No. 24-669

In the Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ,
PETITIONER

v.

PAMELA BONDI, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner failed to exhaust her remedies as required by 8 U.S.C. 1252(d)(1), where petitioner failed to raise the issues she presented to the court of appeals in her briefing before the Board of Immigration Appeals, and the Board merely affirmed the unchallenged decision of the immigration judge on those issues.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-10a, 11a-20a) are not reported in the Federal Reporter, but are available at 2024 WL 4763926 and 2021 WL 5298894, respectively. This Court's order granting certiorari, vacating the first decision of the court below, and remanding (Pet. App. 27a) is available at 143 S. Ct. 2558. The decisions of the Board of Immigration Appeals (Pet. App. 21a-24a) and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2024. The petition was filed on December 17, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, places certain limits on an alien's ability to obtain judicial review of a "final order of removal." 8 U.S.C. 1252(a). As most relevant here, an alien may obtain judicial review of a "final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1).

2. Petitioner is a citizen of Honduras who reentered the United States after being removed and was detained by the Department of Homeland Security. Pet. App. 2a. She sought withholding of removal under 8 U.S.C. 1231(b)(3)(A), claiming that she would face persecution in Honduras 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. 2a-3a. The immigration judge (IJ) denied withholding of removal, finding both that petitioner had not "posited a cognizable particular social group definition" and that she had not "demonstrated any type of nexus between [her] claimed groups and any type of harm she fears in Honduras." Administrative Record (A.R.) 33. The IJ also found that petitioner 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." A.R. 36.

Petitioner appealed to the Board of Immigration Appeals (Board), contending that the IJ had erred in finding that she had not "establish[ed] a particular social group." A.R 17. The Board "adopt[ed] and affirm[ed] the decision of the [IJ]." Pet. App. 22a. 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] findings that gang members were not motivated to harm [petitioner] 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.*

3. Petitioner 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.'" Pet. C.A. Br. 10; see *id.* at 20.

The court of appeals dismissed for lack of jurisdiction on the ground that petitioner had not exhausted her remedies as required by 8 U.S.C. 1252(d)(1). Pet. App. 17a-20a. The court explained that petitioner'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 19a.

After the court of appeals denied a petition for rehearing, Pet. App. 25a-26a, petitioner filed a petition for a writ of certiorari with this Court, asserting that it should grant review to decide whether Section 1252(d)(1)'s exhaustion requirement is satisfied where an alien fails to raise an issue before the Board, but the Board addresses it *sua sponte*. See No. 22-191 Pet. i. The government filed a memorandum in response, explaining that the Court should not grant certiorari with respect to the question presented because the court of appeals' decision was correct and did not implicate any division in the circuits regarding whether and when to recognize

an exception to the exhaustion requirement for cases in which the Board "has elected to address in sufficient detail the merits of a particular issue." No. 22-191 Resp. Mem. 6 (quoting *Portillo Flores* v. *Garland*, 3 F.4th 615, 633 (4th Cir. 2021)). The government observed, however, that it would be appropriate for the Court to hold the petition for *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), which was then pending before the Court. *Santos-Zacaria* concerned whether Section 1252(d)(1)'s exhaustion requirement is jurisdictional, and the government explained that resolution of that question could affect the outcome of petitioner's case. No. 21-191 Resp. Mem. 7-8.

After holding in *Santos-Zacaria* that Section 1252(d)(1)'s exhaustion requirement is not jurisdictional, 598 U.S. at 431, this Court granted the petition for a writ of certiorari, vacated the court of appeals' decision, and remanded for further consideration in light of *Santos-Zacaria*. 143 S. Ct. 2558 (2023).

3. On remand, the court of appeals again dismissed petitioner's petition for review for failure to exhaust. Pet. App. 2a-10a. The court recognized that, after *Santos-Zacaria*, Section 1252(d)(1) could not be characterized as jurisdictional and should instead be viewed as a '"mandatory claim-processing rule[].'" *Id.* at 8a (citation omitted); see *id.* at 8a-9a. But the court observed that mandatory claim-processing rules must be enforced where a party raises them, and here "the Attorney General properly raised" the statutory exhaustion requirement. *Id.* at 9a.

The court of appeals then "conclude[d] as [it] did in [its] prior opinion, that [petitioner] failed to properly exhaust her administrative remedies." Pet. App. 9a. The court explained that "[a] petitioner has not exhausted a claim unless [s]he has both raised the 'core

issue' before the [Board] and also set out any discrete arguments [s]he relies on in support of that claim." *Id.* at 7a-8a (quoting *Jeune* v. *U.S. Att'y Gen.*, 810 F.3d 792, 800 (11th Cir. 2016)). The court found that petitioner had failed to satisfy that requirement with respect to the issues she pressed in her petition for review because her brief before the Board did not challenge either the IJ's "determination that she had failed to demonstrate a nexus between her proposed social groups and the harm she feared in Honduras," or the IJ's "finding that [petitioner] showed only a generalized fear of harm or violence." *Id.* at 9a-10a.

ARGUMENT

Petitioner contends (Pet. 17-22) that the court of appeals erred in dismissing her petition for review for failure to exhaust because, in her view, the Board's *sua sponte* consideration of an issue, taken alone, is sufficient to satisfy the exhaustion requirement in 8 U.S.C. 1252(d)(1). The court of appeals' decision is correct, and this case does not implicate any division in the circuits regarding whether a court may excuse an alien's failure to present an issue before the Board based on the Board's detailed consideration of that issue. The petition for a writ of certiorari should therefore be denied. But if the Court were inclined to grant, it should—at a minimum—hold the petition pending the resolution of *Riley* v. *Bondi*, No. 23-1270 (oral argument scheduled for Mar. 24, 2025), which might establish an independent defect in the court of appeals' jurisdiction.

1. In the INA, Congress has provided for judicial review of a removal order only when an alien has "exhausted all administrative remedies available to [her] as of right." 8 U.S.C. 1252(d)(1). That language is a straightforward codification of the "long-settled" doctrine of ad-

ministrative exhaustion, under which courts must refrain from "toppl[ing] over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006) (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (emphasis omitted).

Here, regulations provide that "[t]he party taking the appeal" from the IJ to the Board "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 an alien to exhaust her administrative remedies under Section 1252(d)(1), she must file an appeal with the Board that raises each of the specific issues she wishes to challenge. See *Woodford*, 548 U.S. at 90, 93 (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").

Petitioner failed to satisfy that exhaustion requirement. In the court of appeals, she sought judicial review of the Board's determination that "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.'" Pet. C.A. Br. 10; see *id.* at 20. But, as the court of appeals explained, petitioner had not presented those issues to the Board. Pet. App. 9a. The IJ found that petitioner had not "posited a particular cognizable social group," A.R. 33, had not established a nexus between her proposed social groups and her persecution, and had not demonstrated that her harm was due to a protected ground as opposed to gang members general "criminality." A.R. 37. In her briefing before the Board, however, petitioner challenged only the first of those three determinations. A.R. 17.

Petitioner does not dispute that she failed to raise those additional issues in her petition for review in her briefing before the Board, instead contending (Pet. 26-29) that the court of appeals should have found those issues exhausted merely because the Board addressed them *sua sponte* in its decision. That contention lacks merit. An issue is not exhausted unless an agency has "erred against objection made at the time appropriate under its practice." *Woodford*, 548 U.S. at 90 (citation and emphasis omitted). Because petitioner did not make an objection about the relevant issues before the Board, that requirement was not satisfied.

Petitioner asserts (Pet. 26) that, if a decision by the Board to address an issue *sua sponte* is not sufficient to satisfy the exhaustion requirement, then "agencies can avoid judicial review simply by *sua sponte* adding an independent basis for denying relief" in their appellate decisions. But that is not what occurred here. The Board did not *sua sponte* add a new rationale for the IJ's denial of withholding; it affirmed other rationales that were already present in the IJ's own decision—and which petitioner had failed to challenge. And another decision from the Eleventh Circuit belies petitioner's concern that the Board might seek to avoid judicial review by addressing new grounds on appeal. In *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284 (11th Cir. 2015), the court held that, where the Board does introduce an entirely new issue through its decision, there is no failure to exhaust under Section 1252(d)(1) because an alien cannot be "fault[ed] * * * for not raising an argument" that was "not yet in existence" when she filed her briefing before the Board. *Id.* at 1299.

2. Petitioner observes (Pet. 13-16) that other courts of appeals have sometimes recognized an exception to the basic rule that an alien must exhaust each issue she

wishes to challenge by presenting it to the Board in cases 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 has otherwise indicated its own intention to "waive[]" compliance with the regulation requiring the party appealing to the Board to raise each specific issue in its 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.).

Petitioner's case does not implicate the propriety of recognizing such an exception, or of applying it, because the Board's decision in her case does not contain a thorough discussion of the relevant issues. To the contrary, the Board merely "adopt[ed] and affirmed the decision of the" IJ, and then added two sentences explaining that it "f[ound] no clear error in the [IJ's] findings that gang members were not motivated to harm the applicant on account of a protected ground" because "the events described * * * appear to concern a personal dispute or vendetta." Pet. App. 22a. That is hardly the kind of "full explanatory opinion or substantive discussion" that other courts have found sufficient to excuse a failure to exhaust. *Garcia-Carbajal*, 625 F.3d at 1238-1239.

Moreover, while petitioner insists (Pet. 11-13) that the Eleventh Circuit stands alone in applying a bright-line rule against finding exhaustion based on the Board's *sua sponte* discussion of an issue, the court of appeals' remand decision did not mention such a rule. Instead, the decision simply explained that petitioner had not raised the relevant issues in her Board briefing and then found that her failure to present issues to the Board constituted a failure to exhaust. In its initial decision, the court of appeals did briefly reference the principle that "even if the [Board] addresses an issue that the petitioner failed to raise in her appeal to the [Board] sua sponte, the petitioner has still failed to exhaust that claim," Pet. App. 18a, but the court did so only in articulating the basic contours of exhaustion doctrine. It did not otherwise discuss the principle or apply it to the facts of this case.

Thus, even if the Court were interested in reviewing whether and when the Board's *sua sponte* consideration of an issue may satisfy the exhaustion requirement, this case would be a poor vehicle to do so because the court below barely mentioned that issue. And there is particular reason for caution here because petitioner appears to exaggerate the scope of the Eleventh Circuit's position: Petitioner does not mention, for example, that the Eleventh Circuit *will* find the exhaustion requirement satisfied in instances where the Board injects a new issue into the case through its decision, even if the alien did not address the issue in its briefing. See *Indrawati*, 779 F.3d at 1299. And if petitioner is correct in alleging (Pet. 9, 17-18) that the Eleventh Circuit frequently applies a rule regarding *sua sponte* Board determinations that conflicts with that of the other circuits, a more suitable vehicle should soon arise.

3. If this Court were nevertheless inclined to grant the petition, it should at least wait until the resolution of *Riley* v. *Bondi*, No. 23-1270 (oral argument scheduled for Mar. 24, 2025), because the decision in that case could expose a new jurisdictional defect here. In *Riley*, the Court will consider whether Section 1252(b)(1)'s 30-day filing deadline for judicial review of a final order of removal is jurisdictional and whether an alien satisfies that deadline by filing a petition for review challenging an agency order denying withholding of removal within 30 days of issuance of that order—even if the removal order issued long before that. See Gov't Br. at i, *Riley*, *supra* (No. 23-1270). In this case, petitioner filed her petition for review within 30 days of the order denying her request for withholding of removal, but more than 30 days after she had a prior order of removal reinstated under 8 U.S.C. 1231(a)(5). See Pet. App. 2a, 21a. Thus, if the Court determines in *Riley* that the 30-day deadline is jurisdictional and may begin to run before a withholding decision issues, that would establish that the court of appeals lacked jurisdiction in this case.

CONCLUSION

The petition for a writ of certiorari should be denied, or—at a minimum—held pending the resolution of *Riley* v. *Bondi*, No. 23-1270 (oral argument scheduled for Mar. 24, 2025).

Respectfully submitted.

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