No. 21-1436

In the Supreme Court of the United States

LEON SANTOS-ZACARIA, AKA LEON SANTOS-SACARIAS,
PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Congress imposed a limit on the court of appeals' jurisdiction in 8 U.S.C. 1252(d)(1) by providing that "[a] court may review a final order of removal only if" the noncitizen seeking review has exhausted administrative remedies.

2. Whether, to satisfy Section 1252(d)(1)'s exhaustion requirement, a noncitizen must present an issue to the Board of Immigration Appeals in the first instance, including through a motion to reconsider where the issue was allegedly introduced by the Board's appellate decision.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2022. On April 3, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 10, 2022, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 3, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-37a.

STATEMENT

A. Statutory And Regulatory Background

1. Judicial review of removal proceedings

a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, contains a series of provisions governing judicial review of orders that noncitizens be removed from the United States.[1] See 8 U.S.C. 1252. Specifically, 8 U.S.C. 1252(a)(1) channels the review of those orders to the courts of appeals under the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129 (28 U.S.C. 2341 *et seq.*). Other provisions of Section 1252 establish that "a petition for review filed * * * in accordance with this section" is the "sole and exclusive means" for judicial review of most removal proceedings, 8 U.S.C. 1252(a)(5), and that "no court shall have jurisdiction" to review questions of law and fact arising from removal proceedings "[e]xcept as otherwise provided in this section," 8 U.S.C. 1252(b)(9).

Section 1252 also contains the exhaustion provision at issue in this case. Section 1252(d)(1) provides that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1).

b. The INA did not always contain such detailed provisions governing judicial review. When Congress en-

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[1] This brief uses the term "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)).

acted the statute in 1952, it did not include special statutory procedures for judicial review of removal orders; such orders were generally reviewed through habeas corpus proceedings or under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 52 (1955). By 1961, however, Congress was concerned about a proliferation of meritless suits in deportation cases "brought solely for the purpose of preventing or delaying indefinitely [the alien's] deportation from this country." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). In an effort to curtail such delaying tactics, Congress decided "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." *Id.* at 22-23; see *Foti* v. *INS*, 375 U.S. 217, 224 (1963). Congress therefore amended the INA to include a series of provisions governing judicial review, which were codified at 8 U.S.C. 1105a. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653.

Section 1105a replaced APA review in the district courts with review in the courts of appeals under the Hobbs Act. 8 U.S. 1105a(a) (Supp. III 1961). But, like current Section 1252, Section 1105a also included INA-specific judicial review provisions designed to account for the statute's "unique subject matter." H.R. Rep. No. 1086, *supra*, at 22. One provision contained the first version of the exhaustion requirement now found at 8 U.S.C. 1252(d)(1). As it existed until its recodification in 1996, Section 1105a(c) provided as follows:

> An order of deportation or of exclusion shall not be reviewed by any court if *the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations*

> or if he has departed from the United States after the issuance of the order. * * * No petition for review or habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. 1105a(c) (1994) (emphasis added).

When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, it recodified the bulk of Section 1105a(c) in 8 U.S.C. 1252(d), making some changes to the phrasing and omitting the portion of Section 1105a(c) that had barred review of a deportation order after the noncitizen had already left the United States. *Nken* v. *Holder*, 556 U.S. 418, 424 (2009) (citing 8 U.S.C. 1105a(c) (1994)). The House Report accompanying IIRIRA explained that new Section 1252(d) was intended to "restate[] the provisions in the first and third sentences of subsection (c) of [then] current [Section 1105a] requiring that a petitioner have exhausted administrative remedies." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 220 (1996).

IIRIRA also altered and moved other provisions from Section 1105a into Section 1252, and it enacted new restrictions on judicial review. See, *e.g.*, 8 U.S.C. 1252(b)(9). In 2005, Congress further amended and expanded Section 1252 through the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 310-311, but it did not make any additional changes to Section 1252(d).

2. Administrative review of removal proceedings

a. The INA provisions governing administrative review of removal proceedings are found in 8 U.S.C. 1229a. Section 1229a provides that an immigration judge (IJ) shall conduct the initial "proceedings for deciding the inadmissibility or deportability of an alien," 8 U.S.C. 1229a(a)(1), and that the IJ "shall inform the alien of the right to appeal" a decision that she is removable, 8 U.S.C. 1229a(c)(5). But neither Section 1229a, nor any other provision of the INA, specifies how that administrative appeal should unfold. Instead, since the INA's enactment in 1952, the contours of appellate review have been established by regulations that vest the Board of Immigration Appeals (Board) with the power to hear appeals of removal (and previously exclusion or deportation) orders, 8 C.F.R. 6.1(b)(1) and (2) (1952); 8 C.F.R. 1003.1(d)(1) (2020), and to issue final orders of removal, 8 C.F.R. 6.1(d)(2) (1952); 8 C.F.R. 1003.1(d)(7) (2020).

From the INA's inception, the regulations governing administrative appeals have required a party to invoke the Board's appellate authority by filing a notice of appeal stating "[t]he reasons for the appeal" and "the particular findings of fact or conclusions of law with which [the party] disagrees." 8 C.F.R. 242.61(f)(2)(ii) (1952); see 8 C.F.R. 1003.3(b) (2020) (requiring noncitizens to include a statement of the basis for the appeal "specifically identify[ing] the findings of fact, the conclusions of law, or both, that are being challenged"). By 1965, the regulations also granted the Board the express power to summarily dismiss any appeal where "the party concerned fails to specify the reasons for his appeal" or where the "only reason specified by the party * * * involves a finding of fact or a conclusion of law which was

conceded by him at the hearing." 8 C.F.R. 3.1(d)(1-a)(i) and (ii) (1965); see 8 C.F.R. 1003.1(d)(2) (2020).

b. The INA provisions governing administrative motions to reconsider and reopen removal proceedings are also found in 8 U.S.C. 1229a. Section 1229a(c)(6) provides that a noncitizen "may file one motion to reconsider a decision that [she] is removable" "within 30 days of the date of entry of" the removal order. 8 U.S.C. 1229a(c)(6)(A) and (B). And it further provides that "[t]he motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C). Section 1229a(c)(7), in turn, provides that a noncitizen "may file one motion to reopen," and that the motion must state "the new facts that will be proven at a hearing to be held if the motion is granted." 8 U.S.C. 1229a(c)(7)(A) and (B). A motion to reopen must generally be filed within 90 days of the final order of removal. 8 U.S.C. 1229a(c)(7)(C).

The statutory provisions granting noncitizens the right to file motions to reconsider and reopen in removal proceedings were added to the INA by IIRIRA in 1996. IIRIRA § 304(a)(3), 110 Stat. 3009-593. Until then, the right to file those motions was made available by regulation. 8 C.F.R. 6.21(a) (1952). And, like the regulations governing appeals to the Board, those regulations have always required movants to specify "the reasons" for their filings. 8 C.F.R. 6.21(a); see 8 C.F.R. 1003.2(b)(1), 1003.3(b) (2020).

B. Procedural History

1. a. Petitioner is a transgender woman and a native and citizen of Guatemala. Pet. App. 15a n.1, 21a. She left Guatemala for Mexico in her early teens, *id.* at 16a, and she first unlawfully entered the United States in

2008, *id.* at 26a. She was apprehended and removed to Guatemala that same year. *Ibid.* Petitioner unlawfully reentered the United States in 2018, and the U.S. Department of Homeland Security (DHS) moved to reinstate her order of removal. *Id.* at 23a, 26a, 30a. Petitioner then sought statutory withholding of removal under Section 1231(b)(3), a form of nondiscretionary protection that prevents a noncitizen from being removed to a country where she will be persecuted based on her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

Petitioner asserted that she qualified for statutory withholding of removal to Guatemala based on her membership in the transgender and gay communities. Pet. App. 16a, 21a-22a.[2] At her hearing before the IJ, she testified that she was raped by a neighbor in Guatemala at the age of 12 because she is gay, and that the neighbor threatened to kill her if she did not leave. *Id.* at 24a-25a. Petitioner further testified that she did not report the assault because she was told the police would not assist "gay people." J.A. 44.

Petitioner acknowledged, however, that since leaving Guatemala as a young teenager, she had voluntarily returned on three occasions, J.A. 49—once to visit her father for a few days in 2014, J.A. 49-50, once to visit her mother in 2015, J.A. 50, and once for approximately 15 days in 2018 to tell her mother that she was going to

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[2] A noncitizen facing the reinstatement of a removal order may also seek protection from removal under the regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. Petitioner did not challenge the denial of her application for CAT protection in her petition for a writ of certiorari.

the United States, J.A. 53-54. But when petitioner's lawyer asked if petitioner thought there was anywhere she "could safely live in Guatemala," she responded "[n]o." J.A. 60.

On cross-examination, petitioner agreed that "a lot has happened * * * in Guatemala" since she was raped by a neighbor. J.A. 70. She specifically acknowledged that she could now register herself "as a woman" in Guatemala "if [she] want[s] to be a woman now legally." J.A. 71. Petitioner and the DHS attorney then had the following exchange:

> [DHS]: And did you ever try to move to a city [in Guatemala] that was more open and free than the one that you grew up in as a child?
>
> [Petitioner]: But I don't know where to go down there. I don't know who would—kind—what kind of people I'm going to get there to live there.
>
> [DHS]: But if you know of cities that are open to gay and lesbian and transgender lifestyles you would rather move to those cities than the one you lived in[,] correct?
>
> [Petitioner]: Yes, probably there is another place where I can live down there but I don't but I try to stay here to get this protection because besides that I have a brother living here so I'm trying to have him help me.

J.A. 71-72. After that exchange, DHS promptly concluded its questioning and petitioner's attorney stated that he did not have anything further to ask his client. J.A. 72-73.

b. The IJ denied petitioner's application for withholding of removal. Pet. App. 21a-30a. In the IJ's view, petitioner was not entitled to a presumption of future

persecution based on her experiences in Guatemala because her rape and mistreatment did not rise to the level of persecution. *Id.* at 27a-28a. The IJ also determined that petitioner had not produced evidence showing "either that there is a reasonable probability that [she] will be singled out individually for persecution" in Guatemala "or that there is a pattern or practice of persecution of an identifiable group" of which petitioner is a part. *Id.* at 28a.

c. The Board affirmed. Pet. App. 14a-20a. It began by disagreeing with the IJ's conclusion that petitioner's experience in Guatemala did not rise to the level of persecution. *Id.* at 16a-17a. The Board therefore found that petitioner was entitled to a presumption of future persecution, but it determined that the presumption had been rebutted in this case. *Id.* at 17a. The Board cited several pieces of evidence supporting its determination, including that the rape occurred 18 years ago; that petitioner had voluntarily returned to Guatemala on a few occasions since then; and that petitioner testified that she "would be legally allowed to change [her] gender to female in Guatemala and that [she] would be able to safely relocate within Guatemala (but [she] preferred to remain in the United States because of [her] brother)." *Id.* at 17a-18a.

2. a. Petitioner sought review by the court of appeals, asserting that the Board had engaged in impermissible factfinding when it determined that the presumption of future persecution was rebutted, and that the evidence in the record did not support the Board's finding. Pet. App. 4a-5a.[3] The court of appeals rejected both challenges. *Id.* at 4a-7a.

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[3] Petitioner did not ask the court of appeals to review the reinstatement of her removal order, and instead challenged only the re-

The court of appeals first dismissed petitioner's claim that the Board had engaged in impermissible factfinding. Pet. App. 4a-5a. It explained that petitioner "did not present this argument before the [Board] in a motion for reconsideration," and that her failure to exhaust the argument meant that the court "lack[ed] jurisdiction to consider it." *Id.* at 4a.

The court of appeals then rejected petitioner's contention that the Board's finding regarding future persecution was "not supported by substantial evidence." Pet. App. 5a. The court observed that, "[d]uring cross-examination," petitioner had "agreed that there was probably a place where she could safely relocate within Guatemala," a concession that was sufficient to rebut the presumption that petitioner's life or freedom would be threatened if she returned there. *Id.* at 6a.

b. Judge Higginson dissented, explaining that he would have found that petitioner exhausted her claim that the Board engaged in impermissible factfinding, Pet. App. 12a, and that he also disagreed with the majority's substantial evidence determination, *id.* at 12a-13a.

c. Shortly after her petition for review was denied by the court of appeals, petitioner filed a motion to reopen and reconsider with the Board, raising the factfinding issue. See 22-60551 C.A. Administrative Record 8-11. The Board denied the motion as untimely because it was filed several years after the statute's 30-day

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jection of her request for withholding of removal under 8 U.S.C. 1231(b)(3)(C). But Section 1252 contemplates that such decisions are subject to judicial review under the provisions governing "final orders of removal" because Section 1252(b)(4) expressly references determinations made under Section 1231(b)(3)(C) in describing the scope of judicial review of "an order of removal." 8 U.S.C. 1252(b)(4).

deadline. *Id.* at 1-6. Petitioner filed a petition for review of the denial on October 13, 2022, and the court of appeals subsequently granted petitioner's request to stay the proceedings until 30 days after this Court's resolution of this case. 22-60551 C.A. Order (Dec. 14, 2022).[4]

SUMMARY OF ARGUMENT

I. A. The exhaustion requirement imposed by 8 U.S.C. 1252(d)(1) is jurisdictional because Congress has "'clearly state[d]' that it is." *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1497 (2022) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006)). In phrasing the provision as a direct limit on what "[a] court may review," 8 U.S.C. 1252(d)(1), Congress employed language that it frequently uses to define the scope of appellate jurisdiction. See, *e.g.*, 28 U.S.C. 2253(a) (defining which district court orders "shall be subject to *review* on appeal" in habeas corpus proceedings) (emphasis added). And other provisions of Section 1252 confirm its jurisdictional character by depriving courts of the power to review removal orders except as provided under Section 1252. 8 U.S.C. 1252(a)(5) and (b)(9). Further confirmation comes from this Court's precedents, which have recognized that other similar provisions of the INA, and the prior iteration of Section 1252(d)(1) itself, are jurisdictional.

B. Petitioner's contrary arguments lack merit. Section 1252(d)(1) does not resemble nonjurisdictional claims-processing rules because it imposes a direct limit

[4] Petitioner's brief states (at 44) that she did not file a motion to reconsider with the Board. That statement is correct to the extent that she did not file a *timely* motion to reconsider, and no Board decision regarding reconsideration was before the court of appeals when it decided the present case.

on what "[a] court may review," not on what a litigant may do. 8 U.S.C. 1252(d)(1). Nor is Section 1252(d)(1)'s jurisdictional nature called into question by the fact that it does not use the term "jurisdiction" or that it is paired with a provision that contains an exception, 8 U.S.C. 1252(d)(2). Congress is free to "defin[e] the 'category' of" suits to be excluded from the courts' jurisdiction "in any manner it wishes." *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 469 (2007). And petitioner's assertion that an express exhaustion requirement cannot be jurisdictional is belied by this Court's precedents holding that both explicit and implicit exhaustion requirements limit the courts' power to review administrative decisions.

II. A. Text, context, and precedent further demonstrate that Section 1252(d)(1) requires issue exhaustion, including through a motion to reconsider in cases where the alleged error was introduced by the Board on appeal. By compelling noncitizens to "exhaust[]" the "administrative remedies available to [them] as of right," 8 U.S.C. 1252(d)(1), the INA codifies "the doctrine of exhaustion in administrative law," under which a litigant must "give[] an agency 'an opportunity to correct its own mistakes'" before seeking judicial review. *Woodford* v. *Ngo*, 548 U.S. 81, 89, 93. (2006) (citation omitted). In the INA, that requires issue exhaustion because the administrative-review scheme is adversarial and the agency's regulations compel litigants to present specific issues for review. See *Sims* v. *Apfel*, 530 U.S. 103, 109 (2000).

B. Petitioner is mistaken in contending that the INA cannot require issue exhaustion because this Court has found that it is not required under the Social Security Act, 42 U.S.C. 301 *et seq*. *Sims*, 530 U.S. at 110-111 (plu-

rality opinion). That statute uses entirely different language to establish an inquisitorial-style administrative-review scheme that is silent as to the specificity with which issues must be presented. *Ibid.* Each of those features meaningfully distinguishes the Social Security Act from the INA.

C. Finally, because Section 1252(d)(1) compels a noncitizen to present a challenge to her removal proceedings to the Board in the first instance, a noncitizen must file a motion to reconsider when she wishes to challenge an error that was allegedly introduced by the Board on appeal. Petitioner errs in suggesting that motions to reconsider are excluded from Section 1252(d)(1)'s ambit because they are not "available * * * *as of right*." 8 U.S.C. 1252(d)(1) (emphasis added). At the same time that Congress codified the current version of Section 1252(d)(1), it codified the right to file a motion to reconsider in 8 U.S.C. 1229a(c)(6)(A). That does not mean, however, that a noncitizen must file a motion to reconsider in every case. The exhaustion doctrine that Section 1252(d)(1) codifies grants the agency *an* opportunity to address its own mistakes, not multiple opportunities, and Board precedent recognizes that a noncitizen need not re-raise arguments in a motion to reconsider that she already raised on appeal. See *In re O-S-G-*, 24 I. & N. Dec. 56, 58 (2006). But where, as here, a noncitizen wishes to obtain judicial review of an issue that she has never previously raised before the Board, she must first exhaust that issue through a motion to reconsider.

ARGUMENT

I. SECTION 1252(d)(1)'S LIMITATION ON A COURT'S POWER TO "REVIEW" A REMOVAL ORDER IS JURISDICTIONAL

This Court will not find a provision to be jurisdictional unless Congress "clearly states" that it is. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006). "Mindful of the[] consequences" of finding that a statute "mark[s] the bounds of a 'court's adjudicatory authority,'" *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1497 (2022) (citation omitted), the Court has repeatedly emphasized that it will not characterize a statute as jurisdictional unless the provision plainly "cabin[s] a court's power." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409-410 (2015) (citation omitted).

The reverse is also true: where a provision constitutes "a clear and explicit *withdrawal* of jurisdiction," then the statute "withdraws jurisdiction." *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 468 (2007). Article III grants Congress the authority to "determine [the] lower federal court[s'] subject-matter jurisdiction," *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004), and "[n]othing prevents Congress from defining the 'category' of excluded suits in any manner it wishes." *Rockwell*, 549 U.S. at 469; see *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Accordingly, when Congress deems a statute jurisdictional, courts must respect that delineation of the bounds of their Article III powers.

The text, structure, and statutory context of Section 1252(d)(1) all make clear that Congress intended for the provision to withdraw the courts' jurisdiction over unexhausted issues arising from removal proceedings.

A. The Traditional Tools Of Statutory Construction Establish That Section 1252(d)(1) Is Jurisdictional

The plain text of Section 1252(d)(1) demonstrates that it governs the courts' subject-matter jurisdiction—that is, it prescribes "the classes of cases a court may entertain." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1846 (2019). Section 1252(d)(1) provides that "[a] court may review a final order of removal *only if* * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1) (emphasis added). By imposing a condition on the court of appeals' authority to "review" the agency's decision and by expressly addressing the condition to the "court," Congress made clear that Section 1252(d)(1)'s limit is a jurisdictional one. *Ibid.*

1. Although petitioner highlights (Br. 8, 21) the absence of the word "jurisdiction" in Section 1252(d)(1), this Court has repeatedly recognized that statutes delineating the scope of appellate "review" are jurisdictional because they demarcate the categories of cases that federal courts of appeals may hear. In *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), for example, the Court recognized that a statute providing that a district court's final order in a habeas proceeding or proceeding under 28 U.S.C. 2255 "'shall be subject to *review*, on appeal, by the court of appeals'" was a "clear jurisdictional grant to the courts of appeals." 565 U.S. at 140, 142 (quoting 28 U.S.C. 2253(a)) (emphasis added). Similarly, in *United States* v. *Denedo*, 556 U.S. 904 (2009), the Court found that the Court of Appeals for the Armed Forces (CAAF) had "subject-matter jurisdiction" over an appeal because the case fell within the confines of 10 U.S.C. 867. 556 U.S. at 915. The statute addressing the CAAF's authority did not use the term "ju-

risdiction," but it still delineated that court's power by specifying the cases that it "shall *review*" and limiting the actions it could take "[i]n any case *reviewed* by it." 10 U.S.C. 867(a) and (c) (2006) (emphases added). And this Court has long recognized that Congress has "substantially limited" the subject-matter jurisdiction of the appellate courts by providing that an "'order remanding a case to the State court from which it was removed is not *reviewable* on appeal or otherwise.'" *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007) (quoting 28 U.S.C. 1447(d)) (emphasis added). Section 1252(d)(1)'s restriction on a court of appeals' power to "review" an unexhausted challenge to a removal order should similarly be understood as a limit on subject-matter jurisdiction. 8 U.S.C. 1252(d)(1).

This Court has also recognized that statutes are jurisdictional where, as here, they "speak[] * * * to a court's power," instead of addressing litigants or describing limits on their claims. *Wong*, 575 U.S. at 410-411 & n.4. Thus, in the post-*Arbaugh* cases where the Court has found that statutory provisions were *not* jurisdictional, those provisions were invariably phrased as either a command to a litigant or a restriction on the litigant's claim or action. See, *e.g.*, *id.* at 410-411 (finding statute nonjurisdictional where it stated that "'[a] tort *claim* * * * shall be forever barred'" instead of purporting to "address [the court's] authority to hear untimely suits") (quoting 28 U.S.C. 2401(b)) (emphasis added; first set of brackets in original); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 438 (2011) (same for statute providing that "a *person* adversely affected * * * shall file a notice of appeal" within 120 days) (quoting 38 U.S.C. 7266(a) (2006)) (emphasis added); *Reed Elsevier* v. *Muchnick*, 559 U.S. 154, 163

(2010) (same for statute providing that "no *civil action* * * * shall be instituted") (quoting 17 U.S.C. 411(a)) (emphasis added). Section 1252(d)(1), by contrast, is phrased as a restriction on what "[a] *court* may review." 8 U.S.C. 1252(d)(1) (emphasis added). It therefore imposes a direct limit on the "court's power"—the hallmark of a jurisdictional provision. *Wong*, 575 U.S at 410.

2. Other portions of Section 1252 confirm that the exhaustion requirement in Subsection (d)(1) is jurisdictional. Multiple provisions of the section expressly deprive courts of any power to consider removal orders in cases that do not conform to Section 1252's limits on judicial review. Thus, Section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals shall be *the sole and exclusive means for judicial review* of" most orders of removal. 8 U.S.C. 1252(a)(5) (emphasis added). Section 1252(b)(9) further specifies that "[j]udicial review of all questions of law and fact * * * arising from" removal proceedings "shall be available only in judicial review of a final order under this section," and that "*no court shall have jurisdiction*," either under habeas corpus statutes or under "any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact." 8 U.S.C. 1252(b)(9). By foreclosing every source of authority to review removal orders outside the bounds of Section 1252, those provisions make plain that Section 1252(d)(1)'s restriction on what "[a] court may review" has jurisdictional force. 8 U.S.C. 1252(d)(1); see *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975) (finding a statutory requirement in the Social Security Act jurisdictional in part because another provision in the same section "foreclosed" "[o]ther sources of jurisdiction").

Additional evidence from statutory context and structure is to the same effect. Section 1252(a)(2), for example, is entitled "Matters not subject to *judicial review*," but its first three subparagraphs provide that "no court shall have *jurisdiction* to review" a particular matter, suggesting that Congress was using the terms "judicial review" and "jurisdiction to review" interchangeably. 8 U.S.C. 1252(a)(2) (emphases altered); see *Biden* v. *Texas*, 142 S. Ct. 2528, 2539 (2022) (quoting the heading and text of Section 1252(a)(2) in explaining that Congress had "unambiguously" "intended to deny subject matter jurisdiction").[5] Section 1252(a)(5) further makes that equivalence express, providing that "[f]or purposes of [the INA], in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review * * * and review pursuant to any other provision of law (statutory or nonstatutory)." 8 U.S.C. 1252(a)(5). In other words, whether phrased as restrictions on "review" or on "jurisdiction," each of Section 1252's limits—including Section 1252(d)(1)—serves as an absolute restriction on a court's review power with respect to removal orders.

3. This Court's "interpretation of similar provisions," *Henderson*, 562 U.S. at 436 (citation omitted), within the INA also supports the conclusion that Section 1252(d)(1) is jurisdictional in nature. For example, the Court has recognized that an INA provision specifying that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in ac-

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[5] The heading was included in Congress's own enactment, not simply the version as codified at Section 1252(a)(2). See IIRIRA § 306(a)(2), 110 Stat. 3009-607.

cordance with this subsection," 8 U.S.C. 1160(e)(1), deprives a court of "general federal-question jurisdiction under 28 U.S.C. § 1331" when it applies. *McNary* v. *Haitian Refugee Ctr.*, *Inc.*, 498 U.S. 479, 494 (1991). The Court later reiterated the jurisdictional nature of such restrictions on judicial review in *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993), which explained that *McNary* had articulated the limits of Section 1160(e)(1)'s "jurisdictional bar," and further held that a nearly identical restriction on "judicial review" in 8 U.S.C. 1255a(f)(1) similarly established a "jurisdictional hurdle," albeit a surmountable one on the facts of that case. *Reno*, 509 U.S. at 56.

The Court again found that a restriction on "review" was jurisdictional in *Demore* v. *Kim*, 538 U.S. 510, 516-517 (2003). There, the Court determined that, before reaching the merits of the parties' dispute, it had to assure itself of its "jurisdiction to hear th[e] case" by assessing the applicability of the bar on "[j]udicial review" contained in 8 U.S.C. 1226(e) (emphases omitted). *Demore*, 538 U.S. at 516. Like the INA provisions in *McNary* and *Reno*, Section 1226(e) does not use the term "jurisdiction"; instead, it provides that certain determinations "shall not be subject to review" and that "[n]o court may set aside any action or decision" covered by the provision. 8 U.S.C. 1226(e).

Those cases cannot be dismissed as relics from a time before the Court brought "some discipline" to the use of the term "jurisdictional." *Henderson*, 562 U.S. at 435. Four members of the Court treated Section 1226(e) as jurisdictional in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018). In *Rodriguez*, the plurality explained that "[b]efore reaching the merits of the lower courts' interpretation" of the INA provisions at issue, it first had to

address "two potential obstacles" to its "jurisdiction," including Section 1226(e). *Id.* at 839 (opinion of Alito, J.). The plurality concluded it could "consider the merits" because the challenge fell "outside of the scope of" Section 1226(e)—not because its reference to "[j]udicial review" kept it from being a jurisdictional bar. *Id.* at 841. Justice Thomas agreed that Section 1226(e) "unequivocally deprives federal courts of jurisdiction" where it applies. *Id.* at 857 n.6 (opinion concurring in the judgment in relevant part).

Like Section 1226(e) and the provisions at issue in *Reno* and *McNary*, Section 1252(d)(1) places a limit on what courts may "review" in the immigration context. 8 U.S.C. 1252(d)(1). Under those precedents, Section 1252(d)(1) should therefore be deemed jurisdictional.

4. Moreover, this Court treated the prior version of the INA's exhaustion requirement and its surrounding provisions as jurisdictional. Congress first enacted the exhaustion requirement in 1961, as part of a package of amendments intended to restrict judicial review. See 8 U.S.C. 1105a(a) (Supp. III 1961); pp. 3-4, *supra.* Shortly before Congress recodified those restrictions in IIRIRA, this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995), described those amendments and the other "judicial review provisions of the INA" as "jurisdictional in nature," such that they must be "construed with strict fidelity to their terms." *Id.* at 405; see *ibid.* (describing the statutory time limit for filing a petition for judicial review as "mandatory and jurisdictional") (citation omitted); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968) (describing Section 1105a as "jurisdictional" because its provisions were "intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts").

This Court has also recognized—both before and after *Arbaugh*—that the pre-IIRIRA provision containing the exhaustion requirement itself was phrased in jurisdictional terms. Former Section 1105a(c) provided that a removal order "shall not be reviewed in any court if the alien has not exhausted the administrative remedies available to him * * * *or* if he has departed from the United States after the issuance of the order." 8 U.S.C. 1105a(c) (1994) (emphasis added). In *Stone*, this Court treated the latter requirement as jurisdictional, explaining that "[o]nce an alien has been deported, the courts lack jurisdiction" to consider his case. 514 U.S. at 399. And three years after *Arbaugh*, this Court repeated that characterization of Section 1105a(c) in *Nken* v. *Holder*, 556 U.S. 418 (2009), observing that "[b]efore IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States." *Id.* at 424. Because Section 1105a(c)'s departure bar was jurisdictional, the exhaustion requirement with which it was paired was jurisdictional, too—as reflected by the consistent holdings of the courts of appeals that addressed that issue before IIRIRA.[6]

When IIRIRA recodified "the materially same language in" new Section 1252(d)(1), Congress "presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning" as jurisdictional. *Lamar, Archer &*

[6] See, *e.g.*, *Margalli-Olvera* v. *INS*, 43 F.3d 345, 350 (8th Cir. 1994); *Perkovic* v. *INS*, 33 F.3d 615, 619 (6th Cir. 1994); *Asencio* v. *INS*, 37 F.3d 614, 615-616 (11th Cir. 1994) (per curiam); *Ravindran* v. *INS*, 976 F.2d 754, 761 (1st Cir. 1992); *Vargas* v. *INS*, 831 F.2d 906, 907-908 (9th Cir. 1987); *Townsend* v. *INS*, 799 F.2d 179, 181 (5th Cir. 1986) (per curiam).

Cofrin, LLP v. *Appling*, 138 S. Ct. 1752, 1762 (2018); see Antonin Scalia & Bryan A. Garner, *Reading Law* 323-324 (2012).

B. Petitioner's Arguments To The Contrary Lack Merit

Petitioner offers several reasons that Section 1252(d)(1) should not be considered a jurisdictional limitation, but each of those arguments is unavailing.

Petitioner begins with the mistaken contention that the text of Section 1252(d)(1) does not supply the requisite clear statement because the provision resembles claim-processing rules that this Court has previously declared nonjurisdictional in that it imposes "procedural obligations" on the parties. Pet. Br. 19-20 (citation omitted). But that characterization of Section 1252(d)(1) overlooks the provision's first clause, which is directed at the reviewing "court," not the parties, and expressly defines the category of cases that the court "may review." 8 U.S.C. 1252(d). None of the nonjurisdictional provisions that petitioner considers analogous shares that feature.

Petitioner next asserts (Br. 22-23) that the introductory clause of Section 1252(d) cannot be jurisdictional because its textual limit on what "[a] court may review" applies not only to paragraph (1) but also to paragraph (2). The latter provision forecloses judicial review of a removal order that has already been considered by another court "unless the reviewing court finds that the petition [for judicial review] presents grounds" that the noncitizen did not have an adequate opportunity to present in the prior proceedings, 8 U.S.C. 1252(d)(2). Petitioner contends (Br. 22) that Section 1252(d)(2) cannot be jurisdictional because it contains an exception that contemplates the exercise of judicial discretion in its application. But this Court has never suggested that Con-

gress is prohibited from attaching the jurisdictional label to provisions that contain such exceptions. To the contrary, it has held that Congress may "defin[e] the 'category' of" suits to be excluded from the courts' jurisdiction "in any manner it wishes." *Rockwell*, 549 U.S. at 469. And in *Rockwell*, the Court found that a False Claims Act, ch. 67, 12 Stat. 696, provision was jurisdictional even though it barred jurisdiction "*unless* * * * the person bringing the action is an original source of the information," even though the application of the "original source" exception was far from straightforward. 549 U.S. at 467 (quoting 31 U.S.C. 3730(e)(4)(A) and (B)) (emphasis added); see *id.* at 470 (noting that the Court was required to address "several preliminary questions" in the course of evaluating the exception's applicability).

Petitioner is also mistaken in contending (Br. 24-25) that Section 1252(d)(1) cannot be jurisdictional because, unlike other provisions in Section 1252, it does not include the term "jurisdiction." As discussed above, see p. 18, *supra*, Section 1252 repeatedly makes clear, both implicitly and explicitly, that there is no meaningful distinction between its provisions limiting "judicial review" and those restricting a court's "jurisdiction to review." 8 U.S.C. 1252(a)(5); see *Biden*, 142 S. Ct. at 2539. Both types of restrictions "mark the bounds of a 'court's adjudicatory authority'" over removal, and therefore govern subject-matter jurisdiction. *Boechler*, 142 S. Ct. at 1497 (citation omitted). In any event, the statutory history readily explains why Congress phrased Section 1252(d)(1)'s exhaustion requirement as a limit on "review" by "[a] court" rather than "jurisdiction"; that is the phrasing Congress that used when it first enacted the INA's exhaustion provision in 1961, and it is the

phrasing that courts, including this Court, had consistently recognized as jurisdictional. See p. 21, *supra.*

Petitioner similarly errs in asserting (Br. 26) that Section 1252(d)(1) cannot be deemed jurisdictional because an exhaustion requirement is a "paradigmatic example of a nonjurisdictional claims-processing rule." In making that assertion, petitioner analogizes to the exhaustion requirement in the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. VIII, 110 Stat. 1321-66, 42 U.S.C. 1997e(a), which this Court has concluded is nonjurisdictional. Petitioner is correct that, in the portion of 42 U.S.C. 1997e(a) that codifies the doctrine of administrative exhaustion, the PLRA uses language similar to Section 1252(d)(1); and that similarity has important implications when interpreting the scope of Section 1252(d)(1)'s exhaustion mandate. See p. 28, *infra*. But the two provisions differ in the way they introduce their exhaustion requirements. Section 1997e(a) phrases its requirement as a restriction on when an "action shall be brought," 42 U.S.C. 1997e, rather than as a limit on what "[a] court may review," 8 U.S.C. 1252(d)(1). That difference renders the two provisions meaningfully distinct for purposes of the *Arbaugh* analysis. See pp. 16-17, *supra.* Moreover, this Court has recognized that Congress used a separate provision of the PLRA to "mak[e] it clear that the PLRA exhaustion requirement is not jurisdictional." *Woodford* v. *Ngo*, 548 U.S. 81, 101 (2006) (discussing 42 U.S.C. 1997e(c)(2), which expressly permits a district court to dismiss a prisoner's complaint on merits grounds before considering whether available administrative remedies were properly exhausted). The INA lacks any such provision.

Petitioner's assertion (Br. 27) that the Court has an "established practice of treating exhaustion requirements" as nonjurisdictional is belied by cases in which the Court *has* treated the exhaustion of administrative remedies as a jurisdictional requirement. For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), the Court held that 29 U.S.C. 160(e), a statute that bars judicial consideration of an objection "'that has not been urged before the [National Labor Relations] Board,'" dictates that courts "lack[] jurisdiction to review objections" that have not been presented to the Board. 456 U.S. at 665-666 (citation omitted); see *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (reiterating that courts "lack[] jurisdiction to review objections not raised before the National Labor Relations Board"); *McNeil* v. *United States*, 508 U.S. 106, 111 (1993) (upholding lower court's jurisdictional dismissal of suit that failed to comply with an exhaustion provision in the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.*).

Indeed, this Court has held that even when a statute lacks an express exhaustion requirement, it may be appropriate to treat a provision establishing an administrative-review scheme as "implicitly" limiting the courts' "jurisdiction" where "the claims at issue 'are of the type Congress intended to be reviewed within the statutory structure.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (brackets and citation omitted); see, *e.g.*, *Elgin* v. *Department of the Treas.*, 567 U.S. 1, 10 (2012); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994); *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-499 (1955); *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 544-545 (1946). Those precedents rest on the presumption that "when Congress creates

procedures 'designed to permit agency expertise to be brought to bear on particular problems,'" it generally intends to preclude courts from exercising jurisdiction until those procedures have been exhausted. *Free Enter. Fund*, 561 U.S. at 489 (quoting *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co*., 379 U.S. 411, 420 (1965)).

Because the INA's exhaustion requirement is express, this Court need not decide whether and to what extent an implicit limit on the courts' jurisdiction might be established by the INA provisions entrusting removal decisions to the agency in the first instance. But at a minimum, this Court's precedents finding that a court's jurisdiction may be implicitly limited by a detailed administrative scheme establish that there is no obstacle to deeming an express exhaustion requirement jurisdictional.

Nor is there any constitutional impediment to treating an exhaustion requirement as jurisdictional. Petitioner's contrary assertion (Br. 28) rests on the mistaken premise that making an exhaustion requirement jurisdictional would impermissibly authorize an agency to "delineate the scope of judicial review over [its] actions." But it is still *Congress* that has established the bounds of the courts' authority when it conditions judicial review on administrative exhaustion. The agency cannot alter the ultimate scope of judicial review merely by altering its procedures because, no matter what procedures the agency adopts, courts will still have the power to review what the agency has done once those procedures have been exhausted.[7]

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[7] If this Court disagrees with the contention that Section 1252(d)(1) is jurisdictional, it should remand to the court of appeals to allow it to determine whether this is a case in which it is appro-

II. SECTION 1252(d)(1)'S EXHAUSTION REQUIREMENT PRECLUDES A COURT FROM CONSIDERING AN ISSUE UNTIL THE AGENCY HAS HAD AN OPPORTUNITY TO ADDRESS IT

The exhaustion requirement in Section 1252(d)(1) is satisfied when a noncitizen has "give[n] the agency a fair and full opportunity to adjudicate [her] claims." *Woodford*, 548 U.S. at 90. That means that a court cannot exercise jurisdiction to review an alleged error of law or fact in an immigration judge's decision unless the noncitizen has presented the issue in an appeal to the Board. And, where the noncitizen alleges that the Board itself introduced a new error through its appellate decision, a court does not have the power to consider that error unless the noncitizen has presented it to the Board, which can be done through a motion to reconsider. That understanding of Section 1252(d)(1)'s requirements flows directly from the statute's text, structure, and implementing regulations.

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priate to apply Section 1252(d)(1) *sua sponte*. This Court has recently held—in a case involving another INA exhaustion provision—that "[w]hen Congress uses 'mandatory language' in an administrative exhaustion provision, 'a court may not excuse a failure to exhaust,'" regardless of whether the requirement is jurisdictional. *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021) (quoting *Ross* v. *Blake*, 578 U.S. 632, 639 (2016)) (emphasis added). While such mandatory-but-nonjurisdictional requirements may still "be waived or forfeited by an opposing party," *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019), courts are sometimes permitted to invoke them *sua sponte*, see *Day* v. *McDonough*, 547 U.S. 198, 209 (2006). Because the court of appeals found that Section 1252(d)(1) is jurisdictional, it did not consider whether the *Day* principle might apply here, and it should be given an opportunity to do so on remand.

A. Section 1252(d)(1) Requires Issue Exhaustion

1. The text of Section 1252(d)(1) prevents a court from exercising jurisdiction over any issue that a noncitizen has not presented to the Board in the first instance. Section 1252(d)(1) provides that a removal order is reviewable "only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). That language is a straightforward codification of the "long-settled" doctrine of administrative exhaustion, under which a court will refuse to review an agency decision "until the prescribed *administrative remedy* has been *exhausted*." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (emphases added); see p. 25, *supra* (citing cases applying the doctrine to prevent courts from exercising jurisdiction until the administrative process is complete).

Statutory context reinforces that conclusion. The INA's exhaustion provision governs when a federal court has the power to review a decision that has been assigned to a federal agency in the first instance—the very context in which the administrative-exhaustion doctrine was developed. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140, 144-145 (1992). Indeed, this Court has determined that similar language in the PLRA codified "the doctrine of exhaustion in administrative law," even though it appeared in a provision concerning when a prisoner could bring suit rather than when a court could review an agency's decisions. *Woodford*, 548 U.S. at 93. That determination applies with all the more force in the context of the INA. See *Northcross* v. *Board of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) ("similarity of language" is "a strong indication that * * * two statutes should be interpreted *pari passu*").

2. Under the doctrine of administrative exhaustion that Section 1252(d)(1) codifies, courts must refrain from "toppl[ing] over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*." *Woodford*, 548 U.S. at 90 (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (emphasis in original). Precisely what that entails will depend on the nature of the administrative-review scheme and the agency's implementing regulations.

The Court has recognized that the specificity with which claims must be exhausted depends in part on the degree to which the "particular administrative proceeding" is "analog[ous] to normal adversarial litigation." *Sims*, 530 U.S. at 109. Thus, under statutes that establish an "inquisitorial rather than adversarial" form of agency proceedings—one in which the adjudicators are charged with helping the litigant to develop her claim—the purposes of exhaustion may be satisfied by requiring a litigant simply to present the decision she wishes to challenge to the agency's appellate body. *Id.* at 110-111 (plurality opinion). But under statutes that adopt a more "adversarial" scheme—one in which "claimants bear the responsibility to develop issues for adjudicators' consideration," *Carr* v. *Saul*, 141 S. Ct. 1352, 1358 (2021)—exhaustion doctrine requires the challenger to raise a specific issue with the agency before pressing it in court. See *Sims*, 530 U.S. at 109 (recognizing that issue exhaustion is the "general rule" in adversarial administrative-review schemes) (citation omitted).

The agency's implementing regulations also inform the contours of the exhaustion requirement. In *Woodford*, the Court explained that the doctrine of adminis-

trative exhaustion compels "[p]roper exhaustion"—that is, exhaustion in "compliance with [the] agency's deadlines and other critical procedural rules." 548 U.S. at 90. And the Court's PLRA cases have generally recognized that the level of specificity with which a prisoner must exhaust his institution's grievance procedures is determined by the "level of detail necessary * * * to comply with * * * the prison's requirements." *Jones* v. *Bock*, 549 U.S. 199, 218 (2007).

Both the nature of the INA's administrative review scheme and its implementing regulations establish that, when Congress codified the doctrine of administrative exhaustion in Section 1252(d)(1), it included a requirement that specific issues be presented to the Board before they could be pressed in a reviewing court. That is made plain by the "adversarial" nature of the INA's review scheme, *Carr*, 141 S. Ct. at 1358, under which the Board serves as an "impartial" adjudicator. 8 C.F.R. 1003.1(d)(1); see 8 C.F.R. 1003.1(d)(1)(ii) (explaining that "Board members shall exercise their independent judgment and discretion in" reviewing cases). It is also made plain by the INA's "critical procedural rules." *Woodford*, 548 U.S. at 90. Since the Act's inception in 1952, regulations have required parties to identify specific errors in their filings before the Board, both in their appeals and in their motions to reconsider. See 8 C.F.R. 242.61(f)(2)(ii) (1952) ("Where deportability is contested, the alien or his representative shall be required to indicate * * * the particular findings of fact or conclusions of law with which he disagrees."); 8 C.F.R. 6.21(a) (1952) ("Motions to reconsider shall state the reasons for reconsideration."); 8 C.F.R. 1003.3(b) (2020) ("The party taking the appeal * * * must specifically identify the findings of fact, the con-

clusions of law, or both, that are being challenged."); 8 C.F.R. 1003.2(b)(1) (2020) ("A motion to reconsider shall state the reasons[.]"); see *Sims*, 530 U.S. at 108 (citing a regulation requiring litigants to "list[] the specific issues to be considered on appeal," 20 C.F.R. 802.211(a) (1999), as an example of an issue-exhaustion requirement) (brackets omitted).

Accordingly, Congress would have been well-aware—both in 1961, when it first enacted the INA's exhaustion requirement, and in 1996, when it recodified the requirement in its current form, see pp. 3-4, *supra*—that by choosing to permit judicial review "only if * * * the alien has exhausted all administrative remedies available to [her] as of right," 8 U.S.C. 1252(d)(1), it was precluding the courts from considering any issue that had not been presented to the Board in the first instance.

3. The structure of the INA's judicial-review scheme confirms that Section 1252(d)(1)'s exhaustion requirement is not satisfied unless a noncitizen has presented the issue she is challenging to the Board. For instance, Section 1252(b)(4) provides that "the court of appeals shall decide [a petition for review] only on the administrative record." 8 U.S.C. 1252(b)(4)(A). If a noncitizen has not raised a particular issue before the Board, the administrative record is unlikely to provide the information a court needs to decide it, hindering meaningful review.

Further, unless a noncitizen is required to exhaust particular issues, the interaction of the INA's provisions regarding motions to reconsider before the Board and petitions for review before the courts of appeals would make little sense. The INA provides that both a motion for reconsideration and a petition for review

must be filed within 30 days of the Board's decision on appeal. 8 U.S.C. 1229a(c)(6), 8 C.F.R. 1003.2 (motions to reconsider); 8 U.S.C. 1252(b)(1) (petitions for review). Section 1252(b)(6) then provides that "[w]hen 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." 8 U.S.C. 1252(b)(6).

Those provisions work in harmony when Section 1252(d)(1) is appropriately interpreted to require noncitizens to present issues to the Board before they can be considered in a petition for review. A noncitizen who wishes to challenge the Board's appellate decision may file a petition for review with the court of appeals raising the issues she has already presented to the Board through her appellate filings, and—if she believes that the Board has introduced a new error through its appellate decision—she may simultaneously file a motion to reconsider in order to exhaust that specific issue before the Board. If the Board ultimately denies the motion to reconsider, the noncitizen may then file a second petition for review raising the now-exhausted issue, and, if the first petition is still pending in the court of appeals, the court's review of both petitions will be consolidated under Section 1252(b)(6).

If, however, there is no issue-exhaustion requirement, the administrative- and judicial-review schemes work in tension. Without Section 1252(d)(1)'s constraint, nothing in the statute would prevent a noncitizen from raising all of her challenges to the Board's appellate decision in a petition for review filed simultaneously with a motion to reconsider. As a result, both the Board and the court could each be engaged in concurrent consideration in the first instance of the unex-

hausted issue, giving rise to the possibility of competing judgments.[8]

Nor is that the only problem that would arise if Section 1252(d)(1) did not impose an issue-exhaustion requirement. If Section 1252(d)(1) could be satisfied despite a noncitizen's failure to raise a particular issue before the Board, courts would find themselves considering alleged errors the Board had never passed upon. That would defeat the primary purposes of an exhaustion requirement: "giv[ing] an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,'" and "promot[ing] efficiency" by allowing an agency to resolve a dispute or at least to "'produce a useful record for subsequent judicial consideration.'" *Woodford*, 548 U.S. at 89 (citation omitted). It is unlikely that Congress intended that result when it enacted Section 1252(d)(1)'s exhaustion requirement and phrased it in jurisdictional terms.

B. Petitioner's Contrary Interpretation Of Section 1252(d)(1) Is Incorrect

The vast majority of the courts of appeals to consider the question, including the court below, have determined that Section 1252(d)(1) imposes an issue-exhaustion re-

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[8] Board precedent would partially mitigate the difficulties presented when different tribunals consider the same issues at the same time because the Board generally declines to consider issues raised in a motion to reconsider that have already been addressed in the Board appeal. See *In re O-S-G-*, 24 I. & N. Dec. 56, 58 (B.I.A. 2006). But that precedent would not prevent the Board from considering in the first instance a new issue allegedly introduced by the Board's appellate decision.

quirement.[9] Petitioner offers three arguments against that understanding. None is persuasive.

1. Petitioner contends (Br. 30) that Section 1252(d)(1) cannot be understood to require issue exhaustion because, in considering how to apply the exhaustion doctrine under the Social Security Act, the Court has cautioned that "[i]ssue exhaustion should not be confused with exhaustion of administrative remedies." *Carr*, 141 S. Ct. at 1358 n.2. In context, that statement means only that the exhaustion of administrative remedies does not invariably require the exhaustion of specific issues because "inquisitorial" review schemes (like the one established under the Social Security Act) require litigants to seek administrative review only of decisions, not of issues. *Id.* at 1358; see *Sims*, 530 U.S. at 109. That principle has no application here given the adversarial nature of the INA's review scheme, see p. 30, *supra*. And, in *Sims*—the case in which the Court first announced that issue exhaustion was not required under the Social Security Act—the Court was "unanimous" in recognizing that "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." 530 U.S. at 112 (O'Connor, J., concurring in part and concurring in the judgment) (citing *id.* at 109 (majority opinion); *id.* at 115 (Breyer, J., dissenting)).

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[9] See, *e.g.*, *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Massis* v. *Mukasey*, 549 F.3d 631, 638-640 (4th Cir. 2008), cert. denied, 558 U.S. 1047 (2009); *Omari* v. *Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559-560 (6th Cir. 2004); *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582-583 (8th Cir. 2005); *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (9th Cir. 2004); *Molina* v. *Holder*, 763 F.3d 1259, 1262 (10th Cir. 2014); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

Moreover, the cases concerning exhaustion under the Social Security Act have little relevance for Section 1252(d)(1) because the statutes are phrased in very different terms. The language the Court has analyzed in the Social Security Act does not, for example, reference "exhaust[ion]" or "administrative remedies." 8 U.S.C. 1252(d)(1); see 42 U.S.C. 405(g) ("[a]ny individual, after any final decision * * * made after a hearing * * * may obtain a review * * * by a civil action"); *Sims*, 530 U.S. at 106 (quoting same).

2. Petitioner also contends (Br. 30-32) that because other statutes have used different formulations to require issue exhaustion, Section 1252(d)(1) should not be understood to do so, or—at a minimum—that any issue-exhaustion requirement should be viewed as "judge-made" and therefore *non*jurisdictional. Congress, however, is free to use different language across different statutes to achieve the same effect. Here, the language that Congress used in the INA codifies administrative-exhaustion doctrine, which in turn requires litigants to present their claims with the level of specificity dictated by the nature of the administrative review scheme and the agency's "critical procedural rules." *Woodford*, 548 U.S. at 90. There is no question that IJs and the Board operate as part of an adversarial rather than inquisitorial system. A noncitizen must specify the issues of fact and law that are being challenged, and DHS is represented before the Board by its own counsel. It was Congress—not the courts—that chose the adversarial model that entails issue exhaustion under Section 1252(d)(1). Cf. *id.* at 91 n.2 (explaining that "proper exhaustion" is required under the PLRA as a matter of statutory interpretation, not as a matter of "'federal common law'") (citation omitted).

3. Petitioner fares no better in advancing (Br. 32) the mistaken contention that a jurisdictional issue-exhaustion requirement will burden courts and litigants by requiring the courts of appeals to "examine every issue" to ensure that it is exhausted. Courts are well-practiced in addressing jurisdictional issues. And even if petitioner's concerns had merit, such policy arguments must be directed to Congress rather than the courts. See, *e.g.*, *Patel* v. *Garland*, 142 S. Ct. 1614, 1627 (2022) ("policy concerns cannot trump the best interpretation of the statutory text").

C. Section 1252(d)(1) Requires A Noncitizen To File A Motion To Reconsider When She Alleges That The Board Has Introduced A New Error On Appeal

Petitioner also contends (Br. 34) that a noncitizen "need not file a motion to reconsider before the Board to properly exhaust her claim" under Section 1252(d)(1). That is correct in cases where the noncitizen has already presented the relevant issue in her appellate filings before the Board. But it is incorrect in cases like this one, where the noncitizen alleges that the Board has introduced a new error through its decision, and a motion to reconsider is necessary to ensure that the agency has an opportunity to correct that error in the first instance.

1. A noncitizen need not file a motion to reconsider where she has already raised the issues she wishes to bring before the court in her appeal before the Board. The doctrine of administrative exhaustion that Section 1252(d)(1) codifies requires litigants to give the agency "*a* fair opportunity to correct [its] own errors," *Woodford*, 548 U.S. at 94 (emphasis added); it does not require that the same administrative body be given multiple opportunities to do so. Congress may depart from

that approach if it chooses, but there is no indication that it did so in the INA. See *In re O-S-G-*, 24 I. & N. Dec. at 58 (explaining that a motion to reconsider "is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision"). Indeed, requiring a noncitizen to file a motion to reconsider as a prerequisite for judicial review of issues that were already presented to the Board would be inconsistent with the INA's provisions requiring that a motion to reconsider and a petition for review be filed on the same timeline. See 8 U.S.C. 1229a(c)(6), 1252(b)(1); see also pp. 31-32, *supra*.

Section 1252(d)(1) does, however, require the filing of a motion to reconsider to exhaust an issue that has not been raised before the Board because the alleged error was first introduced by the Board's own appellate decision. See *In re O-S-G-*, 24 I. & N. Dec. at 58 (recognizing that the legal arguments that may be raised in a motion to reconsider may "flow from new law or a de novo determination reached by the Board in its decision that may not have been addressed by the parties").[10] In that situation, permitting a noncitizen to proceed directly to the court of appeals would violate the funda-

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[10] *In re O-S-G-* also clarifies two other points regarding the use of a motion to reconsider that are not directly relevant here. First, a noncitizen may not raise arguments in a motion to reconsider "that could have been raised earlier in the proceedings," a requirement that is consistent with standard principles of waiver and forfeiture. 24 I. & N. Dec. at 58. Second, a noncitizen may choose to file a motion to reconsider, rather than a petition for judicial review, if an argument that she raised before the Board does not appear to have been "considered in adjudicating the appeal." *Ibid.* By filing the motion to reconsider, the noncitizen is effectively deeming the issue unexhausted and giving the Board another chance to address it.

mental premise of exhaustion doctrine by allowing the court to "topple" an agency decision in circumstances where the agency has not yet "erred against objection made at the time appropriate under its practice." *Woodford*, 548 U.S. at 90 (quoting *L.A. Tucker Truck Lines*, 344 U.S. at 37) (emphasis omitted).

2. Petitioner asserts (Br. 35-42) that a motion to reconsider is *never* required because such a motion is not among the remedies "available to the alien as of right." 8 U.S.C. 1252(d)(1). But the statute's plain meaning suggests otherwise. A remedy is "available" where it is "capable of use to obtain some relief for the action complained of." *Ross* v. *Blake*, 578 U.S. 632, 642 (2016) (citation and internal quotation marks omitted). A motion to reconsider readily fits that description because it is a remedy that can be used "to obtain 'some relief'" for alleged new errors introduced by the Board. *Ibid.*; see *In re O-S-G-*, 24 I. & N. Dec. at 58. And motions to reconsider are capable of use "as of right," 8 U.S.C. 1252(d)(1), because the INA expressly gives a noncitizen the right to "file one motion to reconsider a decision that [she] is removable." 8 U.S.C. 1229a(c)(6)(A); see 8 C.F.R. 1003.2. Indeed, in *Dada* v. *Mukasey*, 554 U.S. 1 (2008), the Court described parallel language in the statute's next paragraph (about motions to reopen) as "plain insofar as it guarantees to each alien the *right* to file 'one motion to reopen proceedings under this section.'" *Id.* at 15 (quoting 8 U.S.C. 1229a(c)(7)(A) (emphasis added); see *Mata* v. *Lynch*, 576 U.S. 143, 144 (2015) (observing that a noncitizen "has a statutory *right* to file a motion to reopen his removal proceedings") (emphasis added).

Petitioner contends that such a reading gives the phrase "'as of right' * * * no work to do." Pet. Br. 39

(citation omitted). That is incorrect. The phrase prevents the government from arguing that a noncitizen must exhaust remedies that she has not been granted a "right" to seek under the INA. For example, a noncitizen need not file a *second* motion to reconsider to present an error allegedly introduced by the Board in deciding her first motion because the statute gives noncitizens the right to file only "one motion to reconsider." 8 U.S.C. 1229a(c)(6)(A).

Congress may also have included the "as of right" language—which has appeared in the exhaustion provision since it was first enacted in 1961, see pp. 3-4, *supra*—to clarify that Section 1252(d)(1) does not require a noncitizen to apply for the class of remedies that the statute authorizes the Attorney General to grant at his discretion, such as "cancellation of removal, [8 U.S.C.] 1229b; permission for voluntary departure, [8 U.S.C.] 1229c; and adjustment of status, [8 U.S.C.] 1255." *Kucana* v. *Holder*, 558 U.S. 233, 246, 248 (2010). This Court has emphasized that the granting of such discretionary relief is "not a matter *of right* under any circumstances, but rather is in all cases a matter of grace." *Patel*, 142 S. Ct. at 1626 (emphasis added; citation omitted). Congress may therefore have intended to make plain that, while a noncitizen must "exhaust[]" her challenges to a removal order through the established administrative procedures, she need not apply for any of the forms of statutory relief from removal that are not "available" to her "as of right." 8 U.S.C. 1252(d)(1).

Petitioner agrees (Br. 37-38) that the phrase "as of right" is meant to clarify that a noncitizen need not exhaust "discretionary" remedies, but in her view the ability to file a motion to reconsider should be categorized alongside the remedies that are placed within the Attor-

ney General's discretion by the statute because an implementing regulation states that "[t]he decision to grant or deny a motion [for reconsideration or reopening] is within the discretion of the Board," 8 C.F.R. 1003.2(a). Treating motions to reconsider as discretionary based on that Board regulation would be in tension with Congress's choice to codify the right to file a motion to reconsider in IIRIRA without labeling it discretionary. See 8 U.S.C. 1229a(c)(6)(A). And this Court refused to accept a similar argument in *Kucana*, which rejected the assertion that the same INA regulation was sufficient to render a Board decision denying a motion to reopen "discretionary" and therefore unreviewable under Section 1252(a)(2)(B). 558 U.S. at 244-252. It would be strange to deem motions to reconsider discretionary for purposes of Section 1252(d)(1) while deeming them non-discretionary for purposes of another provision in the same section of the INA.

In any event, petitioner's argument about the meaning of "as of right" proves too much. Petitioner claims that a remedy is available "as of right" only when an agency "has no discretion to deny review." Pet. Br. 39 (citations omitted). But if that were correct, even an appeal to the Board would not fall within Section 1252(d)(1)'s exhaustion mandate. INA regulations provide that the Board "may summarily dismiss any appeal or portion of any appeal" where, *inter alia*, the noncitizen fails to "specify the reasons for the appeal," the appeal is "untimely," or it "fails to meet essential statutory or regulatory requirements." 8 C.F.R. 1003.1(d)(2)(A), (G), and (H) (2020). The Board therefore has the discretion to dismiss an appeal without review, yet even petitioner recognizes (Br. 30-31) that a noncitizen can-

not satisfy the exhaustion requirement without first appealing an IJ's decision to the Board.[11]

3. Petitioner next asserts that the Court should exclude motions to reconsider from Section 1252(d)(1)'s ambit because of the practical difficulties that might otherwise ensue. But "practical considerations * * * do not justify departing from the statute's clear text." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2118 (2018). And in any event, petitioner's concerns are unfounded.

Nearly all of the courts of appeals to address the issue have already required exhaustion through a motion to reconsider in cases where the noncitizen alleges that the Board introduced a new error through its appellate decision. See Pet. App. 4a-5a; *Gallegos* v. *Garland*, 25 F.4th 1087, 1092-1093 (8th Cir. 2022); *Meng Hua Wan* v. *Holder*, 776 F.3d 52, 57 (1st Cir. 2015); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 & n.6 (10th Cir. 2007); cf. *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1299 (11th Cir. 2015) (finding that Section 1252(d)(1) did not prevent consideration of an alleged error introduced by the Board's appellate decision, without considering the possibility of a motion to reconsider). As a result, affirming that position will not meaningfully alter the status quo. And petitioner is incorrect in contending (Br. 43-44) that if Section 1252(d)(1) is read to require a noncitizen

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[11] To the extent petitioner means to suggest that motions to reconsider are not available as of right because the Board has unfettered discretion to deny such motions, that is incorrect. This Court has explained that motions to reopen and reconsider are reviewed under a "deferential, abuse-of-discretion standard," but it has also recognized that the Board's discretion has limits that may be judicially enforced. *Kucana*, 558 U.S. at 242; see *INS* v. *Stevic*, 467 U.S. 407, 430 (1984) (remanding for consideration of whether the evidence submitted by the respondent in support of his motion to reopen was sufficient to entitle him to a plenary hearing).

to file a motion to reconsider in any circumstances, then it must be read to require a motion to reconsider in every circumstance. The administrative-exhaustion doctrine that Section 1252(d)(1) codifies requires litigants to give the agency "*an* opportunity to correct its own mistakes," not multiple opportunities. *Woodford*, 548 U.S. at 89 (emphasis added; citation omitted).

Petitioner is also mistaken in asserting (Br. 44) that requiring a noncitizen to file a motion to reconsider when she is challenging an error the Board allegedly introduced on appeal is impractical because courts and litigants will have difficulty discerning when an issue has been exhausted. Issue exhaustion is a familiar concept in administrative law, see p. 29, *supra*, and in the INA context, courts have shown a willingness to find an issue exhausted where there is a reasonable argument that it was already before the Board in some form. See, *e.g.*, *Barros* v. *Garland*, 31 F.4th 51, 59-62 (1st Cir. 2022). Indeed, the published courts of appeals decisions requiring exhaustion through a motion to reconsider all involve claims of impermissible factfinding, a species of claim that almost inevitably introduces a "new issue" because it is premised on the assertion that the Board made a finding that the IJ did not. *Id.* at 60 (citation omitted); see *Martinez-Guevara* v. *Garland*, 27 F.4th 353, 360 (5th Cir. 2022) (emphasizing that "[a] new issue is one that 'neither party could have possibly raised' before the Board's decision") (quoting *Omari* v. *Holder*, 562 F.3d 314, 320-321 (5th Cir. 2009)); see also *Gallegos*, 25 F.4th at 1092-1093; *Meng Hua Wan*, 776 F.3d at 57; *Sidabutar*, 503 F.3d at 1122.

Petitioner also suggests (Br. 44-45) that requiring noncitizens to exhaust new issues through motions to reconsider will lead to "outlandish" results because it

will compel noncitizens to file such motions every time they believe the Board made a new procedural error in considering a substantive argument. But even when a court determines that it lacks jurisdiction to consider an unexhausted procedural claim, the court may still consider a related substantive issue if it has been exhausted. In the decision below, for example, the court dismissed petitioner's impermissible-factfinding claim for lack of jurisdiction because she had not raised it in a petition to reconsider, Pet. App. 4a-5a, but the court then considered and rejected petitioner's substantive challenge to the Board's finding that she was ineligible for withholding of removal on the merits, *id.* at 5a-7a.

Finally, petitioner suggests (Br. 46) that requiring a motion to reconsider in order to exhaust new arguments will mean that meritorious claims are rejected because the denial of a motion to reconsider is reviewed only for abuse of discretion. Petitioner does not, however, provide any examples to substantiate that concern, and there is no reason to think that the Board would allow the abuse-of-discretion standard to affect its consideration of a motion raising a meritorious claim that an error was introduced on appeal, or that the courts of appeals would affirm a denial of reconsideration if the Board did deny review in those circumstances.

* * * * *

Under the foregoing principles, the court of appeals correctly determined that it lacked jurisdiction to consider petitioner's claim that the Board had engaged in impermissible factfinding because petitioner "did not present this argument before the [Board] in a motion for reconsideration." Pet. App. 4a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immi-

gration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be

considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or

addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to as-

sume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements

(whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to

apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

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[1] So in original.

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

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[2] So in original. A closing parenthesis probably should appear.

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

2. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action

is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of consti-

tutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the

terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section

1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

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.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, sub-

stantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[3] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

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[3] See References in Text note below.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a

of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the en-

try or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

3. 8 C.F.R. 1003.1(d) (2020) provides:

Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(d) *Powers of the Board*—(1) *Generally*. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by

written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals*—(i) *Standards*. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR 26 or Form EOIR 29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

(E) The party concerned indicates on Form EOIR 26 or Form EOIR 29 that he or she will file a brief or statement in support of the appeal and, thereafter, does

not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(F) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record;

(H) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action by the Board.* The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences.* The filing by a practitioner, as defined in § 1003.101(b), of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section, may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review.* (i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

(4) *Rules of practice*. The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of practitioners and recognized organizations*. The Board shall have the authority pursuant to § 1003.101 et seq. to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or DHS, and upon recognized organizations. The Board shall also have the authority pursuant to § 1003.107 to reinstate disciplined practitioners to appear in a representative capacity before the Board and the Immigration Courts, or DHS, or all three authorities.

(6) *Identity, law enforcement, or security investigations or examinations*. (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other

immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or ex-

aminations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(7) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

4. 8 C.F.R. 1003.2 (2020) provides in pertinent part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision. has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) *Motion to reconsider.* (1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider

any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

* * * * *

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of §1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

5. 8 C.F.R. 1003.3(b) (2020) provides:

Notice of appeal.

(b) *Statement of the basis of appeal.* The party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR 26 or Form EOIR 29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i). The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. The appellant must also indicate in the Notice of Appeal (Form EOIR 26 or Form EOIR 29) whether he or she desires oral argument before the Board and whether he or she will be filing a separate written brief or statement in support of the appeal. An appellant who asserts that the appeal may warrant review by a three-member panel under the standards of § 1003.1(e)(6) may identify in the Notice of Appeal the specific factual or legal basis for that contention.