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 LEGAL SERVICES PROVIDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are twenty-six nonprofit organizations whose missions include advocating for and on behalf of immigrants, refugees, and asylum seekers.[1] Amici frequently assist noncitizens in pursuing appellate review of removal orders—both at the agency level before the Board of Immigration Appeals ("BIA") and in federal court pursuant to 8 U.S.C. § 1252. Because there is no right to government-funded counsel in removal proceedings, many amici also devote significant resources to advising *pro se* litigants in the immigration appeals process.

Drawing from and informed by their practical litigation experience, amici share an interest in ensuring that noncitizens facing removal from the United States have a fair and meaningful opportunity to obtain judicial review of errors made in agency adjudications.

A list of amici follows, in alphabetical order:

- American Gateways
- American Immigration Council
- American Immigration Lawyers Association (AILA)
- Americans for Immigrant Justice
- Asylum Seeker Advocacy Project (ASAP)
- Brooklyn Defender Services

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

- Capital Area Immigrants' Rights (CAIR) Coalition
- Center for Gender & Refugee Studies
- Florence Immigrant & Refugee Rights Project
- Human Rights First
- Immigrant Defenders Law Center (ImmDef)
- Immigrant Legal Defense
- Immigration Equality
- Justice Action Center
- Legal Aid Justice Center
- Make the Road New York
- National Center for Lesbian Rights
- National Immigrant Justice Center
- National Immigration Project of the National Lawyers Guild (NIPNLG)
- Northwest Immigrant Rights Project
- Refugee and Immigrant Center for Education and Legal Services (RAICES)
- Rocky Mountain Immigrant Advocacy Network
- Southern Poverty Law Center
- Tahirih Justice Center
- The Bronx Defenders
- Transgender Law Center

SUMMARY OF ARGUMENT

Amici agree with petitioner that the Fifth Circuit's reading of 8 U.S.C. § 1252(d)(1) is atextual. Amici write separately to explain that statutory context, practical

realities, and common sense further confirm that petitioner's plain-text reading is correct. The Fifth Circuit's approach to Section 1252(d)(1) creates an irrational, unnecessarily bifurcated review system that will lead to wasteful and duplicative filings and confuse noncitizens, attorneys, and even federal judges about what the statute requires—all without improving the efficiency of the process.

1. Because Section 1252(d)(1) is an administrative exhaustion statute, one of the "main purposes" it is meant to serve is promoting efficiency. *Woodford* v. *Ngo*, 548 U.S. 81, 89 (2006). That aim is frustrated by the Fifth Circuit's approach, under which "new" errors introduced by a BIA decision must first be challenged in a motion to reconsider before they are deemed exhausted. The BIA already struggles to manage its heavy caseload and persistent backlog. The Fifth Circuit's approach will, in practice, worsen that problem by compelling noncitizens routinely to file motions for reconsideration in parallel with their petitions for review in the courts of appeals. The federal judiciary's burdens will grow heavier too, as many noncitizens will file a second petition for review after the BIA denies their motion for reconsideration of a decision the BIA has already reached. Amici know of no basis for believing that the Fifth Circuit's approach produces *any* gains in efficiency or accuracy—much less a gain sufficient to offset the new burdens it would impose on litigants, the agency, and the courts.

2. The Fifth Circuit's approach to Section 1252(d)(1) rests on faulty analytical foundations. The court wrongly conflated the treatment of new facts extrinsic to a removal proceeding (such as a State's vacatur of a criminal conviction underlying the removal order), which are typically raised via a motion to *reopen*, with

"new" errors introduced in the BIA decision itself, which the Fifth Circuit held must be exhausted in a motion for *reconsideration*. That flawed logic has resulted in a rule that requires a confusing, multi-track review process in an unnecessarily large number of cases—rather than only in the unusual circumstances where such a process would be appropriate. And the difficulties that courts of appeals have *already* encountered in applying the atextual exhaustion rule, both in the Fifth Circuit and elsewhere, illustrate the incoherence and irrationality of that approach.

The Court should reverse the Fifth Circuit's judgment.

ARGUMENT

Amici agree with petitioner that, in answering the second question presented, the Court need not look beyond the statutory text, which requires exhaustion only of "administrative *remedies*" that are "available … *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added).[2] As petitioner explains, the Fifth Circuit's interpretation of Section 1252(d)(1) is atextual: it requires noncitizens to exhaust *issues* raised for the first time in a BIA decision, via a discretionary motion to reconsider that seeks

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[2] Amici also agree with petitioner that the Fifth Circuit erred in viewing Section 1252(d)(1)'s exhaustion requirement as jurisdictional, rather than as a claims-processing rule. Section 1252(d)(1) "does not speak to a court's authority, but only to a party's procedural obligations." *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014); *see also* Pet. Br. 15-33; *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005) (finding jurisdiction "supplied by" noncitizen's "timely petition for review of the agency's final decision," and observing that federal courts "have jurisdiction over cases and controversies, not particular legal issues that affect the outcome").

relief not available to them "as of right." *See* Pet. Br. 34-42.

"To the extent any doubt remains" on the matter, petitioner's plain-meaning interpretation is further confirmed by "a wider look" at the statute—*i.e.*, a look at Section 1252(d)(1) in context, and with an eye toward the interests it is meant to serve. *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1482 (2021). In this brief, amici discuss some of the many "contextual clue[s]" and practical considerations that reinforce petitioner's arguments. *Id.*

I. THE FIFTH CIRCUIT'S APPROACH TO EXHAUSTION WOULD ADD UNNECESSARY BURDENS AND AGGRAVATE THE INEFFICIENCY OF REVIEW OF REMOVAL ORDERS

A. The Overburdened BIA Already Struggles To Handle Its Heavy Workload

Congress has tasked the immigration courts with adjudicating charges that a noncitizen is removable, *see* 8 U.S.C. § 1229a, and with ruling on applications for relief from removal, *see id.* § 1229a(c)(4). That task is a daunting one—not only because both the agency and litigants must navigate the "complex statutory scheme" that Congress created, *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56-57 (2014) (plurality op.), but also because the agency's backlog has gone from bad to worse. At the end of 2016, there were about 520,000 pending cases before immigration courts; by October 2022, that number had more than tripled, to over 1,700,000. *See* U.S. Dep't of Justice, *EOIR: Adjudication Statistics—Pending Cases, New Cases, and Total Completions*

(Oct. 13, 2022), https://www.justice.gov/eoir/page/file/1242166/download.[3]

The agency's backlog creates an inescapable reality: longer wait times for noncitizens facing removal, including those enduring detention during their removal proceedings. As of 2021, the average wait time in removal cases for a "master calendar" hearing, after receiving a notice to appear, was 1,642 days (or four and a half years). *See* TRAC, *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts* (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637. If a noncitizen requested a merits hearing, then the wait was even longer: on average, 1,963 days (or nearly five and a half years) from the date of the notice to appear. *See id.*[4]

Faced with an unceasing and increasing influx of new cases, the BIA—currently comprised of only 23 permanent members, *see* 8 C.F.R. § 1003.1(a)(1)—has struggled to keep pace. For at least two decades, the BIA has been "unable to adjudicate immigration appeals in removal proceedings effectively and efficiently." *BIA: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002). And as of late 2020, the BIA's "median case appeal time period" was 323 days—a number that includes faster-moving, non-removal appeals. *Appellate Procedures and Decisional Finality in Immigration Proceedings;*

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[3] The category of "pending cases" includes removal, deportation, exclusion, asylum-only, and withholding-only proceedings. *See* U.S. Dep't of Justice, *Adjudication Statistics*, at n.1.

[4] These statistics include noncitizens both in and out of detention. Wait times for detained noncitizens tend to be shorter, "given the usual priority assigned to hearing detained cases." TRAC, *The State of the Immigration Courts*.

Administrative Closure, 85 Fed. Reg. 81,588, 81,619 (Dec. 16, 2020). Amici regularly advise their detained clients to expect to wait at least several months for the BIA to adjudicate their cases; for noncitizens who are not detained, that wait is generally at least a year, and often much longer. Similarly, in amici's experience, the BIA regularly takes months or years to rule on motions to reopen or reconsider.

BIA appeals are now docketed at a faster rate than BIA adjudications, with no change in sight. The number of pending BIA appeals has skyrocketed from 13,968 in 2016 to 98,429 in 2022. *See* U.S. Dep't of Justice, *EOIR: Adjudication Statistics—All Appeals Filed, Completed, and Pending* (Oct. 13, 2022), https://www.justice.gov/eoir/page/file/1248506/download. To put these backlog numbers into perspective: on average, each of the BIA's 23 members[5] would need to review more than 4,200 cases this year to clear his or her docket—before even considering the new appeals that will be filed in the meantime. *See id* (noting 98,429 pending BIA appeals).[6]

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[5] Temporary BIA members may also be appointed, for terms not to exceed six months. *See* 8 C.F.R. § 1003.1(a)(4); *see also* U.S. Dep't of Justice, *EOIR: Board of Immigration Appeals* (updated Nov. 4, 2022) (providing information on current and temporary Board members), https://www.justice.gov/eoir/board-of-immigration-appeals-bios#TemporaryBoardMembers.

[6] Most BIA appeals are adjudicated by a single Board member. *See BIA Practice Manual* § 1.3(a) (updated Nov. 14, 2022) (explaining that panel review under 8 C.F.R. § 1003.1(a)(3) is reserved for cases that fall into specific categories, and *en banc* proceedings under 8 C.F.R. § 1003.1(a)(5) are "not favored"), https://www.justice.gov/eoir/book/file/1528926/download; *see also* U.S. Gov't Accountability Off., GAO-17-438, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing*

The agency's unprecedented backlog has attracted concern and attention from Congress, the Department of Justice, and immigration advocates.[7] Reasonable minds can, and do, differ on how to fix it. But there is no debate that the backlog exists—indeed, it is growing, along with the agency's caseload. And as the BIA struggles to stay above water, the Fifth Circuit's interpretation of Section 1252(d)(1) threatens to open the floodgates and worsen an already troubling situation.

B. The Fifth Circuit's Approach Would Further Burden Both The BIA And The Federal Judiciary, Without Improving Efficiency

"Exhaustion of administrative remedies serves two main purposes." *Woodford*, 548 U.S. at 89. One is protecting the agency's authority, giving it "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court" and discouraging "disregard of the agency's procedures." *Id.* (alteration and quotation marks omitted). The second purpose is "promot[ing] efficiency." *Id.*

Management and Operational Challenges 32 (June 2017) ("From fiscal year 2006 to fiscal year 2015, single BIA members annually reviewed 90 percent or more of completed appeals."), https://www.gao.gov/assets/gao-17-438.pdf.

[7] *See* Straut-Eppsteiner, *U.S. Immigration Courts and the Pending Cases Backlog (R47007)*, Congressional Rsch. Serv. (Apr. 25, 2022), https://crsreports.congress.gov/product/details?prodcode=R47077; U.S. Gov't Accountability Off., GAO-18-701T, *Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program* (Sept. 18, 2018), https://www.gao.gov/assets/gao-18-701t.pdf; Am. Immig. Lawyers Ass'n, *Policy Brief: Why President Biden Needs to Make Immediate Changes to Rehabilitate the Immigration Courts* (Feb. 12, 2021), https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-why-president-biden-needs-to-make.

The Fifth Circuit's approach to Section 1252(d)(1) serves neither of these purposes. As to the first rationale, it is doubtful that the BIA would regularly, or even occasionally, change course if it were routinely to receive motions for reconsideration charging the BIA itself with introducing new errors. Although the BIA does correct errors made by immigration judges ("IJs"), the BIA is unlikely to agree in most cases that it has *itself* erred in deciding a noncitizen's appeal. In amici's experience, the BIA rarely grants motions for reconsideration absent a new development in controlling law. This is especially so because "[t]he decision to grant or deny a motion to … reconsider is within the discretion of the [BIA]." 8 C.F.R. § 1003.2(a).[8]

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[8] In some instances, the BIA is actually *unable* to consider an argument (such as certain constitutional claims) that a noncitizen may choose to put forward for exhaustion reasons. *See, e.g.*, *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 n.2 (BIA 2020). "It makes little sense to require" noncitizens to present claims to BIA "adjudicators who are powerless to grant the relief requested." *Carr* v. *Saul*, 141 S. Ct. 1352, 1361 (2021) ("Such a vain exercise will rarely protect administrative agency authority or promote judicial efficiency." (alterations and quotation marks omitted)).

For example, consider the case of a Mexican applicant for asylum and withholding of removal, represented by amicus National Immigrant Justice Center ("NIJC"). In his BIA brief, the applicant discussed his mental health but did not argue that it should have been a factor in the IJ's "particularly serious crime" analysis because the BIA's then-operative decision in *Matter of G-G-S-* foreclosed that argument. *See* 26 I&N Dec. 339 (BIA 2014), *overruled by Matter of B-Z-R-*, 28 I&N Dec. 563 (A.G. 2022). Later, however, *Matter of G-G-S-* was rejected by multiple courts of appeals, thus opening the door to the argument that mental health *should* be considered in a "particularly serious crime" analysis. *See Matter of B-Z-R-*, 28 I&N Dec. at 564-565. NIJC advised its client to file a motion to reconsider, asking the BIA to consider his mental health—even though NIJC knew that the BIA *could not*

As to the efficiency rationale, the Fifth Circuit's approach does not "promote[] efficiency." *Woodford*, 548 U.S. at 89. On the contrary, it aggravates the inefficiency of appellate review of removal orders, both at the BIA and in federal court. By requiring a motion for reconsideration to exhaust any "new" errors introduced by the BIA's decision—*i.e.*, errors that could not have been addressed in the noncitizen's initial BIA brief—the Fifth Circuit's approach will further overwhelm and overburden the BIA and create duplicative, piecemeal work for the courts of appeals.

To understand why the Fifth Circuit's approach to Section 1252(d)(1) undermines efficiency—and is simply impractical, given the BIA's backlog of cases—it is useful to explain how it plays out in practice. Consider the case at hand.

After being charged with removability, petitioner sought withholding of removal, *see* 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"), *see* 8 C.F.R. §§ 1208.16-1208.18. Disagreeing with the IJ, the BIA held that petitioner had established past persecution and was entitled to a presumption of future persecution. *See id.* § 1208.16(b)(1)(i). But rather than remand to the IJ, the BIA violated its own rules by deciding *sua sponte* that the presumption was nevertheless rebutted in her case. *See id.* § 1003.1(d)(3)(iv)(D)(5)(ii) (explaining that if an IJ "commit[s] an error of law that requires additional factfinding," then the BIA should remand); *see also id.* § 1003.1(d)(1) (holding BIA responsible for resolving

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take this approach in the Seventh Circuit, where *Matter of G-G-S-* still applied. The filing of the motion was thus an exercise in futility, necessary only to safeguard against a potential refusal of the court of appeals to consider the issue due to failure to exhaust.

"questions before it in a manner that is timely, impartial, and consistent" with immigration law and regulations). The BIA therefore denied petitioner's withholding claim on the merits, and it also affirmed the IJ's determination that petitioner had not established CAT eligibility.

At this juncture, according to the Fifth Circuit, petitioner should have filed a motion for reconsideration, arguing that the BIA had violated its own regulations by engaging in factfinding.[9] *See* Pet. App. 4a-5a; 8 C.F.R. § 1003.2(b). But the BIA's decision also constituted a final order of removal, which a motion for reconsideration would not have stayed. *See* 8 C.F.R. § 1003.2(f); *see also Stone* v. *INS*, 514 U.S. 386, 394, 405-406 (1995) (stating that "a deportation order is final, and reviewable, when issued," regardless of whether a motion to reconsider is pending, and should be "reviewed in a timely fashion after issuance"). Nor would a motion for reconsideration have tolled the "mandatory and jurisdictional" 30-day deadline to petition for review of the BIA's order in the court of appeals—as petitioner needed to do to appeal issues that she *had* already exhausted. *Stone*, 514 U.S. at 405; *see* 8 U.S.C. § 1252(b)(1). Finally, when the BIA likely denied her motion for reconsideration months or years later, a second petition for review would be required to review those issues. *See, e.g.*, *Perry* v. *Garland*, 2021 WL 4950236, at *1 (5th Cir. Oct. 22, 2021) ("[T]he BIA's denial of an appeal and its denial of a motion to reconsider are two separate final orders, each of which require

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[9] When pressed at oral argument, even the government declined to take a position on whether a motion to reconsider was required. *See* Oral Arg. 20:54-22:00, *Santos-Zacaria* v. *Garland*, No. 19-60355 (5th Cir. Apr. 28, 2021), https://www.ca5.uscourts.gov/OralArgRecordings/19/19-60355_4-28-2021.mp3.

their own petitions for review." (quotation marks omitted)).

This two-track process, far from furthering the "efficiency" rationale of an exhaustion rule, wastes administrative and judicial resources and is of little practical use. *See Woodford*, 548 U.S. at 89. At the agency level, the Fifth Circuit's misinterpretation of Section 1252(d)(1) further burdens the BIA with a second round of briefing in a large fraction of the appeals before it. The agency itself has described that reconsideration process as one that "is cumbersome, [is] time-consuming, and may not fully address the alleged error." *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52,491, 52,502 (Aug. 26, 2020).

Some noncitizens may manage to persuade the BIA that it erred, though that second-look decision would only come months or years after the initial decision. But the vast majority of movants will not be so fortunate. In amici's collective practical experience, it is vanishingly rare for the BIA to grant a motion for reconsideration *at all*, and it usually does so to address a change in controlling law—not to correct its own (unlawful) fact-finding. *See supra* p. 9.[10]

[10] In *Stone*, the Court analogized motions for reconsideration in the BIA to Rule 60(b) motions filed in federal district courts. *See Stone*, 514 U.S. at 401-402; *see also* Fed. R. Civ. P. 60(b) (identifying circumstances in which a district court might, "[o]n motion and just terms, … relieve a party or its legal representative from a final judgment, order, or proceeding"). Courts have characterized Rule 60(b) not as a tool for routine second-guessing of district court decisions, but as "a mechanism for 'extraordinary judicial relief,'" to be invoked only if the moving party demonstrates 'exceptional circumstances.'" *Ruotolo* v. *City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Paddington Partners* v. *Bouchard*, 34

Still, noncitizens will have no choice but to file motions for reconsideration if this Court endorses the Fifth Circuit's approach. As explained in Part II of this brief, it is far from straightforward—even for federal judges and experienced immigration lawyers, to say nothing of noncitizens navigating the system without counsel—to draw a clean line between the category of "new" BIA errors (which, according to the Fifth Circuit, require a motion for reconsideration) and garden-variety BIA errors (eligible immediately for judicial review). In response to this uncertainty, many noncitizens and their counsel will err on the side of filing "protective" motions for reconsideration—*i.e.*, motions filed primarily to protect the noncitizen from the possibility of inadvertently forfeiting an appellate argument because of a supposed failure to exhaust.[11]

The federal courts of appeals, too, will face additional burdens when noncitizens file two separate petitions for review—first after the BIA's initial decision, and then again after the BIA denies a motion for reconsideration. The result will often be two dockets, two

F.3d 1132, 1142 (2d Cir. 1994)); *see also, e.g.*, *JP Morgan Chase Manhattan Bank* v. *Winget*, 704 F. App'x 410, 417 (6th Cir. 2017) ("A Rule 60(b) motion is not the proper vehicle to relitigate issues that were already considered and decided.").

[11] Nothing would prevent this overly cautious approach to exhaustion from spreading to the IJ stage, as well. In light of the unsettled legal landscape, some amici—particularly when litigating in the Fifth Circuit or other jurisdictions that follow a similarly misguided approach to Section 1252(d)(1)—advise their noncitizen clients to file protective motions to reconsider before IJs to ensure that issues are fully exhausted and preserved. *See, e.g.*, *Pomavilla-Pichisaca* v. *Garland*, No. 22-3328 (8th Cir. June 24, 2022) (petitioner filed motion to reconsider before IJ, arguing that IJ failed to provide sufficient reasoning in declining to reverse asylum officer's adverse reasonable-fear interview determination).

sets of briefing, and two decisions—all addressed to a BIA decision that could and should have been reviewed in a single appeal.

To be sure, Section 1252(b)(6) provides a mechanism for consolidation. 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order."); *see also Stone*, 514 U.S. at 394 (stating that consolidation statute "contemplates two petitions for review and directs the courts to consolidate the matters"). But it does not follow that Congress intended federal courts *routinely* to have to consolidate duplicative petitions for review. And as a practical matter, consolidation will be impossible (or fruitless) if, as will often be the case, the court of appeals is prepared to act on the noncitizen's initial petition for review before the BIA has ruled on the noncitizen's concurrent motion for reconsideration. *See, e.g., Mai* v. *Garland*, Nos. 21-1342, 21-3051, 22-1216 (8th Cir. June 7, 2022) (case remanded prior to agency's resolution of parallel motion to reconsider). Splintering judicial review into "piecemeal appeals" is an outcome that exhaustion statutes are meant to *avoid*, not encourage. *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992); *see* Pet. Br. 41-42.

The Fifth Circuit's interpretation of Section 1252(d)(1), in short, undermines the efficiency rationale for exhaustion by imposing an inefficient and largely futile parallel reconsideration process. The Fifth Circuit's approach will create more work for both the BIA and the courts of appeals. It will also force noncitizens, including those in detention, to wait even longer for a final decision. The Fifth Circuit's approach accordingly frustrates the "strong public interest in bringing litigation to a close as promptly as is consistent with the

interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988).

Nor is efficiency the only important value at stake. Should the Court adopt the Fifth Circuit's atextual interpretation, *pro se* litigants will disproportionately bear the costs. Not only will they have to pay additional filing fees (*e.g.*, for a second petition for review), but many will also endure more time in detention while awaiting resolution of their case. This is all assuming that *pro se* noncitizens can discern when and where to file a motion to reconsider and a petition for review, and what to include in each. *See infra* Part II; *see also, e.g.*, Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 75 & n.242 (2015) (observing that *pro se* noncitizens "struggle to navigate the court system" and that "bureaucratic failures have serious consequences" for noncitizens facing removal).[12]

The Court should reject an interpretation of Section 1252(d)(1) that undermines the efficiency interests

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[12] The interests at stake in removal proceedings are extraordinarily weighty, as the Court has often recognized. Removal "is a particularly severe 'penalty,'" jeopardizing the liberty protected by the Fifth Amendment, even if it is "not, in a strict sense, a criminal sanction." *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893)); *see also, e.g., Vartelas* v. *Holder*, 566 U.S. 257, 267-268 (2012) ("We have several times recognized the severity of that sanction."). In fact, for many noncitizens, losing one's right to remain in the United States may be "'more important'" than a criminal sanction. *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (emphasis added) (quoting *Padilla*, 559 U.S. at 368); *see also Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring) (observing that a noncitizen removed from the country "may lose his family, his friends and his livelihood forever").

underlying administrative exhaustion and unnecessarily promotes confusion, redundancy, and additional burdens on *pro se* litigants. The Fifth Circuit's interpretation contravenes the government's mandate to exercise its power over immigration "fairly and openly." *Kwock Jan Fat* v. *White*, 253 U.S. 454, 464 (1920). Adopting petitioner's plain-text, common-sense reading of Section 1252(d)(1)'s exhaustion requirement benefits the BIA, the courts of appeals, and noncitizens alike.

II. THE FIFTH CIRCUIT HAS MISCONSTRUED PRECEDENT AND CONGRESSIONAL INTENT TO CREATE A BIFURCATED REVIEW PROCESS THAT IS IRRATIONAL AND CONFUSING

If Congress had clearly mandated the inefficient process described in Part I, then the Court's hands might be tied. But Congress did no such thing. *See Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1299 (11th Cir. 2015) (rejecting as "facially nonsensical" government's argument faulting noncitizen "for not raising an argument about the lack of reasoned consideration displayed by a [BIA] decision not yet in existence"). Instead, the Fifth Circuit misread precedent and Congress's intent in imposing a confusing, multi-track review process. The Court should not "impute to Congress such a contradictory and absurd purpose, particularly where doing so has no basis in the statutory text." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2115-2116 (2018) (alterations and quotation marks omitted).

A. The Fifth Circuit Misread Its Own Precedent To Create An Irrational, Bifurcated Review Process

The Fifth Circuit's first precedential opinion holding that "certain allegations of BIA error must first be

brought to the BIA in a motion for reconsideration" to satisfy Section 1252(d)(1)'s exhaustion requirement was *Omari* v. *Holder*, 562 F.3d 314, 319-320 (5th Cir. 2009). But *Omari* relied on faulty analytical foundations that still underlie the Fifth Circuit's approach. By misreading the statute in *Omari*, the Fifth Circuit has created a confusing and atextual bifurcated review process that is inconsistent with the review scheme of which Section 1252(d)(1) is a part.

Omari relied in large part on the Fifth Circuit's earlier decision in *Toledo-Hernandez* v. *Mukasey*, 521 F.3d 332 (5th Cir. 2008). There, the court assessed whether a noncitizen was required to file a motion to reopen (not a motion for reconsideration) for Section 1252(d)(1) exhaustion purposes, even though the factual basis for his motion—Texas's vacatur of a conviction that had been the basis for his removal—occurred months *after* the 90-day deadline to file a motion to reopen had expired. *See id.* at 333-334 & n.1. The Fifth Circuit dismissed the petition, holding that a belated motion to reopen was required for exhaustion. *Id.* at 336-337.[13]

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[13] A motion to reopen and a motion to reconsider share certain similarities but are not the same. A motion to *reopen* is based on new facts; it must state the "new facts that will be proven at a hearing to be held if the motion is granted" and must be "supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). The new evidence must be both "material" and previously "not available." *Id.* In a motion to *reconsider*, there is no new evidence, and there are no new facts. There is simply a new error—here, an error based on the existing record. As a result, a motion to reconsider does not prompt a new hearing; rather, it simply requires a petitioner to "specify[] the errors of fact or law in the prior Board decision." *Id.* § 1003.2(b).

Toledo-Hernandez, in other words, involved a genuinely new factual development that was *extrinsic* to the removal proceeding itself—*i.e.*, a State's vacatur of the underlying criminal conviction. That sort of new development—not the BIA's misapplication of its own regulations in deciding a properly raised issue—is typically the proper subject of a motion to reopen. And yet, in *Omari*, the Fifth Circuit relied upon the inapposite reasoning of *Toledo-Hernandez* to hold that a motion to reconsider is required for exhaustion of a BIA "legal error" involving "an issue stemming from the BIA's act of decisionmaking," which "neither party could have possibly raised prior to the BIA's decision." 562 F.3d at 320-321.

The consequence of the approach chosen in *Omari* and applied in this case—and of similar approaches in other circuits—is to split a single case into a confusing bifurcated review process: one track for BIA-affirmed errors made by the IJ, and another for fresh errors introduced by the BIA. And because those two forms of review must be pursued in parallel—both because of timing requirements, *see* 8 U.S.C. § 1252(b)(1); 8 C.F.R. § 1003.2(b)(2), and because a motion to reconsider does not stay removal, *see* 8 C.F.R. § 1003.2(f)—the process is inefficient and wasteful. *See supra* Part I.

B. The Fifth Circuit's Bifurcated Review Process Ignores Congress's Intent And This Court's Precedent

This Court has refused to "inject ambiguity" into a statute to entertain interpretations that would "impute to Congress a contradictory and absurd purpose." *Pereira*, 138 S. Ct. at 2115-2116 (alterations and quotation marks omitted). In the same vein, without a "clear[] expression of congressional intent," the Court does not

read statutes providing for review of agency decisions "as creating … a seemingly irrational bifurcated system." *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980) (per curiam).[14]

Congress has not stated *any* intent to create a double-track review process of the BIA's decisions, either in Section 1252(d)(1)'s text or elsewhere. On the contrary, in a related statutory context, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, in part to resolve "confusion in the federal courts as to what immigration issues can be reviewed, and which courts can review them" and to restructure the bifurcated process resulting from *INS* v. *St. Cyr*, 533 U.S. 289 (2001). *See* 151 Cong. Rec. 8465, 8526 (2005).[15]

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[14] In *Costle*, the Court held that the statute at issue authorized a single path of review: from the EPA directly to the D.C. Circuit. 445 U.S. at 197. Under the competing interpretation, the statute would have generated concurrent review of an agency decision in a federal district court and court of appeals. *See id.* at 194-196. The Court's rationale in *Costle*—that a two-track review process inherently runs the risk of being confusing and irrational, *see id.* at 197—applies in this case as well.

[15] As the Conference Report further explained, *St. Cyr* held that district courts had "habeas corpus review authority over statutory claims involving discretionary immigration relief"—but after *St. Cyr*, courts of appeals continued to exercise "jurisdiction to review limited threshold 'jurisdiction to determine jurisdiction' questions raised … in petitions for review." 151 Cong. Rec. at 8526. Thus, "some issues [we]re still reviewable in the circuit courts while others [we]re reviewable only in the district courts, resulting in bifurcated and inefficient review." *Id.* ("All of this has resulted in piecemeal review, uncertainty, lack of uniformity, and a waste of resources both for the judicial branch and Government lawyers—the very opposite of what Congress tried to accomplish in 1996.").

To make matters worse, the question whether a BIA error is newly introduced—or simply affirms an IJ's error—is rarely clear-cut. *See infra* Part II.C. Accordingly, the Fifth Circuit's approach incentivizes cautious noncitizens and their counsel to package as many issues as possible into *both* a petition for review *and* a motion to reconsider. The result will be duplicative review and waste of judicial resources. *See Shell Oil Co.* v. *FERC*, 47 F.3d 1186, 1195 (D.C. Cir. 1995) (rejecting a "bifurcated" review process because it "might lead to confusion and unnecessary duplication"); *International Bhd. of Teamsters* v. *Pena*, 17 F.3d 1478, 1482 (D.C. Cir. 1994) ("[T]he interests of assuring a forum capable of treating the case coherently might justify the comparatively modest displacement of the [lower tribunal]."); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-745 (1985) (criticizing the chaos of a dual-stream review process of administrative decisions, rejecting statutory interpretation that would lead to such a process, and allocating exclusive jurisdiction to court of appeals); *Forelaws on Bd.* v. *Johnson*, 709 F.2d 1310, 1313 (9th Cir. 1983) (bifurcated review would cause "confusion, delay[,] and potential for conflicting results").

C. Under The Fifth Circuit's Rule, Courts Of Appeals Will Struggle To Determine When A BIA Error Is "New," Risking Inconsistent And Arbitrary Outcomes For Noncitizens And Counsel

The Fifth Circuit's approach to Section 1252(d)(1) creates so much ambiguity and uncertainty that, in effect, it leaves noncitizens and their counsel without guidance as to what BIA errors qualify as "new" and thus must be exhausted through a motion to reconsider.

As a result, noncitizens—particularly those who are proceeding *pro se*—risk unfairly forfeiting meritorious claims, without judicial review, because of an inadvertent failure to exhaust. *See supra* pp. 14-16 & n.12.

Whether a federal court will consider an error to be newly introduced by the BIA—or merely one that affirmed an IJ's error—will often be impossible for noncitizens to predict. The outcome will depend on how broadly or narrowly a court of appeals defines the issues that were properly presented to the BIA. This will vary from circuit to circuit, panel to panel, and even within a panel. And these disagreements among courts of appeals leave no doubt that noncitizens will have to guess how a court of appeals will apply Section 1252(d)(1)'s exhaustion requirement—an especially daunting task for uncounseled litigants.

Consider Judge Higginson's dissenting opinion in this case. Under Fifth Circuit precedent, "where the BIA has previously ruled on an issue," a noncitizen need not "'file a motion to reopen in order to have the agency reconsider the same issue'" as an exhaustion prerequisite to judicial review. *Dale* v. *Holder*, 610 F.3d 294, 301 (5th Cir. 2010). But as the divided opinion in this case shows, what constitutes the "same" issue is in the eye of the beholder. The panel majority held that petitioner's impermissible-factfinding claim was a new issue that should have been raised in a motion to reconsider to exhaust it. Pet. App. 4a-5a. But in dissent, Judge Higginson took a broader view, noting that petitioner's initial BIA brief had requested a remand to the IJ for additional factfinding. Pet. App. 10a (Higginson, J., dissenting). To Judge Higginson, this request encompassed a request that the BIA not engage in such factfinding itself—meaning that the BIA *had* been presented with the issue before the Fifth Circuit. *Id.*

Such disagreements arise in other circuits too. In *Gill* v. *INS*, a Second Circuit panel considered "the level of specificity at which a claim must have been made to have been 'exhausted.'" 420 F.3d 82, 85 (2d Cir. 2005). The majority reasoned that Section 1252(d)(1) "bars the consideration of … general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not made below." *Id.* at 86. The petitioner in *Gill* had challenged his removal order on the ground that his crime of conviction was not a crime involving moral turpitude ("CIMT"). *Id.* at 84-85. He argued to the IJ and BIA that his offense (attempted assault under New York law) required only a showing of recklessness, while a CIMT required a showing of "some positive intent." *Id.* at 85. Based on this argument, the *Gill* majority reached the "subsidiary" argument that attempted assault was legally incoherent because "a person cannot 'attempt' … to commit a crime of recklessness." *Id.* at 91. Although the petitioner had not raised or briefed the issue to the BIA, the majority found the issue exhausted under its "subsidiary" argument theory. In dissent, however, Judge Jacobs objected that the majority had skirted the exhaustion requirement by considering an argument that petitioner "never raised … to the BIA." *Id.* at 92 (Jacobs, J., dissenting).[16]

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[16] The Fourth Circuit has likewise adopted the Second Circuit's rule that "specific, subsidiary legal arguments[] or arguments by extension" need not be separately raised to the BIA to satisfy Section 1252(d)(1). *Ramirez* v. *Sessions*, 887 F.3d 693, 700-701 (4th Cir. 2018), *as amended* (June 7, 2018) (holding that petitioner was not precluded from citing additional cases in support of claim that obstruction of justice under Virginia law was not a CIMT (quoting *Gill*, 420 F.3d at 86)).

Taking a different tack, the First Circuit declined to apply *Gill*'s rule in *De Lima* v. *Sessions*, where the petitioner advanced not a "subsidiary" argument but rather "an alternative argument that stood on its own legs" and that had not been raised to the BIA. 867 F.3d 260, 269 (1st Cir. 2017) (quoting *Gill*, 420 F.3d at 87). The petitioner in *De Lima* challenged the BIA's affirmance of a removal order on the grounds that theft by fraud under Connecticut law was not categorically a removable aggravated felony theft offense. *Id.* at 267. The panel majority found petitioner's argument unexhausted because it was addressed to subsections of the Connecticut statute not specifically cited in his BIA brief, and based on reasons not raised in that brief. *See id.* at 268. Even though the majority conceded that petitioner's arguments to the BIA and the court of appeals "fell into the common ultimate conclusion that a conviction under the broad Connecticut statute is not categorically a theft offense," it concluded that the arguments were different and directed to different subsections of the criminal statute. *Id.* In dissent, Judge Lipez took a contrary view, reasoning that the question before the court was "only the level of specificity at which a claim must have been made to have been 'exhausted.'" *Id.* at 274 (quoting *Gill*, 420 F.3d at 85). In his view, petitioner had raised "an additional legal *argument* to support his previously made *claim* that [the statute was] overbroad as a matter of law." *Id.* at 275 (emphasis added).

Finally, a recent case in the Tenth Circuit—which follows the Fifth Circuit's approach—provides a further illustration of the unpredictability noncitizens face under this rule. In *A.B.* v. *Garland*, 2022 WL 12081688 (10th Cir. Aug. 30, 2022), the court held that the petitioner had exhausted his challenge to the BIA's

rejection of his argument that the IJ had "ignored ample evidence" that petitioner would be harmed by his own family in his country of origin. *Id.* at *12. At the same time, however, the court held that the petitioner had failed to exhaust his claim that the BIA ignored evidence of past torture in assessing his CAT claim—even though the IJ had "addressed A.B.'s evidence of past torture," the IJ had discounted it, and the BIA had addressed that same evidence in affirming the IJ's denial of withholding. *Id.*

Even within the category of newly introduced errors, boundaries may shift. The First Circuit held in *Meng Hua Wan* v. *Holder* that claims of impermissible factfinding by the BIA must first be raised on a motion to reconsider, as such claims are "directed to the BIA's actions rather than to anything that happened before the IJ." 776 F.3d 52, 57 (1st Cir. 2015). But earlier this year, the First Circuit sharply curtailed the reach of that holding. *See Barros* v. *Garland*, 31 F.4th 51 (1st Cir. 2022). In *Barros*, while acknowledging that *Meng Hua Wan*'s reasoning arguably applied to all BIA errors arising from the BIA's actions, the First Circuit nonetheless restricted *Meng Hua Wan* to challenges of impermissible factfinding. *See id.* at 60-61. As a result, claims not involving BIA "findings of disputed issues of fact concerning legal claims that the IJ did not consider in the first instance" now may be raised in the First Circuit directly in a petition for review. *Id.* at 61.[17]

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[17] In the Eighth Circuit, Judge Kelly recently proposed a similar limitation. *See Mencia-Medina* v. *Garland*, 6 F.4th 846, 850 (8th Cir. 2021) (Kelly, J., concurring) (joining court's opinion "with the understanding that [its] holding [was] limited to a noncitizen's claim, raised for the first time in a petition for review to this court, that the [BIA] engaged in impermissible factfinding"), *pet. for cert. filed*, No. 21-1533 (U.S. June 3, 2022).

In short, federal judges already struggle to parse exactly what evidence and issues the BIA considered, and whether that evidence or those issues were before the IJ and considered by the IJ to the same extent as the BIA considered them. If the Court were to validate the Fifth Circuit's approach to Section 1252(d)(1), then noncitizens seeking judicial review would need to repeat that baffling exercise for each claim, discerning which evidence was or was not considered for which claim, and then guess correctly how to package each claim into a petition for review or motion to reconsider. They would need to do so even if they are unrepresented, detained, or "unfamiliar with English and the habits of American bureaucracies." *Niz-Chavez*, 141 S. Ct. at 1485. And any mistake in that fraught exercise could result in the forfeiture of a meritorious claim—effectively insulating the agency from judicial review.

The sample cases discussed above, in which court of appeals panels were divided, are merely the tip of an iceberg of cases in which noncitizens will have to make predictions based on unpredictable standards. The uncertainties of a bifurcated review system, the unpredictability of whether a court of appeals will deem a claim exhausted, and the risk of shifting categories of newly introduced errors all leave noncitizens without meaningful guidance. Many noncitizens will guess wrong and find themselves ensnared by a trap for the unwary. *See Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000) (rejecting interpretation of habeas exhaustion rule that would "trap the unwary" and bar *pro se* litigants from obtaining federal-court review of colorable claims). Others, fearing that trap, will multiply the proceedings before the agency and the courts. And a wealth of intra-circuit divisions and inter-circuit splits will arise as to how courts should determine whether an

error was "newly" introduced by the BIA, thus requiring a motion for reconsideration, or subsumed in the petitioner's BIA arguments, and thus fully exhausted. No value is added by any of these outcomes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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