No. _____

In The

Supreme Court of the United States

CRISTIAN FUNES,

Petitioner,

v.

LORETTA LYNCH, United States Attorney General,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the "departure bar" regulations under 8 C.F.R. § 1003.2(d) and § 1003.23(b) act as a restriction on the Immigration Court's and the Board of Immigration Appeals' jurisdiction to consider an untimely motion to reopen after an alien has departed the United States.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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The United States Court of Appeals for the Fifth Circuit's December 31, 2015 decision denying a petition for rehearing *en banc* is unreported.

The United States Court of Appeals for the Fifth Circuit's November 9, 2015 decision granting a motion to dismiss Petitioner's petition for review is unreported.

The Board of Immigration Appeals' January 15, 2015 decision denying Petitioner's motion to reopen is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on November 19, 2015. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE LAW

8 U.S.C. § 1229a(c)(7)

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

8 C.F.R. § 1003.2(d)

> 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. § 1003.23(b)

Before the Immigration Court – (1) In general. An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or 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. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 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. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves the right of an alien who has been prejudiced by ineffective assistance of prior counsel to reopen his immigration proceedings and apply for relief from removal that he would have applied for had he been competently advised. The Petitioner, Mr. Funes, was convicted of aggravated assault, an offense waivable under former INA section 212(c); however, his counsel advised him that the commission of the offense stopped the accrual of seven years of lawful unrelinquished domicile necessary for 212(c) relief. Upon that advice, he failed to apply and was deported. Nearly eight years after his deportation, Mr. Funes learned that the law in effect at the time of his deportation actually allowed him to apply for a 212(c) wavier. Mr. Funes filed a motion to reopen alleging ineffective assistance of counsel against his former attorney. However, the BIA held that it had no jurisdiction to entertain the motion as

a result of the "departure bar" at 8 C.F.R. § 1003.2(d) because Mr. Funes had been deported.

Mr. Funes filed a petition for review with the Fifth Circuit Court of Appeals which granted the U.S. Attorney General's motion to dismiss for lack of jurisdiction. The Court subsequently denied a petition for rehearing *en banc*.

All the courts of appeals to have decided the issue have held that the departure bar is invalid. Most courts have found the departure bar regulations contradict 8 U.S.C. § 1229a(c)(7) which states unambiguously and without geographic limitation that aliens have the right to file a motion to reopen. Several other courts have found the departure bar invalid as an unauthorized contraction by an agency of its own jurisdiction. And some courts have relied on both rationales simultaneously. Within this unanimity of result, the circuits are nevertheless split as to whether the departure bar may still apply to motions to reopen that are not filed within the 90-day deadline at 8 U.S.C. § 1229a(c)(7). Whereas the Third, Fourth and Sixth Circuits have held without equivocation that the departure bar is invalid, the Fifth Circuit, and to a lesser extent, the Second Circuit, have held the departure bar to be valid at least as applied to untimely-filed motions to reopen.

We ask the Court to resolve the split in favor of those circuits that have held the departure bar invalid in its entirety. Additionally, we argue that the reasoning underlying the Fifth Circuit's position was

entirely undermined by this Court's recent decision in *Mata v. Lynch*, 135 S.Ct. 2150 (2015).

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Background

The Petitioner, Mr. Funes, is a native and citizen of El Salvador whose status was adjusted to that of lawful permanent resident on January 30, 1990. ROA.436. On January 6, 1994, he was convicted of aggravated assault (committed on October 29, 1992), and sentenced to two years of deferred adjudication of guilt. ROA.436. On April 14, 1999, a Notice to Appear was issued, charging Mr. Funes with removability under 8 U.S.C. § 1227(a)(2)(A)(i) as an alien convicted of a crime involving moral turpitude within five years of admission for which a sentence of one year or longer may be imposed. ROA.436.

C. Before the Immigration Judge

Mr. Funes retained the services of attorney Jesus Macias to represent him in removal proceedings. Mr. Macias affirmatively misinformed Mr. Funes that he did not qualify for relief from removal under former section 212(c) of the Immigration and Nationality Act.

ROA.83. Instead, Mr. Macias applied for asylum and withholding of removal.

At a hearing on February 16, 2001, the IJ denied Mr. Funes' claims for asylum and withholding of removal. Although she explicitly held that his "offense was minimal and is not a particularly serious crime," ROA.264, she denied his claim for asylum because it was filed after the one-year deadline outlined in 8 U.S.C. § 1158(a)(2)(B). ROA.269. She also denied his claim for withholding of removal because she held that the "Respondent has not proven that his life or freedom would be threatened on account of one of the enumerated categories." ROA.269.

D. Administrative Appeal

On April 5, 2002, the Board of Immigration Appeals ("Board" or "BIA") affirmed the immigration judge's decision without opinion. ROA.242.

According to the Department of Homeland Security, Mr. Funes was deported on November 17, 2006. ROA.31.

E. Motion to Reopen

On October 6, 2014, Mr. Funes filed with the BIA a motion to reopen under *Matter of Lozada*, 19 I&N Dec. 638 (BIA), aff'd, 857 F.2d 10 (1st Cir. 1988), arguing that Attorney Macias committed ineffective assistance of counsel by misinforming him that he was not eligible for 212(c) relief. ROA.68-77. In response

to Mr. Funes' confrontation letter, Mr. Macias contended that he was correct that Mr. Funes did not qualify for 212(c) relief because he did not meet the seven-year lawful presence requirement. ROA.89. As Mr. Funes noted to the BIA, ROA.72, Mr. Macias failed to properly research this issue. Had he done so, he would have found that the period of continuous domicile for 212(c) relief ends when the order of removal is administratively final, not when the act rendering the alien deportable is committed. *See Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993) (*en banc*). Mr. Funes therefore held continuous domicile in the U.S. from January 30, 1990, until April 5, 2002, over 12 years.

On January 15, 2015, the BIA denied the Motion to Reopen under *Matter of Lozada*, applying the "departure bar" at 8 C.F.R. § 1003.2(d) as a result of Mr. Funes' deportation.

F. Judicial Review

Following the Board's denial of his motion to reopen, Mr. Funes timely filed a petition for review with the Fifth Circuit Court of Appeals.

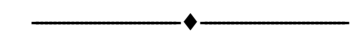
On August 4, 2015, the U.S. Attorney General filed a motion to dismiss the petition for lack of jurisdiction.

On August 18, 2015, Mr. Funes filed a brief in opposition to the motion to dismiss, arguing that under *Mata v. Lynch*, 135 S.Ct. 2150 (2015), the Board's

jurisdictional departure bar analysis was erroneous and impermissibly curtailed Mr. Funes' statutory right to have a motion to reopen considered on the merits.

On November 9, 2015, the panel granted the motion to dismiss without opinion.

On December 7, 2015, Mr. Funes filed a petition for rehearing *en banc*, noting a circuit split on the issue of whether the departure bar was applicable to untimely motions to reopen. The court dismissed the petition for rehearing on December 31, 2015, without opinion.



ARGUMENT FOR ALLOWING THE WRIT

A. Introduction

The question presented is specifically whether aliens who have been deported and who then file untimely motions to reopen their immigration proceedings are precluded as a jurisdictional matter from having their motions to reopen heard. The regulations at issue, commonly referred to as the "departure bar," have been invalidated to one extent or another in every circuit court of appeals to have taken up the issue. However, the reasoning and scope of those decisions differ dramatically with some courts holding that the departure is *ultra vires* in its entirety while others hold that it still maintains a certain limited effect. Petitioner submits that the departure bar is invalid in all circumstances and as such could

not have served as a jurisdictional bar to his motion to reopen made to the BIA.

B. Background

A regulation permitting an alien to file a motion to reopen or reconsider with the BIA has existed since 1940. 5 Fed.Reg. 3502, 3504 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.9-90.10 (1941)). In 1952, the Department of Justice issued a regulation barring the BIA from reviewing such a motion filed by a person no longer present in the United States. 17 Fed.Reg. 11469, 11475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2 (1953)).

Also in 1952, Congress passed the McCarran-Walter Act, which established the current Immigration and Nationality Act. Pub. L. No. 82-414, § 242(c), 66 Stat. 163, 210 (1952) (codified at 8 U.S.C. § 1252(c) (1952)). In 1961, Congress amended the law to provide courts of appeals with jurisdiction to review final orders of deportation through a petition for review. Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651 (1961). However, the 1961 amendment contained a post-departure provision paralleling the regulatory post-departure bar on motions to reopen/reconsider. Specifically, the 1961 amendment provided: "An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after issuance of the order." *Id*. The DOJ issued implementing regulations whereby it repromulgated the post-departure bar to motions to

reopen/reconsider. 27 Fed.Reg. 96, 96-97 (Jan. 5, 1962) (codified at 8 C.F.R. § 3.2 (1962)). In April 1996, the DOJ issued a regulation limiting aliens to one motion to reopen and one motion to reconsider and providing 90 and 30 days respectively for the alien to file each motion. 61 Fed.Reg. 18900, 18901-5 (Apr. 29, 1996) (codified at 8 C.F.R. § 3.2 (1997)).

Shortly thereafter, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, or "IIRIRA," which created a statutory right for the alien to file a motion to reconsider and a motion to reopen with the BIA. IIRIRA § 304(a)(3) (currently codified at 8 U.S.C. § 1229a(c)(6), (7)). Previously, as explained, such a right had existed only pursuant to regulation. Congress also codified in the statute some of the pre-existing regulatory limitations for such motions, including the substantive requirements for motions to reopen, the numeric limitation and time limits. *Id*. However, Congress did not codify or adopt the departure bar regulation. *See Dada v. Mukasey*, 554 U.S. 1, 14 (2008).

IIRIRA also repealed the departure bar to judicial review of petitions for review that Congress originally imposed in 1961. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a).

In 1997, the DOJ promulgated regulations implementing IIRIRA. Notwithstanding the fact that Congress had for the first time codified the right for an alien to file motions to reconsider and reopen with

the BIA and eliminated the post-departure bar for judicial review, the DOJ repromulgated the post-departure bar for motions to reconsider/reopen filed with the BIA. 62 Fed.Reg. 10312, 10321, 10331 (Mar. 6, 1997) (currently codified at 8 C.F.R. § 1003.2(d)). The departure bar regulation currently provides:

> 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).[1]

In 2008, the Board concluded that none of the statutory revisions repealed 8 C.F.R. § 1003.2(d), "that the departure bar rule remains in full effect" and that it continues to impose a "jurisdictional" bar on the Board's authority. *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 660 (BIA 2008).

[1] A nearly identical regulation at 8 C.F.R. § 1003.23(b) purports to limit the jurisdiction of immigration judges.

C. Circuit split

As previously stated, the departure bar has been severely limited in every circuit court of appeals to have addressed the issue.[2] The courts are nearly unanimous, for example, that the departure bar is *ultra vires* at least to the extent it conflicts with an alien's right to file a motion to reopen within 90 days of his final administrative order of removal. In other words, the courts agree that an alien, once deported, may at least use whatever remains of the 90-day statute of limitations in which to file a motion to reopen that the BIA or the Immigration Judge ("IJ") will have jurisdiction to hear.

The rationales for this conclusion fall into two basic groups: 1) courts holding that the departure bar regulations conflict with the statutory right to reopen provided by IIRIRA and do not pass the test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and 2) courts holding that the jurisdictional departure bar is an impermissible contraction by the BIA of its own jurisdiction under *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009).

The First, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held that the regulatory

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[2] Only the Eighth Circuit has yet to address the validity of the departure bar. *See Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011).

departure bar clearly conflicts with the right to reopen provided by IIRIRA, which contains no geographical restriction on the right to reopen, and therefore fails step one of *Chevron*. *See Santana v. Holder*, 731 F.3d 50, 57 (1st Cir. 2013); *Prestol Espinal v. Atty. Gen.*, 653 F.3d 213, 218 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1076-77 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 816 (10th Cir. 2012) (*en banc*); *Lin v. U.S. Atty. Gen.*, 681 F.3d 1236, 1240 (11th Cir. 2012).

On the other hand, the Second, Sixth, and Seventh Circuits have held that the BIA's application of the regulatory departure bar as a jurisdictional rule is an impermissible contraction of its own jurisdiction. *See Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) ("We hold that the BIA may not contract the jurisdiction that Congress gave it by applying the departure bar regulation, 8 C.F.R. § 1003.2(d), as suggested by the BIA in *Armendarez-Mendez*, to statutory motions to reopen."). *See also Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) ("*First*, no statute gives the Board purchase for disclaiming jurisdiction to entertain a motion to reopen filed by aliens who have left the country.") (emphasis original); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) ("As a rule about subject-matter jurisdiction, the departure bar is untenable.") (internal quotations removed).

Additionally, several courts have pointed out that the statutory and the jurisdictional rationales are essentially indistinguishable. *See Toor v. Lynch*, 789 F.3d 1055, 1057 n.1 (9th Cir. 2015); *Contreras-Bocanegra*, 678 F.3d at 816. *See also Santana*, 731 F.3d at 60 n.9 ("With our resolution of Perez Santana's statutory argument, there is no need to address the agency's view of its "jurisdiction." But we share the intuition of several of our sister circuits that the statutory and so-called jurisdictional "inquiries may not be altogether separate.") (citing *Contreras-Bocanegra* and *Prestol Espinal*). *See also Prestol Espinal*, 653 F.3d at 218 (relying on both rationales to find the departure bar invalid).

Among these two camps, some courts have held the departure bar to be entirely invalid as to all motions to reopen, and others have addressed in dicta whether the bar may remain valid as to untimely-filed motions to reopen. In *Santana*, the First Circuit declined to limit its holding invalidating the departure bar to timely-filed motions to reopen, stating:

> The government observes that Perez Santana's arguments "depend on the premise that [8 U.S.C. § 1229a(c)(7)] confers a statutory right to seek reopening," and argues that "such a right exists only insofar as an applicant complies with the statute's requirements for filing a motion to reopen." Thus, the government suggests, the post-departure bar remains validly applicable to motions filed after ninety days, 8 U.S.C. § 1229a(c)(7)(C)(i), or second or subsequent motions, id. § 1229a(c)(7)(A).

> Because such motions fall outside the statute, the argument goes, they must be construed as an appeal to the agency's sua sponte and extra-statutory ability to reopen proceedings, which is wholly a creature of agency discretion.
>
> Because the government's arguments have no effect on the outcome of this case, we decline to address them in this opinion.

Santana, 731 F.3d at 61.

To the contrary, the Third Circuit made no distinction between timely and untimely filed motions to reopen, holding simply that "the plain text of the statute leaves no room for the post-departure bar." *Prestol Espinal*, 653 F.3d at 218.

The Fourth Circuit also found the departure bar invalid in its entirety. *William*, 499 F.3d at 334 ("Having set forth the clear meaning of § 1229a(c)(7)(A), we believe it is evident that 8 C.F.R. § 1003.2(d), containing the post-departure bar on motions to reopen, conflicts with the statute by restricting the availability of motions to reopen to those aliens who remain in the United States. Therefore, we conclude that this regulation lacks authority and is invalid.").

The Fifth Circuit is the only court to have held affirmatively that the departure bar remains in effect if the alien's motion to reopen was untimely filed. *See generally, Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (*see* discussion *infra*). However, the court's logic – that motions to reopen filed pursuant to statute may

have different jurisdictional consequences than those filed pursuant to regulation – has also been cited with approval by the Second Circuit. *See Zhang v. Holder*, 617 F.3d 650, 661 (2d Cir. 2010) (deferring to the Board's construal of its jurisdiction in *In re Armendarez-Mendez*, in part because "there was no statutory basis" for the alien's late-filed motion to reopen).

D. The Position of the Fifth Circuit

The Fifth Circuit held in *Ovalles*, 577 F.3d at 296, that 8 C.F.R. § 1003.2(d) does not conflict with 8 U.S.C. § 1229a(c)(7) so long as the motion to reopen was filed out of compliance with the 90-day statute of limitations in § 1229a(c)(7). This is so, allegedly, because in that circumstance the alien does not have "the right to have his . . . untimely motion heard by the BIA." 577 F.3d at 296. The court subsequently affirmed in *Garcia-Carias v. Holder*, 697 F.3d at 265, that the regulation and statute are in conflict and that the regulation is therefore untenable under *Chevron*. *Garcia-Carias* nevertheless distinguished *Ovalles* because there the Board had denied Mr. Ovalles' motion to reopen on timeliness grounds. *Garcia-Carias*, 697 F.3d at 265. In other words, the Fifth Circuit's position that the departure bar remains valid as to untimely motions to reopen is based on the premise that an alien's motion to reopen is only "statutory" to the extent it is timely filed.

However, the U.S. Supreme Court in *Mata v. Lynch* resolved all doubt that an untimely or otherwise

defective motion to reopen does not implicate the Board's or the courts of appeals' jurisdiction to hear the motion.

The question proposed to the Court in *Mata* was whether the courts of appeals have jurisdiction to review the Board's denial of a motion to reopen which requests equitable tolling of the 90-day statute of limitations. 135 S.Ct. at 2154. However, the Court's response was not, as may have been expected, that equitable tolling could make a "non-statutory" motion into a "statutory" motion, thus conferring jurisdiction on the courts (with the implied logical premise that the courts only hold jurisdiction to review timely filed motions to reopen). Instead, the Court responded that the appellate courts hold jurisdiction to review denials of *all* motions to reopen filed by aliens, regardless of any underlying merits determinations *including those relating to timeliness*.

After first reaffirming its holding in *Kucana v. Holder*, 130 S.Ct. 827 (2010), that the courts of appeals have jurisdiction to review denials of motions to reopen, the Court stated:

> Nothing changes when the Board denies a motion to reopen because it is untimely – nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in

> some other respect, the courts have jurisdiction to review that decision.

Mata, 135 S.Ct. at 2154-55.

As such, the Court has established that there is no underlying connection between the 90-day statute of limitations of motions to reopen and the Board's or the courts' jurisdiction to hear the motion. The alien's "statutory right" to have his motion considered and to have the denial reviewed is not circumscribed by that deadline. As the Sixth Circuit held in *Pruidze*, "No doubt, the agency is not required – by statute or by this decision – to grant Pruidze's motion to reopen. But it is required – by both – to consider it." 632 F.3d at 239.

Therefore, contrary to *Zhang*, "the departure bar" does not "deprive[ ] the Board of authority to consider a motion to reopen that would otherwise be defective under the INA." 617 F.3d at 661. Consequently, the Fifth Circuit was incorrect that *Ovalles* had no "right to have his . . . untimely motion heard by the BIA." *Ovalles*, 577 F.3d at 296. The *Mata* Court continued:

> It follows, as the night the day, that the Court of Appeals had jurisdiction over this case. Recall: As authorized by the INA, Mata filed a motion with the Board to reopen his removal proceeding. The Board declined to grant Mata his proposed relief, thus conferring jurisdiction on an appellate court under *Kucana*. The Board did so for timeliness reasons, holding that Mata had filed his motion after 90 days had elapsed and that he was not entitled to equitable tolling. But as

> just explained, *the reason the Board gave makes no difference*: *Whenever the Board denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision.*

135 S.Ct. at 2155 (emphasis added). And although *Mata* is a case about judicial jurisdiction, there is no question that the statute which gives the court of appeals jurisdiction to review a denial of an untimely motion to reopen gives the Board jurisdiction to hear the motion in the first instance. *See Pruidze*, 632 F.3d at 237-38 ("[8 U.S.C. § 1229a(c)(7)(A)] is an empowering, not a divesting, provision, as it grants the Board authority to entertain a motion to reopen.").

It is not merely this Court's consistent use of the word "statutory" to describe Mata's untimely motion to reopen, *Mata*, 135 S.Ct. at 2153, which affirms that even untimely motions to reopen filed by aliens are filed pursuant to statute (not regulation), but the logical premise of the entire decision. For a court of appeals to claim it has no jurisdiction to review the denial of an untimely motion to reopen makes as little sense as saying it has no jurisdiction to review the denial of a motion to reopen which is not "supported by affidavits or other evidentiary material," 8 U.S.C. § 1229a(c)(7)(B), or of a motion to reconsider that does not "specify errors of law or fact," § 1229a(c)(6)(C), or that is not "supported by pertinent authority." *Id*. All of these are merits determinations. And as stated above, *Mata*'s holding that the untimeliness of an alien's motion to reopen

does not defeat his right to be heard on the merits is flatly inconsistent with the central logic of *Ovalles*, that "Ovalles could not avail himself of his statutory right to file a motion to reopen or for reconsideration because his motion before the Board was untimely." *Garcia-Carias*, 697 F.3d 265.

In short, the courts of appeals generally agree that the departure bar is invalid to the extent it conflicts with the alien's "statutory right" to file a motion to reopen. Where they disagree is where the "statutory right" ends. *Ovalles* determined that the departure bar is valid to the extent that it does not conflict with the statutory right to file a motion to reopen. But after *Mata*, the statutory right to file a motion to reopen *always* conflicts with the departure bar because that right is independent of the merits of the underlying motion, including its timeliness. Thus, the Fifth Circuit's attempt in *Garcia-Carias* to distinguish *Ovalles* was no distinction at all because Ovalles did have "the right to have his facially and concededly untimely motion heard by the BIA," *Ovalles*, 577 F.3d at 296, even if that relief might have been denied on the merits.

We also note that the direct effect of *Mata* was to implicitly overturn the Fifth Circuit's precedent decision in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008), and we believe *Ramos-Bonilla* and *Ovalles* are flipsides of the same coin. Both presumed that an alien had no statutory right to file an untimely motion to reopen and that the motion in question must therefore have been made pursuant to

regulation. *See Ramos-Bonilla*, 543 F.3d at 219. *Mata* established that this logic was error in *Ramos-Bonilla*, and the same applies to *Ovalles*.

Under *Mata*, therefore, the alien's "statutory right" to file a motion to reopen and receive a decision on the merits is not jurisdictionally circumscribed by the 90-day statute of limitations. As such, the Fifth Circuit erred in granting the motion to dismiss Mr. Funes' petition for review for lack of jurisdiction. We therefore ask the Court to grant this Petition for Certiorari and affirm the courts of appeals holding the departure bar is *ultra vires* in its entirety and cannot act to deprive the Board of jurisdiction to hear an untimely motion to reopen.

CONCLUSION

For the reasons explained above, Petitioner asks that his Petition for Certiorari be granted, and that he be given the opportunity to present his arguments before the Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 15-60075

CRISTIAN NICANOR FUNES,

Petitioner

v.

LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Nov. 9, 2015)

Before HIGGINBOTHAM, SMITH and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's opposed motion to dismiss the petition for review for lack of jurisdiction is Granted.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A090 889 950 – Houston, TX Date: JAN 15 2015

In re: CRISTIAN NICANOR FUNES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: Carrie Law
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on October 25, 2002, when we denied his first untimely motion to reopen his removal proceedings. The final administrative decision remains the Board's summary affirmance of the Immigration Judge's decision on April 5, 2002. This motion was submitted on October 6, 2014. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security opposes reopening on the grounds that the respondent has already been removed from the United States. The motion will be denied.

Notwithstanding that this motion is time and number barred, the respondent requests the Board

grant this motion under our authority to reopen proceedings sua sponte based on ineffective assistance rendered by prior counsel. 8 C.F.R. § 1003.2(a). We decline to exercise that authority in this case. We construe the departure bar in 8 C.F.R. § 1003.2(d) as a limitation on our discretionary sua sponte authority. To the extent that the respondent relies on unpublished decisions in other cases, we are not persuaded of the respondent's arguments (Motion at 4). The Board decides each case based on the particular factual and legal circumstances present in those cases. We note, in particular, that in the unpublished cases relied on by the respondent intervening case law potentially affected the aliens' removability and the validity of the underlying removal orders, whereas the respondent alleges only that he was eligible for relief at the time of his prior hearing.

ORDER: The motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 15-60075

CRISTIAN NICANOR FUNES,

Petitioner

v.

LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 31, 2015)

Before HIGGINBOTHAM, SMITH and OWEN, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH

CIR. R. 36), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
UNITED STATES CIRCUIT JUDGE