No. 09-1378

In the Supreme Court of the United States

EDDIE MENDIOLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 8 C.F.R. 1003.2(d), which precludes the Board from granting a motion to reopen filed by an alien who has departed the United States, is valid as applied to motions seeking *sua sponte* reopening.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 585 F.3d 1303. The opinions of the Board of Immigration Appeals (Pet. App. 16a-17a; Administrative Record (A.R.) 462-463; A.R. 438-439) and the immigration judge (A.R. 515-519) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2009. A petition for rehearing was denied on December 30, 2009 (Pet. App. 18a). On March 23, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 28, 2010. The petition was filed on May 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), .23(b)(1) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), .23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), .23(b)(1). Those limitations do not apply, however, if the motion to reopen adequately shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered," since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), .23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the

Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a), .23(b)(3); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

b. If an alien does not file his motion to reopen within the 90-day time period, the IJ or the Board still may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), .23(b)(1) (similar for IJ). Whether to reopen a case *sua sponte* is entrusted to the broad discretion of the Board or IJ. 8 C.F.R. 1003.2(a), .23(b)(3). The Board and the IJs "invoke [their] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Longstanding regulations of the Attorney General bar aliens who have departed the United States from obtaining reopening of their immigration proceedings.

a. The Attorney General has provided for discretionary reopening of immigration proceedings by regulation since 1941. See 6 Fed. Reg. 71-72 (1941). In 1952, the Attorney General amended his regulations to bar immigration officials from granting a motion to reopen filed by an alien who has departed the United States. 17 Fed. Reg. 11,475 (1952) (8 C.F.R. 6.2 (1952)); see *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 648-649 (B.I.A. 2008). That bar has remained substantially the

same since 1952. In its current form, the regulation addressing reopening motions before the Board provides:

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

8 C.F.R. 1003.2(d). Another regulation, 8 C.F.R. 1003.23(b)(1), places the same restrictions on reopening before an IJ.

b. Prior to 1996, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not address whether an alien could file a motion to reopen. In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their stay, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008), and it therefore directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and to specify the time period for the filing of such motions. Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066.

The Attorney General promulgated the final regulations in 1996. Those regulations included time and numerical limits on motions to reopen, and also reaffirmed the longstanding bar on granting motions to reopen filed by aliens who have left the United States. 61 Fed. Reg. 18,905 (8 C.F.R. 3.2(c)(2) (1997)).

c. In 1996, Congress amended the INA to codify procedures for filing motions to reopen. Congress provided that an alien "may file one motion to reopen" and codified the time and numerical limitations contained in the regulation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (8 U.S.C. 1229a(c)(7)). Congress also repealed a longstanding statutory provision that precluded judicial review of removal orders if the alien had departed the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Congress did not, however, address the departure bar that has long been contained in the regulations.

d. The Attorney General then promulgated regulations implementing IIRIRA, which retained the longstanding departure bar. 62 Fed. Reg. 10,321 (1997). The Attorney General explained that "[n]o provision of the new section [on judicial review in IIRIRA] 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." *Ibid.* In the Attorney General's view, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages [a] system [permitting immigration officials to grant such motions] might render." *Ibid.*

3. Petitioner is a native and citizen of Peru who became a lawful permanent resident of the United States in 1989. Pet. App. 3a; A.R. 55. He has since been convicted of several crimes in the United States, including assault with a deadly weapon and misdemeanor possession of steroids in 1996; felony possession of steroids in

2000; and misprision of a felony in 2003. Pet. 7-8; A.R. 515-517, 544-545, 624.

In March 2004, the Department of Homeland Security (DHS) charged petitioner with being removable as an alien who has been convicted of two crimes of moral turpitude and as an alien convicted of an aggravated felony. A.R. 622-625; see 8 U.S.C. 1227(a)(2)(A)(ii) and (iii). After a hearing, an immigration judge determined that petitioner was removable as an aggravated felon because of his drug offenses and ordered him removed to Peru. A.R. 515-519.

4. In November 2004, the Board dismissed petitioner's appeal. A.R. 462-463. The Board rejected petitioner's argument that the IJ should have applied Ninth Circuit law about what offenses qualify as aggravated felonies, as opposed to Tenth Circuit law, explaining that an IJ "must determine removability and relief issues using only the decisions of the circuit in which he or she sits," in addition to decisions from the Supreme Court and the Board. A.R. 462. The Board then concluded that the IJ properly applied Tenth Circuit law. A.R. 463.

Petitioner filed a petition for review of the Board's decision with the court of appeals. The court of appeals dismissed the petition for review, holding that petitioner was removable as an aggravated felon. See *Mendiola* v. *Gonzales*, 189 Fed. Appx. 810, 813-815 (10th Cir. 2006).

Petitioner was removed from the United States while his petition for review was pending. Pet. 10. Petitioner illegally reentered the United States after he had been removed. *Ibid.*

5. In March 2007, eight months after the court of appeals' decision, petitioner filed a motion to reopen with the Board. A.R. 448-454. He argued (A.R. 449)

that he should no longer be considered an aggravated felon in light of *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which held that a state offense that is a felony under state law but a misdemeanor under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, is not a "felony punishable under the [CSA]," and therefore is not an aggravated felony under the INA. 549 U.S. at 52-53; see 8 U.S.C. 1101(a)(43)(B).

The Board denied the motion. A.R. 438-439. The Board explained that the motion was not filed within 90 days of its original decision, as required by statute and regulation, and petitioner could obtain reopening only if the Board decided to reopen his case *sua sponte*. *Ibid.* The Board determined that it could not reopen petitioner's case *sua sponte*, however, because he had departed the United States, and the departure bar in 8 C.F.R. 1003.2(d) deprived the Board of authority to grant *sua sponte* reopening. A.R. 439. The Board stated, in any event, that in its view *Lopez* "does not assist" petitioner because his second drug possession conviction would qualify as a felony under federal law. A.R. 439 n.1.

Petitioner filed a petition for review of that decision. The court of appeals dismissed the petition in May 2008, agreeing that petitioner's second drug offense qualified as an aggravated felony and rejecting his argument that the denial of his motion violated due process. *Mendiola* v. *Mukasey*, 280 Fed. Appx. 719, 722 (10th Cir. 2008). The court also determined that petitioner had waived the argument (which was based on *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (9th Cir. 2007)) that the departure bar in 8 C.F.R. 1003.2(d) should be interpreted not to apply to aliens who filed motions to reopen after the conclusion

of their removal proceedings. *Mendiola*, 280 Fed. Appx. at 722.

6. In September 2008, petitioner filed a second motion to reopen with the Board. A.R. 215-246.[1] In that motion, petitioner noted that in August 2007, a California court entered an order reclassifying his second (2000) steroid possession conviction from a felony to a misdemeanor, and he argued that the offense could no longer qualify as an aggravated felony supporting removal. A.R. 230-234. He also argued, for the first time, that his prior counsel was ineffective in failing to argue that a "steroid" under California law did not qualify as an "anabolic steroid" under federal law, and that but for the ineffective assistance of his prior counsel, he would have prevailed at his removal hearing and in his first motion to reopen. A.R. 240-245. Petitioner also contended that "the ineffective assistance of his former counsel should toll the time and numerical limits for motions to reopen." A.R. 235-245.

The Board denied the motion. Pet. App. 16a-17a. The Board denied the motion because it "exceeds the numerical limitations for motions to reopen" and "has also been filed out of time." *Id.* at 16a (citing 8 C.F.R. 1003.2(c)(2)). The Board also determined that, because petitioner had been removed in March 2005, the departure bar in 8 C.F.R. 1003.2(d) precluded him from obtaining reopening, either pursuant to a timely filed motion or under the Board's *sua sponte* reopening authority. Pet. App. 16a.

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[1] Although the motion requested reconsideration as well as reopening, the Board treated it as only a motion to reopen, Pet. App. 16a-17a; see *id.* at 4a (court of appeals), and petitioner has not challenged that treatment or preserved a separate claim for reconsideration.

7. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-15a. Petitioner contended that the departure bar in 8 C.F.R. 1003.2(d) should be interpreted not to apply to aliens who file motions to reopen after the conclusion of their removal proceedings, and also argued that his prior attorney's ineffectiveness tolled the time and numerical limitations on motions to reopen. Pet. C.A. Br. 16-33. (The court of appeals had rejected the first argument in its earlier decision, *Mendiola*, 280 Fed. Appx. at 722, and it rejected it again, Pet. App. 10a n.4.) Petitioner raised a new argument in his reply brief, contending that the departure bar regulation was invalid because it conflicted with the provisions of the INA that authorize aliens to file motions to reopen, 8 U.S.C. 1229a(c)(7)(A). Pet. C.A. Reply Br. 11-14.

Relying on its recent decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), petition for cert. pending, No. 09-1367 (May 7, 2010), the court first rejected petitioner's challenge to the validity of the departure bar regulation. In *Rosillo-Puga*, the court applied the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and determined that the statute is "simply silent" on whether an alien who has departed the United States may obtain reopening of his removal order. *Rosillo-Puga*, 580 F.3d at 1156. The court explained that the relevant statutory text—which provides that "[t]he alien may file one motion to reconsider a [removal] decision," 8 U.S.C. 1229a(c)(6)(A), and that "[a]n alien may file one motion to reopen proceedings under this section," 8 U.S.C. 1229a(c)(7)(A)—does not evidence any clear intent about whether Congress "meant to repeal the post-departure bars contained in the Attorney General's regulations." 580 F.3d at 1156-

1157. The court was "not persuaded * * * that, by negative inference, Congress intentionally swept away forty years of continuous practice by the Attorney General." *Id.* at 1157. Having "concluded that the statute is not clear and unambiguous," the court determined that the Attorney General's regulation represented a "permissible construction of the statute" under step two of the *Chevron* framework, because an alien's departure from the United States fundamentally changes his status under the law. *Id.* at 1157-1158 (internal quotation marks omitted).

In this case, the court of appeals recounted its analysis in *Rosillo-Puga*, noting that both that case and this one involved *sua sponte* reopening, as opposed to motions to reopen that complied with the time and numerical limits in the statute. Pet. App. 9a-11a & n.4. The court also noted petitioner's concession that "*Rosillo-Puga* divests the [Board] of its sua sponte authority * * * to reopen his proceedings." *Id.* at 12a. The court stated, however, that "as best as [it] can discern," petitioner had an additional argument, that the departure bar does not apply "to motions to reopen filed by aliens * * * where the motion alleges ineffective assistance of counsel rising to the level of a due process violation." *Ibid.* The court noted that petitioner "declined [the court's] invitation to file supplemental briefing on that question," concluded that *Rosillo-Puga* would apply to such a motion, and then determined that it need not decide whether the Board should have equitably tolled the time and numerical limitations on filing motions to reopen. *Id.* at 12a-15a.

8. Petitioner filed a petition for rehearing en banc, which the court of appeals denied, with no member of

the panel and no judge in regular active service requesting a poll. Pet. App. 18a.

9. DHS reports that petitioner was again removed from the United States in July 2010.

ARGUMENT

Petitioner renews his contention (Pet. 26-31) that the departure bar contained in 8 C.F.R. 1003.2(d) is invalid because it conflicts with the statutory provisions governing motions to reopen. Because petitioner's motion is both time-barred and number-barred, this case concerns only the Board's *sua sponte* reopening authority. The court of appeals correctly upheld the validity of the departure bar in these circumstances. Moreover, although the Fourth Circuit has reached a contrary conclusion in considering *timely* motions to reopen, there is no disagreement in the circuits regarding whether the Attorney General may validly limit the ability of immigration officials to grant requests for *sua sponte* reopening filed by aliens who have departed the United States. In any event, this case would present a poor vehicle for considering the underlying legal issues because even if the Board could consider petitioner's request for *sua sponte* reopening and denied it on the merits, the court of appeals would be unable to review that decision, because the decision whether to reopen a case *sua sponte* is committed to agency discretion by law. Further review is therefore unwarranted.

1. This case concerns only a motion to reopen that is both time-barred and number-barred. In that circumstance, the issue the Board must decide is whether to exercise its *sua sponte* discretionary authority to grant relief. As explained above (at p. 2, *supra*), a motion to reopen must be filed within 90 days of entry of the final

order of removal, 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). There is an exception for a motion seeking asylum or withholding of removal based on changed country conditions, 8 U.S.C. 1229a(c)(7)(C)(ii), but petitioner's motion did not seek reopening on that basis, and he has never contended that that exception to the 90-day deadline applies. The motion to reopen at issue here therefore is both time-barred and number-barred: it is petitioner's second motion, and it was filed four years after his removal order was entered. Pet. App. 3a-4a; A.R. 513. In such circumstances, an alien may only request *sua sponte* reopening under 8 C.F.R. 1003.2(a).

It is undisputed that petitioner's motion does not on its face meet the statutory time and number requirements for filing a motion to reopen. Before the court of appeals, petitioner sought equitable tolling of those time and number requirements. Pet. C.A. Br. 16-22. But petitioner does not make any such argument before this Court. The doctrine of equitable tolling, if it is even available in this context, must be "sparingly invoked," *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc) (internal quotation marks omitted), and would require, at a minimum, that the party seeking tolling has demonstrated due diligence in discovering and seeking to cure his attorney's allegedly deficient performance, *e.g.*, *Beltre-Veloz* v. *Mukasey*, 533 F.3d 7, 11 (1st Cir. 2008); *Mahamat* v. *Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005). Whether the alien acted diligently depends on when a reasonable person would have discovered the possibility that his attorney had been ineffective and would have taken steps to cure the deficiency. *E.g.*, *Iavorski* v. *United States INS*, 232 F.3d 124, 134 (2d Cir. 2000). Here, petitioner would have had to establish that

his attorney was ineffective in failing to pursue the argument that a substance that qualifies as a steroid under California law would not also qualify as an anabolic steroid; that the attorney's ineffectiveness prejudiced him; that he complied with the procedural requirements set out by the Board for establishing ineffective assistance of counsel; that a reasonable person would have allowed years to elapse before discovering and taking steps to cure his attorney's alleged ineffectiveness; and that he worked diligently to discover and pursue his attorney's alleged ineffectiveness during the years that elapsed between his removal order and his second motion to reopen. Petitioner would be required to overcome all of those substantial threshold hurdles to demonstrate that the statutory time and numerical limitations should be tolled in his case.

But unless and until petitioner makes such a showing—one petitioner has not attempted to make in his certiorari petition—this case only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening. Because petitioner did not file his motion within the time and number limits prescribed by statute, the statutory provisions allowing an alien to file one timely motion to reopen—8 U.S.C. 1229a(c)(7)—does not apply to him, and there accordingly can be no inconsistency between the departure bar regulation and those statutory provisions in this case.

2. The court of appeals' decision is correct. As the court correctly observed, whether the departure bar regulation at issue is valid depends upon application of the *Chevron* framework. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Here, although the statute prescribes time and numerical limitations for motions to reopen, it says nothing about whether an

alien may obtain reopening after he has departed the United States, and it does not address *sua sponte* reopening at all.

The INA provides that "[a]n alien may file one motion to reopen proceedings under this section" and requires that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i). As the court of appeals explained in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), petition for cert. pending, No. 09-1367 (May 7, 2010), these provisions do not by their terms address whether immigration officials may grant motions to reopen filed by aliens who have departed the United States. *Id.* at 1156-1157; see Pet. App. 9a. The court of appeals found that omission particularly telling, because the Attorney General's regulations have for decades specifically precluded immigration officials from granting motions to reopen filed by aliens who have left the United States. Pet. App. 5a-6a, 9a. Indeed, when Congress codified the time and numerical limitations on motions to reopen in 1996, it left the departure bar unchanged in the regulations. *Id.* at 5a-6a; see p. 5, *supra*. As the court explained, Congress's failure to take any steps to change or override the departure bar strongly suggests that it did not intend to disturb the agency's longstanding practice. See, *e.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). Accordingly, there is no conflict between the statutory language providing for motions to reopen and the departure bar contained in the regulations.

Even if the statutory provisions addressing motions to reopen were thought to clearly and unambiguously grant an alien who has departed the United States a right to one motion within the time limits specified,

those provision are not at issue here, because petitioner has not complied with those time and numerical limits. That is, even if petitioner is correct that the INA "guarantees aliens the right" to file a motion to open as provided in Section 1229a(c)(7), Pet. 15, the statute only gives aliens the right to file such a motion within the time and numerical limits specified in the statute. The Attorney General has, by separate language in the regulations, granted IJs and the Board the discretion to reopen cases on their own motion. See 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), .23(b)(1) (similar for IJ). But *sua sponte* reopening is entirely a creature of regulation; it is not mentioned in Section 1229a(c) at all. Because no statutory provision authorizes an alien to file a motion to reopen outside the time and number limits specified, application of the departure bar to preclude the Board from exercising its discretion to grant *sua sponte* reopening cannot clearly and unambiguously conflict with the statutory text.

After concluding that the INA does not speak directly to the question, the court of appeals correctly determined that the departure bar is based on a permissible reading of the statute. Pet. App. 9a; see *Rosillo-Puga*, 580 F.3d at 1157-1158. Petitioner does not challenge this aspect of the court of appeals' decision, instead making only a *Chevron* step one argument. See Pet. 26-31. In any event, as the court noted, Congress has expressly granted rulemaking authority to the Attorney General, see 8 U.S.C. 1103(g)(2), and the departure bar regulation therefore should be given "controlling weight unless [it is] arbitrary, capricious, or mani-

festly contrary to the statute." *Rosillo-Puga*, 580 F.3d at 1155 (internal quotation marks omitted).

Here, the Attorney General reasonably decided to categorically limit immigration officials from exercising their discretion to grant reopening for aliens who have departed the United States. As the court of appeals recognized, departure is a "transformative event" that fundamentally changes the alien's status under the law. *Rosillo-Puga*, 580 F.3d at 1157 (internal quotation marks omitted). The Attorney General decided that once that event occurs, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render," such as improved accuracy of results. 62 Fed. Reg. at 10,321. That decision is reasonable in light of a central focus of Congress in IIRIRA, which was to place limits on aliens' ability to reopen their cases and to expedite their removal from the United States. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 360 (1996). That focus is reflected in Section 1229a itself, which imposes certain limits on the alien, but does not limit the discretion of the government. Indeed, as this Court has noted, "protecting the Executive's discretion * * * can fairly be said to be the theme of [IIRIRA]." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). The repeated and longstanding determination by Attorneys General over many years to limit the discretion of immigration officials so that they may not grant motions to reopen filed by aliens who have departed the United States is reasonable.

That is particularly true in the context of *sua sponte* reopening. IJs and the Board are never required to exercise their *sua sponte* authority, and they only do so in

extraordinary circumstances. See, *e.g.*, *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999); also p. 3, *supra*. Whether to exercise that authority is entirely entrusted to the agency's discretion, and that decision is not subject to judicial review. See pp. 23-24, *infra*. In the same way that the Attorney General decided to authorize *sua sponte* reopening—a procedural mechanism, not mentioned in the Act, available to IJs and the Board for consideration of an otherwise barred motion in exceptional circumstances—he may reasonably decide to limit that mechanism to certain cases. See, *e.g.*, *Belay-Gebru* v. *INS*, 327 F.3d 998, 1001 (10th Cir. 2003) (observing that "no statutory language authorizes the BIA to reconsider a deportation proceeding *sua sponte*" and that the regulations authorizing *sua sponte* reopening contain "no meaningful standard against which to judge the BIA's exercise of its discretion"). There is, accordingly, no basis for invalidating the longstanding departure bar regulations, particularly in the context of *sua sponte* reopening.

3. Petitioner contends (Pet. 15-17) that review is warranted because the decision below conflicts with the Fourth Circuit's decision in *William* v. *Gonzales*, 499 F.3d 329 (2007). In that case, the Fourth Circuit concluded that the statement in Section 1229a(c)(7) that an alien "may file" one motion to reopen within the specified time limits "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country," and therefore conflicts with the departure bar regulations. *Id.* at 332.

The Fourth Circuit, however, did not address the timeliness of the alien's motion to reopen, or what would be the result if the only vehicle that would be available

to the alien was *sua sponte* reopening.[2] Here, by contrast, petitioner's motion did not comply with the time and numerical limitations in Section 1229a(c)(7), and he therefore could only obtain reopening if the Board decided to reopen his case on its own. In both this case and *Rosillo-Puga*, the court of appeals considered only *sua sponte* reopening. Pet. App. 10a & n.4. And in *Rosillo-Puga*, the court specifically "distinguishe[d] this case from * * * *William*" on the ground that *Rosillo-Puga* concerned only an untimely motion to reopen. 580 F.3d at 1158.[3]

The other courts that have considered the departure bar regulations in the particular context of *sua sponte* reopening have rejected the aliens' challenges. In *Ovalles* v. *Holder*, 577 F.3d 288 (2009), the Fifth Circuit rejected such a challenge and found it unnecessary to address the validity of the departure bar for timely motions to reopen, explaining that, "[i]n asking us to invalidate [8 C.F.R.] 1003.2(d), [the alien] invokes statutory provisions that offer him no relief" because the alien's motion to reopen was untimely. 577 F.3d at 295; see also Pet. App. 8a n.3 (discussing *Ovalles*). The court explained that "because Sections 1229a(c)(6) and 1229a(c)(7) * * * do not grant [the alien] the right to have his facially and concededly untimely motion heard by the [Board], he cannot rely on those statutory provisions as a basis for contending that the [Board] was required to give *sua sponte* consideration to the merits of

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[2] It appears that the motion in *William* may well have been untimely, 499 F.3d at 331, but the court of appeals did not address whether the motion was timely or consider timeliness in its analysis.

[3] The other Tenth Circuit decision petitioner cites (Pet. 16), *Silerio-Nunez* v. *Holder*, 356 Fed. Appx. 151 (2009), also concerned an untimely motion to reopen. *Id.* at 152.

his * * * motion." 577 F.3d at 296. And, like the court below, the Fifth Circuit determined that the untimeliness of the alien's motion was a "key fact [that] distinguishes the present case from *William*." *Id.* at 295; see also *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 2802454, at *1 (5th Cir. July 9, 2010) (per curiam) (declining to reach the question whether 8 C.F.R. 1003.2(d) is contrary to 8 U.S.C. 1229a(c)(7)(A) because the motion to reopen was untimely).

The Second Circuit recently reached the same conclusion in the context of *sua sponte* reopening in *Zhang* v. *Holder*, No. 09-2628, 2010 WL 3169292 (Aug. 12, 2010). The court explained that "[t]here is no dispute here that the Attorney General's decision to provide the [Board] with such authority was a valid use of his rulemaking power under the INA," and "[i]f the Attorney General possesses the authority to vest *sua sponte* jurisdiction in the [Board]—and it is undisputed here that he does—then it stands to reason that he would also have the authority to limit that jurisdiction and define its contours through, among other things, the departure bar." *Id.* at *9. The court noted that the alien "ha[d] not argued that the *sua sponte* power itself is inconsistent with the statute," but found that unsurprising, because "there was no statutory basis for his motion." *Ibid.* Thus, the courts of appeals that have considered the context here have all upheld the validity of the departure bar regulations.

Petitioner cites (Pet. 17-20) a variety of other decisions, none of which conflicts with the decision below. As petitioner himself concedes, several decisions simply assumed the validity of the departure bar, or rejected arguments about how the regulation should be interpreted, without considering any statutory argument like

the one petitioner makes here.[4] In *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-442 (2007), cert. denied, 129 S. Ct. 37 (2008), the First Circuit upheld the departure bar against a different challenge than the one petitioner makes here. In that case, the court rejected the argument that Congress's repeal of 8 U.S.C. 1105a(c) (1994), which precluded judicial review of removal orders for aliens who had departed the United States, abrogated the Attorney General's authority to enforce the departure bar. 489 F.3d at 441. That is different from the argument here, where petitioner contends that the departure bar regulation conflicts with various provisions in Section 1229a. And in any event, the First Circuit's conclusion is consistent with the conclusion reached by the court below.

Finally, the Ninth Circuit has interpreted the departure bar regulation so as not to apply to aliens whose removal proceedings have been completed, but that case

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[4] See *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198, 1200 (6th Cir. 2006); *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-676 (5th Cir. 2003) (*sua sponte* reopening context); see also *Tahiriraj-Dauti* v. *Attorney Gen. of the U.S.*, 323 Fed. Appx. 138, 139 (3d Cir. 2009) (unpublished, non-precedential opinion); *Castillo-Perales* v. *Mukasey*, 298 Fed. Appx. 366, 369 (5th Cir. 2008) (per curiam) (unpublished, non-precedential opinion); *Sankar* v. *United States Att'y Gen.*, 284 Fed. Appx. 798, 799 (11th Cir. 2008) (per curiam) (unpublished opinion); *Ablahad* v. *Gonzales*, 217 Fed. Appx. 470, 475 n.6 (6th Cir. 2007) (unpublished, non-precedential opinion); *Grewal* v. *Attorney Gen. of the U.S.*, 251 Fed. Appx. 114, 115-116 (3d Cir. 2006) (unpublished, non-precedential opinion); *Oladokun* v. *Attorney Gen. of the U.S.*, 207 Fed. Appx. 254, 256-257 (3d Cir. 2006) (unpublished, non-precedential opinion); *Ahmad* v. *Gonzales*, 204 Fed. Appx. 98, 99 (2d Cir. 2006) (per curiam) (unpublished opinion); *Marsan* v. *Attorney Gen. of the U.S.*, 199 Fed. Appx. 159, 165 (3d Cir. 2006) (per curiam) (unpublished opinion); *Jalloh* v. *Gonzales*, 181 Fed. Appx. 131, 132 (2d Cir. 2006) (per curiam) (unpublished opinion).

did not address whether the regulation is consistent with the INA. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007).[5] The Ninth Circuit also has held that 8 C.F.R. 1003.2(d) does not apply to "withdrawal of a[] [motion to reopen] filed by a petitioner who has been involuntarily removed from the United States." *Coyt* v. *Holder*, 593 F.3d 902, 907 (2010). But that decision specifically addressed the portion of the departure bar regulation stating that an alien's departure from the United States "shall constitute a withdrawal" of a motion to reopen that has already been filed, 8 C.F.R. 1003.2(d), which was not the basis for the decision below, and it considered a different argument than petitioner makes here.[6]

To be sure, although this case concerns only a motion seeking *sua sponte* reopening, the court below did state its view that the regulation would be valid even in the context of a timely motion to reopen. But even so, any disagreement in the circuits on the broader question whether the departure bar regulations are valid for timely motions to reopen is limited to the Fourth and Tenth Circuits. See Pet. 15-17 (acknowledging that only two circuits have addressed that question). To the ex-

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[5] As noted above (at pp. 7-9, *supra*), petitioner made an argument based on *Lin* before the court of appeals, both in his petition for review of his first motion to reopen and petition for review of his second motion to reopen. The court of appeals rejected it both times. Petitioner does not seek certiorari on that basis.

[6] In *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-595 (2010), the Seventh Circuit recently determined that the departure bar in 8 C.F.R. 1003.2 should not be interpreted to limit the Board's jurisdiction to consider such motions, but instead to bar the Board from granting such motions. But the court did not cast doubt on the validity of the departure bar itself.

tent that issue may warrant this Court's review, the Court should wait for additional courts of appeals to address it, particularly because the Fourth and Tenth Circuits comprise less than five percent of the total immigration caseload in the courts of appeals. See Administrative Office of the U.S. Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 94-98 (2010) (Table B-3).

Contrary to petitioner's suggestion (Pet. 25-26), there is no disagreement in the courts of appeals about how this Court's recent decision in *Dada* v. *Mukasey*, 128 S. Ct. 2307 (2008), affects the departure bar. As petitioner himself notes (Pet. 25), the *William* court did not consider *Dada* because the decision in *William* predated *Dada*. Moreover, as the *Rosillo-Puga* court noted, "neither party in *Dada* specifically challenged the validity of the regulations," and the Court did not consider their validity. 580 F.3d at 1153 n.3; see *Dada*, 128 S. Ct. at 2320. To the extent that *Dada* is read to indicate that the INA gives an alien an affirmative right to file a motion to reopen, 128 S. Ct. at 2319, that would apply only to motions to reopen that complied with the time and numerical limitations in the statute, not ones that are time-barred and number-barred like the motion here. Finally, the fact that the other courts of appeals (including the Fourth Circuit) have not yet considered the impact of *Dada* on the departure bar provides another reason why certiorari is premature at this time.

4. This case would be a poor vehicle for considering the interplay between the departure bar regulations and the provisions of the INA addressing motions to reopen, because this case involves only *sua sponte* reopening, where the ultimate decision whether to grant relief is

entrusted to the broad discretion of immigration officials and is not judicially reviewable.

Whether to reopen a case outside the time and number limits prescribed by statute is entrusted to the broad discretion of the IJ and the Board. Both exercise that discretion sparingly, reserving it for truly exceptional situations. *In re G-D-*, 22 I. & N. Dec. at 1133-1134. Moreover, all courts of appeals to consider the issue have agreed that once the IJ or Board has decided whether to exercise its *sua sponte* authority, that decision is not reviewable by the federal courts. See *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).[7]

Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). That is true with respect to *sua sponte* reopening; the decision whether to reopen a case is entirely discretionary and there is "no meaningful standard against which to judge the agency's exercise of discretion." *Tamenut*, 521 F.3d at 1003. Further, unlike the statutory and regulatory provisions allowing an alien to file a motion to reopen, the regulations permitting an IJ or the Board to reopen a case *sua sponte* establish a procedural mechanism for immigration officials in aid of their own internal administration of immigration proceedings, and do not confer any privately enforceable rights on an alien.

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[7] In *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that the courts of appeals have agreed that denials of *sua sponte* reopening are unreviewable because *sua sponte* reopening is committed to agency discretion by law. 130 S. Ct. at 839 n.18.

Thus, even if the Board could consider petitioner's motion on its merits, the Board's decision whether to exercise its *sua sponte* authority would be unreviewable.[8] Accordingly, if the Court wishes to consider whether the departure bar regulations are consistent with the provisions of the INA addressing motions to reopen, it should do so in a case where the motion was filed within the time and numerical limits provided.

Several additional features of this case make it a particularly poor vehicle for considering the legal question whether the departure bar regulations conflict with 8 U.S.C. 1229a(c)(7)'s provision that an alien may file one motion to reopen within the time and numerical limits specified. Unlike *Rosillo-Puga*, this case involves not only an untimely motion, but one that is number-barred as well. Pet. App. 16a. Although petitioner suggested below that equitable tolling should apply, that argument was not well-developed: the court of appeals stated that it had trouble "discern[ing]" petitioner's argument, and that when the court invited supplemental briefing on the issue, petitioner "declined [the court's] invitation." *Id.* at 12a-13a. Petitioner did not renew the equitable tolling argument here. But if the Court were to consider it, the Court would be required to make difficult threshold determinations about the availability of equitable tolling generally and its application in this case before even reaching the question petitioner attempts to present. The Court therefore should await a better case for ad-

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[8] Indeed, on remand in *William*, the Board denied the alien's motion on the ground that it was untimely and declined to exercise its *sua sponte* authority. See *William* v. *Holder*, 359 Fed. Appx. 370, 372-373 (4th Cir. 2009). The court of appeals then dismissed the petition for review, stating that it lacked jurisdiction to review the Board's decision not to exercise its *sua sponte* reopening authority. *Id.* at 373.

dressing the question presented. Moreover, petitioner's statutory argument was hardly well-developed in the court of appeals: although the argument petitioner now makes has been available to him since his first motion to reopen in March 2007, he did not make the argument until his reply brief in the court of appeals in this case, and then spent only a few pages developing the argument. See Pet. C.A. Reply 11-14. For that reason, the government argued below that res judicata barred the court's consideration of the issue. Gov't C.A. Br. 17-19. Although the court of appeals did not reach that argument, it may well serve as another basis for affirmance of the decision below, regardless of how this Court would resolve the question presented. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

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