IN THE

Supreme Court of the United States

NIMATALLAH SHAFIK MASSIS,
Petitioner,

v.

ERIC HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in concluding that it lacked jurisdiction to entertain a purely legal challenge to an alien's removal order on the ground that the alien had not raised that issue before the agency, even though the government neither argued in its brief that the alien had failed to exhaust the issue nor disputed the legal error underlying the alien's removal order, and the alien raised the issue in a motion to reopen.

2. Whether an alien in a removal proceeding is denied his Fifth Amendment right to due process when ineffective assistance of retained counsel caused him to concede before an immigration judge that he was removable as an aggravated felon, even though he had not committed an aggravated felony and there was no tactical advantage to counsel's concession.

PARTIES TO THE PROCEEDING

Petitioner Nimatallah Shafik Massis was the petitioner in the court of appeals. Respondents are the Attorney General of the United States, the Secretary of Homeland Security, the Assistant Secretary of Homeland Security, and the Homeland Security Field Office Director, who were the respondents in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nimatallah Shafik Massis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-20a) is reported at 549 F.3d 631.

The initial decision of the Immigration Judge (IJ) accepting petitioner's concession of deportability (App. 51a-53a) is unreported, as is a subsequent decision of

the IJ granting petitioner a discretionary waiver from removal (App. 31a-50a).

The decision of the Board of Immigration Appeals (BIA) vacating the IJ's grant of a discretionary waiver from removal (App. 25a-30a) is unreported, as is the decision of the BIA denying petitioner's motion to reopen (App. 21a-23a).

JURISDICTION

The court of appeals entered its judgment on December 9, 2008. App. 1a-20a. On February 23, 2009, this Court extended the time for filing a petition for certiorari to and including May 8, 2009. No. 08A731. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

2. 8 U.S.C. § 1252 provides in relevant part:

> (d) Review of final orders
>
> 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, and
>
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the

prior proceeding was inadequate or ineffective to test the validity of the order.

STATEMENT

1. Petitioner Nimatallah Shafik Massis entered the United States on November 20, 1974, as a lawful permanent resident. He has four children, all of whom are United States citizens, and lives in his own home in Rockville, Maryland.

In 1995, Massis was arrested for threatening his ex-wife with an ax. He pleaded guilty to and was convicted of misdemeanor reckless endangerment under Maryland law, and was sentenced to prison. App. 4a. Mental health professionals later determined that Massis suffered from an untreated psychiatric condition that they identified as a bipolar disorder with psychotic features. AR 639; CAJA 75-76.[1] While in prison, Massis sought treatment for his psychiatric condition; since his release in 2000, he has been under the continuous treatment of mental health professionals. AR 574, 639; CAJA 71-78, 81-82, 94. Massis and his ex-wife subsequently reconciled and now enjoy a friendly relationship. CAJA 196-197, 202-203, 219-222; *see also* App. 47a.

The government initiated removal proceedings against Massis in 1996 based on his reckless endangerment conviction, charging that Massis was deportable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). App. 4a-5a. It alleged that Massis's

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[1] Citations to the Administrative Record are abbreviated "AR." Citations to the Court of Appeals Joint Appendix are abbreviated "CAJA."

reckless endangerment conviction qualified as a "crime of violence" under 18 U.S.C. § 16 and therefore amounted to an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(F). App. 5a n.3.

In fact, Massis is not removable. It is uncontested that his crime of conviction is not a "crime of violence" as a matter of law and therefore is not an "aggravated felony." The Maryland misdemeanor reckless endangerment statute governing Massis's conviction states that "[a]ny person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person" is guilty of misdemeanor reckless endangerment. Md. Ann. Code art. 27, § 120(a) (1995).[2] That statute does not include the use of force as an element, and by the time of Massis's conviction, the statute had been definitively construed by the Maryland courts not to require or inherently involve the use of force. *See Minor* v. *State*, 605 A.2d 138, 141 (Md. 1992). Reckless endangerment in Maryland is therefore not a "crime of violence" under the two-part test of 18 U.S.C. § 16 because it neither includes force as an element (Section 16(a)) nor "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (Section 16(b)). It is therefore not an "aggravated felony" under the Immi-

[2] The statute has since been twice modified and renumbered. The current version of the statute is Maryland Annotated Code, Criminal Law § 3-204. The statute has remained substantially the same except for the addition of a sub-offense for the reckless discharge of a firearm from a motor vehicle. *See id.* § 3-204(a)(2).

gration and Nationality Act (INA). *See Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004).[3]

Nevertheless, in an initial hearing before an IJ in 1998, Massis's first attorney conceded that Massis was removable as an aggravated felon and sought a waiver from removal under former INA § 212(c) (then codified at 8 U.S.C. § 1182(c) (repealed 1996)). App. 5a. Following this erroneous concession by Massis's first lawyer, the administrative proceedings against Massis were premised on the notion that he is removable as an aggravated felon.

In 2003, after an extensive hearing, the IJ granted Massis discretionary relief from removal pursuant to former Section 212(c). App. 31a-50a. The IJ explained that, although Massis's misconduct was "serious," his mental illness would make removing him "unconscionable." App. 48a. Among the evidence "[t]ipping the balance" in Massis's favor was evidence that he was no longer dangerous and that his ex-wife no longer feared him. *Id.*

The government appealed the grant of Section 212(c) relief to the BIA. On appeal, Massis was represented by a new, second attorney who did not recognize his first attorney's error in conceding removability. In February 2005, the BIA vacated the IJ's decision. App. 25a-30a. The BIA acknowledged Massis's "serious mental disorder," but determined that the disorder "does not excuse his behavior." App. 29a. The BIA or-

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[3] Massis's reckless endangerment conviction also cannot qualify as an aggravated felony because it is a misdemeanor under state law. *See infra* p. 33 (cases holding that state law classification controls).

dered Massis removed to Jordan, a country to which Massis has no connection and in which he has no family.[4]

Following the BIA's decision, Massis retained his present, third counsel, who recognized the critical error in his first attorney's representation: Massis is not removable as an aggravated felon. In a timely motion to reopen the BIA's decision, Massis argued that the erroneous concession amounted to ineffective assistance of counsel. App. 7a. Massis also presented the merits of his argument that misdemeanor reckless endangerment is not an aggravated felony, both in support of his ineffective assistance contention, CAJA 321-327, and as an independent reason to reopen the removal order, *id.* 331-333. The BIA nonetheless rejected the ineffective assistance claim and denied the motion to reopen, but in so doing, failed to address Massis's argument that the Board should reopen *sua sponte* to prevent the miscarriage of justice that would result if Massis were removed as an aggravated felon without any proper legal basis. App. 21a-23a.

2. Massis petitioned the Fourth Circuit for review of the BIA's removal order and denial of his motion to reopen.[5] He argued that misdemeanor reckless endangerment in Maryland is not a "crime of violence" under

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[4] Massis was ordered removed to Jordan because he was born in 1950 in a part of Jerusalem then under Jordanian control. *See* App. 26a n.1.

[5] Massis, through his third counsel, also filed a petition for habeas corpus to enjoin his removal. That petition was transferred to the Fourth Circuit pursuant to the Real ID Act of 2005 and consolidated with Massis's petitions for review of the BIA's removal order and its denial of his motion to reopen. *See* App. 7a & n.5.

18 U.S.C. § 16 and therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See* Pet. C.A. Br. 15-29. He also contended that the BIA erred in refusing to reopen the proceedings because his first counsel's ineffective assistance amounted to a due process violation. *Id.* 31-36. Massis further argued that, in light of the fundamental miscarriage of justice that would result should he be removed as an aggravated felon based solely on his first counsel's erroneous concession, the court of appeals should decide the purely legal question of his deportability. *Id.* 37-40.

In response, the government argued that the BIA had correctly rejected Massis's ineffective assistance of counsel claim, raised in the motion to reopen. But the government did not dispute Massis's fundamental contention that he is not removable as an aggravated felon, stating only in a footnote that "it would not 'result in the denial of fundamental justice' to hold an alien to a concession of deportability." Gov't C.A. Br. 12 n.3 (citation omitted). Nor did the government argue in its brief that Massis had waived his legal challenge to his removal order by failing to present it at the administrative level on direct review. As Massis noted in his reply brief, the government thereby waived any waiver argument it may have had regarding Massis's failure to exhaust the issue of removability. *See* Pet. C.A. Reply Br. 7 & n.5.

3. The court of appeals denied in part and dismissed in part Massis's petitions for review. As to the ineffective assistance of counsel claim, the court concluded that the BIA had not abused its discretion in rejecting the claim, and the court also noted that its recent decision in *Afanwi* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), *petition for cert. filed* (U.S. Jan. 16, 2009) (No. 08-906), foreclosed Massis's constitutional due

process claim based on ineffective assistance of counsel. App. 13a-14a.

The court also dismissed, for lack of jurisdiction, Massis's legal argument that he is not removable because his crime was not an aggravated felony. App. 20a. The court concluded that, because Massis had not presented that argument on direct appeal to the BIA, he had failed to exhaust his administrative remedies as to that issue. App. 15a ("[A]n alien's failure to dispute an issue on appeal to the BIA constitutes a failure to exhaust administrative remedies that bars judicial review."). The court construed Section 1252(d)(1)—which requires exhaustion of administrative remedies before an alien challenges a removal order in the court of appeals—as imposing a jurisdictional bar against judicial review of any issue that was not raised in the administrative proceedings. *Id.* In particular, the court understood *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), to preclude it from creating an equitable "miscarriage of justice" exception to Section 1252(d)(1)'s purported issue exhaustion requirement. App. 19a-20a. Accordingly, the court of appeals did not address the fact that the government's brief neither contended that Massis had waived his legal challenge to the removal order nor argued that he was, in fact, removable.

REASONS FOR GRANTING THE PETITION

There is no question that Congress has required an alien challenging his removal order to exhaust available administrative remedies before petitioning the courts of appeals for review. 8 U.S.C. § 1252(d)(1). The principal question in this case is whether that requirement also imposes a *jurisdictional* bar against judicial review of issues that were not properly raised before the agency, such that the court of appeals lacks *power* to review

any issue not presented to the agency—even if the government does not argue waiver and does not contest the challenge on the merits, and even if a miscarriage of justice would result from the court's failure to review the issue. In so ruling here, the court of appeals placed itself in conflict with other circuits that have instead addressed similar situations under ordinary principles of exhaustion, which permit waiver or exceptions in extraordinary circumstances such as those here, where petitioner is not even removable and the government has neither argued otherwise on appeal nor even argued that petitioner waived his legal challenge by failing to present it to the agency. The court of appeals' interpretation of Section 1252(d)(1) as a jurisdictional bar against review of unexhausted arguments is contrary to this Court's decisions and deepens a widespread circuit conflict on that issue.

This Court has required that Congress clearly state its intent to establish a jurisdictional bar, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006), and has repeatedly cautioned against construing prerequisites to judicial review as "jurisdictional," *see id.* at 510; *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). Here, the court of appeals had jurisdiction over petitioner's petition for review under 8 U.S.C. § 1252(a)(1) and (a)(2)(D). Whether it could reach particular issues raised in that petition for review is not a question of jurisdiction but of administrative exhaustion, which is presumed *not* to be a jurisdictional requirement, *Sims* v. *Apfel*, 530 U.S. 103, 107-108 (2000), and which may be waived in certain, well-settled circumstances, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941). By interpreting Section 1252(d)(1) to require administrative exhaustion of all issues as a jurisdictional matter,

the Fourth Circuit improperly precluded judicial review of even a purely legal challenge to a removal order when the government waived its argument that the alien failed to exhaust the issue and never argued that the alien was in fact removable, and when removal would result in manifest injustice.

The Fourth Circuit's decision also conflicts with the decisions of other courts of appeals that have considered whether administrative exhaustion of specific issues is a jurisdictional requirement under Section 1252(d)(1). Eleven circuits have addressed the question and have adopted a bewildering variety of approaches, revealing significant confusion about when (if ever) an exhaustion requirement should be considered "jurisdictional." The Fourth Circuit's decision is indicative of this disarray. The persistence of these conflicting approaches makes clear that disagreement over this important issue will continue absent this Court's intervention.

In addition, the Fourth Circuit's conclusory rejection of Massis's constitutional ineffective assistance of counsel claim implicates an important constitutional question that has sharply divided the courts of appeals. The court below relied on *Afanwi* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), in which the Fourth Circuit held that there is no right under the Due Process Clause of the Fifth Amendment to effective assistance of retained counsel in removal proceedings. In a pending petition for certiorari, Joseph Afanwi has asked this Court to resolve this sharp conflict among the circuits. *See* Pet., *Afanwi* v. *Holder* (U.S. Jan. 16, 2009) (No. 08-906). Because the Court's disposition of Afanwi's petition may affect the outcome of this matter, the Court should at a minimum hold this case until it has decided whether to grant review in *Afanwi* and then dispose of

this case consistent with its disposition of *Afanwi*, even if the Court does not grant review of the principal question presented in this case.

I. THE FOURTH CIRCUIT'S DECISION EXACERBATES A CONFLICT AMONG ELEVEN CIRCUITS REGARDING WHETHER ISSUE EXHAUSTION IS A JURISDICTIONAL REQUIREMENT UNDER 8 U.S.C. § 1252(d)(1)

There is a widespread split, as well as significant confusion, among eleven circuits regarding whether the requirement in 8 U.S.C. § 1252(d)(1) that aliens exhaust available administrative remedies creates a jurisdictional bar to judicial review of unexhausted issues. Decisions from two circuits (the Second and Seventh) hold that Section 1252(d)(1) does not deprive courts of appeals of subject matter jurisdiction over issues in a petition for review that an alien failed to raise before the BIA and IJ. Nine circuits (the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh) have held that they lack jurisdiction to review such unexhausted issues. Yet five of those nine (the First, Sixth, Eighth, Ninth, and Tenth) permit or have discussed prudential exceptions to their "jurisdictional" rule, indicating that the rule is not truly jurisdictional. Moreover, three of the nine "jurisdictional" circuits (the First, Third, and Eighth) have indicated that they are constrained by binding circuit precedent to remain in the "jurisdictional" camp, strongly implying that they believe that their prior decisions erroneously construed Section 1252(d)(1) as a jurisdictional provision barring review of unexhausted issues.

A. The Fourth Circuit's Decision Squarely Conflicts With Decisions Of The Second And Seventh Circuits

The Fourth Circuit's decision squarely conflicts with decisions of the Second and Seventh Circuits, which have declined to treat Section 1252(d)(1) as a jurisdictional bar to review of unexhausted issues. These courts' decisions anchor their holdings in: (1) this Court's "recent admonition that inferior courts must use great caution in distinguishing mandatory from jurisdictional rules," *Lin Zhong* v. *DOJ*, 480 F.3d 104, 119 (2d Cir. 2007) (citing *Eberhart*, 546 U.S. at 16); *Korsunskiy* v. *Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006) (Easterbrook, C.J., joined by Posner and Coffey, JJ.) (same); (2) the lack of an express statutory proscription against judicial review of unraised issues, *Lin Zhong*, 480 F.3d at 120-121; *cf. Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005); and (3) this Court's case law declining to read issue exhaustion requirements into statutes, *Lin Zhong*, 480 F.3d at 120 n.20, 121 (citing *Sims*, 530 U.S. at 106-108; *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991)). In these circuits, courts recognize that administrative exhaustion of an issue is presumptively a prerequisite to judicial consideration of the issue, but they retain (and have exercised) discretion to consider unexhausted issues in exceptional circumstances, such as those here, where the alien presents a purely legal challenge to his removal order, the government waives any argument that the alien failed to exhaust that issue, and a miscarriage of justice would result should the court decline to reach the issue.

In *Abdelqadar*, 413 F.3d at 670-671, the Seventh Circuit, per Judge Easterbrook, considered its jurisdiction to hear a purely legal issue (whether petitioner had committed a crime of moral turpitude) that the peti-

tioner had not exhausted before the agency. Emphasizing that the government failed to raise exhaustion in its appellate brief, the court rejected the government's assertion at oral argument that issue exhaustion is a prerequisite to appellate jurisdiction over challenges to removal orders. *Id.* Describing the government's position as "lack[ing] any visible means of support," the court explained that "[c]ourts have jurisdiction over cases and controversies, not particular legal issues that affect the outcome," and it noted that "[w]e cannot imagine any reason why an agency should be forbidden, on jurisdictional grounds, to excuse an alien's failure to exhaust a particular issue." *Id.* at 671; *see also Korsunskiy*, 461 F.3d at 849 (holding that court had jurisdiction to consider unexhausted legal point because: "Exhaustion is a condition to success in court but not a limit on the set of cases that the judiciary has been assigned to resolve.... The agency therefore may waive or forfeit the exhaustion issue, something that it could not do for a genuinely 'jurisdictional' limit.").[6]

The Second Circuit has also determined that under Section 1252(d)(1), issue exhaustion is not a prerequisite to the court's jurisdiction. The court first construed the mandate that an alien "exhaust[] all administrative remedies available to the alien as of right," 8

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[6] Despite the clarity of the holdings in *Abdelqadar* and *Korsunskiy*, the Seventh Circuit has elsewhere fallen prey to some of the confusion present in other circuits regarding the nature of the issue exhaustion requirement. In *Zeqiri* v. *Mukasey*, 529 F.3d 364, 370 (7th Cir. 2008), for example, the court cited *Abdelqadar* and *Korsunskiy* but nevertheless found petitioner's "newly raised arguments ... waived and this portion of her petition ... dismissed for want of jurisdiction." The confusion both among *and* within the circuits demonstrates the need for clarification by this Court.

U.S.C. § 1252(d)(1), to require that "a decision has been rendered on [the alien's] application by an IJ and appealed to the BIA—the two administrative remedies available to [the alien] as of right," *Lin Zhong*, 480 F.3d at 118.[7] The Second Circuit then considered whether this statutory language "further requires, as a matter of *statutory jurisdiction*, that an immigration petitioner raise before the BIA all *issues* contained within his or her petition for review" or whether, instead, "the requirement of issue exhaustion is a court-imposed one that is subject to waiver" by the government. *Id.* at 118-119. Relying on this Court's direction that courts refrain from "conflating mandatory with jurisdictional prerequisites to review" and the lack of a clear statutory statement regarding issue exhaustion, the Second Circuit held that the statutory requirement of issue exhaustion is "mandatory (and hence waivable)" but is not jurisdictional. *Id.* at 107; *see id.* at 119-122 (citing *Sims*,

[7] The Second Circuit reaffirmed this reading of Section 1252(d)(2) in *Valenzuela Grullon* v. *Mukasey*, 509 F.3d 107, 111, 112 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008), where it held that a court of appeals lacks jurisdiction over a petition for review if the alien has bypassed the BIA. The court below relied on *Valenzuela Grullon* for the proposition that there is no "'manifest injustice' exception" to Section 1252(d)'s exhaustion requirement, App. 19a (quoting *Valenzuela Grullon*, 509 F.3d at 115), but *Valenzuela Grullon* involved a situation where the alien had not appealed to the BIA at all—not, as here, where the matter was appealed to the BIA but (in the court's view) the alien had not properly preserved an issue in that appeal. *Accord Bah* v. *Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008) (also relied on by the court below and also involving a situation similar to *Valenzuela Grullon* where the alien had not taken an administrative appeal before filing a petition for judicial review).

530 U.S. at 106; *Coleman*, 501 U.S. at 732; *Eberhart*, 546 U.S. at 16).[8]

B. Five Circuits Following A Supposedly "Jurisdictional" Approach Carve Out Court-Made Exceptions To The "Jurisdictional" Bar

While labeling issue exhaustion a jurisdictional requirement, five circuits (the First, Sixth, Eighth, Ninth, and Tenth) nevertheless have held or indicated that prudential exceptions exist. If exhaustion is truly jurisdictional, however, judicially-created exceptions would be foreclosed. *See, e.g., Bowles* v. *Russell*, 127 S. Ct. 2360, 2366 (2007).

The Sixth Circuit, which has, in some cases, labeled its approach "jurisdictional," *see, e.g., Ramani* v. *Ashcroft*, 378 F.3d 554, 558-560 (6th Cir. 2004), has nonetheless recognized an exception where, as in this case, the government fails to raise the issue of exhaustion. In *Al-Najar* v. *Mukasey*, 515 F.3d 708, 713 n.2 (6th Cir. 2008), the court assumed that an argument raised for the first time in a supplemental brief to the

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[8] Although the Second Circuit consistently relies on *Lin Zhong* for the proposition that issue exhaustion is not jurisdictional, Second Circuit (like Seventh Circuit) case law is not perfectly uniform. *See, e.g., Severino* v. *Mukasey*, 549 F.3d 79, 83-84 (2d Cir. 2008); *Karaj* v. *Gonzales*, 462 F.3d 113, 119 (2d Cir. 2006). This discrepancy likely results from confusion surrounding the Second Circuit's distinction—unique among the eleven circuits to have interpreted Section 1252(d)(1)—between *issue* exhaustion and *claim* exhaustion, which, under Second Circuit precedent, *is* a jurisdictional requirement. *See Lin Zhong*, 480 F.3d at 119 n.18. The Second Circuit's blurred distinction between issue and claim exhaustion, which is unsupported by the statutory language or this Court's case law, only heightens the need for clarification by this Court.

BIA was unexhausted because petitioner had failed to present the argument to the IJ, but nevertheless held that it could consider the claim given that the government "did not argue failure to exhaust on appeal." *See also Badwan* v. *Gonzales*, 494 F.3d 566, 571 (6th Cir. 2007) (Sutton, J.) ("[E]ven if we were to assume that Badwan did 'fail[]' to exhaust his administrative remedies as is required, that claim was not raised by the government on appeal and is therefore waived." (internal quotation marks omitted)).

Several other purportedly "jurisdictional" circuits have adopted or suggested the possibility of an exception to prevent a miscarriage of justice. Despite categorizing issue exhaustion as a jurisdictional requirement, *e.g.*, *Mahamat* v. *Gonzales*, 430 F.3d 1281, 1283-1284 (10th Cir. 2005), the Tenth Circuit has held that, to prevent a miscarriage of justice, the court would consider for the first time on appeal from the BIA whether the crime underlying a removal order was in fact an aggravated felony, *Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206, 1209-1210 (10th Cir. 2007) (McConnell, J.)—directly the opposite of the court of appeals' decision in this case, which ruled that it had no power to undertake the very same inquiry. The Tenth Circuit explained that it would review whether the alien's crime was an aggravated felony, despite his failure to raise that issue before the BIA, because "[i]f it was not, [the alien's] conduct does not fulfill the elements necessary for deportation ... and he is, in effect, actually innocent." *Id.* at 1210.

In *Frango* v. *Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006), the Eighth Circuit, rather than construing Section 1252(d)(1) as a statutory jurisdictional bar to judi-

cial consideration of unexhausted issues, as previous circuit decisions had suggested,[9] applied a traditional exhaustion analysis, "[r]egardless of whether § 1252(d)(1) precludes us from addressing unexhausted issues." *Id.* The court examined the availability of exceptions, which "help ensure that justice [is] done." *Id.* at 729. In *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000), the First Circuit considered the availability of a miscarriage of justice exception. The First Circuit noted that, although courts had characterized the issue exhaustion requirement as jurisdictional, "the Supreme Court has, despite the rhetoric of jurisdiction, carved out exceptions." *Id.* at 32;[10] *cf. Sayyah* v. *Farquharson*, 382 F.3d 20, 27 (1st Cir. 2004) ("The exhaustion principle [in Section 1252(d)(1)], while strict, admits of appropriate exceptions in extraordinary instances.").

In another sign of confusion regarding the scope of the "jurisdictional" bar, the Ninth Circuit uniformly has held that issue exhaustion is a jurisdictional question, but nevertheless has created a futility exception grounded in the court's prudential exhaustion doctrine. *See Sun* v. *Ashcroft*, 370 F.3d 932, 943-944 (9th Cir. 2004). Specifically, the court interpreted the purportedly jurisdictional statutory exhaustion requirement of

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[9] *See Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 583-584 (8th Cir. 2005) (noting that the court had previously referred to the issue-exhaustion requirement as jurisdictional, but also noting that court-imposed exhaustion requirements are generally not considered jurisdictional).

[10] The *Sousa* court ultimately declined to decide whether a threatened miscarriage of justice based on an improper classification of an alien as an aggravated felon would trump the exhaustion requirement because it held that the alien was, in any event, properly classified as an aggravated felon. 226 F.3d at 32-34.

remedies "available ... as of right" to exclude issues "'where the agency's position on the question ... appears already set, and it is very likely what the result of recourse to administrative remedies would be.'" *Id.* at 943 (quoting prudential exhaustion doctrine set forth in *El Rescate Legal Servs., Inc.* v. *Executive Office of Immigr. Review*, 959 F.2d 742, 747 (9th Cir. 1991)). The Ninth Circuit's wholesale adoption of a prudential exception to a supposedly jurisdictional rule suggests that that court, like several other circuits, is confused about the true nature of the exhaustion rule reflected in Section 1252(d)(2)—confusion that only this Court can dispel.

C. Among The Circuits That Follow A "Jurisdictional" Approach, Several Question It

At least three circuits (the First, Third, and Eighth) that have, at least in name, adopted a "jurisdictional" approach to issue exhaustion under Section 1252(d)(1) have nonetheless strongly questioned whether that reading of Section 1252(d)(1) is correct.[11] These three circuits have emphasized that binding precedent—rather than convincing legal reasoning—dictates their holdings that issue exhaustion is a jurisdictional requirement. *See Bin Lin* v. *Attorney Gen. USA*, 543 F.3d 114, 120-121 & n.6 (3d Cir. 2008) ("[W]hile there is reason to cast doubt upon the continuing validity of our precedent holding that issue exhaustion is a jurisdictional rule, short of a review en banc, we must dutifully apply that precedent.");

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[11] Two of these circuits—the First and the Eighth—have also considered exceptions to their "jurisdictional" rule. *See supra* pp. 17-18.

Sousa, 226 F.3d at 31 ("If we were writing on a clean slate, it would be very tempting to treat [petitioner's] forfeit of his claim as something less than a jurisdictional objection. After all, in both criminal and civil cases coming from district courts, an appellate court has the option to recognize 'plain error.'").

The Eighth Circuit, in particular, has not only expressed doubt about the correctness of its precedent, *see Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 581 (8th Cir. 2005) ("If we were starting from scratch, there would be reason to question whether § 1252(d)(1) by its terms precludes a court of appeals from considering issues that an alien did not present to the agency."), but in more recent decisions, has evinced even greater uncertainty about the jurisdictional nature of Section 1252(d)(1), *see, e.g.*, *Zine* v. *Mukasey*, 517 F.3d 535, 539-540 (8th Cir. 2008) ("Our prior decisions are inconsistent on the question whether failure to raise an issue before the BIA is a jurisdictionally-fatal failure to exhaust an administrative remedy[.]"); *Frango*, 437 F.3d at 728 ("Regardless of whether § 1252(d)(1) precludes us from addressing unexhausted issues, a court-imposed exhaustion requirement is appropriate here.").

Moreover, it appears that no published decision even in the "jurisdictional" circuits—other than the Fourth Circuit's decision in this case—has actually held that a court of appeals lacks *power* to entertain a challenge to a removal order where the government has not argued that the challenge is barred because it was not properly exhausted before the agency. *Cf. Badwan*, 494 F.3d at 571 (reviewing and sustaining challenge where government did not argue exhaustion); *Lin Zhong*, 480 F.3d at 120 (stating that the "use of 'jurisdictional' language" in a case that did not "expressly consider[] the question of whether the Attorney Gen-

eral might *waive* an argument as to issue exhaustion, cannot, without more, be held to govern cases in which the government has failed to raise an exhaustion argument"). Even within the "jurisdictional" circuits, therefore, the Fourth Circuit's decision places that court at one extreme end of the debate. The decision below only exacerbates the disarray among and within the circuits regarding the operation of Section 1252(d)(1). Review by this Court is necessary to clarify the meaning of that provision.

II. THE FOURTH CIRCUIT'S RULING THAT IT LACKED JURISDICTION OVER MASSIS'S LEGAL CHALLENGE IS ERRONEOUS

The Fourth Circuit's decision is incorrect and contrary to this Court's decisions in two fundamental respects. First, Section 1252(d)(1) does not address *issue* exhaustion at all—rather, it simply requires that the alien fully proceed before the agency prior to pursuing judicial review. If the alien has unsuccessfully pursued his available remedies before the agency, then ordinary exhaustion principles apply to any issue that he raises for the first time in the court of appeals. Second, ordinary exhaustion principles are not jurisdictional. Although an alien's failure to satisfy them is not lightly to be overlooked, there are circumstances in which a court of appeals will not insist on strict compliance with exhaustion—notably, where (as here) the government does not invoke exhaustion on appeal.

A. Section 1252(d)(1) Does Not Address Issue Exhaustion

"[R]equirements of administrative issue exhaustion are largely creatures of statute." *Sims*, 530 U.S. at 107. The language of 8 U.S.C. § 1252(d)(1), however, does not address judicial review of unexhausted issues. That

provision states only that an alien must "exhaust[] all administrative remedies available to the alien as of right." *Id.* "Exhaustion of administrative remedies" typically refers to a requirement that a claimant not bypass an entire step at the agency level (including an administrative appeal) before pursuing his case in court. *See Sims*, 530 U.S. at 107 (stating that "petitioner exhausted administrative remedies by requesting review by the [Social Security Appeals] Council" and thus "nothing ... bars judicial review of her claims"); *cf. Coleman*, 501 U.S. at 731-732 (explaining that a habeas petitioner can exhaust available state court remedies even if he defaults on certain claims by failing to raise them in state court). Accordingly, several courts of appeals have held that they may not entertain a petition for review when the alien failed to proceed *at all* before either the IJ or the BIA. *See, e.g.*, *Valenzuela Grullon* v. *Mukasey*, 509 F.3d 107, 111 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008). Once a petitioner satisfies those requirements, however, the statutory text contains no proscription against judicial review of unexhausted *issues*.

Section 1252(d)(1) makes no mention of issue exhaustion, nor does it use language of the kind necessary to require issue exhaustion. In *Sims*, this Court made clear that an *issue* exhaustion requirement should not be presumed merely from the existence of an *administrative remedies* exhaustion requirement. In determining that the Social Security Act contained no issue exhaustion requirement, the Court stated that it is "not necessarily" the case that "an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies." 530 U.S. at 107 (citation omitted).

By contrast, in other contexts, where Congress has intended to create an issue exhaustion requirement (as opposed to an administrative remedy exhaustion requirement), Congress has plainly stated its intent by referring to "objections" rather than "remedies." For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982), this Court found that the National Labor Relations Act contains a jurisdictional issue exhaustion requirement and accordingly held that the court of appeals lacked jurisdiction to review objections that had not been raised before the National Labor Relations Board. The statute at issue in *Woelke* stated that "[n]o *objection* that has not been urged before the Board ... shall be considered by the court." 29 U.S.C. § 160(e) (emphasis added). Similarly, in *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498, 501 (1955), this Court held that the court of appeals lacked authority to review unexhausted issues because the statute provided that "'[n]o *objection* to the order of the Commission shall be considered by the Court ... unless such objection shall have been urged before the Commission,'" *id.* at 497 (quoting Section 19(b) of the Natural Gas Act (emphasis added and alteration omitted)). Section 1252(d)(1) of the INA, by contrast, requires only administrative remedy exhaustion and is silent regarding the exhaustion of issues, arguments, or objections.

With the exception of their interpretation of Section 1252(d)(1) and its predecessor, 8 U.S.C. § 1105a(c) (repealed 1996), the courts of appeals have declined to read jurisdictional issue exhaustion requirements into statutes. Even where Congress has spoken in terms of "questions" not presented below, courts have construed that statutory language to codify traditional judicial exhaustion doctrines, and not as imposing a jurisdic-

tional bar. For example, the D.C. Circuit has interpreted 47 U.S.C. § 405, which explicitly requires parties to petition the FCC for rehearing before raising a new issue on judicial review, as establishing a nonjurisdictional issue exhaustion requirement, subject to the "traditionally recognized exceptions to the exhaustion doctrine." *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & nn.6, 7 (D.C. Cir. 1983) (cited with approval in *Sims*, 530 U.S. at 108); *see also Action for Children's Television* v. *FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977) (Section 405 "leaves room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied" (internal quotation marks omitted)); *accord National Black Media Coal.* v. *FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986).[12]

The Fourth Circuit therefore erred in reading Section 1252(d)(2) as an issue exhaustion provision. Rather, this Court's decisions make clear that the correct rule is that the requirement of "exhaustion of 'all administrative remedies available to [an] alien as of right' under 8 U.S.C. § 1252(d)(1) does not require—as a *statutory* matter—that a petitioner ... raise to the BIA each issue presented in his or her petition for judicial review." *Lin Zhong*, 480 F.3d at 121. Therefore, under Section 1252(d)(1), "the failure to exhaust individual issues before the BIA does not deprive this court

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[12] Section 405(a), which is even more direct in its exhaustion language than Section 1252(d)(1), provides: "The filing of a petition for reconsideration shall not be a condition precedent to judicial review of [an FCC decision] except where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass."

of *subject matter jurisdiction* to consider those issues." *Id.* at 121-122. Whether the court of appeals may or should entertain such issues is to be determined by reference to traditional exhaustion principles.

B. Issue Exhaustion Is Not Jurisdictional

This Court's decisions make clear that, although issue exhaustion is unquestionably an important part of orderly administrative procedure, it is not an inexorable jurisdictional requirement. *E.g.*, *Sims*, 530 U.S. at 107. Even though the courts, in the absence of a statute, have in some circumstances themselves "imposed an issue-exhaustion requirement," they have done so by "analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* at 108-109; *cf. United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

But the principle ordinarily barring consideration of an issue raised for the first time on appeal is not a jurisdictional one. This Court's cases articulating that principle "do not announce an inflexible practice," and the Court has recognized that "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel*, 312 U.S. at 556, 557. After all,

> [r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previ-

> ously been specifically urged would be out of harmony with this policy.

Id. at 557.

To reach its conclusion that Section 1252(d)(1) contains a jurisdictional issue exhaustion requirement, the Fourth Circuit mistakenly relied in significant part on this Court's decision in *Bowles*, 127 S. Ct. 2360. App. 16a-17a. *Bowles*, however, did not involve issue exhaustion. Rather, *Bowles* involved a situation where a party appealing an adverse decision of a district court attempted to file an appeal beyond the period allowed by statute. 127 S. Ct. at 2362. The Court ruled (as it had in prior cases) that the time limit for a notice of appeal is "mandatory and jurisdictional," *id.* at 2363 (internal quotation marks omitted), but it also noted that several recent cases had distinguished between "claims-processing rules," which are nonjurisdictional, and true jurisdictional rules, which restrict a court's power to decide a case, *see id.* at 2364; *see also Kontrick*, 540 U.S. at 452-456 (declining to read time limit for raising an issue in bankruptcy rules as jurisdictional); *Eberhart*, 546 U.S. at 15-19 (declining to read time limit for motion for new trial as jurisdictional and finding government's timeliness argument waived).

At least absent express direction by Congress to the contrary, issue exhaustion is properly understood as a nonjurisdictional "claims-processing rule." In this case, the court of appeals had jurisdiction over Massis's petitions for review under 8 U.S.C. § 1252(a)(1), which were timely filed; the only question was whether the court should address a particular issue that, it concluded, Massis had not properly preserved before the agency. The case thus resembles one in which a court of appeals has jurisdiction over a timely-filed appeal

under 28 U.S.C. § 1291 but must decide whether to address an issue not properly raised in the district court. That is a question not of appellate power but of appellate discretion.

This case thus is less analogous to *Bowles* than to *Scarborough* v. *Principi*, 541 U.S. 401 (2004). In *Scarborough*, this Court held that a 30-day deadline for filing applications for attorney's fees under the Equal Access to Justice Act (EAJA) was not jurisdictional. *Id.* at 414. As the Court explained, the case for which the claimant sought attorney's fees was already within the district court's subject matter jurisdiction; the only question was whether timeliness considerations should have barred the court from reaching a claim that arguably was not timely filed. *See id.* at 413. Like the EAJA provision at issue in *Scarborough*, the principle of issue exhaustion "does not describe what classes of cases the [court] is competent to adjudicate." *See id.* at 414 (internal quotation marks and citation omitted).

C. This Case Is An Appropriate One To Overlook Any Failure Of Issue Exhaustion

In the rare case, such as this one, where (1) the government has waived its argument that an alien has not exhausted an issue, (2) that issue is a purely legal question, and (3) manifest injustice would result from the court's failure to reach the issue, it is appropriate for a reviewing court to entertain the alien's challenge to his removal order. Wrongly shackled to a jurisdictional approach, the Fourth Circuit erroneously ignored these factors.

First, where the government does not assert that the petitioner failed to exhaust an issue, a court may deem any exhaustion requirement waived and consider

the merits of the issue. *See, e.g.*, *Al-Najar*, 515 F.3d at 713 n.2; *Lin Zhong*, 480 F.3d 123-125; *Abdelqadar*, 413 F.3d at 670-671. Here, Massis argued in his motion to reopen that his misdemeanor reckless endangerment conviction under Maryland law does not constitute an "aggravated felony" under the INA. *See* App. 7a. He again asserted this argument in his petition for review to the Fourth Circuit. App. 8a-9a. Neither in its response to Massis's motion to reopen nor in its answering brief in the Fourth Circuit did the government argue that Massis had waived this issue. Under these circumstances, a court of appeals may and should exercise its discretion to hold the government to its waiver and consider the merits of the petitioner's argument.

Second, an exception is warranted when no facts are in dispute and the issue is solely one of statutory interpretation. *See McKart* v. *United States*, 395 U.S. 185, 197-198 & n.15 (1969) (addressing issue not previously raised to relevant administrative authority because issue was "solely one of statutory interpretation" and "no further factual inquiry would have been at all useful"); *Abdelqadar*, 413 F.3d at 670-672 (addressing the merits of an unexhausted issue that was "strictly legal").

Here, no material facts are in dispute, and the central substantive issue presented on appeal is a pure question of legal interpretation that appellate courts routinely decide without deferring to the BIA: whether Massis is subject to removal as an "aggravated felon" under 8 U.S.C. § 1101(a)(43)(F) on the basis of his 1995 misdemeanor reckless endangerment conviction in Maryland. *See e.g.*, *Bobb* v. *United States Att'y Gen.*, 458 F.3d 213, 217 n.4 (3d Cir. 2006) (declining to give *Chevron* deference to BIA's determination of whether a particular criminal offense is an aggravated felony be-

cause that determination involves "matters outside the authority or expertise of the BIA"); *Soliman* v. *Gonzales*, 419 F.3d 276, 281 (4th Cir. 2005) (stating that courts of appeals need not defer to the agency's conclusion that a particular offense constitutes an aggravated felony because that question does not "lie[] within the BIA's authority or expertise"). Furthermore, the resolution of the legal issue here is plain: Massis is not removable because reckless endangerment is not a crime of violence and therefore not an aggravated felony that can serve as the basis for his removal. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004). Indeed, the government conceded this fundamental point below by not arguing in the court of appeals that Massis is removable as an aggravated felon.

Third, courts may make an exception "to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below" when "injustice might otherwise result." *Hormel*, 312 U.S. at 557; *see also Batrez Gradiz*, 490 F.3d at 1209-1210 (invoking "miscarriage of justice" exception under Section 1252(d) to decide whether petitioner had committed an aggravated felony and hence was removable despite petitioner's failure to raise that issue to BIA); *Sousa*, 226 F.3d at 31-32 (suggesting that reviewing court could excuse failure to exhaust an issue under Section 1252(d) in "extreme cases" to avoid "a miscarriage of justice"). Here, a miscarriage of justice would result if Massis were removed as an "aggravated felon" when it is undisputed that he did not commit a crime satisfying that statutory definition.

The miscarriage of justice in Massis's case is all the more compelling because Massis *did*, in fact, raise this argument before the BIA when he asked the BIA to use its *sua sponte* power to reopen the proceedings to

prevent a miscarriage of justice, stating that "whether or not Respondent's counsel was constitutionally ineffective, it is clear that Respondent is not deportable as charged." CAJA 331. The motion to reopen was timely filed after the BIA ordered Massis's removal and Massis, upon retaining current counsel, learned of his statutory ineligibility for removal. *See supra* p. 6.

Although the Fourth Circuit concluded that Massis did not exhaust this issue, the court cited no support for its view that a claim is unexhausted if raised before the BIA in a motion to reopen. The Fourth Circuit's holding is contrary to well-established Fifth Circuit precedent that "[a]n alien fails to exhaust his administrative remedies with respect to an issue when the issue is not raised in the first instance before the BIA—either on direct appeal *or* in a motion to reopen." *Kuang-Ze Wang* v. *Ashcroft*, 260 F.3d 448, 452-453 (5th Cir. 2001) (emphasis added); *see also Roy* v. *Ashcroft*, 389 F.3d 132, 136-137 (5th Cir. 2004). The Fourth Circuit's position also runs afoul of Section 1252(d)(1)'s purpose, which is simply "to give the BIA an opportunity to address [the alien's] arguments before presenting them to th[e] court." *Padilla* v. *Gonzales*, 470 F.3d 1209, 1214 (7th Cir. 2006). To fulfill this purpose, the "paramount concern ... is that (1) the petitioner raise the issue, *or* (2) the BIA actually decide the issue." *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1121 (10th Cir. 2007). Massis gave the BIA ample opportunity to correct its error by raising this issue in his motion to reopen as soon as he learned of it, and he therefore satisfied Section 1252(d)'s exhaustion requirement.

III. THE FOURTH CIRCUIT IMPROPERLY REFUSED TO CONSIDER MASSIS'S CONSTITUTIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The court of appeals summarily concluded that its decision in *Afanwi* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), in which it held that aliens have no right under the Due Process Clause of the Fifth Amendment to effective assistance of retained counsel in removal proceedings, foreclosed Massis's due process claim based on the deficient representation he received from prior counsel. App. 13a-14a.[13] The Fourth Circuit's precedent places it in the minority of circuits that have addressed that issue. Only two circuits—the Fourth and Eighth—plainly reject a constitutional right to effective assistance of counsel under the Due Process Clause in removal proceedings. *See Afanwi*, 526 F.3d at 799; *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). By contrast, seven circuits (the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh) recognize that the right to a fundamentally fair hearing, guaranteed by the Fifth Amendment Due Process Clause, encompasses the right to effective assistance of retained counsel during removal proceedings. *See Lozada* v. *INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States* v. *Perez*, 330 F.3d 97, 101 (2d Cir. 2003); *Fadiga* v. *Attorney Gen. USA*, 488 F.3d 142, 155 (3d Cir. 2007); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Ray* v. *Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006);

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[13] The Fourth Circuit reviewed, under a highly deferential abuse of discretion standard, the BIA's rejection of Massis's ineffective assistance of counsel claim. App. 11a. In so doing, it expressly did *not* address ineffective assistance as a *constitutional* matter, noting that any such claim was foreclosed by circuit precedent. App. 13a-14a.

Osei v. *INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005).[14] A violation of this constitutional right occurs if the alien is prejudiced by counsel's deficient performance. *E.g.*, *Perez*, 330 F.3d at 101-102; *Fadiga*, 488 F.3d at 155.

In a pending petition for certiorari, Joseph Afanwi has asked the Court to resolve this sharp conflict among the circuits. *See* Pet., *Afanwi* v. *Holder*, (U.S. Jan. 16, 2009) (No. 08-906). Because this Court's disposition of Afanwi's petition may affect the outcome of this matter, this Court at a minimum should hold in abeyance this petition until the Court has decided whether to grant the petition in *Afanwi*.

In the interest of judicial economy, Massis adopts and incorporates by reference the legal arguments and reasons for granting a writ of certiorari set forth in the *Afanwi* Petition, namely: (1) there is a compelling interest in national uniformity with respect to the due process rights of aliens in removal proceedings, and (2) the Due Process Clause of the Fifth Amendment entitles aliens facing removal to a fundamentally fair hearing, which necessarily entails a constitutional guarantee of competent assistance of counsel. *See Afanwi* Pet. 15-27. If this Court concludes—as a majority of circuits have—that ineffective assistance of retained counsel in

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[14] The Seventh Circuit has issued conflicting decisions on this question. *See, e.g.*, *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993) (recognizing due process right); *Magala* v. *Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (denying due process right); *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (finding that right to effective assistance in removal proceedings is "derived ... ultimately [from] the Fifth Amendment's due process clause").

the removal context violates an alien's Fifth Amendment due process rights, this Court should grant Massis's petition, vacate the Fourth Circuit's denial of that claim, and remand for further proceedings.

Massis has a meritorious constitutional claim of ineffective assistance of counsel based on his concession of deportability. At the time Massis's former counsel conceded deportability in 1998, it was clear under Maryland law that misdemeanor reckless endangerment did not meet the definition of a "crime of violence" under 18 U.S.C. § 16. That provision states that a crime of violence required "the use, attempted use, or threatened use of physical force" as an element of the offense, *id.* § 16(a), or that the offense be a "felony" and involve "by its nature ... a substantial risk" that physical force may be used in the commission of the offense, *id.* § 16(b). Reckless endangerment does not have as an element the use of force, nor does it involve a substantial risk that force will be used in committing the offense. *See* Md. Ann. Code art. 27, § 120(a) (1995); *Minor* v. *State*, 605 A.2d 138, 141 (Md. 1992) (establishing that reckless endangerment does not require or inherently involve the use of force).[15] Reckless endangerment, therefore, is not a federally defined "crime of violence" and cannot constitute an "aggravated felony" under the INA. *See Leocal*, 543 U.S. at 11.

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[15] The law of the Fourth Circuit was clear as far back as 1993 that an assessment of whether an offense qualifies as a "crime of violence" under Section 16 required application of a categorical approach that considers the inherent nature of the offense rather than a particular defendant's conduct. *See United States* v. *Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993).

Moreover, reckless endangerment is a *misdemeanor*, not a felony, under Maryland law. *See supra* p. 4. Accordingly, Maryland's reckless endangerment offense cannot, as a matter of law, constitute a "felony" within the meaning of that term in 18 U.S.C. § 16(b) and cannot serve as the basis for removal as an "aggravated felony" under the INA. *See, e.g., Francis* v. *Reno*, 269 F.3d 162, 168-170 (3d Cir. 2001) (holding that Section 16(b) applies only to crimes classified as felonies under state law); *see also Singh* v. *Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006) (holding that Pennsylvania's reckless endangerment offense, which is a misdemeanor, could not constitute a "felony" under Section 16(b)).

Equally plain is that Massis's counsel's concession resulted in prejudice because the concession deprived Massis of an absolute defense to deportability and now serves as the sole basis for his unlawful deportation order. It is at least "reasonabl[y] probab[le]," *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), that, had Massis's counsel argued to the IJ that Massis's offense was not one that rendered him deportable, the IJ would have agreed. Massis was, therefore, prejudiced by his counsel's ineffective representation.[16]

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[16] The Fourth Circuit's statement that counsel's concession "is particularly understandable in light of counsel's decision to seek equitable relief in the form of a discretionary waiver of the deportation," App. 13a, is incorrect. There was no need or advantage for Massis's counsel to choose between contesting deportability and requesting a Section 212(c) waiver. Aliens in removal proceedings frequently both challenge the charge of deportability and request discretionary relief from removal. *See, e.g., Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 766 (BIA 2005); *Matter of Saint John*, 21 I. & N. Dec. 593, 594 (BIA 1996). Neither the immigration laws

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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nor the facts of this case inhibited Massis's counsel from pursuing both arguments in the alternative. *Cf. INS* v. *Doherty*, 502 U.S. 314, 328 (1992) ("Precisely because an alien may qualify for one form of relief from deportation, but not another, the INS allows aliens to plead in the alternative in immigration proceedings."). Moreover, because a successful challenge to the basis for Massis's deportability would have resulted in a bar to his removal, there could not have been any tactical advantage in conceding the one point that could have provided Massis with an absolute defense to deportability and instead seeking a form of relief that is merely discretionary.