Nos. 11-60549 and 11-60706

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GIBRIEL LARI,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER OF
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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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Petitioner hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Eric Holder, Jr., U.S. Attorney General,

2. Petitioner Gibriel Lari,

3. Counsel for Petitioner, Matthew Lorn Hoppock, Dunn & Davison, LLC and Valerie K. Tarbutton, McCrummen Immigration Law Group, LLC,

4. *Amici Curiae* American Immigration Council and the National Immigration Project of the National Lawyers Guild.

s/ Beth Werlin

Beth Werlin
American Immigration Council

Dated: December 14, 2011

CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Beth Werlin, attorney for the *Amicus Curiae,* American Immigration Council, certify that this organization is a non-profit organization which 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.

s/ Beth Werlin

Beth Werlin
American Immigration Council
Dated: December 14, 2011

I, Trina Realmuto, attorney for the *Amicus Curiae,* National Immigration Project of the National Lawyers Guild, certify that this organization is a non-profit organization which 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.

s/ Trina Realmuto

Trina Realmuto
National Immigration Project of the
National Lawyers Guild
Dated: December 14, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

I. INTRODUCTION AND STATEMENT OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Immigration Project of the National Lawyers Guild (National Immigration Project) and the American Immigration Council proffer this brief to assist the Court in its consideration of the departure regulation at 8 C.F.R. § 1003.2(d) in Case No. 11-60706. This regulation bars noncitizens who depart the United States from exercising their statutory rights to pursue a motion to reconsider and motion to reopen before the Board of Immigration Appeals (BIA or Board). Amici submit that the departure bar regulation impermissibly contracts the agency's jurisdiction and conflicts with the motion statutes, 8 U.S.C. §§ 1229a(c)(6)&(7).

To date, six courts of appeals have agreed, invalidating the departure bar regulation on one or both of these bases.[1] *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) (regulation impermissibly contracts BIA jurisdiction); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011) (regulation conflicts with motion to reconsider statute); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (regulation conflicts with motion to reopen statue); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011) (regulation impermissibly contracts BIA jurisdiction); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010) (regulation impermissibly

[1] Although this case involves a motion to reconsider and other cases have involved motions to reopen, it is a distinction without a difference because the departure bar language applies to both and the analyses are the same. *See Prestol Espinal v. AG of the United States*, 653 F.3d 213, 217 n.3 (3d Cir. 2011).

contracts BIA jurisdiction); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010) (regulation conflicts with motion to reopen statute); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011) (same). The only circuit to uphold the regulation has granted en banc rehearing. *Contreras-Bocanegra v. Holder*, 629 F.3d 1170, 1172 (10th Cir. 2010) (rehearing en banc pending, argued Nov. 15, 2011).

Although this Court has addressed the departure bar regulation, it has not addressed whether the Board's refusal to exercise its congressionally-delegated jurisdiction conflicts with the Supreme Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 590, 597-98 (2009). The Court also has not addressed the regulation's conflict with the motions statutes and its discord with the Supreme Court's interpretation of the motion to reopen statute in *Dada v. Mukasey*, 554 U.S. 1 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010).

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. 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. Both organizations have a

direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to pursue motions to reconsider and reopen.

As such, this brief focuses on the BIA's refusal to adjudicate Petitioner's motion to reconsider. This brief does not address the underlying merits of Petitioner's initial removal order at issue in Case No. 11-60549 or the merits of his motion to reconsider.[2] Undersigned counsel for amici curiae have appeared in many of the cases that have addressed the departure regulation, including *Prestol Espinal*, *William*, *Pruidze*, *Reyes-Torres*, and *Contreras-Bocanegra*. In addition, undersigned counsel have appeared in other cases that have discussed the regulation without considering whether it conflicts with the motion to reopen statute or impermissibly contracts the agency's jurisdiction. *See, e.g.*, *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (denying en banc rehearing and clarifying regulation validity remains an open question).

[2] Importantly, the merits of the motion to reconsider are not before the Court, as the BIA denied Petitioner's motion solely on the basis that it lacked jurisdiction due to Petitioner's deportation. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

II. LEGISLATIVE, REGULATORY, AND ADMINISTRATIVE BACKGROUND

The regulatory right to file a motion to reconsider or reopen with the Board has existed since 1940. *See* 5 Fed. Reg. 3502, 3504 (September 4, 1940). In 1952, the former Immigration and Naturalization Service barred the BIA from reviewing a motion filed by a person who departed the United States. 17 Fed. Reg. 11469, 11475 (December 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.

From the outset, the BIA 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).

In 1961, Congress amended the immigration laws and, *inter alia*, gave the circuit courts jurisdiction to review final orders of deportation through a petition for review. Act of September 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)).[3] Three months after

[3] Former 8 U.S.C. § 1105a(c) reads:

the enactment of the 1961 laws, the Department of Justice (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 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 then newly-created subsection (d). *See* 61 Fed. Reg. 18900 (April 29, 1996) (creating 8 C.F.R. § 3.2(d) (1997)).[4]

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

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> 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 June 4, 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).

immigration laws. Relevant here are the following changes:

- Congress, for the first time, codified the right to file a motion to reconsider and the right to file a motion to reopen. IIRIRA § 304 (adding new 8 U.S.C. §§ 1229a(c)(5) and 1229a(c)(6) (1997)).[5] Congress also codified several of the pre-existing regulatory requirements for motions to reopen and reconsider, including numeric limitations, filing deadlines, and substantive and evidentiary requirements for motions. *Id.*; 8 C.F.R. §§ 3.2(b) and 3.2(c) (1997).

- Congress repealed former 8 U.S.C. § 1105a(c)'s departure bar to judicial review and § 1105a(a)(3)'s automatic stay. IIRIRA § 306(b).

- Congress replaced the pre-existing judicial review of deportation orders provisions with 8 U.S.C. § 1252. IIRIRA § 306(a). Significantly, Congress did not reenact a departure bar to judicial review or an automatic stay in current 8 U.S.C. § 1252.

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

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). DOJ retained the departure bar on review of motions filed with the BIA. Moreover, DOJ extended the regulatory departure bar to motions filed with immigration judges. *See* 62 Fed. Reg. at

[5] In 2005, Congress moved the motion to reconsider and motion to reopen provisions to 8 U.S.C. §§ 1229a(c)(6) and 1229a(c)(7) respectively, but did not change their substance. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(d), 119 Stat. 231 (May 11, 2005).

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, 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, 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 concluded that immigration judges have jurisdiction to review certain motions filed by individuals outside the United States. *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. THIS CASE RAISES ISSUES NOT PREVIOUSLY RAISED OR DECIDED BY THIS COURT.

Although this Court has addressed the departure bar regulation, it did so without considering either of the two main arguments presented here: (1) whether the regulation impermissibly contracts the agency's jurisdiction; or (2) whether the regulation conflicts with the motion statute. Accordingly, because these issues

have not been "squarely addressed" by this Court, *stare decisis* is not applicable. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *See also Webster v. Fall*, 266 U.S. 507, 511 (1925); *Thomas v. Tex. Dep't of Crim. Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

Specifically, in *Navarro-Miranda v. Ashcroft*, this Court considered "the interplay between § 3.2(a) [the *sua sponte* reopening regulation] and § 3.2(d) [predecessor regulation to § 1003.2(d)]." 330 F.3d 672, 675 (5th Cir. 2003). The Court did not address whether the departure regulation violated the motion to reopen statute or whether the Board's refusal to adjudicate a post departure motion is an impermissible contraction of its congressionally-designated authority.

Likewise, in *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009), the Court addressed the departure bar regulation and upheld it as applied to *sua sponte* motions. Although the issue was briefed,[6] the court declined to address whether the departure bar conflicts with the motion statute because the petitioner's motion was not timely filed within any relevant statutory deadline. *Id.* at 295 ("Ovalles invokes statutory provisions that offer him no relief").

This Court's decision in *Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010), also is inapposite. There, the court assumed the validity of the departure bar (8 C.F.R. § 1003.23(b)(1)) and addressed whether it applies to someone who departs the

[6] Undersigned counsel appeared as amici curiae in that case.

United States after the initiation of removal proceedings but before entry of a removal order. *Toora*, 603 F.3d at 286-88.

Thus, whether the departure bar regulation is an impermissible exercise of agency jurisdiction and whether it conflicts with Congress's intent to allow post departure motions are issues of first impression.

B. THE BOARD'S INTERPRETATION OF 8 C.F.R. § 1003.2(d) AS JURIDICTIONAL CONFLICTS WITH THE SUPREME COURT'S DECISION IN *UNION PACIFIC* AND DECISIONS OF THE SECOND, SIXTH, AND SEVENTH CIRCUITS.

For decades, the Executive Office for Immigration Review (EOIR) has said that it lacks jurisdiction over persons outside the United State and has erroneously characterized 8 C.F.R. § 1003.2(d) as jurisdictional. *See Matter of G- y B-*, 6 I&N Dec. at 159 (reaffirmed in *Matter of Armendarez*, 24 I&N Dec. 646); *see also* A.R. 2 (BIA decision). Notwithstanding the agency's longstanding understanding of its jurisdiction,[7] the Court cannot allow the Board to refuse to exercise jurisdiction which Congress delegated to it.

The Supreme Court has held that it is impermissible 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, 590, 597-98 (2009). The Court reasoned that Congress alone controls an agency's jurisdiction and, unless

[7] *Accord Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (holding that courts do not give deference to longstanding administrative interpretations that conflict with the statute).

Congress provides an agency authority to "adopt rules of jurisdictional dimension," any attempt to limit its jurisdiction cannot stand. *Union Pacific*, 130 S. Ct. at 597. To date, three circuits have applied the Supreme Court's rationale in *Union Pacific* to find that the departure regulation constitutes an impermissible contraction of the Board's jurisdiction. *See Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) ("The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction'-which is to say, adjudicatory competence") (internal quotation omitted); *Pruidze v. Holder*, 632 F.3d 234, 237-39 (6th Cir. 2011) ("no statute gives the Board purchase for disclaiming jurisdiction to entertain a motion to reopen filed by aliens who have left the country"); *Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) ("[E]very indication points to the fact that Congress did not intend to create a jurisdictional bar for motions to reopen filed by an alien in the United States who is later removed from the United States"). *But see Contreras-Bocanegra v. Holder*, 629 F.3d 1170, 1172 (10th Cir. 2010) (rehearing en banc pending) (declining to apply *Union Pacific* analysis where panel concluded it was bound by its prior precedent upholding the departure bar).[8]

Whether a rule is jurisdictional or a claim processing rule "is not merely semantic but one of considerable practical importance for judges and litigants."

[8] Specifically, the panel relied on *Rosilla-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), which did not address *Union Pacific*. Importantly, however, the Tenth Circuit granted rehearing en banc in *Contreras-Bocanegra*. *See* No. 10-9500 (10th Cir. en banc argument Nov. 15, 2011).

Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011). Interpreting 8 C.F.R. § 1003.2(d) as jurisdictional deprives Petitioner of his statutory and regulatory rights to pursue his motion to reconsider (8 U.S.C. § 1229a(c)(6) and 8 C.F.R. § 1003.2(b)) and his right to seek judicial review if the Board denies the motion, 8 U.S.C. §§ 1101(a)(47)(B) and 1252(a)&(b)(6). *Accord Kucana*, 130 S. Ct. at 834 (affirming federal court review of decisions denying motions).

Here, indisputably, Congress vested EOIR, which consists of immigration judges and the Board, with adjudicatory authority over removal proceedings and administrative appeals. This authority is evidenced by (at least) the following statutory provisions:

- 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien").
- 8 U.S.C. § 1229a(c)(5) (where immigration judge finds alien removable, the judge "shall inform the alien of the right to appeal that decision. . .").
- 8 U.S.C. § 1101(a)(47)(B) (final administrative removal order defined by reference to the Board of Immigration Appeals).
- IMMACT90[9] § 545(d)(1) (recognizing right to administrative appeal deportation order).
- 6 U.S.C. § 521 (recognizing EOIR's legal status within the Department of Justice).

As part of EOIR's authority to conduct removal proceedings, Congress conferred EOIR with authority to adjudicate motions to reconsider and reopen,

[9] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

which the Supreme Court has recognized as an integral part of removal proceedings.[10] Congress conferred this authority through (at least) the following statutory provisions:

- 8 U.S.C. § 1229a(c)(6) (providing for motion to reconsider in section 1229a, entitled "Removal Proceedings," and linking motion deadline to "entry of a final administrative order of removal").
- 8 U.S.C. § 1229a(c)(7) (providing for same with respect to motions to reopen).
- 8 U.S.C §§ 1252(a) & (b)(6) (vesting the courts of appeals with judicial review over agency decisions, including BIA denials of motions).

Writing for the Seventh Circuit, Chief Judge Easterbrook addressed the INA's grant of authority with respect to motions: "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. . . ." *Marin-Rodriguez*, 612 F.3d at 593-94.

Similarly, Judge Sutton, writing for the Sixth Circuit, recognized that the Board's exercise of jurisdiction over certain types of post-departure motions, see *Matter of Bulnes*, 25 I&N Dec. at 58-60, is inconsistent with its refusal to exercise

[10] The Supreme Court repeatedly has emphasized that motions to reopen [and reconsider] are "important [procedural] safeguards" designed to "ensure a proper and lawful disposition" of immigration proceedings. *Kucana*, 130 S. Ct. at 838 (citing *Dada*, 554 U.S. at 18). *See also Luna*, 637 F.3d at 85, 96-97 (noting government emphasis on Supreme Court's recognition of the importance of motions and arguing motions are an adequate substitute to habeas corpus review).

jurisdiction over other types of post-departure motions. *Pruidze*, 632 F.3d at 239 (discussing *Matter of Bulnes* and noting "[e]ven the Board does not buy everything it is trying to sell"). The court reasoned that, if the Board truly lacked adjudicatory competence over a motion after departure, it logically must follow that it lacks jurisdiction "to hear a subset of those motions." *Id.*[11]

Moreover, nothing in the INA authorizes the agency to adopt jurisdictional rules. Amici acknowledge that Congress granted the Attorney General authority to "establish such regulations, . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section." 8 U.S.C. § 1103(g)(2). Significantly, however, as the Sixth Circuit held, such a broad grant of authority does not authorize the Attorney General to limit or eliminate adjudicatory authority within its statutory jurisdiction. *See Pruidze*, 632 F.3d at 240 (citing 8 U.S.C. § 1103(g)(2)).

The plain language of 8 U.S.C. § 1103(g)(2) does not even suggest that the agency may determine its own jurisdiction. Nor could it do so since "Congress

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[11] The Eighth, Ninth and Tenth Circuits similarly have rejected the Board's classification of its administrative appeal deadline regulation as jurisdictional where, inconsistent with the mandatory nature of jurisdictional provisions, the Board has waived its so-called "jurisdictional" bar in select cases. *See Liadov v. Mukasey*, 518 F.3d 1003, 1007-08 n.4, 1010 (8th Cir. 2008)*; Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011); *Huerta v. Gonzales*, 443 F.3d 753, 753 (10th Cir. 2006).

alone controls the [agency's] jurisdiction." *Union Pacific*, 130 S. Ct. at 437. Further, even assuming that § 1103(g)(2) could be broadly construed, it is well established that "[a] specific provision controls one of more general application." *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). *See also Radzanower v. Touche Ross & Co*., 426 U.S. 148, 153 (1976) ("where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment") (internal quotes omitted). Here, as explained above, the entire statutory scheme contemplates EOIR review of removal proceedings, including motions under 8 U.S.C. §§ 1229a(c)(6)&(7). Thus, the court cannot construe to 8 U.S.C. § 1103(g)(2) to trump this specific delegation of authority.

In sum, Congress vested EOIR with jurisdiction over removal proceedings, including motions to reconsider and reopen, but did not grant either EOIR or the Attorney General any authority to adopt jurisdictional rules governing their adjudication. Thus, because the Board has authority to adjudicate motions, the Board cannot refuse "to adjudicate cases on the false premise that it lack[s] power to hear them." *Union Pacific*, 130 S. Ct. at 599.

C. THE DEPARTURE BAR REGULATION CONFLICTS WITH THE MOTION TO RECONSIDER AND MOTION TO REOPEN STATUTES.

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 reasonable 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 unreasonable construction of the statute.

1. Congress Intended to Allow Post Departure Motions to Reconsider and Reopen.

a. The plain language of the motion statutes does not distinguish between motions filed before or after departure.

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 reconsider and reopen statutes, 8 U.S.C. §§ 1229a(c)(6) and 1229a(c)(7), which contain 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"). Section 1229a(c)(6)(A), provides that "[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States."

Similarly, 8 U.S.C. § 1229a(c)(7)(A) provides that "[a]n alien may file one motion to reopen proceedings under this section…." The plain language of the motion statutes afford noncitizens both the right to file a motion and the right to have it adjudicated. *See Dada v. Mukasey*, 554 U.S. 1, 18-19 (2008).

In providing these rights, the statute does not distinguish between individuals abroad and those in the United States – both groups are encompassed in these straightforward, all-inclusive provisions. *See Prestol Espinal*, 653 F.3d at 217 ("the plain text of the statute . . . makes no exceptions for aliens who are no longer in this country"). Thus, as the Fourth Circuit concluded:

> *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. . . .

William, 499 F.3d at 332 (emphasis added). The Court cannot find that the statute is ambiguous because Congress did not expressly address post departure motions. Such an approach "would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations." *Prestol Espinal*, 653 F.3d at 220. *See also City of Dallas v. FCC*, 165 F.3d 341, 353-54 (5th Cir. 1999) (rejecting agency's attempt to manufacture an ambiguity by arguing that Congress was silent).

In addition, the Supreme Court has emphasized the significance of Congress's codification of the right to file a motion to reopen.[12] *See Prestol Espinal*, 653 F.3d at 219 (discussing Supreme Court's "repeated emphasis on the statutory right to file a motion to reopen, and the effort of the Court to avoid abrogating that right"). In *Dada*, the Court found that the purpose of the motion to reopen is "to ensure a 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*, 554 U.S. at 18. *See also Kucana*, 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*, 554 U.S. at 18.

The departure regulation, however, does exactly that: it limits the availability of pursuing a motion after a person's departure even though the statute does not include such a limitation. For that reason, the Court should invalidate it. *See Sung v. Keisler*, 505 F.3d 372, 376-77 (5th Cir. 2007) (striking down BIA interpretation because, contrary to the statute, it distinguished between adjustment of status applications pending before the agency and the immigration court); *see also Khalid v. Holder*, 655 F.3d 363, 367 (5th Cir. 2011) (adopting statutory interpretation that "adds no unwritten requirements to the text").

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[12] *Dada*, 554 U.S. at 14 ("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 15 ("[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'").

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

In addition, Congress's codification of many pre-IIRIRA regulatory requirements for motions and its deliberate omission of the departure bar demonstrate its intent to permit motions after departure. Prior to §§ 1229a(c)(6) and (7)'s 1996 enactment, the regulations governing motions to reconsider and reopen contained time and numeric limitations, content and evidence requirements, and the departure bar to review. Significantly, when Congress codified the right to file motions to reconsider and reopen, it codified most other pre-1997 regulatory limitations on motions, but chose not to codify the departure bar.[13] *See Luna*, 637 F.3d at 100-01 (noting that Congress "codified selected regulations regarding the motion to reopen process," but "declined to codify the BIA's departure bar regulation that applied to regulatory motions to reopen").

Congress is presumed to have known about these pre-IIRIRA regulatory requirements, limitations, and bars when it codified motions to reconsider and

[13] Specifically, it codified: the numeric limitations on motions to reconsider and reopen, 8 C.F.R. §§ 3.2(b)(2) and 3.2(c)(2) (1997) (codified at 8 U.S.C. §§ 1229a(c)(5)(A) and 1229a(c)(6)(A) (1997)); substantive and evidentiary requirements of motions to reopen, 8 C.F.R. §§ 3.2(b)(1) and 3.2(c)(1) (1997) (codified at 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(B) (1997)); the 30 and 90 day filing deadlines, 8 C.F.R. §§ 3.2(b)(2) and 3.2(c)(2) (1997) (codified at 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(C)(i) (1997)); and the exception to the 90 day deadline where the basis of the motion is to apply for asylum based on changed country conditions, 8 C.F.R. § 3.2(c)(3)(ii) (1997) (codified at 8 U.S.C. § 1229a(c)(6)(C)(ii) (1997)).

reopen. *See Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988). Further, "[w]hen Congress provides exceptions in 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 ones set forth." *William*, 499 F.3d at 333 (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)). As the Third Circuit noted,

> That inference is particularly strong when, as here, Congress specifically codified other regulatory limitations already in existence. Congress did not codify the post-departure bar notwithstanding its long history. Neither we nor the agency should be permitted to override Congress' considered judgment.

Prestol Espinal, 653 F.3d at 222.

Thus, this Court should give significance to Congress's deliberate omission of the departure bar by finding that Congress intended to permit motions post departure. *See Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007) (rejecting an interpretation of the statute that would add requirements not adopted by Congress); *United States v. DeCay*, 620 F.3d 534, 541 (5th Cir. 2010) (holding that inclusion of some exemptions meant that Congress did not intend to include other exemptions).

c. Invalidating the departure bar is the only way to reconcile the motion to reconsider and reopen statutes with Congress's simultaneous enactment of a 90 day removal period and repeals of the departure bar to judicial review and automatic stay pending judicial review.

In IIRIRA, Congress also enacted a 90 day removal period and repealed the departure bar to judicial review. These actions are consistent with Congress's intent to allow post departure motions. *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); *Khalid v. Holder*, 655 F.3d 363, 367 (5th Cir. 2011) ("a statutory provision cannot be read in isolation, but necessarily derives meaning from the context provided by the surrounding provisions, as well as the broader context of the statute as a whole").

First, through IIRIRA Congress provided that the government must deport noncitizens within 90 days of the removal order. IIRIRA § 304(a)(3) (codified at 8 U.S.C. § 1231(a)(1)). The 90 day period and the 30 day period for filing a motion to reconsider, as well as the 90 day period for filing a motion to reopen all begin on the date the removal order becomes final. *See* 8 U.S.C. § 1231(a)(1)(B); 8 U.S.C. § 1229a(c)(6)(B); 8 U.S.C. § 1229a(c)(7)(C)(i). Thus, "if aliens are permitted to file motions to reconsider but are then removed by the government before the time to file has expired, the right to have that motion adjudicated is abrogated." *Prestol*

Espinal, 653 F.3d at 223. As a result, the departure bar is irreconcilable with the motion statutes. *See id.*; *Coyt*, 593 F.3d at 907 (finding that only way to "harmonize" motion to reopen statute removal period is to find that physical removal does not preclude filing a motion); *see also Luna*, 637 F.3d at 101 (90 day removal period is not in tension with 90 day motion to reopen period if individuals are permitted to pursue reopening from outside the country).

Second, Congress's repeal of the statutory departure bar to judicial review and automatic stay provision also is consistent with allowing post departure motions. IIRIRA repealed former 8 U.S.C. § 1105a(c) (1996), which had precluded judicial review of deportation orders after a person departed and provided an automatic stay of deportation if the noncitizen sought judicial review. *See* IIRIRA § 306(b) (repealing former 8 U.S.C. § 1105a(a)(3)'s stay of deportation upon service of petition for review and subsection (c)'s judicial review departure bar). As the Seventh Circuit noted, the repeal of 8 U.S.C. § 1105a(c), "pulled the rug out from under [BIA decisions finding no jurisdiction over post-departure motions], based on the norm that departure ended all legal proceedings in the United States." [14] *Marin-Rodriguez*, 612 F.3d at 594. *See infra* § III.C.2.

[14] 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 v. INS*, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990) (departure regulation "operates parallel to 8 U.S.C. § 1105a(c)").

(discussing BIA's erroneous contention that departure ends all legal proceedings).

Moreover, by repealing the departure bar to judicial review, Congress sought to achieve two goals: expedite the physical removal and increase accuracy of removal decisions by permitting greater opportunity for review. *See Prestol Espinal*, 653 F.3d at 222-23; *William*, 499 F.3d at 332 n.3; *see also Nken v. Holder*, 556 U.S. 418, 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"); *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"). "Congress could not have intended to undermine the second part of that goal – accuracy in determinations – by preventing aliens from filing motions for review with the BIA post-departure while simultaneously allowing aliens to seek even higher review with court of appeals." *Prestol Espinal*, 653 F.3d at 223. Thus, the departure bar is in direct tension with Congress's repeal of the statutory departure bar to judicial review and the automatic stay provision.

d. Congress's inclusion of a geographic limitation for certain VAWA 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 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 have a geographic limitation, its inclusion of a physical presence requirement in § 1229a(c)(7)(C)(iv)(IV) would be redundant. *See Prestol Espinal*, 653 F.3d at 224; *William*, 499 F.3d at 333. *See also Waggoner*, 488 F.3d at 636 (avoiding interpretation of an immigration waiver provision that would "render superfluous the words setting forth that requirement" in a subsequent subsection of the statute).

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 creates a strong inference that Congress did not intend to impose a geographic limit. *William*, 499 F.3d at 333; *see Prestol Espinal*, 653 F.3d at 223-24; *Luna*, 637 F.3d at 101; *see also Waggoner*, 488 F.3d at 636 (applying the statutory cannon construction "*expressio unius est exclusio alterius*

(the expression of one thing is the exclusion of another)"); *United States v. Zavala-Sustaita*, 214 F.3d 601, 607 (5th Cir. 2000) (giving meaning to Congress's decision to eschew limits used in other provision of the immigration laws).

2. Even If the Court Finds Congress's Intent Ambiguous, the Departure Bar Regulation Is An Unreasonable Construction of the Motion Statutes.

Even if Congress's intent was not clear from the statute's plain language and the application of statutory construction rules, the Court need not defer to 8 C.F.R. § 1003.2(d) because the regulation is an unreasonable construction of the statute. *Chevron U.S.A*, 467 U.S. at 842-43.

In considering whether an agency interpretation is reasonable, this Court considers whether the interpretation "bears a rational relationship to the statutory purposes." *La. Envtl. Action Network v. United States EPA*, 382 F.3d 575, 582 (5th Cir. 2004). As discussed in § III.C.1, *supra*, Congress's codification of the right to seek reconsideration; Congress's adoption of many of the pre-IIRIRA regulatory limits on motion, but its choice not to adopt the departure bar; Congress's repeal of the departure bar to judicial review and its adoption of a 90 day removal period; and Congress's codification of a geographic limitation for VAWA motions – particularly when read together – demonstrate that the departure bar does not bear a rational relationship to IIRIRA's dual purposes of expediting removal and ensuring accuracy of immigration decisions.

Further, the Court considers whether the agency's reasons for its interpretation are rational. *See Texas Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 934 (5th Cir. 1998). Here the BIA's justification for the departure bar in *Matter of Armendarez* does not meet even this minimal standard. 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 (DHS) 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, as the Sixth Circuit notes, "[e]ven the Board does not buy everything it is trying to sell." *Pruidze*, 632 F.3d at 239. 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 country. 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 United States 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). And, in fact, *Armendarez* itself concedes the BIA may exercise jurisdiction over cases where the individual has

been removed and subsequently prevails in a petition for review. *Matter of Armendarez*, 24 I&N Dec. 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").

Thus, by the BIA's own admission, departure from the country does not automatically nullify one's status or one's ability to pursue a case before the BIA. The fact that IIRIRA's statutory scheme contemplates that many individuals will pursue claims from outside the United States undermines the BIA's characterization of departure as a transformative event and demonstrates that the BIA's justification for the regulation is unreasonable.

Finally, the departure bar regulation is unreasonable because it allows one party to the removal proceedings to unilaterally control the litigation, an act that the Supreme Court has cautioned against. *Cf. Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008) (rejecting argument that would allow "the political branches to govern without legal constraint"). Here, § 1003.2(d) gives DHS unilateral control over the litigation, as DHS may deport a person before he or she can file a timely motion or before the BIA adjudicates the motion. *See Luna*, 637 F.3d at 99-102 (striking that departure bar to prevent DHS from "unilaterally terminating" proceedings); *Marin-Rodriguez*, 612 F.3d at 593 ("It is unnatural to speak of one

litigant withdrawing another's motion"). *Accord Matter of Luis*, 22 I&N Dec. 747, 752 (BIA 1999) (holding that noncitizen's departure during government-filed administrative appeal does not withdraw appeal); *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("[t]o allow the government to cut off Madrigal's statutory right to appeal an adverse decision, in this manner, simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process").[15]

IV. CONCLUSION

For the reasons set forth above, the Court should find that 8 C.F.R. § 1003.2(d) does not bar BIA review of Petitioner's motion to reconsider, grant the petition for review, and remand the case to the BIA for adjudication of Petitioner's motion.

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[15] In the context of the departure bar's application to an administrative BIA appeal (8 C.F.R. § 1003.4), the Fifth Circuit has reserved the question of whether the bar applies to a person who is forcibly removed. *See Long v. Gonzales*, 420 F.3d 516, 520 n.6 (5th Cir. 2005).

Dated: December 14, 2011

Respectfully submitted,

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CERTIFICATE THAT REQUIRED PRIVACY REDACTIONS HAVE BEEN MADE

I hereby certify that pursuant to 5th Cir. R. 25.2.13 the required privacy redactions have been made to this brief.

s/ Beth Werlin

Beth Werlin
American Immigration Council
Dated: December 14, 2011

CERTIFICATE THAT ELECTRONIC SUBMISSION IS AN EXACT COPY OF THE PAPER DOCUMENT

I hereby certify that pursuant to 5th Cir. R. 25.2.1 the electronic submission is an exact copy of the paper document.

s/ Beth Werlin

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A virus check using McAfee Virus Scan Enterprise ver 8.5i has been run on the file containing the electronic version of this brief, and no viruses have been detected.

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Beth Werlin
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Dated: December 14, 2011

CERTIFICATE OF SERVICE

I, Beth Werlin, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 14, 2011. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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