No. 12-2270

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

VLADIMIR PEREZ SANTANA,
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, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE POST-DEPORTATION HUMAN RIGHTS PROJECT 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*, certify that the American Immigration Council, the National Immigration Project of the National Lawyers Guild, and the Post-Deportation Human Rights Project do not have any parent corporations or issue stock.

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Dated: January 8, 2012

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

I, Beth Werlin, attorney for *Amici Curiae*, certify that this brief was not authored in whole or in part by the party's counsel. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief, nor did anyone – other than the *amici curiae*, its members or its counsel – contribute money that was intended to fund preparing or submitting the brief.

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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), the American Immigration Council and the Post-Deportation Human Rights Project proffer this brief to assist the Court in its consideration of the departure regulation at 8 C.F.R. § 1003.2(d). This regulation bars noncitizens who depart the United States from exercising their statutory right to pursue a motion to reopen before the Board of Immigration Appeals (BIA or Board). *Amici* submit that the departure bar regulation conflicts with the motion statute, 8 U.S.C. § 1229a(c)(7) and impermissibly contracts the agency's jurisdiction.

To date, nine courts of appeals have agreed, invalidating the departure bar regulation on one or the other of these bases. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012)

(en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).[1]

Although this Court has addressed the departure bar regulation, it has not addressed whether the regulation conflicts with the motion to reopen statute and its discord with the Supreme Court's interpretation of the motion statute in *Dada v. Mukasey*, 554 U.S. 1 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010). In addition, this Court 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). Moreover, the Court has not addressed whether the regulation applies to timely filed motions based on vacated convictions that formed a "key part" of the removal proceeding. *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006).

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

[1] Although this case involves a motion to reopen (8 U.S.C. § 1229a(c)(7)) and two other cases (*Prestol* and *Lari*) have involved motions to reconsider (8 U.S.C. § 1229a(c)(6), 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 at 217 n.3; *Lari*, 697 F.3d at 278 n.2.

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 Post-Deportation Human Rights Project, based at the Center for Human Rights and International Justice at Boston College, is a legal advocacy project devoted to the representation of individuals who have been deported and the promotion of the rights of deportees and their family members. These organizations have a direct interest in ensuring that noncitizens are not unduly prevented from pursuing motions to reopen. Undersigned counsel for *amici* curiae have appeared in many of the cases that have addressed the departure regulation, including *Prestol Espinal*, *William*, *Lari*, *Pruidze*, *Reyes-Torres*, and *Contreras-Bocanegra*. In addition, undersigned counsel appeared on rehearing before this Court in *Pena-Muriel v. Gonzales*, in which the Court clarified that it had upheld the departure bar regulation without considering whether it conflicts with the motion to reopen statute or impermissibly contracts the agency's jurisdiction. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (denying en banc rehearing and clarifying regulation validity remains an open question).

II. LEGISLATIVE, REGULATORY, AND ADMINISTRATIVE BACKGROUND

The regulatory right to file a motion to 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)).[2] 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)).[3]

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[2] 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.

[3] 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 (EOIR). *See* EOIR Background Information, http://www.usdoj.gov/eoir/background.htm (last visited January 2, 2013). 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).

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

- Congress, for the first time, codified the right to file a motion to reopen. IIRIRA § 304 (adding new 8 U.S.C. § 1229a(c)(6) (1997)).[4] Congress also codified several of the pre-existing regulatory requirements for motions to reopen, including numeric limitations, filing deadlines, and substantive and evidentiary requirements for motions. *Id.*; 8 C.F.R. § 3.2(c) (1997).

- Congress repealed former 8 U.S.C. § 1105a(c)'s departure bar to judicial review 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. IIRIRA § 306(a) (enacting 8 U.S.C. § 1252(b)(6)).

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

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

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 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) (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). *Cf. Matter of Diaz-Garcia*, 25 I&N Dec.

794, 797 (BIA 2012) (finding that departure does not preclude BIA from adjudicating an appeal where DHS unlawfully deported appellant).

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 any of the three main arguments presented here: (1) whether the regulation conflicts with the motion statute; (2) whether the regulation impermissibly contracts the agency's jurisdiction; or (3) whether the regulation applies to timely filed motions based on vacated convictions. 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).

Specifically, in *Pena-Muriel v. Gonzales*, this Court considered a challenge to the regulation at 8 C.F.R. § 1003.23(b)(1), which bars motions to reopen before immigration judges based on virtually identical language to the regulation challenged in this case. 489 F.3d 438 (1st Cir. 2007). In that case, the petitioner did not appeal his removal order and voluntarily left the United States. Five years later, he sought to reopen proceedings after the state court vacated his conviction. *Id.* at 440. The petitioner asserted that the regulation conflicted with Congress's repeal of the departure bar to

judicial review in 8 U.S.C. § 1252 and due process.

In upholding the regulation on statutory grounds, the Court's analysis focused on the judicial review statute. *Pena-Muriel*, 489 F.3d at 441-43. Following a rehearing petition, the Court clarified that whether the departure bar conflicts with the motion to reopen statute remains an open question:

> When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States, 8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7). We will not address that issue now on rehearing.

Pena-Muriel v. Gonzales, 510 F.3d 350, 350 (1st Cir. 2007) (citation omitted).

Thus, this Court has not addressed whether the departure regulation violated the motion to reopen statute. Nor has the Court addressed whether the Board's refusal to adjudicate a post departure motion is an impermissible contraction of its congressionally-designated authority. *See Matos v. Holder*, 660 F.3d 91, 94 n.2 (1st Cir. 2011) (expressly declining to address petitioner's challenge to the departure bar regulation based on the Sixth Circuit's decision in *Pruidze*).

Similarly, the Court has not addressed whether the regulation applies

to timely filed motions based on a vacated conviction where the person was deported while a request post-conviction relief (based on a constitutional violation) was pending in criminal court. Although the *Pena-Muriel* Court acknowledges that this may be "an 'appropriate' basis for reopening," the decision does not address, specifically, whether the departure bar regulation applies in this situation. *Pena-Muriel*, 489 F.3d. at 443 (citations omitted).

B. THE DEPARTURE BAR REGULATION CONFLICTS WITH THE MOTION TO REOPEN STATUTE.

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, deference is not warranted because the regulation is an unreasonable construction of the statute.

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

a. The plain language of the motion statute 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 reopen statute, 8 U.S.C. § 1229a(c)(7), which contains no such bar. *See Consumer Product Safety Commission v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself"). Section 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 statute affords 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 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); *Garcia-Carias*, 697 F.3d at 263 ("By its clear terms, the statute does not distinguish between those aliens who remain in the United States – the unmodified "alien" captures both."). 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.[5] *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

[5] *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'").

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 Succar v. Ashcroft*, 394 F.3d 8, 24-25 (1st Cir. 2005) (striking down agency interpretation denying a category of noncitizens from applying for adjustment of status because "[t]he statute has never stated that an alien is ineligible to adjust status if he is in removal proceedings").

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)(7)'s 1996 enactment, the regulations governing motions to reopen contained time and numeric limitations, content and evidence requirements, and the departure bar to review. Significantly, when Congress codified the

right to file a motion to reopen, it codified most other pre-1997 regulatory limitations on motions, but chose not to codify the departure bar.[6] *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 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

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[6] Specifically, it codified: the numeric limitations on motions to reopen, 8 C.F.R. § 3.2(c)(2) (1997) (codified at 8 U.S.C. § 1229a(c)(6)(A) (1997)); substantive and evidentiary requirements, 8 C.F.R. § 3.2(c)(1) (1997) (codified at 8 U.S.C. § 1229a(c)(6)(B) (1997)); the 30 and 90 day filing deadlines, 8 C.F.R. § 3.2(c)(2) (1997) (codified at 8 U.S.C. § 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)).

should be permitted to override Congress' considered judgment.

Prestol Espinal, 653 F.3d at 222. *See also Garcia-Carias*, 697 F.3d at 264.

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 Succar*, 394 F.3d at 24-26.

c. Invalidating the departure bar is the only way to reconcile the motion to reopen statute 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); *Taing v. Napolitano*, 567 F.3d 19, 26 (1st Cir. 2009) (considering the agency's interpretation in light of the "specific context in which the language is used and broader context of the statute as a whole") (internal citation omitted).

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 removal period and the 90 day period for filing a motion to reopen begin on the date the removal order becomes final. *See* 8 U.S.C. § 1231(a)(1)(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." *Marin-Rodriguez*, 612 F.3d at 594. *See infra* § III.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, 424 (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 courts 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 O'Connell v. Shalala*, 79 F.3d 170, 179 (1st Cir. 1996) ("Because courts usually presume that every word and phrase in a statute is pregnant with meaning, …, the prospect of redundancy cuts against the Secretary's interpretation") (internal citation omitted).

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 Garcia-Carias*, 697 F.3d at 264; *Prestol Espinal*, 653 F.3d at 223-24; *Luna*, 637 F.3d at 101.

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

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.

First, as discussed in § III.B.1, *supra*, Congress's codification of the right to seek reopening; Congress's adoption of many of the pre-IIRIRA regulatory limits on motions, 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. *Accord Saysana v. Gillen*, 590 F.3d 7, 16-17 (1st Cir. 2009) (finding the agency's interpretation unreasonable because it relied on factors not logically connected to the statutory provision at issue).

Further, the BIA's justification for the departure bar in *Matter of Armendarez* is irrational. 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 concludes 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 found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the country. It is 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*, 556 U.S. at 435 ("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 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").

C. 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 Board has said that it lacks jurisdiction over persons outside the United States 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. 3 (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 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

[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).

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").

Whether a rule is jurisdictional or a claim processing rule "is not merely semantic but one of considerable practical importance for judges and litigants." *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 reopen (8 U.S.C. § 1229a(c)(7) and 8 C.F.R. § 1003.2(c)) and 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[8] § 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 reopen, which the Supreme Court has recognized as an integral part of removal proceedings. *See supra* III.B.1.a. Congress conferred this authority through (at least) the following statutory provisions:

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

The Seventh Circuit 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, the Sixth Circuit recognized that the Board's exercise of

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

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 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.*[9]

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

[9] 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).

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 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). 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 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.

D. THE DEPARTURE REGULATION IS NOT APPLICABLE TO PETITIONER BECAUSE THE CRIMINAL COURT VACATED A CONVICTION THAT CONSTITUTED A "KEY PART" OF THE REMOVAL ORDER.

Even if the departure bar did not conflict with the motion to reopen statute and did not impermissibly contract the agency's jurisdiction, the Court still should not apply it to the Petitioner because a vacated conviction serves as the basis of his timely motion to reopen. Here, the criminal court vacated the conviction that constituted the basis for Petitioner's removability. *See* AR 173-174 (Notice to Appear); AR 19-35 (proof of vacatur). Prior to IIRIRA, one court of appeals held that the departure bar to judicial review did not apply to an otherwise late-filed petition for review where the departure was not "legally executed." *See, e.g.*, *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). The court later extended this ruling to the departure bar on (then regulatory) motions to reopen, reasoning that a departure is not "legally executed" when a criminal court subsequently vacates a conviction that constituted a "key part" of the removal order. *See Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *cf. William*, 499 F.3d 329 (striking down departure bar regulation where petitioner's conviction was vacated); *Pruidze*, 632 F.3d at 235 (same). *But see Baez v. INS*, 41 F.3d 19, 23-24 (1st Cir. 1994) (refusing

to apply *Mendez* rationale to assume jurisdiction over a petition for review).[10]

Here, the conviction formed not only a "key part" of the removal order, but it was the sole basis for it. *Cardoso-Tlaseca*, 460 F.3d at 1107. Thus, even if the Court declines to strike down the regulatory departure bar based on its conflict with 8 U.S.C. § 1229a(c)(7) and the agency's impermissible contraction of its own jurisdiction, the Court should hold that the regulation is inapplicable to Petitioner, who pursued post-conviction relief prior to his forced deportation and timely pursued reopening after the criminal court vacated his conviction.

IV. CONCLUSION

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

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[10] In *Baez*, the court refused to interpret the *statutory* departure bar to judicial review in former 8 U.S.C. § 1105a(c) as inapplicable where the departure was not "legally executed." The court concluded it was "duty bound" to honor the meaning of the statute. 41 F.3d at 24. In 1996, IIRIRA § 306(b) repealed the departure bar to judicial review at issue in *Baez*.

Unlike *Baez*, this case involves a *regulatory* departure bar, which has no statutory basis. Thus, *amici* submit the Court should apply the rationale underlying *Mendez* and its progeny – that a departure should be construed to mean a "legally executed" departure – to find that a departure is not "legally executed" where the underlying conviction is vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14 point font.

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CERTIFICATE OF SERVICE FORM FOR ELECTRONIC FILINGS

I hereby certify that on January 8, 2013, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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