

PETITION FOR RULEMAKING TO AMEND REGULATIONS GOVERNING MOTIONS
TO REOPEN AND RECONSIDER REMOVAL PROCEEDINGS FOR NONCITIZENS WHO
DEPART THE UNITED STATES

SUBMITTED TO
THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

August 6, 2010

On Behalf of:

National Immigration Project of the National Lawyers Guild; American Immigration Council;
Post-Deportation Human Rights Project; Vakhtang Pruidze; Ramon Espinal Prestol; and Isela
Guadalupe Pinto-Reyes

I. STATEMENT OF PETITION

Petitioners (National Immigration Project of the National Lawyers Guild, American Immigration Council, Post-Deportation Human Rights Project Vakhtang Pruidze; Ramon Espinal Prestol; and Isela Guadalupe Pinto-Reyes) hereby petition the Department of Justice, Executive Office for Immigration Review to initiate a rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), to amend existing regulations governing the adjudication of motions to reopen and motions to reconsider immigration cases. The current regulations, 8 C.F.R. § 1003.2(d) and 8 C.F.R. § 1003.23(b)(1), bar a person from pursuing a motion to reopen or motion to reconsider with the Board of Immigration Appeals (BIA or Board) or the Immigration Courts after he or she has departed or has been removed from the United States. The Attorney General has ultimate authority over the administration of the Executive Office for Immigration Review (EOIR), which houses both the Board and the Immigration Courts, pursuant to 8 U.S.C. § 1103(g). EOIR has said that it welcomes written suggestions regarding potential revisions to the departure regulations.¹

II. SUMMARY OF PETITION

As organizations that advocate for the fair and just administration of immigration laws and as noncitizens who seek the right to have their claims adjudicated, petitioners have a direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to pursue motions to reopen and reconsider. The existing regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) do exactly this: they preclude noncitizens who depart or are removed from the United States from exercising their statutory right to pursue motions to reopen and motions to reconsider before the Board or immigration judges, respectively.

Striking the departure bar is consistent with Congress's intent when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). When it enacted this statute, Congress took the significant step of codifying the right to file motions to reopen and reconsider. Simultaneously, Congress repealed the departure bar to judicial review, evidencing its intention to permit noncitizens to file petitions for review after their departure. Furthermore, Congress also simultaneously enacted other provisions related to removal and voluntary departure, all of which are irreconcilable with the regulatory departure bar on motions to reopen and reconsider. Notably, since its codification, the Supreme Court twice has recognized that motions to reopen are an "important safeguard" for noncitizens.

The courts repeatedly have held that one of Congress's goals in enacting IIRIRA was to encourage prompt removal and departure from the United States upon the completion of immigration proceedings. Yet, the regulations have created an incentive for noncitizens with removal orders to ignore such orders and remain here – because complying with the order would mean foreclosing an opportunity to exercise their statutory right to file a motion to reconsider or reopen, a right that is especially compelling if factual or legal circumstances change. Thus,

¹ See AILA-EOIR Liaison Meeting Agenda (March 25, 2010) at 9-10 (question #8) available at <http://www.justice.gov/eoir/statspub/eoiraila032510.pdf> (last visited August 6, 2010).

contrary to Congress's intentions, the departure bar actually undermines the goal of encouraging compliance with removal orders.

Nothing in the INA supports EOIR's position that it lacks jurisdiction over motions to reopen after a person has departed. In fact, through IIRIRA, Congress has made clear that immigration judges and the BIA have authority to issue decisions in cases where the person is outside the United States. Thus, not only is EOIR's position regarding its own jurisdiction in conflict with the current immigration statute, but as the Supreme Court has said, it is unlawful for an agency to contract its own jurisdiction by regulation.

Further, over the past several years, the departure bar has been the subject of litigation in several courts of appeals, and now is the focus of two petitions for certiorari. At least two courts have invalidated the bar, one court has upheld it, and others have created exceptions to its application in certain situations. Challenges to the bar are pending in at least four circuits. Given the fractured state of the bar's application, there is an overriding lack of uniformity in its application. Striking the bar would restore uniformity.

It also would restore EOIR's authority to adjudicate motions to remedy deportations wrongfully executed, whether intentionally or inadvertently, by DHS. At present, immigration judges and the BIA are powerless to adjudicate motions to correct wrongful deportations, even under the most egregious circumstances.

In sum, the agency's historical justifications for the bar are even less compelling today than they have even been, given the post-IIRIRA developments mentioned above and the Supreme Court's recognition of the critical role motions to reopen and reconsider play in the fair and just administration of immigration law.

III. STATEMENT OF INTEREST

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and persons working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. The National Immigration Project budgets significant funds and staff time to providing technical assistance on motions to reopen and motions to reconsider to attorneys, legal representatives and noncitizens in removal proceedings. The National Immigration Project also has filed amicus briefs to assist the federal courts of appeals in examining the validity of the existing regulatory bar to review of motions to reopen or reconsider after a person departs the United States. Through its membership network and litigation efforts, the National Immigration Project is acutely aware of the problems faced by noncitizens outside the United States seeking reopening or reconsideration of their removal proceedings, which point to the need to amend the existing regulations.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process,

and constitutional and human rights in immigration law and administration. The Council's Legal Action Center has established itself as a leader in litigation, information-sharing, and collaboration among immigration litigators across the country. The Legal Action Center works with other immigrants' rights, civil rights, and human rights organizations and immigration attorneys throughout the United States to promote the just and fair administration of our immigration laws and the accountability of immigration agencies. The Legal Action Center budgets significant funds and staff time to working with legal advocates to protect the right to seek reopening and reconsideration of removal orders. The Legal Action Center has appeared as amicus curiae in numerous cases addressing the existing bar to motions to reopen and reconsider after a person has departed or has been removed from the United States.

The Post-Deportation Human Rights Project (PDHRP), based at the Center for Human Rights and International Justice at Boston College, offers a novel and multi-tiered approach to the problem of harsh and unlawful deportations from the United States. It is the first and only legal advocacy project in the country to undertake the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country.

The following individual petitioners are noncitizens who seek reopening or reconsideration and who have departed the United States either before or after the filing such motion:

Vakhtang Pruidze is a 26-year old native of Russia. He was admitted to the United States lawfully on August 15, 1997 and later became a lawful permanent resident. His parents, brother and wider family are all lawful permanent residents or U.S. citizens. An immigration judge ordered Mr. Pruidze removed based on a possession of marijuana offense under Michigan law, and the Board of Immigration Appeals affirmed. The Department of Homeland Security deported Mr. Pruidze on April 29, 2009. On May 12, 2009, the Michigan court vacated the conviction that formed the sole basis of Mr. Pruidze's removability. The Board of Immigration Appeals, however, refused to reopen his case. The only reason cited by the Board in its decision was 8 C.F.R. § 1003.2(d), the post departure bar, because Mr. Pruidze no longer was in the country.

Ramon Espinal Prestol is a 48 year old native of the Dominican Republic who, before being removed in 2009, had lived in the United States since his entry in 1982. He has three U.S. citizen children. Mr. Prestol was removed on November 24, 2009. He subsequently filed a motion to reconsider with the Board of Immigration Appeals, asserting that the Board erred by failing to address his legal arguments concerning his eligibility for relief. The Board denied the motion, citing the post departure bar 8 C.F.R. § 1003.2(d).

Isela Guadalupe Pinto-Reyes is a 40 year-old native of El Salvador and mother of four United States citizen children, one of whom is severely handicapped and another who is a minor. She immigrated to the United States fleeing the civil war in the late 1970s with her immediate family,

and obtained lawful residency in the United States at age 14. She has been the victim of severe domestic abuse, developed drinking problems; and yet she overcame those problems through alcohol treatment and counseling. She has substantial equities in the United States, including a U.S. citizen mother, lawful permanent resident father, and two U.S. citizen siblings. She was unrepresented at her first immigration court hearing, which resulted in an order of removal. Under current immigration laws, as a lawful permanent resident, she would not be removable. In its refusal to reopen Ms. Pinto-Reyes' case, the Board of Immigration Appeals stated that it was "sympathetic to the fact that the respondent has longstanding and significant ties to the United States" and that it regretted having to apply the departure bar to her case.

IV. LEGAL AUTHORITY TO AMEND THE REGULATIONS GOVERNING MOTIONS TO REOPEN AND RECONSIDER REMOVAL PROCEEDINGS

The Attorney General possesses the authority to define the power of the Board of Immigration Appeals and the Immigration Courts, and to set forth procedures for Immigration Courts.² The scope of the Attorney General's authority necessarily includes amending existing regulations to comport with new legislation enacted by Congress. Moreover, Congress expressly instructed the agency to promulgate regulations to implement its codification of the motion to reopen and motion to reconsider statutes. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress instructed that "[t]he Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date [*i.e.* by March 2, 1997]."³ Section 304 of IIRIRA, which codified motions to reopen and motions to reconsider, is located within Title III-A of that Act.

On January 3, 1997, the Department of Justice (DOJ) promulgated proposed rules, including amendments to existing rules governing reopening and reconsideration in removal proceedings.⁴ In doing so, DOJ acknowledged a previous Presidential directive that required the agency to conduct "a page-by-page review of all regulations and to eliminate or revise those that are outdated or otherwise in need of reform."⁵ Thus, DOJ was on notice that it was required "to eliminate or revise" outdated regulations governing motions to reopen or reconsider when it codified those motions. Yet, as discussed below, over commenters' objections to the departure bar, DOJ retained the departure bar when it issued interim rules.⁶ The decision to retain the departure bar is ripe for reconsideration.

² See 8 U.S.C. § 1103(g)(2) (stating that the Attorney General can "establish such regulations" and "review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out" the immigration laws).

³ IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 309(b) (Sept. 30, 1996).

⁴ See 62 Fed. Reg. 444 (January 3, 1997).

⁵ See 62 Fed. Reg. 444 (January 3, 1997) ("In addition, this rule incorporates a number of changes which are a part of the Administration's reinvention initiative, mandated in a directive signed by the President on March 4, 1995, requiring all heads of departments and agencies to conduct a page-by-page review of all regulations and *to eliminate or revise those that are outdated or otherwise in need of reform*") (emphasis added).

⁶ See 62 Fed. Reg. 10312, 10321 (March 6, 1997).

V. LEGISLATIVE AND REGULATORY BACKGROUND OF THE REGULATORY DEPARTURE BAR ON ADJUDICATION OF MOTIONS TO REOPEN AND RECONSIDER

The McCarran-Walter Act of 1952 established the structure of present immigration law, 8 U.S.C. § 1001 et seq.⁷ Pursuant to that Act, final orders of deportation were reviewable via a petition for a writ of habeas corpus.⁸ The former Immigration and Naturalization Service, which then acted as both the prosecutor and adjudicator of immigration cases, promulgated a regulation providing for motions to reopen and motions to reconsider before the BIA.⁹ That regulation barred the BIA from reviewing a motion filed by a person who had departed the United States.¹⁰ From the outset, the BIA understood this regulation as being jurisdictional.¹¹

In 1961, Congress amended the McCarran-Walter Act and, *inter alia*, gave the circuit courts jurisdiction to review final orders of deportation through a petition for review.¹² The 1961 judicial review provision paralleled the language of the motion regulation and barred the federal courts from reviewing deportation and exclusion orders where the person had departed the country after issuance of the order.¹³ Three months after the enactment of the 1961 laws, the DOJ issued implementing regulations in which it re-promulgated the departure bar to motions.¹⁴

From the early 1960s until 1996, the 1961 version of the judicial review provision barring review after departure remained unchanged. The statute also provided for an automatic stay of deportation while the petition was pending.¹⁵ Similarly, the language of the departure bar on

⁷ Pub. L. No. 82-414, 66 Stat. 163 (March 27, 1952) (codified at 8 U.S.C. §§ 1101-1524 (1953)).

⁸ 8 U.S.C. § 1252(c) (1953).

⁹ In 1940, the “Board of Review of the Immigration and Naturalization Service” was transferred to the Office of the Attorney General, and its name was changed to the “Board of Immigration Appeals.” See 5 Fed. Reg. 3502, 3503 (September 4, 1940).

¹⁰ 17 Fed. Reg. 11,469, 11,475 (December 19, 1952) (codified at 8 C.F.R. § 6.2). The regulatory right to file a motion to reopen or reconsider existed since 1940, but the original version of the regulation did not contain a departure bar. 5 Fed. Reg. at 3504.

¹¹ See *Matter of G- y B-* 6 I&N Dec. 159 (BIA 1954).

¹² Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651 (1961).

¹³ See *id.* (creating former 8 U.S.C. § 1105a(c) (1962)). Former 8 U.S.C. § 1105a(c) reads:

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

¹⁴ The rule re-designated 8 C.F.R. § 6.2 as 8 C.F.R. § 3.2 (1962). See 27 Fed. Reg. 96, 96-97 (January 5, 1962).

¹⁵ 8 U.S.C. § 1105a(a)(3) (1995).

motions filed with the BIA by individuals outside the country also remained unchanged.¹⁶ In 1983, DOJ created the immigration judge (IJ) position – assuming functions previously performed by the Immigration and Naturalization Service – and combined the BIA with the immigration judges to comprise a new agency, the Executive Office for Immigration Review.¹⁷ DOJ subsequently promulgated regulations governing procedures for immigration judges to adjudicate motions to reopen.¹⁸

Through the enactment of IIRIRA, Congress adopted numerous substantive and procedural changes to the immigration laws. Most significantly, Congress, for the first time, codified the right to file a motion to reopen and the right to file a motion to reconsider.¹⁹ The motion to reopen statute, 8 U.S.C. § 1229a(c)(7), provides, “An alien may file one motion to reopen proceedings under this section” Likewise, the motion to reconsider statute, 8 U.S.C. § 1229a(c)(6), provides, “[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States.” As the Supreme Court held, the plain language affords noncitizens both the right to file a motion to reopen [and reconsider] and the right to have it adjudicated once it is filed.²⁰

Also through IIRIRA, Congress repealed the entire judicial review scheme of the Immigration and Nationality Act, including the departure bar to judicial review and the automatic stay of deportation that then existed, and replaced it with new judicial review provisions.²¹ Significantly, Congress did not reenact a departure bar to judicial review.²²

¹⁶ However, the departure regulation later was moved to then newly-created subsection (d). See 61 Fed. Reg. 18900 (April 29, 1996) (creating 8 C.F.R. § 3.2(d) (1997)).

¹⁷ See EOIR Background Information, <http://www.usdoj.gov/eoir/background.htm> (last visited August 6, 2010).

¹⁸ See 52 Fed. Reg. 2931 (January 29, 1987) (codified at 8 C.F.R. § 3.22 (1988)). DOJ redesignated § 3.22 as § 3.23 in 1992. See 57 Fed. Reg. 11568 (April 6, 1992).

¹⁹ IIRIRA, § 304 (adding new 8 U.S.C. § 1229a(c)(5)&(6)(1997) (recodified as 8 U.S.C. §§ 1229a(c)(6) and 1229a(c)(7) by REAL ID Act of 2005, Pub. L. No. 109-13, § 101(d), 119 Stat. 231 (May 11, 2005)). Congress also codified several of the pre-existing regulatory requirements for motions to reopen and reconsider, including numeric limitations, filing deadlines, and substantive and evidentiary requirements for motions. *Id.*; 8 C.F.R. §§ 3.2(b) and 3.2(c) (1997).

²⁰ *Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008).

²¹ IIRIRA § 306 (repealing former 8 U.S.C. § 1105a and enacting new 8 U.S.C. § 1252).

²² As discussed in section VI.A of this petition, Congress also consolidated judicial review of final removal, deportation, and exclusion orders with review of motions to reopen and motions to reconsider. IIRIRA § 306(a) (enacting 8 U.S.C. § 1252(b)(6)). Furthermore, Congress adopted a 90 day period for the government to deport a person who has been ordered removed. IIRIRA § 304(a)(3) (adding new 8 U.S.C. § 1231(a)(1)). Finally, Congress replaced the pre-existing voluntary departure provision and in doing so limited the voluntary departure period to 60 or 120 days. IIRIRA § 304(a)(3) (replacing pre-existing voluntary departure provision with 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)). These changes took effect on April 1, 1997. IIRIRA § 309(a).

Nonetheless, DOJ, in promulgating regulations implementing IIRIRA, retained the departure bar to motions to reopen and motions to reconsider filed with the BIA.²³ DOJ also extended the regulatory departure bar to motions filed with immigration judges.²⁴

In 2003, the departure regulations were moved to a new section of title 8 of the Code of Federal Regulations, without change to their content.²⁵ The current version of the BIA regulation reads:

A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.²⁶

The language of the departure bar governing motions before immigration judges is nearly identical to the language of the departure bar governing motions filed with the BIA. 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.²⁷

VI. THE ATTORNEY GENERAL SHOULD AMEND THE MOTION TO REOPEN AND MOTION TO RECONSIDER REGULATIONS BY STRIKING THE DEPARTURE BAR IN ORDER TO MAKE THE REGULATIONS CONSISTENT WITH THE IMMIGRATION AND NATIONALITY ACT

A. Striking the departure bar would make the motion to reopen and reconsider regulations consistent with Congress's codification of the rights to file a motion to reopen and a motion to reconsider, the repeal of the departure bar to judicial review and other provisions concurrently enacted through IIRIRA.

²³ See 62 Fed. Reg. 10312 (March 6, 1997).

²⁴ See 62 Fed. Reg. at 10321, 10331 (codified at former 8 C.F.R. §§ 3.2(d) and 3.23(b)(1)(1997)).

²⁵ 68 Fed. Reg. 9824, 9830 (February 28, 2003) (redesignating 8 C.F.R. §§ 3.2(d) and 3.23(b)(1) as 8 C.F.R. §§ 1003.2 and 1003.23).

²⁶ 8 C.F.R. § 1003.2(d).

²⁷ 8 C.F.R. § 1003.23(b)(1).

The departure regulations now conflict with the motion to reopen statute and the motion to reconsider statute. The motion to reopen statute provides, “An alien may file one motion to reopen proceedings under this section...” and the motion to reconsider statute provides, “[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States.”²⁸ As the Supreme Court held in *Dada v. Mukasey*, the plain language affords noncitizens both the right to file a motion to reopen [and reconsider] and the right to have it adjudicated once it is filed.²⁹ In providing these rights, the statutes do not distinguish between individuals abroad and those in the United States – both groups are encompassed in these straightforward, all-inclusive provisions.³⁰

The Supreme Court in *Dada* also emphasized the significance of Congress’s codification of the right to file a motion to reopen.³¹ Significantly, the Court found that the statutory right to file a motion to reopen is an important safeguard in removal proceedings and, absent explicit limiting language in the statute, individuals must be permitted to pursue reopening:

The purpose of a motion to reopen is to ensure a proper and lawful disposition. *We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law.* See 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C) (barring aliens who have committed, *inter alia*, aggravated felonies or terrorism offenses from receiving voluntary departure); § 1229c(b)(1)(B) (requiring an alien who obtains voluntary departure at the conclusion of removal proceedings to demonstrate “good moral character”). *This is particularly so when the plain text of the statute reveals no such limitation.*³²

²⁸ 8 U.S.C. § 1229a(c)(7)(A); 8 U.S.C. § 1229a(c)(6)(A).

²⁹ 128 S. Ct. 2307, 2318-19 (2008). Much of the case law discussed in this petition addresses the motion to reopen statute – possibly a reflection of the greater number of motions to reopen filed as compared to motions to reconsider. However, because the departure bar applies equally to both types of motions, the regulatory and legislative histories of these motions is nearly identical, and the arguments against the bar are inextricably intertwined, the case law on motions to reopen is applicable to motions to reconsider.

³⁰ The Fourth Circuit concluded that the plain language of the motion to reopen statute expressly permits noncitizens to pursue a motion post departure, noting that “[w]e 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.” *William v. Gonzales*, 499 F.3d 329, 322 (4th Cir. 2007).

³¹ *Dada*, 128 S. Ct. at 2316 (“It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien”); *id.* at 2316 (“[T]he statutory text is plain insofar as it guarantees to each alien the right to file ‘one motion to reopen proceedings under this section’”); *id.* at 2319 (“We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen”).

³² *Dada*, 128 S. Ct. at 2318 (emphasis added). See also *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada* and reaffirming that a motion to reopen is an “important safeguard”).

Thus, the Supreme Court confirms that the agency may not infringe on the “important safeguard” of a motion to reopen when the “the plain text of the statute reveals no such limitation.”³³ The departure regulations, however, do exactly that: they limit the availability of pursuing a motion post departure even though the statute does not include such a limitation.

Additionally, Congress made clear its intent to permit motions after a person’s departure by choosing *not to codify* the departure regulation in IIRIRA. When Congress codified the motion to reopen and the motion to reconsider in 1996, it codified numerous other preexisting regulatory limitations on motions.³⁴ Congress is presumed to have enacted the motion statutes knowing the pre-IIRIRA regulatory requirements, limitations and bars on motions to reopen and reconsider.³⁵ As the Supreme Court has aptly instructed, “do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”³⁶ Thus, Congress’s deliberate omission of the departure bar demonstrates its intent to permit motions after departure.

Likewise, Congress’s simultaneous enactment of other provisions related to judicial review, removal, and voluntary departure evidences its intent to permit noncitizens to file motions after their departure.³⁷ Significantly, Congress explicitly repealed the former judicial review provision, which had precluded judicial review of deportation orders after the person departed the U.S.³⁸ Although the departure regulations address motions to reopen and reconsider and not judicial review, it is telling that Congress repealed the former departure bar to judicial review,

³³ See *Dada*, 128 S. Ct. at 2318.

³⁴ Specifically, it codified:

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

³⁵ See *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988).

³⁶ *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

³⁷ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”) (internal citations omitted).

³⁸ See IIRIRA § 306(b) (repealing 8 U.S.C. § 1105a(c) (1996)).

which contained the same concept and similar language. Indeed, at least one court has noted that the departure bar “operates parallel to 8 U.S.C. § 1105a(c).”³⁹ If Congress repealed the judicial review departure bar to allow petitions for review from outside the United States, it logically follows that Congress’s refusal to codify the regulatory departure bar to motions also was intended to allow motions from outside the United States.

Second, Congress adopted a 90 day period for the government to deport a person who has been ordered removed.⁴⁰ Congress simply could not have intended to give noncitizens 90 days to file a motion to reopen while requiring removal within that same 90 day time period if removal automatically withdraws the motion to reopen.⁴¹

Third, Congress amended the voluntary departure statute to limit the voluntary departure period to 60 or 120 days.⁴² Congress could not have intended to grant 60 or 120 days in which to voluntarily depart if such departure would strip noncitizens of their statutory right to pursue a motion to reopen.⁴³

Fourth, Congress provided for judicial review of motions to reopen and specified that review of such motions shall be consolidated with review of the final order of removal.⁴⁴ It is inconceivable that Congress would permit judicial review of the denial of a motion to reopen, yet, by virtue of the departure bar, preclude many people from exercising the statutory right to seek such review.⁴⁵

³⁹ See *Wiedersperg v. INS*, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990).

⁴⁰ IIRIRA § 304(a)(3) (codified at 8 U.S.C. § 1231(a)(1)).

⁴¹ See *Martinez Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (“The only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien's removal within ninety days is to hold, consistent with the other provisions of IIRIRA, that the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.”)

⁴² See IIRIRA § 304(a)(3) (codified at 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)).

⁴³ The Supreme Court in *Dada* held that one way to preserve this right is to permit a person to withdraw a voluntary departure request. See *Dada*, 128 S. Ct. at 2319-20. Significantly, however, the Court recognized the “untenable conflict” between the voluntary departure and motion to reopen rules, and noted that a “more expeditious solution” would be to allow motions post departure. *Id.* at 2320. Despite the Court’s clear doubts about the validity of the departure regulations, it could not act upon them because the departure regulations were not challenged in that case. *Id.* See also Transcript of Oral Argument at 8, *Dada v. Mukasey*, 128 S. Ct. 329 (No. 06-1181) (Chief Justice Roberts commenting, “if I thought it important to reconcile the two [motion to reopen and voluntary departure statutes], I would be much more concerned about that interpretation -- that the motion to reopen is automatically withdrawn [upon departure] -- than I would suggest we start incorporating equitable tolling rules and all that”).

⁴⁴ See IIRIRA § 306(a)(2) (codified at 8 U.S.C. § 1252(b)(6)).

⁴⁵ Where a person is removed while the petition for review of a removal order is pending, but before the BIA has adjudicated the motion to reopen, the departure bar forecloses judicial review over the motion. Similarly, even where DHS does not remove the person until after the BIA adjudicates the motion, if the circuit court grants the petition for review and remands the

Thus, not only is the departure regulation in conflict with the subsequently enacted motion to reopen and reconsider statutes, but it is irreconcilable with Congress's simultaneous enactment of these other provisions.

B. Striking the departure bar would further Congress's goal of encouraging prompt removal and departure from the United States.

The Supreme Court, has recognized that one of Congress's main goals in enacting IIRIRA – in particular its removal of the departure bar to judicial review – was to expedite physical departure from the United States.⁴⁶ Striking the departure bar would promote this objective whereas retaining it actually undermines it by putting people who fail to comply with a final order or take voluntary departure in a better situation than those who are removed and those who depart promptly. Under the existing regulations, persons who self-deport – either knowingly or unknowingly – and persons who comply with their removal orders or voluntary departure orders are categorically prohibited from seeking reopening or reconsideration of their proceedings no matter how compelling the reason. However, individuals who do not comply with a removal order can seek reopening or reconsideration.⁴⁷ Thus, striking the departure bar would be consistent with – and would actually promote – one of IIRIRA's objectives of encouraging prompt physical removal or departure from the United States.

C. Striking the bar is necessary to conform to Supreme Court and other precedent decisions addressing agency jurisdiction.

motion to the agency, the BIA presumably would invoke the departure bar and dismiss the motion despite the court's favorable ruling.

⁴⁶ See IIRIRA § 306(b) (repealing former 8 U.S.C. § 1105a, including subsection (a)(3)'s stay of deportation upon service of petition for review and subsection (c)'s departure bar); *William*, 499 F.3d at 332 n.3 (“[O]ne of IIRIRA’s aims is to expedite the removal of aliens from the country while permitting them to continue to seek review . . . from abroad”); *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009) (“IIRIRA inverted these provisions to allow for more prompt removal. First, Congress lifted the ban on adjudication of a petition for review once an alien has departed”); *Martinez Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010) (citing *Nken*, finding “IIRIRA ‘inverted’ certain provisions of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad.”).

⁴⁷ While the 90 day deadline for filing motions to reopen generally prevents the filing and granting of late-filed motions, there are numerous exceptions to the filing deadline, including motions seeking to reopen and rescind an in absentia removal order, 8 U.S.C. § 1229a(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, 8 U.S.C. § 1229a(c)(7)(C)(ii). In addition, the courts have held that the motion deadlines are subject to equitable tolling. See *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); but see *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

EOIR had taken the position that it lacks “jurisdiction” over motions filed by persons who have departed or been deported. Most recently, the agency articulated this position in the BIA’s published decision *Matter of Armendarez*.⁴⁸ In that case, the BIA reasoned that the physical removal of a person is a “transformative event” that results in “nullification of legal status.”⁴⁹ The BIA went on to say that only the Department of Homeland Security and the Department of State have responsibilities related to noncitizens outside the United States and thus “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid.”⁵⁰

However, the BIA’s statements are unfounded. As the Supreme Court has made clear in a series of post-IIRIRA decisions, the BIA does in fact, indeed must, retain jurisdiction over cases where a person has been removed.⁵¹

The Supreme Court also has made clear that it is unlawful for an agency to contract its own jurisdiction by regulation.⁵² For that reason, the Seventh Circuit Court of Appeals has invalidated the departure regulation.⁵³ Speaking specifically about the INA’s grant of authority with respect to motions, the Seventh Circuit explained:

The Immigration and Nationality Act authorizes the Board to reconsider or reopen its own decisions. It does not make that step depend on the alien’s presence in the United States. Until 1996 deportation proceedings (as they were then called), and judicial review of deportation orders, automatically halted when the alien left this nation . . . [IIRIRA] repealed [the former judicial review provisions precluding judicial review post departure]. One would suppose that this change also pulled the rug out from under *Matter of G- y B-* and similar decisions, based as they were on the earlier norm that departure ended all legal proceedings in the United States, though the Board nonetheless held in *Matter of Armendarez-Mendez* that the 1996 repealer did not affect motions to reconsider or reopen.

The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks “jurisdiction”—which is to say, adjudicatory competence, see *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243, 176 L. Ed. 2d 18 (2010)

⁴⁸ 24 I&N Dec. 646 (BIA 2008) (holding that departure bar imposes a limit on the agency’s jurisdiction).

⁴⁹ *Id.* at 655-56.

⁵⁰ *Id.* at 656.

⁵¹ *Carachuri-Rosendo v. Holder*, 560 U.S. ___, 130 S. Ct. 2577, 177 L. Ed. 2d 68, 82 n.8 (2010); *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006); *Nken*, 129 S. Ct. at 1761 (“Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return”).

⁵² *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

⁵³ *Marin-Rodriguez v. Holder*, No. 09-3105, 2010 U.S. App. LEXIS 14385 (7th Cir. July 14, 2010).

(collecting cases)-to issue decisions that affect the legal rights of departed aliens.⁵⁴

The BIA's decision in *Matter of Bulnes*,⁵⁵ further underscores the misunderstanding that serves as the basis for its jurisdictional holding in *Matter of Armendarez*. In *Bulnes*, the BIA found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the U.S. It is entirely inconsistent for the BIA to say that removal or departure is a "transformative event" barring a motion to reopen in *Armendarez* and then essentially ignore this fact in *Bulnes* and allow a person who departed the U.S. to pursue a motion to reopen.⁵⁶

Thus, the BIA's conclusion that it lacks jurisdiction over motions post departure is indefensible. In order to bring the agency in line with Supreme Court, Seventh Circuit and even its own precedent, EOIR must strike the departure bar.

D. Striking the departure bar from the regulations would create uniformity in adjudication of motions to reopen and reconsider.

The current law governing the departure bar on motions to reopen or reconsider lacks uniformity. As a result, whether the departure bar applies varies greatly depending on numerous factors including the location of the person's immigration proceedings, the basis for reopening, and whether the case sought to be reopened was conducted in absentia.

If EOIR completes removal proceedings within the jurisdiction of the Fourth or Seventh Circuit Courts of Appeals, the departure bar does not apply because those courts have invalidated the regulation.⁵⁷ If EOIR conducts removal proceedings within the jurisdiction of the Ninth Circuit Court of Appeals, an immigration judge and the Board must delve further into the facts to assess whether the departure bar applies in light of the many decisions addressing the bar in that circuit. For example, if the movant was forced to depart before the motion could be adjudicated, the departure bar does not apply.⁵⁸ If a person seeks reopening based on a vacated conviction which

⁵⁴ See *id.* at *7-8. It is undisputable that Congress vested immigration judges and the Board of Immigration Appeals with jurisdiction over motions to reopen and reconsider in removal proceedings. See 8 U.S.C. §§ 1229a (discussing authority of immigration judges); 1101(a)(47)(B) (referring to the Board of Immigration Appeals in defining final order of deportation)). See also, 8 U.S.C. § 1242(b)(6) (providing for judicial review of motions to reopen and reconsider in the courts of appeals).

⁵⁵ 25 I&N Dec. 57 (BIA 2009).

⁵⁶ The Seventh Circuit noted the discrepancies between *Armendarez* and *Bulnes*. See *Marin-Rodriguez*, 2010 U.S. App. LEXIS 14385 at *11-12.

⁵⁷ *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (finding departure bar regulation conflicts with motion to reopen statute); *Marin-Rodriguez v. Holder*, No. 09-3105, 2010 U.S. App. LEXIS 14385 (7th Cir. July 14, 2010) (finding EOIR impermissibly contracted its own jurisdiction).

⁵⁸ See *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). In *Martinez Coyt*, the court held that the regulation's directive that motions to reopen are withdrawn after a person departs the U.S. is invalid as applied to a person who has been "involuntarily removed." *Martinez Coyt*,

formed a key part of the proceeding, the departure bar also would not apply.⁵⁹ Finally, if the movant filed the motion after removal proceedings were completed and after departure, it is unclear whether the courts of appeals would find that the departure bar does not apply.⁶⁰

If EOIR completes removal proceedings outside the Fourth, Seventh, or Ninth Circuits, the Board of Immigration Appeals applies the departure bar.⁶¹ In all circuits, except the Tenth Circuit, the departure bar remains subject to challenge.⁶² Indeed, challenges to the regulation are before at least four circuit courts and the Supreme Court.⁶³ Petitioners expect the number of challenges before the circuit courts to increase. Moreover, unless the departure bar is amended, we anticipate the issue increasingly will be raised in petitions for certiorari to the Supreme Court.

Moreover, until recently, DHS and many immigration judges took the position that the departure bar applied to motions to reopen to rescind in absentia orders, even though those motions are filed pursuant to a separate statute, 8 U.S.C. § 1229a(b)(5)(C). The Board clarified that the departure bar does not apply in this situation when the basis for the motion is lack of notice of the hearing.⁶⁴ Also, in an unpublished case, at least one panel of the BIA has found that the

593 F.3d at 907. The Court reasoned that the regulation “completely eviscerates” the statutory right to file a motion to reopen. *Id.* Further, the only way to harmonize the statutory right to file a motion to reopen within 90 days and the statutory requirement to effectuate the removal within 90 days is to find that “the physical removal of a petitioner by the United States does not preclude the petitioner from filing a motion to reopen.” *Id.* This reasoning applies equally to a situation where a person files a motion to reopen after he or she departs or is deported. However, the court has not explicitly ruled on this issue to date.

⁵⁹ See *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).

⁶⁰ In *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), the Ninth Circuit read the departure bar regulations as not applying to individuals who file a motion to reopen after removal proceedings are completed. Subsequently, in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the BIA rejected the court’s reading of the regulation and said that it would not follow *Lin* and *Reynoso-Cisneros*. The Ninth Circuit has not reconsidered its case law in light of the BIA’s decision.

⁶¹ See *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).

⁶² See *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156-57 (10th Cir. 2009) (upholding bar). See also *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (refusing to consider challenge where motion was not timely filed); *Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (noting that the court had not considered whether the regulatory bar violated the motion to reopen statute).

⁶³ See, e.g., *Prestol Espinol v. Attorney General*, 10-1473 (3d Cir. docketed Feb. 17, 2010); *Pruidez v. Holder*, 09-3836 (6th Cir. docketed July 9, 2009); *Marroquin v. Holder*, 10-1846 (8th Cir. docketed April 16, 2010); *Reyes-Torres v. Holder*, 09-70214, 08-74452 (9th Cir. docketed Jan. 21, 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), *petition for cert. filed* (May 7, 2009) (09-1367); *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009) *petition for cert. filed* (May 12, 2009) (09-1378).

⁶⁴ See *Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009). Moreover, as discussed above in section VI.C., the BIA’s decision in *Bulnes* calls into question the reasonableness of its

departure bar does not preclude an IJ from adjudicating a post departure motion to reopen to rescind an in absentia order based on exceptional circumstances (ineffective assistance of counsel).⁶⁵ However, the lack of precedent on this issue renders the application of the departure bar in the in absentia context subject to different interpretations by different Board panels.

Thus, it is clear that if and when the departure bar applies to a motion to reopen or reconsider is neither uniform nor consistent. This results in different standards for different motions depending on the type of motion filed, the circuit law governing the immigration judge and the Board, and the basis of the motion. The agency should strike the departure bar to preserve uniformity in adjudication of motions to reopen and reconsider.

E. Striking the departure bar would restore EOIR’s adjudicatory authority and would promote transparency.

Striking the departure bar would restore the IJs’ and BIA’s adjudicatory authority and promote transparency. At present, EOIR is powerless to remedy wrongful deportations executed by the Department of Homeland Security.

There are numerous circumstances where a person is afforded a stay of removal while a motion is pending. For example, deportation is automatically stayed while a motion to reopen an in absentia removal or deportation proceeding is pending at the immigration court.⁶⁶ Similarly, battered spouses, children and parents who file a motion to reopen pursuant to 8 U.S.C. § 1229a (c)(7)(C)(IV) are entitled to a stay while the motion is pending. Yet, DHS sometimes violates the stay and unlawfully departs a person while these automatic stays are in place.⁶⁷ Likewise, DHS sometimes executes a deportation order despite the fact that either an IJ or the Board of Immigration Appeals has issued a stay,⁶⁸ or in violation of the person’s statutory and regulatory

decision in *Armendarez*. In *Armendarez*, the BIA finds that “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid.” *Matter of Armendarez*, 24 I&N Dec. at 656. Yet in *Bulnes*, the BIA found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the U.S.

⁶⁵ *In re Martin Becerra-Sanchez*, A090 637 609, 2010 WL 1747423 (BIA April 12, 2010).

⁶⁶ 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. §§ 1003.23(b)(4)(ii) (removal proceedings); 1003.23(b)(4)(iii)(C) (deportation proceedings).

⁶⁷ Regulations also provide for automatic stays of deportation during the 30 day time period for filing an appeal to the Board (unless waived), while a BIA appeal is pending, or while an appeal is before the Board by way of certification. 8 C.F.R. § 1003.6(a). *See, e.g., Madrigal v. Holder*, 572 F.3d 239, 245-46 (6th Cir. 2009) (DHS wrongly deported individual in violation of automatic stay).

⁶⁸ *See* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v). *See, e.g., Singh v. Waters*, 87 F.3d 346, 349-350 (9th Cir. 1996) (holding that petitioner was unlawfully deported in violation of his statutory right to counsel where INS executed deportation order even though an immigration judge had granted a motion to reopen petitioner’s deportation proceedings and issued a stay of deportation).

right to counsel.⁶⁹ Detained immigrants also may face situations where a postdeparture motion is necessary to remedy an error by DHS.⁷⁰

While wrongful deportations are not the norm, they do occur. Yet, if DHS wrongly deport a person in violation of a stay or otherwise – regardless whether it was intentional or by mistake – the departure regulations prevent EOIR from adjudicating a motion and remedying the situation, no matter how meritorious it is.

In effect, the departure bar allows DHS to unilaterally divest noncitizens of their right to pursue a motion to reopen or reconsider before the BIA or IJ. When this occurs, the statutory right to file a motion to reopen or reconsider effectively is rendered meaningless without federal court intervention.⁷¹ As such, the departure bar frustrates the ability of the Board and IJs to take actions that are “appropriate and necessary for the disposition of the case.”⁷² Thus, striking the departure bar is necessary to restore the EOIR’s adjudicatory authority over motions to reopen or reconsider.

Striking the departure bar also would ensure that – as a practical matter – noncitizens are not deprived of the opportunity to file motions to reopen and reconsider and stay motions. DHS may deport a person as soon as the removal order becomes final as defined in 8 U.S.C. § 1101(a)(47). That is, DHS may deport a person even before he or she: (1) receives notice of the decision; (2) has a reasonable opportunity to assess whether either a motion to reconsider or motion to reopen is a viable option; and (3) has a reasonable opportunity to file a stay request with EOIR and have

⁶⁹ See, e.g., *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977) (finding that deportation violated statutory and regulatory right to counsel where INS failed to provide counsel with notice of intent to deport and deported petitioner without an opportunity to contact counsel); *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984) (holding that deportation violated statutory right to counsel where INS executed deportation without notice to counsel).

⁷⁰ For example, DHS may detain a person granted voluntary departure with safeguards longer than the time period granted by the IJ or BIA. Likewise, if a detainee is granted voluntary departure (without safeguards) but the immigration judge denies bond or the immigration judge sets a bond the detainee cannot afford to post, DHS’ detention of the detainee prevents a timely departure within the voluntary departure period. In these situations, the detainee’s voluntary departure order will automatically convert to a removal order, 8 C.F.R. § 1240.26(d), and he or she will face a statutory penalty under 8 U.S.C. § 1229c(d) for overstaying the voluntary departure period. But for the departure bar, the Board or an IJ could remedy the removal order and penalties caused by DHS’s refusal to allow the person to timely depart within the voluntary departure period. For example, the Board could reopen proceedings to rescind and reissue its decision to accommodate compliance with the voluntary departure order.

⁷¹ And, even if the noncitizen has the benefit of counsel and access to the federal courts, some federal courts have been unwilling to remedy unlawful deportations. *But see Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) (rejecting Ninth Circuit line of cases allowing for courts to exercise jurisdiction over unlawfully executed deportation orders); *Baez v. INS*, 41 F.3d 19, 23-24 (1st Cir. 1994) (same); *Roldan v. Racette*, 984 F.2d 85, 90 (10th Cir. 1993) (same); *Saadi v. INS*, 912 F.2d 428 (10th Cir. 1990) (per curiam).

⁷² 8 C.F.R. §§ 1003.1(d)(1)(ii); 1003.10(b).

it adjudicated. Striking the departure bar would help ensure fair play in the administrative process by allowing the noncitizen to exercise his or her statutory right to a motion to reconsider or reopen when DHS removes the person before these legal options have been explored or pursued.

Finally, striking the departure would promote transparency in the immigration system by allowing the adjudication of motions to reopen and reconsider based on DHS's unlawful actions. Eliminating the departure bar promotes exposure of such actions and restores the EOIR's ability to remedy them without forcing noncitizens, many of whom lack counsel, the financial resources, and knowledge of the legal system, to seek redress in the federal courts.

F. The agency's justification for retaining the departure bar after IIRIRA's enactment was not reasonable at the time and is even less reasonable now.

The agency did not offer any practical reason for retaining the departure bar following IIRIRA's codification of motions to reopen and reconsider. Specifically, when DOJ promulgated the post-IIRIRA regulations pertaining to motions to reopen and reconsider, the agency rejected commenters' suggestions that (1) the regulation be consistent with the repeal of the departure bar to judicial review; and (2) the regulation be amended so that departure does not constitute withdrawal of a motion to reopen.⁷³ Specifically, DOJ reasoned that it could not amend the departure bar absent a provision of INA § 242, 8 U.S.C. § 1252, supporting or authorizing it to do so.⁷⁴

The Department should not continue to stand by this flawed justification for retaining the bar. First, the Department erroneously relied on 8 U.S.C. § 1252, which involves the *federal courts'* jurisdiction to review agency decisions. The regulation at issue precludes *administrative* adjudication of motions following departure. However, to the extent that 8 U.S.C. § 1252 has bearing on the analysis, Congress's decision to repeal the departure bar on judicial review heavily weighs in favor of also striking the departure bar on administrative motions. In this way, the rules governing administrative motions would comport with the rules governing judicial review in that they would encourage departure by permitting access to the procedural protections Congress created to correct defects in removal proceedings notwithstanding departure.

Second, in response to commenters who suggested that the regulation should be amended so that departure does not constitute withdrawal of a motion to reopen, DOJ said: "The Department believes that the burdens associated with the adjudication of motions to reopen . . . on behalf of deported or departed aliens would greatly outweigh any advantages this system might render."⁷⁵ However, DOJ offered no explanation for what "burden" is associated with motions to reopen. Not all such motions are filed in order to apply for relief, nor is a subsequent hearing always

⁷³ 62 Fed. Reg. 10312, 10321 (March 6, 1997).

⁷⁴ *Id.* ("No provision of the new section 242 [8 U.S.C. § 1252] of the Act supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States").

⁷⁵ 62 Fed. Reg. at 10321.

necessary.⁷⁶ Furthermore, there is no indication that the costs of adjudicating these motions differs significantly from the costs of adjudicating motions filed on behalf of individuals present in the United States. If anything, the cost to the government is less because a person outside the country need not be monitored or detained by DHS.

Finally, given the Fourth and Seventh Circuits' nullification of the departure bar in *William* and *Marin-Rodriguez*, the Ninth Circuit's partial nullification of the bar in *Martinez Coyt* and the more recent Supreme Court decisions emphasizing the importance of motions to reopen, any justifications for retaining the bar are even more unreasonable.

VII. CONCLUSION

For the reasons set forth above, petitioners respectfully request that the Attorney General initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553(e), to amend the regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b) to strike the bar on adjudicating motions to reopen and motions to reconsider when the movant departs the United States.

August 6, 2010

Respectfully submitted,

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⁷⁶ Moreover, in the event of a hearing, a person could appear telephonically. See 8 C.F.R. § 1003.25(c).

APPENDIX A

PROPOSED AMENDMENTS TO CURRENT REGULATIONS

The following are proposed amendments to current regulations implementing the above concerns. Redactions are indicated with a strikethrough.

8 C.F.R. § 1003.2(d)

~~(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 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)(1)

(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.