No. 07-101

In the Supreme Court of the United States

JACQUELINE FINLAYSON-GREEN,
PETITIONER

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals did not abuse its discretion in denying petitioner's motion to reconsider its denial of petitioner's untimely motion to reopen her removal proceedings based on allegations of ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 228 Fed. Appx. 919. The decisions of the Board of Immigration Appeals (BIA or Board) (Pet. App. 6-10, 11-13) and the immigration judge (IJ) (Pet. App. 17-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2007. The petition for a writ of certiorari was filed on July 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that removal proceedings brought under 8 U.S.C. 1229a (2000 & Supp. V 2005) are initiated by a written Notice to Appear served in person on the alien, or, if personal service is not practical, "through service by mail to the alien or to the alien's counsel of record." 8 U.S.C. 1229(a)(1). The Notice to Appear must identify, among other things, the nature of the proceedings, the conduct alleged to be unlawful, and the charges against the alien. 8 U.S.C. 1229(a)(1)(A), (C) and (D).

b. Section 1229a sets forth procedures for the conduct of removal proceedings. In situations where an alien fails to appear, Section 1229a(b)(5)(A) provides that the alien "shall be ordered removed in absentia if the [Immigration and Naturalization] Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable" as charged. 8 U.S.C. 1229a(b)(5)(A).[1]

Section 1229a(b)(5)(C) sets forth limited circumstances in which a removal order that was entered *in absentia* may be rescinded. "Such an order," it declares,

> may be rescinded only—
>
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because

[1] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

> of exceptional circumstances (as defined in subsection (e)(1) of this section),[2] or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. 1229a(b)(5)(C). In addition, federal regulations provide that an IJ "may upon his or her own motion at any time * * * reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals," 8 C.F.R. 1003.23(b)(1), and that the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," 8 C.F.R. 1003.2(a).[3]

2. Petitioner is a native and citizen of Jamaica who overstayed a nonimmigrant visa. In 1997, she married an American citizen, who filed an immigrant relative visa petition on her behalf. In August 1999, petitioner's husband withdrew the petition, asserting that the mar-

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[2] The statute defines "exceptional circumstances" as "refer[ring] to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1229a(e)(1) (Supp. V 2005).

[3] A separate regulation provides the general "time and numerical limitations [on motions to reopen] set forth in [8 C.F.R. 1003.23(b)(1)] shall not apply to a motion to reopen agreed upon by all parties and jointly filed." 8 C.F.R. 1003.23(b)(4)(iv). Motions to reopen *in absentia* removal orders, however, are addressed in a different portion of the regulations, 8 C.F.R. 1003.23(b)(4)(iii).

riage was a sham and that petitioner had paid him to marry her. Pet. App. 8.

3. a. On October 8, 1999, the Immigration and Naturalization Service (INS) issued a Notice to Appear alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B), and was subject to removal as a result. Admin. R. 186-188 (A.R.). The Notice of Removal ordered petitioner to appear before an IJ in Miami, Florida on December 14, 1999. A.R. 186.

On November 26, 1999, attorney Dorothea Kraeger entered an appearance on behalf of petitioner and made a one-sentence request to have "this matter transferred because [petitioner] as well as counsel reside in the State of Arizona." A.R. 180. In that document, petitioner admitted to having remained in the United States longer than permitted by her visa, but denied that she had paid her former husband to assist her in obtaining lawful residence and stated that she would be "requesting relief in the form of adjustment of status." A.R. 180; see A.R. 186, 188.

On November 29, 1999, the IJ denied petitioner's transfer motion, stating that no venue change would be granted "until *all* issues of removability are resolved" and ordering petitioner to report in person in Miami on December 14, 1999. Pet. App. 21-22.

On December 10, 1999—four days before petitioner's removal hearing—attorney Kraeger filed a motion asking the IJ to reconsider the denial of petitioner's request for a change of venue. A.R. 176-178. In those moving papers, petitioner asserted that she had divorced her former husband and moved to Arizona, and that she could not afford to travel to Miami for her immigration hearing. A.R. 176-177. Petitioner stated that she "has admitted and conceded" the allegations in the Notice to

Appear, and that she intended to request relief from removal at the hearing. A.R. 177. "In the alternative," petitioner stated that she "would be available at the office of her counsel for a 9[a.m.] hearing, telephonically to discuss the issues regarding her removability and renewed Motion to Change Venue." *Ibid.*

Petitioner did not appear at her removal hearing on December 14, 1999. Pet. App. 17. At the hearing, the IJ denied petitioner's motion to reconsider the denial of petitioner's earlier motion for a change of venue, stating that "[t]he factual allegations have not been admitted" and that a telephonic appearance would not be permitted. *Id.* at 19. Concluding that petitioner's change of venue motion had conceded facts sufficient to establish removability, however, the IJ entered an *in absentia* order directing that petitioner be removed to Jamaica. *Id.* at 17-18.

b. Petitioner appealed the IJ's *in absentia* removal order to the BIA, claiming that the IJ had "erred as a matter of law" in failing to transfer her case from Florida to Arizona. A.R. 133; see A.R. 152-153. On April 16, 2003, the BIA affirmed the IJ's removal order without opinion. Pet. App. 16. Petitioner sought review by the Eleventh Circuit, but that petition was dismissed on September 8, 2003, after petitioner failed to file a timely brief. *Id.* at 14.

c. On October 28, 2005—nearly five years after the IJ's *in absentia* removal order, two-and-a-half years after the BIA affirmed that order, and more than two years after the Eleventh Circuit dismissed her petition for review of the Board's decision—petitioner filed a motion to reopen her removal proceedings with the BIA. A.R. 46, 48-57. In that motion, petitioner, now represented by new counsel, claimed that Kraeger had pro-

vided ineffective assistance of counsel and that this constituted an "exceptional circumstance[]" sufficient to warrant reopening petitioner's removal proceedings. A.R. 48, 53-56. Petitioner also stated that she had married a United States citizen in May 2000 with whom she had two children, and that her husband had filed a relative visa petition on her behalf and that she had filed a new application for adjustment of status. A.R. 52. Petitioner's motion to reopen her removal proceedings did not address petitioner's failure to seek reopening within the 180-day period specified in 8 U.S.C. 1229a(b)(5)(C)(i), or assert that the period was subject to equitable tolling.

The BIA denied petitioner's motion to reopen her removal proceedings. Pet. App. 12-13. Citing the Eleventh Circuit's decisions in *Anin* v. *Reno*, 188 F.3d 1273 (1999), and *Abdi* v. *United States Attorney General*, 430 F.3d 1148 (2005), the Board stated that the 180-day "deadline for filing a motion seeking to reopen an *in absentia* deportation order [is] 'jurisdictional and mandatory.'" Pet. App. 12 (quoting *Anin*, 188 F.3d at 1278). "In any event," the BIA continued, petitioner had "fail[ed] to adequately explain why she waited so long to file the pending motion." *Id.* at 12-13. Although petitioner's filing stated that her former attorney Kraeger had "turned over [petitioner's] case" to another named attorney after Kraeger was suspended from practice, *id.* at 13 (quoting A.R. 52), those documents "fail[ed] to state" exactly when that had occurred "or why [that new attorney] could not have assisted [petitioner] in filing an earlier motion." *Id.* at 12-13. Petitioner did not file a petition for review with the court of appeals from that decision.

c. On May 9, 2006, petitioner filed a motion asking the Board to reconsider its denial of her untimely motion to reopen her removal proceedings. A.R. 14-19. In that motion and accompanying affidavits, petitioner asserted that she "had no idea" that the Eleventh Circuit had dismissed her appeal "until July 2005." A.R. 15-16, 23. According to petitioner, Kraeger had repeatedly told her that "our case was 'ok' or 'fine'" as late as the early months of 2005, but that on April 23, 2005, she had received an email message from Kraeger's assistant informing her that Kraeger had been suspended from the practice of law and that petitioner's appeal papers were still in her file. A.R. 23. Petitioner asserted that she had met with a new attorney on May 16, 2005, but that she and that attorney had been unable to meet with Kraeger to obtain petitioner's file until July 12, 2005, because Kraeger skipped an earlier meeting. A.R. 23-24. On August 1, 2005, petitioner retained a third attorney, because her second one did not practice in Florida. A.R. 24-25. Petitioner also argued in her motion to reconsider that the 180-day filing deadline for filing motions to reopen *in absentia* removal orders should have been equitably tolled based on attorney Kraeger's ineffective handling of petitioner's case. A.R. 17-18.

On May 12, 2006, petitioner supplemented her motion to reconsider by filing with the BIA a notice that she had received from the Department of Justice stating that her husband's relative visa petition had been approved, and asserting that she would be eligible for adjustment of status if her case were reopened. A.R. 4, 8.

On August 15, 2006, the BIA denied petitioner's motion to reconsider its denial of her motion to reopen her removal proceedings. Pet. App. 6-10. The purpose of a motion to reconsider, the Board stated, is "to allege er-

rors in appraising the facts and the law." *Id.* at 9. The Board reiterated its previous statements that the statutory 180-day time limit on motions to reopen based on exceptional circumstances is "mandatory and jurisdictional." *Ibid.* It also noted that petitioner "does not claim [that] she was unaware of the hearing in Miami" and stated "she would not have been eligible for any relief from removal, even if she had attended the hearing." *Ibid.* As a result, the Board concluded that petitioner "does not meet the statutory requirements for recision of the in absentia order." *Id.* at 9-10.

4. A unanimous panel of the Eleventh Circuit denied a petition for review in an unpublished per curiam opinion. Pet. App. 1-5. Citing its earlier decision in *Anin*, the court of appeals concluded that the 180-day period set forth in 8 U.S.C. 1229a(b)(5)(C)(i) "cannot be equitably tolled on account of ineffective[ness] * * * of counsel." Pet. App. 4. Accordingly, the court of appeals held that "the BIA did not abuse its discretion in denying the motion to reopen based on untimeliness." *Ibid.*[4]

ARGUMENT

Petitioner contends (Pet. 10-18) that the Eleventh Circuit's refusal to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and conflicts with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unpublished decision is correct, no other court of appeals would hold that the BIA abused its discretion in refusing to invoke equitable tolling on

[4] The court of appeals also concluded that the Board had not abused its discretion in declining to exercise its authority to reopen petitioner's removal proceeding *sua sponte*. Pet. App. 4 (citing 8 C.F.R. 1003.2(a)). That issue is not before this Court. See Pet. i.

these facts, and petitioner would be unable to obtain relief even if equitable tolling were sometimes available. The Court recently denied certiorari in another case from the Eleventh Circuit raising the same issue, *Kennedy* v. *Keisler*, cert. denied, No. 06-1603 (Oct. 9, 2007), and there is no reason for a different disposition here.

1. The BIA did not abuse its discretion in denying petitioner's motion to reconsider its earlier denial of petitioner's untimely motion to reopen her removal proceedings. Whether a given statutory time limitation is subject to equitable tolling is ultimately a matter of statutory construction. See, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 349-354 (1997). In addition, this Court's decisions confirm that the BIA's reasonable constructions of the immigration statutes that it administers are entitled to *Chevron* deference, including in situations where those interpretations are announced in the course of adjudicating individual cases. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In two decisions issued in 1998, the BIA concluded that the 180-day deadline for motions to reopen proceedings based on "exceptional circumstances" contained in former 8 U.S.C 1252b(c)(3)(A) (1994)—a provision whose language was in all material respects identical to the one at issue in this case[5]—contained no "exception" for situations

[5] Former Section 1252b(c)(3) provided that an order of deportation entered in absentia could be rescinded

> only—
>
> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

"where the failure to timely file a motion to reopen is due to ineffective assistance of counsel." *In re Lei*, 22 I. & N. Dec. 113, 115-116; see *In re A-A-*, 22 I. & N. Dec. 140, 143. The statutory language, the Board stressed, clearly stated that deportation orders could be rescinded "*only*" in the specifically enumerated circumstances, and contained "no exceptions to [the 180-day] time bar." *In re Lei*, 22 I. & N. Dec. at 116; *In re A-A-*, 22 I. & N. Dec. at 143. The BIA also explained that its interpretation was "consistent with the overall statutory scheme," because the broader provision of which the relevant language was a part had been "enacted to provide stricter and more comprehensive deportation procedures, particularly for in absentia hearings, to ensure that proceedings are brought to a conclusion with meaningful consequences." *In re Lei*, 22 I. & N. Dec. at 116; *In re A-A-*, 22 I. & N. Dec. at 144.

The BIA's conclusion that allegations of ineffective assistance of counsel are insufficient to prevent the running of the 180-day time period for filing motions to reopen based on exceptional circumstances is entirely reasonable and thus entitled to deference by the courts. Section 1229a(b)(5)(C) states that an *in absentia* re-

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> (B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

8 U.S.C. 1252b(c)(3) (1994). This provision was repealed by Section 308(b)(6) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-615, and redesignated as amended as 8 U.S.C. 1229a(b)(5)(C) by IIRIRA Section 304(a)(3), 110 Stat. 3009-589. See pp. 2-3, *supra* (quoting current Section 1229a(b)(5)(C)).

moval order may be rescinded "only" in three specified circumstances—where the alien's failure to attend the removal hearing was due to "exceptional circumstances," where the alien "did not receive notice in accordance with [8 U.S.C. 1229(a)(1) or (2)]," or where imprisonment prevented the alien from attending the hearing. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Of the enumerated grounds, only one—the provision under which petitioner seeks relief—contains a time limitation. That "explicit listing" of provisions as to which time limits do and do not apply demonstrates "that Congress did not intend [the agency or] courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote." *Brockcamp*, 519 U.S. at 352.

In addition, "[t]he nature of the underlying subject matter" (*Brockcamp*, 519 U.S. at 352) reinforces the conclusion that Congress did not intend to permit equitable tolling based on claims of ineffective assistance of counsel. As this Court has explained, motions to reopen removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). In addition, permitting aliens to avoid the 180-day time bar by claiming ineffective assistance of counsel would "waste the time and efforts of immigration judges called upon to preside at [the] hearings" that would presumably be necessary whenever an alien could make a "prima facie" ineffectiveness claim. *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (citation omitted).

2. Petitioner nonetheless asserts that this Court should grant review because of what she claims is a circuit split about whether equitable tolling is available in situations where an alien claims that her failure to com-

ply with the 180-day time limitation was due to the "ineffectiveness" of the alien's privately retained attorney.[6] Petitioner is mistaken; in fact, it is entirely likely that no court of appeals would have held that the BIA

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[6] Although it is not the ground upon which she seeks a writ of certiorari, petitioner errs in suggesting that "counsel's ineffectiveness can give rise to a due process violation," Pet. 11; see Pet. 17. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does not require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id*. at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although petitioner is correct that a number of courts have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Three circuits have assumed without deciding that equitable tolling is sometimes available under 8 U.S.C. 1229a(b)(5)(C)(i). See *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc) (Pet. 16); *Scorteanu* v. *INS*, 339 F.3d 407, 413 (6th Cir. 2003); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005).

b. Although petitioner is correct (Pet. 11-12) that the Third and Ninth Circuits have concluded that equitable tolling is sometimes available under Section 1229a(b)(5)(C)(i), both courts have carefully limited their holdings to situations in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. In *Borges* v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005), an alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his removal proceedings on that basis had been due to a paralegal's false statement that such a document had, in fact, been filed. See *id.* at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the Third Circuit held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied on "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (brackets in original; citation omitted).[7]

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[7] Petitioner does not cite *Borges*, referencing instead the Third Circuit's decision in *Mahmood* v. *Gonzales*, 427 F.3d 248, 251 (2005) (Pet.

The Ninth Circuit's decisions are similar. In *Lopez* v. *INS*, 184 F.3d 1097 (1999) (Pet. 12), that court held that the 180-day limitations period contained in the predecessor statute that the BIA construed in *In re Lei* and *In re A-A-*, see pp. 9-10 & note 5, *supra*, was subject to equitable tolling "where the alien's late petition [to reopen was] the result of the deceptive actions by a notary posing as an attorney." *Lopez*, 184 F.3d at 1100; see *id.* at 1098 ("We conclude that the statutory time limit for reopening is tolled by the *fraudulent* representations made by Lopez's former 'counsel.'") (emphasis added). In *Varela* v. *INS*, 204 F.3d 1237 (2000) (Pet. 12), the Ninth Circuit extended *Lopez*'s reasoning to "[a] federal regulation [that] places time and numerical limitations on motions to reopen deportation proceedings" in situations where an alien attended the initial removal hearing. *Id.* at 1239 (citing 8 C.F.R. 3.2(c)(2) (2000)). Once again, however, the Ninth Circuit stressed that equitable tolling was available because the alien had been "*defrauded* by an individual purporting to provide legal representation." *Id.* at 1240 (emphasis added). *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218 (9th Cir. 2002) (Pet. 12), construed the same regulation that had been at issue in *Varela*. 282 F.3d at 1223-1224. There, the Ninth Circuit concluded that equitable tolling was avail-

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12, 16). In *Mahmood*, the court of appeals read *Borges* as holding that the statutory deadlines set forth in Section 1229a "are subject to tolling in at least some circumstances" and assumed that ineffective assistance of counsel could sometimes warrant such tolling. See *id.* at 251-252. Because the court found that the alien's lack of due diligence would preclude equitable tolling in that case, however, it did "not attempt to define generally what qualifies as ineffectiveness sufficient to justify tolling." *Id.* at 252 n.8.

able because a non-lawyer to whom the aliens had given money to coordinate their removal proceedings had "missed the deadline for filing the application for suspension of deportation[,] * * * *lied* [to the aliens] about having done so," and later "compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced [the alien's] claims." *Id.* at 1224-1225 (emphasis added).[8]

Here, the petition for a writ of certiorari neither alleges fraud, nor asserts facts that could establish the kind of fraudulent conduct that might be sufficient to warrant equitable tolling under *Borges*, *Lopez*, *Varela*, and *Rodriguez-Lariz*. Petitioner repeatedly describes the issue presented as whether the 180-day deadline may be tolled for "ineffective assistance of counsel." Pet. 1.[9] Nor does the petition for a writ of certiorari allege anything that could fairly be characterized as "fraud" by petitioner's former counsel. Although petitioner alleges that Kraeger's ineffectiveness "resulted in her failure to attend the removal hearing" (Pet. 8), petitioner has never disputed that she received notice of that hearing and of the IJ's denial of her initial motion

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[8] *Socop-Gonzalez* v. *INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (Pet. 11-12, 16), did not involve equitable tolling based on ineffective assistance of counsel. In that case, the court of appeals held that equitable tolling was available under the same regulation construed in *Varela* in a situation where an alien had relied on incorrect advice provided by an INS official. See *id.* at 1181, 1193-1194.

[9] See Pet. 8 (maintaining that "Ms. Kraeger's ineffective assistance as counsel resulted in [petitioner's] failure to attend the removal hearing, and her failure to properly appeal the *in absentia* removal order to the Eleventh Circuit"); Pet. 11 ("Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for motions to reopen based on ineffective assistance of counsel.").

for a change of venue. Moreover, even assuming that Kraeger advised petitioner not to attend her removal hearing—a fact never directly alleged in the petition—such a tactical decision on Kraeger's part, while certainly ill-advised, falls far short of the sort of affirmative "false representations of a material fact made with knowledge of [its] falsity and with intent to deceive the other party" (*Borges*, 402 F.3d at 407 (quoting *Valansi* v. *Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002))) that would be necessary to support a finding of fraud. Accordingly, neither Third Circuit nor Ninth Circuit precedent would support the conclusion that the BIA abused its discretion in failing to apply equitable tolling on the facts alleged in the petition for a writ of certiorari.

c. Petitioner is correct that the Second and Seventh Circuits have stated that ineffective assistance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings. One of the decisions she cites, however, does not even involve the statutory 180-day deadline for moving to reopen *in absentia* removal orders. Both of the decisions, moreover, predate this Court's recent clarification that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (see note 6, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman* v. *Thompson*, 501 U.S. 722 (1991), has no constitutionally based claim of ineffective assistance of counsel. Accordingly, to the extent that either of the decisions of the Second and Seventh Circuits suggests

that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

In any case, it is highly unlikely that petitioner would have been able to obtain relief in any other circuit even before *Lawrence*. The relevant holding of *Iavorski* v. *INS*, 232 F.3d 124 (2d Cir. 2000) (Pet. 12), was that ineffective assistance of immigration counsel may sometimes warrant tolling a 90-day limitations period set forth in a 1996 Department of Justice regulation that is not at issue in this case. See *id.* at 129-130.[10] In so holding, the Second Circuit relied on the text of the underlying statute directing the Department of Justice to place limitations on the number and time for filing motions to reopen and reconsider, "the Department of Justice's own interpretation of its rule making mandate from Congress, and the BIA's view of the rules that were promulgated." *Id.* at 130. In addition, moreover, the *Iavorski* court held that equitable tolling was unavailable as a matter of law in that case because the alien had failed to exercise "due diligence" during the period that he sought to have tolled. *Id.* at 134. The Seventh Circuit has likewise held that equitable tolling is unavailable absent a showing of due diligence by the alien. See *Pervaiz* v. *Gonzales*, 405 F.3d 488, 490-491 (7th Cir. 2005) (Pet. 12).[11]

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[10] The regulation was the same one at issue in the Ninth Circuit's decision in *Varela*. See *Iavorski*, 232 F.3d at 131.

[11] Petitioner also cites the Fourth Circuit's unpublished decision in *Davies* v. *INS*, 10 Fed. Appx. 223 (2001) (Pet. 12). Like *Iavorski* and *Pervaiz*, *Davies* predates this Court's decision in *Lawrence*. In addition, the Fourth Circuit's three-paragraph per curiam opinion states only that "[u]nder the unusual facts and exceptional circumstances presented in this case"—facts and circumstances that are described no-

As the Board found in this case (Pet. App. 12-13), petitioner would not be eligible for equitable tolling even if allegations of ineffective assistance of counsel were sometimes sufficient to authorize it. In her petition for a writ of certiorari, petitioner nowhere alleges that she exercised sufficient "due diligence in preserving [her] legal rights" to justify resort to the "sparingly" invoked doctrine of equitable tolling. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Nor do the facts in the administrative record establish due diligence on her part. Petitioner did not file her motion to reopen her removal proceedings until October 28, 2005, nearly five years after the IJ's *in absentia* removal order, more than two years after the BIA summarily affirmed that order, and more than two years after the Eleventh Circuit dismissed her petition for review based on her failure to file a brief. Pet. App. 12, 14-18. In her initial motion to reopen her removal proceedings, petitioner failed to state when Kraeger had been suspended from practice or why her second attorney "could not have assisted [her] in filing an earlier motion." *Id.* at 13a. And although petitioner's motion for reconsideration asserted that she did not discover that Kraeger had been suspended until April 2005 and did not learn of Kraeger's misconduct in her case until July 2005, A.R. 16, 22-23, the function of a motion to reconsider is to "specify the errors of law or fact in the previous order," 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005); see Pet. App. 9, not to allege facts and make arguments than an alien neglected to raise sooner. In any event, even petitioner's belated

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where in the opinion other than a statement that counsel "had been ineffective in numerous respects"—the court had concluded that the BIA abused its discretion in denying the aliens' petition to reopen their removal proceedings. See *id.* at 224.

explanation did not account for the fact that her October 28, 2005, motion to reopen her removal proceeding was filed more than 180 days after she learned that Kraeger had been suspended from practice. Even if a court were to conclude that it was reasonable for petitioner to take no affirmative action to protect her interests before that time, receipt of the April 23, 2005, email message would have put any reasonable person on notice that there may be a problem. Accordingly, even a properly presented claim of equitable tolling in this case would have failed as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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