No. 22-191

IN THE
Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ, *Petitioner,*
v.
MERRICK B. GARLAND, *Respondent.*

BLANCA MARISOL MONCADA AND BEATRIZ MARISOL CASTRO-MONCADA, *Petitioners,*
v.
MERRICK B. GARLAND, *Respondent.*

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

In its response brief, the government chooses not to respond to Petitioners' meritorious arguments for why this case should be granted. The government does not challenge the existence of a clear circuit split on whether issues resolved *sua sponte* by the Board of Immigration Appeals are exhausted under 8 U.S.C. § 1252(d)(1) for purposes of judicial review. *See* Pet.12–18. The government also does not dispute that this issue arises approximately 130 times per year across the country, has arisen nearly 100 times just within the Eleventh Circuit, and risks metastasizing to other contexts across the administrative state. *See id.* at 18–21; Br. *Amicus Curiae* Cato Institute 11–14. Nor does the government disagree that maintaining circuit uniformity is especially important in the context of immigration, or that the Eleventh Circuit's rule has draconian negative consequences by foreclosing judicial review not just of the issue resolved *sua sponte* but also other objections to the BIA's ruling. *See* Pet.23–26. And the government makes only a passing defense of the merits of the Eleventh Circuit's rule. *See* BIO6; Pet.28–31.

Even though the government effectively concedes that this case warrants a grant of certiorari—or perhaps precisely *because* of that—the government instead rests almost exclusively on the suggestion that the Court hold this case to be disposed of after a decision is rendered in *Santos-Zacaria v. Garland*, No. 21-1436, which is scheduled for argument in January 2023.

This is a makeweight argument designed to avoid this Court's review of an eminently cert-worthy issue on which almost every circuit has opined. Even the government acknowledges that the questions presented in *Santos-Zacaria* are "meaningfully distinct" from the question presented here. BIO8. And, as explained below, the outcome of *Santos-Zacaria* cannot affect Petitioners' case. Forcing them to wait and possibly then return to the Eleventh Circuit would be a pointless exercise.

The government has wagered that it can avoid a grant simply by refusing to respond to the substance of a meritorious Petition. The Court should decline to reward that gamble. The Petition should be granted.

I. THE COURT SHOULD GRANT AND CONSIDER THIS CASE AS A COMPANION TO *SANTOS-ZACARIA*.

As Petitioners argued in their supplemental brief of October 4, the cert-worthiness of this case is confirmed by the Court's grant in *Santos-Zacaria*, which addresses (1) whether § 1252(d)(1)'s exhaustion requirement is jurisdictional or instead a mandatory claims processing rule, and (2) whether § 1252(d)(1) requires a motion for reconsideration or reopening at the BIA after its opinion injects a new issue into the case.

The government argues in response that the Court should hold this case pending the resolution of *Santos-Zacaria* and then dispose of the case in light of that decision. BIO8. But the government provides no

explanation whatsoever about *how* an opinion in *Santos-Zacaria* could possibly affect this case. That is because it cannot. Regardless of how this Court decides either of the questions presented in *Santos-Zacaria*, the outcome here will be the same. Indeed, the government concedes that the questions in *Santos-Zacaria* are "meaningfully distinct" from those here. BIO8.

On the first question presented in *Santos-Zacaria*: whether § 1252(d)(1) is jurisdictional says nothing about whether issues resolved *sua sponte* are deemed exhausted. If this Court holds that § 1252(d)(1) is jurisdictional, that would mirror the Eleventh Circuit's longstanding caselaw, *see, e.g., Fernandez-Bernal v. Att'y Gen. of U.S.*, 257 F.3d 1304, 1317 n. 13 (11th Cir. 2001), so there would be no change in how that court or this Court would approach Petitioners' case. And if this Court holds that § 1252(d)(1) is instead a mandatory claims processing rule, the Eleventh Circuit will still say that exhaustion was mandatory here (albeit not jurisdictional) because the government below invoked the supposed failure to exhaust. *See, e.g.*, Br. for Resp. 2, 10–11, 14–17, *Castaneda-Martinez*, No. 21-10015 (11th Cir. June 1, 2021); *Myles v. Miami-Dade Cnty. Corr. & Rehab. Dep't*, 476 F. App'x 364, 366 (11th Cir. 2012) ("Because exhaustion is mandated by the statute, we have no discretion to waive this requirement.") (citing *Alexander v. Hawk*, 159 F.3d 1321, 1325–26 (11th Cir. 1998)). The Eleventh Circuit would then cite its *sua sponte* rule and refuse to address the merits of the

challenges to the BIA's *sua sponte* rulings. The outcome would be exactly the same.

On the second question presented in *Santos-Zacaria*: whether a motion for reopening or reconsideration is required where the BIA injects a new issue into the case similarly says nothing about whether the issues resolved *sua sponte* here should be deemed exhausted. The government does not suggest that the BIA's *sua sponte* resolution of an issue triggers the rule that the alien must seek reopening or reconsideration, nor has any court held or suggested as much. Quite the opposite. For example, the Fifth Circuit requires an alien to seek reopening or rehearing for new issues injected into the case by the BIA, *see Santos-Zacaria*, but also holds that issues resolved *sua sponte* by the BIA are exhausted regardless of any reopening or reconsideration request, *see Lopez-Dubon v. Holder*, 609 F.3d 642, 644 & n.1 (5th Cir. 2010). *Sua sponte* resolutions typically involve a merits issue *already in the case*, not a truly "new issue" for which reconsideration must first be sought. Here, for example, the BIA *sua sponte* resolved issues that had already been addressed by the immigration judge. *See* Pet.App.9, 17. Accordingly, regardless of how this Court rules on the second question presented in *Santos-Zacaria*, holding and remanding this case would inevitably yield the same outcome as before.

Because the government does not dispute the cert-worthiness of the question presented (as further demonstrated below) and because the issues in *Santos-Zacaria* are orthogonal to, but cannot be

dispositive of, the issues in this case, the Court should grant the Petition and consider it alongside *Santos-Zacaria*.

II. THE GOVERNMENT CONCEDES THE CIRCUITS ARE OPENLY DIVIDED ON THE QUESTION PRESENTED.

The government does not dispute that half a dozen circuits have expressly rejected the Eleventh Circuit's *sua sponte* exhaustion rule. *See* Pet.12–18; BIO6–7. Nor does the government contend that further percolation is needed or that the Eleventh Circuit might change its rule absent this Court's intervention. *See* Pet.22. Indeed, the Eleventh Circuit summarily denied Petitioners' requests for rehearing en banc, both of which presented the great weight of contrary circuit authority, Pet.App.27, 29, and the Eleventh Circuit has recognized for years that it is an outlier on this issue, Pet.22.

The government tries to downplay the circuit split by claiming that "sometimes" circuits will deem an issue exhausted when the BIA has *sua sponte* "'elected to address in sufficient detail the merits of [that] particular issue.'" BIO6 (quoting *Portillo Flores v. Garland*, 3 F.4th 615, 633 (4th Cir. 2021)). When the government says "sometimes," it apparently means "in dozens of cases every year in every circuit court across the country, except for one—the Eleventh Circuit."

The government next claims that to trigger this "exception," the BIA must provide a "thorough

discussion" of an issue. BIO7. But that language is in no judicial opinion. The government simply conjures it from thin air. No court requires a "thorough discussion" of an issue just for it to be exhausted, meaning the government's position is even more extreme than the Eleventh Circuit's. Moreover, the government's position ignores how the BIA operates. It almost never issues the sort of full-dress opinions that the government seems to imagine. Rather, in nearly every case, the BIA issues a short opinion that resolves the issues succinctly, as occurred here. *See* Pet.App.19–26. Except for the Eleventh Circuit, every circuit to address the issue has held that such opinions are sufficient to exhaust any issue the BIA resolved on the merits. *See* Pet.15–18.

The government's cited cases stand only for the proposition that the BIA must actually *resolve* the particular issue *sua sponte*, rather than, say, noting the existence of the issue in passing or failing to issue an opinion at all. For example, the government's own cases make clear that issues resolved *sua sponte* by the BIA will be deemed exhausted, in contrast to "stray or cryptic comments by an agency in the course of its decision," which will not qualify. *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1239 (10th Cir. 2010) (Gorsuch, J.) (cited at BIO7). Judge Tymkovich's prior opinion in *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007), for example, explains the distinction that the government now disregards: the *sua sponte* exhaustion rule applies "where the BIA issues a full explanatory opinion or a discernible substantive discussion on the merits over matters not

presented by the alien. We will not entertain jurisdiction over matters where the BIA summarily affirms the IJ decision *in toto* without further analysis of the issue." 503 F.3d at 1122 (cited favorably by *Garcia-Carbajal*).

That is why the question presented in this case explicitly states that the BIA must have "resolved" the issue, rather than merely "consider[ed]" it, which is the sleight-of-hand language the government now uses, BIO6. And that is why every case Petitioners cite in the circuit-split section of their Petition involved the *resolution* of an issue by the BIA, as even the government ultimately seems to acknowledge by citing the Petition pages 15 to 18 as "collecting cases" demonstrating as much. BIO7.

It is undisputed that the BIA decisions here *resolved* Petitioners' claims by providing "a discernible substantive discussion on the merits," *Sidabutar*, 503 F.3d at 1122—indeed, that is precisely how the BIA denied relief, *see* Pet.App.21, 25. These were no "stray or cryptic comments." *Garcia-Carbajal*, 625 F.3d at 1239. The Eleventh Circuit agreed that the BIA had "explained" its *sua sponte* rulings, "determined" that Petitioners did not prevail, and "found" against them on the merits of those issues. Pet.App.7, 9, 16.

For these reasons, the Petition squarely implicates the circuit split on whether issues resolved *sua sponte* by the BIA are exhausted for purposes of judicial review under § 1252(d)(1).

III. THE QUESTION PRESENTED IS WORTHY OF REVIEW.

By resting exclusively on the unpersuasive contentions above, the government has deliberately and strategically chosen to concede all of Petitioners' other arguments regarding cert-worthiness. The Court should not reward the government's gambit of trying to avoid a grant by refusing to acknowledge the indisputable points that the question presented arises very frequently, is important, and risks metastasizing across the administrative state.

The Question Presented Arises Frequently. The government does not dispute Petitioners' showing that the question presented arises with great frequency in the circuit courts, i.e., approximately 130 times per year, and nearly 100 times in the Eleventh Circuit since 2006, when that court first announced its precedent on this issue. Pet.18–21. An issue arising so often across the country is undoubtedly worthy of this Court's review, especially given the need for uniformity in circuit caselaw on immigration matters. *Id.* at 23.

Review of Immigration Adjudications Is Especially Important. The government likewise does not dispute that these immigration proceedings are important mechanisms for providing life-changing relief, yet the Eleventh Circuit's rule often forecloses judicial review altogether, including of other objections to the BIA decision that were exhausted even under the Eleventh Circuit's precedent. Pet.24–26.

As Justice Kennedy has noted, "An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped." *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers). A ruling requiring the lower court to review the merits of their claims is all that Petitioners seek from this Court.

And as *amicus curiae* Cato Institute argues, judicial review of administrative decisions "is a bedrock component of judicial oversight," which applies with even greater weight in the context of immigration decisions, where aliens "are less likely to raise appropriate arguments to the BIA and the BIA is consequently more likely to resolve relevant issues *sua sponte*." Br. *Amicus Curiae* Cato Institute 4, 6.

The Eleventh Circuit's Rule Risks Spreading Throughout the Administrative State. The government likewise does not dispute Petitioners' and *amicus curiae* Cato Institute's arguments that the question presented is especially worthy of review because there is nothing unusual about the exhaustion language in § 1252(d)(1), and thus the Eleventh Circuit's rule would presumably apply to any number of other administrative proceedings, including Social Security and certain military and healthcare benefits determinations. *See* Pet.27–28; *see* Br. *Amicus Curiae* Cato Institute 11–14.

IV. THE GOVERNMENT BARELY DEFENDS THE MERITS OF THE ELEVENTH CIRCUIT'S RULE.

The Petition explains that the Eleventh Circuit's *sua sponte* rule is wrong for several reasons. *First*, "by addressing an issue on the merits, an agency is expressing its judgment as to what it considers to be a sufficiently developed issue." *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 63 (1st Cir. 2013). As Judge Tymkovich has explained, it makes no sense for a circuit court later to second-guess that agency view. *Sidabutar*, 503 F.3d at 1120 ("Where the BIA determines an issue administratively-ripe to warrant its appellate review, [courts] will not second-guess that determination."). It is similarly illogical to insist that the BIA somehow lacked a full opportunity to consider the issue or apply its expertise. *See* Pet.28–30. *Second*, the INA provides for "[j]udicial review of a final order of removal," indicating that the BIA's order (i.e., decision) is what a circuit court must review, including whatever issues the BIA resolved in that order. *Third*, Congress knows how to impose a strict party presentment requirement for exhaustion of administrative remedies but did not do so here. *See, e.g.*, 15 U.S.C. § 78y(c)(1).

In response, the government addresses none of those points and instead argues only that Petitioners are "incorrect." BIO6. But the government fails to explain why, beyond its mistaken view (discussed above) that no issue is exhausted unless the BIA writes a full-length treatise on it—a theory so extreme

that no court or commentator has ever previously suggested it, *see* Part II, *supra*.

As nearly every circuit in the country has recognized: when the BIA chooses to resolve an issue on the merits, it is exhausted.

* * *

This case presents an opportunity for an easy reversal on an important issue—one so worthy of a grant that the government tries to avoid this Court's review by refusing to engage with the Petition and by suggesting the Court instead hold this case for the opinion in another case that the government acknowledges raises completely different questions. The Court should reject the government's gamble and grant the Petition.

CONCLUSION

The Court should grant the Petition.

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