No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Petitioners are Alma Aracely Castaneda-Martinez, Blanca Marisol Moncada, and Beatriz Marisol Castro-Moncada. Respondent is the Attorney General of the United States, Merrick B. Garland.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Castaneda-Martinez v. U.S. Att'y Gen.*, No. 21-10115 (11th Cir.) (opinion issued Nov. 15, 2021; rehearing *en banc* denied March 17, 2022).
- *Castaneda-Martinez v. Garland*, No. 21A739 (U.S.) (May 19, 2022, order granting application extending time to file petition until August 12, 2022).
- *Moncada v. U.S. Att'y Gen.*, No. 21-10267 (11th Cir.) (opinion issued Apr. 12, 2022; rehearing *en banc* denied July 12, 2022).

There are no additional proceedings in any court that are directly related to these cases within the meaning of this Court's Rule 14(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Petitioners seek review of two separate judgments that "involve [an] identical … question[]." Sup. Ct. R. 12.4.

OPINIONS BELOW

Petitioner Castaneda-Martinez: The Eleventh Circuit's November 15, 2021, opinion (Pet.App.1) is unreported but available at 2021 WL 5298894. The Eleventh Circuit's March 17, 2022, order denying *en banc* review (Pet.App.27) is unreported. The Board of Immigration Appeals' December 23, 2020, order dismissing the appeal (Pet.App.19) is unreported.

Petitioners Moncada and Castro-Moncada: The Eleventh Circuit's April 12, 2022, opinion (Pet.App.11) is unreported but available at 2022 WL 1090937. The Eleventh Circuit's July 12, 2022, order denying *en banc* review (Pet.App.29) is unreported. The Board of Immigration Appeals' December 30, 2020, order dismissing the appeal (Pet.App.23) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment in *Castaneda-Martinez* on November 15, 2021, and denied *en banc* review on March 17, 2022. On May 19, 2022, Justice Thomas extended the time to file a

petition for a writ of certiorari to August 12, 2022. *See* No. 21A739. The Eleventh Circuit entered its judgment in *Moncada* on April 12, 2022, and denied *en banc* review on July 12, 2022.

STATUTORY PROVISION INVOLVED

"A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right[.]" 8 U.S.C. § 1252(d).

INTRODUCTION

The circuit courts are openly divided on an issue of statutory interpretation that has a significant impact on important administrative proceedings: 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. Section 1252(d)(1) states that a federal court "may review a final order of removal only if … the alien has exhausted all administrative remedies available to the alien as of right." Accordingly, courts often hold they are jurisdictionally precluded from reviewing any issue that was not exhausted.

The Eleventh Circuit has long held that an issue the BIA resolves *sua sponte* is not exhausted, and thus the court lacks jurisdiction to review it. *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250–51 (11th Cir. 2006). And where the *sua sponte* ruling provides an independent and adequate ground for denying relief, it becomes dispositive and precludes

review of any other objections to the BIA's ruling, as well.

Half a dozen circuits have expressly rejected the Eleventh Circuit's rule. These courts all recognize that when an administrative agency *sua sponte* resolves an issue on the merits rather than ignoring it or deeming it forfeited, the agency inherently concluded the issue was fairly presented and thereby rendered it exhausted for purposes of subsequent judicial review.

In the two cases below, the Eleventh Circuit refused to consider Petitioners' challenges to the bases on which the BIA denied relief, because the court concluded those issues were resolved *sua sponte* by the BIA. For example, the Immigration Judge found Petitioner Castaneda-Martinez credible and did not dispute that she had suffered persecution after a gang murdered several of her family members and then relentlessly pursued her and even raped her friend's 16-year-old daughter to "punish" Petitioner. On appeal, the BIA concluded there was no nexus between a protected social group and Petitioner's persecution, which precluded all relief. But when Petitioner challenged the BIA's decision at the Eleventh Circuit, the court held it lacked jurisdiction altogether because the BIA had resolved the nexus issue *sua sponte*.

The Eleventh Circuit's rule threatens the integrity of immigration proceedings. "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).

As explained below, this issue arises in an estimated 130 cases a year across the circuit courts, and this case presents an ideal vehicle to resolve it. Moreover, although this case involves the BIA, there is nothing unusual about § 1252(d)(1)'s exhaustion provision, and the Eleventh Circuit's rule could metastasize to other administrative decisions—ranging from veterans issues, to IRS claims, to Indian trust management—thereby providing an incentive for agencies to shield their decisions from judicial review.

Finally, the Eleventh Circuit's rule is not just wrong and illogical, but also violates the requirement that "when a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority." *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (cleaned up).

This is an ideal case to resolve disagreement over a straightforward question of immigration law and ensure there is no incentive for agencies to bootstrap themselves out of judicial scrutiny. The Court should grant the petition.

STATEMENT OF THE CASE

A. Petitioner Castaneda-Martinez

1. Immigration Court

Petitioner Castaneda-Martinez is a 38-year-old native and citizen of Honduras. In September 2018, an Immigration Judge ("IJ") held a hearing on Petitioner's I-589 application for withholding of removal and relief under the Convention Against Torture ("CAT"). CMAR30–38.[1] At the end of that hearing, the IJ found Petitioner credible, stating that her testimony was "candidly responsive," "consistent," and "especially detailed." CMAR32. Petitioner testified that when she was in Honduras, a gang called Los Chentes (associated with MS-13) was extorting a "tax" from her uncle, who owned a small grocery store. CMAR103–05. When the uncle stopped paying and encouraged other businesses to do the same, two members of Los Chentes arrived at the store and shot him three times, killing him in front of Petitioner. CMAR106–12. One of the gang members warned Petitioner that if she ever spoke about the murder, she was "going to pay double." CMAR111.

Petitioner quickly moved in with her sister-in-law. Several months later, her uncle's cousin Omar Marchado Bonilla convinced Petitioner to report the

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[1] "CMAR" refers to the administrative record filed with the Eleventh Circuit in Castaneda-Martinez's case.

murder, CMAR113–16, but Los Chentes found out and soon shot Omar 10 to 15 times, killing him, too. CMAR118–19.

Petitioner moved again, this time to her friend Norma's house, which was over 1.5 hours away. CMAR121–22. A few months later, members of Los Chentes found her and broke into the house. CMAR122–23. Petitioner recognized one of the men from her uncle's murder. CMAR122–23. Petitioner and Norma's 16-year-old daughter both tried to escape, but the gang members caught the daughter and raped her. CMAR125. The gang members told the daughter that her rape was "[Petitioner's] fault," that Petitioner "would pay just as Omar had," and that "they were going to find [Petitioner] no matter where" she was. CMAR125, 187.

Petitioner moved again, this time to her friend Alba's house, but knowledge of her arrival quickly spread, and Alba told her to leave. CMAR126. Petitioner fled and arrived in the United States. CMAR127.

Although the IJ found Petitioner's testimony credible and did not dispute that she had been subject to persecution, the IJ nonetheless denied relief because he concluded that Petitioner had not identified a proper "particular social group" nor a nexus between a social group and her persecution. CMAR30–38.

2. Board of Immigration Appeals

In August 2020, Petitioner appealed to the Board of Immigration Appeals, where she argued that being a "snitch" who tried to report gang violence to the police qualified as membership in a particular social group. CMAR 16–17, 24–26. She continued that her attempt to file a police report "was one of the central reasons, if not the main reason, why she was persecuted." CMAR26; *see also* CMAR 54.

On December 23, 2020, the BIA dismissed the appeal. The BIA addressed the merits of the nexus issue, finding there was an insufficient link between Petitioner's persecution and a particular social group because "the events described by the applicant appear to concern a personal dispute or vendetta." Pet.App.20. That holding was dispositive of Petitioner's withholding of removal claim.[2]

3. Eleventh Circuit

Petitioner sought review in the Eleventh Circuit and challenged the BIA's ruling regarding nexus. But the court held that it lacked jurisdiction to consider that issue, even though it formed the sole basis on which the BIA had rejected Petitioner's withholding claim. Pet.App.7–10. The court explained that Petitioner failed to adequately raise

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[2] The BIA also denied CAT relief, but that finding is not relevant here because Petitioner did not challenge it at the Eleventh Circuit. Pet.App.5 n.1.

the nexus issue in her briefing at the BIA—i.e., the BIA had resolved the merits of that issue *sua sponte*—and thus subsequent judicial review was precluded. Pet.App.9–10.

Petitioner sought rehearing *en banc*, which the Eleventh Circuit denied. Pet.App.27.

B. Petitioners Moncada and Castro-Moncada

1. Immigration Court

Petitioners Moncada and Castro-Moncada are also natives and citizens of Honduras. On November 1, 2018, an IJ held a hearing on Moncada's application for asylum, withholding of removal, and relief under the Convention Against Torture. MAR108–200.[3] Her daughter Castro-Moncada was a derivative beneficiary.

Moncada testified that when she was in Honduras, a man named Eduardo had targeted members of her family, including by threatening to burn down their house and kill them, and asking Moncada to turn over her daughter to him. Eduardo was assisted by a woman who knew where Moncada's children went to school, where her husband lived, and what days the family went to church. MAR136.

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[3] "MAR" refers to the administrative record filed with the Eleventh Circuit in Moncada's and Castro-Moncada's case.

Moncada had first-hand evidence that the government would not pursue these criminals. She had previously been raped by a man whom she reported to the police, who not only ignored her report but later hired the rapist as a police officer. MAR45, MAR47, MAR153, MAR391.

Although the IJ found Moncada credible, Pet.App.14, he concluded there had been no past persecution or nexus between persecution and a protected ground, which precluded asylum or withholding of removal. MAR56. The IJ also rejected the CAT claim due to insufficient evidence the Honduran government would consent or acquiesce to torture. Pet.App.25.

2. Board of Immigration Appeals

On November 28, 2018, Petitioners Moncada and Castro-Moncada appealed to the BIA, claiming past and future persecution by Eduardo. MAR11. On December 30, 2020, the BIA dismissed the appeal, agreeing with the IJ that Petitioners had not demonstrated a nexus between persecution and membership in a particular social group. Pet.App.24–25. That issue was dispositive of the asylum and withholding claims. Pet.App.25. Similarly, the BIA rejected the CAT claim on the merits because the Honduran government would not acquiesce in torture. *Id.*

3. Eleventh Circuit

Petitioners Moncada and Castro-Moncada sought judicial review of the BIA's merits determinations, but the Eleventh Circuit held that it lacked jurisdiction to consider the bases on which the BIA had rejected Petitioners' claims—i.e., the lack of nexus, and the lack of acquiescence by the Honduran government—because the BIA had resolved the merits of those issues *sua sponte*. Pet.App.16–18.

Petitioners Moncada and Castro-Moncada sought rehearing *en banc*, which the Eleventh Circuit denied. Pet.App.29.

REASONS FOR GRANTING THE PETITION

This case satisfies all of the Court's considerations for granting *certiorari*.

First, the circuit courts are openly divided on the question presented, with half a dozen expressly rejecting the Eleventh Circuit's rule. *See* Part I, *infra*.

Second, the question presented arises frequently. As estimated below, over a hundred circuit cases each year involve this issue. The Eleventh Circuit itself has an extensive immigration docket and has invoked its jurisdictional "*sua sponte* rule" approximately a hundred times since 2006. *See* Part II.A, *infra*.

Third, no further percolation is needed in the lower courts, and maintaining uniformity in immigration matters is particularly important. *See* Part II.B, *infra*.

Fourth, the Eleventh Circuit's rule is especially problematic due to a combination of factors: (1) these agency proceedings can provide life-changing relief from persecution or even torture; (2) the inability to challenge an issue resolved *sua sponte* frequently renders moot all other challenges to the BIA's decision; (3) it is often unclear precisely on which basis an IJ actually denied relief; and (4) the rule is jurisdictional and cannot be waived or forgiven. *See* Part II.C, *infra*.

Fifth, this case is an excellent vehicle for resolving this issue, as it was squarely presented and resolved in both decisions below, and the Eleventh Circuit's exhaustion rule precluded review of the petitions. *See* Part II.D, *infra*.

Sixth, the Eleventh Circuit's approach risks metastasizing throughout the administrative state. There is nothing unusual about § 1252(d)(1)'s exhaustion requirement. If the Eleventh Circuit's rule spreads beyond the BIA, other agencies—ranging from Veterans Affairs, to the IRS, to the Department of the Interior—will have tremendous incentive to shield their rulings from judicial review simply by adding *sua sponte* holdings. *See* Part II.E, *infra*.

Seventh, the Eleventh Circuit's rule is wrong. As other courts have recognized, when an administrative agency resolves the merits of an issue *sua sponte*, that issue has been adequately exhausted. And when Congress wishes to impose a strict party-presentment requirement, it knows how to do so, but such language is absent from § 1252(d)(1). *See* Part III, *infra*.

The Court should grant the petition.

I. THE CIRCUITS ARE OPENLY DIVIDED ON THE QUESTION PRESENTED.

The circuit courts are split into distinct camps on whether an issue resolved on the merits *sua sponte* by the BIA is exhausted under § 1252(d)(1).

A. The Eleventh Circuit Bars Judicial Review of Any Issue the BIA Resolved *Sua Sponte*.

The Eleventh Circuit has concluded that it lacks jurisdiction under § 1252(d)(1) to review any issue that the BIA resolved *sua sponte*. *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247 (11th Cir. 2006).

In *Amaya-Artunduaga*, a petitioner challenged the BIA's adverse ruling on credibility, which the BIA had resolved on the merits *sua sponte*. *Id.* at 1250–51. The Eleventh Circuit explained why, in its view, the fact that "the BIA reviewed the IJ's adverse credibility determination *sua sponte* does not alter our conclusion" that the issue was unexhausted. *Id.* at 1250. "Certainly, the exhaustion doctrine exists, in part, to avoid premature interference with administrative processes and to allow the agency to consider the relevant issues. Courts have also opined, however, that § 1252(d)(1)'s exhaustion requirement ensures the agency 'has had a full opportunity to consider a petitioner's claims,' and 'to allow the BIA to compile a record which is adequate for judicial review.'" *Id.* (citations omitted). "Reviewing a claim that has not been presented to the BIA, even when the BIA has considered the underlying issue *sua sponte*, frustrates these objectives. An issue or claim does not exist in isolation; rather, each is presented in the context of argument." *Id.* Accordingly, "[r]equiring exhaustion allows the BIA to consider the niceties and contours of the relevant arguments, thereby fully considering

the petitioner's claims and compiling a record which is adequate for judicial review." *Id.* (cleaned up).

Even though the issue arises only when the BIA itself has deemed the record sufficient to resolve an issue, the Eleventh Circuit reasoned that when "the BIA addresses an issue *sua sponte*, … 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.* at 1250–51.

"[A]pplying § 1252(d)(1)'s exhaustion requirement," the Eleventh Circuit "dismiss[ed] Amaya's challenge to the adverse credibility determination," even though "the BIA [had] addressed th[at] underlying issue *sua sponte*." 463 F.3d at 1251.

The Eleventh Circuit has subsequently invoked its exhaustion rule approximately a hundred times, *see* Part II.A, *infra*, and has further repeated the rule in another precedential decision, *see Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1298 n.19 (11th Cir. 2015).

The Eleventh Circuit applied this rule in both decisions below and dismissed Petitioners' challenges due to lack of jurisdiction. *See* Pet.App.7–10, 16–18.

B. Most Circuits Reject the Eleventh Circuit's Rule.

Almost all other circuits hold that issues the BIA resolves *sua sponte* are deemed exhausted under 8 U.S.C. § 1252(d)(1). Half a dozen of those circuits have expressly rejected the Eleventh Circuit's rule.

First Circuit. In *Mazariegos-Paiz v. Holder*, 734 F.3d 57 (1st Cir. 2013), the First Circuit held in the context of § 1252(d)(1) that "an issue is exhausted when it has been squarely presented to and squarely addressed by the agency, regardless of which party raised the issue (or, indeed, even if the agency raised it *sua sponte*)." 734 F.3d at 63. "[B]y addressing an issue on the merits, an agency is expressing its judgment as to what it considers to be a sufficiently developed issue." *Id.* In so holding, the First Circuit noted that it was rejecting the Eleventh Circuit's contrary rule. *Id.*

Second Circuit. In *Ruiz-Martinez v. Mukasey*, 516 F.3d 102 (2d Cir. 2008), the Second Circuit held that even when a petitioner "did not challenge [a specific issue] in his brief to the BIA," that issue would be "considered exhausted, and we may review it," where "the BIA explicitly addressed it in its decision." *Id.* at 112 n.7.

Third Circuit. In *Bin Lin v. U.S. Attorney General*, 543 F.3d 114 (3d Cir. 2008), the Third Circuit recognized the "disagreement among our sister circuits" on the issue but rejected the Eleventh Circuit's view, holding instead that "we have

jurisdiction to address the IJ's adverse credibility determination because the BIA considered the issue *sua sponte*." *Id.* at 123, 123–24.

Fourth Circuit. In *Portillo Flores v. Garland*, 3 F.4th 615 (4th Cir. 2021) (*en banc*), the majority of the Fourth Circuit's *en banc* court agreed with the "circuits [that] have found a claim exhausted 'whenever the agency has elected to address in sufficient detail the merits of a particular issue,' even if the agency raised it *sua sponte*." *Id.* at 633 (quoting the First Circuit's decision in *Mazariegos-Paiz*). The six-judge dissent, however, declined to join that holding and concluded that the argument at issue had not been exhausted. *Id.* at 648 (Quattlebaum, J., dissenting).

Fifth Circuit. In *Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010), the Fifth Circuit "not[ed] a circuit split on this issue," expressly rejected the Eleventh Circuit's rule, and adopted the majority view by holding that the purposes of exhaustion "are fulfilled when the BIA chooses to address an issue on the merits despite potential defects in its posture before the BIA." *Id.* at 644 & n.1. "Thus, if the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that 8 U.S.C. § 1252(d)(1) requires to confer our jurisdiction." 609 F.3d at 644 (cleaned up).

Sixth Circuit. In *Khalili v. Holder*, 557 F.3d 429 (6th Cir. 2009), the Sixth Circuit noted the circuit split, expressly rejected the Eleventh Circuit's view,

and instead "follow[ed] the majority of circuit courts in finding appellate jurisdiction to review issues raised *sua sponte* by the BIA" because, "[i]n such cases, the BIA's action waives that issue's exhaustion requirements." *Id.* at 435.

Seventh Circuit. In several unpublished decisions, the Seventh Circuit has expressly rejected the Eleventh Circuit's rule and held that "when the BIA has addressed an issue *sua sponte*, it was exhausted to the extent it could be." *Cisneros-Cornejo v. Holder*, 330 F. App'x 616, 619 (7th Cir. 2009) (cleaned up); *see Liu v. Mukasey*, 264 F. App'x 530, 533 (7th Cir. 2008) (same). It does not appear the Seventh Circuit has addressed this issue in a published opinion.

Eighth Circuit. In *Ramirez v. Sessions*, 902 F.3d 764 (8th Cir. 2018), the Eighth Circuit held that a due process claim not raised at the BIA had nonetheless been exhausted "given that the Board's order specifically determined [the petitioner] received a fundamentally fair hearing and has not shown any resulting prejudice." *Id.* at 770 (cleaned up).

Ninth Circuit. The Ninth Circuit has long held that any issue resolved *sua sponte* by the BIA is deemed exhausted under § 1252(d)(1). *See Abebe v. Gonzalez*, 432 F.3d 1037, 1041 (9th Cir. 2005) (*en banc*).

Tenth Circuit. In *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007), Judge Tymkovich,

writing for the panel, "respectfully disagree[d]" with the Eleventh Circuit's rule and held that issues resolved *sua sponte* by the BIA are deemed exhausted. *Id.* at 1119–22. The Tenth Circuit provided a lengthy discussion of why the Eleventh Circuit's rule is wrong, noting that "[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all § 1252(d)(1) requires to confer our jurisdiction." 503 F.3d at 1120.

II. THIS CASE MERITS REVIEW.

A. The Question Presented Frequently Arises Both Nationally and in the Eleventh Circuit.

The question presented arises with great frequency in the circuit courts generally (over a hundred times a year, as estimated below) and in the Eleventh Circuit specifically (approximately a hundred times since the rule was announced in 2006).

1. Circuit courts review approximately 6,400 BIA decisions each year,[4] and questions of proper exhaustion loom large in nearly every case because

[4] Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2021*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 (noting that in 2021, there were 7,491 administrative agency appeals to the circuit courts, of which 85% were appeals of BIA decisions).

most circuits consider issue exhaustion under § 1252(d)(1) to be a jurisdictional requirement.[5]

Although most circuits do not note when the BIA resolved an issue *sua sponte* (because it does not affect their jurisdiction), an estimate of how often the circuit courts review such an issue can be made by comparison to the Eleventh Circuit, as that court typically *does* expressly note when a case implicates its jurisdictional exhaustion rule.

The Eleventh Circuit invoked its rule in at least 29 cases from 2017 through 2021, i.e., about 5.8 per year.[6] Extrapolating based on the respective caseloads of administrative appeals across the circuits with immigration dockets, this translates to over 130 circuit cases nationwide *each year* involving an issue the BIA resolved *sua sponte*.[7]

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[5] *See, e.g.*, *Sousa v. INS*, 226 F.3d 28, 31–32 (1st Cir. 2000); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 594–95 (3d Cir. 2003); *Massis v. Mukasey*, 549 F.3d 631, 638 (4th Cir. 2008); *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997); *Ramani v. Ashcroft*, 378 F.3d 554, 559–60 (6th Cir. 2004); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 583 (8th Cir. 2005); *Barron v. Ashcroft*, 358 F.3d 674, 677–78 (9th Cir. 2004) (*en banc*); *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019); *Fernandez-Bernal v. Att'y Gen. of U.S.*, 257 F.3d 1304, 1317 n. 13 (11th Cir. 2001). *But see Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, 120–22 (2d Cir. 2007); *Korunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006).

[6] A sample of these cases is cited below in Part II.A.

[7] Of the circuits with immigration dockets, only a few hear more agency appeals than the Eleventh Circuit. Administrative Office of the U.S. Courts, *Table B-5—U.S. Courts of Appeals*

To put that in context: on average, several times a week, a circuit court decides a case involving an issue the BIA had resolved on the merits *sua sponte*.

2. This issue also arises frequently within the Eleventh Circuit itself, which has one of the busier immigration dockets in the country given its geographic location and large population. A Westlaw search reveals that the Eleventh Circuit has invoked its *sua sponte* exhaustion rule as many as a hundred times to preclude judicial review since announcing that rule in 2006.[8]

In addition to the two decisions below involving Petitioners, there are dozens of clear-cut instances in the last few years alone. A few examples:

- "Although the [BIA] *sua sponte* addressed whether Sri Lanka could and would protect Srikanthavasan, that 'does not alter our conclusion' regarding our lack of jurisdiction" over that issue. *Srikanthavasan v. U.S. Att'y Gen.*, 828 F. App'x 590, 596 (11th Cir. 2020).
- "The Board did consider that issue *sua sponte*. But issues raised by the Board *sua sponte* are not administratively exhausted." *Linyushina*

Statistical Tables For The Federal Judiciary (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/12/31.

[8] For example, a search of "*sua sponte*" in the same paragraph as "exhaust!" and "*Amaya-Artunduaga*" hits on 106 cases in the Eleventh Circuit.

v. U.S. Att'y Gen., 826 F. App'x 731, 736 n.5 (11th Cir. 2020).

- "The Board's *sua sponte* consideration of those claims does not vest us with jurisdiction." *Ruiz v. U.S. Att'y Gen.*, 773 F. App'x 1081, 1082 (11th Cir. 2019).
- "[T]his Court lacks jurisdiction to consider [petitioner's argument], notwithstanding the fact that it was the basis for the BIA's decision." *Domingo Ramirez v. U.S. Att'y Gen.*, 755 F. App'x 957, 958 (11th Cir. 2019).
- "[A]lthough the BIA addressed the relocation issue anyway, that does not provide us with jurisdiction." *Osorio-Zacarias v. U.S. Att'y Gen.*, 745 F. App'x 335, 340 (11th Cir. 2018).
- "That the BIA chose to address *sua sponte* the IJ's adverse credibility determination does not change our conclusion about the scope of our jurisdiction." *Baracaldo-Zamora v. U.S. Att'y Gen.*, 729 F. App'x 908, 911 (11th Cir. 2018).
- "The fact that the BIA *sua sponte* addressed the adverse credibility determination does not cure the lack of exhaustion." *Luchina v. U.S. Att'y Gen.*, 687 F. App'x 907, 915 (11th Cir. 2017).

Many more could be cited. Rarely will this Court face a distinct legal issue that arises with such frequency across the country and also within the circuit with the minority position.

B. The Split Is Ripe for Review, and Uniformity Is Particularly Important in this Context.

1. No further percolation is needed. Nearly every circuit has weighed in. *See* Part I, *supra*. And there is no realistic chance the Eleventh Circuit will self-correct. That court denied *en banc* review in both cases below despite being presented with the weight of authority from other circuits. *See* Pet.App.27, 29. In fact, the Eleventh Circuit has been aware for years that it is an outlier but has steadfastly stuck with its rule: "This Court seems to be alone in holding that we have no jurisdiction to review issues the BIA *sua sponte* addresses on administrative appeal." *Molina-Salazar v. U.S. Att'y Gen.*, 773 F. App'x 523, 525 n.2 (11th Cir. 2019).

No further progress is realistically possible at the circuit level. The circuits are fully entrenched. This Court should step in.

The government will predictably argue that this Court should not bother to correct a "lopsided" circuit split. But facilely counting the number of circuits on each side of the ledger drastically underestimates the effect of the Eleventh Circuit's rule. As demonstrated above, the question presented arises on a near-daily basis across the country, and the Eleventh Circuit itself routinely invokes its *sua sponte* rule. This issue arises within the Eleventh Circuit as often as many splits arise *in total* across the country.

2. Further, the interest in maintaining uniformity in circuit practice is equally implicated by both "lopsided" and "even" splits, which presumably explains the Court's past practice of granting certiorari when even *one* "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, this Court routinely grants *certiorari* despite "lopsided" splits or where there is no split at all. *See, e.g.*, *Thompson v. Clark*, 141 S. Ct. 1513 (2021) (granting *certiorari* on 7-1 split); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 & n.4 (2018) (resolving 6-1 split); *Coleman v. Tollefson*, 575 U.S. 532, 536 (2015) (noting grant in 8-2 split); *Chambers v. United States*, 555 U.S. 122, 125 (2009) (resolving 10-1 split).

Moreover, as underscored by the Constitution, relevant statutes, and this Court's decisions, the interest in maintaining national uniformity is particularly strong in the context of immigration law. *See* U.S. Const. Art. I, § 8, cl. 4 (Congress has power to "establish an uniform Rule of Naturalization"); Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384 ("[T]he immigration laws of the United States should be enforced vigorously and uniformly."); *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "the Nation's need to 'speak with one voice' in immigration matters").

C. The Eleventh Circuit's Rule Is Especially Problematic.

A combination of factors renders the Eleventh Circuit's rule especially problematic and thus deserving of this Court's review.

1. Immigration proceedings are important mechanisms for providing life-changing—and even life-saving—relief from persecution and torture, yet, under the Eleventh Circuit's rule, petitioners are altogether denied judicial review of an issue that the BIA chose to address on the merits.

As Justice Kennedy stated, "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*, 538 U.S. at 1305. But the rule of law means little if it allows a bureaucratic agency to deny such important relief *sua sponte* and simultaneously escape judicial review.

And the result is even worse when the BIA *sua sponte* denies relief on what amounts to an alternative ground. The Eleventh Circuit holds that this precludes review not just of the issue resolved *sua sponte* but also of other potentially meritorious arguments that were undoubtedly exhausted. For example, if the BIA rejects the petitioner's argument

about membership in a particular social group and then *sua sponte* rules that the petitioner did not make a sufficient showing of a nexus, the Eleventh Circuit lacks jurisdiction to review *either* of those rulings because the BIA's *sua sponte* alternative finding about nexus is insulated from judicial review and independently precludes a grant of relief. The Eleventh Circuit has even acknowledged this result yet continues to apply its rule anyway. *See Leiva-Hernandez v. U.S. Att'y Gen.*, No. 20-14163, 2021 WL 3012652, at *3 (11th Cir. July 16, 2021).

As a result, petitioners can be subject to removal without a court ever having reviewed the bases the BIA provided for rejecting asylum, withholding, or CAT relief.

2. The Eleventh Circuit's rule is especially illogical in the context of determinations about whether there is a nexus between persecution and a particular social group, which is the dispositive issue in most immigration proceedings. Because nexus and particular social group are routinely recited together—i.e., "persecution because of membership in a particular social group"—it is often difficult to discern whether an IJ denied relief due to lack of a particular social group, or also due to lack of nexus. And it can be equally difficult to know whether lack of nexus is an independent holding or simply a recognition that persecution cannot be on account of a particular social group if no such group exists.

This explains why the BIA often *sua sponte* addresses nexus or particular social group. Where

the BIA itself is not confident enough to say that particular aspect was forfeited, it makes little sense for a court subsequently to second-guess the BIA and conclude that the petitioner failed to preserve a challenge to an ambiguous IJ ruling.

3. The Eleventh Circuit's rule is especially unforgiving because it is jurisdictional, meaning the court has an obligation to raise it even when the government does not. *See Amaya-Artunduaga*, 463 F.3d at 1250–51. Moreover, as a jurisdictional rule, it is conclusive once invoked, meaning the court is forbidden from looking at the underlying merits of the BIA's *sua sponte* ruling, which could be unsupported by substantial evidence or even directly contradicted by precedent.

Although *Amaya-Artunduaga* seemed to imply, in passing, that § 1252(d)(1) might contain an "excuse or exception" to its exhaustion requirement, *see* 463 F.3d at 1250, the Eleventh Circuit subsequently construed that part of *Amaya-Artunduaga* "as dicta," *Martinez-Rubio v. U.S. Atty. Gen.*, 564 F. App'x 478, 480 n.6 (11th Cir. 2014), and indeed it appears the court has never identified any such excuse or exception.

D. This Case Presents an Ideal Vehicle.

This case presents an ideal vehicle to resolve the question presented because the Eleventh Circuit's decisions below stated that the court lacked jurisdiction to review Petitioners' challenges

precisely because the BIA resolved the merits of those issues *sua sponte*, Pet.App.7–10, 16–18, although in neither decision did the BIA say it was doing so *sua sponte* or otherwise hold that Petitioners failed to raise the relevant issues.

Further, although this Court would not reach the underlying merits of the BIA's rulings, it is worth noting that all Petitioners were deemed credible at the Immigration Court, and Petitioner Castaneda-Martinez in particular provided harrowing testimony of how she was relentlessly pursued—at incredible cost—due to her willingness to testify against Los Chentes, and her membership in a family that had opposed gang extortion, which the IJ never disputed would amount to past persecution. In short, these are certainly not weak cases that would necessarily be denied relief on the merits even absent the Eleventh Circuit's exhaustion rule.

E. The Eleventh Circuit's Rule Risks Metastasizing Throughout the Administrative State.

As this Court has noted, administrative exhaustion requirements can be imposed by statute, by regulation, and even by courts themselves. *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021). Although Petitioners' cases arise in the context of BIA decisions, there is nothing unique about § 1252(d)(1)'s exhaustion provision, nor was the Eleventh Circuit's rationale specific to the BIA.

Accordingly, there is no reason why the Eleventh Circuit's rule would not apply equally to other requirements to exhaust available administrative remedies, be they (for example) in the context of challenges to IRS determinations, 26 U.S.C. § 7433(d); to Medicare claims, *Cmty. Oncology All., Inc. v. OMB*, 987 F.3d 1137, 1143 (D.C. Cir. 2021); to certain Veterans Affairs claims, 38 U.S.C. § 1703A(h)(3); to Indian trust disputes, 25 U.S.C. § 5613(b)(4)(B); or to actions taken by the Department of Agriculture, 7 U.S.C. § 6912(e).

Under the Eleventh Circuit's rule, agencies can avoid judicial review simply by *sua sponte* adding an independent basis for denying relief. The Court should nip this issue in the bud before it spreads across and further empowers the administrative state.

III. THE ELEVENTH CIRCUIT'S RULE IS WRONG.

Section 1252(d)(1) precludes judicial review unless the petitioner has "exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). As most circuits have held, when the BIA chooses to resolve an issue on the merits, that issue has been fully exhausted. *See* Part I.B, *supra*. That is because, "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*, 734 F.3d at 63.

1. The Eleventh Circuit provided several rationales for its contrary rule, but none is persuasive. *First*, the court held that when "the BIA addresses an issue *sua sponte*, … we cannot say the BIA fully considered the petitioner's claims." *Amaya-Artunduaga*, 463 F.3d at 1250–51. But it makes little sense to say an administrative agency failed to fully consider an issue that the agency went out of its way to resolve on the merits. As Judge Tymkovich explained for the Tenth Circuit, "Where the BIA determines an issue administratively-ripe to warrant its appellate review, [courts] will not second-guess that determination." *Sidabutar*, 503 F.3d at 1120. In other words, the BIA itself can surely "determine … when [it] is sufficiently apprised of the applicable issues to entertain the appeal." *Lin*, 543 F.3d at 124 (cleaned up).

Second, the Eleventh Circuit insisted that judicially "[r]eviewing a claim that has not been presented to the BIA, even when the BIA has considered the underlying issue *sua sponte*, frustrates the[] objectives" of exhaustion, including providing the agency "a full opportunity to consider a petitioner's claims, and to allow the BIA to compile a record which is adequate for judicial review." *Amaya-Artunduaga*, 463 F.3d at 1250–51 (cleaned up); *see Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting importance of an agency giving "the benefit of its experience and expertise"). But again it is nonsensical to say the BIA lacked a full opportunity to consider an issue or compile an adequate record when the BIA chose to address and resolve the

merits of an issue. As other circuits have correctly concluded: "Where the BIA has issued a decision considering the merits of an issue, even *sua sponte*, these interests have been fulfilled." *Sidabutar*, 503 F.3d at 1121. By consciously deciding not to deem the issue forfeited and instead addressing it on the merits, the "agency here had sufficient opportunity to correct its own errors." *Lin*, 543 F.3d at 126.

Likewise, in deciding to address the matter based on its own understanding of the record and the law, the "BIA has already had an opportunity to apply its experience and expertise without judicial interference." *Id.* at 125; *see Sidabutar*, 503 F.3d at 1121. And by reaching a decision, "the BIA determined under its own rules that it had enough information on the record to issue a 'discernible substantive discussion.'" *Sidabutar*, 503 F.3d at 1120; *see also Mazariegos-Paiz*, 734 F.3d at 63.

2. The Eleventh Circuit also failed to consider how textually anomalous its rule is. Section 1251(a) provides for "[j]udicial review of a final order of removal," indicating that the BIA's decision is what a circuit court must review, and that review does not turn on whether, in the court's view, the parties' administrative briefing adequately raised a particular issue.

Further, Congress knows how to impose a strict party presentment requirement for exhaustion of administrative remedies. *See, e.g.*, 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the [Securities and Exchange] Commission, for which

review is sought under this section, may be considered by the court *unless it was urged before the Commission* or there was reasonable ground for failure to do so.") (emphasis added). But § 1252(d)(1) contains no such language.

* * *

This case presents an easy opportunity to resolve a circuit split on administrative exhaustion arising in a recurring set of important cases. The Court should grant the petition and reject any incentive for administrative agencies to preclude judicial review simply by resolving the merits of an issue *sua sponte*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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August 12, 2022

APPENDIX

APPENDIX

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APPENDIX A

[November 15, 2021]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-10115

Non-Argument Calendar

ALMA ARACELY CASTANEDA-MARTINEZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the

Board of Immigration Appeals

Agency No. A089-099-071

Opinion of the Court

Before JORDAN, NEWSOM, and LAGOA, Circuit Judges.

PER CURIAM:

Alma Castaneda-Martinez petitions this Court for review of the Board of Immigration Appeals' ("BIA") decision affirming the immigration judge's denial of her claim for withholding of removal. She argues that the BIA and the immigration judge's finding that her mistreatment by the gang, Los Chentes, was motivated by personal animus rather than her membership in a particular social group is unsupported by the record. Further, Castaneda-Martinez contends that the IJ erred in concluding that her proposed particular social group—witnesses to gang crimes who attempt to report those crimes—was not cognizable. In response, the government argues that we lack jurisdiction to consider Castaneda-Martinez's challenge to the immigration judge's nexus finding because she failed to raise that argument before the BIA and that we should thus dismiss her petition.

I.

Castaneda-Martinez, a Honduran citizen, was previously removed from the United States in 2008. She reentered the United States in May 2016 and was detained by the Department of Homeland Security and received a reasonable fear interview,

after which an asylum officer found that she had a reasonable fear of persecution should she return to Honduras. Subsequently, she was placed in withholding-only proceedings before an immigration judge.

Castaneda-Martinez applied for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(b)(3)(A), and for relief under the Convention Against Torture ("CAT"), asserting persecution on account of membership in a particular social group. In a statement attached to her application, she asserted that she left Honduras because her life was threated by a gang known as Los Chentes. According to Castaneda-Martinez, the threats began after she witnessed gang members murder her uncle because he refused to continue paying a "tax" to the gang. She decided to contact the police, despite being warned by the gang members not to do so. But, when Castaneda-Martinez, accompanied by her cousin and grandmother, arrived at the police station, no one was there for her to report the murder. During the next several days, she received threatening text messages and heard from neighbors that those gang members intended to kill her as well. She moved to a friend's house in a nearby village, but the gang members found her after five months. While Castaneda-Martinez escaped, her friend's daughter was raped by the gang members. She moved to another friend's house, but after people in her home village heard Castaneda-Martinez was staying with that friend and reported that Los Chentes was still looking for her, her friend informed her she could no longer stay with her. As such, Castaneda-Martinez

fled to the United States.

At the hearing on her application, Castaneda-Martinez provided testimony similar to her personal statement and also testified that her cousin had been murdered after the attempted report of her uncle's murder to the police. Through counsel, she articulated three particular social groups: (1) a person who "witnessed firsthand the murder of her uncle by the Los Chentes [and] took steps to file a report"; (2) a person "persecuted by Los Chentes on account of her familial relationship," i.e., her uncle; and (3) a person "persecuted by the Los Chentes gang because she is related to a business owner who refused to pay a local tax." She further argued that her opposition to the gang was sufficient to establish her membership in those proposed social groups because it existed independently of her persecution and was the reason the gang targeted her.

The immigration judge issued an oral decision denying Castaneda-Martinez's withholding of removal and CAT claims. While finding her testimony credible, the immigration judge found that she had "not posited a cognizable particular social group definition or demonstrated any type of nexus between [the three] claimed groups and any type of harm she fears in Honduras." As to her first proposed group, the immigration judge held it was not cognizable because it only contained Castaneda-Martinez and was not "socially distinct within society for any reason." In analyzing the first group, the immigration judge noted that Castaneda-Martinez had never filed a police report against the gang members. As to her second group, the immigration

judge found that she had not shown the gang was motivated by animus against her family, in particular noting that Castaneda-Martinez's grandmother still safely lived in Honduras and that her parents and siblings continued to live in Honduras safely. As to the third proposed group, the judge found it insufficient to show any type of social distinction within society. And the immigration judge found that it was clear that Castaneda-Martinez "simply feared being the victim of crime and in the matters for a general . . . criminal strife," but that "generalized fear of harm or violence without more does not support" a withholding of removal claim.[1] Thus, because Castaneda-Martinez "failed to demonstrate any type of nexus due to one of the five annuity grounds such as that of membership to their social group definition," the immigration judge found her application for withholding of removal must fail. The immigration judge therefore ordered Castaneda-Martinez removed to Honduras.

Castaneda-Martinez appealed to the BIA. Her notice of appeal argued that the immigration judge erred in determining that her proposed social groups were not cognizable as well as in finding that she could live elsewhere in Honduras without risk of persecution by the gang. She stated that she "was targeted because of her relationship with her uncle and because she was connected to activities involving

[1] The immigration judge also denied Castaneda-Martinez's CAT claim, but she does not make any argument challenging that denial on appeal.

seeking justice with the prosecutor, which resulted in the assassination of [her] cousin and the gang's attempt to kill [her]."

In her brief to the BIA, Castaneda-Martinez argued that the immigration judge erroneously limited her first proposed social group "to the facts solely specific to [her]—a single person—rather than to the large group consisting of 'individuals who witness gang crimes and take steps to report them.'" She also argued that the fact that she failed to file a report was not required for her proposed group to be recognized. She further argued that she and her cousin "were targeted and threatened because they went to the state's office to file a complaint—even though no complaint was filed." And she concluded that she had "demonstrated that her the social group defined as 'witnesses of gang crimes who took steps (attempted to file) a police report/complaint,' was a cognizable particular social group." Her brief, however, did not challenge the immigration judge's rejection of her two other proposed social groups. And she did not challenge the immigration judge's finding that she "simply feared being the victim of crime and in the matters for a general . . . criminal strife," which was a "generalized fear of harm or violence" that could not support a withholding of removal claim—i.e., that there was a nexus between the persecution she suffered and a protected ground. *See Sanchez v. U.S. Att'y Gen.,* 392 F.3d 434, 437–38 (11th Cir. 2004). Instead, she merely argued that her attempt to file a police report "was one of the central reasons, if not the main reason, why she was persecuted."

On December 23, 2020, the BIA adopted and affirmed the immigration judge's decision, as there was no clear error in the judge's findings of fact concerning the actual motive of the gang members in Honduras, i.e., that "gang members were not motivated to harm the applicant on account of a protected ground." Rather, the BIA explained that the events "appear[ed] to concern a personal dispute or vendetta for a crime committed by gang members, which does not amount to past persecution on account of a protected ground." This petition followed.

II.

Generally, when the BIA issues a decision, we only review that decision. *Jeune v. U.S. Att'y Gen.,* 810 F.3d 792, 799 (11th Cir. 2016). However, "[w]hen the BIA explicitly agrees with the findings of the immigration judge, we review the decision of both the BIA and immigration judge as to those issues." Id. We review legal questions, including our own jurisdiction, de novo. *Id.*; *Amaya- Artunduaga v. U.S. Att'y Gen.,* 463 F.3d 1247, 1250 (11th Cir. 2006). And we do not consider issues not decided by the BIA. *Gonzalez v. U.S. Att'y Gen.,* 820 F.3d 399, 403 (11th Cir. 2016).

Additionally, we may review a final order of removal only if the petitioner has exhausted her administrative remedies. 8 U.S.C. § 1252(d)(1). "[W]hen a petitioner has neglected to assert an error before the BIA that [she] later attempts to raise before us, the petitioner has failed to exhaust [her] administrative remedies." *Jeune*, 810 F.3d at 800. It

is not enough for the petitioner to "merely identif[y]" an issue before the BIA. Id. She must raise the "core issue" to the BIA and set out any discrete arguments relied on in support Of her claim. Id. "'Unadorned, conclusory statements do not satisfy this requirement,' and the petitioner must do more than make a passing reference to the issue." Id. And, even if the BIA addresses an issue that the petitioner failed to raise in her appeal to the BIA sua sponte, the petitioner has still failed to exhaust that claim. *See Amaya-Artunduaga*, 463 F.3d at 1251 ("[W]e think the goals of exhaustion are better served by our declining to review claims a petitioner, without excuse or exception, failed to present before the BIA, even if the BIA addressed the underlying issue sua sponte.").

An otherwise removable individual is entitled to withholding of removal if her "life or freedom would be threatened in th[e] country [of removal] because of [her] . . . membership in a particular social group." 8 U.S.C. § 1231(b)(3)(A). An applicant for withholding of removal "bears the burden of demonstrating that it is 'more likely than not' she will be persecuted or tortured upon being returned to her country." *Sanchez Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1238 (11th Cir. 2007) (quoting *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1232 (11th Cir. 2005)). "[E]vidence that either is consistent with acts of private violence . . . or that merely shows that a person has been the victim of criminal activity, does not constitute evidence of persecution based on a statutorily protected ground." *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1258 (11th Cir. 2006).

Here, we conclude that Castaneda-Martinez failed to exhaust her challenge to the immigration judge's nexus finding. In rejecting Castaneda-Martinez's claims for relief, the immigration judge rejected each of her proposed particular social groups. The immigration judge also found that Castaneda-Martinez had not "demonstrated any type of nexus between these claimed groups and any type of harm she fears in Honduras." Rather, the judge found she simply possessed a "generalized fear of harm or violence"—i.e., a fear of being a victim of crime and of general criminal strife—but that fear could not support any type of application for withholding of removal. In its review of the immigration judge's order, the BIA found that "the events described by the applicant appear to concern a personal dispute or vendetta for a crime committed by gang members, which does not amount to past persecution on account of a protected ground."

But Castaneda-Martinez did not challenge the immigration judge's determination that she had not demonstrated the requisite nexus between her proposed social groups and the harm she feared in Honduras or the finding that she merely had a generalized fear of harm or violence in her brief to the BIA. Indeed, her brief fails to articulate an argument or provide a factual or legal basis addressing how the immigration judge erred in this respect. Castaneda-Martinez's brief rather challenged the immigration judge's determinations that her "group consisted of only one member" and that she was "not able to meet the witness social group simply because she did not actually [file a police report]." While her brief to the BIA briefly

mentions that her attempt to file a police report "was one of the central reasons, if not the main reason, why she was persecuted," we conclude that this passing reference, to the extent it can be construed as raising argument as to the nexus requirement, was not sufficient for exhaustion purposes.

Because Castaneda-Martinez failed to exhaust her administrative remedies as to the key nexus issue for her withholding of removal claim, we lack jurisdiction to review it. Accordingly, we dismiss the petition.[2]

PETITION DISMISSED.

[2] Castaneda-Martinez's other challenge, regarding the cognizability of one of her proposed particular social groups, is also not properly before us as the BIA did not consider and decide that issue. See *Gonzalez*, 820 F.3d at 403.

APPENDIX B

[April 12, 2022]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-10115

Non-Argument Calendar

BLANCA MARISOL MONCADA,
BEATRIZ MARISOL CASTRO-MONCADA,
Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the

Board of Immigration Appeals

Agency No. A208-778-595

Before JILL PRYOR, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Blanca Marisol Moncada and her daughter seek review of the Board of Immigration Appeals' ("BIA") final order affirming the Immigration Judge's ("IJ") denial of Moncada's application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). After careful review, we dismiss in part and deny in part the petition.

I.

Moncada and her daughter Beatriz, both natives and citizens of Honduras, were given notices to appear charging them as removable as noncitizens present in the United States without being admitted or paroled. Both conceded removability; Moncada applied for asylum, withholding of removal, and CAT relief. Moncada alleged that she suffered past persecution and had a well-founded fear of future persecution based on membership in a particular social group, "[m]others of females that are of child-bearing age claimed by men in transnational criminal organizations." AR at 202.[3] Beatriz is a derivative beneficiary of Moncada's claims; she did not file her own application for relief.

[3] AR" is the administrative record.

In her application and at a hearing before an IJ, Moncada asserted that a man named Eduardo, a member of the MS-13 gang, began pursuing a relationship with Beatriz. Moncada understood Eduardo to be dangerous and someone who would not take no for an answer. Eduardo once showed Moncada's son, Fernando, tattoos that he said represented families or women that he had killed because they refused his advances. And gang members who extracted monthly bribes from Moncada's business told her they were not going to request a monthly bribe; rather, they said, "We want your daughter." *Id.* at 140.

Eduardo communicated his desires to Beatriz through a woman named Maria Jose Montalvan. Montalvan made repeated harassing phone calls to Beatriz. Montalvan also came to Moncada's home one day and told her that she knew where Moncada's bank was, where her children went to school, that her husband was living in Miami, and what days the family went to church. Later that night, Montalvan and Eduardo came to Moncada's house; they screamed obscenities and Beatriz's name while throwing beer bottles at the family's front door. The two assailants threatened to burn down the house if Beatriz did not come out of the home and leave with them. Moncada and Beatriz fled the next day. Moncada believed Eduardo would carry out his threats because she was raped when she was young, her attacker continued to threaten her, and he nonetheless later became a police officer.

The IJ denied her claims for asylum, withholding of removal, and CAT relief. The IJ

concluded that Moncada was credible but found that she had failed to meet her burden to establish that she had been the victim of past persecution or that she had a well-founded fear of future persecution in Honduras. The IJ explained that Moncada had never been physically harmed in connection with the reason she and her daughter left Honduras for the United States, and the threats she received were insufficient to constitute persecution. Further, the IJ found, even if the threats had constituted persecution, Moncada had not shown that the threats were made on account of a protected ground. Moncada's proposed particular social group, "mothers of females that are of child-bearing age claimed by men in transnational criminal organizations," was not a valid social group, and she was not necessarily targeted because of her membership in that group. The IJ considered that Moncada's proposed social group may be better described as a "family kinship"— a different protected ground—but concluded that even so, she had not been threatened because she was her daughter's mother but because she may have resisted Eduardo's attempts to seize her daughter.

The IJ also found that Moncada had failed to establish that Honduran authorities would be unwilling or unable to protect her, especially considering that she had not reported any of the incidents despite having filed police reports for past assaults. And, the IJ found, Moncada had failed to show that she could not safely relocate to another part of Honduras.

Having concluded that Moncada failed to show

past persecution, for most of the same reasons the IJ further found that she had failed to establish a well-founded fear of future persecution on account of a protected ground. And given that she had not met the standards for asylum, the IJ explained that Moncada had failed to demonstrate eligibility for withholding of removal, which sets a higher standard of proof. Finally, the IJ concluded that Moncada was ineligible for CAT relief because she had failed to establish that it was more likely than not that she would be tortured with the consent or acquiescence of Honduran authorities upon her return to her home country.

Moncada appealed to the BIA, specifically challenging the IJ's determinations as to past and future persecution. She argued that she had suffered from past persecution despite not having been physically injured. She explained that she feared Eduardo would kill her and her daughter and knew he had the power to hurt them. She argued that her fear for her daughter's life satisfied her burden. And, she argued, her fear was reasonable.

The BIA affirmed the IJ's decision. The BIA "affirm[ed] the [IJ's] conclusion that [Moncada] did not establish that any past harm she suffered and that she fears she will suffer in the future was or will be on account of her membership in a valid particular social group, family or kinship ties, or any other ground protected by" the Immigration and Nationality Act. *Id.* at 3. The BIA continued, "[b]ecause [Moncada's] claims are fatally flawed on this ground, it is unnecessary to consider the other aspects of the [IJ's] decision." *Id.* at 4. The BIA

further determined that Moncada had not established that, if returned to Honduras, it was more likely than not that she would experience torture with the consent or acquiescence of the Honduran government.

Moncada petitioned this Court for review.

II.

We review only the BIA's decision, except to the extent that it expressly adopts the IJ's decision. *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019). Findings by the IJ that the BIA did not reach are not properly before us. *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1344 (11th Cir. 2007).

We review our subject matter jurisdiction de novo. *Amaya-Artunduaga v. U.S. Atty. Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006). We lack jurisdiction to consider a claim raised in a petition for review unless the petitioner has exhausted her administrative remedies by presenting that claim to the BIA. *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1297 (11th Cir. 2015); see 8 U.S.C. § 1252(d)(1) (providing that this Court "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). We lack jurisdiction to review an unexhausted issue, even if the BIA considers the issue sua sponte. *Amaya-Artunduaga*, 463 F.3d at 1250. To exhaust an issue, a petitioner need not "use precise legal terminology" or proffer a well-developed argument, but the petitioner must "provide information sufficient to enable the BIA to review and correct any errors"

allegedly made by the IJ. *Indrawati*, 779 F.3d at 1297–98.

III.

In her petition for review, Moncada argues that the BIA erred in finding that she had not asserted membership in a cognizable particular social group. She argues that the BIA erred in concluding she was not entitled to CAT relief because she had not met her burden to show that it was more likely than not that she would be tortured with consent or acquiescence of the Honduran government.

And she argues that the IJ erred in finding that: she was not being targeted because she is Beatriz's mother; she had not shown past persecution because Eduardo and Montalvan had not acted on their threats; her failure to report the incidents to authorities defeated her argument that Honduran authorities would be unwilling or unable to protect her; and she failed to show she could not safely relocate within Honduras.

We lack jurisdiction to consider Moncada's challenges to the BIA's order. Moncada did not argue before the BIA either that the harm she suffered or feared would be on account of her membership in her asserted social group, or that it was more likely than not that she would be tortured with the consent or acquiescence of the Honduran government. Thus, she failed to exhaust her administrative remedies as to these issues. *Indrawati,* 779 F.3d at 1297–98. The fact that the BIA *sua sponte* addressed the issues Moncada now raises does not permit us to reach

them. *Amaya-Artunduaga*, 463 F.3d at 1250. We therefore dismiss in part Moncada's petition for review.

Moncada challenges several of the IJ's findings, but the BIA expressly declined to adopt those findings, so they "do[] not form any part of the order currently under review." *Lopez*, 504 F.3d at 1344. Because we are not permitted to review these findings that the BIA did not adopt, see *id*., we deny in part the petition for review.

PETITION DISMISSED IN PART, DENIED IN PART.

APPENDIX C

[December 23, 2020]

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041
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File: A089-099-071 - Orlando, FL

In re: Alma Aracely CASTANEDA-MARTINEZ
WITHHOLDING ONLY PROCEEDINGS APPEAL

ON BEHALF OF APPLICANT: Laura J. Roman, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Honduras, appealed the Immigration Judge's decision, dated September 24, 2018, which denied her application for withholding of removal and protection under the Convention Against Torture. *See* section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), 8 C.F.R. §§ 1208.16, 18. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the

Immigration Judge under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.l(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. *See* 8 C.F.R. § 1003. l(d)(3)(ii).

We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994). A "persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error." *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Upon review of the record, there is no clear error in the Immigration Judge's findings of fact concerning the motive of the gang members in Honduras.

The applicant bears the burden to establish eligibility for relief. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). We find no clear error in the Immigration Judge's findings that gang members were not motivated to harm the applicant on account of a protected ground (IJ at 3-7). Rather, the events described by the applicant appear to concern a personal dispute or vendetta for a crime committed by gang members, which does not amount to past persecution on account of a protected ground (IJ at 3-7; Tr. at 17-59). *See Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) ("When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group will not be 'one central reason' for the abuse."); *Rodriguez v. US. Att'y Gen.*, 735 F.3d 1302, 1311 (11th Cir. 2013) (finding that victims of criminal activity were not

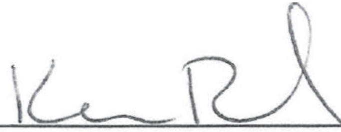
harmed on account of a ground protected by the Act); *Ruiz v. US. Att'y Gen.,* 440 F.3d 1247, 1258 (11th Cir. 2006) ("[e]vidence that either is consistent with acts of private violence . .. or that merely shows that a person has been the victim of criminal activity, does not constitute evidence of persecution based on a statutorily protected ground")

The applicant has also not established eligibility for protection under the Convention Against Torture (IJ at 8-9; Tr. 17-59). While the applicant may fear private criminal actors in Honduras, she has not presented any argument on appeal to demonstrate, upon her removal to that country, it is more likely than not she will be tortured by or at the instigation of or with the consent or acquiescence (including "willful blindness") of a public official or other person acting in an official capacity. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a); *Matter of J-F-F-* , 23 I&N Dec. 912, 917 (A.G. 2006) (holding that a claim to protection under the Convention Against Torture cannot be granted by stringing together a series of suppositions). Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

NOTICE: If a applicant is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed

to prevent or hamper the applicant's departure pursuant to the order of removal, the applicant shall be subject to a civil monetary penalty of up to $813 for each day the applicant is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).



FOR THE BOARD

APPENDIX D

[December 30, 2020]

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041
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Files: A208-778-595 - Miami, FL
A208-778-596

In re: Blanca Marisol MONCADA
Beatriz Marisol CASTRO-MONCADA

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENTS: Rachel Diaz, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondents, natives and citizens of Honduras, appeal from the Immigration Judge's November 1, 2018, decision which denied their applications for asylum, withholding of removal, and

protection under regulations implementing the Convention Against Torture (CAT).[4] *See* sections 208(b)(l)(A) and 24l(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1208(b)(l)(A), 1231(b)(3); 8 C.F.R. §§ 1208.16(c)-1208.18. The Department of Homeland Security did not respond to the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § I 003.1 (d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003. l(d)(3)(ii).

On appeal, the respondent argues that her "accounts of fear of persecution in the past are sufficient to presume that her life and freedom would be threatened if she returned to her native country" (Respondent's Br. at 4). We affirm the decision of the Immigration Judge. The respondent states that she left Honduras because of threats and the violent sexual intentions of a man toward her daughter (Respondent's Br. at 2, 4). She believed that the man was a member of a transnational criminal organization (*Id.*). We affirm the Immigration Judge's conclusion that the respondent did not

[4] The respondents are a mother and her daughter. The mother is the lead respondent. The daughter is a derivative applicant on her mother's application for asylum. 8 C.F.R. § 1208.21. Reference to the singular "respondent" will be to the lead respondent.

establish that any past harm that she suffered and that she fears she will suffer in the future was or will be on account of her membership in a valid particular social group, family or kinship ties, or any other ground protected by the Act (IJ at 16-22). *Matter of A-B-*, 27 l&N Dec. 316, 334-36 (A.G. 2018); *Matter of W-G-R-*, 26 I&N Dec. 208,217 (BIA 2014). The respondent's fear of becoming a victim of crime is not fear of persecution on account of her membership in a cognizable particular social group or other ground protected by the Act (IJ at 16-20). *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1309-11 (11th Cir. 2013) (requiring that the applicant demonstrate that the harm suffered or feared was and is on account of a ground protected by the Act). Therefore, the respondent is not eligible for asylum or withholding of removal. Because the respondent's claims are fatally flawed on this ground, it is unnecessary to consider the other aspects of the Immigration Judge's decision. *Matter of A-B-,* 27 I&N Dec. at 340.

We also agree with the Immigration Judge that the respondent did not establish that, if she returned to Honduras, it was more likely than not that she would experience torture with the consent or acquiescence of the Honduran government, including through willful blindness (IJ at 22-23). *See* 8 C.F.R. § 1208.l&(a)(l); *Fernandez-Gonzalez v. US. Att 'y Gen.*, 707 F. App'x 674, 679 (11th Cir. 2017) (unpublished) ('[u]nsuccessful government activity to combat non-governmental perpetrators of torture does not constitute acquiescence"), citing *Reyes-Sanchez v. US. Att'y Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $813 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(l4).

FOR THE BOARD

APPENDIX E

[March 17, 2022]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-10115

ALMA ARACELY CASTANEDA-MARTINEZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, NEWSOM, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX F

[July 12, 2022]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-10267-GG

BLANCA MARISOL MONCADA,
BEATRIZ MARISOL CASTRO-MONCADA
Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42