No. 14-73489

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NERY ROBERTO ESPANA ORELLANA
(A040-417-826),

Petitioner

v.

LORETTA E. LYNCH, Attorney General,

Respondent

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

DETAINED

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Dated: March 25, 2016

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DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 29(c), prospective amicus curiae, American Immigration Lawyers Association (AILA), state that no publicly held corporation owns 10% or more of the stock of AILA.

Pursuant to Fed. R. App. P. 29(c)(5), amicus curiae further states that no counsel for the parties authored this amicus brief in whole or in part, and no party, party's counsel, or person or entity other than amicus curiae and undersigned counsel contributed money that was intended to fund preparing or submitting this amicus brief.

INTEREST OF AMICUS

Prospective amicus, American Immigration Lawyers Association ("AILA"), is a national organization comprised of more than 14,000 lawyers and law school professors who practice and teach in the field of immigration and nationality law.[1] Amicus has a strong interest in assuring that the rules governing administrative appeals to the BIA of removal orders are fair and accord with fundamental due process and the statute, 8 U.S.C. § 1101(a)(47)(B), which permits appeals to the BIA.

[1] More information about amicus curiae is included in the motion for leave to file this brief.

INTRODUCTION

In her concurring opinion in *Garcia v. Lynch*,786 F.3d 789 (9th Cir. 2015), Judge Berzon observed that the "fundamental problem" with the conclusion of the Board of Immigration Appeals (BIA) that it lacks jurisdiction over a timely appeal filed after a waiver of the right to appeal, is that the appeal waiver regulations, found at 8 C.F.R. §§ 1003.3(a)(1), 1003.39, and 1241.1(b), are "flatly inconsistent" with the plain language of 8 U.S.C. § 1101(a)(47)(B). *Garcia*, 786 F.3d at 799. Specifically, § 1101(a)(47)(B) provides that "only . . . two circumstances" cause a removal order to be final – (1) when the Board affirms an immigration judge's order, or (2) upon "expiration of the period in which the alien is permitted to seek review of such order by the Board." Thus, Judge Berzon concluded "[t]here is no reasonable construction of the statutory language allowing a noncitizen *no* time to seek review, but instead asking him to declare his intention regarding appeal immediately upon issuance of the [immigration judge]'s decision." *Garcia*, 786 F.3d at 799 (emphasis in the original).

Accordingly, this instant petition for review squarely present the open question, thoughtfully examined by Judge Berzon in her concurring opinion in *Garcia*, 786 F.3d at 797-801, of whether the BIA erred in finding that it has no jurisdiction to consider a Notice of Appeal filed after a waiver of the right to appeal.

The regulations upon which the BIA based its conclusion clearly violate the plain language of the only statute in the Immigration and Nationality Act that specifically mentions the Board of Immigration Appeals,[2] and this Court has repeatedly rejected similar decisions by the BIA depriving a noncitizen of his appellate rights by improperly disclaiming jurisdiction.

Consequently, the time has now come for this Court to declare once and for all that the statute must govern and strike down the BIA's construction of the conflicting regulations as ultra vires. Upon doing so, this Court should then grant Mr. Espana Orellana's petition for review, overturn the BIA's October 31, 2014 decision, and remand for the BIA to adjudicate Mr. Espana Orellana's timely appeal on the merits. Only then will Mr. Espana Orellana finally have the full and fair opportunity he was unjustly denied to raise and litigate his meritorious defenses to removal.

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[2] 8 U.S.C. § 1101(a)(47)(B) – a removal "shall become final upon the earlier of (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals."

SUMMARY OF THE ARGUMENT

The BIA's refusal to accept Mr. Espana Orellana's timely-filed Notice of Appeal violated the plain language of 8 U.S.C. § 1101(a)(47)(B)(ii), which provides that a noncitizen does not receive a final order of removal until "the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." A person ordered removed by the IJ generally has thirty days to file a Notice of Appeal to the BIA; however, the BIA's position – that it does not have jurisdiction to consider the Notice of Appeal if the noncitizen has waived appeal – contradicts the statutory language of § 1101(a)(47)(B)(ii), requiring a "period" in which the noncitizen may seek agency review. When a regulation violates the plain language of a statute, such as here, the BIA may not rely on jurisdictional excuses to justify its refusal to consider the merits of an appeal. Therefore, the BIA erred in failing to accept jurisdiction over Mr. Espana Orellana's timely-filed appeal.

The BIA also erred in purporting to disclaim jurisdiction over the timely-filed appeal because of Mr. Espana Orellana's appeal waiver. This Court, in *Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011), held that the 30-day time limit at 8 C.F.R. § 1003.38(b) for appealing an IJ's decision to the BIA is not jurisdictional. Consequently, it was clear error for the BIA to dismiss the appeal premised upon similar regulations that likewise lack the power to strip the BIA of its jurisdiction.

ARGUMENT

I. THE BIA ERRED IN DISMISSING PETITIONER'S TIMELY FILED APPEAL ON THE BASIS OF ITS APPEAL WAIVER REGULATIONS

A. The Plain Language of 8 U.S.C. § 1101(47)(B)(ii) Establishes a Mandatory Time Period in Which a Noncitizen May Seek Agency Review of an Immigration Judge's Decision

In the Immigration and Nationality Act, Congress determined that an order of removal "shall become final upon the earlier of –

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the *expiration of the period* in which the alien is permitted to seek review of such order by the Board of Immigration Appeals."

8 U.S.C. § 1101(a)(47)(B) (emphasis added). The statute does not state the length of the period in which a noncitizen is permitted to seek review. However, a noncitizen has thirty calendar days to file a Notice of Appeal of the IJ's decision. 8 C.F.R. § 1003.38(b).

Therefore, a plain language and common-sense reading of the statute shows that an order of removal becomes final when the BIA dismisses the noncitizen's appeal, or when the noncitizen does not file a Notice of Appeal to the BIA within thirty days of the IJ's decision. The BIA's adherence to its appeal waiver regulations at 8 C.F.R. § § 1003.3(a)(1) and § 1003.39 as governing the question of finality "is

flatly inconsistent with the INA." *Garcia v. Lynch*,786 F.3d 789, 798 (9th Cir. 2015) (Berzon concurring). Therefore, "according to the INA's terms, there are two events which can trigger the finality of a removal order—a BIA affirmance or the running of the appeal period. The waiver of the right to appeal is not mentioned as triggering finality." *Id*.

Here, the IJ issued an oral decision on July 17, 2014 ordering Mr. Espana Orellana removed to Guatemala. AR 44, 76-77. The BIA received Mr. Espana Orellana's Notice of Appeal on July 28, 2014 – 11 days after the IJ's order of removal. AR 34-39. Thus, as Mr. Espana Orellana filed a Notice of Appeal within thirty days of the IJ's decision, the BIA erred in finding that he had received an "administratively final" order and in dismissing his appeal for this reason. AR 2.

B. The Regulations Prohibiting BIA Review upon a Noncitizen's Waiving Appeal Violate the Plain Language of the Statute

Contrary to the statute, the regulations do not necessarily provide for a specific "period" in which the noncitizen is permitted to seek agency review of an IJ's decision. Under 8 C.F.R. § 1241.1, an order of removal from an IJ becomes final:

> (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
>
> (b) Upon *waiver of appeal by the respondent*;
>
> (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time. . .

> (f) If an immigration judge issues an alternative order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period. . .

(emphasis added). The regulations further provide that "the decision of the Immigration Judge becomes final *upon waiver of appeal or upon expiration of the time to appeal* if no appeal is taken whichever occurs first." 8 C.F.R. § 1003.39 (emphasis added). *See also* 8 C.F.R. § 1003.3(a)(1) ("A Notice of Appeal may not be filed by any party who has waived appeal pursuant to §1003.39"); 8 C.F.R. § 1003.1(d)(2)(i)(G) ("A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which. . . [t]he appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record.").

The regulations impermissibly narrow the scope of 8 U.S.C. § 1101(a)(47)(B) and violate the plain language of the statute. While the statute recognizes a final order of removal upon the "expiration of the period" in which the noncitizen is permitted to appeal, the regulations recognize a final order "upon expiration of the time to appeal," and when the right to appeal is waived. *See* 8 U.S.C. § 1101(a)(47)(B)(ii); 8 C.F.R. § 1241.1(b), (c); 8 C.F.R. § 1003.39; 8 C.F.R. § 1003.3(a)(1). However, since the statute specifically provides for a "period" of time in which a noncitizen may seek agency review, the regulations that find that a final order exists before thirty days have passed from the date of the IJ's decision are ultra vires to the statute.

This conclusion is also compelled by *Ocampo v. Holder*, 629 F.3d 923, 927 (9th Cir. 2010), which held that 8 C.F.R. § 1241.1(f) (which purported to fix the finality of a removal order when, *inter alia*, the period of voluntary departure ordered in the alternative to removal expires) is inconsistent with 8 U.S.C. § 1101(a)(47)(B), because that provision's statutory definition of finality, is "clear and unambiguous that removal orders become final only in these two circumstances, so there [wa]s no need to resort to" a regulation providing a third alternative "for clarification." *Ocampo*, 629 F.3d at 927.

This Court further held in *Ocampo* that applying 8 C.F.R. § 1241.1(f)'s voluntary departure expiration date to trigger finality in the face of the plain language of 8 U.S.C. § 1101(a)(47)(B) would violate the rule that "'[a] regulation may not serve to amend a statute, nor add to the statute something which is not there,' by 'effectively amending 8 U.S.C. § 1101(a)(47)(B) to afford an additional circumstance when removal orders become final that is not expressed in the statute.' *Id*. (quoting *Cal. Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997).").

Because 8 C.F.R. § 1241.1(f), which was found invalid in *Ocampo*, contains the same appeal waiver alternative to fixing the date of a removal order's finality as 8 C.F.R. § 1003.39 and 1003.3(a)(1) – the regulations the BIA relied upon in its decision here – *a fortiori*, these regulations must also be invalid.

As Judge Berzon astutely observed in her concurring opining in *Garcia*, "*Ocampo*'s reasoning applies equally to each of these provisions. Each is inconsistent with the 'clear and unambiguous' statutory definition of finality, *Ocampo*, 629 F.3d at 927, as each adds a finality trigger that does not appear in the statute." *Garcia*, 786 F.3d at 799.

Respondent may argue that the regulations interpret the statute to mean that once appeal is waived the period in which the noncitizen is permitted to appeal to the BIA has "expired," such that the order of removal is administratively final. However, such an interpretation is only permitted when the statute is ambiguous. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Here, the statute is clear on its face that some type of "period" is required. *See* 8 U.S.C. § 1101(a)(47)(B)(ii). Under the BIA's interpretation, the "period" would merely consist of a matter of seconds between the IJ's oral decision and the noncitizen's waiver of appeal, which would effectively eviscerate any common-sense idea of a "period" of time in which a noncitizen could seek further agency review. Furthermore, the regulations repeatedly use the term "expiration" to indicate the passing of the thirty days in which a noncitizen may file an appeal. *See* 8 C.F.R. § 1241.1; 8 C.F.R. § 1003.39. To contend that "expiration" means one thing in the context of the statute and another in the context of the regulations would create needless confusion.

Therefore, the only reasonable way to read the statute is to look to its plain language, which requires that a "period" of time – in this case, thirty days – must elapse in order to find that a noncitizen is no longer allowed to file an appeal to the BIA.

As Judge Berzon persuasively reasoned in her concurrence in *Garcia*:

> the statutory provision unambiguously refers to some "period," that is, some time span with ascertainable starting and ending dates. Consistent with the express congressional directive to "issue regulations with respect to. . . the *time period* for the filing of administrative appeals in deportation proceedings," Immigration Act of 1990, Pub.L. No. 101–649, § 545(d)(2), 104 Stat. 4978, 5066 (1990) (emphasis added), the regulations provide that the notice of appeal must be filed within 30 days from the issuance of the IJ's decision. 8 C.F.R. § 1003.38(b). In other words, the "period in which the alien is permitted to seek review," 8 U.S.C. § 1101(a)(47)(B)(ii), is defined by the regulation: 30 days. At the expiration of that period, not earlier, the order becomes final unless there has been an appeal.

Garcia, 786 F.3d at 799.

Four years ago, this Court considered a case in which the BIA similarly declined to consider an appeal under its overly strict reading of its own regulations. In *Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011), a noncitizen's attorney diligently attempted to file a Notice of Appeal within thirty days of the IJ's decision but was unable to do so due to the failure of her overnight courier service. The BIA found that it lacked jurisdiction to consider the appeal pursuant to its regulations,

which required the Notice of Appeal to be filed within thirty days. *Id*. at 947-48 (citing 8 C.F.R. § 1003.38(b)). However, this Court held that "the statute is not ambiguous and is not jurisdictional." *Id*. at 947. Rather, the regulation in question was a "claim-processing rule," which as a general matter does not reach questions of subject matter jurisdiction such that the agency would be deprived of jurisdiction. *Id*. at 948.

In support of this holding, this Court significantly noted:

> [T]he regulation does not say that it is jurisdictional. Nor does the agency itself treat the time limit as jurisdictional. Instead, the agency sua sponte decides to exercise its authority where the reasons for lateness are "extraordinary," something it could not do if the time limit was jurisdictional. By reviewing cases where the lateness is extraordinary, the agency interprets its own regulation as a non-jurisdictional claim-processing rule.

Id. at 949.

This Court then concluded, "[t]here is no ambiguous statute that would entitle the agency to deference under *Brand X* and *Chevron*, just an administrative claim-processing rule that must be treated as non-jurisdictional." *Id*. at 949.[3]

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[3] *Irigoyen-Briones* specifically rejected a published BIA decision finding the thirty-day period to file a Notice of Appeal was jurisdictional and declined to afford the BIA deference since the statute was not ambiguous. *Irigoyen-Briones*, 644 F.3d at 947 (rejecting the government's request to defer to *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006)). Similarly, the BIA has held in several published decisions that it lacks jurisdiction to consider a Notice of Appeal filed within thirty days if the noncitizen waives appeal. *See Matter of Shih*, 20 I&N Dec. 697 (BIA 1993); *Matter*

In other words, this Court has rejected the BIA's past attempts to foreclose consideration of an appeal based on its own regulations – particularly when those regulations are not, in fact, rooted in the language of the statute. *See also Ocampo v. Holder*, 629 F.3d 923, 927 (9th Cir. 2010) (holding that 8 U.S.C. § 1101(a)(47) is "clear and unambiguous that removal orders become final only in these two circumstances, so there is no need to resort to 8 C.F.R. § 1241.1(f) for clarification").

Here, the BIA similarly contended that it was stripped of the authority to consider Mr. Espana Orellana's timely appeal following his "administratively final" order of removal. AR 2. However, the only authority in support of this position are regulations that are not grounded in the language of the statute and, in fact, contradict it. The BIA's reliance on its regulations to reject Mr. Espana Orellana's timely appeal was ultra vires, a mistake of law, and violated the plain language of § 1101(a)(47)(B). Also, under 8 C.F.R. § 1003.38(b), Mr. Espana Orellana had thirty days in which to file a Notice of Appeal, which he did, on August 18, 2014. AR 34-39. Therefore, the regulations purporting to cut short "the expiration of the period in which the alien is permitted to seek review of such order" violate the plain language of the statute.

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of Rodriguez-Diaz, 22 I&N 1320, 1322 (BIA 2000) ("We do not have jurisdiction over the decision of an Immigration Judge once the parties waive their right to appeal."). As in *Irigoyen-Briones*, this Court should decline to extend deference to *Shih* and *Rodriguez-Diaz* since those cases, like *Liadov*, erroneously claim that the agency lacks jurisdiction to consider an appeal based on ultra vires regulations.

II. THE BIA ERRED IN PURPORTING TO DISCLAIM JURISDICTION

The BIA's order dismissing Mr. Espana Orellana's appeal also erred by insisting that the Board "lacks jurisdiction over this case" because Mr. Espana Orellana "waived appeal." AR 2. The BIA improperly disclaimed its own jurisdiction on the basis of its regulations – 8 C.F.R. §§ 1003.3(a)(1) and 1003.39 – which are clearly not jurisdictional, and, as discussed *supra*, are ultra vires. *See Garcia v. Lynch*, 786 F.3d 789, 797 (9th Cir. 2015) ("the regulation upon which the BIA relied for its conclusion that it lacked jurisdiction is flatly inconsistent with the Immigration and Nationality Act."). The fact that the BIA nevertheless considers its appeal waiver regulations to divest it of jurisdiction is well explained by Judge Berzon in *Garcia*:

> Routinely, when an Immigration Judge ("IJ") renders a decision, he asks the respondent and the Department of Homeland Security ("DHS") to decide, then and there, whether to reserve or waive the right to appeal. *See In re Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1323 n. 2 (BIA 2000) (advising IJs to inform respondents: "If you want to appeal my decision, or if you want to think about appeal and decide later, you must reserve appeal now."). If the parties both waive appeal, and the waiver is otherwise valid, then, the BIA maintains, it "do[es] not have jurisdiction over the decision of [the] Immigration Judge." *Id*. at 1322 (citing *Matter of Shih*, 20 I. & N. Dec. 697 (BIA 1993)). That is so, the BIA says, because "[w]henever the right to appeal is [validly] waived, the decision of the Immigration Judge becomes final and may be implemented immediately." *Id*.; *see also Shih*, 20 I. & N. Dec. at 699 (holding that, "[b]ecause the immigration judge's decision is final [upon appeal waiver], the applicant's subsequent attempt to withdraw his waiver by filing a Notice of Appeal ... has no effect" and the BIA therefore "lacks jurisdiction to adjudicate the case.").

However, under the reasoning of this Court's decision in *Irigoyen-Briones*, *supra*, the BIA could not have possibly been deprived of "jurisdiction" to adjudicate Mr. Espana Orellana's appeal, as agency regulations have no power to confer or strip jurisdiction, a power which is exclusively the prerogative of Congress when it enacts statutes containing explicit jurisdictional commands. Moreover, "even if a regulation could be jurisdictional, the appeal-waiver rule would not so qualify. *See Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011)." *Garcia*, 786 F.3d at 797, n.2.

Furthermore, one of the BIA's own precedent decisions cited in its order in this case, *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000), recognizes the Board's limited jurisdiction to consider on appeal the validity of the purported waiver of appeal, and the Board's general certification authority at 8 C.F.R. § 1003.1(c) permits it to consider any appeal, regardless of procedural defects, which the Board could not do if the appeal waiver regulations were in fact truly jurisdictional.

As Judge Berzon well explains in her concurrence in *Garcia*:

> the Supreme Court has rejected "a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts." *City of Arlington, Tex. v. F.C.C.*, —— U.S. ——, 133 S.Ct. 1863, 1868, —— L.Ed.2d —— (2013). The analogy to the jurisdiction of courts—that is, to "the question whether [a court has] the power to decide at all," *id*. (emphasis omitted)—is particularly inapt where, as here, the agency disclaims authority based only on its own regulation. . . [A] BIA regulation, at least one that does not purport to interpret a statute, is, in effect, the Attorney General telling himself what

> he may or may not do; presumably, he could simply change the rules if he were so inclined. That being the case, such regulations are more like a court's internal rules, such as our own standing orders, than external constraints that could properly be conceived of as jurisdictional. . . The Supreme Court has "urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011). "Among the types of rules that should not be described as jurisdictional are ... 'claim-processing rules' ... that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id*. at 1203. A requirement that parties must affirmatively reserve appeal at the hearing is a "quintessential claim-processing rule[ ]."

Here, the BIA's disclaimer of jurisdiction over Mr. Espana Orellana's timely-filed appeal cannot stand, especially in light of this Court's decision in *Hernandez v. Holder*, 738 F.3d 1099, 1102 (9th Cir. 2013) (the BIA's rule that, following dismissal of a late appeal, any motion must be filed with the IJ is <u>not</u> a jurisdictional bar to the BIA's authority to consider such motion). In *Hernandez*, this Court reversed the BIA's disclaimer of jurisdiction to adjudicate a motion to reopen and held that the BIA's imposition of the "place-of-filing" rule at 8 C.F.R. § 1003.2(a) – i.e., that any motion must be filed with the IJ after the BIA dismisses an appeal on timeliness grounds – was unfounded, reasoning that this procedural provision is a "claims processing rule," not a jurisdictional bar to the BIA's authority. *Id*. Accordingly, this court vacated the BIA's order and remanded the case for further proceedings. *Id*.

In reaching its holding in *Hernandez*, this Court declared that the originating statute, 8 U.S.C. § 1229a(c)(7), does nothing to diminish the BIA's jurisdiction or authorize the BIA to diminish its own jurisdiction. *Id*. It stated that the instant case could not be meaningfully distinguished from the Court's prior decision in *Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011), which concluded that the 30-day time limit for filing a notice of appeal at 8 C.F.R. § 1003.38(b) is not jurisdictional, given the BIA's policy of reviewing cases where the late filing is extraordinary, because, despite the place-of-filing rule, the BIA can and has used its certification authority under 8 C.F.R. § 1003.1(c) to consider motions that it believed should have been filed with the IJ, which it could not have done if the place-of-filing rule were truly jurisdictional. *Id*.

The Supreme Court has repeatedly affirmed that administrative agencies have no independent authority to contract their own jurisdiction. *See Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817, 824-25 (2013) (recounting the course of this jurisprudence). Because the statute enacted by Congress in 1996, 8 U.S.C. § 1101(a)(47)(B), does not contain any "waiver of appeal" limitation, the BIA's contrary imposition of such a limitation in *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000), and *Matter of Shih*, 20 I&N Dec. 697 (BIA 1993), must be disapproved.

Accordingly, the BIA's dismissal of Mr. Espana Orellana's appeal was erroneous because it was based upon the faulty premise that it lacked the ability to consider his appeal. *See Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011) (expressly rejecting the BIA's wrong assertion that the 30-day appeal filing deadline was jurisdictional).

The general rule is that the label 'jurisdictional' is only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority. *Id*. at 948. Therefore, other procedural bars, however emphatic, are not properly labeled jurisdictional. The power to confer and limit the jurisdiction of an administrative agency resides exclusively with Congress. *See Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 83-84 (2009); *Iavorski v. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000) ("The power to establish jurisdictional bars resides with Congress"); *cf*. *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."). Unless a statute "clearly states" that a procedural rule is jurisdictional, it is *ipso facto* not jurisdictional. *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515 (2006); *accord Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

Moreover, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *Iavorski*, 232 F.3d at 133 (the BIA's jurisdiction is "a question purely of statutory construction. . . within the initial step in the *Chevron* analysis. When, as here, we are called upon to engage only in an exercise of statutory interpretation, we avoid the danger of venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine."). Thus here, as in *Irigoyen-Briones*, 644 F.3d at 949, "[t]here is no ambiguous statute that would entitle the agency to deference under [*Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688 (2005)] and *Chevron*, just an administrative claim-processing rule that must be treated as non-Jurisdictional." *Id*. *Irigoyen-Briones* controls the outcome of this case. The statute at issue in this appeal, 8 U.S.C. § 1101(a)(47)(B)(ii), specifically provides for a "period" of time in which a noncitizen may seek agency review. The appeal waiver regulations that purport to cut off this "period" are both inconsistent with the statute and have no power to limit the BIA's jurisdiction over a timely appeal. The statute contains no limitation concerning waiver of appeal, let alone that immediately reserving the right to appeal is a "jurisdictional" requirement.

The Government may argue that, regardless of whether the BIA lacked "jurisdiction" over Mr. Espana Orellana's appeal, it nevertheless lacked "authority" to consider it under its controlling understanding of 8 C.F.R. §§ 1003.1(d)(2)(i)(G), 1003.39, 1003.3(a)(1), and 1241.1, as interpreted by *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000), and *Matter of Shih*, 20 I&N Dec. 697 (BIA 1993). However, the BIA simply never lacks the "authority" to adjudicate any case – whether its regulations provide express appellate authority – because of its certification authority at 8 C.F.R. § 1003.1(c). As this Court's decision in *Irigoyen-Briones* pointed out, the BIA *may* adjudicate even an untimely appeal pursuant to its certification authority at 8 C.F.R. § 1003.1(c). This reality undercuts the notion that the BIA lacks "authority" to act because of its own regulations.

Moreover, the fact that Congress has never codified the appeal waiver regulations is a strong indication that their omission from the statute was intentional. In other sections of the INA, Congress has shown its ability to limit a noncitizen's right to obtain administrative review. *See*, *e.g.*, 8 U.S.C. §§ 1229a(c)(6), (7), placing explicit time and numerical limitations on a noncitizen's right to file motions to reconsider and motions to reopen. Accordingly, the BIA clearly erred in disclaiming jurisdiction to adjudicate Mr. Espana Orellana's timely-filed appeal. Thus, this Court should order a remand for the BIA to adjudicate the timely-filed appeal on the merits.

III. THE BIA'S ADHERENCE TO ITS APPEAL WAIVER REGULATIONS IS CONTRARY TO THE PLAIN LANGUAGE OF § 1101(a)(47)(B), IS THUS UNREASONABLE, AND ALSO RAISES GRAVE DUE PROCESS CONCERNS THAT THIS COURT SHOULD STRIVE TO AVOID BY INVALIDATING THE BIA'S OVERLY NARROW CONSTRUCTION

Even assuming that 8 C.F.R. §§ 1003.1(d)(2)(i)(G), 1003.39, 1003.3(a)(1), and 1241.1 carry the same force as a statutory claim processing rule (as this Court did for 8 C.F.R. § 1003.38(b), the regulation at issue in *Irigoyen-Briones*), the BIA's construction of these regulations fails to account for the command of 8 U.S.C. § 1101(a)(47)(B)(ii) for a "*period* in which the alien is permitted to seek review. . . by the Board of Immigration Appeals" (emphasis added). Thus, while the BIA's refusal to entertain an appeal subsequent to an express waiver of the right to appeal after an actual "period" of time has passed might be a permissible exercise of the BIA's authority to fashion its own rules of procedure through regulations and the issuance of precedent decisions, here its construction of the regulations as requiring an immediate decision whether to reserve or waive appeal at the very moment the IJ issues a decision is unreasonably contrary to the plain language of § 1101(a)(47)(B) and raises grave constitutional concerns.

The BIA's construction of the appeal waiver regulations improperly erects a jurisdictional obstacle to exercising the statutory right to file an administrative appeal, where no such limitation exists by statute, and thus is unworthy of the *Chevron*

deference ordinarily afforded to an agency's interpretation of its own statutes, and also unworthy of the heightened deference afforded to an agency's interpretations of its own regulations by the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). As Judge Berzon succinctly put it, "[t]here is no reasonable construction of the statutory language allowing a noncitizen no time to seek review, but instead asking him to declare his intention regarding appeal immediately upon issuance of the IJ's opinion." *Garcia*, 786 F.3d at 799.

While it is true in general that, absent constitutional constraints, agencies are free to fashion their own rules of procedure permitting them to discharge their duties, *Vermont Yankee Nuclear Power Corp, v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978), this is not true when such rules are arbitrary, capricious, or manifestly contrary to the governing statutes and regulations. *See El Rescate Legal Serv., Inc. v. EOIR*, 959 F.2d 742, 750 (9th Cir. 1991). S*ee also Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982).[4]

[4] Furthermore, as removal proceedings involve the potential deprivation of a significant liberty interest they must be conducted according to the principles of fundamental fairness and substantial justice. *Id. See also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (stating that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.").

Here, this Court does not owe *Auer* deference to the BIA's case law construction of its appeal waiver regulations, which the BIA applied in rejecting Mr. Espana Orellana's appeal, because the BIA's grafting additional requirements onto a statutory scheme for which the language is just not susceptible is exactly what this Court forbade the BIA from doing in *Lal v. INS*, 255 F.3d 998, 1004-5 (9th Cir. 2001) (striking down the BIA's attempt to graft onto 8 C.F.R. § 208.13(b)(1)(ii) a requirement of an "ongoing disability" to warrant a grant of humanitarian asylum based upon the severity of past persecution, because "[t]he plain language of the regulation does not allow for this interpretation.").

This Court has previously struck down the BIA's construction of certain of its own regulations when examined by the BIA in isolation and out of context. In *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011), this Court held that the BIA's interpretation of the parallel regulations at 8 C.F.R. § 245.13(k) and 8 C.F.R. § 1245.13(k), relating to departure from the United States during the pendency of a permanent residence application, was inconsistent with the regulations' plain language and context. There, Lezama-Garcia inadvertently drove across the border into Mexico and was detained while attempting to return without a valid entry document. *Id*. at 522-23. The IJ concluded that Lezama-Garcia abandoned his pending application "as of the moment of his departure," by operation of 8 C.F.R.

§ 245.13(k), which deems such application abandoned by departing the U.S. without first obtaining advance parole. *Id*. at 523-24. This Court reversed, holding such interpretation contrary to the regulation's plain language and context because two sentences before the language cited to by the Immigration Judge, the regulation mandates such a result only "[i]f an applicant . . . *desires* to travel outside, and return to, the United States." *Id*. at 530. This court reasoned that the regulation did not address the situation of an applicant such as Lezama-Garcia who did not desire to leave the United States, and that the consequence of failing to obtain advance parole should not apply to "undesired" or involuntary departures. *Id*. at 531. In so holding, this Court found that the BIA's interpretation of the regulations did not "sensibly conform" to the "purpose and wording" of the regulations. *Id*. at 532 (*quoting Lal v. INS*, 255 F.3d at 1004).

The BIA's construction of the appeal waiver regulations here is also an *unreasonable* interpretation because it is arbitrary and capricious, eviscerates an noncitizen's statutory right to appeal, and is untethered from the purposes of this country's immigration laws. Demanding that a noncitizen decide immediately whether to waive appeal before being able to investigate whether the IJ's decision may have been in error places a noncitizen in the impossible position of choosing "between Scylla and Charybdis." *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

While respondent may argue that Mr. Espana Orellana's remedy was to timely file a motion to reconsider with the IJ upon discovering the IJ's errors, such a remedy is clearly inadequate because only the BIA is empowered with certification authority, 8 C.F.R. § 1003.1(c), the authority to adjudicate an appeal, 8 C.F.R. § 1003.1(b), and the power to overrule the decision of an immigration judge, 8 C.F.R. §§ 1003.1(e)(5), (6)(iv). Therefore, limiting Mr. Espana Orellana to seeking reconsideration of the abusive actions and the decision complained of from the very IJ who took these actions and issued this decision would deprive Mr. Espana Orellana of the procedural protections of a direct appeal, including the production of a transcript of his hearings, a de novo review by the BIA of the IJ's conduct and legal determinations, and the right to review by this Court of an adverse decision for substantial evidence under 8 U.S.C. § 1252(b)(4)(B).

Furthermore, unlike direct administrative appeals, motions are "disfavored," and need to meet a "heavy burden" for success. *See e.g. INS v. Abudu*, 485 U.S. 94, 108 (1988); *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008). In addition, the decision whether or not to grant a motion to reconsider is discretionary, whereas a direct appeal is an administrative remedy as of right.

This Court's discussion in *Siong v. INS*, 376 F.3d 1030, 1038 (9th Cir. 2004), of the difference between an appeal and a motion is instructive:

> In a direct appeal of an IJ's decision, the BIA reviews the IJ's findings of fact for clear error and "questions of law, discretion, and judgment and all other issues" de novo. 8 C.F.R. § 1003.1(d)(3). By contrast, the decision to grant or deny a motion to reopen is "within the discretion of the Board." 8 C.F.R. § 1003.2(a); *see also INS v. Doherty*, 502 U.S. 314, 323, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992) (stating that "[t]he granting of a motion to reopen is ... discretionary"). . . Because the BIA was considering only the denial of a motion to reopen, Siong did not receive the in-depth review of the IJ's factual conclusion that he would be entitled to receive on direct appeal. Furthermore, the Board's discussion of the merits of Siong's claim was only in the context of determining whether he had shown the prejudice required to establish an ineffective assistance claim. Finally, because Siong's initial appeal to the BIA was dismissed as untimely, no transcript of the proceedings before the IJ was prepared. The Board therefore did not have a transcript before it – an obvious impediment to review.

In this case, the BIA's summary rejection of a timely appeal, based upon its appeal waiver rule, from which no proper purpose may be discerned, poses the real danger of completely denying a noncitizen of his or her statutory right to an appeal altogether. Thus, the BIA's appeal waiver rule cannot be said to be tied, even loosely, to the purposes of the immigration laws, but rather is in direct contravention of these laws. *See Judulang v. Holder*, 132 S.Ct. 476, 490 (2011) (requiring connection between BIA rule and immigration law purposes). *See also Toquero v. INS*, 956 F.2d 193, 196 (9th Cir. 1992) ("to survive judicial scrutiny, the BIA's procedures in summarily dismissing appeals must" not sink to the level of being "so arbitrary as to undermine the principles of due process").

There is also no reasoned explanation ever articulated by the BIA for the BIA's waiver of appeal rules. "When an administrative agency sets its policy, it must provide a reasoned explanation for its action." *Judulang v. Holder*, 132 S.Ct. 476, 479 (2011). Here, as with *Judulang*, "the BIA has failed to meet" this "unwavering" bar. *Id*.

Furthermore, because a restrictive reading of 8 U.S.C. § 1101(a)(47)(B) in light of the appeal waiver regulations would implicate the due process right of noncitizens facing removal to an administrative appeal, which under 8 U.S.C. § 1252(d)(1), is a prerequisite to obtaining judicial review, the canon of constitutional avoidance requires a common-sense reading of the statute, *see Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004), in a way that does not trample on the right to due process. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988) (holding that the imperative of constitutional avoidance trumps traditional principles of administrative deference). This canon of constitutional avoidance "allows courts to avoid the decision of constitutional questions. . . [by] choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts" *Clark v. Suarez Martinez*, 543 U.S. 371, 380-83 (2005); *See also Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Here, as Judge Berzon expressed it, "the appeal waiver system in immigration court raises some troubling due process concerns. Noncitizens – often unrepresented – are asked during the course of the hearing to make a binding decision whether to pursue an appeal. . . It may well be that due process requires time to think and consult with counsel before appeal rights can be validly waived." *Garcia*, 786 F.3d at 800.

CONCLUSION

For the foregoing reasons, this Court should declare once and for all that the statute, 8 U.S.C. § 1101(a)(47)(B), must govern, and strike down the BIA's inconsistent construction of the regulations at 8 C.F.R. §§ 1003.3(a)(1), 1003.39, and 1241.1(b) as ultra vires, grant this petition for review, overturn the BIA's October 31, 2014 decision, and remand for the BIA to adjudicate Mr. Espana Orellana's timely-filed appeal on the merits.

Dated: March 25, 2016

Respectfully submitted by,

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BRIEF FORMAT CERTIFICATION PER CIRCUIT RULE 32-1

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and the Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,801 words (not including the Table of Contents, Table of Authorities, and this Certificate of Compliance).

Dated: March 25, 2016

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CERTIFICATE OF SERVICE

I certify that, on March 25, 2016, I electronically filed the foregoing: **BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER** with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I also certify that counsels for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Executed this 25th day of March, 2016.

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