

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LEON SANTOS-ZACARIA, AKA )  
LEON SANTOS-SACARIAS, )  
                                ) Petitioner, )  
                                ) v. ) No. 21-1436  
MERRICK B. GARLAND, )  
ATTORNEY GENERAL, )  
                                ) Respondent. )  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-1436, San -- Santos-Zacaria versus Garland.

Mr. Hughes.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE PETITIONER

MR. HUGHES: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals erred in dismissing Petitioner's improper fact-finding claim in three separate ways.

First, unlike several of its neighboring provisions, the exhaustion requirement in 1252(d)(1) does not contain the requisite clear statement to render it jurisdictional.

Second, and regardless, any issue preservation requirement is not statutory and thus not jurisdictional, and that is especially so since the government's rule is not normal issue preservation, where issues must be raised before a decision, but, rather, a super-strong rule where a litigant must, in some poorly

1 defined category of cases, request  
2 post-decision reconsideration.

3 Third, because a motion to reconsider  
4 is not a remedy available as of right, a  
5 non-citizen does not need to file such a motion  
6 to properly exhaust.

7 I'd like to start with this last  
8 point, which has tremendous practical  
9 implications, and if we are right the  
10 Petitioner properly exhausted, she prevails  
11 regardless of (d)(1)'s jurisdictional status.

12 The government correctly concedes that  
13 a non-citizen need not normally file a motion  
14 to reconsider. This should foreclose the  
15 government's position because the government  
16 has no textual basis to argue that motions to  
17 reconsider sometimes qualify as remedies  
18 available as of right and sometimes not.

19 As we have described, a motion to  
20 reconsider is plainly a discretionary remedy.

21 CHIEF JUSTICE ROBERTS: Well, is that  
22 -- how do you analyze it? You -- you have an  
23 absolute right to file a motion for  
24 reconsideration, right? It may be  
25 discretionary whether you're going to get

1 reconsideration or not. So how do you parse  
2 that? Where do you look to see if something is  
3 a matter of right? Is it being the -- the --  
4 the right to seek it or the right to have the  
5 court look at a particular thing? How do you  
6 --

7 MR. HUGHES: I think the term "as of  
8 right," Your Honor, is one that's been well  
9 defined in centuries of judicial practice as  
10 one where the -- the decisionmaker lacks  
11 discretion. And I'd point the Court to this  
12 Court's Rule 10, just as one place to begin,  
13 where the Court says review on a writ of  
14 certiorari is not a matter of right but of  
15 judicial discretion. And in the briefs, we  
16 cite several other examples, like appeals in  
17 the federal courts, Rules 3 and 4, that --

18 CHIEF JUSTICE ROBERTS: Well, but just  
19 to stop you there, you know, review on  
20 certiorari is not a matter of right. You may  
21 not get review. On the other hand, you do have  
22 an absolute right to file a petition for  
23 certiorari.

24 MR. HUGHES: And as of --

25 CHIEF JUSTICE ROBERTS: So I'm just

1 saying, in one of those situations, where do  
2 you look to see if there's -- where's the  
3 right? Is it in the actual decision of the  
4 court, or is it in the right to petition the  
5 court to -- to afford such consideration?

6 MR. HUGHES: So I think the  
7 distinction is whether or not there's that  
8 layer of discretion because that's what "as of  
9 right" means as a technical term. And I think  
10 it has to mean that in this context, or else  
11 Congress's inclusion of the phrase "as of  
12 right" doesn't do any effective work in the  
13 context of this statute.

14 Look to the examples the government  
15 points to as things that it calls  
16 discretionary. That's cancellation of removal,  
17 adjustment of status, those sorts of things.  
18 The government says those are discretionary.  
19 But note, if a non-citizen files a request for  
20 one of those things, they have a right to at  
21 least have it considered in the same way one  
22 would have a right to -- to file the  
23 reconsideration motion.

24 But nobody, including the government,  
25 in those other contexts thinks that that

1 renders the thing that's being requested the  
2 kind of remedy that would be fairly described  
3 in law as one as of right.

4 So, again, if it's just the right to  
5 file, then that just effectively negates this  
6 limitation that Congress expressly put into  
7 (d)(1).

8 JUSTICE BARRETT: Why is --

9 JUSTICE KAVANAUGH: Mr. --

10 JUSTICE BARRETT: -- why is -- what is  
11 the remedy here? I guess I would have thought  
12 of an appellate remedy as, you know, vacatur or  
13 reversal, that kind of thing. And I think, you  
14 know, I -- I can see where you're going with  
15 "as of right." When we think about the  
16 remedy -- and this is a problem, I think, on  
17 the government's side too -- why would the  
18 remedy either be the right to file a motion or  
19 the review that you obtain? Neither one of  
20 those really seems like a remedy to me.

21 MR. HUGHES: Well, I think, in the  
22 context of exhaustion provisions, the notion of  
23 a remedy is usually considered what is -- what  
24 is something that is capable of being used, so  
25 that -- that's the term "available remedies"



1 that the courts looked at in the Prison  
2 Litigation Reform Act, and it's capable of  
3 being used for getting relief for the --  
4 whatever the litigant's position is.

5 So one -- something that's a remedy is  
6 the kind of administrative mechanism that one  
7 could use to get some form of relief. And so  
8 that is why I think an appeal to the -- the --  
9 the BIA, for example, would be an available  
10 remedy that we would agree would be one that  
11 would qualify as something as of right.

12 JUSTICE BARRETT: Which really helps  
13 you, right? Because then, if it's just  
14 shorthand for the procedure that would allow  
15 someone to get relief, then it does seem more  
16 like it's the actual review and not the filing  
17 of the motion.

18 MR. HUGHES: I -- I think -- yes, Your  
19 Honor, I -- I agree with that. And, again, we  
20 don't say that a motion to reconsider could not  
21 be a remedy. It's just not a remedy that is  
22 available as of right. It's a quintessential  
23 discretionary remedy. And to give purpose to  
24 Congress's limitation to discretion -- or to  
25 remedies as of right, we think that's exactly

1 the kind of category of thing that should be  
2 excluded.

3 JUSTICE KAVANAUGH: Can I ask you  
4 about the first issue, the question of whether  
5 it's jurisdictional? I read our cases to  
6 create a fundamental divide between statutes  
7 that speak to the court's authority and  
8 statutes that impose commands on litigants or  
9 prohibitions on litigants.

10 And this statute, at least on its  
11 face, speaks to the court, the court's power to  
12 review. So why isn't that enough in this  
13 particular case?

14 MR. HUGHES: Your Honor, I certainly  
15 think that's a relevant factor, but by no  
16 stretch do I think that's a sufficient factor.  
17 And let me offer some other examples.

18 So, in the context of Section 1252  
19 itself, we cite to provision (b)(2) in the  
20 briefs, where (b)(2) says, "The court of  
21 appeals shall review the proceeding on  
22 typewritten briefs." That's mandatory. It  
23 uses the word "shall." It's a direction at the  
24 court. It's saying what the court shall do,  
25 and it's in the context of review. It's --

1           JUSTICE KAVANAUGH: This -- this says  
2 "may review only if," not "if," "only if." And  
3 this provision in '96 carries forward a prior  
4 version of this language that this Court itself  
5 had referred to as jurisdictional.

6           And so I guess I'm still -- put aside  
7 the example you gave -- why shouldn't the  
8 divide -- and we referred in Fort Bend to the  
9 divide being does the provision speak to a  
10 court's authority as opposed to a party's  
11 procedural obligations, and this seems to speak  
12 to the court's authority because it says a  
13 court may review only if.

14           MR. HUGHES: Well, in -- in a few  
15 ways, a few answers, Your Honor. First, there  
16 are additional examples, habeas in Section  
17 2254(b) speaks to the courts' authority, the  
18 First Step Act speaks to courts' authority, but  
19 those have been found to be non-jurisdictional.  
20 I can explain that.

21           But, on the recodification point, Your  
22 Honor, there are two pretty essential points.  
23 First, I don't think it's fair to read Stone as  
24 having said the exhaustion principle was  
25 jurisdictional. Certainly, there's no express

1 holding that -- that would trigger a  
2 recodification provision -- or doctrine.

3 But, second, beyond that, in 1996,  
4 Congress did change the language. Now it  
5 didn't change the language enormously, but it  
6 changed the language. And I think this is  
7 important because, in 1996, in IIRIRA, as we  
8 point out, in 12 other places, when Congress  
9 wanted to strip --

10 JUSTICE KAVANAUGH: But I guess -- I'm  
11 sorry to interrupt --

12 MR. HUGHES: Yeah.

13 JUSTICE KAVANAUGH: -- but does this  
14 language speak to the courts' authority?

15 MR. HUGHES: It -- it directs actions  
16 courts take during review in the same way that  
17 (b)(2) does. I don't think, though, that  
18 necessarily means it is a limitation on the  
19 power of the court. At least that's not the  
20 only plausible understanding of the statute as  
21 a limitation on --

22 JUSTICE KAVANAUGH: Do you --

23 MR. HUGHES: -- the power of the  
24 court.

25 JUSTICE KAVANAUGH: -- do you think

1 Congress could make an exhaustion requirement  
2 jurisdictional without using the word  
3 "jurisdiction"?

4 MR. HUGHES: I think it would be  
5 exceedingly difficult for the -- for the court  
6 to do so because --

7 JUSTICE KAVANAUGH: And why -- why  
8 then do we have a special magic words  
9 requirement just for exhaustion requirements  
10 and not just follow the usual Fort Bend divide?

11 MR. HUGHES: So, Your Honor, I'm not  
12 suggesting there are some special magic words,  
13 but I think there are several factors that  
14 counsel here. One is the point of what  
15 Congress did in all the surrounding provisions.  
16 It had in this statute a special language when  
17 it wanted to. So I do think the magic words  
18 applies a bit differently in the context of --  
19 of this particular statute.

20 But, with exhaustion, especially in  
21 the context where it is an agency that is  
22 establishing the rules of exhaustion, it would  
23 be passing strange in our view that an agency  
24 is delegated the authority to establish rules  
25 that themselves then have jurisdictional

1 character that limit the -- the subject matter  
2 jurisdiction of federal courts.

3 We think --

4 JUSTICE ALITO: Mr. --

5 MR. HUGHES: -- if that's what  
6 Congress intended, it would need to say that  
7 expressly.

8 JUSTICE ALITO: Mr. Hughes, could you  
9 give me the example of how a provision -- an  
10 exhaustion provision would have to be worded to  
11 limit the court's jurisdiction without using  
12 the term "jurisdiction"?

13 MR. HUGHES: Your Honor, I don't think  
14 I have an example, but I do -- in this statute,  
15 when Congress wanted to speak in jurisdiction,  
16 in 12 other places, it used the phrase "no  
17 court shall have jurisdiction," and I think  
18 that's pretty statute-specific evidence that  
19 when Congress meant to use jurisdiction in this  
20 statute it had the -- the language at hand.

21 JUSTICE ALITO: So it really does seem  
22 like you're arguing for a magic words rule.  
23 And haven't we said that magic words are not  
24 required?

25 MR. HUGHES: Oh, certainly, Your

1 Honor. But I'm not talking about the -- the  
2 general abstract of what applies in every case.  
3 I'm talking about in IIRIRA, when Congress  
4 wrote this statute, it was fixated on what is  
5 going to be jurisdictional and what is not  
6 going to be jurisdictional. It had that  
7 language at hand, and it used in this -- in  
8 this statute very precise language.

9 JUSTICE ALITO: So, if all that we had  
10 before us were the language of the provision,  
11 would it be jurisdictional?

12 MR. HUGHES: Would -- if we knew we  
13 had --

14 JUSTICE ALITO: We have a provision  
15 that is worded exactly like this provision, but  
16 we don't have (d)(2). We don't have any of  
17 your other arguments. We just have the  
18 language. Would that be a jurisdictional  
19 provision?

20 MR. HUGHES: I -- I don't think it  
21 necessarily would, but in under -- undertaking  
22 the clear statement test, this Court says it  
23 looks to all of the traditional tools of  
24 statutory interpretation.

25 JUSTICE ALITO: Well, why would that

1 language not be sufficient?

2 MR. HUGHES: Well, Your Honor, I don't

3 --

4 JUSTICE ALITO: Because it doesn't  
5 include the word "jurisdiction"?

6 MR. HUGHES: Well, in -- in this  
7 specific context, that's right, but also, in  
8 describing the context of review, that --  
9 there's ambiguity in that language because  
10 review, it can mean in certain contexts an  
11 equivalence of -- of -- of subject matter  
12 jurisdiction.

13 JUSTICE ALITO: If --

14 MR. HUGHES: But it can --

15 JUSTICE ALITO: Oh, I'm sorry, go  
16 ahead, finish.

17 MR. HUGHES: It -- it can also  
18 describe what it is a court is to do in the  
19 course of reviewing things for which it does  
20 have subject matter jurisdiction. So I do  
21 think there's inherent ambiguity there. But,  
22 again, we don't look at just this one issue.  
23 We look at all the traditional tools of  
24 interpretation.

25 And I think that shows that -- again,



1 my burden is not to say that our argument is  
2 the better one. The Court was quite clear in  
3 Boechler saying that's not the test. It's the  
4 government has to show their interpretation as  
5 jurisdictional is the only plausible argument  
6 for them to demonstrate that. And -- and,  
7 again, if we're wrong about this, it has the  
8 effect of delegating to agencies the ability to  
9 make rules that have jurisdictional character.

10 JUSTICE ALITO: All right. If we look  
11 at one of our own prior decisions handed down  
12 during the bad old days when the Court was not  
13 disciplined about the use of jurisdiction and a  
14 provision is described as jurisdictional, does  
15 it follow necessarily that that is -- that  
16 provision is jurisdictional?

17 MR. HUGHES: I don't think that it's  
18 necessarily the case, if a court did something  
19 that I think Arbaugh calls a drive-by after --

20 JUSTICE ALITO: No, it's not a  
21 drive-by. It's a -- it -- it's a pretty clear  
22 statement in the case describing this as  
23 jurisdictional, the issue, and -- and the Court  
24 says it's jurisdictional.

25 MR. HUGHES: Well, I think the Court

1 would have precedent to decide if it's going to  
2 adhere to a -- a -- a -- a -- a prior  
3 pronouncement of this Court or if there's a  
4 basis in -- in changed case law to revisit  
5 that, so I think that that normal process would  
6 apply.

7 But, if the Court has held that it's  
8 jurisdictional not just in a -- in a passing  
9 statement but in a reasoned holding, that --  
10 that's going to be binding too.

11 JUSTICE SOTOMAYOR: Well, we did --

12 JUSTICE ALITO: Well, I'm just  
13 wondering -- if I could --

14 JUSTICE SOTOMAYOR: Sorry.

15 JUSTICE ALITO: I'm sorry, one -- one  
16 more follow-up. Then I'm done.

17 If -- if that's so, then why would you  
18 even concede that a statute passed by Congress  
19 in the days when the Court and Congress were  
20 using the term "jurisdiction" in some instances  
21 to talk about claims processing rules, why  
22 would that even be sufficient?

23 MR. HUGHES: Well, I -- I -- I'm not  
24 sure I -- I need to say that the argument goes  
25 that far. I think it's well understood that in

1 this statute in IIRIRA, Congress used  
2 "jurisdiction," you know, in a particular way,  
3 that Congress did, in fact, have  
4 jurisdiction-stripping in mind in 1996.

5 And in this statute, Congress was not  
6 using it in some loose sense of the word. It  
7 knew what it was doing in the statute. It just  
8 used the jurisdictional language when it wanted  
9 to here.

10 JUSTICE KAGAN: The -- the government  
11 says that this statute uses the words inter --  
12 the words "jurisdiction" and "judicial review"  
13 interchangeably. You can see that in  
14 1252(a)(2) where it talks about matters not  
15 subject to judicial review, and then there  
16 follow a whole list of provisions saying that  
17 no court shall have jurisdiction.

18 So, if that's true, if there's  
19 interchangeability between "jurisdiction" and  
20 "judicial review" in this statute, doesn't your  
21 argument on the meaning of (d) become much  
22 weaker?

23 MR. HUGHES: No, Your Honor, I don't  
24 think so. The government rests on (a)(5) for  
25 that sort of interchangeability argument, and

1 to the extent they think there is that sort of  
2 hypertechnical argument, it fails because  
3 (a)(5) references a broader phrase, "judicial  
4 review."

5 And (d)(1) notably doesn't actually  
6 use the term "judicial review." It uses the  
7 term "review." And I think that's distinct  
8 because "review," again, can mean the concept  
9 of jurisdiction, or it can mean the act of what  
10 a court does in the context of when it is  
11 reviewing something over which it does have  
12 jurisdiction.

13 But, again, even if the Court does not  
14 agree with us on (d)(1) -- and I think it  
15 should for -- for the reasons we've said --  
16 there is no stretch in which this issue  
17 preservation principle that the government  
18 suggests itself has jurisdictional character.

19 And I think that's a -- a completely  
20 separate and independent concern with the  
21 government's position because, again, issue  
22 preservation, as this Court in -- in Carr and  
23 Sims and a series of cases has said, is a  
24 doctrine that is distinct from remedy  
25 exhaustion.

1           And we don't think there's any basis  
2 to find that there has been a clear statement  
3 in this statute to say issue preservation takes  
4 on jurisdictional character. The statute's  
5 quite clear, it says remedy exhaustion, not  
6 issue exhaustion.

7           And, beyond that, the kind of issue  
8 exhaustion, issue preservation the government  
9 is pressing is not sort of the normal  
10 run-of-the-mill issue preservation that we  
11 think of in federal courts.

12           Normal issue preservation is district  
13 court decides an issue. You go to the court of  
14 appeals. In your brief, you have to preserve  
15 any arguments you wish for the court of appeal  
16 on pain of forfeiture or waiver.

17           But that's not the principle that --  
18 that's doing -- that the government thinks is  
19 doing the work here. They think there is a --  
20 a sort of doctrine of preservation on steroids  
21 where, after the agency decides the case, one  
22 has to go back to the agency to ask for  
23 reconsideration.

24           That's not how things normally --

25           JUSTICE KAVANAUGH: Well, it -- it's

1 limit -- more limited than that. It's where  
2 the agency decision itself, the BIA decision  
3 itself, introduces a new err -- error that  
4 couldn't previously have been known.

5 In those circumstances, they're saying  
6 -- I'm not saying I agree or disagree with this  
7 -- but they're saying more narrowly, in those  
8 circumstances, you have to go back for the  
9 motion to reconsider.

10 MR. HUGHES: Well, I -- I want to talk  
11 about the -- the -- what Congress did here and  
12 why I don't think that's a proper way to read  
13 the statute, but that rule, I don't think, Your  
14 Honor, is one that is especially administrable.

15 As we point out how the Fifth Circuit  
16 has dealt with this, they have found that the  
17 most basic kind of administrative error, the  
18 agency didn't give reasons for its decision, is  
19 the kind of error that one has to present back  
20 to the agency on a reconsideration motion.

21 I think that is taking this doctrine  
22 quite far to say, if the agency just gives no  
23 reason that you can't go up to the court of  
24 appeals, you have to go back to the agency.  
25 I -- I -- I don't think that's a proper rule.

1           But, when Congress wants to have a  
2           reconsideration mechanism, there are a few ways  
3           that it does it. We -- we -- we acknowledge in  
4           the briefs, in certain statutory schemes,  
5           Congress has chosen to do so. For example, we  
6           point to the FERC scheme, 21 U.S.C. Section  
7           825(1).

8           And the way that works in FERC and  
9           other agencies is the agency issues a decision,  
10          and then, after the agency issues a decision,  
11          the litigant who's disappointed has to go back  
12          to the agency and say the agency got these  
13          series of issues wrong, and then their appeal  
14          is limited to the nature of those issues  
15          that -- that have been presented.

16          But, when Congress does that, it does  
17          so with very express language that's nothing  
18          like what we have here. But, importantly,  
19          struck -- structurally, it creates a tolling  
20          process whereby judicial review does not begin  
21          until that process is complete.

22          The way the government envisions this  
23          statute is a litigant would have to first file  
24          a petition for review of the final order of  
25          removal, but, at the same time, the government

1 believes, while you're filing that petition for  
2 review to have a timely petition for review,  
3 your claims are simultaneously unexhausted and  
4 you must at -- at -- at that same time go back  
5 to the -- the Board and ask for a motion to  
6 reconsider.

7           And I think that position is  
8 compounded by the fact that the government  
9 believes this is a jurisdictional rule. So  
10 take, for example, the only issue you're  
11 raising in your petition for review is the  
12 argument that the government thinks is  
13 unexhausted. The government is setting up a  
14 scenario where a litigant has to file a  
15 petition for review that it itself believes the  
16 court of appeals at that moment lacks  
17 jurisdiction over because it's unexhausted and  
18 then simultaneously exhausts that claim before  
19 the agency.

20           JUSTICE GORSUCH: Mr. Hughes, it's  
21 certainly an interesting process that's being  
22 posited, and one wonders how many circles of  
23 review would be required if an agency's  
24 explanation continued to be deficient. Could  
25 it be more than one? Interesting questions.



1           But I just -- before you sat down, I  
2           wanted to give you a chance to respond to the  
3           government's suggestion that even if it loses  
4           on everything else, we should remand the case  
5           to allow the court of appeals to have the  
6           opportunity sua sponte to raise some objections  
7           of its own. And I know the government lawyer  
8           before the Fifth Circuit didn't raise any of  
9           these concerns and seemed to disavow them. I  
10          don't know whether that's waiver or forfeiture  
11          or what in your view, but I just wanted to give  
12          you a chance to -- to talk to us about that.

13                 MR. HUGHES: Thank you, Your Honor.

14                 So the -- the government's opposition  
15          brief at page 13, they acknowledged at the  
16          certiorari stage that waiver and forfeiture  
17          would apply in this case. I think that  
18          acknowledgment was -- was right then.

19                 Their suggestion that there should be  
20          a sua sponte ability of the lower courts to  
21          reconsider I -- I -- I just don't think is  
22          correct. And we point the Court to the  
23          Sineneng-Smith decision, where this Court said  
24          pretty clearly that the lower courts "should  
25          not sally forth each day looking for wrong" --

1 "wrongs to right." You know, we're talking  
2 about the government here. If the government  
3 wishes to press an exhaustion -- a failure to  
4 exhaust, they certainly have the -- the ability  
5 to do so. And, again, it was asked at oral  
6 argument and the government did not take the  
7 opportunity to press exhaustion.

8           And let me be clear, I think there's a  
9 substantive reason to think why it is  
10 government lawyers should, in fact, have this  
11 authority. When we're talking immigration  
12 cases, it's -- it's known that sometimes  
13 individuals are pro se or may not have, you  
14 know, every ounce of -- of -- of lawyering  
15 behind them, and it can well be appropriate to  
16 -- to determine in specific cases the  
17 government wishes to waive exhaustion in the  
18 interests of justice and public confidence in  
19 the immigration system.

20           JUSTICE JACKSON: Can I just ask you  
21 about whether or not we need to opine on the  
22 issue exhaustion versus remedy exhaustion if we  
23 agree with you about "as of right"?

24           MR. HUGHES: I don't think the Court  
25 would have to, Your Honor. If the Court agrees

1 with us that we're correct in the meaning of  
2 (d)(1) and that Petitioner here properly  
3 exhausted, then the Court need not reach the  
4 question of the jurisdictional status of these  
5 other issues.

6 I do think Petitioner prevails either  
7 if the Court agrees that (d)(1) is not  
8 jurisdictional at all or issue preservation  
9 isn't jurisdictional or, alternatively, if  
10 we're right about the meaning of the statute.  
11 So I -- I think the Court could resolve this  
12 case on -- on -- on a variety of those  
13 different grounds.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Thomas, anything?

17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: Is there -- is  
19 there any scenario you -- in which you see us  
20 addressing both questions? Assume we --

21 MR. HUGHES: Again, Your Honor, I  
22 think we wouldn't presuppose to suggest how the  
23 Court should resolve the case. We, I think,  
24 have three independent ways that we --

25 JUSTICE SOTOMAYOR: No, I know, and

1 they're each independent. I'm asking a  
2 different question.

3 Is there any way we reach both?

4 MR. HUGHES: Well, if the Court were  
5 to disagree with us on one, I think it would  
6 have to reach the other. Alternatively, if the  
7 Court agrees with us on -- on all of the  
8 points, I think it would be at the Court's  
9 discretion if it believes that bringing  
10 guidance to the system here would warrant  
11 resolving both the jurisdictional question and  
12 -- and the statutory question. So I -- I -- I  
13 think it would be, you know, at the -- at the  
14 Court's election, depending on how it wishes to  
15 resolve the issue.

16 JUSTICE SOTOMAYOR: I -- I have a very  
17 simple view. I know we've been trying hard to  
18 bring clarity to this area of jurisdiction or  
19 not. And you kept saying the plausibility  
20 argument. And you're right, because it's  
21 strange -- it's strange language, because it  
22 seems addressed to the court but on an issue  
23 where it's relying on the litigant to exhaust,  
24 which is very different than most  
25 jurisdictional cases that have to do with

1 subject matter classifications, correct? The  
2 court can't hear certain types of issues, and  
3 it has nothing to do with what the litigant  
4 does or doesn't do.

5 MR. HUGHES: That -- I -- I entirely  
6 agree, Your Honor. I think that's what this  
7 Court's Patchak case teaches, which is, if the  
8 restriction goes to something substantive about  
9 the nature of the claims, some substantive  
10 category, that context suggests it is more  
11 likely the Court's speaking of jurisdiction.

12 Rather, when Patchak gives exhaustion  
13 as a specific example and it goes through the  
14 procedure of how those claims are -- are to be  
15 addressed, that is at least a thumb on the  
16 scale towards thinking it's not a  
17 jurisdictional requirement.

18 JUSTICE SOTOMAYOR: So what you're  
19 basically saying, both of you could have good  
20 arguments, as you do, but, in that case, the  
21 tie is against jurisdiction.

22 MR. HUGHES: And, again, in this  
23 specific statute, when Congress wanted to speak  
24 about jurisdiction, it had the express language  
25 at hand. It used it a lot in the past --

1 JUSTICE SOTOMAYOR: It would have been  
2 very easy to do this one. The court has no  
3 jurisdiction to review, and (a) and (b) would  
4 remain exactly the same, correct?

5 MR. HUGHES: In provisions above and  
6 below, Congress did exactly that. It revised  
7 this language. It didn't use the same language  
8 it had used pre- --

9 JUSTICE SOTOMAYOR: And Stone did not  
10 speak about exhaustion. Stone talked about  
11 jurisdiction with respect to time limits,  
12 correct?

13 MR. HUGHES: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: So there is no  
15 holding by us that exhaustion is  
16 jurisdictional?

17 MR. HUGHES: Correct. We agree, Your  
18 Honor.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAVANAUGH: In the reply  
21 brief, you say that when a statute addresses a  
22 court's competence to adjudicate a particular  
23 category of cases, it may be -- indeed be  
24 jurisdictional, and then you discuss 2253,  
25 867(a), and 1447(d), and you say those are all

1 jurisdictional even though they don't use the  
2 word "jurisdiction," correct?

3 MR. HUGHES: Well, at the very least  
4 they are far more jurisdictional than what we  
5 -- we have here because they are going to the  
6 nature of the claim, whereas this statute is  
7 agnostic to the nature of the claim but,  
8 rather, goes to the procedure, whether the  
9 individual litigant used the proper procedure  
10 below.

11 JUSTICE KAVANAUGH: So do you think we  
12 should say in the interest of providing  
13 clarity, because I think, you know, this can be  
14 a huge waste of time that's unnecessary for the  
15 lower courts and doesn't put Congress on notice  
16 of what the state of play is, should we say  
17 something like exhaustion requirements are  
18 jurisdictional only if the word "jurisdiction"  
19 is in there?

20 That would be clear and provide better  
21 guidance than, you know, it could be, may not  
22 be, look at some other provisions, kind of  
23 throw it up in the air and see how it comes  
24 out, because that's just an invitation to a lot  
25 more lower court litigation which really serves

1 no purpose.

2 MR. HUGHES: I think there's no --  
3 would be no problem if the Court thought that  
4 that was an appropriate way to -- to approach  
5 exhaustion requirements because I do think  
6 exhaustion requirements, case after case  
7 repeatedly asserts they're not the sort of  
8 thing that is typically jurisdictional.

9 In this Court's decision in Ross v.  
10 Blake, for example, the Court went through  
11 fairly extensive analysis that lower courts  
12 might need to undertake in order to determine  
13 whether or not a particular remedy in that case  
14 was available.

15 That seems generally incompatible with  
16 the notion that this goes to a court's subject  
17 matter jurisdiction rather than to a claims  
18 processing rule.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett? No?

22 Justice Jackson?

23 JUSTICE JACKSON: Is there currently  
24 widespread confusion about whether or not  
25 exhaustion requirements are jurisdictional?



1           MR. HUGHES: Well, I think this  
2 statute shows that there is -- is fairly  
3 widespread confusion, Your Honor. Many of the  
4 lower courts' reliance on earlier holdings  
5 before this Court brought discipline to the  
6 notion of jurisdiction --

7           JUSTICE JACKSON: But, since the clear  
8 statement rule, have we ever found that an  
9 exhaustion requirement is jurisdictional?

10          MR. HUGHES: No, Your Honor, and we  
11 certainly don't think that the Court should do  
12 so here. So that -- I think the full tenor of  
13 this Court's cases are clear that an exhaustion  
14 rule is just incompatible with -- with it being  
15 jurisdictional.

16          JUSTICE JACKSON: Thank you.

17          CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19          Ms. Dubin.

20                    ORAL ARGUMENT OF YAIRA DUBIN  
21                    ON BEHALF OF THE RESPONDENT

22          MS. DUBIN: Mr. Chief Justice, and may  
23 it please the Court:

24                    The INA creates an adversarial scheme  
25 that authorizes judicial review only after

1 agency procedures are exhausted. That reflects  
2 Congress's judgment on how best to manage the  
3 high volume of immigration cases to achieve  
4 uniformity, efficiency, and fairness in an  
5 overburdened system.

6           Petitioner's arguments conflict with  
7 that judgment in two ways. First, Petitioner  
8 argues that her failure to exhaust is not a  
9 jurisdictional defect. But 1252(d)(1) imposes  
10 a direct limit on a court's power, providing  
11 that a court may review a final order of  
12 removal only if the alien exhausted all  
13 administrative remedies available as of right.  
14 That language speaks clearly to a court's  
15 authority, not simply to what a litigant must  
16 do. Congress need not use the word  
17 "jurisdiction," and there's no special rule for  
18 exhaustion requirements.

19           Critically, this Court has never held  
20 that a restriction like this one is not  
21 jurisdictional. Petitioner's contrary argument  
22 would upset Congress's judgment that appellate  
23 courts should review Board decisions, not  
24 adjudicate arguments in the first instance.

25           Second, Petitioner dilutes the

1 statutory exhaustion requirement. She does not  
2 seriously dispute that issue exhaustion is  
3 required at least by regulation. Yet, she  
4 draws on Social Security cases to say that the  
5 INA omits that critical obligation. But  
6 nothing in the Social Security Act even  
7 reference administrative exhaustion, and its  
8 scheme is inherently non-adversarial.

9 By contrast, the INA expressly  
10 requires administrative exhaustion in a highly  
11 adversarial system where non-citizens have long  
12 been required to identify errors for review.  
13 Petitioner can't explain why Congress would  
14 codify the doctrine of administrative  
15 exhaustion but leave out this essential  
16 requirement.

17 The Court should reject Petitioner's  
18 approach and hold that non-citizens cannot  
19 forego available agency procedures to raise  
20 issues in federal court in the first instance.  
21 Here, where the Board allegedly introduced a  
22 new error, that means filing a motion to  
23 reconsider.

24 Petitioner's fail to do -- failure to  
25 do so forecloses judicial review.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Can you give us an  
3 example of another provision where "as of  
4 right," the phrase "as of right," is used to  
5 describe a discretionary motion?

6 MS. DUBIN: I don't have an example of  
7 that, but I think what's important is that  
8 Petitioner's examples of "as of right" are, as  
9 the Chief Justice were saying, examples where  
10 you're talking about whether you're entitled to  
11 the relief at issue, whereas, in the exhaustion  
12 context, the relevant question is whether  
13 you're entitled to file for a particular remedy  
14 which has -- which is capable of use to obtain  
15 that relief. And that's what the Court said in  
16 *Ross versus Blake*.

17 So, in the exhaustion context in  
18 particular, what you want to know is whether  
19 the non-citizen has taken all opportunities to  
20 present the agency with her arguments.

21 I also just want to note that a motion  
22 to reconsider is not something that gives the  
23 agency unfettered discretion. It's reviewable  
24 for abuse of discretion, and if the agency, for  
25 instance, were to say that an impermissible

1 fact-finding claim is meritorious, but we just  
2 don't want to grant the motion, that would be  
3 an abuse of discretion.

4 JUSTICE JACKSON: I guess I don't  
5 understand, I'm sorry. You sort of seem to be  
6 distinguishing "as of right" in the exhaustion  
7 context, and I -- can you say again why you  
8 think that a situation in which the particular  
9 mechanism at issue is the motion for  
10 reconsideration that can be filed, it's  
11 available, but what does it mean to you when  
12 the statute says the particular mechanism has  
13 to be available as of right?

14 MS. DUBIN: It's a mechanism, it's a  
15 procedural mechanism that you have the right to  
16 file, and it's capable of giving you some  
17 relief. And so, for example --

18 JUSTICE JACKSON: Well, I don't think  
19 "as of right" is doing any work in that  
20 analysis. If -- if you file it and you have a  
21 right to file it, then it's available. But  
22 what does it mean for it to be available as of  
23 right?

24 I thought that meant that the  
25 recipient of it, the agency or the

1 administrative body, has no choice but to grant  
2 the motion, and by grant, I mean give you  
3 reconsideration. It's non-discretionary in  
4 terms of their reaction to it.

5 So lower court appeals are  
6 non-discretionary. You have a right to appeal.  
7 It's as of right. And the lower court has to  
8 review your appeal. By contrast, a cert  
9 petition is not as of right. You have the  
10 right to file it. We receive it. But we don't  
11 have to review it. That's discretionary.

12 So, if I'm right about that, am I  
13 using "as of right" in the -- in the  
14 appropriate way or the way you understand it or  
15 not?

16 MS. DUBIN: That's not the way we  
17 understand it --

18 JUSTICE JACKSON: Okay.

19 MS. DUBIN: -- in the statute, and I  
20 think, actually, the certiorari example is a  
21 good one because, when we say that certiorari  
22 is not available as of right, what we're not  
23 talking about is the right to file a petition  
24 for certiorari. What we're talking about is  
25 the right to review on certiorari.

1 JUSTICE JACKSON: And why isn't that  
2 exactly what we're talking about here?

3 MS. DUBIN: Because I don't think that  
4 should be the inquiry in an exhaustion  
5 requirement. We don't want to know whether, if  
6 you file it, you're entitled to relief. We  
7 want to know if you -- you're -- if you file  
8 it, you're entitled to have the agency consider  
9 your arguments. And that's what we want --  
10 that's what we want to have happen. That's the  
11 entire structure of this case.

12 JUSTICE JACKSON: No, no, no. But --  
13 but, if you're talking about a motion for  
14 reconsideration, it's the same. Your -- does  
15 the agency have to consider your arguments on  
16 reconsideration? If they do, then it's as of  
17 right.

18 Only we know in this context they  
19 don't, that you could -- you have a right to  
20 file it, but just like a cert petition, they  
21 can say we don't want to look at this motion  
22 for reconsideration and -- and that's all.

23 MS. DUBIN: I -- I think that's not  
24 correct, Your Honor. As -- as I mentioned  
25 earlier to Justice Thomas, I think that the

1 right understanding of how a motion to  
2 reconsider works is that if you have a  
3 meritorious claim and it's not blocked by other  
4 procedural defects, for instance, that you  
5 failed to raise it earlier when you should have  
6 and things like that, so you have an  
7 impermissible fact-finding claim and you  
8 brought it at the right time and for the right  
9 reasons and the agency nonetheless denies a  
10 review because they simply don't feel like  
11 granting it because they simply don't want to  
12 give you relief, that would be an abuse of  
13 discretion in this context.

14 JUSTICE KAGAN: If -- if -- if you're  
15 right about what "as of right" means, Ms.  
16 Dubin, then wouldn't there be an obligation to  
17 file in every case? But, in parts of your  
18 brief, you suggest that there's only an  
19 obligation to file when the BIA itself has  
20 introduced the error. I don't understand how  
21 the two parts of your position can coincide.

22 MS. DUBIN: Yes. And I think that  
23 comes -- that -- that you have our position  
24 correct, and I think that it comes from the  
25 exhaustion requirement, what it means to



1 exhaust.

2           The requirement that a litigant  
3 exhaust comes from administrative exhaustion,  
4 from well-settled principles, and what that  
5 requirement means is that you have to give the  
6 agency the chance to correct its own errors,  
7 but it doesn't require that you give the agency  
8 multiple chances to correct its own errors.

9           So that's what makes it such that a  
10 motion to reconsider is only available as of  
11 right when you haven't yet raised the argument  
12 before.

13           Another way, I think, to think of the  
14 same restriction --

15           JUSTICE KAGAN: I see how that makes  
16 sense. I just don't see how you get it from  
17 the text of the statute, how you're able to  
18 parse the text on the one hand to say that  
19 there's an obligation and on the other hand to  
20 say but that obligation disappears when you've  
21 already had a first shot.

22           MS. DUBIN: Right. So I think there's  
23 two ways to parse the statutory text to get to  
24 that requirement. One is the exhaustion  
25 requirement, which is what I was highlighting

1 before, which brings with it this doctrine of  
2 administrative exhaustion. And that's what  
3 this Court said in Woodford in interpreting the  
4 PLRA, which uses similar language.

5 The second way is from available, I  
6 think, because the agency is not going to hear  
7 arguments you made before and -- and they've  
8 said that in *In re OSG*, which is agency  
9 precedent.

10 So, under this Court's precedent in  
11 *Ross versus Blake*, it's simply not available to  
12 you to file a second motion to reconsider in  
13 that circumstance.

14 JUSTICE KAVANAUGH: Can I ask you a  
15 question on the first issue, the broader  
16 jurisdiction issue?

17 I think the other side, as I  
18 understand their position, says the reference  
19 to court supports you, but, in this particular  
20 context, two things kind of override that, one  
21 being the references to "jurisdiction"  
22 elsewhere in the statute and the second being  
23 that this is an exhaustion requirement.

24 So why isn't that the better way to  
25 read the statute given the broader context?

1 MS. DUBIN: Right. So I think that --  
2 I mean, I -- I didn't take Petitioner to take a  
3 square position on this, but I take Petitioner  
4 to sort of indicate that if it was just the  
5 plain text alone here, we have a very good  
6 argument that this is jurisdictional. But I  
7 think you're right that there -- that  
8 Petitioner is saying that the rest of the  
9 statutory context cuts the other way.

10 And we see it differently. I think  
11 1252 cuts in favor of this provision being  
12 jurisdictional because it doesn't use the word  
13 "jurisdiction" exclusively as the way of  
14 talking about a court's authority. And those  
15 are the provisions that Justice Kagan flagged  
16 earlier in 1252(a)(2) and also 1252(a)(5).

17 I think what Petitioner's response to  
18 that is, well, those use the words "judicial  
19 review" and not "review." And I think that's  
20 slicing the baloney a little bit thin. I don't  
21 think that --

22 JUSTICE KAGAN: Well, I -- I read  
23 1252(a)(5) exactly the opposite way, that you  
24 can read it as Congress was quite aware that it  
25 was using these two terms in the statute and

1 that the two terms meant something different,  
2 except for, in that purpose, with respect to  
3 the availability of habeas, they should mean  
4 the same thing.

5 But that Congress was saying we're --  
6 we're taking notice that both of these terms  
7 exist in this statute, and, here, we want them  
8 to have the same consequence but in other  
9 respects not because they're two different  
10 terms.

11 MS. DUBIN: Right. I think that that  
12 would be one argument if all you had was  
13 1252(a)(5), but you also have 1252(a)(2), which  
14 says "matters not subject to judicial review"  
15 and then lists a number of things about  
16 jurisdiction. So I don't think that  
17 explanation would help there.

18 But I think the second part of this  
19 answer is that 1252(d)(1) has a prior source.  
20 It comes from 1105(a). And this is the  
21 language that Congress had used in 1105(a) much  
22 before IIRIRA.

23 When Congress then codified this  
24 provision in IIRIRA, it was after a lot of  
25 courts of appeals and this Court had described

1 that provision as jurisdictional.

2 So there's no real, like, mystery as  
3 to why the Court used the language it did in  
4 1252(b)(1).

5 JUSTICE SOTOMAYOR: But it didn't --  
6 it didn't codify the exact language.

7 MS. DUBIN: It codified almost exactly  
8 the same --

9 JUSTICE SOTOMAYOR: Yeah, you keep  
10 using the word "almost" in your brief also.  
11 But it didn't. That's the point.

12 MS. DUBIN: So I think what -- what I  
13 think is critical about what -- the changes  
14 that Congress made from 1105(a) to 1252(d)(1)  
15 is that Congress almost did --

16 JUSTICE SOTOMAYOR: I know it's what  
17 you think is critical, but go back to the  
18 operative question, which is the fact that  
19 we're going back and forth, doesn't that prove  
20 your adversary's point that there's a plausible  
21 argument, and once there's a plausible  
22 argument, it's not jurisdictional?

23 MS. DUBIN: I don't think there's a  
24 plausible argument, and -- and the reason is  
25 because of what changes Congress made from 1105

1 to 1252(d)(1). All Congress did in the  
2 relevant part of the statute was omit -- was  
3 change from a passive voice and a double  
4 negative.

5 So the original provision said an  
6 order of deportation or exclusion shall not be  
7 reviewed by any court if the alien has not  
8 exhausted administrative remedies. And our  
9 provision says a court may review a final order  
10 of removal only if. That is a classic cleaning  
11 up of language, not meaning to change the  
12 substance of prior provisions.

13 JUSTICE JACKSON: But does that help  
14 you or hurt you? Because it certainly sound --  
15 sounded to me like the former formulation was  
16 more of a claims processing issue. I thought  
17 you were suggesting that the change was made to  
18 make it more jurisdictional. But read the  
19 former language again.

20 MS. DUBIN: An order of deportation or  
21 of exclusion shall not be reviewed by any court  
22 if the alien has not exhausted the  
23 administrative remedies available to him as  
24 of -- as of right.

25 JUSTICE JACKSON: And that sounds to

1 me like you could replace "shall not be  
2 reviewed" in that -- or situation with "the  
3 court shall dismiss." Would you -- would you  
4 agree that if it said the court shall dismiss  
5 any application by an alien unless there's  
6 exhaustion, that that would be claims  
7 processing and not jurisdictional?

8 MS. DUBIN: No. And -- but I think  
9 the important point is that we don't think the  
10 other provision was less jurisdictional. We  
11 think 1105(a) --

12 JUSTICE JACKSON: I know. That's what  
13 I'm trying to explore. It seems to me that if  
14 you're saying these two are the same, and the  
15 former sounds at least to me in not power of  
16 the court but more the court shall dismiss, the  
17 court shall not review in the sense of, you  
18 know, look -- you're looking at various claims  
19 and which ones are you going to decide, doesn't  
20 that hurt you?

21 I mean, this language, "a court may  
22 review only if," that's today's language, and I  
23 take the point that that sounds like you're  
24 speaking to the power of the court. But the  
25 prior language that you read, to me, did not

1 sound like you were speaking to the power of  
2 the court or at least Congress was. It sounded  
3 like Congress was saying essentially the court  
4 shall dismiss this application if they haven't  
5 exhausted.

6 And you now seem to be suggesting that  
7 no change substantively was made between the  
8 two, and I think that actually hurts you.

9 MS. DUBIN: I think -- so what I'm --  
10 what I think we're disagreeing on is whether --  
11 so this is just phrased -- the same language,  
12 it "shall not be reviewed by any court" versus  
13 "a court may review only if," to me, the only  
14 difference between those two commands, which  
15 are both directed at the court -- and I think  
16 that's the critical point for purposes of  
17 exhaustion requirement, is that one is written  
18 as "shall not be reviewed by any court" and one  
19 is "a court may review only if" --

20 JUSTICE JACKSON: Right. But, in any  
21 event, neither of those say the language that  
22 appears everywhere else when the court is  
23 really speaking to jurisdiction, right? Like  
24 is it your suggestion that when the Court said  
25 "no court shall have jurisdiction to review,"



1 which it says many, many times, you think that  
2 the Court -- that Congress was using  
3 interchangeably that language and the one in  
4 our statute, both to be referring to  
5 jurisdiction?

6 MS. DUBIN: Correct.

7 JUSTICE BARRETT: Counsel --

8 JUSTICE KAVANAUGH: And -- and --

9 JUSTICE BARRETT: -- can I ask you a  
10 -- oh, go ahead.

11 JUSTICE KAVANAUGH: Go ahead. Go  
12 ahead.

13 JUSTICE BARRETT: Well, I was going to  
14 switch to waiver or forfeiture, so --

15 JUSTICE KAVANAUGH: Okay. So then one  
16 question on Justice Jackson's questions. I  
17 think the key is, on the prior language, this  
18 Court had said it's jurisdictional, right?

19 MS. DUBIN: This Court had said it's  
20 jurisdictional.

21 JUSTICE KAVANAUGH: And in Nken, we  
22 repeated that post -- you know, post the -- the  
23 new act and post-Arbaugh, right?

24 MS. DUBIN: Both of them.

25 JUSTICE KAVANAUGH: So that's what I

1 -- that's what I thought was your argument, was  
2 the language didn't really change in substance.  
3 We called it jurisdictional, so it's still  
4 jurisdictional.

5 MS. DUBIN: That's correct. But I --  
6 that is absolutely correct and a  
7 hundred percent agree with it, but I do want to  
8 say that I think what this Court's cases have  
9 been saying over and over again in saying that  
10 there doesn't need to be a magic word  
11 requirement is that a limitation on what a  
12 court may review is talking to the court's  
13 adjudicatory authority, and both of them are  
14 written that way. But also, if you had any  
15 doubt, then, yes, definitely.

16 JUSTICE KAVANAUGH: Okay.

17 MS. DUBIN: But --

18 JUSTICE KAVANAUGH: Justice Barrett?  
19 Oh.

20 JUSTICE BARRETT: I -- counsel, I just  
21 wanted to ask you about the waiver or  
22 forfeiture. Let's say that we disagree with  
23 you about jurisdiction. At the cert stage, you  
24 seemed to indicate that waiver or forfeiture  
25 would apply. So, if we disagree with you about

1 jurisdiction, shouldn't we just remand to the  
2 Fifth Circuit for it to address the  
3 impermissible fact-finding claim, or do you  
4 think that the waiver/forfeiture issue would  
5 still be alive and that there's a possibility  
6 that you didn't forfeit it?

7 MS. DUBIN: We think what would be  
8 alive is the application of the Day versus  
9 McDonough principle. And I just want to  
10 highlight that we did flag that in our brief in  
11 opposition. It's in Footnote 3 on the same  
12 page that Petitioner's counsel pointed to. And  
13 the application of that principle turns on  
14 whether it was appropriate to bring up -- for  
15 the court of appeals to raise sua sponte  
16 something that we did not strategically waive.  
17 And I think that would be the inquiry in that  
18 case, and I think it would be appropriate for  
19 the court of appeals to undertake that in the  
20 first analysis.

21 JUSTICE KAVANAUGH: Can I ask a  
22 question about, if you were to lose this case  
23 on the first issue, would it be better for us  
24 for clarity purposes to say exhaustion  
25 requirements are not jurisdictional unless the

1 word "jurisdiction" is used, just so the lower  
2 courts don't thrash around in this  
3 unnecessarily for years on end?

4 MS. DUBIN: I think the Court has been  
5 pursuing clarity in this -- in this area, and I  
6 do think that this provision comes as close as  
7 you can to saying this is a limitation on a  
8 court authority without using the word  
9 "jurisdiction." So, if you disagree with that,  
10 I do think it would be very helpful.

11 JUSTICE KAVANAUGH: And I -- okay. So  
12 that's helpful.

13 And then -- but would there be  
14 systemic harm that the government's aware of  
15 from us saying, you know, an exhaustion  
16 requirement -- in this Arbaugh world, an  
17 exhaustion requirement subcategory is only  
18 going to be jurisdictional if the word  
19 "jurisdiction" is used? Are you aware of any  
20 systemic problems that would arise from a clear  
21 statement to the lower courts like that?

22 MS. DUBIN: I'm not aware of systemic  
23 problems that would arise from that. I think,  
24 if you were very concerned about that, you  
25 could say, you know, going forward for

1 provisions drafted after this date.

2 JUSTICE KAVANAUGH: Well, we've -- I  
3 don't think -- well, I won't speak more to  
4 that. Okay.

5 (Laughter.)

6 MS. DUBIN: Can I --

7 JUSTICE JACKSON: Is there -- is there  
8 any case in which this case has applied the  
9 clear statement rule since Arbaugh and found  
10 that exhaustion was jurisdictional that you're  
11 aware of?

12 MS. DUBIN: I think the closest is  
13 Smith versus Berryhill in the Social Security  
14 context, where the Court recognized that the  
15 finality requirement in the Social Security Act  
16 is jurisdictional.

17 JUSTICE JACKSON: Finality?

18 MS. DUBIN: Yes. But the Court has  
19 referred to that requirement in the Social  
20 Security Act as an exhaustion requirement.  
21 It's not exhaust -- the type of exhaustion  
22 requirement we have here, but it's an  
23 exhaustion requirement that the Court has found  
24 continues to be jurisdictional post-Arbaugh.

25 JUSTICE KAVANAUGH: On the exhaustion

1 precedent that was being discussed earlier with  
2 your colleague on the other side, my  
3 understanding of all the exhaustion cases we  
4 have is that not a single one of them that I'm  
5 aware of or that was cited to us at least spoke  
6 to the court's authority.

7 Is that your understanding as well, as  
8 distinct from putting an obligation on the  
9 litigant in the statutory language?

10 MS. DUBIN: Yeah, and I think the best  
11 example of a comparator is the PLRA, which is  
12 written as "no action shall be brought," which  
13 is a very different type of phrasing, as  
14 opposed to a limitation on a power.

15 JUSTICE KAGAN: But it's not as though  
16 those cases used that sort of distinction. I  
17 mean, maybe they didn't have to, but they spoke  
18 in pretty general terms about how exhaustion  
19 requirements are generally non-jurisdictional,  
20 much like we've said statutes of limitations  
21 are usually non-jurisdictional.

22 And maybe you could come up with  
23 something that suggests a different rule in a  
24 particular case, but all of these cases, and  
25 there are quite a lot of them, just sort of

1     assume or not -- not assume, say that the  
2     presumption is that exhaustion is  
3     non-jurisdictional.

4             MS. DUBIN:  So I don't think that's  
5     the right way to read those cases.  There are a  
6     few cases that refer to exhaustion requirements  
7     in tandem, hand in hand, with claims processing  
8     rules, which I take the Court to mean in -- in  
9     the paradigmatic case to be a filing deadline,  
10    a timely filing requirement.

11            And there have been exhaustion  
12    requirements that this Court has considered  
13    that have looked like a filing deadline  
14    requirement.  So an example of that is the  
15    deadline for filing a charge with the EEOC.  
16    But then there's no requirement after that that  
17    the EEOC go through an adversarial adjudicative  
18    scheme to actually look at what happened before  
19    a court will review.  It's just a filing  
20    deadline with the EEOC.

21            And the Court has seen exhaustion  
22    cases like that.  But I don't think the Court  
23    has looked at an exhaustion requirement like  
24    this, which goes to the structure of the  
25    agency's scheme and the idea that a court of

1 appeals will only be sitting there to review  
2 what has gone through an adversarial agency  
3 adjudication in the first instance.

4 And I don't think that you can read  
5 the Court's prior references to exhaustion  
6 cases to include that particular context in  
7 which we think it would be very appropriate for  
8 a jurisdictional requirement to exist.

9 JUSTICE GORSUCH: Ms. -- Ms. Dubin, I  
10 understand that we could stop at the end of QP  
11 1, say it's not jurisdictional and remand and  
12 have fun with the sua sponte question. But the  
13 QP 2, if the government were to have actually  
14 objected or might in a future case, seems to me  
15 pretty important and likely to impact a very,  
16 very large number of immigration appeals.

17 And -- and, therefore, I wonder  
18 whether the government -- I wonder, in the  
19 government's view, whether it does make sense  
20 for us to go ahead and address that now so that  
21 everybody has clarity on the playing field?

22 MS. DUBIN: Yes. So the -- the -- the  
23 courts of appeals all agree that an issue  
24 exhaustion require -- is required under the --  
25 under the INA, that this provision, whether you



1 read it as a statutory or regulatory  
2 obligation, agency rules --

3 JUSTICE GORSUCH: No, but the motion  
4 --

5 MS. DUBIN: -- require issue  
6 exhaustion.

7 JUSTICE GORSUCH: -- having to refile  
8 a petition, you know, for reconsideration, that  
9 question is what I'm aiming at.

10 MS. DUBIN: So I just -- I did want to  
11 highlight that the most important thing is that  
12 the normal context in which this comes up is  
13 from an immigration judge to the Board, right?  
14 You didn't make a particular claim against what  
15 the immigration judge when you appealed to the  
16 --

17 JUSTICE GORSUCH: Put that aside. I'm  
18 talking about from the BIA to the court of  
19 appeals. Can the court of appeals take it up  
20 when there could have been, theoretically, a --  
21 a petition for rehearing to correct the BIA's  
22 faulty reasoning? Okay? I would think that  
23 comes up an awful lot or could come up an awful  
24 lot, especially if we don't answer the  
25 question. And so I'm just wondering whether

1 the government would agree that it makes sense  
2 for us to go ahead and address that question.

3 MS. DUBIN: I think it would -- it  
4 nearly always comes up in this context when you  
5 have an impermissible fact-finding claim --

6 JUSTICE GORSUCH: Right.

7 MS. DUBIN: -- because that's the type  
8 of claim that the Board is introducing a new  
9 error, and that's when it comes up that you  
10 would have a jurisdictional exhaustion  
11 requirement say that you needed to raise that  
12 to the Board. And I do think it would be  
13 helpful to address that if the Court was going  
14 to give clarity to that area.

15 JUSTICE GORSUCH: Thank you.

16 JUSTICE BARRETT: Counsel, can I  
17 follow up on Justice Gorsuch? So, you know,  
18 that's the remedy exhaustion question. Do you  
19 agree, though, that issue exhaustion or --  
20 let's see, I thought this was a little bit  
21 unclear in the briefs -- that issue exhaustion  
22 could also exist as a court-made doctrine  
23 requiring that the issue have been exhausted  
24 even if the statute speaks exclusively to  
25 remedy?

1           So, if we do decide the remedy  
2 question that Justice Gorsuch is referring to,  
3 that doesn't mean that we're ruling out the  
4 possibility of issue exhaustion as well?

5           MS. DUBIN: That's -- I agree with  
6 that, and that's what I was trying to say, and  
7 I apologize for going a little off track there.  
8 But what I was trying to say is that it's  
9 extremely important to the way the system works  
10 and it would be very destabilizing to not  
11 require issue exhaustion, whether it's as a  
12 matter of statute, as a matter of regulations,  
13 or as a matter of judge-made doctrine.

14           The agency since 1951 has required you  
15 to present specific issues to the Board, and  
16 that's critically important for the way the  
17 Board operates given how -- the high volume of  
18 cases and that it's an adversarial system in  
19 which litigants are expected to develop their  
20 own claims.

21           JUSTICE JACKSON: I guess I don't  
22 understand why, even if you're right that  
23 there's some sort of an issue exhaustion  
24 requirement here, that wasn't met in these  
25 circumstances.

1 I mean, isn't the issue on appeal  
2 whether the presumption of future persecution  
3 was rebutted and wasn't that what the agency  
4 was deciding?

5 MS. DUBIN: So Petitioner brought two  
6 claims. Petitioner brought -- when she -- when  
7 she went to the court of appeals. One claim  
8 was that. One claim was about the substance of  
9 the decision below and whether she had -- in  
10 fact, was entitled to withholding. But one  
11 claim was about an impermissible fact-finding  
12 claim that the Board had violated its own  
13 regulations by doing a fact-finding when it  
14 adjudicated her appeal.

15 JUSTICE JACKSON: But the fact-finding  
16 was to an end. I mean, wasn't the -- the  
17 ultimate issue is whether the presumption of  
18 future persecution was rebutted and there are  
19 facts that -- that the fact-finder looks at to  
20 make that determination.

21 And so, to the extent the Board  
22 disagreed, they looked at other facts, that's  
23 really all part of the same issue, isn't it?

24 MS. DUBIN: The issues here are  
25 certainly related, but I think there's a big

1 difference between saying that the procedural  
2 objection to what the Board did right violated  
3 the Board's own regulations versus the  
4 substantive determination, did the Board  
5 correctly or incorrectly find that she was  
6 entitled to withholding or that the presumption  
7 had been rebutted, that's a separate claim and  
8 a separate question.

9 JUSTICE JACKSON: And as an  
10 administrative matter, sort of  
11 administrability, your suggestion is that a  
12 person would have to figure out -- parse it  
13 that narrowly to determine whether or not they  
14 had to make a motion for reconsideration as a  
15 jurisdictional matter related to the issue --  
16 to that issue but not that one?

17 MS. DUBIN: Issue exhaustion across  
18 administrative contexts requires parsing. I  
19 mean, for instance, I think a couple years ago,  
20 in Ramirez versus Collier, in the PLRA context,  
21 the Court looked to whether the prisoner had  
22 raised the audible prayer claim as opposed to  
23 just a regular prayer claim.

24 You are looking to what sort of issues  
25 and arguments have been brought up to this

1 point, but I think, to the extent you're  
2 worried about confusion, this has come up, as I  
3 mentioned earlier, in the impermissible  
4 fact-finding context because what the  
5 non-citizen is trying to do is add a claim, add  
6 a claim that's a procedural claim in addition  
7 to her substantive claim, and that claim is a  
8 claim that the Board introduced a new error.  
9 So that is where the courts of appeals --

10 JUSTICE JACKSON: So what about  
11 Justice Gorsuch's previous question to other  
12 counsel, how -- how -- how many times do we  
13 have to have reconsideration? Like what if the  
14 Board introduces a new error in the context of  
15 this motion for reconsideration? Does this go  
16 on ad -- ad infinitum in your view?

17 MS. DUBIN: I think that's the beauty  
18 of the "as of right" language. It only allows  
19 for one motion to reconsider because that's  
20 what you're allowed under the statute and the  
21 regulations.

22 JUSTICE KAVANAUGH: On your question  
23 to -- on the question that Justice Barrett and  
24 Justice Gorsuch asked, this may be repetitive,  
25 but I just want you to follow up.

1 MS. DUBIN: Sure.

2 JUSTICE KAVANAUGH: You're worried if  
3 you lose this case that we say something about?  
4 Can you repeat that just so we don't  
5 inadvertently do something that's going to  
6 cause problems?

7 MS. DUBIN: Yes. We are worried that  
8 you would say that there's no issue exhaustion  
9 requirement in this context, whether as statute  
10 or regulation. We think that would be clearly  
11 wrong because the regulations require issue  
12 exhaustion.

13 I don't take Petitioner to be  
14 seriously disputing that there is an issue  
15 exhaustion requirement. And it's critically  
16 important to have that issue exhaustion  
17 requirement because the Board can't pick  
18 through the immigration judge decisions to  
19 figure out what the -- what you think the  
20 errors are. You need to present those to the  
21 Board.

22 So it's very important to keep intact  
23 that issue exhaustion is required in this  
24 scheme. I -- I do think it is required as a  
25 matter of statute and it's jurisdictional, but

1 the critical point is that issue exhaustion is  
2 required.

3 JUSTICE KAVANAUGH: Okay. Second  
4 question, different one. What's the court of  
5 appeals standard of review on an impermissible  
6 fact-finding claim?

7 MS. DUBIN: So it's going to be coming  
8 up from a motion to reconsider because that's  
9 the circumstance in which you have to review  
10 it, and they will review it for abuse of  
11 discretion.

12 But there is no indication and we  
13 think it would be incorrect that if you have a  
14 correct -- if you have a meritorious  
15 impermissible fact-finding claim and the Board  
16 nonetheless rejects it and there's no  
17 procedural bar to them reaching it, that would  
18 be an abuse of discretion.

19 JUSTICE KAVANAUGH: Okay. So would it  
20 be abuse of discretion even if you lose this  
21 case? In other words, they haven't brought it  
22 in a motion to reconsider -- you would lose on  
23 the third issue, I guess?

24 MS. DUBIN: It depends if you --

25 JUSTICE KAVANAUGH: Are you -- are you



1 following the question?

2 MS. DUBIN: I believe so.

3 JUSTICE KAVANAUGH: Okay.

4 MS. DUBIN: But, if I'm not, please  
5 let me know. It depends -- it depends if you  
6 see it as a legal error or factual error. But,  
7 if it was a legal error, it would be reviewed  
8 de novo. And if it's a factual error, it would  
9 be reviewed for substantial evidence.

10 But I don't think the distinction  
11 matters here because, like I said, if you have  
12 a meritorious impermissible fact-finding claim,  
13 under any of the standards of review -- abuse  
14 of discretion, de novo, or substantial evidence  
15 -- you would prevail.

16 JUSTICE KAVANAUGH: Can you describe  
17 what you think an impermissible fact-finding  
18 claim is when it's successful?

19 MS. DUBIN: I think it's when the  
20 Board finds facts that are -- that the  
21 immigration judge didn't consider and -- and  
22 uses that to make -- and rests its decision on  
23 that. So I think what -- why that's not the  
24 case here is because what the Board did is  
25 reweigh the same facts the immigration judge

1 considered but this time with the -- with the  
2 presumption that the immigration judge found  
3 didn't apply.

4 So, instead of saying that these facts  
5 mean that you haven't shown entitlement to  
6 withholding without a presumption of future  
7 persecution, the Board here said, even if you  
8 include the presumption of future persecution,  
9 we think it's been rebutted --

10 JUSTICE ALITO: But suppose the --

11 MS. DUBIN: -- and that the --

12 JUSTICE ALITO: -- suppose the  
13 government made just that argument before the  
14 Board, and Petitioner responded, you can't  
15 decide the case on that basis because that  
16 would be impermissible fact-finding. And  
17 suppose that the Board then rules in your  
18 favor.

19 Under those circumstances, wouldn't  
20 the impermissible fact-finding issue have been  
21 decided by the Board? And under those  
22 circumstances, would it be necessary for the  
23 Petitioner or someone else in a similar  
24 position to file a motion for reconsideration?

25 MS. DUBIN: No, because, in that

1 circumstance, the Board would have decided, and  
2 there's no obligation to keep bringing the same  
3 arguments to the Board.

4 JUSTICE JACKSON: Can I ask you,  
5 getting back a little bit to the  
6 jurisdictional, I guess I'm a little worried  
7 that the -- the fact that the exhaustion  
8 provision is directed at the court may not  
9 necessarily be indicative of its jurisdictional  
10 character.

11 So I -- I can imagine a provision that  
12 says a court must dismiss a final order of  
13 removal if the agency, you know -- or, sorry,  
14 if the alien has not exhausted all  
15 administrative remedies.

16 Would -- would that be jurisdictional  
17 to you, just because it's directed to what the  
18 court must do?

19 MS. DUBIN: I think provisions that  
20 are directed to what the court must do is what  
21 this Court has been looking for in this series  
22 of cases. That's what the court said --

23 JUSTICE KAGAN: But, in those cases,  
24 it's always what the court must do with respect  
25 to a particular category of substantive claims.

1 I think Justice Sotomayor said this before.

2 And this is very different. It's what  
3 the court must do, but then it says, depending  
4 on which procedural hoops the party has or has  
5 not jumped through.

6 So the second half of this provision  
7 is very much looking towards what the party is  
8 doing. You know, all Mr. Hughes needs is a  
9 plausible reading. You have half of this  
10 provision. He has the other half of this  
11 provision.

12 The cases that you're talking about  
13 are quite different because they don't make the  
14 criterion one that has to do with what the  
15 party is obligated to do.

16 When you make that the criterion,  
17 doesn't this become not a jurisdictional  
18 provision, or at least doesn't it plausibly  
19 become not a jurisdictional provision?

20 MS. DUBIN: I don't think so. I think  
21 that the -- the Court said this in Rockwell,  
22 that Congress can define "jurisdiction" as it  
23 wishes, depending on what it decides is the  
24 requisite criteria.

25 Here, what it didn't want --

1 JUSTICE KAGAN: Well, it totally can.  
2 But the question is, how are we going to read  
3 the language in front of us? And we've  
4 consistently said that when the key thing is  
5 what the party has to do, that's  
6 non-jurisdictional.

7 And, here, everything depends on what  
8 the party has done or not done.

9 MS. DUBIN: Right. But I don't think  
10 it was just the key thing as what the party has  
11 to do. I think it was that the only -- the  
12 only person that Congress meant to restrict is  
13 the party. Congress didn't mean to restrict  
14 the court.

15 I would also just say then, in the  
16 Court's prior cases, they haven't only had  
17 jurisdiction turn on whether it's a subject  
18 matter. In Gonzalez and Denedo, both of those  
19 turned on the lower court procedures, and that  
20 is how the jurisdiction bar worked in both of  
21 those cases.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: There are  
2 circumstances -- there are circumstances in  
3 which there's a constitutional basis for a  
4 clear statement rule. But, here, I take it  
5 we're just interpreting a statutory provision.

6 So what basis do we have for imposing  
7 a -- a clear statement rule either  
8 retroactively or prospectively on Congress?  
9 Are we not -- even if it's not desirable to  
10 have to decide all these on a case-by-case  
11 basis, isn't that our obligation, to decide the  
12 meaning of particular provisions that come  
13 before us?

14 MS. DUBIN: Pre-Arbaugh, I think that  
15 is what the Court was doing. But then, for a  
16 long time now, the Court has said that a clear  
17 statement rule applies in this context. We  
18 didn't -- we didn't feel the need to fight  
19 that.

20 JUSTICE ALITO: Yeah. Well, what is  
21 our authority to do that?

22 MS. DUBIN: I think that the Court was  
23 trying to do it as a matter of divining  
24 congressional intent. The idea was that when  
25 Congress wants to speak in jurisdictional

1 language, it speaks clearly. So that -- that  
2 was the authority. It was saying this is what  
3 Congress is doing and descriptively describing  
4 that.

5 I think that in some cases, what --  
6 and especially in the early cases, what the  
7 Court was doing was it was seeing provisions  
8 that really looked like they went to a cause of  
9 action, like the number of employees under  
10 Title VII, and the Court was saying those  
11 really aren't what Congress would have meant to  
12 be jurisdictional.

13 I think this case is many steps past  
14 this because you have a limitation that's  
15 addressed to a court, and I don't think that in  
16 Arbaugh and the cases that came right after it,  
17 the Court was trying to say that that sort of  
18 thing isn't what Congress would have meant to  
19 be jurisdictional.

20 JUSTICE ALITO: Well, do you think  
21 there's an empirical basis for that? We -- we  
22 have gotten into Congress's mind and said, you  
23 know, when they impose an exhaustion  
24 requirement, we think that almost always they  
25 mean that that's not jurisdictional in the true

1 sense of the word?

2 MS. DUBIN: I definitely don't think  
3 so in the exhaustion context, especially like  
4 here, and this is something that I was saying  
5 earlier. I think that when Congress imposes a  
6 restriction on the relationship between an  
7 adjudicative agency proceeding and a court of  
8 appeals, it actually would want that to be  
9 jurisdictional. And if we're looking to what  
10 Congress would want, I think this is exactly  
11 the type of provision that Congress would want  
12 to be jurisdictional because it means that a  
13 court of appeals won't be sitting there  
14 reviewing agency actions in the first instance.  
15 It will have the benefit of reasoned  
16 decisionmaking that might avoid the need for  
17 judicial review altogether.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor?

20 Justice Kagan?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: Can I just clarify



1 that last point? Because I -- I thought, when  
2 we were talking about jurisdictional, we were  
3 talking about Article III.

4 Is that what we mean by -- in which  
5 case there is a constitutional concern here.  
6 There is some, you know, responsibility on  
7 Congress's part to be clear about what it is  
8 it's doing in terms of -- of restricting the  
9 authority of the court.

10 So do I have that wrong? Am I --  
11 maybe I'm back in the old days thinking of  
12 jurisdiction in different ways, but I -- I  
13 thought the whole point was we wanted to make  
14 sure that jurisdictional determinations were  
15 taking -- taken seriously because they  
16 implicate these constitutional concerns about  
17 the power of the court.

18 MS. DUBIN: That -- I think the source  
19 of the -- the -- of the clear statement rule is  
20 -- is much more Congress -- the assumption that  
21 this is how Congress drafts in the  
22 jurisdictional area. And that -- I think you  
23 see that in Arbaugh and the cases that came  
24 right after it.

25 I think even if you did see this as

1 some sort of constitutional limitation, this is  
2 the sort of case in which you would  
3 particularly want to enforce that limitation  
4 because of what I was saying to Justice Alito.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Hughes, rebuttal?

8 REBUTTAL ARGUMENT OF PAUL W. HUGHES  
9 ON BEHALF OF THE PETITIONER

10 MR. HUGHES: Thank you, Mr. Chief  
11 Justice.

12 So I'd like to start with (d)(1), the  
13 "as of right," because this does come up an  
14 awful lot, and I think the Court's guidance  
15 would be helpful.

16 As to "as of right," we just don't  
17 think the government has any role for that  
18 statutory text that isn't already captured by  
19 the separate term "available." And in many  
20 exhaustion provisions, Congress spoke about  
21 available remedies, but, here, Congress added  
22 more, added "as of right," and we think that  
23 statutory language has to have a purpose, and  
24 only Petitioner gives that language meaning.

25 Next, the government, in order to try

1 to escape the result that their textual  
2 interpretation would lead, that every  
3 non-citizen always has to file a motion to  
4 reconsider, I heard the textual argument that  
5 it -- that their -- their retort is that a  
6 motion to reconsider would be improper in the  
7 event that the Board has already resolved or  
8 decided that issue.

9 But that just can't be right because a  
10 motion to reconsider, as the name implies,  
11 "reconsider," the classic use of that is to go  
12 back to the Board and say, well, you decided  
13 this thing, this issue of fact or this issue of  
14 law, but we think the thing that you decided  
15 you got wrong. That's inherent in the concept  
16 of a motion to reconsider.

17 So I don't think it works for the  
18 government to suggest that a motion to  
19 reconsider when you are just straightforwardly  
20 asking the Board to reconsider what it already  
21 did is somehow procedurally improper such that  
22 that becomes a textual escape from the place  
23 that their statutory argument would ultimately  
24 lead.

25 As to the jurisdictional status of

1 (d)(1), we do think the Court has plainly  
2 adopted the clear statement rule, and for all  
3 of the reasons we've discussed, this just  
4 doesn't satisfy it and certainly not the issue  
5 preservation requirement that the government  
6 requires. Again, it's not a normal issue  
7 preservation requirement but one that is much  
8 more muscular, requiring parties just not to  
9 preserve their issues when they go up to the  
10 appellate body but to go back to that appellate  
11 body and say you introduced a new error.

12 Congress can do that if it wishes. It  
13 has done so in other statutes. But it creates  
14 a structure that makes sense that tolls  
15 judicial review and provides for that  
16 expressly. Congress just did nothing of the  
17 sort here.

18 Ultimately, we think our positions  
19 just accord with the text and they create a  
20 sensible statutory structure, and it properly  
21 empowers government lawyers to find waiver and  
22 -- or waive exhaustion, as is typically the  
23 case in exhaustion statutes, where that would  
24 be appropriate to do so. We just don't think  
25 this is jurisdictional, and we also think

1 Petitioner properly exhausted.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4 (Whereupon, at 11:07 a.m., the case  
5 was submitted.)

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## Official - Subject to Final Review

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