No. 10-9500

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JESUS CONTRERAS-BOCANEGRA,
Petitioner,

v.

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

ON REVIEW FROM A DECISION OF THE
BOARD OF IMMIGRATION APPEALS

JOINT SUPPLEMENTAL BRIEF OF *AMICI CURIAE*

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STATEMENT UNDER
Fed. R. App. P. 29-5

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

I, Trina Realmuto, attorney for amici curie, National Immigration Project of the National Lawyers Guild, the Post-Deportation Human Rights Project, and the Rocky Mountain Immigrant Advocacy Network, 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 its stock.

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I, Beth Werlin, attorney for amici curiae, certify that the American Immigration Council and the American Immigration Lawyers Association are non-profit organizations that do not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

//

//

//

//

Other Authorities

Rules

Regulations

Amici curiae submit this joint supplemental brief to the En Banc Court in Response to the Court's August 2, 2011 order.

***Question 1*: Could the Attorney General's regulatory decision to limit the "jurisdiction" of the BIA through the post-departure bar (8 C.F.R. § 1003.2(d)) be characterized as a "categorical exercise of discretion"?**

A. The departure bar regulation cannot be characterized as a categorical exercise of discretion.

The Board of Immigration Appeals (Board or BIA) consistently has taken the position that 8 C.F.R. § 1003.2(d) is a limit on the agency's jurisdiction, not a categorical exercise of discretion. Administrative Record at 6; *Matter of G- y B-*, 6 I&N Dec. 159, 160 (BIA 1954), *affirmed by, Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).[1] Likewise, throughout this and all related litigation challenging the validity of 8 C.F.R. § 1003.2(d), counsel for the government has characterized the regulation as a limit on jurisdiction. *See, e.g.*, Brief of Respondent at 9 (filed June 1, 2010) (8 C.F.R. § 1003.2(d) "divests the Board of jurisdiction over motions to reopen filed by aliens after they have

[1] In *Matter of Armendarez*, the BIA detailed the agency's longstanding position that the departure bar is jurisdictional:

> As early as 1954, we construed the departure bar rule as imposing a limitation on our jurisdiction to entertain motions filed by aliens who had departed the United States. *Matter of G- y B-*, 6 I&N Dec. 159, 159-60 (BIA 1954). We have reiterated that construction of the rule in an unbroken string of precedents extending over 50 years, consistently holding that reopening is unavailable to any alien who departs the United States after being ordered removed. …

Id. at 648.

been removed from the United States"). Never has the Board or counsel for the government asserted that the regulation is an exercise of discretion, much less a *categorical* exercise of discretion.

Absent such a justification for the regulation, neither this Court nor counsel for the government can characterize it as an exercise of discretion at this late point in the litigation. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"). *See also Haga v. Astrue*, 482 F.3d 1205, 1207-08 (10th Cir. 2007) ("[T]his court may not create or adopt post-hoc rationalizations to support [an agency's] decision that are not apparent from the [ ] decision itself"); *Allen v. Barnhart*, 357 F.3d 1140, 1142 (10th Cir. 2004) (holding that district court's "post hoc effort to salvage the [agency's] decision would require us to overstep our institutional role and usurp essential functions committed in the first instance to the administrative process"). Thus, because the Board characterizes the departure bar regulation as jurisdictional, *see* p. 1 and n.1, *supra*, this Court must judge the order on that basis alone.[2]

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[2] Moreover, the Board's characterization of the regulation as jurisdictional conflicts with Supreme Court precedent. The Court has emphasized that subject-matter jurisdiction is about adjudicatory capacity, i.e., "the power to hear a case," whereas a claim-processing rule "does not reduce the adjudicatory domain of a tribunal . . . ." *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 596 (2009). *See also Huerta v. Gonzales*, 443 F.3d 753, 753 (10th Cir. 2006) (discussing distinction "between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule") (citation omitted); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 2011 U.S. App. LEXIS 10912, *11-15 (9th Cir. May 31, 2011) (same).

In this case, none of the relevant statutory provisions support the Board's characterization of the departure bar regulation as curtailing its adjudicatory capacity. *See* Brief of the National Immigration Project of the National Lawyers Guild *et al*. as

B. Even if the departure bar regulation could be characterized as a categorical exercise of discretion, the Board cannot exercise discretion to deprive noncitizens of their statutory rights to file motions to reopen and reconsider.

Even if the Board had found that 8 C.F.R. § 1003.2(d) is a categorical exercise of discretion – which it did not – such interpretation would not validate the regulation because it would not eliminate the conflict between the regulation and the motion to reopen and motion to reconsider statutes.

Although an agency can exercise certain grants of discretion categorically through the adoption of a regulation, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001), both the Supreme Court and this Court have made explicit that any such categorical regulation must accord with the statute that regulation is implementing, using rules of statutory interpretation found in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Lopez*, 531 U.S. at 241-42 (upholding categorical exercise of discretion after first finding that there was a gap in the statute for the agency to fill and that the agency's interpretation was permissible); *Wedelstedt v. Wiley*, 477 F.3d 1160, 1166-68 (10th Cir. 2007) (striking down a regulation that purported to be a categorical exercise of agency discretion because it conflicted with the statute).

Amici Curiae in Support of Petitioner's En Banc Rehearing Petition, at pp. 7-13. *See also 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 citation 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").

As this Court explained, the Supreme Court in *Lopez* "ma[d]e clear [ ] that an agency's authority to promulgate categorical rules is limited by clear congressional intent to the contrary.… In other words, *Lopez* applies only when Congress has not spoken to the precise issue and the statute contains a gap." *Wedelstedt*, 477 F.3d at 1168 (citing *Lopez*, 531 U.S. at 242 and 243). Here, the departure bar conflicts with the plain language of the motions statutes. Brief of *Amici Curiae* American Immigration Council and American Immigration Lawyers Association in Support of the Petition for Rehearing En Banc, at pp. 4-6. The regulation also conflicts with Congress' intent as evidenced in the larger statutory structure and Congress' choice to adopt certain preexisting regulations restricting motions but not the departure bar. *Id.* at pp. 6-12. The government even applies the departure bar where the Department of Homeland Security deports the person before the expiration of the statutory period for filing a motion or after a motion is filed but before the Board adjudicates it. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 2011 U.S. App. LEXIS 7062, *6-8 (9th Cir. 2011); *see also Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("To 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").

In short, even if the regulation had been meant as a categorical exercise of discretion, the Court should find that it violates Congress' clear intent to permit post-departure motions.

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***Question 2*: There appears to be some tension between 8 U.S.C. § 1182(a)(9)(A)'s bar on admission of previously removed aliens and 8 U.S.C. § 1229a(c)(6) & (7)'s allowance for reopening or reconsideration in at least some circumstances. Could the post-departure bar be a reasonable regulatory response by the Attorney General to this apparent ambiguity?**

A. The Court need not address 8 U.S.C. § 1182(a)(9)(A).

Section 1182(a)(9)(A) renders a previously removed noncitizen inadmissible and, accordingly, only comes into play when a person is either seeking admission to the United States or is applying for a form of relief that requires admissibility. As a result, the issue will arise – if it arises at all[3] – only in adjudicating the merits of the motion or at some point after the motion is granted.[4] It does not speak to the threshold issue in this case: whether the BIA has authority to adjudicate motions to reopen filed by noncitizens outside the United States. Not surprisingly, the six circuit courts to find the departure bar unlawful have not addressed § 1182(a)(9)(A). *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Espinal v. AG of the United States*, No. 10-1473, 2011 U.S. App. LEXIS 15900 (3d Cir. Aug. 3, 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir.

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[3] As explained below, § 1182(a)(9)(A) does not apply when a case is reopened, and even if it did, it would not serve as an impediment to legal status in all cases.

[4] For example, in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), the court struck down the departure bar as conflicting with the motion to reopen statute without addressing § 1182(a)(9)(A). Only after the court invalidated the regulation did the government raise § 1182(a)(9)(A), and ultimately, the court dismissed the petition for review without reaching the merits. *William v. Holder*, 359 Fed. Appx. 370, 373-74 & n.3 (4th Cir. 2009) (unpublished). Although *amici* dispute the government's assertion that § 1182(a)(9)(A) was applicable, it is telling that § 1182(a)(9)(A) had no bearing on the court's initial consideration of the validity of the departure bar regulation.

2010); *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011).

Moreover, in neither *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008),[5] and *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009), did the BIA offer a perceived tension between the motion to reopen and reconsider statutes and 8 U.S.C. § 1182(a)(9)(A) as a reason for adopting the departure bar. Therefore, it would be improper for the Court to uphold the departure bar based on any such perceived tension. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (a reviewing court can only "judge the propriety of [an agency] action solely by the grounds invoked by the agency").

B. There is no tension between 8 U.S.C. § 1182(a)(9)(A) and the departure bar because reopening vacates the underlying removal order and restores a person to prior status.

Even if the Court were to consider § 1182(a)(9)(A)'s applicability to the case, the Court should find that there is no tension between this provision and the motion statutes. The plain language of the inadmissibility statute makes clear that § 1182(a)(9)(A) only applies to a person "who has been ordered removed" or "departed the United States while an order of removal was outstanding." 8 U.S.C. §§ 1182(a)(9)(A)(i) & (ii). When the BIA reopens a case, the removal order is vacated. *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009). As the Supreme Court said:

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[5] Although the BIA noted that § 1182(a)(9)(A) generally applies when a person ordered removed leaves the United States, it did not consider or conclude that the bar would apply if the individual's case subsequently were reopened or reconsidered. *Matter of Armendarez*, 24 I&N at 656. In fact, the BIA's reference to § 1182(a)(9)(A) is inapposite to the issue at hand, as the Board was merely stating a truism: that § 1182(a)(9)(A) applies to noncitizens with prior removal orders.

> [A] determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order. See Tr. of Oral Arg. for Respondent 42 ("[I]f the motion to reopen is granted, that vacates the final order of removal and, therefore, there is no longer a final order of removal pursuant to which the alien could be removed").

Id.[6] As a result of reopening, the person has not been "ordered removed" and there is no "order of removal," and, therefore, by its very terms, § 1182(a)(9)(A) does not apply.

Supreme Court case law further bolsters this position by analogizing motions to reopen and reconsider to motions under Federal Rule of Civil Procedure 60(b). *See Stone v. INS*, 514 U.S. 386, 401 (1995) ("The closest analogy to the INS' discretionary petition for agency reconsideration is the motion for relief from judgment under Federal Rule of Civil Procedure 60(b)"); *see also INS v. Doherty*, 502 U.S. 314, 326 (1992) (analogizing a Rule 60(b) motion to a motion to reopen). As the Seventh Circuit explains,

> When a district court grants a Rule 60(b) motion, the effect is to vacate the previous judgment in the case. See Fed. R. Civ. P. 60(b); *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). Consequently, the previously filed case is reinstated and goes forward from that point. . . . We think that the same result obtains when a motion to reopen is granted in the immigration context.

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[6] *See also Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (holding that "the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings"); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) ("The BIA's granting of the motion to reopen means there is no longer a final decision to review"); *Su Mei Yan v. AG of the United States*, 391 Fed. Appx. 226, 229 (3d Cir. 2010) (unpublished) ("The grant of Yan's motion to reopen vacated the 1993 order of deportation and continued the original proceedings"); *Suharti v. United States AG*, 349 Fed. Appx. 443, 450 (11th Cir. 2009) (unpublished) ("The BIA's sua sponte reopening of the immigration proceedings on . . . March 6 2006 rendered the BIA's 28 June 2005 order non-final…. See AR at 228-29 (vacating its June 28, 2005, order)"); *Excellent v. Ashcroft*, 359 F. Supp. 2d 333 (S.D.N.Y. 2005) ("When the BIA grants a motion to reopen, as it did here, the previous order of deportation is vacated").

Bronisz v. Ashcroft, 378 F.3d 632, 637 (7th Cir. 2004).

Moreover, the reasons for providing the right to seek reopening compel this conclusion. "The purpose of a motion to reopen is to ensure a proper and lawful disposition." *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008).[7] Thus, in reopening a case, the original order ceases to control, and the BIA must issue a new order. Were the En Banc Court to construe § 1182(a)(9)(A) as applying even after the BIA vacates the removal order, such construction would undermine significantly the goal of "ensuring a proper and lawful disposition."

Importantly, *amici* and the government agree that when an order is vacated, a person is restored to the status he or she had prior to the order. In its brief in *Nken v. Holder*, the Solicitor General – speaking on behalf of the Department of Justice[8] – represented that the government facilitates the return to the United States of persons who prevail on their petition for review, and "accord[s] them the status they had at the time of removal." *Nken v. Holder*, Brief for Respondent at 44, 2009 U.S. S. Ct. Briefs LEXIS 15, *76 (Jan. 7, 2009). The Supreme Court, citing the government's brief, reached this same conclusion, stating that persons who prevail on their petition for review "can be afforded effective relief by facilitation of their return, along with *restoration of the*

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[7] Given this important purpose, the Court in *Dada* – a case involving a conflict between the motion to reopen and voluntary departure statutes – elected to "safeguard" the right to pursue reopening. *Id.* at 2319. *See also Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada* and reaffirming that a motion to reopen is an "important safeguard").

[8] The Solicitor General's position is the agency's position. *United States v. Providence Journal*, 485 U.S. 693, 699-700 (1988).

immigration status they had upon removal."[9] *Nken*, 129 S. Ct. at 1761 (emphasis added). Restoring a person to his or her status prior to the removal order requires that the consequences of the removal do not apply. *Accord* Letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Litigation at 1, *Hing Chuen Wu v. Holder*, No. 08-60073 (5th Cir. April 1, 2009) (attached as Addendum).[10]

Finally, to the extent that § 1182(a)(9)(A) might be read as applying even where the case is reopened or reconsidered, the Court, consistent with the Supreme Court's decision in *Dada*, nonetheless should construe this provision as inapplicable to preserve the statutory rights to pursue reopening and reconsideration. *See Espinal v. AG of the United States*, No. 10-1473, 2011 U.S. App. LEXIS 15900, *15-16 (3d Cir. Aug. 3, 2011) (discussing *Dada v. Mukasey* and finding that the Supreme Court's "repeated emphasis on the statutory right to file a motion to reopen, and the effort of the Court to avoid

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[9] Notably, *Nken* involved judicial review of *a motion to reopen*. *See Nken*, 129 S. Ct. at 1754 (following denial of motion to reopen, petitioner sought judicial review and requested a stay of removal). Regardless whether a court of appeals finds the original order unsustainable or the agency reopens a case to ensure a lawful disposition, the fundamental principle is the same: the underlying order has been vacated, and thus, the person is restored to his or her status prior to removal.

[10] In this post-argument letter brief to the Fifth Circuit, the Department of Justice explains that granting the petition for review would vacate the underlying order. *Id.* Further, "[i]f the Petition for Review were granted, the U.S. Department of Homeland Security could parole Mr. Wu into the United States, through which he could pursue adjustment of status in conjunction with a waiver under 8 U.S.C. § 1182(h)(1)(B)." *Id.* Department of Justice assumes that § 1182(a)(9)(A) does not apply because, if it were to apply, the petitioner would not be able to pursue adjustment of status. *See* 8 U.S.C. § 1255(a)(2) (requiring a person be admissible in order to qualify for adjustment of status).

abrogating that right (even in the face of another statutory provision which conflicted), inform[s] our analysis").[11]

C. Even if there were some tension between the motion statutes and § 1182(a)(9)(A), the departure bar could not be a reasonable regulatory response.

Even assuming there were ambiguity in the motion statutes, and § 1182(a)(9)(A) applied when a case is reopened or reconsidered, the departure bar is not a reasonable regulatory response. Significantly, many cases will not implicate § 1182(a)(9)(A) or any other ground of inadmissibility. For example, where the immigration judge orders a lawful permanent resident removed based solely on a criminal conviction that subsequently is vacated, upon reopening, the immigration judge terminates proceedings. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Reopening restores the person to her status prior to the removal order, i.e., lawful permanent resident, *see Matter of Lok*, 18 I&N Dec. 101, 105-06 (BIA 1981),[12] and therefore, the person may be able to reenter the United States as a resident without seeking admission pursuant to 8 U.S.C. § 1101(a)(13)(C). Even where proceedings are reopened, but not terminated, § 1182(a)(9)(A) may not serve as an impediment to relief from removal, such as

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[11] Moreover, another way to resolve any perceived tension between the motion statutes and § 1182(a)(9)(A) is to construe a grant of a motion to reopen or reconsider as implied "consent" to reapply for admission pursuant to § 1182(a)(9)(A)(iii).

[12] The BIA held that lawful permanent resident status terminates when there is a final order, but that "reversal on the merits of that deportability finding by an appellate court or administratively upon a motion for reopening or reconsideration" can restore lawful permanent resident status. *Id*.

cancellation of removal under 8 U.S.C. § 1229b(a), which does not require a finding of admissibility.[13]

Not only are there situations where § 1182(a)(9)(A) will not be implicated, but even if it were implicated, a statutory "exception" permits the government to consent to a person's readmission. 8 U.S.C. § 1182(a)(9)(A)(iii). Where the government provides such consent, § 1182(a)(9)(A) does not apply. 8 U.S.C. § 1182(a)(9)(A)(iii).

Thus, because § 1182(a)(9)(A) does not preclude all movants from obtaining legal status upon reopening, the departure bar is an overbroad and unreasonable response to any tension between the motion statutes and § 1182(a)(9)(A).

***Question 3*: If a removed alien succeeds in a motion to reopen or reconsider, what relief can the BIA grant? How does the availability and nature of any possible relief from the BIA inform the reasonableness of 8 C.F.R. § 1003.2(d)'s post-departure bar?**

A. Although not relevant to the analysis, reopening a case is itself significant relief and may lead to other immigration benefits.

For reasons similar to why § 1182(a)(9)(A) is not relevant to the Court's inquiry, the relief available to the Board if a noncitizen's case is reopened or reconsidered is not relevant to the merits issue of whether a person has the right to pursue reopening or reconsideration after departure or deportation. *See* pp. 5-6, *supra.* Even if it were relevant, a Board decision granting reopening or reconsideration has the significant effect of vacating the final order of removal. This effect alone is a benefit to an individual.

[13] This is the case regardless whether the person is able to reenter the United States without seeking admission (8 U.S.C. § 1101(a)(13)(C)), or by being paroled in (8 U.S.C. § 1182(d)(5)(A)). Neither manner of entry necessitates being admissible.

Just as the Board, an adjudicatory tribunal, does not physically execute a removal order, it also does not physically execute the movant's return to the United States. However, Board decisions are "binding on all officers and employees of the Department of Homeland Security [DHS]," including U.S. Customs and Immigration Enforcement (ICE), a component agency of the Department of Homeland Security. 8 C.F.R. § 103.37(g) (stating DHS bound by BIA decisions). Moreover, as a practical matter, DHS acknowledges that U.S. Customs and Immigration Enforcement may parole a person with pending removal proceedings into the United States,[14] so even absent any explicit BIA action, a person may be returned. Thus, because ICE is bound by the BIA's decision in individual cases and acknowledges that it can facilitate return, the Board's grant of reopening or reconsideration effectively requires ICE to return a successful movant to the United States.

Even assuming ICE would refuse to respect the Board's decision and effectuate return, a Board decision granting reopening or reconsideration nonetheless carries significance as it opens the door to possible immigration status in the future. Specifically, it may allow the person to apply for an immigrant or nonimmigrant visa, as applicable, at a U.S. Embassy or consular post abroad.[15] In addition, reopening also

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[14] *See* pp. 8-9, *supra*, citing *Nken* and n. 10. *See also* Department of Homeland Security Memorandum of Agreement (Sept. 2008), at Addendum 2 ("ICE is responsible for considering a parole requests made by a noncitizen "in removal proceedings . . . regardless of whether [he or she] is within or outside of the U.S"), located at http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf, last visited Aug. 24, 2011.

[15] For example, if the Board reopens based on a finding that the person was not convicted of a crime involving moral turpitude or had not made a material

removes potential collateral consequences of a removal order, including civil or criminal consequences of illegal reentry after a prior order, 8 U.S.C. §§ 1231(a)(5), 1326(a).

In sum, although the Court need not concern itself with the Board's ability to grant relief, such concerns must be dismissed because reopening itself provides significant relief and can lead to other immigration benefits.

B. Even if relief were relevant to the Court's inquiry, the nature of such relief does not justify the departure bar.

Although the availability and nature of relief is not relevant to whether the Board has capacity to adjudicate post-departure motions, in fact, a decision to grant such motions indisputably provides an immigration benefit in that it vacates the prior removal order. As discussed above, eliminating the prior removal order and legal consequences that would flow from it alone provides a significant benefit to the movant. Thus, the availability and nature of this relief is perfectly aligned with the statutory scheme in which Congress codified motions to reopen and reconsider; it permits the physical departure of noncitizens ordered removed while safeguarding the right to file a motion to reopen. *See 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"); *William*, 499 F.3d at 332 n.3 ("[O]ne of IIRIRA's aims is to expedite the removal of aliens from the country …"); *Espinal v. AG of the United States*, __ F.3d __,

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misrepresentation, the person would not be inadmissible under 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) or (a)(6)(C), respectively, and therefore, would not a waiver of inadmissibility if they later apply for a visa from abroad.

2011 U.S. App. LEXIS 15900, *32 (3d Cir. Aug. 3, 2011) ("Congress specifically withdrew the statutory post-departure bar to judicial review in conformity with IIRIRA's purpose of speeding departure, but improving accuracy").

For this reason, the Board's unsubstantiated claim that removed noncitizens have "literally passed beyond [its] aid" is erroneous and does not justify the departure bar. *Matter of Armendarez*, 24 I&N Dec. at 656. Importantly, the Board in *Matter of Armendarez* did not address the legal consequences of vacating a prior order, including the impact on a person's eligibility for an immigrant or nonimmigrant visa in the future. Moreover, and in contradiction of this claim, the BIA goes on to concede it exercises jurisdiction over cases where an individual has been removed and subsequently prevails in a petition for review. *Id.* at 656-57, n.8 *citing Lopez v. Gonzalez*, 127 S. Ct. 625, 629 n.2 (2006).

Further, and perhaps more significantly, "[e]ven the Board does not buy everything it is trying to sell." *Pruidze v. Holder*, 632 F.3d 234, 239 (6th Cir. 2011). In *Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009), the BIA found that it can adjudicate in absentia motions to reopen based on lack of notice filed by noncitizens outside the United States. Thus, any conceivable reliance on its ability to afford relief by the Board in *Matter of Armendarez* is critically, if not fatally, undermined by its holding in *Matter of Bulnes. Cf. Marin-Rodriguez*, 612 F.3d at 595 (highlighting the tension between *Armendarez* and *Bulnes*)).

***Question 4*: May a removed alien seek reconsideration or reopening directly from the Attorney General? If so, does the ability to seek reconsideration or reopening from additional sources satisfy 8 U.S.C. § 1229a(c)(6) & (7)?**

A. The INA does not provide a right to seek reconsideration or reopening directly from the Attorney General.

Nothing in the Immigration and Nationality Act (INA or Act) provides that a noncitizen may seek reconsideration or reopening directly with the Attorney General regardless whether DHS has executed his or her removal order. The overall statutory scheme of the INA, as well as specific provisions within the Act, demonstrates that the Attorney General's role with respect to removal proceedings is *not* adjudicatory. Rather, Congress intended immigration judges and the Board of Immigration Appeals to adjudicate applications, motions and other requests in removal proceedings.

The role of the Attorney General is outlined in 8 U.S.C. § 1103(g). Significantly, none of the Attorney General's congressionally-delegated "powers" in this section call for the Attorney General to act as an adjudicator in the first instance. Section 1229a, which governs removal proceedings including motions to reopen and reconsider, vests immigration judges with exclusive authority over removability determinations. 8 U.S.C. § 1229a(a)(1). The Attorney General's role in these proceedings primarily is to prescribe regulations and procedures. *See, e.g.*, 8 U.S.C. §§ 1229a(b)(1), (4) & (d). Congress also provided the Board with adjudicatory responsibilities, as set forth in the definition of a final order of deportation, 8 U.S.C. § 1101(a)(47). Notably, in this section, Congress describes the role of the Attorney General as "delegate[ing] the responsibility for determining whether an alien is deportable" – not for making that determination himself.

Moreover, the regulations prescribed by the Department of Justice identify where to file motions to reopen and reconsider and, consequently, who adjudicates them. As a general rule, the motions are filed with either the immigration judge or the Board, depending on which adjudicator last exercised jurisdiction over the case. *See* 8 C.F.R. § 1003.2(a) (Board); 8 C.F.R. § 1003.23(b)(ii) (immigration court). *See also Matter of Mladineo*, 14 I&N Dec. 591, 592 (BIA 1974) (discussing where to file motion).

To the extent that the Department of Justice has prescribed a regulation, 8 C.F.R. § 1003.1(h)(1), purporting to authorize certification of a case to the Attorney General for "review" of a Board decision, the plain language of the regulation contemplates just that: review of the Board's decision, not adjudication in the first instance. *Nakimbugwe v. Gonzales*, 475 F.3d 281, 284 (5th Cir. 2007) (finding "clear and unambiguous" language of regulation controlling).

Thus, nothing in the overall statutory scheme of the INA, specific provisions of the Act itself, or the regulations implementing removal proceedings suggests that a noncitizen pursue reconsideration or reopening directly with the Attorney General.

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B. Even if the Attorney General could review motions to reopen or reconsider filed by removed noncitizens, such review would not satisfy 8 U.S.C. § 1229a(c)(6) & (7).

Even if the Court were to construe the certification regulation as authorizing the Attorney General to adjudicate motions to reopen or reconsider, such review would be insufficient to safeguard the statutory right to file such motions. As the Supreme Court has made clear, 8 U.S.C. § 1229a(c)(6) & (7) guarantee noncitizens the "right" to file a motion to reopen or reconsider. *Dada*, 128 S. Ct. at 2318. *See also Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). If noncitizens abroad were required to file motions with the Attorney General, pursuant to the certification regulation 8 C.F.R. § 1003.1(h)(1)(1),[16] the procedure would deprive all noncitizens, except perhaps a rare few, of their statutory right to file these motions. The regulation provides for review on certification only in the exercise of the Attorney General's discretion; the regulation lacks any requirement to compel the Attorney General to review cases referred to him. *Id*. Furthermore, the Attorney General rarely certifies cases; in the last twenty-five years, the Attorney General certified just fifteen cases.[17] Thus, the discretionary nature of this seldom-used regulation cannot adequately safeguard the statutory right to file a motion to reopen or reconsider.

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[16] As no other statute or regulation even arguably authorizes the Attorney General to act in this capacity, *amici* address the inadequacies of this regulation rather than speculate about a judicially created or prospective procedural vehicle.

[17] *See Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009) and 25 I&N Dec. 1 (A.G. 2009); *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008) and 23 I&N Dec. 694 (A.G. 2005); *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008); *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008); *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006); *Matter of A-H-*,23 I&N Dec. 774 (A.G. 2005); *Matter of Luviano-*

Respectfully submitted,

s/ Beth Werlin

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Dated: August 30, 2011

Rodriguez, 23 I&N Dec. 718 (A.G. 2005); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (A.G. 2005); *Matter of E-L-H-*, 23 I&N Dec. 700 (A.G. 2004); *Matter of C-Y-Z-*, 23 I&N Dec. 693 (A.G. 2004); *Matter of Jean*, 23 I&N 373 (A.G. 2002); *Matter of Y-L-*, *A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of S-S-*, 23 I&N Dec. 270 (A.G. 2002).

ADDENDUM

U.S. Department of Justice

Civil Division
Office of Immigration Litigation (OIL)

JCC:jdh
39-76-1905.03

Washington, D.C. 20530

April 1, 2009

Honorable Charles R. Fulbruge III, Clerk
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Hing Chuen Wu v. Holder, U.S. Attorney General, (5th Cir. 08-60073)

Dear Mr. Fulbruge:

Oral argument in the above-referenced case took place on March 30, 2009, in New Orleans, Louisiana before Judges Jolly, Prado and Southwick. Pursuant to the Court's specific request during argument, Respondent submits the following letter regarding whether Mr. Wu's removal moots the relief he seeks in this Petition for Review. It would appear that it does not.

If the Petition for Review were granted, the U.S. Department of Homeland Security could parole Mr. Wu into the United States, through which he could pursue adjustment of status in conjunction with a waiver under 8 U.S.C. § 1182(h)(1)(B). As noted in Respondent's brief, at note 2, § 1182(h)(1)(B) generally applies to aliens seeking admission into the United States, but has been extended to removable aliens seeking to remain here through adjustment of status in conjunction with the waiver. Because Mr. Wu has been removed, there is no remedy that can return him to the status he had prior to his removal, *i.e.*, an alien seeking to *remain* in the United States pending adjudication of an application for adjustment of status in conjunction with a discretionary waiver. A grant of the Petition, however, would vacate the entry of an order of removal against Mr. Wu and he would, for the time being, not lose his lawful permanent resident status. Therefore, it would appear that Mr. Wu would be able to seek adjustment of status in conjunction with the waiver.

As noted during argument, however, neither Mr. Wu's removal nor the recent approval of the visa petition has any bearing on the Board's affirmance of the immigration judge's denial of a continuance. Under 8 U.S.C. § 1252(b)(4), "a court of appeals shall decide the petition only on the administrative record on which the order of removal is based." The Board's affirmance of the immigration judge's decision was

proper in light of Mr. Wu's failure to present any evidence of the *prima facie* approvability of the visa petition and given the concerns regarding his continued detention during the proceedings. Therefore, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionally spaced and pursuant to the Court's August 2, 2011 Order, this brief does not exceed 20 pages in length in 13 point font.

s/ Beth Werlin

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Dated: August 30, 2011

CERTIFICATE REGARDING
PRIVACY, ECF, AND VIRUS PROTECTION

I, Beth Werlin, certify that:

- All required privacy redactions have been made;
- The ECF submission of the brief is identical to the 14 hard copies of the brief that will be filed with the Court within two business days of the ECF filing;
- The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (McAfee Virus Scan Enterprise, ver. 8.5i, updated on August 30, 2011), and, according to the program is free of viruses.

s/ Beth Werlin

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Dated: August 30, 2011

CERTIFICATE OF SERVICE

When All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 10-9500

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 Tenth Circuit by using the appellate CM/ECF system on August 30, 2011.

I certify that all participants in the case *that require service* are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Beth Werlin

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