No. 21-1436

In the Supreme Court of the United States

LEON SANTOS-ZACARIA,

Petitioner,

v.

MERRICK GARLAND, U.S. Attorney General,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Prior to seeking judicial review, 8 U.S.C. § 1252(d)(1) requires a noncitizen to exhaust "all administrative remedies available to the alien as of right." This case presents two questions:

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

2. Whether, to exhaust "all administrative remedies available to the alien as of right," a noncitizen must file a motion to reconsider with the Board of Immigration Appeals, asking the Board to exercise its discretion to correct its own error.

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

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2022. The Court granted a timely petition for certiorari on October 3, 2022. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1252(d) provides:

> (d) Review of final orders
>
> A court may review a final order of removal only if—
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, and
>
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 C.F.R. § 1003.2 provides in relevant part:

> The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board * * *. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

STATEMENT

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress provided comprehensive standards—both jurisdictional and procedural—governing judicial review of immigration proceedings. Relevant here, Section 1252(d)(1) obligates noncitizens to "exhaust[] all administrative remedies available to the alien as of right."

Petitioner is a transgender woman who was raped and received death threats on account of her gender identity and sexual orientation in her native Guatemala. She fled to the United States and sought withholding of removal. An immigration judge (IJ) found petitioner's account of harm "credible" but inexplicably ruled that she did not suffer past persecution, and thus was not entitled to a presumption of future persecution. Petitioner appealed to the Board of Immigration Appeals, which reversed on the issue of past persecution. But rather than remand to the IJ to find whether the government rebutted the presumption of future persecution, the Board made several findings of fact on its own—contrary to its governing regulations—and determined that petitioner had not shown she would be persecuted in the future.

Petitioner sought review before the Fifth Circuit, claiming in relevant part that the Board procedurally erred by engaging in its own factfinding, rather than remanding to the IJ for factfinding in the first instance. The government responded on the merits; it never claimed that petitioner failed to exhaust this argument; and it declined to argue exhaustion when asked directly during oral argument.

The court of appeals nonetheless held *sua sponte* that petitioner had failed to exhaust her improper factfinding argument. In that court's view, petitioner

needed to file a discretionary motion to reconsider before the agency in order to exhaust the "remedies available * * * as of right." 8 U.S.C. § 1252(d)(1). And because the court viewed the provision as jurisdictional, the government's waiver of exhaustion had no effect.

That position is doubly wrong as a matter of plain text. And it creates a treacherous trap for vulnerable litigants, setting up landmines of administrative procedure that block judicial review.

To begin with, Section 1252(d)(1) is not a jurisdictional requirement; it is a waivable claims-processing rule. In stark contrast to numerous provisions surrounding it, Section 1252(d)(1) contains no mention of "jurisdiction." The Court's "clear-statement rule"—under which it will "treat 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, 1499 (2022))—thus resolves this question. And the broader statutory structure further compels that result, which also accords with the usual, nonjurisdictional role of an exhaustion requirement.

More, Section 1252(d)(1) does not require *issue* exhaustion; it requires "exhaust[ing] all administrative *remedies*." Because issue exhaustion does not emanate from the statute, it cannot be jurisdictional.

Finally, regardless of the jurisdictional status of Section 1252(d)(1), the provision requires a noncitizen to exhaust only those remedies "available to the alien as of right." But reconsideration is not a remedy available "as of right;" it is a quintessential discretionary remedy. Any contrary conclusion would produce the most bizarre consequences—requiring noncitizens to file motions to reconsider in *every single case*. For good

reason, not even the court of appeals below—nor any other court—has construed the statute this way. The text precludes it.

For all of these reasons, the Court should hold that the Fifth Circuit erred in dismissing petitioner's improper-factfinding claim.

A. Statutory and regulatory background.

1. Removal proceedings ordinarily begin in immigration court before an IJ. The Department of Homeland Security (DHS) files a charging document describing the statutory grounds for a noncitizen's removal. See 8 U.S.C. § 1229; 8 C.F.R. § 1003.14. After initial hearings, the IJ conducts an evidentiary hearing on contested matters. See 8 C.F.R. §§ 1240.7, 1240.10. The IJ makes all findings of fact. See *id.* §§ 1003.10(b), 1003.1(d)(3)(iv)(A). The IJ then issues an opinion making determinations of removability and deciding any claims for relief from removal, such as asylum, withholding of removal, or protection under the Convention Against Torture. *Id.* § 1240.12.

2. DHS can sometimes bypass these immigration court procedures when it seeks to reinstate a previous removal order. 8 U.S.C. § 1231(a)(5). But when—as here—DHS finds the noncitizen has a "reasonable fear of persecution," the agency refers the noncitizen's withholding claims to an IJ, whose orders are appealable under the same regulations as initial removal orders. 8 C.F.R. § 1208.31(e).

Congress has provided that a noncitizen is entitled to withholding of removal when the noncitizen's "life or freedom would be threatened" because of a protected trait if the noncitizen were removed to a particular country. 8 U.S.C. § 1231(b)(3)(A). This narrow form of relief has a higher standard than asylum: An applicant must demonstrate "a clear probability of

persecution" to receive withholding of removal. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). But if an applicant proves past persecution, she receives a rebuttable presumption "that the applicant's life or freedom would be threatened in the future in the country of removal." 8 C.F.R. § 1208.16(b)(1)(i).

3. Either party may appeal the IJ's decision to the Board of Immigration Appeals. 8 C.F.R. §§ 1003.38, 1240.15. The Board is a 23-member body with nationwide jurisdiction over immigration appeals. *Id.* § 1003.1(a)-(b). In most circumstances, appeals are adjudicated by a single member of the Board. *Id.* § 1003.1(e)(3), (6). When the Board dismisses an appeal, the IJ's removal order becomes final. 8 C.F.R. § 1241.1(a).

The Board's regulations prohibit it from engaging in factfinding, except by taking administrative notice of "facts that are not reasonably subject to dispute." 8 C.F.R. § 1003.1(d)(3)(iv). Instead, when "the immigration judge committed an error of law that requires additional factfinding," the Board should remand to the IJ. *Id.* § 1003.1(d)(3)(iv)(D)(5)(ii).

4. Noncitizens may petition for judicial review of a final removal order from the Board. 8 U.S.C. § 1252(a). Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress enacted a comprehensive scheme governing judicial review of immigration proceedings. See Pub. L. No. 104-208, § 306, 110 Stat. 3009, 607-612 (codified as amended at 8 U.S.C. § 1252).

IIRIRA contains several provisions expressly limiting the jurisdiction of Article III courts to review immigration claims. For example, 8 U.S.C. § 1252(a)(2)(A) provides that, "[n]otwithstanding any other provision of law * * * no court shall have

jurisdiction to review" certain aspects of expedited removal. See 110 Stat. 3009, 607. Several other provisions in Section 1252 similarly restrict jurisdiction. See, *e.g.*, 8 U.S.C. § 1252(a)(2)(B)-(C).

At the same time, other provisions in IIRIRA impose claims-processing requirements. For example, Section 1252 creates procedural requirements for service (*id.* § (b)(3)(A)) and briefing (*id.* § (b)(3)(C)), among many others.

Relevant here, Congress provided for an administrative exhaustion requirement. Before filing a petition, the noncitizen must have "exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). Whether this requirement is jurisdictional is the first question presented.

In enacting this provision in IIRIRA, Congress borrowed from the Immigration and Nationality Act Amendments of 1961, which first introduced a statutory administrative exhaustion requirement for immigration proceedings. See Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 653. Under that statute, "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order." *Ibid.*

5. Following an adverse Board decision, a noncitizen may file a motion to reconsider. Whether a motion to reconsider is an "administrative remed[y] available to the alien as of right" for purposes of the exhaustion requirement in Section 1252(d)(1) is the second question presented.

A noncitizen "may file one motion to reconsider a decision that the alien is removable from the United

States." 8 U.S.C. § 1229a(c)(6). The noncitizen must file such a motion, which "shall specify the errors of law or fact in the previous order," "within 30 days of the date of entry of a final administrative order of removal." *Ibid*. The governing Board regulation provides that "[t]he decision to grant or deny a motion to * * * reconsider is within the discretion of the Board, subject to the restrictions of this section." 8 C.F.R. § 1003.2(a).

B. Factual background and proceedings below.

1. Petitioner Leon Santos-Zacaria, who goes by Estrella, is a transgender woman attracted to men. J.A. 39, 42-44; Pet. App. 2a.[1] Originally from a small town in Guatemala (J.A. 39), petitioner was raped by a neighbor when she was twelve years old. J.A. 44. The rapist repeatedly denigrated petitioner using an anti-gay slur and threatened to kill her if she reported the rape. J.A. 44-45, 82-83. On account of petitioner's expression of sexual orientation and gender identity, townspeople threatened to "kill" her. J.A. 42; A.R. 251. Petitioner fled Guatemala, eventually reaching the United States. Pet. App. 16a.

Petitioner was twice removed to Guatemala, in 2008 and 2012. Pet. App. 22a-23a. To avoid persecution there, she quickly fled to Mexico each time, remaining in Guatemala for only a week or two. J.A. 45-47. Petitioner briefly visited Guatemala three times to see her parents, including to attend her father's funeral. J.A. 49-50; Pet. App. 11a. During each visit, petitioner concealed her transgender identity by cutting her hair and wearing male clothing. J.A. 43, 51, 55;

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[1] The IJ found petitioner "credible" "on the material issues." Pet. App. 22a. Santos-Zacaria speaks Konjobal, a Mayan language local to the region where she was born, and thus her testimony came through translation. Pet. App. 13a n.4.

Pet. App. 11a. She hired private transportation and hid in her parents' home. Pet. App. 11a.

In 2018, after a gang assaulted and raped petitioner in Mexico, she sought refuge once more in the United States. J.A. 84.

2. DHS moved to reinstate petitioner's 2008 removal order. A.R. 245. Petitioner expressed fear of returning to Guatemala and sought withholding of removal. See 8 U.S.C. § 1231(b)(3).

In an administrative proceeding, a DHS officer found that petitioner had a "reasonable fear of persecution." A.R. 226-228. Petitioner explained that there is "nowhere in Guatemala" she can live because "there is nowhere there that [she] would be protected." J.A. 88-89. DHS referred the case to immigration court. A.R. 228.

3. Before the IJ, petitioner introduced substantial evidence demonstrating that her experience of persecution is common for transgender or gay persons in Guatemala.[2] The State Department notes that "[t]ransgender individuals * * * face severe discrimination," including abuse and extortion by the police. J.A. 91. Per the State Department, the Guatemalan "government undertook minimal efforts to address" the "general societal discrimination against LGBTI persons." J.A. 90.

According to a country conditions expert, "LGBT persons are rejected, despised and abused in both private and public spheres." A.R. 273. Transgender women are subject to a "constant threat of violence," with numerous reports of transgender women being murdered, often in grotesque and public ways. A.R.

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[2] Petitioner identifies as a transgender woman but may be perceived in Guatemala as a gay man. J.A. 41-43.

366, 371. And yet these reports are just the tip of the iceberg, as most crimes against LGBT persons go unreported for fear of retaliation. A.R. 276-277.

Consistent with the State Department's report, petitioner testified that there was nowhere she "could safely live in Guatemala." J.A. 61. Her attorney asked: "Is there anywhere that you think that you could safely live in Guatemala?" *Ibid*. Petitioner responded unequivocally: "No." *Ibid.* Petitioner explained that the "whole country" is unsafe for her "because there [are] no police * * * anywhere that [are] going to protect [her]." *Ibid.* She repeatedly underscored her belief that "the police in Guatemala [are] not going to help [her]." J.A. 45. This testimony was consistent with petitioner's reasonable fear interview, which petitioner reaffirmed before the IJ. J.A. 60.

On cross-examination, the government lawyer pursued a line of questioning to probe whether petitioner could relocate safely to another part of Guatemala. Petitioner testified that, while she has "protection" here in the United States, she does "not down there." J.A. 72. In response to the government lawyer's suggestion that gay individuals may travel to Guatemala, petitioner explained that "there's a difference between just coming to visit there and living down there." *Ibid.*

The government then asked petitioner whether she ever tried "to move to a city that was more open and free" than where she grew up. J.A. 72. Petitioner responded that she did not know of such a place, explaining that she did not "know where to go down there" to find such a city. J.A. 73.

The government attorney then rephrased the question, converting it to a hypothetical: "But if you know of cities that are open to gay and lesbian and

transgender lifestyles you would rather move to those cities than the one you lived in correct?" Through an interpreter, petitioner only then responded to the hypothetical: "Yes, probably there is another place I can live down there." J.A. 73.[3]

4. The IJ denied petitioner's application for withholding of removal. Pet. App. 29a. Although the IJ found petitioner was "credible," the rape and death threats petitioner described, in the IJ's view, "d[id] not rise to the level of persecution contemplated by the Immigration and Nationality Act." Pet. App. 27a. The IJ further reasoned, despite petitioner's testimony that the rapist "said that * * * I am a gay" (J.A. 43), that "[t]here is no indication that * * * [the rapist] was motivated by [petitioner's] membership [in] a Particularized Social Group." Pet. App. 27a-28a. Accordingly, the IJ concluded that petitioner had not established past persecution, and thus she was not entitled to a presumption of future persecution. Pet. App. 28a; see 8 C.F.R. § 1208.16(b)(1).

Because the IJ found that petitioner was not entitled to a presumption of future persecution, the IJ did not consider whether that presumption was rebutted. Instead, without the presumption, the IJ briefly disposed of the question of future persecution, concluding that petitioner's fears were "speculative" because she had not presented evidence that her rapist was "still looking for [her]" and because she did not tell the police about her rape when she was twelve years old.

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[3] Petitioner also agreed with the DHS attorney's suggestion that she could "register as a woman" in Guatemala, which, according to the State Department, is not true. J.A. 72; see J.A. 91 (State Department report explaining that Guatemalan officials "still barred transgender individuals from obtaining identification documents that reflected a different gender").

Pet. App. 27a-29a. The IJ did not find that petitioner could safely relocate within Guatemala.

5. Petitioner timely appealed to the Board. In her brief to the Board, petitioner "request[ed] that her case be remanded to properly analyze her claim for relief under the proper standards" if "additional fact-finding is necessary." J.A. 18.

Although the Board disagreed with the IJ's analysis, it nonetheless dismissed petitioner's appeal. Pet. App. 20a.

The Board first determined that petitioner's credible account of rape had established past persecution—and thus a presumptive fear of future persecution—and that the IJ's decision to the contrary was clear error. Pet. App. 16a-17a.

But the Board did not stop there. Rather than remanding to the IJ for factfinding about whether the presumption was rebutted—as required by 8 C.F.R. § 1003.1(d)(3)(iv)(A)—the Board instead proceeded to find on its own that "the presumption * * * has been rebutted in this case." Pet. App. 17a. In making this finding, the Board also made several underlying factual findings, including that petitioner could "safely relocate within Guatemala," notwithstanding extensive contrary record evidence. *Ibid.*

6. Santos-Zacaria petitioned the Fifth Circuit for review, challenging both the agency's procedure—the Board's impermissible factfinding that the presumption of future persecution had been rebutted—and the substance of the agency's decision. In support of the impermissible-factfinding claim, petitioner noted that, because of the IJ's focus on past persecution, the IJ never analyzed current country conditions as relevant to the rebuttal of the presumption of future persecution. C.A. Pet. Br. 15-16.

The government did not claim before the Fifth Circuit that petitioner failed to exhaust her remedies. C.A. Resp. Br. 1-2, 16-17. At oral argument, a panel member pointed out to the government that "you haven't said that they failed to exhaust in a motion to reconsider." C.A. Oral Arg. at 20:54. The government declined that invitation to advance an exhaustion argument and instead responded to the merits of the factfinding claim. *Id.* at 21:00-22:00. The Solicitor General thus agrees that, because "the government did not raise or rely on petitioner's failure to exhaust in the court of appeals, * * * waiver and forfeiture would apply" here. Opp. 13.

Nonetheless, the Fifth Circuit held *sua sponte* that petitioner had failed to exhaust her administrative remedies in accordance with Section 1252(d)(1); in its view, such failure deprived it of jurisdiction over the impermissible-factfinding claim. Pet. App. 4a. Relying on its precedent in *Omari* v. *Holder*, 562 F.3d 314, 319 (5th Cir. 2009), the Fifth Circuit held that "[f]ailure to exhaust an issue deprives th[e] court of jurisdiction" under Section 1252(d)(1) as to "that issue." Pet. App. 4a. Because petitioner did not first raise her "impermissible factfinding" argument "before the BIA in a motion for reconsideration," the Court held that petitioner failed "to satisfy exhaustion" under Section 1252(d)(1) for that claim. Pet. App. 4a (quoting *Omari*, 562 F.3d at 320).

The court of appeals proceeded to address the substantive challenge to the withholding denial. It concluded that the Board's finding that the presumption of future persecution was rebutted—because petitioner could reasonably relocate within Guatemala—was supported by substantial evidence. Pet. App. 7a.

Judge Higginson dissented on both issues. Pet. App. 10a-13a. As he saw it, petitioner had satisfied

the exhaustion requirement in Section 1252(d)(1) by requesting a remand in her brief before the Board for any additional factfinding that was needed. Pet. App. 10a. And Judge Higginson further concluded that "the Board * * * engaged in factfinding not permitted by [8 C.F.R. § 1003.1(d)(3)(iv)]" when it "determined that 'the presumption of future persecution * * * ha[d] been rebutted.'" *Ibid.*; see also *id.* at 10a n.1 (noting that in making this finding, the Board "credit[ed] a cross-examination remark over direct testimony the IJ found credible"). As to the Board's substantive decision, Judge Higginson found that the Board's determination that the presumption of future persecution had been rebutted (because petitioner could safely relocate within Guatemala) was a "gross mischaracterization of the record." Pet. App. 12a.

SUMMARY OF ARGUMENT

The court of appeals should have exercised jurisdiction over petitioner's improper-factfinding claim.

I. Section 1252(d)(1) does not impose a jurisdictional issue-exhaustion requirement. The court below was thus wrong to conclude that "[f]ailure to exhaust an issue deprives [a] court of jurisdiction over that issue." Pet. App. 4a. Rather, as a nonjurisdictional requirement, the government can—as it did here—waive any noncompliance.

First, Section 1252(d)(1) is not jurisdictional at all. A statutory procedural requirement is jurisdictional "only if Congress 'clearly states' that it is." *Boechler, P.C.*, 142 S. Ct. at 1497. Congress must "plainly show" that it meant to "imbue[] a procedural bar with jurisdictional consequences." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 410 (2015). It did not here. The text of Section 1252(d)(1) makes no mention whatsoever of "jurisdiction."

The structure and context of the provision confirm what the text compels. The government's position relies on root language in subsection (d) that applies equally to both paragraphs (d)(1) and (d)(2). But paragraph (d)(2) cannot reasonably be construed as a jurisdictional condition because it permits—indeed requires—courts of appeals to exercise their discretion to determine whether a remedy is "inadequate" or "ineffective." That is hardly the typical task for a court to undertake to assure itself of jurisdiction. Moreover, Section 1252, and many other provisions enacted in IIRIRA alongside the exhaustion requirement, use crystal clear jurisdiction-stripping language. The conspicuous absence of this same language in Section 1252(d)(1) is powerful evidence that Congress did not intend for the exhaustion requirement to be a jurisdictional limitation.

Finally, concluding that the administrative-exhaustion provision in Section 1252(d)(1) is nonjurisdictional is in step with the ordinary expectation that administrative-exhaustion provisions are claims-processing rules and not jurisdictional conditions. Concluding otherwise here would raise serious separation-of-powers concerns, as an agency's own creation of administrative remedies would have jurisdictional consequences, altering the scope of judicial review. The Court can avoid such concern by construing the statute in a manner that is faithful to its text: Section 1252(d)(1) is a nonjurisdictional procedural requirement.

Second, regardless of Section 1252(d)(1)'s jurisdictional status, it does not, contrary to the decision below, impose an issue-exhaustion requirement. The provision by its plain terms obligates noncitizens to exhaust available "*remedies*," not *issues*. There is no "clear statement" by Congress rendering *issue*

exhaustion a jurisdictional requirement. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

II. To properly exhaust available administrative remedies, a noncitizen need not file a motion to reconsider. Section 1252(d)(1) requires a noncitizen to "exhaust[] all administrative remedies available to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added). A motion to reconsider is an archetypal discretionary remedy. 8 C.F.R. § 1003.2(a); *Matter of O-S-G-*, 24 I. & N. Dec. 56, 57 (BIA 2006) ("[W]e have authority to deny a motion to reconsider as a matter of discretion."). A motion to reconsider is not, therefore, a remedy "available to the alien as of right."

The government's contrary position would produce absurdities. Under its statutory construction—where a motion to reconsider is required to properly exhaust because a noncitizen has a "right" merely to file one—a noncitizen would have to file such a motion in every single immigration case in order for the reviewing court to have jurisdiction. That consequence would create enormous waste of litigant and government resources. Coupled with the government's position that the same requirement is jurisdictional, it creates literal impossibilities too. Indeed, these results are so bizarre that no court has ever read the provision this way. It is no wonder the text affirmatively forecloses such a construction.

ARGUMENT

I. SECTION 1252(D)(1) IS NOT JURISDICTIONAL.

This Court has rebuffed "profligate use" of the term "jurisdictional" to describe statutory provisions that establish procedural limitations. *Auburn Reg'l*, 568 U.S. at 153. Jurisdictional rules, which can "result in a waste of adjudicatory resources" and "disturbingly disarm litigants," are "unique in our

adversarial system." *Ibid.* In order to "bring some discipline to the use" of the term "jurisdiction"—and to distinguish jurisdictional limitations from procedural claims-processing rules subject to waiver and forfeiture—this Court has adopted a "'readily administrable bright line' rule." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006)). A statutory limitation is jurisdictional only if Congress "clearly state[s] that the rule is jurisdictional." *Auburn Reg'l*, 568 U.S. at 153.

Respecting that principle requires finding that Section 1252(d)(1) is not jurisdictional. Congress made no "clear statement" that Section 1252(d)(1) ranks as a jurisdictional limitation. Rather, the text, structure, context, and purpose of the provision all confirm that it is a mandatory claims-processing rule, subject to waiver and forfeiture. And Section 1252(d)(1) certainly does not render *issue* exhaustion a jurisdictional requirement.

A. Congress must provide a clear statement to render a rule jurisdictional.

This Court has painstakingly distinguished "between jurisdictional prescriptions and claim-processing rules." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161 (2010). Jurisdictional rules circumscribe "a court's power." *Boechler, P.C.*, 142 S. Ct. at 1497. Claims-processing rules, by contrast, "promote the orderly progress of litigation." *Ibid.* (quoting *Henderson*, 562 U.S. at 435). Because claims-processing rules—even if mandatory for litigants—"do not bear on a court's power," they are "nonjurisdictional rules" subject to waiver and forfeiture. *Ibid.*

The distinction has paramount practical importance. "Jurisdictional requirements * * * must be

raised by courts *sua sponte*," sometimes long after litigants spend substantial time and money on a case. *Boechler, P.C.*, 142 S. Ct. at 1497. Tardy recognition of jurisdictional defects or challenges to subject-matter jurisdiction "result[s] in the waste of judicial resources and may unfairly prejudice litigants." *Henderson*, 562 U.S. at 434. Mindful of the "drastic" consequences "that attach to the jurisdictional label" (*id.* at 435), the Court expects Congress to "plainly show" that it meant to "imbue[] a procedural bar with jurisdictional consequences" (*Kwai Fun Wong*, 575 U.S. at 410). This approach is appropriately "suited to capture Congress' likely intent." *Henderson*, 562 U.S. at 436.

Thus, it is well settled that a procedural requirement is jurisdictional "only if Congress 'clearly states' that it is." *Boechler, P.C.*, 142 S. Ct. at 1497 (quoting *Arbaugh*, 546 U.S. at 515); see also *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1850 (2019); *Hamer* v. *Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017); *Musacchio* v. *United States*, 577 U.S. 237, 246 (2016); *Kwai Fun Wong*, 575 U.S. at 409; *Auburn Reg'l*, 568 U.S. at 153; *Henderson*, 562 U.S. at 435-436; *Reed Elsevier*, 559 U.S. at 163. Under this "clear-statement rule," it "is not enough" that a jurisdictional construction is "better" than other possible interpretations; rather, "[t]o satisfy the clear-statement rule, the jurisdictional condition must be just that: clear." *Boechler, P.C.*, 142 S. Ct. at 1499. In other words, "traditional tools of statutory construction must *plainly* show that Congress" intended to "deprive a court of authority to hear a case." *Kwai Fun Wong*, 575 U.S. at 410 (emphasis added).

The clear-statement rule is all the more applicable and reflective of Congress's intent in circumstances—as here—concerning review of agency action. As the

Court has repeatedly observed, administrative law functions against the backdrop of a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). The presumption "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020). This "interpretive guide" has been "consistently applied" to "legislation regarding immigration, and particularly to questions concerning * * * jurisdiction." *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010). The Court should thus be doubly hesitant in these circumstances to deem a procedural rule jurisdictional, absent a definitively clear instruction from Congress to do so.

B. The text, structure, context, and purpose of Section 1252(d) confirm that it is not jurisdictional.

1. The text lacks a clear statement that exhaustion is jurisdictional.

a. Section 1252(d)(1) provides that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." This text makes no explicit mention of federal-court jurisdiction. That is, on its face, Section 1252(d)(1) "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the federal courts. *Arbaugh*, 546 U.S. at 515. This conspicuous silence is dispositive.

Even when a statutory provision does contain express references to "jurisdiction," that is not always enough to demonstrate that the jurisdictional interpretation is the "clearly right" one for purposes of satisfying the clear-statement rule. *Boechler, P.C.*, 142 S.

Ct. at 1498; see also *Reed Elsevier, Inc.*, 559 U.S. at 163-164; *Biden* v. *Texas*, 142 S. Ct. 2528, 2539-2540 (2022). But Section 1252(d)(1) makes no mention at all of "jurisdiction." See *Kwai Fun Wong*, 575 U.S. at 410 ("Traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.").

Given the lack of any such terminology in Section 1252(d)(1), the most natural reading of the text is as a mandatory claims-processing rule. Although Section 1252(d)(1) requires noncitizens to exhaust claims before the agency, the mandatory nature of the text's demand on noncitizens is immaterial to whether the provision is jurisdictional. Indeed, a mandatory command "is true of most * * * statutes" providing for the orderly processing of claims, and this Court has "consistently found it of no consequence" with respect to jurisdiction. *Kwai Fun Wong*, 575 U.S. at 411.

b. Nor does it matter if the text of Section 1252(d)(1) is viewed as demanding. "[E]mphatic" language—even such extreme statutory text as a provision that claims "shall be forever barred" for noncompliance with a procedural requirement—does not transform a mandatory claims-processing rule into a jurisdictional limit. See *Kwai Fun Wong*, 575 U.S. at 411 (reasoning that such strong language did "not * * * matter"). "What matters instead is" whether the statutory text "speak[s] in jurisdictional terms." *Ibid.* (quoting *Arbaugh*, 546 U.S. at 515). It does not here.

Further, Section 1252(d)(1) "speak[s] to * * * a party's procedural obligations," indicating its nonjurisdictional character. *EPA* v. *EME Homer City Generation*, 572 U.S. 489, 512 (2014). It requires "*the alien* [to] exhaust[] all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1) (emphasis added). True, the noncitizen's ability to obtain

"review" is conditioned on compliance with this procedural prerequisite (8 U.S.C. § 1252(d)), but as the Court has repeatedly explained, such a "statutory condition * * * is not automatically 'a *jurisdictional* prerequisite to suit.'" *Reed Elsevier*, 559 U.S. at 166 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

The government is thus quite wrong to contend that Section 1252(d)(1) "delineat[es] the classes of cases a court may entertain," making it jurisdictional. Opp. 11 (quoting *Fort Bend*, 139 S. Ct. at 1848). The Court has expressly distinguished "a 'claim-processing rule,' like * * * an exhaustion requirement," from statutory provisions that "address[] 'a court's competence to adjudicate a particular category of cases.'" *Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018) (quoting *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 316 (2006)). Section 1252(d)(1) is plainly the former, which is especially strong evidence that it is nonjurisdictional. Under the government's contrary view, *every* procedural rule would describe "the classes of cases a court may entertain," causing the exception to swallow the rule. Opp. 11.

Moreover, the Court has consistently declined to read similarly worded requirements as jurisdictional, nor does it deem them "classes of cases" outside the scope of jurisdiction. See, *e.g.*, *Reed Elsevier*, 559 U.S. at 163-164 (holding nonjurisdictional the Copyright Act's statement that "no civil action for infringement * * * shall be instituted" unless a copyright is registered) (quoting 17 U.S.C. § 411(a)). Instead, the Court has explained, "when Congress does not rank a prescription as jurisdictional" via a "clear[] state[ment]" to that effect, "courts should treat the restriction as nonjurisdictional in character." *Fort Bend*, 139 S. Ct. at 1850 (quoting *Arbaugh*, 546 U.S. at 515-516).

Just so here. Section 1252(d)(1) does not describe a "class[] of case" (*Fort Bend*, 139 S. Ct. at 1848) nor a "category of case[]" (*Patchak*, 138 S. Ct. at 906) for which jurisdiction is lacking. Rather, it expressly describes "a 'claim-processing rule,' like * * * an exhaustion requirement." *Ibid*.

c. In the absence of any clear statement, the government is forced to rely heavily on the Court's instruction that there is no "magic words" requirement to render a provision jurisdictional. *Auburn Reg'l*, 568 U.S. at 153; see Opp. 11. We agree that Congress need not use "magic" words—but it must use "clear" ones. It is not enough for the government to show that Section 1252(d)(1) could be "plausibly construed to condition * * * jurisdiction" on the noncitizen's exhaustion. *Boechler, P.C.*, 142 S. Ct. at 1498. Rather, "[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." *Ibid*. And where "the text does not clearly mandate the jurisdictional reading," the Court will not select it. *Ibid*.

No such "clear[] mandate" is present here. Not only does Section 1252(d)(1) lack clearly jurisdictional language on its face, but three additional reasons each indicate that exhaustion is nonjurisdictional—and together compel the conclusion that Section 1252(d), at the least, is not *clearly* jurisdictional: *First*, because Section 1252(d)(2) is not amenable to a jurisdictional reading, Section 1252(d)(1) is not either. *Second*, throughout neighboring provisions, Congress used clear and specific language to limit jurisdiction, which Congress chose not to use in Section 1252(d)(1). And *third*, administrative exhaustion—especially where the agency itself can determine the steps required to exhaust—is structurally, historically, and constitut-

ionally at odds with a jurisdictional requirement. We discuss each point in turn.

2. Section 1252(d)(2) cuts strongly against a jurisdictional reading.

The structure of Section 1252(d) as a whole confirms that the exhaustion requirement in paragraph (d)(1) is best construed as nonjurisdictional. At the very least, Section 1252(d)(2) demonstrates that Congress did not "clearly state" that exhaustion is jurisdictional. *Fort Bend*, 139 S. Ct. at 1850.

The government must rely for its contrary position on root language in Section 1252(d)—"[a] court may review a final order of removal only if"—that applies to both paragraphs (d)(1) *and* (d)(2). In other words, the government's argument necessarily rises and falls with whether *both* paragraph (d)(1) *and* paragraph (d)(2) clearly limit federal court jurisdiction.

But paragraph (d)(2) cannot be construed as a jurisdictional condition. It provides:

> [A] court may review a final order of removal only if * * * another court has not decided the validity of the order, *unless the reviewing court finds* that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. § 1252(d)(2) (emphasis added). Section 1252(d)(2) grants discretionary authority to courts, which in turn "expressly *allows* courts to adjudicate" certain removal orders. *Reed Elsevier*, 559 U.S. at 165.

The discretionary judgment a court must undertake in determining whether a paragraph (d)(2) exception applies cannot be squared with interpreting the

very same provision as a jurisdictional limitation. In order to "find[]" whether an exception applies to the general condition, the reviewing court must have jurisdiction over the petition itself. And while a court necessarily has "jurisdiction to determine its own jurisdiction" (*e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002)), it would be "unusual"—at minimum—"to ascribe jurisdictional significance to a condition subject to * * * exceptions" (*Reed Elsevier*, 559 U.S. at 165).

Indeed, if the government were correct, courts would appear to have some measure of discretion to decide whether a jurisdiction-stripping provision applies, as there is no objective factual inquiry to identify whether the remedy in a prior proceeding was "inadequate" or "ineffective." 8 U.S.C. § 1252(d)(2). It would be bizarre, to say the least, for Congress to delegate to the courts of appeals discretion to decide for themselves whether jurisdiction even *exists*. Cf. *Hudson* v. *Parker*, 156 U.S. 277, 284 (1895) ("This Court cannot * * * enlarge or restrict its own inherent jurisdiction * * * under the * * * laws of the United States."); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 973-974 (5th Cir. 2000) (noting the "basic constitutional principle" "that only Congress may confer jurisdiction on the lower federal courts" and distinguishing the impermissible "delegation of the power to confer jurisdiction" to courts themselves from Congress's delegation of "rulemaking authority over the courts' own practices").

Because paragraph (d)(2) is not jurisdictional, paragraph (d)(1) is not either.

3. In neighboring provisions, Congress used far more express language to limit jurisdiction.

Statutory context abundantly confirms what the text and structure of paragraph (d)(1) make plain: Congress intended the exhaustion requirement to be a mandatory claims-processing rule, not a jurisdictional limitation. Indeed, the Court has recently reasoned that, "in section 1252, where Congress intended to deny subject matter jurisdiction, * * * it did so unambiguously" using the phrase "*no court shall have jurisdiction to review*." *Biden*, 142 S. Ct. at 2539.

Section 1252 is surrounded on all sides by other provisions, adopted by IIRIRA, that impose explicitly jurisdictional conditions.

- 8 U.S.C. § 1182(a)(9)(B)(v): "*No court shall have jurisdiction* to review a decision or action by the Attorney General regarding a waiver under this clause." 110 Stat. 3009, 577 (emphasis added).
- 8 U.S.C. § 1225(b)(1)(D): "In any action brought against an alien under section 275(a) or section 276, *the court shall not have jurisdiction* to hear any claim." 110 Stat. 3009, 582 (emphasis added).
- 8 U.S.C. § 1229c(f): "*No court shall have jurisdiction* over an appeal from denial of a request for an order of voluntary departure." 110 Stat. 3009, 597 (emphasis added).

Even more tellingly, Congress used the same express jurisdictional phrase many more times in IIRIRA when adopting Section 1252 itself. The exhaustion provision in Section 1252(d)(1)—which contains no mention of "jurisdiction" at all—is sandwiched between provisions that again use the same

crystal-clear command to strip jurisdiction over certain claims or remedies:

- 8 U.S.C. § 1252(a)(2)(A): "Notwithstanding any other provision of law, *no court shall have jurisdiction* to review" certain aspects of expedited removal under INA § 235. 110 Stat. 3009, 607 (emphasis added).
- 8 U.S.C. § 1252(a)(2)(B): "Notwithstanding any other provision of law, *no court shall have jurisdiction* to review" certain enumerated discretionary decisions. 110 Stat. 3009, 607 (emphasis added).
- 8 U.S.C. § 1252(a)(2)(C): "Notwithstanding any other provision of law, *no court shall have jurisdiction* to review any final order of removal against an alien who is removable by reason of having committed a criminal offense." 110 Stat. 3009, 607-608 (emphasis added).
- 8 U.S.C. § 1252(g): "Except as provided in this section * * *, *no court shall have jurisdiction* to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 110 Stat. 3009, 612 (emphasis added).

And, in 2005, Congress once again amended Section 1252 to limit jurisdiction; again, it used the text "no court shall have jurisdiction" to do so. See Pub. L. No. 109-13, § 106, 119 Stat. 311 (2005) (codified at 8 U.S.C. § 1252(b)(9)) ("'Except as otherwise provided in this section, *no court shall have jurisdiction*, * * * by any * * * provision of law (statutory or nonstatutory), to review [a final order of removal].").

Time and again, when Congress has sought to impose jurisdictional limitations in the INA, it has used express jurisdictional language—almost always using the same exact phrase. *Biden*, 142 S. Ct. at 2539-2540. In other words, "[i]f Congress had wanted" to make the Section 1252(d)(1) exhaustion requirement jurisdictional, "it knew exactly how to do so—it could have simply borrowed from the statute next door." *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018). Congress chose not to do so, and this Court "generally take[s] [such a] choice to be deliberate." *Badgerow* v. *Walters*, 142 S. Ct. 1310, 1318 (2022).

4. Exhaustion requirements are ordinarily nonjurisdictional—and holding so here is required by separation of powers.

a. This straightforward construction is further strengthened by the fact that exhaustion is perhaps *the* paradigmatic example of a nonjurisdictional claims-processing rule. See, *e.g.*, *Patchak*, 138 S. Ct. at 906 (describing a "claim-processing rule" as one "like * * * an exhaustion requirement").

The Court has consistently "treated as nonjurisdictional * * * threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier*, 559 U.S. at 166. Under the Prison Litigation Reform Act, for example, "failure to exhaust is an affirmative defense," and not even a pleading requirement. *Jones* v. *Bock*, 549 U.S. 199, 216 (2007). The Court has thus made clear "that the PLRA exhaustion requirement is not jurisdictional." *Woodford* v. *Ngo*, 548 U.S. 81, 101 (2006); see also *Fort Bend*, 139 S. Ct. at 1850 (same for administrative exhaustion requirement in Title VII); *EME Homer City Generation*, 572 U.S. at 512 (same for the Clean Air Act's requirement that comments be raised with

"reasonable specificity" to be available for judicial review); *Union Pac. R.R. Co.* v. *Brotherhood of Locomotive Eng'rs Gen. Comm. of Adjustment*, 558 U.S. 67, 82-84 (2009) (same for the exhaustion of grievance procedures under Railway Labor Act); *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (same for exhaustion requirement in the Social Security Act).

The Court's established practice of treating exhaustion requirements as claims-processing rules rather than jurisdictional limitations makes sense, because the "primary purpose of administrative exhaustion" is to avoid "premature interruption of the administrative process." *Kappos* v. *Hyatt*, 566 U.S. 431, 439 (2012). In other words, exhaustion requirements are aimed at "promot[ing] the orderly progress of litigation" by preserving efficiency. *Henderson*, 562 U.S. at 435. They are "a condition to success in court but not a limit on the set of cases that the judiciary has been assigned to resolve." *Korsunskiy* v. *Gonzalez*, 461 F.3d 847, 849 (7th Cir. 2006) (Easterbrook, J.). They do not "cabin a court's power." *Kwai Fun Wong*, 575 U.S. at 409.

Those core efficiency purposes are achieved by construing the exhaustion requirement here as a mandatory claims-processing rule. In cases where the government exercises its discretion to enforce exhaustion, any failure to exhaust would preclude a court from reviewing the final order of removal. But in cases such as this one, where the government declines to assert an exhaustion defense, the "orderly progress of litigation" is facilitated by permitting judicial review. *Henderson*, 562 U.S. at 435.

b. To conclude otherwise—to treat an administrative-exhaustion requirement as a jurisdictional condition—would raise grave separation-of-powers concerns. "Only Congress may determine a lower federal

court's subject-matter jurisdiction." *Hamer*, 138 S. Ct. at 17 (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004)). The Constitution assigns Congress—not the Executive—the task of establishing lower federal courts, and thus determining the metes and bounds of their jurisdiction. U.S. Const. Art. III § 1.

Exhaustion requirements, on the other hand, compel parties to "complete the administrative review process in accordance with the applicable procedural rules." *Bock*, 549 U.S. at 218 (quoting *Woodford*, 548 U.S. at 88). Those rules are often—as here—defined by regulations promulgated by the agencies themselves. See 8 C.F.R. §§ 1003.0-1003.2, 1240.15. Thus, "[i]f Congress meant for [Section 1252(d)(1)]'s mandate to be jurisdictional, a court's adjudicative power would turn on [the] agency's rules and precedents for raising issues—rules and precedents that could change" on the agency's own accord. *Saleh* v. *Barr*, 795 F. App'x 410, 423 (6th Cir. 2019) (Murphy, J., concurring). A jurisdictional reading of the provision would therefore mean that the Executive could alter the bounds of federal-court jurisdiction by changing its procedural rules. It is doubtful the Constitution permits agencies to themselves delineate the scope of judicial review over their actions. And it is highly unlikely that Congress would intend to delegate this "assertion of raw administrative power." *Patel* v. *Garland*, 142 S. Ct. 1614, 1627-1628 (2022) (Gorsuch, J., dissenting).

Mindful of these separation-of-powers concerns, the Court has consistently circumscribed congressional delegations of rulemaking authority to exclude the power to define federal-court jurisdiction. Federal Rules, for example, do not create jurisdictional conditions unless they are explicitly "imposed by Congress." *Hamer*, 138 S. Ct. at 21 (holding that a Federal Rule

of Appellate Procedure setting a time limit for filing a notice of appeal was not jurisdictional because it was developed by the Rules Committee and not set out in a statute); see also *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."). If Congress cannot "confer[] by a statute" the "[]ability of a court * * * to extend or restrict [its] jurisdiction," neither can it delegate to an agency the ability for that agency to restrict judicial scrutiny of its actions. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941).

At the very least, when one possible interpretation of a statute raises a "serious" constitutional question, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen* v. *Preap*, 139 S. Ct. 954, 971 (2019). Not only is an alternative construction—one that reads Section 1252(d)(1) as a mandatory claims-processing rule—possible here, but that interpretation is also the better one. The constitutional avoidance canon thus marches in lockstep with the text, structure, and context of the statute.

* * *

In Section 1252(d)(1), there is no "express" mention of jurisdiction at all—in stark contrast to other provisions of Section 1252. *Boechler, P.C.*, 142 S. Ct. at 1498. And even if Section 1252(d)(1) could be "plausibly construed to condition * * * jurisdiction" on exhaustion, that "is not enough." *Boechler, P.C.*, 142 S. Ct. at 1498-1499. For all the foregoing reasons, Section 1252(d)(1) lacks the clarity necessary to conclude that Congress intended a jurisdictional limitation.

C. Section 1252(d)(1) contains no issue-exhaustion requirement.

Per its plain terms, Section 1252(d)(1) requires noncitizens to exhaust available *remedies*. It does not obligate noncitizens to exhaust *issues*. Thus, even assuming that Section 1252(d)(1) were jurisdictional (as just described, it is not), there is no "clear statement" by Congress (*Auburn Reg'l*, 568 U.S. at 153) rendering issue exhaustion a jurisdictional requirement. The court of appeals, accordingly, was wrong to hold that failure "to exhaust an issue deprives [a] court of jurisdiction over that issue." Pet. App. 4a.

The government cannot contend that Section 1252(d)(1)'s requirement that noncitizens "exhaust[] all *administrative remedies*" carries with it a requirement to exhaust all *issues*. As the Court recently put it, "[i]ssue exhaustion should not be confused with exhaustion of administrative remedies." *Carr* v. *Saul*, 141 S. Ct. 1352, 1358 n.2 (2021). Indeed, the Court has specifically rejected the contention that "an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies." *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000).

In the usual course, "requirements of administrative issue exhaustion are * * * creatures of statute." *Sims*, 530 U.S. at 107. There is no shortage of examples where Congress has imposed an issue-exhaustion requirement on parties proceeding before agencies. The National Labor Relations Act, for example, provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982) (quoting 29 U.S.C. § 160(e) (alterations in original); see also *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-499 (1955) (interpreting

similar language in the Natural Gas Act to impose an issue-exhaustion requirement). Similar statutory language is quite common. Congress has mandated, for example, that "no objection to an order of the [Small Business] Administration shall be considered by the court unless such objection was urged before the Administration." 15 U.S.C. § 687a(e).[4] When Congress wishes to impose an issue-exhaustion requirement, it does so with clarity.

Because nothing in Section 1252(d)(1) mandates issue exhaustion in the first place, there is certainly no congressional "clear statement" that would render an issue-exhaustion requirement *jurisdictional*. *Auburn Reg'l*, 568 U.S. at 153.

To be sure, the absence of a statutory issue-exhaustion requirement does not resolve whether a judge-made issue-exhaustion doctrine applies to review of Board decisions. The Court has developed

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[4] See also, *e.g.*, 5 U.S.C. § 7123(c) ("No objection that has not been urged before the [Federal Labor Relations] Authority, or its designee, shall be considered by the court."); 15 U.S.C. § 77i(a) ("No objection to the order of the [Securities and Exchange] Commission shall be considered by the court unless such objection shall have been urged before the Commission."); 15 U.S.C. § 80a-42(a) (same); 15 U.S.C. § 80b-13(a) (same); 15 U.S.C. § 687(e) (same); 27 U.S.C. § 204(h) (requiring that in challenges relating to certain actions of the Secretary of the Treasury "[n]o objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary"); 15 U.S.C. § 717r(b) (requiring that, in appeals from certain orders of FERC, "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission"); 15 U.S.C. § 3416(a)(4) (same); 16 U.S.C. § 825*l*(b) (same); 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

reticulated standards addressing that very question, considering "whether to require issue exhaustion based on 'an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.'" *Carr*, 141 S. Ct. at 1358 (quoting *Sims*, 530 U.S. at 108-109). Whether there *is* an issue-exhaustion requirement is not before the Court here.

But whatever the answer to that question, a *judicially imposed* issue-exhaustion requirement cannot strip courts of jurisdiction that Congress has conferred. "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick*, 540 U.S. at 452. The Court has thus explicitly held that it is error to treat a "court-imposed issue exhaustion requirement * * * as jurisdictional." *Sims*, 530 U.S. at 106 n.1.

In sum, if issue exhaustion is required here, that requirement does not emanate from Section 1252(d)(1). It therefore cannot have jurisdictional character, and may instead be waived or forfeited.

D. Appropriate calibration of the exhaustion requirement is essential to promote judicial efficiency and fair outcomes.

Jurisdictional rules have "harsh consequences" for both litigants and courts. *Kwai Fun Wong*, 575 U.S. at 409. Because such rules cannot be waived or forfeited, courts must intervene themselves to consider whether jurisdiction is established. *Arbaugh*, 546 U.S. at 514. If both remedy and issue exhaustion are required for jurisdiction, a reviewing court must examine every issue raised and determine whether it has gone through every proper step. This burden needlessly wastes judicial resources and threatens the fair and efficient resolution of noncitizens' claims.

"[Courts] do not, or should not, sally forth each day looking for wrongs to right." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008). Instead, they rely "on the parties to frame the issues for decision" because the "parties know what is best for them." *Ibid*. (quoting *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)). And that is particularly so when the government is a litigant, as deciding whether to waive a procedural requirement to advance justice and resolve a case is "the core of the prosecutorial function." *Morrison* v. *Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

This consideration is particularly acute in the immigration context, where prosecutorial discretion is essential to facilitating just outcomes. Noncitizens in removal proceedings "often are unrepresented, detained, or not fluent English speakers, [and] may not have the resources to offer more than their own testimony." *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 776 (2021) (Breyer, J., dissenting). They must navigate a maze of agency procedures to obtain relief from removal. And yet they face the most formidable adversary: "the richest, most powerful, and best represented litigant" in the country—the United States government. *Greenlaw*, 554 U.S. at 244. Despite this stark imbalance, noncitizens risk being barred from court for failing to perfectly follow the requisite procedures. But because many of these requirements are nonjurisdictional, DHS prosecutors properly have discretion to waive them when, in the government's view, doing so would help facilitate a just and efficient resolution to a particular case. That essential prosecutorial power should not be foreclosed.[5]

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[5] As it did here, the court of appeals below bars noncitizens' arguments as unexhausted on a *sua sponte* basis with considerable

II. A NONCITIZEN NEED NOT FILE A MOTION TO RECONSIDER TO PROPERLY EXHAUST.

There is also a second, independent reason why the court of appeals should have heard petitioner's claim on the merits: Regardless of Section 1252(d)(1)'s jurisdictional status, a noncitizen need not file a motion to reconsider before the Board to properly exhaust her claim. The statute obligates a noncitizen to "exhaust[] all administrative remedies available to the alien *as of right*" (8 U.S.C. § 1252(d)(1) (emphasis added)), but because a motion to reconsider is discretionary, it does not qualify as a remedy "available as of right."[6] The text thus conclusively resolves this question in petitioner's favor.

Nor could the result be any different. If, as the government posits, a motion to reconsider *does* qualify as a remedy available "as of right" within the meaning of the statute, sheer absurdity results: *Every* noncitizen, in *every* immigration proceeding, would be forced to file a motion to reconsider in order to properly exhaust. But Section 1252(d)(1) has never been con-

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frequency. See, *e.g.*, *Martinez-Guevara* v. *Garland*, 27 F.4th 353, 359 (5th Cir. 2022); *Pena* v. *Garland*, 2022 WL 996574, at *1 (5th Cir. 2022); *Samsonyan* v. *Garland*, 2022 WL 4078577, at *1 (5th Cir. 2022); *Kumar* v. *Garland*, 2022 WL 4364125, at *2 (5th Cir. 2022); *Flores-Flores* v. *Garland*, 2022 WL 3031314, at *2 (5th Cir. 2022). This issue is not, as the government suggests (Opp. 12), of "little practical importance."

[6] A noncitizen aggrieved by a Board decision may file a "motion to reconsider," which must "specify[] the errors of fact or law" committed by the Board. 8 C.F.R. § 1003.2(b)(1). A "motion to reopen proceedings * * * state[s] the new facts that will be proven at a hearing * * * if the motion is granted." *Id.* § 1003.2(c)(1). Here, the court of appeals held that petitioner needed to submit "a motion for reconsideration" in order to preserve her claim that the Board committed an error of law. Pet. App. 4a.

strued in this most extraordinary manner—and the government's position is foreclosed by the statutory design.

A. Motions to reconsider are not "remedies available as of right."

"Statutory interpretation * * * begins with the text." *Ross* v. *Blake*, 578 U.S. 632, 638 (2016). Here, because there is "plain and unambiguous statutory language" (*Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)), that is also where the inquiry must end. Reconsideration of a Board decision is not a remedy "available to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added).

1. Remedies available "as of right" are distinct from those which lie in the adjudicator's discretion. See Black's Law Dictionary (11th ed. 2019) (defining "as of right" as "[b]y virtue of a legal entitlement").

To start with, an "appeal as of right" is one "over which an appellate court must exercise review *because it has no discretion to deny review*." Black's Law Dictionary (11th ed. 2019) (defining "appeal as of right") (emphasis added). Conversely, "discretionary review" means "[t]he form of * * * review that is *not a matter of right* but that occurs only with the appellate court's permission." Black's Law Dictionary (11th ed. 2019) (defining "discretionary review") (emphasis added). Federal Rule of Appellate Procedure 3 governs "[a]n appeal permitted by law as of right," whereas Federal Rule of Appellate Procedure 5 addresses appeals that are "within the court of appeals' discretion." See also S. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").[7]

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[7] This distinction has considerable import. For example, "in first appeals *as of right*, States must appoint counsel to represent

Likewise, intervention has two varieties. "Intervention of right" is mandatory: "the court *must* permit anyone to intervene who" meets certain qualifications. Fed. R. Civ. P. 24(a) (emphasis added). But "permissive intervention" is discretionary, providing that a "court *may* permit" intervention. Fed. R. Civ. P. 24(b) (emphasis added). See also *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R. Co.*, 331 U.S. 519, 531 (1947) ("Some statutes speak of intervention 'as of right.' * * * In such a case, the right to intervene is absolute and unconditional. * * * [T]here is no room for the operation of a court's discretion.").

This core distinction has venerable legal vintage. See, *e.g.*, *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672 (1926) ("A stay is not a matter of right * * *. It is an exercise of judicial discretion."); *In re Peterson*, 253 U.S. 300, 317-318 (1920) ("While in equity proceedings the allowance and imposition of costs is * * * a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right."); *Twitchell* v. *Pennsylvania*, 74 U.S. 321, 324 (1868) ("[W]rits of error to State courts have never been allowed, as of right. It has always been the practice to submit the record of the State courts to a judge of this court, whose duty has been to ascertain * * * whether the case upon the face of the record will justify the allowance of the writ."); S. Ct. R. 20 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.").

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indigent defendants," while "a State need not appoint counsel to aid a poor person in discretionary appeals." *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005). Cf. *Austin* v. *United States*, 513 U.S. 5, 8 (1994).

2. A motion asking the Board to reconsider is a paradigmatic example of a request for discretionary relief. Indeed, the governing regulation leaves no room for doubt: "The decision to grant or deny a motion to * * * reconsider is within the discretion of the Board." 8 C.F.R. § 1003.2(a). Nor is the Board shy about its power: "[W]e have authority to deny a motion to reconsider as a matter of discretion." *Matter of O-S-G-*, 24 I. & N. Dec. at 57.

The government sees it the same way, acknowledging "that the Board has discretion to deny a motion for reconsideration even when a party 'has made out a *prima facie* case for relief.'" Opp. 16 (quoting 8 C.F.R. § 1003.2(a)). The Board, the government explains, "may deny a noncitizen's request for relief on discretionary grounds." *Ibid*.

It is thus little surprise that the Court has referred to a motion to reconsider as a "discretionary petition." *Stone* v. *INS*, 514 U.S. 386, 401 (1995). Its "closest analogy," the Court explained, is a Rule 60(b) motion for relief. *Ibid*. And a Rule 60(b) motion "does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995).[8]

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[8] Similarly, the Court has long recognized that a motion to reopen resides with "the Board's 'broad discretion,'" with an "abuse-of-discretion standard of review." *Kucana*, 558 U.S. at 242; see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). That conclusion bears persuasively on the discretionary nature of motions to reconsider as well—after all, the government has declared both discretionary in one breath. See 8 C.F.R. § 1003.2.

Indeed, there is a longstanding view that administrative requests to reconsider are discretionary, not matters "of right." See *United States* v. *ICC*, 396 U.S. 491, 521 (1970) ("It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion."); *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944) (same). So too with courts. See *Steines* v. *Franklin Cnty.*, 81 U.S. 15, 22 (1871) (holding that a motion for rehearing in a state court "is not founded in a matter of right, but rests in the sound discretion of the court").

Because a motion to reconsider is not a remedy available "as of right," a noncitizen need not file such a motion to properly exhaust. The plain text of the statute resolves this question.

3. The government's sole argument to the contrary is that "an administrative remedy is '*available* to' a noncitizen 'as of right' so long as she has the 'right' to invoke it." Opp. 16. That is wrong multiple times over.

By focusing solely on the word "right," the government disregards that the phrase "as of right" is a term of art with a specific meaning in the law. See pages 35-36, *supra*. No one would deny that a litigant who has lost before a court of appeals has a "right" to file a petition for certiorari, yet no one would plausibly describe the remedy requested as one "available *as of right*." Cf. S. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right."). A party no doubt has a "right" to file a motion requesting both intervention "as of right" and "permissive intervention" (Fed. R. Civ. P. 24), but only the former has this Court called "absolute and unconditional" when properly invoked, with "no room for the operation of a court's discretion." (*Brotherhood of R.R. Trainmen*, 331 U.S. at 531).

Whether a litigant has a right to invoke a remedy is thus beside the point. Litigants will generally always have the right to request a discretionary remedy, but the remedy remains one left to the adjudicator's discretion. By contrast, a remedy is one available "as of right" if the adjudicator "has no discretion to deny review." Black's Law Dictionary (11th ed. 2019) (defining "appeal as of right"). With that distinction in hand, the government's argument unravels. See, *e.g.*, *FCC* v. *AT&T, Inc.*, 562 U.S. 397, 406 (2011) (rejecting construction that treated a legal term of art "as simply the sum of its two words," because "two words together may assume a more particular meaning than those words in isolation"); *George* v. *McDonough*, 142 S. Ct. 1953, 1959 (2022) ("Where Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.'").

More, it is well understood that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Section 1252(d)(1) purposefully limits the scope of obligatory exhaustion to "administrative remedies available * * * as of right." As we see it, the term "as of right" serves a critical function—it makes mandatory the exhaustion of non-discretionary remedies (for example, an appeal from the IJ to the Board), but it specifically excludes discretionary procedures, like a motion to reconsider.

Under the government's reading, by contrast, the phrase "as of right" has no work to do. A motion to reconsider is perhaps the most archetypal discretionary remedy. If *this* were construed a remedy available "as of right," the phrase would cease to have meaning, as it would not serve a limiting function.

Rather than fidelity to text, the government's contrary position appears to rest principally on a gestalt sense that agencies should have an opportunity to correct their mistakes in the first instance. But even if accurate, that sense would not be a legitimate basis to "read into [the] statute[] words that aren't there." *Romag Fasterns, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020); cf. *Utility Air Reg. Grp*. v. *EPA*, 573 U.S. 302, 328 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). In any event, that gestalt sense does not accurately describe normal procedures: A disappointed litigant need not seek reconsideration at the district court before filing an appeal, nor request rehearing from the court of appeals before seeking certiorari. That is, parties generally need not tell a tribunal that it erred as a prerequisite to seeking further review.

When Congress wishes to upset that usual approach, it does so expressly. For example, the Federal Power Act, which governs judicial review of certain orders by the Federal Energy Regulatory Commission, requires a party first to raise any "objection" in an "application for rehearing" before the party may argue that objection in court. 16 U.S.C. § 825*l*(b); see also 15 U.S.C. § 717r(b) (similar); *id*. § 3416(a)(4). By virtue of this statutory design, "[p]arties seeking review of FERC orders must petition for rehearing of those orders and must themselves raise in that petition all of the objections urged on appeal." *Platte River Whooping Crane Critical Habitat Maint. Tr.* v. *FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (emphasis removed).

Congress certainly knows how to draft a statute that obligates an aggrieved party to request reconsideration by the agency prior to seeking judicial review. Yet it did nothing of the sort in Section 1252(d)(1). The

Court should respect that legislative choice. See *Badgerow*, 142 S. Ct. at 1318; *SAS Inst.*, 138 S. Ct. at 1355.

4. Finally, the government's position is flatly incompatible with the dual-track system of review that Congress has established.

After the Board rules, a noncitizen "must" file her petition for review "not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). Meanwhile, a motion to reconsider also "must be filed within 30 days of" the final removal order. 8 U.S.C. § 1229a(c)(6)(B).

In *Stone*, the Court held that filing a motion to reconsider does not render an order of removal nonfinal, and thus there is no tolling of the deadline to file a petition for review of the underlying removal order. *Stone*, 514 U.S. at 405-406. Rather, a noncitizen must file a petition for review to challenge the order of removal; if the noncitizen also files a motion to reconsider, she may then file a second petition for review from the disposition of that motion, which will be consolidated with the first petition if it remains pending in the appellate court. *Ibid*. Multiple aspects of this structure indicate that Section 1252(d)(1)'s exhaustion requirement does not require a motion to reconsider.

First, it seems rather unlikely that Congress created a structure whereby an order of removal is simultaneously "final" for purposes of judicial review, triggering a deadline to seek review (*Stone*, 514 U.S. at 405), yet unexhausted for purposes *of that very review*. That is, it is difficult to imagine that Congress intended to obligate noncitizens to file petitions for review of final removal orders, while also requiring them to simultaneously return to the Board with

motions to reconsider in order to exhaust. "If Congress had wanted" such an unusual procedure for judicial review, "it could have said so in words far simpler than those that it wrote." *Biden*, 142 S. Ct. at 2539.

Second, the government's position is made all the more bizarre through its insistence that Section 1252(d)(1) is jurisdictional. If that were correct, impossibility results. Noncitizens would have to file petitions for review within 30 days of the Board's initial determination (see 8 U.S.C. § 1252(b)(1); *Stone*, 514 U.S. at 405-406), but it is exceedingly unlikely that, within this 30-day window, a motion to reconsider could be filed and then adjudicated by the Board. All of these petitions for review would therefore raise unexhausted claims—and courts of appeals would, per the government, be dutybound to dismiss them for lack of jurisdiction. The government thus erects an irreconcilable conflict between the time requirement of Section 1252(b)(1) and the exhaustion requirement of Section 1252(d)(1).

In fact, the Court has already construed the predecessor statutes to establish a system where a petition for review stemming from a final order of removal *is* subject to judicial review notwithstanding a concurrently pending motion to reconsider at the Board. That is, "the statute is best understood as reflecting an intent on the part of Congress that deportation orders are to be reviewed in a timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider." *Stone*, 514 U.S. at 394. This is implicit—if not explicit—confirmation that a motion to reconsider is not required to exhaust.

B. The government's construction would require a motion to reconsider in every case, among other absurdities.

Not only is the government's position wrong as a textual matter, but it would also lead to absurdities.

1. Under the government's approach, every noncitizen, in every case, would be obligated to file a motion to reconsider prior to seeking judicial review. No court has ever adopted such an extraordinary reading of Section 1252(d)(1), but it is the inescapable conclusion of the government's position.

The government appears to advance a construction whereby a motion to reconsider is required only to exhaust a claim that the Board engaged in "impermissible factfinding." Opp. 15. The rule adopted by the court of appeals, meanwhile, sweeps to whenever a Board decision "itself results in a new issue." *Omari*, 562 F.3d at 320.

But there exists no legal basis for these putative limitations. If, as the government contends (Opp. 15-16), a motion to reconsider filed with the Board is a "remedy available * * * as of right," then it is always such a remedy within the meaning of Section 1252(d)(1). The government cannot contend that a motion to reconsider sometimes is a remedy available "as of right," and sometimes not. The government thus commits itself to a remarkable position: As it reads the statute, every noncitizen would always have to file a motion to reconsider in order to properly exhaust.

Addressing the pre-IIRIRA statute, which had a similar exhaustion provision (see page 6, *supra*), the Court explained that a noncitizen who loses before the Board may "seek review" and, further, the noncitizen, "*if he chooses*, may also seek agency reconsideration of the order." *Stone*, 514 U.S. at 405-406 (emphasis

added). But the government now contends that such a motion to reconsider was not optional at all—it was a mandatory requirement to exhaust. So far as we know, no court has ever reached such a notable conclusion, and the government has never before advanced it. Indeed, although petitioner here did not file a motion to reconsider, the court of appeals still exercised jurisdiction over significant aspects of her appeal. See Pet. App. 5a-7a.

The result of the government's construction is extraordinary waste. Consider, for example, a noncitizen who loses his case before a single Board member, on the basis of a legal principle identified in an earlier, controlling Board decision. The government would obligate this litigant to file a motion to reconsider. But to what end? The motion would be referred back to the single Board member. See 8 C.F.R. § 1003.2(i). It is hard to imagine that, in every case, Congress would have sought to saddle the Board with a motion to reconsider as a prerequisite to judicial review.[9]

2. Absurdity results even if the lower court's position—that a motion to reconsider is required only when the Board's decision "itself results in a new issue" (*Omari*, 562 F.3d at 320)—is taken at face value.

To start with, what qualifies as a new issue is far from straightforward. The dissent below concluded that petitioner had, in fact, exhausted the issue of factfinding, since she had asked the Board to remand the case to the IJ to develop additional facts. Pet. App. 10a. The majority responded by observing that petitioner made this argument *before* the Board engaged

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[9] The Board faces an enormous backlog of nearly 90,000 pending cases. *Case Appeals Filed, Completed, and Pending*, Executive Office For Immigration Review Adjudication Statistics (Oct. 13, 2022), perma.cc/AGW6-NTC7.

in impermissible factfinding (Pet. App. 4a), but petitioner certainly gave the Board notice of her argument, and thus it is hard to understand how this was "a new issue." *Omari*, 562 F.3d at 320.

Moreover, the rule applied below yields rather outlandish results. When a noncitizen claims that the Board "erred as a matter of law by 'offer[ing] no explanation or authority for its conclusions,'" the court below bars judicial review absent a motion to reconsider. *Flores-Flores* v. *Garland*, 2022 WL 3031314, at *2 (5th Cir. 2022). Elsewhere, the court has said that exhausting a challenge to "the sufficiency of [the Board's] reasons" requires "a motion to reconsider." *Ouedraogo* v. *Garland*, 2022 WL 2764733, at *1 (5th Cir. 2022). Perhaps the most foundational requirement of an agency adjudicator under the APA is to articulate "a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In the court below, preserving *this* argument—the foundation of reasoned agency decisionmaking—necessitates a motion to reconsider. This is most extraordinary: As that court would have it, the Board must be reminded on a case-by-case basis that it needs to supply sufficient reasoning—or else a litigant fails to exhaust the argument. Cf. *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1299 (11th Cir. 2015) (calling such a rule "facially nonsensical").

Recently, the Fifth Circuit considered a claim by a noncitizen who argued that the Board's decision was inconsistent with a later-issued opinion. *Santa Maria Ochoa* v. *Garland*, No. 21-60220, 2022 WL 4990263, at *1 (5th Cir. 2022). The petition for review in that matter was docketed March 17, 2021 (meaning that the Board decision occurred sometime before), and the noncitizen sought the benefit of an intervening

decision, *Matter of L-E-A-*, 28 I. & N. Dec. 304, 305 (2021), which was decided on June 16, 2021. *Maria Ochoa*, 2022 WL 4990263, at *1. Even though the issuance of the *L-E-A-* decision occurred more than 30 days after the Board's decision, and thus was outside the period of time for the noncitizen to file a timely motion to reconsider (see 8 C.F.R. § 1003.2(b)(2)), the court nonetheless held that the noncitizen "failed to present this new defect to the BIA in a motion to reconsider and so has failed to exhaust this issue." *Maria Ochoa*, 2022 WL 4990263, at *1. The court below accordingly maintains that, to seek the benefit of an intervening decision issued during the pendency of a petition for review, a noncitizen must file an *untimely* motion to reconsider in order to exhaust. See also *Ventura-De Caceres* v. *Garland*, 2022 WL 2168873, at *1 (5th Cir. 2022) (similar). No statute or regulation directs a noncitizen that such a counterintuitive action is necessary.

Even when a noncitizen complies with the lower court's exhaustion rule, absurdity still results. Because the Board's decision on a motion to reconsider is reviewed "for abuse of discretion," the court below will not reverse the Board's denial of reconsideration "unless the decision is 'capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach.'" *Nguhlefeh Njilefac* v. *Garland*, 992 F.3d 362, 365 (5th Cir. 2021). By forcing entire categories of arguments into the motion-to-reconsider framework, the effect of the rule adopted below is to impose a highly deferential standard of review. But there is no reasoned basis to subject an error introduced by the Board to a far more deferential standard of review than would otherwise apply. The lower court's approach, defended by the govern-

ment, thus results in utterly irrational standards of review, improperly insulating agencies from appropriate judicial oversight.[10]

Such an approach erects a needless labyrinth that ensnares litigants, precluding resolution of their claims on the merits and creating a "trap for the unwary." *McNeil* v. *United States*, 508 U.S. 106, 113 (1993). This is an especially concerning result given a documented lack of quality legal counsel in proceedings before the agency. See Robert Katzmann, *When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts*, 143 Daedalus 37, 37 (2014) ("[T]he nation's immigrant representation problem is twofold: 1) there is a profound lack of representation * * * and 2) in far too many deportation cases, the quality of counsel is substandard.").

Courts should not artificially insulate agencies from judicial review. Because a motion to reconsider is not an "administrative remed[y] available * * * as of right" (8 U.S.C. § 1252(d)(1)), it is not required to properly exhaust—regardless of whether or not exhaustion more generally is jurisdictional.

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[10] And what is a noncitizen to do if the Board introduces another error in a decision responding to a motion to reconsider? File a subsequent motion to reconsider, notwithstanding the statute limiting a noncitizen to only one such motion? See 8 U.S.C. § 1229a(c)(6).

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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