No. 10-517

In the Supreme Court of the United States

INDAH ESTALITA, 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 of Immigration Appeals from granting a motion to reopen filed by an alien who has departed the United States, is valid as applied to a timely motion to reopen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Regulations and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 10-517

INDAH ESTALITA, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the *Federal Reporter* but is reprinted at 382 Fed. Appx. 711. The opinions of the Board of Immigration Appeals (Pet. App. 23-24, 25-26, 29-32) and the immigration judge (Pet. App. 7-22, 27-28) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-6) was entered on June 11, 2010. A petition for rehearing was denied on July 27, 2010 (Pet. App. 33). The petition for a writ of certiorari was filed on October 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. 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 basis of the motion is to apply for asylum or withholding of removal and the motion is 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) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

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

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 time in the United States, see *Dada* v. *Mukasey*, 554 U.S. 1, 13 (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 April 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 departed the United States. 61 Fed. Reg. 18,905 (1996) (8 C.F.R. 3.2(c)(2) (1997)).

c. In September 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, overturn the longstanding regulation containing the bar to reopening for an alien who has departed the United States.

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. Section 245(a) of the INA, 8 U.S.C. 1255(a), provides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisites must be met. The alien must "make[] an application for such adjustment"; be "eligible to receive an immigrant visa" and be "admissible to the United States for permanent residence"; and must have an "immigrant visa * * * immediately available to [her] at the time [her] application is filed." *Ibid.*

If the alien seeks to adjust status on the basis of employment, she must go through a multi-step process. First, her employer must obtain a certification from the Department of Labor (DOL) (through Form ETA-750) that "there are not sufficient workers who are able, willing, qualified * * * and available at the time of application" to perform the job the alien seeks to perform in the United States, and that "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly em-

ployed." 8 U.S.C. 1182(a)(5)(A)(i). Second, the employer must obtain approval from United States Citizenship and Immigration Services (USCIS) of an Immigrant Petition for Alien Worker (Form I-140) indicating that the alien possesses the required education and experience for the job. 8 C.F.R. 204.5. When the alien's priority date (the date DOL accepted the labor certification for processing) becomes current, the alien may submit an application to adjust her status to that of a lawful permanent resident.

Even if all of the statutory prerequisites are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in [her] favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980).

4. Petitioner is a native and citizen of Indonesia. Pet. App. 2. She entered the United States as a nonimmigrant visitor in October 2000 and remained beyond the time permitted. *Id.* at 2, 7.

In April 2001, petitioner filed an application for asylum. Administrative Record (A.R.) 645. The Department of Homeland Security (DHS) referred her asylum application to an IJ and charged petitioner with being removable as an alien who remained in the United States beyond the time permitted. Pet. App. 2-3; A.R. 643; see 8 U.S.C. 1252(a)(1)(B). Petitioner conceded that she is removable as charged but renewed her application for asylum and sought withholding of removal, protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85,

and voluntary departure under 8 U.S.C. 1229c. Pet. App. 3, 20-21.

The IJ found petitioner removable as charged, denied her applications for asylum, withholding of removal, and CAT protection, and granted her request for voluntary departure. Pet. App. 7-22. Petitioner contended that she would be persecuted or tortured if returned to Indonesia because she is Christian and of Chinese ancestry. *Id.* at 12-15. The IJ found that petitioner's testimony "wasn't reliable"; "wasn't truthful"; and "was not sufficiently detailed, consistent or believable to provide a coherent account of the basis for her fears." *Id.* at 18. Indeed, the IJ found that petitioner's asylum application was "very close to * * * frivolous." *Ibid.*

The IJ noted that although petitioner claimed to be a Christian her entire life, there was little documentation of that fact (only a letter from a church she attended in the United States). Pet. App. 16-17; A.R. 532 (letter). The IJ also observed that petitioner "was never confronted or never hurt in any way" as a result of her religion or ancestry. Pet. App. 19. Although the IJ found that petitioner failed to establish past persecution, he also determined that even if petitioner had made such a showing, "there has been a change in country circumstances" because the new President of Indonesia has "declared * * * that all religions should be tolerated" and has worked to improve relations between Muslims and Christians. *Id.* at 16, 19.

The IJ then granted petitioner's request for voluntary departure under 8 U.S.C. 1229c. Pet. App. 21; see *Dada*, 554 U.S. at 9-11 (discussing voluntary departure). "Voluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement"; "[i]n return for anticipated benefits, including the possibility of

readmission, an alien who requests voluntary departure represents that he or she has the means to depart the United States and intends to do so promptly." *Dada*, 554 U.S. at 19 (internal quotation marks omitted). The IJ explained that under the grant of voluntary departure, petitioner was required to leave the United States within 30 days. Pet. App. 21.

5. The Board affirmed the IJ's decision without issuing a separate opinion. Pet. App. 23-24. The Board stated that petitioner was required to voluntarily depart the United States by June 12, 2004. *Id.* at 3, 23-24. DHS later extended that date to July 12, 2004. *Id.* at 3, 25; A.R. 196; see 8 C.F.R. 1240.26(f).

6. Five days before her scheduled departure deadline, petitioner filed a motion to reopen her case. She sought to adjust her status to that of a lawful permanent resident based on employment. A.R. 189-191. She contended that her employer recently had obtained an approved labor certification on her behalf, her I-140 visa petition was *prima facie* approvable, and the priority date was current. Pet. App. 3, 25; A.R. 189-191. Petitioner did not, however, seek to withdraw her request for voluntary departure. Cf. *Dada*, 554 U.S. at 6, 21-22. Instead petitioner departed, in accordance with her agreement under her voluntary departure order, on July 12, 2004. Pet. App. 3-4. Unaware of that fact, the Board granted the motion to reopen and remanded the proceedings to the IJ. *Id.* at 25-26.

7. DHS reports that on August 10, 2004—five days after the Board's decision granting her motion to reopen—petitioner attempted to re-enter the United States. She lacked a visa or any other valid document necessary for entry. Petitioner and her husband claimed, in sworn statements, that they were "legal resi-

dents" of the United States. A.R. 70. Because petitioner expressed fear of returning to Indonesia, A.R. 65-71, she received a credible fear interview and was paroled into the United States and charged with being removable as an "arriving alien," A.R. 54; 8 U.S.C. 1225(b)(1)(A)(i); 8 C.F.R. 1001.1(q). See also Pet. 11 (acknowledging this chain of events).

8. DHS then filed with the IJ a motion to terminate proceedings for lack of jurisdiction. Pet. App. 4; A.R. 52-57. The motion asserted that the Board could not grant petitioner reopening because she departed the United States while her motion to reopen was pending. A.R. 55 (relying on *In re Crammond*, 23 I. & N. Dec. 179, 180 (B.I.A. 2001) (holding that when the Board is presented with evidence that it has granted a motion to reopen after the alien's departure from the United States, it is appropriate to reconsider and vacate the prior order)).

The IJ granted the motion to terminate, stating that petitioner's departure withdrew her motion to reopen under 8 C.F.R. 1003.2(d). Pet. App. 27-28.

9. The Board dismissed petitioner's appeal. Pet. App. 29-31. The Board explained that petitioner's departure while her motion to reopen was pending "constitute[d] a withdrawal of such motion" under 8 C.F.R. 1003.2(d). Pet. App. 30. The Board stated that it had not been aware of petitioner's departure at the time of its prior decision and "[h]ad that information been available, [it] would not have reopened proceedings." *Ibid.*

10. The court of appeals denied the petition for review in an unpublished, non-precedential opinion. Pet. App. 1-6. Petitioner contended that the departure bar in 8 C.F.R. 1003.2 was invalid because it conflicted with the provision of the INA that authorizes aliens to file

one motion to reopen, 8 U.S.C. 1229a(c)(7)(A). Pet. Supp. C.A. Br. 17-48.[1]

The court of appeals rejected that argument, relying on its recent decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), cert. denied, 131 S. Ct. 502 (2010). 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 her 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 represents a "permissible construction of the statute" at step two of the *Chevron* framework, because an alien's departure from the United States fundamentally changes her status under the law. *Id.* at 1157-1158 (internal quotation marks omitted).

---

[1] Petitioner also contended that due process requires that she be allowed to file one timely motion to reopen. Pet. App. 4. The court of appeals rejected that argument, *id.* at 6, and petitioner does not renew it before this Court.

In this case, the court of appeals recounted its analysis in *Rosillo-Puga* and then concluded that "the [Board] properly determined that [petitioner's] departure from the United States during the pendency of her motion to reopen constituted a withdrawal of her motion." Pet. App. 5-6.

11. Petitioner filed a petition for rehearing en banc, which was denied, with no member of the panel and no judge in regular active service requesting a poll. Pet. App. 33.

ARGUMENT

Petitioner contends (Pet. 25-29) that the bar to reopening contained in 8 C.F.R. 1003.2(d) is invalid because it conflicts with the statutory provisions governing motions to reopen. The decision below is correct, and it does not create binding circuit precedent and therefore cannot give rise to the type of disagreement in published circuit opinions that would warrant this Court's review. Although the court below relied upon its prior decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), cert. denied, 131 S. Ct. 502 (2010), that case was different because it addressed an untimely motion to reopen, and such untimely motions are not addressed in 8 U.S.C. 1229a(c)(7).[2] In any event, this case would be a poor vehicle for considering the question presented. Petitioner requested and was granted voluntary departure, and then filed a motion to reopen to obtain adjustment of status, a discretionary mechanism that is available only to an alien who is *within* the United States. It

[2] This Court recently denied certiorari petitions challenging the departure bar regulation in the context of untimely motions to reopen. See *Rosillo-Puga*, 131 S. Ct. at 502 (No. 09-1367); *Mendiola* v. *Holder*, 131 S. Ct. 502 (2010) (No. 09-1378).

therefore is especially reasonable to provide that reopening will not be granted to an alien to allow her to pursue adjustment of status if she has voluntarily departed the United States, and that departure therefore will be regarded as a withdrawal of the motion to reopen. Moreover, petitioner cannot obtain adjustment of status in this proceeding due to her departure from the United States and return as an arriving alien. Further review is therefore unwarranted.

1. The court of appeals' decision is correct. As the court below understood, Pet. App. 5, whether the 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 she has departed the United States.

a. 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). These provisions do not by their terms address whether immigration officials may grant motions to reopen or reconsider filed by aliens who have departed the United States. See *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441 (1st Cir. 2007) ("no statutory language * * * explicitly addresses the issue"), cert. denied, 129 S. Ct. 37 (2008). The court below found that omission particularly telling, because the Attorney General's regulations have for decades specifically precluded immigration officials from granting motions to reopen or reconsider filed by aliens who have left the United States. Pet. App. 5.

Indeed, when Congress codified the time and numerical limitations on motions to reopen and reconsider in 1996, it left the departure bar unchanged in the regulations. See p. 4, *supra*. As the court of appeals recognized (Pet. App. 5), 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); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [relevant] change."). Accordingly, there is no conflict between the statutory language providing for motions to reopen and the departure bar contained in the regulations.

Petitioner does not contend that Section 1229a(c)(7) expressly addresses the situation of an alien who has filed a motion to reopen and then left the United States. Instead, she suggests (Pet. 26-27) that Section 1229a provides "exceptions" and that "no others" may be included. The provisions petitioner cites are not "exceptions"; they are minimum requirements for filing a motion to reopen—*i.e.*, that (subject to limited exceptions) the alien may file only one motion and must do so within 90 days. The statute does not say that all motions to reopen that meet those requirements set out in the statute must be granted, and it has long been settled that that is not the case. To the contrary, the decision whether to grant reopening has always been discretionary with the Attorney General, and the regulation petitioner challenges reflects a longstanding exercise of that discretion by making reopening unavailable to an alien who has left the country. Moreover, the statutory provi-

sions petitioner cites are prerequisites that Congress borrowed from the existing regulations when codifying provisions for motions to reopen. As explained above (see pp. 12-13, *supra*), it is significant that when Congress codified those provisions, it did not make any change to the longstanding departure bar.

Petitioner is also wrong to rely (Pet. 27) on the provision addressing victims of domestic violence, 8 U.S.C. 1229a(c)(7)(C)(iv)(IV). That provision creates an exception to the usual 90-day time limit for filing a motion to reopen for a victim "physically present in the United States at the time of filing the motion." *Ibid.* That provision would preclude the Attorney General from allowing such a victim to file a motion for reopening after 90 days if she left the country. It does not suggest that the Attorney General may not as a discretionary matter provide that other aliens who have left the country will also be denied reopening.

Finally, petitioner contends (Pet. 28-29) that IIRIRA's repeal of the bar to *judicial* review for aliens who have left the United States means Congress intended the same result for motions to reopen. Like petitioner's other arguments, any such inference cannot make the statutory text (which simply does not speak to the issue) unambiguously clear. In any event, Congress's repeal of the bar to judicial review does not aid petitioner, because at the same time Congress made that change, it chose not to repeal the longstanding departure bar regulation. See p. 4, *supra*. Congress had good reason to make that distinction: "A petition for review of a final order of removal represents an alien's first and only opportunity for judicial review of the merits of the order, whereas a motion to reopen seeks a *subsequent* opportunity for administrative review." *William* v. *Gon-*

zales, 499 F.3d 329, 343 (4th Cir. 2009) (Williams, C.J., dissenting) (emphasis in original).

b. After concluding that the INA does not speak directly to the question, the court of appeals correctly determined that the regulation is based on a permissible reading of the statute. Pet. App. 5; 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. 25-26. In any event, Congress has expressly granted rulemaking authority to the Attorney General, see 8 U.S.C. 1103(g)(2), and the departure bar regulation therefore must be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984).

Here, the Attorney General reasonably decided to categorically limit immigration officials from exercising their discretion to grant reopening to aliens who have departed the United States. Departure is a "transformative event" that fundamentally changes the alien's status under the law. *In re Armendarez-Mendez,* 24 I. & N. Dec. 646, 655-656 (B.I.A. 2008). As the Attorney General explained in retaining the departure bar following the enactment of IIRIRA, once departure 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." 62 Fed. Reg. 10,321 (1997). That decision is reasonable in light of a central focus of Congress in IIRIRA, which was to place limits on aliens' ability to reopen and reconsider 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's ability to obtain reopening, but does not limit the discretion of the government with respect to such motions. 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. There is, accordingly, no basis for invalidating the longstanding regulations.

c. The application of the provision in the regulation that departure constitutes a withdrawal of the motion to reopen is particularly reasonable here, where the alien is seeking reopening to pursue an application for the new relief of adjustment of status. Petitioner requested and received the privilege of voluntary departure, and she did not withdraw that request when she filed her motion to reopen to seek adjustment, but instead departed according to the terms of that agreement.

"[A]djustment of status is merely a procedural mechanism by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (B.I.A. 1992). Before Congress created the mechanism of adjustment of status, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already in the United States is treated as if she were seeking admission from

abroad but is permitted to remain here while the application is pending. See *ibid.*; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S-*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

Adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. Because the adjustment-of-status procedure ultimately affects the procedures by which, and the location from which, an alien may seek discretionary admission into the country—rather than her substantive entitlement to admission—it is particularly appropriate to provide that reopening will not be granted to an alien who has departed the United States to allow her to pursue adjustment of status, rather than applying for admission at a consulate abroad.

2. Petitioner contends (Pet. 14-23) that review is warranted because there is disagreement in the circuits regarding the question presented. There is no disagreement warranting review in this case.[3]

a. As an initial matter, the decision below is unpublished and does not create circuit precedent. See Pet. App. 2 n. *; see also 10th Cir. R. 32.1(A). Although the decision below relied on the court's prior decision in *Rosillo-Puga*, the issue addressed in that case was different, because it concerned an untimely motion to reopen. As the government explained in its brief in opposition to the certiorari petition in *Rosillo-Puga*, to the extent that 8 U.S.C. 1229a(c)(7) could be interpreted to afford an alien a right to file a motion to reopen even

[3] Contrary to petitioner's contention (Pet. 23), the government did not "acknowledge[] a circuit split concerning timely motions to reopen" in the briefs in opposition to certiorari in *Rosillo-Puga* and *Mendiola*.

post-departure, that could only be true with respect to motions that are filed within the time and numerical limitations contained in that statute. Br. in Opp. at 12-17, *Rosillo-Puga*, *supra*; see 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (providing that "[a]n alien may file one motion to reopen proceedings under this section" and that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal"). Although the court in this case applied *Rosillo-Puga* in the context of a timely motion to reopen, it did so in an unpublished, non-precedential opinion. Because there is no precedential decision in the Tenth Circuit addressing timely motions to reopen, there is no decision of that court that could give rise to a circuit conflict warranting this Court's review on the question whether Section 1229a(c)(7) invalidates the departure bar in the context of a timely motion to reopen.

b. The Fourth Circuit is the only circuit to have invalidated the departure bar regulations as conflicting with the statutory text, and no circuit has expressly rejected such a challenge in a published decision in the context of a timely motion to reopen.

The Fourth Circuit held in *William* v. *Gonzales*, *supra*, 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. 499 F.3d at 332. *William* is distinguishable from this case on several grounds. The alien in *William* was removed involuntarily from the United States, *id.* at 331, while petitioner chose voluntary departure, "an agreed-upon exchange of benefits" (*Dada*, 554 U.S. at 19) where

petitioner made certain concessions in order to arrange her own affairs before departure and remain eligible for future benefits, such as readmission, while the United States obtained in return her agreement to prompt departure. Further, the alien in *William* was seeking to reopen his proceedings based on new evidence that he contended called into question whether he was removable at all, 499 F.3d at 331, while petitioner here sought reopening to seek a new form of relief through a procedural mechanism available only to aliens in the United States, see pp. 16-17, *supra*. And unlike the alien in *Dada*, she did not seek to withdraw her request for voluntary departure when she filed her motion to reopen. Cf. *Dada*, 554 U.S. at 6, 19-21. Having requested and obtained voluntary departure and chosen to follow through with her commitment to depart, it is entirely reasonable to treat petitioner's voluntary departure as a withdrawal of her motion to obtain relief that would have been available only if she had remained in the United States. The circumstances of this case are thus quite different from *William*.

The Fourth Circuit is, moreover, the only court of appeals that has invalidated the regulation at issue on the ground that it conflicts with the statute. In *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-595 (2010), the Seventh Circuit 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 may instead operate to bar the Board from granting such motions. But the court did not hold that a bar to reopening for an alien who is no longer in the United States is invalid; instead, it noted that the Board "may well be entitled to recast its approach" as a claim-processing rule rather than one of "subject-matter jurisdiction."

See *id.* at 595; see generally *Union Pacific R.R. Co.* v. *Brotherhood of Locomotive Engr's*, 130 S. Ct. 584, 596 (2009) (explaining that in contrast to a jurisdictional rule, "a claim-processing rule even if unalterable on a party's application does not reduce the adjudicatory domain of a tribunal" (internal quotation marks omitted)). Indeed, *Marin-Rodriguez* expressly rejected the reasoning in *William*. 612 F.3d at 592-593.

In *Coyt* v. *Holder*, 593 F.3d 902, 907 (2010), the Ninth Circuit 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." That decision considered a different argument than petitioner makes here. The Ninth Circuit found 8 C.F.R. 1003.2(d) "invalid as applied to a forcibly removed petitioner," meaning an alien who was physically deported by the government. *Coyt*, 593 F.3d at 907-908. The court stated that it "need not, and d[id] not, reach" any question whether the departure bar could be applied to a "voluntary" departure. *Id.* at 907 n.3. Here, petitioner voluntarily departed the United States, and *Coyt* by its terms would not apply to her case.[4]

In *Madrigal* v. *Holder*, 572 F.3d 239 (2009), the Sixth Circuit addressed a different regulation, 8 C.F.R.

---

[4] The Ninth Circuit has interpreted the departure bar regulation so as not to apply to aliens whose removal proceedings have been completed. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007). The *Lin* court reasoned that, because the regulation is phrased in the present tense, it applies only to aliens in removal proceedings, and not to those whose proceedings have been completed. *Lin* did not address whether the regulation is consistent with the INA, and it is therefore inapposite here.

Petitioner also cites (Pet. 20) *Aguilera-Ruiz* v. *Ashcroft*, 348 F.3d 835, 837 (9th Cir. 2003), but that case considered 8 C.F.R. 1003.4, which was not considered by the courts in this case.

1003.4, which provides that an alien's departure from the United States constitutes a withdrawal of a previously-filed appeal before the Board. The court held that the departure bar in that regulation did not withdraw the alien's administrative appeal which remained pending when the alien was physically removed by the government. 572 F.3d at 242-243. Because 8 U.S.C. 1003.4 addresses administrative appeals, not motions to reopen, *Madrigal* is inapposite here; neither the Board nor the court of appeals relied on (or even cited) it.[5]

c. Accordingly, the only court to invalidate the departure bar as inconsistent with Section 1229a(c)(7) is the Fourth Circuit. There is no decision from another court of appeals that conflicts with that decision. The decision below does not create circuit precedent, and in *Rosillo-Puga*, the Tenth Circuit specifically "distinguishe[d] th[at] case from * * * *William*" on the ground that *Rosillo-Puga* concerned only an untimely motion to reopen. 580 F.3d at 1158.[6]

Moreover, petitioner's citation (Pet. 17) of *Pena-Muriel* v. *Gonzales*, *supra*, is inapposite, because there 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 pre-

---

[5] Petitioner cites (Pet. 20) two other decisions of the Sixth Circuit. The first, *Ablahad* v. *Gonzales*, 217 Fed. Appx. 470 (2007) (unpublished), does not create circuit precedent. The second, *Mansour* v. *Gonzales*, 470 F.3d 1194 (2006), applied 8 C.F.R. 1003.2(d), but it did not consider the argument that that regulation conflicts with the statutory provisions governing reopening. 470 F.3d at 1198.

[6] 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.

cluded judicial review of removal orders for aliens who had departed the United States, abrogated the Attorney General's authority to enforce the departure bar. *Pena-Muriel*, 489 F.3d at 441. That is different from the argument here, where petitioner contends that the departure bar regulation conflicts with Section 1229a(c)(7)(A). And in any event, the First Circuit's conclusion is consistent with the conclusion reached by the court below.

Finally, petitioner cites (Pet. 18 n.4) a number of decisions that apply the departure bar, but those decisions do not address whether the regulation is consistent with the statute, and they therefore cannot create a circuit split on that issue. The decision below therefore does not create or contribute to any disagreement in the circuits on the question presented.

3. In any event, this case would be a poor vehicle to consider the question presented. Regardless of how this Court resolved the question presented, petitioner cannot obtain reopening. She is now ineligible to have her case reopened because her status as an arriving alien means the IJ cannot grant her adjustment of status, which is the relief she seeks through reopening. See *In re Yauri*, 25 I. & N. Dec. 103, 109 (B.I.A. 2009) ("[W]e have not been granted authority to reopen the proceedings of respondents who are under a final administrative order of removal to pursue matters that could affect their removability if we have no jurisdiction over such matters.").

When petitioner attempted to re-enter the United States in August 2004, she had no valid documents and was paroled into the United States as an "arriving alien." See A.R. 54; 8 U.S.C. 1225(b)(1)(A); see also 8 C.F.R. 1.1001(q) (defining "arriving alien" as "an applicant for admission coming or attempting to come into

the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport"). "An arriving alien remains an arriving alien even if paroled" into the United States. 8 C.F.R. 1.1001(q). Petitioner therefore was and still is an arriving alien.

Under regulations applicable to all cases pending administrative or judicial review on or after May 12, 2006, and subject to limited exceptions not applicable here, for "an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien." 8 C.F.R. 1245.2(a)(1)(ii). Instead, only USCIS has jurisdiction over such an alien's application for adjustment of status. 8 C.F.R. 245.2(a)(1); see 71 Fed. Reg. 27,585 (2006). Accordingly, the IJ would not be able to adjudicate petitioner's application for adjustment of status even if reopening were available to her. Instead, petitioner could only obtain such adjudication from USCIS.[7] For that reason as well, further review is unwarranted.

---

[7] Petitioner filed a Form I-140 petition and an application for adjustment of status with USCIS on June 27, 2004. A.R. 190. When she voluntarily departed the United States, her departure was deemed abandonment of, and caused termination of, that adjustment application. 8 C.F.R. 245.2(a)(4)(ii)(A). Her departure did not abandon the Form I-140 petition, however, nor does it preclude her from filing a new application for adjustment of status with USCIS. Petitioner is precluded by regulation, however, from obtaining adjustment of status through the immigration courts.

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

DECEMBER 2010