No. 10-1846

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DANIEL ROLANDO ORTEGA-MARROQUIN,
Petitioner,

v.

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

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS
AGENCY NO. A 072 519 426

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 26.1

I, Beth Werlin, attorney for the *Amici Curiae,* American Immigration Council and the National Immigration Project of the National Lawyers Guild, certify that these organizations are non-profit organizations that do not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10% or more of their stock.

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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 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 statute in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010). Moreover, the BIA's conclusion that it lacks jurisdiction over motions post departure is indefensible, as Congress provided the immigration agency with jurisdiction over cases where a person has departed, and an agency cannot contract its own jurisdiction by regulation.

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. Undersigned counsel for amici curiae appeared in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), and *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156-57 (10th Cir. 2009), two cases deciding the exact issue presented here. In addition, amici have submitted a petition for rulemaking to the Department of Justice (DOJ), asking the agency to amend regulations governing the adjudication of motions to strike the departure bar.

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.[1] 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). Although the regulatory right to file a motion with the Board had existed since 1940 (5 Fed. Reg. 3502, 3504 (September 4, 1940)), in 1952, the former Immigration and Naturalization Service (INS) barred the BIA from

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

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 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 motion 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)).[2] Three months after the enactment of the 1961 laws, the DOJ issued implementing regulations, in which it re-promulgated the departure bar to motions. *See* 27 Fed. Reg. 96, 96-97 (January 5, 1962) (codified at 8 C.F.R. § 3.2 (1962)). From the outset, the BIA

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[2] Former 8 U.S.C. § 1105a(c) read:

> 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.

understood the departure bar to motions as a limitation on its jurisdiction. *See Matter of G- y B-*, 6 I&N Dec. 159 (BIA 1954).

From the early 1960s until 1996, the 1961 version of 8 U.S.C. § 1105a(c) (barring judicial review post departure) remained unchanged. Similarly, the language of the regulation barring motions filed with the BIA by individuals outside the country also remained unchanged, although it later was moved to the newly-created subsection (d). *See* 61 Fed. Reg. 18900 (April 29, 1996) (creating 8 C.F.R. § 3.2(d) (1997)).[3]

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)).[4] Congress also codified several of the pre-existing regulatory requirements for

[3] In 1983, DOJ created the immigration judge position – previously the function was performed by INS – 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 Aug. 13, 2010). 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).

[4] 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).

motions to reopen, including numeric limitations, filing deadlines, and substantive and evidentiary requirements for motions. *Id.*; 8 C.F.R. § 3.2(c) (1997).

- Congress repealed former 8 U.S.C. § 1105a(c)'s departure bar to judicial review, replaced the pre-existing judicial review of deportation orders provisions with 8 U.S.C. § 1252, and did not reenact a departure bar to judicial review. IIRIRA §§ 306(a) & (b).

- 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)).

- 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).

On March 6, 1997, DOJ promulgated regulations implementing IIRIRA. *See* 62 Fed. Reg. 10312 (March 6, 1997). Despite the changes detailed above, DOJ retained the departure bar on review of motions filed with the BIA and extended the departure bar to motions filed with immigration judges. *See* 62 Fed. Reg. at 10312, 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, 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 require that the person must be "physically present in the U.S. 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, the regulations containing the departure bar at 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 departure bar 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).

In a 2008 decision, the BIA upheld the departure bar regulation and reaffirmed its belief that it lacks jurisdiction over motions post departure. *See Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The BIA 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, 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 immigration judge from adjudicating a motion to reopen an in absentia order for lack of notice).

III. ARGUMENT

A. THE DEPARTURE BAR CONFLICTS WITH THE STATUTORY RIGHT TO FILE A MOTION TO REOPEN.

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*, 467 U.S. at 842-43. Second, if congressional intent cannot be discerned, a court must consider whether the agency interpretation is a permissible construction of the statute. *Id.* Here, the departure bar regulation conflicts with the clear intent of Congress, and therefore is invalid. However, even if the Court were to find that the statute is ambiguous, *Chevron* deference is not warranted because the regulation is an impermissible construction of the statute.

1. Congress Intended to Permit Post Departure Motions.

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.[5] 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 departure bar as conflicting with the motion statute); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (upholding the regulation); *see also Marin-Rodriguez v. Holder*, __ F.3d __, No. 09-3105, 2010 U.S. App. LEXIS 14385, at *4-10 (7th Cir. July 14, 2010) (in dicta, disagreeing with Fourth Circuit's analysis, but agreeing with the result and invalidating the regulation on other grounds).[6] The Ninth Circuit also found that the statute conflicted with

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[5] That Petitioner seeks review of the Board's decision to vacate its prior order reopening Petitioner's removal proceedings does not change the issue before this Court. The Board relied on the departure regulation to conclude it lacked jurisdiction over Petitioner's motion. *See* Petioner's Opening Brief at 14-15 and Appendix.

[6] Other courts have addressed the departure bar without deciding whether the regulation conflicts with the motion statute. The First Circuit considered whether the regulation conflicts with 8 U.S.C. § 1252, the judicial review statute. *Pena-Muriel v. Gonzales*, 489 F.3d 483, 441-43 (1st Cir. 2007). The court subsequently clarified that whether the regulation conflicts with the motion statute remains an open question. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007).

The Fifth and Second Circuits have upheld the departure bar as applied to sua sponte motions and declined to address whether the departure bar conflicts with the motion statute. *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, __ F.3d __, No. 09-2628-ag, 2010 U.S. App. LEXIS 16681, at *9 & n.2 (2d Cir. Aug. 12, 2010).

Congress's intent with respect to a person who has been "involuntarily removed," as was the case here. *See Martinez Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010).[7]

a. The plain language of the motion to reopen statute – which does not distinguish between motions filed before or after departure – evidences Congress's intent to allow post departure motions.

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, which contains no such 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, 8 U.S.C. § 1229a(c)(7)(A), provides that "[a]n alien may file one motion to reopen proceedings under this section . . . ." As the Supreme Court held, the plain language of the motion to reopen statute affords

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Here, unlike the petitioners in *Ovalles* and *Zhang*, Petitioner Ortega-Marroquin contends that his motion to reopen is timely because the deadline was equitably tolled, *see* Petitioner's Opening Brief at 11-12, and thus the court should decide whether the regulation conflicts with the motion statute. Moreover, because the departure regulation and the Board's decision in *Matter of Armendarez* provide the sole basis for the Board's decision in this case, the Court must decide the lawfulness of the regulation notwithstanding whether the motion was based on the BIA's statutory or sua sponte authority. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[7] Although the Ninth Circuit did not consider the validity of the bar where the person's departure is voluntary and the person files the motion after his or her departure, the court's reasoning applies equally to this situation.

noncitizens both the right to file a motion and the right to have it adjudicated once it is filed. *See Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008). In providing this right, 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 post departure:

> *We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file [one motion to reconsider and] 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 purpose of the motion to reopen is "to ensure a

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[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").

proper and lawful disposition" and that the Court "must be reluctant" to adopt an interpretation of the statute that would limit this "important safeguard." *Dada*, 128 S. Ct. at 2318. *See also Kucana v. Holder*, 130 S. Ct. at 834 (reaffirming that a motion to reopen is an "important safeguard"). "This is particularly so when the plain text of the statute reveals no such limitation." *Dada*, 128 S. Ct. at 2318.

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. The departure bar regulation cuts-off eligibility based on requirements that Congress did not impose and must be struck down. *See Martinez Coyt*, 593 F.3d at 907 ("It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA"); *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 regulation. This regulation 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) (1997), providing numeric limitations on motions to reopen. *See* 8 U.S.C. § 1229a(c)(6)(A) (1997);
>
> 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);
>
> 8 C.F.R. § 3.2(c)(2) (1997), providing 90 day filing deadline. *See* 8 U.S.C. § 1229a(c)(6)(C)(i) (1997); and
>
> 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 to reopen statute knowing the pre-IIRIRA regulatory requirements, limitations and bars on such motions. *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 deliberate omission of the departure bar demonstrates its intent to permit motions after departure. *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). *Cf. Thom v. United States*, 283 F.3d 939, 944 (8th Cir. 2002) (where statute provides some exceptions, the "court should hesitate before it reads into the Code what is not expressly contained therein"). This Court must give significance to Congress's deliberate omission of the departure bar by invalidating the regulation.

c. Invalidating the departure bar is the only way to reconcile the motion to reopen statute with Congress's simultaneous repeal of the departure bar to judicial review and its enactment of a 90 day removal period and 60 and 120 day voluntary departure period.

In IIRIRA, Congress repealed the departure bar to judicial review and enacted several other provisions related to judicial review, removal, and voluntary departure which cannot be reconciled with the departure bar. The simultaneous repeal and 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.[9] *See Wiedersperg v. INS*, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990) (8 C.F.R. § 3.2 "operates parallel to 8 U.S.C. § 1105a(c)"). As the Seventh Circuit recently noted, the repeal of 8 U.S.C. § 1105a(c), "pulled the rug out from under *Matter of G-y B-* and similar decisions, based on the norm that departure ended all legal proceedings in the United States." *Marin-Rodriguez*, 2010 U.S. App. LEXIS 14385, at *8.

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)). As the Ninth Circuit has recognized, 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. The Court stated:

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[9] In addition, Congress provided that judicial review of motions shall be consolidated with review of final removal orders. *See* IIRIRA § 306(a)(2) (codified at 8 U.S.C. § 1252(b)(6)). It is inconceivable that Congress would permit judicial review of motions to reopen, yet, by virtue of the departure bar, preclude the exercise of that statutory right.

> The only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien's removal within ninety days is to hold, consistent with the other provisions of IIRIRA, that the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.

See Martinez Coyt, 593 F.3d at 907.

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 individuals 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 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,[10] it could not act upon them because the departure regulation was not challenged in that case. *Id.*

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[10] *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").

Thus, Congress's removal of the bar to judicial review post departure and its enactment of the 90 day removal period and the strict limits on the voluntary departure period – particularly when read together – evidence that Congress intended to permit individuals to exercise their statutory right to file motions to reopen post departure.

d. That Congress required physical presence within the United States for certain VAWA motions and did not require physical presence for general motions evidences its intention to permit the filing of motions from outside the United States.

Congress's codification of a geographic limitation on certain motions filed under the Violence Against Women Act further evidences its intent to permit other motions post departure. In 2005, Congress incorporated a narrow geographic limitation on special rule motions filed by victims of domestic violence. VAWA 2005 § 825(a)(2)(F) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)) (requiring that the person be "physically present in the United States at the time of filing the motion"). 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 Lutheran Social Service of Minnesota v. U.S.*, 758 F.2d 1283, 1289 (8th Cir. 1985) (finding that Congress's decision to omit an "exclusively religious" requirement in the definition of an "integrated auxiliary" and its inclusion of that requirement elsewhere in the Internal Revenue Code "can only be viewed as an intentional and purposeful decision not to limit the group of integrated auxiliaries qualifying for the filing exception to those that are exclusively religious").

The BIA's attempt in *Matter of Armendarez* to justify the departure bar regulation in spite of § 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 § 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. First, the VAWA 2000 language that Congress amended in 2005 was located under the "Deadline" subsection of the general 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 U.S. 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 U.S.

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 U.S., 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 § 1229a(c)(7), should be read to authorize the filing of motions from outside the U.S.

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 physical presence requirement for another group – is a significant expression of Congress's desire not to carry the departure bar forward in other post-IIRIRA motions.

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. The regulation undermines Congress's intent in enacting IIRIRA and therefore is impermissible.

The courts, including the Supreme Court, have recognized that the design of IIRIRA – in particular its removal of the departure bar to judicial review – was intended to expedite physical departure from the United States. *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 on adjudication of a petition for review once an alien has departed"); *Martinez Coyt*, 593 F.3d at 906 (citing *Nken*, finding "IIRIRA 'inverted' certain provisions

of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad."). The departure bar actually undermines this objective by putting people who fail to comply with a final order of removal or voluntary departure in a better situation than those who are removed and those who depart promptly.

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.[11] Such a result is unreasonable because it effectively *discourages* compliance with the order of removal and undermines a primary objective of IIRIRA. *See Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 900 (8th Cir.1999) ("[W]e will apply a common sense meaning to the text of the statute and interpret its provisions in a manner logically consistent with the Act as whole").

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

[11] 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). Also the filing deadline is subject to equitable tolling. *See Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *see also Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005) (citing cases).

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 § 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 § 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 post departure. *See Wiedersperg*, 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. *Cf. Marin-Rodriguez*, 2010 U.S. App. LEXIS 14385, at *8.

Second, DOJ said: "The Department believes that the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render." 62 Fed. Reg. at 10312. 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.[12] 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 U.S. If anything, the cost is less because a person outside the country need not be monitored or detained.

c. The Board's justification for the departure bar in **Matter of Armendarez** *is unreasonable.*

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

Furthermore, the BIA's justification for the departure bar in *Armendarez* is unreasonable. In *Matter of 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." *Id.* 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. at 58-60, 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 and demonstrates that the BIA's justification for the regulation is unreasonable.

B. THE REGULATION BARRING "JURISDICTION" OVER POST DEPARTURE MOTIONS IS AN UNLAWFUL EXERCISE OF AGENCY AUTHORITY.

The Supreme Court has held that it is unlawful for an agency to contract its own jurisdiction through regulation or decision. *See Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009). For decades, EOIR said that it lacks jurisdiction over persons outside the U.S. and has erroneously characterized 8 C.F.R. § 1003.2(d) as jurisdictional. *See Matter of G- y B-*, 6 I&N Dec. 159 (BIA 1954) (reaffirmed in *Matter of Armendarez*, 24 I&N Dec. 646). Notwithstanding this longstanding understanding of its jurisdiction, under *Union Pacific*, the Court cannot allow the Board to continue to contract its own jurisdiction. *Accord Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (despite longstanding agency construction of statute, no deference to agency where construction conflicts with the language of the statute).

In *Union Pacific*, the National Railroad Adjustment Board (Board) dismissed grievance claims against the railroad for lack of jurisdiction, relying on

the Board's own procedural rules. *Id.* at 594. In reversing the decisions, the Supreme Court reasoned that the Board erroneously declared its procedural rules "jurisdictional." *Id.* at 590. "Congress alone," the Court said, "controls the Board's jurisdiction." *Id.* And, since "Congress gave the Board no authority to adopt rules of jurisdictional dimension," the Court held the Board's creation of jurisdictional rules on its own accord was untenable. *See id.* at 597, 98.

Similarly here, Congress vested the BIA with authority over motions to reopen,[13] but did not grant it any authority to adopt jurisdictional rules governing their adjudication. Thus, like the Board in *Union Pacific*, its refusal to adjudicate claims based on lack of jurisdiction cannot stand.

Writing for the Seventh Circuit, Chief Judge Easterbrook relied on *Union Pacific* to invalidate the departure regulation. *Marin-Rodriguez*, 2010 U.S. App.

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[13] Congress provided immigration judges and the BIA with jurisdiction over motions to reopen removal proceedings. *See* 8 U.S.C. §§ 1229a(a) & (c)(7) (discussing authority of immigration judges and providing the right to seek reopening); 1101(a)(47)(B) (referring to the BIA in defining final order of deportation)); *see also* 8 U.S.C. § 1252(b)(6) (providing for consolidated judicial review of motions to reopen and reconsider in the courts of appeals). *Cf. Zhang*, 2010 U.S. App. LEXIS 16681, at *42-43 (contrasting the statutory grant of jurisdiction in *Union Pacific* with the general grant of authority to issue regulations (including regulations establishing sua sponte motions), which petitioner did not allege "conflicts with the INA [and] leads to [an] interpretative problem under *Chevron* . . . ").

LEXIS 14385.[14] Speaking specifically about the INA's grant of authority with respect to motions, the Seventh Circuit explained:

> As a rule about subject-matter jurisdiction, § 1003.2(d) is untenable. The Immigration and Nationality Act authorizes the Board to reconsider or reopen its own decisions. It does not make that step depend on the alien's presence in the United States. . . .
>
> The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks "jurisdiction"-which is to say, adjudicatory competence, see *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243, 176 L. Ed. 2d 18 (2010) (collecting cases)-to issue decisions that affect the legal rights of departed aliens.

See id. at *7-8; *see also Zhang*, 2010 U.S. App. LEXIS 16681, at *39 (noting that the INA serves as the basis of the BIA's jurisdiction over a motion to reconsider). Thus, the court remanded the case to the Board for adjudication of the petitioner's motion.

The Supreme Court has made clear in a series of post-IIRIRA decisions that the BIA does, indeed must, retain jurisdiction over cases where a person has been removed. *Carachuri-Rosendo v. Holder*, 560 U.S. __, 130 S. Ct. 2577, 177 L. Ed. 2d 68, 82 n.8 (2010); *Lopez*, 549 U.S. at 52 n.2; *Nken*, 129 S. Ct. at 1761. Indeed,

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[14] In *Zhang*, the Second Circuit clarified that its decision is not in conflict with *Marin-Rodriguez* or *Union Pacific*, as unlike Marin-Rodriguez, Zhang "was not eligible to avail himself of [the] statutory entitlement" to a motion to reopen. *Zhang*, 2010 U.S. App. LEXIS 16681, at *39. Though not deciding the issue, the Second Circuit suggested that it would reach a different result had the case not involved a sua sponte motion, which has a purely regulatory, not statutory basis. *Id*. at *39-43.

even the BIA itself has found that it retains jurisdiction despite departure over some motions to reopen. As discussed in section III, A, 2, c, above, despite reasoning that that the physical removal of a person is a "transformative event" that results in "nullification of legal status," and precludes it from exercising jurisdiction over a motion to reopen, *see Matter of Armendarez*, 24 I&N Dec. at 655-56, the BIA later found that it may review motions to reopen based on lack of notice notwithstanding a person's departure. *See Matter of Bulnes*, 25 I&N Dec. at 58-60. *See also Marin-Rodriguez*, 2010 U.S. App. LEXIS 14385, at *11-12 (noting discrepancies between *Armendarez* and *Bulnes*).

In sum, the BIA's conclusion that it lacks jurisdiction over motions post departure is indefensible. In order to bring the agency in line with Supreme Court, Seventh Circuit and its own precedent, this Court must find that the departure bar is invalid.

IV. CONCLUSION

For the reasons set forth above, the Court should grant the petition for review and remand the case to the BIA for reinstatement of its initial decision granting the motion to reopen.

Respectfully submitted,

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