Nos. 09-70214, 08-74452

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN REYES-TORRES,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER RULE
Fed. R. App. P. 26.1

I, Beth Werlin, attorney for the Amicus, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: January 11, 2010

s/ Beth Werlin
_____
Beth Werlin

I, Trina Realmuto, attorney for the Amicus, certify that the National Immigration Project of the National Lawyers Guild is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: January 11, 2010

s/ Trina Realmuto
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Trina Realmuto

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I. STATEMENT OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the American Immigration Council and the National Immigration Project of the National Lawyers Guild (National Immigration Project) proffer this brief to assist the Court in its consideration of the departure regulation at 8 C.F.R. § 1003.2(d). This regulation bars noncitizens who depart the United States from exercising their statutory right to pursue a motion to reopen before the Board of Immigration Appeals (BIA or Board). Amici submit that the departure bar in this regulation, initially promulgated in 1952, conflicts with subsequent statutory authority codifying the right to file a motion to reopen and cannot be reconciled with the Supreme Court's interpretation of the motion to reopen statute in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008). Moreover, this Court's precedents in *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006), and *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), establish that regardless whether the regulation is valid, Petitioner should not be precluded from filing a motion to reopen post departure because his vacated conviction was a "key part" of the removal order (*Cardoso-Tlaseca*) and he filed his motion after removal proceedings were completed (*Lin*).

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in

immigration law and administration. The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. Both organizations have a direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to pursue motions to reopen.

As such, this brief focuses on the motion to reopen statute, regulations and case law addressing the departure bar, and does not address the underlying merits of Petitioner's initial removal order or the merits of his motion to reopen or reconsider. Amici curiae note, however, that whether Petitioner's 1984 offense which formed the basis of deportability is a conviction for immigration purposes remains an open question in this Circuit.[1] Further, to the extent that Respondent

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[1] Petitioner was found deportable for having been convicted of violating 8 U.S.C. § 1324(a)(2), for which he was sentenced under the Federal Youth Correction Act (FYCA), 18 U.S.C. § 42009. The immigration judge (IJ) and the Board ignored evidence that the sentencing judge explicitly determined that Petitioner warranted treatment under the FYCA. *See* Petitioner's Opening Brief at 1.

In 1996, Congress created a federal definition of "conviction," *see* 8 U.S.C. § 1101(a)(48)(A), and subsequently, this Court held that a disposition under the Federal First Offenders Act, 18 U.S.C. § 3607, cannot be treated as a conviction. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). However, the Court has not decided the parallel question whether a disposition under the FYCA constitutes a conviction. *See US v. Hovsepian*, 359 F.3d 1144, 1159 n.11 (9th Cir. 2004) (en banc) ("[w]e are not called on here to decide whether a conviction that was expunged under FYCA may be used per se to disqualify an applicant for naturalization").

offers explanations for the denial of the motion to reopen that were not set forth in the BIA's decision, *see* Respondent's Brief at 15-16, the Court "may not accept appellate counsel's post hoc rationalizations for agency action…." *See Altamirano v. Gonzales*, 427 F.3d 586, 595 (9th Cir. 2005) (internal citations omitted).

II. LEGISLATIVE, REGULATORY, AND ADMINISTRATIVE BACKGROUND

The McCarran-Walter Act of 1952 established the structure of present immigration law, 8 U.S.C. § 1001 et seq.[2] Pursuant to that Act, final orders of deportation were reviewable via a petition for a writ of habeas corpus. 8 U.S.C. § 1252(c) (1952). The former Immigration and Naturalization Service, which then acted as both the prosecutor and adjudicator of immigration cases (*see* note 4 *infra*), created a regulation providing for motions to reopen. That regulation barred the BIA from reviewing a motion filed by a person who departed the United States. 17 Fed. Reg. 11469, 11475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2). The regulation stated:

> … a motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation

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[2] Pub. L. No. 82-414, 66 Stat. 163 (March 27, 1952) (codified at 8 U.S.C. §§ 1101-1524 (1953)).

> proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

In 1961, Congress amended the McCarran-Walter Act and, *inter alia*, gave the circuit courts jurisdiction to review final orders of deportation through a petition for review. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651 (1961). The 1961 judicial review provision paralleled the language of the regulation and barred the federal courts from reviewing deportation and exclusion orders where the person had departed the country after issuance of the order. *See id.* (creating former 8 U.S.C. § 1105a(c) (1962)).[3] Three months after the enactment of the 1961 laws, the Department of Justice (DOJ) issued implementing regulations, redesignating 8 C.F.R. § 6.2 as 8 C.F.R. § 3.2 (1962). *See* 27 Fed. Reg. 96, 96-97 (January 5, 1962).

From the early 1960s until 1996, the 1961 version of 8 U.S.C. § 1105a(c) (barring judicial review post departure) remained unchanged.[4] Similarly, the

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[3] Former 8 U.S.C. § 1105a(c) reads:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

[4] In 1983, DOJ created the immigration judge position – previously the function was performed by the Immigration and Naturalization Service – and combined the pre-existing BIA with the immigration judges to comprise a new agency, the Executive Office for Immigration Review. *See* EOIR Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Jan. 6, 2010).

language of the regulation barring motions to reopen filed with the BIA by individuals outside the country also remained unchanged, although it later was moved to then newly-created subsection (d). *See* 61 Fed. Reg. 18900 (April 29, 1996) (creating 8 C.F.R. § 3.2(d) (1997)).

Through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), Congress adopted numerous substantive and procedural changes to the immigration laws. Relevant here are the following changes:

- Congress, for the first time, codified the right to file a motion to reopen. IIRIRA § 304 adding new 8 U.S.C. § 1229a(c)(6) (1997).[5]

- Congress repealed former 8 U.S.C. § 1105a(c)'s departure bar to judicial review. IIRIRA § 306(b).

- Congress replaced the pre-existing judicial review of final deportation and exclusion orders with 8 U.S.C. § 1252. IIRIRA § 306(a). Significantly, Congress did <u>not</u> reenact a departure bar to judicial review in current 8 U.S.C. § 1252.

- Congress consolidated judicial review of final removal, deportation, and exclusion orders with review of motions to reopen. IIRIRA § 306(a) enacting 8 U.S.C. § 1252(b)(6).

DOJ subsequently promulgated procedures for immigration judges to adjudicate motions to reopen. *See* 52 Fed. Reg. 2931 (January 29, 1987) (codified at 8 C.F.R. § 3.22 (1988)). DOJ redesignated § 3.22 as § 3.23 in 1992. *See* 57 Fed. Reg. 11568 (April 6, 1992).

[5] In 2005, Congress moved the motion to reopen provision to 8 U.S.C. § 1229a(c)(7), but did not change its substance. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(d), 119 Stat. 231 (May 11, 2005).

- Congress adopted a 90 day period for the government to deport a person who has been ordered removed. IIRIRA § 304(a)(3) adding new 8 U.S.C. § 1231(a)(1).

- Congress replaced the pre-existing voluntary departure provision with 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2), limiting the voluntary departure period to 60 or 120 days. IIRIRA § 304(a)(3).

These changes took effect on April 1, 1997. IIRIRA § 309(a).

On March 6, 1997, the DOJ promulgated regulations implementing IIRIRA. *See* 62 Fed. Reg. 10312 (March 6, 1997). Although Congress codified the right to file and obtain judicial review of motions to reopen, consolidated such review with review of a final order, and eliminated the departure bar to judicial review, DOJ retained the departure bar on review of motions to reopen filed with the BIA. Moreover, DOJ extended the regulatory departure bar to motions filed with immigration judges. *See* 62 Fed. Reg. at 10321, 10331 (codified at former 8 C.F.R. §§ 3.2(d) and 3.23(b)(1) (1997)).

In 2000, Congress amended the motion to reopen statute to include a special rule for victims of domestic violence. *See* Victims of Trafficking and Violence Protection Act of 2000, 106 Pub. L. No. 386, § 1506(b)(3), 114 Stat. 1464 (October 28, 2000) (VAWA 2000) (codified at 8 U.S.C.§ 1229a(c)(6)(C)(iv)(2001)). Under the special rule, qualifying domestic violence victims are exempt from the general motion to reopen filing deadline. 8 U.S.C. § 1229a(c)(6)(C)(iv)(2001). In 2005, Congress amended the special rule to include

an additional requirement: the person must be "physically present in the United States at the time of filing the motion." *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(a)(2)(F), 119 Stat. 2960, 3063-64 (Jan. 5, 2006) (VAWA 2005) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)).

In 2003, 8 C.F.R. §§ 3.2(d) and 3.23(b)(1) were redesignated as 8 C.F.R. §§ 1003.2 and 1003.23, without change to their content. 68 Fed. Reg. 9824, 9830 (February 28, 2003). The current version of the regulation reads:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d).[6]

The BIA addressed the current regulation in a 2008 decision, *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The BIA said that it would not follow this Court's holdings in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), which are addressed

[6] The language of the departure bar in 8 C.F.R. § 1003.23(b)(1), governing motions before immigration judges, is nearly identical to the language of the departure bar in 8 C.F.R. § 1003.2(d).

in section III. C of this brief. *See Matter of Armendarez*, 24 I&N Dec. at 653. The BIA, upholding and applying the regulation, reasoned that the departure bar is consistent with the statutory scheme, which it characterized as distinguishing between individuals outside the United States and those inside the United States. *See Matter of Armendarez*, 24 I&N Dec. at 655-57.

The following year, however, the BIA stepped back from this position and found that some individuals who left the U.S. are permitted to seek reopening. *See Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009) (finding that departure does not preclude an IJ from adjudicating a motion to reopen an in absentia order for lack of notice).

III. ARGUMENT

A. THE DEPARTURE REGULATION IS NOT APPLICABLE TO PETITIONER BECAUSE HIS VACATED CONVICTION FORMED A "KEY PART" OF THE REMOVAL ORDER.

Even before Congress codified the right to file a motion to reopen, this Court construed 8 C.F.R. § 1003.2(d) and its predecessor regulation as inapplicable where a conviction that formed a "key part" of the removal proceeding was subsequently nullified. *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981) (conviction which formed the basis of deportation order later set aside); *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990) (conviction which

formed the basis of deportation order vacated); *Cf. William*, 499 F.3d 329 (striking down departure bar regulation where petitioner's conviction was vacated).

Significantly, in *Cardoso-Tlaseca v. Gonzales*, this Court held that the "key part" analysis applies not only where the vacated conviction forms the "sole" basis of the removal order, but also where the vacated conviction affects eligibility for relief. 460 F.3d 1102 (9th Cir. 2006). The Court reasoned that the conviction was a "key part" of the removal proceedings because it subjected the petitioner to removal and precluded his eligibility for relief. *Id*. at 1107. Thus, the Court rejected the government's argument that its prior precedents in *Wiedersperg* and *Estrada Rosales* did not apply, and found that the Board erred in refusing to reopen proceedings based on the regulatory departure bar.

Cardoso-Tlaseca controls here. Petitioner's subsequently vacated conviction had subjected him to removal and precluded his eligibility for relief. *See* Petitioner's Brief at 2-3. Thus, the conviction was a "key part" of the removal proceeding. Accordingly, the Board erred when it refused to adjudicate Petitioner's motion to reopen based on 8 C.F.R. § 1003.2(d).

B. THE COURT SHOULD INVALIDATE 8 C.F.R. § 1003.2(d).

The Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs challenges to the validity of an

agency regulation. First, the court must determine if Congress has made clear its intent by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. If Congress's intent is clear, this intent governs. *Chevron U.S.A*, 467 U.S. at 842-43. Second, only if congressional intent cannot be discerned, a court must consider whether the agency interpretation is a permissible construction of the statute. *Id.*

1. 8 C.F.R. § 1003.2(d) Violates the Plain Language of 8 U.S.C. § 1229a(c)(7) and Congressional Intent.

Whether the departure bar regulation at 8 C.F.R. § 1003.2(d) conflicts with 8 U.S.C. § 1229a(c)(7), the statute governing motions to reopen, is an issue of first impression in this Circuit. Two other courts, the Fourth and the Tenth Circuits, have considered this issue and reached opposite conclusions. *See William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (striking down the departure bar as conflicting with the motion to reopen statute); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (upholding the regulation).[7]

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[7] A few other cases have addressed the departure bar without considering whether the regulation conflicts with the motion to reopen statute. In *Pena-Muriel v. Gonzales*, the First Circuit considered whether the regulation conflicts with 8 U.S.C. § 1252, the judicial review statute. 489 F.3d 483, 441-43 (1st Cir. 2007); *see William*, 499 F.3d at 332 n.1. The First Circuit subsequently clarified that the issue decided in *William* still is an open question in that circuit. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (order denying petition for rehearing en banc).

In *Ovalles v. Holder*, the Fifth Circuit upheld the application of the departure bar to a motion to reopen filed under the sua sponte regulation and declined to

a. The plain language of the motion to reopen statute, as interpreted by the Supreme Court in *Dada v. Mukasey*, does not distinguish between motions filed before or after departure from the United States.

The departure bar regulation at 8 C.F.R. § 1003.2(d) is invalid because it conflicts with the plain language of the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), which contains no such departure bar. *See Consumer Product Safety Commission v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself").

The motion to reopen statute provides, "An alien may file one motion to reopen proceedings under this section…." 8 U.S.C. § 1229a(c)(7)(A). As the Supreme Court held, the plain language affords noncitizens both the right to file a motion to reopen and the right to have it adjudicated once it is filed. *Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008). In providing these rights, the statute does not distinguish between individuals abroad and those in the United States – both groups are encompassed in this straightforward, all-inclusive provision. Thus, as the Fourth Circuit concluded, the plain language expressly permits noncitizens to pursue a motion to reopen post departure:

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address whether the departure bar conflicts with the motion to reopen statute. 577 F.3d 288, 295-96 (5th Cir. 2009). Here, unlike the petitioner in *Ovalles*, Petitioner Reyes Torres filed his motion to reopen well within both the 30 day motion to reconsider and the 90 day motion to reopen time period, *see* Petitioner's Opening Brief at 2-3, and thus was not filing under the sua sponte regulation.

> *We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.* This is so because, in providing that "*an alien* may file," the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words "an alien." Because the statute sweeps broadly in this reference to "an alien," it need be no more specific to encompass within its terms those aliens who are abroad.

William, 499 F.3d at 332 (emphasis added).

In addition, the Supreme Court has emphasized the significance of Congress's codification of the right to file a motion to reopen.[8] Significantly, in *Dada*, the Court found that the statutory right to file a motion to reopen is an important safeguard in removal proceedings and, absent explicit limiting language in the statute, individuals must be permitted to pursue reopening:

> The purpose of a motion to reopen is to ensure a proper and lawful disposition. *We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law.* See 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C) (barring aliens who have committed, *inter alia*, aggravated felonies or terrorism offenses from receiving voluntary departure); § 1229c(b)(1)(B) (requiring an alien who obtains voluntary departure at the conclusion of removal proceedings to demonstrate "good moral character"). *This is*

[8] *Dada*, 128 S. Ct. at 2316 ("It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien"); *id.* at 2316 ("[T]he statutory text is plain insofar as it guarantees to each alien the right to file 'one motion to reopen proceedings under this section'"); *id.* at 2319 ("We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen").

particularly so when the plain text of the statute reveals no such limitation.

Dada, 128 S. Ct. at 2318 (emphasis added). Thus, *Dada* confirms that an agency may not infringe on the "important safeguard" of a motion to reopen when the "the plain text of the statute reveals no such limitation." *Id.*

The departure regulation, however, does exactly that: it limits the availability of pursuing a motion post departure even though the statute does not include such a limitation. As a result, the regulation cuts-off eligibility based on requirements that Congress did not impose and must be struck down. *See Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994) ("…the INS may not *restrict* eligibility to a smaller group of beneficiaries than provided for by Congress") (emphasis in the original); *Schneider v. Chertoff*, 450 F.3d 944, 953-58 (9th Cir. 2006) (striking down DHS regulations imposing requirements which were not imposed by statute); *Rosillo-Puga*, 580 F.3d at 1164 (Lucero, J., dissenting) ("the Attorney General cannot by regulation rewrite the Act to exempt an entire subclass of aliens when Congress itself chose not to authorize such an exemption").

b. Congress's choice not to codify the pre-existing departure bar evidences its intent not to carry the bar forward.

Prior to § 1229a(c)(7)'s 1996 enactment, noncitizens were able to file motions to reopen pursuant to the pre-1997 regulations. These regulations imposed time limits, numeric limitations, content and evidence requirements, and a

bar to review based on departure. *See supra* § II. Significantly, when Congress codified the right to file motions to reopen in 1996, it codified other pre-1997 regulatory limitations on motions, but chose not to codify the departure bar. Specifically, it codified:

> 8 C.F.R. § 3.2(c)(2) (1997), providing numeric limitations on motions to reopen. *See* 8 U.S.C. § 1229a(c)(6)(A) (1997);
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> 8 C.F.R. § 3.2 (c)(1) (1997), setting forth substantive and evidentiary requirements of motions to reopen. *See* 8 U.S.C. § 1229a(c)(6)(B) (1997);
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> 8 C.F.R. § 3.2(c)(2) (1997), providing a 90 day filing deadline. *See* 8 U.S.C. § 1229a(c)(6)(C)(i) (1997); and
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> 8 C.F.R. § 3.2(c)(3)(ii) (1997), creating an exception to the 90 day deadline where the basis of the motion is to apply for asylum based on changed country conditions. *See* 8 U.S.C. § 1229a(c)(6)(C)(ii) (1997).

Congress is presumed to have enacted the motion statute knowing the pre-IIRIRA regulatory requirements, limitations and bars on motions to reopen. *See Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988). As the Supreme Court has aptly stated, courts "…do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . ." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

Given Congress's codification of many pre-IIRIRA regulatory requirements, its choice not to codify the departure regulation must be construed as evidencing Congress's intention to repeal the departure bar. *William*, 499 F.3d at 333 (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides

exceptions to a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth")); *Rosillo-Puga*, 580 F.3d at 1164-65 (Lucero, J., dissenting). *See also Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009) (en banc) ("If Congress had intended to exclude family-only alien smugglers…, it could have included a provision similar to the exception for controlled substance traffickers"). This Court must give significance to Congress's deliberate omission of the departure bar by invalidating the regulation.

c. Congress's simultaneous enactment of other provisions establishes its intent to permit motions to reopen after departure.

In IIRIRA, Congress enacted several other provisions related to removal, voluntary departure and judicial review which cannot be reconciled with the departure bar. The simultaneous enactment of these provisions further evidences that Congress intended to permit individuals to file motions after their departure. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (internal citations omitted).

First, Congress explicitly repealed former 8 U.S.C. § 1105a(c) (1996), which precluded judicial review of deportation orders after the person departed the U.S.

See IIRIRA § 306(b). Although the departure regulation addresses motions to reopen and not judicial review, it is telling that the enactment of former § 1105a(c)'s bar to judicial review post departure was consistent with the regulation. *See Wiedersperg*, 896 F.2d at 1181 n.2 (8 C.F.R. § 3.2 "operates parallel to 8 U.S.C. § 1105a(c)").

Second, Congress adopted a 90 day period for the government to deport a person who has been ordered removed. IIRIRA § 304(a)(3) (codified at 8 U.S.C. § 1231(a)(1)). Congress simply could not have intended to give noncitizens 90 days to file a motion to reopen but require removal within that same 90 day time period if removal automatically withdraws the motion to reopen.

Third, Congress amended the voluntary departure statute to limit the voluntary departure period to 60 or 120 days. *See* IIRIRA § 304(a)(3) (codified at 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)). Congress could not have intended to grant 60 or 120 days in which to voluntarily depart if such departure would strip them of their statutory right to pursue a motion to reopen. The Supreme Court in *Dada* held that one way to preserve this right is to permit a person to withdraw a voluntary departure request. *See Dada,* 128 S. Ct. at 2319-20. Significantly, however, the Court recognized the "untenable conflict" between the voluntary departure and motion to reopen rules, and noted that a "more expeditious solution" would be to allow motions post departure. *Id.* at 2320. Despite the Court's clear

doubts about the validity of the departure regulations, it could not act upon them because the departure regulations were not challenged in that case. *Id.*[9]

Fourth, Congress provided for judicial review of motions to reopen and specified that review of such motions shall be consolidated with review of the final order of removal. *See* IIRIRA § 306(a)(2) (codified at 8 U.S.C. § 1252(b)(6)). It is inconceivable that Congress would permit judicial review of the denial of a motion to reopen, yet, by virtue of the departure bar, preclude many people from exercising the statutory right to seek such review. Where a person is removed while the petition for review of a removal order is pending, but before the BIA has adjudicated the motion to reopen, the departure bar would foreclose judicial review over the motion. Similarly, even where the person is not removed until after the BIA adjudicates the motion, if the circuit court grants the petition for review and remands the motion to the agency, the BIA presumably would invoke the departure bar and dismiss the motion despite the court's favorable ruling.

Thus, Congress's removal of the bar to judicial review post departure and its enactment of the 90 day removal period, the strict limits on the voluntary departure period, and the right to seek review of a motion to reopen – particularly when read

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[9] *See also* Transcript of Oral Argument at 8, *Dada v. Mukasey*, 128 S. Ct. 329 (No. 06-1181) (Chief Justice Roberts commenting, "…if I thought it important to reconcile the two [motion to reopen and voluntary departure statutes], I would be much more concerned about that interpretation -- that the motion to reopen is automatically withdrawn [upon departure] -- than I would suggest we start incorporating equitable tolling rules and all that").

together – evidence that Congress intended to permit individuals to pursue motions to reopen post departure.

d. Congress's inclusion of a geographic limitation for some motions evidences its intention to permit general motions to reopen post departure.

Congress's codification of a geographic limitation on certain motions to reopen filed under the Violence Against Women Act Court further evidences its intent to permit other motions to reopen post departure. In 2005, Congress incorporated a narrow geographic limitation on special rule motions to reopen filed by victims of domestic violence. VAWA 2005 § 825(a)(2)(F) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)). Specifically, Congress required that the person be "physically present in the United States at the time of filing the motion." 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV). If Congress had intended all motions to reopen to have a geographic limitation, its inclusion of a physical presence requirement in § 1229a(c)(7)(C)(iv)(IV) would be redundant. *William*, 499 F.3d at 333; *Rosillo-Puga*, 580 F.3d at 1165-67 (Lucero, J., dissenting).

Further, "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Given that Congress did codify a geographic limitation for special rule motions, its decision not to include such a limit on general motions to reopen creates a strong inference that Congress

did not intend to impose a geographic limit on these motions. *William*, 499 F.3d at 333. *See also Sanchez*, 560 F.3d at 1033 ("Congress's failure to create an exception or waiver… supports the inference that Congress intended no such exception").

The BIA's attempt in *Matter of Armendarez* to justify the departure bar regulation in spite of Congress's enactment of 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) is unconvincing. The Board acknowledges: (1) "that there is some incongruity between the departure bar rule and the 'physical presence' requirement" [for VAWA motions]; (2) that "a regulation may sometimes be superseded by the implications of a later statute…."; and (3) that it cannot find a single piece of legislative history explaining Congress's inclusion of the physical presence requirement enacted in 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV). *Matter of Armendarez*, 24 I&N Dec. at 658-59.

Nonetheless, the BIA ignores these facts and sweepingly surmises, without statutory support, that, by including a physical presence requirement for special rule motions, Congress was simply trying to correct its failure to include such a requirement in the predecessor statute, which, until it was corrected, "could have been read to authorize the filing of motions from outside the United States if the movant otherwise satisfied the statutory requirements." *Id.* This argument fails for two reasons. First, the VAWA 2000 language that Congress amended in 2005 was

located under the "Deadline" subsection of the motion to reopen statute and merely provided an exception to the filing deadline; alone, it does not speak to whether a motion may be filed from outside the United States.[10] With special rule motions, as with all motions to reopen, the operative language is contained in 8 U.S.C. § 1229a(c)(7)(A), providing that "an alien may file one motion to reopen proceedings under this section…" Thus, there is no evidence to suggest that the 2000 special rule read independently from the rest of the motion to reopen provisions authorizes motions from outside the United States.

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[10] VAWA 2000 amended the motion statute to read:

> (C) Deadline.---
> . . .
>
> (iv) Special rule for battered spouses and children--The deadline specified in subsection (b)(5)(C) for filing a motion to reopen does not apply--
>
> (I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A), clause (ii) or (iii) of section 204(a)(1)(B), or section 240A(b)(2);
>
> (II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen; and
>
> (III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.

8 US.C. § 1229a(c)(7)(C)(iv) (2001).

Second, even if the BIA were correct that Congress was concerned that the VAWA 2000 provision could be interpreted as authorizing motions from outside the United States, it begs the question why Congress also did not make this same correction to the general motion to reopen statute located in the same statutory section Congress amended. In fact, assuming arguendo that the BIA were correct about Congress's intent, the BIA's rationale supports Petitioner's and amici curiae's reading of the statute: absent explicit limiting language, broad language, like that in 8 U.S.C. § 1229a(c)(7), should be read to authorize the filing of motions from outside the United States.

In sum, Congress's choice not to codify the pre-1997 departure bar to review of a motion to reopen – especially in light of adding a geographic limitation for another group – is a significant expression of Congress's desire not to carry the bar forward in post-IIRIRA motions to reopen.

2. Even If the Court Finds Congress's Intent Ambiguous, the Regulation Barring Review of Post Departure Motions Is An Impermissible Construction of 8 U.S.C. § 1229a(c)(7).

a. DOJ's justifications for refusing to eliminate the departure bar following IIRIRA's enactment are erroneous and inadequate.

When DOJ promulgated the post-IIRIRA regulations pertaining to motions to reopen, the agency rejected commenters' suggestions that (1) the regulation be consistent with the repeal of the departure bar to judicial review; and (2) the

regulation be amended so that departure does not constitute withdrawal of a motion to reopen. 62 Fed. Reg. 10312, 10321 (March 6, 1997). Because DOJ's rejection of the former suggestion is erroneous and its rejection of the latter suggestion is inadequate, its retention of the departure bar is unreasonable.

Specifically, DOJ reasoned that it could not amend the departure bar absent a provision of 8 U.S.C. § 1252 supporting or authorizing it to do so. *Id.* ("No provision of the new section 242 [8 U.S.C. § 1252] of the Act supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States").

DOJ's explanation is indefensible. Section 1252 involves the *federal courts'* jurisdiction to review agency decisions. In contrast, the regulation at issue precludes administrative adjudication of motions following departure. Thus, any departure limitation on agency adjudication over motions to reopen would not be contained in 8 U.S.C. § 1252. Rather, if any such limitation existed, Congress presumably would have included it in 8 U.S.C. § 1229a (relating to removal proceedings, including the motion to reopen provision). Moreover, to the extent that 8 U.S.C. § 1252 has bearing on the analysis, it heavily weighs in favor of permitting persons who depart to pursue motions to reopen. After all, the 1961 enactment of former § 1105a(c)'s bar to judicial review post departure was

consistent with the regulatory bar to motions to reopen post departure. *See Wiedersperg v. INS*, 896 F.2d at 1181 n.2. Congress's 1996 repeal of this bar should have been reflected in the 1997 regulations by eliminating the departure bar to motions to reopen.

Second, in response to commenters who suggested that the regulation should be amended so that departure does not constitute withdrawal of a motion to reopen, DOJ said: "The Department believes that the burdens associated with the adjudication of motions to reopen … on behalf of deported or departed aliens would greatly outweigh any advantages this system might render." 62 Fed. Reg. at 10321. However, DOJ offered no explanation for what "burden" is associated with motions to reopen. Not all such motions are filed in order to apply for relief, nor is a subsequent hearing always necessary.[11] Furthermore, there is no indication that the costs of adjudicating these motions differs significantly from the costs of adjudicating motions filed on behalf of individuals present in the United States. If anything, the cost is less because a person outside the country need not be monitored or detained by DHS.

b. The regulation leads to an absurd result and undermines Congress's intent in enacting IIRIRA.

[11] Moreover, in the event of a hearing, a person could appear telephonically. *See* 8 C.F.R. § 1003.25(c).

Under the regulation, persons who unknowingly self-deport and persons who comply with their removal orders or voluntary departure orders are categorically prohibited from seeking reopening of their proceedings no matter how compelling the reason. Meanwhile, individuals who do not comply with a removal order can seek reopening.[12] Such a result is absurd because it effectively *discourages* compliance with the order of removal. *See Gallarde v. INS*, 486 F.3d 1136, 1143 (9th Cir. 2007) ("We read statutes in a manner that avoids such an absurd result").

As a result, the regulation also undermines one of IIRIRA's objectives: encouraging prompt physical removal or departure from the U.S. *See* IIRIRA § 306(b) (repealing former 8 U.S.C. § 1105a, including subsection (a)(3)'s stay of deportation upon service of petition for review and subsection (c)'s departure bar); *William*, 499 F.3d at 332 n.3 ("[O]ne of IIRIRA's aims is to expedite the removal of aliens from the country while permitting them to continue to seek review … from abroad"); *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009) ("IIRIRA inverted these provisions to allow for more prompt removal. First, Congress lifted the ban

[12] While the 90-day deadline for filing motions to reopen generally prevents the filing and granting of late-filed motions, there are numerous exceptions to the filing deadline, including motions seeking to reopen and rescind an in absentia removal order, 8 U.S.C. § 1229a(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, 8 U.S.C. § 1229a(c)(7)(C)(ii). This Court also has held that the filing deadline is subject to equitable tolling. *See, e.g., Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001).

on adjudication of a petition for review once an alien has departed"); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (by repealing the departure bar to judicial review in IIRIRA, Congress expressed its "desire to expedite removal"). The departure regulation actually undermines this objective by putting people who fail to comply with a final order or take voluntary departure in a better situation than those who are removed and those who depart promptly.

c. The Board's decision in *Matter of Armendarez* is unreasonable.

Furthermore, the BIA's justification for the departure bar in *Armendarez* is unreasonable. In *Armendarez*, the BIA labels the physical removal of a person a "transformative event" that results in "nullification of legal status." 24 I&N Dec. at 655-56. The BIA goes on to say that only the Department of Homeland Security and the Department of State have responsibilities related to noncitizens outside the United States and thus "[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid." *Matter of Armendarez,* 24 I&N Dec. at 656.

Yet, the same decision concedes the BIA may exercise jurisdiction over cases where the individual has been removed and subsequently prevails in a petition for review. *Id.* at 656-57, n. 8 (citing *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006)). *See also Nken*, 129 S. Ct. at 1761 ("Aliens who are removed may

continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return").

Moreover, in *Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009), the BIA actually found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the U.S. It is entirely inconsistent for the BIA to say that removal or departure is a "transformative event" barring a motion to reopen in *Armendarez* and then essentially ignore this fact in *Bulnes* and allow a person who departed the U.S. to pursue a motion to reopen. *See also Matter of Morales*, 21 I&N Dec. 130, 147 (BIA 1995) (finding that removal need not moot an appeal).

Thus, by the BIA's own admission, departure from the U.S. does not automatically nullify one's status and/or one's ability to pursue a case at the BIA. The fact that many individuals are permitted to pursue claims from outside the U.S. undermines the BIA's characterization of departure as a transformative event.

C. THE BOARD MISCONSTRUED THIS COURT'S HOLDING IN *LIN*.

In *Matter of Armendarez*, the BIA misconstrued this Court's decision in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007). In *Lin*, this Court read the departure regulation at 8 C.F.R. 1003.23(b)(1) as not applying to individuals who file a motion to reopen with an IJ after removal proceedings are completed. 473 F.3d at

982. Because the petitioner's removal proceedings "were completed" when he was removed, the Court held that the departure bar did not apply to his later filed motion to reopen. *Id*. The Court subsequently extended its holding in *Lin* to the departure bar in 8 C.F.R. § 1003.2(d) (motions filed with the BIA). *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007).

In *Armendarez*, the BIA incorrectly assumed that this Court found that the departure bar regulation was ambiguous, and therefore, under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), it could reject this Court's interpretation of the regulation. *See* 24 I&N Dec. at 650-53. Although the *Lin* Court cites the rule of lenity, 473 F.3d at 981, 982, the Court identifies no actual ambiguities in the regulatory language; rather, it states:

> The regulation is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she "*is* the subject of removal . . . proceedings." 8 C.F.R. § 1003.23(b)(1) (emphasis added). Because petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time.

Lin, 473 F.3d at 982.

Thus, the *Lin* Court's straightforward analysis of the regulatory language suggests the regulation is clear on its face.[13] Accordingly, to the extent that the *Lin*

[13] In addition, *Lin* holds that its reading of the regulation is "consistent" with *Singh v. Gonzales*, 412 F.3d 1117 (9th Cir. 2005), in which the Court found that the "plain language" of the same regulation makes it clear that it does not apply to

Court based its analysis on the plain language of the regulation, the BIA is bound by *Lin*. *See Brand X*, 545 U.S. at 982-83 (agency may not offer a conflicting interpretation where the language is unambiguous).

IV. CONCLUSION

For the reasons set forth above, the Court should grant the petitions for review and remand the case to the BIA for further consideration.

Respectfully submitted,

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someone who departs prior to the initiation of proceedings. *See Lin*, 473 F.3d at 982.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 6,928 words.

DATED: January 11, 2010

s/ Beth Werlin

Beth Werlin

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I, Brian Yourish, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 11, 2010.

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s/ Brian Yourish

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Date: January 11, 2010