No. 22-191

In The
Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

Jonathan Y. Ellis
Counsel of Record
Sean A. McClelland
Francis J. Aul
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

QUESTION PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Among other things, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has a strong interest in supporting robust judicial review, the rigorous enforcement of separation-of-powers principles, and the ability of private parties in administrative proceedings to vindicate their rights in federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alone among the federal courts of appeals, the Eleventh Circuit prevents judicial review of any issue the Board of Immigration Appeals resolves *sua sponte*. Such resolution, the Eleventh Circuit says, means that the issue was not "fully considered" and therefore unexhausted for purposes of judicial review. *Amaya-*

---

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified pursuant to Rule 37.2(a) of *amicus curiae*'s intent to file this brief, and all parties have provided written consent to its filing.

Artunduaga v. U.S. Att'y Gen., 463 F.3d 1247, 1251 (11th Cir. 2006) (per curiam). As petitioners well explain, that rule is wrong. *See* Pet. 28–31. Cato respectfully submits this brief to highlight three additional reasons why the Eleventh Circuit's rule warrants this Court's review.

I. First, by insulating *sua sponte* agency decisionmaking from federal judicial review, the Eleventh Circuit's rule hinders effective oversight of the administrative state and effectively denies those aggrieved by the BIA's decisions an adequate remedy for violations of their rights. That flies in the face of longstanding presumptions favoring judicial review of agency action. In fact, it incentivizes agency reliance on *sua sponte* decisionmaking to avoid court intervention. This Court should take this case to reinforce federal court oversight of BIA decisions.

II. Second, the Eleventh Circuit's rule amplifies structural disadvantages inherent in immigration adjudications. Immigration is one of worst conceivable contexts to erect such a bar to judicial review. Most immigrants lack counsel for some or all of their proceedings. They are often detained and therefore face challenges developing the factual record. They must navigate byzantine procedures known better to their repeat-player agency opponents. And they often speak little to no English. All of these features make immigrants less likely to present and fully develop every argument against removal, as the Eleventh Circuit's rule demands of them. Moreover, the BIA's decisions are often simply wrong on the merits. Courts should be closely scrutinizing those decisions, not foreclosing review whenever the BIA uses a basis for removal no party addressed below. This Court should

step in to ensure adequate oversight over removal decisions.

III. Finally, the Eleventh Circuit's rule threatens all manner of other exhaustion requirements. Although 8 U.S.C. § 1252(d)(1) only concerns review of BIA decisions, analogous exhaustion requirements exist for a wide range of significant, potentially life-altering agency decisions. By its terms, the Eleventh Circuit's rationale for concluding that *sua sponte* decisions are not exhausted under Section 1252(d)(1) would seemingly apply to all of them. This Court should grant further review to correct the Eleventh Circuit's rule before it spreads to other areas of the law.

ARGUMENT

The Eleventh Circuit's rule threatens to prevent judicial review over a wide swath of agency decisions. At present, it does so in a particularly troubling context—immigration—in which most litigants are especially ill-prepared to raise the full panoply of arguments against removal. But it equally risks foreclosing judicial review with respect to a wide variety of other exhaustion requirements. This Court should grant the petition.

I. Courts Must Presumptively Remedy Erroneous Agency Decisionmaking.

The Eleventh Circuit's rule undermines one of the oldest principles of administrative law (indeed, of Anglo-American law generally): judicial review over agency decisionmaking. It functionally insulates a wide swath of significant—and potentially life-altering—immigration decisions from court oversight.

Worse, it does so by encouraging agency decisionmakers to conjure new bases for their decisions to avoid judicial scrutiny. That approach would often enable the adjudicators to evade review on their own initiative. This Court should correct the Eleventh Circuit's course.

Independent judicial review of executive action is a bedrock component of judicial oversight. The principle appears prominently in the writings of both Coke and Blackstone. *See James Bagg's Case* (1615), 11 Co. Rep. 93b, 98a, 77 Eng. Rep. 1271, 1278 (KB) (recognizing judicial authority over "any manner of misgovernment" such that "no wrong or injury, either public or private, can be done, but that it shall be reformed or punished by due course of law"); 1 WILLIAM BLACKSTONE, COMMENTARIES *137 (1769) ("A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries"). It has likewise long rested at the core of federal judicial power: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). And it is grounded in irreducible notions of executive accountability: "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

The principle applies with special force to agency actions. As Chief Justice Marshall put it in *United States v. Nourse*, foreclosing judicial review of

administrative conduct is an "anomaly" inconsistent with "a government of laws and of principle":

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

34 U.S. 8, 28–29 (1835). No surprise, then, that courts have long applied a "strong presumption" in favor of judicial review of agency action. *Bowen*, 476 U.S. at 670. And Congress has likewise facilitated such oversight; the Administrative Procedure Act creates a robust default rule authorizing judicial review. *See Weyerhauser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Put simply: the mine run of agency decisions must be reviewable at some point by a court.

The Eleventh Circuit's rule contravenes that principle. It effectively renders an entire type of case—any one in which agency adjudicators raise a dispositive issue *sua sponte*—unreviewable by the judiciary. That is doubly concerning: both the merits of the underlying claim and the propriety of the agency's *sua sponte* decisionmaking evade judicial oversight.

Worse still, the Eleventh Circuit's rule seems to actively encourage agencies to engage in more *sua sponte* decisionmaking to duck court review. It would be a particularly dull adjudicator who could not see that finding a new basis for denying a claim could save the hassle of federal judicial intervention down the line. Many adjudicators may thus be tempted to shield their decisions from judicial oversight by going beyond the arguments presented by the parties. That temptation should be discouraged, not indulged. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (emphasizing that "our adversarial system of adjudication" relies on "the principle of party presentation"). The Eleventh Circuit's rule, in short, facilitates—in fact, incentivizes—adjudicators using their own bases for a decision to avoid judicial review.

II. Insulating BIA Decisions From Oversight Doubles Down On Asymmetries In Immigration Adjudication.

These concerns are all the more pressing in the immigration setting. Like many who litigate against government agencies, immigrants face numerous structural disadvantages that limit their ability to present and fully develop issues and arguments on their own. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 30–31 (1st Cir. 2021) (identifying various such asymmetries); Sabrineh Ardalan, *Asymmetries in Immigration Protection*, 85 BROOK. L. REV. 319, 331–36 (2020) (same). The net result is twofold: immigrants are less likely to raise appropriate arguments to the BIA and the BIA is consequently more likely to resolve relevant issues *sua sponte*. The Eleventh Circuit's rule that such matters are unexhausted—and therefore unreviewable—then seals in any errors along the way.

Like many targets of agency action, immigrants do not have an easy time litigating even meritorious claims. Most do not even have a lawyer. Per one 2015 study of 1.2 million deportation cases, only 37% of immigrants are represented by counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel In Immigration Court*, 164 U. PENN. L. REV. 1, 7 (2015). Even that number, however, masks significantly more troubling figures for specific immigrant groups. As relevant here, immigrants from Central America are particularly unlikely to be represented; only 35% of Nicaraguans, 30% of Guatemalans, and 23% of Hondurans (like petitioners here) have counsel during removal proceedings. *Id.* at 45 (Figure 12). The numbers are similarly low for immigrants detained in small cities; only 10% of such immigrants end up being represented. *Id.* at 41.

Other disadvantages likewise limit immigrants' ability to adequately litigate their claims. Many immigrants—especially those who are detained—cannot meaningfully gather evidence in general, let alone the sort of country-condition evidence they commonly need to advance asylum claims. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013). They also face often-arcane immigration procedures "much better known to government representatives." *Hernandez-Lara*, 10 F.4th at 31. And they generally have to navigate complex proceedings with little-to-no English skills, never mind a working knowledge of what legal arguments might persuade relevant decisionmakers. *See id.* at 30–31.

Similar problems plague adjudications at the BIA level. A 2014 Executive Office for Immigration Review report, for instance, determined that

immigrants were unrepresented in over 25% of BIA proceedings.[2] The raw numbers on that front are stark: of the approximately 171,000 immigrant-filed appeals between 2002 and 2011, over 43,000 involved unrepresented immigrants.[3] And the evidence collection challenges, procedural confusion, and language difficulties from earlier stages compound at the BIA, where earlier missteps (often born from lack of counsel) commonly result in argument waiver or forfeiture. *E.g.*, *Matter of R-C-R-*, 28 I&N Dec. 74, 78–79 (BIA 2020). Quite simply, many (if not most) immigrants are ill-equipped to fully litigate their assertions against removal, either in immigration court or before the BIA.

These structural disadvantages limit the type and quality of arguments immigrants raise on their own. Detained immigrants without counsel are, for instance, nearly eleven times less likely than their counseled peers to request asylum or other relief from deportation: only 3% of unrepresented detained immigrants seek such relief while 32% of represented detained immigrants do. Eagly & Shafer, *Access to Counsel*, 164 U. PENN. L. REV. at 51 (Figure 15). Unrepresented immigrants are also correspondingly

---

[2] Executive Office for Immigration Review, *A Ten Year Review of the BIA Pro Bono Project: 2002–2011* at 12, https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.

[3] Executive Office for Immigration Review, *A Ten Year Review of the BIA Pro Bono Project: 2002–2011* at 12, https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.

less likely to be successful in actually receiving such relief: only 2% of *pro se* detained immigrants avoid removal while 21% of represented detained immigrants do. *Id.* at 50. And they are likewise less likely to win at the BIA, too; there, *pro se* litigants received favorable decisions only 9.5% of the time, as compared to a general win rate of 15% for immigrants across the board (and an even higher 31% win rate for cases involving counsel appointed under the BIA Pro Bono Project).[4]

All these weaknesses make the BIA more likely to engage in the very sort of *sua sponte* decisionmaking the Eleventh Circuit's rule insulates from review. Immigrants' relative inability to present or fully develop arguments on their own gives the BIA relatively open runway to find its own reasons in favor of removal. *Cf. Matter of R-C-R-*, 28 I&N Dec. at 78–79. And it appears that the BIA rarely hesitates in doing as much. It commonly discovers new bases for denying relief. *See, e.g.*, *Linyushina v. U.S. Att'y Gen.*, 826 F. App'x 731, 736 & n.5 (11th Cir. Aug. 24, 2020) (per curiam); *Osorio-Zacarias v. U.S. Att'y Gen.*, 745 F. App'x 335, 340 (11th Cir. Aug. 14, 2018) (per curiam); *Amaya-Artunduaga*, 463 F.3d at 1250. The BIA is, in other words, quite active in going beyond the briefing to adduce its own reasons for denying relief.

That state of affairs is all the more troubling because the BIA gets a lot of cases—even ones it does not resolve *sua sponte*—wrong. In 2021 alone, federal

---

[4] Executive Office for Immigration Review, *A Ten Year Review of the BIA Pro Bono Project: 2002–2011* at 12, https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.

courts of appeals remanded over 1,300 matters to the BIA for further review.[5] And BIA's reversal rate appears substantially higher than the rate for other types of matters involving similarly deferential standards of review. Judicial statistics suggest, for example, that the BIA's decisions are reversed more than 50% more frequently than decisions resolving post-conviction petitions for federal prisoners, and more than 87% more frequently than decisions resolving post-conviction petitions for state prisoners.[6] (Although judicial statistics do not break down reversal rates by particular agency, BIA decisions account for 85% of administrative agency appeals, the relevant statistic for the above figures.)

The Eleventh Circuit's rule further entrenches such errors against judicial review. It effectively punishes (generally unrepresented and non-fluent) immigrants for not managing to guess what reasoning the agency might use for deciding against them. Virtually every other circuit has avoided that result. The Eleventh Circuit's approach warrants this Court's attention.

---

[5] Executive Office for Immigration Review, *Adjudication Statistics: Circuit Court Remands Filed*, https://www.justice.gov/eoir/page/file/1199211/download (data generated July 15, 2022).

[6] Administrative Office of the U.S. Courts, *Table B-5—U.S. Courts of Appeals Statistical Tables For The Federal Judiciary* (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/12/31.

III. The Eleventh Circuit's Rule Threatens To Foreclose Judicial Review Across The Administrative State.

Finally, the Eleventh Circuit's rule risks infecting all manner of other exhaustion requirements. Left unchecked, it threatens to turn a range of exhaustion provisions across the administrative state into functional bars to judicial oversight. Further review is necessary to curtail the Eleventh Circuit's rule before it spreads.

The exhaustion requirement at issue in this case, 8 U.S.C. § 1252(d)(1), is, of course, not the only exhaustion requirement in the United States Code. As the petition identifies, there are a host of others. *See* Pet. 28. Matters as far ranging as IRS determinations, Medicare claims, Veterans Affairs claims, Indian trust disputes, and Department of Agriculture proceedings all have similar—and often jurisdictional—exhaustion prerequisites. *Id.*

The list goes on (and on). The following are just a handful of other matters generally reviewable only after agency exhaustion:

- Social Security benefits determinations, 42 U.S.C. § 405(g);
- Federal Tort Claims Act claims, 28 U.S.C. § 2675(a);
- Military service record corrections, 10 U.S.C. § 1034(g)(4);
- Merit Systems Protections Board reviews of adverse employment actions, 5 U.S.C. §§ 1221(h)(1)–(2), 7703;

- Occupational Safety and Health Administration orders, 29 U.S.C. § 660(a);
- Claims against failed financial institutions over which the FDIC is appointed as a receiver, 12 U.S.C. § 1821(d)(13)(D);
- Surface Transportation Board benefits determinations, 45 U.S.C. § 355(f);
- Federal Mine Safety and Health Review Commission safety determinations, 30 U.S.C. § 816(a);
- Environmental Protection Agency pesticide registration decisions, 7 U.S.C. § 136n; and
- Federal employee vision and dental benefits claims, 5 U.S.C. §§ 8961, 8991.

Like the immigration proceedings at issue here, such decisions often involve serious and potentially life-altering consequences for the parties facing agency action. Many go directly to an individual's ability to earn a livelihood, stay healthy, and contribute productively to society. They all warrant judicial review at some stage of the proceedings.

There is apparently nothing, however, logically stopping the Eleventh Circuit's rule from further proliferating to any of these other exhaustion requirements. The rule rests on an uncabined statutory requirement that an individual "has exhausted all administrative remedies." 8 U.S.C. § 1252(d)(1). Nothing about that language is particular to the immigration context. And the Eleventh Circuit's "*sua sponte* rule" likely is not either.

The Eleventh Circuit does not articulate its rule in any immigration-specific way. Quite the opposite,

the Eleventh Circuit's rule is a seemingly-general-purpose conclusion that adjudicators have not "fully considered" an issue they raise on their own. *Amaya-Artunduaga*, 463 F.3d at 1251. In the words of the case that established the rule:

> If . . . the BIA addresses an issue *sua sponte*, and a petitioner is entitled to then base arguments thereon in his petition for review before the federal courts, we cannot say the BIA fully considered the petitioner's claims, as it had no occasion to address the relevant arguments with respect to the issue it reviewed, nor can we say there is any record, let alone an adequate record, of how the administrative agency handled the claim in light of the arguments presented.

Id.; *see also, e.g., Srikanthavasan v. U.S. Att'y Gen.*, 828 F. App'x 590, 596 (11th Cir. Sept. 25, 2020) (per curiam) (articulating similar assumption); *Ruiz v. U.S. Att'y Gen.*, 773 F. App'x 1081, 1082 (11th Cir. July 22, 2019) (same); *Domingo Ramirez v. U.S. Att'y Gen.*, 755 F. App'x 957, 958 (11th Cir. Mar. 5, 2019) (per curiam) (same); *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1298 n.19 (11th Cir. 2015) (same). That general-purpose assumption about what constitutes full consideration is evidently divorced from anything about immigration law. The "*sua sponte* rule" would therefore appear to be unshackled from immigration law, as well.

Nor is there any broader reason to think the rule is likely to stay immigration-specific. To the contrary, the Eleventh Circuit has repeatedly said that its

rule comes from what it views as the "goals of exhaustion" generally—rather than anything particular about immigration specifically. *Amaya-Artunduaga*, 463 F.3d at 1251; *see Srikanthavasan*, 828 F. App'x at 596 ("The exhaustion doctrine exists to avoid premature interference with administrative processes, to allow the agency to consider the relevant issues, to give it a full opportunity to consider a petitioner's claims, and to allow the board to compile a record which is adequate for judicial review." (internal quotation marks and alterations omitted)); *Luchina v. U.S. Att'y Gen.*, 687 F. App'x 907, 915 (11th Cir. May 9, 2017) (per curiam) ("Reviewing issues that the BIA addresses *sua sponte* still frustrates the purposes of exhaustion"). The rule would therefore seem to extend to all other exhaustion requirements, whether created by statute, regulation, or judicial gloss. All such exhaustion requirements, after all, would appear to share the same "goals." *Amaya-Artunduaga*, 463 F.3d at 1251.

If left unchecked, then, the Eleventh Circuit's rule threatens to cloak all manner of *sua sponte* decisionmaking from judicial oversight. Litigants across the administrative state will be left without meaningful court assessment of their rights. This Court should intervene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan Y. Ellis
Counsel of Record
Sean A. McClelland
Francis J. Aul
McGuireWoods LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

September 29, 2022