Session I: Wrongful Removals

Readings for Session I

Copies of the following are attached:
1. [omitted]
3. Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010)
5. Molina v. Holder, No. 12-73462 (9th Cir. 2013) (excerpts)

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The following additional materials are available as further background information or to provide the full versions of (non-confidential) excerpted sources distributed by email.

1. Boston College Law School, Post-Departure Human Rights Project, Practice Advisory on Post-Departure Motions to Reopen or Reconsider (Dec, 2012)
4. Practice Advisory: Departure Bar to Motions to Reopen and Reconsider (Nov. 2013)
5. Molina v. Holder, No. 12-73462 (9th Cir. 2013) (complete)
Table 6.
Aliens Removed by Criminal Status and Country of Nationality: Fiscal Years 2009 to 2011
(Countries ranked by 2011 aliens removed)

<table>
<thead>
<tr>
<th>Country of nationality</th>
<th>Total</th>
<th>Criminal*</th>
<th>Non-Criminal</th>
<th>Total</th>
<th>Criminal*</th>
<th>Non-Criminal</th>
<th>Total</th>
<th>Criminal*</th>
<th>Non-Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>391,953</td>
<td>188,382</td>
<td>203,571</td>
<td>385,100</td>
<td>169,656</td>
<td>215,444</td>
<td>393,457</td>
<td>131,837</td>
<td>261,620</td>
</tr>
<tr>
<td>Mexico</td>
<td>293,966</td>
<td>144,745</td>
<td>149,221</td>
<td>275,831</td>
<td>128,396</td>
<td>147,435</td>
<td>278,568</td>
<td>99,616</td>
<td>178,952</td>
</tr>
<tr>
<td>Guatemala</td>
<td>30,313</td>
<td>11,700</td>
<td>18,613</td>
<td>29,736</td>
<td>9,432</td>
<td>20,304</td>
<td>29,652</td>
<td>6,547</td>
<td>23,105</td>
</tr>
<tr>
<td>Honduras</td>
<td>21,963</td>
<td>10,801</td>
<td>11,162</td>
<td>25,131</td>
<td>10,420</td>
<td>14,711</td>
<td>27,290</td>
<td>6,998</td>
<td>20,292</td>
</tr>
<tr>
<td>El Salvador</td>
<td>17,308</td>
<td>8,486</td>
<td>8,822</td>
<td>20,361</td>
<td>8,368</td>
<td>11,993</td>
<td>20,849</td>
<td>6,344</td>
<td>14,505</td>
</tr>
<tr>
<td>Brazil</td>
<td>3,012</td>
<td>541</td>
<td>2,471</td>
<td>3,535</td>
<td>487</td>
<td>3,048</td>
<td>3,726</td>
<td>388</td>
<td>3,338</td>
</tr>
<tr>
<td>Ecuador</td>
<td>1,699</td>
<td>700</td>
<td>999</td>
<td>2,386</td>
<td>692</td>
<td>1,694</td>
<td>2,383</td>
<td>602</td>
<td>1,781</td>
</tr>
<tr>
<td>Canada</td>
<td>1,289</td>
<td>412</td>
<td>877</td>
<td>1,345</td>
<td>457</td>
<td>888</td>
<td>1,329</td>
<td>418</td>
<td>911</td>
</tr>
<tr>
<td>Colombia</td>
<td>1,857</td>
<td>1,037</td>
<td>820</td>
<td>2,409</td>
<td>1,241</td>
<td>1,168</td>
<td>2,720</td>
<td>1,124</td>
<td>1,596</td>
</tr>
<tr>
<td>Nicaraqua</td>
<td>1,495</td>
<td>694</td>
<td>801</td>
<td>1,906</td>
<td>804</td>
<td>1,102</td>
<td>2,175</td>
<td>620</td>
<td>1,555</td>
</tr>
<tr>
<td>China, People's Republic</td>
<td>987</td>
<td>214</td>
<td>773</td>
<td>1,068</td>
<td>166</td>
<td>902</td>
<td>970</td>
<td>135</td>
<td>835</td>
</tr>
<tr>
<td>All other countries, including unknown.</td>
<td>18,064</td>
<td>9,052</td>
<td>9,012</td>
<td>21,392</td>
<td>9,193</td>
<td>12,199</td>
<td>23,795</td>
<td>9,045</td>
<td>14,750</td>
</tr>
</tbody>
</table>

*Refers to persons removed who have a prior criminal conviction.

Note: Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.


Table 7.
Criminal Aliens Removed by Crime Category: Fiscal Years 2009 to 2011
(Crime categories ranked by 2011 criminal aliens removed)

<table>
<thead>
<tr>
<th>Crime category</th>
<th>2011</th>
<th></th>
<th></th>
<th>2010</th>
<th></th>
<th></th>
<th>2009</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td></td>
<td>Number</td>
<td>Percent</td>
<td></td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>Total</td>
<td>188,382</td>
<td>100.0</td>
<td></td>
<td>169,656</td>
<td>100.0</td>
<td></td>
<td>131,837</td>
<td>100.0</td>
</tr>
<tr>
<td>Dangerous Drugs*</td>
<td>43,262</td>
<td>23.0</td>
<td></td>
<td>42,890</td>
<td>25.3</td>
<td></td>
<td>38,940</td>
<td>29.5</td>
</tr>
<tr>
<td>Criminal Traffic Offenses**</td>
<td>43,022</td>
<td>22.8</td>
<td></td>
<td>31,062</td>
<td>18.3</td>
<td></td>
<td>20,877</td>
<td>15.8</td>
</tr>
<tr>
<td>Immigration†</td>
<td>37,458</td>
<td>19.9</td>
<td></td>
<td>31,828</td>
<td>18.8</td>
<td></td>
<td>20,491</td>
<td>15.5</td>
</tr>
<tr>
<td>Assault</td>
<td>12,755</td>
<td>6.8</td>
<td></td>
<td>12,175</td>
<td>7.2</td>
<td></td>
<td>9,675</td>
<td>7.3</td>
</tr>
<tr>
<td>Larceny</td>
<td>5,705</td>
<td>3.0</td>
<td></td>
<td>5,459</td>
<td>3.2</td>
<td></td>
<td>4,331</td>
<td>3.3</td>
</tr>
<tr>
<td>Fraudulent Activities</td>
<td>4,218</td>
<td>2.2</td>
<td></td>
<td>3,889</td>
<td>2.3</td>
<td></td>
<td>2,997</td>
<td>2.3</td>
</tr>
<tr>
<td>Burglary</td>
<td>3,795</td>
<td>2.0</td>
<td></td>
<td>4,213</td>
<td>2.5</td>
<td></td>
<td>3,893</td>
<td>3.0</td>
</tr>
<tr>
<td>Robbery</td>
<td>3,745</td>
<td>2.0</td>
<td></td>
<td>3,646</td>
<td>2.1</td>
<td></td>
<td>3,359</td>
<td>2.5</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>3,572</td>
<td>1.9</td>
<td></td>
<td>3,268</td>
<td>1.9</td>
<td></td>
<td>2,886</td>
<td>2.2</td>
</tr>
<tr>
<td>Family Offenses†</td>
<td>2,961</td>
<td>1.6</td>
<td></td>
<td>3,330</td>
<td>2.0</td>
<td></td>
<td>2,685</td>
<td>2.0</td>
</tr>
<tr>
<td>All other categories, including unknown.</td>
<td>27,889</td>
<td>14.8</td>
<td></td>
<td>27,896</td>
<td>16.4</td>
<td></td>
<td>21,703</td>
<td>16.5</td>
</tr>
</tbody>
</table>

* Including the manufacturing, distribution, sale, and possession of illegal drugs.

** Including hit and run and driving under the influence.

† Including entry and reentry, false claims to citizenship, and alien smuggling.

Note: Data refers to persons removed who have a prior criminal conviction. Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Marin-Rodriguez v. Holder, 612 F.3d 591 (2010)

612 F.3d 591
United States Court of Appeals, Seventh Circuit.

Jose Concepcion MARIN–RODRIGUEZ, Petitioner,
v.


Synopsis
Background: Mexican alien petitioned for review of order of the Board of Immigration Appeals (BIA) denying reconsideration of denial of his motion to remand case to immigration judge (IJ), on ground that it lacked jurisdiction after alien had been removed.

[ Holding:] The Court of Appeals, Easterbrook, Chief Circuit Judge, held that BIA had jurisdiction to reconsider its decision after alien’s removal.

Petition granted.

Attorneys and Law Firms

*591 Matthew Lorn Hoppock, Attorney (argued), McCrummen Immigration Law Group, North Kansas City, MO, for Petitioner.

Allen W. Hausman, Attorney (argued), OIL, Attorney, Department of Justice, Civil Division, Immigration Litigation, Washington, DC, for Respondent.

Before EASTERBROOK, Chief Judge, FLAUM, Circuit Judge, and HIBBLER, District Judge.†
† Of the Northern District of Illinois, sitting by designation.

Opinion

EASTERBROOK, Chief Judge.

The Board of Immigration Appeals believes that it lacks jurisdiction to reconsider or reopen any of its decisions after the alien has left the United States. We must decide whether the Board’s understanding is correct.

Jose Concepcion Marin–Rodriguez entered the United States from Mexico by stealth in 1988 and remained undetected *592 until 2005, when he was convicted of using fraudulent documents to obtain employment under the pretense of citizenship. 18 U.S.C. § 1546(a). He sought cancellation of removal, contending that a return to Mexico would cause hardship for himself and his family. To be eligible for that relief, an alien usually must submit biometric information that will enable the agency to determine that he is who he claims to be, and to find out whether he has any disqualifying criminal convictions. 8 C.F.R. § 1003.47(d). At a hearing in mid–2006, Marin–Rodriguez was told to submit fingerprints and warned that, if he did not, his application would be denied. When the next hearing occurred 15 months later, Marin–Rodriguez still had not complied. The immigration judge deemed his application for cancellation of removal to have been abandoned, see 8 C.F.R. § 1003.47(c), and ordered him removed because he is a citizen of Mexico without a visa or any other claim of right to be in the United States.

Marin–Rodriguez appealed to the Board of Immigration Appeals. While that appeal was pending, he submitted a set of fingerprints and asked the Board to remand to the IJ for reconsideration. But in September 2008 the Board deemed his motion untimely and dismissed his appeal. Marin–Rodriguez protested the next month, via a motion for reconsideration, that a motion for remand filed while an appeal is pending cannot be untimely. (The submission of fingerprints was late, but what the Board said is that the motion was untimely.) On April 29, 2009, the Board granted this motion and remanded to the IJ, stating that its decision of September 2008 had been mistaken in deeming untimely the motion for remand.

Before the IJ could act, however, the Department of Homeland Security asked the Board to reconsider. It observed that Marin–Rodriguez had been removed to Mexico on April 10, 2009, after both the Bureau of Immigration and Customs Enforcement and the Board had denied his requests for a stay of removal. The Board granted the Department’s motion and withdrew the remand to the IJ. This order states: “As the respondent has been removed, the Board was without jurisdiction to consider the respondent’s motion to reconsider. See 8 C.F.R. § 1003.2(d).” This is the order that Marin–Rodriguez asks us to set aside.
The Board’s belief that it lacks jurisdiction to grant relief to an alien who is no longer in the United States has a pedigree dating to 1954. See Matter of G- y B-, 6 I. & N. Dec. 159 (BIA 1954) (discussing the 1952 version of the regulation), reaffirmed in Matter of Armendarez–Mendez, 24 I. & N. Dec. 646 (BIA 2008). One court of appeals has held that the Board’s refusal to adjudicate these requests conflicts with 8 U.S.C. § 1229a(c)(7)(A). See William v. Gonzales, 499 F.3d 329 (4th Cir.2007). Other circuits have held that the Board is entitled to treat an alien’s departure as an event that deprives it of jurisdiction. See Toora v. Holder, 603 F.3d 282, 285 (5th Cir.2010); Mendiola v. Holder, 585 F.3d 1303 (10th Cir.2009); Pena–Muriel v. Gonzales, 489 F.3d 438, 441–43 (1st Cir.2007); Mansour v. Gonzales, 470 F.3d 1194, 1198 (6th Cir.2006); Singh v. Gonzales, 468 F.3d 135, 140 (2d Cir.2006). We were asked to consider this subject in Munoz De Real v. Holder, 595 F.3d 747 (7th Cir.2010), but bypassed it, because the alien’s request was untimely. We cannot duck here, for the Board itself has concluded that Marin–Rodriguez satisfied its timing requirements.

The fourth circuit’s conclusion rests on § 1229a(c)(7)(A), which says that “[a]n alien may file one motion to reopen proceedings under this section”. We don’t *593 agree with the fourth circuit’s understanding of this statute, because the statement “a litigant may file motion X” differs from the statement “the opportunity to file motion X cannot be limited.” Consider a simple rule: “A motion to reopen must be filed within 90 days of the final decision.” That does not detract from the entitlement to file a motion, any more than the time limit for appeal undercuts the right to file one appeal. Cf. Lantz v. CIR, 607 F.3d 479 (7th Cir.2010) (the Treasury Department is entitled to set a two-year deadline for seeking innocent-spouse relief in a tax proceeding, even though the statute lacks an outer limit). People have a right to trial by jury, but not if they settle their dispute; criminal defendants have a right to appeal, but they may surrender that right as part of a plea bargain. United States v. Wenger, 58 F.3d 280 (7th Cir.1995). And although an alien is entitled to seek permission to depart voluntarily, someone who applies for judicial review of a removal order gives up that opportunity. Dada v. Mukasey, 554 U.S. 1, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008); 8 C.F.R. § 1240.26(b)(3)(iii), adopted and explained at 73 Fed.Reg. 76927 (Dec. 18, 2008). If the Supreme Court sees no incompatibility between a statutory right to apply for something and an implied-withdrawal approach, it is hard to fault the Board for adopting a similar view. Thus an alien with a right to move for reconsideration may give up that right by a specified act. Whether the particular condition the Board has attached to exercise of this particular entitlement—that the alien be in the United States—is a proper one can’t be resolved by pointing to the existence of the right. The validity of the condition must be ascertained on other grounds.

[A][B] The Board relied on 8 C.F.R. § 1003.2(d), which reads:

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

Similar language appears in 8 C.F.R. §§ 1003.4 and 1003.23(b). The regulation says that departure from the United States “shall constitute a withdrawal” of the motion. It is strange phraseology as applied to an alien whose departure was beyond his control; it amounts to saying that, by putting an alien on a bus, the agency may “withdraw” its adversary’s motion. It is unnatural to speak of one litigant withdrawing another’s motion. This led us to wonder whether the regulation—which does not use or allude to the concept of jurisdiction—should be understood as meaning that the Board has decided to exercise its discretion to deny all post-decision motions by aliens who have left the United States. An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards. See Lopez v. Davis, 531 U.S. 230, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001). But neither the Board nor the regulation describes the dismissal-departure rule as a categorical exercise of discretion. Given SEC v. Chenery Corp., 318 U.S. 80, 87–88, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we must confine attention to the Board’s stated rationale: lack of jurisdiction.

As a rule about subject-matter jurisdiction, § 1003.2(d) is untenable. The Immigration and Nationality Act authorizes the *594 Board to reconsider or reopen its own decisions. It does not make that step depend on the alien’s presence in the United States. Until 1996 deportation proceedings (as they were then called), and judicial review of deportation orders, automatically halted when
the alien left this nation. 8 U.S.C. § 1105(a)(c) (1994). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 repealed § 1105a(c). Pub.L. 104–208, division C, title III, subtitle A, § 306(b), 110 Stat. 3009–546, 3009–612. One would suppose that this change also pulled the rug out from under Matter of G- y B- and similar decisions, based as they were on the earlier norm that departure ended all legal proceedings in the United States, though the Board nonetheless held in Matter of Armandarez-Mendez that the 1996 repealer did not affect motions to reconsider or reopen.

The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks “jurisdiction”—which is to say, adjudicatory competence, see Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 134 S.Ct. 1237, 1243, 176 L.Ed.2d 17 (2010) (collecting cases)—to issue decisions that affect the legal rights of departed aliens. The Board certainly could have decided Marin–Rodriguez’s appeal from the IJ’s removal order, notwithstanding his removal, if he had not asked for the remand. And if the Board had the authority to decide his appeal, why did it lose that authority just because it remand. And if the Board had the authority to decide his appeal, why did it lose that authority just because it

The Board may well be entitled to recast its approach as one resting on a categorical exercise of discretion, but it cannot insist that it has elected to foreclose subject-matter jurisdiction that it possesses under a statute. A recent decision suggests that the Board may be in the process of abandoning its “jurisdictional” characterization of the departure rule. Matter of Bulnes–Nolasco, 25 I. & N. Dec. 57 (BIA 2009), holds that the Board does possess jurisdiction if a departed alien contends that she did not receive proper notice of proceedings before the immigration judge. It is hard to see how the arguments an alien offers in support of reopening can affect whether the Board has subject-matter jurisdiction—though easy to see how a distinction could be justified as a conclusion that the Board always denies certain kinds of motions as an exercise of discretion, while entertaining others on the merits.

The view taken by the sixth and ninth circuits is hard to reconcile with the principle that the judiciary should accept an agency’s plausible reading of its own regulations. Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); see also Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 129 S.Ct. 2458, 2467–70, 2472–74, 174 L.Ed.2d 193 (2009). The Board understands § 1003.2(d) as equally applicable to voluntary and involuntary departures, and the text of the regulation supports that view notwithstanding the oddity of applying the word “withdrawal” to the consequence of an involuntary departure. But because the Board also believes that the regulation curtails its jurisdiction—which is why it applies to involuntary and voluntary departures alike—we come out in the same place as the sixth and ninth circuits on the basis of Union Pacific, without suggesting that the Board has misunderstood the regulation.

There is another route to the same result. Two courts of

appeals have held that § 1003.2(d) and equivalent regulations do not apply when the alien is removed involuntarily—in other words, that it makes sense to treat departure from the United States as the withdrawal of a motion only when the alien could have remained to see the litigation through. Coyt v. Holder, 593 F.3d 902, 905–07 (9th Cir.2010); Madrigal v. Holder, 572 F.3d 239, 243–45 (6th Cir.2009). The fourth circuit reached the same conclusion using its approach in William. See Sadhvani v. Holder, 596 F.3d 180, 183 (4th Cir.2009). Three other circuits are to the contrary, though without much discussion. Paredes v. Attorney General, 528 F.3d 196, 199 n. 3 (3d Cir.2008); *595 Ugokwe v. Attorney General, 453 F.3d 1325, 1328 (11th Cir.2006) (dictum); Ahmad v. Gonzales, 204 Fed.Appx. 98, 99 (2d Cir.2006) (non-precedential).

The Board may well be entitled to recast its approach as one resting on a categorical exercise of discretion, but it cannot insist that it has elected to foreclose subject-matter jurisdiction that it possesses under a statute. A recent decision suggests that the Board may be in the process of abandoning its “jurisdictional” characterization of the departure rule. Matter of Bulnes–Nolasco, 25 I. & N. Dec. 57 (BIA 2009), holds that the Board does possess jurisdiction if a departed alien contends that she did not receive proper notice of proceedings before the immigration judge. It is hard to see how the arguments an alien offers in support of reopening can affect whether the Board has subject-matter jurisdiction—though easy to see how a distinction could be justified as a conclusion that the Board always denies certain kinds of motions as an exercise of discretion, while entertaining others on the merits.
The Board’s rationale for denying Marin–Rodriguez’s motion was the lack of jurisdiction, so he is entitled to a remand even if the Board is rethinking its approach. Marin–Rodriguez may not have much to gain—his conviction for immigration-related fraud may block adjustment of status even if the IJ decides to accept the untimely fingerprints—but the Chenery principle requires us to send this subject to the agency rather than decide for ourselves whether the conviction is for a crime of moral turpitude. See also, e.g., Gonzales v. Thomas, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006). The IJ thought that § 1546(a) establishes a crime of moral turpitude, and if that’s right then adjustment of status is unavailable, but the Board of Immigration Appeals dismissed Marin–Rodriguez’s appeal without reaching that issue.

Before we wrap up, a few words are in order about why we have elected to decide this case at all. Three days before the date for oral argument, counsel for the Attorney General filed a motion asking us to remand the proceeding to the Board. Normally motions to remand are granted as a matter of course, see Ren v. Gonzales, 440 F.3d 446 (7th Cir.2006), but Marin–Rodriguez opposed this motion and we directed the parties to come prepared to discuss the subject at oral argument.

The motion did not say what the Board planned to do with the proceeding on remand: entertain the matter on the merits, re-remand to the IJ (as Marin–Rodriguez wants), or just write a different opinion. At oral argument we asked the Attorney General’s lawyer whether the Board has changed its mind and now believes that it has jurisdiction to entertain the sort of motion that Marin–Rodriguez presented. Counsel said that he did not know—that he spoke only for the Attorney General and not for the Board or the Department of Homeland Security. Yet the Attorney General has not exercised his authority to withdraw this proceeding from the Board and decide it himself. See 8 C.F.R. § 1003.1(h). The motion requested a remand to the Board, not to the Attorney General. What’s more, counsel stated that the Department of Justice has not changed the view, expressed in its brief, that the Board is right in believing that it lacks jurisdiction.

There is no point in remanding to a body that has already declared the absence of subject-matter jurisdiction, unless it has reconsidered that issue or is prepared to do so. The motion to remand does not moot the controversy. Marin–Rodriguez wants relief different from what the Attorney General is prepared to allow. So we deny the motion to remand.

The petition for review is granted, and the proceeding is remanded to the Board for further consideration consistent with this opinion.
695 F.3d 267
United States Court of Appeals,
Third Circuit.

Utpal Ajitkumar DESAI, Petitioner
v.
ATTORNEY GENERAL OF the UNITED STATES,
Respondent.


Synopsis
Background: Native and citizen of India filed petition for review of Board of Immigration Appeals (BIA) order denying his motion to reopen.

[ Holding:] The Court of Appeals, Hardiman, Circuit Judge, held that BIA lacked jurisdiction, pursuant to post-departure bar, to consider alien’s motion.

Petition denied.

Attorneys and Law Firms

**268** Scott E. Bratton, Esq. [Argued], Margaret Wong & Associates, Cleveland, OH, Attorneys for Petitioner.

Tiffany L. Walters, Esq. [Argued], Eric H. Holder, Jr., Esq., Thomas W. Hussey, Esq., John M. McAdams, Jr., Esq., United States Department of Justice, Office of Immigration Litigation, Civil Division, Washington, DC, Attorneys for Respondent.

Before: RENDELL, FUENTES, and HARDIMAN, Circuit Judges.

Opinion

**OPINION OF THE COURT**

HARDIMAN, Circuit Judge.

This appeal involves the jurisdiction of the Board of Immigration Appeals (BIA). A regulation known as the “post-departure bar,” which is codified at 8 C.F.R. § 1003.2(d), precludes a removed person from filing a motion to reopen immigration proceedings. In **Prestol Espinal v. Attorney General**, 653 F.3d 213, 224 (3d Cir.2011), we held the post-departure bar invalid to the extent it conflicted with a statute, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, 8 U.S.C. § 1229a(c)(7), that grants aliens the right to file one motion to reopen under certain conditions. We now consider whether the bar we rejected in **Prestol Espinal** can nonetheless be invoked by the agency as a basis for refusing to reopen proceedings **sua sponte** under a regulation, 8 C.F.R. § 1003.2(a). We hold that it can.

I


In 2008, Desai was charged with removability based on his 2002 conviction for possession of a controlled substance and his 1994 conviction for third-degree theft. Although he did not contest removability, he applied for relief under the Convention Against Torture (CAT), alleging that his HIV-positive status made him vulnerable to discrimination and persecution in India. The Immigration Judge (IJ) held that Desai had not demonstrated eligibility for CAT relief, the BIA affirmed, and we denied Desai’s subsequent petition for review. See **Desai v. Att’y Gen.**, 330 Fed.Appx. 333, 334–35 (3d Cir.2009).

In February 2010, a year after Desai was removed to India, his 2002 conviction for possession of a controlled substance was vacated and relisted for a new trial. That November, well after the ninety-day window for filing a timely motion to reopen had closed, see 8 U.S.C. § 1229a(c)(7)(C), Desai filed a motion to reopen **sua sponte**. Motions to reopen **sua sponte** are governed by a regulation, 8 C.F.R. § 1003.2(a), that states:

The Board may at any time reopen or reconsider on its own motion any case in **269** which it has
rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

The BIA denied Desai’s motion, finding that it lacked jurisdiction to consider Desai’s request because of the post-departure bar, which provides:

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

8 C.F.R. § 1003.2(d). The BIA noted, further, that, even if it had jurisdiction, it would nonetheless deny Desai’s motion on the merits. (3d Cir.2010), and evaluating “constitutional claims or questions of law raised upon a petition for review,” 8 U.S.C. § 1252(a)(2)(D); accord Brandao v. Att’y Gen., 654 F.3d 427, 428 (3d Cir.2011).

[2] “Because the BIA retains unfettered discretion to decline to sua sponte reopen or reconsider a deportation proceeding, this court is without jurisdiction to review a decision declining to exercise such discretion to reopen or reconsider the case.” Calle–Vujiles v. Ashcroft, 320 F.3d 472, 475 (3d Cir.2003). Where, however, we are “presented with a BIA decision rejecting a motion for sua sponte reopening, we may exercise jurisdiction to the limited extent of recognizing when the BIA has relied on an incorrect legal premise.” Pllumi v. Att’y Gen., 642 F.3d 155, 160 (3d Cir.2011). “In such cases we can remand to the BIA so it may exercise its authority against the correct ‘legal background.’” Id. (quoting Mahmood v. Holder, 570 F.3d 466, 469 (2d Cir.2009)). Following Pllumi, we exercise our jurisdiction in this case to examine the validity of the BIA’s legal determination that the post-departure bar precluded its review of Desai’s motion to reopen sua sponte.

II

[1] Our jurisdiction is governed by Immigration and Nationality Act (INA) § 242, 8 U.S.C. § 1252, amended by the REAL ID Act of 2005, Pub. L. No. 109–13, Div. B, 119 Stat. 231, which authorizes us to review final orders of deportation, exclusion, and removal. In cases such as this one, where a petitioner is removable for having been convicted of an aggravated felony, our jurisdiction is limited to addressing the jurisdictional prerequisite, Restrepo v. Att’y Gen., 617 F.3d 787, 790.

Desai claims the BIA erred in determining that it lacked jurisdiction to consider his motion because of the post-departure bar of 8 C.F.R. § 1003.2(d). He relies on our decision in Prestol Espinal, where we invalidated the post-departure bar after finding it inconsistent with IIRIRA, 8 U.S.C. § 1229a(c), which grants an alien the right to file one motion to reopen. *270 subject to certain restrictions.’ 653 F.3d at 224.

[3] In Prestol Espinal, however, we invalidated the post-departure bar only in those cases where it would nullify a statutory right, i.e., where a petitioner’s motion to reopen falls within the statutory specifications. Prestol Espinal does not discuss, or even acknowledge, motions to reopen that are filed out of time or otherwise disqualified under the statutory scheme. Such motions, which may still be considered by the BIA as motions to reopen sua sponte, are not authorized by statute. Instead, they arise under a regulation, 8 C.F.R. § 1003.2(a), that the Attorney General promulgated under her broad authority to review
administrative determinations in immigration cases, see, e.g., 8 U.S.C. § 1103(g)(2). Because the BIA considers motions sua sponte pursuant to a grant of authority from the Attorney General, there is no statutory basis for a motion to reopen in the sua sponte context. See Zhang v. Holder, 617 F.3d 650, 661 (2d Cir.2010).

In Prestol Espinal, we reasoned that “the post-departure bar regulation conflicts with Congress’ clear intent.” 653 F.3d at 224. Although our conclusion was stated broadly and seemed to suggest that the post-departure bar was invalid in its entirety, our explanation made clear that we had only statutory motions to reopen or reconsider in mind:

First, the plain text of the statute provides each “alien” with the right to file one motion to reopen and one motion to reconsider. Second, the importance and clarity of this right has been emphasized by the Supreme Court in [Dada v. Mukasey, 554 U.S. 1, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008)]. Third, Congress specifically considered and incorporated limitations on this right and chose not to include the post-departure bar, despite its prior existence in regulation. Fourth, the post-departure bar would eviscerate the right to reopen/reconsider by allowing the government to forcibly remove the alien prior to the expiration of the time allowance. Fifth, Congress included geographic limitations on the availability of the domestic violence exception, but included no such limitation generally. Sixth, Congress specifically withdrew the statutory post-departure bar to judicial review in conformity with IIRIRA’s purpose of speeding departure, but improving accuracy.

Id. As we have explained, motions to reopen sua sponte like the one Desai filed in this case are not governed by that statutory scheme. Thus, the concern driving our holding in Prestol Espinal—that the post-departure bar undermines an alien’s statutory right to file one motion to reopen—does not extend to cases like this one, where neither that statutory right nor congressional intent is implicated.2

2 Desai’s claim that the BIA incorrectly relied on Matter of Armendarez–Mendez, 24 I. & N. Dec. 646 (BIA 2008), also is unavailing. In Armendarez–Mendez, issued before Prestol Espinal, the BIA found that it lacked jurisdiction to entertain an alien’s untimely motion requesting sua sponte reopening of his removal proceedings because he had filed it after his departure from the United States. Id. at 660. While Armendarez–Mendez’s broad suggestion that “the departure bar rule remains in full effect” after IIRIRA even where an alien is exercising his statutory right to file a timely motion to reopen, id., has been abrogated by Prestol Espinal, its holding remains valid as applied to motions requesting sua sponte reopening for the reasons discussed above.

*271 Our decision today finds further support in Zhang, where the Second Circuit Court of Appeals “consider[ed] the scope of the BIA’s jurisdiction to reopen otherwise-final removal proceedings in response to a party’s motion, where the motion to reopen is deficient under the INA and instead asks the Board to invoke its sua sponte authority.” 617 F.3d at 654. Distinguishing Zhang’s case from those dealing with a statutory right to file a motion to reopen or a broad statutory grant of authority, the Second Circuit found that “the BIA [was] not plainly erroneous in its position ... that the departure bar limits its sua sponte jurisdiction” and that the BIA “did not err in concluding that § 1003.2(d) deprived it of authority to consider [Zhang’s] motion to reopen [sua sponte] after he was removed from the country.” Id. at 665; see also id. at 664 (“[T]his is not an instance where a statute vests an agency with broad authority that the agency has declined to exercise.”). We agree with, and adopt, the Second Circuit’s analysis.

For the reasons stated, we hold that the BIA did not err when it concluded that it lacked jurisdiction to consider Desai’s motion to reopen sua sponte. Therefore, we will deny his petition.
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR WILLIAM MOLINA,
A 020-065-527,
Petitioner,

v.

ERIC H. HOLDER, Attorney General,
Respondent.

Appeal of Board of Immigration Appeals’
Order Denying Motion to Reopen

PETITIONER’S OPENING BRIEF

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INTRODUCTION

Victor Molina lived in this country for nearly thirty years as a lawful permanent resident, and his wife, children, and grandchildren all remain in the United States. He was deported in 2010 based on a conviction from 1990 that unquestionably did not authorize his deportation. He raised meritorious legal challenges to his deportation at every stage of proceedings, including before the Board of Immigration Appeals (“BIA”), this Court, and in a petition for certiorari before the United States Supreme Court. But his claims were rejected at each step, and the Supreme Court declined to hear his case. In keeping with this Court’s mandate, Mr. Molina complied with the removal order and was removed to Colombia in 2010, where he remains today, separated from his family.

Roughly two years after his departure, the Supreme Court granted review in a different case that addressed the issues that Mr. Molina had raised, and issued a ruling adopting the arguments he had advanced. See Vartelas v. Holder, 132 S. Ct. 1479 (2012). Less than thirty days later, he filed a motion to reopen his proceedings based on that decision, seeking application of the correct law to his case. But the BIA denied his motion, holding that he has no avenue for relief even though his removal was plainly illegal.

Thus, this case presents the simple question of whether a non-citizen deported under an erroneous interpretation of the immigration laws, and who
timely raises a meritorious challenge to his removal at every stage of proceedings, has any avenue for relief by which he can have the benefit of the law as Congress originally intended it. The Government apparently takes the position that such individuals have no remedy.

However, the Government’s position is erroneous for at least two reasons. First, because Mr. Molina filed his motion to reopen within 90 days of the Supreme Court’s decision, the statutory deadline for filing a motion to reopen must be equitably tolled to allow him to raise the issues decided in his favor in *Vartelas*. A wealth of authority from a variety of contexts recognizes equitable tolling as the mechanism to permit individuals to obtain the benefit of decisions clarifying the correct interpretation of statutes in situations like this one.

Second, even if the statutory deadline cannot be equitably tolled, the BIA should have exercised its authority to reopen his case *sua sponte*, as it has routinely done for “fundamental changes of law” in other cases. The BIA claimed that a regulation – known as the “departure bar” – barred it from reopening Mr. Molina’s case because he is abroad, but that interpretation is inconsistent with established Ninth Circuit precedent construing the scope of that regulation. Moreover, even if the regulation does apply, the BIA has failed to advance a “reasoned” basis for its interpretation – which rewards people who break the law by remaining in the United States after being ordered deported, at the expense of people who follow
the law, as Mr. Molina did – and its application of the bar is therefore “arbitrary and capricious” under Judulang v. Holder, 132 S. Ct. 476 (2011).

STATEMENT OF FACTS

Victor William Molina de la Villa was born on May 22, 1952 in Colombia. He first traveled to the United States as a visitor in 1971. He returned to Colombia thereafter, and then came again to this country to study in 1974. While studying in the northeast in 1977 he met and then married Zoraida Molina, an American citizen from Puerto Rico. AR 642. The couple has now been married for 36 years, including the last two and a half years since he left the United States pursuant to his removal order.¹

Mr. Molina became a lawful permanent resident on January 20, 1980, as the spouse of an American citizen. He and his wife lived in New Jersey and Puerto Rico for some time before settling in the Southern California area. During this time, Mr. Molina worked as a mechanic and a truck driver, while he and Mrs. Molina raised the couple’s three children: Maritza, Katherine, and Victor Jr. AR 432, 629-631, 637. Mr. Molina served as the breadwinner for his family until he was detained in connection with his removal proceedings. AR 444.

In 1990, Mr. Molina was arrested for violating California Penal Code § 220, Assault with Intent to Commit Rape, Mayhem, etc. The incident involved an

¹ Cites to the administrative record are denoted “AR”; to Petitioner’s excerpts of records, “ER”; and to Petitioner’s request for judicial notice, “RJN.”
encounter he had, while drinking, with a woman during the daytime. Mr. Molina admitted to having encountered the woman in question, but claimed that he had never intended to rape her. AR 642. After a trial, a jury found Mr. Molina guilty as charged, and he was convicted in February 1990. AR 1113-1121. Mr. Molina had never been convicted of a crime before, and has not been arrested or convicted since. AR 642.

At his sentencing, the judge found “unusual reasons” justifying a substantially reduced sentence. He stated that “[a]t this time I intend to grant probation. The unusual reasons being there was no harm to this lady. Mr. Molina did walk away when screaming was heard. This was daytime. She wasn’t too much harmed.” AR 1107. Mr. Molina received a sentence of six years suspended to 365 days of county jail followed by probation. He ultimately spent approximately six months in county jail prior to his release. AR 642.

After his conviction, Mr. Molina worked hard to rehabilitate himself. He attended family counseling as a condition of probation, which he successfully completed. AR 642, 528. He dedicated himself to his wife and family, continued to support his family financially, became heavily involved with his children’s education, and became an active member of his church community. AR 658,

As Mr. Molina argued in his prior petition for review, he relied on the absence of serious immigration consequences at the time of his conviction in deciding to go to trial, as he likely could have pled guilty to a lesser offense had he known of the future immigration consequences of his conviction. See generally AR 484-494.
(letter from children’s educational advisor at school); AR 655 (letter from social worker); AR 657 (letter from minister). In 1998, the California Superior Court judge who had originally sentenced him granted his motion for an expungement under California Penal Code § 1203.4. AR 266.

In February 2002, Mr. Molina was allowed to renew his green card in February 2002 without incident. AR 443. In December 1998, Mr. Molina traveled for two weeks to Colombia to visit his elderly parents. In March 2002 Mr. Molina traveled again to Colombia, going this time for less than two weeks with his two brothers for his father’s 90th birthday. On both occasions, he was allowed to return without incident. AR 438.

On November 20, 2002, Mr. Molina traveled for a third time to Colombia to see his family for a period of less than two weeks. However, upon his return to the United States, the government detained him for removal proceedings based on his then-twelve year old conviction. AR 345, 524-525, 642.
B. The BIA Erred in Holding that an Intervening Decision Cannot Constitute a Basis for Equitable Tolling

The Board should have found that the 90-day deadline for Mr. Molina to file his motion to reopen was tolled because the basis for that motion – the Supreme Court’s decision in Vartelas – was not available until after the 90 day deadline expired. Three distinct considerations support tolling of the deadline in this case.

First, this Court’s precedent makes clear that equitable tolling is warranted where a deportation order is based on governmental “error,” even if such error does not involve affirmative or wrongful misconduct. Second, courts have tolled statutory deadlines for the precise type of error at issue here – intervening judicial decisions concerning the interpretation of statutes – in two closely related contexts: Rule 60(b) motions for relief from final civil judgments, and post-conviction habeas cases. There is no basis to adopt a different rule in the immigration context, particularly given that this Court frequently relies on habeas case law in applying equitable tolling in immigration cases.

Third, the Court should find equitable tolling is available here because Mr. Molina has “diligently” pursued his claims, including by pressing the exact same arguments that the Supreme Court recognized in Vartelas throughout his removal proceedings and on judicial review, and by promptly filing his motion to reopen. In light of these extraordinary and compelling circumstances, equitable tolling is warranted to permit Mr. Molina to reopen his unlawful deportation order.
1. **This Court’s Law Governing Equitable Tolling in the Immigration Context Makes Clear that Mr. Molina Timely Filed His Motion**

The INA provides that a noncitizen has the right to file one motion to reopen within 90 days of entry of a final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(C). Twice in recent years, the Supreme Court has emphasized that the “motion to reopen is an important safeguard” intended “to ensure a proper and lawful disposition” of immigration proceedings. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008) (holding that a grant of voluntary departure does not preclude a noncitizen from withdrawing the motion for voluntary departure and pursuing a motion to reopen); *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (holding that the BIA’s decisions on motions to reopen are subject to judicial review). Likewise, this Court has recognized that Congress codified the motion to reopen, along with other changes to the immigration system in IIRIRA, in part to “increas[e] the accuracy of” immigration proceedings. *Coyt*, 593 F.3d at 906.

While the immigration statutes require that the motion to reopen be filed within 90 days of the removal order, this Court has found that the 90-day deadline for motions to reopen is subject to equitable tolling. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187-90 (9th Cir. 2001) (en banc). While equitable tolling is reserved for “exceptional circumstances,” *see Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011), this Court has flexibly applied equitable tolling in immigration
cases in a variety of circumstances “when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error.” *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003) (ineffective assistance of counsel); *Socop-Gonzalez*, 272 F.3d at 1193-96 (mistaken advice of INS officer); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000) (fraud by third party).

While this Court has not yet directly addressed whether equitable tolling is available due to the BIA’s errors of law, it has already suggested in two en banc decisions that a motion to reopen would be available in such circumstances, in part because other avenues for relief are not generally available to such individuals. See *United States v. Lopez-Velasquez*, 629 F.3d 894, 899-900 (9th Cir. 2010) (en banc) (“In general, ‘[w]hen intervening law renders an alien eligible for discretionary relief for which he was ineligible at the time of his deportation hearing, the proper remedy is for the [alien] . . . to file a motion to reopen.’”)(alterations in original) (citation omitted). See also *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (en banc) (upholding prohibition on collateral attacks in reinstatement of removal proceeding in part because “[i]f Morales has a legitimate basis for challenging his prior removal order, he will be able to pursue it after he leaves the country, just like every other alien in his position”).
This Court should now make clear what these en banc decisions have suggested and hold that the deadline for Mr. Molina’s motion to reopen was equitably tolled due to the errors of law in his case, which the Supreme Court has now corrected in Vartelas. This Court has found that governmental “error” can support equitable tolling of the 90-day deadline, even where such error was a product of a good faith misunderstanding by governmental officials rather than “affirmative misconduct” or “wrongful conduct of a third party.” Socop-Gonzalez, 272 F.3d at 1184-85, 1193 (finding equitable tolling warranted where INS official mistakenly advised petitioner to withdraw asylum appeal, which prevented petitioner from adjusting his status). “[T]he party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party’s control, and that these circumstances go beyond a garden variety claim of excusable neglect.” Id. at 1193 (internal citation and quotations omitted).

Here, the fact that Vartelas corrected the “error” of law after the 90-day deadline had run prevented Mr. Molina from prevailing on his meritorious claims, much as this Court has recognized with respect to noncitizens that were thwarted by ineffective assistance of counsel, mistaken advice, or fraud by third parties. See Iturribarria, 321 F.3d at 897-99; Socop-Gonzalez, 272 F.3d at 1193-96; Varela, 204 F.3d at 1240. Mr. Molina’s “inability, through no fault of his own and despite
due diligence,” to have his claims correctly adjudicated “support[s] an equitable tolling argument.” Socop-Gonzalez v. INS, 272 F.3d at 1184. See generally Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (“When external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate.”).

Indeed, the BIA itself has recognized that it should reopen final orders of removal due to a “fundamental change in law.” In numerous cases, the BIA has reopened final orders of removal when an intervening BIA, circuit court or Supreme Court decision clarifies that a noncitizen’s removal order was based on an error of law. See supra Section I. These cases reflect the BIA’s general understanding that, as in the Rule 60(b) and habeas contexts discussed below, statutory deadlines and finality interests should not bar the reopening of removal orders based on fundamental errors of law.

2. Caselaw from Analogous Contexts Establishes the Availability of Equitable Tolling for Errors of Law Like Those at Issue Here

Further support for the application of equitable tolling to this case comes from case law in two analogous contexts: Rule 60(b) motions seeking to
collaterally attack a final civil judgment, and habeas petitions seeking to
collaterally attack a final criminal conviction.

Federal Rule of Civil Procedure 60(b) permits relief from final civil
judgments based on an intervening judicial decision. *Cf. Stone v. INS*, 514 U.S.
386, 401 (1995) (analogizing motions to reconsider immigration decisions to
motions for relief from a judgment under Federal Rule of Civil Procedure 60(b)).
Rule 60(b)(5) provides that a civil litigant can seek relief from a judgment where
“applying it prospectively is no longer equitable,” which courts have construed to
apply where a judgment’s prospective effects conflict with an intervening judicial
(stating that Rule 60(b)(5) is applicable where there have been “subsequent
changes in either statutory or decisional law”); *Belleview Manor Assoc. v. United

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8 This Court’s cases applying equitable tolling in the immigration context have
relied heavily on principles derived from equitable tolling doctrine more generally.
*See, e.g.*, *Avagyan*, 646 F.3d at 677–79 (relying on Supreme Court and Ninth
Circuit precedents regarding equitable tolling for habeas petitions to determine
whether equitable tolling was available in an immigration case); *Socop-Gonzalez*,
272 F.3d at 1193-96. Other equitable tolling caselaw, particularly from the post-
conviction habeas context, makes abundantly clear that tolling is available even
where no governmental misconduct took place, and in some cases in the absence of
any error at all. *See, e.g.*, *Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006)
(deficient law library); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003)
(mental illness); *Lott v. Mueller*, 304 F.3d 918, 924 (9th Cir. 2002) (physical
separation from legal files and transcripts); *Corjasso v. Ayers*, 278 F.3d 874, 878
(9th Cir. 2002) (district court erroneously dismissed, and then lost, petitioner’s §
2254 motion); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (prison
officials failed to timely prepare a check for the court’s filing fee).
States, 165 F.3d 1249, 1252, 1254 (9th Cir. 1999) (affirming Rule 60(b)(5) grant based on Supreme Court case overruling Ninth Circuit precedent after initial decision became final); Charles Alan Wright & Arthur Miller, Federal Practice and Procedure: Civil § 2961 (2d ed. 1995 & Supp. 2010) (“The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law.”) (footnotes omitted).

Similarly, in the habeas context, it is well established that a prisoner can collaterally attack a conviction based on an intervening judicial decision clarifying the scope of a substantive criminal statute. Just as in the immigration context, federal statutes set forth the rules for federal prisoners seeking to challenge their convictions, even after they have become final, by filing a habeas petition under 28 U.S.C. § 2255. The statute requires such petitions to be filed within one year of the

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9 A civil litigant can also seek relief from a final judgment under Rule 60(b)(6), a catch-all provision that authorizes relief for “any other reason that justifies relief.” Courts have applied Rule 60(b)(6) to reopen final civil judgments based on an intervening judicial decision. See Phelps v. Alameida, 569 F.3d 1120, 1129-30 (9th Cir. 2009) (holding that district court abused its discretion by denying a Rule 60(b)(6) motion based on an intervening Ninth Circuit decision construing AEDPA’s time limits for habeas petitions for California prisoners). The Second Circuit has applied this body of doctrine in the immigration context, reversing a district court decision denying a Rule 60(b)(6) motion where an intervening circuit decision clarified that the district court’s order (which affirmed the petitioner’s order of deportation) was based on an error of law. Pichardo v. Ashcroft, 374 F.3d 46, 56 (2d Cir. 2004) (Rule 60(b)(6) warranted because “manifest injustice will occur because the change in law goes to the very basis of Pichardo’s deportation”).
date of the conviction, 28 U.S.C. § 2255(f)(1), but provides for the functional
equivalent of tolling by setting different timing rules for clarifications of law as
recognized by the Supreme Court. See 28 U.S.C. § 2255(f)(3) (setting one year
period to run from “the date on which the right asserted was initially recognized by
the Supreme Court, if that right has been newly recognized by the Supreme Court
and made retroactively applicable to cases on collateral review”).

Even where a prisoner fails to meet the statutory deadline for filing a post-
conviction relief motion based on the rules described above, the Supreme Court
has held that AEDPA’s one-year filing deadlines are subject to equitable tolling.
See generally Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (holding that a
petitioner is entitled to equitable tolling if he shows “(1) that he has been pursuing
his rights diligently, and (2) that some extraordinary circumstance stood in his way
and prevented timely filing”) (internal citation and quotations omitted). Following
Holland, this Court has held equitable tolling is appropriate where a petitioner
establishes a credible claim of “actual innocence,” Lee v. Lampert, 653 F.3d 929,
932 (9th Cir. 2011) (en banc), and has applied that rule to permit post-conviction
relief claims where a petitioner alleges that he “was convicted for conduct not
prohibited by law.” Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir.
2011) (finding petitioner made showing of actual innocence where his conduct was
not prohibited by statute, as interpreted by intervening Ninth Circuit decision).
The ample authority permitting collateral attacks on final judgments rendered invalid by intervening clarifications of statutory law provides strong support for the application of equitable tolling in this case. *Vartelas* clarifies that Mr. Molina is, essentially, “actually innocent” of the government’s charges of inadmissibility because the substantive immigration law does not “reach” his conduct. *See Bousley*, 523 U.S. at 620. There is no question that, like the civil judgment at issue in *Bellevue Manor* and the criminal judgment at issue in *Bousley*, the judgment ordering Mr. Molina removed rested on an interpretation of the law that was incorrect at the time the judgment against him was issued, although that error only became clear through subsequent decisional law. *See supra* Section I. Moreover, Mr. Molina continues to suffer severe “prospective” effects as a result of his unlawful deportation – circumstances which would warrant the equivalent of reopening under Rule 60(b) or Section 2255. Mr. Molina not only remains forcibly separated from his family and home in the United States, but the final order of deportation serves to bar his reentry to the country for 20 years from the date of his deportation, which in his case could well be the rest of his life. *See* 8 U.S.C. § 1182(a)(9)(A)(ii). These profound restraints on his liberty warrant the application of equitable tolling.
3. Equitable Tolling is Warranted Because Mr. Molina Has Diligently Pursued his Claims

Finally, to qualify for equitable tolling, Mr. Molina must also show “diligence” in pursuing his claims. See Iturribarria, 321 F.3d at 897; Holland v. Florida, 130 S. Ct. at 2562. Here, there can be no serious dispute that Mr. Molina satisfies that requirement. He raised the correct legal arguments against his removal order at all stages, see supra Section I. See Phelps, 569 F.3d at 1137 (finding Rule 60(b) relief warranted in part because the petitioner “has pressed all possible avenues of relief”). When the Supreme Court announced its decision overruling prior circuit precedent and clarifying the law in his favor, Mr. Molina filed his motion well within 90 days of the decision. See AR 11 (motion filed within 30 days of Vartelas).

Moreover, while others in his position might have evaded authorities or unlawfully re-entered the country after removal, Mr. Molina has continued to comply with the orders of the agency and this Court while separated from his family, as this Court’s caselaw strongly commands. See Morales-Izquierdo, 486 F.3d at 498 (rejecting suggestion that noncitizen can “force the government to re-adjudicate a final removal order by unlawfully reentering the country”). Given that Mr. Molina’s removal order was plainly unlawful, and that he has timely taken every lawful measure available to challenge his removal order both before and
after it was entered, this Court should permit equitable tolling and deem his motion timely filed.

C. The BIA Erred in Holding that the Departure Bar Prohibits the Sua Sponte Reopening of Mr. Molina’s Case

If the Court concludes that equitable tolling is unavailable notwithstanding the arguments set forth above, it must consider whether the BIA erred in declining to exercise its sua sponte authority to reopen Mr. Molina’s removal proceedings. The Board declined to exercise that authority under its “departure bar,” codified at 8 C.F.R. § 1003.2(d), which the Board has construed to eliminate its jurisdiction to reopen the proceedings of any individual who has departed the country pursuant to a removal order and is no longer present.

The Board’s application of the departure bar to this case must be reversed for two reasons. First, because the BIA has failed to provide a “reasoned” basis for the BIA’s application of the bar in Mr. Molina’s case that is tied to the “purposes of the immigration laws or the appropriate operation of the immigration system,” it is arbitrary and capricious under Judulang v. Holder, 132 S. Ct. 476, 488 (2011). Moreover, the BIA has selectively declined to apply the purportedly “jurisdictional” departure bar to motions filed by noncitizens abroad, including in cases seeking reopening based on errors of law, rendering its application to Mr. Molina all the more arbitrary. See Section II.C.1.
Second, even if the departure bar could generally be understood as a rational method of enforcing the immigration laws, it does not apply to Mr. Molina’s motion under established Ninth Circuit case law construing the departure bar’s scope. See Section II.C.2.

1. The BIA’s Application of the Departure Bar is Arbitrary and Capricious

   a. The BIA Has Failed to Provide a “Reasoned” Explanation for its Construction of the Departure Bar

   The BIA has failed to provide a “reasoned” explanation for its application of the departure bar, under which the BIA rewards those who break the law – by remaining in the United States in violation of removal orders – at the expense of people like Mr. Molina, who play by the rules. The BIA’s rule not only lacks a “reasoned” basis, it is contrary to Congress’ recent changes to the immigration system that have sought to enable noncitizens to litigate their immigration cases from abroad.

   The Supreme Court’s unanimous decision in Judulang made clear that “courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.” 132 S. Ct. at 484-85. The Court’s application of that principle in Judulang – to a BIA rule governing the availability of Section 212(c) relief in deportation cases – is instructive for this case. The Court began by noting that the parties disputed whether the BIA had the power to limit the
availability of Section 212(c) in deportation cases at all, but the Court declined to resolve that issue. *Id.* at 485. Instead, the Court held that even if the BIA had the authority to restrict Section 212(c)’s availability, “it must do so in some rational way.” *Id.* “[A]gency action must be based on non-arbitrary, relevant factors, which here means that the BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.” *Id.* (internal quotations and citations omitted). Because the Court found that the BIA’s approach bore “no relation to these matters—[it] neither focuses on nor relates to an alien’s fitness to remain in the country,” the Court invalidated the Board’s rule as “arbitrary and capricious.” *Id.* at 485.

Likewise, here, the BIA must define the scope of its power to *sua sponte* reopen in “in some rational way.” However, the BIA’s case setting forth the reasons for its construction of the departure bar – *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008) – offered reasons that “bear no relation” to the “purposes of the immigration laws or the appropriate operation of the immigration system.” *Judulang*, 132 S. Ct. at 485. *See also Castro v. Att’y Gen.*, 671 F.3d 356, 370 (3d Cir. 2012) (applying *Judulang* to reject BIA’s interpretation of “purpose or benefit” language in INA § 212(a)(6)(C)(ii) as “unmoored from the [statute’s] purposes and concerns”).
First, *Armendarez* repeatedly emphasized the BIA’s long-standing policy of refusing to consider motions filed by noncitizens abroad, which stretches back to 1940. *See* 24 I. & N. Dec. at 648, 653, 654, 657. However, history “is a slender reed to support a significant government policy,” *Judulang*, 132 S. Ct. at 488 (“Arbitrary agency action becomes no less so by simple dint of repetition.”), particularly, where as here, Congress has recently reversed that long-standing history by eliminating the impediments that limited noncitizens from litigating from abroad. *See infra* Section II.A.

Second, the BIA asserted that “the present immigration system is predicated on the assumption that the physical removal of an alien from the United States is a transformative event that fundamentally alters the alien’s posture under the law.” *Armendarez*, 24 I. & N. Dec. at 655-56. However, as this Court recognized when it struck down the departure bar with respect to statutory motions to reopen, that principle evaporated after IIRIRA. *See Coyt*, 593 F.3d at 906. IIRIRA enacted a statutory scheme to allow noncitizens to litigate their immigration cases from abroad on direct review through petitions of review, and on collateral attack through motions to reopen. Indeed, even the BIA itself has recognized that it has the authority to consider motions to reopen filed by noncitizens abroad in certain circumstances. *See Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57, 59-60 (BIA 2009) (finding jurisdiction to consider motions to reopen *in absentia* orders). *See*
also Pruidze, 632 F.3d at 239 (citing Bulnes-Nolasco and stating “[e]ven the Board does not buy everything it is trying to sell”).

Further, on three occasions in recent years, the Supreme Court has made clear that a person’s departure from the United States does not terminate his ability to continue litigating a removal case. These include two Supreme Court cases holding that petitioners’ removal from the country did not render their cases moot. See Lopez v. Gonzales, 549 U.S. 47, 52 n.2 (2006) (holding that petitioner “can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that [he] had committed an aggravated felony”); Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2584 n.8 (2010) (holding that if petitioner prevailed on his claim that his offense was not an aggravated felony, “he may still seek cancellation of removal even after having been removed”).10 The third case, Nken v. Holder, 556 U.S. 418 (2009), relied for its holding on the Solicitor General’s statement that persons who

10 In Armendarez, the Board acknowledged the conflict between its position and Lopez’s conclusion that the case was not moot. 24 I. & N. Dec. at 649 n.2 (acknowledging that Solicitor General’s brief states “were this Court to decide that [Lopez’s] cocaine conviction is not an aggravated felony, the Board would address petitioner’s request for cancellation of removal, which is a form of relief that petitioner can continue to pursue in administrative proceedings even while he is in Mexico”) (emphasis added). Remarkably, the BIA appears to suggest that the Solicitor General, in a brief representing the views of the federal government on appeal from a BIA decision in the Supreme Court, had incorrectly stated the law. See id. The Solicitor General has never retracted its position and indeed, two years after Armendarez, did not reverse its position in another appeal from a BIA decision in Carachuri-Rosendo.
prevail on their petition for review “can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.” *Nken*, 556 U.S. at 435.

Accordingly, the BIA’s meek claim that “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid,” *Armendarez*, 24 I. & N. Dec. at 656, as justification for the departure bar ignores these recent changes to the immigration statute’s basic structure – repeatedly recognized by the Supreme Court – that now enable departed noncitizens to continue litigating their cases from abroad.

Third, the BIA’s assertion that the departure bar serves to protect agency separation-of-powers concerns makes little sense. *See Armendarez*, 24 I. & N. Dec. at 656 (“Responsibility for border security and the inspection and admission of aliens from abroad is delegated to the Secretaries of Homeland Security and State, but *not* to this Board. Thus, our inability to entertain motions filed by aliens who have departed the United States is not just a matter of administrative convenience. It is also an expression of the limits of our authority within the larger immigration bureaucracy.”) (emphasis in original). As a threshold matter, it cannot be reconciled with the BIA’s authority to grant statutory motions to reopen filed by people who are abroad. Moreover, the BIA’s consideration of motions to reopen the BIA’s *own decisions* does not impact “border security” or “the
inspection and admissions of aliens” – those functions still reside within the
purview of other executive agencies. Rather, Congress has empowered the BIA to
tertain motions to reopen as a means of ensuring “accuracy” in the BIA’s
decisionmaking. Coyt, 593 F.3d at 906.

Finally, the BIA cited the Attorney General’s statement, in promulgating the
1997 version of the departure bar regulations, that “the burdens associated with the
adjudication of motions to reopen and reconsider on behalf of deported or departed
aliens would greatly outweigh any advantages this system might render.”
Armendarez, 24 I. & N. Dec. at 657 n.9. While the Attorney General did not
identify the precise “burdens” that would be created, Congress has already
determined itself that whatever burdens are posed from litigation abroad are
outweighed by its benefits. Coyt, 593 F.3d at 906. See also Judulang, 132 S. Ct.
490 (“Cost is an important factor for agencies to consider in many contexts. But
cheapness alone cannot save an arbitrary agency policy.”). Moreover, because the
Board’s sua sponte authority is limited to “exceptional circumstances,” the burdens
posed by requests for sua sponte reopening are necessarily limited to a small
number of exceptionally compelling cases. That burden is small, particularly when
compared with the enormous volumes of litigation from abroad enabled by
Congress’ other changes to the immigration system, including the right to litigate
petitions for review and statutory motions to reopen from abroad. Precisely
because *sua sponte* motions are limited to the most “exceptional circumstances,”
whatever minimal burden they pose cannot justify eliminating this critical
safeguard against unlawful or unjust agency action.

Most important, the BIA’s application of the departure bar is “unreasonable”
because it is at cross-purposes with the “purposes and concerns of the immigration
laws.” *Judulang*, 132 S. Ct. at 490. The departure bar, as construed by the BIA,
rewards people who break the law by remaining in the country past their departure
dates, while punishing those who obey our immigration laws as Mr. Molina did.

*See In re Carvajal*, 2009 Immig. Rptr. LEXIS 446, *5 (BIA June 1, 2009)
(observing that if the respondent had departed the U.S. his motion would be barred
by departure bar, but if he remained the Board would consider it on the merits).

Indeed, it appears that the BIA even declines to apply the departure bar in cases in
which a noncitizen illegally reenters the country after deportation. *See, e.g., In re
Bonilla*, RJN 343-47 (BIA Nov. 2, 2012) (not applying departure bar to noncitizen
who “admittedly reentered the country without permission”); *In re Rosales
Armendarez*, 24 I. & N. Dec. at 657 (suggesting the departure bar applies to
individuals who have reentered the country).¹¹

¹¹ In *Armendarez*, the noncitizen sought Section 212(c) relief pursuant to a
regulation – adopted after the Supreme Court’s decision in *St. Cyr* – that expressly
excluded people who reentered the country. *See* 8 C.F.R. §1003.44(k). The BIA
Thus, despite Congress’s enactment of dramatic changes to the immigration laws designed to require people to leave the country by providing them avenues to litigate from abroad, the BIA has maintained a policy that actively encourages people to disobey final removal orders by granting such individuals more rights than people who departed in accordance with the agency’s rulings. The BIA’s policy is thus not only at cross-purposes with the Congressional and other executive branch efforts to discourage this conduct, but also with this Court’s repeated statements recognizing that the proper mechanism for noncitizens to collaterally attack removal orders is through filing motions to reopen from abroad – not by remaining in or reentering the country unlawfully. See infra Section II.C.2.a (citing Morales-Izquierdo, 486 F.3d at 498 and Planes, 652 F.3d at 996).

b. The BIA’s Inconsistent Application of the Departure Bar

To survive review under the “arbitrary and capricious” standard, the Board’s rule must be not only rational in concept, but also be applied in a rational way. See Judulang, 132 S. Ct. at 488 (rejecting rule in part because “the BIA has repeatedly vacillated in its method for applying § 212(c) to deportable aliens”); see also Holder v. Martinez-Gutierrez, 132 S. Ct. 2011, 2019-21 (2012) (upholding cited that regulation in suggesting that there is a bar to relief in reentry cases. Armendarez, 24 I. & N. Dec. at 647 (citing §1003.44(k)). It is therefore unclear if the BIA views its jurisdiction as only limited in reentry cases involving 8 C.F.R. §1003.44 or in every reentry case, notwithstanding the fact that it has declined to apply it in the cases cited infra.
BIA rule for calculating minor’s length of residence in cancellation cases, after substantive review of BIA caselaw, because “the BIA has consistently imputed a parent’s knowledge of inadmissibility (or lack thereof) to a child”).

In contrast to the BIA’s consistent practice in *Martinez*, a review of the BIA’s decisions on motions to reopen reveals that, in practice, the Board has routinely exercised the jurisdiction it claims not to have.

Although BIA decisions rarely state the location of the respondent, it is nonetheless clear that the BIA has considered motions to reopen filed by noncitizens located abroad on numerous occasions. These include cases in which, like Mr. Molina, the noncitizen sought *sua sponte* reopening based on a “fundamental change in law.” *See, e.g.*, *In re Eddie Mendiola*, 2012 WL 3276543 (BIA July 11, 2012); *In re Huerta*, RJN 343 (BIA Dec. 14, 2012); *In re Torres-Jimenez*, 2012 Immig. Rptr. LEXIS 5712, *3-*4 (BIA Aug. 17, 2012). The BIA has also considered motions to reopen and requests to *sua sponte* reopen based on other grounds, such as ineffective assistance of counsel or where a criminal conviction has been vacated. *See, e.g.*, *In re Acosta*, 2013 WL 1933892 (BIA March 13, 2013); *In re Ortega-Marroquin*, RJN 349-50 (BIA Jan. 20, 2012); *In Re Pacheco*, 2012 Immig. Rptr. LEXIS 5532 (BIA May 22, 2012); *In re Salama,*
Ortega-Marroquin provides a telling example of the Board’s inconsistent practice. There, the Eighth Circuit found that the BIA had not considered whether the departure bar applied to the petitioner’s untimely motion to reopen, and remanded with specific instructions that the BIA consider whether the departure bar applied. See Ortega-Marroquin v. Holder, 640 F.3d 814, 820 (8th Cir. 2011) (observing that “the validity of the departure bar would be before this court” if the BIA asserted it on remand). Instead, on remand, the BIA found that the 90-day deadline was equitably tolled due to ineffective assistance of counsel, and made no mention of the departure bar. See Ortega-Marroquin, ER 349-50. The BIA reached this result even though, under Armendarez, the bar applies equally to timely and untimely motions to reopen. At the time of the BIA’s decision, there was no Eighth Circuit precedent striking down the departure bar with respect to

12 In Salama and Pacheco, the BIA cited to the relevant circuit court authority (from the court in which the immigration court was located) striking down the departure bar with respect to statutory motions to reopen. However, in those decisions, it is unclear whether the BIA had concluded that those circuit court decisions applied to sua sponte motions, or if the BIA was simply choosing not to invoke the departure bar. If the former, then the departure bar should not apply here either under Coyt. The BIA has provided no reasoned explanation for why it would follow some circuit court decisions striking down the departure bar but not others. Moreover, the BIA offered no explanation for why it declined to apply the departure bar in Acosta, which arose in the First Circuit, which has yet to issue a decision on the validity of the departure bar (and, as such, is presumably still governed by the BIA’s construction of the departure bar in Armendarez).
statutory motions to reopen, nor did the BIA cite any other basis on which the
departure did not apply in the case.

The BIA’s selective invocation of the departure bar not only contradicts its
position that the departure bar is jurisdictional – a position that has already been
repudiated by several courts, see, e.g., *Marin-Rodriguez*, 612 F.3d at 591 – but it
also demonstrates that the BIA’s application of the bar to Mr. Molina is entirely
arbitrary. “Such inconsistent treatment is the hallmark of arbitrary agency action,”
*Catawba County v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009), and the BIA’s selective
application of the departure bar to Mr. Molina must be reversed. *See Judulang*,
(“Though the agency’s discretion is unfettered at the outset, if it announces and
follows – by rule or by settled course of adjudication – a general policy by which
its exercise of discretion will be governed, an irrational departure from that policy
(as opposed to an avowed alteration of it) could constitute action that must be
overturned . . . .”).

For these reasons, the Court should strike down the departure bar both
because it is “unmoored” from the purposes of the immigration laws and because
the Board applies it in a selective and inconsistent manner. *See Judulang*, 132
S.Ct. at 490.
2. The Departure Bar Does Not Prohibit Sua Sponte Reopening in This Case

If the Court concludes the departure bar is not arbitrary and capricious, it should hold at a minimum that the bar does not apply to Mr. Molina’s request for sua sponte reopening, for at least three reasons. First, under settled Ninth Circuit precedent, the departure bar does not apply to deportation orders that were not “lawfully executed.” While the cases concerning that exception to the departure bar typically involve convictions that can no longer serve as the basis for a removal order because they have been vacated, their rationale applies equally to cases like this one, which involves a conviction that cannot serve as a basis for the removal order for a different reason. Second, by its terms, the departure bar limits the noncitizen’s ability to reopen proceedings, but does not restrict the agency’s authority in any way. Third, this Court has construed the departure bar regulation to apply only to people who filed the motion while in deportation proceedings, and Mr. Molina indisputably filed his motion after his proceedings concluded.

a. The Ninth Circuit has Held that the Departure Bar Does Not Apply where a Deportation Was Not “Legally Executed”

The departure bar does not apply to collateral attacks on deportation orders that were not “legally executed” due to an error of law.

This Court has held that 8 C.F.R. § 1003.2(d) does not apply where the underlying removal order was not “legally executed.” See Cardoso-Tlaseca v.
Gonzales, 460 F.3d 1102, 1106-07 (9th Cir. 2006) (holding that deportation order is not “legally executed” for purposes of the departure bar where a court subsequently vacates a conviction that constituted a “key part” of the deportation order). Cardosa-Tlaseca followed a line of cases in which this Court held that the pre-IIRIRA departure bar to judicial review (former INA §106(c), repealed by IIRIRA § 306(b)) did not apply where the deportation was not “legally executed.” See id. at 1106-07 (collecting cases). Although several of these cases involve vacated convictions (as did Cardoso-Tlaseca), this Court has also found that deportations were not “lawfully executed” based on other flaws in the underlying deportation order. See Thorsteinsson v. INS, 724 F.2d 1365, 1367 (9th Cir. 1984) (examining record of deportation hearing for noncitizen abroad to determine whether deportation order was not “legally executed” due to ineffective assistance of counsel); Mendez v. INS, 563 F.2d 956, 959 (9th Cir. 1977) (finding departure bar inapplicable to noncitizen abroad based on failure of INS to notify noncitizen’s counsel of deportation order); Zepeda-Melendez v. INS, 741 F.2d 285, 288-289 (9th Cir. 1984) (same). See also Peralta-Cabrera v. Gonzales, 501 F.3d 837, 842 (7th Cir. 2007) (observing, with respect to former INA 106(c), “[f]ederal appellate courts have interpreted the term ‘departure’ to mean only ‘legally executed departures’; thus, jurisdiction over a petition for review is not removed if the petitioner's departure was due to unlawful government action.”).
Under the Ninth Circuit’s settled interpretation of the departure bar, it does not apply here because Mr. Molina’s deportation order was not “lawfully executed.” Vartelas has clarified that Mr. Molina should not have been treated as “seeking admission,” and in any event that he should have been afforded an opportunity to apply for Section 212(c) relief. See Cardenas-Delgado, 2013 U.S. App. LEXIS 13085 at *2. Vartelas has thus eviscerated not only a “‘key part’ of the government’s case in his removal proceeding,” Cardoso-Tlaseca, 460 F.3d at 1106, but, in fact, the entire case against him. There is no meaningful difference between the circumstances of the petitioner in Cardoso-Tlaseca, who had a deportable conviction deemed vacated, and Mr. Molina, whose conviction could not have served as a basis for denying him admission under Vartelas. In both cases, subsequent court decisions have clarified that neither was in fact convicted of a deportable offense. If anything, Mr. Molina is in a stronger position than the petitioner in Cardoso-Tlaseca, because, as Vartelas has clarified, he was never properly considered inadmissible. See supra Section I.

Petitioner’s argument draws further support from this Court’s law governing the treatment of collateral attacks by individuals who have illegally reentered the United States. While such individuals are entitled to fewer avenues to challenge their removal order because they broke the law by reentering, this Court has nonetheless held that such individuals can collaterally attack a removal order that
was not lawfully executed, including where a subsequent judicial decision clarified the interpretation of statutes at issue in their removal cases. For example, a defendant charged with illegal reentry under 8 U.S.C. § 1326 can collaterally attack his underlying removal order where a subsequent judicial decision clarified that the order was unlawful because he was erroneously mis-advised concerning his eligibility for relief from removal. See, e.g., *United States v. Leon-Paz*, 340 F.3d 1003, 1005-07 (9th Cir. 2003) (determining that the alien’s due process rights were violated because the IJ informed him he was ineligible for relief, which was an error of law in light of the Supreme Court’s subsequent decision in *St. Cyr*); *United States v. Camacho-Lopez*, 450 F.3d 928, 929-30 (9th Cir. 2006) (same for defendant deported based on DUI prior to Supreme Court case holding that DUI was not a deportable offense).¹³

Similarly, while noncitizens placed into reinstatement of removal proceedings after illegally entering in violation of their prior removal orders are

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¹³ The Ninth Circuit limited *Leon-Paz*’s rule governing the availability of collateral attacks based on an IJ’s failure to inform a noncitizen of eligibility for relief established by a subsequent “change in law” in *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013). However, *Vidal-Mendoza* expressly reaffirmed *Leon-Paz* and the availability of collateral attacks for failure to advise that “a statutory change applie[s] prospectively only.” *Id.* at 1018. While the precise scope of *Vidal-Mendoza* is unclear, it does not affect Mr. Molina’s claims for at least two reasons. First, his claim derives directly from the BIA’s misconstruction of IIRIRA, not on an IJ’s failure to advise him about the availability of relief. Second, the error he raises is indistinguishable from the one in *Leon-Paz*, which also concerned the retroactivity of statutory clarifications.
generally prohibited from collaterally attacking the underlying removal order, even they can do so if there is a “gross miscarriage of justice” in the underlying removal order. *See De Rincon v. DHS*, 539 F.3d 1133, 1138 (9th Cir. 2008).\(^\text{14}\)

Even the general prohibition on collateral attacks in reinstatement proceedings supports Mr. Molina’s position here. The central rationale for barring collateral attacks in the reinstatement context is that “reinstatement of a prior order does not change the alien’s rights or remedies. The only effect of the reinstatement order is to cause Morales’ removal, thus denying him any benefits from his latest violation of U.S. law.” *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497-98 (9th Cir. 2007) (en banc). *See also United States v. Arias-Ordenez*, 597 F.3d 972, 980 (9th Cir. 2010) (*Morales-Izquierdo* “explained that the effect of reinstatement itself was simply to return the alien to the same legal position he occupied prior to the illegal reentry”). Reinstatement does not affect a noncitizen’s “rights and remedies” because, as this Court has repeatedly found, the proper mechanism for noncitizens in Mr. Molina’s position is to remain abroad and seek to reopen their cases. *See Morales-Izquierdo*, 486 F.3d at 498 (“[A]n alien who respects our laws and remains abroad after he has been removed should have no fewer opportunities

\(^{14}\) The Board recognized long ago that a judicial decision by the Supreme Court clarifying the meaning of the immigration statutes could constitute such a fundamental miscarriage of justice. *See Matter of Farinas*, 12 I. & N. Dec. 467, 472 (BIA 1967). *But see Feliz Debeato v. AG of the United States*, 505 F.3d 231, 236 (3d Cir. 2007).
to challenge his removal order than one who unlawfully reenters the country


despite our government’s concerted efforts to keep him out. If Morales has a


legitimate basis for challenging his prior removal order, he will be able to pursue it

after he leaves the country, just like every other alien in his position.”); *Planes v.

*Holder, 652 F.3d 991, 996 (9th Cir. 2011) (stating in illegal reentry case, that

“some avenues of relief would remain open to an alien who was removed with an

appeal pending,” including that “an alien who is time- and number-barred from

obtaining consideration of a motion to reopen as a matter of right may petition the

Board to reopen his or her case sua sponte”). As these decisions implicitly

recognize, the ability of a noncitizen to reopen a defective removal order from

abroad is a critical safeguard to ensure the integrity of the deportation process. *Cf.

*Kucana*, 558 U.S. at 242.


Finally, to the extent there is any ambiguity in whether the departure bar

applies to deportation orders based on errors in law, that ambiguity must be

construed in light of the serious constitutional concerns posed by a rule that would

leave long-time lawful permanent residents like Mr. Molina stranded abroad

without any process to remedy their unlawful deportation. *See Dent v. Holder*, 627

F.3d 365, 374 (9th Cir. 2010) (“The doctrine of constitutional avoidance requires

us to construe the statute and the regulation, if possible, to avoid a serious

constitutional question.”). As a long-time lawful permanent resident, Mr. Molina
must be entitled to some process that would enable him to correct his unlawful deportation.  *Cf. Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (due process protects lawful permanent resident denied entry from abroad); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (rejecting “captious interpretation[]” of the immigration laws that would unfairly lead to exclusion of lawful permanent resident). For this reason, this Court must construe § 1003.2(d) to avoid the serious constitutional concerns posed by the BIA’s decision, which has left Mr. Molina without any opportunity to correct his unlawful deportation.

b. **The Departure Bar Does Not Limit the Agency’s Authority to Reopen Sua Sponte**

Regardless of whether the departure bar applies to removal orders based on errors of law, the departure bar does not preclude the BIA from reopening Mr. Molina’s case for a different reason: by its plain terms, § 1003.2(d) limits the rights of *noncitizens* to move to reopen cases, but provides no limitation on the *agency’s* authority to reopen. The departure bar provides: “A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States.” 8 C.F.R. § 1003.2(d) (emphasis added). *See also id.* at § 1003.2(a) (”The Board may *at any time* reopen or reconsider on its own motion any case in which it has rendered a decision.”) (emphasis added). The plain language of § 1003.2(d) thus does not apply to the Board’s *sua sponte* authority.
The Board’s construction to the contrary ignores the text of the regulation and BIA caselaw in a closely analogous context. The regulation itself clearly distinguishes between the rights of the parties in an immigration case to move to reopen, on the one hand, and the BIA’s separate authority to consider reopening *sua sponte*, on the other. *Compare* § 1003.2(a) (“*The Board* may at any time reopen or reconsider on its own motion . . . .”) *with id.* (“the *Service*, or . . . the *party affected by the decision*” may file a motion “to reopen or reconsider any case in which a decision has been made by the Board”) (emphases added). Indeed, when the regulations seek to restrict the jurisdiction of the BIA itself, they clearly state as much. *See, e.g.*, 8 CFR § 1003.1(b) (limiting BIA jurisdiction to certain delineated matters).

The Board’s construction is also in conflict with its own closely analogous caselaw, which holds that a parallel departure bar – which treats appeals to the BIA as withdrawn when the noncitizen departs the U.S. – as applicable only to the noncitizen’s appeal, and not to appeals filed by the government, in light of the regulation’s plain language. *Matter of Luis*, 22 I. & N. Dec. 747, 752 (BIA 1999) (“The language of 8 C.F.R. § 3.4 makes no mention of appeals filed by the *Service.*”). Similarly, here the regulation makes no mention of *sua sponte* authority, as it speaks only of the parties’ motions to reopen.
Because the plain language of the regulation does not restrict the BIA’s authority to *sua sponte* reopen, the BIA erred in concluding it had no jurisdiction to consider *sua sponte* reopening Mr. Molina’s case. *See Chen v. Ashcroft*, 378 F.3d 1081, 1086 (9th Cir. 2004) (“we need not defer to the BIA’s reading of an INS regulation if an alternative reading is compelled by the regulation’s plain language”) (internal quotations and citation omitted).

c. **The Ninth Circuit Has Held that the Departure Bar Does Not Apply to Motions to Reopen Filed After the Closure of Proceedings**

The departure bar also does not apply to Mr. Molina’s motion to reopen for a third reason: this Court has interpreted it to apply only where a person filed a motion to reopen while *still in proceedings*, and not when the motion is filed after the departure. *See Zi-Xing Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (“the regulation is phrased in the present tense and so by its terms applies only to a person who departs the United States while he or she ‘is the subject of removal . . . proceedings.’”) (quoting 8 C.F.R. § 1003.23(b)(1)) (emphasis in original)); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (applying *Lin* to motions to reopen filed with the BIA under 8 C.F.R. § 1003.2(d)). However, in *Matter of Armendarez*, the BIA expressly disagreed with this Court’s construction of the departure bar, and declined to apply *Lin* even within the Ninth Circuit. *See*
It is unclear whether the agency had the authority to decline to follow Lin. In Brand-X, the Supreme Court held “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” 545 U.S. at 982. The Court in Lin did not clearly state whether its construction of Section 1003.2 flowed from the “unambiguous terms of the” regulation. While the Court appeared to construe the plain language of the regulation, it also appeared to apply the rule of lenity, which typically only applies when considering ambiguous language. Lin, 473 F.3d at 982.15

To the extent that Lin was based on the plain language of the regulation, then the BIA was without authority to adopt a contrary interpretation and Lin governs Mr. Molina’s case. However, to the extent the BIA was within its authority to adopt a contrary interpretation than Lin, this Court should nonetheless reject the

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15 Although this Court has not addressed the relationship between Chevron deference and the rule of lenity in the immigration cases, it has found that Chevron deference takes precedence in habeas cases. See Mujahid v. Daniels, 413 F.3d 991, 996 (9th Cir. 2005). But see INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (rejecting Attorney General’s interpretation of the refugee laws in part because of “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien”).