No.

In the Supreme Court of the United States

LEON SANTOS-ZACARIA,

Petitioner,

v.

MERRICK GARLAND, U.S. Attorney General,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After the Board of Immigration Appeals (BIA) denied her application for withholding of removal, petitioner Leon Santos-Zacaria filed a petition for review. Although the government agreed that the court had jurisdiction, the Fifth Circuit *sua sponte* dismissed in part for lack of jurisdiction pursuant to 8 U.S.C. § 1252(d)(1), which requires a noncitizen to exhaust "all administrative remedies available to the alien as of right."

This holding implicates two circuit splits, each of which independently warrants review.

1. Eight circuits hold that Section 1252(d)(1)'s exhaustion requirement is jurisdictional. Two circuits disagree, holding that exhaustion may be waived. Multiple courts and judges have called for further review of this issue. The first question presented is:

Whether Section 1252(d)(1)'s exhaustion requirement is jurisdictional, or merely a mandatory claims-processing rule that may be waived or forfeited.

2. Further, petitioner's merits argument is that the BIA engaged in impermissible factfinding. In these circumstances, the Fifth Circuit, along with three other circuits, requires a noncitizen to file a motion to reopen or reconsider with the agency in order to satisfy Section 1252(d)(1)'s requirement that a noncitizen exhaust "remedies available * * * as of right." Two other circuits, recognizing that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board" (8 C.F.R. § 1003.2) disagree. The second question presented is:

Whether, to satisfy Section 1252(d)(1)'s exhaustion requirement, a noncitizen who challenges a new error introduced by the BIA must first ask the agency to exercise its discretion to reopen or reconsider.

RELATED PROCEEDINGS

Santos-Zacaria v. *Garland*, No. 19-60355
(5th Cir. Jan. 10, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leon Santos-Zacaria respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 22 F.4th 570. The decisions of the Board of Immigration Appeals (App., *infra*, 14a-20a) and the immigration judge (*id.* at 21a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2022. On April 3, 2022, Justice Alito extended the time for filing this petition until May 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(d)(1) states:

> A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right.

8 C.F.R. § 1003.2(a) establishes, in relevant part:

> The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board [of Immigration Appeals], 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.

STATEMENT

This is an unusual petition insofar as it presents two distinct—though related—questions, each of which independently warrants this Court's review. The first question is whether Section 1252(d)(1) creates a jurisdictional issue-exhaustion requirement, or merely a waivable mandatory claims-processing rule. The second is whether, when the BIA introduces an error in the first instance, a noncitizen must first file with the BIA a discretionary motion to reopen or reconsider to satisfy Section 1252(d)(1)'s requirement of exhausting all "remedies available * * * as of right." The circuits are conflicted as to both.

Leon Santos-Zacaria, a 34-year-old transgender woman, was raped in her native Guatemala on account of her sexual orientation. App., *infra,* 2a, 15a; A.R. 118-119. Routinely subjected to discrimination—rising to the level of death threats—she fled Guatemala. A.R. 114-119. After arriving in the United States, she sought withholding of removal. App., *infra*, 16a.

Despite acknowledging her rape, the immigration judge surprisingly ruled that Santos-Zacaria did not suffer past persecution. App., *infra*, 27a. On appeal, the BIA reversed on this issue, finding that her rape—an issue not in material dispute—constitutes past persecution. *Id.* at 16a-17a. But the BIA, in a single-member decision, then went on to embark on new factfinding of its own, concluding that Santos-Zacaria had not shown she would be persecuted in the future. *Id.* at 17a-19a.

Santos-Zacaria petitioned for review, arguing that the BIA had engaged in impermissible factfinding by deciding the issue of future persecution itself, rather than remanding to the immigration judge for

factfinding (as required by the governing regulations). The government did not challenge this claim on any procedural ground, defending it only on the merits. C.A. Resp. Br. 1, 16-17. Given the opportunity to raise an exhaustion defense at oral argument, the government declined. C.A. Oral Arg. at 20:54-22:00.

The Fifth Circuit nonetheless found *sua sponte* that Santos-Zacaria's impermissible-factfinding argument was unexhausted. App., *infra*, 4a-5a. The Fifth Circuit holds that, if the BIA decision introduces a new error, petitioner must return to the BIA itself—via a discretionary and likely futile motion for reconsideration or reopening—before seeking review by an Article III court. *Ibid.* Moreover, the court below deems this requirement *jurisdictional*, meaning that the government may not forfeit or waive it. *Ibid.*

The purported statutory authority for this holding is 8 U.S.C. § 1252(d)(1), which states that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."

As a matter of plain text, the Fifth Circuit's position is doubly wrong: It is wrong as to the jurisdictional status of the exhaustion requirement, and it is wrong as the substantive content of that requirement. This Court should review both issues.

First, seven circuits follow the Fifth Circuit in holding Section 1252(d)(1) to be jurisdictional, while two circuits disagree. This circuit split is well recognized, and several opinions have called for further attention to this issue in light of the Court's recent decisions distinguishing jurisdictional from mandatory claims-processing rules. *Saleh* v. *Barr*, 795 F. App'x 410, 422 (6th Cir. 2019) (Murphy, J., concurring);

Robles-Garcia v. *Barr*, 944 F.3d 1280, 1283-1284 (10th Cir. 2019).

Second, two circuits have held that a noncitizen need not file a discretionary rehearing or reopening motion in order to satisfy Section 1252(d)(1), while three follow the Fifth Circuit in holding that discretionary motions are required. Confusion about whether "remedies available to the alien as of right" include discretionary motions creates a trap for the unwary—especially if the requirement is jurisdictional.

This case is a compelling vehicle for review. A different determination on either question would have allowed the panel to reach the merits of petitioner's claim—likely changing the outcome of the case. Indeed, Judge Higginson, dissenting below, reached the merits and *would* have reversed the BIA's decision, ruling for petitioner. App., *infra*, 10a-13a. That confirms that petitioner presents, at the very least, the sort of plausible claim that should be heard on the merits.

Because this is a frequently invoked statute, and because the issues addressed in these proceedings are extraordinarily grave—applicants for withholding press claims that, if meritorious, seek to avoid likely persecution or death—this Court's resolution of these questions is imperative. The Court should grant review of both questions presented.

A. Statutory and Regulatory Background

Federal statutes and regulations govern the procedure used to challenge immigration removal orders.

Removal orders begin in immigration court in front of an immigration judge. The Department of Homeland Security (DHS) files a charging document. 8 C.F.R. § 1003.14. After an initial hearing for

pleadings and scheduling, the immigration judge conducts an evidentiary hearing on contested matters. EOIR Policy Manual, pt. 2, § 4.15; 8 C.F.R. § 1240.10(a). At the end of this hearing the immigration judge may render an oral opinion immediately, or may render an oral or written opinion at a later date. *Id*. § 1240.12(a), EOIR Policy Manual, pt. 2, § 4.16(g). The immigration judge makes all findings of fact. The immigration judge then makes determinations of removability and decides on relief from removal—including asylum, withholding of removal, or protection under the Convention Against Torture. EOIR Policy Manual, pt. 2, § 1.4(a)(1)-(2).

When DHS seeks to reinstate a previous removal order, the noncitizen may not seek asylum. See 8 U.S.C. § 1231(a)(5). But when—like here—DHS finds a "reasonable fear of persecution," the noncitizen's withholding and Convention Against Torture claims are heard before an immigration judge and are appealable under the same regulations as initial removal orders. See EOIR Policy Manual, pt. 2, § 7.4(b)(4), (e), (h); *Johnson* v. *Guzman-Chavez*, 141 S. Ct. 2271, 2282-2283 (2021).

In either case, either party may appeal to the Board of Immigration Appeals (BIA) within 30 calendar days. 8 C.F.R. §§ 1003.2(b), 1003.38, 1240.15. The BIA is a 23-member body with nationwide jurisdiction over immigration appeals. *Id.* at § 1003.1(a)-(b). Except in special circumstances requiring panel or en banc review, BIA cases are adjudicated by a single board member. EOIR Policy Manual, pt. 3, § 1.3(a)(1).

Regulations bar the BIA from engaging in fact-finding except by taking administrative notice of a particularized list of matters. 8 C.F.R. § 1003.1(d)(3)(iv)(A). When "the immigration judge committed an error of law that requires additional

factfinding," the proper course is a remand to the immigration judge. *Id.* § 1003.1(d)(3)(iv)(D)(5)(2).

Following a BIA final removal order, noncitizens may petition for judicial review. 8 U.S.C. § 1252(a).

However, Article III courts do not have jurisdiction to review all immigration claims. For example, Section 1252(a)(2) is entitled "[m]atters not subject to judicial review." Section 1252(a)(2)(B) provides that "no court shall have jurisdiction to review" certain forms of discretionary relief. Section 1252(a)(2)(C) provides that "no court shall have jurisdiction" to review removal orders against noncitizens who are removable "by reason of having committed [certain] criminal offense[s]."

Other provisions of Section 1252 impose procedural requirements on petitions for review. The petition must be filed in the court of appeals for the circuit where the immigration judge sits. 8 U.S.C. § 1252(b). The petition must be filed within 30 days of the date of the final order of removal, among other procedural requirements. *Id*. §§ 1252(b)(1)-(3), 1252(c).

The authorizing statute also requires exhaustion: Before filing a petition, the noncitizen must have "exhausted all administrative remedies available to the alien as of right." *Id.* § 1252(d)(1).

In addition to appealing the immigration judge's decision to the BIA, and petitioning for review in the court of appeals, other administrative motions are available. Whether these motions are "administrative remedies available to the alien as of right" for purposes of the exhaustion requirement is the second question presented.

Prior to appealing to the BIA, either party may make a motion to the immigration judge to reconsider or reopen. EOIR Policy Manual, pt. 2, §§ 5.7, 5.8.

Regulations leave "[t]he decision to grant or deny a motion to reopen or a motion to reconsider [] within the discretion of the Immigration Judge." 8 C.F.R. § 1003.23. Similar motions are available before the BIA. Parties may move to reconsider within 30 days, identifying "errors of fact or law in the prior Board decision." *Id.* § 1003.2(b). Or they may file a motion to reopen with additional facts. *Id.* § 1003.2(c).

BIA regulations leave "[t]he decision to grant or deny a motion to reopen or reconsider [] within the discretion of the Board," subject to limited exceptions. 8 C.F.R. § 1003.2(a). The regulations make express that "even if the party moving has made out a *prima facie* case for relief," the BIA nonetheless "has discretion to deny a motion to reopen." *Ibid*.

B. Factual Background

Petitioner is a transgender woman attracted to men. App., *infra*, 2a. As a teenager in Guatemala, she was raped by a neighbor because of her sexual orientation. *Ibid.* The neighbor threatened to kill her. *Id.* at 24a-25a.

After fleeing Guatemala, she eventually came to the United States in 2008 and 2012. App., *infra*, 22a-23a. She was twice removed back to Guatemala. *Ibid.* To avoid persecution there, she went to Mexico, where she has also faced persecution. App., *infra,* 26a; A.R. 116, 122.

On brief trips to visit her father, she felt forced to hide her transgender identify by cutting her hair short and wearing men's clothes. App., *infra,* 11a. And in 2017, the State Department found "police violence against lesbian, gay, bisexual, transgender, and intersex individuals" was a "'significant human rights issues' in Guatemala." *Ibid.*

C. Proceedings Below

In May 2018, petitioner again entered the United States. App., *infra,* 16a. That same month, DHS began the process to reinstate the 2008 removal order. A.R. at 245.

Petitioner expressed her fear of returning to Guatemala and applied for withholding or deferral of removal. She alleged both that her "life or freedom would be threatened" in Guatemala, 8 U.S.C. § 1231(b)(3), and that her removal would violate the Convention Against Torture.

1. In an administrative proceeding at DHS, an asylum officer found that petitioner had a "reasonable fear of persecution" and referred the issue to immigration court. A.R. at 226-228.

2. In November 2018, the immigration judge denied petitioner's application for withholding of removal. App., *infra*, 29a. The immigration judge found that she "ha[d] not established past persecution." *Id.* at 27a. In the immigration judge's estimation, the rape and death threats were 18 years ago, committed by a neighbor who may no longer live in Guatemala, and did "not rise to the level of persecution contemplated by the Immigration and Nationality Act." *Ibid*. Despite petitioner's testimony that the rapist told her it was "because * * * I am a gay," A.R. 119, the immigration judge wrote that "[t]here is no indication that * * * [the rapist] was motivated by Respondent's membership [in] a Particularized Social Group." App., *infra*, 27a-28a.

Finding that petitioner therefore was not entitled to a presumption of future persecution, the immigration judge did not consider whether that presumption was rebutted. And without the presumption, the immigration judge found that Santos-Zacaria "did not

establish a well-founded fear of future persecution." App., *infra*, 29a.

3. Petitioner timely appealed to the BIA. In April 2019, the BIA dismissed petitioner's appeal. App., *infra,* 20a.

The Board disagreed with the Immigration Judge, finding that petitioner *had* established a presumptive fear of future persecution. App., *infra*, 16a-17a. Rather than remanding to the Immigration Judge for factfinding about whether the presumption was rebutted—as required by 8 C.F.R. § 1003.1(d)(3)(iv)(A)—the BIA instead proceeded to conclude on its own that "the presumption * * * has been rebutted in this case." App., *infra,* 17a.

4. Santos-Zacaria then petitioned the Fifth Circuit for review of the BIA's decision, challenging both the agency's procedure—the impermissible factfinding—and the substance of the decision.

Before the Fifth Circuit, the government's briefs did not claim Santos-Zacaria failed to exhaust her remedies. C.A. Resp. Br. 1, 16-17. At oral argument, a panel member pointed out to the government that "you haven't said that they failed to exhaust in a motion to reconsider." C.A. Oral Arg. at 20:54. The government declined that invitation to advance an exhaustion argument and instead responded to the merits of the factfinding claim. *Id.* at 21:00-22:00.

Nonetheless, the Fifth Circuit held *sua sponte* that Santos-Zacaria failed to satisfy Section 1252(d)(1), thus (in its view) depriving the court of jurisdiction. Relying on its precedent in *Omari* v. *Holder*, 562 F.3d 314, 319 (5th Cir. 2009), the Court held that "[f]ailure to exhaust an issue deprives" the Court of jurisdiction pursuant to Section 1252(d)(1) as to "that issue." App., *infra*, 4a. Additionally,

arguments that the BIA has introduced a new error—including "[a]llegations of impermissible factfinding by the BIA"—"must first be brought before the BIA in a motion for reconsideration to satisfy exhaustion." *Ibid*. (quoting *Omari*, 562 F.3d at 319-320).

Judge Higginson dissented. App., *infra*, 10a-13a. In his view, petitioner had adequately raised the impermissible factfinding issue by requesting remand to the immigration judge. And on the merits, Judge Higginson would have overturned the BIA's decision that the presumption of future persecution had been rebutted, because "the Government's evidence suggests that gay and transgender persons regularly face violence, harassment, and discrimination in Guatemala," and petitioner's own experiences corroborated that finding. *Id.* at 11a. Further, he explained that "the Government * * * gross[ly] mischaracteriz[ed] [] the record" in suggesting that petitioner could safely relocate within Guatemala, when she in fact "categorically *denied* that she could live safely anywhere within" the country. *Id.* at 12a (emphasis added).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address one or both of the two independently important issues in this case: whether Section 1252(d)(1) creates a jurisdictional exhaustion requirement, and whether that requirement—jurisdictional or not—requires noncitizens to file discretionary motions with the BIA before petitioning the federal courts for review.

I. THE COURT SHOULD RESOLVE WHETHER SECTION 1252(d)(1) IS JURISDICTIONAL.

A. The circuits are split over the jurisdictional status of Section 1252(d)(1).

There is a well-recognized and irreconcilable circuit split over whether 8 U.S.C. § 1252(d)(1) is

jurisdictional. Eight circuits hold it that it is jurisdictional; by contrast, two circuits have reevaluated this position in light of this Court's recent and repeated statements that the term "jurisdictional" should be reserved for rules addressing a court's "adjudicatory capacity," rather than simply "important and mandatory" procedural rules. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011).

As Judge Murphy of the Sixth Circuit recently put it, "a circuit split already exists" over the issue, and while "most circuit courts continue to treat [the Section 1252(d)(1)] exhaustion requirement as jurisdictional, * * * most of these decisions do not confront the Supreme Court's recent jurisprudence in this area." *Saleh* v. *Barr*, 795 F. App'x 410, 423 (6th Cir. 2019) (Murphy, J., concurring); see also *id.* at 421 ("I see reasons to doubt this jurisdictional view of § 1252(d)(1).").

Other courts have acknowledged the split as well. See *Lin* v. *Att'y Gen. of U.S.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008) ("Over the last several years, a number of our sister courts of appeals have struggled with 'the question whether the failure to raise an *issue* before the BIA is a jurisdictionally-fatal failure to exhaust an administrative *remedy* for purposes of 8 U.S.C. § 1252(d)(1), or simply raises the non-jurisdictional question whether review of that issue is precluded by the doctrine of administrative exhaustion.'") (collecting cases) (quoting *Zine* v. *Mukasey*, 517 F.3d 535, 539-540 (8th Cir. 2008)); *Alvarado* v. *Holder*, 759 F. 3d. 1121, 1127 n.5 (9th Cir. 2014) (noting that "some circuits have held that *issue* exhaustion, as opposed to exhaustion of administrative *remedies*, is not a statutory jurisdictional requirement," but adhering to contrary circuit precedent).

1. The **Seventh Circuit** has squarely held that "the [Section 1252(d)(1)] exhaustion requirement is

not a jurisdictional bar," and is instead "a mandatory case-processing rule." *Chavarria-Reyes* v. *Lynch*, 845 F.3d 275, 279 (7th Cir. 2016); see also *Arobelidze* v. *Holder*, 653 F.3d 513, 517 (7th Cir. 2011) (holding that, because Section 1252(d)(1) "is non-jurisdictional, it is subject to waiver, forfeiture, and other discretionary considerations"). As Judge Easterbrook explained, "[c]ourts have jurisdiction over cases and controversies, not particular legal issues that affect the outcome. We cannot imagine any reason why an agency should be forbidden, on jurisdictional grounds, to excuse an alien's failure to exhaust a particular issue." *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005); accord *Korsunskiy* v. *Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006).

Similarly, the **Second Circuit** holds that, "in the context of 8 U.S.C. § 1252(d)(1), the failure to exhaust individual issues before the BIA does not deprive this court of *subject matter jurisdiction* to consider those issues." *Zhong* v. *U.S. Dep't of Justice*, 480 F.3d 104, 121-122 (2d Cir. 2007); see also *id.* at 123 ("[C]ourts of appeals are not statutorily-precluded from reviewing issues not raised to the BIA."). In so holding, the court distinguished "[Section] 1252(d)(1)'s statutory jurisdictional requirement of exhaustion of *remedies*" from "the separate requirement of exhaustion of *issues*," which it viewed as "[j]udicially-imposed" and therefore waivable. *Id.* at 119, 123 (emphases added).

2. By contrast, eight circuits—the **First, Third, Fourth, Fifth, Sixth, Ninth, Tenth,** and **Eleventh Circuits**—all hold that Section 1252(d)(1) does impose a jurisdictional exhaustion requirement. See, *e.g.*, *Garcia-Cruz* v. *Sessions*, 858 F.3d 1, 7-8 (1st Cir. 2017) ("[A]dministrative exhaustion in this context is an inquiry into subject-matter jurisdiction" and is "nonwaivable.") (quotation marks omitted; *Lin*, 543

F.3d at 120 (concluding that a defect in "statutory exhaustion" under Section 1252(d)(1) "deprive[s] us of jurisdiction over a given case"); *Massis* v. *Mukasey*, 549 F.3d 631, 640 (4th Cir. 2008) (interpreting "section 1252(d)(1) as imposing a jurisdictional hurdle" when "an alien[] fail[s] to dispute an issue on appeal to the BIA"); *Omari*, 562 F.3d at 319 ("[F]ailure to exhaust an issue deprives this court of jurisdiction over that issue,"); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004) ("[O]nly claims properly presented to the BIA * * * can be reviewed by this court" as a jurisdictional matter); *Alvarado*, 759 F.3d at 1127 (Section 1252(d)(1) "bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below."); *Robles-Garcia* v. *Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019) ("[B]ecause Robles-Garcia has not yet made her *Pereira* argument to the IJ or the BIA, we lack jurisdiction to consider it."); *Alim* v. *Gonzales*, 446 F.3d 1239, 1253 (11th Cir. 2006) ("[W]e lack jurisdiction over claims that have not been raised before the BIA.").

Several of these courts, however, have expressed reservations about this precedent in light of this Court's more recent pronouncements. See *Robles-Garcia*, 944 F.3d at 1283-1284 (holding Section 1252(d)(1) jurisdictional "with some reluctance," because despite this Court's "warn[ings]" to "be sparing in our use of the word 'jurisdiction,'" "[w]e are bound by our prior Tenth Circuit precedent"); *Lin*, 543 F.3d at 120 n.6 ("[W]hile there is reason to cast doubt upon the continuing validity of our precedent holding that issue exhaustion is a jurisdictional rule, short of a review en banc, we must dutifully apply that precedent."); *Saleh*, 795 F. App'x at 421-423 (Murphy, J., concurring).

This Court's intervention is thus imperative to resolve this persistent and acknowledged split among the circuits.

B. This is an attractive vehicle to resolve this important question.

Not only has the question presented divided the circuits, but it is important and cleanly presented here.

1. Jurisdictional rules lead to "harsh consequences." *United States* v. *Wong*, 575 U.S. 402, 409 (2015). "Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and * * * do not allow for equitable exceptions." *Boechler, P.C.* v. *Comm'r of Internal Revenue*, No. 20-1472, 2022 WL 1177496 at *3 (U.S. Apr. 21, 2022). Confusion over whether a rule is jurisdictional therefore risks waste of judicial resources, prejudice to parties, and unnecessary abdication of judicial review. These consequences are magnified in the case of Section 1252(d)(1).

First, jurisdictional requirements have severe consequences for judges. If judges believe a question is jurisdictional, they must investigate and decide it *sua sponte* even if a case would be easier to resolve on the merits, and even in the absence of argument from the parties. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006). If the question is not in fact jurisdictional, this results in "waste of judicial resources." *Henderson*, 562 U.S. at 434. Conversely, if the question is jurisdictional and a court does not recognize and address it, the validity of the litigation will be constantly in question. *Fort Bend Cty.* v. *Davis*, 139 S. Ct. 1843, 1849 (2019).

These concerns are elevated in the immigration context. Thousands of immigration cases are appealed

to circuit courts every year (see Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1105 (2018)), and the noncitizens pursuing these appeals often lack resources, hire unsophisticated counsel, and face language barriers, among other obstacles to effective legal presentation. Given these barriers and the legal complexity of issue exhaustion, many noncitizens at least arguably fail to cleanly present or exhaust specific issues—leaving it to the courts to sort out, *sua sponte*, which issues are preserved.

Uncertainty over whether a requirement is jurisdictional also has severe consequences for litigants. A jurisdictional rule "alters the normal operation of our adversarial system." *Henderson*, 562 U.S. at 434. Generally speaking, courts do not "sally forth each day looking for wrongs to right." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). But a jurisdictional rule alters the norms of party presentation by forcing the court to attend to arguments that parties have not presented, and may even have purposefully waived.

This means that uncertainty over such a rule risks "unfair prejudice" to litigants. *Henderson*, 562 U.S. at 434. On the one hand, litigants who believe they are able to rely on the opposition's forfeiture or waiver need to know if they are unable to do so. *Arbaugh*, 546 U.S. at 514-516; *Union Pac. R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 558 U.S. 67 (2009). On the other hand, litigants who wish to waive their own arguments may be prejudiced if they are unexpectedly or unnecessarily forbidden from doing so. Government agencies, especially, may often wish to waive statutory requirements for efficiency or policy reasons. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013); *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975).

For these reasons, parties must understand whether Section 1252(d)(1) imposes a jurisdictional requirement. Noncitizens need to know whether they can rely on agency filings and representations—particularly with their lives often quite literally on the line. And the government must also know whether it is allowed to waive exhaustion—for example, in order to allow a meritorious but poorly preserved claim, to promote efficiency, or to achieve other policy goals.

2. Moreover, this case is an attractive vehicle to resolve the jurisdictional status of Section 1252(d)(1), because the Fifth Circuit's holding that the exhaustion requirement is jurisdictional was determinative of petitioner's claim.

Even a requirement that is merely mandatory, rather than jurisdictional, will lead to dismissal if the opposing party timely raises the requirement. *Fort Bend Cty.*, 139 S. Ct. at 1849. The difference between mandatory and jurisdictional rules becomes outcome-determinative, however, when the opposing party waives or forfeits the requirement—as was the case here.

In briefing at the Fifth Circuit, the government did not raise exhaustion. C.A. Resp. Br. 1, 16-17. At oral argument, when invited to argue exhaustion, the government declined. C.A. Oral Arg. at 20:54-22:00. If exhaustion is not a jurisdictional requirement, the court should therefore have accepted the government's election not to press the issue and proceeded to the merits of the improper-factfinding argument—rather than acting against the noncitizen *sua sponte*.

Judge Higginson, dissenting below, did reach the merits of petitioner's claim, and would have found for petitioner. App., *infra*, 10a-13a. Moreover, Judge Higginson's analysis of the merits strongly suggests that,

if the majority had not *sua sponte* raised exhaustion, petitioner's withholding of removal claim would have had a plausible chance to succeed—thus making the procedural holding below determinative of her ultimate right to relief under the INA.

C. Because Section 1252(d)(1) is not jurisdictional, the decision below is wrong.

The Fifth Circuit was wrong to characterize exhaustion as jurisdictional, and thus raise it *sua sponte* to dismiss Santos-Zacaria's petition for review.

Courts should "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler, P.C.*, 2022 WL 1177496 at *3 (quoting *Arbaugh*, 546 U.S. at 515). "Congress need not incant magic words, but the traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Ibid.* (citation and quotation marks omitted). Indeed, "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Ibid.*

That high bar is not met here. To begin, exhaustion requirements are generally understood to be nonjurisdictional affirmative defenses, and there is no evidence Congress intended to depart from this norm. See *Jones* v. *Bock*, 549 U.S. 199, 211, 216 (2007) (exhaustion requirement in the Prison Litigation Reform Act); *Salfi*, 422 U.S. 749 (exhaustion requirement in Social Security Act); *Union Pac. R. Co.*, 558 U.S. 67 (exhaustion of grievance procedures under Railway Labor Act); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010); (requirement of registration before copyright suit under Copyright Act).

To the contrary, statutory context affirmatively indicates that the provision was intended *not* to be jurisdictional. A number of surrounding provisions explicitly carve out the court's jurisdiction in no uncertain terms. For example, Section 1252(a)(2) states that "no court shall have jurisdiction to review" discretionary denials of relief and certain orders against noncitizen criminals. The Act adopting Section 1252(d)(1) added similar language to many other sections of Title 8. See Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codifying "no court shall have jurisdiction" in 8 U.S.C. §§ 1182(a), 1182(h), 1182(i), 1158, 1229c, 1231(a)(2), 1251(a)(3), 1252(g)(1), 1255(a)).

Thus, "[i]f Congress had wanted" to make the exhaustion requirement jurisdictional, "it knew exactly how to do so—it could have simply borrowed from the statute next door." *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018). The lack of explicit jurisdictional language in Section 1252(d)(1) indicates that Congress did not intend to create a jurisdictional requirement. Cf*., e.g.*, *Jama* v. *ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

The Court should grant review to correct the misinterpretation of Section 1252 that continues to prevail in most—but not all—of the circuits.

II. THE COURT SHOULD RESOLVE WHETHER MOTIONS TO RECONSIDER AND REOPEN ARE NECESSARY TO SATISFY SECTION 1252(d)(1).

Regardless of whether Section 1252(d)(1) is jurisdictional, the Court should resolve a circuit split on the content of that provision—specifically, whether discretionary motions are "remedies available * * * as of right" that must be exhausted. 8 U.S.C. § 1252(d)(1).

A. The circuits are divided over whether Section 1252(d)(1) requires discretionary motions to exhaust particular issues.

A noncitizen must "exhaust all administrative remedies available * * * as of right." 8 U.S.C. § 1252(d)(1). The circuits agree that a party must appeal an immigration judge's decision to the BIA. See 8 C.F.R. § 1003.1(b). A noncitizen who is unsuccessful before the BIA, however, has the additional option of moving the BIA to reconsider or reopen the decision. The decision to grant or deny these motions is "within the discretion of the Board," and the BIA "has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. § 1003.2.

The circuits are split on whether such discretionary motions are "remedies available * * * as of right" when the BIA itself introduces a new error.

1. Two circuits hold that when the BIA introduces a new error in its opinion (and the noncitizen thus had no opportunity to address that error in its brief before the BIA), the noncitizen need not file discretionary reconsideration or reopening motions in order to satisfy Section 1252(d)(1).

The **Ninth Circuit** has held that it "retain[s] jurisdiction over petitions where the challenged agency action was committed by the Board after briefing was completed, because the only remaining administrative remedies for such an action were not available 'as of right.'" *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271, 1280 (9th Cir. 2018).

Similarly, the **Eleventh Circuit** has rejected as "facially nonsensical" an exhaustion argument that would "fault[]" the noncitizen "for not raising an argument about [procedural flaws] displayed by a decision not yet in existence." *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1299 (11th Cir. 2015); see also *Ullah* v. *U.S. Att'y Gen.*, 760 F. App'x 922, 928-929 (11th Cir. 2019) (applying the same rule to a claim of "improper fact-finding" by the BIA, like the claim raised here); *Zapata-Matute* v. *U.S. Att'y Gen.*, 783 F. App'x 1008, 1013 (11th Cir. 2019) (reasoning that a noncitizen "could not have raised 'an argument about the lack of reasoned consideration displayed by a [BIA] decision not yet in existence'").

2. By contrast, the **First, Fifth, Eighth,** and **Tenth Circuits** do require discretionary motions for exhaustion purposes where the BIA commits a new error. See *Meng Hua Wan* v. *Holder*, 776 F.3d 52, 57 (1st Cir. 2015) (holding that "a claim asserting that the BIA engaged in impermissible factfinding must be raised on a motion for reconsideration in order to satisfy the exhaustion requirement"); *Omari*, 562 F.3d at 319-320 ("Omari could have brought his allegation of impermissible factfinding before the BIA in his motion for reconsideration, and we conclude that his failure to do so constitutes a failure to exhaust the issue."); *Mencia-Medina* v. *Garland*, 6 F.4th 846, 848-849 (8th Cir. 2021) ("Mencia-Medina did not exhaust his claim that the Board engaged in improper fact-

finding" because "[h]e did not move to reopen or reconsider on that basis, so the issue was never presented to the Board."); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 & n.6 (10th Cir. 2007) (holding that claims based "on the BIA's inability to conduct de novo factfinding" were unexhausted because they "should have been brought before the BIA in the first instance through a motion to reconsider or reopen").[1]

In sum, the courts of appeals are starkly divided. This Court's guidance is needed to bring them into alignment.

B. This question is important.

The question presented is also of great practical importance, and is cleanly presented here.

The circuit split creates a trap for the unwary, particularly for under-resourced litigants and counsel. Immigration lawyers familiar with practice in the Ninth and Eleventh Circuits would have their claims jurisdictionally barred elsewhere if they fail to file a likely futile motion to reconsider. Moreover, the atextual nature of the issue exhaustion requirement increases the likelihood that well-intentioned noncitizens with meritorious claims will nevertheless lose out on judicial review. See *McNeil* v. *United States*, 508 U.S. 106, 113 (1993) (discussing how clear, textually focused exhaustion rules avoid "trap[s] for the unwary").

The circuit split creates a Kafkaesque labyrinth for asylum seekers. When the BIA erroneously affirms

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[1] The Third Circuit has described the issue as "an open question." *Gracia Moncaleano* v. *Att'y Gen. of U.S.*, 390 F. App'x 81, 86 (3d Cir. 2010) ("It is an open question in our Circuit whether the petitioner must file a motion to reconsider" in order to exhaust claims that "result from the BIA's opinion itself" and thus "could not have been raised to the BIA" beforehand.).

a removal order, a noncitizen who looks at the statute would learn that he or she must only exhaust "remedies available * * * as of right." 8 U.S.C. § 1252(d)(1). Seeing only discretionary motions remaining (8 C.F.R. § 1003.2), the noncitizen would go to federal court to press his or her meritorious claim. But the noncitizen would find in certain circuits—and only in those circuits—that, when a government agency issues a removal order based on an error, the noncitizen must disregard the statutory text and first return to the BIA, asking the Board to exercise its discretion to correct the error before seeking judicial review. Failure to do this is fatal to the claim, since the court lacks jurisdiction and a motion to reconsider before the BIA would now be untimely. *Id.* at § 1003(b)(2). And in most circuits, the government is unable to exercise its policy discretion to waive this step out of sensitivity to its inequity, because the rule itself is deemed jurisdictional. *Supra*, Part I.

The uncertainty on this issue also contributes to the overwhelming case load faced by the BIA. Applicants facing the "drastic measure" of removal (*Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010)), must file largely futile motions to reconsider or reopen if their case arises in any of the circuits that have not yet issued a clear opinion on this issue. Finding it easier to not distinguish among circuits, parties may conservatively file these motions even in favorable circuits as a precaution. This contributes to the BIA receipt of over 7,600 motions to reopen or reconsider per year. EOIR, STATISTICS YEARBOOK, DOJ (2018) (data for 2018).

Moreover, if, as most circuits hold, Section 1252(d)(1) is jurisdictional, resolving a circuit split on the scope of such a frequently invoked federal jurisdictional provision is important. See Gelbach &

Marcus, *supra*. Jurisdictional rules are supposed to be easily administrable bright lines. Providing clarity to litigants regarding when they can access federal courts to review important executive branch adjudications of their rights is of fundamental importance.

Finally, this case is also an attractive vehicle to address the issue. Judge Higginson dissented below, highlighting the jurisprudential disagreement about when motions to reconsider are necessary. App., *infra*, 10a. And as Judge Higginson also points out, petitioner has a strong claim on the merits if this procedural bar is overcome, meaning that the Fifth Circuit's procedural ruling likely changes the ultimate outcome of the case. *Id.* at 10a-13a.

C. Because a discretionary motion to reopen is not a "remedy available as of right," the decision below is wrong.

The Fifth Circuit was wrong to read an atextual issue exhaustion requirement into the statute, thus forcing noncitizens to file discretionary motions before petitioning for review of removal orders.

1. "Statutory interpretation, as [this Court] always say[s], begins with the text." *E.g.*, *Ross* v. *Blake*, 578 U.S. 632, 638 (2016). And it ends there too when the Court finds "plain and unambiguous statutory language." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

The clear statutory text here does not require discretionary motions. The sole question under the statute is whether such a motion is a "remedy available to the alien as of right." 8 U.S.C. § 1252(d)(1). And BIA regulations definitively answer that question in the negative: "The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," and the Board is expressly provided

"discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. § 1003.2. Because regulations provide that the Board has authority to deny even a *meritorious* motion to reopen, this relief is therefore *not* "available to the alien as of right." The "plain and unambiguous statutory language" (*Hardt*, 560 U.S. at 251), should therefore end this case.

2. The circuits holding that discretionary motions nonetheless *are* required for exhaustion purposes do not grapple with this statutory text. Indeed, some of these circuits (including the court below) even explicitly *agree* that "a motion to reopen * * * cannot be characterized as a remedy available 'as of right,'" given "the broad discretion" granted the agency with respect to such motions. *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 388 (5th Cir. 2001); cf. *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582 (8th Cir. 2005) ("[C]onsistent with the distinction between exhaustion of remedies and issues * * * the plain language of § 1252(d)(1) could be read to require only exhaustion of *remedies* available as of right.").

Instead, these courts make the assumption that, although the plain statutory text speaks only of exhaustion of *remedies*, exhaustion of *issues* must be required as well. See, e.g., *Goonsuwan*, 252 F.3d at 388 ("The appropriate inquiry is not whether Goonsuwan filed a motion to reopen, but rather whether he presented to the BIA the issue [in question], thus exhausting his administrative remedies *as to that issue*."); *Meng Hua Wan*, 776 F.3d at 57 (regardless whether the remedy is available as of right, "the core purpose of the exhaustion requirement is frustrated when * * * the BIA's decision gives rise to a new issue and the alien fails to use an available and effective

procedure for bringing the *issue* to the agency's attention.") (emphasis added).

According to these circuits, the result is that claims of BIA errors occurring only after briefing is completed are unexhausted because the *issue* necessarily has not been presented to the BIA, notwithstanding that the only remaining procedural *remedies* with respect to such a claim—reopening or reconsideration—are discretionary and not "as of right." 8 U.S.C. § 1252(d)(1).

That assumption is both atextual and unfounded. To begin, it is a fundamental principle of statutory interpretation that "this Court" does not "usually read into statutes words that aren't there." *Romag Fasterns, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020); accord, *e.g.*, *Jama*, 543 U.S. at 341 ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply."). No issue-exhaustion requirement appears in the text of Section 1252(d)(1).

Such "[a]textual judicial supplementation [of a statute] is *particularly* inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019) (emphasis added). And it is indisputable that when Congress wants to create an issue-exhaustion requirement, it knows how to do so. See, *e.g.*, 29 U.S.C. § 160(e) (National Labor Relations Act, providing that "[n]o *objection* that has not been urged before the Board * * * shall be considered by the court") (emphasis added); 15 U.S.C. § 771(a) (Securities Act of 1933, providing that "[n]o *objection* to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission"); 16 U.S.C. § 825*l*(b) (Federal Power Act, employing similar language). That

Congress declined to use readily available issue-exhaustion language in Section 1252(d)(1) militates strongly against reading such a requirement into the text.

What is more, this Court has expressly rejected the premise underlying these circuits' approach: "that an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies." *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000). As the Court explained, "[w]e think that this is not necessarily so." *Ibid.* To the contrary, "requirements of administrative issue exhaustion are largely creatures of statute" (*ibid.*), and with respect to such "statutory exhaustion provision[s] * * * Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to" (*Ross* v. *Blake*, 578 U.S. 632, 639 (2016)).

Because Congress has required exhaustion only of as-of-right *remedies* in Section 1252(d)(1), and because exhaustion of remedies does not necessarily imply exhaustion of *issues* (*Sims*, 530 U.S. at 107), the circuit decisions requiring issue exhaustion via discretionary BIA motions are at odds with the statutory text. The Court should grant certiorari to correct this misunderstanding, too, and restore uniformity as to the application of this important federal statute.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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