No. 10-1473

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAMON PRESTOL ESPINAL,

Petitioner,

v.

ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

ON REVIEW FROM A DECISION 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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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Beth Werlin, attorney for Amici Curiae, the American Immigration Council, certify that we are 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 our stock.

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I, Trina Realmuto, attorney for Amici Curiae, the National Immigration Project of the National Lawyers Guild, certify that we are 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 our 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 (National Immigration Project) proffer this brief to assist the Court in its consideration of the departure regulation at 8 C.F.R. § 1003.2(d). This regulation bars noncitizens who depart the United States from exercising their statutory right to pursue a motion to reopen and a motion to reconsider 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 a motion to reconsider and cannot be reconciled with the Supreme Court's interpretation of the motion to reopen statute in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010).

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 reconsider and reopen.

As such, this brief focuses on the motion to reopen and motion to reconsider statutes, regulations and case law addressing the departure bar, and does not address the underlying merits of Petitioner's initial removal order or the merits of his motion to reconsider.[1] 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 addressing the exact issue presented here. In addition, counsel for amici curaie filed a brief in support of rehearing in *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007), in which the court upheld the departure bar but clarified that it had not considered whether the bar violates the motion to reopen statute. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007).

[1] Importantly, the merits of the motion to reconsider are not before the Court, as the BIA denied the Petitioner's motion solely on the basis that it lacked jurisdiction to adjudicate the motion because the Petitioner had been removed. *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"); *Marshall v. Lansing*, 839 F.2d 933, 943-44 (3d Cir. 1988) ("A court must review the agency's actual on-the-record reasoning process. Only a formal statement of reasons from the agency can provide this explanation, not a *post hoc* rationalization, or agency counsel's in-court reasoning.").

II. LEGISLATIVE, REGULATORY, AND ADMINISTRATIVE BACKGROUND

The McCarran-Walter Act of 1952 established the structure of present immigration law, 8 U.S.C. § 1001 et seq.[2] Pursuant to that Act, final orders of deportation were reviewable via a petition for a writ of habeas corpus. 8 U.S.C. § 1252(c) (1952). 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 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.

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

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

order. *See id.* (creating former 8 U.S.C. § 1105a(c) (1962)).[3] Three months after the enactment of the 1961 laws, the Department of Justice (DOJ) issued implementing regulations, 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.

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[3] Former 8 U.S.C. § 1105a(c) reads:

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

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

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 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. 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 in current 8 U.S.C. § 1252.

- Congress 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)).

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

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

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

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[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).

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

In 2000, Congress amended the motion to reopen statute to include a special rule for victims of domestic violence. *See* Victims of Trafficking and Violence Protection Act of 2000, 106 Pub. L. No. 386, § 1506(b)(3), 114 Stat. 1464 (October 28, 2000) (VAWA 2000) (codified at 8 U.S.C.§ 1229a(c)(6)(C)(iv) (2001)). Under the special rule, qualifying domestic violence victims are exempt from the general motion to reopen filing deadline. 8 U.S.C. § 1229a(c)(6)(C)(iv) (2001). In 2005, Congress amended the special rule to include an additional requirement: the person must be "physically present in the United States at the time of filing the motion." *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(a)(2)(F), 119 Stat. 2960, 3063-64 (Jan. 5, 2006) (VAWA 2005) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)).

In 2003, 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).[6]

The BIA upheld the departure bar in a 2008 decision, *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The BIA said it would not follow two Ninth Circuit decisions that read the departure bar as inapplicable to a certain class of noncitizens. *Matter of Armendarez*, 24 I&N Dec. at 653 (citing *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007)). Further, the BIA, upholding the regulation, reasoned that the departure bar is consistent with the statutory scheme, which it characterized as distinguishing between individuals outside the United States and those inside the United States. *See Matter of Armendarez*, 24 I&N Dec. at 655-57.

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

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

III. ARGUMENT

THE COURT SHOULD INVALIDATE THE DEPARTURE BAR AT 8 C.F.R. § 1003.2(d).

The Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs challenges to the validity of an agency regulation. First, the court must determine if Congress has made clear its intent by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. If Congress's intent is clear, this intent governs. *Chevron U.S.A*, 467 U.S. at 842-43. Second, only if congressional intent cannot be discerned, a court must consider whether the agency interpretation is a permissible construction of the statute. *Id.* 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.

A. 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)(6) and (7), the statutes governing motions to reconsider and motions to reopen, respectively, is an issue of first impression in this Circuit.[7] The Fourth and the Tenth Circuits have considered this issue in the context of motions to reopen and reached opposite conclusions. *See William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (striking down the departure bar as conflicting with the motion to reopen statute); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (upholding the regulation). The Ninth Circuit took a slightly different approach, holding that the departure bar is invalid as applied to a person who has been "involuntarily removed," but did not consider the validity of the bar where the motion is filed after the person departs or is deported. *See Martinez Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010).[8] However, the Ninth Circuit's

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[7] Petitioner Prestol Espinal filed a motion to reconsider pursuant to 8 U.S.C. § 1229a(c)(6) in this case, and not a motion to reopen pursuant 8 U.S.C. § 1229a(c)(7). Much of the case law addressed in this brief addresses the motion to reopen statute – possibly a reflection of the greater number of motions to reopen filed as compared to motions to reconsider. However, because the departure bar applies equally to both types of motions, the regulatory and legislative histories of these motions is nearly identical, and the arguments against the bar are inextricably intertwined, the case law on motions to reopen is applicable to motions to reconsider.

[8] A few other cases have addressed the departure bar without considering whether the regulation conflicts with the motion statutes. In *Pena-Muriel v. Gonzales*, the First Circuit considered whether the regulation conflicts with 8

reasoning applies equally to a situation where a person files a motion to reopen after he or she departs or is deported.

1. The plain language of the motion to reconsider and motion to reopen statutes – 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 reconsider and reopen statutes, 8 U.S.C. §§ 1229a(c)(6) and (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").

The motion to reconsider statute plainly provides, "The alien may file one motion to reconsider a decision that the alien is removable from the United States." 8 U.S.C. § 1229a(c)(6)(A). Similarly, 8 U.S.C. § 1229a(c)(7)(A) provides that "An alien may file one motion to reopen proceedings under this section…." As the Supreme Court held, the plain language of the motion to reopen [and motion to

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U.S.C. § 1252, the judicial review statute. 489 F.3d 483, 441-43 (1st Cir. 2007); *see William*, 499 F.3d at 332 n.1. The First Circuit subsequently clarified that the issue decided in *William* still is an open question. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (order denying petition for rehearing en banc).

In *Ovalles v. Holder*, the Fifth Circuit upheld the application of the departure bar to a motion to reopen filed under the sua sponte regulation and declined to address whether the departure bar conflicts with the motion to reopen statute. 577 F.3d 288, 295-96 (5th Cir. 2009). Here, unlike the petitioner in *Ovalles*, Petitioner Prestol Espinal filed his motion to reconsider well within both the 30 day motion to reconsider and the 90 day motion to reopen time period, *see* Petitioner's Opening Brief at 6-7, and thus was not filing under the sua sponte regulation.

reconsider] statute affords noncitizens both the right to file a motion and the right to have it adjudicated once it is filed. *Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008). In providing these rights, the statutes do 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.[9] Significantly, in

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[9] *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"). *See also Martinez Coyt v. Holder*, 593 F.3d at 906 ("IIRIRA, for the

Dada, the Court found that the statutory right to file a motion to reopen is an important safeguard in removal proceedings and, absent explicit limiting language in the statute, individuals must be permitted to pursue reopening:

> The purpose of a motion to reopen is to ensure a proper and lawful disposition. *We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law.* See 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C) (barring aliens who have committed, *inter alia*, aggravated felonies or terrorism offenses from receiving voluntary departure); § 1229c(b)(1)(B) (requiring an alien who obtains voluntary departure at the conclusion of removal proceedings to demonstrate "good moral character"). *This is particularly so when the plain text of the statute reveals no such limitation.*

Dada, 128 S. Ct. at 2318 (emphasis added). Thus, *Dada* confirms that an agency may not infringe on the "important safeguard" of a motion to reconsider or reopen when "the plain text of the statute reveals no such limitation." *Id. See also Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada* and reaffirming that a motion to reopen is an "important safeguard").

The departure regulation, however, does exactly that: it limits the availability of pursuing a motion post departure even though the statute does not include such a limitation. As a result, the regulation cuts-off eligibility based on requirements that Congress did not impose and must be struck down. *See Martinez*

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first time, provides petitioners with a statutory right to file a motion to reopen administrative proceedings, while specifying that the right must be exercised within ninety days after the final order of removal").

Coyt v. Holder, 593 F.3d 902, 907 (9th Cir. 2010) ("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"). *See also Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (BIA cannot apply regulation to cut off statutory right to appeal); *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007) (striking down BIA interpretation erroneously distinguishing between adjustment applications pending before DHS and those pending before the immigration court where the statute contained no distinction).

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

Prior to §§ 1229a(c)(6) and (7)'s 1996 enactment, noncitizens were able to file motions to reconsider and reopen pursuant to the pre-1997 regulations. These regulations imposed time limits, numeric limitations, content and evidence requirements, and a bar to review based on departure. *See supra* § II. Significantly, when Congress codified the right to file motions to reconsider and

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(b)(2) and 3.2(c)(2) (1997), providing numeric limitations on motions to reconsider and reopen. *See* 8 U.S.C. §§ 1229a(c)(5)(A) and 1229a(c)(6)(A) (1997);
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> 8 C.F.R. §§ 3.2(b)(1) and 3.2(c)(1) (1997), setting forth substantive and evidentiary requirements of motions to reconsider and reopen. *See* 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(B) (1997);
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> 8 C.F.R. §§ 3.2(b)(2) and 3.2(c)(2) (1997), providing 30 and 90 day filing deadlines. *See* 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(C)(i) (1997); and
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> 8 C.F.R. § 3.2(c)(3)(ii) (1997), creating an exception to the 90 day deadline where the basis of the motion is to apply for asylum based on changed country conditions. *See* 8 U.S.C. § 1229a(c)(6)(C)(ii) (1997).

Congress is presumed to have enacted the motion to reconsider and reopen statutes 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). *See also United States v. Thorton*, 306 F.3d 1355, 1359 (3d Cir. 2002) (finding its interpretation of the Sentencing Guidelines "consistent with Congress' intent as expressed by its deliberate omission of language creating a scienter requirement," noting that "[w] hen Congress wanted to include such a requirement in the Guidelines, it knew exactly how to do so"); *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009) (en banc) ("If Congress had intended to exclude family-only alien smugglers…, it could have included a provision similar to the exception for controlled substance traffickers"). This Court must give significance to Congress's deliberate omission of the departure bar by invalidating the regulation.

3. Invalidating the departure bar is the only way to reconcile the motion to reconsider and reopen statutes 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 reconsider and 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.[10] *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)").

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

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:

> 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 v. Holder, 593 F.3d 902, 907 (9th Cir. 2010). *Accord Barrios v. AG of the United States*, 399 F.3d 272, 278 (3d Cir. 2005) ("We agree that it is contrary to congressional intent to allow aliens to file motions to reopen but afford them no reasonable opportunity to receive a ruling on the merits").

Third, Congress amended the voluntary departure statute to limit the voluntary departure period to 60 or 120 days (depending on the stage of proceedings at which the immigration judge grants voluntary departure). *See* IIRIRA § 304(a)(3) (codified at 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)). Congress could not have intended to grant 60 or 120 days in which to voluntarily depart if such departure would strip them of their statutory right to pursue a motion to reopen and a motion to reconsider. 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, [11] it could not act upon them because the departure regulations were not challenged in that case. *Id.* ("This regulation, however, has not been challenged in these proceedings, and we do not consider it here").

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 reconsider and reopen post departure.

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[11] *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").

4. 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 to reopen filed by victims of domestic violence. VAWA 2005 § 825(a)(2)(F) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)). Specifically, Congress required that the person be "physically present in the United States at the time of filing the motion." 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV). If Congress had intended all motions to reopen to have a geographic limitation, its inclusion of a physical presence requirement in § 1229a(c)(7)(C)(iv)(IV) would be redundant. *William*, 499 F.3d at 333; *Rosillo-Puga*, 580 F.3d at 1165-67 (Lucero, J., dissenting).

Further, "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Given that Congress did codify a geographic limitation for special rule motions, its decision not to include such a limit on general motions to reconsider or reopen creates a strong inference that Congress did not intend to impose a geographic limit on these motions. *William*, 499 F.3d at 333. *See also Sanchez*, 560 F.3d at 1033 ("Congress's failure

to create an exception or waiver… supports the inference that Congress intended no such exception").

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

Nonetheless, the BIA ignores these facts and sweepingly surmises, without statutory support, that, by including a physical presence requirement for special rule motions, Congress was simply trying to correct its failure to include such a requirement in the predecessor statute, which, until it was corrected, "could have been read to authorize the filing of motions from outside the United States if the movant otherwise satisfied the statutory requirements." *Id.* This argument fails for two reasons. First, the VAWA 2000 language that Congress amended in 2005 was located under the "Deadline" subsection of the motion to reopen statute and merely provided an exception to the filing deadline; alone, it does not speak to whether a

motion may be filed from outside the United States. With special rule motions, as with all motions to reopen, the operative language is contained in 8 U.S.C. § 1229a(c)(7)(A), providing that "an alien may file one motion to reopen proceedings under this section…" Thus, there is no evidence to suggest that the 2000 special rule read independently from the rest of the motion to reopen provisions authorizes motions from outside the United States.

Second, even if the BIA were correct that Congress was concerned that the VAWA 2000 provision could be interpreted as authorizing motions from outside the United States, it begs the question why Congress also did not make this same correction to the general motion to reopen statute located in the same statutory section Congress amended. In fact, assuming arguendo that the BIA were correct about Congress's intent, the BIA's rationale supports Petitioner's and amici curiae's reading of the statutes: absent explicit limiting language, broad language, like that in 8 U.S.C. § 1229a(c)(6) and (7), should be read to authorize the filing of motions from outside the United States.

In sum, Congress's choice not to codify the pre-1997 departure bar to review of a motion to reconsider or 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.

B. 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)(6) AND 1229a(c)(7).

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

When DOJ promulgated the post-IIRIRA regulations pertaining to motions to reopen, the agency rejected commenters' suggestions that (1) the regulation be consistent with the repeal of the departure bar to judicial review; and (2) the regulation be amended so that departure does not constitute withdrawal of a motion to reopen. 62 Fed. Reg. 10312, 10321 (March 6, 1997). Because DOJ's rejection of the former suggestion is erroneous and its rejection of the latter suggestion is inadequate, its retention of the departure bar is unreasonable.

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

DOJ's explanation is indefensible. Section 1252 involves the *federal courts'* jurisdiction to review agency decisions. In contrast, the regulation at issue precludes administrative adjudication of motions following departure. Thus, any

departure limitation on agency adjudication over motions to reopen would not be contained in 8 U.S.C. § 1252. Rather, if any such limitation existed, Congress presumably would have included it in 8 U.S.C. § 1229a (relating to removal proceedings, including the motion to reopen and reconsider provisions). Moreover, to the extent that 8 U.S.C. § 1252 has bearing on the analysis, it heavily weighs in favor of permitting persons who depart to pursue motions to reopen or reconsider. 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 and reconsider.

Second, in response to commenters who suggested that the regulation should be amended so that departure does not constitute withdrawal of a motion, 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 10321. However, DOJ offered no explanation for what "burden" is associated with motions to reopen. Not all such motions are filed in order to apply for relief, nor is

a subsequent hearing always necessary.[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 United States. If anything, the cost is less because a person outside the country need not be monitored or detained by the Department of Homeland Security.

2. 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

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

action, while eliminating prior statutory barriers to pursuing relief from abroad."). *See also Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 284 (3d Cir. 2004) (noting that extending voluntary departure would conflict with the goal of expeditious removal proceedings, as reflected in IIRIRA). 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 or reconsideration of their proceedings no matter how compelling the reason. Meanwhile, individuals who do not comply with a removal order can seek reopening or reconsideration.[13] Such a result is unreasonable because it effectively *discourages* compliance with the order of removal and undermines a primary objective of IIRIRA. *See Barrios*, 399 F.3d at 276-78 (finding BIA's interpretation of statute unreasonable because it was arbitrary and does not comport with congressional intent); *accord United States v. Schneider*, 14

[13] While the 90-day deadline for filing motions to reopen generally prevents the filing and granting of late-filed motions, there are numerous exceptions to the filing deadline, including motions seeking to reopen and rescind an in absentia removal order, 8 U.S.C. § 1229a(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, 8 U.S.C. § 1229a(c)(7)(C)(ii). This Court also has held that the filing deadline is subject to equitable tolling. *See Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005).

F.3d 876, 880 (3d Cir. 1994) ("It is the obligation of the court to construe a statute to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose").

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

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.

IV. CONCLUSION

For the reasons set forth above, the Court should grant the petition for review and remand the case to the BIA for further consideration of the merits of Petitioner's motion to reconsider.

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CERTIFICATE OF BAR MEMBERSHIP

I certify that pursuant to L.A.R. 46.1 (e), I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation because this brief contains 6,899 words. This brief has also been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 Times New Roman.

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CERTIFICATE OF VIRUS CHECK

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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CERTIFICATE THAT BRIEF IS IDENTICAL TO ORIGINAL

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.	)	
Attorney General of the United States, Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2010, I served this brief and 10 copies, via regular U.S. mail, on the Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that the foregoing brief was also served on the Office of the Clerk, and on those listed below, via the Court's CM/ECF system. Copies of the brief also were mailed to:

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