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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER & NATIONAL IMMIGRATION LITIGATION ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC also has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and thus has an interest in ensuring that statutory prerequisites to filing suit are treated as jurisdictional only when Congress clearly requires that result.

The National Immigration Litigation Alliance (NILA) is a not-for-profit membership organization that seeks to realize systemic change in the immigrant rights arena through litigation—by engaging in impact litigation to eliminate systemic obstacles that noncitizens routinely face and by building the capacity of immigration attorneys to litigate in federal court through its strategic assistance and co-counseling programs. NILA and its members have a direct interest in ensuring that noncitizens are not unduly prevented from obtaining judicial review of removal orders.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Leon Santos-Zacaria seeks refuge in the United States because she fears persecution and torture on account of her sexual orientation in her country of origin, Guatemala. Pet. 8. In a single-member decision, the Board of Immigration Appeals (BIA) concluded that a rape that Santos-Zacaria experienced as a child "was sufficiently severe to rise to the level of past persecution," Pet. App. 16a, and that it was related to Santos-Zacaria's sexual orientation, *id.* at 17a, but it nonetheless denied her protection from removal on the ground that she had not demonstrated that she would be persecuted in the future, *id.* 17a-19a. Even though Santos-Zacaria had asked the Board to remand her case to the Immigration Judge for further factfinding on that exact question, *id.* at 10a; *see also* 8 C.F.R. § 1003.1(d)(3)(iv)(D)(5)(ii) (permitting BIA to remand for additional factfinding when "the immigration judge committed an error of law that requires additional factfinding on remand"), the Board instead addressed the question in the first instance and dismissed the appeal, *id.* at 20a. Santos-Zacaria then filed a timely petition for review of the Board's decision. Pet. App. 3a.

Before filing a petition for review of a removal order, a non-citizen must "exhaust[] all administrative remedies available to [her] as of right." 8 U.S.C. § 1252(d)(1). While Santos-Zacaria's failure to exhaust might have required dismissal of her petition if the government had timely raised that argument, the government did not do so here. Indeed, the government affirmatively elected not to argue that Santos-Zacaria failed to exhaust even when it was invited to do so. Pet. 16 ("At oral argument, when invited to argue exhaustion, the government declined." (citing C.A.

Oral Arg. at 20:54-22:00)). Thus, so long as the exhaustion requirement is not jurisdictional, the government has waived the argument that Santos-Zacaria failed to exhaust, and the court can consider the merits of her claim that the Board, after finding that she was entitled to a presumption of future persecution, should have remanded the case to the IJ to assess, in the first instance, whether the government could rebut that presumption.[2] This Court should conclude that the exhaustion requirement is not jurisdictional.

First, this Court has recently "undertaken to ward off profligate use of the term 'jurisdictional.'" *Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1848 (2019) (quotation marks and brackets omitted). Put differently, it has attempted to carefully police the use of the label "jurisdictional," seeking to curtail "drive-by jurisdictional rulings,'" *Reed Elsevier, Inc. v.*

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[2] As relevant here, in assessing whether the government could rebut the presumption, the IJ would be required to undertake an assessment that was not part of her initial decision—specifically, whether the government had established factually, by a preponderance of the evidence, that Santos-Zacaria was able to relocate safely to another part of Guatemala. 8 C.F.R. § 208.16(b)(1)(i)(B), (ii). In making that assessment, the IJ would have considered the prior testimony she heard first-hand, as well as additional admissible testimonial or documentary evidence presented on remand. *Matter of L-S-*, 25 I. & N. Dec. 705, 709 n.4 (BIA 2012) ("As a general matter, when a case is remanded to an Immigration Judge, unless we specifically limit the scope of the proceedings below, the Immigration Judge reacquires jurisdiction and may consider additional evidence concerning new or previously considered relief if the requirements for submitting such evidence are met."). By making the determination that Santos-Zacaria could safely relocate within Guatemala, the BIA both impermissibly usurped the IJ's factfinding role and also deprived Santos-Zacaria of the opportunity to present additional evidence germane to that issue.

Muchnick, 559 U.S. 154, 161 (2010) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)), that impose tremendous costs on litigants and judges.

After all, "[b]randing a rule as going to a court's subject matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Jurisdictional prerequisites cannot be waived or forfeited by parties, and can therefore be raised at any time, including months or years into litigation. Moreover, courts are required to assess jurisdictional requirements *sua sponte*. These rules make sense because jurisdictional requirements go to a court's power to hear a case, but they come at a cost to litigants and judges, who must address jurisdictional issues even when they are not properly raised and argued.

Given the dramatic consequences that result when a requirement is deemed jurisdictional, this Court has applied a "readily administrable bright line" test for determining whether a particular statutory prerequisite to suit concerns a court's subject-matter jurisdiction: "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (emphasis added).

Applying that standard to exhaustion requirements, this Court has repeatedly held that these requirements are not jurisdictional unless Congress has clearly stated that they are or there has been a long tradition of treating them as such. *See Reed Elsevier*, 559 U.S. at 168 (noting that "context, including this Court's interpretation of similar provisions in many

years past, is relevant to whether a statute ranks a requirement as jurisdictional," but concluding that the requirement at issue was nonjurisdictional); *see also Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (describing situations where this Court has "been willing to treat a long line of Supreme Court decisions left undisturbed by Congress as a clear indication that a requirement is jurisdictional" (quotation marks omitted)). As this Court has explained, exhaustion requirements are quintessential "claim-processing rule[s] . . . that require[] the parties to take certain procedural steps at certain specified times." *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (quotation marks omitted); *see Reed Elsevier*, 559 U.S. at 166 (noting that this Court has generally "treated as nonjurisdictional . . . threshold requirements that claimants must complete, or exhaust, before filing a lawsuit").

This Court should reach the same conclusion with respect to § 1252(d)(1)'s exhaustion requirement. To start, Congress has not clearly stated that § 1252(d)(1)'s exhaustion requirement is jurisdictional. The provision does not use the word "jurisdiction" and does not contain any other terms of "jurisdictional import." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). It instead uses language that this Court has repeatedly held is not jurisdictional, even as Congress clearly delineated neighboring provisions of the statute as jurisdictional.

Significantly, when Congress last codified the exhaustion requirement in 1996 revisions to the Immigration and Nationality Act (INA), it inserted the phrase "no court shall have jurisdiction" into at least twelve different parts of the Act, but did not use that language in § 1252(d). Furthermore, the requirement

is "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction" over petitions for review, *Reed Elsevier*, 559 U.S. at 164, bolstering the argument that its "legal character" is not truly jurisdictional, *id.* at 166.

Finally, there is no long tradition of treating § 1252(d)(1)'s requirement as jurisdictional, nor is there a "long line of Supreme Court decisions left undisturbed by Congress" to compel such a conclusion. *Boechler*, 142 S. Ct. at 1497. This Court has never evaluated § 1252(d)(1), and the courts of appeals that have labeled it as jurisdictional relied on case law that predates this Court's recent efforts to "ward off" excessive use of the term "jurisdiction," *Fort Bend*, 139 S. Ct. at 1848, and to "'bring some discipline' to" the application of that label, *Boechler,* 142 S. Ct. at 1500 (quoting *Henderson*, 562 U.S. at 435).

In short, there is nothing in the text or history of § 1252(d) to "plainly show that Congress imbued [the exhaustion requirement] with jurisdictional consequences." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015). And that is what this Court's cases require. This Court should reverse.

ARGUMENT

I. This Court Has Adopted a Clear Statement Rule to Determine Whether Statutory Requirements Are Jurisdictional.

A. This case, like many before it, "concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Arbaugh*, 546 U.S. at 503. Subject-matter jurisdiction refers to "prescriptions

delineating the classes of cases a court may entertain," *Fort Bend*, 139 S. Ct. at 1848, and "the courts' statutory or constitutional power to adjudicate the case," *Steel Co.*, 523 U.S. at 89 (emphasis omitted). Subject-matter jurisdiction contrasts with other "predicate[s] for relief," which are "merits-related determination[s]" related to a plaintiff's need to make out a valid claim against a defendant. *See Arbaugh*, 546 U.S. at 511 (quoting 2 J. Moore et al., *Moore's Federal Practice* § 12.30[1] (3d ed. 2005)). Such predicates include so-called claim-processing rules, which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435. Though these rules are "important," they "should not be given the jurisdictional brand." *Id.*

To bring order to these categorizations, and ward against "profligate use of the term" jurisdiction, *Fort Bend*, 139 S. Ct. at 1848 (quoting *Auburn*, 568 U. S. at 153), this Court has developed a "readily administrable bright line" test for determining whether a particular statutory prerequisite to bringing suit is jurisdictional, *Arbaugh*, 546 U.S. at 516. Specifically, "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id.* at 515-16 (emphasis added). By contrast, "[w]hen Congress does not rank a prescription as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Fort Bend*, 139 S. Ct. at 1849 (brackets omitted); *Henderson*, 562 U.S. at 439 (a provision is not jurisdictional if its language "provides *no clear indication* that Congress wanted that provision to be treated as having jurisdictional attributes" (emphasis added));

Boechler, 142 U.S. at 1499 ("[t]o satisfy the clear-statement rule, the jurisdictional condition must be just that: clear"). Whether Congress has clearly stated that a provision is jurisdictional can be "discerned by looking to [its] text, context, and relevant historical treatment." *Reed Elsevier*, 559 U.S. at 166.

B. Requiring Congress to state clearly that a particular prerequisite is jurisdictional makes sense given the significant consequences that attach to jurisdictional requirements. *See Henderson*, 562 U.S. at 434 (calling a requirement jurisdictional "is not merely semantic but [a question] of considerable practical importance for judges and litigants"). "[H]arsh consequences" attend the jurisdictional label, *Kwai Fun Wong*, 575 U.S. at 402, because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system," *Henderson*, 562 U.S. at 434. "Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and . . . do not allow for equitable exceptions." *Boechler*, 142 S. Ct. at 1497 (citing *Henderson*, 562 U.S. at 434-35; *Auburn*, 568 U.S. at 154).

To start, our justice system ordinarily "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006). And failure to "raise a claim for adjudication at the proper time" generally results in "forfeiture of that claim." *Id.* at 356-57; *see Henderson*, 562 U.S. at 434 ("For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times.").

By requiring litigants to raise all arguments in defense of their position early in litigation, the system "induce[s] the timely raising of claims and objections," which allows courts "to determine the relevant facts and adjudicate the dispute" in the first instance. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Put differently, "waiver and forfeiture rules . . . ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008).

The costs of departing from this "orderly progression," *id.* at 487, are particularly severe for noncitizens in removal proceedings, who frequently have limited English proficiency, "are not guaranteed legal representation[,] and are often subject to mandatory detention," *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013); Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L. Rev. 485, 486 (2018) (reporting that sixty-three percent of noncitizens in deportation proceedings lack representation). As this Court has recognized, the consequences of removal are "grave," *Bridges v. Wixon*, 326 U.S. 135, 165 (1945), and "severe," *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (quotation marks omitted)), because removal is a "drastic measure" that is "'the equivalent of banishment or exile,'" *id.* at 373 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)). And for noncitizens with fear-based claims, preserving the right to remain in the United States may mean the difference between life and death, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen]

makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."), making the protections ensured by ordinary waiver and forfeiture rules especially critical.

Relatedly, "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."). Jurisdictional requirements, then, impose a burden on courts to determine whether those requirements are met in every case. This can often be time-consuming and difficult without the cooperation of the parties: "if subject-matter jurisdiction turns on contested facts," the judge might have to "review the evidence and resolve the dispute on her own." *Arbaugh*, 546 U.S. at 514.

These costs to litigants and judges are necessary when a particular issue actually goes to jurisdiction. But "[b]ecause the consequences that attach to the jurisdictional label may be so drastic," this Court has repeatedly admonished against labeling rules as jurisdictional unless Congress "clearly states" an intention to imbue a particular rule with those drastic consequences to follow. *Arbaugh*, 546 U.S. at 515. If Congress has not spoken clearly, the Court will presume that the requirement is a claim-processing rule and is not to be "given the jurisdictional brand," *Henderson*, 562 U.S. at 435.

C. This Court has applied the clear-statement test to a variety of exhaustion requirements, and has repeatedly rejected claims that statutory prerequisites

are jurisdictional unless Congress has clearly stated that they are jurisdictional, or there is a long tradition of treating them as jurisdictional. Indeed, when considering various statutory requirements that a plaintiff proceed in another forum or seek redress in other ways before coming to federal court, this Court has repeatedly construed the requirement as nonjurisdictional. *See Reed Elsevier*, 559 U.S. at 166 ("We . . . have treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit."); *see*, *e.g.*, *Fort Bend*, 139 S. Ct. at 1851 (requirement to file charge with EEOC before filing suit under Title VII); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009) (requirement to conference before seeking arbitration in Railway Labor Act); *Jones v. Bock*, 549 U.S. 199, 211, 216 (2007) (exhaustion requirement in the Prison Litigation Reform Act); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (requirement to file timely charge with EEOC before filing suit under Title VII).

In *Zipes*, this Court held that Title VII's statutory requirement for timely filing an EEOC charge is not a jurisdictional prerequisite for filing suit in federal court. *Id.* at 393; *see Reed Elsevier*, 559 U.S. at 166 ("*Zipes* . . . held that Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court was nonjurisdictional."). The Court evaluated the plain text of the requirement, which stated that "[a] charge under this section shall be filed within one hundred and eighty days." *Zipes*, 455 U.S. at 394 n.10 (citing 42 U.S.C. § 2000e-5(e)). After observing that the requirement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the

district courts," the Court looked at the statute's structure. *Id.* at 394. It noted that Title VII's jurisdiction-granting provision "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC" and "contains no reference to the timely-filing requirement." *Id.* at 393-94; *see id.* at 393 n.9 (specifying that 42 U.S.C. § 2000e-5(f)(3) is Title VII's jurisdictional provision). Instead, "[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision" from the part of the statute granting jurisdiction. *Id.* at 394. For these reasons, the Court acknowledged that its prior cases "contain scattered references to the timely-filing requirement as jurisdictional," but nevertheless held that the timely filing requirement was not jurisdictional. *Id.* at 395.

In *Reed Elsevier*, this Court once again held that an exhaustion requirement was not jurisdictional because of its use of nonjurisdictional language and placement outside of a jurisdiction-granting provision. That case involved a Copyright Act provision stating that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made." 559 U.S. at 157-58. This Court held that the registration requirement was nonjurisdictional for several reasons. First, it was "not located in a jurisdiction-granting provision," because jurisdiction over copyright claims was conferred by a separate part of the statute. *Id.* at 166. Furthermore, the registration requirement was "not clearly labeled jurisdictional . . . and admit[ted] of congressionally authorized exceptions." *Id.* For these reasons, this Court concluded that the registration requirement's "legal character"

was not jurisdictional, despite "widespread agreement among the circuits" that it was. *Id.* at 160.

In *Jones*, this Court evaluated an exhaustion requirement in the Prison Litigation Reform Act (PLRA), affirming the importance of congressional clarity in the face of the default practice of treating exhaustion as nonjurisdictional. *Jones*, 549 U.S. at 210. After acknowledging that the PLRA makes exhaustion "mandatory," such that "unexhausted claims cannot be brought in court," this Court noted that exhaustion is "typically regard[ed] . . . as an affirmative defense," and that the Court itself had "referred to exhaustion in these terms." *Id.* at 212 (citing *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 75 (1998)). Given this background principle, the Court held that the PLRA's language, which stated that "no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted," *id.* at 210 (citing 42 U.S.C. § 1997e(a)), did not disturb the "general proposition" that exhaustion is not a jurisdictional prerequisite, *id.* at 212. The PLRA's "silen[ce] on the issue," the Court reasoned, was "strong evidence that the usual practice should be followed," *id.*, and that the exhaustion requirement should be treated as an affirmative defense.

In *Fort Bend*, this Court again affirmed the proposition that exhaustion is generally not a jurisdictional requirement and held that the requirement to file a charge with the EEOC before filing suit under Title VII is not jurisdictional. *Fort Bend*, 139 S. Ct. at 1851. The charge-filing requirement, the Court reasoned, did not "refer in any way to the jurisdiction of the district courts." *Id.* (citing 42 U.S.C. § 2000e-5(e)(1) and (f)(1)). In addition, the requirement was "separate" from the jurisdiction-granting provision of Title VII

because it was "stated in provisions discrete from Title VII's conferral of jurisdiction." *Id.* at n.8 (rejecting an argument that the charge-filing requirement was "textually linked" to the separate subsection granting jurisdiction over Title VII actions). Furthermore, while the Court noted that it had previously "treat[ed] a requirement as jurisdictional when a long line of Supreme Court decisions left undisturbed by Congress attached a jurisdictional label to the prescription," that was not the case there. *Id.* at 1849 (quotation marks and brackets omitted).

These cases articulate two general principles. First, an exhaustion requirement must "speak in jurisdictional terms" to pose a jurisdictional limitation. *Auburn*, 568 U.S. at 154 (quotation marks omitted). Second, a "requirement . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Id.* at 155. *Auburn* involved a provision instructing that a provider of medical services "may obtain a hearing" from an agency review board if "such provider files a request for a hearing within 180 days after notice of [a] final determination." *Id.* (citing 42 U.S.C.A. § 1395oo(a)(3)). This Court explained that the provision did not contain the word "jurisdiction" and "contains neither the mandatory word 'shall' nor the appellation 'notice of appeal'"—both words with "jurisdictional import." *Id.* Furthermore, the Court rejected a "proximity-based argument" that the provision should be jurisdictional because it was "placed in a section of the statute that also contains jurisdictional provisions." *Id.* at 155. Rather, the Court held, the provision should be assessed on its own, to determine whether its language "reveals a design to preclude" jurisdiction. *Id.* at 154.

II. Congress Has Not Clearly Stated That § 1252(d)(1)'s Exhaustion Requirement Is Jurisdictional.

For all the reasons that this Court has repeatedly held that other, similar statutory prerequisites are not jurisdictional, it should likewise hold that § 1252(d)(1)'s exhaustion requirement is not jurisdictional.

A. The text of § 1252(d)(1) provides no indication—let alone a clear one—that Congress intended the exhaustion requirement to be jurisdictional. The subsection provides that "[a] court may review a final order of removal only if . . . the [noncitizen] has exhausted all administrative remedies available to the [noncitizen] as of right." 8 U.S.C. § 1252(d)(1). It "does not speak in jurisdictional terms or refer in any way to the jurisdiction of [appellate] courts." *Zipes*, 455 U.S. at 394. Indeed, its text "says nothing about whether a federal court has subject-matter jurisdiction." *Reed Elsevier*, 559 U.S. at 164.

Significantly, the plain text of § 1252(d)(1) differs from requirements this Court has determined to be jurisdictional. It does not state, for example, that "[n]o court shall have jurisdiction" over certain claims. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007) (quoting 31 U.S.C. § 3730(e)(4)(A)). Nor does it provide that courts "shall only have jurisdiction of cases when" a certain amount in controversy is claimed, *see* 16 U.S.C. § 814, or provide that parties "shall be immune from the jurisdiction of the courts of the United States," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (quoting 28 U.S.C. § 1604), or state that courts are "vested with jurisdiction to entertain" only certain suits, 7 U.S.C.

§ 2707(e)(3); *Arbaugh*, 546 U.S. at 516 (noting that "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal . . . courts," but it has described these restrictions clearly and "expressly"); *see id.* at 516 n.11 (citing examples).

Instead, § 1252(d)(1) uses language that this Court has repeatedly held is not jurisdictional in the context of other statutory provisions. The exhaustion requirement set forth in § 1252(d)(1) echoes a provision in a statute providing for habeas review that this Court repeatedly held to be nonjurisdictional, even in the era of "drive-by jurisdictional rulings," *Reed Elsevier*, 559 U.S. at 161; *see Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application."); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("[T]he exhaustion rule . . . though to be strictly enforced, is not jurisdictional."); *compare* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."), *with* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the [noncitizen] has exhausted all administrative remedies available . . . .").[3] If anything,

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[3] These decisions analyzed the language of 28 U.S.C. § 2254(b) that existed prior to the passage of the Antiterrorism and Effective Death Penalty Act of 1996, which amended the provision in a manner that made clear that it is not jurisdictional, permitting the denial of a petition for habeas corpus on its merits notwithstanding the failure of the petitioner to exhaust administrative remedies, and referring specifically to the states' ability to waive the exhaustion requirement. *See* Antiterrorism and Effective

§ 1252(d)(1) sounds less jurisdictional because it does not use the "mandatory word 'shall.'" *Auburn*, 568 U.S. at 154. Although § 2254(b)(1) arguably "delineat[ed] the classes of cases a court may entertain," Opp. 11, that fact did not, on its own, make the provision jurisdictional.

Like the exhaustion requirements in *Jones* and *Reed Elsevier*, § 1252(d)(1) "imposes the type of precondition to suit that supports nonjurisdictional treatment," *Reed Elsevier*, 559 U.S. at 166; *see* 42 U.S.C. § 1997e(a)) ("[N]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted."); 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made . . . ."). By providing that a court "may review" a final removal order "only if the [noncitizen] has exhausted all administrative remedies," 8 U.S.C. § 1252(d)(1), the provision creates a "statutory condition that requires a party to take some action before filing a lawsuit," *Reed Elsevier*, 559 U.S. at 166.

B. The surrounding statutory context confirms that § 1252(d)(1) is non-jurisdictional. Subsection 1252(d)(1)'s exhaustion requirement "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [such] claims." *Reed Elsevier*, 559 U.S. at 164. Subsection 1252(a)(1) provides for "[j]udicial review of a final order of removal" and states how those procedures shall be "governed." 8 U.S.C. § 1252(a)(1); *see Mata v. Lynch*, 576 U.S. 143, 147 (2015) (citing § 1252(a)(1) to state that "[t]he INA,

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Death Penalty Act of 1996, Pub. L. 104-132, § 104(2)(3), 110 Stat. 1214 (amending 28 U.S.C. § 2254(b)).

in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review 'final order[s] of removal'"). Subsection 1252(a)(2) then carves out certain immigration orders from this grant of jurisdiction in explicit terms, providing that "no court shall have jurisdiction to review" certain decisions. 8 U.S.C. § 1252(a)(2). Subsection 1252(d)(1)'s exhaustion requirement "appears as an entirely separate provision" from § 1252(a), *Zipes*, 455 U.S. at 394, and cannot "become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions," *Auburn*, 568 U.S. at 155.

Furthermore, Congress clearly delineated neighboring provisions of the statute as jurisdictional, reinforcing § 1252(d)(1)'s non-jurisdictional character. In other subsections of § 1252, *see, e.g.*, 8 U.S.C. § 1252(a)(2)(A) ("no court shall have jurisdiction"); *id.* § 1252(a)(2)(B) (same); *id.* § 1252(a)(2)(C) (same); *id.* § 1252(b)(9) (same); *id.* § 1252(g) (same), as well as other sections of the INA, *see*, *e.g.*, *id.* § 1158(a)(3) ("no court shall have jurisdiction"); *id.* § 1182(a)(9)(b)(V) (same); *id.* § 1229c(f) (same), Congress used explicit language to designate jurisdictional provisions. By omitting similar language in § 1252(d)(1), Congress indicated its plan to give that provision a different meaning. Indeed, when evaluating a provision's jurisdictional nature, this Court has noted the significance of Congress's use of "jurisdictional terms" in one part of a statute, but not another. *See Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . ." (citing *Russello v. United States,* 464 U.S. 16, 23 (1983)));

Auburn, 568 U.S. at 156 (describing this "general rule").

Moreover, § 1252(d)(2), which uses the same language as § 1252(d)(1), contains several exceptions that illustrate the non-jurisdictional character of both subsections of § 1252(d). Subsection 1252(d)(2) states that 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 certain circumstances exist. *See* 8 U.S.C. § 1252(d)(2). The presence of these "congressionally authorized exceptions" in § 1252(d)(2) suggests that neither subsection of § 1252(d) has a truly jurisdictional "character." *Reed Elsevier*, 559 U.S. at 166; *id.* at 165 ("It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.").

The history of § 1252(d) further illustrates that Congress did not plan for the provision to impose a jurisdictional bar. Congress significantly overhauled the INA's judicial review provisions in 1996. *See* Pub. L. 104-208, 110 Stat. 3009-607 (1996). This law almost wholly preserved § 1252(d)'s statutory text, which was formerly codified at 8 U.S.C. § 1105a(c). *See* H. R. Rep. No. 104-828, at 220 (1996) ("Section 242(d) restates the provisions in the first and third sentences of subsection (c) of current section 106 requiring that a petitioner have exhausted administrative remedies . . . ."). Legislators made one change to the text of the exhaustion provision, however: They replaced "shall" with "may," diluting the requirement's "jurisdictional import," *Auburn*, 568 U.S. at 154. *Compare* 8 U.S.C. § 1105a(c) (1994) ("[a]n order of deportation or of exclusion *shall* not be reviewed by any court if" (emphasis added)), *with* 8 U.S.C. § 1252(d) ("[a] court *may* review a final order of removal only if" (emphasis

added)). They did not, however, include any explicitly jurisdictional language in the revised provision.

The absence of jurisdictional language is particularly striking given the statute's history. In the 1996 amendments, Congress specifically designated certain "matters [as] not subject to judicial review," including in § 1252(a), *see* 110 Stat. at 3009-607, and in a variety of other immigration provisions. Indeed, in the 1996 enactment that included the revisions to the INA, Congress used the phrase "no court shall have jurisdiction" thirteen times—once to bar judicial review of certain EPA rules, *see* 110 Stat. at 3009-469, and twelve times to limit review of a variety of immigration decisions, *see, e.g.*, *id.* at 3009-597 (barring review of denial of voluntary departure); *id.* at 3009-649 (barring review of certain causes of action relating to legalization decisions); *id.* at 3009-639 (barring review of waivers of certain grounds of inadmissibility). But lawmakers did not use that phrase—or any phrase like it—when revising the exhaustion requirement that would become 8 U.S.C. § 1252(d)(1), *id.* at 3009-608.

III. There Is No Long Tradition of Treating § 1252(d)(1)'s Exhaustion Requirement as Jurisdictional.

While this Court has been willing to treat "a long line of Supreme Court decisions left undisturbed by Congress" as a clear indication that a requirement is jurisdictional, *Fort Bend*, 139 S. Ct. at 1849 (quotation marks and brackets omitted), no such line of authority exists here.

This Court has never considered whether the exhaustion requirement in § 1252(d) is jurisdictional. Indeed, as this Court explained in *Reed Elsevier*, it has "treated as nonjurisdictional other types of threshold

requirements that claimants must complete, *or exhaust*, before filing a lawsuit." 559 U.S. at 166 (emphasis added); *Patchak*, 138 S. Ct. at 906 (distinguishing jurisdictional provision from "a 'claim-processing rule,' like a filing deadline or an exhaustion requirement"); *Rafeedie v. I.N.S.*, 880 F.2d 506, 526 (D.C. Cir. 1989) (Ginsburg, J., concurring) ("[A] statutory exhaustion requirement, unless Congress explicitly declares otherwise, does not impose an absolute, unwaivable limitation on judicial review.").

To be sure, several courts of appeals have concluded that the requirement is jurisdictional, *see* Pet. 12-13; BIO 12, but there was also "widespread agreement among the circuits" that the provision at issue in *Reed Elsevier* was jurisdictional before this Court concluded otherwise, *see Reed Elsevier*, 559 U.S. at 160; *Zipes*, 455 U.S. at 395 (describing "scattered references to the timely-filing requirement as jurisdictional").

And notably, most of those decisions in the courts of appeals rely on cases that predate this Court's recent attempt to "bring some discipline to the use of the label jurisdictional," *Henderson*, 562 U.S. at 435; *see, e.g.*, *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 62 (1st Cir. 2013) (citing *Athehortua-Vanegas v. INS*, 876 F.2d 238, 240 (1st Cir. 1989)); *Lin v. Att'y Gen. of U.S.*, 543 F.3d 114, 119 (3d Cir. 2008) (citing *Abdulrahman v. Ashcroft*, 330 F.3d 587, 594-95 (3d Cir. 2003)); *Massis v. Mukasey*, 549 F.3d 631, 638 (4th Cir. 2008) (quoting a 2001 decision stating that the proposition was "well settled"); *Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009) (citing *Wang v. Ashcroft*, 260 F.3d 448, 452-53 (5th Cir. 2001)); *Ramani v. Ashcroft*, 378 F.3d 554, 558 (6th Cir. 2004) (citing *Perkovic v. INS*, 33 F.3d 615, 619 (6th Cir. 1994)); *Alvarado v. Holder*, 759 F.3d 1121,

1127 (9th Cir. 2014) (citing *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)); *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019) (citing *Rivera-Zurita v. INS*, 946 F.2d 118, 120 n.2 (10th Cir. 1991)); *Alim v. Gonzales*, 446 F.3d 1239, 1253 (11th Cir. 2006) (citing cases from 2003 and 1994); *see generally Boechler*, 142 S. Ct. at 1494 (rejecting party's appeal to "lower court cases" that "almost all predate this Court's effort to bring some discipline to the use of the term jurisdictional" (quotation marks omitted)).[4]

For this reason, circuit judges in the courts that have found § 1252(d)(1) to be jurisdictional have expressed doubts about "the continuing validity" of their precedent. *See Lin*, 543 F.3d at 120 n.6; *Saleh v. Barr*, 795 F. App'x 410, 414 (6th Cir. 2019) ("Although the concurrence raises the question of whether we should continue to consider the exhaustion requirement as jurisdictional, we are bound to do so here."); *Sousa v. INS*, 226 F.3d 28, 31 (1st Cir. 2000) ("If we were writing on a clean slate, it would be very tempting to treat [the failure to exhaust issues] as something less than a jurisdictional objection.").

* * *

To show that § 1252(d)(1)'s exhaustion requirement is jurisdictional, the government must demonstrate that the "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Boechler*,

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[4] In addition, many of these courts of appeals last analyzed the statute before Congress significantly overhauled the INA's judicial review provisions in 1996. At that point, Congress had not yet enacted § 1252(a)'s explicit jurisdiction-stripping provisions, *see supra* at 20, underscoring the limited relevance of these holdings today.

142 S. Ct. at 1497. It cannot make that showing here. The plain text of § 1252(d)(1), as well as its place in the statutory scheme, do not demonstrate any "jurisdictional character," providing no reason why a "statutory condition devoid of an express jurisdictional label should be treated as jurisdictional." *Reed Elsevier*, 559 U.S. at 167.

"Given the unfairness and waste of judicial resources entailed in tying the [exhaustion] requirement to subject-matter jurisdiction," it is the "sounder course" to "leave the ball in Congress' court." *Arbaugh*, 546 U.S. at 515 (citation and quotation marks omitted). This Court should do that here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

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