No. 09-1378

In the Supreme Court of the United States

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

Blank Page

REPLY BRIEF FOR PETITIONER

The government's brief has the character of a voyage through the looking glass: it opposes review of an issue that was not decided below and is not presented in the petition. The government addresses, almost exclusively, the BIA's authority to reopen proceedings *sua sponte*. But the agency's *sua sponte* authority is *not* the subject of the petition; the question presented, instead, is whether an alien's departure from the United States vitiates his or her *statutory entitlement* to file a motion to reopen or reconsider an order of removal. The Tenth Circuit decided below that departure has that effect, and that statutory holding is the one challenged in the petition.

It is not hard to see why the government would rather avoid *that* question. The issue presented here has divided the courts of appeals, as the government concedes; it is the source of pervasive and growing confusion; and it is a matter of enormous practical importance, as the government notably does not deny. It also is a question, the government's understandable obscurantism notwithstanding, that is squarely and cleanly presented in this case. Further review accordingly is warranted.

A. This Case Presents The Question Whether The Regulatory Departure Bar Is Invalid.

The government recognizes the conflict in the circuits on the question addressed in the petition: whether BIA's departure bar regulations are invalid under IIRIRA. Its principal argument against review accordingly is that this question is not presented in this case. The government maintains that, "[b]ecause petitioner's motion is both time-barred and number-

barred, this case concerns only the Board's *sua sponte* reopening authority," and that "[i]n both this case and *Rosillo-Puga* [v. *Holder*, 580 F.3d 1147 (10th Cir. 2009)], the court of appeals considered only *sua sponte* reopening." Opp. 11, 18. A holding directed only to the scope of BIA's *sua sponte* authority, the government concludes, does not merit the Court's attention.

That description of the holding below, however, is manifestly wrong, and would rewrite the Tenth Circuit's ruling in a remarkable way. In fact, the court of appeals decided, expressly and unambiguously, that "*[the] post-departure bar divests [the BIA] of jurisdiction to review a motion to reopen filed by a removed alien*, like Petitioner, even though relevant regulations allow an alien to file one motion to reopen within 90 days." Pet. App. 14a (emphasis added). See *id.* at 13a (*Rosillo-Puga* held "that Congress's provision for one motion to reopen within 90 days of removal * * * does not alter the valid continued operation of the regulatory post-departure bar to motions to reopen"). This is, in so many words, a holding that the departure bar trumps the entitlement to file a motion to reopen or reconsider in *all* circumstances.

There is no room for doubt on this point. The Tenth Circuit did not treat this case, as the government would have it, as one that "concerns only the Board's *sua sponte* reopening authority" and that involves "only a motion to reopen that is both time-barred and number-barred." Opp. 11. Indeed, the court of appeals *could not* have regarded the case that way. Arguing below, petitioner conceded that, under circuit precedent, the departure bar *denied* the Board *sua sponte* authority to grant post-departure

relief. See Pet. App. 12a. Instead, petitioner took the position that he was simply not subject to the time and numerosity limits on motions to reopen because those limits were equitably tolled in his case by the ineffective assistance of his prior counsel; he therefore invoked the statutory entitlement to file a post-departure motion that was recognized by the Fourth Circuit in *William* v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007). See Pet. App. 12a, 15a.

The Tenth Circuit rejected that argument on the merits, disagreed with *William* (on the Tenth Circuit precedent of *Rosillo-Puga*), and concluded that under BIA's regulations the agency lacks all authority to consider the motions to reopen "of deported or departed aliens." For that reason, the court below did "not reach the issue of whether BIA should have equitably tolled the time and numerical limits on filing motions to reopen." *Id.* at 15a. Because the question posed to and decided by the court thus was whether a departed alien who *satisfies* the time and numerosity bars (through equitable tolling or otherwise) has an entitlement to file a motion to reopen or reconsider, the court in its holding below said not a word about the BIA's *sua sponte* authority.

Deconstructing the government's brief suggests that, despite itself, it cannot help but recognize these points. The government acknowledges that petitioner pressed an equitable tolling argument below, but complains that "petitioner does not make any such [equitable tolling] argument before this Court"; the government argues that "unless and until petitioner makes such a showing [of entitlement to equitable tolling]—one petitioner has not attempted to make in his certiorari petition—this case presents only a question about whether the departure bar regulation

is valid as applied to *sua sponte* reopening." Opp. 12, 13. But with respect, this argument is silly. *Of course* we do not present an equitable tolling claim to this Court: the equitable tolling issue was not decided below because the Tenth Circuit held, as a threshold matter, that the departure bar made satisfaction of the statutory and regulatory time and numerosity requirements (again, through equitable tolling or otherwise) immaterial. In such circumstances, the ordinary procedural course is for the Court to resolve the question presented in the petition and, if petitioner prevails, to remand for "full consideration by the courts below" of petitioner's entitlement to equitable tolling. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004); see, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788, 797-798 (2009). That is the proper outcome here.[1]

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[1] Although that should be enough to show that the question presented in the petition was decided below and is properly before the Court now, it may be added that there is every reason to expect that petitioner's equitable tolling claim would prevail on remand. The government backhandedly acknowledges that equitable tolling of the time and numerosity limits is available (Opp. 12-13), a point it could hardly deny. See *Riley* v. *INS*, 310 F.3d 1253, 1257-1258 (10th Cir. 2002); see also *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005) (tolling filing deadline until three months after aliens learned or should have learned of prior counsel's ineffectiveness). The government does not dispute that petitioner properly raised his equitable tolling argument before both the Board and the court of appeals, which acknowledged the argument but considered themselves unable to consider its merits due to the departure bar. He pursued the claim diligently, demonstrating his original lawyer's incompetence, promptly retaining new counsel when he learned of that incompetence, and filing his current motion to reopen within two months of obtaining the administrative record. Pet. 12-13 & n.10. And the prejudicial effect of original counsel's deficient

B. The Courts Of Appeals Are Divided Over The Validity Of The Departure Bar Regulations.

Once past its effort to recharacterize the holding below, the government has very little to say in opposition to the petition. Although the government's discussion of the point is a bit confused, it ultimately recognizes the conflict between the Fourth and Tenth Circuits on the validity of the departure bar. Opp. 21; see *id.* at 17-22. This point, too, is not debatable; the conflict has been acknowledged repeatedly by the Tenth Circuit (see Pet. 16; Pet. App. 9a), and has been noted by the Seventh and Ninth Circuits. See *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 592 (7th Cir. 2010); *Coyt* v. *Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) ("Those circuits are split.").[2] There is no

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performance is manifest: among other things, counsel failed to raise a full and obvious defense to removability at petitioner's removal hearing. Pet. 8-10. The government thus does not deny that, absent the attorney's mistakes, there is much more than a "reasonable likelihood" that petitioner would have prevailed at his removal hearing and on a subsequent motion to reopen. *Lopez* v. *Mukasey*, 313 Fed. App'x 96, 100 (10th Cir. 2008) (citing *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1209 (10th Cir. 2004)); see Pet. 7-12.

[2] Although ultimately acknowledging that "the court below did state its view that the regulation would be valid even in the context of a timely motion to reopen" (Opp. 21), the government tries to minimize the conflict between the Tenth and Fourth Circuits by asserting that "[i]n both this case and *Rosillo-Puga*, the [Tenth Circuit] considered only *sua sponte* reopening." Opp. 18. But that is wrong. As we explain in text, the Tenth Circuit's decision in this case assumed satisfaction of the time and numerosity requirements and proceeded to approve application of the departure bar. And although that is enough to establish that the Tenth and Fourth Circuits disagree on the validity of the departure bar as it applies to motions that satisfy the time and numerosity requirements, in *Rosillo-Puga* itself the court

reason to delay review, as the government urges (at Opp. 21-22). The issue has been thoroughly addressed by majority and dissenting opinions in both the Fourth and the Tenth Circuits. See Pet. 15-17. Other courts have added their two cents. See, *e.g.*, *Marin-Rodriguez*, 612 F.3d at 592-593. There is no prospect that the conflict will resolve itself absent this Court's intervention. And because the source of the conflict is disagreement about the meaning of a statute, the problem cannot be cured by agency action. The government does not contend otherwise, or suggest any benefit that would follow from postponing resolution of the question presented here.

To the contrary, there is a compelling reason for the Court to address the issue now: the confusion in the lower courts regarding the application of the departure bar is pervasive and growing. Since the filing of the petition in this case, the Seventh Circuit, in an opinion by Chief Judge Easterbrook, struck down the departure bar regulation governing motions to reopen as "untenable," coming out "in favor of the rul-

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addressed the validity of the departure bar as a threshold matter *before* considering these requirements. Although the court did ultimately observe that the motion in *Rosillo-Puga* was time-barred, as the government notes here (at Opp. 18), it did so as a secondary, alternative ruling (see 580 F.3d at 1158); the Tenth Circuit's principal holding was that the departure bar is valid and governs in *all* cases. *Id.* at 1152-1158. Indeed, although Judge O'Brien would have preferred to decide *Rosillo-Puga* on the ground (advanced by the government here) that Rosillo-Puga's motion was time-barred, he joined the lead opinion specifically to provide a majority for the Tenth Circuit's decision upholding the departure bar. See *id.* at 1160-1161 (O'Brien, J., concurring); see also Pet. App. 11a n.5 (Judge O'Brien provided majority in *Rosillo-Puga* to decide "whether the regulatory post-departure bar contravenes the statutory provisions").

ing in *William*." *Marin-Rodriguez*, 612 F.3d at 593-594. The Seventh Circuit did so, however, "on a rationale distinct from the [F]ourth [C]ircuit's": noting that the BIA believes that it lacks jurisdiction to entertain the claims of aliens who have departed the country, the Seventh Circuit reasoned that "since 1996 nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction' * * * to issue decisions that affect the legal rights of departed aliens," and that "an administrative agency is not entitled to contract its own jurisdiction." *Id.* at 594.[3]

As a consequence, the lower courts have now adopted a range of inconsistent approaches.[4] The

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[3] The government's description of *Marin-Rodriguez* as deciding only that the departure bar regulation "should not be interpreted to limit the Board's jurisdiction to consider such motions [to reopen], but instead to bar the Board from granting such motions" (Opp. 21 n.6) is, to put it charitably, a stretch. In fact, the Seventh Circuit noted that the BIA regarded the departure bar not as "a categorical exercise of discretion" but as a rule that "curtails its jurisdiction," and held that such a jurisdictional rule is unenforceable. 612 F.3d at 593, 595. Although the court added that the BIA may be entitled to recast its rule "as one resting on a categorical exercise of discretion" (*id.* at 595), unless and until it does so, and unless such a rule is upheld, the departure bar is void in the Seventh Circuit. See *id.* There is no reason to believe the Board will make an attempt to recast the rule any time soon: "the Department of Justice has not changed the view, expressed in its brief, that the Board is *right* in believing that it lacks jurisdiction." *Id.* at 596.

[4] Although the government argues that "[t]he other courts that have considered the departure bar regulations in the particular context of *sua sponte* reopening have rejected the aliens' challenges" (Opp. 18), the comparison to petitioner's case is wholly inapt. The decisions discussed by the government are ones in which the time and numerosity restrictions denied the alien entitlement to relief (*id.* at 18-19) and the aliens did *not* advance

Tenth Circuit and several other courts of appeals have upheld the departure bar. See Pet. 17-19. The Fourth Circuit has held the departure bar invalid as inconsistent with 8 U.S.C. § 1229a(c)(7)(A). The Seventh Circuit has held the bar unenforceable as an improper attempt by the agency to limit its jurisdiction. And as we showed in the petition (at 20; see also Opp. 20-21), the Ninth Circuit has held that the departure bar is simply not applicable to aliens whose removal proceedings have been completed. The result is that identically situated aliens are treated differently in different parts of the country. Because the availability of motions to reopen and reconsider is a matter of enormous practical importance—as this Court recognized in *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008), and as the government very notably does not deny—such inconsistency is intolerable.

C. This Case Provides A Suitable Vehicle For Resolution Of The Conflict.

Finally, the government's formulaic recital of no fewer than five reasons why this case provides a poor vehicle with which to resolve the conflict is wholly insubstantial: quantity is no substitute for quality.

First, and principally, the government maintains that review is inappropriate because this case "involves only *sua sponte* reopening," a sort of determination that (the government says) is not judicially reviewable. Opp. 22-24. But this is, of course, simply

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arguments for equitable tolling, as petitioner does here. See *Zhang* v. *Holder*, No. 09-2628, 2010 WL 3169292, at *7 (2d Cir. Aug. 12, 2010); *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 2802454 (5th Cir. July 9, 2010); *Ovalles* v. *Holder*, 577 F.3d 288, 298 n.7 (5th Cir. 2009).

a reprise of the government's original mischaracterization of the holding below, and adds nothing to its argument.

Second, the government says that "[u]nlike *Rosillo-Puga*, this case involves not only an untimely motion, but one that is number-barred as well." Opp. 24. But that assertion is immaterial for present purposes because petitioner's position is that *both* bars are equitably tolled—and the Tenth Circuit declined to resolve the tolling point because it held that the departure bar applies in *all* cases.[5]

Third, the government states that petitioner's equitable tolling argument is "not well-developed," that he "did not renew the equitable tolling argument here," and that if the Court were to consider the equitable tolling claim it "would be required to make difficult threshold determinations." Opp. 24. It is undisputed, however, that the equitable tolling claim was presented to both the BIA and to the court of appeals. See note 1, *supra*. And as we have explained, that claim is *not* presented on the merits for determination by this Court; as noted above, we would expect the issue to be decided by the Tenth Circuit on remand if this Court grants the petition and reverses on the validity of the departure bar.

Fourth, the government declares that petitioner's statutory argument "was hardly well-developed in the court of appeals." Opp. 25. But that assertion is beside the point; the issue was *decided* by the Tenth Circuit and therefore is properly before this Court. See *United States* v. *Wells*, 519 U.S. 482, 488 (1997)

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[5] In contrast to petitioner, Rosillo-Puga did not advance an equitable tolling claim below. See *Rosillo-Puga*, 580 F.3d at 1161.

(Court may decide any question presented in a petition that was passed on by the court of appeals).

Fifth, the government suggests that res judicata might provide an alternative basis for affirmance of the decision below. Opp. 25. But the government recognizes that "the court of appeals did not reach that argument" (*ibid.*), and the government's contention, if it has any plausibility, may be presented to the Tenth Circuit on remand. Accordingly, because each of these makeweight arguments lacks merit, and because this Court's intervention is necessary to resolve a conflict on a recurring and very important question, review of this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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