DEARLY DEPARTED: AN ANALYSIS OF THE DEPARTURE BAR UNDER *MENDIOLA V. HOLDER* AND *WILLIAM V. GONZALES*

Daniel E. Bonilla[*]

I. INTRODUCTION

On April 29, 2009, Department of Homeland Security (DHS) officials removed[1] then-green-card holder Vakhtang Pruidze based on a state conviction for possession of a controlled substance.[2] Thirteen days later, the state court set aside the conviction, and Pruidze moved to reopen[3] his removal proceedings.[4] The Board of Immigration Appeals (BIA or "Board"), however, denied the motion because Pruidze no longer physically resided in the United States, and thus the BIA held that it lacked jurisdiction to hear the motion.[5] Ultimately, however, the Sixth Circuit Court of Appeals reversed, holding that the

[*] J.D. Candidate, May 2012, Seton Hall University School of Law; B.A., 2005, University of Louisville. I would like to thank Professor Lori Nessel for her guidance throughout the development of this Comment, Megan Bedell for her invaluable suggestions and assistance, and the Law Review members who helped prepare this Comment for publication.

[1] Until the passing of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, the term "deportation" referred to aliens who had been removed from the country. Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-587–89 (1996) (codified in scattered sections of 8 and 18 U.S.C. (2006)); *see* Jennifer M. Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 140 n.28 (2009). IIRIRA consolidated the then-separate "exclusion" and "deportation" proceedings under one all-encompassing label of "removal" proceedings. *See* 8 U.S.C. § 1324c(e) (2006); 18 U.S.C. §§ 1546(a), 1015(e)–(f) (2006).

[2] Pruidze v. Holder, 632 F.3d 234, 235 (6th Cir. 2011).

[3] "A motion to reopen is based on 'facts or evidence not available at the time of the original decision' [and] must be supported by affidavits or other evidence." RACHEL E. ROSENBLOOM ET AL., CTR. FOR HUMAN RIGHTS AND INT'L JUSTICE AT BOSTON COLL., POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER 2 (2010) (quoting Patel v. Ashcroft, 378 F.3d 610, 612 (7th Cir. 2004)), *available at* http://www.bc.edu/content/dam/files/centers/humanrights/pdf/MTRPracticeAdvisory2010FINAL_APPENDIX.pdf ; *see* 8 U.S.C. § 1229a(c)(7)(B) (2006).

[4] *Pruidze*, 632 F.3d at 235.

[5] *Id.*

BIA cannot constrict its statutory jurisdiction based on the Attorney General's regulations or its own decisions.[6]

On May 7, 2004, the BIA, within the Ninth Circuit's jurisdiction, granted Rafael Martinez Coyt thirty days to depart the United States voluntarily.[7] By fault of his former attorney, however, Coyt did not learn of the court's ruling until October 2004.[8] After being removed, Coyt filed a motion for the BIA to reissue the decision in order to grant a new voluntary departure period.[9] The BIA denied the motion on grounds that Coyt's motion had been withdrawn once he departed the country.[10] After reviewing the regulation at issue, the Ninth Circuit held that a motion is not withdrawn when the alien has been *involuntarily* removed.[11]

On April 9, 2009, DHS officials removed Jesus Contreras-Bocanegra after the BIA denied his motion to cancel his removal.[12] Thereafter, Contreras filed a timely motion to reopen based on ineffective assistance of counsel.[13] Once again, the BIA denied Contreras's motion; this time, the court held that it lacked jurisdiction due to his departure.[14] The Tenth Circuit affirmed, holding that based on its prior rulings, the regulation at issue divests the BIA of jurisdiction to entertain such motions, even when they are timely.[15]

The above-referenced cases are only three examples of how different circuit courts of appeals interpret post-departure bars under the Code of Federal Regulations. For example, immigrants who have been subjected to removal proceedings in New Jersey, New York, Ohio, Indiana, or Maryland, but are currently residing in another country, are permitted to file motions to reopen regardless of whether they are currently the subject of removal proceedings or whether the U.S. government has already removed them.[16] Even immigrants

[6] *Id.* at 237–38.

[7] Coyt v. Holder, 593 F.3d 902, 903–04 (9th Cir. 2010).

[8] *Id.* at 904.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 907.

[12] Contreras-Bocanegra v. Holder, 629 F.3d 1170, 1170–71 (10th Cir. 2010).

[13] *Id.* at 1171.

[14] *Id.*

[15] *Id.* at 1172.

[16] The Third Circuit, which includes New Jersey, held that the regulatory post-departure bar conflicts with Congress's clear intent regarding motions to reopen. Espinal v. U.S. Att'y Gen., 653 F.3d 213, 224 (3d Cir. 2011). The Second Circuit, of which New York is a part, has held that the BIA cannot constrict its own jurisdiction.

who have been subjected to removal proceedings in Alaska but are currently living in another country, so long as their removal was *involuntarily* and/or they are not currently subject to removal proceedings, may file a motion to reopen.[17] Unfortunately, the regulatory departure bar under 8 C.F.R. § 1003.2(d) prohibits immigrants who have been subjected to removal proceedings in Maine, Texas, Colorado, or Florida, among other states, from moving to reopen their proceedings once they have departed the country.[18] This Comment sets forth that such inconsistent interpretations of federal law and regulations threaten to undermine the important concepts of uniformity and just application of the law in American jurisprudence.

The lack of uniformity in application of the departure bar is of increasing concern due to the growing annual number of removed aliens in recent years.[19] In fiscal year 2010, 392,862 aliens were removed,[20] more than double the number of removals in 1999.[21] The

Luna v. Holder, 637 F.3d 85, 100 (2d Cir. 2011). The court in *Luna*, however, limited its holding to statutory motions. *Id.* at 102. Ohio is located within the Sixth Circuit's jurisdiction and permits aliens to file motions to reopen their proceedings after they have departed because the court has ruled that the BIA cannot constrict its statutory jurisdiction by regulations or its own decisions. Pruidze v. Holder, 632 F.3d 234, 235, 237–38 (6th Cir. 2011). Indiana, which is within the Seventh Circuit's jurisdiction, permits aliens to file motions to reopen or reconsider for the same reasons articulated by the Sixth Circuit. Marin-Rodriguez v. Holder, 612 F.3d 591, 595 (7th Cir. 2010). Maryland, which is within the Fourth Circuit's jurisdiction, permits aliens to file motions to reopen pursuant to 8 U.S.C. § 1229a(c)(7)(A) regardless of whether they are physically present in the United States. William v. Gonzales, 499 F.3d 329, 333 (4th Cir. 2007).

[17] Alaska, which falls within the Ninth Circuit's jurisdiction, permits an alien to reopen a case pursuant to 8 C.F.R. § 1003.23(b)(1) if the alien moves to reopen after the removal order is final or after being involuntarily removed. Coyt v. Holder, 593 F.3d 902, 905–07 (9th Cir. 2010); Lin v. Gonzales, 473 F.3d 979, 982 (9th Cir. 2007).

[18] Each state falls under the jurisdictions of the First, Fifth, Tenth, or Eleventh Circuits, respectively. *See* Contreras-Bocanegra v. Holder, 629 F.3d 1170, 1173 (10th Cir. 2010); Mendiola v. Holder, 585 F.3d 1303, 1311 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010); Ovalles v. Holder, 577 F.3d 288, 295–96 (5th Cir. 2009) (relying on Navarro-Miranda v. Ashcroft, 330 F.3d 672 (5th Cir. 2003)); Sankar v. U.S. Att'y Gen., 284 F. App'x 798, 799 (11th Cir. 2008); Pena-Muriel v. Gonzales, 489 F.3d 438, 441–42 (1st Cir. 2007); Ablahad v. Gonzales, 217 F. App'x 470, 475 n.6 (6th Cir. 2007).

[19] *See generally* Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357 (1999) (describing different aspects of the interplay between federal immigration law and state criminal law).

[20] Stephen Dinan, *More Criminal Aliens Deported Last Year*, WASH. TIMES, Oct. 6, 2010, at A1; *see also* Anthony M. DeStefano, *Deportations Rise Under Obama*, NEWSDAY, Aug. 2, 2010, at A32.

[21] OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 (2009)(noting that there were 183,114 deportations in 1999), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/

continuous increase in the number of immigrants removed each year emphasizes the significant implications stemming from the fact that immigrants unfortunate enough to have resided in particular states in the United States will be forever barred from reopening their cases, despite valid grounds for doing so.

The situation is further compounded by the fact that most criminal convictions result in mandatory detention.[22] Such a practice, in conjunction with the rising number of deportations, raises new concerns. For example, in *Mendiola v. Holder*, DHS officials transferred the petitioner, Mendiola, to an immigration detention facility in another circuit court's jurisdiction.[23] The immigration judge (IJ) denied Mendiola's motion for a change of venue,[24] and, ultimately, the court denied his motion to reopen due to the regulatory post-departure bar, which deprived the court of jurisdiction to hear the motion.[25] This practice implicates serious concerns for aliens facing removal proceedings in this country because DHS officials, or Immigration and Customs Enforcement (ICE) agents, can transfer an alien to a jurisdiction that is more favorable to their position;[26] as a practical matter, DHS officials can engage in forum shopping.[27]

In order to ensure that litigants are afforded adequate legal protections, the Legislature has created several safeguards in the judicial system. For instance, the United States Supreme Court recently

2008/ois_yb_2008.pdf. *See generally* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37 (2007) (discussing how litigation has increased in light of Congress's narrowing and elimination of prior forms of relief).

[22] *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 389 (2002) ("Furthermore, Congress has ordered the mandatory detention of most non-citizens whose criminal convictions render them deportable.").

[23] Mendiola v. Holder, 585 F.3d 1303, 1305 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010); Mendiola v. Gonzales, 189 F. App'x 810, 812 (10th Cir. 2006).

[24] *Mendiola*, 189 F. App'x at 812.

[25] *Mendiola*, 585 F.3d at 1311.

[26] *Id.*

[27] *See* RICHARD L. SKINNER, DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 1 (2009) ("ICE transfers detainees to other detention facilities to prepare for final removal, reduce overcrowding, or meet the specialized needs of the detainee."), *available at* http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C31048%7C30690 . An alien's counsel may also engage in forum shopping, as noted by Judge Bea of the Ninth Circuit. *Immigration Litigation Reduction: Hearing on H.R. 109-537 Before the Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of the Honorable Carlos T. Bea, Circuit Judge, Ninth Circuit Court of Appeals).

noted in *Kucana v. Holder* that "[t]he motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings."[28] Courts should not subject such an important legal right to chance—a chance that a deportable alien lives in a jurisdiction that permits him or her to file a motion to reopen after departing the country. Because "this conflict involves an issue of significant practical importance,"[29] it is imperative that the immigration courts provide uniformity in the application of the regulatory departure bar throughout the country.

It is also clear that Congress's intent in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Immigration and Nationality Act of 1952 (INA)[30] was to make motions to reopen available to immigrants inside and outside of the country.[31] This Comment proposes that Congress should modify the INA to include language clearly indicating that an alien's geographic location at the time of filing of a motion to reopen or reconsider removal proceedings should not bar the immigration courts of jurisdiction to hear such motions. Ultimately, this Comment concludes that amending the INA's statutory language to explicitly grant immigration courts the jurisdiction to consider an alien's motion to reopen regardless of whether the alien is within or without the country would provide uniformity in this context by resolving the current circuit conflicts while also remaining true to the IIRIRA's statutory purpose. Part II of this Comment begins with background information on the history of immigration law in the United States by discussing the INA before the IIRIRA's enactment in 1996. Part III focuses on the state of immigration law after the IIRIRA's enactment. In Part IV, this Comment provides a brief overview of three BIA cases, each of which address different departure bar issues. This Part provides insight into some of the background matters that are analyzed in the circuit cases discussed throughout this Comment. Part V analyzes the Fourth Circuit's *William v. Gonzales* and the Ninth Circuit's

[28] 130 S. Ct. 827, 834 (2010) (quoting Dada v. Mukasey, 554 U.S. 1, 18 (2008)).

[29] Petition for a Writ of Certiorari at 20, Mendiola v. Holder, 585 F.3d 1303 (10th Cir. 2009) (No. 08-9565), *available at* http://www.scotusblog.com/wp-content/uploads/2010/07/09-1378_pet.pdf.

[30] Pub. L. No. 82-414, ch. 414, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C. (2006)).

[31] *See* Reyes-Torres v. Holder, 645 F.3d 1073, 1076 (9th Cir. 2011) ("'The intent of Congress is clear' in that 'Congress anticipated that petitioners would be able to pursue relief after departing from the United States.'" (quoting Coyt v. Holder, 593 F.3d 902, 906 (9th Cir. 2010))).

recent decision in *Mendiola v. Holder*. In addition, this Part illustrates the lack of uniformity in U.S. circuit courts of appeals by noting the differences in departure bar jurisprudence found in several different cases. Then, Part VI provides an argument for modification or abolishment of the regulatory departure bars. Lastly, Part VII discusses possible solutions to the lack of uniformity by proposing an amendment to 8 U.S.C. § 1229a(c)(7)(A) that would render all currently phrased regulatory departure bars invalid and thus inapplicable to departed aliens who file motions to reopen their proceedings.

II. THE HISTORY OF IMMIGRATION LAW BEFORE IIRIRA

This Comment provides the historical background behind the origins of the regulatory departure bars to better illustrate their current varying interpretations. Congress enacted the first general immigration statute in 1882, which "imposed a head tax of 50 cents [per immigrant] and excluded idiots, lunatics, convicts, and persons likely to become a public charge."[32] Also in 1882, Congress passed the controversial Chinese Exclusion Act.[33] A codification of the general immigration law occurred in 1891,[34] and by 1893, Congress enacted a provision for the establishment of boards to determine the admissibility of arriving immigrants.[35] By 1903, the legislature revised the statutory provisions to enumerate rejections of certain types of immigrants.[36] In 1907, Congress added additional exclusions for the feebleminded and persons who had committed crimes involving moral turpitude, among others.[37] Essentially, Congress aimed to dis-

[32] CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[2] (2010); *see* Act of Aug. 3, 1882, 22 Stat. 214.

[33] Chinese Exclusion Act, ch. 126, 22 Stat. 58, *repealed by* the Magnuson Act, ch. 344, § 1, 57 Stat. 600 (1943) (prohibiting the immigration of Chinese Laborers in the United States); *see* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 29 (1998) ("The Chinese Exclusion Act of 1882 was the first Asian Exclusion Law, and the one that generated the most contemporary controversy.").

[34] While Congress and different states had already enacted legislation relating to immigration prior to 1891, *see* Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267, 268–69 (2006), the codification in 1891 "provided the first general immigration law applying to all aliens entering the United States," Marian L. Smith, *The INS and the Singular Status of North American Indians*, 21 AM. INDIAN CULTURE & RESEARCH J. 131, 146 (1997).

[35] *See* GORDON ET AL., *supra* note 32.

[36] *See* Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213 (repealed 1907) (excluding epileptics, insane persons, professional beggars, and anarchists, among others).

[37] *See* Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898.

allow certain types of individuals whom Congress deemed to be of unsound mind or character from entering the United States.

Also in 1907, Congress created the Dillingham Commission to investigate the immigration system of the United States.[38] Although the commission's report included recommendations to improve the country's immigration system, Congress did not adopt any such legislation until 1917, when it passed a comprehensive revision of the immigration laws over the veto of President Wilson.[39] This comprehensive revision expanded the powers of immigration officers and conferred discretionary authority to admit certain barred groups.[40] After World War I ended in 1918, immigration began to rise in the United States, with some years registering over a million immigrants per year.[41] This influx of immigrants ultimately resulted in the Quota Law of 1921.[42]

The Acts of 1917 and 1921 were the primary components of immigration policy until the Alien Registration Act of 1940, which expanded the Attorney General's power.[43] This Act delegated to the Attorney General "broad authority to establish rules and regulations to enforce the nation's immigration laws."[44] Pursuant to regulations, the Attorney General established the BIA in 1940; the regulations "authorized the Board to 'issue orders of deportation'; 'consider and determine appeals'; and resolve motions for 'reconsideration, reargument or reopening of a case after the issuance of a final decision.'"[45] Then, in 1952, Congress enacted the INA, also known as the

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[38] *See* GORDON ET AL., *supra* note 32, § 2.02[2].

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5 (placing numerical limitations on how many immigrants of certain nationalities could be permitted in the United States), *repealed by* Act of June 27, 1952, Pub. L. No. 414, 66 Stat. 163, 279 (1952).

[43] Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (codified as amended in scattered sections of 50 U.S.C. (2006)), *amended by* Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

[44] Zhang v. Holder, 617 F.3d 650, 661 (2d Cir. 2010).

[45] *Id.* at 654–55; *see* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940). In 1913, the immigration-related federal agency established in 1891

> was transferred to the newly created Department of Labor and divided into the Bureau of Immigration and the Bureau of Naturalization. The two bureaus were combined in 1933 . . . and . . . named the Immigration and Naturalization Service (INS) . . . . [In] March 2003, the functions of the INS were transferred to DHS.

McCarran-Walter Act.[46] The INA further expanded the Attorney General's authority by granting the Attorney General the power to administer and enforce the Act.[47] It also "authorized him to 'establish such regulations . . . as he deem[ed] necessary for carrying out [that] authority.'"[48] Subsequently, the "Attorney General promulgated a series of regulations defining the '[a]ppellate jurisdiction' of the BIA and the '[p]owers of the Board.'"[49] Regulations promulgated at this time included motions to reopen and motions for reconsideration of Board decisions.[50] More importantly, these regulations also included the first version of the regulatory departure bar, which stated that "[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 deportation proceedings subsequent to his departure from the United States."[51]

In the 1954 case *In re G-y-B*, the BIA upheld the departure bar as a jurisdictional limitation of its power to consider a motion to reopen.[52] The Board's holding clearly validated the regulatory departure bar. Then, in 1958, the Attorney General revised the regulations to include sua sponte authority for the BIA to reopen proceedings and reconsider its own decisions.[53] Congress also made changes by amending the INA in 1961 to include provisions relating to judicial

Zhang, 617 F.3d at 655 n.3 (internal citations omitted). The provisions established under the Alien Registration Act were further enlarged by the Internal Security Act of 1950, Pub. L. No. 81-831, ch. 1024, 64 Stat. 987 (codified as amended in scattered section of 50 U.S.C.).

[46] Pub. L. No. 82-414, ch. 414, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C.). The Act was co-named after its sponsors Senator Pat McCarran and Congressman Francis Walter. Richard Boswell, *Immigration Law: Crafting True Immigration Reform*, 35 WM. MITCHELL L. REV. 7, 8–9 (2008).

[47] *Zhang*, 617 F.3d at 655.

[48] 8 U.S.C. § 1103(a) (2006); *Zhang*, 617 F.3d at 655 (quoting § 103(a), 66 Stat. at 173).

[49] *Zhang*, 617 F.3d at 655 (quoting Immigration and Nationality Regulations, 17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (final rule codified at 8 C.F.R. § 6.1(b), (d) (1952)).

[50] 8 C.F.R. § 6.2 (1952); *see Zhang*, 617 F.3d at 656 n.4.

[51] § 6.2; *see also* 8 C.F.R. § 1003.2(d) (2011) (containing an identical current limit on motions to reopen and reconsider exclusion, deportation, or removal proceedings before the BIA); *id.* § 1003.23(b)(1)(containing an identical current limit on motions to reopen and reconsider exclusion, deportation, or removal proceedings before an IJ); *Zhang*, 617 F.3d at 656.

[52] 6 I. & N. Dec. 159, 160 (B.I.A. 1954).

[53] *Zhang*, 617 F.3d at 656.

review of BIA decisions.[54] One such provision modeled the regulatory departure bar and stated that "[a]n order of deportation or of exclusion shall not be reviewed *by any court* if the alien . . . has departed from the United States after the issuance of the order."[55] Congress's amendment codified the departure bar.[56]

The Attorney General's regulations pertaining to motions to reopen remained unchanged until the Immigration Act of 1990.[57] This Act authorized the Attorney General to

> issue regulations with respect to . . . the period of time in which motions to reopen . . . may be offered in deportation proceedings, which regulations [should] include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.[58]

Ultimately, the Attorney General followed this directive and promulgated regulations that permitted aliens to file only "one motion to reopen within 90 days."[59] The revised regulations, however, retained the IJ and the BIA's sua sponte authority to reopen proceedings.[60]

III. A BRIEF OVERVIEW OF IMMIGRATION LAW AFTER THE IIRIRA

In 1996, Congress enacted the IIRIRA, which codified "some—but not all—of the Attorney General's 1996 regulations regarding motions to reopen."[61] Included within the statute were the Attorney General's regulatory numerical and temporal limitations for motions to reopen or reconsider.[62] Congress, however, did *not* include the departure bar or regulations that granted sua sponte authority to the IJ and BIA in the statute.[63] Instead, the IIRIRA repealed the originally codified departure bar in such a manner that an alien's departure

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[54] Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650 (repealed 1996); *see Zhang*, 617 F.3d at 656.

[55] 8 U.S.C. § 1105a(c) (1964) (repealed 1996); *see Zhang*, 617 F.3d at 656.

[56] *Zhang*, 617 F.3d at 656; *see* § 1105a(c).

[57] Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978 (codified at 8 U.S.C. §1252b (repealed 1996)); *see Zhang*, 617 F.3d at 656.

[58] § 545(d)(1), 104 Stat. at 5066; *see also Zhang*, 617 F.3d at 656.

[59] *Zhang*, 617 F.3d at 657 (quoting Dada v. Mukasey, 554 U.S. 1, 13 (2008)).

[60] 8 C.F.R. §§ 3.2(a), 3.23(b)(1) (2000); *see also Zhang*, 617 F.3d at 657.

[61] *Zhang*, 617 F.3d at 657.

[62] *See* 8 U.S.C. § 1229a(c)(7) (2006) (stating that "[a]n alien may file one motion to reopen proceedings under this section," which must generally be filed "within 90 days of the date of entry of a final administrative order of removal"). For the text of the current departure bar see *infra* Part VII.

[63] *Zhang*, 617 F.3d at 657.

from the United States no longer foreclosed that alien's legal ability to seek judicial review of a BIA order.[64]

The Attorney General specifically addressed the IIRIRA's repeal of the INA's codified departure bar by promulgating new regulations on March 6, 1997, which included both a departure bar and sua sponte authority for the BIA to consider motions to reopen.[65] According to the Attorney General, "'[n]o provision of the [IIRIRA] supports reversing the long established rule that a motion to reopen . . . cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States.'"[66] These regulations, promulgated by the Attorney General, are still in effect today. Congress, however, has not amended the statutory language in 8 U.S.C. § 1229a(c)(6)(A) or 8 U.S.C. § 1229a(c)(7)(A) to include these regulations or any jurisdictional bar to considering motions to reopen or reconsider by aliens after they have departed from the county.

IV. BIA'S REGULATORY DEPARTURE BAR JURISPRUDENCE

In order to understand the reasoning behind the BIA's departure bar holdings in subsequent circuit court of appeals opinions, this Part will briefly highlight three major BIA cases analyzing post-departure bars.

A. In re G-y-B

In 1954, the Board in *In re G-y-B* upheld the first version of the 1952 regulatory post-departure bar.[67] The IJ originally excluded the petitioner under the INA on grounds that he was affiliated with the Communist party of a foreign state.[68] Thus, on August 14, 1953, petitioner departed the country and subsequently filed a motion to reopen and reconsider on November 24, 1953.[69] Although the petitioner included new facts to support his claim that he should not have been excluded, the Board ruled that it was "without jurisdiction to act on

[64] *Id.*

[65] *See* 8 C.F.R. § 1003.2 (2011) (originally codified at 8 C.F.R. § 3.2(a), (d) (1997)); *see also id.* §§ 1003.2(d), 1003.23(b)(1); *Zhang*, 617 F.3d at 657.

[66] *Zhang*, 617 F.3d at 657 (quoting 62 Fed. Reg. at 10,312).

[67] 6 I. & N. Dec. 159, 160 (B.I.A. 1954); *see also Zhang*, 617 F.3d at 656.

[68] *In re G-y-B*, 6 I. & N. Dec. at 159.

[69] *Id.*

the motion."[70] The Board applied the post-departure bar under 8 C.F.R. § 6.12,[71] which in pertinent part stated,

> Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal but prior to a decision thereon shall constitute a withdrawal of the appeal and the initial decision in the case shall be final to the same extent as though no appeal had been taken.[72]

For this reason, the Board dismissed petitioner's motions.[73]

B. In re Armendarez-Mendez

The Board continued upholding its ruling in *In re G-y-B* throughout the years. In 2008, the BIA once again upheld its longstanding application of the regulatory departure bar in *In re Armendarez-Mendez*.[74] Government officials removed respondent from the United States on December 11, 2000.[75] Then, nearly five and one-half years later, respondent filed a motion for the court to reopen his proceedings sua sponte.[76] Having found the departure bar in 8 C.F.R. § 1003.2(d) applicable, the Board denied his motion.[77] Respondent subsequently filed a petition of review to the Fifth Circuit.[78] In light of the holding in the Ninth Circuit's case *Lin v. Gonzales*,[79] the Fifth Circuit remanded respondent's matter to the BIA to consider the questions raised in his case.[80]

On remand, in a lengthy opinion, the Board detailed the history and analyzed the different interpretations of the regulatory departure bar and the validity of the regulation as applied in different federal circuit courts.[81] The Board first reviewed the Ninth Circuit's holding in *Lin* and concluded that its reasoning was unpersuasive because "[w]hen the departure bar rule is examined in context, we believe it

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[70] *Id.*

[71] *Id.* at 159–60.

[72] 8 C.F.R. § 6.12 (1952).

[73] *In re G-y-B*, 6 I. & N. Dec. at 160.

[74] 24 I. & N. Dec. 646, 660 (B.I.A. 2008).

[75] *Id.* at 646, 647.

[76] *See id.* at 646.

[77] *Id.*

[78] *Id.*

[79] 473 F.3d 979, 982 (9th Cir. 2007) (holding that so long as 8 C.F.R. § 1003.23(b)(1) is explicitly phrased in the present tense, an IJ has jurisdiction to consider a motion to reopen filed by a removed alien).

[80] *In re Armendarez-Mendez*, 24 I. & N. Dec. at 646.

[81] *Id.* at 647–60.

clearly applies to removed aliens."[82] The Board then detailed its disagreement with the Fourth Circuit's holding in *William v. Gonzales*.[83] In the Board's view, the Act, when taken as a whole, draws a distinction between aliens who have departed after being ordered removed and those who have remained in the United States.[84] Ultimately, the Board explained that it was bound by the Fourth Circuit's precedent to apply the *William* holding to BIA cases involving post-departure bar issues; however, the Board explicitly noted that such rulings would be limited exclusively to the Fourth Circuit's jurisdiction.[85] The Board further explained, albeit in dicta,[86] that "the departure bar regulation deprives the BIA of jurisdiction to consider statutory motions to reopen after the movant's departure from the United States."[87] The BIA concluded that, in other jurisdictions, it will continue to uphold the validity of the regulatory departure bars.[88]

C. In re Bulnes-Nolasco

In 2009, the BIA restricted the scope of the departure-bar rule in *In re Bulnes-Nolasco* with regard to a motion to reopen to rescind an order.[89] The court held the departure bar inapplicable to aliens who have departed the country while under an outstanding order of deportation or removal issued in absentia.[90] Respondent, a native and

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[82] *Id.* at 651.

[83] *Id.* at 654–60; William v. Gonzales, 499 F.3d 329, 330 (4th Cir. 2007) (holding that the INA's statutory language always invalidates regulatory departure bars). For a discussion of *William* see, *infra* Part V.A.

[84] *In re Armendarez-Mendez*, 24 I. & N. Dec. at 655 ("[The *William* court] observed that [8 U.S.C. §] 240(c)(7) of the Act does not expressly distinguish between aliens who have departed the United States after being ordered removed and those who have remained."). The Board also disagreed with the majority in *William* because it did not find that the physical presence requirement under 8 U.S.C. § 240(c)(7)(C)(v)(IV) implicitly invalidated the departure bar. *Id.* at 658; *see* 8 U.S.C. § 1229a(c)(7)(C)(v)(IV) (2006) (imposing a physical presence requirement in the United States for domestic violence victims for filing motions to reopen or reconsider).

[85] *In re Armendarez-Mendez*, 24 I. & N. Dec. at 660.

[86] Petitioner Armendarez-Mendez violated the regulatory filing deadline by submitting the motion at issue nearly fifteen months late. *Id.* at 647. Therefore, reaching the issue of whether the departure bar was valid was not necessary to the court's conclusion. *See id.*

[87] Luna v. Holder, 637 F.3d 85, 100 (2d Cir. 2011) (citing *In re Armendarez-Mendez*, 24 I & N. Dec. at 653–60).

[88] *In re Armendarez-Mendez*, 24 I. & N. Dec. at 660.

[89] 25 I. & N. Dec. 57, 60 (B.I.A. 2009).

[90] *Id.*

citizen of Honduras, entered the United States without inspection on July 28, 1996.[91] Then, in August 1996, the DHS served respondent with an Order to Show Cause and Notice of Hearing.[92] Respondent, however, did not appear for her deportation hearing two years later, at which point the IJ ordered her deported in absentia.[93] Nine years later, on December 7, 2007, respondent filed a motion to reopen on the ground that she did not receive proper notice of the deportation hearing.[94] Upholding the application of the departure bar, the IJ denied respondent's motion on January 17, 2008.[95]

The Board read 8 U.S.C. § 1l01(g) as presupposing the existence of an outstanding order for deportation as the basis on which an alien's "self-deportation" may deprive the court of jurisdiction to consider the alien's motion to reopen or reconsider.[96] Examining the specific language used in 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2),[97] the Board focused on the usage of the term "rescinded" and noted that the term "rescind" means "to annul ab initio"[98] when dealing with an in absentia deportation order.[99] The Board then ruled that "[a]n in absentia deportation order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission, with the result that the respondent reverts to the same immigration status that he . . . possessed prior to entry of the order."[100] Ultimately, the Board concluded, as did the

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[91] *Id.* at 57.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *In re Bulnes-Nolasco*, 25 I. & N. Dec. at 58. Respondent then filed a motion for reconsideration, but the IJ denied that motion as well. *Id.*

[96] *Id.* at 59.

[97] Regarding exceptions to filing deadlines, the regulation provides in relevant part:

> (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:
>
> . . . .
>
> (2) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

8 C.F.R. § 1003.23(b)(4)(iii)(A)(2) (2011).

[98] *See In re* M-S-, 22 I. & N. Dec. 349, 353 (B.I.A. 1998) (citing BLACK'S LAW DICTIONARY 1306 (6th ed. 1990) ("'[R]escission' means to annul ab initio.")). "Ab initio" is a Latin term meaning "[f]rom the beginning." BLACK'S LAW DICTIONARY 4 (7th ed. 1999).

[99] *In re Bulnes-Nolasco*, 25 I. & N. Dec. at 59.

[100] *Id.*

Eleventh Circuit in *Contreras-Rodriguez v. United States Attorney General*,[101] "that an in absentia deportation order does not so qualify if it was issued in a proceeding of which the alien did not properly receive notice."[102]

The above-referenced cases illustrate the lack of predictability and uniformity in the BIA's decisions.[103] Despite having a long history of upholding the regulatory departure bars, the BIA has recently begun modifying its jurisprudence in this area of the law. As noted, the BIA deviated slightly from its longstanding practice of upholding the regulatory departure bar in *In re Bulnes-Nolasco*, which *may* suggest that the BIA is willing to assess the validity of departure bars separately in different contexts.[104]

V. DEPARTURE BAR JURISPRUDENCE IN THE FEDERAL COURTS

A. The Fourth Circuit's William v. Gonzales

Tunbosun Olawale William ("William"), a native and citizen of Nigeria, became a legal permanent resident of the United States in 1996.[105] One year later, a Maryland court sentenced William to prison and probation after he pled guilty to receipt of a stolen credit card in violation of Maryland law.[106] Then, in November 1997, "the Immigration and Naturalization Service ('INS') charged William with being removable as an aggravated felon for committing an offense involving fraud or deceit," and subsequently "charged William with being removable as having committed a crime of moral turpitude."[107] Ultimately, an IJ found William removable based on his conviction of a

[101] 462 F.3d 1314 (11th Cir. 2006). *See In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 654 n.6 (B.I.A. 2008) (reserving decision on this issue).

[102] *In re Bulnes-Nolasco*, 25 I. & N. Dec. at 59. Finally, the Board remanded the matter to the IJ to allow him to decide whether the respondent's in absentia deportation order was subject to rescission for lack of proper notice. *Id.* at 60.

[103] *See* David Isaacson, *Filing and Adjudication of Motions to Reopen and Reconsider After Departure from the United States*, CYRUS D. MEHTA & ASSOCS., PLLC IMMIG. & NAT'LITY L. (Sept. 13, 2010), http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus201091310474&Month=&From=Menu&Page=19&Year=All ("Recent caselaw . . . indicates that this rule is not as uniform as many had previously supposed.").

[104] *In re Bulnes-Nolasco*, 25 I. & N. Dec. at 60; *see infra* Part IV.C.

[105] William v. Gonzales, 499 F.3d 329, 331 (4th Cir. 2007).

[106] *Id.* The court sentenced William "to eighteen months imprisonment, with nine months suspended and three years probation." *Id.*

[107] *Id.*; *see* 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(i), 1227(a)(2)(A)(iii) (2006).

crime of moral turpitude and ineligible for relief.[108] The BIA affirmed the IJ's decision and William did not seek further review in the Fourth Circuit.[109] Government officials then removed William from the United States in July 2005.[110]

Shortly after removal, William filed a petition for a writ of *coram nobis*[111] in state court seeking to vacate his Maryland conviction.[112] In October 2005, the state court granted William's writ and vacated his conviction.[113] Then, in December 2005, "William filed a motion to reopen immigration proceedings before the BIA" based on the exceptional circumstances of his case.[114] The BIA denied his motion by holding that the departure bar under 8 C.F.R. § 1003.2(d) stripped the court of jurisdiction to consider William's motion because he had already been removed from the country.[115] At this point, William petitioned the Fourth Circuit for review of the BIA's application of the departure bar.[116] William primarily argued that "the post-departure bar on motions to reopen[] is invalid because it conflicts with clear statutory language."[117] The government, however, argued that the statute is "silent with respect to *post-departure* motions to reopen in that it does not specifically address them," and therefore the Attorney General's regulations appropriately fill the gap.[118]

Judge Shedd, writing for the majority, used the *Chevron*[119] analysis to determine the validity of the Agency's regulation.[120] Beginning

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[108] *William*, 499 F.3d at 331.

[109] *Id.* William did, however, file a motion to reconsider with the BIA whereby he argued "that he had received limited post-conviction relief in the form of a reduction of sentence." *Id.* The BIA denied this motion and, once again, William did not pursue further review in the Fourth Circuit. *Id.*

[110] *Id.*

[111] *See* United States v. Denedo, 129 S. Ct. 2213, 2220 (2009) ("The writ of *coram nobis* is an ancient common-law remedy designed to correct errors of fact.").

[112] *William*, 499 F.3d at 331.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 331. William argued that 8 U.S.C. § 1229a(c)(7)(A) grants the right to reopen without regard to an alien's physical presence in the country. *See id.* at 332. This, he argued, conflicted with 8 C.F.R. § 1003.2(d), which limits the right based on the alien's physical presence in the country. *See id.* at 331–32.

[118] *William*, 499 F.3d at 332.

[119] Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Under the *Chevron* doctrine, a court must first consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the inquiry ends because both the court and the agency "must give effect to the unambiguously expressed intent of

with the statutory provision, the court noted that 8 U.S.C. § 1229a(c)(7)(A) provides that "'[a]n alien may file one motion to reopen proceedings under this section.'"[121] Given its precise language, which explicitly provides for a temporal limitation but also specifically removes the prior codified geographical limitation, the court found that "§ 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country."[122] Thus, the Fourth Circuit foreclosed the government's argument that the statute "is silent with respect to *post-departure* motions to reopen."[123]

Additionally, the court found that the "clarity and breadth of the statutory language likewise overc[a]me the Government's argument that . . . Congress codified the right to file a motion to reopen while leaving the regulatory post-departure bar in place by not expressly repealing it."[124] According to the court, Congress clearly addressed and "at least implicitly repealed" the departure bar when it decided to grant "an alien" the right to move to reopen without further specifying a physical presence requirement.[125] Moreover, the court noted that the government's argument also lacked contextual support because "one of IIRIRA's aims is to expedite the removal of aliens from the country while permitting them to continue to seek review of their removal orders from abroad."[126]

The majority found that the overall structure of 8 U.S.C. § 1229a reinforced its interpretation of § 1229a(c)(7)(A) in two ways.[127] First, Congress's specific limitations on the right to file a motion to reopen supports the conclusion that § 1229a(c)(7)(A) cannot be read to exclude aliens who have departed the country.[128] Second, for motions

Congress." *Id.* at 842–43. On the other hand, if Congress has not addressed the question at issue, the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

[120] *William*, 499 F.3d at 331.

[121] *Id.* at 332 (quoting 8 U.S.C. § 1229a(c)(7)(A)(2006)). For the text of the current departure bar see, *infra* Part VII.

[122] *William*, 499 F.3d at 332.

[123] *Id.*

[124] *Id.* at n.2.

[125] *Id.*

[126] *Id.* at n.3.

[127] *Id.* at 333.

[128] *William*, 499 F.3d at 333; *see* United States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

to reopen for victims of domestic violence under § 1229a(c)(7)(C)(iv)(IV),[129] Congress expressly included a physical presence requirement.[130] Thus, the court drew a negative inference that, by not requiring physical presence in the statutory language of § 1229a(c)(7)(A), Congress did not intend to limit such motions to reopen to aliens who have not departed the country.[131] Further, the court also noted that if Congress had intended the departure bar to apply to all motions, the express language requiring physical presence for victims of domestic violence would be superfluous.[132]

The majority concluded that congressional intent was unequivocal: "§ 1229a(c)(7)(A) clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed."[133] Therefore, 8 C.F.R. § 1003.2(d) is in direct conflict with the clear language of the statute; the INA thereby removes any authority from the regulation and renders it invalid.[134]

Chief Judge Williams dissented.[135] The Chief Judge's primary disagreements with the majority's analysis were that Congress's statutory language did not repeal the regulatory departure bar and that the majority never engaged in the second step of the *Chevron* analy-

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[129] The Act states in pertinent part:

> (iv) Special rule for battered spouses, children, and parents. Any limitation under this section on the deadlines for filing such motions shall not apply.
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> . . . .
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> (IV) if the alien is physically present in the United States at the time of filing the motion.

8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) (2006).

[130] *See William*, 499 F.3d at 333.

[131] *Id.*; *see* Clay v. United States, 537 U.S. 522, 528 (2003) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

[132] *See William*, 499 F.3d at 333; *see, e.g.*, TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

[133] *William*, 499 F.3d at 333; *see In re* Coleman, 426 F.3d 719, 725 (4th Cir. 2005) ("If the language is plain and the statutory scheme is coherent and consistent, we need not inquire further.").

[134] *William*, 499 F.3d at 334; *see* Allen v. United States, 173 F.3d 533, 536 (4th Cir. 1999) ("[W]e must overturn a regulation that clearly conflicts with the plain text of the statute.").

[135] *William*, 499 F.3d at 334 (Williams, C.J., dissenting).

sis.[136] Unlike the majority, the dissent could not get a "'clear sense of congressional intent' to repeal the departure bar simply because the numerical limitation on motions to reopen now occupies a place in the United States Code where previously it only existed in the Federal Register."[137] Chief Judge Williams further noted that, when viewed in its entirety, 8 U.S.C. § 1229a(c)(7) makes clear that the statute is nothing more than a numerical limitation on an alien's ability to file a motion to reopen immigration proceedings.[138] Moreover, the dissent pointed out that Congress did not add the domestic violence exception's physical presence requirement to § 1229a until 2000—nearly a decade after IIRIRA's enactment.[139]

Under Chief Judge Williams's own analysis of *Chevron*'s first step, he concluded that the statute is silent, and the agency is empowered by statute to issue regulations to dispel the silence.[140] The Judge then proceeded to *Chevron*'s second step.[141] Chief Judge Williams concluded that the Attorney General's reasoning that the goal of achieving finality in immigration matters outweighs the burdens associated with adjudicating motions to reopen filed on behalf of departed or removed aliens is reasonable enough to defer to the Attorney General and thus uphold the regulation.[142]

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[136] *See id.*

[137] *Id.* at 335 (quoting Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004)).

[138] *See id.* at 336; *see* United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole.").

[139] *William*, 499 F.3d at 337 (Williams, C.J., dissenting); *see* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. According to Chief Judge Williams, this Act sought to "snuff out sex slave trade and domestic violence," which is "connected neither in time nor purpose" to the IIRIRA amendments regarding motions to reopen. *William*, 499 F.3d at 337 (Williams, C.J., dissenting). Chief Judge Williams countered the "negative inference" argument by stating that "Congress is presumed to have known about and approved of the departure bar when it amended the INA without explicitly repealing it." *Id.* at 338–41.

[140] *See William*, 499 F.3d at 342 (Williams, C.J., dissenting).

[141] *Chevron*'s second step requires the court to determine whether the regulation is "reasonable in light of the legislature's revealed design" in order to uphold the agency's interpretation. *Id.* (internal quotation marks and citation omitted).

[142] *See id.* at 345; Nat'l Lead Co. v. United States, 252 U.S. 140, 146 (1920) (explaining that deference to an agency's construction of a statute is "especially [appropriate] where such construction has been long continued").

B. The Tenth Circuit's Mendiola v. Holder

Prior to the release of the *Mendiola* decision, but after briefing, the Tenth Circuit decided *Rosillo-Puga v. Holder*.[143] Finding the case analogous to Mendiola's, the *Mendiola* court relied heavily on the precedential effect of *Rosillo-Puga*.[144]

1. *Rosillo-Puga v. Holder*

In 2003, an IJ ordered Rosillo-Puga removed to Mexico.[145] Three years later he filed a motion to reopen his proceedings with the IJ on the ground that the court could exercise sua sponte jurisdiction under 8 C.F.R. § 1003.23(b)(1)[146] to consider his motion.[147] The IJ denied Rosillo-Puga's motion, and the BIA affirmed the IJ's decision, finding that § 1003.23(b)(1) deprived the IJ of jurisdiction to hear Rosillo-Puga's motion to reopen proceedings because he had already departed the country.[148]

Rosillo-Puga relied upon *William v. Gonzales* in making his argument that 8 U.S.C. § 1229a(c)(7)(A) permits "an alien" to file one motion to reopen regardless of whether that alien is inside or outside the United States.[149] The *Rosillo-Puga* court, however, disagreed with the majority's opinion in *William* and instead reached the same conclusion that was articulated in Chief Judge Williams's dissent.[150] As the court did in *William*, the *Rosillo-Puga* court applied the two-step *Chevron* test to review the Agency's construction of the statute at issue.[151] First, the court analyzed Congress's statutory language and found that it was "simply silent on the issue of whether it meant to repeal the post-departure bars contained in the Attorney General's

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[143] 580 F.3d 1147 (10th Cir. 2009) (dealing with regulatory motions to reopen under 8 C.F.R. §§ 1003.23(b)(1), 1003.2(d)), *cert. denied*, 131 S. Ct. 502 (2010).

[144] *See* Mendiola v. Holder, 585 F.3d 1303, 1304–05 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).

[145] *Id.* at 1306 (citing *Rosillo-Puga*, 580 F.3d at 1149). This Part of the Comment focuses mainly on the *Mendiola* court's iteration of the facts and holding of *Rosillo-Puga*. It is the author's position that the precedential effect of *Rosillo-Puga* is better understood through the *Mendiola* court's iteration of *Rosillo-Puga*'s facts and holding.

[146] 8 C.F.R. § 1003.23(b)(1) (2011) ("An Immigration Judge may upon his or her own motion at any time . . . reopen or reconsider any case . . . .").

[147] *Mendiola*, 585 F.3d at 1306–07 (citing *Rosillo-Puga,* 580 F.3d at 1150).

[148] *Id.* at 1307.

[149] *See id.*; *see also* William v. Gonzales, 499 F.3d 329, 332 (4th Cir. 2007). For a discussion of 8 U.S.C. § 1229a(c)(7)(A) (2006), see *infra* Part VII.

[150] *Mendiola*, 585 F.3d at 1307.

[151] *Id.* at 1307–08; *see William*, 499 F.3d at 331–32.

regulations."[152] The court then inquired into "whether the agency's interpretation is 'based on a permissible construction of the statute.'"[153] Finding it "inconceivable" for Congress to have repealed the regulatory post-departure bar without stating anything about its forty-year history in practice, the court upheld the post-departure bar as a valid regulation under the "Attorney General's Congressionally-delegated rulemaking authority, and [therefore ruled that the bar] does not contravene 8 U.S.C. § 1229a(c)(7)(A) or (7)(C)."[154]

The *Rosillo-Puga* court ultimately upheld the BIA's holdings that it lacked jurisdiction to hear Rosillo-Puga's motion to reopen under 8 C.F.R. § 1003.2(d) and that the BIA and IJ lacked sua sponte jurisdiction under 8 C.F.R. § 1003.2(a)[155] to consider the motion to reopen.[156] The ruling, however, was not unanimous; Judge Lucero filed a lone dissent.[157]

Judge Lucero reasoned that a plain reading of 8 U.S.C. § 1229a(c)(6)(A) and (7)(A) "unambiguously guarantee[s] every alien the right to file . . . one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States."[158] According to the dissent, Congress's use of inclusive language in the

[152] *Mendiola*, 585 F.3d at 1307–08 (quoting Rosillo-Puga v. Holder, 580 F.3d 1147, 1157 (10th Cir. 2009)) (internal quotation marks omitted).

[153] *Id.* at 1308 (quoting *Rosillo-Puga*, 580 F.3d at 1157).

[154] *See id.* (quoting *Rosillo-Puga*, 580 F.3d at 1156) (internal quotation marks omitted).

[155] 8 C.F.R. § 1003.2(a) (2011) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."); *see* 8 C.F.R. § 1003.23(b)(1) (2011) ("An [IJ] may upon his or her own motion at any time . . . reopen or reconsider any case in which he or she has made a decision . . . .").

[156] *Mendiola*, 585 F.3d at 1308; *see also* Navarro-Miranda v. Ashcroft, 330 F.3d 672, 675–76 (5th Cir. 2003) (finding the interpretation by the BIA that the departure bar removes its jurisdiction, including its sua sponte authority, to reopen the removal proceedings of a deported alien to be reasonable and upholding the same).

[157] *See Rosillo-Puga*, 580 F.3d at 1161–71 (Lucero, J., dissenting); *see also Mendiola*, 585 F.3d at 1308 n.5. For purposes of developing Judge Lucero's arguments in his dissenting opinion in greater detail from that which is found in the *Mendiola* opinion, this Comment will provide some additional information by analyzing text taken directly from Judge Lucero's dissenting opinion in *Rosillo-Puga*.

[158] *Rosillo-Puga*, 580 F.3d at 1162 (Lucero, J., dissenting). Under a different approach, Judge Lucero noted that the Supreme Court's recent decision in *Dada v. Mukasey* "'supports the conclusion that the post-departure bar is inconsistent with' the statute because it 'held all aliens have a statutory right to file one motion to reopen' pursuant to § 1229a(c)(7)." *Mindeola*, 585 F.3d at 1308 n.5 (quoting *Rosillo-Puga*, 580 F.3d at 1168 (Lucero, J., dissenting)); *see* Dada v. Mukasey, 554 U.S. 1, 22 (2008) (stating that a "more expeditious solution" to the problem would be to permit aliens to file motions to reopen after they have left the country) (decided on other grounds).

terms "the alien" and "an alien" indicated Congress's intent not to exclude a subclass of aliens—those who have departed and are thus outside the INA's scope.[159] Judge Lucero also found, as did the majority in *William*, that the textual contrast between the domestic violence section of the statute, which explicitly imposes a physical presence requirement, and other sections of the statute that do not, illuillustrates Congress's intent not to place geographical limitations on all motions to reopen or reconsider.[160] Such a reading, the dissent noted, would render the physical presence requirement under the domestic violence section "mere surplusage."[161]

2. *Mendiola v. Holder*

Eddie Mendiola, a native and citizen of Peru, became a lawful permanent resident of the United States in April 1989.[162] In July 1996 and August 2000, a California state court convicted Mendiola of possession of steroids.[163] Subsequently, an Idaho state court convicted Mendiola of being an accessory to a felony in September 2003.[164] Thereafter, DHS officials detained and transported Mendiola to an immigration detention facility in Colorado.[165] The DHS then commenced removal proceedings against Mendiola on grounds that he was an alien convicted of an aggravated felony.[166]

Mendiola moved for a change of venue from the Tenth Circuit to the Ninth Circuit, arguing that his underlying conviction occurred in California and thus his case should fall within the Ninth Circuit's jurisdiction.[167] The IJ denied a change of venue, applied Tenth Circuit law, found that Mendiola was removable based upon his aggravated felony conviction, and ordered him removed to Peru.[168] The

[159] *Rosillo-Puga*, 580 F.3d at 1164 (Lucero, J., dissenting).

[160] *Id.* at 1165; *see also* William v. Gonzales, 499 F.3d 329, 333 (4th Cir. 2007).

[161] *Rosillo-Puga*, 580 F.3d at 1165 (Lucero, J., dissenting) (quoting *William*, 499 F.3d at 333).

[162] Mendiola v. Gonzales, 189 F. App'x 810, 812 (10th Cir. 2006).

[163] *Id.*; *see* CAL. HEALTH & SAFETY CODE § 11377(a) (West 2010). On July 30, 1996, a California state court convicted Mendiola of misdemeanor possession in violation of a state law. *Mendiola*, 189 F. App'x at 812. Then, on August 7, 2000, the court convicted him of felony possession. *Id.*

[164] *Mendiola*, 189 F. App'x at 812.

[165] *Id.*

[166] *Id.*; *see* 8 U.S.C. §§ 1101(a)(43)(B) (2006) (defining aggravated felony to include a "drug-trafficking crime"); *id.* § 1227(a)(2)(A)(iii) (pertaining to removability).

[167] *Mendiola*, 189 F. App'x at 812.

[168] *Id.*

BIA affirmed the IJ's decision and dismissed Mendiola's appeal.[169] The BIA noted that the IJ properly applied Tenth Circuit law because "there [wa]s no reason to believe that the Tenth Circuit would apply Ninth Circuit law to determine [Mendiola's] removability simply because [his] criminal conviction occurred within the territorial jurisdiction of the Ninth Circuit."[170]

Mendiola then petitioned the Tenth Circuit for review.[171] While his petition was pending, government officials removed Mendiola to Peru in March 2005.[172] The court then denied Mendiola's petition.[173] Within two years, Mendiola returned to the United States illegally.[174] In 2007, Mendiola filed his first motion to reopen with the BIA while he was in federal custody for his illegal return.[175] The BIA denied his motion on two grounds: (1) 8 C.F.R. § 1003.2(d) stripped the BIA of jurisdiction to consider the motion, and (2) Mendiola's motion was untimely because it was filed nearly three years after the expiration of the ninety-day limit imposed by § 1003.2(c)(2).[176] Mendiola filed another petition in 2007.[177] The BIA similarly denied this petition.[178]

In 2008, Mendiola obtained new counsel and filed a second motion to reopen his proceedings on grounds that his former attorney's ineffectiveness and the California court's reduction of his second conviction from a felony to a misdemeanor in 2007 rendered it ap-

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[169] *Id.*

[170] *Id.* (citing United States v. Castro-Rocha, 323 F.3d 846 (10th Cir. 2003) (applying Tenth Circuit law when deciding if conviction in a state outside Tenth Circuit's jurisdiction constituted aggravated felony); Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001) (same); United States v. Cabrera-Sosa, 81 F.3d 998 (10th Cir. 1996) (same)).

[171] *Id.* at 811.

[172] Mendiola v. Holder, 585 F.3d 1303, 1305 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).

[173] *Mendiola*, 189 F. App'x at 815.

[174] *Mendiola*, 585 F.3d at 1305. Shortly after Mendiola returned illegally to the United States, federal agents detained him on a charge of reentry after removal for an aggravated felony. *Id. See generally* 8 U.S.C. § 1326 (2006).

[175] *Mendiola*, 585 F.3d at 1305.

[176] *Id.*; *see* 8 C.F.R. § 1003.2(c)(2) (2011) ("[A] party may file only one motion to reopen . . . proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered . . ."). Mendiola's final administrative order of removal was issued in 2004. *Mendiola*, 585 F.3d at 1305.

[177] *Mendiola*, 585 F.3d at 1305.

[178] *Id.* Mendiola failed to argue in his briefs that § 1003.2(d) did not apply to his case. Mendiola v. Mukasey, 280 F. App'x 719, 722 (10th Cir. 2008).

propriate.[179] The BIA denied Mendiola's second motion to reopen, holding again that it lacked jurisdiction to consider the matter under 8 C.F.R. § 1003.2(d) and that it also lacked authority to reopen the matter sua sponte under § 1003.2(a).[180] In addition, the BIA found that Mendiola's motion was deniable due to its untimeliness and to the numerical limitation placed on motions to reopen under § 1003.2(c)(2).[181] Undeterred, Mendiola once again filed a petition for review with the Tenth Circuit, which the court ultimately granted.[182]

Circuit Judge Baldock, writing for the majority, began the court's analysis with a look at the history of the post-departure bar in the United States and the IIRIRA's enactment in 1996.[183] The court noted that "for fifty years the BIA has consistently followed this 'jurisdictional principle,' holding 'that reopening is unavailable to any alien who departs the United States after being ordered removed.'"[184] After discussing the pertinent facts and holding of *Rosillo-Puga*, the court focused its attention on Mendiola's primary arguments. Mendiola argued that the BIA erred when it held that 8 C.F.R. § 1003.2(d) deprived it of jurisdiction to hear his motion to reopen.[185] He also argued that "*Rosillo-Puga* did not extend the post-departure bar's application to motions to reopen filed by aliens pursuant to 8 C.F.R. § 1003.2(c) where the motion alleges ineffective assistance of counsel rising to the level of a due process violation."[186]

The court relied on *Rosillo-Puga*'s precedential effect to counter both arguments.[187] First, the court, in accordance with stare decisis principles, upheld the *Rosillo-Puga* court's conclusion that § 1003.2(d) was valid.[188] Second, finding that the language of 8 C.F.R. § 1003.2(c) "mirrors" the language of 8 U.S.C. § 1229a(c)(7), which

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[179] *Mendiola*, 585 F.3d at 1305.

[180] *Id.*; *see* 8 C.F.R. § 1003.2(a) (2011) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.").

[181] *Mendiola*, 585 F.3d at 1305–06; *see* 8 C.F.R. § 1003.2(c)(2) (2011); *see also* 8 U.S.C. § 1229a(c)(7) (2006) (containing similar language involving a ninety-day limit).

[182] *Mendiola*, 585 F.3d at 1306.

[183] *Id.*

[184] *Id.* (quoting *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 648 (B.I.A. 2008)).

[185] *Id.* at 1304.

[186] *Id.* at 1309; *see* § 1003.2(c)(2) (2011).

[187] *Mendiola*, 585 F.3d at 1310.

[188] *Id.*; *see* Rosillo-Puga v. Holder, 580 F.3d 1147, 1156 (2009).

the *Rosillo-Puga* court addressed, the *Mendiola* court applied the same analysis to the present matter.[189]

The court then iterated the *Rosillo-Puga* court's conclusion that "Congress's provision for one motion to reopen within 90 days of removal in those statutory subsections does not alter the valid continued operation of the regulatory post-departure bar to motions to reopen."[190] The court then noted that the departure bar divested the BIA and IJ of jurisdiction in *Rosillo-Puga* under a similar regulatory departure bar and also specified that the court is "bound by the precedent."[191] Thus, the court held that the departure bar applied to Mendiola.[192]

C. Additional Applications of the Departure Bar in the Federal Circuits

As the case summaries above have shown, case law "indicates [that] this rule is not as uniform as many had previously supposed."[193] "[A] substantial number of Court of Appeals and BIA cases have opened up the possibility that certain aliens may be able to file or pursue motions to reopen and reconsider even after departing from the United States."[194] To illustrate the disparities in departure bar jurisprudence in different areas of the country, this Comment will now consider a sample of pertinent circuit cases.

1. The First Circuit Upholds Regulatory Departure Bar's Validity

In *Pena-Muriel v. Gonzales*, the First Circuit held that the departure bar in 8 C.F.R. § 1003.23(b)(1) was a valid jurisdictional limitation on an IJ's authority to consider a departed alien's motion to reopen or reconsider proceedings.[195] The First Circuit's jurisdiction includes Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.[196] Therefore, a departed alien whose removal proceed-

[189] *Mendiola*, 585 F.3d at 1309–10.

[190] *Id.* (citing *Rosillo-Puga*, 580 F.3d at 1156).

[191] *Id.* at 1310.

[192] *Id.*

[193] Isaacson, *supra* note 103.

[194] *Id.*

[195] 489 F.3d 438, 443 (1st Cir. 2007) (en banc); *see also* Zhang v. Holder, 617 F.3d 650, 654 n.2 (2d Cir. 2010) (noting that the *Pena* court rejected "the argument that the departure bar was impliedly repealed by the [IIRIRA]"); William v. Gonzales, 499 F.3d 329, 345 n.6 (4th Cir. 2007) (Williams, C.J., dissenting).

[196] *See Court Locator*, U.S. CRTS., http://www.uscourts.gov/court_locator.aspx (last visited Jan. 5, 2012).

ings have taken place or are taking place within the First Circuit's jurisdiction will be barred from filing a motion to reopen the proceedings.

2. The Second Circuit Holds that the BIA Cannot Constrict Its Congressionally-Given Jurisdiction

In *Zhang v. Holder*, the Second Circuit upheld as reasonable the BIA's decision to bar the petitioner's motion to reopen removal proceedings seeking the court's sua sponte authority under 8 C.F.R. § 1003.2(a) because of the particular historical evolution of the regulation and because the alien had departed the country.[197] More specifically, the court upheld as "not plainly erroneous" the BIA's interpretation that 8 C.F.R. § 1003.2(d) deprives the Board of jurisdiction to hear petitioner's motion to reopen sua sponte.[198] In 2011, however, the Second Circuit revisited the departure bar issue and reached a different result in *Luna v. Holder*.[199] While following an approach similar to the Sixth[200] and Seventh Circuits',[201] the court in *Luna* held that the "BIA may not contract the jurisdiction that Congress gave it by applying the departure bar regulation [under] 8 C.F.R. § 1003.2(d) . . . to statutory motions to reopen."[202] According to the court, Congress did not make jurisdiction pursuant to 8 U.S.C. § 1229a(c)(7) dependent upon whether an alien is present within the United States.[203] Rather, the IIRIRA repealed the statutory bar to departed aliens that had already been in place.[204] Ultimately, the court held that "the BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed or otherwise departs the United States before or after filing the motion."[205] Thus, a departed alien who was subject to or is subject to removal proceed-

[197] *Zhang*, 617 F.3d at 661.

[198] *Id.* at 652.

[199] 637 F.3d 85, 100 (2d Cir. 2011).

[200] *See* discussion *infra* Part V.C.6.

[201] *See* discussion *infra* Part V.C.7.

[202] *Luna*, 637 F.3d at 100.

[203] *Id.* at 101.

[204] *Id.*; 8 U.S.C. § 1105a (repealed 1996).

[205] *Luna*, 637 F.3d at 102. The court declined, however, to determine the validity of 8 C.F.R. § 1003.2(d) in every possible context. *Id.* Thus, it is not clear how the court will rule on an issue regarding the regulatory sua sponte motion to reopen.

ings in Connecticut, New York, or Vermont is not barred from filing a statutory motion to reopen.[206]

3. The Third Circuit Holds Post-Departure Bar Conflicts with Clear Congressional Intent

In an unpublished opinion in 2009, the Third Circuit upheld the validity of the departure bar contained in 8 C.F.R. § 1003.2(d), pertaining to motions to reopen or reconsider before the BIA.[207] In 2010, the Third Circuit held the BIA's interpretation of the regulatory departure bar in 8 C.F.R. § 1003.3(e)[208] to be incorrect because the Board equated the word "departure" with "deportation" and/or "remov[al]."[209] In its decision, the court noted that although an alien who *voluntarily* departs during deportation proceedings may be deemed to have waived his or her right to *appeal*, "it is less equitable to so deem an alien who was *involuntarily* removed . . . ."[210]

More recently, the Third Circuit unequivocally held that "the post-departure bar regulation [under 8 C.F.R. § 1003.2(d)] conflicts with Congress'[s] clear intent for several reasons."[211] Those reasons included, among others, that the "plain text of the statute provides each 'alien' with the right to file one motion to reopen"; that Congress incorporated geographical limitations in a subsequent addition to the IIRIRA but did not add a geographical limitation to the overall statute generally; and that "Congress specifically withdrew the statutory post-departure bar to judicial review in conformity with IIRIRA's purpose of speeding departure, but improving accuracy."[212] The Third Circuit's jurisdiction includes Delaware, New Jersey, and Pennsylvania.[213] Therefore, aliens whose judicial proceedings took place in

[206] The Second Circuit's jurisdiction comprises these states. *See Court Locator*, *supra* note 196.

[207] Tahiraj-Dauti v. U.S. Att'y Gen., 323 F. App'x 138, 139 (3d Cir. 2009); *see infra* text accompanying note 266.

[208] 8 C.F.R. § 1003.3(e) (2011) ("Departure from the United States of a person who is the subject of deportation proceedings, prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal.").

[209] Patel v. U.S. Att'y Gen., 394 F. App'x 941, 944–55 (3d Cir. 2010).

[210] *Id.* at 945 (emphasis added); *see* 8 C.F.R. § 1003.3(e) (2011) (pertaining to waivers of appeal).

[211] Espinal v. U.S. Att'y Gen., 653 F.3d 213, 224 (3d Cir. 2011). Although this case dealt specifically with the motion-to-reconsider portion of the regulation, the court noted that the analysis for the motion to reopen is the same and thus if one portion is invalid, the other is as well. *Id.* at 217 n.3.

[212] *Id.* at 224.

[213] *See Court Locator*, *supra* note 196.

these states will not be jurisdictionally barred solely because they have filed motions to reopen after departing the United States.

4. The Fourth Circuit Holds that Regulatory Departure Bars Are Always Invalid

As noted in greater detail above,[214] the Fourth Circuit holds that the departure bar contained in 8 C.F.R. § 1003.2(d) clearly conflicts with the statutory language in 8 U.S.C. § 1229a(c)(7)(A) and therefore is rendered invalid.[215] Thus, an alien who faces removal proceedings in Maryland, North Carolina, South Carolina, Virginia, or West Virginia is *not* jurisdictionally barred from filing a motion to reopen or reconsider *solely* because the alien has departed the country.[216]

5. The Fifth Circuit Upholds Regulatory Departure Bar's Validity

In 2003, the Fifth Circuit in *Ovalles v. Holder* ruled that the BIA's decision—that the departure bar in 8 C.F.R. § 1003.2(d) deprived the BIA of the jurisdiction to sua sponte consider a motion to reopen filed by an alien who has departed the country following termination of removal proceedings—was proper.[217] More recently, the court directly ruled on the regulatory departure bar's validity in *Toora v. Holder*.[218] In *Toora*, the court held that the departure bar contained in 8 C.F.R. § 1003.23(b)(1) "applied to an alien who departed the U.S. after receiving notice of his deportation proceeding, but before the proceeding was completed and the [IJ] entered a deportation order."[219] Thus, individuals whose removal proceedings have already

[214] *See supra* Part V.A.

[215] William v. Gonzales, 499 F.3d 329, 331 (4th Cir. 2007).

[216] The Fourth Circuit's jurisdiction comprises these states. *See Court Locator*, *supra* note 196.

[217] 577 F.3d 288, 299–300 (5th Cir. 2009) (finding no need to squarely address the validity of § 1003.2(d) because the motion to reopen was untimely); *see* Navarro-Miranda v. Ashcroft, 330 F.3d 672, 676 (5th Cir. 2003) (upholding 8 C.F.R. § 3.2(d)—the predecessor to § 1003.2(d)—as a valid restriction on the BIA's jurisdiction to hear an alien's motion to reopen once that alien has departed the United States). *See generally* Emma Rebhorn, Note, Ovalles v. Holder*: Better Late than . . . on Time? The Fifth Circuit Avoids Ruling on the Validity of the Postdeparture Bar*, 84 TUL. L. REV. 1347 (discussing how the Fifth Circuit avoided directly addressing the validity of the departure bar at issue).

[218] 603 F.3d 282 (5th Cir. 2010).

[219] Toora v. Holder*, No. 09-60073*, FINDLAW (Apr. 9, 2010, 12:03 PM), http://blogs.findlaw.com/fifth_circuit/2010/04/toora-v-holder-no-09-60073.html (discussing *Toora*, 603 F.3d at 288).

been terminated and individuals who are *presently* subject to removal proceedings in Louisiana, Mississippi, or Texas, and have departed the United States either after completion of their removal proceedings or prior to an official removal order, will be barred from moving to reopen or reconsider their proceedings.[220]

6. The Sixth Circuit Holds that the BIA Cannot Constrict Its Jurisdiction to Hear Statutorily Created Motions to Reopen

In 2007, the Sixth Circuit simply noted in a footnote in *Ablahad v. Gonzales* that petitioner's "motions to reopen were also barred by 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1)."[221] Two years later, however, the court addressed the particular matter at issue in *Madrigal v. Holder* with finality when it held that the departure bar rule under 8 C.F.R. § 1003.4[222] does not apply to aliens who have been *involuntarily* removed from the United States.[223] In 2011, the Sixth Circuit resolved all of the outstanding issues concerning the departure bar's application in *Pruidze v. Holder*, where the court held that the BIA cannot curtail its own jurisdiction to entertain a departed alien's motion to reopen.[224] First, the court explicitly stated that "no statute gives the [BIA] purchase for disclaiming jurisdiction to entertain a motion to reopen filed by aliens who have left the country."[225] Second, the court explained that a line of recent Supreme Court decisions makes clear that the BIA's authority is to interpret the regulation as a mandatory legal rule and not as jurisdictional.[226] Absent a statute providing the BIA with such authority, "the agency may not disclaim jurisdiction to

[220] The Fifth Circuit's jurisdiction comprises these states. *See Court Locator*, *supra* note 196.

[221] 217 F. App'x 470, 475 n.6 (6th Cir. 2007).

[222] 8 C.F.R. § 1003.4 (2011) (pertaining to withdrawal of appeal).

[223] 572 F.3d 239, 243–45 (6th Cir. 2009); *see* Marin-Rodriguez v. Holder, 612 F.3d 591, 594 (7th Cir. 2010) (noting that the Sixth Circuit is one of two circuits that hold departure bars inapplicable to involuntarily removed aliens). Involuntary removal entails a government-induced removal. *See* Coyt v. Holder, 595 F.3d 902, 907 (9th Cir. 2010) ("[T]he physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.").

[224] 632 F.3d 234, 237–38 (6th Cir. 2011).

[225] *Id.* at 237.

[226] *Id.* at 238 (citing Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs, 130 S. Ct. 584 (2009); Bowles v. Russell, 551 U.S. 205 (2007); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006); Kontrick v. Ryan, 540 U.S. 443 (2004); Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998)).

handle a motion to reopen that Congress empowered it to resolve."[227] Thus, the BIA erred when it held that 8 C.F.R. § 1003.2(d) deprived it of jurisdiction to entertain Pruidze's motion.[228] It follows that an alien whose removal proceedings took place in Kentucky, Michigan, Ohio, or Tennessee and has since departed the country voluntarily or involuntarily may file a motion to reopen his or her proceedings.[229]

7. The Seventh Circuit Holds that the BIA Cannot Constrict Its Jurisdiction

The Seventh Circuit's approach is similar to the Sixth Circuit's. In *Marin-Rodriguez v. Holder*, the Seventh Circuit struck down the departure bar under 8 C.F.R. § 1003.2(d) as invalid because an agency is not entitled to "contract its own jurisdiction by regulations or by decisions in litigated proceedings."[230] Thus, "until the BIA rethinks the theoretical basis for the departure bar . . . motions to reopen . . . will survive an alien's departure in the Seventh Circuit as well."[231] It follows that aliens who are or were subjected to removal proceedings in Illinois, Indiana, or Wisconsin, have since departed the country, and wish to move to reopen their removal proceedings are not jurisdictionally barred simply due to the regulatory departure bar's physical presence requirement.[232]

8. The Ninth Circuit Holds the Regulatory Departure Bar Inapplicable to Involuntarily Removed Aliens

In 2007, the *Lin v. Gonzales*[233] court relied "on the rule of lenity to hold that 8 C.F.R. § 1003.23(b)(1) does not deprive an IJ of jurisdiction to consider a motion to reopen filed by a removed alien" so long as the regulation is explicitly phrased in the present tense.[234]

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[227] *Id.* at 239.

[228] *Id.* at 241.

[229] The Sixth Circuit's jurisdiction comprises these states. *See Court Locator*, *supra* note 196.

[230] 612 F.3d 591, 594 (7th Cir. 2010) ("We think that *Union Pacific* is dispositive in favor of the holding in *William*—though on a rationale distinct from the [F]ourth [C]ircuit's."); *Union Pac. R.R.*, 130 S. Ct. 584; *see also* ROSENBLOOM ET AL., *supra* note 3, at 6–7 (noting that the court in *Marin-Rodriguez* held that the regulations are not jurisdictional, and thus, the BIA cannot decline a motion to reopen on that ground).

[231] *See* Isaacson, *supra* note 103.

[232] The Seventh Circuit's jurisdiction comprises these states. *See Court Locator*, *supra* note 196.

[233] 473 F.3d 979 (9th Cir. 2007).

[234] Zhang v. Holder, 617 F.3d 650, 659 (2d Cir. 2010) (citing *Lin*, 473 F.3d at 982).

Subsequently, the Ninth Circuit held in *Coyt v. Holder* that the regulatory departure bar rule is not applicable to aliens who were *involuntarily* removed from the United States.[235] More recently, in *Reyes-Torres v. Holder*, the court upheld its ruling in *Coyt* and reiterated that Congress's intent in enacting IIRIRA is clear: "Congress anticipated that petitioners would be able to pursue relief after departing from the United States."[236] In particular, the court held that 8 C.F.R. § 1003.2(d) did not deprive the BIA of jurisdiction to entertain Reyes-Torres's motion to reopen his case after being removed from the United States.[237] Thus, the departure bar's physical presence requirement is clearly inapplicable in cases where removal proceedings have been completed and the alien has been removed. The Ninth Circuit's jurisdiction includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.[238]

9. The Tenth Circuit Holds that Regulatory Departure Bars Are Always Valid

The Tenth Circuit's approach to departure-bar case law is in direct contrast to the Fourth Circuit's. In *Mendiola v. Holder*, the Tenth Circuit held that the departure bar in 8 C.F.R. § 1003.2(d) does not conflict with the statutory language of 8 U.S.C. § 1229a(c)(7)(A) and therefore is a valid regulation applicable to departed aliens.[239] The court recently upheld the departure bar's validity once again in *Contreras-Bocanegra v. Holder*.[240] In *Contreras-Bocanegra*, the court held that the departure bar under 8 C.F.R. § 1003.2(d) divested the BIA of jurisdiction to hear petitioner's motion to reopen despite the timeliness of said motion because the motion was filed after petitioner departed the country.[241] Therefore, an alien who faces removal proceedings in Colorado, Kansas, New Mexico, Oklahoma, Utah, or

[235] 593 F.3d 902, 907 (9th Cir. 2010) ("[Section 1003.2(d)] cannot apply to cause the withdrawal of an administrative petition filed by a petitioner who has been involuntarily removed . . . ."); *see Marin-Rodriguez*, 612 F.3d at 594 (noting that the Sixth Circuit is one of two circuits that hold departure bars inapplicable to involuntarily removed aliens). *See generally* Susan Kilgore, *Developments in the Judicial Branch: Ninth Circuit Issues Decision in* Coyt v. Holder, *Invalidating Departure Bar on Motions to Reopen and Creating Circuit Split*, 24 GEO. IMMIGR. L.J. 383 (2010).

[236] 645 F.3d 1073, 1076 (9th Cir. 2011) (quoting *Coyt*, 593 F.3d at 906) (internal quotation marks omitted).

[237] *Id.* at 1077.

[238] *See Court Locator*, *supra* note 196.

[239] 585 F.3d 1303, 1308 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).

[240] 629 F.3d 1170, 1172 (10th Cir. 2010).

[241] *Id.* at 1171–72.

Wyoming is jurisdictionally barred from filing a motion to reopen or reconsider after departing from the United States.[242]

10. The Eleventh Circuit Upholds the Regulatory Departure Bar as Valid

Sankar v. United States Attorney General is an unpublished opinion addressing the applicability of the regulatory departure bar.[243] Ultimately, the court in *Sankar* specifically upheld the departure bar in 8 C.F.R. § 1003.23(b)(1) as applied to motions to reopen or reconsider before an IJ.[244] If the court's analysis does not change, aliens who were or are subject to removal proceedings in Alabama, Florida, or Georgia, and have since departed will not be permitted to file motions to reopen or reconsider.[245]

11. The Varying Approaches of the Circuit Courts of Appeals

The aforementioned cases illustrate the lack of consistency in the courts' application of the departure bar and the recent trend among the circuit courts of appeals of invalidating regulatory post-departure bars. More importantly, the cases also highlight the nuances in different circuit holdings of how narrowly or broadly the provisions are interpreted. Such concerns indicate a need for change in this context. The needed change, however, will require either a Supreme Court ruling or an amendment to the INA's statutory language.

VI. AN ARGUMENT FOR MODIFICATION OR ABOLISHMENT OF THE REGULATORY DEPARTURE BAR

As evidenced throughout this Comment, there is a lack of uniformity among the U.S. circuit courts of appeals' departure bar jurisprudence in the immigration context. Specifically, the circuit courts are divided on the applicability and/or validity of the physical presence requirement in the departure bars—these "[d]ifferences in le-

[242] *See Court Locator*, *supra* note 196.
[243] 284 F. App'x 798 (11th Cir. 2008).
[244] *Id.* at 799.
[245] *See Court Locator*, *supra* note 196.

gal rules applied by the circuits result in unequal treatment of citizens . . . solely because of differences in geography."[246]

In 1990, the Federal Courts Study Committee ("Study Committee") examined inter-circuit conflicts and "recommended that the Federal Judicial Center 'study the number and frequency of unresolved conflicts' to determine how many were 'intolerable.'"[247] The Study Committee's report defined "intolerable" conflicts in the court system to include circumstances when the lack of uniformity "encourages forum shopping among circuits [or] creates unfairness to litigants in different circuits . . . [or] encourages non-acquiescence by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions."[248] Given these guidelines, the current regulatory departure bar conflicts in the different circuits are clearly "intolerable" conflicts.

Such longstanding conflicts are causes for concern, especially considering the existence of Supreme Court Rule 10 ("Rule 10"), which provides guidance for the Court's discretionary power to choose which writs of certiorari to grant.[249] One guiding principle the Supreme Court uses in considering a petition is whether a "[U.S.] court of appeals has entered a decision in conflict with the decision of another [U.S.] court of appeals on the same important matter."[250] Interestingly, at least one commentator has said that Rule 10 is partly derived from former President and Chief Justice Taft's vision for the Supreme Court; a vision that involved "two broad objectives: (i) to resolve important questions of law, and (ii) to maintain *uniformity* in federal law."[251]

Although one commentator has noted that maintaining uniformity in federal law "has fallen by the wayside" since the retirement in

[246] COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195, 206–07 (1975).

[247] Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1582 (2008) (quoting JUDICIAL CONFERENCE OF THE U. S., FED. COURTS STUDY COMM'N, REPORT OF THE FEDERAL COURTS STUDY COMMISSION 124–25 (1990) [hereinafter FED. COURTS STUDY COMM. REPORT]).

[248] *Id.* (quoting FED. COURTS STUDY COMM'N REPORT at 124–25) (internal quotation marks omitted).

[249] SUP. CT. R. 10.

[250] SUP. CT. R. 10(a).

[251] Kenneth W. Star, *The Supreme Court and its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1365 (2006) (emphasis added).

1993 of Justice White[252]—who openly advocated that a primary aim of the Court is "to provide some degree of coherence and uniformity in federal law throughout the land"[253]—it is still an objective the Court generally adheres to. As Justice Scalia noted, "The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law."[254] Nonetheless, petitioning the Court to resolve an inter-circuit conflict does not guarantee that the petition will be granted, but the "likelihood that the Court will grant review increases markedly."[255]

Unfortunately, however, some conflicts among the circuits can persist for years before the Supreme Court finally decides to hear the matter.[256] Specifically, in the departure bar context, the Supreme Court has rejected certiorari in at least three cases since 2008.[257] It is not clear at this point whether the Supreme Court will grant certiorari to clarify the matter at issue, especially since "relatively few immigration cases are taken up by the Supreme Court."[258]

Additionally, as noted above, lack of uniformity may lead parties, both governmental entities as well as private parties, to engage in forum shopping, and it certainly fosters less predictability in the law, which raises questions of fundamental fairness concerning similarly situated persons in different locations being treated differently under the same laws.[259] Such uncertainty also raises philosophical questions about the overall effectiveness of our court system.[260] Further, uni-

[252] *Id. See generally* Linda Greenhouse, *The Supreme Court: White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 20, 1993, at 1.

[253] Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B. J. 346, 349 (1982).

[254] Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting); *see, e.g.*, Dada v. Mukasey, 554 U.S. 1, 7 (2008) ("[The Court] granted certiorari . . . to resolve the disagreement among the Courts of Appeals."); Whorton v. Bockting, 549 U.S. 406, 415 (2007) (stating that the Court "granted certiorari to resolve th[e] conflict" among courts of appeals and state supreme courts).

[255] Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 KAN. L. REV. 313, 319 (2009).

[256] *See, e.g.*, Bryan M. Shay, Note, *"So I Says to 'the Guy,' I Says . . .": The Constitutionality of Neutral Pronoun Redaction in Multidefendant Criminal Trials*, 48 WM. & MARY L. REV. 345, 365 (2006) ("This relatively even split in the circuits persisted for almost twenty years until the Court finally got the chance to settle the debate . . . .").

[257] Mendiola v. Holder, 585 F.3d 1303 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010); Rosillo-Puga v. Holder, 580 F.3d 1147 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010); Pena-Muriel v. Gonzales, 489 F.3d 438 (1st Cir. 2007).

[258] *Immigration Litigation Reduction*, *supra* note 27, at 49.

[259] *See supra* text accompanying notes 23–27, 29.

[260] For example, given the importance of maintaining uniformity throughout American jurisprudence, as seen in the due process and equal protection clauses of

form application of the law can improve judicial efficiency by limiting the amount of resources that courts expend deciphering a law's applicability when different circuits have such varying approaches to the same issue.

First, forum shopping is a practice that our courts greatly despise.[261] For this reason, courts are encouraged to "consider the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[262] Litigants, however, may undertake such gamesmanship when the legal environment provides them with the opportunity to receive a more favorable outcome in a different jurisdiction.

Second, "[l]ack of predictability" is also of great concern; it is "detrimental to citizens of foreign countries, citizens of the United States, and to the United States as a country."[263] Such unpredictability "may frustrate the reasonable expectations of litigants and lead to disparate results across the states."[264] Instead, courts should strive to achieve predictability because it "helps determine the precedent to which a court should adhere, and it 'encourage[s] reliance on adjudication.'"[265] In addition, predictability of the law can further assist an attorney in advising clients and preparing clients' cases.

Third, the current lack of uniformity leads to fundamental unfairness in our legal system. As indicated throughout this Comment, an alien who was subject to removal proceedings in state A may be unable to file a motion to reopen his or her proceedings, but would be permitted to do so if he or she had faced removal proceedings in State B. This is not a situation in which state laws mandate a variation of results because different states have different laws or word those laws differently. Rather, this is a situation in which federal statutory law and federal regulations are interpreted differently although the language contained therein is the same. As a result, similarly situated persons in different areas are not treated the same.

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the Constitution, should changes be made to the American court system so that such inter-circuit conflicts do not persist for several years?

[261] *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[262] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 n.2 (2010) (internal quotation marks omitted); *Erie R.R. Co.*, 304 U.S. at 77–79.

[263] Christina Manfredi, Comment, *Waiving Goodbye to Personal Jurisdiction Defenses: Why United States Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver Within the Context of International Litigation*, 58 CATH. U. L. REV. 233, 258 (2008).

[264] *Id.* at 238 (internal quotation marks omitted).

[265] *Id.* at 256–57 (quoting Estabrook v. United States, 41 Fed. Cl. 283, 289 (1998)).

Finally, judicial efficiency may be improved by increasing uniformity in this context. Courts may be able to save limited resources by not having to decipher what exactly the law in each circuit is or will be. Lower courts will have more guidance and clarity to rule on issues pertaining to motions filed by departed aliens. The BIA and immigration courts may also experience an improvement in efficiency. As the BIA has explicitly indicated, it will apply the Fourth Circuit's interpretation of departure bar jurisprudence only in the Fourth Circuit's jurisdiction. Thus, the BIA will continue to rely on its own interpretation of the regulatory departure bars in other circuits. This practice may lead to more cases being overturned—if the circuit does not agree with the BIA's approach, as shown in Part VII—which results in more litigation and greater use of resources. Absent a Supreme Court ruling on the matter, in order to resolve these concerns, Congress should modify the INA's statutory language or abolish regulatory departure bars entirely.

VII. MODIFICATIONS AND AMENDMENTS

There are several different ways to modify or amend the language in the regulatory departure bars as well as the relevant INA statutes. This Part's objective is to propose a modification or amendment that will result in uniformity among the circuits. For illustrative purposes, this Part will use the language contained in the departure bar under 8 C.F.R. § 1003.2(d), which provides:

> (d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.[266]

[266] 8 C.F.R. § 1003.2(d) (2011) (pertaining to the BIA).

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

Id. § 1003.23(b)(1) (pertaining to Immigration Court).

Similarly, this section will use the language contained in the INA under 8 U.S.C. §§ 1229a(c)(7)(A)–(C), which provides:

> (c) Decision and burden of proof.
> . . . .
> (7) Motions to reopen
> (A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).
> (B) Contents. The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.
> (C) Deadline.
> (i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.[267]

It is evident from the different circuit courts' holdings that modifying the regulatory departure bars will not resolve all of the current conflicts.[268] As previously indicated, the Second, Third, Fourth, Sixth, and Seventh Circuits hold that the BIA either cannot constrict its congressionally-granted jurisdiction or that the regulatory departure bars are rendered invalid by the clear language found within the pertinent section(s) of the INA.[269] Each of the circuits, however, acknowledges that the INA's statutory language is controlling.[270] The differences lie in how each circuit interprets this language. Therefore, a realistic solution to the current conflicts, absent a Supreme Court ruling directly on point, involves amending the INA's statutory language.

There are two possible modifications that are most reasonable in this context: one that includes statutory language requiring a geographic presence for all motions to reopen or one that includes statutory language explicitly stating that no such geographic presence is required. Beginning with the former, such an amendment could include: (1) language contained in current regulatory departure bars, in addition to explicit language to include (2) aliens who *were* the subject of removal proceedings, (3) aliens who voluntarily departed

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[267] 8 U.S.C. § 1229a(c)(7)(A)–(C) (2006) (additional provisions under subsection (C) omitted).

[268] *See* discussion *supra* Part V.

[269] *See* discussion *supra* Part V.

[270] *See* discussion *supra* Part V.

the country, and (4) aliens who involuntarily departed. The amendment could be structured as follows:

> (7) Motions to reopen.
> (A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).
> *(i) Subparagraph (A) shall not apply to an alien who is the subject of removal proceedings or was the subject of removal proceedings wherein a final order had been issued subsequent to his or her voluntary or involuntary 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.*
> . . . .
> (C) Deadline.
> (i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

Although such statutory amendment would resolve the conflicts among *all* of the circuit courts, it would be contrary to Congress's intent of improving the expedition of removing aliens in enacting the IIRIRA.[271] The court in *Coyt* explained that the IIRIRA "'inverted' certain provisions of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad."[272] The court continued by explaining that prior to the IIRIRA "removal of a petitioner from the United States precluded courts from exercising jurisdiction over petitions for review."[273] Therefore, at the time when orders of final removal were pending, aliens were granted automatic stays.[274] The "IIRIRA changed that by lifting the prior statutory bar over courts exercising jurisdiction over departed aliens, removing the automatic

[271] *See* Coyt v. Holder, 593 F.3d 902, 906 (9th Cir. 2010) ("Congress wished to expedite the physical removal of those aliens not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations.").

[272] *Id.* (quoting Nken v. Holder, 129 S. Ct. 1749, 1755 (2009)); *see also* Espinal v. U.S. Att'y Gen., 653 F.3d 213, 224 (3d Cir. 2011) (noting the "IIRIRA's purpose of speeding departure, but improving accuracy"); Luna v. Holder, 637 F.3d 85, 101 (2d Cir. 2011) (illustrating the same point as in *Coyt* by quoting the identical language from *Nken*).

[273] *Coyt*, 593 F.3d at 906.

[274] *Id.*; *see* 8 U.S.C. § 1105a(a)(3) (repealed 1996).

stay provision upon petition for review, and informing the Attorney General that removal need not be deferred."[275] The court in *Coyt* then concluded that "the intent of Congress is clear" in that when Congress enacted the IIRIRA it "anticipated that petitioners would be able to pursue relief *after* departing from the United States."[276]

Additional insights into the IIRIRA's structural meanings were discussed in *William v Gonzales*.[277] The majority in *William* made clear that Congress's use of the term "alien" does not distinguish between aliens within or without the country; that Congress enacted limitations in the section at issue, but a geographical limitation for departed aliens is not included; and that Congress's explicit physical requirement under 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)[278] would be rendered superfluous if Congress already geographically limited motions to reopen or reconsider for aliens.[279] Therefore, the amendment proposed above would be contrary to the IIRIRA's original purpose.

Perhaps then the more appropriate method to resolve the lack of uniformity without frustrating the IIRIRA's purpose or congressional intent would be an amendment to the statutory language that explicitly states that an alien may file one motion to reopen whether he or she (1) is the subject of or (2) was the subject of removal proceedings, regardless of whether the alien (3) voluntarily or (4) involuntarily departed the country. For example,

(7) Motions to reopen.

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[275] *Coyt*, 593 F.3d at 906; *see* IIRIRA, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009, 3009-612 (1996) (repealing 8 U.S.C. § 1105a); 8 U.S.C. §§ 1252(b)(3)(B), 1252(b)(8)(C) (2006); *see also Espinal*, 653 F.3d at 224 ("Congress specifically withdrew the statutory post-departure bar to judicial review.").

[276] *Coyt*, 593 F.3d at 906 (emphasis added); *see also Luna*, 637 F.3d at 101 (stating that Congress has done nothing since enacting IIRIRA to indicate "that an alien's departure after filing a motion to reopen should be a jurisdictional bar"); Reyes-Torres v. Holder, 645 F.3d 1073, 1076 (9th Cir. 2011) (quoting *Coyt*'s language regarding Congress's intent in enacting IIRIRA).

[277] 499 F.3d 329 (4th Cir. 2007).

[278] 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) (2006) ("(iv) Special rule for battered spouses, children, and parents. Any limitation under this section on the deadlines for filing such motions shall not apply. . . . (IV) if the alien is physically present in the United States at the time of filing the motion.")

[279] *William*, 499 F.3d at 332–33; *see also Espinal*, 653 F.3d at 224 (providing similar arguments in its reasons why "the post-departure bar regulation conflicts with Congress' clear intent"); *Luna*, 637 F.3d at 101 (discussing Congress's explicit physical presence requirement for the domestic violence section and how "Congress's choice to include this limitation in only one small subsection makes significant its decision to omit such a requirement from the rest of the law").

> (A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).
> *(i) Subparagraph (A) shall apply to an alien who is the subject of exclusion, deportation, or removal proceedings or was the subject of removal proceedings wherein a final order had been issued subsequent to his or her voluntary or involuntary 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 not constitute a withdrawal of such motion.*
> . . . .
> (C) Deadline.
> (i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

This approach would essentially abolish the regulatory departure bar rule by explicitly stating in the INA's statutory language that an alien who files a motion to reopen or reconsider his or her immigration proceedings is not be jurisdictionally barred from doing so solely due to the alien's geographic location. More importantly, such an amendment could bring the needed uniformity in each circuit's current approach to the departure bar's application in the immigration context. For example, the circuits that relied upon the Attorney General's discretionary power to issue regulations as the reason to render such departure bars valid would no longer be able to uphold a BIA's or an IJ's denial of a motion on such jurisdictional grounds.[280] In addition, the Ninth Circuit would no longer need to distinguish between aliens who voluntarily departed the country and those who were involuntarily removed.[281] Furthermore, the Second, Sixth, and Seventh Circuits would now have clear guidance as to whether the BIA retains jurisdiction to consider motions filed by aliens who have departed.[282] Finally, the Third and Fourth Circuits could continue to uphold the statute itself as the final word on whether a court has ju-

[280] *See generally* Zhang v. Holder, 617 F.3d 650 (2d Cir. 2010); Toora v. Holder, 603 F.3d 282 (5th Cir. 2010); Mendiola v. Holder, 585 F.3d 1303 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010); Sankar v. U.S. Att'y Gen., 284 F. App'x 798 (11th Cir. 2008); Pena-Muriel v. Gonzales, 489 F.3d 438 (1st Cir. 2007).

[281] *See generally Coyt*, 593 F.3d 902.

[282] *See generally* Luna v. Holder, 637 F.3d 85 (2d Cir. 2011); Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011); Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010).

risdiction to consider a motion to reopen filed by a departed alien.[283] Ultimately, this amendment or one that is similarly drafted would resolve each of the current inter-circuit conflicts while also conforming to congressional intent not to impose a geographic limitation.

Such an amendment would provide uniformity in this immigration context that has been nonexistent for many years. "Given that judicial efficiency and finality are important values,"[284] the INA's statutory language should be amended to provide greater uniformity in this immigration context by explicitly stating that an alien may file a motion to reopen regardless of whether the alien resides inside or outside of the United States. The longer departure bar jurisprudence remains inconsistent, the longer certain parties may fall victim to the concerns described in this Comment. Without a Supreme Court ruling on this matter or a modification of the current law, the problems detailed above will persist and aliens in certain jurisdictions will continue to be removed without the possibility of having their cases reheard.

VIII. CONCLUSION

As departure bar jurisprudence currently stands, aliens subject to removal proceedings in different areas of the country will face different outcomes, not based upon the merits of their cases, but solely because of their geographic locations. Such lack of uniformity presents problems in our legal system. This Comment has outlined a few of these problems. One problem involves governmental agencies, as well as private parties, engaging in forum shopping.[285] Another problem, which common sense dictates, is that such a non-uniform practice leads to lack of predictability in the law. This is probably most troublesome in circuits that have yet to directly address the departure bar's validity, as well as circuits where only unpublished, nonprecedential decisions have been issued.[286] An attorney advising his or her client in these jurisdictions has greater difficulty predicting what the outcome may be or how the court will interpret the laws that

[283] *See generally* Espinal v. U.S. Att'y Gen., 653 F.3d 213 (3d Cir. 2011); William v. Gonzales, 499 F.3d 329 (4th Cir. 2007).

[284] Stutson v. United States, 516 U.S. 193, 197 (1996).

[285] *See supra* Part I (discussing how DHS officials subjected Mendiola to removal proceedings in a different circuit's jurisdiction); *see also* SKINNER, *supra* note 27, at 1.

[286] For a discussion of cases from circuits that have issued only nonprecedential opinions regarding the departure bar, see *supra* Part V.C.

are already in place. Our judicial system should strive to maintain a framework devoid of such concerns.

An amendment to the INA's statutory language explicitly stating that physical presence is not required for departed aliens to file motions to reopen their proceedings would provide the clarity that circuit courts need in order to reach similar outcomes on identical issues. As such, an amendment to the INA's statutory language that explicitly grants immigration courts the jurisdiction to consider an alien's motion to reopen, regardless of whether the alien is within or without the country, would both provide uniformity among the different circuit courts of appeals and remain true to the IIRIRA's statutory purpose of expediting removal proceedings "while eliminating prior statutory barriers to pursuing relief from abroad."[287]

[287] Coyt v. Holder, 593 F.3d 902, 906 (9th Cir. 2010).