No. 24-12

In the Supreme Court of the United States

WENDY CAROLINA MIGUEL-PEÑA AND BNRM,

Petitioners,

v.

MERRICK B. GARLAND,
UNITED STATES ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition demonstrated that review is warranted to resolve the disarray among the circuit courts on a pressing issue of administrative law—the standard for assessing whether a noncitizen has properly exhausted a legal argument before the agency in immigration proceedings. The circuit courts are intractably divided. Finding itself in the minority, the Tenth Circuit has taken an excessively strict approach that is inconsistent with principles of administrative exhaustion and this Court's precedents. It applied that restrictive test here to hold that petitioners—who had identified consistent deficiencies with their notice to appear at every stage—failed to exhaust their critical argument on appeal simply because of the labels they attached to the government's plain errors. And the court did all this *sua sponte*, in the face of the government's waiver. Only this Court may resolve the division of authority.

The government offers no compelling basis to resist review. Although it charts a wide array of approaches taken by the lower courts, it is undeniable that petitioners' claims would certainly have been deemed exhausted in at least some circuits—especially the Ninth. The government's disagreement on the merits is precisely what the Court should grant review to resolve—but, in any event, the government's merits position is mistaken. Finally, the government's vehicle contention—that petitioners might lose on the merits—is incorrect.

Further review is warranted to resolve a question of enormous practical importance for the tens of thousands of noncitizens who navigate this bureaucratic maze each year.

1. Because petitioners' claims would have been found exhausted in other circuits, this case implicates a clear circuit conflict regarding the governing standard.

The conflict with the Ninth Circuit is apparent. The Ninth Circuit's most recent decision addressing the issue, *Suate-Orellana* v. *Garland*, 101 F.4th 624, 629 (9th Cir. 2024), confirms as much. There, the petitioner "argued before the IJ that the NTA was statutorily deficient and that, *as a result*, the IJ lacked jurisdiction;" that argument "exhausted her claim that her NTA was statutorily deficient" for claims-processing purposes as well. The court explained that, by presenting the need for dismissal as a consequence of the statutory deficiency before the IJ *and* the BIA, the petitioner gave the agency "an adequate opportunity to pass on the issue." *Id.* (quoting *Arizmendi-Medina* v. *Garland*, 69 F.4th 1043, 1051 (9th Cir. 2023)).

The briefing in this case is a near identical match to the Ninth Circuit's description in *Suate-Orellana*. Before the IJ, petitioners identified the statutory and regulatory requirements and argued that "the documents filed with this Court as the charging documents in the instant matter * * * do not comply with the statutory mandate found in 8 U.S.C. § 1229(a)(1)." C.A. A.R. 787. They further argued that, because the proceedings were not "properly initiated," "jurisdiction does not adhere." C.A. A.R. 791. And before the BIA, Petitioners maintained that the NTAs were missing "the time and date of the hearing," which are "statutory and regulatory requirements that the IJ ignored when he denied the Motion to Terminate." C.A. A.R. 019-020. They then argued that remand or dismissal were required because "these missing elements are

fundamental to constitutional due process." C.A. A.R. 020. Just as in *Suate-Orellana*, petitioners "clearly argued" that their NTAs were "not a notice to appear" under the statute and regulations. 101 F.4th at 630. The Ninth Circuit, accordingly, would hold that petitioners here "exhausted [their] argument" that their NTAs were "statutorily deficient." *Ibid.*

In arguing to the contrary, the government (at 17) asserts that petitioners here made an argument that "sounded exclusively in jurisdiction." But that is not accurate, so far as the Ninth Circuit is concerned. As the record reflects, petitioners argued that the NTA in their case failed to satisfy statutory and regulatory standards and *thus* dismissal was necessary—precisely what was deemed sufficient to constitute exhaustion in *Suate-Orellana*.

The earlier-decided *Umana-Escobar* v. *Garland*, 69 F.4th 544 (9th Cir. 2023), on which the government relies, is not to the contrary. There, the argument before the BIA "sounded *exclusively* in jurisdiction" because the petitioner had not raised the NTA deficiencies before the IJ—and so had forfeited any nonjurisdictional components of his argument. *Id.* at 550. That is quite unlike the circumstances here, where petitioners have consistently identified the issues with their NTAs and thus do not need to rely only on the jurisdictional aspects of their arguments for issue preservation.

This case would be governed by *Suate-Orellana*—and petitioners' claims would proceed to the merits.

The government next notes that the Third and Eleventh Circuits have rejected arguments along the lines of Petitioners' below. BIO 16-18 (citing *Farah* v. *U.S. Att'y Gen.*, 12 F.4th 1312 (11th Cir. 2021) and

Hernandez-Chavez v. *Att'y Gen.*, 843 F. App'x 423 (3d Cir. 2021)). *Hernandez-Chavez* is, of course, unpublished—and the government has not identified any precedential case consistent with the Third Circuit's "liberal" exhaustion policy. 843 F. App'x at 425.[1] As for the Eleventh Circuit, the government cannot disregard that the governing standard there—unlike the Tenth Circuit—"does not require a petitioner to 'use precise legal terminology.'" *Indrawati* v. *U.S. Atty. Gen.*, 779 F.3d 1284, 1297 (11th Cir. 2015).

The disarray in the lower courts over the governing standard is producing divergent results.

2. The conflict among the circuits is reason enough to grant review: Regardless whether the court below erred as to the exhaustion standard, administration of the Nation's immigration laws demands nationwide uniformity, so noncitizens are not ensnared by bureaucratic labyrinths. But review is especially warranted because the decision below is deeply flawed—and the government cannot rehabilitate it.

To start with, the government cannot deny that issue exhaustion in the immigration context is judicially imposed; it is not a creature of statute. See Pet. 15-17. This has meaningful implications, in that judicially-adopted exhaustion requirements are far less strict than their statutory counterparts. As the government maintains, the functional test focuses on whether a petitioner has presented the agency with "an opportunity to consider" and "rul[e]" on their

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[1] *Hernandez-Chavez* also predates this Court's decision in *Santos-Zacaria* and relies on the Third Circuit's now-reversed precedent holding that "exhaustion before the BIA .* * * is a jurisdictional prerequisite." *Id.* at 426 n.6.

claim. *Unemployment Comp. Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946).

Effectuating this judicial interest does not rest on *identicality* of argument below. Rather, the question turns on whether the agency had awareness of the issue that animates to petitioner's claim. Here, there is no question that the BIA had precise awareness of the issue—the defective NTAs. Thus, the agency *was* provided "the opportunity to resolve a controversy or correct its own errors before judicial intervention." *Zara* v. *Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004), *abrogated on other grounds by Santos-Zacaria* v. *Garland*, 143 S. Ct. 1103 (2023); *see Bonhometre* v. *Gonzales*, 414 F.3d 442, 447 (3d Cir. 2005) (drawing this standard from *Zara*).

No statute, precedent, or other authority suggests, by contrast, the rigidity of the lower court's decision—that a noncitizen "must present the *same specific legal theory* to the BIA before he or she may advance it in court." Pet. App. 11a. The best the government can do (at 13) is attempt to ground it in the hoary principle that a "reviewing court" should not "usurp[] the agency's function." *Aragon*, 329 U.S. at 155. But when a petitioner argues to an agency that the NTA defects warrant relief—and then argues before a court that those same NTA defects warrant relief—there is surely no usurpation of the agency's function. Here, the agency had every opportunity to grant relief on this issue—it simply failed to (in violation of its own precedent), which is why appellate review is so critical. *See Matter of Fernandes*, 28 I.&N. Dec. 605 (BIA Aug. 4, 2022).

3. The government last claims (at 18-20) that this case presents a poor vehicle because petitioners might

lose on the merits of their challenge to the adequacy of the NTAs. The government relies on the BIA's regulations, which reduce the statutory requirements for NTAs to an option the agency must follow "where practicable." BIO at 18 (quoting 8 C.F.R. § 1003.18(b)). But the government fails to engage with petitioners' straightforward, *statutory* textual argument: "written notice * * * *shall* be given" containing enumerated details, including "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1), (a)(1)(G)(i) (emphasis added). The BIA cannot reduce this unambiguous statutory requirement to a mere precatory recommendation that must be followed only at the agency's convenience. *Util. Air Regul. Group* v. *EPA*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Rather than wrestle with the clear statutory text, the government identifies (at 19) that certain circuit courts have rejected the argument that deficiencies in the NTA require dismissals in an immigration case. But many of the government's cases upheld BIA's NTA regulations under a deferential standard of review no longer valid after this Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). See, *e.g.*, *Santos-Santos* v. *Barr*, 917 F.3d 486, 491 (6th Cir. 2019) ("We * * * 'accord a great deal of deference to the Attorney General's and the [Board]'s permissible constructions of the statute which they administer.") (alteration in original) (quoting *Soumah* v. *Holder*, 403 F. App'x 999, 1001 (6th Cir. 2010)); *Goncalves Pontes* v. *Barr*, 938 F.3d 1, 3 (1st Cir. 2019). Tellingly, *none* of the government's cases postdates *Loper Bright*.

Moreover, several of the government's cases rejected only the notion that a defective NTA deprives the IJ of *jurisdiction*—which says little about whether dismissal is required when admitted deficiencies are timely raised. See, *e.g.*, *Ali* v. *Barr*, 924 F.3d 983, 986 (6th Cir. 2019); *Karingithi* v. *Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019); *Nkomo* v. *Att'y Gen.*, 930 F.3d 129, 135 (3d Cir. 2019); *Banegas Gomez* v. *Barr*, 922 F.3d 101, 110-111 (2d Cir. 2019).

Regardless, the government cannot deny that the Seventh Circuit has reach the precise opposite result. *Ortiz-Santiago* v. *Barr*, 924 F.3d 956, 961-962 (7th Cir, 2019). And the Tenth Circuit has cited *Ortiz-Santiago* favorably, noting that "[a] failure to comply with the statute dictating the content of a Notice to Appear" "may be grounds for a dismissal of the case." *Martinez-Perez* v. *Barr*, 947 F.3d 1273, 1279 (10th Cir. 2020). That makes sense: Just a few years ago, this Court explained that "omission of time-and-place information is not * * * some trivial, ministerial defect." *Pereira* v. *Sessions*, 585 U.S. 198, 214 (2018). Rather, failing to "specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'" *Ibid.* (alteration in original).

The government has thus—at most—demonstrated that there is a circuit split on the question underlying the question presented. Although the Tenth Circuit has not yet addressed that question, *Martinez-Perez*, if anything, suggests that the court would view petitioners' claim favorably. This is certainly the sort of substantial question that warrants resolution on the merits. The government is thus flatly wrong in claiming that the nature of petitioners' arguments is

a vehicle defect with respect to the question presented.

* * *

Further review is warranted: Petitioners' claims would have been deemed exhausted by other circuits; the decision to the contrary below is wrong; and the underlying merits of petitioners' substantive claims are substantial. And that is especially so given the gravity of this issue. Thousands of administrative agency decisions from the BIA are appealed to Article III courts each year. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1105 (2018). These cases often involve claims where a noncitizen fears persecution or death if wrongfully returned to their home country. In these circumstances, ensuring that courts apply a consistent, nationwide standard for exhaustion of legal issues is essential—as noncitizens are often un- or under-represented, and thus clear procedural rules to navigate the bureaucratic agencies are imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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