No. 21–1436

In the Supreme Court of the United States

LEON SANTOS-ZACARIA,
Petitioner,

v.

MERRICK B. GARLAND, Attorney General,
Respondent

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

BRIEF OF *AMICI CURIAE* FORMER IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF NEITHER PARTY

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AMICI CURIAE AND THEIR INTEREST[1]

Amici are former immigration judges (IJs) and former members of the Board of Immigration Appeals (BIA). *Amici* have an interest in this case based on their many years of dedicated service administering the immigration laws of the United States. Collectively, *amici* presided over thousands of immigration proceedings and considered thousands of motions to reconsider in connection with those proceedings. From this experience, *amici* are well-positioned to inform this Court about the processes for filing motions to reconsider before the BIA, as well as the BIA's system for ruling on these motions.

Amici believe and hope this information will aid the Court in its decision in this case. *Amici* are not supporting either party and take no position on the legal merits of the questions presented.

Amici's names, former positions, and years of service are:

- Steven Abrams, Immigration Judge, New York, 1997–2013
- Terry A. Bain, Immigration Judge, New York, 1994–2019

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel contributed funds for its preparation or submission.

- Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994–2012
- Esmerelda Cabrera, Immigration Judge, New York and New Jersey, 1994–2005
- Jeffrey S. Chase, Immigration Judge, New York, 1995–2007
- George T. Chew, Immigration Judge, New York, 1995–2017
- Joan V. Churchill, Immigration Judge, Washington, D.C., and Virginia, 1980–2005
- Matthew D'Angelo, Immigration Judge, Massachusetts, 2003–2018
- Bruce J. Einhorn, Immigration Judge, California, 1990–2007
- Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000–2003
- Noel A. Ferris, Immigration Judge, New York, 1994–2013
- James R. Fujimoto, Immigration Judge, Illinois, 1990–2019
- Gilbert Gembacz, Immigration Judge, California, 1996–2008
- Jennie Giambastiani, Immigration Judge, Illinois, 2002–2019
- Alberto E. Gonzalez, Immigration Judge, California, 1995–2005

- John F. Gossart, Jr., Immigration Judge, Maryland, 1982–2013
- Paul Grussendorf, Immigration Judge, Pennsylvania and California, 1997–2004
- Miriam Hayward, Immigration Judge, California, 1997–2018
- Charles M. Honeyman, Immigration Judge, New York and Pennsylvania, 1995–2020
- William P. Joyce, Immigration Judge, Massachusetts, 1996–2002
- Samuel Kim, Immigration Judge, California, 2020–2022
- Carol King, Immigration Judge, California, 1995–2017
- Elizabeth A. Lamb, Immigration Judge, New York, 1995–2018
- Donn L. Livingston, Immigration Judge, Colorado and New York, 1995–2018
- Dana Leigh Marks, Immigration Judge, California, 1987–2021
- Margaret McManus, Immigration Judge, New York, 1991–2018
- Steven Morley, Immigration Judge, Pennsylvania, 2010–2022
- Charles Pazar, Immigration Judge, Tennessee, 1998–2017
- Laura Ramirez, Immigration Judge, California, 1997–2018

- John W. Richardson, Immigration Judge, Arizona, 1990–2018
- Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995–2002
- Susan G. Roy, Immigration Judge, New Jersey, 2008–2010
- Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995–2003; Immigration Judge, Virginia, 2003–2016
- Patricia M. B. Sheppard, Immigration Judge, Massachusetts, 1993–2006
- Ilyce S. Shugall, Immigration Judge, California, 2017–2019
- Helen Sichel, Immigration Judge, New York, 1997–2020
- Andrea Hawkins Sloan, Immigration Judge, Oregon, 2010–2017
- Gabriel C. Videla, Immigration Judge, New York and Florida, 1994–2022
- Robert D. Vinikoor, Immigration Judge, Illinois, 1984–2017
- Polly A. Webber, Immigration Judge, California, 1995–2016
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INTRODUCTION AND SUMMARY

In Sections I–III of this brief, *amici* provide background information about the BIA and motions to reconsider removal orders. Sections IV and V provide statistics about the BIA's caseload and backlog. In Section VI, *amici* draw on their experience and explain practicalities that affect how the BIA adjudicates motions to reconsider. In Section VII, *amici* describe the practical effects for both noncitizens and the BIA if this Court were to adopt a rule requiring noncitizens to file motions to reconsider removal orders before seeking judicial review of such orders.[2]

DISCUSSION

I. The Board of Immigration Appeals and Its Procedures

The Board of Immigration Appeals (BIA) is the appellate body that reviews "administrative adjudications under the [Immigration and Nationality Act] that the Attorney General may by regulation assign to it." 8 C.F.R. § 1003.1(d)(1). The BIA is part of the Department of Justice (DOJ) and "responsible only to the Attorney General." 1 C. Gordon, S. Mailman & S. Yale-Loehr, IMMIGRATION LAW AND PROCEDURE § 3.05[2]. Because the BIA is detached from the Department of Homeland Security (DHS) and its predecessor the Immigration and Naturalization Service (INS), it

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[2] This brief uses "noncitizen" as equivalent to the statutory term "alien." *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

is "completely divorced from the enforcement apparatus." *Id.* The BIA is not subject to the procedural requirements of the Administrative Procedure Act, *Ardestani v. INS*, 502 U.S. 129, 133 (1991), and is not bound by DHS and INS rules, *Matter of Singh*, 21 I. & N. Dec. 427, 431 (BIA 1996).

The BIA currently has twenty-three permanent members, 8 C.F.R. § 1003.1(a)(1), and, since 1995, it has also had temporary members to help address its burgeoning caseload, 60 Fed. Reg. 29,469 (June 5, 1995); 8 C.F.R. § 1003.1(a)(4). Most cases are decided by one BIA member, but some cases are adjudicated by three-member panels. 8 C.F.R. § 1003.1(e). Single-member adjudication was first authorized in 1999 and was expanded to more cases in 2002. *See* 64 Fed. Reg. 56,135, 56,135–56,136 (Oct. 18, 1999); 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002). Since the 2002 reform, single-member review is required in all appeals that do not satisfy specific criteria, such as a need to settle inconsistencies or resolve a matter of "major national import." *See* 8 C.F.R. § 1003.1(e)(6)(i)–(vii).

When a noncitizen files an appeal with the BIA, the case is referred to a "screening panel comprising a sufficient number of Board members." 8 C.F.R. § 1003.1(e) *see also id.* § 1003.1(e)(1). The screening panel determines whether summary disposition is appropriate. *Id.* §§ 1003.1(d)(2)(ii), 1003.1(e)(1); *see also id.* §§ 1003.1(d)(2)(i)(A)–(F). If it is not, the screening panel assigns the appeal for merits review by a single member or a three-member panel, according to the criteria discussed above.

II. Noncitizens' Limited Right to Move for Reconsideration

A noncitizen who has received a final order of removal has a statutory right to file a motion to reconsider the decision. 8 U.S.C. § 1229a(c)(6); *see also* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). A motion to reconsider must allege errors in law or fact. 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. §§ 1003.2(b)(1), 1003.23(b)(2). Subject to certain exceptions, the statute limits a noncitizen to one motion to reconsider. 8 U.S.C. § 1229a(c)(6)(A); *see also* 8 C.F.R. §§ 1003.2(b)(2), 1003.23(b)(1). A noncitizen who loses on appeal to the BIA may file a motion to reconsider with the BIA. *See* 8 C.F.R. § 1003.2(a).

An analogous statutory provision authorizes a noncitizen to file one motion to reopen proceedings based on intervening events. 8 U.S.C. § 1229a(c)(7)(A). This numerical limitation is also subject to certain exceptions. In view of the statutory single-motion limitation on motions to reopen, some courts have concluded that a noncitizen may ask either an IJ or the BIA to reopen a proceeding, but not both. *See Bahri v. Gonzales*, 2006 WL 1316920, at *1 (7th Cir. May 12, 2006) (holding that a motion to reopen filed with the BIA was barred because the noncitizen had filed a motion to reopen with the IJ); *Ai Ling Li v. Mukasey*, 277 F. App'x 53, 54 (2d Cir. 2008) (stating that "a party may file only one motion to reopen removal (whether before the BIA or an IJ)"); *see also* 8 C.F.R. § 1003.2(c)(2).

The same reasoning could be extended to motions to reconsider if an affirmance by the BIA is

considered the same "decision that the alien is removable" rendered by the IJ. *See* 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); *cf. Barroso v. Gonzales*, 429 F.3d 1195, 1201 n.12 (9th Cir. 2005) (extending the reasoning from a case about the interaction of a motion to reopen with voluntary departure to a motion to reconsider because the "reasoning applies equally well to a motion to reconsider … as it does to a motion to reopen").

In this case, the Government has taken the position that the right to file a motion to reconsider is a remedy that is available "as of right" under 8 U.S.C. § 1252(d)(1). But if the single-motion limitation is construed to preclude noncitizens who have requested reconsideration by the IJ from seeking reconsideration by the BIA, then motions for reconsideration will not always be available "as of right" even under the Government's view of that term.

Under the statute and regulations, motions to reconsider at the immigration court and at the BIA are generally subject to filing deadlines. *See* 8 U.S.C. § 1229a(c)(6)(B) (30 days to file motion to reconsider); 8 C.F.R. §§ 1003.2(b)(2) (30 days to file motion to reconsider with BIA), 1003.23(b)(1) (30 days to file motion to reconsider with IJ). But there are no statutes, rules, or regulations requiring an IJ or the BIA to rule on motions to reconsider within a certain period.

Filing a motion to reconsider does not automatically stay a noncitizen's deportation or removal. *See* 8 C.F.R. § 1003.2(f). The noncitizen

must file a motion to stay removal in accordance with the BIA's practice manual. *See Board of Immigration Appeals Practice Manual* § 6.3(c) [hereinafter *"BIA Practice Manual*"]. To date, the BIA has not articulated a definitive standard for deciding stay motions in a precedential opinion, its practice manual, or other guidance, and no regulation addresses the issue. *See* T. Realmuto & K. Macleod-Ball, *The Basics of Motions to Reopen EOIR-Issued Removal Orders, National Immigration Litigation Alliance and American Immigration Council* 10 (Apr. 25, 2022) [hereinafter "*Basics of Motions to Reopen*"].[3]

When a noncitizen files a motion to reconsider, the motion is referred to the BIA's screening panel for assignment. 8 C.F.R. § 1003.2(i). If the motion addresses a single-member decision, the screening panel assigns the motion to one member unless three-member adjudication is warranted under 8 C.F.R. § 1003.1(e)(6). *Id*. Unlike screening-panel review of new BIA appeals in 8 C.F.R. § 1003.1(e)(1), screening of motions to reconsider has no mandatory time period for completion. *See id.* § 1003.2(i). BIA members and staff are therefore likely to prioritize other matters that have mandated deadlines.

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[3] Available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.

III. Immigration Judges and the BIA have Broad Discretion to Deny Motions to Reconsider

IJs and BIA members have broad discretion to grant or deny motions to reconsider. 8 C.F.R. §§ 1003.23(b)(1)(iv), 1003.2(a). They have even broader discretion to grant or deny motions to reopen: an IJ or BIA member may deny a motion to reopen even when a noncitizen has made out a *prima facie* case for relief. 8 C.F.R. §§ 1003.23(b)(3), 1003.2(a); *see INS v. Abudu*, 485 U.S. 94, 105–06 (1988).

The BIA's discretion is conferred by regulation, not statute. 8 C.F.R. § 1003.2(a); *see also Kucana v. Holder*, 558 U.S. 233, 243 (2010) ("The Board's discretionary authority … is 'specified' not in a statute, but only in the Attorney General's regulation."). A regulatory amendment adopted in April 1996 afforded this discretion. 61 Fed. Reg. 18,900, 18,904 (Apr. 29, 1996). The same amendment also imposed the numerical and time limitations outlined above. *Id.* at 18,904–18,905.

The regulation predates the statutory amendment codifying a noncitizen's right to file motions to reconsider and the numerical and time limitations described above. *See* Omnibus Consolidated Appropriations Act, Pub. L. 104–208, 110 Stat. 3009 (Sept. 30, 1996). That amendment also codified the right to file motions to reopen. This Court has observed that when Congress codified the right to file such motions and the corresponding limits, "Congress did not codify the regulation delegating

to the BIA discretion to grant or deny motions to reopen." *Kucana*, 558 U.S. at 249.

As a result, some have questioned whether the discretion conferred by the regulation survived the 1996 amendment. *Basics of Motions to Reopen* at 8; *see also Mata v. Lynch*, 576 U.S. 143, 148 (2015) (noting that this Court had declined to consider whether courts have jurisdiction to review the BIA's use of its discretionary power). This doubt may be strongest for motions to reopen because noncitizens sometimes establish clear bases for reopening (*e.g.*, vacatur of a conviction that previously rendered the noncitizen removable). This Court, however, has reasoned that, given "the Legislature's silence on the discretion of the Attorney General (or his delegate, the Board) over reopening motions, … Congress left the matter where it was pre[-statute]: The BIA has broad discretion, conferred by the Attorney General, to grant or deny a motion to reopen." *Kucana*, 558 U.S. at 250 (internal quotation marks omitted). And agency regulations continue to provide that rulings on motions to reopen and motions to reconsider are discretionary. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1)(iv); 1003.23(b)(3).

As a result, although noncitizens may choose whether to seek reconsideration before the IJ or BIA, the IJ and BIA may deny any such motion in their unilateral discretion. This continuing discretion to grant or deny may suggest that motions to reconsider do not provide noncitizens an administrative remedy that is available "as of right" under 8 U.S.C. § 1252(d)(1).

IV. Increasing Immigration Caseloads

The U.S. immigration system has a substantial backlog of cases, and that backlog is growing rapidly. In 2020, the Executive Office for Immigration Review (EOIR) was "managing the largest caseload both the immigration court system and the [BIA had] ever seen." 85 Fed. Reg. 18,105, 18,106 (Apr. 1, 2020). As of June 2022, there were close to 1.8 million cases pending in immigration courts. EOIR, *Workload and Adjudication Statistics, Pending Cases, New Cases, and Total Completions* (Oct. 13, 2022).[4] That is an almost 27% increase from the caseload in 2021 and over five times the number from a decade ago. *See id.* (1,789,764 pending cases in 2022, 1,408,412 in 2021, and 327,683 in 2012). Cases are continuing to accumulate, as new filings per year continue to be at least double the number of cases completed. *See* EOIR, *Workload and Adjudication Statistics, Pending Cases, New Cases and Total Completions* (703,848 cases filed and 312,486 cases completed in the same timeframe).

The BIA's caseload has grown even more rapidly in recent years, exacerbating its backlog. Between 2018 and 2019, the BIA's pending cases "essentially doubled." 85 Fed. Reg. at 18,106. And in 2022, the BIA received 29,506 new appeals, up almost 50% from the number of new appeals in 2021. EOIR, *Workload and Adjudication Statistics, BIA Case Appeals, Filed, Completed, and*

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[4] Available at https://www.justice.gov/eoir/page/file/1242166/download.

Pending (Oct. 13, 2022).[5] By contrast, the BIA completed only 21,657 cases in 2022. *Id.* As of June 2022, the BIA's backlog had grown to 89,803 cases. *Id.*

The EOIR recently announced the appointment of 51 new IJs. *See* EOIR, *Notice – EOIR Announces 32 New Immigration Judges* (Oct. 26, 2022)[6]; EOIR, *Notice – EOIR Announces 19 New Immigration Judges* (Aug. 5, 2022).[7] These increases in IJs have not been accompanied by a corresponding addition in BIA members. The agency has recognized, however, that as "new immigration judges enter on duty, the number of decisions rendered nationwide by immigration judges will increase and, in turn, the number of appeals filed with the Board will also increase." 85 Fed. Reg. at 18,106.

The time to adjudicate cases has also increased substantially. Although the time varies considerably, an IJ's review can take over 1,000 days, and the national average in fiscal year 2022 was 795 days. *See* Syracuse University, *TRAC Immigration, Immigration Court Backlog Tool*.[8] Recent statistics for the BIA are not publicly available, but in 2012 the BIA took an average of 485 days to

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[5] Available at https://www.justice.gov/eoir/page/file/1248501/download.

[6] Available at https://www.justice.gov/eoir/page/file/1546941/download.

[7] Available at https://www.justice.gov/eoir/page/file/1524336/download.

[8] Available at https://trac.syr.edu/phptools/immigration/court_backlog/.

decide appeals in non-detained cases and 105 days to decide appeals in detained cases. *See* Office of the Inspector General, U.S. Dep't of Justice, I-2013-001, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* 43 (2012).

V. Statistics Regarding Motions to Reconsider

Exact statistics regarding the number of motions to reconsider that are filed with the BIA, their grant rate, and the time it takes to adjudicate them are unavailable to the public. Organizations have tried to obtain such statistics but, as of the filing date of this brief, no data have been reported. *See*, *e.g.*, American Immigration Council, *Seeking Information About Board of Immigration Appeals' Treatment of Motions to Reconsider* (Sept. 21, 2021).[9]

Nevertheless, the available information suggests that the increase in immigration caseloads has led to a corresponding increase in, and accumulation of, motions to reconsider. Moreover, in *amici*'s experience, motions to reconsider filed with the BIA often are not ruled on expeditiously.

In 2018, the last year for which public statistics are available, the BIA received 7,659 motions to reconsider or reopen. EOIR, *Immigration Review, Statistics Yearbook* 36 (2018). In the same year,

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[9] Available at https://www.americanimmigrationcouncil.org/FOIA/seeking-information-about-board-immigration-appeals-treatment-motions-reconsider.

only 5,823 motions to reconsider or reopen were resolved. *Id*. At the end of fiscal year 2022, BIA had a backlog of 4,531 pending motions to reconsider, reopen, or recalendar. EOIR, *Workload and Adjudication Statistics, Pending Cases, New Cases, and Total Completions*.

The growing backlog of motions to reconsider and the long and increasing times to adjudicate these motions may also suggest that motions to reconsider do not provide noncitizens an administrative remedy that is practically available "as of right" under 8 U.S.C. § 1252(d)(1).

VI. Practicalities of Adjudicating Motions to Reconsider

In *amici*'s experience, motions to reconsider are not ordinarily decided on a first-in-first-out basis. Instead, they are more often decided based on practical circumstances and the pressures of specific cases.

In particular, the treatment of a motion to reconsider is often affected by the decision on any corresponding motion to stay removal. As discussed above, the filing of a motion to reconsider does not automatically stay removal in most cases—separate stay motions must be filed. *See* 8 C.F.R. § 1003.2(f); BIA Practice Manual § 6.3(c). The BIA normally takes up stay motions only when removal is imminent (within three business days). *See BIA Practice Manual* § 6.3(c)(2)(A); *Basics of Motions to Reopen* 9–10. Even then, the BIA often denies motions to stay removal without acting on accompanying motions to reconsider. *See Basics of Motions to Reopen* 11. In circuits that require a

motion to reconsider to exhaust administrative remedies, noncitizens have no recourse in court until the motion to reconsider is resolved. Although the denial of a stay and the resulting deportation does not necessarily moot a motion to reconsider, reconsideration is seldom granted after the movant has left the country.

Apart from the practical issues involving stays of removal, the BIA's heavy caseload and broad discretion encourage denials of motions to reconsider. Granting a motion to reconsider typically requires analysis and explanation, whereas denials may rest on reasons previously stated. And because the BIA has broad discretion on the merits of such motions, members know that denials are unlikely be overturned on appeal.

As a result, motions to reconsider are rarely granted. The low likelihood of success may also suggest that motions to reconsider do not provide noncitizens an administrative remedy that is practically available "as of right."

VII. The Practical Effects of a Rule Requiring Noncitizens to File a Motion for Reconsideration Before Seeking Judicial Review

A rule requiring noncitizens to file motions for reconsideration by the BIA before they can petition for judicial review would have significant practical effects on both noncitizens and the BIA.

For noncitizens, such a rule would have substantial downsides and little upside. Given the BIA's large caseload and backlog, motions for

reconsideration are likely to sit unresolved for months if not years. Many noncitizens facing removal orders are detained and would remain in detention while their reconsideration motions are pending. Because stays are not automatic, some would be deported before a ruling. And ultimately, the odds of convincing the BIA to grant a motion for reconsideration would remain very slim.

For the BIA, a rule requiring noncitizens to file motions to reconsider to exhaust administrative remedies would substantially add to the agency's already overwhelming caseload and backlog. Disposing of a motion for reconsideration is not a simple process. A BIA staff member must analyze the motion and prepare a proposed disposition. The screening panel must assign the motion to one or more judges. And then the assigned judge or judges must rule on the motion. Making motions for reconsideration a prerequisite to judicial review would add multiple layers of work for a body that is already struggling to manage its existing caseload. And in the end, very few rulings would change.

CONCLUSION

Amici urge the Court to consider the information in this brief in deciding whether noncitizens should be required to file motions to reconsider in order to exhaust their administrative remedies before seeking judicial review.

Respectfully submitted,

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November 23, 2022