No. 10-1210

In the Supreme Court of the United States

MAKDA FESSEHAIE TECLEZGHI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's untimely motion to reopen where petitioner failed to establish that the reopening deadline should be equitably tolled based on the alleged ineffective assistance of her three prior attorneys.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter* but is reprinted at 378 Fed. Appx. 615. The decisions of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 14-16) and denying her motion for reconsideration (Pet. App. 12-13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2010. A petition for rehearing was denied on January 4, 2011 (Pet. App. 28). The petition for a writ of certiorari was filed on April 4, 2011. 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 the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that she is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that she is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

An alien applying for asylum must file her application within one year of arriving in the United States, unless she demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances that materially affect her eligibility for asylum or extraordinary circumstances that excuse her failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that her application for asylum was timely filed. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

b. Withholding of removal is available if the alien demonstrates that her "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.

1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" in the country of removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

c. An alien who is present in the United States and fears torture if removed to a certain country may obtain protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85.[1] To obtain protection under the CAT, the alien must demonstrate that it is more likely than not that she would be tortured in the country of removal. 8 C.F.R. 1208.16(c)(2). Torture "is an extreme form of cruel and inhuman treatment" that "does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. 1208.18(a)(2); see 8 C.F.R. 1208.18(a)(1). For the alien to qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1). The burden is on the alien to establish that it is more likely than not that she would be

[1] The CAT has been implemented through regulations of the Department of Justice. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note); see also 8 C.F.R. 1208.16-1208.18.

tortured if removed to the proposed country of removal. 8 C.F.R. 1208.16(c)(2).

2. a. An alien may file a motion to reopen 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 matter. 8 C.F.R. 1003.2(c) (Board), 1003.23(b) (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); see 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). When the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien generally may file only one such motion to reopen, and it 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).[2]

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 oppor-

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[2] Those limitations do not apply, however, if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered," and if the alien presents evidence of changed conditions that "is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(1).

tunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs 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 (1992).

b. An alien may file a motion to reconsider any order of the Board or the IJ. 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), 1003.23(b). The alien may file only one such motion for any given decision, and it must be filed within 30 days of the date of entry of the decision of which reconsideration is sought. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2), 1003.23(b)(1). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1), 1003.23(b)(2). Whether to grant a motion to reconsider is discretionary. See, *e.g.*, *Liu* v. *Mukasey*, 553 F.3d 37, 40 (1st Cir. 2009).

3. Petitioner is a native and citizen of Eritrea who entered the United States in April 1998 as a nonimmigrant visitor and remained beyond the time authorized. Pet. App. 2. In October 1998, she filed an application for asylum with the former Immigration and Naturalization Service (INS), contending that she would be persecuted on account of her religion (Jehovah's Witness) if she were returned to Eritrea. *Ibid.*; see Administrative Record (A.R.) 588-597. Petitioner did not claim that she feared persecution on any other ground. See A.R. 592, 596-597; see Pet. App. 23 (IJ's observation that petitioner alleged a fear of persecution "on only one ground"—her religion).

An asylum officer determined that petitioner was not eligible for asylum on the ground that her testimony was not credible and referred petitioner's asylum application to an IJ. A.R. 508-509; see Pet. App. 2. The INS charged petitioner with being removable as an alien who remained in the United States beyond the time authorized. Pet. App. 2, 20; A.R. 626-627 (Notice to Appear); see 8 U.S.C. 1227(a)(1)(B). Petitioner conceded that she is removable as charged. Pet. App. 20; A.R. 380, 390.

After a hearing, the IJ determined that petitioner is removable and denied her requests for asylum, withholding of removal, and CAT protection, primarily on the ground that petitioner's testimony was not credible. Pet. App. 19-27. The IJ found that petitioner was "unable to provide sufficient knowledge of the Bible, which is the touchstone of the Jehovah['s] Witness religion," and that petitioner did not provide a credible explanation for her apparent lack of knowledge. *Id.* at 24-25. The IJ also found that petitioner testified inconsistently about whether she ever attended a place of worship for Jehovah's Witnesses after she arrived in the United States, *ibid.*, and whether petitioner had trouble obtaining a passport and exit visa when she left Eritrea even though she had not met the country's national service requirement, *id.* at 26. The IJ further observed that there was no documentary evidence supporting petitioner's claim of religious persecution: "There is no[] document whatsoever from any church, whether in Eritrea or San Francisco [where petitioner lived in the United States], or any affidavit from any member of any other Jehovah['s] Witnesses certifying that [petitioner] is actually a Jehovah['s] Witness." *Ibid.* The IJ therefore denied petitioner's applications for asylum and withholding of removal. *Ibid.* The IJ also concluded

that petitioner had not demonstrated a likelihood of torture in Eritrea. *Id.* at 26-27.

4. The Board dismissed petitioner's appeal. Pet. App. 17-18. The Board stated that it had "reviewed the record of proceedings" and concluded that the IJ "adequately considered all of the evidence presented, under the proper legal standards, and correctly addressed the relevant issues in this case." *Ibid.* Specifically, the Board upheld the IJ's adverse credibility finding, explaining that "that finding was based on inconsistencies that are present in the record and are central to [petitioner's] claim." *Id.* at 18.

The Board rejected petitioner's argument that her testimony was sufficient to support her claim, explaining that "the various reasons cited by the [IJ] for declining to credit [petitioner's] veracity are sufficient to find that she failed to meet her burden of proof by credible testimony." Pet. App. 18. The Board also determined that petitioner failed to satisfactorily explain the "absence of supporting witnesses" in her case, and it concluded that the documentation petitioner did supply "is not of a sufficiently specific and persuasive character to overcome the reasons for finding that [petitioner] has fabricated her claim." *Ibid.*

5. Petitioner filed a petition for review, which the court of appeals denied in part and dismissed in part in an unpublished, memorandum opinion. See *Teclezghi* v. *Gonzales*, 187 Fed. Appx. 749 (9th Cir. 2006). The court determined that the "IJ was justified in making an adverse credibility determination" in petitioner's case, because there were "inconsistencies in [petitioner's] testimony [that] go to the heart of her asylum claim." *Id.* at 750. The court explained that petitioner "did not display the commanding Biblical knowledge typical of Jeho-

vah's Witnesses"; petitioner stated that "she did not have time to go to church" and, when pressed, "explained that she had only been between one and three times in the past two years"; and petitioner's "testimony about the ease with which she acquired her passport changed after she was reminded that Eritrea required proof of national service—something a Jehovah's Witness would not have—before it would issue a passport." *Ibid.* The court also noted that petitioner had failed to provide evidence to corroborate her claim, "such as proof of church membership." *Ibid.* Because the court concluded that petitioner "was properly found to be ineligible for asylum," it also upheld the Board's denial of withholding of removal and CAT protection. *Id.* at 750-751.

6. a. In October 2006, almost three years after the Board dismissed petitioner's appeal, petitioner filed a motion to reopen her case with the Board. Pet. App. 14-15; see A.R. 236-240 (motion to reopen). Petitioner alleged for the first time that she had been persecuted in Eritrea on account of her membership in a particular social group—Eritrean females who had been subject to female genital mutilation (FGM) as infants. A.R. 238-240. Petitioner acknowledged that her motion to reopen was untimely, but argued that the 90-day time limitation should be equitably tolled because all three of her prior attorneys had been ineffective in not asking her if she had undergone FGM in Eritrea. A.R. 237-238; see Pet. App. 15.

The Board denied petitioner's motion to reopen. Pet. App. 14-16. The Board determined that petitioner's motion was untimely, and it declined to apply equitable tolling. *Id.* at 14-15. The Board explained that petitioner did "not provide an adequate reason for why this

claim was not raised to the Board until almost 3 years after we dismissed [her] appeal." *Id.* at 15. The Board observed that, under Ninth Circuit law, "the motion to reopen period may be tolled due to deception, fraud, or error," but it determined that tolling was not appropriate here because petitioner's three prior attorneys "did not prevent [her] from earlier raising her claim that she had been subject to FGM." *Ibid.* (internal quotation marks omitted). The Board also noted that petitioner had offered "inconsistent and insufficient testimony" in support of her first claim, and that "it is apparent that [petitioner] was not fully candid [with] her prior counsel concerning her [first] asylum claim." *Id.* at 16. The Board concluded that petitioner's "assertions that her 3 prior counsel were ineffective" are similarly "not worthy of belief, particularly when the claim is raised so long after [the Board] dismissed [her] appeal." *Ibid.*

Petitioner filed a petition for review of the Board's decision with the court of appeals.

b. Petitioner also filed a motion to reconsider with the Board. See A.R. 9-45. The Board denied petitioner's motion to reconsider. Pet. App. 12-13. The Board stated that it had reviewed its prior decision and "evaluated all pertinent facts" and concluded that it had not erred. *Id.* at 12. The Board explained that the only issue on which it had previously ruled was "the question of whether [petitioner] had established an exception to the regulatory limits on the filing of motions to reopen." *Id.* at 13. The Board noted that petitioner "d[id] not raise the argument that there is necessarily ineffective assistance of counsel, justifying equitable tolling of mandatory time limits, when any female from [petitioner's] country employs an attorney on an unsuccessful asylum claim and that attorney does not raise [FGM] as a

ground for seeking asylum," and that, in any event, petitioner "cites to no precedent decision" that supports that proposition. *Ibid.* Accordingly, the Board concluded that petitioner had not raised any argument that justified reversing its denial of her untimely motion to reopen. *Id.* at 12-13.

Petitioner filed a petition for review of that ruling with the court of appeals, and it was consolidated with her petition for review of the Board's denial of her untimely motion to reopen.

7. The court of appeals denied the petitions for review in an unpublished, non-precedential decision. Pet. App. 1-11. The court observed that under Ninth Circuit precedent, the 90-day deadline for filing a motion to reopen is subject to equitable tolling on the ground of ineffective assistance of counsel, but only when an alien "is prevented from filing because of deception, fraud, or error" and the alien "acts with due diligence in discovering the deception, fraud, or error." *Id.* at 6 (quoting *Iturribarria* v. *INS*, 321 F.3d 889, 897 (9th Cir. 2003)). The court noted that the cases in which it had applied equitable tolling to consider an untimely motion to reopen "generally involved the malfeasance of attorneys, people misrepresenting themselves as attorneys, or immigration officials, who affirmatively defrauded their clients, completely failed to file documents for their clients as promised, or actively misled the petitioners such that their claims were defaulted." *Ibid.*

This case, the court explained, was "very different" from those in which it had applied equitable tolling. Pet. App. 8. The court observed that petitioner hired three attorneys to seek relief from removal "based on her professed fear of persecution upon returning to Eritrea on account of her religious beliefs," and those attorneys

"zealously advocated on her behalf first before the IJ, then before the [Board], and finally on appeal before this court." *Ibid.* The court explained that petitioner then waited almost three years before seeking to reopen her case, and in her motion, she argued that "her prior attorneys provided ineffective assistance because they failed to ask her an intensely personal question and raise a claim for relief that [p]etitioner admittedly never mentioned to them." *Ibid.* Petitioner, the court explained, "never even alluded to female genital mutilation as a reason she might fear returning to Eritrea." *Ibid.* Under those circumstances, the court declined to "craft a new rule of law out of whole cloth and hold categorically that it is attorney error, which, with prejudice, would result in ineffective assistance of counsel, for an attorney not to inquire of his or her own accord into the condition of a client's genitals when the client comes to the attorney expressing fear of religious persecution or any other unrelated subjective fear of returning to his or her native land." *Ibid.*

Accordingly, the court held that the Board had not abused its broad discretion in denying petitioner's untimely motion to reopen. Pet. App. 8-9. The court also concluded that the Board had not abused its discretion in denying petitioner's motion to reconsider, explaining that petitioner "could point to no error of law or fact in the [Board's] discretionary decision to deny her motion to reopen." *Id.* at 9.

Judge Fletcher concurred in the judgment, explaining that she believed petitioner's counsel was ineffective but also that she agreed that reopening was unwarranted "because of the amount of time that elapsed between [petitioner's] initial petition and her motion to reopen." Pet. App. 9-11.

8. Petitioner filed a petition for rehearing, which was denied. Pet. App. 28-36.

ARGUMENT

Petitioner seeks review of the court of appeals' decision holding that the Board did not abuse its discretion in denying her untimely motion to reopen immigration proceedings. The decision of the court of appeals is correct, and it does not conflict with any decision of another court of appeals or this Court. Contrary to petitioner's contentions (Pet. 9-17), this case does not present the questions whether the Due Process Clause provides aliens with a constitutional right to effective assistance of counsel or what the contours of such a right would be, because petitioner did not present those questions to the Board or the court of appeals, and neither the Board nor the court of appeals addressed them. In any event, this case would be a poor vehicle in which to consider those questions, because petitioner has not established ineffective assistance of counsel even under the standard she suggests. Further review is therefore unwarranted.

1. The "only issues" before the court of appeals were "whether the Board * * * abused its discretion in refusing to reopen [petitioner's] case after almost three years' delay and in denying [p]etitioner's motion to reconsider the same." Pet. App. 2. The Board explained—and petitioner acknowledges (Pet. 7)—that petitioner's motion to reopen was filed several years too late, because a motion to reopen a Board decision generally must be filed within 90 days of that decision. Pet. App. 6; see 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). Accordingly, the Board could consider the merits of petitioner's motion to reopen only if (1) equitable tolling of the 90-day deadline is available, despite the

mandatory language of 8 U.S.C. 1229a(c)(7)(C), and (2) equitable tolling is warranted on the facts of this case. The Board observed that Ninth Circuit case law holds that equitable tolling of the 90-day deadline for filing a motion to reopen is appropriate in certain circumstances, but it concluded that equitable tolling was not warranted in the circumstances of petitioner's case. Pet. App. 15-16. The court of appeals upheld that determination as within the Board's broad discretion. *Id.* at 8. That determination was correct.

a. As an initial matter, the court of appeals' decision is unpublished and non-precedential, and thus cannot give rise to the type of disagreement in published opinions that would warrant this Court's review. Further, as explained below, petitioner's challenge to the court of appeals' equitable tolling holding is fact-bound and does not raise any legal question warranting this Court's review. The court of appeals' holding does not implicate any disagreement in the circuits: petitioner has not cited any decision of any court of appeals holding that a failure to inquire about a possible ground for asylum never even alluded to by an alien constitutes ineffective assistance sufficient to equitably toll the statutory 90-day motion-to-reopen deadline. See Pet. App. 13 (petitioner "cite[d] to no precedent decision" supporting such a claim). Further review is unwarranted for these reasons alone.

b. The court of appeals' decision is correct. The courts of appeals review denials of motions to reopen under the highly deferential abuse-of-discretion standard, generally upholding the Board's decision "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any percep-

tible rational approach." *Zhao* v. *Gonzales*, 404 F.3d 295, 304 (5th Cir. 2005) (internal quotation marks omitted); see *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010) (observing that courts of appeals have "employed a deferential, abuse-of-discretion standard" in reviewing denials of motions to reopen).

The question here is whether the Board abused its discretion in declining to apply equitable tolling. Under Ninth Circuit case law, equitable tolling of the 90-day deadline for filing a motion to reopen is limited to a narrow range of circumstances involving "the malfeasance of attorneys, people misrepresenting themselves as attorneys, or immigration officials, who affirmatively defrauded their clients, completely failed to file documents for their clients as promised, or actively misled the petitioners such that their claims were defaulted." Pet. App. 6. Moreover, the court applies equitable tolling only when the alien shows that she has "act[ed] with due diligence in discovering the [attorney's] deception, fraud, or error." *Iturribarria* v. *INS*, 321 F.3d 889, 897 (9th Cir. 2003). Although petitioner now suggests (Pet. 41) that the Ninth Circuit's equitable tolling standard is wrong, she did not make that argument below, and it therefore should not be entertained here. See Pet. C.A. Br. 17-18 (relying on court of appeals' equitable tolling precedent); Pet. C.A. Reply Br. 2, 6-8 (same).

Assuming *arguendo* that the express statutory limitations on motions to reopen may be equitably tolled, the court of appeals correctly concluded that petitioner failed to justify such tolling. As the court explained, petitioner's three attorneys did nothing to mislead her or prevent her from making her case. To the contrary: they "zealously advocated on her behalf first before the IJ, then before the [Board], and finally on appeal before

[the Ninth Circuit]" with respect to the only basis on which petitioner claimed a fear of persecution (religion). Pet. App. 8. Petitioner never suggested—to the asylum officer, to the IJ, to the Board, or to her first three attorneys—that she feared persecution on any basis other than her religion. *Ibid.* Only when petitioner's religion-based claim was rejected by the court of appeals did she assert a new ground for relief and claim that all three of her previous attorneys had been ineffective. Petitioner's first three attorneys were not ineffective for failing to pursue an asylum claim based on FGM, because petitioner not only "never mentioned" a fear of persecution based on FGM, she "never even alluded to" FGM as a basis for a fear of returning to Eritrea. *Ibid.* The court of appeals appropriately declined "to craft a new rule of law out of whole cloth and hold categorically that it is attorney error, which, with prejudice, would result in ineffective assistance of counsel, for an attorney not to inquire of his or her own accord into the condition of a client's genitals when the client comes to the attorney expressing fear of religious persecution or any other unrelated subjective fear of returning to his or her native land." *Ibid.* Petitioner has not identified any court of appeals decision finding attorney malfeasance sufficient to warrant equitable tolling in similar circumstances.[3]

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[3] There is a question whether petitioner exhausted her current argument with the Board. A court of appeals may review a Board decision only when "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). According to the Board, petitioner "d[id] not raise the argument that there is necessarily ineffective assistance of counsel, justifying equitable tolling of mandatory time limits, when any female from [petitioner's] country employs an attorney on an unsuccessful asylum claim and that attorney does not

Moreover, the Board's decision not to apply equitable tolling was justified because even if petitioner's attorneys had been ineffective, petitioner failed to show that she acted with due diligence in seeking reopening. Petitioner waited until nearly three years after her removal order became final to argue that her attorneys had been ineffective in failing to pursue an asylum claim based on FGM. In her motion to reopen, petitioner made no effort to explain how she diligently pursued her claim during that time. See A.R. 236-240. Not surprisingly, the Board found that petitioner "d[id] not provide an adequate reason" for why she waited so long to file her motion to reopen. Pet. App. 15. In her motion to reconsider, petitioner asserted that she filed her motion to reopen after she learned of her attorneys' supposed ineffectiveness, A.R. 35-36, but she did not explain how she was diligently pursuing her case from the time her removal order became final to the time at which she allegedly discovered her attorneys' ineffectiveness. For that reason, even the member of the court of appeals panel who would have found ineffective assistance concurred in upholding the Board's denial of reopening. See Pet. App. 11 (Fletcher, J., concurring in the judgment).

Finally, even if the filing period could be equitably tolled and petitioner's motion to reopen could be considered, the Board did not abuse its discretion in denying the motion. Petitioner's motion to reopen asserted that she had been subject to FGM, but she did not submit any corroborating evidence, such as medical evidence, other documentary evidence, or statements of corroborating witnesses. See A.R. 236-240 (motion to reopen).

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raise [FGM] as a ground for seeking asylum." Pet. App. 13. That argument, however, is featured prominently in petitioner's certiorari petition. See Pet. 7, 16-17, 34-37.

Petitioner's motion on its face did not satisfy the standards for reopening: it did not support its assertions with any "affidavits or other evidentiary material," as is required by statute and regulation. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3).[4] Moreover, petitioner's motion could not be granted "unless it appear[ed] to the Board that evidence sought to be offered [was] material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1). Because petitioner provided no credible explanation for why she waited to file her new claim, see Pet. App. 16, petitioner could not meet the requirement of proving that the evidence she sought to present was previously unavailable. Thus, even if the Board had considered the merits of petitioner's motion to reopen, it would have had ample reason to deny it.[5]

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[4] After the Board denied her motion to reopen, petitioner filed a motion to reconsider, and she did attach some documentary evidence to that motion. But that was too late: the statute and regulations clearly require that an alien support a motion to reopen with specific assertions of facts that will be proven and evidence to corroborate them, see 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3), and petitioner did not do that. See also *In re O-S-G-*, 24 I. & N. Dec. 56, 57-58 (B.I.A. 2006) ("A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen, which seeks a new hearing based on new or previously unavailable evidence.").

[5] Petitioner does not appear to challenge the court of appeals' holding that the Board did not abuse its discretion in denying her motion to reconsider. In any event, the court of appeals' decision is correct on that score as well, because petitioner failed to show any error of fact or law in the Board's denial of the motion to reopen. Pet. App. 9; see 8 U.S.C. 1229a(c)(6)(C); 8 C.F.R. 1003.2(b)(1), 1003.23(b)(2).

2. Petitioner contends (Pet. 9-37) that this case presents the questions "whether asylum seekers have the Fifth Amendment right to effective assistance of counsel" and whether the standard set out in *Strickland* v. *Washington*, 466 U.S. 668 (1984), should be used to determine whether counsel was effective. She is mistaken. Petitioner did not raise any such contentions before the Board or the court of appeals, and neither the Board nor the court of appeals passed on them. Accordingly, this case does not present those questions.

Petitioner's argument to the Board was that equitable tolling was warranted on the facts of her case because her attorneys were ineffective. See Pet. App. 15-16. In her motion to reopen, petitioner did not mention the Due Process Clause or rely on an asserted constitutional right to effective assistance of counsel. See A.R. 236-240. She also did not address what standard would apply to determine whether any such constitutional right had been violated, and she did not mention *Strickland*. See *ibid.*[6] Instead, petitioner simply relied on the Board's decision in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), and argued that she followed the procedures set out in that case. See A.R. 238-239. The Board considered that argument, and it did not address the question whether there is a constitutional right to effective assistance of counsel or what the standard would be for assessing counsel's effectiveness. See Pet. App. 14-16. Petitioner's failure to present her constitutional arguments to the Board means that the federal courts lack

[6] Petitioner did not present any arguments concerning a constitutional right to effective assistance of counsel in her motion to reconsider. See A.R. 9-44. The Board accordingly did not address any such arguments in its decision denying petitioner's motion to reconsider. See Pet. App. 12-13.

the authority to consider them, because Congress has provided that the courts may review a Board decision only when "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1).

Petitioner also did not present her constitutional arguments in the court of appeals. In her opening brief, she argued that she satisfied the procedural requirements for presenting a claim of ineffective assistance of counsel under *Lozada*, Pet. C.A. Br. 23-25, but she did not ask the court of appeals to address a constitutional right to effective assistance of counsel or to apply the *Strickland* standard to assess claims of ineffective assistance of counsel.[7] Petitioner did not make any constitutional argument in her reply brief, instead arguing that her attorneys' ineffectiveness warranted equitable tolling on the facts of this case. See Pet. C.A. Reply Br. 2-10. Because petitioner did not present the constitutional arguments to the court of appeals, the court of appeals did not rule on them. See Pet. App. 1-11. Specifically, the court of appeals did not address the question "whether asylum seekers have the Fifth Amendment right to effective assistance of counsel" or "what standard should be used to assess attorney performance." Pet. 9. This Court should not consider those questions in the first instance. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) (this Court ordinarily does not address issues that were not passed upon by the courts below).

It is true that there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective

[7] Petitioner asserted in passing (Pet. C.A. Br. 22) that "[a] claim of ineffective assistance of counsel is a due process claim," but she did not provide any argument in support of that assertion.

performance by their privately retained counsel. See, *e.g.,* Br. in Opp. at 12-13, *Afanwi* v. *Holder*, 130 S. Ct. 350 (2009) (No. 08-906) (discussing cases).[8] If and when the Court decides this issue, it should conclude that the Fifth Amendment does not confer a right to have a removal order set aside on the basis of allegedly ineffective assistance by privately retained counsel in immigration proceedings.[9] But this case does not present that

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[8] This Court has declined to grant certiorari in cases presenting a question about whether an alien in removal proceedings has a constitutional right to effective assistance from privately retained counsel. See *Machado* v. *Holder*, cert. granted, judgment vacated, and case remanded on other grounds, 130 S. Ct. 1236 (2010) (No. 08-7721); *Massis* v. *Holder*, cert. denied, 130 S. Ct. 736 (2009) (No. 08-1392); *Afanwi* v. *Holder*, cert. granted, judgment vacated, and case remanded on other grounds, 130 S. Ct. 350 (2009) (No. 08-906).

[9] As this Court has explained, when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-754 (1991). When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffective assistance of counsel in such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see *Lawrence* v. *Florida*, 549 U.S. 327, 337 (2007). Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by counsel of the alien's choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). But that provision does not mean that the attorney is a government actor. Accordingly, when an alien has invoked that privilege and retained a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are not those of the government, but are instead attributed to the client.

constitutional question, and so the Court's resolution of the question should wait for another day.

3. Even if this case presented the constitutional questions petitioner asserts, this would be a poor vehicle for considering them. First, the court of appeals' decision is unpublished and does not create any binding circuit precedent. It therefore cannot lead to the type of disagreement in published opinions that could warrant this Court's review. Second, the ineffective assistance question in this case arose in the context of equitable tolling. The question before the court of appeals was not simply whether petitioner's three attorneys were ineffective, but whether they were so ineffective—and petitioner pursued her claim with such diligence—that the Board abused its discretion in refusing to reopen her case, nearly three years after her removal order became final. Third, resolving the constitutional questions would not change the outcome of her case. The court of appeals explained in detail why petitioner's three prior attorneys were not ineffective. Pet. App. 8; see pp. 14-15, *supra*.

Fourth, in addressing ineffective assistance through the lens of equitable tolling, petitioner had made inconsistent arguments about how to determine whether counsel has been effective. Before the Board and the court of appeals, petitioner relied on the *Lozada* procedural framework. See A.R. 238-239; Pet. C.A. Br. 23-25; Pet. C.A. Reply Br. 2-6. In her certiorari petition, she asks this Court to "dismantle" *Lozada*'s requirements. Pet. 30. Similarly, petitioner argued to the court of appeals that the standard for judging whether her counsel's ineffectiveness prejudiced her case was whether "the performance of counsel was so inadequate that it *may* have affected the outcome of [her] proceedings."

Pet. C.A. Br. 28 (quoting *Ortiz* v. *INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (emphasis added by petitioner)). Now, petitioner relies for the first time (Pet. 28-30) on *Strickland*, which sets out a more demanding standard for prejudice: the client "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a "reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Because petitioner failed to present her *Strickland*-based argument to the Board and the court of appeals, and because petitioner's arguments about effective assistance in the context of equitable tolling have been inconsistent, this case would be a poor vehicle in which to consider any questions concerning a constitutional right to effective assistance of counsel in immigration proceedings. For these reasons as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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