No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

REPLY BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The court of appeals' jurisdiction does not depend on its resolution of the merits of the equitable-tolling issue 3
B. The court of appeals erred in recharacterizing the Board's equitable-tolling decision as a decision addressing only *sua sponte* reopening 7
C. The merits of petitioner's equitable-tolling arguments are not before this Court 12

TABLE OF AUTHORITIES

Cases:

Assaad, In re, 23 I. & N. Dec. 553 (B.I.A. 2003) 16
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 7
Compean, In re, 24 I. & N. Dec. 710 (A.G. 2009), vacated, 25 I. & N. Dec. 1 (A.G. 2009) 16
Estrada, In re, 26 I. & N. Dec. 180 (B.I.A. 2013) 16
Gonzales v. *Thomas*, 547 U.S. 183 (2006) 8, 17
Gotora v. *Holder*, 567 Fed. Appx. 219 (5th Cir. 2014) 7
Holland v. *Florida*, 560 U.S. 631 (2010) 20
Ibarra-Gonzalez v. *Holder*, 542 Fed. Appx. 341 (5th Cir. 2013) 6
ICC v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987) 8, 9, 11, 21
INS v. *Orlando Ventura*, 537 U.S. 12 (2002) 8
J-G-, In re, 26 I. & N. Dec. 161 (B.I.A. 2013) 16
Lin v. *Mukasey*, 286 Fed. Appx. 148 (5th Cir. 2008) 5
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 9
Livingston Powdered Metal, Inc. v. *NLRB*, 669 F.2d 133 (3d Cir. 1982) 20
Lozada, In re, 19 I. & N. Dec. 637 (B.I.A. 1988) 7

Cases—Continued: Page

McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1868) 4
Miller v. *French*, 530 U.S. 327 (2000) 20
NLRB v. *Zeno Table Co.*, 610 F.2d 567 (9th Cir. 1979) 20
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 18
Negusie v. *Holder*, 555 U.S. 511 (2009) 17
Pace v. *DiGuglielmo*, 544 U.S. 408 (2005) 20
Poliner v. *Texas Health Sys.*, 537 F.3d 368 (5th Cir. 2008), cert. denied, 555 U.S. 1149 (2009) 5
Ramos-Bonilla v. *Mukasey*, 543 F.3d 216 (5th Cir. 2008) 6
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 4
Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 18
SEC v. *Chenery Corp.*:
318 U.S. 80 (1943) 3, 8
332 U.S. 194 (1947) 3, 7, 10
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 3, 4
Torabi v. *Gonzales*, 165 Fed. Appx. 326 (5th Cir. 2006) 5
United States v. *Ocean Bulk Ships, Inc.*, 248 F.3d 331 (5th Cir.), cert. denied, 534 U.S. 1065 (2001) 6
Wood v. *Allen*, 558 U.S. 290 (2010) 13
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 18

Statutes, regulations and rules:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* and 701 *et seq.*:
5 U.S.C. 701(a)(2) 9, 11
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593....19
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1229a(b)(5)(C)(i)....15
8 U.S.C. 1229a(b)(5)(C)(ii)....14
8 U.S.C. 1229a(c)(6)(C) (2000) 19
8 U.S.C. 1229a(c)(7)(C)....14, 18, 19
8 U.S.C. 1229a(c)(7)(C)(i) 1, 2, 13, 14, 20, 21
8 U.S.C. 1229a(c)(7)(C)(ii)-(iv)....14
8 U.S.C. 1229a(c)(7)(C)(iii)....15
8 U.S.C. 1229a(e)(1) 15
49 U.S.C. 10327(g) (1982) 8
8 C.F.R.:
Section 1003.2(a)....21
Section 1003.2(c)(3)(iii) 15
Fed. R. Civ. P.:
Rule 4(m)....19
Rule 6(b) 20
Rule 6(b)(1) 19
Rule 26(a)(3)(B)....19
Sup. Ct. R. 15.2 12
5th Cir. R. 47.5.4 5

Miscellaneous:

Black's Law Dictionary (6th ed. 1990)....19

Miscellaneous—Continued: Page

61 Fed. Reg. 18,902 (Apr. 29, 1996) 19
Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel*, RIN 1125-AA68 (2015), http://www.reginfo.gov/public/do/eoDetails?rrid=125038 17
4B Charles Alan Wright et al., *Federal Practice and Procedure* (2015) 19

In the Supreme Court of the United States

No. 14-185

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

REPLY BRIEF FOR THE RESPONDENT

The court of appeals held that it lacked jurisdiction to review the decision of the Board of Immigration Appeals (Board or BIA) denying petitioner's untimely motion to reopen his removal proceedings. Pet. App. 2-3. The court reasoned that (1) its precedent required that it "construe[]" petitioner's "request for equitable tolling" of the 90-day deadline for filing a motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i) as an invitation to the Board to reopen proceedings on its *own* motion (*sua sponte*) under Board regulations, and (2) courts lack jurisdiction to review Board determinations declining to reopen *sua sponte*. Pet. App. 2-3. In light of its jurisdictional holding, the court of appeals emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." *Id.* at 3.

The government's opening brief explains (at 16-28) that the court of appeals erred because it does have jurisdiction to review the Board's denial of an alien's motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i), including when the alien seeks review of the Board's denial of equitable tolling of the 90-day filing deadline. The government's brief explains (at 29-32) that the court of appeals further erred by recharacterizing the Board's equitable-tolling decision as one resolving a different question, *i.e.*, whether the Board should reopen the proceedings *sua sponte*. A remand is thus warranted to allow the court of appeals to exercise its jurisdiction to address the merits of petitioner's equitable-tolling arguments in the first instance. Gov't Br. 32-36.

The Court-appointed Amicus Curiae dedicates most of his argument to the merits of petitioner's request for tolling, arguing that the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, does not allow the 90-day statutory deadline for motions to reopen to be equitably tolled. Br. 14-34. Amicus contends (Br. 3) that this extended, "initial inquiry" into the merits is necessary to resolve "the ultimate question * * * whether the Fifth Circuit properly dismissed the petition [for review] for want of jurisdiction." Resolution of the merits of the equitable-tolling issue, the argument continues (Br. 35-40), justifies the court of appeals' decision to construe the Board's rejection of petitioner's equitable-tolling contentions as an agency decision denying *sua sponte* reopening. The latter determination, Amicus explains (Br. 40-43), is not subject to judicial review.

That analysis is erroneous. The court of appeals' *jurisdiction* to review a Board decision addressing

equitable tolling does not depend on resolving the *merits* of the equitable-tolling issue. Indeed, the court of appeals here made clear that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." Pet. App. 3. This Court thus granted certiorari on the limited question whether the court of appeals had "*jurisdiction* to review Petitioner's request that the Board equitably toll" his filing deadline. See Pet. i (emphasis added). Moreover, a court conducting judicial review of an agency order is not free to reformulate the basis for the agency's decision as the Fifth Circuit did here. The court's task on review is to assess "the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); accord *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (*Chenery I*). Because the court of appeals did have jurisdiction to review the Board's denial of equitable tolling as part of reviewing the Board's denial of reopening, but failed to address petitioner's arguments that the Board erred in denying equitable tolling, this Court should reverse and remand for further proceedings.

A. The Court Of Appeals' Jurisdiction Does Not Depend On Its Resolution Of The Merits Of The Equitable-Tolling Issue

The fundamental premise of Amicus's argument (Br. 3) is that the court of appeals' jurisdiction to review the Board's equitable-tolling decision depends on the outcome of the merits, *i.e.*, on whether the 90-day deadline for an alien to file a motion to reopen "is subject to equitable tolling" under the INA. That premise is incorrect.

"Jurisdiction is power to declare the law." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

(quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). It is therefore well settled that a court lacks authority "to pronounce upon the meaning * * * of a state or federal law" when it lacks jurisdiction, and that "to do so is, by very definition, for [the] court to act ultra vires." *Id.* at 101-102. It follows that a court's determination of its own "subject-matter jurisdiction necessarily *precedes* a ruling on the merits," not vice versa. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (emphasis added). Cf. *id.* at 584-585 (explaining that a court need not resolve whether it has subject-matter jurisdiction when it can rule on other "threshold grounds for denying audience to a case on the merits").

Amicus contends (Br. 37), however, that if the filing deadline for petitioner's "motion to reopen cannot be equitably tolled" under the INA, then "petitioner's only route to relief" before the Board would have been to suggest that the Board exercise its distinct authority to reopen his case on its own motion (because no deadline applies to the Board's own exercise of its *sua sponte* reopening authority). And a determination not to reopen *sua sponte*, Amicus continues (Br. 40-43), is not subject to judicial review. But the court of appeals' *jurisdiction* to review the Board's denial of petitioner's motion to reopen does not turn on whether petitioner's request for equitable tolling should fail on the merits. Even if the court of appeals were to conclude—contrary to every court of appeals to have resolved the issue (see Gov't Br. 33 & n.12)—that the 90-day deadline for filing a motion to reopen is *not* subject to equitable tolling, that conclusion would merely provide a basis for *upholding* the Board's denial of reopening *on the merits*, *i.e.*, for ruling that

the Board's denial of the alien's untimely motion to reopen was not erroneous. See *id.* at 31-32.

Amicus's argument that the court of appeals' jurisdiction turns on the availability of equitable tolling before the Board is also inconsistent with the decision under review. Petitioner argued below that the deadline for filing his motion to reopen was subject to equitable tolling, Pet. C.A. Br. 7-15, but the Fifth Circuit recognized that it could not resolve the merits of those arguments if it lacked jurisdiction over his petition for review. The court thus emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims" because it had determined that it "lack[ed] jurisdiction to review the [Board's] denial of [petitioner's] untimely motion to reopen." Pet. App. 3.

Moreover, the Fifth Circuit has yet to resolve in a precedential decision whether equitable tolling applies in this context. Although Amicus asserts (Br. 2, 10) that Fifth Circuit "precedent" holds that an alien's reopening "deadline cannot be equitably tolled," no such binding precedent exists. Amicus apparently relies (Br. 10) on the Fifth Circuit's unpublished (and unexplained) disposition in *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (2008) (per curiam). See Gov't Br. 34. But that decision, like every unpublished Fifth Circuit decision issued after 1995, is "not precedent." 5th Cir. R. 47.5.4; see *Poliner* v. *Texas Health Sys.*, 537 F.3d 368, 381 n.44 (5th Cir. 2008), cert. denied, 555 U.S. 1149 (2009). Moreover, even if such unpublished decisions were precedential, the Fifth Circuit's earlier, unpublished "hold[ing] that the doctrine of equitable tolling applies" to an alien's reopening deadline, *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (2006) (per

curiam); see Gov't Br. 34—not the subsequent panel decision in *Lin*—would be the relevant circuit precedent. See *United States* v. *Ocean Bulk Ships, Inc.*, 248 F.3d 331, 340 n.2 (5th Cir. 2001) (explaining that "the holding of the first panel to address an issue is the law of th[e] Circuit" and "bind[s] all subsequent panels" until overruled en banc or by this Court) (citation omitted), cert. denied, 534 U.S. 1065 (2001). Accordingly, as previously explained (Gov't Br. 35-36 & n.14), the Fifth Circuit has yet to resolve whether the deadline for an alien to file a motion to reopen may be equitably tolled.

Since 2008, the Fifth Circuit's precedent has required Fifth Circuit panels (a) to "construe" a request to equitably toll the deadline for an alien's motion to reopen as a suggestion that the Board reopen proceedings on its own motion, and then (b) to dismiss a challenge to the Board's denial of reopening because the denial of *sua sponte* reopening is not subject to judicial review. *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Although Amicus asserts (Br. 14 n.2) that the "premise" for the Fifth Circuit's "construal rule" is that equitable tolling is unavailable, the Fifth Circuit has never adopted that view in a published decision. See Gov't Br. 35-36. In fact, in unpublished decisions after *Ramos-Bonilla* in which the Fifth Circuit has assumed *arguendo* that it had "jurisdiction to review the [Board]'s denial of equitable tolling," the court has upheld the Board's decisions not on the ground that tolling is unavailable, but on the basis that the alien failed to show "the type of due diligence" required for equitable tolling, *Ibarra-Gonzalez* v. *Holder*, 542 Fed. Appx. 341, 342 (2013) (per curiam), or failed to satisfy the *Lozada* require-

ments[1] for establishing an underlying claim of counsel ineffectiveness, *Gotora* v. *Holder*, 567 Fed. Appx. 219, 222 n.1 (2014) (per curiam).

In short, Amicus errs in concluding that the jurisdictional question presented in this case turns on the resolution of the merits. That contention incorrectly puts the merits cart before the jurisdictional horse and cannot be reconciled with the Fifth Circuit's own recognition that it lacks authority to determine whether equitable tolling is available if it lacks jurisdiction to review the Board's denial of such tolling.

B. The Court Of Appeals Erred In Recharacterizing The Board's Equitable-Tolling Decision As A Decision Addressing Only *Sua Sponte* Reopening

Even assuming *arguendo* that an alien's reopening deadline is never subject to equitable tolling, the Fifth Circuit erred in "construe[ing]" petitioner's motion to the Board to reopen proceedings by equitably tolling the 90-day deadline as a request to the Board to reopen proceedings on its own motion, Pet. App. 2a. That artificial recharacterization of the basis for the Board's decision contravenes settled principles governing judicial review of agency orders. See Gov't Br. 29-31.

1. This Court has long recognized the "fundamental rule of administrative law" that a court conducting judicial review of agency action "must judge the propriety of [that] action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196; see, *e.g.*, *Burlington Truck Lines, Inc.* v. *United States*, 371

---

[1] See Gov't Br. 25-26 (discussing the requirements in *In re Lozada*, 19 I. & N. Dec. 637, 638-640 (B.I.A. 1988), for establishing counsel ineffectiveness).

U.S. 156, 168-169 (1962) ("*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."); *Chenery I*, 318 U.S. at 87-88 (holding that "an administrative order must be judged [by the grounds] upon which the record discloses that [the agency] action was based" and that a court must therefore confine its "review to a judgment upon the validity of the grounds upon which the [agency] itself based its action"). That rule of judicial review is so fundamental that this Court has twice summarily reversed the Ninth Circuit when it sought to resolve an alien's petition for review on grounds different than those addressed by the Board. See *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam).

Amicus does not appear to dispute that principle. Amicus instead argues (Br. 39-40) that the *Chenery* rule "only 'pertains to the basis that a court may use for the affirmance of agency action that is reviewable' and 'has nothing whatever to do with whether agency action is reviewable.'" Br. 39 (quoting *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)) (emphasis omitted). Although Amicus is correct that the *Chenery* rule does not itself address whether agency action is reviewable, that point lends no support to the court of appeals' decision in this case.

In *Locomotive Engineers*, this Court addressed a statutory provision that expressly authorized an interested party to "petition [the Interstate Commerce Commission (ICC)] to reopen and reconsider an action of the Commission" in certain rail-carrier proceedings. 482 U.S. at 278 (quoting 49 U.S.C. 10327(g) (1982) (repealed 1995)). The Court concluded that

although a party could obtain limited APA review of the agency's denial of a petition for "reopening on the basis of new evidence or changed circumstances," *id.* at 278, 284, no review was available if the agency "refus[ed] to reconsider [its action] for material error" because such a decision on reconsideration is "'committed to agency discretion by law,'" *id.* at 282, 284 (quoting 5 U.S.C. 701(a)(2)). In so ruling, the Court explained that although *Chenery* requires a reviewing court to limit its review to "the basis the agency used" to justify its action, the *Chenery* rule "has nothing whatever to do with whether agency action is reviewable" and, thus, did not support the (erroneous) view that "[agency] action becomes reviewable" "if the agency gives a 'reviewable' reason for [an] otherwise unreviewable action." *Id.* at 283 (emphasis omitted).[2]

That understanding of the *Chenery* rule has no application here. To be sure, the *Chenery* rule does not directly address whether the Board's denial of an

---

[2] The Court illustrated its point by explaining that a prosecutor's "failure to prosecute an alleged criminal violation" based on the belief that "the law will not sustain a conviction" is not subject to review, even though the prosecutor's legal rationale is "an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point." *Locomotive Eng'rs*, 482 U.S. at 283. The same holds true when the Board declines to reopen a case on its own motion. Just as a citizen has no right to compel a prosecutor to pursue criminal charges or to obtain judicial review of the prosecutor's decision not to do so, see *ibid.*; see also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973), the regulation recognizing the Board's *sua sponte* reopening authority confers no private right to compel the Board to make its *own* motion to reopen the proceedings and no cognizable right to obtain judicial review of the Board's determination not to do so. See Gov't Br. 35 n.13. Both types of action are committed to agency discretion. See p. 21, *infra*.

alien's request to equitably toll the reopening deadline is subject to judicial review. But it does require that a reviewing court restrict its review of the Board's decision to the "grounds invoked by the agency." *Chenery II*, 332 U.S. at 196. Even Amicus acknowledges (Br. 39) that a court may not "affirm" agency action on grounds on which the agency might have, but did not, base its decision. The Fifth Circuit has disregarded that basic rule of administrative law by "constru[ing]" (Pet. App. 2a) the Board's denial of equitable tolling as something that it was not: an agency determination not to reopen proceedings *sua sponte*.

2. Amicus argues (Br. 39) that the court of appeals' "construal" rule is permissible because there is "no question that the Board treated petitioner's [reopening] motion as an invitation to reopen on the Board's [own] motion." But that misses the point. The Board, as it often does, *both* resolved the merits of petitioner's motion to reopen, which sought equitable tolling of petitioner's filing deadline, *and* additionally considered whether to reopen the proceedings on its own motion. See Gov't Br. 10-11, 30-31 & n.11. Although the government agrees that the court of appeals lacked authority to review the Board's decision not to exercise its *sua sponte* reopening authority, that conclusion does not justify the Fifth Circuit's decision to disregard the Board's *distinct* ruling on petitioner's motion to reopen by treating the Board's decision as merely considering whether to accept an invitation to reopen the proceedings on its own motion.

3. Amicus explains (Br. 35-37) that when a litigant files a claim, petition, or motion with a court, the court may possess authority to construe the litigant's contentions in a manner favorable to the litigant. That

practice, however, does not authorize a court conducting judicial review of agency action to disregard the very basis on which the agency expressly resolved a motion filed in agency proceedings.

This Court's decision in *Locomotive Engineers* does not suggest otherwise. As Amicus recognizes (Br. 36-37), *Locomotive Engineers* concluded that a court could review the ICC's denial of a petition (*i.e.*, motion) that "sought reopening on the basis of new evidence or changed circumstances," but that no judicial review was available of an ICC order denying a petition seeking "reconsider[ation] for material error" because that particular determination was committed to agency discretion by law within the meaning of 5 U.S.C. 701(a)(2). See 482 U.S. at 282, 284. In that limited sense, *Locomotive Engineers* concluded that the availability of APA review can depend on the "basis on which the 'petition * * * sought [relief].'" Amicus Br. 36-37 (quoting 482 U.S. at 284). But nothing in *Locomotive Engineers* suggests that the reviewing court could have "construed" the agency's resolution of a motion to reopen on the basis of new evidence (which was subject to review) as an agency denial of a motion for reconsideration based on material error (which was not). The bedrock rule of administrative law reflected in *Chenery* is that a reviewing court must review agency action on its own terms. The Fifth Circuit failed to do so here.

If the court of appeals had correctly reviewed the Board's denial of equitable tolling on its own terms rather than "construing" the Board's decision as one involving only the denial of *sua sponte* reopening, the court would have had no basis for dismissing this case for want of jurisdiction. The only basis for the court's

jurisdictional holding was that a decision by the Board denying *sua sponte* reopening is not subject to review. No similar jurisdictional hurdle exists when a court reviews the Board's denial of equitable tolling.

C. The Merits Of Petitioner's Equitable-Tolling Arguments Are Not Before This Court

1. The question presented to this Court is whether the court of appeals erred by holding that it lacks "jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2)." Pet. i. That question should be resolved in the affirmative for the reasons given above. The separate issue on the merits—whether the Board has discretion to equitably toll the deadline for an alien to file a motion to reopen—lies outside the question presented, which does not turn on the merits of this case. As a result, the merits issues that Amicus has briefed (at 14-34) are simply not before this Court.

Amicus cites this Court's Rule 15.2 to suggest (Br. 14 n.2) that the government has waived its argument that the issue whether petitioner's reopening deadline is subject to equitable tolling is not properly before the Court, because the government did not make that argument before certiorari was granted. That is incorrect. Rule 15.2 provides that "[a]ny [nonjurisdictional] objection to consideration of a *question presented* based on what occurred in the proceedings below * * * may be deemed waived unless called to the Court's attention in the brief in opposition." (emphasis added). The Question Presented in this case, however, is expressly limited to the question of the court of appeals' "jurisdiction." Pet. i. The govern-

ment had no objection to the question on which review was sought, and no obligation to root out statements in the certiorari petition that may have strayed beyond the question that petitioner himself presented. Any other rule would encourage future petitioners to embed similar statements in the body of their certiorari petitions in an attempt to have this Court resolve numerous issues that would lie beyond the petitioners' own formulations of the Questions Presented.

Amicus notes (Br. 14 n.2) that the body of petitioner's certiorari petition not only addressed jurisdiction but also discussed the merits of the equitable-tolling issue. That additional discussion, however, does not alter the question that petitioner himself formulated and presented to this Court for review. See Pet. i. Indeed, it is settled that "the fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [the Court]," because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and brackets omitted); see Gov't Br. 32.

2. Although the question whether the Board has discretion to equitably toll the 90-day deadline for an alien to file a motion to reopen is thus not presented to this Court, the government has explained that its position is that 8 U.S.C. 1229a(c)(7)(C)(i) does not foreclose the Board from exercising such discretion to apply equitable tolling in appropriate cases. Gov't Br. 37-40. Amicus has focused the majority of his efforts (Br. 14-34) on this merits issue, which should be addressed by the court of appeals in the first instance on remand. Gov't Br. 32-36. Nevertheless, as explained

below, the government disagrees with Amicus's conclusion that the INA forecloses the Board from equitably tolling the reopening deadline.

a. Amicus argues (Br. 15-16) that Congress prohibited the Attorney General (or the Board exercising his delegated authority) from equitably tolling the 90-day deadline in 8 U.S.C. 1229a(c)(7)(C)(i) because the text of that provision specifies that the alien's motion to reopen "shall be filed" within the 90-day period and because Congress provided exceptions to the deadline that do not include an exception for equitable tolling. When viewed in its full context, however, Section 1229a(c)(7)(C) does not unambiguously prohibit the Attorney General from construing the Act to permit equitable tolling of the reopening deadline.

First, the statute is silent with respect to equitable tolling. Nothing in Section 1229a(c)(7)(C) expressly addresses whether the Attorney General may equitably toll the time to file a reopening motion.

Moreover, the statutory exceptions to the 90-day deadline reflect specific, categorical considerations that the Attorney General may reasonably conclude are distinct in kind from those advanced by equitable tolling. The statutory exceptions eliminate the reopening deadline altogether for (a) certain categories of asylum applications; (b) cases involving certain types of battered spouses, children, and parents; and (c) aliens who never received the requisite notice of the underlying removal proceedings or who could not have appeared in the removal proceedings because they were incarcerated. 8 U.S.C. 1229a(b)(5)(C)(ii) and (c)(7)(C)(ii)-(iv). Congress also increased the reopening deadline by a fixed amount (to 180 days) for certain other aliens ordered removed *in absentia*. See

8 U.S.C. 1229a(b)(5)(C)(i), (c)(7)(C)(iii), and (e)(1). Those exceptions do not speak directly to whether Congress would have intended to prohibit the Attorney General from exercising discretion to toll the 90-day deadline for aliens who have diligently pursued their rights but who confronted exceptional circumstances that prevented them from filing timely.

Moreover, if Congress had intended to foreclose the exercise of such discretion, it would not have allowed both the Department of Homeland Security (DHS) and the Board to allow the administrative reopening of proceedings after the statutory deadline had passed. Amicus acknowledges (Br. 34 n.8) that DHS may "waive the [alien's 90-day reopening] deadline." Because nothing in the relevant regulation restricts DHS's ability to "waive" that deadline, DHS may do so for any reason it deems appropriate. See 8 C.F.R. 1003.2(c)(3)(iii). Amicus further concedes that the Board has authority "'to apply *equitable tolling principles* to, and to consider the merits of, an otherwise untimely motion to reopen,'" so long as the Board does so under the rubric of exercising its "*sua sponte* authority." Amicus Br. 27 (quoting Gov't Br. 40) (emphasis added). But there is no reason to believe that Congress would have intended *to prohibit* the Board from exercising discretion to toll a reopening deadline by relying on principles of equitable tolling yet *to allow* the Board to "apply equitable tolling principles" to reach the same outcome so long as it invokes its *sua sponte* authority. That flaw in Amicus's position shows that the broader legal context governing reopening of removal proceedings undermines Amicus's contention that Congress intended to foreclose the Attorney General from allowing equitable tolling of

the statutory deadline in appropriate circumstances. See Gov't Br. 39-40.

b. i. Amicus correctly notes (Br. 27-28) that the Board has yet to issue a published decision addressing the application of equitable tolling to an alien's motion-to-reopen deadline. Cf. Gov't Br. 24 & n.8 (explaining that the Board's equitable-tolling rulings have been in non-precedential decisions).[3] But in the initial opinion in *In re Compean*, Attorney General Mukasey both noted that the courts of appeals had "h[eld] that the reopening deadline may be equitably tolled" for deficient attorney performance and independently concluded that "the Board may exercise its discretion to allow tolling of the 90-day [reopening] period * * * if the alien affirmatively shows that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance." 24 I. & N. Dec. 710, 732 (A.G. 2009), vacated, 25 I. & N. Dec. 1 (A.G. 2009). Although Attorney General Holder vacated the *Compean* decision on reconsideration and directed the initiation of rulemaking to address the "framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel," 25 I. & N. Dec. at 2; see Gov't Br. Gov't Br. 25-26 nn.9-10, the government's position here—in the absence of a precedential Board decision—is that the Board has discretion to equitably toll the

[3] The Board has issued no published decisions analyzing the availability of equitable tolling in any immigration context, and we have identified only three of its published decisions that have used any variant of the phrase "equitable tolling." See *In re Estrada*, 26 I. & N. Dec. 180, 186 (2013); *In re J-G-*, 26 I. & N. Dec. 161, 162 (2013); *In re Assaad*, 23 I. & N. Dec. 553, 566 n.2 (2003) (Filppu, Board Member, concurring).

reopening deadline.[4] Notably, every court of appeals to have resolved the issue has held equitable tolling to be appropriate in this context. See Gov't Br. 33 & n.12.

To be clear, the government does not seek *Chevron* deference for that conclusion because no binding agency decision presently resolves the issue. Cf. Amicus Br. 28. It bears repeating, however, that the question whether the reopening deadline is subject to equitable tolling is a *merits* issue not presented in this case, which concerns only the court of appeals' jurisdiction to review the Board's decision. See pp. 12-13, *supra*. But even if the issue were presented, the appropriate course would not be for this Court to resolve that question in the first instance. Where "the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (quoting *Thomas*, 547 U.S. at 186).

No unusual circumstances would warrant a departure from that rule in this case. Indeed, even the court of appeals here has itself yet to resolve the merits of the equitable-tolling issue in a reasoned or precedential opinion. Gov't Br. 34-35; pp. 5-6, *supra*.

---

[4] The Department of Justice is pursuing the rulemaking process that the Attorney General directed in *Compean*. The Department's notice of proposed rulemaking is currently pending review by the Office of Management and Budget. See Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel*, RIN 1125-AA68 (2015), http://www.reginfo.gov/public/do/eoDetails?rrid=125038.

Moreover, judicial resolution of issues bearing on equitable tolling without the benefit of a precedential agency decision could potentially be overtaken by subsequent regulatory action. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005). When the Attorney General or the Board addresses in a future precedential adjudicatory decision or rulemaking proceeding whether and to what extent equitable-tolling principles apply in this context, the agency would not be bound to follow exactly the tolling rules that have been adopted for court proceedings. The agency could instead choose to define differently the contours of the tolling standards and procedures that would apply in its own administrative adjudications. See Gov't Br. 37-39 (discussing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), and the fundamental difference between procedural rules for agency adjudications and rules developed by courts for court proceedings). Such agency procedures could, for instance, specify the type of prejudice from counsel ineffectiveness that an alien would have to show to justify tolling, or could establish an outer time limit on the availability of tolling. Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 821, 828 (2013) (upholding an agency regulation imposing a three-year maximum "good cause" extension of a 180-day statutory deadline to file an administrative appeal).

ii. Amicus incorrectly asserts (Br. 31-32) that the government has "change[d] its interpretation" after rejecting "the availability of equitable tolling" in earlier rulemaking proceedings. In April 1996, before Congress enacted 8 U.S.C. 1229a(c)(7)(C), the Attorney General concluded in rulemaking proceedings that

"a 'good cause exception' would [not] be an appropriate procedural mechanism" for extending an alien's reopening deadline under the Department's regulations, and she noted that the Board's authority to reopen cases *sua sponte* was "a mechanism" that may be used to address certain cases presenting exceptional circumstances. 61 Fed. Reg. 18,902 (Apr. 29, 1996). That rejection of a "good cause" standard did not resolve the distinct question whether 8 U.S.C. 1229a(c)(7)(C)—which Congress enacted five months *later* in September 1996[5]—must be construed to foreclose the Board from exercising discretion to equitably toll an alien's reopening deadline.

A "good cause" standard applies in numerous contexts. See, *e.g.*, Fed. R. Civ. P. 4(m) (extension of deadline to serve process), 6(b)(1) (extension of deadlines set forth in the Federal Rules of Civil Procedure, local rules, and certain statutes), 26(a)(3)(B) (extension of deadline for certain discovery objections). And although its meaning may vary somewhat based on the particular context and "procedures involved," the phrase "good cause" generally refers to a "[l]egally sufficient ground or reason" the determination of which is left "largely in the [tribunal's] discretion." *Black's Law Dictionary* 692 (6th ed. 1990). As a result, a "good cause" standard often encompasses a broad spectrum of reasons deemed sufficient to warrant an extension of time. See, *e.g.*, 4B Charles Alan Wright et al., *Federal Practice and Procedure* § 1165, at 608 (2015) (explaining that courts will normally

---

[5] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (adding 8 U.S.C. 1229a(c)(6)(C) (2000), which is now designated as Section 1229a(c)(7)(C)).

grant extensions under Rule 6(b) "in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party"); see also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005) ("A [habeas] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court.").

The traditional equitable-tolling standard, by contrast, is much more circumscribed. It applies "only" when the party seeking tolling has demonstrated that (1) "'he has been pursuing his rights diligently'" and (2) "'some extraordinary circumstance [both] stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418); see *Pace*, 544 U.S. at 416, 418 (separately addressing "good cause" and "equitable tolling"); see also, *e.g.*, *Livingston Powdered Metal, Inc.* v. *NLRB*, 669 F.2d 133, 136 (3d Cir. 1982) ("good cause" standard is "less stringent" than an "'extraordinary circumstances' test"); *NLRB* v. *Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979) (similar).

This Court has concluded that a court's authority to grant relief under a "good cause standard does not by itself necessarily imply that any other reason for [the same relief]—for example, on the basis of traditional equitable principles—is precluded." *Miller* v. *French*, 530 U.S. 327, 340 (2000). The Attorney General's determination that a "good cause exception" was unwarranted under regulations governing reopening similarly does not imply that the subsequently enacted Section 1229a(c)(7)(C)(i) must be construed to foreclose the Attorney General from allowing equitable tolling for a more limited set of cases. Nor did the Attorney General's description in those earlier rule-

making proceedings of the Board's *sua sponte* reopening authority as "a mechanism" for addressing certain cases suggest it is the only mechanism Section 1229a(c)(7)(C)(i) allows for addressing otherwise untimely reopening requests.

3. Finally, we note that the government agrees with Amicus—and all 11 courts of appeals with jurisdiction to review the Board's decisions—that the Board's decision not to reopen proceedings on its *own* motion is not subject to judicial review. See Gov't Br. 35 n.13; Amicus Br. 40-43. The Board's *sua sponte* reopening regulation (8 C.F.R. 1003.2(a)) confers no private right either to seek or to compel the Board to make its *own* motion to reopen proceedings. A Board determination declining to act on its own motion in any particular proceeding is an action committed to agency discretion by law, regardless of the Board's legal rationale for its determination. See p. 9 & n.2, *supra* (discussing *Locomotive Eng'rs*, *supra*). Moreover, the absence of judicially manageable standards for judging the Board's refusal to act *sua sponte* to reopen proceedings independently reinforces the conclusion that such decisions are not subject to judicial scrutiny. See *Locomotive Eng'rs*, 482 U.S. at 283 ("[T]he impossibility of devising an adequate standard of review" "confirm[s]" that agency action is not subject to review.); Gov't Br. 35 n.13.

But this case does not involve *sua sponte* reopening. As Amicus acknowledges (Br. 40 n.10), petitioner expressly disclaimed any argument that the Board's denial of *sua sponte* reopening is subject to judicial review. The certiorari petition makes clear that petitioner did not "disagree[]" with the Fifth Circuit's holding "that the Board's *sua sponte* discretion is un-

reviewable," and that petitioner "only * * * disagrees" with the court of appeals' independent conclusion that "a request for equitable tolling is equivalent to a request for *sua sponte* power." Pet. 6. Although petitioner may have since reconsidered that concession, see Pet. Br. 26-27 (suggesting that the Board's denial of *sua sponte* reopening may be subject to review), petitioner has affirmatively waived any contrary position in this Court.

In the end, this case boils down to one simple point: The court of appeals erred in construing the Board's denial of petitioner's reopening motion, which sought equitable tolling of petitioner's filing deadline, as a different type of Board determination about whether to reopen proceedings on the Board's own motion.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2015