No. 09-1367

In the Supreme Court of the United States

MARTIN ROSILLO-PUGA, AKA MARTIN PUGA,
AKA MARTIN ROSILLO, 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

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QUESTION PRESENTED

Whether 8 C.F.R. 1003.23(b)(1), which precludes immigration judges from granting motions to reopen or reconsider filed by aliens who have departed the United States, is valid as applied to motions seeking *sua sponte* reopening or reconsideration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-56) is reported at 580 F.3d 1147. The opinions of the Board of Immigration Appeals (Pet. App. 59-61) and the immigration judge (Pet. App. 62-65) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57-58) was entered on September 15, 2009. A petition for rehearing was denied on December 8, 2009 (Pet. App. 66-67). On March 1, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 7, 2010, and the petition was filed on that date. 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) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

b. An alien may file one motion to reconsider any order of the Board or the IJ. 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), .23(b). The alien may file only one such motion for any given decision, and it must be filed within 30 days of the date of entry of the decision of which reconsideration is sought. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2), .23(b)(1). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1), .23(b)(2). Whether to grant a motion to reconsider is discretionary. See, *e.g.*, *Liu* v. *Mukasey*, 553 F.3d 37, 40 (1st Cir. 2009).

c. If an alien does not file his motion to reopen within the 90-day time period, or file his motion to reconsider within the 30-day time period, the IJ or the Board still may reopen or reconsider 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."), 1003.23(b)(1) (similar for IJ). Whether to reopen or reconsider a case *sua sponte* is entrusted to the broad discretion of the Board or IJ. 8 C.F.R. 1003.2(a), .23(b)(1). 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 re-

served 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 or reconsideration of their immigration cases.

a. The Attorney General has provided for discretionary reopening and reconsideration in 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 or reconsider 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 or reconsideration motions before an IJ provides:

> 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.

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

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 or reconsider. 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 and motions to reconsider that an alien may file and to specify the time periods for the filing of such motions. Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 5066.

The Attorney General promulgated the final regulations in 1996. Those regulations included time and numerical limits on motions to reopen and motions to reconsider, and also reaffirmed the longstanding bar on granting such motions filed by aliens who have left the United States. 61 Fed. Reg. 18,904-18,905 (8 C.F.R. 3.2(c)(1)-(2) and (d) (1997)).

c. In 1996, Congress amended the INA to codify certain procedures for filing motions to reopen and motions to reconsider. Congress provided that an alien "may file one motion to reconsider a decision that the alien is removable from the United States" and "may file one motion to reopen," and Congress codified the time and numerical limitations contained in the regulations. 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)(6) and (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 long-standing 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 Mexico who married a United States citizen and became a conditional legal permanent resident in 1995. Pet. App. 3. In 1997, he was convicted of battery; the victim was his wife. *Ibid.* On the basis of this conviction, the Department of Homeland Security charged petitioner with being removable as an alien convicted of a crime that qualified as an aggravated felony and a crime of domestic violence. *Ibid.*; see 8 U.S.C. 1227(a)(2)(A)(iii) and (E)(i).

Petitioner admitted the factual allegations supporting removability and did not seek any relief from removal. Pet. App. 3; Administrative Record (A.R.) 99. After a hearing, an IJ determined that petitioner was removable as charged and ordered him removed to Mexico. A.R. 99. Petitioner waived his right to appeal and was removed in 2003. Pet. App. 3. Three months later, the Seventh Circuit held in *Flores* v. *Ashcroft*, 350 F.3d 666, 671-672 (2003), that the offense petitioner commit-

ted does not qualify as either an aggravated felony or a crime of domestic violence for purposes of immigration law. Pet. App. 3-4.

4. Over three years later, petitioner filed a motion with an IJ, seeking to have his case reopened or reconsidered in light of *Flores*. Pet. App. 4; see A.R. 63-75. Petitioner acknowledged that his motion to reopen or reconsider was untimely, but requested the IJ to reopen his case *sua sponte*. Pet. App. 63; A.R. 71-72. Petitioner acknowledged the departure bar contained in 8 C.F.R. 1003.23(b)(1), but argued that it did not apply to *sua sponte* reopening. A.R. 73-74.

The IJ denied the motion. Pet. App. 62-65. The IJ noted that, whether the motion is properly characterized as a motion to reopen or a motion for reconsideration, it was untimely, and petitioner acknowledged that it was untimely in his motion. *Id.* at 63. The IJ then considered whether to grant petitioner reopening or reconsideration *sua sponte*. *Id.* at 63-64. The IJ determined that he lacked jurisdiction to grant *sua sponte* reopening or reconsideration, explaining that the departure bar contained in 8 C.F.R. 1003.23(b)(1) "precludes [an] IJ [from] exercis[ing] his general discretion in reopening and reconsidering proceedings" when an alien files the motion after he has departed the United States. Pet. App. 64. In so holding, the IJ rejected petitioner's argument that the regulation that generally grants IJs discretion to reopen or reconsider proceedings *sua sponte* trumps the departure bar. *Id.* at 64-65.

5. The Board dismissed petitioner's appeal. Pet. App. 59-61. Citing its prior decision in *In re G-N-C-*, 22 I. & N. Dec. at 288, the Board agreed with the IJ that the departure bar deprived the IJ of jurisdiction to consider a motion to reopen or reconsider filed after an

alien had departed the United States. Pet. App. 59-60. The Board also "agree[d] with the Immigration Judge's determination that the specific regulatory language prohibiting motions after the alien has departed the United States overrides the more general regulatory language affording the Immigration Judge the right to reopen or reconsider *sua sponte*." *Id.* at 60.

6. The court of appeals denied petitioner's petition for review. Pet. App. 1-56. Petitioner had argued that the departure bar regulation, 8 C.F.R. 1003.23(b)(1), was invalid because it conflicted with the provisions of the INA that address motions to reopen and reconsider, 8 U.S.C. 1229a(c)(6)(A) and (7)(A). In petitioner's view, because the INA permits an alien to file one motion to reopen or reconsider within certain specified time limits, the Attorney General may not by regulation deprive immigration officials of the discretion to grant such motions for aliens who have departed the United States. Pet. C.A. Br. 12-23.

The court of appeals rejected that argument and upheld the validity of the departure bar regulation. Applying the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court first determined that "the statute is simply silent" on whether an alien who has departed the United States may obtain reopening or reconsideration of his removal order. Pet. App. 21. 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." Pet. App. 21-22.

The court noted that the Fourth Circuit had reached a contrary conclusion in *William* v. *Gonzales*, 499 F.3d 329 (2007), but concluded that the dissenting judge in that case had the better of the argument that the statutory text did not speak to the departure bar issue. Pet. App. 14-21. The court of appeals agreed with the *William* dissent that Congress would have used more explicit language had it wished to repeal the longstanding departure bar, particularly because that bar had existed in the regulations for decades and the Attorney General had reaffirmed it in the regulations addressing motions to reopen, which Congress relied upon when it enacted the statutory requirements for motions to reopen. *Id.* at 17. The court stated that it was "not persuaded * * * that, by negative inference, Congress intentionally swept away forty years of continuous practice by the Attorney General." *Id.* at 22-23.

Having "concluded that the statute is not clear and unambiguous," the court of appeals determined that the Attorney General's regulation represented a "permissible construction of the statute" under step two of the *Chevron* framework. Pet. App. 22-23 (internal quotation marks omitted). The court explained that because Congress "has not merely failed to address a precise question but has also made an explicit delegation of rulemaking authority" to the Attorney General, the Attorney General's regulations should be "given controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 22 (internal quotation marks omitted). Here, the court explained, the regulation is reasonable because an alien's departure from the United States fundamentally changes his status un-

der the law: "whatever immigration status the removed alien may have possessed before is vitiated," and he is "in no better position after departure than any other alien who is outside the territory of the United States." *Id.* at 24 (quoting *In re Armendarez-Mendez*, 24 I. & N. Dec. at 655-656 (emphasis omitted)).

The court of appeals then noted that petitioner's case only concerned *sua sponte* reconsideration or reopening, because petitioner's motion to reconsider and to reopen was untimely and "he has waived any argument that he should be excused from those procedural requirements [*i.e.*, the time limits]." Pet. App. 25; see also *id.* at 33 n.1 (O'Brien, J., concurring) (petitioner "expressly acknowledged the untimeliness of his motion to reopen and/or reconsider in the agency proceedings"). The court also rejected petitioner's argument that the regulations that generally permit IJs and the Board to reopen or reconsider cases *sua sponte* trump the departure bar, agreeing with the Board that the more specific departure bar controls the more general regulations about *sua sponte* authority. *Id.* at 29. Finally, the court noted that it would not be able to review a denial of *sua sponte* reopening or reconsideration in any event, because there are no meaningful standards by which to judge the agency's exercise of discretion and the decision is one committed to agency discretion by law. *Id.* at 29-31.[1]

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[1] The court also rejected petitioner's arguments that the departure bar regulations should be interpreted to apply only to aliens whose proceedings are not yet final when they file their motions to reopen or reconsider, Pet. App. 25-27, and that application of the regulation to him would be arbitrary and capricious or violate his due process rights, *id.* at 28, 30-31. Petitioner does not renew those arguments before this Court.

One judge concurred, stressing that this case involves only a motion for *sua sponte* reconsideration or reopening, and not a motion that complies with the time limits set out in the statute. Pet. App. 31-34 (O'Brien, J., concurring). The concurring judge noted (*id.* at 31-32) that the only other court to consider that issue as of that time, the Fifth Circuit, had agreed that the departure bar, as applied to *sua sponte* motions, is fully consistent with the INA. See *Ovalles* v. *Holder*, 577 F.3d 288 (2009). One judge dissented, stating that he "would invalidate the challenged portion of 8 C.F.R. § 1003.23(b)(1) under the first step of *Chevron*." Pet. App. 34 (Lucero, J., dissenting).

7. 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. 66-67.

ARGUMENT

Petitioner renews his contention (Pet. 28-35) that the departure bar contained in 8 C.F.R. 1003.23(b)(1) is invalid because it conflicts with the statutory provisions governing motions to reconsider and reopen. Because, as petitioner has acknowledged, his motion is untimely (whether construed as a motion to reopen or a motion to reconsider), this case concerns only the IJ's *sua sponte* reopening or reconsideration 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* reconsideration or

reopening filed by aliens who have departed the United States. Moreover, this case would present a poor vehicle for considering the underlying legal issues because even if the IJ could consider petitioner's request for *sua sponte* reopening or reconsideration and denied it on the merits, the court of appeals would be unable to review that decision, because the decision whether to reconsider or 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 reconsider and reopen that is untimely. In that circumstance, the issue the IJ must decide is whether to exercise his *sua sponte* discretionary authority to grant reopening or reconsideration. 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), .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 any exception to the 90-day deadline applies. Similarly, a motion to reconsider an order of an IJ or the Board must be filed within 30 days of the date of entry of the order. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2); see also p. 3, *supra.* Petitioner's motion was filed more than three and one-half years after his removal order was entered. Pet. App. 4. It was therefore untimely, and petitioner therefore could only request *sua sponte* reopening or reconsideration under 8 C.F.R. 1003.23(b)(1).

Petitioner has acknowledged throughout this litigation that he did not meet the statutory time require-

ments for filing a motion to reopen or reconsider and that he therefore can seek only *sua sponte* reopening or reconsideration. Pet. App. 24-25; *id.* at 32 n.1 (O'Brien, J., concurring); see Pet. 11-12. This case, therefore, only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening or reconsideration. Because petitioner did not file his motion within the time limits prescribed by statute, the statutory provisions regarding timely motions to reopen and reconsider—8 U.S.C. 1229a(c)(6) and (7)—do not apply to him and there accordingly can be no inconsistency between the departure bar regulation and those statutory provisions in this case.[2]

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 and reconsider, it says nothing about whether an alien may obtain reopening or reconsideration after he has departed the United States, and it does not address *sua sponte* reopening at all.

The INA provides that "[t]he alien may file one motion to reconsider a [removal] decision" and states that

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[2] Petitioner also contends (Pet. 35-37) that this Court's review is warranted because the court of appeals stated that the untimeliness of his motion was an "alternative basis" for denying his petition for review. Pet. App. 24. That is a fact-specific and case-specific argument that does not warrant this Court's review. Moreover, the court's determination that the motion was untimely—which petitioner has conceded—simply underscores the conclusion that petitioner was relegated to requesting *sua sponte* reopening, and the departure bar regulations are plainly valid in that context.

"[t]he motion must be filed within 30 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(6)(A) and (B). With respect to motions to reopen, 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, 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. Pet. App. 21-22. 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 or reconsider filed by aliens who have left the United States. *Id.* at 17-18, 21-22. 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. *Id.* at 17-18; see pp. 5-6, *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 reconsider and the departure bar contained in the regulations.

Even if the statutory provisions addressing motions to reopen and reconsider 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, be-

cause petitioner has not complied with those time limits. That is, even if petitioner is correct that the INA "expressly provide[s] aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation," Pet. 7, the statute only gives aliens the right to file such a motion within the time 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 or reconsider outside the time limits specified, application of the departure bar to preclude IJs from exercising their discretion to grant *sua sponte* reopening or reconsideration 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. 22-23. Petitioner does not challenge this aspect of the court of appeals' decision, instead making only a *Chevron* step one argument. See Pet. 29-35. 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 manifestly contrary to the statute." Pet. App. 22 (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. Pet. App. 23 (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 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, 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 or reconsider 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 pp. 3-4,

infra; Pet. 25. Whether to exercise that authority is entirely entrusted to the agency's discretion, and that decision is not subject to judicial review. See pp. 22-23, *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 untimely 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 [Board] to reconsider a deportation proceeding *sua sponte*" and that the regulations authorizing *sua sponte* reopening contain "no meaningful standard against which to judge the [Board'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 or reconsideration.

3. Petitioner contends (Pet. 15-21) 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.[3] Here, by contrast, petitioner conceded that his motion was untimely and that he could only obtain reopening if the IJ decided to reopen his case *sua sponte*. Indeed, the court below specifically "distinguishe[d] this case from * * * *William*" on the ground that this case concerned only an untimely motion to reopen or reconsider. Pet. App. 25.

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 or reconsider was untimely. 577 F.3d at 295. 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 his * * * motion." *Id.* 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

[3] 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.

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, without considering any statutory argument like the one petitioner makes here. 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* context); see also Pet. 18 (in *Navarro-Miranda* "the Fifth Circuit applied the regulation without mentioning IIRIRA"); Pet. 19 (Sixth Circuit in *Mansour* assumed the validity of the bar "without considering any IIRIRA-related arguments").

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 did not address whether the regulation is consistent with the INA. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007). 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.[4]

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[4] 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.

To be sure, although this case concerns only a motion seeking *sua sponte* reopening or reconsideration, 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 extent 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. 27-28), 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. 27), the *William* court did not consider *Dada* because the decision in *William* predated *Dada*. Moreover, as the court below noted, "neither party in *Dada* specifically challenged the validity of the regulations," and the Court did not consider its validity. Pet. App. 13 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 timely

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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.

motions to reopen, not untimely ones like at issue 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 and reconsider, 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.

As petitioner acknowledges (Pet. 25), whether to reopen or reconsider a case outside the time 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, as the court below recognized (Pet. App. 30), 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).[5]

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

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[5] 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.

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 or reconsider, the regulations permitting an IJ or the Board to reopen or reconsider 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. Thus, even if the IJ could consider petitioner's motion on its merits, the IJ's decision whether to exercise his *sua sponte* authority would be unreviewable.[6] Accordingly, if the Court wishes to consider whether the departure bar regulations are consistent with the provisions of the INA addressing motions to reopen and reconsider, it should do so in a case where the motion was timely filed.

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[6] 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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