courts of appeals that had addressed the issue. *Id.* at 7-10 (citing, *inter alia*, *Kucana* v. *Holder*, 558 U.S. 233 (2010) (holding that denial of motion to reopen is subject to judicial review)); *id.* at 10-13 (collecting court of appeals decisions). Petitioner contended that he acted with due diligence in filing the motion to reopen promptly after the alleged ineffective assistance of prior counsel was discovered, and that the ineffectiveness had prejudiced him, as it foreclosed his ability to present his arguments to the Board on appeal. *Id.* at 14-15. Given those facts, petitioner requested that the court of appeals grant equitable tolling of the motion to reopen deadline and grant his petition for review. Petitioner also argued that the Board had erred in concluding that his state assault conviction was a crime involving moral turpitude. *Id.* at 15-26.

In response, the government argued that the court of appeals lacked jurisdiction to consider the Board's denial of petitioner's request for equitable tolling under the court's prior decision in *Ramos-Bonilla*, 543 F.3d at 220. Gov't C.A. Br. 18-19. The government also defended the Board's decision on the merits, arguing that, in any event, petitioner could not estab-

lish that he was prejudiced by the failure to file an administrative brief on appeal. *Id.* at 19-20; see *id.* at 13-18.

The court of appeals denied in part and dismissed in part the petitions for review in an unpublished decision issued on March 5, 2014. Pet. App. 1-3. The court held that, under *Ramos-Bonilla*, "an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the [Board] to exercise its discretion to reopen the removal proceeding *sua sponte*." *Id.* at 2. Accordingly, the court explained, because "we have no meaningful standard against which to judge that exercise of discretion, we lack jurisdiction to review such decisions." *Id.* at 2-3. The court declined petitioner's request that it overrule *Ramos-Bonilla*, stating that only the en banc court could overrule circuit precedent and explaining that *Ramos-Bonilla*'s holding had not been overturned or called into question by intervening Supreme Court precedent. *Id.* at 3 (citing *Kucana*, 558 U.S. at 233).[1]

Petitioner filed a petition for rehearing en banc. The court of appeals did not call for a response from the government, and in May 2014 that court denied that petition. Pet. App. 24-25.

ARGUMENT

The government agrees with petitioner that the court of appeals erred in denying his petition for review for lack of jurisdiction under *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Equitable

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[1] The court of appeals also held that petitioner had abandoned any challenge to the Board's denial of his motion to reconsider. Pet. App. 3.

tolling is available for an alien who demonstrates that ineffective assistance of counsel caused him to miss the 90-day deadline for filing a motion to reopen, so long as the alien complies with the procedural requirements established by the Board for considering such claims. There are adequate standards to be applied by a court of appeals in reviewing Board decisions rejecting arguments for equitable tolling based on ineffective assistance of counsel. *Ramos-Bonilla*'s conclusion that there is no jurisdiction in these circumstances is incorrect, and the court of appeals erred in relying on that precedent. The government therefore has decided to support en banc reconsideration of *Ramos-Bonilla* by the court of appeals. Accordingly, we suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of the position concerning the court of appeals' jurisdiction set forth in this brief.

In the alternative, the petition for a writ of certiorari should be denied. Although the basis of the court of appeals' decision was flawed, plenary review is not warranted. Even if petitioner were to prevail on his question presented, he could not ultimately obtain relief, for two independent reasons. First, the Board has already concluded that petitioner cannot establish that his removal from the United States would result in "exceptional and extremely unusual hardship" to a qualifying family member, as required by 8 U.S.C. 1229b(b)(1)(D). Petitioner did not challenge that finding in his petition for review in the court of appeals. Second, petitioner became aware of his counsel's alleged ineffective assistance of counsel well before the expiration of the 90-day period for filing a

motion to reopen but failed to file within that period. Petitioner's lack of diligence is an independent reason that he is not ultimately entitled to equitable tolling. As a result, petitioner could not obtain relief even if he prevailed in this Court on the jurisdictional question he presents. For these reasons, if the Court does not vacate the judgment below and remand, it should deny the petition for certiorari.

1. The court of appeals dismissed the petition for review for lack of jurisdiction under its prior decision in *Ramos-Bonilla*. That decision is erroneous. Equitable tolling of the 90-day filing deadline for a motion to reopen may be warranted in cases of ineffective assistance of counsel. A court of appeals therefore has jurisdiction to review the Board's denial of a request for equitable tolling under the traditional abuse-of-discretion standard for review of the denial of a motion to reopen.

a. As the Board correctly noted in this case, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. To establish that equitable tolling is warranted based on ineffective assistance of counsel, the Board has established a procedural framework that aliens must follow. See *In re Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988).[2] The Board requires:

> 1) an affidavit by the alien setting forth the relevant facts, including the agreement with counsel

[2] The Attorney General has directed the Executive Office for Immigration Review to initiate rulemaking procedures that would culminate in a regulatory framework for addressing ineffective assistance of counsel claims. See *In re Compean, Bangaly & J-E-C*, 25 I. & N. Dec. 1, 2 (A.G. 2009). Proposed rules have not yet been issued.

> regarding the alien's representation; 2) evidence that counsel was informed of the allegations [of ineffective assistance] and allowed to respond, including any response; and 3) an indication that * * * a complaint has been lodged with the relevant disciplinary authorities, or an adequate explanation for the failure to file such a complaint.

Lara v. *Trominski*, 216 F.3d 487, 496 (5th Cir. 2000) (citing *Lozada*, 19 I. & N. Dec. at 639). "In addition to these requirements, an alien alleging ineffective assistance of counsel must also show that he or she was prejudiced by the actions or inactions of counsel." *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (en banc) (citing *Lozada*, 19 I. & N. Dec. at 640).[3]

An alien who complies with these procedural requirements for establishing a claim of ineffective assistance of counsel must also demonstrate that equitable tolling is warranted based on that purported ineffectiveness. See *Singh* v. *Holder*, 658 F.3d 879, 884 (9th Cir. 2011) (noting that compliance with *Lozada*'s procedural requirements is only one aspect of establishing that equitable tolling is warranted). An alien seeking to justify equitable tolling must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) (quoting *Pace* v. *DiGuglielmo*, 544

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[3] Any remedy for ineffective assistance of counsel in removal proceedings must be derived from this administrative framework, as aliens have no constitutionally protected right to effective assistance of counsel and thus cannot establish a due process claim based on counsel's ineffectiveness. See, *e.g.*, Br. in Opp. at 16-17, *Merchant* v. *Holder*, 134 S. Ct. 1276 (2014) (No. 13-400); Gov't Br. at 10-12, *Afanwi* v. *Holder*, 558 U.S. 801 (2009) (No. 08-906).

U.S. 408, 418 (2005)), cert. denied, 131 S. Ct. 3025 (2011). Equitable tolling of the 90-day statutory motion to reopen filing deadline is thus available only in narrow and extraordinary circumstances, where the alien can establish ineffective assistance of counsel that was prejudicial to his proceedings and that was discovered as soon as possible through the exercise of due diligence in the pursuit of his claims. See, *e.g.*, *Lawrence* v. *Florida*, 549 U.S. 327, 336 (2007) (requiring extraordinary circumstances to warrant equitable tolling); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (noting that "[f]ederal courts have typically extended equitable relief only sparingly").

b. All of the courts of appeals that have squarely addressed the availability of equitable tolling of the 90-day deadline have held that such tolling is available in appropriate circumstances.[4] The Fifth Circuit has not addressed that issue in a published decision, although it has reached contrary conclusions on the subject in various unpublished decisions.[5] In one of

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[4] See, *e.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 134 (2d Cir. 2000); *Borges* v. *Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Barry* v. *Mukasey*, 524 F.3d 721, 724-725 (6th Cir. 2008); *Pervaiz* v. *Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Valeriano* v. *Gonzales*, 474 F.3d 669 (9th Cir. 2007); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo* v. *United States Att'y Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (per curiam); see also *Romer* v. *Holder*, 663 F.3d 40, 43 (1st Cir. 2011) (noting that it has not yet issued a precedential decision on the issue).

[5] Compare, *e.g.*, *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (rejecting availability of equitable tolling), with *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 329-331 (5th Cir. 2006) (per curiam) (granting equitable tolling). The petitioner in

those unpublished decisions, *Lin* v. *Mukasey*, 286 Fed. Appx. 148 (5th Cir. 2008) (per curiam), the court explained that "[b]ecause equitable tolling is not a basis for filing an untimely * * * motion under the statute or regulations, [a request for tolling on the basis of ineffective assistance of counsel] is in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling." *Id.* at 150. For the reasons explained above, *Lin*'s analysis is mistaken: Equitable tolling of the 90-day deadline for filing a statutorily authorized motion to reopen *is* potentially available in cases where the basis for tolling is the ineffective assistance of counsel. See pp. 13-15, *supra*.

In its published decision in *Ramos-Bonilla*, the Fifth Circuit held that it lacked jurisdiction to review the Board's denial of equitable tolling of the 90-day deadline for filing a motion to reopen. 543 F.3d at 220. It did so by expressly relying upon *Lin*'s (mistaken) holding that a request for equitable tolling of the statutory 90-day deadline is "in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte." *Ibid.* (quoting *Lin*, 286 Fed. Appx. at 150). The court reasoned that it lacked jurisdiction because there was no meaningful standard by which it could review the agency's decision denying reopening sua sponte. *Lin*, 286 Fed. Appx. at 150 (citing *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004)).

Whiteley v. *Holder*, 544 Fed. Appx. 373 (5th Cir. 2013) (per curiam), No. 14-5188, asked this Court to grant certiorari to decide whether the 90-day deadline is subject to equitable tolling. The Court denied certiorari on November 17, 2014.

We agree that a Board decision declining to reopen a removal proceeding sua sponte is not subject to judicial review. See *Kucana* v. *Holder*, 558 U.S. 233, 251 n.18 (2010) (noting court of appeals decisions so holding). But *Ramos-Bonilla*'s jurisdictional analysis lacks merit. It rests on the flawed premise—set forth in *Lin*—that an alien's request for equitable tolling of the 90-day deadline for filing a motion to reopen as authorized by statute must be treated as a request for sua sponte reopening. Instead, the court there should have recognized that equitable tolling of that deadline is available in accordance with the principles adopted by the Board in *Lozada*, *supra*, and *Assaad*, *supra*, and that if tolling is allowed, the alien's motion is timely under 8 U.S.C. 1229a(c)(7). The courts of appeals may exercise jurisdiction to review the denial of a motion to reopen, *Kucana*, 558 U.S. at 253, including a denial based on the Board's determination not to equitably toll the 90-day deadline for such a motion.

In conducting such review, the courts of appeals must apply the traditional abuse-of-discretion standard that, under circuit precedent, governs review of equitable-tolling decisions in other contexts. See, *e.g.*, *Granger* v. *Aaron's, Inc.*, 636 F.3d 708, 712 (5th Cir. 2011); see also *Bead* v. *Holder*, 703 F.3d 591, 593-595 (1st Cir. 2013) (utilizing abuse-of-discretion standard in reviewing denial of equitable tolling); *El-Gazawy* v. *Holder*, 690 F.3d 852, 859-860 (7th Cir. 2012) (same). In applying that standard, courts can review the Board's decision with respect to each of the relevant factors of the equitable tolling analysis, including the procedural requirements for making an ineffective-assistance-of-counsel claim under the Board's decision

in *Lozada* and the standard tolling requirements of diligence and extraordinary circumstances.

Because the court of appeals relied on its flawed analysis in *Ramos-Bonilla*, its dismissal of petitioner's case for lack of jurisdiction was error. The court should have reviewed petitioner's challenge to the Board's decision on the merits. We therefore suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of the position set forth in this brief concerning the court of appeals' jurisdiction.

2. If the Court does not vacate the judgment below and remand for further consideration of the jurisdictional issue, it should deny the petition for a writ of certiorari because petitioner will not ultimately be able to obtain relief. If the Court does deny certiorari in this case, the government will request that the court of appeals overrule its decision in *Ramos-Bonilla*, in another appropriate case.

a. The Board rejected petitioner's request for cancellation of removal on two independent grounds. See pp. 7-8, *supra*. In addition to holding that petitioner had failed to establish any error in the IJ's conclusion that his conviction was for a crime involving moral turpitude, the Board also determined that petitioner had not established any "exceptional and extremely unusual hardship" to any qualifying relative in the event of petitioner's removal. Pet. App. 8-9. Such hardship is required in order for an alien who is not a lawful permanent resident to establish eligibility for cancellation of removal. 8 U.S.C. 1229b(b)(1)(D). Thus, the Board expressly determined that "*aside from* [*petitioner's*] *ineligibility due to his conviction*,

the motion to reopen does not document that he is eligible for the relief sought." Pet. App. 9 (emphasis added); see generally *INS* v. *Abudu*, 485 U.S. 94, 105 (1988) (holding that the Board may deny a motion to reopen when "the movant would not be entitled to the discretionary grant of relief").

The Board's determination that petitioner did not establish any "exceptional and extremely unusual hardship" to a qualifying relative is independently dispositive of petitioner's motion to reopen. That determination would prevent petitioner from obtaining relief even if he could establish that his prior counsel was ineffective for failing to challenge the Board's classification of his Texas conviction as a crime involving moral turpitude. Notably, petitioner waived any right to review that alternative basis for the Board's denial of his motion to reopen by failing to challenge it on appeal to the Fifth Circuit. See generally Pet. C.A. Br. 5-27; *In re Katima Canal Breaches Litig.*, 620 F.3d 455, 459 n.3 (5th Cir. 2010) (holding that arguments not raised in the opening brief are waived).

b. In addition, petitioner ultimately would not be entitled to equitable tolling because he failed to exercise due diligence in pursuing his ineffective-assistance-of-counsel claim. The record is clear that on September 21, 2012, petitioner was served with a copy of the Board's decision dismissing his administrative appeal for failure to file a brief, a fact that he concedes. A.R. 118, 138. At that point he had 90 days—until December 20, 2012—in which to file a timely motion to reopen. On October 15, 2012, petitioner swore an affidavit indicating that he had already consulted with two new attorneys who had told him that his prior counsel had performed ineffectively

in failing to file an administrative brief. A.R. 118-119. Nonetheless, petitioner did not file his motion until January 14, 2013—over three weeks after expiration of the 90-day filing period. See Pet. App. 6; A.R. 88.

Petitioner cannot establish the requisite due diligence on these facts. To this day, petitioner has not offered a compelling excuse for his untimely filing. His brief to the court of appeals asserted that filing his claim "a mere 115 days" after the Board's denial of his claim "shows due diligence" because petitioner's attorney avoided discussing his case with him on several occasions. Pet. C.A. Br. 14-15. But petitioner received, by mail, the Board's decision dismissing his administrative appeal for failure to file a brief, and petitioner's October 15, 2012 affidavit makes clear that he was aware of the basis for his claim of ineffective assistance of counsel well before the statutory deadline had expired. A.R. 118-119.

In these circumstances, there is no apparent reason why petitioner could not have brought his ineffective-assistance claim before the 90-day statutory deadline. Petitioner's lack of diligence renders him ineligible for equitable tolling, and he would therefore not be able to obtain any benefit from a favorable jurisdictional ruling from this Court on the question presented.

3. As explained above, the government agrees with petitioner that the court of appeals' decision in *Ramos-Bonilla* is erroneous, and it accordingly plans to urge the court of appeals to overrule *Ramos-Bonilla*. In light of the government's position, it seems unlikely that any split of authority between the Fifth Circuit and other circuits on the question presented will persist. See Pet. 21-26 (citing circuit cases). Because the Fifth Circuit may overturn *Ramos-Bonilla* in light of

the government's position—and because petitioner is not ultimately entitled to further relief in his own case—plenary review by this Court is not warranted.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to the court of appeals for further consideration in light of the position set forth in this brief concerning the court of appeals' jurisdiction. Alternatively, the petition should be denied.

Respectfully submitted.

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