No. _____

In The

Supreme Court of the United States

JACQUELINE FINLAYSON-GREEN,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether Section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. 1525b(c)(3), which provides in pertinent part that an *in absentia* order of removal may be rescinded "upon motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances" is jurisdictional or can be equitably tolled?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in conflict with the Second, Third, Fourth and Ninth Circuits, held that the 180-day deadline for reopening an *in absentia* order of removal based on exceptional circumstances is mandatory and jurisdictional, and may not be tolled based on petitioner's claim of ineffective assistance of counsel. Certiorari should be granted to resolve the split in the circuits, which undermines the longstanding policy of national uniformity in enforcement of the immigration laws.

OPINIONS OF THE COURTS BELOW

The decision of the court of appeals (App. 1-5) is not published in the Federal Reporter, but can be found at *Finlayson-Green v. U.S. Attorney Gen.*, 06-14947 (11th Cir. April 25, 2007). The *per curiam* order of the Board of Immigration Appeals (App. 15-16) and the decision of the Immigration Judge (App. 17-18) are unreported.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on April 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Section 240(b)(5) of the Immigration and Nationality Act states in pertinent part:

> (A) In general. – Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)) . . .
>
> (C) Rescission of order. – Such an order may be rescinded only – (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)) . . .

8 U.S.C. 1229(a)(b)(5)(A); 8 U.S.C. 1229(a)(b)(5)(C)(i)

STATEMENT

Statutory History

In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061, Congress took steps to reduce the frequency with which aliens failed to appear at their scheduled deportation hearings. *See* H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1 at 150 (1990). Congress required the former Immigration and Naturalization Service (INS) to provide aliens in removal proceedings written notice of the nature of the proceeding, the grounds

for the charge of removability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1229(a)(1) and (2). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered removed *in absentia* if the INS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable" 8 U.S.C. 1229(a)(b)(5)(A).

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may not seek rescission of the removal order entered in absentia unless the alien moves "within 180-days after the date of the order of removal" to reopen the removal proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1229(e)(1)])." 8 U.S.C. 1229(a)(b)(5)(C)(i). The term "exceptional circumstances" refers to circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. 8 U.S.C. 1229(a)(e)(1). Exceptional circumstances can be demonstrated when counsel has been ineffective, and ineffective assistance of counsel is a well-established basis for granting a motion to reopen in Immigration Court pursuant to the Board of Immigration Appeals' (BIA) holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). In fact, the BIA has held that a petitioner does not need to demonstrate prejudice when an attorney's incompetence led to an *in absentia* order. *See Matter of Rivera-Carlos*, 21 I & N Dec. 599 (BIA 1996); *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996).

Administrative regulations incorporate the statutory requirements for obtaining reopening of an in absentia removal order in the immigration court. *See* 8 C.F.R. 1003.23(b)(4)(ii). The regulations further provide that an alien may not appeal the entry of an *in absentia* removal order directly to the BIA. 8 C.F.R. 1240.15. Rather, the alien may make an appeal to the BIA if the immigration judge (IJ) denies the alien's motion to reopen the removal proceeding. *See Matter of Guzman*, 22 I & N Dec. 722, 723 (BIA 1999) (en banc) ("Only when an alien has exhausted this avenue of relief [by filing a motion to reopen] may he or she file an appeal with the [BIA].").

In amending the Immigration and Nationality Act (INA), through the Immigration Act of 1990, with respect to the period of time and numerical limitations in which motions to reopen and motions to reconsider may be offered in deportation proceedings, Congress' apparent aim was to eliminate the prior practice under which an alien could ignore a deportation or voluntary departure order, and years later, attempt to reopen the proceedings without any adverse consequences. *See Stone v. INS*, 514 U.S. 386, 400, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995) (noting that the Immigration Act of 1990 "took . . . steps to reduce [the] abuses of successive and frivolous administrative appeals and motions").

The legislative history of this provision indicates, however, that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining these new limitations, the House Conference Committee directed that, "the Attorney General . . . shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-955, at 133 (1990). The Committee explicitly mentioned one such exception, for

"asylum claims which arise due to a change in circumstances in the country of the alien's nationality after the initiation of the deportation proceedings." *Id.* The Department of Justice responded to this congressional mandate by issuing rules that, while clearly establishing that only one motion to reopen would be permitted and that it must be filed within 90 days, also offered mechanisms whereby otherwise untimely motions could still be considered when the circumstances so required.

Under the new regulations, the time and numerical limits for motions to reopen do "not apply to a motion to reopen agreed upon by the parties [*i.e.*, the INS and the alien] and jointly filed." 8 C.F.R. 1003.23(b)(4)(iv) (2000). Moreover, an IJ or the BIA are permitted to reopen a proceeding, upon their own motions, at any time. *See* 8 C.F.R. 1003.23(b)(1) (2000) ("An [IJ] may upon his or her own motion at any time . . . reopen . . . any case in which he or she has made a decision. . . ."); 8 C.F.R. 1003.2(a) (2000) ("The [BIA] may at any time reopen . . . on its own motion any case in which it has rendered a decision."). In explaining the exercise of this authority, the BIA has stated that,

> the regulations governing motions . . . give the [BIA] clear authority to reopen and remand cases without regard to other regulatory provisions. . . . It would therefore appear that [the BIA] has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action.

Matter of Yewondwosen, 21 I & N Dec. 1025 (BIA 1997). The authority of an IJ or BIA to accommodate special cases has

survived a subsequent statutory codification of the limits on motions to reopen that, on its face, admits to no such exceptions, further demonstrating that the Department of Justice, in its application of these limits, does not consider them to be jurisdictional. A few months after the Department of Justice promulgated the final rule limiting motions to reopen, Congress established new "removal" proceedings to replace the former "deportation" or "exclusion" proceedings, and in so doing provided the same limits on the reopening of proceedings. *Cf.* 61 Fed. Reg. 18, 900 (promulgating administrative rule on April 29, 1996) with Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, div. C, Tit. III, 304(a)(3), 100 Stat. 3009-593 (enacting statutory rules on Sept. 30, 1996) (codified at 8 U.S.C. 1229(a)(c)(6)(C)). The statutory provisions follow the administrative rule in limiting an alien to "one motion to reopen proceedings," that "shall be filed within 90 days of the date of the entry of a final administrative order." 8 U.S.C. 1229(a)(c)(6)(A), (C)(i). The administrative regulations continue to provide, nevertheless, for *sua sponte* reopening by an IJ or the BIA, or reopening by agreement of the parties at any time, despite the fact that no such exceptions are found in the more recent statutory provisions. *See* 8 C.F.R. 1003.23(b)(1), (b)(4)(iv); 8 C.F.R. 3.2(a) (2000). Whether in the form of specific limits, or the authority for the Department of Justice to impose such limits, the flexibility with which IJs and the BIA have applied these congressional restrictions on motions to reopen confirms that they are not jurisdictional. *See Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

In sum, nothing in the 1990 statute that directed the Department of Justice to limit the timing and number of motions to reopen show that these limitations were intended

to be jurisdictional and therefore not subject to equitable tolling.

B. Factual and Procedural Background

Petitioner is a native and citizen of Jamaica. Petitioner entered the United States on December 31, 1996 and has remained in the United States since that time. On March 11, 1997, Petitioner married a United States citizen who filed a visa petition on her behalf, along with her application for adjustment of status. On September 3, 1999, the INS denied Petitioner's application for adjustment of status for failure to appear at the interview. Petitioner maintains that she and her husband appeared for the interview, but it was not held because her husband did not bring any identification. (App. 8).

On August 25, 1999, Petitioner's husband withdrew the petition with a statement alleging the marriage was not *bona fide*. However, the Petitioner maintains that the marriage was *bona fide* and asserts that she divorced her husband on October 28, 1999 because he was a drug addict. *Id.* On October 8, 1999, the Service commenced proceedings to remove petitioner from the United States. *Id.* After her divorce, petitioner moved from Florida to Arizona and she retained an attorney in Arizona, Dorothea Kraeger, to represent her in her removal proceedings. Petitioner married another United States citizen on May 6, 2000. (App. 8 and App. 10). His visa petition on her behalf was approved on May 10, 2006. They have two United States citizen children. *Id.*

Ms. Kraeger filed a motion to change venue and motion for a telephonic hearing with the immigration court in Miami, Florida which was denied on November

29, 1999. The IJ found that the issues of removability were not resolved. (App. 21). Subsequently, Ms. Kraeger filed a motion to reconsider the denial of change of venue request and a motion for a telephonic hearing, which were both denied on December 14, 1999, based on petitioner's non-admission of the factual allegations against her. (App. 19). On the same date, the IJ determined that petitioner was removable from the United States, and entered an in absentia order of removal to Jamaica. (App. 17-18). Subsequently, Ms. Kraeger failed to file a motion to reopen with the immigration court, and instead filed an appeal of the IJ's in absentia order of removal with the BIA. On April 16, 2003, the Board of Immigration Appeals affirmed the IJ's removal order without opinion. (App. 15-16). In May 2003, Ms. Kraeger filed a Petition for Review with the United States Court of Appeals for the Eleventh Circuit. The Petition was dismissed on September 8, 2003, because Ms. Kraeger failed to file a brief. (App. 14).

Ms. Kraeger was suspended by the Arizona bar on April 23, 2005. (App. 7). Ms. Kraeger was also suspended from practice before the Board of Immigration Appeals. (App. 12-13). Petitioner maintains that Ms. Kraeger's ineffective assistance as counsel resulted in her failure to attend the removal hearing, and her failure to properly appeal the *in absentia* removal order to the Eleventh Circuit Court. (App. 2). In October 2005, Petitioner, through new counsel, filed a Motion to Reopen with the BIA due to the ineffective assistance of Ms. Kraeger, pursuant to the BIA's holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). The BIA denied petitioner's Motion to Reopen on April 10, 2006, stating that Petitioner failed "to adequately explain why she waited so long to file the pending motion ... or why Franquinha [petitioner's

attorney at that time] could not have assisted Petitioner in filing an earlier motion." (App. 13).

Petitioner submitted a motion to reconsider the decision on May 9, 2006, with an affidavit from the petitioner detailing the timeline of events that led to her Motion to Reopen ultimately being filed in October 2005. Petitioner requested that the Board reopen the case *sua sponte* under 8 C.F.R. 1003.2(a) because the Motion to Reopen was filed outside the 180-day time limit, or that the BIA recognize the doctrine of equitable tolling in her case.

The Board denied petitioner's motion to reconsider on August 15, 2006, stating "[because the respondent failed to meet the requirements for reopening an *in absentia* order of removal set forth under section 240B(5) [*sic*] of the Act, the Board has no authority to rescind the Petitioner's order of deportation." The Board went on to state, "[t]he Eleventh Circuit has held that the requirements of section 240(b)(5) of the Act are mandatory and jurisdictional. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *see Abdi v. United States Attorney Gen.*, 430 F.3d 1148 (11th Cir. 2005)." (App. 7-10).

Petitioner timely filed a petition for review of the BIA's decision with the Eleventh Circuit. On April 25, 2007, the Eleventh Circuit denied the petition and affirmed the decision of the BIA. The court determined that the BIA did not abuse its discretion as petitioner filed a motion to reopen over 2 years after the BIA issued its decision affirming the IJ's in absentia order. The court found that the 180-day time limitation as set forth by 8 U.S.C. 1229(a)(1); 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii), is "jurisdictional and mandatory" and cannot be equitably

tolled on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999). The Court failed to consider Petitioner's claims that her *in absentia* order of removal was a direct result of the ineffective assistance rendered by her counsel. The Court found only that the time limitations for motions to reopen are jurisdictional and cannot be equitably tolled on account. (App. 1-5).

REASONS FOR GRANTING THE PETITION

A. The Decision of the Eleventh Circuit Conflicts With The Decisions of Five Other Circuit Courts.

The circuit split warrants review by this court. The conflict among the circuits creates disparate treatment of aliens depending on where they reside. The schism violates the fundamental principle that immigration laws should be applied uniformly across the country.

Pursuant to Section 240(b)(5) of the INA, when an alien fails to appear as directed in a notice of a removal hearing, the alien "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229(a)(b)(5)(A). Such an order can be rescinded "only" (1) if the alien files a motion to reopen within 180 days of the order's entry and successfully demonstrates that the failure to appear was because of exceptional circumstances or (2) at any time if the alien demonstrates that she did not receive the notice to appear in accordance with 8 U.S.C. 1229(a)(1) and (2). 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii). It is well established that the Fifth

Amendment entitles aliens to due process of law in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 307, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) (*citing The Japanese Immigrant Case*, 189 U.S. 86, 100-101, 47 L. Ed. 721, 23 S. Ct. 611 (1903)). During deportation proceedings aliens have a statutory right to be represented by counsel at their own expense. 8 U.S.C. 1362 (1994). The Circuit Courts are in general agreement that counsel's ineffectiveness can give rise to a due process violation, and have contemplated that the vehicle commonly used to redress claims of ineffective assistance of counsel in deportation proceedings has been an administrative motion to reopen proceedings. *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001); *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999); *Goonsuwan v. Ashcroft*, 252 F.3d 383 (5th Cir. 2001); *Store v. INS*, 256 F.3d 498 (7th Cir. 2001); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999).

The disparity between the circuit courts lies in their varying approaches to the equitable tolling doctrine and whether it should be used to toll filing deadlines for motions to reopen based on ineffective assistance of counsel. Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for motions to reopen based on ineffective assistance of counsel. *Anin*, 188 F.3d at 1278. The Eleventh Circuit has held that the 180-day time limitation is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Id.* The Ninth, Second, Third, Fourth and Seventh Circuits have held that when a Petitioner does not discover his attorney's malpractice within the 90- or 180-day window,

the deadline will be equitably tolled. *Rodriguez-Lariz*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2nd Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). This allows a Petitioner, with a showing of due diligence after discovering the malpractice, to stop the 90 or 180-day period from running until the Petitioner discovers (or should discover) that the attorney acted fraudulently or ineffectively. Similarly, the Supreme Court has held that

> where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of that statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts ... to conceal it from the knowledge of the other party."

Homberg v. Armbrecht, 327 U.S. 392, 397, 90 L. Ed. 743, 66 S. Ct. 582 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L. Ed. 636 (1874); *Federal Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996). " 'This equitable doctrine is read into every federal statue of limitation.' " *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (quoting *Homberg*, 327 U.S. at 397; *Federal Election Comm'n*, 104 F.3d at 240).

Failure to review this issue will perpetuate incongruous treatment of aliens based on geography. Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act

of 1986, stating "It is the sense of the Congress that. . . . the immigration laws of the United States should be enforced vigorously and uniformly." 11 Pub. L. No. 99-603, 115, 100 Stat. 3359, 3385 (1986). The Courts of Appeals have often recognized the importance of uniform enforcement of immigration laws. Ironically, the Eleventh Circuit, which is in opposition to five circuits on the issue presented, has stated, "The laws that we administer often affect individuals and the cases we administer in the most fundamental ways. We think that all would agree that to the greatest extent possible *our immigration laws should be applied in a uniform manner nationwide . . .* " *Saramillo v. INS,* 1 F.3d 1149, 1166 (11th Cir. 1993) (emphasis added). The Seventh Circuit similarly stated, "National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in that laws that determine who may cross our national borders and who may become a citizen." *Rosedo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). *See also, e.g., Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). The split between the Circuit Courts with regard to the nature of the 180-day deadline for filing a motion to reopen removal proceedings is ripe for the Court's consideration. The question presented will not benefit from further consideration in the Circuit Courts.

B. Review Is Also Warranted Because The Decision Below is Clearly Incorrect And Is Contrary to Congressional Intent

Lower Court decisions holding that the 180-day filing deadline is mandatory and jurisdictional are unpersuasive. The Eleventh Circuit in its decision below denied the

petition for review, finding that it has held that the 180-day time limitation in Section 1229(a) is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Anin*, 188 F.3d at 1278-79. The Eleventh Circuit, therefore, did not consider petitioner's claim that her *in absentia* order was a direct result of the ineffective assistance rendered by her counsel. Although *Anin* held that Section 1229(a) has a jurisdictional limit, Supreme Court precedent and statutory interpretation demonstrate that it is better viewed as a tollable statute of limitation. The Supreme Court held that if the time limit is contained in an ordinary statue of limitations it is assumed that it is subject to equitable tolling. *See Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). In *Irwin*, the Court noted that there is a "rebuttable presumption" that equitable tolling applies to federal statutes, and nothing in the INA rebuts this presumption. *Id.* Section 1229(a) contains no specific tolling provision, suggesting that Congress did not want to override the normal pro-tolling presumption, nor does the statute contain detailed or emphatic language. Indeed, it is linguistically similar to numerous other statutes that courts have held to be subject to equitable tolling.

Similarly, the legislative history and statutory purpose evince no congressional intent to limit courts' equitable powers. The history demonstrates a clear concern with prosecutorial fairness and individual equities, and while the statute's purpose includes preventing collusive obstruction, Congress did not intend to limit courts' presumed powers to redress injustice. Given this evidence, the Eleventh Circuit's jurisdictional conclusion seems mistaken.

As courts cannot toll jurisdictional deadlines, a congressional intent to allow tolling would strongly suggest that Congress did not intend to restrict courts' jurisdiction. Congressional intent is, thus, of central concern, and the Court has provided guidance for interpreting it in this context. In *United States v. Locke*, the Court noted that "statutory filing deadlines are generally subject to the defense of . . . equitable tolling," and because Congress is aware of this, there is a "rebuttable presumption" that equitable tolling applies to suits against both private defendants and the United States. *United States v. Locke*, 471 U.S. 84, 94 (1985). A court confronting the issue of whether a filing deadline is tollable must ask the question: "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997). Here, as in other situations, the silence of Congress may express a clear legislative intent. *Landsgraf v. USI Film Products*, 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) (noting the "traditional presumption" that statues will not be held to have retroactive effect "absent clear congressional intent favoring such a result").

Anin did not explain its jurisdictional reasoning in its determination that the filing deadline is mandatory and jurisdictional, and the court of appeals case, on which it relied, *Kamara v. INS*, provides scant support for its position. *Anin* at 1278-79; *Kamara v. INS*, 149 F.3d 904, 906 (8th Cir. 1988) In *Kamara*, the Eighth Circuit held that the BIA "did not err" in denying as time barred a tardy motion to reopen. *Id.* The court nowhere termed the deadline jurisdictional, nor did it hold that equitable modification was beyond its power. As such, the Eleventh Circuit's jurisdictional holding goes far beyond the Eighth

Circuit's, and neither opinion defends its statutory interpretation in a setting where the Court normally presumes equitable powers.

The Ninth, Second, Third, Fourth and Seventh Circuits have recognized the equitable tolling doctrine where the ineffective assistance of counsel suffered by the petitioner warranted reopening. *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2d Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). The First Circuit has declined to make a finding. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001).

While recognizing the equitable tolling doctrine, the circuit courts have analyzed the text, structure, legislative history, and purpose of Congress' 1990 amendment to the INA in their respective determinations that that the limitations imposed on motions to reopen in deportation proceedings are subject to equitable tolling. *See Lopez v. INS*, 184 F.3d 1097; *Iavorski*, 232 F.3d 879.

The Second and Ninth Circuit Courts have correctly determined that the 1990 Immigration Act and subsequent regulations do not indicate that Congress intended to impose a jurisdictional limit on the filing deadline for a motion to reopen based on ineffective assistance of counsel. *Id.* In fact, the legislative history indicates that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining the limits on motions to reopen, the House

Conference Committee directed that, "the Attorney General . . . shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-995, at 133 (1990).

The First Circuit has recognized that the text, of the statue in question, says nothing explicitly about whether equitable tolling is allowed. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001). In prior cases courts have found that the presence or absence of the words "limitations" or "jurisdiction" to be important, because a statute of limitation is usually subject to equitable tolling, while a jurisdictional provision never is. *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (finding persuasive the use of "period of limitations' and limitations period" and absence of word "jurisdiction"); *Shendock v. Director, Office Workers' Comp. Programs*, 893 F.2d 1458, 1462 (2d Cir. 1990) (giving considerable weight to Congress's use of "jurisdiction" in filing provision. Here, the statue contains neither of these terms. Moreover, the potential result of not allowing equitable tolling for filing a motion to reopen based on an *in absentia* order of deportation, would raised due process concerns. The Courts have recognized that non-citizens are entitled to due process. The Courts have determined that when counsel's performance is so ineffective as to have impinged on the fundamental fairness of the hearing it is a violation of the Fifth Amendment due process clause. A jurisdictional filing deadline for a motion to reopen under these circumstances would give no recourse to petitioner whose due process rights are violated.

The INA's 180-day filing deadline for contesting in absentia deportation is best viewed as an equitably tollable statue of limitations, rather than a limit on the courts' jurisdiction. In *Irwin*, this court established that when a time limit is contained in a statue of limitations it is

assumed that it is subject to equitable tolling, absent contrary congressional intent. Nothing in the INA's text, legislative history or purpose indicates that the 180-day filing deadline is jurisdictional, and therefore, the Eleventh Circuit's decision is in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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