In The

Supreme Court of the United States

MARTIN ROSILLO-PUGA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provided aliens the statutory right to file a motion to reconsider a determination of removability (8 U.S.C. § 1229a(c)(6)(A)) and to reopen removal proceedings. 8 U.S.C. § 1229a(c)(7)(A). The statute expressly imposes limits on the number and timing of such motions, but does not condition the right to file on an alien's geographic location. When the Attorney General promulgated implementing regulations for IIRIRA, however, she retained, without amendment, a pre-IIRIRA regulation barring aliens from filing such motions after the alien has been removed from or has voluntarily departed the United States. The questions presented are:

(1) Whether this regulation, 8 C.F.R. § 1003.23(b)(1), is invalid under IIRIRA because it denies aliens who have been removed or who otherwise have departed the United States their statutory right to file a motion to reopen or reconsider an order of removability.

(2) Whether the Tenth Circuit Court of Appeals may usurp the Immigration Judge's (IJ) and Board of Immigration Appeal's (BIA) discretionary authority to *sua sponte* reconsider or reopen removal proceedings by denying a petition for review based on reasons not articulated in either the IJ's or BIA's orders denying the motion in the first instance.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mr. Martin Rosillo-Puga respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1) is reported at 580 F.3d 1147. The court of appeals' order denying rehearing en banc (App., *infra*, 66) is unpublished.

The order of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 59) is unpublished.

The order of the Immigration Judge denying petitioner's motion to reopen (App., *infra*, 62) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2009. A timely petition for rehearing was denied on December 8, 2009. On March 1, 2010, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to May 7, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

[8 U.S.C. §§ 1229a(c)(6)A) and (c)(7)(A)]

[8 C.F.R. § 1003.23(b)(1)]

The relevant statutory and regulatory provisions are set out in the appendix to this Petition.

STATEMENT

Congress has provided that aliens determined removable from the United States may file a motion to reconsider the order of removal and/or to reopen the removal proceedings, so that they may present new evidence or seek relief from error. This case involves Mr. Martin Rosillo-Puga, formerly a lawful resident of the United States, married for 16 years to a U.S. citizen, with two U.S. citizen children and deported due to a misdemeanor battery conviction. Shortly after his removal, the Seventh Circuit held that a conviction under the same Indiana battery statute pursuant to which Mr. Rosillo was convicted and removed, did not constitute an aggravated felony or a crime of violence as required to support an order of removal. See *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003).

While there is no geographic limitation on those aliens entitled to file a motion to reconsider removal or to reopen removal proceedings in the statutory text establishing these remedies, in this case the Tenth

Circuit held that such relief is unavailable to aliens once they have departed the United States. This issue has been widely litigated and has divided the numerous courts of appeals who have considered the validity of the regulatory departure bar. In this case, the Tenth Circuit flatly rejected the Fourth Circuit's contrary and well-reasoned opinion that Congress expressly and unambiguously guaranteed aliens the right to seek removal or reconsideration regardless of their location. Four other courts of appeals also have taken conflicting approaches to the question.

This is an issue of substantial practical importance. Under the current state of the law, an alien who follows the law and departs the United States after an unfavorable determination in removal proceedings would be unable to file a motion to reopen or reconsider in the First, Fifth, Sixth and Tenth Circuits, while aliens in the Fourth and Ninth Circuits would be able to seek such redress even after departing. More astonishing, however, is that under the current state of the law, an alien who defies an order of removal and remains in the country illegally is entitled to seek this relief in every Circuit.

By holding that aliens who follow the law and depart as required may not avail themselves of such relief, the Tenth Circuit departed from the governing statutory language, and frustrated the congressional purpose. To bring uniformity to the courts of appeals and eliminate a significant distortion of the immigration law, further review is warranted.

This petition is submitted in coordination with counsel for Petitioner Eddie Mendiola who will be filing a similar petition, from the same (Tenth) Circuit on or before May 28, 2010. For the Court's convenience and for the sake of judicial economy, counsel suggest that the Court consider these petitions together. These cases challenge the validity of different, but substantively identical regulations prohibiting the filing of motions to reopen removal proceedings or reconsider an order of removal by those aliens who have departed the United States. Both regulations suffer from the same defect – they are contrary to Congress' express intent to offer relief to any and all aliens who have had an adverse ruling on removability regardless of their geographic location when such motions are filed.

This petition differs from the Mendiola petition in that it also challenges the validity of the Tenth Circuit's alternative basis for denial of Mr. Rosillo's appeal – that his motion to reopen and/or reconsider was untimely. The Tenth Circuit exceeded the scope of its review authority, because the IJ's and BIA's orders clearly indicate that no procedural or substantive issues were considered at all. Rather, first the IJ and then the BIA determined that they had no jurisdiction to consider any substantive or procedural aspect of Mr. Rosillo's motion to reopen and/or reconsider solely because he had departed the country.

A. Statutory And Regulatory Background.

1. The government initiates removal proceedings against a noncitizen by filing a Notice to Appear with an Immigration Judge (IJ), specifying the grounds alleged for removal. 8 U.S.C. § 1229(a)(1). Aliens determined to be removable by an IJ may appeal their removal order to the BIA. The removal order becomes final upon review by the BIA (or upon expiration of the BIA review filing deadline). *Id.* § 1101(a)(47). At that point, the alien may seek judicial review of the removal order by filing a petition for review in the court of appeals for the circuit in which the removal hearing was conducted. *Id.* § 1252(a)(5).

An alien also may seek administrative review of an IJ's removal decision or of a final removal order by filing a motion to reopen or reconsider.[1] *Id.* § 1229a(c)(6)-(7). Motions to reopen give aliens a chance to challenge their removal by presenting new, material facts unavailable at their original removal proceedings. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). Motions to reconsider allow an alien to challenge

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[1] Such motions are filed directly with the IJ where the BIA does not take jurisdiction over the alien's case – for example, where an alien fails to appeal his removal order. Otherwise, they are properly filed with the BIA. See BIA Practice Manual App. K (Where to File a Motion).

mistakes of fact or law in the original administrative decision. *Id.* §§ 1003.2(b)(1), 1003.23(b)(2).[2]

The BIA has had the authority to entertain such motions since its creation. See 5 Fed. Reg. 3502, 3503-3504 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.9) (creating the BIA and providing that "[t]he reconsideration, reargument or reopening of a final decision by the Board of Immigration Appeals shall be permitted only upon motion."); see also 23 Fed. Reg. 9115, 9118 (1958) (final rule codified at 8 C.F.R. § 3.2 (1959)) (allowing the BIA to "reopen or reconsider any case in which it has rendered a decision" on its own motion or by written motion of a party). Until 1996, however, motions to reopen and reconsider removal orders were solely creatures of regulation. The governing regulations prevented the Board or an IJ from considering motions to reopen or reconsider filed "by or in behalf of a person who is the subject of deportation proceedings *subsequent to his departure from the United States*." *Ibid.* (emphasis added). This regulatory post-departure bar mirrored the then-governing statutory limit on judicial review, which provided that "[a]n order of deportation or of

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[2] The regulations governing motions to reopen and reconsider were originally codified at 8 C.F.R. § 3.2. The regulations were re-codified in 2003 pursuant to the Homeland Security Act of 2002, as amended, which transferred the functions of the former Immigration and Naturalization Service to the Department of Homeland Security, while retaining the Executive Office of Immigration Review in the Department of Justice. 68 Fed. Reg. 9824, 9826 (Feb. 28, 2003).

exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after issuance of the order." 8 U.S.C. § 1105a(c) (1962). Until the repeal of this post-departure bar to federal court review in 1996, most aliens received an automatic stay of their removal order pending resolution of any appeals to prevent the court from being divested of jurisdiction by the alien's departure from the United States. See § 1105a(a)(3) (1994). Such a stay also preserved the alien's right to file a motion to reopen or reconsider an IJ or BIA decision.

2. What began as a regulatory privilege became a statutory right with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009. Among its many reforms, IIRIRA repealed the statutory prohibition on judicial review of removal orders when an alien has departed the country. IIRIRA also, for the first time, expressly provided aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation within 90 days of the entry of the final administrative order of removal. See 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); *id.* § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings. . . ."). The new statute does not include an express post-departure bar on the now statutorily-authorized motions to reopen (or reconsider) deportation proceedings before the IJ (or BIA).

When the Attorney General promulgated implementing regulations for IIRIRA in March 1997, however, she retained without change the pre-IIRIRA bar on post-departure motions to reopen and to reconsider. The current regulation, 8 C.F.R. § 1003.23(b)(1), which is substantially identical to the one in force before the enactment of IIRIRA, prohibits the IJ from considering motions to reopen removal proceedings filed by any alien who has departed the United States, either voluntarily or involuntarily. It reads:

> A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion 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.

A second regulation, 8 C.F.R. § 1003.2(d), contains virtually identical language governing motions to reopen or reconsider filed before the BIA.[3]

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[3] 8 C.F.R. § 1003.2(d) includes a post-departure bar for motions to reopen or reconsider filed with the Board of Immigration Appeals. It reads, in relevant part:

> (d) Departure, deportation, or removal. 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

(Continued on following page)

B. Mr. Martin Rosillo-Puga.

Petitioner Mr. Martin Rosillo-Puga, a native and citizen of Mexico, married Chiara Rosillo, a United States citizen, in 1994. (R. 000030). On July 18, 1995, Mr. Rosillo became a conditional legal permanent resident of the United States after the filing by his wife of an immediate relative petition. (R. 000030; 000101). Mr. Rosillo and Chiara have now been married for sixteen (16) years and have two minor children who are also United States citizens, Alejandra and Martin, Jr. (R. 000030). During Mr. Rosillo's residency in the United States, he provided his family with necessary emotional, physical, and financial support. (R. 000030-31). Mr. Rosillo was gainfully employed as a landscaper and trained to be a heavy equipment operator. (R. 000030). Mr. Rosillo's wife, Chiara, suffers from a number of serious medical conditions, and depended on Mr. Rosillo's financial support to provide for their family. (R. 000031).

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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.

C. Removal Proceedings.

On August 14, 2003, the Department of Homeland Security commenced removal proceedings against Mr. Rosillo by filing a Notice to Appear before the Immigration Court. (R. 000101-02). Mr. Rosillo was unable to obtain counsel for the immigration court proceedings and appeared *pro se*. (R. 000030). Mr. Rosillo did not believe that he could challenge the charges alleged in the immigration proceedings. (*Id.*). On August 18, 2003, Mr. Rosillo was ordered removed from the United States to his native country of Mexico on the basis that his 1997 conviction for misdemeanor battery, pursuant to section 35-42-1 of the Indiana Code, constituted an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) and a removable offense under 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (E)(i). (R. 000099; 000101-02). Mr. Rosillo had no money to hire a lawyer to appeal the removal order and was subsequently removed. (R. 000030). He was physically removed to Mexico and resides in La Calera, a small village consisting of approximately 300 families. (*Id.*).

Three months after Mr. Rosillo's removal, the Seventh Circuit held that a conviction under the same Indiana battery statute pursuant to which Mr. Rosillo was convicted, did not constitute an aggravated felony or a crime of violence which subjected Mr. Rosillo to removal. See *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). Mr. Rosillo, as noted, did not have counsel during his removal proceedings or immediately after his removal, and was thus unaware

that his removal order was based on an erroneous interpretation of statutory language. (See R. 000030-31). Moreover, his home in the small Mexican village of La Calera did not have a telephone or computer by which Mr. Rosillo could have discovered the error. (R. 000030). And, Mr. Rosillo did not have access to any other sources of information about legal developments in the United States. (R. 000030-31). He discovered that his conviction was based on the erroneous interpretation of section 35-42-2-1 only after his wife found volunteer lawyers to assist Mr. Rosillo at the Post-Deportation Human Rights Project at Boston College Law School. (R. 000031). Upon learning of the error and with the assistance of counsel for the first time, Mr. Rosillo promptly initiated proceedings to reconsider or reopen his removal proceedings. (R. 000068-98).

D. Motion To Reconsider Or Reopen Removal Proceedings And Appeal To BIA.

On May 7, 2007, with the assistance of counsel, Mr. Rosillo filed a Motion To Reconsider or Reopen Proceedings before the Immigration Judge on the ground that his battery conviction is not a crime of violence under 18 U.S.C. § 16, and therefore not a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i) nor an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii). (R. 000063-000070). Because Mr. Rosillo did not discover the error in law prior to the 90-day limitation for filing a motion to reopen, Mr. Rosillo requested that the IJ exercise *sua*

sponte jurisdiction under 8 C.F.R. § 1003.23(b)(1) to reopen or reconsider the removal order based upon the exceptional circumstance of a change in the law. (R. 000071-74). Pursuant to 8 C.F.R. § 1003.23(b), the IJ "may upon his or her own motion *at any time*, or upon motion of . . . the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals."

In an opinion dated May 24, 2007, the IJ explained that in most circumstances he had general discretion to reopen and reconsider proceedings pursuant to 8 C.F.R. § 1003.23(b)(1). (R. 000054). However, the IJ concluded that he was constrained from exercising his general discretion to reopen and reconsider proceedings due to the regulatory post-departure bar, 8 C.F.R. § 1003.23(b)(1). (*Id.*). The IJ denied Mr. Rosillo's motion to reopen or reconsider on the sole ground that the post-departure bar precluded the exercise of his *sua sponte* jurisdiction. (R. 000054).

Mr. Rosillo subsequently appealed the IJ's decision to the Board of Immigration Appeals. (R. 000011). Mr. Rosillo argued that the regulatory post-departure bar did not preclude the IJ from exercising his *sua sponte* jurisdiction to reopen or reconsider his removal proceedings because the regulatory post-departure bar in 8 C.F.R. § 1003.23(b)(1) is contrary to the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1229a(c)(6), which codifies the right to file a motion to reopen *without*

imposing any post-departure bar. (R. 000020). The BIA, however, affirmed the IJ's order on the same ground. (R. 000002). The BIA concluded that the regulatory post-departure bar in C.F.R. § 1003.23(b)(1) precluded the IJ from exercising jurisdiction over a motion to reopen after the alien departs from the United States. (R. 000002).

E. Tenth Circuit Decision.

Mr. Rosillo petitioned the Tenth Circuit to reverse the BIA decision. Mr. Rosillo argued that the IJ was not precluded from exercising his discretion to reopen or reconsider under 8 C.F.R. § 1003.23(b)(1), because the regulation is an invalid exercise of the Attorney General's authority. The regulation directly conflicts with the express language of 8 U.S.C. §§ 1229a(c)(6)(A) and (7)(A), which grant aliens the right to file one motion to reconsider and one motion to reopen proceedings irrespective of the alien's geographic location. A divided Court of Appeals affirmed the BIA's ruling on the applicability of the post-departure bar and denied Mr. Rosillo's petition for review. App., *infra*, 21, 31.

The court recognized that the Fourth Circuit concluded that 8 U.S.C. § 1229(a)(7)(A) "clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed." *Id.* at 14 (quoting *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007)). The court, however, declined to follow

the *William* majority, and instead relied on the lone dissent in *William*, upholding the regulatory post-departure bar as valid under the statutes in question. As an alternative basis for denial of the petition for review, the Tenth Circuit held that Mr. Rosillo's petition was untimely. *Id.* at 24-25. The Tenth Circuit denied the petition on the ground of timeliness despite the fact that neither the IJ nor the BIA articulated timeliness as a basis for denial in their orders.

REASONS FOR GRANTING THE PETITION

As this case demonstrates, the availability of a motion to reopen or reconsider is a matter of more than theoretical or technical importance. As is the case here, such a motion may be the only avenue for relief from the erroneous removal of an alien (here, a long-time resident) from the United States. Congress accordingly guaranteed aliens the right to make such motions, whether or not they have already departed the United States; that guarantee was an essential component of Congress' decision also to expedite the removal of certain aliens from the country. The Tenth Circuit's decision in this case, upholding a decision that bars aliens from filing such motions after their departure, cannot be reconciled with the statutory language and congressional purpose. Because that decision also cements an acknowledged conflict in the circuits, further review is in order.

I. The Courts Of Appeals Are Divided Over The Validity Of 8 C.F.R. § 1003.23(b) And The Companion Regulation, 8 C.F.R. § 1003.2(d).

To begin with, there is a clear and acknowledged conflict between the Fourth and Tenth Circuits (both of which were themselves divided) over the question that this case presents – whether the regulatory post-departure bar on motions to reopen or reconsider before the BIA or an IJ is consistent with the controlling statute. But that is not the full extent of the confusion: four additional circuits have considered the treatment of post-departure motions to reopen or reconsider and have taken widely divergent approaches. As a result, identically situated persons face different rules regarding post-departure motions to reopen or reconsider in different parts of the country. Because uniformity in this area of the law is essential, further review is warranted for this reason alone.

1. As the Tenth Circuit panel in this case acknowledged, a divided Fourth Circuit panel has held the regulation invalid under IIRIRA because "§ 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." *William*, 499 F.3d at 332. The *William* majority explained that the statutory language "speak[s] to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (*i.e.* 'alien[s]') which it vests with the right to

file these motions." *Ibid.* It also reasoned that "the fact that Congress provided for [other] specific limitations on the right to file a motion to reopen bolsters the conclusion that § 1229a(c)(7)(A) cannot be read to except from its terms those aliens who have departed the country." *Id.* at 333. And the *William* majority noted that Congress did include a physical presence requirement in a different subsection of the statute dealing with aliens who apply for relief from removal as victims of domestic violence (*ibid.*), concluding that it "must draw a 'negative inference' from Congress' exclusion of the physical presence requirement from [§ 1229a(c)(7)(A)]." *Ibid.* The *William* decision speaks directly to the question presented in this case, and, insofar as is relevant here, William and petitioner are identically situated.

On the other hand, the Tenth Circuit expressly rejected the Fourth Circuit's conclusion. The majority "agree[d] with the [*William*] dissent's position and conclude[d] that 8 C.F.R. § 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally delegated rulemaking authority, and does not contravene 8 U.S.C. §§ 1229a(c)(6)(A) or (7)(A)." App., *infra,* 21. The majority believed that "the statute is simply silent on the issue of whether it meant to repeal the post-departure bars" and that "the agency's answer is based on a permissible construction of the statute." *Id.* at 21. In his lengthy dissent, Judge Lucero agreed with the *William* majority that "the pertinent provisions of § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee every alien the right

to file one motion to reconsider removability and one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States." *Id.* at 35.

The Tenth Circuit expressly rejected the Fourth Circuit's conclusion and held the regulation valid, not only in the present case but also in *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009) and *Silerio-Nunez v. Holder*, No. 08-9556, 2009 WL 4755726 (10th Cir. Dec. 14, 2009).[4] The Tenth Circuit panels in *Mendiola* and *Silerio-Nunez*, bound by the decision in this case, held that the regulation is valid under IIRIRA. See *Silerio-Nunez*, 2009 WL 4755726, at *2, *Mendiola*, 585 F.3d at 1310.

There is no denying this conflict. It has been repeatedly acknowledged by the Tenth Circuit and noted by the Ninth. See *Coyt v. Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) ("Those circuits are split. The Fourth Circuit has invalidated 8 C.F.R. § 1003.2(d) in its entirety. The Tenth Circuit upheld both [8 C.F.R. § 1003.2(d) and § 1003.23(b)(1)].") (internal citations omitted).

2. While their analyses differ in some particulars from those of the Fourth and Tenth Circuits, four additional courts of appeals also have considered

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[4] Like this case, *Silerio-Nunez* addresses 8 C.F.R. § 1003.23(b)(1)'s post-departure bar to review by an IJ. *William* and *Mendiola* discuss the issue in the context of 8 C.F.R. § 1003.2(d)'s post-departure bar to review by the BIA.

the treatment of post-departure motions to reopen or reconsider and have adopted widely divergent rules.[5] Like the Tenth Circuit, the First, Fifth, and Sixth Circuits have held, even after the enactment of IIRIRA, that 8 C.F.R. § 1003.2(d) and § 1003.23(b)(1) bar review of post-departure motions to reopen or reconsider. In contrast, the Ninth Circuit, like the Fourth, has held that an alien may file a motion to reopen or reconsider after departing the United States, unless the alien departs *while* he or she is the subject of removal proceedings. Therefore, an individual identically situated to petitioner may file a motion to reopen or reconsider in the Fourth and Ninth Circuits but not in the First, Fifth, Sixth, and Tenth.

Both the Fifth and Sixth Circuits have enforced the regulatory post-departure bar, post-IIRIRA. In *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003), the Fifth Circuit applied the regulation without mentioning IIRIRA. The court subsequently declined to comment on the merits of *William* because it declared itself bound by its decision. *Castillo-Perales v. Mukasey*, 298 F. App'x 366, 369 (5th Cir. 2008).[6]

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[5] The Seventh Circuit has noted but declined to reach the question of whether the regulatory post-departure bar remains valid under IIRIRA. See *Munoz De Real v. Holder*, 595 F.3d 747, 749 (7th Cir. 2010).

[6] In *Ovalles v. Holder*, 577 F.3d 288, 295 (5th Cir. 2009), the Fifth Circuit did not reach the question of whether IIRIRA precludes the regulatory post-departure bar to review of motions to reopen or reconsider because petitioner did not file his motion to reopen within the statutory deadline.

Similarly, without considering any IIRIRA-related arguments, the Sixth Circuit has stated that the regulation precludes an alien from reopening his or her removal proceedings once the alien has left the country. See *Mansour v. Gonzales*, 470 F.3d 1194, 1198 (6th Cir. 2006).

The First Circuit likewise has held that 8 C.F.R. § 1003.23(b)(1)'s post-departure bar is valid notwithstanding the enactment of IIRIRA, specifically concluding that the regulation had not been displaced by IIRIRA's repeal of 8 U.S.C. § 1105a(c), which read: "An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order." See *Pena-Muriel v. Gonzales*, 489 F.3d 438, 441-442 (1st Cir. 2007). Petitioner thus would not be able to reopen his removal proceedings under the First Circuit rule.

The Ninth Circuit, on the other hand, has held that an alien *may* file a motion to reopen or reconsider even after being deported because the post-departure bar "is phrased in the present tense and so by its terms applies only to a person who departs the United States while he or she 'is the subject of removal . . . proceedings.'" *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007). Because petitioner departed the United States only after his removal proceedings were completed, the Ninth Circuit would find that the regulatory post-departure bar does not apply to him and that he is therefore able to reopen his removal proceedings.

The upshot of these conflicting approaches is intolerable inconsistency: An alien in precisely the same circumstances as petitioner would have been permitted to seek relief in the Fourth and Ninth Circuits, but not in the First, Fifth, Sixth, and Tenth. This Court's intervention to clarify the law accordingly is essential.

II. The Issue Presented Here Is A Recurring One Of Substantial Practical Importance.

This conflict involves an issue of significant practical importance. Deportation is a severe penalty. *Padilla v. Kentucky*, ___ S. Ct. ___, 2010 WL 1222274, at *6 (March 31, 2010). As this Court recently acknowledged, "[t]he motion to reopen is an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings." *Nken v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317-2319 (2008)) (internal citations omitted). For a significant number of aliens, however, access to this crucial statutory right, as well as the right to file a motion to reconsider, depends solely on the geography of their appeal: The current conflict implicates six circuits that together handled over 62% of BIA appeals filed in 2009. Administrative Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts 94 tbl.B-3 (2009). Furthermore, the split stems, in part, from disagreement over the meaning of this Court's recent treatment of the motions to reopen in *Dada v.*

Mukasey, 128 S. Ct. 2307 (2008), which requires this Court's resolution.

A. The Practical Importance Of Motions To Reopen And Reconsider Counsels In Favor Of Review.

The practical importance of the statutory right itself counsels in favor of review. Motions to reopen and reconsider are a vital safeguard in a system that has been modified both to establish procedures leading to swift removal of aliens and to reduce the avenues for discretionary relief from removal. The 1990s saw a range of statutory and administrative changes to the immigration system that greatly expanded the number of aliens eligible for removal, largely by expanding the definition of aggravated felony to include a wider variety of crimes. "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses" and "the 'drastic measure' of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla*, 2010 WL 1222274, at *4. See also, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harvard Law Review 1890-1935 (2000); Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. Crim. L. &

Criminology 287, 295-296 (2009); see also Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. on Reg. 47, 66-67 (2010). This is particularly so given the complexity of immigration procedures and the lack of access to legal counsel during immigration proceedings. See *Ardestani v. INS*, 502 U.S. 129, 112 S. Ct. 515 (1991); *Escobar Ruiz v. INS*, 838 F.2d 1020, 1026 (9th Cir. 1988) ("deportation hearings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel.").

Yet, as more aliens became subject to removal, the system increasingly denies them access to discretionary relief. IIRIRA, for example, amended the INA to eliminate § 212(c) waivers of removal – a form of discretionary relief in which a court considered a range of equitable factors counseling against removal – replacing it with a more limited form of relief explicitly denied to aggravated felons. *I.N.S. v. St. Cyr*, 533 U.S. 289, 294-97 (2001).

These changes have led to the removal of ever-increasing numbers of aliens.[7] The number of noncitizens

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[7] The increasing rate at which immigrants are being deported has incited some harsh criticism for the immigration adjudication system both from the bench and the immigration bar. In a 2005 opinion, Judge Richard Posner opined that the state of the immigration adjudication system "ha[d] fallen below the minimum standards of legal justice[.]" *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Courts of appeal and commentators alike have complained of overburdened, biased,

(Continued on following page)

facing removal orders increased dramatically with the enactment of IIRIRA, rising over 64% from 1996 to 1997 – twice as much as it had in any of the previous five years. Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2008, at 95 tbl.36 (2009). Since 1997, that number has grown three-fold, with 358,886 aliens removed in 2008 alone (the latest year for which statistics are available). *Ibid.*

But resolution of these cases is not immune from error, due particularly to the BIA's increased use of summary procedures to deal with its "staggering" case backlog. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 23 & 29-31 (2005). Under the current rules, a majority of cases have been referred to a single Board member for review (instead of a panel) and Board members are permitted to

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and unprofessional IJs and poor legal analysis in immigration decisions. See, *e.g.*, *Wang v. Att'y General of U.S.*, 423 F.3d 260, 270 (3d Cir. 2005) (deeming an IJ opinion to be "highly improper" due to its contemptuous tone and the IJ's reliance on consideration of personal issues irrelevant to the merits of the claim); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595, 598-610 (noting high IJ caseloads, lack of resources, politicized hiring, and subpar work product). See also Jaya Ramji-Nogales et al., *Refuge Roulette: Disparities in Asylum Adjudication*, 60 Stan. Law. R. 295 (2007) (documenting inconsistencies in asylum grant rates across immigration judges).

summarily dispose of cases without basis in law or fact without issuing an opinion. 64 Fed. Reg. 56135 (Oct. 18, 1999) (establishing streamlined procedure); 67 Fed. Reg. 54878 (Aug. 26, 2002) (expanding the procedures to be the "dominant method of adjudication for the large majority of cases before the Board").

The "alarming frequency" of ineffective assistance of counsel in the immigration context, (*Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008)), as well as the lack of access to counsel for many aliens subject to removal proceedings, is another major source of error. Noncitizens without access to counsel, particularly those deported to their home countries, often have little access to information about legal developments in the United States making it impossible to challenge deportation orders by filing a *timely* motion to reopen deportation proceedings. Accordingly, the IJ and BIA's authority to *sua sponte* reopen immigration proceedings is often the only vehicle by which a noncitizen can seek review of the "drastic" penalty of deportation. Indeed, the bright line post-departure bar enacted by the agency also raises serious due process concerns. *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Boumediene v. Bush*, 553 U.S. 723 (2008).

Courts and federal agencies have long held a "full panoply of powers which they may invoke *sua sponte*." *Wang v. Ashcroft*, 260 F.3d 448, 453 (5th Cir. 2001) (recognizing the power of BIA to act *sua sponte* to reopen immigration proceedings). In this context, the IJ is authorized "upon his or her own motion *at any time*, or upon motion of the Service or the alien,

[to] reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." 8 C.F.R. § 1003.23. Similarly, the BIA may also "at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2. The IJ and BIA's *sua sponte* authority to reopen immigration proceedings is consistent with the broad discretion granted the agencies to grant or deny motions to reopen. *Kucana v. Holder*, 130 S. Ct. 877, 838 (2010) (noting discretion conferred by the Attorney General to consider motions to reopen).

The IJ and BIA's *sua sponte* authority is essential because exceptional situations occasionally arise after entry of an order of removal that undermine the very basis of the removal. See *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 (5th Cir. 2008); *In re G-D*, 22 I&N Dec. 1132 (BIA 1999). To be sure, exceptional situations are rare. The IJ and BIA exercise their *sua sponte* authority "sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). However, there are occasions where a significant change in the law may undermine the basis of removal such that the removal might never have occurred in the face of the change. See *In re G-D*, 22 I&N Dec. at 1135. But, rarely do such changes in the law occur within the 90-day limitation period to reopen immigration proceedings. See, *e.g.*, *In re GCL*, 23 I&N Dec. 359 (BIA 2002)

(reopening asylum proceedings finalized in 1995 after 1996 change in law regarding the definition of a refugee); *In re XGW*, 22 I&N Dec. 71 (BIA 1998) (reopening asylum proceedings after change in the law that occurred four months after the denial of application for asylum). Or, rarely are noncitizens who are often without access to legal counsel, aware of such significant legal developments. Consequently, the IJ and BIA's *sua sponte* authority to reopen serves the interest of justice by providing often the only remedy for noncitizens seeking review of deportation orders subject to new changes in the law.

In this context, motions to reopen and reconsider serve a necessary and important checking function on removal proceedings. They are, in many situations, an alien's only practical option for vindicating his or her due process rights, raising previously unavailable evidence or a change in the law that directly bears upon – or may completely preclude – his removal, or correcting the mistakes of an ineffective attorney or mistaken immigration judge.[8]

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[8] Over 12,000 such motions were filed with immigration judges in 2008. Office of Planning, Analysis & Technology, Executive Office for Immigration Review, FY 2009 Statistical Yearbook at B7 fig.2 (March 2009). In the same year, the BIA received 7,823 motions to reopen (not including IJ appeals). *Id.* at T2 tbl.16.

B. Court Of Appeals Confusion Over *Dada v. Mukasey* Requires Resolution By This Court.

Apart from the practical importance of the statutory right at stake, the specific question of whether the post-departure bar is valid requires this Court's resolution because it stems, in part, from inconsistent interpretations of this Court's recent decision in *Dada v. Mukasey,* 128 S. Ct. 2307 (2008). In *Dada*, the Court affirmed the statutory right to pursue a motion to reopen and held that, in order to "safeguard" that right, an alien must be permitted to withdraw a request for voluntary departure that, if granted, would trigger the §§ 1003.23(b)(1) and 1003.2(d) departure bars and preclude decision of the motion. 128 S. Ct. at 2319. (The question of the validity of the post-departure bar was not before the Court. *Id.* at 2320.)

Although the Fourth Circuit's *William* decision predates *Dada*, the panel majority in the present case, which relies on the *William* dissent, cites *Dada* for support. The majority relies on *Dada* for the proposition that "[t]he very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here – the alien's motion to reopen would not be withdrawn but for the regulation," App., *infra,* 12, n. 3, although the majority conceded that "neither party in *Dada* specifically challenged the validity of the regulations at issue," *id.* at 13, n. 3. The dissent, in sharp contrast, believed that *Dada* "all but compels the

conclusion" that IIRIRA trumps the departure bar because *Dada* recognized that "an alien *must* be allowed to file one motion to reopen" and "an alien cannot be forced by regulation to forfeit a motion guaranteed by statute." *Id.* at 51-52 (Lucero, J., dissenting). This Court should take this opportunity to resolve this substantial divergence of interpretation.

Congress and the Attorney General have had over a decade to address the discrepancy between the unequivocal statutory rights granted by IIRIRA and the post-departure bar in § 1003.23(b)(1). They have failed to do so, leaving the courts of appeals with no guidance and leading to the current intractable conflict. The issue presented in this case is likely to arise in many future IJ proceedings and involves an important source of administrative review in a system where it is sorely needed. The Court's guidance is therefore necessary to bring the statutory and regulatory treatment of these motions into alignment.

III. The Tenth Circuit's Decision Was Wrong.

The need for review is especially acute here because the Tenth Circuit's decision below is wrong. The plain language and structure of IIRIRA show that Congress meant to displace the departure bar, and this interpretation is consistent with the broader congressional purpose. The evolution of immigration law has decoupled physical presence from jurisdiction, making an alien's physical presence increasingly

irrelevant to the jurisdiction of the court reviewing his or her case. The departure bar is a holdover that Congress intended to be set aside. The logic of the current system of judicial review compels this conclusion.

A. The Statutory Language Is Plain And Unambiguous.

Congress provided in 8 U.S.C. § 1229a(c)(7)(A) that "*[a]n alien* may file one motion to reopen any proceeding[] under this section." Similarly, § 1229a(c)(6)(A) provides "*[t]he alien* may file one motion to reconsider . . . " (emphasis added). The language of these provisions is plain and unequivocal: there is no exception for aliens who have departed the United States. "We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there'" (*Dodd v. United States*, 545 U.S. 343, 357 (2005) ((alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992))); all aliens, regardless of location, are treated alike and have a right to file a motion to reopen. See App., *infra,* 35 (Lucero, J., dissenting) ("A plain reading of 8 U.S.C. §§ 1229a(c)(6)(A) and (7)(A) comfortably occupies all the space on the issue before us and leaves any potential for valid promulgation of the challenged portion of 8 C.F.R. § 1003.23(b)(1) outside in the bitter cold."); *William*, 499 F.3d at 332 ("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.");

Azarte v. Ashcroft, 394 F.3d 1278, 1285-86 (9th Cir. 2005) ("With respect to motions to reopen . . . , Congress' language in IIRIRA is clear and unambiguous."). The Attorney General may not rewrite an Act of Congress by regulating the exclusion of a subclass of aliens that Congress unambiguously intended to reach. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

B. The Structure Of The Statute Confirms Congress' Intent For The Reach Of §§ 1229a(c)(6)(A) And 7(A) To Be Sufficiently Broad To Include Departed Aliens.

A review of the statute as a whole indicates that had Congress intended to exclude such a significant class of aliens from relief prescribed by 8 U.S.C. §§ 1229a(6)(A) and 7(A), it most certainly would have said so.

Indeed, another subsection of 8 U.S.C. § 1229a distinguishes between aliens within and without the United States, providing that the usual 90-day time limit for a motion to reopen does not apply to a battered spouse, child, or parent who "is physically present in the United States at the time of filing the motion." § 1229a(c)(7)(C)(iv)(IV). Congress therefore plainly knew how to limit certain forms of relief to aliens currently in the United States, and it chose not to impose such a limit in §§ 1229a(c)(6)(A) and (7)(A). If physical presence in the United States were

required for *any* alien to file a motion to reopen, the language in § 1229a(c)(7)(iv)(IV) requiring specified aliens to be "physically present" would be superfluous.[9]

The statute also includes several express limitations on motions to reopen, including those on timeliness, §§ 1229a(c)(6)(B), (7)(C), content, §§ 1229a(c)(6)(C), (7)(B), and numerosity, §§ 1229a(c)(6)(A), (7)(A). But § 1229a includes no limitation on geography. When Congress makes the scope of its intention clear through limitations and exceptions, the lack of other limitations and exceptions should be read to indicate Congress' decision *not* to include those limitations and exceptions. *United States v. Johnson,* 529 U.S. 53, 58 (2000) ("When 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 the ones set forth."). Thus, it is properly inferred that Congress intentionally eschewed a geographical limitation on aliens filing motions to reopen.

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[9] Adopting the reasoning of the *William* dissent, the majority in the present case opined that § 1299a(c)(7)(C)(iv)(IV)'s physical-presence requirement was not added until 2006 and is therefore unhelpful in discerning what Congress intended when it enacted IIRIRA in 1996. App., *infra*, 17, 21. But if the majority's reading were correct – if there is a physical presence requirement implicit in §§ 1229a(c)(6)(A) and (7)(A), adding the physical-presence language in 2006 would have been unnecessary. That language presumably was added *because* §§ 1229a(c)(6)(A) and (7)(A) had no such requirement. *Id.* at 1165-66.

C. Legislative History Confirms Congress' Intent To Include Even Those Aliens Who Have Departed.

The legislative background of IIRIRA supports the conclusion that Congress meant what it said – any alien who has been determined removable may file a motion to reopen or reconsider. Congress expressly intended IIRIRA "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Needless to say, allowing aliens to file motions *after they have been removed* is fully consistent with – and may even facilitate – this goal. One of Congress' primary concerns in enacting IIRIRA was the amount of time it took to deport aliens who had committed crimes.[10]

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[10] See *Members' Forum on Immigration: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary,* 104th Cong. 38 (1995) (statement of Rep. Susan Molinari) ("The criminal alien population, which has an extremely high rate of recidivism, can be curbed by simply improving deportation procedures, thus saving our local communities millions of dollars by providing them with much more safety. It also frees up desperately needed jail space."); *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary,* 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) ("The administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens."); *Proposals for Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the*

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This concern with efficient removal, however, is a "non-sequitur" with respect to allowing aliens *already outside of the country* to file motions to reopen and reconsider. See App., *infra,* 48-49 (Lucero, J., dissenting). As these aliens have already left the country prior to filing, there is no danger that they will use motions to reopen or reconsider as a "means of delaying removal." *Id.* at 49. Indeed, if these filings were barred, Congress would be creating a disincentive for aliens to leave the country, leading them to withdraw motions for voluntary departure or to refuse to comply with removal orders, adding to the original problem. See *Dada*, 128 S. Ct. at 2320.

Nor would allowing post-departure motions result in an unmanageable increase in filings. IIRIRA still "limits in significant ways the availability of the motion to reopen," *Dada*, 128 S. Ct. at 2316, most importantly through filing deadlines and numerical limits. These procedural limits greatly restrict the number of aliens eligible to file such motions, absent grounds (such as exceptional circumstances or ineffective assistance of counsel) for equitable tolling or *sua sponte* reopening or reconsideration. Moreover, as this Court has repeatedly recognized, the immigration authorities retain considerable discretion over

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Judiciary, 103rd Cong. 40 (1994) (statement of Barbara Jordan, Chair, Comm'n on Immigration Reform) ("The top priority of interior enforcement strategies should be the removal of deportable criminal aliens from the U.S. in such a way that the potential for their return to the U.S. will be minimized.").

whether to grant a motion to reopen or reconsider. See, *e.g.*, *INS v. Abudu*, 484 U.S. 94 (1988). The BIA's streamlined summary procedures allow the Board to easily dispose of facially invalid or frivolous motions. And, of course, "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done." *In re S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997).

Congress created the statutory right to seek reopening or reconsideration as part of a comprehensive revision of the law governing when an alien's physical location should (or should not) bear on the judicial review of his or her immigration status. Pre-IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States (8 U.S.C. § 1105a(c) (1994)), and so most aliens were able to obtain an automatic stay of their removal order while judicial review was pending. *Id.* § 1105a(a)(3). Interested in more efficient removal, Congress in IIRIRA rendered aliens' location irrelevant to the jurisdiction of reviewing courts. Among other things, IIRIRA lifted a statutory bar to judicial review of deportation orders for aliens who had departed the country. See *William*, 499 F.3d at 330. The statutory right to move to reopen regardless of location is a piece of that reform. (The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, was the next major piece of legislation to address removal procedures; it took a further step in the same

direction by repealing jurisdictional obstacles for aliens pursuing petitions for review after they depart. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005)).

Having made these changes, Congress also repealed the presumption of an automatic stay of removal pending completion of judicial review and restricted the availability of injunctive relief to preclude removal. See *Nken v. Holder*, 129 S. Ct. 1749, 1755-56 (2009). Under this decoupling of jurisdiction and physical presence in the United States, the post-departure bar on motions to reopen or reconsider is a relic from a bygone era. It should not survive Congress' substantial revision of immigration law.

IV. The Tenth Circuit's Alternative Basis For Denying The Petition Is Erroneous.

The Tenth Circuit panel majority, over the strong dissent of Judge Lucero, denied Mr. Rosillo's petition for review on the alternative ground that the petition was untimely. Despite Mr. Rosillo's express preservation of his right to request the IJ and BIA to reopen *sua sponte* his removal proceedings in briefs filed with the IJ and BIA, the Tenth Circuit completely ignored the IJ and BIA's discretionary powers to reopen Mr. Rosillo's removal proceedings based on exceptional circumstances. Instead, the Tenth Circuit denied Mr. Rosillo's petition on a ground that the IJ and the BIA never considered – timeliness. Significantly, neither the IJ nor the BIA based their

dismissal of Mr. Rosillo's motion on timeliness. Rather, the IJ and BIA's denial of Mr. Rosillo's petition was entirely based on the departure bar. App. at 64 & 59, respectively. And, the Tenth Circuit's consideration of factors outside the scope of the IJ and BIA's conclusions of law is erroneous.

Judge Lucero's dissent aptly describes the fundamental rule of administrative law. A reviewing court may not uphold an agency decision based on reasons not articulated by the agency itself in its decision. *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S. Ct. 2314, 2326 (1974); *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459 (1943). Nor may reviewing courts search the record to find alternative grounds to support an agency decision. *Mayo v. Schiltgen*, 921 F.2d 177 (8th Cir. 1990). "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Id.* at 88, 63 S. Ct. at 460. This is so because appellate courts simply "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.*

The Tenth Circuit exceeded its authority when it decided that Mr. Rosillo's motion to reopen was due to be denied because it was untimely. Only after the IJ and BIA have opined on the timeliness of Mr. Rosillo's motion to reopen, may the Tenth Circuit review their decisions. If the Tenth Circuit's opinion remains valid, the opinion will effectively neutralize the IJ and the

BIA's *sua sponte* authority in the Tenth Circuit and effectively overrule *Chenery*. This power is simply too important to allow the Tenth Circuit to render it meaningless in light of the severity of the penalty of deportation, the complexity of deportation proceedings, and the lack of other avenues of redress for exceptional situations such as we have here – where changes in law that would render removal invalid in the first instance have developed subsequent to the removal proceedings.

In light of the foregoing, this Court should grant review and reverse the Tenth Circuit's erroneous decision denying Mr. Rosillo's petition for review on the basis of timeliness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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