No. 22-191

In the Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ, ET AL.,
PETITIONERS

v.

MERRICK B. GARLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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Petitioners Castaneda-Martinez, Blanca Moncada, and her daughter Beatriz Castro-Moncada are noncitizens who seek to challenge their removal orders on grounds that they did not raise before the Board of Immigration Appeals (Board).* The court of appeals denied their challenges under 8 U.S.C. 1252(d)(1), which provides that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." *Ibid.* Petitioners do not dispute that they failed to present the relevant issues to the Board, but they contend (Pet. 28-31) that the court of appeals should have found that they satisfied the exhaustion requirement because, despite

* This memorandum uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

petitioners' forfeiture, the Board considered those issues.

The court of appeals decision is correct and does not warrant this Court's review. But this Court recently granted a petition for a writ of certiorari concerning a distinct but related question regarding the proper application of Section 1252(d)(1)'s exhaustion requirement. See *Santos-Zacaria* v. *Garland*, No. 21-1436 (oral argument scheduled for Jan. 17, 2023). Because this Court's analysis in *Santos-Zacaria* could well bear on the proper resolution of petitioners' cases, the Court should hold this petition pending its decision in *Santos-Zacaria*.

STATEMENT

1. a. Petitioner Castaneda-Martinez is a citizen of Honduras who applied for withholding of removal under 8 U.S.C. 1231(b)(3)(A), claiming eligibility on the ground that she faces persecution on account of her "membership in a particular social group," *ibid.*, because she was targeted by a gang in Honduras after witnessing the murder of her uncle and taking steps towards reporting the murder to the police. Pet. App. 2-3. The immigration judge (IJ) denied protection from removal, finding that Castaneda-Martinez had not "posited a cognizable particular social group definition or demonstrated any type of nexus between [her] claimed groups and any type of harm she fears in Honduras." *Castaneda-Martinez* Administrative Record (A.R.) 33. The IJ also found that she fears being a crime victim "due to the gang's criminalities" in Honduras, but "this without more does not establish any * * * harm due to" a "protected ground." *Id.* at 36.

b. Castaneda-Martinez appealed to the Board, contending that the IJ had erred in finding that she had not

"establish[ed] a particular social group." *Castaneda-Martinez* A.R 17. The Board "adopt[ed] and affirm[ed] the decision of the [IJ]." Pet. App. 20. It explained that "[t]he applicant bears the burden to establish eligibility for relief," and it concluded that there was "no clear error in the [IJ's] finding that gang members were not motivated to harm the applicant on account of a protected ground" because "the events described by the applicant appear to concern a personal dispute or vendetta for a crime committed by gang members." *Ibid.*

c. Castaneda-Martinez filed a petition for review with the court of appeals asserting, as relevant here, that the IJ and the Board had clearly erred in finding that the "gang members were motivated, not on account of a protected ground, but rather by a 'personal dispute or vendetta for a crime committed by gang members.'" *Castaneda-Martinez* C.A. Br. 10; see *id.* at 20. The court dismissed that argument for lack of jurisdiction on the ground that Castaneda-Martinez had not exhausted her remedies as required by Section 1252(d)(1). Pet. App. 7-10. The court explained that Castaneda-Martinez's brief before the Board had not "challenge[d] the [IJ'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." *Id.* at 9.

The court of appeals subsequently denied Castaneda-Martinez's petition for rehearing, in which she argued that "issues resolved *sua sponte* by the [Board] are administratively exhausted" under Section 1252(d)(1). *Castaneda-Martinez* C.A. Pet. for Reh'g. 14; see *id.* at 5-14.

2. a. Petitioner Moncada is a citizen of Honduras who alleges that she came to the United States after she was repeatedly threatened—and those around her were threatened and harmed—because Moncada's daughter, petitioner Castro-Moncada, did not accept the advances of a gang member. Pet. App. 13. Moncada applied for asylum under 8 U.S.C. 1158(b)(1)(A), with Castro-Moncada as a derivative, withholding of removal under 8 U.S.C. 1231(b)(3), and protection under the regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. *Moncada* A.R. 42; see Pet. App. 24 & n.4. An IJ denied the applications, *Moncada* A.R. 41-64, and supported the denials by finding, *inter alia*, that the threats from the gang did not rise to the level of persecution because Moncada was not physically harmed, *id.* at 55-56; that even if the threats did constitute persecution, Moncada had not shown that she was threatened on account of a protected ground because she had not established that she was a member of a particular social group or that she was targeted because of her membership in a protected group, *id.* at 56-59; and that Moncada had not established that it is more likely than not that she will be tortured, as required for relief under the CAT, *id.* at 62. See Pet. App. 14-15.

b. Moncada and Castro-Moncada appealed to the Board, arguing that Moncada's "accounts of fear of persecution * * * [we]re sufficient to presume" that she would face additional persecution because she did not need to show physical harm to establish persecution, and her "fear of returning to her native country is rea-

sonable given what she knows happens to people that do not comply with the wishes of men in transnational criminal organizations." *Moncada* A.R. 11. The Board affirmed the IJ's denial of asylum and withholding of removal because the Board agreed with the IJ's "conclusion that [Moncada] did not 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." Pet. App. 24-25. The Board also affirmed the denial of CAT protection because it "agree[d] with the [IJ] that [Moncada] did not establish" that it was more likely than not that she would be tortured if she returns to Honduras. *Id.* at 25.

c. Moncada and Castro-Moncada filed a petition for judicial review, which the court of appeals dismissed in relevant part. Pet. App. 11-18. The court observed that the petition for review "argue[d] that the [Board] erred in finding that [Moncada] had not asserted membership in a cognizable particular social group" and "in concluding that she was not entitled to CAT relief." *Id.* at 17. But the court found that Moncada had "failed to exhaust her administrative remedies" with respect to both arguments because she had not raised them before the Board, and "[t]he fact that the [Board] *sua sponte* addressed" the issues did not "permit [the court] to reach them." *Id.* at 17-18 (citing *Amaya-Artunduaga* v. *U.S. Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006) (per curiam)).

The court of appeals denied a subsequent petition for rehearing, in which Moncada and Castro-Moncada asserted that Section 1252(d)(1)'s exhaustion requirement

is satisfied so long as the Board addresses an issue *sua sponte*. *Moncada* C.A. Pet. for Reh'g. 5-15.

DISCUSSION

Before this Court, petitioners contend (Pet. 28-31) that the Board's *sua sponte* consideration of an issue is enough, by itself, to satisfy the exhaustion requirement in Section 1252(d)(1). That contention is incorrect. Nevertheless, *Santos-Zacaria* v. *Garland*, No. 21-1436 (oral argument scheduled for Jan. 17, 2023), presents a distinct but related question, and the Court's resolution of that case could well inform the proper analysis of the exhaustion requirement in petitioners' cases.

1. Section 1252(d)(1) permits judicial review only when a noncitizen has "exhausted all administrative remedies available to [her] as of right." 8 U.S.C. 1252(d)(1). An appeal to the Board is a remedy available to a noncitizen as of right, see 8 U.S.C. 1229a(c)(5), and Board regulations provide that "[t]he party taking the appeal must * * * specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). Accordingly, in order for a noncitizen to exhaust her administrative remedies under Section 1252(d)(1), she must file an appeal with the Board that raises the specific issue she wishes to challenge. See *Woodford* v. *Ngo*, 548 U.S. 81, 90, 93 (2006) (holding that the PLRA's requirement to exhaust "such administrative remedies as are available" mandates "compliance with [the] agency's deadlines and other critical procedural rules"). The mere fact that the Board's decision reaches the issue is not enough.

Courts have sometimes recognized an exception to that rule where the Board "has elected to address in sufficient detail the merits of a particular issue." *Portillo Flores* v. *Garland*, 3 F.4th 615, 633 (4th Cir. 2021)

(en banc) (quoting *Mazariegos-Paiz* v. *Holder*, 734 F.3d 57, 63 (1st Cir. 2013)); see Pet. 15-18 (collecting cases). But courts adopting that approach generally recognize that the exception should be limited to circumstances where the Board has thoroughly considered the issue or otherwise indicated an intent to "waive[]" compliance with the regulation requiring Board appellants to raise each specific issue in their briefing. *Lin* v. *Attorney Gen.*, 543 F.3d 114, 125 (3d Cir. 2008). For example, the Tenth Circuit has held that "this form of exhaustion will be the rare exception," that may be applied only when the Board "*identifie*[*d*] [the] potential argument," "chose to exercise its discretion to entertain th[e] matter," and "explicitly decide[d] that matter in a full explanatory opinion or substantive discussion." *Garcia-Carbajal* v. *Holder*, 625 F.3d 1233, 1238-1239 (2010) (Gorsuch, J.).

Petitioners' cases do not implicate the propriety of recognizing such an exception, or of applying it, because neither of the underlying Board decisions contains a thorough discussion of the relevant issues. To the contrary, in both cases, the relevant portion of the Board's decision merely contains a few sentences affirming the IJ's findings of fact. See Pet. App. 20-21, 24-25. This Court's review of their cases is therefore unwarranted.

2. The Court should, however, hold this case pending a decision in *Santos-Zacaria*, *supra* (No. 21-1436). In that case, the Court will consider whether Section 1252(d)(1) imposes a jurisdictional bar on the review of a claim that the Board engaged in impermissible fact-finding, where the noncitizen failed to press that claim before the Board through a motion to reconsider. See Pet. at i, *Santos-Zacaria*, *supra* (No. 21-1436); Opp. at i, *Santos-Zacaria*, *supra* (No. 21-1436). While that

question is meaningfully distinct from the one presented in this case, *Santos-Zacaria* will require the Court to interpret the same statutory exhaustion requirement at stake in the cases below. As a result, the Court's decision is likely to elucidate the nature of Section 1252(d)(1)'s exhaustion requirement in a way that bears on the court of appeals' decisions in petitioners' cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Santos-Zacaria* v. *Garland*, No. 21-1436, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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