No. 21-1436

In the Supreme Court of the United States

LEON SANTOS-ZACARIA,

Petitioner,

v.

MERRICK GARLAND, U.S. Attorney General,

Respondent.

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

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INTRODUCTION

Petitioner should prevail for three separate reasons. *First*, Section 1252(d)(1) is a claims-processing rule, not a jurisdictional requirement. Because of the clear-statement rule (Pet'r Br. 18-29), it "is not enough" for the government's construction to be "better" than ours; rather, the government may prevail only if its construction is "clearly right." *Boechler, P.C.* v. *Commissioner of Internal Revenue*, 142 S. Ct. 1493, 1498-1499 (2022). At the very least, the government fails to show that our nonjurisdictional reading is implausible.

Second, Section 1252(d)(1) does not render *issue* exhaustion—which appears nowhere in the statutory text—jurisdictional. See Pet'r Br. 30-32. While issue exhaustion may well be required in this context, it is non-statutory and thus nonjurisdictional. Section 1252(d)(1) certainly contains no clear statement making issue exhaustion jurisdictional.

Third, a motion to reconsider is not a remedy "available *as of right*." As it must, the government concedes (at 36) that a motion to reconsider is not normally required; instead, it advances a hybrid rule whereby a noncitizen must file a motion to reconsider only if "the alleged error was first introduced by the Board's own appellate decision." Gov't Br. 37. But the government does not even attempt to offer a construction of the statutory text that would yield the surprising result that motions to reconsider are sometimes remedies "available as of right" and sometimes not.

ARGUMENT

I. SECTION 1252(D) IS NOT JURISDICTIONAL.

A. The text lacks a clear statement that Section 1252(d)(1) is jurisdictional.

1. As we demonstrated (Pet'r Br. 18-19), it is difficult to conclude that "Congress imbued" Section 1252(d)(1) "with jurisdictional consequences" (*United States* v. *Kwai Fun Wong*, 575 U.S. 402, 410 (2015)) when it did not "speak in jurisdictional terms or refer in any way to the jurisdiction" of federal courts (*Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006)).

While Congress's decision not to mention "jurisdiction" in the text is always powerful evidence that Congress intended courts to "treat the restriction as nonjurisdictional in character" (*Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1850 (2019)), that statutory design takes on special weight here, where Section 1252(d) exists in a sea of provisions that *do* expressly constrain jurisdiction. Throughout Section 1252, Congress used the phrase "no court shall have jurisdiction" when it meant to strip jurisdiction. See Pet'r Br. 24-26. Congress thus "knew" how to clearly state jurisdictional intent—"it could have simply borrowed from the statute next door." *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018); see *Biden* v. *Texas*, 142 S. Ct. 2528, 2539 (2022). It did not.

Recognizing that "[m]ultiple provisions" of Section 1252 "expressly deprive courts" of jurisdiction, the government's principal response (at 17) is that Section 1252(d)(1)'s spatial placement near these jurisdictional bars "confirm[s] that the exhaustion requirement" is "jurisdictional." But the Court has already rejected this "proximity-based argument": A statutory "requirement * * * does not become jurisdictional simply because it is placed in a section of a statute

that also contains jurisdictional provisions." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013). To the contrary, "Congress's use of 'certain language in one part of the statute and different language in another'" typically demonstrates that "different meanings were intended." *Id.* at 156; see *Gonzalez* v. *Thaler*, 565 U.S. 134, 143 (2012).

2. Against this, the government relies almost exclusively on Section 1252(d)(1)'s use of the term "review," claiming that "review" and "jurisdiction" are essentially synonymous. But the government elides a critical distinction. While Congress may use the term "judicial review" to denote jurisdiction, that inference is drawn where the statute describes, as a substantive matter, "a court's competence to adjudicate a particular category of cases." *Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018). When a statute addresses, by contrast, the procedures a litigant must undertake before a court may "review" a case among the "category of cases" for which a court *does* have jurisdiction—that is, when the statute proscribes a "claim-processing rule"—reference to the action of "review" is unlikely to have jurisdictional consequence. See *ibid*.

We made this point earlier (Pet'r Br. 20), and the government offers no direct response. It merely parrots the principle that Congress may "prescribe 'the classes of cases a court may entertain.'" Gov't Br. 15. That argument is only skin deep: This Court's cases make clear that statutes limiting jurisdiction over classes of cases almost always operate based on the *substance* of the claim at issue. See *Patchak*, 138 S. Ct. at 906 ("[Section] 2(b) completely prohibits actions relating to the Bradley Property."). This is juxtaposed with a "claim-processing rule" like "an exhaustion requirement," which does not delineate the "particular

category of cases" (*ibid.*) a court has power to adjudicate.

The INA confirms that the term "review," by itself, does not necessarily denote a jurisdictional requirement. Consider Section 1252(b), which provides certain "requirements" that attach "to review of an order of removal." 8 U.S.C. § 1252(b). This includes, among other things, the requirement of "typewritten briefs." *Id.* § 1252(b)(2). This is not a jurisdictional requirement, notwithstanding the statutory term "review."[1]

The government thus draws the wrong lesson from Section 1252(a)(5). See Gov't Br. 18, 23. There, Congress declared 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'" are equivalent defined terms. 8 U.S.C. § 1252(a)(5). This provision highlights that Congress uses clear language when it wishes to strip jurisdiction—the terms "judicial review" or "jurisdiction to review." Congress used those terms throughout the INA to foreclose jurisdiction over *substantive* categories of claims. See, *e.g.*, 8 U.S.C. § 1252(a)(2) (titled "matters not subject to judicial review"); *id.* § 1252(a)(2)(D) (describing jurisdiction-stripping provisions which "limit[] or eliminate[] judicial review").

Notably, Congress did not employ either of the two specifically defined terms in Section 1252(d)(1);

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[1] This also answers the government's attempt to bootstrap jurisdiction by suggesting that *every* requirement in Section 1252 is jurisdictional due to Section 1252(b)(9). See Gov't Br. 17. Not only would this transform obvious claims-processing rules into jurisdictional requirements, but it is also irreconcilable with the Court's holding that Section 1252(f)(1) does not cabin subject-matter jurisdiction. *Biden*, 142 S. Ct. at 2540.

rather, it used the unadorned word "review." That choice, presumed "deliberate" (*Badgerow* v. *Walters*, 142 S. Ct. 1310, 1318 (2022)), makes good sense, as Section 1252(d) does not delineate a substantive category of claim.

Other INA provisions confirm our point. The government understands Section 1226(e), titled "judicial review,"[2] to strip jurisdiction over a substantive kind of claim: "a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding * * * detention or release." *Jennings* v. *Rodriquez*, 138 S. Ct. 830, 841 (2018) (plurality). So too with 8 U.S.C. § 1160(e)(1), which provides that there "shall be no * * * judicial review" over a defined substantive claim—"a determination respecting an application for adjustment of status under this section." See Gov't Br. 18-19.

The Court's precedents also belie the government's claim (at 16-17) that the use of the term "review" in statutory text implies that the statute "speaks * * * to a court's power." *Kwai Fun Wong*, 575 U.S. at 410. The Court recently passed on a statute which referenced "review" and disclaimed that the term was "jurisdictional language." *Boechler*, 142 S. Ct. at 1497. The statute provided that a person "may, within 30 days of a determination * * *, petition the Tax Court *for review* of such determination (and the Tax Court *shall have jurisdiction* with respect to such matter)." 26 U.S.C. § 6330(d)(1) (emphases added). The Court determined that "[t]he only jurisdictional language appears in the parenthetical at the end of the sentence." *Boechler*, 142 S. Ct. at 1497.

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[2] Congress enacted this statutory title. See Pub. L. 104-208, 110 Stat. 3009-586 (1996).

Context is thus critical. When a statute addresses "a court's competence to adjudicate a particular category of cases" (*Patchak*, 138 S. Ct. at 906), it may indeed be jurisdictional. For example, 28 U.S.C. § 2253(a) identifies a discrete category of claim subject to judicial review—"the final order" resulting from a "habeas corpus proceeding." See Gov't Br. 15 (*Gonzalez*). 10 U.S.C. § 867(a) provides that the "Court of Appeals for the Armed Forces shall review" certain categories of "cases." See Gov't Br. 15 (*Denedo*). And 28 U.S.C. § 1447(d) categorizes different types of remand orders and deems most of them "not reviewable on appeal or otherwise." See Gov't Br. 16 (*Powerex*). These statutes all address the "classes of cases a court may entertain"—and thus speak to judicial power. *Fort Bend*, 139 S. Ct. at 1848.

Not so with Section 1252(d)(1). It does not define a "class of cases"; indeed, the exhaustion requirement is agnostic to the nature of the claim. Rather, Section 1252(d)(1) is best understood to impose a "procedural obligation[]" on noncitizens (*EPA* v. *EME Homer City Generation*, 572 U.S. 489, 512 (2014)): It requires "alien[s]" to "exhaust[] all administrative remedies available * * * as of right" (8 U.S.C. § 1252(d)(1)). Because Section 1252(d)(1) operates to "command * * * a litigant" (Gov't Br. 16) to exhaust prior to filing a petition for review, the "legal character" (*Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010)) of this requirement is wholly different from statutes that delineate the kinds of "cases and controversies" that courts may hear (*Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005) (Easterbrook, J.)).[3]

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[3] The government's assertion (at 16) that it matters how the "command" is "phrased" misses the mark. Courts routinely find statutes nonjurisdictional, even when they are "phrased" as a

3. Section 1252(d)(2) also cuts against a jurisdictional reading. See Pet'r Br. 22-23. The government's response (at 22-23)—that Congress may define the category of suits to be excluded from review "in any manner it wishes" (*Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 469 (2007))—misses the point. By using the words "[n]o court shall have jurisdiction," the statute in *Rockwell* had a "clear and explicit * * * jurisdictional nature." *Id.* at 467-468 (quoting 31 U.S.C. § 3730(e)(4)). That express jurisdictional language—entirely absent in Section 1252(d)—meant that the Court did not have "to wrestle with the issue." *Id.* at 468.

Moreover, that statute "define[d] 'original source,'" providing a framework for courts to determine whether jurisdiction existed. *Rockwell*, 549 U.S. at 467. By contrast, whether Section 1252(d)(2) applies—and thus, as the government sees it, strips jurisdiction—turns on a discretionary judgment with limited congressional guidance. Pet'r Br. 22-23. If Section 1252(d)(2) is jurisdictional, it would be a peculiar, if not improper, delegation from Congress. See *Hudson* v. *Parker*, 156 U.S. 277, 284 (1895).

B. Exhaustion requirements are paradigmatic nonjurisdictional claims-processing rules.

1. In response to the well-established, "general proposition" (*Jones* v. *Bock*, 549 U.S. 199, 212 (2007)) that the Court "treat[s] as nonjurisdictional * * * threshold requirements that claimants must

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command to courts. See *United States* v. *Saladino*, 7 F.4th 120, 123 (2d. Cir. 2021) (holding, "like many * * * sister circuits," that the First Step Act's administrative exhaustion requirement for compassionate release is nonjurisdictional); 18 U.S.C. § 3582(c)(1)(A) ("*The court may not* modify a term of imprisonment * * * except that * * *.") (emphasis added).

complete, or exhaust, before filing a lawsuit" (*Reed Elsevier*, 559 U.S. at 166), the government points to pre-*Arbaugh* cases. See Gov't Br. 25 (discussing *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982) and *McNeil* v. *United States*, 508 U.S. 106 (1993)). Since *Arbaugh*, however, lower courts have "reevaluate[d]" *McNeil*'s holding. *Copen* v. *United States*, 3 F.4th 875, 881 (6th Cir. 2021). As for the *issue*-exhaustion provision in *Woelke*, Section 1252(d)(1)'s remedy-exhaustion requirement is meaningfully different. See pages 12-18, *infra*; compare 29 U.S.C. § 160(e).

In any event, those pre-*Arbaugh* cases cannot rebut the "usual practice": Exhaustion is generally not a jurisdictional prerequisite. *Jones*, 549 U.S. at 212; see also Pet'r Br. 26-27 (collecting cases). Our point is not that Congress can *never* enact a jurisdictional exhaustion requirement. Rather, to do so, Congress must act with exceptional clarity. It did not here.

The government finally contends that jurisdiction "may be *implicitly* limited by a detailed administrative scheme." Gov't Br. 26 (emphasis added). But as the government admits (*ibid.*), these holdings are irrelevant here, where there is an express exhaustion requirement. The meaning of the text thus governs.

2. We further explained (at 27-29) that treating Section 1252(d)(1) as jurisdictional would raise serious separation-of-powers concerns by inviting an agency to tinker with federal court jurisdiction. In fact, the government admits that, because the INA does not "specif[y] how [the] administrative appeal should unfold," the Board is "vest[ed]" with authority to establish the steps necessary to exhaust through "implementing regulations." Gov't Br. 5, 29.

Despite those admissions, the government argues our concern is mistaken 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*." Gov't Br. 26 (emphasis added). But therein lies the problem: If an administrative agency may fashion exhaustion rules that define a court's jurisdiction, then the court does *not* have any "power" unless those procedures are followed, allowing the Executive Branch to circumscribe the judicial power. That troubling outcome counsels against a jurisdictional reading. See *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns * * * caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain.").

C. Congress did not codify a jurisdictional interpretation of Section 1252(d)(1).

The government's recodification argument (at 20-22) is doubly mistaken: There is not a "long line of Supreme Court decisions," and Congress did not leave the predecessor text "undisturbed." *Fort Bend*, 139 S. Ct. at 1849.

1. The government is wrong to rely (at 20-21) on *Stone* v. *INS*, 514 U.S. 386 (1995), a case that exemplifies the outdated "profligate * * * use of" the term "jurisdictional." *Arbaugh*, 546 U.S. at 510. The government quotes (at 20) a description of the entire predecessor statutory *section* as "jurisdictional in nature" because it contained "[j]udicial review provisions" that "must be construed with strict fidelity to their terms." *Stone*, 514 U.S. at 405. This "drive-by jurisdictional ruling" (*Arbaugh*, 546 U.S. at 511) was not specific to the exhaustion provision; the government's reasoning would apply identically to the requirement that a

"court shall review * * * typewritten briefs." Pub. L. 87-301, § 5(a), 75 Stat. 652.

Stone's remark that, "[o]nce an alien has been deported, the courts lack jurisdiction to review the deportation order's validity" (514 U.S. at 399), is no more insightful. Although this now-rescinded restriction was housed within the same provision as the exhaustion requirement (8 U.S.C. § 1105a(c) (1994)), the Court has consistently "parsed a single statutory sentence to distinguish between its jurisdictional and nonjurisdictional elements." *Boechler*, 142 S. Ct. at 1499. Furthermore, the Court was making a separate point regarding the interplay of legislative provisions; there is no indication the Court was using the term "jurisdiction" in the post-*Arbaugh* Article III sense.[4]

Because it cannot point to any "of this Court's decisions" (*Henderson*, 562 U.S. at 436) holding that the INA's exhaustion requirement was jurisdictional, the government instead cites (at 21 n.6) lower court cases. The Court recently rejected this approach—it does not matter for recodification purposes that Congress may have been "aware of lower court cases" holding a provision jurisdictional, especially when those cases "all predate this Court's effort to bring some discipline to the use of the term jurisdictional." *Boechler*, 142 S. Ct. at 1500.

2. The government's recodification argument also fails because Congress did not "preserve[]" the same "language" when it adopted Section 1252(d)(1). *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018). The prior exhaustion requirement read: "An order of deportation * * * shall not be reviewed by

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[4] Because *Nken* v. *Holder*, 556 U.S. 418 (2009), was decided more than a decade after Congress enacted Section 1252(d)(1), it sheds no light on what Congress intended. Contra Gov't Br. 21.

any court if the alien has not exhausted." Pub. L. No. 87-301, 75 Stat. 651-653 (1961). In IIRIRA, Congress rephrased the provision: "A court may review a final order of removal only if the alien has exhausted." 8 U.S.C. § 1252(d)(1).

The fact that Congress reworked the text—rather than copying old language verbatim—is telling. Throughout IIRIRA, Congress used crystal-clear jurisdictional language when it meant to strip jurisdiction, employing the phrase "no court shall have jurisdiction" "thirteen times." Constitutional Accountability Center Am. Br. 20; see also Pet'r Br. 24-25. Given that Congress took the trouble to rewrite the text, if it had meant for the requirement to be jurisdictional, surely it would have used the same jurisdiction-stripping language it enacted everywhere else.

* * *

"[J]urisdictional statutes speak about jurisdiction." *Kwai Fun Wong*, 575 U.S. at 411 n.4. Section 1252(d)(1) does not. It "speak[s] to * * * a party's procedural obligations." *EME Homer City Generation*, 572 U.S. at 512. And even if the government's jurisdictional interpretation is "plausible," traditional tools of statutory construction "do[] not clearly mandate the jurisdictional reading." *Boechler*, 142 S. Ct. at 1498.[5]

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[5] The government has already acknowledged that, because "the government did not raise or rely" on petitioner's asserted "failure to exhaust in the court of appeals," "waiver and forfeiture would apply" if Section 1252(d)(1) is not jurisdictional. BIO 13. There is no meritorious basis for the government to backtrack and request a remand (at 26 n.7): Lower courts must "follow the principle of party presentation;" "[t]hey 'do not, or should not, sally forth each day looking for wrongs to right.'" *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

II. SECTION 1252(D)(1) DOES NOT CONTAIN AN ISSUE-EXHAUSTION REQUIREMENT.

We demonstrated two additional, independent reasons why the court of appeals erred in finding petitioner's improper-factfinding claim unexhausted: (1) because Section 1252(d)(1) does not clearly mandate issue exhaustion, any issue-exhaustion requirement is nonjurisdictional (Pet'r Br. 30-32); and (2) a motion to reconsider never qualifies as a remedy "available as of right" (Pet'r Br. 34-47).

In response, the government conflates these arguments, contending that, if issue exhaustion *is* jurisdictional, petitioner was obligated to file a motion to reconsider. Gov't Br. 27-36. That position is wrong. And, as we demonstrate in the final section, the statutory text forecloses the government's argument regardless.

A. The text says nothing about exhausting issues, and this Court has been clear that statutes requiring remedy exhaustion do not contain implied statutory issue-exhaustion requirements. *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000). In the absence of an explicit issue exhaustion requirement, the Court determines whether to fashion "a judicially imposed" one. *Id.* at 108. Critically, such "court-imposed issue-exhaustion" is *not* "jurisdictional" (*id.* at 106 n.1) and is thus subject to waiver.

The government's primary response is that the INA's requirement that a noncitizen "exhaust[] * * *

United States v. *Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021), states that courts may not fashion non-statutory exceptions to exhaustion; it does not hold that courts must raise an exhaustion defense when the government fails to do so. And *Day* v. *McDonough* merely notes that—where there is no "intelligent waiver"—a court has discretion to address "a clear computation error." 547 U.S. 198, 202, 209-210 (2006).

remedies" (8 U.S.C. § 1252(d)(1)) "codifies" the *entire* "doctrine of administrative exhaustion"—both remedy and issue exhaustion. Gov't Br. 29. That is wrong both as a matter of statutory interpretation and the Court's exhaustion precedents.

1. The government's argument turns on its attempt to lump together two distinct doctrines—remedy exhaustion and issue exhaustion—as a singular "doctrine of administrative exhaustion." The Court, however, has repeatedly warned against conflating these distinct requirements. See *Carr* v. *Saul*, 141 S. Ct. 1352, 1358 n.2 (2021) ("Issue exhaustion should not be confused with exhaustion of administrative remedies."); *Woodford* v. *Ngo*, 548 U.S. 81, 91 n.2 (2006) ("[I]ssue exhaustion" is a "different question[]" from exhaustion of remedies.); *Sims*, 530 U.S. at 107 (rejecting the proposition "that an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies").

A statute's explicit invocation of remedy exhaustion, if anything, affirmatively suggests that issue exhaustion was *not* intended; it certainly does not indicate the opposite. See *NLRB* v. *SW General, Inc.*, 137 S. Ct. 929, 940 (2017) ("[E]xpressing one item of [an] associated group or series excludes another left unmentioned."). To adapt Justice Scalia's memorable phrasing, "[i]t is implausible that the mention of [one] discrete" form of administrative exhaustion—remedy exhaustion—"was a shorthand way of referring to *all* [forms of exhaustion]. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis added).

That observation is particularly apt given that Congress has elsewhere demonstrated it "kn[ows] exactly how" (*SAS Inst.*, 138 S. Ct. at 1355) to impose an administrative issue-exhaustion requirement when it wants to: It uses straightforward, explicit language like "[n]o objection that has not been urged before the Board … shall be considered by the court." *Woelke*, 456 U.S. at 665 (quoting 29 U.S.C. § 160(e)); see Pet'r Br. 30-31 & n.4 (citing a dozen additional, similarly explicit, statutes). As the Court has explained, "Congress's choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard." *SAS Inst.*, 138 S. Ct. at 1355.

Faced with this legion of statutes explicitly requiring issue exhaustion, the government can offer only that "Congress * * * is free to use different language across different statutes to achieve the same effect." Gov't Br. 35. But that's just it: The "language" in Section 1252(d)(1) *does not* "achieve" an issue-exhaustion rule in the first place.

Tellingly, the government identifies no case in which this Court has read statutory language like "exhaust[] * * * remedies" (8 U.S.C. § 1252(d)(1)) to really mean "exhaust remedies *and issues.*" To be sure, the government repeatedly points (at 28, 29, 30, 33, 35, 36, 38) to *Woodford*, implying that a statute codifying "the doctrine of exhaustion in administrative law" (*Woodford*, 548 U.S. at 93) necessarily requires issue exhaustion. But *Woodford* held only that the statute "codified" background rules surrounding *remedy* exhaustion—specifically, the rule that proper exhaustion of remedies requires following the agency's procedures for those remedies. See 548 U.S. at 90 ("Proper exhaustion demands compliance with the agency's deadlines and other critical procedural rules."). The Court explicitly did *not* read an issue-exhaustion

requirement into the statute. Quite to the contrary, the Court distinguished *Sims*, upon which we rely, as "concern[ing] [the] different question[]" of "issue exhaustion." *Id.* at 91 n.2.

2. Additionally, the government's position would flip the Court's settled precedent on its head.

This Court has repeatedly explained that "requirements of administrative issue exhaustion are largely creatures of statute." *Sims*, 530 U.S. at 107; see also *Carr*, 141 S. Ct. at 1358. In making this point, the Court has drawn from the same explicit issue-exhaustion statutes upon which we rely. See, *e.g.*, *Sims*, 530 U.S. at 107-108 (collecting examples of explicit statutory language); *Carr*, 141 S. Ct. at 1358 (citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 & n.6 (1952), which collects explicit issue-exhaustion statutes).

"[I]n the absence" of an express issue exhaustion provision (*Sims*, 530 U.S. at 108), "*courts* decide" whether "to impose a *judicially created* issue-exhaustion requirement" "based on 'an analogy to the rule that appellate courts will not consider arguments not raised before trial courts'" (*Carr*, 141 S. Ct. at 1358 (emphases added)). See also *Sims*, 530 U.S. at 109 (similar).

Sims and *Carr* thus establish a two-step inquiry. *First*, the Court determines whether the statute expressly requires issue exhaustion. *Carr*, 141 S. Ct. at 1358. *Second*, if it does not and is instead silent, the Court considers whether to require non-statutory, "judicially created issue-exhaustion" by examining the "adversarial" or "inquisitorial" character of the underlying administrative proceedings. *Ibid*.

The distinction is important because, as this Court has explained, judge-made issue exhaustion

cannot pose a jurisdictional bar. *Sims*, 106 n.1 (concluding that "the Fifth Circuit erred in treating" "a court-imposed issue-exhaustion requirement * * * as jurisdictional"). Rather, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick* v. *Ryan*, 540 U.S. 433, 452 (2004); see also, *e.g.*, *Hamer* v. *Neighborhood Hous. Serv. of Chi.*, 138 S. Ct. 13, 17 (2017) (describing "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute").[6]

The government, however, reasons that because BIA procedure is sufficiently adversarial, *Congress* must have intended to impose issue exhaustion when what it actually said was remedy exhaustion. See Gov't Br. 30-31, 34. Not only does that atextual approach "read into [the] statute[] words that aren't there" (*Romag Fasteners, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020)), it would invert the analytical approach established by *Sims* and *Carr*. Under those cases, the adversariness inquiry is a backstop to supply judge-made issue exhaustion in the absence of a statutory requirement; it is not a tool to read issue

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[6] The government also identifies regulations that it says require issue exhaustion, but pointedly does not argue that these regulations are themselves a basis for affirmance, instead asserting only that the regulations are relevant to what "Congress codified" in Section 1252(d)(1). Gov't Br. 30-31. And rightly so, because any such regulatory requirement cannot be jurisdictional, since similar separation-of-powers concerns preclude a reading that would empower an agency to unilaterally restrict federal-court jurisdiction. See, *e.g.*, *Kucana*, 558 U.S. at 237; *Carlyle Towers Condo. Ass'n, Inc.* v. *FDIC*, 170 F.3d 301, 310 (2d Cir. 1999) ("[I]t is axiomatic that agencies can neither grant nor curtail federal court jurisdiction."); Pet'r Br. 28-29. While the government points (at 29-30) to regulatory exhaustion procedures in the PLRA context, the government elsewhere (at 24) acknowledges that this provision is nonjurisdictional.

exhaustion into a statute that is "silent" on its face. *Carr*, 141 S. Ct. at 1358. The government's effort to instead insert the adversariness analysis into the process of statutory interpretation, thereby transforming a nonjurisdictional requirement into a jurisdictional one, is baseless sleight-of-hand.

B. The government offers little beyond this misguided attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Reg. Grp*. v. *EPA*, 573 U.S. 302, 328 (2014).

The government discounts (at 34) our reliance on *Sims*'s warning not to conflate issue and remedy exhaustion, because of the Court's agreement that issue exhaustion applies "in most cases" (*ibid.*) (quoting *Sims*, 530 U.S. at 112 (O'Connor, J., concurring)). But that is non-responsive; *Sims* makes clear that this "general rule" arises from a combination of potentially jurisdictional statutory provisions and nonjurisdictional "court-imposed issue-exhaustion." *Sims*, 530 U.S. at 106 n.1, 108. We do not here resist that issue-exhaustion principles may generally apply to BIA proceedings. Our point is that, if issue exhaustion *does* apply, it does not derive from the statute, and therefore cannot be jurisdictional. See Pet'r Br. 31-32.

The government also points (at 31-33) to logistical concerns. While these may be valid reasons to apply judge-made issue exhaustion, as a matter of statutory interpretation they "cannot overcome the force of the plain text," which expressly invokes only one of two distinct exhaustion doctrines. *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 460 (2012).

Finally, the government identifies (at 33-34 & n.9) circuit decisions that, it says, "have determined that Section 1252(d)(1) imposes an issue-exhaustion requirement." But most of these cases rely on doctrine

predating this Court's express rejection, in *Sims* and subsequent cases, of the notion "that an issue-exhaustion requirement" is a necessary "'corollary' of any requirement of exhaustion of remedies." *Sims*, 530 U.S. at 107; see also *Carr*, 141 S. Ct. at 1358 n.2 (similar). The circuit cases thus fail to grapple with the fundamental defect in the government's argument: The statute says nothing whatsoever about issue (as opposed to remedy) exhaustion.[7]

C. Finally, Congress has not "clearly stated" that issue exhaustion is required in the first place, much less that this unwritten requirement imposes a jurisdictional bar. *Boechler*, 142 S. Ct. at 1497; see Pet'r Br. 30-31.

The government would have this Court hold that Congress meant issue exhaustion when it said remedy exhaustion, *and* that Congress meant that requirement to be jurisdictional when it said nothing about jurisdiction. As discussed above, those atextual interpretations are wrong to begin with—but it is beyond the pale for the government to suggest that they are so "clearly" right that no other interpretation is even "plausible." *Boechler*, 142 S. Ct. at 1498.

III. A MOTION TO RECONSIDER IS NOT A REMEDY "AVAILABLE AS OF RIGHT."

Petitioner also prevails for one final reason: Section 1252(d)(1) specifies the remedies a noncitizen must exhaust: those remedies that are "available as of right." Pet'r Br. 35-42. Because a motion to reconsider

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[7] By contrast, the Second Circuit's opinion in *Zhong* v. *U.S. Dep't of Justice*, 480 F.3d 104, 117-122 (2d Cir. 2007), engages with these issues in detail and concludes that Section 1252(d)(1) does not require issue exhaustion, meaning that issue exhaustion in the Board context is judge-made, and therefore waivable.

is not a remedy "available as of right"—as confirmed by regulation, Board precedent, and the government's own admission—a noncitizen need not file such a motion to properly exhaust. See 8 C.F.R. § 1003.2(a); *Matter of O-S-G-,* 24 I. & N. Dec. at 57; BIO 16. The contrary holding below was error.

A. The government agrees with us in one crucial respect: "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." Gov't 36. Of course this is correct; any contrary construction would yield absurdity. Pet'r Br. 43-44. As the government recognizes, a holding otherwise "would be inconsistent with the INA's provisions requiring that a motion to consider and a petition for review be filed on the same timeline." Gov't Br. 37; see also Pet'r Br. 41-42 (similar).

The problem for the government, however, is that this concession is fatal to its position. If the government is right in claiming (at 38) that a motion to reconsider *is* a remedy "available as of right," then the net result would be that *every* noncitizen would have to exhaust that remedy before turning to court. Because the government's position is irreconcilable with its own conception of how the statute must operate, its construction cannot be correct.

The government offers not one iota of text-based argument to the contrary. It never explains how a motion to reconsider sometimes qualifies as a remedy "available as of right," and sometimes not. Rather, its textual arguments (at 38-40) would apply indiscriminately to all motions to reconsider, regardless of whether the noncitizen seeks to raise an assertedly "new" argument.

Rather than parse the text, the government lays out (at 36-38) an exhaustion regime it thinks would make sense based on first principles. But that is not statutory interpretation; it is a naked attempt to "rewrite clear statutory terms to suit [the government's] own sense of how the statute should operate." *Utility Air Reg. Grp.*, 573 U.S. at 328; see Pet'r Br. 40.

B. The government's textual construction is also wrong. It first offers that motions to reconsider "are capable of use 'as of right'" because "the INA expressly gives a noncitizen the right to 'file one.'" Gov't Br. 38. We have already explained why that is incorrect (see Pet'r Br. 38-39): The right to file a motion does not make the remedy available "as of right." To take just one example, litigants have a statutory right to file a certiorari petition (28 U.S.C. § 1254), but this Court's rules make clear that "[r]eview on a writ of certiorari is not a matter of right." S. Ct. R. 10. The government does not respond.

Nor does our position "prove[] too much." Gov't Br. 40. The government claims that, under our rule, direct appeals to the Board would not be "as of right" because such appeals can be dismissed for violation of Board procedures. *Ibid.* But dismissal for procedural noncompliance is a familiar feature of many remedies that undoubtedly *are* available "as of right": For example, the Federal Rules of Appellate Procedure explicitly recognize that an "[a]ppeal as of [r]ight" must be dismissed if the notice of appeal is not "timely," and other procedural "failure[s]" may also be "ground[s] * * * for * * * dismissing the appeal." Fed. R. App. P. 3(a)(2). "Intervention of [r]ight" similarly requires a "timely motion." Fed. R. Civ. P. 24(a). Yet these remedies are, by definition, available as of right, and the court must rule on their merits if they are properly invoked.

Next, the government argues that—despite the Board's regulation, its own precedent, and the government's earlier admission (BIO 16)—motions to reconsider are not really discretionary. Gov't Br. 40-41. The government suggests that reading the regulation providing that "[t]he decision to grant or deny a motion to * * * reconsider is within the discretion of the Board" (8 C.F.R. § 1003.2(a)) according to its text is "in tension" with the statutory authorization, adopted as part of IIRIRA, to file such motions. Gov't Br. 40; see 8 U.S.C. § 1229a(c)(6)(A). But the Court has already rejected this exact argument with respect to motions to reopen: "From the Legislature's silence on the discretion of the Attorney General (or his delegate, the Board) over reopening motions, we take it that Congress left the matter where it was pre-IIRIRA: The BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen.'" *Kucana*, 558 U.S. at 250.

The government also looks to *Kucana* for support, claiming that the Court there "reject[ed] the assertion that the same INA regulation was sufficient to render a Board decision to reopen 'discretionary' and therefore unreviewable under Section 1252(a)(2)(B)." Gov't Br. 40. But the critical fact about *Kucana* goes unmentioned by the government: Section 1252(a)(2)(B) "precludes judicial review only when the statute itself specifies the discretionary character of the Attorney General's authority," not when regulations do so. *Kucana*, 558 U.S. at 244-245; see *id.* at 248 (motions to reopen are "specified as discretionary by regulation"). That is, *Kucana* recognized that motions to reopen *are* discretionary, but held that they are outside the Section 1252(a)(2)(B) jurisdictional bar because they are made discretionary by regulation rather than by

statute. The same reasoning applies to motions to reconsider.[8]

Finally, and ironically, the government dismisses our demonstration of the practical difficulties arising from its position (see Pet'r Br. 41-47) by quoting this Court's admonition that "practical considerations * * * do not justify departing from the statute's clear text." Gov't Br. 41. That contention is rather remarkable, as it is *the government* whose arguments hardly even reference the statutory text. By contrast, our reading is firmly rooted in the words Congress enacted; it is thus appropriate to consider practical considerations as confirmation for our text-based construction.

CONCLUSION

The Court should reverse the judgment below.

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[8] A discretionary remedy remains discretionary even if its denial may be reviewed for abuse of discretion. Cf. Gov't Br. 41 n.11. For example, that appellate courts may review the denial of a request for permissive intervention does not make the remedy requested one available "as of right." See *OOGC Am., LLC* v. *Chesapeake Exploration, LLC*, 975 F.3d 449, 454 (5th Cir. 2020) ("We review a district court's denial of permissive intervention for clear abuse of discretion.").

Indeed, courts may sustain the Board's denial of a reconsideration motion without even inquiring whether the original Board decision was correct. See, *e.g.*, *Boudaguian* v. *Ashcroft*, 376 F.3d 825, 828 (8th Cir. 2004) (declining "to consider whether the BIA's initial order was correct in deciding whether the agency's denial of a motion to reconsider was an abuse of discretion."). This means that a noncitizen could *correctly* identify an error in the Board's decision through a motion to reconsider yet receive no relief from the court of appeals on abuse-of-discretion review.

Respectfully submitted.

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