

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LEON SANTOS-ZACARIA, AKA )  
LEON SANTOS-SACARIAS, )  
Petitioner, )  
v. ) No. 21-1436  
MERRICK B. GARLAND, )  
ATTORNEY GENERAL, )  
Respondent. )  
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Pages: 1 through 76  
Place: Washington, D.C.  
Date: January 17, 2023

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6                            v.                                    ) No. 21-1436

7   MERRICK B. GARLAND,                         )

8   ATTORNEY GENERAL,                          )

9                            Respondent.                        )

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12    Washington, D.C.

13    Tuesday, January 17, 2023

14

15    The above-entitled matter came on for  
16 oral argument before the Supreme Court of the  
17 United States at 10:03 a.m.

18

19   APPEARANCES:

20

21   PAUL W. HUGHES, ESQUIRE, Washington, D.C.; on behalf  
22    of the Petitioner.

23   YAIRA DUBIN, Assistant to the Solicitor General,

24    Department of Justice, Washington, D.C.; on behalf  
25    of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-1436, San -- Santos-Zacaria versus Garland.

Mr. Hughes.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE PETITIONER

MR. HUGHES: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals erred in dismissing Petitioner's improper fact-finding claim in three separate ways.

First, unlike several of the -- its neighboring provisions, the exhaustion requirement in 1252(d)(1) does not contain the requisite clear statement to render it jurisdictional.

Second, and regardless, any issue preservation requirement is not statutory and thus not jurisdictional, and that is especially so since the government's rule is not normal issue preservation, where issues must be raised before a decision, but, rather, a super-strong rule where a litigant must, in some poorly

1 defined category of cases, request  
2 post-decision reconsideration.

3 Third, because a motion to reconsider  
4 is not a remedy available as of right, a  
5 non-citizen does not need to file such a motion  
6 to properly exhaust.

7 I'd like to start with this last  
8 point, which has tremendous practical  
9 implications, and if we are right the  
10 Petitioner properly exhausted, she prevails  
11 regardless of (d)(1)'s jurisdictional status.

12 The government correctly concedes that  
13 a non-citizen need not normally file a motion  
14 to reconsider. This should foreclose the  
15 government's position because the government  
16 has no textual basis to argue that motions to  
17 reconsider sometimes qualify as remedies  
18 available as of right and sometimes not.

19 As we have described, a motion to  
20 reconsider is plainly a discretionary remedy.

21 CHIEF JUSTICE ROBERTS: Well, is that  
22 -- how do you analyze it? You -- you have an  
23 absolute right to file a motion for  
24 reconsideration, right? It may be  
25 discretionary whether you're going to get

1 reconsideration or not. So how do you parse  
2 that? Where do you look to see if something is  
3 a matter of right? Is it being the -- the --  
4 the right to seek it or the right to have the  
5 court look at a particular thing? How do you  
6 --

7 MR. HUGHES: I -- I think the term "as  
8 of right," Your Honor, is one that's been well  
9 defined in centuries of judicial practice as  
10 one where the -- the decision-maker lacks  
11 discretion. And I'd point the Court to this  
12 Court's Rule 10, just as one place to begin,  
13 where the Court says review on a writ of  
14 certiorari is not a matter of right but of  
15 judicial discretion. And in the briefs, we  
16 cite several other examples, like appeals in  
17 the federal courts, Rules 3 and 4, that --

18 CHIEF JUSTICE ROBERTS: Well, but just  
19 to stop you there, you know, review on  
20 certiorari is not a matter of right. You may  
21 not get review. On the other hand, you do have  
22 an absolute right to file a petition for  
23 certiorari.

24 MR. HUGHES: And as of --

25 CHIEF JUSTICE ROBERTS: So I'm just

1 saying, in one of those situations, where do  
2 you look to see if there's -- where's the  
3 right? Is it in the actual decision of the  
4 court, or is it in the right to petition the  
5 court to -- to afford such consideration?

6 MR. HUGHES: So I think the  
7 distinction is whether or not there's that  
8 layer of discretion because that's what "as of  
9 right" means as a technical term. And I think  
10 it has to mean that in this context, or else  
11 Congress's inclusion of the phrase "as of  
12 right" doesn't do any effective work in the  
13 context of this statute.

14 Look to the examples the government  
15 points to as things that it calls  
16 discretionary. That's cancellation of removal,  
17 adjustment of status, those sorts of things.  
18 The government says those are discretionary.  
19 But note, if a non-citizen files a request for  
20 one of those things, they have a right to at  
21 least have it considered in the same way one  
22 would have a right to -- to file the  
23 reconsideration motion.

24 But nobody, including the government,  
25 in those other contexts thinks that that

1 renders the thing that's being requested the  
2 kind of remedy that would be fairly described  
3 in law as one as of right.

4 So, again, if it's just the right to  
5 file, then that just effectively negates this  
6 limitation that Congress expressly put into  
7 (d)(1).

8 JUSTICE BARRETT: Why is --

9 JUSTICE KAVANAUGH: Mr. --

10 JUSTICE BARRETT: -- why is -- what is  
11 the remedy here? I guess I would have thought  
12 of an appellate remedy as, you know, vacatur or  
13 reversal, that kind of thing. And I think, you  
14 know, I -- I can see where you're going with  
15 "as of right." When we think about the  
16 remedy -- and this is a problem, I think, on  
17 the government's side too -- why would the  
18 remedy either be the right to file a motion or  
19 the review that you obtain? Neither one of  
20 those really seems like a remedy to me.

21 MR. HUGHES: Well, I think, in the  
22 context of exhaustion provisions, the notion of  
23 a remedy is usually considered what is it --  
24 what is something that is capable of being  
25 used, so that -- that's the term "available



1 remedies" that the courts looked at in the  
2 Prison Litigation Reform Act, and it's capable  
3 of being used for getting relief for the -- the  
4 -- whatever the litigant's position is.

5 So one -- so -- something that's a  
6 remedy is the kind of administrative mechanism  
7 that one could use to get some form of relief.  
8 And so that is why I think an appeal to the --  
9 the -- the BIA, for example, would be an  
10 available remedy that we would agree would be  
11 one that would qualify as something as of  
12 right.

13 JUSTICE BARRETT: Which really helps  
14 you, right? Because then, if it's just  
15 shorthand for the procedure that would allow  
16 someone to get relief, then it does seem more  
17 like it's the actual review and not the filing  
18 of the motion.

19 MR. HUGHES: I -- I think -- yes, Your  
20 Honor, I -- I -- I agree with that. And,  
21 again, we don't say that a motion to reconsider  
22 could not be a remedy. It's just not a remedy  
23 that is available as of right. It's a  
24 quintessential discretionary remedy. And to  
25 give purpose to Congress's limitation to

1 discretion -- or to -- to remedies as of right,  
2 we think that's exactly the kind of category of  
3 thing that -- that should be excluded.

4 JUSTICE KAVANAUGH: Can I ask you  
5 about the first issue, the question of whether  
6 it's jurisdictional? I read our cases to  
7 create a fundamental divide between statutes  
8 that speak to the court's authority and  
9 statutes that impose commands on litigants or  
10 prohibitions on litigants.

11 And this statute, at least on its  
12 face, speaks to the court, the court's power to  
13 review. So why isn't that enough in this  
14 particular case?

15 MR. HUGHES: Your Honor, I certainly  
16 think that's a relevant factor, but by no  
17 stretch do I think that's a sufficient factor.  
18 And let me offer some other examples.

19 So, in the context of Section 1252  
20 itself, we cite to provision (b)(2) in the  
21 briefs, where (b)(2) says, "The court of  
22 appeals shall review the proceeding on  
23 typewritten briefs." That's mandatory. It  
24 uses the word "shall." It's a direction at the  
25 court. It's saying what the court shall do,

1 and it's in the context of review. It's --

2 JUSTICE KAVANAUGH: This -- this says  
3 "may review only if," not "if," "only if." And  
4 this provision in '96 carries forward a prior  
5 version of this language that this Court itself  
6 had referred to as jurisdictional.

7 And so I -- I guess I'm still -- put  
8 aside the example you gave -- why shouldn't the  
9 divide -- and we referred in Fort Bend to the  
10 divide being does the provision speak to a  
11 court's authority as opposed to a party's  
12 procedural obligations, and this seems to speak  
13 to the court's authority because it says a  
14 court may review only if.

15 MR. HUGHES: Well, in -- in a few  
16 ways, a few answers, Your Honor. First, there  
17 are additional examples, habeas in -- in  
18 Section 2254(b) speaks to the courts'  
19 authority, the First Step Act speaks to courts'  
20 authority, but those have been found to be  
21 non-jurisdictional. I can explain that.

22 But, on the recodification point too,  
23 Your Honor, there are two pretty essential  
24 points. First, I don't think it's -- it's fair  
25 to read Stone as having said the exhaustion

1 principle was jurisdictional. Certainly,  
2 there's no express holding that -- that would  
3 trigger a recodification provision -- or -- or  
4 -- or doctrine.

5 But, second, beyond that, in 1996,  
6 Congress did change the language. Now it  
7 didn't change the language enormously, but it  
8 changed the language. And I think this is  
9 important because, in 1996, in IIRIRA, as we  
10 point out, in 12 other places, when Congress  
11 wanted to strip --

12 JUSTICE KAVANAUGH: But I guess -- I'm  
13 sorry to interrupt --

14 MR. HUGHES: Yeah.

15 JUSTICE KAVANAUGH: -- but does this  
16 language speak to the courts' authority?

17 MR. HUGHES: It -- it directs actions  
18 courts take during review in the same way that  
19 (b)(2) does. I don't think, though, that  
20 necessarily means it is a limitation on the  
21 power of the court. At least that's not the  
22 only plausible understanding of the statute as  
23 a limitation on --

24 JUSTICE KAVANAUGH: Do you --

25 MR. HUGHES: -- the power of the

1 court.

2 JUSTICE KAVANAUGH: -- do you think  
3 Congress could make an exhaustion requirement  
4 jurisdictional without using the word  
5 "jurisdiction"?

6 MR. HUGHES: I think it would be  
7 exceedingly difficult for the -- for the court  
8 to do so because --

9 JUSTICE KAVANAUGH: And why -- why  
10 then do we have a special magic words  
11 requirement just for exhaustion requirements  
12 and not just follow the usual Fort Bend divide?

13 MR. HUGHES: So, Your Honor, I'm not  
14 suggesting there are some special magic words,  
15 but I think there are several factors that  
16 counsel here. One is the point of what  
17 Congress did in all the surrounding provisions.  
18 It had in this statute a special language when  
19 it wanted to. So I do think the magic words  
20 applies a bit differently in the context of --  
21 of this particular statute.

22 But, with exhaustion, especially in  
23 the context where it is an agency that is  
24 establishing the rules of exhaustion, it would  
25 be passing strange in our view that an agency

1 is delegated the authority to establish rules  
2 that themselves then have jurisdictional  
3 character that limit the -- the subject matter  
4 jurisdiction of federal courts.

5 We think --

6 JUSTICE ALITO: Mr. --

7 MR. HUGHES: -- if that's what  
8 Congress intended, it would need to say that  
9 expressly.

10 JUSTICE ALITO: Mr. Hughes, could you  
11 give me the example of how a provision -- an  
12 exhaustion provision would have to be worded to  
13 limit the court's jurisdiction without using  
14 the term "jurisdiction"?

15 MR. HUGHES: I -- I -- Your Honor, I  
16 don't think I have an example, but I do -- in  
17 this statute, when Congress wanted to speak in  
18 jurisdiction, in 12 other places, it used the  
19 phrase "no court shall have jurisdiction," and  
20 I think that's pretty statute-specific evidence  
21 that when Congress meant to use jurisdiction in  
22 this statute it had the -- the language at  
23 hand.

24 JUSTICE ALITO: So it really does seem  
25 like you're arguing for a magic words rule.

1 And haven't we said that magic words are not  
2 required?

3 MR. HUGHES: Oh, certainly, Your  
4 Honor. But I'm not talking about the -- the  
5 general abstract of what applies in every case.  
6 I'm talking about in IIRIRA, when Congress  
7 wrote this statute, it was fixated on what is  
8 going to be jurisdictional and what is not  
9 going to be jurisdictional. It had that  
10 language at hand, and it used in this -- in  
11 this statute very precise language.

12 JUSTICE ALITO: So, if all that we had  
13 before us were the language of the provision,  
14 would it be jurisdictional?

15 MR. HUGHES: Would -- if we knew  
16 nothing --

17 JUSTICE ALITO: We have a provision  
18 that is worded exactly like this provision, but  
19 we don't have (d)(2). We don't have any of  
20 your other arguments. We just have the  
21 language. Would that be a jurisdictional  
22 provision?

23 MR. HUGHES: I -- I -- I don't think  
24 it necessarily would, but in under --  
25 undertaking the clear statement test, this

1 Court says it looks to all of the traditional  
2 tools of statutory interpretation.

3 JUSTICE ALITO: Well, why would that  
4 language not be sufficient?

5 MR. HUGHES: Well, Your Honor, I don't  
6 --

7 JUSTICE ALITO: Because it doesn't  
8 include the word "jurisdiction"?

9 MR. HUGHES: Well, in -- in this  
10 specific context, that's right, but also, in  
11 describing the context of review, that --  
12 there's ambiguity in that language because  
13 review, it can mean in certain contexts an  
14 equivalence of -- of -- of subject matter  
15 jurisdiction.

16 JUSTICE ALITO: If --

17 MR. HUGHES: But it can --

18 JUSTICE ALITO: Oh, I'm sorry, go  
19 ahead, finish.

20 MR. HUGHES: It -- it can also  
21 describe what it is a court is to do in the  
22 course of reviewing things for which it does  
23 have subject matter jurisdiction. So I do  
24 think there's inherent ambiguity there. But,  
25 again, we don't look at just this one issue.



1 We look at all the traditional tools of  
2 interpretation.

3 And I think that shows that -- again,  
4 my burden is not to say that our argument is  
5 the better one. The Court was quite clear in  
6 Boechler saying that's not the test. It's the  
7 government has to show their interpretation as  
8 jurisdictional is the only plausible argument  
9 for them to demonstrate that. And -- and,  
10 again, if we're wrong about this, it has the  
11 effect of delegating to agencies the ability to  
12 make rules that have jurisdictional character.

13 JUSTICE ALITO: All right. If we look  
14 at one of our own prior decisions handed down  
15 during the bad old days when the Court was not  
16 disciplined about the use of jurisdiction and a  
17 provision is described as jurisdictional, does  
18 it follow necessarily that that is -- that  
19 provision is jurisdictional?

20 MR. HUGHES: I don't think that it's  
21 necessarily the case, if a court did something  
22 that I think Arbaugh calls a drive-by after --

23 JUSTICE ALITO: No, it's not a  
24 drive-by. It's a -- it -- it's a pretty clear  
25 statement in the case describing this as

1 jurisdictional, the issue, and -- and the Court  
2 says it's jurisdictional.

3 MR. HUGHES: Well, I think the Court  
4 would have precedent to decide if it's going to  
5 adhere to a -- a -- a -- a -- a prior  
6 pronouncement of this Court or if there's a  
7 basis in -- in changed case law to revisit  
8 that, so I think that that normal process would  
9 apply.

10 But, if the Court has held that it's  
11 jurisdictional not just in a -- in a passing  
12 statement but in a reasoned holding, that --  
13 that's going to be binding too.

14 JUSTICE SOTOMAYOR: Well, we did --

15 JUSTICE ALITO: Well, I'm just  
16 wondering -- if I could --

17 JUSTICE SOTOMAYOR: Sorry.

18 JUSTICE ALITO: I'm sorry, one -- one  
19 more follow-up. Then I'm done.

20 If -- if that's so, then why would you  
21 even concede that a statute passed by Congress  
22 in the days when the Court and Congress were  
23 using the term "jurisdiction" in some instances  
24 to talk about claims processing rules, why  
25 would that even be sufficient?

1           MR. HUGHES: Well, I -- I -- I'm not  
2 sure I -- I need to say that that argument goes  
3 that far. I think it's well understood that in  
4 -- in this statute in IIRIRA, Congress used  
5 "jurisdiction," you know, in a particular way,  
6 that Congress did, in fact, have  
7 jurisdiction-stripping in mind in 1996.

8           And in this statute, Congress was not  
9 using it in some loose sense of the word. It  
10 knew what it was doing in the statute. It just  
11 used the jurisdictional language when it wanted  
12 to here.

13           JUSTICE KAGAN: The -- the government  
14 says that this statute uses the words -- the  
15 words "jurisdiction" and "judicial review"  
16 interchangeably. You can see that in  
17 1252(a)(2) where it talks about matters not  
18 subject to judicial review, and then there  
19 follow a whole list of provisions saying that  
20 the -- no court shall have jurisdiction.

21           So, if that's true, if there's  
22 interchangeability between "jurisdiction" and  
23 "judicial review" in this statute, doesn't your  
24 argument on the meaning of (d) become much  
25 weaker?

1           MR. HUGHES: No, Your Honor, I don't  
2 think so. The government rests on (a)(5) for  
3 that sort of interchangeability argument, and  
4 to the extent they think there is that sort of  
5 hypertechnical argument, it fails because  
6 (a)(5) references a broader phrase, "judicial  
7 review."

8           And (d)(1) notably doesn't actually  
9 use the term "judicial review." It uses the  
10 term "review." And I think that's distinct  
11 because "review," again, can mean the concept  
12 of jurisdiction, or it can mean the act of what  
13 a court does in the context of when it is  
14 reviewing something over which it does have  
15 jurisdiction.

16           But, again, even if the Court is --  
17 does not agree with us on (d)(1) -- and I think  
18 it should for -- for the reasons we've said --  
19 there is no stretch in which this issue  
20 preservation principle that the government  
21 suggests itself has jurisdictional character.

22           And I think that's a -- a completely  
23 separate and independent concern with the  
24 government's position because, again, issue  
25 preservation, as this Court in -- in Carr and

1       Sims and a series of cases has said, is a  
2       doctrine that is distinct from remedy  
3       exhaustion.

4               And we don't think there's any basis  
5       to find that there has been a clear statement  
6       in this statute to say issue preservation takes  
7       on jurisdictional character. The statute's  
8       quite clear, it says remedy exhaustion, not  
9       issue exhaustion.

10              And, beyond that, the kind of issue  
11       exhaustion, issue preservation the government  
12       is pressing is not sort of the normal  
13       run-of-the-mill issue preservation that we  
14       think of in federal courts.

15              Normal issue preservation is district  
16       court decides an issue. You go to the court of  
17       appeals. In your brief, you have to preserve  
18       any arguments you wish for the court of appeal  
19       on pain of forfeiture or waiver.

20              But that's not the principle that --  
21       that's doing -- that the government thinks is  
22       doing the work here. They think there is a --  
23       a sort of doctrine of preservation on steroids  
24       where, after the agency decides the case, one  
25       has to go back to the agency to ask for

1 reconsideration.

2 That's not how things normally --

3 JUSTICE KAVANAUGH: Well, it -- it's  
4 limit -- more limited than that. It's where  
5 the agency decision itself, the BIA decision  
6 itself, introduces a new err -- error that  
7 couldn't previously have been known.

8 In those circumstances, they're saying  
9 -- I'm not saying I agree or disagree with this  
10 -- but they're saying more narrowly, in those  
11 circumstances, you have to go back for the  
12 motion to reconsider.

13 MR. HUGHES: Well, I -- I want to talk  
14 about the -- the -- what Congress did here and  
15 why I don't think that's a proper way to read  
16 the statute, but that rule, I don't think, Your  
17 Honor, is one that is especially administrable.

18 As we point out how the Fifth Circuit  
19 has dealt with this, they have found that the  
20 most basic kind of administrative error, the  
21 agency didn't give reasons for its decision, is  
22 the kind of error that one has to present back  
23 to the agency on a reconsideration motion.

24 I think that is taking this doctrine  
25 quite far to say, if -- if the agency just

1 gives no reason that you can't go up to the  
2 court of appeals, you have to go back to the  
3 agency. I -- I -- I don't think that's a  
4 proper rule.

5 But, when Congress wants to have a  
6 reconsideration mechanism, there are a few ways  
7 that it does it. We -- we -- we acknowledge in  
8 the briefs, in certain statutory schemes,  
9 Congress has chosen to do so. For example, we  
10 point to the FERC scheme, 21 U.S.C. Section  
11 825(1).

12 And the way that works in FERC and  
13 other agencies is the agency issues a decision,  
14 and then, after the agency issues a decision,  
15 the litigant who's disappointed has to go back  
16 to the agency and say the agency got these  
17 series of issues wrong, and then their appeal  
18 is limited to the nature of those issues  
19 that -- that have been presented.

20 But, when Congress does that, it does  
21 so with very express language that's nothing  
22 like what we have here. But, importantly,  
23 struck -- structurally, it creates a tolling  
24 process whereby judicial review does not begin  
25 until that process is complete.

1           The way the government envisions this  
2 statute is a litigant would have to first file  
3 a petition for review of the final order of  
4 removal, but, at the same time, the government  
5 believes, while you're filing that petition for  
6 review to have a timely petition for review,  
7 your claims are simultaneously unexhausted and  
8 you must at -- at -- at that same time go back  
9 to the -- the -- the Board and ask for a motion  
10 to reconsider.

11           And I think that position is  
12 compounded by the fact that the government  
13 believes this is a jurisdictional rule. So  
14 take, for example, the only issue you're  
15 raising in your petition for review is the  
16 argument that the government thinks is  
17 unexhausted. The government is setting up a  
18 scenario where a litigant has to file a  
19 petition for review that it itself believes the  
20 court of appeals at that moment lacks  
21 jurisdiction over because it's unexhausted and  
22 then simultaneously exhausts that claim before  
23 the agency.

24           JUSTICE GORSUCH: Mr. Hughes, it is  
25 certainly an interesting process that -- that's



1 being posited, and one wonders how many circles  
2 of review would be required if -- if an  
3 agency's explanation continued to be deficient.  
4 Could it be more than one? Interesting  
5 questions.

6           But I -- I just -- before you sat  
7 down, I wanted to give you a chance to respond  
8 to the government's suggestion that even if it  
9 loses on everything else, we should remand the  
10 case to allow the court of appeals to have the  
11 opportunity sua sponte to raise some objections  
12 of its own. And I know the government lawyer  
13 before the Fifth Circuit didn't raise any of  
14 these concerns and seemed to disavow them. I  
15 don't know whether that's waiver or forfeiture  
16 or -- or what in your view, but I -- I just  
17 wanted to give you a chance to -- to talk to us  
18 about that.

19           MR. HUGHES: Thank you, Your Honor.

20           So the -- the government's opposition  
21 brief at page 13, they acknowledged at the  
22 certiorari stage that waiver and forfeiture  
23 would apply in this case. I think that  
24 acknowledgment was -- was right then.

25           Their suggestion that there should be

1 a sua sponte ability of the lower courts to  
2 reconsider I -- I -- I just don't think is  
3 correct. And we point the Court to the  
4 Sineneng-Smith decision, where this Court said  
5 pretty clearly that the lower courts "should  
6 not sally forth each day looking for wrong" --  
7 "wrongs to right." You know, we're talking  
8 about the government here. If the government  
9 wishes to press an exhaustion -- a failure to  
10 exhaust, they certainly have the -- the ability  
11 to do so. And, again, it was asked at oral  
12 argument and the government did not take the  
13 opportunity to press exhaustion.

14 And -- and let me be clear, I think  
15 there's a substantive reason to think why it is  
16 government lawyers should, in fact, have this  
17 authority. When we're talking immigration  
18 cases, it's -- it's known that sometimes  
19 individuals are pro se or may not have, you  
20 know, every ounce of -- of -- of lawyering  
21 behind them, and it can well be appropriate to  
22 -- to determine in specific cases the  
23 government wishes to waive exhaustion in the  
24 interests of justice and public confidence in  
25 the immigration system.

1 JUSTICE JACKSON: Can I just ask you  
2 about whether or not we need to opine on the  
3 issue exhaustion versus remedy exhaustion if we  
4 agree with you about "as of right"?

5 MR. HUGHES: I don't think the Court  
6 would have to, Your Honor. If the Court agrees  
7 with us that we're correct in the meaning of  
8 (d)(1) and that Petitioner here properly  
9 exhausted, then the Court need not reach the  
10 question of the jurisdictional status of these  
11 other issues.

12 I do think Petitioner prevails either  
13 if the Court agrees that (d)(1) is not  
14 jurisdictional at all or issue preservation  
15 isn't jurisdictional or, alternatively, if  
16 we're right about the meaning of the statute.  
17 So I -- I -- I think the Court could resolve  
18 this case on -- on -- on a variety of those  
19 different grounds.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Thomas, anything?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: Is there -- is  
25 there any scenario you -- in which you see us

1 addressing both questions? Assume we --

2 MR. HUGHES: Again, Your Honor, I  
3 think we wouldn't presuppose to suggest how the  
4 Court should resolve the case. We, I think,  
5 have three independent ways that -- that we --

6 JUSTICE SOTOMAYOR: No, I know, and  
7 they're each independent. I'm asking a  
8 different question.

9 Is there any way we reach both?

10 MR. HUGHES: Well, if the Court were  
11 to disagree with us on one, I think it would  
12 have to -- to reach the other. Alternatively,  
13 if the Court agrees with us on -- on all of the  
14 points, I think it would be at the Court's  
15 discretion if it believes that bringing  
16 guidance to the system here would warrant  
17 resolving both the jurisdictional question and  
18 -- and the statutory question. So I -- I -- I  
19 think it would be, you know, at the -- at the  
20 Court's election, depending on how it wishes to  
21 resolve the issue.

22 JUSTICE SOTOMAYOR: I -- I have a very  
23 simple view. I know we've been trying hard to  
24 bring clarity to this area of jurisdiction or  
25 not. And you kept saying the plausibility

1 argument. And you're right, because it's  
2 strange -- it's strange language, because it  
3 seems addressed to the court but on an issue  
4 where it's relying on the litigant to exhaust,  
5 which is very different than most  
6 jurisdictional cases that have to do with  
7 subject matter classifications, correct? The  
8 court can't hear certain types of issues, and  
9 it has nothing to do with what the litigant  
10 does or doesn't do.

11 MR. HUGHES: That -- I -- I entirely  
12 agree, Your Honor. I think that's what this  
13 Court's Patchak case teaches, which is, if the  
14 -- the restriction goes to something  
15 substantive about the nature of the claims,  
16 some substantive category, that context  
17 suggests it is more likely the Court's speaking  
18 of jurisdiction.

19 Rather, when Patchak gives exhaustion  
20 as a specific example and it goes through the  
21 procedure of how those claims are -- are to be  
22 addressed, that is at least thumb on the scale  
23 towards thinking it's not a jurisdictional  
24 requirement.

25 JUSTICE SOTOMAYOR: So what you're

1 basically saying, both of you could have good  
2 arguments, as you do, but, in that case, the  
3 tie is against jurisdiction.

4 MR. HUGHES: And, again, in this  
5 specific statute, when Congress wanted to speak  
6 about jurisdiction, it had the express language  
7 at hand. It used it a lot in the past --

8 JUSTICE SOTOMAYOR: It would have been  
9 very easy to do this one. The court has no  
10 jurisdiction to review, and (a) and (b) would  
11 remain exactly the same, correct?

12 MR. HUGHES: In provisions above and  
13 below, Congress did exactly that. It revised  
14 this language. It didn't use the same language  
15 it had used everywhere else.

16 JUSTICE SOTOMAYOR: And Stone did not  
17 speak about exhaustion. Stone talked about  
18 jurisdiction with respect to time limits,  
19 correct?

20 MR. HUGHES: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: So there is no  
22 holding by us that exhaustion is  
23 jurisdictional?

24 MR. HUGHES: Correct. We agree, Your  
25 Honor.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAVANAUGH: In the reply  
3 brief, you say that when a statute addresses a  
4 court's competence to adjudicate a particular  
5 category of cases, it may be -- indeed be  
6 jurisdictional, and then you discuss 2253,  
7 867(a), and 1447(d), and you say those are all  
8 jurisdictional even though they don't use the  
9 word "jurisdiction," correct?

10 MR. HUGHES: Well, at the very least  
11 they are far more jurisdictional than what we  
12 -- we have here because they are going to the  
13 nature of the claim, whereas this statute is  
14 agnostic to the nature of the claim but,  
15 rather, goes to the procedure, whether the  
16 individual litigant used the proper procedure  
17 below.

18 JUSTICE KAVANAUGH: So are -- do you  
19 think we should say in the interest of  
20 providing clarity, because I think, you know,  
21 this can be a huge waste of time that's  
22 unnecessary for the lower courts and doesn't  
23 put Congress on notice of what the state of  
24 play is, should we say something like  
25 exhaustion requirements are jurisdictional only

1 if the word "jurisdiction" is in there?

2 That would be clear and provide better  
3 guidance than, you know, it could be, may not  
4 be, look at some other provisions, kind of  
5 throw it up in the air and see how it comes  
6 out, because that's just a invitation to a lot  
7 more lower court litigation which really serves  
8 no purpose.

9 MR. HUGHES: I -- I -- I think there's  
10 no -- would be no problem if the Court thought  
11 that that was an appropriate way to -- to  
12 approach exhaustion requirements because I do  
13 think exhaustion requirements, case after case  
14 repeatedly asserts they're not the sort of  
15 thing that is typically jurisdictional.

16 In this Court's decision in Ross v.  
17 Blake, for example, the Court went through  
18 fairly extensive analysis that lower courts  
19 might need to undertake in order to determine  
20 whether or not a particular remedy in that case  
21 was available.

22 That seems generally incompatible with  
23 the notion that this goes to a court's subject  
24 matter jurisdiction rather than to a claims  
25 processing rule.



1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett? No?

4 Justice Jackson?

5 JUSTICE JACKSON: Is there currently  
6 widespread confusion about whether or not  
7 exhaustion requirements are jurisdictional?

8 MR. HUGHES: Well, I think this  
9 statute shows that there is -- is fairly  
10 widespread confusion, Your Honor. Many of the  
11 lower courts' reliance on earlier holdings  
12 before this Court brought discipline to the  
13 notion of -- of jurisdiction --

14 JUSTICE JACKSON: But, since the clear  
15 statement rule, have we ever found that an  
16 exhaustion requirement is jurisdictional?

17 MR. HUGHES: No, Your Honor, and we  
18 certainly don't think that the Court should do  
19 so here. So that -- that -- I think the full  
20 tenor of this Court's cases are clear that an  
21 exhaustion rule is just incompatible with --  
22 with it being jurisdictional.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Ms. Dubin.

2 ORAL ARGUMENT OF YAIRA DUBIN  
3 ON BEHALF OF THE RESPONDENT

4 MS. DUBIN: Mr. Chief Justice, and may  
5 it please the Court:

6 The INA creates an adversarial scheme  
7 that authorizes judicial review only after  
8 agency procedures are exhausted. That reflects  
9 Congress's judgment on how best to manage the  
10 high volume of immigration cases to achieve  
11 uniformity, efficiency, and fairness in an  
12 overburdened system.

13 Petitioner's arguments conflict with  
14 that judgment in two ways. First, Petitioner  
15 argues that her failure to exhaust is not a  
16 jurisdictional defect. But 1252(d)(1) imposes  
17 a direct limit on a court's power, providing  
18 that a court may review a final order of  
19 removal only if the alien exhausted all  
20 administrative remedies available as of right.  
21 That language speaks clearly to a court's  
22 authority, not simply to what a litigant must  
23 do. Congress need not use the word  
24 "jurisdiction," and there's no special rule for  
25 exhaustion requirements.

1           Critically, this Court has never held  
2           that a restriction like this one is not  
3           jurisdictional. Petitioner's contrary argument  
4           would upset Congress's judgment that appellate  
5           courts should review Board decisions, not  
6           adjudicate arguments in the first instance.

7           Second, Petitioner dilutes the  
8           statutory exhaustion requirement. She does not  
9           seriously dispute that issue exhaustion is  
10          required at least by regulation. Yet, she  
11          draws on Social Security cases to say that the  
12          INA omits that critical obligation. But  
13          nothing in the Social Security Act even  
14          reference administrative exhaustion, and its  
15          scheme is inherently non-adversarial.

16          By contrast, the INA expressly  
17          requires administrative exhaustion in a highly  
18          adversarial system where non-citizens have long  
19          been required to identify errors for review.  
20          Petitioner can't explain why Congress would  
21          codify the doctrine of administrative  
22          exhaustion but leave out this essential  
23          requirement.

24          The Court should reject Petitioner's  
25          approach and hold that non-citizens cannot

1 forego available agency procedures to raise  
2 issues in federal court in the first instance.  
3 Here, where the Board allegedly introduced a  
4 new error, that means filing a motion to  
5 reconsider.

6           Petitioner's fail to do -- failure to  
7 do so forecloses judicial review.

8           I welcome the Court's questions.

9           JUSTICE THOMAS: Can you give us an  
10 example of another provision where "as of  
11 right," the phrase "as of right," is used to  
12 describe a discretionary motion?

13           MS. DUBIN: I don't have an example of  
14 that, but I think what's important is that  
15 Petitioner's examples of "as of right" are, as  
16 the Chief Justice were saying, examples where  
17 you're talking about whether you're entitled to  
18 the relief at issue, whereas, in the exhaustion  
19 context, the relevant question is whether  
20 you're entitled to file for a particular remedy  
21 which has -- which is capable of use to obtain  
22 that relief. And that's what the Court said in  
23 Ross versus Blake.

24           So, in the exhaustion context in  
25 particular, what you want to know is whether

1 the non-citizen has taken up all opportunities  
2 to present the agency with her arguments.

3 I also just want to note that a motion  
4 to reconsider is not something that gives the  
5 agency unfettered discretion. It's reviewable  
6 for abuse of discretion, and if the agency, for  
7 instance, were to say that an impermissible  
8 fact-finding claim is meritorious, but we just  
9 don't want to grant the motion, that would be  
10 an abuse of discretion.

11 JUSTICE JACKSON: I guess I don't  
12 understand, I'm sorry. You sort of seem to be  
13 distinguishing "as of right" in the exhaustion  
14 context, and I -- can you say again why you  
15 think that a situation in which the particular  
16 mechanism at issue is the motion for  
17 reconsideration that can be filed, it's  
18 available, but what does it mean to you when  
19 the statute says the particular mechanism has  
20 to be available as of right?

21 MS. DUBIN: It's a mechanism, it's a  
22 procedural mechanism that you have the right to  
23 file, and it's capable of giving you some  
24 relief. And so, for example --

25 JUSTICE JACKSON: Well, I don't think

1 "as of right" is doing any work in that  
2 analysis. If -- if you file it and you have a  
3 right to file it, then it's available. But  
4 what does it mean for it to be available as of  
5 right?

6 I thought that meant that the  
7 recipient of it, the agency or the  
8 administrative body, has no choice but to grant  
9 the motion, and by grant, I mean give you  
10 reconsideration. It's non-discretionary in  
11 terms of their reaction to it.

12 So lower court appeals are  
13 non-discretionary. You have a right to appeal.  
14 It's as of right. And the lower court has to  
15 review your appeal. By contrast, a cert  
16 petition is not as of right. You have the  
17 right to file it. We receive it. But we don't  
18 have to review it. That's discretionary.

19 So, if I'm right about that, am I  
20 using "as of right" in the -- in the  
21 appropriate way or the way you understand it or  
22 not?

23 MS. DUBIN: That's not the way we  
24 understand it --

25 JUSTICE JACKSON: Okay.

1 MS. DUBIN: -- in the statute, and I  
2 think, actually, the certiorari example is a  
3 good one because, when we say that certiorari  
4 is not available as of right, what we're not  
5 talking about is the right to file a petition  
6 for certiorari. What we're talking about is  
7 the right to review on certiorari.

8 JUSTICE JACKSON: And why isn't that  
9 exactly what we're talking about here?

10 MS. DUBIN: Because I don't think that  
11 should be the inquiry in an exhaustion  
12 requirement. We don't want to know whether, if  
13 you file it, you're entitled to relief. We  
14 want to know if you -- you're -- if you file  
15 it, you're entitled to have the agency consider  
16 your arguments. And that's what we want --  
17 that's what we want to have happen. That's the  
18 entire structure of this case.

19 JUSTICE JACKSON: No, no, no. But --  
20 but, if you're talking about a motion for  
21 reconsideration, it's the same. Your -- does  
22 the agency have to consider your arguments on  
23 reconsideration? If they do, then it's as of  
24 right.

25 Only we know in this context they

1 don't, that you could -- you have a right to  
2 file it, but just like a cert petition, they  
3 can say we don't want to look at this motion  
4 for reconsideration and -- and that's all.

5 MS. DUBIN: I -- I think that's not  
6 correct, Your Honor. As -- as I mentioned  
7 earlier to Justice Thomas, I think that the  
8 right understanding of how a motion to  
9 reconsider works is that if you have a  
10 meritorious claim and it's not blocked by other  
11 procedural defects, for instance, that you  
12 failed to raise it earlier when you should have  
13 and things like that, so you have an  
14 impermissible fact-finding claim and you  
15 brought it at the right time and for the right  
16 reasons and the agency nonetheless denies a  
17 review because they simply don't feel like  
18 granting it because they simply don't want to  
19 give you relief, that would be an abuse of  
20 discretion in this context.

21 JUSTICE KAGAN: If -- if -- if you're  
22 right about what "as of right" means, Ms.  
23 Dubin, then wouldn't there be an obligation to  
24 file in every case? But, in parts of your  
25 brief, you suggest that there's only an



1 obligation to file when the BIA itself has  
2 introduced the error. I don't understand how  
3 the two parts of your position can coincide.

4 MS. DUBIN: Yes. And I think that  
5 comes -- that -- that you have our position  
6 correct, and I think that it comes from the  
7 exhaustion requirement, what it means to  
8 exhaust.

9 The requirement that a litigant  
10 exhaust comes from administrative exhaustion,  
11 from well-settled principles, and what that  
12 requirement means is that you have to give the  
13 agency the chance to correct its own errors,  
14 but it doesn't require that you give the agency  
15 multiple chances to correct its own errors.

16 So that's what makes it such that a  
17 motion to reconsider is only available as of  
18 right when you haven't yet raised the -- the  
19 argument before.

20 Another way, I think, to think of the  
21 same restriction --

22 JUSTICE KAGAN: I see how that makes  
23 sense. I just don't see how you get it from  
24 the text of the statute, how you're able to  
25 parse the text on the one hand to say that

1       there's an obligation and on the other hand to  
2       say but that obligation disappears when you've  
3       already had a first shot.

4               MS. DUBIN: Right. So I think there's  
5       two ways to parse the statutory text to get to  
6       that requirement. One is the exhaustion  
7       requirement, which is what I was highlighting  
8       before, which brings with it this doctrine of  
9       administrative exhaustion. And that's what  
10      this Court said in Woodford in interpreting the  
11      PLRA, which uses similar language.

12             The second way is from available, I  
13      think, because the agency is not going to hear  
14      arguments you made before and -- and they've  
15      said that in *In re OSG*, which is agency  
16      precedent.

17             So, under this Court's precedent in  
18      *Ross versus Blake*, it's simply not available to  
19      you to file a second motion to reconsider in  
20      that circumstance.

21             JUSTICE KAVANAUGH: Can I ask you a  
22      question on the first issue, the broader  
23      jurisdiction issue?

24             I think the other side, as I  
25      understand their position, says the reference

1 to court supports you, but, in this particular  
2 context, two things kind of override that, one  
3 being the references to "jurisdiction"  
4 elsewhere in the statute and the second being  
5 that this is an exhaustion requirement.

6 So why isn't that the better way to  
7 read the statute given the broader context?

8 MS. DUBIN: Right. So I think that --  
9 I mean, I -- I didn't take Petitioner to take a  
10 square position on this, but I take Petitioner  
11 to sort of indicate that if it was just the  
12 plain text alone here, we have a very good  
13 argument that this is jurisdictional. But I  
14 think you're right that there -- that  
15 Petitioner is saying that the rest of the  
16 statutory context cuts the other way.

17 And we see it differently. I think  
18 1252 cuts in favor of this provision being  
19 jurisdictional because it doesn't use the word  
20 "jurisdiction" exclusively as the way of -- of  
21 talking about a court's authority. And those  
22 are the provisions that Justice Kagan flagged  
23 earlier in 1252(a)(2) and also 1252(a)(5).

24 I think what Petitioner's response to  
25 that is, well, those use the words "judicial

1 review" and not "review." And I think that's  
2 slicing the baloney a little bit thin. I don't  
3 think that --

4 JUSTICE KAGAN: Well, I -- I read  
5 1252(a)(5) exactly the opposite way, that you  
6 can read it as Congress was quite aware that it  
7 was using these two terms in the statute and  
8 that the two terms meant something different,  
9 except for, in that purpose, with respect to  
10 the availability of habeas, they should mean  
11 the same thing.

12 But that Congress was saying we're --  
13 we're taking notice that both of these terms  
14 exist in this statute, and, here, we want them  
15 to have the same consequence but in other  
16 respects not because they're two different  
17 terms.

18 MS. DUBIN: Right. I think that that  
19 would be one argument if all you had was  
20 1252(a)(5), but you also have 1252(a)(2), which  
21 says "matters not subject to judicial review"  
22 and then lists a number of things about  
23 jurisdiction. So I don't think that  
24 explanation would help there.

25 But I think the second part of this

1 answer is that 1252(d)(1) has a prior source.  
2 It comes from 1105(a). And this is the  
3 language that Congress had used in 1105(a) much  
4 before IIRIRA.

5 When Congress then codified this  
6 provision in IIRIRA, it was after a lot of  
7 courts of appeals and this Court had described  
8 that provision as jurisdictional.

9 So there's no real, like, mystery as  
10 to why the Court used the language it did in  
11 1252(b)(1).

12 JUSTICE SOTOMAYOR: But it didn't --  
13 it didn't codify the exact language.

14 MS. DUBIN: It codified almost exactly  
15 the same --

16 JUSTICE SOTOMAYOR: Yeah, you keep  
17 using the word "almost" in your brief also.  
18 But it didn't. That's the point.

19 MS. DUBIN: So I think what -- what I  
20 think is critical about what -- the changes  
21 that Congress made from 1105(a) to 1252(d)(1)  
22 is that Congress -- all it did --

23 JUSTICE SOTOMAYOR: I know it's what  
24 you think is critical, but go back to the  
25 operative question, which is the fact that

1 we're going back and forth, doesn't that prove  
2 your adversary's point that there's a plausible  
3 argument, and once there's a plausible  
4 argument, it's not jurisdictional?

5 MS. DUBIN: I don't think there's a  
6 plausible argument, and -- and the reason is  
7 because of what changes Congress made from 1105  
8 to 1252(d)(1). All Congress did in the  
9 relevant part of the statute was omit -- was  
10 change from a passive voice and a double  
11 negative.

12 So the original provision said an  
13 order of deportation or exclusion shall not be  
14 reviewed by any court if the alien has not  
15 exhausted administrative remedies. And our  
16 provision says a court may review a final order  
17 of removal only if. That is a classic cleaning  
18 up of language, not meaning to change the  
19 substance of the prior provisions.

20 JUSTICE JACKSON: But does that help  
21 you or hurt you? Because it certainly sound --  
22 sounded to me like the former formulation was  
23 more of a claims processing issue. I thought  
24 you were suggesting that the change was made to  
25 make it more jurisdictional. But read the

1 former language again.

2 MS. DUBIN: "An order of deportation  
3 or of exclusion shall not be reviewed by any  
4 court if the alien has not exhausted the  
5 administrative remedies available to him as  
6 of" -- "as of right."

7 JUSTICE JACKSON: And that sounds to  
8 me like you could replace "shall not be  
9 reviewed" in that -- or situation with "the  
10 court shall dismiss." Would you -- would you  
11 agree that if it said the court shall dismiss  
12 any application by an alien unless there's  
13 exhaustion, that that would be claims  
14 processing and not jurisdictional?

15 MS. DUBIN: No. And -- but I -- I  
16 think the important point is that we don't  
17 think the other provision was less  
18 jurisdictional. We think 1105(a) --

19 JUSTICE JACKSON: I know. And that's  
20 what I'm trying to explore. It seems to me  
21 that if you're saying these two are the same,  
22 and the former sounds at least to me in not  
23 power of the court but more the court shall  
24 dismiss, the court shall not review in the  
25 sense of, you know, look -- you're looking at

1 various claims and which ones are you going to  
2 decide, doesn't that hurt you?

3 I mean, this language, "a court may  
4 review only if," that's today's language, and I  
5 take the point that that sounds like you're  
6 speaking to the power of the court. But the  
7 prior language that you read, to me, did not  
8 sound like you were speaking to the power of  
9 the court or at least Congress was. It sounded  
10 like Congress was saying essentially the court  
11 shall dismiss this application if they haven't  
12 exhausted.

13 And you now seem to be suggesting that  
14 no change substantively was made between the  
15 two, and I think that actually hurts you.

16 MS. DUBIN: I -- I think -- so what  
17 I'm -- what I think we're disagreeing on is  
18 whether -- so this is just phrased -- the same  
19 language, it "shall not be reviewed by any  
20 court" versus "a court may review only if," to  
21 me, the only difference between those two  
22 commands, which are both directed at the court  
23 -- and -- and I think that's the critical point  
24 for purposes of exhaustion requirement, is that  
25 one is written as "shall not be reviewed by any



1 court" and one is "a court may review only if"

2 --

3 JUSTICE JACKSON: Right. But, in any  
4 event, neither of those say the language that  
5 appears everywhere else when the court is  
6 really speaking to jurisdiction, right? Like  
7 is it your suggestion that when the Court said  
8 "no court shall have jurisdiction to review,"  
9 which it says many, many times, you think that  
10 the Court -- that the Congress was using  
11 interchangeably that language and the one in  
12 our statute, both to be referring to  
13 jurisdiction?

14 MS. DUBIN: Correct.

15 JUSTICE BARRETT: Counsel --

16 JUSTICE KAVANAUGH: And -- and --

17 JUSTICE BARRETT: -- can I ask you a  
18 -- oh, go ahead. Go ahead.

19 JUSTICE KAVANAUGH: Go ahead. Go  
20 ahead.

21 JUSTICE BARRETT: Well, I was going to  
22 switch to waiver or forfeiture, so --

23 JUSTICE KAVANAUGH: Okay. So then one  
24 question on Justice Jackson's questions. I  
25 think the key is, on the prior language, this

1 Court had said it's jurisdictional, right?

2 MS. DUBIN: This Court had said it's  
3 jurisdictional.

4 JUSTICE KAVANAUGH: And -- and in  
5 Nken, we repeated that post -- you know, post  
6 the -- the new act and post-Arbaugh, right?

7 MS. DUBIN: Both of them.

8 JUSTICE KAVANAUGH: So that's what I  
9 -- that's what I thought was your argument, was  
10 the language didn't really change in substance.  
11 We called it jurisdictional, so it's still  
12 jurisdictional.

13 MS. DUBIN: That's correct. But I --  
14 I -- that is absolutely correct and a  
15 hundred percent agree with it, but I do want to  
16 say that I think what this Court's cases have  
17 been saying over and over again in saying that  
18 there doesn't need to be a magic word  
19 requirement is that a limitation on what a  
20 court may review is talking to the court's  
21 adjudicatory authority, and both of them are  
22 written that way. But also, if you had any  
23 doubt, then, yes, definitely.

24 JUSTICE KAVANAUGH: Okay.

25 MS. DUBIN: But --

1 JUSTICE KAVANAUGH: Justice Barrett?

2 Oh.

3 JUSTICE BARRETT: I -- counsel, I just  
4 wanted to ask you about the waiver or  
5 forfeiture. Let's say that we disagree with  
6 you about jurisdiction. At the cert stage, you  
7 seemed to indicate that waiver or forfeiture  
8 would apply. So, if we disagree with you about  
9 jurisdiction, shouldn't we just remand to the  
10 Fifth Circuit for it to address the  
11 impermissible fact-finding claim, or do you  
12 think that the waiver/forfeiture issue would  
13 still be alive and that there's a possibility  
14 that you didn't forfeit it?

15 MS. DUBIN: We think what would be  
16 alive is the application of the Day versus  
17 McDonough principle. And I just want to  
18 highlight that we did flag that in our brief in  
19 opposition. It's in Footnote 3 on the same  
20 page that Petitioner's counsel pointed to. And  
21 the application of that principle turns on  
22 whether it was appropriate to bring up -- for  
23 the court of appeals to raise sua sponte  
24 something that we did not strategically waive.  
25 And I think that would be the inquiry in that

1 case, and I think it would be appropriate for  
2 the court of appeals to undertake that in the  
3 first analysis.

4 JUSTICE KAVANAUGH: Can I ask a  
5 question about, if you were to lose this case  
6 on the first issue, would it be better for us  
7 for clarity purposes to say exhaustion  
8 requirements are not jurisdictional unless the  
9 word "jurisdiction" is used, just so the lower  
10 courts don't thrash around in this  
11 unnecessarily for years on end?

12 MS. DUBIN: I think the Court has been  
13 pursuing clarity in this -- in this area, and I  
14 do think that this provision comes as close as  
15 you can to saying this is a limitation on a  
16 court authority without using the word  
17 "jurisdiction." So, if you disagree with that,  
18 I do think it would be very helpful.

19 JUSTICE KAVANAUGH: And I -- okay. So  
20 that's helpful.

21 And then -- but would there be  
22 systemic harm that the government's aware of  
23 from us saying, you know, an exhaustion  
24 requirement's -- in this Arbaugh world, an  
25 exhaustion requirement subcategory is only

1 going to be jurisdictional if the word  
2 "jurisdiction" is used? Are you aware of any  
3 systemic problems that would arise from a clear  
4 statement to the lower courts like that?

5 MS. DUBIN: I'm not aware of systemic  
6 problems that would arise from that. I think,  
7 if you were very concerned about that, you  
8 could say, you know, going forward for  
9 provisions drafted after this date.

10 JUSTICE KAVANAUGH: Well, we've -- I  
11 -- I don't think -- well, I won't speak more to  
12 that. Okay.

13 (Laughter.)

14 MS. DUBIN: Can I --

15 JUSTICE JACKSON: Is there -- is there  
16 any case in which this case has applied the  
17 clear statement rule since Arbaugh and found  
18 that exhaustion was jurisdictional that you're  
19 aware of?

20 MS. DUBIN: I think the -- the closest  
21 is Smith versus Berryhill in the Social  
22 Security context, where the Court recognized  
23 that the finality requirement in the Social  
24 Security Act is jurisdictional.

25 JUSTICE JACKSON: Finality?

1 MS. DUBIN: Yes. But the Court has  
2 referred to that requirement in the Social  
3 Security Act as an exhaustion requirement.  
4 It's not the exhaust -- the type of exhaustion  
5 requirement we have here, but it's an  
6 exhaustion requirement that the Court has found  
7 continues to be jurisdictional post-Arbaugh.

8 JUSTICE KAVANAUGH: On the exhaustion  
9 precedent that was being discussed earlier with  
10 your colleague on the other side, my  
11 understanding of all the exhaustion cases we  
12 have is that not a single one of them that I'm  
13 aware of or that was cited to us at least spoke  
14 to the Court's authority.

15 Is that your understanding as well, as  
16 distinct from putting a obligation on the  
17 litigant in the statutory language?

18 MS. DUBIN: Yeah, and I think the best  
19 example of the comparator is the PLRA, which is  
20 written as "no action shall be brought," which  
21 is a very different type of phrasing, as  
22 opposed to a limitation on a power.

23 JUSTICE KAGAN: But -- but it's not as  
24 though those cases used that sort of  
25 distinction. I mean, maybe they didn't have

1 to, but they spoke in pretty general terms  
2 about how exhaustion requirements are generally  
3 non-jurisdictional, much like we've said  
4 statutes of limitations are usually  
5 non-jurisdictional.

6 And maybe you could come up with  
7 something that suggests a different rule in a  
8 particular case, but all of these cases, and  
9 there are quite a lot of them, just sort of  
10 assume or not -- not assume, say that the  
11 presumption is that exhaustion is  
12 non-jurisdictional.

13 MS. DUBIN: So I don't think that's  
14 the right way to read those cases. There are a  
15 few cases that refer to exhaustion requirements  
16 in tandem, hand in hand, with claims processing  
17 rules, which I take the Court to mean in -- in  
18 the paradigmatic case to be a filing deadline,  
19 a timely filing requirement.

20 And there have been exhaustion  
21 requirements that this Court has considered  
22 that have looked like a filing deadline  
23 requirement. So an example of that is the  
24 deadline for filing a charge with the EEOC.  
25 But then there's no requirement after that that

1 the EEOC go through an adversarial adjudicative  
2 scheme to actually look at what happened before  
3 a court will review. It's just a filing  
4 deadline with the EEOC.

5 And the Court has seen exhaustion  
6 cases like that. But I don't think the Court  
7 has looked at an exhaustion requirement like  
8 this, which goes to the structure of the  
9 agency's scheme and the idea that a court of  
10 appeals will only be sitting there to review  
11 what has gone through an adversarial agency  
12 adjudication in the first instance.

13 And I don't think that you can read  
14 the Court's prior references to exhaustion  
15 cases to include that particular context in  
16 which we think it would be very appropriate for  
17 a jurisdictional requirement to exist.

18 JUSTICE GORSUCH: Ms. -- Ms. Dubin, I  
19 -- I understand that we could stop at the end  
20 of QP 1, say it's not jurisdictional and remand  
21 and have fun with the sua sponte question. But  
22 the -- the QP 2, is -- if the government were  
23 to have actually objected or might in a future  
24 case, seems to me pretty important and likely  
25 to impact a very, very large number of



1 immigration appeals.

2 And -- and, therefore, I -- I wonder  
3 whether the government -- I wonder, in the  
4 government's view, whether it does make sense  
5 for us to go ahead and address that now so that  
6 everybody has clarity on the playing field?

7 MS. DUBIN: Yes. So the -- the -- the  
8 courts of appeals all agree that an issue  
9 exhaustion require -- is required under the --  
10 under the INA, that this provision, whether you  
11 read it as a statutory or regulatory  
12 obligation, agency rules --

13 JUSTICE GORSUCH: No, but the motion  
14 --

15 MS. DUBIN: -- require issue  
16 exhaustion.

17 JUSTICE GORSUCH: -- having to refile  
18 a petition, you know, for reconsideration, that  
19 question is what I'm aiming at.

20 MS. DUBIN: So I just -- I did want to  
21 highlight that the most important thing is that  
22 the normal context in which this comes up is  
23 from an immigration judge to the Board, right?  
24 You didn't make a particular claim against what  
25 the immigration judge when you appealed to the

1 --

2 JUSTICE GORSUCH: Put -- put that  
3 aside. I'm -- I'm talking about from the BIA  
4 to the court of appeals. Can the court of  
5 appeals take it up when there could have been,  
6 theoretically, a -- a petition for rehearing to  
7 correct the BIA's faulty reasoning? Okay? I  
8 would think that comes up an awful lot or could  
9 come up an awful lot, especially if we don't  
10 answer the question. And so I'm just wondering  
11 whether the government would agree that it  
12 makes sense for us to go ahead and address that  
13 question.

14 MS. DUBIN: I think it would -- it  
15 nearly always comes up in this context when you  
16 have an impermissible fact-finding claim --

17 JUSTICE GORSUCH: Right.

18 MS. DUBIN: -- because that's the type  
19 of claim that the Board is introducing a new  
20 error, and that's when it comes up that you  
21 would have a jurisdictional exhaustion  
22 requirement say that you needed to raise that  
23 to the Board. And I do think it would be  
24 helpful to address that if the Court was going  
25 to give clarity to that area.

1 JUSTICE GORSUCH: Thank you.

2 JUSTICE BARRETT: Counsel, can I  
3 follow up on Justice Gorsuch? So, you know,  
4 that's the remedy exhaustion question. Do you  
5 agree, though, that issue exhaustion or --  
6 let's see, I thought this was a little bit  
7 unclear in the briefs -- that issue exhaustion  
8 could also exist as a court-made doctrine  
9 requiring that the issue have been exhausted  
10 even if the statute speaks exclusively to  
11 remedy?

12 So, if we do decide the remedy  
13 question that Justice Gorsuch is referring to,  
14 that doesn't mean that we're ruling out the  
15 possibility of issue exhaustion as well?

16 MS. DUBIN: That's -- I agree with  
17 that, and that's what I was trying to say, and  
18 I -- I apologize for going a little off track  
19 there. But what I was trying to say is that  
20 it's extremely important to the way the system  
21 works and it would be very destabilizing to not  
22 require issue exhaustion, whether it's as a  
23 matter of the statute, as a matter of  
24 regulations, or as a matter of judge-made  
25 doctrine.

1           The agency since 1951 has required you  
2           to present specific issues to the Board, and  
3           that's critically important for the way the  
4           Board operates given how -- the high volume of  
5           cases and that it's an adversarial system in  
6           which litigants are expected to develop their  
7           own claims.

8           JUSTICE JACKSON: I guess I don't  
9           understand why, even if you're right that  
10          there's some sort of an issue exhaustion  
11          requirement here, that wasn't met in these  
12          circumstances.

13          I mean, isn't the issue on appeal  
14          whether the presumption of future persecution  
15          was rebutted and wasn't that what the agency  
16          was deciding?

17          MS. DUBIN: So Petitioner brought two  
18          claims. Petitioner brought -- when she -- when  
19          she went to the court of appeals. One claim  
20          was that. One claim was about the substance of  
21          the decision below and whether she had -- in  
22          fact, was entitled to withholding. But one  
23          claim was about an impermissible fact-finding  
24          claim that the Board had violated its own  
25          regulations by doing a fact-finding when it

1 adjudicated her appeal.

2 JUSTICE JACKSON: But the fact-finding  
3 was to an end. I mean, wasn't the -- the  
4 ultimate issue is whether the presumption of  
5 future persecution was rebutted and there are  
6 facts that -- that the fact-finder looks at to  
7 make that determination.

8 And so, to the extent the Board  
9 disagreed, they looked at other facts, that's  
10 really all part of the same issue, isn't it?

11 MS. DUBIN: The issues here are  
12 certainly related, but I think there's a big  
13 difference between saying that the procedural  
14 objection to what the Board did right violated  
15 the Board's own regulations versus the  
16 substantive determination, did the Board  
17 correctly or incorrectly find that she was  
18 entitled to withholding or that the -- the  
19 presumption had been rebutted, that's a  
20 separate claim and a separate question.

21 JUSTICE JACKSON: And as an  
22 administrative matter, sort of  
23 administrability, your suggestion is that a  
24 person would have to figure out -- parse it  
25 that narrowly to determine whether or not they

1 had to make a motion for reconsideration as a  
2 jurisdictional matter related to the issue --  
3 to that issue but not that one?

4 MS. DUBIN: Issue exhaustion across  
5 administrative contexts requires parsing. I  
6 mean, for instance, I think a couple years ago,  
7 in Ramirez versus Collier, in the PLRA context,  
8 the Court looked to whether the prisoner had  
9 raised the audible prayer claim as opposed to  
10 just a regular prayer claim.

11 You are looking to what sort of issues  
12 and arguments have been brought up to this  
13 point, but I think, to the extent you're  
14 worried about confusion, this has come up, as I  
15 mentioned earlier, in the impermissible  
16 fact-finding context because what the  
17 non-citizen is trying to do is add a claim, add  
18 a claim that's a procedural claim in addition  
19 to her substantive claim, and that claim is a  
20 claim that the Board introduced a new error.  
21 So that is where the courts of appeals --

22 JUSTICE JACKSON: So what about  
23 Justice Gorsuch's previous question to other  
24 counsel, how -- how -- how many times do we  
25 have to have reconsideration? Like what if the

1 Board introduces a new error in the context of  
2 this motion for reconsideration? Does this go  
3 on ad -- ad infinitum in your view?

4 MS. DUBIN: I think that's the beauty  
5 of the "as of right" language. It only allows  
6 for one motion to reconsider because that's  
7 what you're allowed under the statute and the  
8 regulations.

9 JUSTICE KAVANAUGH: On your question  
10 to -- on the question that Justice Barrett and  
11 Justice Gorsuch asked, this may be repetitive,  
12 but I just want you to follow up.

13 MS. DUBIN: Sure.

14 JUSTICE KAVANAUGH: You're worried if  
15 you lose this case that we say something about?  
16 Can you repeat that just so we don't  
17 inadvertently do something that's going to  
18 cause problems?

19 MS. DUBIN: Yes. We are worried that  
20 you would say that there's no issue exhaustion  
21 requirement in this context, whether as statute  
22 or regulation. We think that would be clearly  
23 wrong because the regulations require issue  
24 exhaustion.

25 I don't take Petitioner to be

1 seriously disputing that there is an issue  
2 exhaustion requirement. And it's critically  
3 important to have that issue exhaustion  
4 requirement because the Board can't pick  
5 through the immigration judge decisions to  
6 figure out what the -- what you think the  
7 errors are. You need to present those to the  
8 Board.

9           So it's very important to keep intact  
10 that issue exhaustion is required in this  
11 scheme. I -- I do think it is required as a  
12 matter of statute and it's jurisdictional, but  
13 the critical point is that issue exhaustion is  
14 required.

15           JUSTICE KAVANAUGH: Okay. Second  
16 question, different one. What's the court of  
17 appeals standard of review on an impermissible  
18 fact-finding claim?

19           MS. DUBIN: So it's going to be coming  
20 up from a motion to reconsider because that's  
21 the circumstance in which you have to review  
22 it, and they will review it for abuse of  
23 discretion.

24           But there is no indication and we  
25 think it would be incorrect that if you have a



1 correct -- if you have a meritorious  
2 impermissible fact-finding claim and the Board  
3 nonetheless rejects it and there's no  
4 procedural bar to them reaching it, that would  
5 be an abuse of discretion.

6 JUSTICE KAVANAUGH: Okay. So would it  
7 be abuse of discretion even if you lose this  
8 case? In other words, they haven't brought it  
9 in a motion to reconsider -- you would lose on  
10 the third issue, I guess?

11 MS. DUBIN: It depends if you --

12 JUSTICE KAVANAUGH: Are you -- are you  
13 following the question?

14 MS. DUBIN: I believe so.

15 JUSTICE KAVANAUGH: Okay.

16 MS. DUBIN: But, if I'm not, please  
17 let me know. It depends -- it depends if you  
18 see it as a legal error or factual error. But,  
19 if it was a legal error, it would be reviewed  
20 de novo. And if it's a factual error, it would  
21 be reviewed for substantial evidence.

22 But I don't think the distinction  
23 matters here because, like I said, if you have  
24 a meritorious impermissible fact-finding claim,  
25 under any of the standards of review -- abuse

1 of discretion, de novo, or substantial evidence  
2 -- you would prevail.

3 JUSTICE KAVANAUGH: Can you describe  
4 what you think an impermissible fact-finding  
5 claim is when it's successful?

6 MS. DUBIN: I think it's when the  
7 Board finds facts that are -- that the  
8 immigration judge didn't consider and -- and  
9 uses that to make -- and rests its decision on  
10 that. So I think what -- why that's not the  
11 case here is because what the Board did is  
12 reweigh the same facts the immigration judge  
13 considered but this time with the -- with the  
14 presumption that the immigration judge found  
15 didn't apply.

16 So, instead of saying that these facts  
17 mean that you haven't shown with -- entitlement  
18 to withholding without a presumption of future  
19 persecution, the Board here said, even if you  
20 include the presumption of future persecution,  
21 we think it's been rebutted --

22 JUSTICE ALITO: But suppose the --

23 MS. DUBIN: -- and that the --

24 JUSTICE ALITO: -- suppose the  
25 government made just that argument before the

1 Board, and Petitioner responded, you can't  
2 decide the case on that basis because that  
3 would be impermissible fact-finding. And  
4 suppose that the Board then rules in your  
5 favor.

6 Under those circumstances, wouldn't  
7 the impermissible fact-finding issue have been  
8 decided by the Board? And under those  
9 circumstances, would it be necessary for the  
10 Petitioner or someone else in a similar  
11 position to file a motion for reconsideration?

12 MS. DUBIN: No, because, in that  
13 circumstance, the Board would have decided, and  
14 there's no obligation to keep bringing the same  
15 arguments to the Board.

16 JUSTICE JACKSON: Can I ask you,  
17 getting back a little bit to the  
18 jurisdictional, I guess I'm a little worried  
19 that the -- the fact that these exhaustion  
20 provision is directed at the court may not  
21 necessarily be indicative of its jurisdictional  
22 character.

23 So I -- I can imagine a provision that  
24 says a court must dismiss a final order of  
25 removal if the agency, you know -- I'm sorry,

1 if the alien has not exhausted all  
2 administrative remedies.

3           Would -- would that be jurisdictional  
4 to you, just because it's directed to what the  
5 court must do?

6           MS. DUBIN: I think provisions that  
7 are directed to what the court must do is what  
8 this Court has been looking for in this series  
9 of cases. That's what the court said --

10           JUSTICE KAGAN: But, in those cases,  
11 it's always what the court must do with respect  
12 to a particular category of substantive claims.  
13 I think Justice Sotomayor said this before.

14           And this is very different. It's what  
15 the court must do, but then it says, depending  
16 on which procedural hoops the party has or has  
17 not jumped through.

18           So the second half of this provision  
19 is very much looking towards what the party is  
20 doing. You know, all Mr. Hughes needs is a  
21 plausible reading. You have half of this  
22 provision. He has the other half of this  
23 provision.

24           The cases that you're talking about  
25 are quite different because they don't make the

1 criterion one that has to do with what the  
2 party is obligated to do.

3           When you make that the criterion,  
4 doesn't this become not a jurisdictional  
5 provision, or at least doesn't it plausibly  
6 become not a jurisdictional provision?

7           MS. DUBIN: I don't think so. I think  
8 that the -- the Court said this in Rockwell,  
9 that Congress can define "jurisdiction" as it  
10 wishes, depending on what it decides is the  
11 requisite criteria.

12           Here, what it didn't want --

13           JUSTICE KAGAN: Well, it totally can.  
14 But the question is, how are we going to read  
15 the language in front of us? And we've  
16 consistently said that when the key thing is  
17 what the party has to do, that's  
18 non-jurisdictional.

19           And, here, everything depends on what  
20 the party has done or not done.

21           MS. DUBIN: Right. But I don't think  
22 it was just the key thing as what the party has  
23 to do. I think it was that the only -- the  
24 only person that Congress meant to restrict is  
25 the party. Congress didn't mean to restrict

1 the court.

2 I would also just say then, in the  
3 Court's prior cases, they haven't only had  
4 jurisdiction turn on whether it's a subject  
5 matter. In Gonzalez and Denedo, both of those  
6 turned on the lower court procedures, and that  
7 is how the jurisdiction bar worked in both of  
8 those cases.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: There are  
14 circumstances -- there -- there are  
15 circumstances in which there's a constitutional  
16 basis for a clear statement rule. But, here, I  
17 take it we're just interpreting a statutory  
18 provision.

19 So what basis do we have for imposing  
20 a -- a clear statement rule either  
21 retroactively or prospectively on Congress?  
22 Are we not -- even if it's not desirable to  
23 have to decide all these on a case-by-case  
24 basis, isn't that our obligation, to decide the  
25 meaning of particular provisions that come

1 before us?

2 MS. DUBIN: Pre-Arbaugh, I think that  
3 is what the Court was doing. But then, for a  
4 long time now, the Court has said that a clear  
5 statement rule applies in this context. We  
6 didn't -- we didn't feel the need to fight  
7 that.

8 JUSTICE ALITO: Yeah. Well, what is  
9 the -- our authority to do that?

10 MS. DUBIN: I think that the Court was  
11 trying to do it as a matter of divining  
12 congressional intent. The idea was that when  
13 Congress wants to speak in jurisdictional  
14 language, it speaks clearly. So that -- that  
15 was the authority. It was saying this is what  
16 Congress is doing and descriptively describing  
17 that.

18 I think that in some cases, what --  
19 and especially in the early cases, what the  
20 Court was doing was it was seeing provisions  
21 that really looked like they went to a cause of  
22 action, like the number of employees under  
23 Title VII, and the Court was saying those  
24 really aren't what Congress would have meant to  
25 be jurisdictional.

1           I think this case is many steps past  
2 this because you have a limitation that's  
3 addressed to a court, and I don't think that in  
4 Arbaugh and the cases that came right after it,  
5 the Court was trying to say that that sort of  
6 thing isn't what Congress would have meant to  
7 be jurisdictional.

8           JUSTICE ALITO: I mean, do you think  
9 there's an empirical basis for that? We -- we  
10 have gotten into Congress's mind and said, you  
11 know, when they impose an exhaustion  
12 requirement, we think that almost always they  
13 mean that that's not jurisdictional in the true  
14 sense of the word?

15           MS. DUBIN: I definitely don't think  
16 so in the exhaustion context, especially like  
17 here, and this is something that I was saying  
18 earlier. I think that when Congress imposes a  
19 restriction on the relationship between an  
20 adjudicative agency proceeding and a court of  
21 appeals, it actually would want that to be  
22 jurisdictional. And if we're looking to what  
23 Congress would want, I think this is exactly  
24 the type of provision that Congress would want  
25 to be jurisdictional because it means that a



1 court of appeals won't be sitting there  
2 reviewing agency actions in the first instance.  
3 It will have the benefit of reasoned decision  
4 making that might avoid the need for judicial  
5 review altogether.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch?

10 Justice Kavanaugh?

11 Justice Barrett?

12 Justice Jackson?

13 JUSTICE JACKSON: Can I just clarify  
14 that last point? Because I -- I thought, when  
15 we were talking about jurisdictional, we were  
16 talking about Article III.

17 Is that what we mean by -- in which  
18 case there is a constitutional concern here.  
19 There is some, you know, responsibility on  
20 Congress's part to be clear about what it is  
21 it's doing in terms of -- of restricting the  
22 authority of the court.

23 So do I have that wrong? Am I --  
24 maybe I'm back in the old days thinking of  
25 jurisdiction in different ways, but I -- I

1 thought the whole point was we wanted to make  
2 sure that jurisdictional determinations were  
3 taking -- taken seriously because they  
4 implicate these constitutional concerns about  
5 the power of the court.

6 MS. DUBIN: That -- I think the source  
7 of the -- the -- of the clear statement rule is  
8 -- is much more Congress -- the assumption that  
9 this is how Congress drafts in the  
10 jurisdictional area. And that -- I think you  
11 see that in Arbaugh and the cases that  
12 succeeded -- came right after it.

13 I think even if you did see this as  
14 some sort of constitutional limitation, this is  
15 the sort of case in which you would  
16 particularly want to enforce that limitation  
17 because of what I was saying to Justice Alito.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Hughes, rebuttal?

21 REBUTTAL ARGUMENT OF PAUL W. HUGHES  
22 ON BEHALF OF THE PETITIONER

23 MR. HUGHES: Thank you, Mr. Chief  
24 Justice.

25 So I'd like to start with (d)(1), the

1 "as of right," because this does come up an  
2 awful lot, and I think the Court's guidance  
3 would be helpful.

4 As to "as of right," we just don't  
5 think the government has any role for that  
6 statutory text that isn't already captured by  
7 the separate term "available." And in many  
8 exhaustion provisions, Congress spoke about  
9 available remedies, but, here, Congress added  
10 more, added "as of right," and we think that  
11 statutory language has to have a purpose, and  
12 only Petitioner gives that language meaning.

13 Next, the government, in order to try  
14 to escape the result that their textual  
15 interpretation would lead, that every  
16 non-citizen always has to file a motion to  
17 reconsider, I heard the textual argument that  
18 it -- that their -- their -- their retort is  
19 that a motion to reconsider would be improper  
20 in the event that the Board has already  
21 resolved or decided that issue.

22 But that just can't be right because a  
23 motion to reconsider, as the name implies,  
24 "reconsider," the classic use of that is to go  
25 back to the Board and say, well, you decided

1 this thing, this issue of fact or this issue of  
2 law, but we think the thing that you decided  
3 you got wrong. That's inherent in the concept  
4 of a motion to reconsider.

5 So I don't think it works for the  
6 government to suggest that a motion to  
7 reconsider when you are just straightforwardly  
8 asking the Board to reconsider what it already  
9 did is somehow procedurally improper such that  
10 that becomes a textual escape from the -- the  
11 -- the place that their statutory argument  
12 would ultimately lead.

13 As to the jurisdictional status of  
14 (d)(1), we do think the Court has plainly  
15 adopted the clear statement rule, and for all  
16 of the reasons we've discussed, this just  
17 doesn't satisfy it and certainly not the issue  
18 preservation requirement that the government  
19 requires. Again, it's not a normal issue  
20 preservation requirement but one that is much  
21 more muscular, requiring parties just not to  
22 preserve their issues when they go up to the  
23 appellate body but to go back to that appellate  
24 body and say you introduced a new error.

25 Congress can do that if it wishes. It

1 has done so in other statutes. But it creates  
2 a structure that makes sense that tolls  
3 judicial review and provides for that  
4 expressly. Congress just did nothing of the  
5 sort here.

6           Ultimately, we think our positions  
7 just accord with the text and they create a  
8 sensible statutory structure, and it properly  
9 empowers government lawyers to find waiver and  
10 -- or waive exhaustion, as is typically the  
11 case in exhaustion statutes, where that would  
12 be appropriate to do so. We just don't think  
13 this is jurisdictional, and we also think  
14 Petitioner properly exhausted.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17           (Whereupon, at 11:07 a.m., the case  
18 was submitted.)

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## Official

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