No. 21-1436

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition demonstrated that the Court should review two questions regarding the proper interpretation of 8 U.S.C. § 1252(d)(1): *First*, whether that section creates a jurisdictional requirement that cannot be waived or forfeited; and *second*, whether the text requiring exhaustion of "administrative remedies available to the alien as of right" (*id.*) requires exhaustion of undisputedly discretionary motions to reopen or reconsider.

The government tellingly begins with the merits. BIO 10-16. But even if its positions were correct (to be clear, they are not), that would not undermine the importance of resolving the disagreement among the circuits regarding important and frequently-litigated questions of federal law.

As to the circuit conflicts, the government has little response; the divergence between the lower courts on both questions presented is apparent, and warrants review. See, *e.g.*, *Saleh* v. *Barr*, 795 F. App'x 410, 423 (6th Cir. 2019) (Murphy, J., concurring) (noting that "a circuit split already exists" over whether Section 1252(d)(1)'s "exhaustion requirement [is] jurisdictional").

Finally, this case is a proper vehicle because, contrary to the government's puzzling suggestion (BIO 13-15), the questions presented were outcome-determinative here: The only judge below that addressed petitioner's impermissible-factfinding challenge, rather than finding it unexhausted, would have reversed on that ground. See Pet. App. 10a (Higginson, J., dissenting).

The Court should grant review.

A. The circuits are split as to both questions presented.

As the petition explained, the courts of appeals are divided regarding both questions presented.

1. There is an acknowledged circuit conflict regarding whether Section 1252(d)(1) creates a jurisdictional requirement. The Second and Seventh Circuits have clearly held that—at least as applied to exhaustion of issues—Section 1252(d)(1) is not a jurisdictional bar. See *Chavarria-Reyes* v. *Lynch*, 845 F.3d 275, 279 (7th Cir. 2016) ("[Section] 1252(d)(1) * * * *is not a jurisdictional bar*," and is instead "a mandatory case-processing rule") (emphasis added);[1] *Zhong* v. *U.S. Dep't of Justice*, 480 F.3d 104, 120 (2d Cir. 2007) ("Today we hold (a) that 8 U.S.C. § 1252(d)(1) does not make issue exhaustion a statutory jurisdictional requirement, [and] (b) that as a result, a failure to exhaust specific issues may be waived by the Attorney General.").

Relegating its circuit split analysis to the rear of its brief, the government curiously asserts that there is "almost" uniformity. BIO 16. But uniformity is an all-or-nothing proposition, and the government cannot seriously deny its absence here.

The government observes that, in the Second Circuit, exhaustion of remedies under Section 1252(d)(1)—as opposed to exhaustion of issues—is a jurisdictional bar. BIO 17 (citing *Zhong*, 480 F.3d at 119). We fail to see how this observation helps the government, however, because the exhaustion applied by

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[1] See also *Arobelidze* v. *Holder*, 653 F.3d 513, 517 (7th Cir. 2011); *Korsunskiy* v. *Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006) ("The agency contends that [Section 1252(d)(1)'s] exhaustion requirement, too, is 'jurisdictional.' It is not."); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005).

the Fifth Circuit below *is* issue exhaustion. See Pet. App. 4a ("[F]ailure to exhaust an *issue* deprives this court of jurisdiction over that *issue.*") (quoting *Omari* v. *Holder*, 562 F.3d 314, 319 (5th Cir. 2009)) (emphasis added); *ibid.* ("[B]ecause Santos did not present this *argument* before the BIA * * * we lack jurisdiction to consider it.") (emphasis added). And whether this stance is "idiosyncratic" or not (BIO 17), the government does not dispute that the exhaustion-waiver issue would have come out the other way in the Second Circuit, again cutting in favor of review.

As to the Seventh Circuit, the government merely points to other cases. But our authority both postdates (*Chavarria-Reyes*, 845 F.3d at 279) *and* predates (*Korsunskiy*, 461 F.3d at 849) the government's.[2]

2. There is likewise a square conflict over the second question presented. As we explained, the Ninth and Eleventh Circuits hold that, where the BIA introduces a new error in its opinion, Section 1252(d)(1)'s mandate to exhaust "remedies available * * * as of right" does not require a noncitizen to file a discretionary motion to reopen or reconsider. Pet. 19-21 (collecting cases); see *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271, 1280 (9th Cir. 2018); *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1297, 1299 (11th Cir. 2015).

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[2] In the Seventh Circuit, the earliest holding controls. See *Brooks* v. *Walls*, 279 F.3d 518, 522-523 (7th Cir. 2002). The Seventh Circuit's treatment of Section 1252(d)(1) as non-jurisdictional predates the government's earliest case, *Padilla*, and thus constitutes the law of the circuit. Compare *Padilla* v. *Gonzales*, 470 F.3d 1209, 1213 (7th Cir. 2006) (decided in December 2006), with *Korsunskiy*, 461 F.3d at 849 (holding, in August 2006, that Section 1252(d)(1)'s "exhaustion requirement * * * is not" "jurisdictional").

a. Responding to the Eleventh Circuit, all the government can muster is an observation that *Indrawati* "did not discuss whether or when a motion for reconsideration may be required" (BIO 19)—but that case indisputably stands for the proposition that Section 1252(d)(1) is no bar to immediate judicial review when a new error is introduced by the BIA. See *Indrawati*, 779 F.3d at 1297, 1299. The government's disagreement with the reasoning behind that holding is a merits question, not an impediment to certiorari.

Moreover, following the filing of the petition, the Eleventh Circuit confirmed *Indrawati*'s clear holding. After the BIA had "relied on its own reasoning" to deny an asylum claim, a petitioner challenged that decision for a "lack of reasoned consideration." *Morales* v. *U.S. Att'y Gen.*, 33 F.4th 1303, 1308 (11th Cir. 2022). Relying explicitly on *Indrawati*, the court rejected the government's contention that the petitioner had "failed to exhaust his claim below." *Ibid*. The court "maintain[s] jurisdiction to review [petitioner's] argument that the BIA failed to give reasoned consideration because a petitioner logically cannot raise such an argument before the BIA has decided." *Ibid*.

And, while we agree that unpublished decisions "do not * * * bind" (BIO 18), they are nonetheless confirmatory evidence. *Ullah* unmistakably identified *Indrawati*'s holding: "Like the petitioner in *Indrawati*, [petitioner] could not have raised his improper fact-finding claim before the BIA issued its final decision. Thus, under *Indrawati*, [petitioner] was not required to raise his claim in order to administratively exhaust that issue." *Ullah* v. *U.S. Att'y Gen.*, 760 F. App'x 922, 929 (11th Cir. 2019). In response to the government's citation of "other circuits [holding] that a petitioner's improper fact-finding claim must be raised in a motion for reconsideration to be administratively

exhausted," the *Ullah* court explained that it was "bound by *Indrawati*'s explicit jurisdictional holding." *Id*. at 929 n.7. *Ullah* thus demonstrates that our reading of *Indrawati*—and not the government's—is correct.

Indeed, since the filing of the petition, the Eleventh Circuit, relying on *Indrawati*, has again confirmed that "a petitioner is not required to exhaust a challenge to a legal error that does not exist until the BIA issues its decision; instead, the petitioner may raise that challenge in her petition for review." *Castaneda-Reyes* v. *U.S. Att'y Gen.*, 2022 WL 2983270, at *2 (11th Cir. July 28, 2022) (per curiam). For this reason, a petitioner need not "seek reconsideration" in order "to exhaust her administrative remedies." *Id*. at *3. There can be no serious doubt that the Eleventh Circuit applies a rule diametrically opposed to the one employed below.

b. The government next asserts that the Ninth Circuit's precedents "ha[ve] been overtaken by a change in the law," and that "the Ninth Circuit * * * should join the other circuits that have found that a failure to move for reconsideration may render a claim unexhausted." BIO 19-20. To start, the government's suggestion is a tacit admission that Ninth Circuit law is *currently* contrary to the other circuits, just as we contend.

Moreover, the government is wrong to assert that the Ninth Circuit's reasoning has been undermined by an IIRIRA statutory amendment from *1996*. BIO 19. If that argument had any merit, it surely would have come to the Ninth Circuit's attention during the intervening 26 years. But the Ninth Circuit has repeatedly and recently reaffirmed its same approach. See *Olivas-Motta*, 910 F.3d at 1280; *Alcaraz* v. *I.N.S.*, 384 F.3d 1150, 1158 (9th Cir. 2004).

And for good reason—the IIRIRA amendment did not effect any relevant substantive change. While the authority for motions to reopen was moved from regulation to statute (cf. BIO 19), the feature the *Castillo-Villagra* court found determinative about reopening motions—their discretionary nature—has remained constant. Compare *Castillo-Villagra* v. *I.N.S.*, 972 F.2d 1017, 1024 (9th Cir. 1992) ("Since *Doherty* requires that motions to reopen be treated as 'discretionary,' they cannot be deemed remedies available 'as of right,' so cannot be a statutory prerequisite to judicial review."), with 8 C.F.R. § 1003.2(a) (continuing to provide that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.").

The government's need to rely on a fanciful contention—that the Ninth Circuit might revisit its binding precedent based on a decades-old statutory amendment—only serves to confirm the intractable circuit conflict.

B. The government's merits positions are incorrect.

The government's merits contentions are no reason to deny review and, in any event, are erroneous.

1. As we demonstrated (Pet. 17-18), Section 1252(d)(1) is best read as a claim-processing rule, not a jurisdictional bar. In an effort "'to bring some discipline' to use of the jurisdictional label," this Court "treat[s] a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler, P.C.* v. *Commissioner of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022). And while Congress need not "incant magic words" to impose a jurisdictional requirement (BIO 11 (quotation marks omitted)), "the 'traditional tools of statutory construction must *plainly*

show that Congress imbued a procedural bar with jurisdictional consequences.'" *Boechler, P.C.*, 142 S. Ct. at 1497 (emphasis added).

Here, as we explained, those traditional tools certainly do not "plainly show" that Section 1252(d)(1) is jurisdictional. See Pet. 17-18. To the contrary, "[e]lsewhere in section 1252, where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously." *Biden* v. *Texas*, 142 S. Ct. 2528, 2539-2540 (2022) (collecting examples of such unambiguous jurisdictional language, including "no court shall have jurisdiction to review" and "no court shall have jurisdiction to hear any cause or claim") (quoting 8 U.S.C. § 1252(a)(2), (g)).

The government simply points (BIO 12) to Section 1252(d)(1)'s use of the term "review"—but there is no reason to conclude that this word stands in for "jurisdiction" when Congress used express jurisdictional language throughout neighboring provisions. Indeed, the very Act that adopted Section 1252(d)(1) employed far more specific language elsewhere when it sought to denote jurisdiction. See Pet. 18.

As the Court put it in *Boechler, P.C.*, "[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." 142 S. Ct. at 1498. Just so here. See also *Saleh*, 795 F. App'x at 422-423 (Murphy, J., concurring) ("[Section] 1252(d)(1) does not mention jurisdiction, and I fail to see a 'clear' indication that Congress wanted the rule to be jurisdictional. Indeed, courts usually 'regard exhaustion as an affirmative defense,' not a jurisdictional requirement.").

2. The government's response as to the second question presented is even more confounding. As we explained (Pet. 23-26), a noncitizen plainly need not file a motion for reopening or reconsideration in order to "exhaust[] all administrative remedies available * * * *as of right*" (8 U.S.C. § 1252(d)(1) (emphasis added)), because the BIA has complete discretion to deny such motions, "even if the party moving has made out a *prima facie* case for relief" (8 C.F.R. § 1003.2(a)). See also *ibid.* ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board.").

In response, the government takes the perplexing position that reconsideration and reopening motions fall within the statutory text because *the procedure for filing* such a motion is "available * * * as of right"—notwithstanding that the BIA has discretion to deny such a motion even if meritorious. See BIO 16.

But that is simply not the question—the statute requires the "*remed*[*y*]" to be "available * * * as of right" (8 U.S.C. § 1252(d)(1)), not merely that the procedure for seeking that remedy is available. Here, that means that petitioner must have a "right" to reconsideration (or reopening) itself—the ultimate remedy sought—if she satisfies the prerequisites for that relief; it is plainly insufficient that she merely has "the 'right' to make the request" (BIO 16), when the BIA has discretion to deny even a legally correct motion. See, *e.g.*, *Alcaraz*, 384 F.3d at 1160 ("[T]he failure to file a discretionary motion cannot deprive this court of jurisdiction," because discretionary remedies "cannot be deemed remedies available as of right.").

Perhaps unsurprisingly, none of the circuits on the government's side of the split have adopted this reasoning; as we explained, they instead impose an atextual *issue* exhaustion requirement as a corollary

of Section 1252(d)(1)'s *remedy* exhaustion provision. Pet. 24-26. But that reasoning does violence to the statutory text by "read[ing] into [the] statute[] words that aren't there" (*Romag Fasteners, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020)) and by disregarding this Court's admonition that issue exhaustion is *not* necessarily a "corollary of any requirement of exhaustion of remedies" (*Sims* v. *Apfel*, 530 U.S. 103, 107 (2000)).

C. This is a proper vehicle.

Finally, the government suggests that this case is an unsuitable vehicle because, it claims, the dismissal of petitioner's impermissible-factfinding argument was not "outcome determinative." BIO 13-15. Not so.

First, the government is simply wrong when it asserts that the dissenting judge below "did not address" "petitioner's impermissible-factfinding challenge" "on the merits." BIO 15. To quote the very first sentence of Judge Higginson's dissent: "The Board exceeded its scope of review by engaging in impermissible factfinding." Pet. App. 10a (Higginson, J., dissenting); see also *ibid.* ("When the Board, in a single-member decision, determined that 'the presumption of future persecution * * * has been rebutted in this case,' it engaged in factfinding not permitted by the regulation."); *ibid.* ("I would remand" on this ground). That language could not be clearer, and it demonstrates that the only judge below who evaluated petitioner's impermissible-factfinding argument found it to be a winning one. That is enough to make this vehicle appealing.

Second, the government is wrong to insinuate (BIO 15) that the majority below actually reached this procedural issue. It did not; the court expressly rejected the impermissible factfinding argument based solely on jurisdiction. Pet. App. 4a-5a.

The government instead points to the lower court's consideration of petitioner's *substantive* argument. BIO 15. But that is an issue subsequent to the procedural contention that it was error for the BIA to even render a factual determination.

Citing cases from outside the Fifth Circuit, the government's main point seems to be that petitioner's argument is doomed to fail because the BIA *may* evaluate, in the first instance, record evidence. BIO 13-14 (collecting cases); cf. generally 8 C.F.R. § 1003.1(d)(3)(iv)(A) ("The Board will not engage in factfinding in the course of deciding cases."). To the extent the government's cases stand for that proposition, they implicate an *additional* circuit split and thus counsel in favor of review of the merits below, not against it. Compare BIO 13-14 with, *e.g.*, *Osmani* v. *Garland*, 24 F.4th 617, 623 (7th Cir. 2022) ("By engaging in de novo review of undeveloped record evidence * * * (which the IJ did not consider and upon which made no findings), the BIA engaged in impermissible factfinding and exceeded the scope of its appellate review.").

Moreover, the BIA here did more than simply evaluate record evidence; in order to "conclude" that the presumption of future persecution was rebutted, as it did (Pet. App. 17a), the BIA necessarily had to "*find[] by a preponderance of the evidence*" either that "[t]here has been a fundamental change of circumstances" or that petitioner "could avoid could avoid a future threat to * * * her life or freedom by relocating to another part" of Guatemala. 8 C.F.R. § 208.16(b)(1)(i)(A)-(B) (emphasis added); see Pet. App. 17a (BIA, citing this regulation). The IJ, by contrast, had no occasion to consider these issues—particularly internal relocation—because she found that

there was no presumption of future persecution in the first place. Pet. App. 28a-29a.

If the prohibition on the BIA "engag[ing] in fact-finding" (8 C.F.R. § 1003.1(d)(3)(iv)(A)) means anything, it must encompass "conclud[ing]" (Pet. App. 17a) that a fact that must be "f[ou]nd[] by a preponderance of the evidence" (8 C.F.R. § 208.16(b)(1)(i)) is present, when the IJ did not first do so.

Finally, the government notes in passing that "this Court has denied writs of certiorari presenting similar questions" (BIO 9)—but those cases actually *did* involve serious vehicle flaws. In *Omwega*, "there [was] no question of waiver or forfeiture because the government raised [the] petitioner's failure to exhaust as soon as she made the relevant arguments," rendering the distinction between a jurisdictional and a mandatory claims-processing rule academic. BIO 12, *Omwega* v. *Garland*, No. 20-1395 (Sept. 29, 2021). And the petitioner in *Romero-Escobar* "knowingly and intelligently waived his right to appeal the IJ's order of removal to the Board" *at all*, rather than simply declining to file a discretionary motion for reconsideration. BIO 2, *Romero-Escobar* v. *Garland*, No. 15-266 (Nov. 4, 2015).

Because this case does not share these obvious deficiencies—indeed, the government concedes that it never argued exhaustion, meaning that "waiver and forfeiture would apply" (BIO 13)—the Court should take this opportunity to resolve the disagreement among the courts of appeals regarding the proper interpretation of Section 1252(d)(1).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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