No.

In the Supreme Court of the United States

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

Whether this regulation, 8 C.F.R. § 1003.2(d), is invalid under IIRIRA because it denies aliens who have been removed from or who otherwise have departed the United States their statutory right to file a motion to reopen or reconsider an order of removability.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Mendiola respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a-15a) is reported at 585 F.3d 1303. The court of appeals' order denying rehearing and rehearing en banc (App., *infra*, 18a) is unpublished.

The order of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 16a-17a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2009. A timely petition for rehearing was denied on December 30, 2009. On March 23, 2010, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to May 28, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 8, U.S. Code § 1229a(c), originally enacted as section 240(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, provides in relevant part:

(c) Decision and burden of proof

* * * * *

(6) Motions to reconsider

> **(A) In general**
>
> The alien may file one motion to reconsider a decision that the alien is removable from the United States.
>
> * * * * *
>
> **(7) Motions to reopen**
>
> **(A) In general**
>
> An alien may file one motion to reopen proceedings under this section * * *.

Title 8, Code of Federal Regulations § 1003.2 provides in relevant part:

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

STATEMENT

Congress has provided that an alien who is ordered removed from the United States may file a motion to reconsider the order of removal or to reopen the removal proceedings, so that the alien may present new evidence or seek relief from error. In this case, however, the Tenth Circuit held that such relief is unavailable to aliens once they have de-

parted the United States. This issue has been widely litigated and has divided the courts of appeals: The Tenth Circuit here expressly rejected the contrary view of the Fourth Circuit, which has held that Congress expressly guaranteed aliens the right to seek removal or reconsideration no matter what their location. Seven other courts of appeals also have taken conflicting approaches to the question.

This is an issue of substantial practical importance. Summary administrative processes or—as in this case—the ineffective assistance of counsel during removal proceedings lead with some frequency to errors in the determination of removability; here, manifest errors by petitioner's counsel led the Board of Immigration Appeals ("BIA" or "Board") to overlook two considerations that should have precluded petitioner's removal. Motions to reconsider or reopen are an "important safeguard" against errors of this sort. *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008). By holding that many aliens may not even request such relief, the Tenth Circuit departed from the governing statutory language, frustrated the congressional purpose, and embraced a rule that leaves no recourse for the demonstrably erroneous exclusion of persons from the United States. Further review, to bring uniformity to the courts of appeals and eliminate a significant distortion of the immigration law, accordingly is warranted.

A. Statutory and Regulatory Background

1. The government initiates removal proceedings against a noncitizen by filing a Notice to Appear with an Immigration Judge ("IJ"), specifying the grounds alleged for removal. 8 U.S.C. § 1229(a)(1). Aliens determined to be removable by the IJ may appeal their removal order to the BIA. The removal order be-

comes final upon review by the BIA (or upon expiration of the filing deadline for BIA review). *Id.* § 1101(a)(47)(B). At that point, the alien may seek judicial review of the removal order by filing a petition for review in the court of appeals for the circuit in which the removal hearing was conducted. *Id.* § 1252(a)(5).

An alien also may seek administrative review of an IJ's removal decision or of a final removal order by filing a motion to reopen or reconsider.[1] *Id.* § 1229a(c)(6)-(7). Motions to reopen give aliens a chance to challenge their removal by presenting new, material facts that were unavailable at their original removal proceedings. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). See *Dada*, 128 S. Ct. at 2315, 2318. Motions to reconsider allow an alien to challenge mistakes of fact or law in the original administrative decision. *Id.* §§ 1003.2(b)(1), 1003.23(b)(2).[2]

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[1] Such motions are filed directly with the IJ where the BIA never took jurisdiction over the alien's case—for example, where an alien failed to appeal the removal order. Otherwise, they are properly filed with the BIA. See BIA Practice Manual app. K ("Where to File a Motion"), *available at* http://www.usdoj.gov/eoir. Motions may be filed with the BIA while the alien's appeal is pending, but may be treated as a motion to remand to the IJ or consolidated with the appeal to the Board. 8 C.F.R. §§ 1003.2(b)(1), 1003.2(c)(4).

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

The BIA has had the authority to entertain such motions since its creation. See Immigration and Naturalization Service, Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3504 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.9) (creating the BIA and providing that "[t]he reconsideration, reargument or reopening of a final decision by the Board of Immigration Appeals shall be permitted only upon motion."); see also *Dada*, 128 S. Ct. at 2315; Immigration and Naturalization Service, Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9118 (1958) (final rule codified at 8 CFR § 3.2 (1959)) (allowing the BIA to "reopen or reconsider any case in which it has rendered a decision" on its own motion or by written motion of a party). Until 1996, however, motions to reopen and reconsider removal orders were solely creatures of regulation. And of particular importance here, the governing regulations prevented the Board or an IJ from considering motions to reopen or reconsider filed by "by or in behalf of a person who is the subject of deportation proceedings *subsequent to his departure from the United States*." *Ibid.* (emphasis added). This regulatory post-departure bar mirrored the then-governing statutory limit on judicial review, which provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after issuance of the order." 8 U.S.C. § 1105a(c) (1964). Until the repeal of this post-departure bar to federal court review in 1996, most aliens received an automatic stay of their removal order pending resolution of any appeal to prevent the court from being divested of jurisdiction by the alien's departure from the United States. See § 1105a(a)(3) (1994); *Nken* v. *Holder*, 129 S. Ct. 1249, 1755 (2009) (explaining pre-IIRIRA regime).

2. What began as a regulatory privilege became a statutory right with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009. Among its many reforms, IIRIRA repealed the statutory prohibition on judicial review of removal orders when an alien has departed the country. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing former 8 U.S.C. § 1105a). IIRIRA also, for the first time, expressly provided aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation within 90 days of the entry of the final administrative order of removal. 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); *id.* § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings * * *."). The new statute does *not* include a post-departure bar on the now statutorily-authorized motions to reopen or reconsider deportation proceedings before the BIA (or an IJ).

When the Attorney General promulgated implementing regulations for IIRIRA in March 1997, however, she retained without change the pre-IIRIRA bar on post-departure motions to reopen and to reconsider. The current regulation, 8 C.F.R. § 1003.2(d), which is substantially identical to the one in force before the enactment of IIRIRA, prohibits the BIA from considering motions to reopen removal proceedings filed by any alien who has departed the United States, either voluntarily or involuntarily. It reads:

> A motion to reopen or 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.

Ibid. A second regulation, 8 C.F.R. § 1003.23(b)(1), contains virtually identical language governing motions to reopen or reconsider filed before IJs.[3]

B. Removal Proceedings

Petitioner, a native and citizen of Peru, moved to the United States at age two and became a lawful permanent resident in 1989. A.R. 55.

In 1996, petitioner pleaded guilty to misdemeanor possession of steroids, in violation of section 11377 of the California Health and Safety Code. A.R. 550, 553. Four years later, he was charged with felony possession of steroids as a repeat offender. A.R. 544-545. As the California courts subsequently recognized, this conviction was flawed because the

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[3] 8 C.F.R. § 1003.23(b)(1) provides, in relevant part:

> (b) *Before the Immigration Court*—
>
> (1) *In general.* * * * 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.

prosecution did not charge or establish (and petitioner did not admit to) the fact of the prior conviction. But petitioner, due to the ineffective assistance of his attorney, pleaded guilty to the felony charge. A.R. 541. The erroneous felony conviction remained on petitioner's record for eight years.

On March 29, 2004, the Government initiated removal proceedings against petitioner, based in relevant part on his two state convictions for steroid possession. A.R. 622-625. The government charged that petitioner had committed a drug trafficking crime as defined by 18 U.S.C. § 924(c).[4] Specifically, the government alleged that petitioner had possessed anabolic steroids in violation of the Controlled Substances Act (CSA), and that he was therefore removable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). A.R. 624; see 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" as, *inter alia*, a drug trafficking crime as defined in 18 U.S.C. § 924(c)). But this argument, too, was flawed; although the government submitted the indictments, pleas, judgment, and sentencing documents from the two California possession convictions for the immigration court's consideration[5] (A.R. 535-556), none of those documents proved that petitioner in fact pos-

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[4] A drug trafficking crime is, *inter alia*, any conduct "punishable as a felony" under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). *Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006); see 18 U.S.C. § 924(c)(2). While first-time possession is punished only as a misdemeanor under the CSA, recidivist possession is punished as a felony. 21 U.S.C. § 844(a).

[5] In removal proceedings, the government has the burden of establishing removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). To prove removability, the government is limited to the conviction record. *Id.* §1229a(c)(3)(B).

sessed anabolic steroids *proscribed by the Controlled Substances Act.* Petitioner had in fact been charged with simple "steroid" possession, and California punishes possession of a far wider range of steroids than does the CSA. Compare Cal. Health & Safety Code § 11056(f) (West 2007), with 21 C.F.R. 1300.01(b)(4) (2009); see also *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (noting that "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA" and concluding that, as a result, "the simple fact of a conviction under Cal. Health & Safety Code § 11377 is insufficient [to establish a federal drug trafficking conviction]"). Petitioner's counsel at the time, however, failed intelligibly to raise this defense to removability.[6]

On July 14, 2004, the IJ concluded that petitioner was removable as an aggravated felon and ordered him removed to Peru. A.R. 513. The IJ relied on the fact that "anabolic steroids" are on both the federal and California controlled substance schedules, even though petitioner was never charged with possessing anabolic steroids. A.R. 516-517.

Petitioner appealed to the BIA, which affirmed the IJ's decision in reliance both on the incorrect belief that petitioner's steroid possession violated fed-

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[6] Counsel did refer briefly to the distinction between state and federal law, although he garbled the explanation: "[T]here is no connection between the California statutes regarding the possession of steroids and a federal analog in the federal schedules of controlled substances, since 'steroids' are not contained therein." A.R. 595; see also A.R. 530. Inexplicably, however, counsel abandoned this argument on appeal to the BIA and Tenth Circuit and in petitioner's first motion to reopen (on which the same attorney was counsel).

eral law and on petitioner's defective felony conviction, stating that, in the Tenth Circuit, "a state drug offense qualifies as a drug trafficking aggravated felony *if it is punishable under federal narcotics law* and *classified as a felony in the convicting jurisdiction.*" A.R. 463 (emphasis added). The Tenth Circuit, also relying on the mistaken felony conviction, denied petitioner's subsequent petition for review. *Mendiola* v. *Gonzales*, 189 F. App'x 810 (10th Cir. 2006). In March 2005, while his petition for review was pending before the court of appeals, petitioner was removed from the United States.

C. Motions to Reopen and Reconsider

Petitioner returned to the United States in the summer of 2005 and was subsequently charged with reentering after removal for an aggravated felony, in violation of 8 U.S.C. § 1326. A.R. 123-125. The information, however, was later dismissed without prejudice on the government's motion. A.R. 294.

1. First Motion to Reopen

On May 14, 2007, while in custody, petitioner filed a motion to reopen (through the same attorney who had represented him in his removal proceedings), requesting that the BIA reconsider its decision in light of this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006).[7] A.R. 448-454. The BIA denied the motion for lack of jurisdiction under 8 C.F.R.

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[7] The motion to reopen was twice rejected for jurisdictional and procedural errors committed by petitioner's counsel. Counsel originally filed with the Immigration Court, though jurisdiction rested solely with the BIA. A.R. 374. When subsequently filed with the proper body, the motion was again rejected for being filed on the wrong form and not including a certificate of service. A.R. 372. These errors were later corrected.

§ 1003.2(d), the regulation prohibiting motions to reopen before the BIA following departure from the United States. A.R. 438-439. The BIA also noted that the motion was untimely because it had been filed more than 90 days after entry of the final order of removal (A.R. 438), and that the Board was precluded by §1003.2(d)'s post-departure bar from exercising its authority to *sua sponte* reopen or reconsider a decision that does not meet the time or numerical limit.[8] A.R. 439.

On August 28, 2007, the California Superior Court entered an order correcting petitioner's conviction record, re-classifying his 2000 steroid possession conviction as a misdemeanor. A.R. 84. Though aware that the motion to correct the record was pending in California Superior Court, petitioner's immigration attorney failed to properly present this information to the BIA and was therefore barred from presenting the corrected criminal record on petition for review to the Tenth Circuit. A.R. 135.

Petitioner's counsel filed a petition for review with the Tenth Circuit,[9] but failed to dispute the BIA's conclusion that the post-departure bar in

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[8] Pursuant to 8 C.F.R. § 1003.2(a), the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." Under this discretionary power, the BIA may entertain motions that do not meet the time or numerical limits.

[9] Petitioner's opening brief was originally rejected due to multiple, basic procedural defects, including failure to attach the BIA order being appealed and failure to submit the necessary motion for permission to file. His reply brief was similarly flawed; the original filing had the wrong case number, was oversized, and was missing the necessary motion to file out of time. These errors were later corrected. A.R. 153.

§ 1003.2(d) controlled the disposition of his motion. The Tenth Circuit denied petitioner's petition for review. *Mendiola* v. *Mukasey*, 280 F. App'x 719, 722 (10th Cir. 2008).

Petitioner's counsel promised to petition this Court for review of the Tenth Circuit's decision, taking $1,000 in advance payment. A.R. 144. But counsel subsequently advised petitioner to find another lawyer "who could do a better job"; two weeks before the petition was to be filed, in July 2008, the attorney acknowledged that he was not a member of this Court's bar. A.R. 135. Petitioner, previously unaware of his attorney's numerous and prejudicial mistakes, immediately began to search for new representation, retaining new counsel on July 27, 2008. A.R. 134.

2. Second Motion to Reopen

On September 11, 2008, less than two months after retaining new counsel, petitioner filed a motion to reopen and reconsider with the BIA, arguing that extraordinary circumstances—his corrected conviction history—rendered his removal order invalid. Mot. Reopen & Reconsider 12-16, *In re Mendiola*, No. A 092-099-498 (BIA Sept. 11, 2008). Petitioner also argued that, but for the ineffective assistance of his prior counsel, he would have prevailed at his immigration hearing and in his original motion to reopen, and that the ineffective assistance of his former counsel should toll the time and numerical limits for motions to reopen. *Id.* at 17-27.[10]

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[10] In compliance with *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988), which sets forth the grounds for reopening a removal case for ineffective assistance of counsel, petitioner's new counsel filed a bar complaint against petitioner's previous attorney with the Colorado Supreme Court. A.R. 129. Petitioner's

The Board rejected petitioner's claim, holding that the post-departure bar in 8 C.F.R. § 1003.2(d) both prohibited him from filing a motion to reopen and denied the BIA the authority to reopen petitioner's proceedings *sua sponte*. A.R. 2. The BIA also denied the new motion on the grounds that it was untimely and barred as an impermissibly successive petition under 8 C.F.R. § 1003.2(c)(2). A.R. 2.

D. Tenth Circuit Decision

The court of appeals affirmed the BIA's ruling on the applicability of the post-departure bar and, on that basis, denied petitioner's petition for review. App., *infra*, 12a-15a. The court recognized that the Fourth Circuit has reached a different conclusion, holding that IIRIRA "unambiguously provides an alien with the right to file one motion to reopen [within 90 days], regardless of whether he is within or without the country." *Id.* at 7a (quoting *William* v. *Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007)). But the court below noted that the Tenth Circuit previously had "disagreed with the *William* majority and, instead, reached the same conclusion as the *William*

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new counsel also informed prior counsel of the complaint and allegations against him. A.R. 137-138. Petitioner's 2008 motion to reopen also included detailed retainer agreements and invoices, A.R. 142-150, as well as a declaration from petitioner recounting his previous counsel's misleading behavior and deficient representation, A.R. 134-136. See generally *Riley* v. *I.N.S.*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("Specifically, the BIA must review Appellant's due diligence along with his attempts to comply with the BIA's requirements detailed in *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988) (claims of ineffective assistance of counsel require a threefold showing: 1) affidavit detailing agreement with counsel, 2) counsel informed of allegations and given opportunity to respond, and 3) complaint filed with disciplinary authorities).")

dissent," upholding "the regulatory post-departure bar as valid under the statutes in question." *Id.* at 9a (citing *Rosillo-Puga* v. *Holder*, 580 F.3d 1147, 1157 (10th Cir. 2009)). The court therefore declared itself bound by circuit precedent and held that "the BIA reasonably determined 8 C.F.R. § 1003.2(d) divests it of jurisdiction to entertain motions to reopen removal proceedings of deported or departed aliens." *Id.* at 15a. Having thus held the post-departure bar dispositive, the court stated that it "need not reach the issue of whether the BIA should have equitably tolled the time and numerical limits on filing motions to reopen * * * in light of the alleged ineffectiveness of Petitioner's former attorney." *Id.*

REASONS FOR GRANTING THE PETITION

As this case demonstrates, the availability of a motion to reopen or reconsider is a matter of more than theoretical or technical importance: Such a motion is intended "to ensure a proper and lawful disposition" of a removal proceeding. *Dada*, 128 S. Ct. at 2318. These motions may be the only avenue for relief from the erroneous and permanent removal of an alien from the United States, as is the case here. Congress accordingly guaranteed aliens the right to make such motions, whether or not they have already departed the United States; that guarantee was an essential component of Congress's decision also to expedite the removal of deportable aliens from the country. The Tenth Circuit's decision in this case, which bars aliens from filing such motions after their departure, cannot be reconciled with the statutory language and congressional purpose. Because that decision also cements an acknowledged conflict in the circuits on a question expressly left open by this Court in *Dada*, further review is in order.

I. The Courts Of Appeal Are Divided Over The Validity of 8 C.F.R. § 1003.2(d).

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

1. As the Tenth Circuit panel in this case acknowledged, a divided Fourth Circuit panel has held the post-departure bar regulation invalid under IIRIRA because the statute "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country." *William*, 499 F.3d at 332. Over a lengthy and vigorous dissent by Chief Judge Williams, the Fourth Circuit majority in *William* explained that the statutory language "speak[s] to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (*i.e.* 'alien[s]') which it vests with the right to file these motions." *Ibid.* The Fourth Circuit also reasoned that "the fact that Congress provided for [other] specific limitations on the right to file a motion to reopen bolsters the conclusion that § 1229a(c)(7)(A) [the statu-

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

On the other hand, the Tenth Circuit expressly rejected the Fourth Circuit's conclusion in *William* and held the post-departure bar regulation valid, not only in the present case but also in *Rosillo-Puga* and *Silerio-Nunez* v. *Holder*, 356 F. App'x 151 (10th Cir. 2009).[11] In *Rosillo-Puga*, the majority "agree[d] with the [*William*] dissent's position and conclude[d] that 8 C.F.R. § 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(6)(A) or (7)(A)." *Rosillo-Puga*, 580 F.3d at 1156. The majority believed that "the statute is simply silent on the issue of whether it meant to repeal the post-departure bars" and that "the agency's answer is based on a permissible construction of the statute." *Id.* at 1156-

[11] *William* addresses 8 C.F.R. § 1003.2(d)'s post-departure bar to review by the BIA; *Rosillo-Puga* and *Silerio-Nunez* discuss the issue in the context of 8 C.F.R. § 1003.23(b)(1)'s identical post-departure bar to review by an IJ. No judge on either court suggested that this distinction is material.

1157. In his lengthy dissent, Judge Lucero agreed with the *William* majority that "the pertinent provisions of § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee every alien the right to file one motion to reconsider removability and one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States." *Id.* at 1162 (Lucero, J., dissenting).[12] The Tenth Circuit panel in *Silerio-Nunez*, like the panel in this case, was bound by *Rosillo-Puga* and held the regulation valid under IIRIRA. See *Silerio-Nunez*, 356 F. App'x at 152-153.

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

2. While their analysis differs in some particulars from those of the Fourth and Tenth Circuits, seven additional courts of appeals also have considered the treatment of post-departure motions to reopen or reconsider and have adopted divergent rules.[13] Like the Tenth Circuit, the First, Second, Third, Fifth, Sixth, and Eleventh Circuits have held, even after the enactment of IIRIRA, that 8 C.F.R. § 1003.2(d) and § 1003.23(b)(1) bar review of post-

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[12] A petition for certiorari in *Rosillo-Puga* was filed almost simultaneously with the petition in this case.

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

departure motions to reopen or reconsider. In contrast, the Ninth Circuit, like the Fourth, has held that an alien *may* file a motion to reopen or reconsider after departing the United States, unless the alien departs *while* he or she is the subject of removal proceedings. Therefore, an individual identically situated to petitioner may file a motion to reopen or reconsider in the Fourth Circuit (and in the Ninth Circuit if his or her removal proceedings have ended), but not in the First, Second, Third, Fifth, Sixth, Tenth, or Eleventh.

The Second, Third, Fifth, Sixth, and Eleventh Circuits have enforced post-IIRIRA the regulatory post-departure bar to review of motions to reopen or reconsider. In *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672 (5th Cir. 2003), the Fifth Circuit applied the regulation without discussing IIRIRA. The court subsequently declined to comment on the merits of the Fourth Circuit's analysis in *William* because it declared itself bound by its decision in *Navarro-Miranda*. See *Castillo-Perales* v. *Mukasey*, 298 F. App'x 366, 369 (5th Cir. 2008).[14] Similarly, without considering any IIRIRA-related arguments, the Sixth Circuit has stated that the post-departure bar regulation precludes an alien from reopening his or her removal proceedings after leaving the country. See *Ablahad* v. *Gonzales*, 217 F. App'x 470, 475 n.6 (6th Cir. 2007); *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198

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[14] In both *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 1141567, at *1 (5th Cir. Mar. 17, 2010), and *Ovalles* v. *Holder*, 577 F.3d 288, 295 (5th Cir. 2009), the Fifth Circuit did not reach the question of whether IIRIRA precludes the regulatory post-departure bar to review of motions to reopen or reconsider because petitioner did not file his motion to reopen within the statutory deadline.

(6th Cir. 2006).[15] The Second, Third, and Eleventh Circuits have all done the same in unpublished decisions. For the Second Circuit, see *Ahmad* v. *Gonzales*, 204 F. App'x 98, 99 (2d Cir. 2006), and *Jalloh* v. *Gonzales*, 181 F. App'x 131, 132 (2d Cir. 2006); for the Third Circuit, see *Tahiraj-Dauti* v. *Attorney General of the United States*, 323 F. App'x 138, 139 (3d Cir. 2009), *Grewal* v. *Attorney General of the United States*, 251 F. App'x 114, 115-116 (3d Cir. 2007), *Oladokun* v. *Attorney General of the United States*, 207 F. App'x 254, 256-257 (3d Cir. 2006), and *Marsan* v. *Attorney General of the United States*, 199 F. App'x 159, 165 (3d Cir. 2006); for the Eleventh Circuit, see *Sankar* v. *United States Attorney General*, 284 F. App'x 798, 799 (11th Cir. 2008).

The First Circuit likewise has held that 8 C.F.R. § 1003.23(b)(1)'s post-departure bar is valid notwithstanding the enactment of IIRIRA, specifically concluding that the regulation had not been displaced by IIRIRA's repeal of 8 U.S.C. § 1105a(c), which formerly read: "An order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." See *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-442 (1st Cir. 2007); see also *id.* at 443 (upholding reasonableness of the Attorney General's "interpretation of the effect of the statutory change on the [post-departure] regulatory bar"). Petitioner thus would not be able to reopen his removal proceedings under the First Circuit rule.

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[15] In *Uritsky* v. *Holder*, 327 F. App'x 605, 608-609 (6th Cir. 2009), the Sixth Circuit acknowledged but did not need to comment on *William* because petitioner filed his motion to reopen past the statutory deadline and made no equitable tolling arguments.

The Ninth Circuit, on the other hand, has held that an alien *may* file a motion to reopen or reconsider even after being deported because the post-departure regulatory bar "is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she '*is* the subject of removal . . . proceedings.'" *Lin* v. *Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007). Therefore, an individual whose removal proceedings have ended may seek the reopening or reconsideration of those proceedings in the Ninth Circuit even after leaving the country. See *ibid.* (post-departure bar did not apply "[b]ecause petitioner's original removal proceedings were completed when he was removed to China, [and] he did not remain the subject of removal proceedings after that time.").

The upshot of these conflicting approaches is intolerable inconsistency: An alien in precisely the same circumstances as petitioner would have been permitted to seek relief in the Fourth Circuit (and in the Ninth Circuit if no longer the subject of removal proceedings), but not in the First, Second, Third, Fifth, Sixth, Tenth, and Eleventh. This Court's intervention to clarify the law accordingly is essential.

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

This conflict involves an issue of significant practical importance. As this Court recently acknowledged, "[t]he motion to reopen is an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings." *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada*, 128 S. Ct. at 2318) (internal citations omitted). For a significant number of aliens, however, access to this crucial statutory right, as well as the right to file a mo-

tion to reconsider, depends solely on the geography of their appeal: The current conflict implicates nine circuits that together handled the vast majority, over 97%, of BIA appeals filed in 2009. Administrative Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts 94 tbl.B-3 (2009). Furthermore, the split stems, in part, from disagreement over the meaning of this Court's recent treatment of motions to reopen in *Dada*. That makes the need for review by this Court especially acute.

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

The practical importance of the statutory right to move to reopen or reconsider itself counsels in favor of review. Motions to reopen and reconsider are a vital safeguard in a system that has been modified both to expedite the removal of aliens and to reduce the avenues for discretionary relief from removal.

The 1990s saw a range of statutory and administrative reforms to the immigration system that greatly increased the number of aliens eligible for removal, largely by expanding the definition of "aggravated felony" to include additional crimes. See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. on Reg. 47, 63-66 (2010); see also Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. Crim. L. & Criminology 287, 295-296 (2009). As more aliens became subject to removal, however, the system increasingly denied them access to discretionary relief. IIRIRA, for example, eliminated so-called

"§ 212(c) waivers" of removal—which had permitted IJs to consider a range of equitable factors in precluding removal—replacing them with a more limited form of relief explicitly denied to aggravated felons. See *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 294-297 (2001).

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

But resolution of removal proceedings is, to put it charitably, not immune from error. This is due, in part, to the BIA's increased use of summary procedures to deal with its "staggering" case backlog. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 23 & 29-31 (2005). See *Dada*, 128 S. Ct. at 2317-18. Under the current rules, a majority of cases are referred to a single Board member for review (instead of to a panel) and Board members may summarily dispose of cases without opinion when they believe that the alien's position lacks a basis in law or fact. Executive Office for Immigration Review, Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (establishing streamlined procedure); Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug.

26, 2002) (expanding the procedures to be the "dominant method of adjudication for the large majority of cases before the Board"). Removal errors also frequently stem from the "alarming frequency" of ineffective assistance of counsel in the immigration context. *Aris* v. *Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008). Overburdened and undertrained attorneys often are unequipped to deal with the complexity of the regulatory scheme or the nuances of their client's cases. See LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 Drake L. Rev. 123, 141-143 (2009) (discussing factors contributing to ineffective assistance in immigration proceedings).[16]

In this context, motions to reopen and reconsider serve a necessary and important checking function on removal proceedings. They are, in many situations, an alien's only practical option for presenting previously unavailable evidence that directly bears upon—or may completely preclude—removal, cor-

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[16] Courts have recognized that the immigration adjudication system "has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.). Courts of appeal and commentators alike have complained of overburdened, biased, and unprofessional IJs and poor legal analysis in immigration decisions. See, *e.g.*, *Wang* v. *Att'y General of U.S.*, 423 F.3d 260, 270 (3d Cir. 2005) (deeming an IJ opinion to be "highly improper" due to its "contemptuous tone" and the IJ's consideration of personal issues irrelevant to the merits of the claim); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595, 598-610 (2009) (noting high IJ caseloads, lack of resources, and sub-par work product). See also Jaya Ramji-Nogales et al., *Refuge Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) (documenting inconsistencies in asylum grant rates between immigration judges).

recting the mistakes of an ineffective attorney or mistaken immigration judge, or vindicating his or her due process rights.[17]

Motions to reopen are of particular importance as the "primary vehicle" for aliens to seek redress for ineffective assistance of counsel. Maria Baldini-Potermin, *It's Time to Reconsider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse*, 10-01 Immigr. Briefings 1 (2010). Such motions are found to be meritorious with some frequency. See, *e.g.*, *Aris* v. *Mukasey*, 517 F.3d 595 (2d Cir. 2008) (vacating BIA's denial of motion to reopen on grounds of ineffective assistance where previous attorney failed to properly inform alien about hearing date, which resulted in *in absentia* removal order); *Mai* v. *Gonzales*, 473 F.3d 162, 166 (5th Cir. 2006) (vacating denial of motion to reopen for ineffective assistance of counsel where previous attorney admitted to a ground for removal over alien's strong denial of the charge, supported by affidavits and witnesses, "cut[ting] off all available avenues of relief" for the alien); *Singh* v. *Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (directing BIA to grant motion to reopen where alien's previous lawyer failed to file a brief in support of appeal to the BIA without informing alien, resulting in summary dismissal of appeal). This is unsurprising, as an alien is likely to be unaware of the attorney's mistakes until after the entry of a final removal order. See, *e.g.*, *Aris*, 517 F.3d at 598 (2d Cir.

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

2008) (alien remained unaware of removal order against him for "nearly a decade," as it was entered *in absentia*). A rule that altogether denies aliens who have departed the country recourse for such errors is therefore one of substantial importance.

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

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

Although the Fourth Circuit's *William* decision predates *Dada*, both the majority in the Tenth Circuit's controlling *Rosillo-Puga* decision and the dissent, which relied on *William*, cited *Dada* for support. The majority relied on *Dada* for the proposition that "[t]he very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here—the alien's motion to reopen would not be withdrawn but for the regulation" (*Rosillo-Puga*, 580 F.3d at 1153 n.3)—although the majority acknowledged that "neither party in *Dada* specifically challenged the validity of the regulations at issue," *id.* The dissent, in sharp contrast, believed that *Dada* "all but compels the conclusion"

that IIRIRA trumps the departure bar because *Dada* recognized that "an alien *must* be allowed to file one motion to reopen" and "an alien cannot be forced by regulation to forfeit a motion guaranteed by statute." *Id.* at 1162, 1169 (Lucero, J., dissenting).

This Court noted in *Dada* that "[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure." 128 S. Ct. at 2320. But because the post-departure bar regulation was "not * * * challenged in these proceedings, [the Court did] not consider it" in *Dada*. *Ibid.* The regulation is challenged in this case, however. The Court accordingly should take the opportunity presented here to answer the question left open in *Dada*.

III. The Tenth Circuit's Decision Is Wrong.

The significance of the conflict in the courts of appeals itself warrants review. It should be added, though, that the decision below is incorrect. The plain language and structure of IIRIRA show that Congress meant to displace the departure bar, as does the broader congressional purpose. And the evolution of immigration law has decoupled physical location from jurisdiction to resolve removal disputes, making an alien's physical presence in the United States increasingly irrelevant to the jurisdiction of the court reviewing his or her case. In the current statutory regime, the regulatory departure bar is an incongruous anomaly.

1. Congress provided in 8 U.S.C. § 1229a(c)(7)(A) that "[a]n alien may file one motion to reopen any proceeding[] under this section." This "statutory text

is plain insofar as it guarantees each alien the right to file 'one motion to reopen proceedings under this section'" (*Dada*, 128 S. Ct. at 2316): there is no exception for aliens who have departed the United States. "We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there'" (*Dodd* v. *United States*, 545 U.S. 353, 357 (2005) ((alteration in original) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249 (1992))); all aliens, regardless of location, are treated alike and have a right to file a motion to reopen. See *Rosillo-Puga*, 580 F.3d at 1162 (Lucero, J., dissenting) ("A plain reading of 8 U.S.C. § 1229a(c)(6)(A) and (7)(A) comfortably occupies all the space on the issue before us and leaves any potential for valid promulgation of the challenged portion of 8 C.F.R. § 1003.23(b)(1) outside in the bitter cold."); *William*, 499 F.3d at 332 ("We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country."); *Azarte* v. *Ashcroft,* 394 F.3d 1278, 1285-1286 (9th Cir. 2005) ("With respect to motions to reopen * * *, Congress' language in IIRIRA is clear and unambiguous * * *."). The Attorney General may not rewrite an Act of Congress by mandating the exclusion of a subclass of aliens that Congress unambiguously intended to reach. See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

In contrast, another subsection of 8 U.S.C. § 1229a distinguishes between aliens within and without the United States, providing that the usual 90-day time limit for a motion to reopen does not apply to a battered spouse, child, or parent who "is physically present in the United States at the time of filing the motion." § 1229a(c)(7)(C)(iv)(IV). Congress

therefore plainly knew how to limit certain forms of relief to aliens currently in the United States, and it chose not to impose such a limit in § 1229a(c)(6)(A) and (7)(A). See *Clay* v. *United States*, 537 U.S. 522, 528 (2003) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983))). Indeed, if physical presence in the United States were required for *any* alien to file a motion to reopen, the language in § 1229a(c)(7)(C)(iv)(IV) requiring that specified aliens be "physically present" would be superfluous.[18]

The statute also includes several express limitations on motions to reopen, including those on timeliness (§ 1229a(c)(6)(B), (7)(C)), content, (§ 1229a(c)(6)(C), (7)(B)), and numerosity (§ 1229a(c)(6)(A), (7)(A)). But § 1229a includes no limitation on geography. When Congress makes the scope of its intention clear by providing for certain limitations and exceptions, the lack of other limitations and exceptions should be read to indicate Congress's decision *not* to include them. *United States* v.

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[18] The majority in *Rosillo-Puga* opined that § 1229a(c)(7)(C)(iv)(IV)'s physical-presence requirement is unhelpful in discerning what Congress intended when it enacted IIRIRA in 1996 because that requirement was not added to the statute until 2006. 580 F.3d at 1154-55. But if the majority's reading were correct—if there is a physical presence requirement implicit in § 1229a(c)(6)(A) and (7)(A)—adding the physical-presence language in 2006 would have been unnecessary. That language presumably was added *because* § 1229a(c)(6)(A) and (7)(A) contains no such requirement. *Id.* at 1165-1166.

Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). Thus, it is properly inferred that Congress intentionally eschewed a geographical limitation on aliens filing motions to reopen.

2. The legislative background of IIRIRA supports this conclusion. Congress intended IIRIRA "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Needless to say, allowing aliens to file motions *after they have been removed* is fully consistent with—and may even facilitate—this goal. One of Congress's primary concerns in enacting IIRIRA was the amount of time it took to deport aliens who had committed crimes.[19] This concern with efficient re-

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

moval, however, is a "non-sequitur" with respect to allowing aliens *already outside of the country* to file motions to reopen and reconsider. *Rosillo-Puga*, 580 F.3d at 1167 (2009) (Lucero, J., dissenting). As these aliens have already left the United States prior to filing, there is no danger that they will use motions to reopen or reconsider as a "means of delaying removal." *Id.* at 1168. Indeed, if these filings were barred, Congress would have created a disincentive for aliens to leave the country, leading them to withdraw motions for voluntary departure or to refuse to comply with removal orders, thus adding to the original problem that Congress sought to address. See *Dada*, 128 S. Ct. at 2320.

Nor would allowing post-departure motions result in an unmanageable increase in filings. IIRIRA still "limits in significant ways the availability of the motion to reopen" (*Dada*, 128 S. Ct. at 2316), most importantly through filing deadlines and numerical limits. These procedural limits greatly restrict the number of aliens eligible to file such motions, absent grounds (such as ineffective assistance of counsel) for equitable tolling or *sua sponte* reopening or reconsideration by the BIA or an IJ. The BIA's streamlined summary procedures also allow the Board to easily dispose of facially invalid or frivolous motions. And, of course, "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when

and Refugee Affairs of the S. Comm. on the Judiciary, 103d Cong. 15 (1994) (statement of Hon. Barbara Jordan, Chair, Commission on Immigration Reform) ("The top priority of interior enforcement strategies should be the removal of deportable criminal aliens from the U.S. in such a way that the potential for their return to the U.S. will be minimized.").

justice is done." *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (BIA 1997).

3. Finally, Congress created the statutory right to seek reopening or reconsideration as part of a comprehensive revision of the law governing when an alien's physical location should (and should not) bear on judicial review of his or her immigration status. Pre-IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States (8 U.S.C. § 1105a(c) (1994)), and so most aliens were able to obtain an automatic stay of their removal order while judicial review was pending. *Id.* § 1105a(a)(3). Interested in more efficient removal, Congress in IIRIRA rendered aliens' location irrelevant to the jurisdiction of reviewing courts. Among other things, IIRIRA lifted the statutory bar to judicial review of deportation orders for aliens who had departed the country. See pages 5-6, *supra*; *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009). The statutory right to move to reopen regardless of location is of a piece with that reform.

Having made these changes, Congress also repealed the presumption of an automatic stay of removal pending completion of judicial review and restricted the availability of injunctive relief to preclude removal. See *Nken*, 129 S. Ct. at 1755-56. In light of this decoupling of jurisdiction from physical presence in the United States, the post-departure bar on motions to reopen or reconsider remains as a living dinosaur from a bygone era. It should not survive Congress's substantial revision of immigration law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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