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IN THE SUPREME COURT OF THE UNITED STATES

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NOEL REYES MATA, :
Petitioner : No. 14-185

v. :

LORETTA E. LYNCH, :
ATTORNEY GENERAL. :

- - - - - x

Washington, D.C.

Wednesday, April 29, 2015

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:20 a.m.

APPEARANCES:

MARK C. FLEMING, ESQ., Boston, Mass.; on behalf of
Petitioner.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Respondent in support of reversal and
remand.

WILLIAM R. PETERSON, ESQ., Houston, Tex.; for
Court-appointed amicus curiae, supporting the
judgment below.

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1 P R O C E E D I N G S

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 14-185, Mata v. Lynch.

5 Mr. Fleming.

6 ORAL ARGUMENT OF MARK C. FLEMING

7 ON BEHALF OF THE PETITIONER

8 MR. FLEMING: Mr. Chief Justice, and may it
9 please the Court:

10 The Court has been offered two ways to
11 approach this case, a short way and a long way. We
12 believe we prevail under both and I will address both,
13 but I would start with the short way, which we think is
14 the right way. This is a case about appellate
15 jurisdiction --

16 JUSTICE KENNEDY: You know the way to our
17 hearts.

18 (Laughter.)

19 MR. FLEMING: I try to please, Justice
20 Kennedy.

21 This is a case about appellate jurisdiction
22 and specifically whether Congress has given the courts
23 of appeals jurisdiction to review the denial of a motion
24 to reopen that would be timely through the application
25 of equitable tolling. And that question is answered by

1 Section 1252 of the INA, which creates jurisdiction over
2 denials of motion to reopen as the Court confirmed in
3 Kucana and it makes no distinction based on the grounds
4 of the denial of the motion to reopen.

5 In this case the board denied Mr. Mata's
6 motion as untimely, it ruled that equitable tolling was
7 generally available, but that Mr. Mata was not entitled
8 to it because it erroneously believed that his
9 misdemeanor assault conviction qualified as a crime
10 involving moral turpitude. That legal error was
11 reviewable. It would have been reviewed in any other
12 circuit. It should have been reviewed here and the
13 government agrees, and Mr. Peterson as amicus, does not
14 mount any argument that that denial somehow does not
15 fall within the jurisdictional grant of Section 1252.

16 JUSTICE GINSBURG: Can you explain why -- on
17 the surface, he beats up his girlfriend. But why that
18 is not a crime involving moral turpitude? Because I had
19 thought that the -- the rest of this is academic if the
20 bottom line is he's committed a crime of moral
21 turpitude?

22 MR. FLEMING: Justice Ginsburg, first of
23 all, that -- that is a question that the First Circuit
24 did not reach and we submit should have reached. But to
25 answer the question, the BIA has a very developed

1 jurisprudence regarding when assault crimes qualify as
2 crimes involving moral turpitude and it involves
3 consideration of a number of factors.

4 It involves not only the level of injury
5 that was either intended or caused, but also the level
6 of intent. And as the level of intent that is
7 chargeable under the offense decreases from
8 intentionality to, say, recklessness, then the level of
9 bodily injury that is required has to concomitantly
10 increase in order for it to constitute moral turpitude.

11 In Texas, the simple assault statute that
12 Mr. Mata pled guilty under is not an aggravated assault
13 statute. It can be charged based only on bodily injury
14 and that is defined in a purposely broad way, as the
15 Texas court of appeals has stated, to include even
16 injury caused by relatively minor physical contact.

17 So simple assault that can be charged under
18 that provision is not turpitudeness and that's what the
19 Board should have ruled and that was the argument that
20 was presented to the Fifth Circuit, but the Fifth
21 Circuit determined that it did not have jurisdiction to
22 decide. That is the issue we've asked this Court to
23 review. Of course, it does not need to go into the
24 turpitudeness or not quality of the offense under
25 Section 2201(a)(1) of the Texas Penal Code.

1 Because this is a jurisdictional question,
2 there is no need to go further to the issues that Mr.
3 Peterson is raising regarding whether there is equitable
4 tolling as a matter of merits under the INA. We don't
5 think it's necessary. We think the Fifth Circuit can
6 address that if appropriate, if it chooses to on remand.

7 JUSTICE GINSBURG: What if --

8 JUSTICE SCALIA: Well, wait --

9 JUSTICE GINSBURG: Wouldn't the Fifth
10 Circuit need to be -- I mean, the Fifth Circuit view was
11 no equitable tolling, period. The statute says 90 days.
12 It has a couple of exceptions and that's it. So if we
13 simply say you have jurisdiction, the -- the answer
14 would likely be fine, you told us we have jurisdiction.
15 We think this limitation period has no give, end of
16 case.

17 MR. FLEMING: Justice Ginsburg, we don't
18 think that's what the Fifth Circuit did in this case or
19 in any other. In this case, the Court specifically
20 disavowed any ruling on the merits of the equitable
21 tolling claim. It simply dismissed the petition for
22 lack of jurisdiction. Notably, the BIA in 2012 in a
23 case called Chavez-Guzman, which we cite in our reply,
24 recognized that the Fifth Circuit has not addressed in a
25 published decision whether the motion time limitations

1 may be equitably tolled in cases claiming
2 ineffectiveness of counsel.

3 JUSTICE SCALIA: Why did -- why did the
4 Fifth Circuit treat this, therefore, as a -- as it
5 requested review the sua sponte extension granted below?

6 MR. FLEMING: It's --

7 JUSTICE SCALIA: Why -- why would it have
8 done that if it -- if it thought that, in fact, there
9 was some argument about whether -- whether they could
10 appeal the denial of extension in law as opposed to in
11 the sua sponte discretion of the agency?

12 MR. FLEMING: It's -- there are two stages
13 to the answer, Justice Scalia. And it's regrettable
14 that the decisions that issue from the Fifth Circuit do
15 not -- they have conclusory statements in them and not a
16 lot of reasoning.

17 First of all, you have the unpublished
18 decisions which say that the circuit will construe a
19 request for equitable tolling as a request for sua
20 sponte reopening.

21 JUSTICE SCALIA: Why? Why would one do
22 that?

23 MR. FLEMING: So my best reading of them --
24 and again, the reasoning is sparse. They say that in
25 their view, equitable tolling is not a basis for filing

1 a motion after 90 days. Now, because they have not --

2 JUSTICE SCALIA: Which means there --
3 there's no equitable tolling.

4 MR. FLEMING: I -- I -- now, that's not
5 something that they've ever adopted in a published
6 decision. I think one reading of that -- and this is
7 the reading the government, I think, endorses or at the
8 very least there's a dispute about it -- is that the
9 Fifth Circuit was saying the statute and the regulations
10 on their terms do not use the words "equitable tolling."
11 That, of course, does not resolve the fundamental
12 question whether as a matter of statutory
13 interpretation --

14 JUSTICE SCALIA: Sure.

15 MR. FLEMING: -- or as a matter of
16 administrative authority equitable tolling can be
17 applied.

18 But I -- I want to be clear, we -- we do not
19 fear this question at all. And if the Court wishes to
20 reach the merits issues that Mr. Peterson has put before
21 the Court, we are happy to fight on that ground. We
22 simply want it to be plain that we didn't present the --
23 the jurisdictional question as including a merits
24 question. If the Court thinks it needs to be decided,
25 then the Court has the briefing and I'm prepared to talk

1 about it.

2 JUSTICE SCALIA: Do you acknowledge that
3 if -- if you view this as the Fifth Circuit viewed it,
4 as a request to review the sua sponte extension granted
5 by the agency, that the Fifth Circuit would have had no
6 jurisdiction over that?

7 MR. FLEMING: We do not, Justice Scalia.
8 And I just want to be clear the context in which I
9 answer that question. That requires a lot of steps
10 before the Court even gets to that. First of all, it
11 not only requires getting to the merits issues, it
12 requires rejecting our primary -- our contention on the
13 merits, which is that as a matter of statutory
14 interpretation, this is tollable. It requires rejecting
15 the government's position that at the very least, the
16 statute does not prohibit the board from implementing
17 the 90-day time limit by using equitable tolling. And
18 if you get to that point such that you're in a
19 through-the-looking-glass world where the board was, in
20 fact, not doing what it thought it was doing, namely,
21 exercising authority under the statute, but instead,
22 exercising regulatory sua sponte authority, then you get
23 to the question, are there judicially manageable
24 standards to review what the board, in fact, did in this
25 case?

1 And there clearly are. They have -- they're
2 being reviewed in every other circuit when there is a
3 request for equitable tolling based on ineffective
4 assistance of counsel. The equitable tolling standards
5 are well settled under this Court's decision in Pace v.
6 DiGuglielmo. The ineffective assistance standards are
7 well settled by the board's own Lozada decision.

8 Now, it may well be that there are other
9 situations where the board simply says request denied
10 and that may be a situation where jurisdiction would be
11 in doubt. But if you are talking about a case like this
12 one where the board writes an opinion that says, here
13 are the standards we are applying and we believe that
14 the Petitioner is ineligible for equitable tolling
15 because his conviction is for a crime involving moral
16 turpitude, that is a legal question that is reviewable,
17 regardless of how you caption the authority under which
18 the board is acting.

19 JUSTICE SOTOMAYOR: Now, I've -- I've
20 forgotten, but is there a circuit split on that third --
21 on the sua sponte review?

22 MR. FLEMING: There is no circuit split as
23 such because every other circuit believes, as we think
24 is correct, that this kind of decision is reviewable as
25 a matter of statutory authority. And that's what the

1 board is doing. That's what the board itself thinks
2 it's doing. So every other circuit to have decided the
3 issue does say it has jurisdiction to review this kind
4 of decision. They don't call it sua sponte.

5 JUSTICE GINSBURG: Then how do we make it clear
6 to the Fifth Circuit? We say Fifth Circuit, you have
7 jurisdiction. They say fine. We said before and we say
8 again that this statute is not susceptible to equitable
9 tolling and then we're right back where we are.

10 MR. FLEMING: If that is, in fact, what the
11 Fifth Circuit does, then it may well be, because then
12 there would be a clear circuit split on the merits
13 question of the availability of equitable tolling. I
14 would hold out hope that the Fifth Circuit would not
15 create that circuit split; that when disabused of the
16 belief that it lacks jurisdiction, it would then engage
17 in the analysis that we and the government believe it
18 should engage in and find that like every other circuit
19 to have addressed the issue, there is, in fact,
20 equitable tolling available and would address Mr. Mata's
21 request for it on the merits.

22 JUSTICE GINSBURG: Well, it knew at the time
23 it rendered its decision that the other circuits were
24 taking a different position on whether the 90-day period
25 was susceptible to extension.

1 MR. FLEMING: It did, Your Honor. The panel
2 felt -- felt itself bound by prior precedent on the
3 jurisdictional question. This is why I don't think
4 fundamentally that it reached a decision in this case or
5 in any published opinion on the merits of that.

6 JUSTICE SCALIA: I'm not sure -- did the
7 First Circuit say it has no jurisdiction to review
8 the -- the statutory question?

9 MR. FLEMING: The --

10 JUSTICE SCALIA: I thought all it did was,
11 since there is no tolling under the statute, we're going
12 to interpret this as a sua sponte thing, and the only
13 question before them is whether that sua sponte thing
14 conferred jurisdiction or not. Isn't that what
15 happened?

16 MR. FLEMING: It -- I -- I don't think so,
17 Justice Scalia.

18 JUSTICE SCALIA: Okay.

19 MR. FLEMING: I think if that had happened,
20 if that was really what the Fifth Circuit meant to do,
21 then it should have assumed jurisdiction over our
22 request for statutory tolling. It should have denied
23 the petition to that extent, and then it could have
24 dismissed the request for sua sponte reopening. But it
25 didn't do that. It dismissed the entire thing for lack

1 of jurisdiction, which is why we think there is no
2 merits ruling here that the Court needs to reach.

3 Again, however, I say that if the Court
4 wishes to reach it, we believe the answer is clear and
5 correct under this Court's precedence that the 90-day
6 time limit is a statute of limitations, and that it
7 should be -- there is no reason to think that the
8 presumption of tolling either doesn't apply or has been
9 rebutted.

10 CHIEF JUSTICE ROBERTS: Where -- where is
11 Mr. Mata at this point?

12 MR. FLEMING: He's -- he's at home with his
13 family. His -- his order has been --

14 CHIEF JUSTICE ROBERTS: So you don't mind if
15 this goes back to the Fifth Circuit.

16 MR. FLEMING: This should go back to the
17 Fifth Circuit, and the question is simply that Mr.
18 Peterson has raised is, what does it go back with? Does
19 it go back solely with directions that the court has
20 jurisdiction and everything else should be addressed by
21 the -- the Fifth Circuit in the first instance, or does
22 it go back with a decision that, in addition to there
23 being jurisdiction, there is also equitable tolling, and
24 then the Fifth Circuit can address the question on the
25 merits.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. FLEMING: With the Court's permission,
3 I'll reserve the balance of my time. Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Yang.

5 ORAL ARGUMENT OF ANTHONY A. YANG

6 ON BEHALF OF THE RESPONDENT

7 IN SUPPORT OF REVERSAL AND REMAND

8 MR. YANG: Mr. Chief Justice, and may it
9 please the Court:

10 The court of appeals here rested its
11 decision on a basic and fundamental error of
12 administrative law. Rather than review the board's
13 decision on its own terms, the court of appeals
14 recharacterized the question before it into a different
15 question over which it lacked jurisdiction. That course
16 is inconsistent with the Chenery rule, which, since even
17 before the APA, required that judicial review of agency
18 action be based on the rationale adopted by the agency.

19 JUSTICE SCALIA: But the way you put it
20 causes me to believe that you agreed that the Fifth
21 Circuit would have had no jurisdiction.

22 MR. YANG: We --

23 JUSTICE SCALIA: If indeed it was the sua
24 sponte action that they were reviewing.

25 MR. YANG: That's right. We disagree with

1 Petitioner on this point --

2 JUSTICE SCALIA: On that point.

3 MR. YANG: But we don't think it affects the
4 disposition here. Also I would note that every single
5 court of appeals with jurisdiction over immigration
6 cases agrees with our position. There is no circuit
7 split because it's unanimous in our favor.

8 JUSTICE KAGAN: And Mr. Yang, could you
9 point me to the place in the board's decision that you
10 think makes clear what the board was doing? Because as
11 I looked at the board's decision, honestly, I found it a
12 little bit difficult to tell whether the board was
13 denying it on statutory grounds or on sua sponte
14 grounds.

15 MR. YANG: I agree with you that the board's
16 decision could be a little bit more clear. Some
17 background is helpful.

18 This is a question of equitable tolling for
19 ineffective assistance of counsel. That's the claim.
20 And so that claim embodies at least four requirements.
21 One, you have to have normal equitable tolling
22 satisfied.

23 You have to also show ineffective
24 assistance, and that has subparts, including prejudice
25 from the ineffective assistance, and you have to show

1 that you've met the requirements of the Lozada decision,
2 which has certain procedural showings that have to be
3 made.

4 Now, in order to get to equitable tolling,
5 you therefore have to show prejudice. And if you look
6 at Petition Appendix 7, after talking about Lozada in
7 the first full paragraph, in the second paragraph, they
8 say, you know, in Lozada, although the resulting
9 summary -- there was a summary dismissal of appeal, did
10 not amount to a deprivation of due process and was not
11 prejudicial.

12 And then with respect to prejudice, they
13 explain on two bases, the decision here, or the alleged
14 ineffective assistance was not prejudicial, one, because
15 it was not a crime of -- there was a crime of moral
16 turpitude which precluded relief; and, two, the alien
17 failed to submit at the motion to reopen stage, evidence
18 showing that there was exceptional and extremely unusual
19 hardship.

20 All of that goes to prejudice, which goes to
21 the tolling question. And the predicate, of course, was
22 the statement earlier that the time for filing a motion
23 to reopen may be tolled in cases of ineffective
24 assistance of counsel, but then they were just focusing
25 on the second.

1 So the way that we read the board, which I
2 think is the way the board has decided these cases
3 generally is that the questions of ineffective
4 assistance and equitable tolling here are kind of mixed.
5 And the board's decision addressed the -- the prejudice
6 prong of that -- those requirements.

7 JUSTICE BREYER: I somehow have the
8 impression, I don't know, the AG is going to have some
9 kind of rulemaking relevant to this.

10 MR. YANG: There is pending rulemaking, as
11 we noted in our brief. There is a notice of proposed
12 rulemaking that the Department has submitted to OMD that
13 is expected to, you know, hopefully go forward.

14 JUSTICE BREYER: Rulemaking has to do with
15 the existence or nonexistence of equitable tolling under
16 this provision?

17 MR. YANG: The rulemaking, of course, is not
18 public, but what I can tell you --

19 JUSTICE BREYER: Yes.

20 MR. YANG: -- is that the -- in the Compean
21 decision, the Attorney General addressed generally
22 questions of ineffective assistance of counsel. One of
23 the components of that was equitable tolling of the
24 deadline for ineffective assistance. It would be
25 logical to assume that because the -- that Compean

1 ruling was vacated in favor of the rulemaking, the
2 rulemaking scope could be similar to the Attorney
3 General's decision.

4 JUSTICE KAGAN: So on that assumption, that
5 would, as I understand it, give the Fifth Circuit
6 something new to think about in -- in addressing this
7 question; is that right?

8 MR. YANG: It certainly would, and it would
9 also have the benefit, on remand, of the government's
10 clear view that there is equitable tolling here,
11 although not applicable to this alien, but just
12 generally equitable tolling is available as all the
13 courts of appeals have decided. And as we note in our
14 brief, we don't think the Fifth Circuit is precluded
15 even at the panel level from reaching that decision.

16 JUSTICE GINSBURG: Would the -- would the
17 Fifth Circuit, with this rulemaking, you can't tell us
18 what it is at this stage, this early stage, would it be
19 available, will they have a rule should we remand this
20 case to the Fifth Circuit?

21 MR. YANG: I think it's unlikely there's
22 going to be a final rule by the time this Court's
23 decision is issued. The unified agenda projects a
24 notice of proposed rulemaking being issued late this
25 year. And then the notice and comment period would have

1 to elapse, and we'd have to get to a final rule. So I
2 don't think by the time June rolls around, we'll get the
3 final rule.

4 JUSTICE KAGAN: I'm -- I'm sorry, but there
5 would be an NPR when? Late this calendar year?

6 MR. YANG: Late this calendar year. That's
7 what the unified agenda projects.

8 So -- but again, I don't think sending this
9 case back on the very basic point that the Fifth Circuit
10 can't sidestep its obligation to review a motion to
11 reopen by characterizing it as something that it's not,
12 would wipe the slate clean. The Fifth Circuit in its
13 first -- in an earlier unpublished decision, in fact,
14 found that there was equitable tolling and reversed the
15 board to apply equitable tolling. Only later did it
16 change course without any reasoning and assert, again
17 with zero reasoning, that there was not equitable
18 tolling, and then adopted this construal rule.

19 But the construal rule itself is just
20 fundamentally into the teeth of the Chenery doctrine.
21 And had the court of appeals recognized that what it had
22 to review was the denial of the alien's motion to
23 reopen, it would have had jurisdiction. And it doesn't
24 matter, you know, amicus has tried to -- I think
25 artfully tried to recharacterize this jurisdictional

1 question into a question of the merits, but the answer
2 to the merits doesn't affect the jurisdiction.

3 If you were to assume, as the amicus has
4 argued, that there is no equitable tolling in this
5 context because the statute precludes it, that would not
6 be a jurisdictional problem. What it would mean is that
7 the court of appeals would simply affirm the board on
8 the merits; that is affirm the board's denial of a
9 motion to reopen, because there can be no equitable
10 tolling.

11 Again, we come back to the -- this case is a
12 very simple case. It's an appropriate case to end the
13 term on; it's quick, it's easy. The court of appeals
14 should have simply done what courts of appeals do all
15 the time when they're conducting agency review, a review
16 of agency action; that is, review the action before it
17 and not recharacterize it into something that it's not.

18 CHIEF JUSTICE ROBERTS: Well, to be fair to
19 the Fifth Circuit, I mean, I can't put myself in their
20 mind, but I think they may well have been trying to give
21 Mr. Mata the benefit of the doubt or give him every
22 chance. I mean, they say it's equitable tolling but,
23 you know, you're not going to get equitable tolling, so
24 that's no relief. And since you can't get it, maybe
25 you're trying to get something else. And so we'll look

1 at whether you get something else, and then too bad, it
2 turns out you don't get that either.

3 MR. YANG: Well, I won't speculate what
4 to -- what the court of appeals' motivations might have
5 been for its ruling, but the ruling itself is again just
6 fundamentally into the teeth of Chenery. It's true that
7 whencourts are addressing a pleading that's filed
8 before the court, itself, the court can say, well, I'm
9 going to read this generously. They do this in certain
10 contexts.

11 But when you're conducting review of agency
12 action, the rule that has always existed in the modern
13 APA era has been you look to what the agency has done.
14 And when you look to what the agency has done here, it
15 addressed and rejected the alien's motion to reopen.

16 JUSTICE KAGAN: Just to try to be a little
17 bit generous to the Fifth Circuit, again, I mean, I
18 started off by saying, I found it a little bit hard to
19 tell what the agency was doing. And you presented a
20 very good explanation, but it's an explanation that
21 actually requires some background knowledge, and I'm not
22 sure that they would have gotten that from just looking
23 at the face of the thing.

24 MR. YANG: And I don't mean to -- to fault
25 the Fifth Circuit.

1 JUSTICE KAGAN: But, I mean, you can't
2 really -- Chenery can't really operate very well if you
3 can't figure it out.

4 MR. YANG: Well, that's true. But the --
5 that is true, but the answer then is always to remand.
6 If you can't discern what the -- the course of the
7 agency's decision is, the other established rule is you
8 remand. And, you know, the -- this is not an unfamiliar
9 question to the courts. Generally, if you can discern,
10 even if it's in a cryptic way, what -- what the -- the
11 alien's -- excuse me -- the agency's path in an agency
12 decision, you review that. If you --

13 JUSTICE GINSBURG: Is it true that the --
14 the -- the agency, the BIA, has, a number of times,
15 recognized the existence of equitable tolling of this
16 90-day period, but has never done so in a
17 precedential opinion?

18 MR. YANG: That -- that is correct. That is
19 correct. It -- there is no precedential opinion. There
20 was, of course, the Attorney General's opinion in
21 Compean, which addressed both the standards for
22 ineffective assistance claims, as well as the
23 application of equitable tolling for cases involving
24 ineffective assistance. So the AG made that ruling, and
25 it's a way that's consistent with, I think, the -- what

1 we've articulated in the brief. That was vacated in
2 lieu of what -- what we will now have, which is a
3 rulemaking process to address the questions. So there
4 is no precedent, although the Attorney General has
5 briefly spoken on the issue.

6 If there's no further questions, I'm going
7 to --

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. YANG: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Peterson.

11 ORAL ARGUMENT OF WILLIAM R. PETERSON

12 ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE,

13 SUPPORTING THE JUDGMENT BELOW

14 MR. PETERSON: Mr. Chief Justice, and may it
15 please the Court:

16 We agree with the government that orders
17 denying statutory motions to reopen are reviewable in
18 the courts of appeals, and we agree with the government
19 that orders of the board denying invitations for the
20 board to reopen sua sponte are not reviewable in the
21 courts of appeals because they're committed to agency
22 discretion by law.

23 Where we part ways with the government is on
24 how you distinguish between the two of them. And we
25 offer what we think is the easiest test, which is the

1 timeliness. If an alien asks the board to reopen within
2 the statutory deadline, within the 90 days, he has a
3 right to reopening that is reviewable under Kucana if
4 the board denies it.

5 On the other hand, if the alien requests
6 reopening after the expiration of the 90-day statutory
7 period, the board is not obligated to grant reopening in
8 those circumstances. The board could grant reopening
9 only through its exercise of its sua sponte authority,
10 and as a result, that decision is wholly in the board's
11 discretion.

12 Now, the government turns to Chenery to
13 suggest a rule that courts must always characterize
14 agency decisions in precisely the way the agencies did.
15 This Court, we think, rejected that argument in
16 Brotherhood of Locomotive Engineers where it explained
17 that Chenery has nothing whatever to do with whether
18 agency action is reviewable. So we see Brotherhood as a
19 remarkably analogous case. There the request being made
20 of the commission was to reconsider a previous decision,
21 and the court distinguished between two types of ways
22 that a party could ask the commission to change one of
23 its earlier decisions.

24 It could file a motion for reconsideration,
25 simply suggesting that the law was wrong, the earlier

1 decision was simply incorrect on the same record. The
2 court held that that is not reviewable. Or the party
3 could file a motion to reopen with new evidence
4 attached, which would be reviewable. And what the court
5 said was that in determining whether the court of
6 appeals had jurisdiction over the petition for review,
7 it didn't need to focus on how the agency characterized
8 its order. It could focus on whether that order was
9 reviewable.

10 So in this case, Petitioner acknowledges
11 that if equitable tolling is unavailable, his motion to
12 reopen was untimely. If he filed 115 days, his only
13 argument in favor of timeliness is equitable tolling.

14 JUSTICE SOTOMAYOR: Well, I'm -- I'm a
15 little concerned because we do have to, on some levels,
16 address the question of whether a sua -- sua sponte
17 decision not to -- not to reopen is -- is reviewable.
18 I -- I think as a general matter, one could say that
19 given the vast discretion that the BIA gets in denying,
20 that one should basically defer to their decisions in
21 sua sponte reopenings. But occasionally, they do it not
22 as an exercise of discretion, but as an erroneous
23 interpretation of law. And there's plenty of standards
24 to correcting that. And so even for me, in sua sponte
25 openings -- and I do understand I'm probably on a losing

1 slope -- and I think that's what the -- the board is
2 basically saying. It's a matter of -- of deciding
3 whether there was ineffective assistance of counsel, and
4 we have a right and this is the standard we're going to
5 set. Lozada sets the standard that we're going to look
6 at, and for that reason, there is equitable tolling.
7 That's basically all they're saying, in my judgment.

8 MR. PETERSON: Your Honor, we disagree that
9 Lozada sets the standard for ineffective assistance of
10 counsel. We believe that Lozada sets the standard for
11 how an ineffective assistance of counsel claim must be
12 raised.

13 JUSTICE SOTOMAYOR: You're right. How it --
14 but here, they basically said it -- you didn't have due
15 diligence, I believe, and so you failed the
16 prerequisites.

17 MR. PETERSON: Your Honor, we would disagree
18 that in this case, the board actually construed
19 Petitioner as asking for equitable tolling. And there's
20 a reason for that, which is that Petitioner did not ask
21 for equitable tolling before the Board of Immigration
22 Appeals. His initial motion to reopen does not
23 acknowledge its untimeliness. It says nothing about
24 untimeliness at all. He mentions, in his reply in
25 support of the motion to reopen, that it is not

1 untimely if there are exceptional circumstances. You
2 will not find the phrase "equitable tolling" in any of
3 the papers the Petitioner filed with the Board of
4 Immigration --

5 JUSTICE GINSBURG: Well, who was he --

6 MR. PETERSON: -- Appeals.

7 JUSTICE GINSBURG: -- represented by at that
8 stage? I mean, is -- this is a case involving
9 ineffective assistance of counsel when he brought the --
10 at -- at what stage was there competent counsel?

11 MR. PETERSON: Justice Ginsburg, my
12 understanding is that Petitioner's current theory is that
13 he was represented by competent counsel when he retained
14 new counsel after the board's initial denial of his
15 appeal. That was October 10th, 19 days after the
16 board's decision. You'll see --

17 JUSTICE BREYER: What we have here is a
18 question that we agreed to review. The question is
19 whether the Fifth Circuit Court of Appeals erred in this
20 case in holding it has no jurisdiction to review
21 Petitioner's request that the board equitably tolled the
22 90-day deadline on his motion to reopen as a result of
23 ineffective assistance of counsel. We granted review on
24 that.

25 As far as what the Fifth Circuit said, among

1 other things it says, it lacks jurisdiction to review
2 the BIA's denial of Mata's untimely motion to reopen,
3 and so it need not address the merits. Now, it said
4 other things, too, which tend to support you as going on
5 this other ground, but it did say that. And you read,
6 at least somewhat possibly, you could say he did ask the
7 board to equitably toll his motion. And the board said,
8 no, we won't equitably do that because it's not going to
9 make any difference, basically. You weren't really
10 prejudiced.

11 Okay. Given all that, why should we decide
12 a different question? Why don't we decide the question
13 that we said we would decide? And if we're going to
14 decide the question we said we'd decide, I would think
15 the answer is pretty clear. They did have jurisdiction
16 to review it. They can review it and say the board was
17 right because they have a lot of discretion here,
18 et cetera, or for whatever reason, because there is no
19 equitable tolling, whatever they want to say. I
20 wouldn't guess that.

21 But I've never heard of any precedent that
22 would -- I can't think of one that would suggest that
23 when an agency does something like this, requests
24 equitably to toll, denied, appeal, that a court of
25 appeals wouldn't consider whether they're right or

1 wrong. I mean, what -- what -- if we get to that
2 question, is there any case? No, because I thought
3 normally, courts of appeals do review that kind of
4 question. You may have a weak argument, but then
5 they'll review it. They'll say no.

6 MR. PETERSON: Justice Breyer, as we
7 understand what the Fifth Circuit did here, the Fifth
8 Circuit has already established in its jurisprudence
9 that equitable tolling is unavailable for statutory
10 motions.

11 I know Petitioner now takes a different
12 view. I point you to Petitioner's arguments before the
13 court of appeals in his reply brief on page 8 where he
14 asked the court of appeals to reexamine its holding in
15 Ramos-Bonilla that motions to reopen are not subject to
16 equitable tolling. So at least before the court of
17 appeals, Petitioner saw the Fifth Circuit's
18 jurisprudence the same way that we did.

19 Now, because, in the Fifth Circuit,
20 equitable tolling of the 90-day deadline is unavailable,
21 the Board of Immigration Appeals could have granted
22 relief only by exercising its sua sponte authority to
23 reopen. That is the only basis on which the Board of
24 Immigration Appeals could have reopened in this case.
25 Therefore, the Board of Immigration Appeals' decision

1 whether or not to reopen is a decision that is committed
2 to agency discretion by law.

3 CHIEF JUSTICE ROBERTS: Well, but normally
4 it's a -- a circuit precedent establishing a particular
5 rule on the merits doesn't operate as a bar to
6 jurisdiction. I mean -- I mean, they may give you a
7 very short order citing the decision that controls the
8 precedent in the particular case, but they certainly
9 have jurisdiction in reviewing.

10 For example, I mean, let's suppose you've
11 got an argument that you want to overturn the precedent.
12 They would have had jurisdiction to do that.

13 MR. PETERSON: Mr. Chief Justice, we think
14 the difference here is that the deadline isn't simply a
15 question of whether the board was right or wrong in
16 denying the statutory motion. We see the timeliness as
17 the key distinction between whether the board's
18 discretion was unfettered on reopening or fettered on
19 reopening. And so the first question as we see it --
20 that is how we distinguish orders denying statutory
21 motions to reopen from orders denying motions to reopen
22 sua sponte.

23 And so the first question we would say that
24 a court of appeals would need to address is whether the
25 alien's motion to reopen before the Board of Immigration

1 Appeals was timely.

2 If that motion was untimely, then it rested
3 solely in the board's discretion whether to grant or
4 deny reopening. And for that reason, under Heckler v.
5 Chaney, under Brotherhood of Locomotive Engineers, the
6 Fifth Circuit properly dismissed for lack of
7 jurisdiction.

8 JUSTICE KAGAN: Do you deny that the
9 plaintiff here -- that Petitioner thought that he was
10 asking for equitable tolling? Because I guess -- I
11 guess this is very similar to the Chief Justice's
12 question, but it seems to me if somebody comes in and he
13 says, I'm entitled to equitable tolling, and the court
14 thinks, no, you're not, equitable tolling is
15 unavailable. Then what the court should do is something
16 like this. It should first say, sorry, equitable
17 tolling is not available.

18 Now, is there a different way we can
19 construe your petition? Oh, maybe there is. We can
20 construe it as a sua sponte decision. Now in the end
21 that's going to lead you to the same results because we
22 don't have jurisdiction over that, but that that's the
23 proper order of things. You know, first we'll say, oop,
24 sorry you lose equitable tolling is unavailable, and
25 then we'll do whatever construing we can do to see if

1 there are any alternative avenues, and then we decide
2 there are not.

3 MR. PETERSON: Well, Justice Kagan we
4 believe that's what the Fifth Circuit did, albeit
5 implicitly. I point to page 3 of the Petition Appendix:
6 We lacked jurisdiction to review the BIA's denial of
7 Mata's untimely motion to reopen.

8 JUSTICE KAGAN: No, but there's a -- there
9 is something, and this is what the Chief Justice was
10 saying, too. There is something that the court does
11 have jurisdiction over and it's the question of whether
12 equitable tolling was available. That's a merits
13 question, I have jurisdiction over whether equitable
14 tolling is available. I say it's not or I say it is;
15 doesn't matter, I have jurisdiction over that question
16 either way.

17 MR. PETERSON: The court of appeals
18 certainly always has jurisdiction to determine whether
19 it has jurisdiction. So on the way to a jurisdictional
20 ruling --

21 JUSTICE KAGAN: It's not determining whether
22 it has jurisdiction. That -- whether equitable tolling
23 is available or is unavailable is -- is not itself a
24 jurisdictional question. That's a merits question.

25 And then when you decide that it's

1 unavailable you can say, okay, is there another way to
2 construe the thing, and that ends -- that lands you in a
3 jurisdictional question as to whether you have
4 jurisdiction over sua sponte decisions.

5 MR. PETERSON: Justice Kagan, as we've tried
6 to suggest it, the timeliness is related to the
7 jurisdiction, because the timeliness of the motion to
8 reopen tells you whether the board's order denying
9 reopening is an order that was solely in the board's
10 discretion or not.

11 JUSTICE GINSBURG: Well it's really --
12 you're taking a merits first. You decide the merits and
13 then we say, then there's no jurisdiction. This is --
14 this is what -- whatever the rule is -- as you recognize,
15 is a claim-processing rule. You -- that rule needs to be
16 interpreted whether it has any give.

17 But it's -- it's -- there's jurisdiction to
18 decide that question. I think you agree that there is
19 jurisdiction in the Fifth Circuit to decide whether or
20 not this 90-day limit can be equitably tolled.

21 MR. PETERSON: Your Honor, yes, Justice
22 Ginsburg, we do agree the Fifth Circuit can decide
23 that -- has decided it, and as a result of deciding
24 that, did properly reach the judgement it reached in
25 this case.

1 JUSTICE KAGAN: But you see there's a little
2 bit of a problem with the way the Fifth Circuit is going
3 about this thing, because what the Fifth Circuit has
4 done is to say that equitable tolling is unavailable and
5 the only time it ever uttered those words is in an
6 unpublished opinion. And in all the published opinions
7 it's just said, you know, we're construing this as
8 something else and we have no jurisdiction over that.
9 And what that effectively has done is to insulate from
10 our review the determination that the Fifth Circuit has
11 made, if the Fifth Circuit has made it, that equitable
12 tolling is unavailable.

13 MR. PETERSON: Justice Scalia, when
14 Ramos-Bonilla adopted the --

15 JUSTICE KAGAN: He's definitely Justice
16 Scalia.

17 (Laughter.)

18 MR. PETERSON: I'm very sorry --

19 JUSTICE KAGAN: And we're not often
20 confused.

21 (Laughter.)

22 JUSTICE SCALIA: It's a good question,
23 though.

24 (Laughter.)

25 MR. PETERSON: Thank you. When the Fifth

1 Circuit in Ramos-Bonilla adopted the second half of --
2 adopted the construal rule from Lin v. Mukasey, we think
3 the Fifth Circuit necessarily adopted the premise for
4 that construal rule as well.

5 So when the Fifth Circuit quotes Lin v.
6 Mukasey for the proposition that an argument seeking
7 equitable tolling is in essence an argument that the BIA
8 should have exercised its discretion to reopen sua
9 sponte, we think that Ramos-Bonilla necessarily adopted
10 Lin's premise of that, that equitable tolling is not a
11 basis for filing an untimely or numerically barred
12 motion.

13 JUSTICE GINSBURG: Wouldn't the --

14 JUSTICE BREYER: But the problem that I
15 actually have, I guess, at your reaction, is if we don't
16 follow what I think is the fairly simple thing of the
17 question presented, you announce two things that I think
18 there's a huge argument about.

19 One is whether there is court review of the
20 sua sponte thing because, as you probably know, there
21 has been a long argument for 40 years about the meaning
22 of that first part of the APA in Davis; or somebody
23 says, well, when they say there's no court review when
24 you commit a matter of discretion to the agency by law,
25 of course there isn't. They're acting lawfully. But

1 you can still get review of whether they acted as an
2 abuse of that discretion. Of course. And I think you
3 can.

4 But I understand there are different points
5 on that. Do we really want to open up that big
6 question?

7 And as far as the other question you want us
8 to open up about whether this is statutorily
9 forbidden -- you say whether -- whether equitable
10 tolling is forbidden here, again there are two views.
11 Lots of the circuits think, no, it isn't, and moreover
12 the SG thinks that, moreover they're having a rulemaking
13 on that in a year or so that could encompass that, but
14 it's secret. But nonetheless -- nonetheless it might.

15 And -- and so we're getting into what's
16 actually I think a tough question. And maybe it's
17 cowardly. But I'm thinking why go into those two tough
18 questions, when in fact we asked for the answer to a
19 simple question. There are -- you have written a very
20 good brief and I understand what you're doing and -- but
21 I still am sort of stuck on this, which I'll put to you.

22 MR. PETERSON: Well, thank you, Justice
23 Breyer. I know it's the end of the term and I'm asking
24 you to complicate the case --

25 JUSTICE BREYER: Yes.

1 MR. PETERSON: But let me point out though
2 that the Solicitor General might agree that equitable
3 tolling is available, but agrees with us that every
4 court of appeals other than the Fifth Circuit to have
5 addressed the availability of equitable tolling has
6 gotten its analysis wrong. The Solicitor General agrees
7 with us that the presumption of equitable tolling is
8 inapplicable to these sorts of statutes.

9 Every court of appeals to have reached this,
10 as Petitioner does, reaches the result that equitable
11 tolling is available through the presumption of
12 equitable tolling. And now the Solicitor General
13 suggests that the administrative rulemaking might
14 provide a solution to this. Well, in at least two
15 circuits, and likely more, that's been foreclosed. If
16 you look at the Second Circuit's decision in Iavorski,
17 the Ninth Circuit's decision in Soca-Gonzalez, both of
18 them note that Board of Immigrations Appeals' position
19 is that equitable tolling is unavailable. Both of them
20 conclude that the statute unambiguously requires
21 equitable tolling and reject deference to the agency.

22 So to the extent that you have
23 administrative rulemaking here, as best I can
24 understand, the Fifth Circuit is the only circuit that
25 would actually be able to even potentially give effect

1 to it. And --

2 JUSTICE SOTOMAYOR: I'm sorry. I'm totally
3 confused. I -- I think what the agency is saying, at
4 least in this situation, is there is no explicit command
5 in the statute about equitable tolling. There is a time
6 limit in the statute. But can it be tolled or not?
7 There's no explicit command in the statute it can't.

8 And so as a matter of procedure, which
9 generally we give a huge amount of deference to the
10 agency, it has, albeit in unpublished opinions, followed
11 a practice of considering it in motions to reopen. And
12 from that practice, they're telling us, there is,
13 because the agency has determined that, with respect to
14 IAC claims, that they will do it.

15 I don't actually see that much problem with
16 the problem, but I do agree with Justice Breyer that we
17 don't need to get to that question here, because we
18 really don't know whether that's the view of the Fifth
19 Circuit or not. And if they find it or if they say it
20 doesn't exist, I want to consider their reasons. That's
21 what we usually do.

22 But they haven't really given us reasons,
23 other than to say the statute requires it, but I don't
24 see why.

25 MR. PETERSON: Justice Sotomayor, with

1 respect to the Fifth Circuit, I believe, I would hope,
2 that we've supplied the reasonings -- reasoning for why
3 the Fifth Circuit's decision on equitable tolling is
4 correct.

5 With respect to the agency determinations,
6 the Board of Immigration Appeals, with rare
7 exceptions -- and there's no suggestion that this case
8 is one -- will follow the authority of the circuit in
9 which it sits. So you can certainly find numerous
10 unpublished Board of Immigration Appeals decisions
11 applying equitable tolling to the statutory deadline,
12 but they do so primarily because they are following the
13 circuit authority.

14 Now, the government agrees with us that the
15 Board of Immigration Appeals has not independently
16 interpreted the statute in a way that would receive
17 Chevron deference to require equitable tolling. So
18 right now, I don't believe the board has taken an
19 official position, except for in the government's brief,
20 that equitable tolling of the statutory deadline is
21 available.

22 JUSTICE GINSBURG: The odd thing with
23 saying --

24 JUSTICE SOTOMAYOR: That's -- that's --

25 JUSTICE GINSBURG: -- the Fifth Circuit

1 was right in saying we -- we -- so -- so we're going to
2 give the Petitioner another chance, we'll consider it
3 under sua sponte. But the board said twice that its
4 power to reopen on its own motion is not meant as a cure
5 for filing defects or otherwise circumvent the
6 regulation.

7 So I think what they're saying is that if
8 there's a -- if there's a flaw, if the 90 days -- if the
9 90 days is -- can't be stretched, then we shouldn't
10 reach that same conclusion by saying, oh, but we can do
11 this sua sponte.

12 They -- they seem to be saying their
13 exercise of their sua sponte authority is controlled by,
14 do we have a rule that says 90 days and no more? If we
15 do have such a rule, we shouldn't be exercising our
16 authority sua sponte to get around that. And that's --
17 that's in the Petitioner Appendix at both 5 and 9, when
18 they say we shouldn't use our power to reopen on our own
19 motion that way, to get around what is the rule.

20 MR. PETERSON: Yes, Justice Ginsburg. We do
21 think the Board of Immigration Appeals certainly uses
22 its sua sponte authority to reopen sparingly and
23 respectfully of the statutory deadlines. As we see
24 here, the problem is giving effect to a deadline that
25 Congress set. Congress certainly meant something when

1 it required these motions to reopen to be filed within
2 90 days.

3 And that means that the board's decision
4 whether to reopen sua sponte, in order to exist
5 alongside and not simply swallow that statutory
6 deadline, needs to be in some way different in kind.
7 And we think the way that it's different is that when
8 the board is reopening sua sponte, when it's considering
9 reopening on its own motion, that's a decision that is
10 wholly in the board's discretion, and that is
11 unreviewable in the courts under Heckler v. Chaney.

12 And so when an alien properly invokes the
13 statutory authority for reopening, the ability to reopen
14 within the 90 days that we all agree under Kucana is
15 reviewable, it's, of course, reviewable. When the alien
16 misses that statutory window, when he asks the board to
17 reopen after the 90-day period is done, the board's
18 decision whether or not to grant or to reopen is wholly
19 in the board's discretion.

20 So when an alien asks the board to reopen --
21 and I think this case is the best example. When you
22 look at the request for reopening, you don't see, please
23 reopen using your statutory authority. You don't see,
24 please reopen using your sua sponte authority to reopen.
25 You simply see, Board of Immigration Appeals, please

1 reopen my case.

2 The way you determine what the true nature
3 of the board's authority is for the decision that it's
4 denying is whether that motion was filed within the
5 statutory time limit or without.

6 So if the court of appeals looks at it and
7 determines the alien asked for reopening after the end
8 of the statutory deadline, the answer there is that the
9 board's decision, its order that says, we deny
10 reopening, is wholly within the discretion of the board
11 and is unreviewable under Heckler v. Chaney.

12 JUSTICE SCALIA: So -- so you -- you say the
13 Fifth Circuit did not implicitly hold that there was no
14 review of -- of the statutory deadline period --

15 MR. PETERSON: As we understand --

16 JUSTICE SCALIA: -- because you think the
17 Fifth Circuit read the -- the board's decision, since it
18 came after the 90 days, to be a sua sponte decision and,
19 hence, nonreviewable.

20 But that's not consistent with their earlier
21 decisions, which said, we're going to interpret it this
22 way because we have no jurisdiction to do it if you
23 interpret it the other way.

24 I mean, they didn't say that, if it's after
25 the 90 days, the -- the board should consider it to be

1 an appeal to its sua sponte authority. They said, since
2 we believe that -- that there is -- that there is no
3 extension of the 90-day period under the statute, in
4 order to help the Petitioner, we're going to interpret
5 it as a request for review of the sua sponte authority.

6 Isn't that -- isn't that what they said.

7 MR. PETERSON: Yes, Your Honor, but we see
8 the two as essentially indistinguishable. Because the
9 Petitioner's request came after the expiration of the
10 90-day period, it could have been granted only through
11 the board's exercise of its sua sponte authority. And a
12 decision whether to grant or deny the board's exercise
13 of its sua sponte, in our view, is unreviewable.

14 Let me point out one possible concern in
15 writing an opinion here. And that's the habeas context.
16 As the Court's aware, prisoners can be quite creative in
17 attempting to circumvent the bar on second or successive
18 petitions under 2254 and 2255 and will frequently file
19 motions captioned under 2241 or possibly obscure common
20 law writs, seeking relief that's properly available
21 under 2254 or 2255.

22 In those circumstances, the district courts
23 will properly look at the merits of petitioner's
24 request, determine that it is a request that could truly
25 be granted only under 2254, 2255, and whatever the

1 caption the prisoner has placed on it will enforce
2 AEDPA's jurisdictional bar.

3 And finally, with respect to merits of
4 equitable tolling, we would simply note that, in our
5 view, Justice Ginsburg, I believe the Fifth Circuit has
6 already determined that Petitioner's motion to reopen
7 was untimely. And in the event that the Court remands
8 to the Fifth Circuit without addressing anything other
9 than the jurisdictional question, the inevitable result
10 in the Fifth Circuit would simply be to deny on the
11 merits, which is a result that would not lead to any
12 greater benefit for Petitioner.

13 If there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Fleming, you have four minutes
16 remaining.

17 REBUTTAL ARGUMENT OF MARK C. FLEMING

18 ON BEHALF OF THE PETITIONER

19 MR. FLEMING: Thank you, Mr. Chief Justice.

20 I -- I would simply clarify the -- the issue
21 raised, I think, first by Justice Kagan, but then by
22 others, as to whether there was any confusion in either
23 the board or the Fifth Circuit as to what relief my
24 client was seeking.

25 In the board decision, on page 7 of the

1 Petition Appendix, the board makes clear that it
2 understands that Mr. Mata was seeking tolling. It says,
3 in bringing this untimely motion to reopen, the
4 Respondent claims ineffective assistance of counsel, and
5 then a description of matter of Lozada. And then the
6 board says, and the time for filing a motion to reopen
7 may be tolled. In cases of ineffective --
8 ineffectiveness of counsel, the alien must show that he
9 was prejudiced by counsel's performance. And then the
10 analysis of this particular case continues.

11 And in the Fifth Circuit, the panel opinion
12 says, when it is summarizing the decision or the
13 proceedings below -- and this is on page 2 of the
14 Petition Appendix -- Mata subsequently filed an untimely
15 motion to reopen his removal proceedings based on a
16 claim of ineffective assistance of counsel and asking
17 the BIA to equitably toll the applicable finding --
18 filing period, or exercise its authority to reopen his
19 proceedings sua sponte.

20 The Fifth Circuit knew exactly what was
21 going on. There was a request for statutory tolling or
22 sua sponte reopening.

23 So I don't mean to be ungenerous to this
24 circuit at all. I think they got this exactly right.
25 They understood the nature of the relief requested.

1 Where they went wrong is they believed they lacked
2 jurisdiction over the first request, and that everything
3 had to fall into the second request, where they believe
4 they also lacked jurisdiction. And so they dismissed
5 the entire petition. That error --

6 JUSTICE GINSBURG: Do you --

7 MR. FLEMING: -- is the one that should
8 be --

9 JUSTICE GINSBURG: -- do you disagree with
10 Mr. Peterson that if we were simply to say, Fifth
11 Circuit, you have jurisdiction to decide this issue of
12 equitable tolling, that then the -- from what they've
13 done so far, the likelihood is they'll say, fine, we
14 have jurisdiction, there is no equitable tolling?

15 MR. FLEMING: I do disagree because I don't
16 think that's a foregone conclusion. I think there is
17 every likelihood that the Fifth Circuit, once freed from
18 its erroneous view that it is bound by panel precedent
19 or by some other principle to not exercise appellate
20 jurisdiction, will then look at the reasoning that other
21 courts of appeals, every other court of appeals to have
22 addressed this, have applied, and conclude that there
23 is, in fact, equitable tolling.

24 Will they review Mr. Mata's appeal on the
25 merits and necessarily rule in his favor? I think they

1 should and those are the arguments we will press on the
2 merits.

3 But I don't think that it's our burden to
4 show ultimate victory on every issue in order to show
5 that the Fifth Circuit misconstrued its jurisdiction.

6 JUSTICE GINSBURG: What -- what of the
7 argument that -- that the presumption of equitable
8 tolling applies to statutes of limitations, but not for
9 procedural time limits like this?

10 MR. FLEMING: Our -- our position, Justice
11 Ginsburg, as laid out in our reply brief, is that this
12 is a statute of limitations. It serves the policies
13 that this Court recognized in Young that are advanced by
14 a statute of limitations, namely, the advancing of
15 repose. It will ensure in most cases that after 90
16 days, the BIA's order of removal will be final, and it
17 does also encourage the bringing of timely -- a prompt
18 motion to reopen claims, so that they are not lagging on
19 for a long time. And that was Congress's intent.

20 None of that is inconsistent with tolling.
21 This Court has said repeatedly in cases like Bowen and
22 Holland that when you have a situation like extreme
23 misconduct by counsel, where there is a -- an
24 extraordinary hurdle that diligence will not get you
25 over, it is consistent with the principle of -- of

1 statute of limitations to allow tolling to proceed. And
2 we submit that this is not a situation where the
3 presumption is actually rebutted or does not apply.

4 I'd say a word about the agency context
5 because it is something that has been brought up on both
6 sides -- I apologize. I will not say that.

7 We would respectfully submit that the
8 judgment should be reversed and the case remanded.

9 CHIEF JUSTICE ROBERTS: Thank you.
10 Mr. Peterson, this Court appointed you to brief and
11 argue this case as an amicus curiae in support of the
12 judgment below. You have ably discharged that
13 responsibility, for which we are grateful.

14 The case is submitted.

15 (Whereupon, at 12:12 p.m., the case in the
16 above-entitled matter was submitted.)

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