No. 21-1436

In the Supreme Court of the United States

LEON SANTOS-ZACARIA AKA LEON SANTOS-SACARIAS,
PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that 8 U.S.C. 1252(d)(1) prevented the court from reviewing petitioner's claim that the Board of Immigration Appeals engaged in impermissible factfinding because petitioner had not exhausted that claim through a motion to reconsider.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-13a) is reported at 22 F.4th 570. The decisions of the Board of Immigration Appeals (Pet. App. 14a-20a) and the immigration judge (Pet. App. 21a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2022. On April 3, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 10, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a noncitizen who was removed from the United States subject to a lawful order of removal and

later reentered the United States unlawfully. Pet. App. 16a.[1] When the Department of Homeland Security (DHS) sought to reinstate her prior removal order in 2018, petitioner applied for withholding of removal. *Id.* at 21a-22a. An immigration judge (IJ) denied her application, *id.* at 21a-30a, and the Board of Immigration Appeals (Board), affirmed, *id.* at 14a-20a. Petitioner sought judicial review, contending that the Board had engaged in impermissible factfinding because it had affirmed the denial of relief on grounds different from those on which the IJ relied. *Id.* at 3a; Pet. C.A. Br. 7-8; Pet. C.A. Reply Br. 6-9. The court of appeals denied the petition for review, holding that it could not consider petitioner's charge of impermissible factfinding because she had failed to exhaust that challenge in a motion to reconsider before the Board. Pet. App. 4a-5a.

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, if a noncitizen who has been removed from the United States later returns illegally, the prior removal order may be reinstated. 8 U.S.C. 1231(a)(5). When that occurs, the noncitizen is ineligible for any form of categorical relief from removal, *ibid.*, but if she believes that she will be subject to persecution in the country to which she will be removed, she may apply for statutory withholding of removal under 8 U.S.C. 1231(b)(3).[2] That statute provides, with

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[1] This brief 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)).

[2] A noncitizen facing the reinstatement of a removal order may also seek protection from removal 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.

certain exceptions, that the Secretary of Homeland Security "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

To make the showing required for withholding of removal, an applicant may demonstrate that she "suffered past persecution in the proposed country of removal," in which case she is entitled to a rebuttable presumption that she will face the requisite threat in the future. 8 C.F.R. 1208.16(b)(1). If the noncitizen cannot establish past persecution, she "bears the burden of establishing that it is more likely than not that" she will face a threat to her life or freedom if she is removed to the proposed country. 8 C.F.R. 1208.16(b)(1)(ii). She cannot meet her burden if she "could avoid a future threat * * * by relocating to another part of the proposed country of removal." 8 C.F.R. 1208.16(b)(2).

b. When a noncitizen whose removal order has been reinstated asserts a reasonable fear of persecution, she is referred for a hearing before an IJ to determine whether she qualifies for withholding of removal. 8 C.F.R. 1208.16, 1208.31(e); see also 8 C.F.R. 1208.2(c)(2). If the IJ denies that application, the noncitizen may appeal to the Board. 8 C.F.R. 1003.1(b), 1208.31(e), 1240.15. Any appeal "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b).

No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. But petitioner does not challenge the denial of her application for CAT protection in her petition for a writ of certiorari.

If the Board affirms the denial of relief, the INA grants the noncitizen the right to file a "motion to reconsider" within 30 days of the Board's decision. 8 U.S.C. 1229a(c)(6)(A); see 8 C.F.R. 1003.2(a) and (b)(2). The INA also provides that a noncitizen may petition a court of appeals for judicial review of a final order of removal within 30 days of the order's issuance. 8 U.S.C. 1252(b)(1). But, under Section 1252(d)(1), the court "may review a final order of removal only if [the petitioner] has exhausted all administrative remedies available * * * as of right." 8 U.S.C. 1252(d)(1).

2. a. Petitioner is a native and citizen of Guatemala who first unlawfully entered the United States in 2008. Pet. App. 21a, 26a. After she was removed to Guatemala, she reentered the United States, but her initial order of removal was reinstated and she was returned to Guatemala. *Id.* at 23a, 26a. Petitioner again reentered the United States sometime in 2018, and DHS again sought to reinstate her initial order of removal in the same year. *Id.* at 23a, 26a, 30a.

Petitioner sought statutory withholding of removal based on her membership in the transgender and gay communities. Pet. App. 16a, 21a-22a. At her hearing before the IJ, she testified that she was raped by a neighbor in Guatemala at the age of 12 because she is gay, and that the neighbor threatened to kill her if she did not leave. *Id.* at 24a-25a; Administrative Record (A.R.) 118-119. Petitioner further testified that she did not report the assault to the police because she was told by other members of the gay community that the police do not protect "gay people." A.R. 119; Pet. App. 25a.

Petitioner further testified that she left Guatemala for Chiapas, Mexico at the age of 13 or 14 because her "father was sick and [her] mother [could not] help * * *

support" her and her siblings. A.R. 115-116; see Pet. App. 24a. She testified that she "was trying to find a way[] to stay" in Guatemala, but she could not stay because she was "discriminated a lot because [she is] gay so every time [she went] out people ma[d]e fun of [her]." A.R. 116. She also testified that, after she was removed to Guatemala from the United States in 2008, she stayed there for only "a month or two weeks" because people made fun of her for being gay. A.R. 121.

Petitioner acknowledged, however, that she voluntarily returned to Guatemala on three subsequent occasions, A.R. 124—once to visit her father for a few days in 2014, A.R. 124-125, once to visit her mother in 2015 after her father had passed away, A.R. 125, and once for approximately 15 days in 2018 to tell her mother that she was going to the United States, A.R. 128-129. In response to her lawyer's questioning, she stated that nothing happened to her during her visits because she would just "get inside the house and hide" herself. A.R. 129; see A.R. 125. She also responded "[n]o" when her lawyer asked if she thought there was anywhere she "could safely live in Guatemala." A.R. 135.

On cross-examination, petitioner agreed that "a lot has happened in Guatemala" since the rape she suffered as a 12 year old. A.R. 146. She also acknowledged that she could register herself "as a woman" in Guatemala "if [she] want[s] to be a woman now legally." *Ibid.* Petitioner and the DHS attorney then had the following exchange:

> [DHS:] And did you ever try to move to a city [in Guatemala] that was more open and free than the one that you grew up in as a child?

> [Petitioner:] But I don't know where to go down there. I don't know who would—kind—what kind of people I'm going to get there to live there.
>
> [DHS:] But if you know of cities that are open to gay and lesbian and transgender lifestyles you would rather move to those cities than the one you lived in[,] correct?
>
> [Petitioner:] Yes, probably there is another place where I can live down there but I don't but I try to stay here to get this protection because besides that I have a brother living here so I'm trying to have him help me.

A.R. 147. After that exchange, DHS promptly concluded its questioning and petitioner's attorney stated that he did not have anything further to ask his client. A.R. 147-148.

b. The IJ denied petitioner's application for withholding of removal. Pet. App. 21a-30a. The IJ explained that, in her view, petitioner was not entitled to a presumption of future persecution based on petitioner's experiences in Guatemala because the rape she described was at the hands of "a single private individual approximately 18 years ago," and there was no indication the individual "still lives there or that this individual was motivated by" petitioner's "membership [in] a Particularized Social Group." *Id.* at 27a-28a. The IJ also found that petitioner's assertions that she was mocked and threatened in Guatemala based on her membership in a protected community were not "developed with any kind of particularity or specificity as to date, time, place, source, [and] methods." *Id.* at 28a.

The IJ then determined that petitioner had not produced evidence showing "either that there is a reasona-

ble probability that [she] will be singled out individually for persecution" in Guatemala "or that there is a pattern or practice of persecution of an identifiable group" of which petitioner is a part. Pet. App. 28a. The IJ explained that, while petitioner testified that she would be persecuted because she is gay and transgender, that evidence is "speculative," and petitioner had "not shown that the Guatemalan government is unwilling or unable to protect" her. *Id.* at 28a-29a.

c. The Board affirmed the denial of protection. Pet. App. 14a-20a. The Board began by disagreeing with the IJ's conclusion that petitioner had not established past persecution in Guatemala. *Id.* at 16a-17a. The Board explained that the rape petitioner suffered "at the age of 12[] was sufficiently severe to rise to the level of past persecution," and that "the evidence reflects that [petitioner] was raped because [she] was gay." *Ibid.* The Board therefore found that petitioner was entitled to a presumption of future persecution, but it determined that the presumption had been rebutted in this case. *Id.* at 17a. The Board cited several pieces of evidence supporting its determination, including that the rape occurred 18 years ago; that petitioner had voluntarily returned to Guatemala on a few occasions since then; and that petitioner testified that she "would be legally allowed to change [her] gender to female in Guatemala and that [she] would be able to safely relocate within Guatemala (but [she] preferred to remain in the United States because of [her] brother)." *Id.* at 17a-18a.

d. Petitioner did not invoke her right to file a "motion to reconsider" with the Board, 8 U.S.C. 1229a(c)(6)(A), instead proceeding directly to filing a petition for review in the court of appeals. Pet. App. 4a-5a. Her briefs in the court of appeals asserted that the

Board had engaged in impermissible factfinding when it determined that the presumption of future persecution was rebutted because, in petitioner's view, the Board's regulations required that determination to be made in the first instance by the IJ. Pet. C.A. Br. 7-8; Pet. C.A. Reply Br. 6-9. Petitioner also pressed a distinct challenge that the evidence in the record did not rebut the presumption that she would face persecution in Guatemala. Pet. C.A. Br. 8-15.

3. a. The court of appeals rejected both challenges. Pet. App. 4a-7a. It first dismissed petitioner's assertion that the Board had engaged in impermissible factfinding, explaining that petitioner "did not present this argument before the [Board] in a motion for reconsideration," and that her failure to exhaust that argument meant that the court "lack[ed] jurisdiction to consider" it. *Id.* at 4a.

The court of appeals then rejected petitioner's contention that the Board's "determination that the government rebutted the presumption of future persecution [was] not supported by substantial evidence." Pet. App. 5a. The court observed that, "[d]uring cross-examination," petitioner had "agreed that there was probably a place where she could safely relocate within Guatemala," a concession that was sufficient to rebut the presumption that petitioner's life or freedom would be threatened if she returned there. *Id.* at 6a. The court also acknowledged and rejected the dissent's suggestion that petitioner's concession was "'vague and equivocal,'" explaining that the Board "reasonably interpreted her statement to mean that she did in fact know of a city or cities in Guatemala where it was probably safe for gay and transgender people to live." *Ibid.* (citation omitted).

b. Judge Higginson dissented, explaining that he would have found that petitioner exhausted her claim that the Board engaged in impermissible factfinding because petitioner's brief supporting her appeal to the Board had suggested a remand for additional factfinding as an alternative to reversal. Pet. App. 12a. Judge Higginson also disagreed with the majority's determination that substantial evidence supported the Board's conclusion that the presumption of further persecution had been rebutted because he thought petitioner's testimony that "probably there is another place where [she] can live" in Guatemala was more "equivocal" than the majority suggested. *Id.* at 12a-13a.

ARGUMENT

Petitioner contends (Pet. 10-26) that the court of appeals erred in determining that 8 U.S.C. 1252(d)(1) deprived the court of authority to review the impermissible-factfinding challenge that she had failed to present to the Board in a motion for reconsideration. The court of appeals' decision is correct; it does not implicate any division in the circuits that warrants this Court's consideration; and this Court has denied petitions for writs of certiorari presenting similar questions about Section 1252(d)(1), see *Omwega* v. *Garland*, 142 S. Ct. 424 (2021) (No. 20-1395); *Romero-Escobar* v. *Lynch*, 577 U.S. 1048 (2015) (No. 15-266). Further, petitioner's assertion (Pet. 4) that, if the court of appeals had reached the merits of the impermissible-factfinding challenge, it "likely" would have changed the outcome of her case is mistaken; the court of appeals *did* reach the merits of petitioner's primary substantive claim, squarely rejecting her assertion that there was insufficient evidence to rebut the presumption that she would face persecution if she were to return to Guatemala. Pet. App. 5a-7a (ci-

tation omitted). Thus, there is no reason to believe that petitioner would prevail on remand even if this Court were to accept her arguments about the proper application of Section 1252(d)(1). The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that Section 1252(d)(1) precludes review of petitioner's claim that the Board engaged in impermissible factfinding because she failed to present that claim to the Board in a motion for reconsideration. Section 1252(d)(1) states that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to [her] as of right." 8 U.S.C. 1252(d)(1). As the court of appeals explained, petitioner's impermissible-factfinding claim is "unexhausted" because she failed to raise it before the Board in a motion for reconsideration. Pet. App. 4a. Motions for reconsideration are among the "administrative remedies available to [a noncitizen] as of right," 8 U.S.C. 1252(d)(1), because the INA expressly provides that a noncitizen "may file one motion to reconsider a decision that [she] is removable," 8 U.S.C. 1229a(c)(6)(A).

Petitioner does not dispute that she failed to raise her impermissible-factfinding challenge in a motion to reconsider, nor does she assert that she exhausted that challenge through her appeal to the Board. Instead, she contends that Section 1252(d)(1) does not establish a jurisdictional bar, Pet. 17-18, and that a motion to reconsider is not a "remedy available to the alien as of right," Pet. 23 (citing 8 U.S.C. 1252(d)(1)). Both contentions lack merit.

a. Section 1252(d)(1) is properly classified as jurisdictional. This Court has recently and repeatedly explained that the term "jurisdictional" is appropriately

applied to statutory provisions "delineating the classes of cases a court may entertain." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1848 (2019); see *Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018) (jurisdictional provisions address "a court's competence to adjudicate a particular category of cases") (citation omitted). Section 1252(d)(1) satisfies that description well. By its clear terms, the provision "delineat[es] the class[] of cases" the courts of appeals "may entertain," *Fort Bend*, 139 S. Ct. at 1848, by mandating that "[a] court may review" "only" those cases in which a noncitizen has "exhausted all administrative remedies," 8 U.S.C. 1252(d)(1).

Petitioner asserts that Section 1252(d)(1) should not be regarded as jurisdictional because, unlike other provisions of Section 1252, Section 1252(d)(1) does not provide that "no court shall have jurisdiction" over unexhausted claims. Pet. 18 (quoting, *e.g.*, 8 U.S.C. 1252(g)). But this Court has never required that Congress "incant magic words" to limit jurisdiction. *Patchak*, 138 S. Ct. at 905 (citation omitted). Rather, the key question is whether the text establishes that the provision "cabin[s] a court's power." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409 (2015). Thus, in *Biden* v. *Texas*, 142 S. Ct. 2528 (2022), this Court found that 8 U.S.C. 1252(f)(1) did not pertain to lower courts' subject-matter jurisdiction (as opposed to their power to issue specific remedies). In doing so, the Court found "confirm[ation]" of its conclusion by contrasting Section 1252(f)(1)'s phrasing with that of Section 1252(g), which says that "no court shall have jurisdiction to review" certain kinds of decisions. 142 S. Ct. at 2539-2540. But the critical test remained whether the provision deprived courts of the "power to hear" the relevant category of claims. *Id.* at 2539.

A similar analysis of the text of Section 1252(d)(1) establishes that it *is* jurisdictional because it imposes an express limit on which cases "[a] court may review." 8 U.S.C. 1252(d). And petitioner's arguments to the contrary run counter to the nearly universal holdings of the courts of appeals that have addressed the issue. See *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Grullon* v. *Mukasey*, 509 F.3d 107, 112 (2d Cir. 2007), cert. denied, 555 U.S. 813 (2008); *Xie* v. *Ashcroft*, 359 F.3d 239, 245-246 n.8 (3d Cir. 2004); *Massis* v. *Mukasey*, 549 F.3d 631, 638-640 (4th Cir. 2008), cert. denied, 558 U.S. 1047 (2009); *Omari* v. *Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559-560 (6th Cir. 2004); *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582-583 (8th Cir. 2005); *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (9th Cir. 2004); *Molina* v. *Holder*, 763 F.3d 1259, 1262 (10th Cir. 2014); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

b. In any event, the question of whether Section 1252(d)(1) is jurisdictional is generally of little practical importance because petitioner concedes (Pet. 17) that Section 1252(d)(1) is an "exhaustion requirement," and this Court has recently held—in a case involving another INA exhaustion provision—that "[w]hen Congress uses 'mandatory language' in an administrative exhaustion provision, 'a court *may not excuse* a failure to exhaust.'" *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021) (quoting *Ross* v. *Blake*, 578 U.S. 632, 639 (2016)) (emphasis added). As the Court has previously explained, while "judge-made exhaustion doctrines * * * remain amenable to judge-made exceptions," "statutory exhaustion provision[s] stand[] on a different footing," and this Court will not "add unwrit-

ten limits onto their rigorous textual requirements." *Ross*, 578 U.S. at 639.

To be sure, concluding that a requirement is nonjurisdictional generally means that, like most other requirements or defenses, it "can be waived or forfeited by an opposing party."[3] *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019); see *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). Here, the government did not raise or rely on petitioner's failure to exhaust in the court of appeals, so waiver and forfeiture would apply. That does not mean, however, that this is the rare case in which Section 1252(d)(1)'s jurisdictional status is outcome determinative because the government's failure to assert the exhaustion bar reflects how readily the underlying argument may be defeated on the merits.

Petitioner's impermissible-factfinding challenge was based on the erroneous premise that, once the Board had determined that the IJ erred in failing to find past persecution, the Board's general inability to engage in factfinding required it to remand to the IJ rather than consider whether the evidence already in the record was sufficient to rebut the presumption of future persecution. Pet. C.A. Br. 7-8; Pet. C.A. Reply Br. 6-9. But the courts of appeals have long recognized the Board's authority to affirm an IJ's decision on alternative grounds that are supported by the record. See, *e.g.*, *Rotinsulu* v. *Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008) (the Board is free to reject the IJ's reasoning and instead explain "based on its review of the record, why it considered the IJ's decision to be supportable"); *Ye* v. *Department of Homeland Sec.*, 446 F.3d 289, 296 (2d Cir. 2006) (the

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[3] Of course, as this Court has recognized, a court may still invoke, *sua sponte*, a party's failure to comply with a nonjurisdictional requirement. See *Day* v. *McDonough*, 547 U.S. 198, 209 (2006).

Board "did not overstep its authority [in affirming on alternative grounds] because it based its decision on facts already in the record"); *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1231 (10th Cir. 2004) (recognizing that the Board may "independently state a correct ground for affirmance in a case in which the reasoning proffered by the IJ is faulty") (citation omitted); *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003) (observing that even the Board's summary affirmance procedures "allow a Board member to affirm the IJ's decision based on different reasons than those set forth by the IJ").

Indeed, the principle that the Board may affirm based on reasoning distinct from the IJ's is so well-established that the Fifth Circuit typically "reviews the order of the" Board exclusively, and "will consider the underlying decision of the IJ *only* if it influenced the determination of the" Board. *Gomez-Palacios* v. *Holder*, 560 F.3d 354, 358 (2009) (emphasis added). So do other courts of appeals. See, *e.g.*, *Chen* v. *Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005) (reviewing only the Board's decision because the Board "did not adopt the decision of the IJ to any extent"); *Liu* v. *Ashcroft*, 380 F.3d 307, 312 (7th Cir. 2004) (similar). Thus, even if the court had reached the merits of petitioner's impermissible-factfinding challenge, it would have rejected that challenge.

Petitioner's assertion (Pet. 16-17) that the jurisdictional bar *was* outcome determinative in her case is based on a misreading of both the dissenting and majority opinions. Petitioner states that the dissent "reach[ed] the merits" of her impermissible-factfinding claim, and that the dissent's "analysis of the merits strongly suggests that * * * petitioner's withholding of removal claim would have had a plausible chance to succeed" had

the majority not applied a jurisdictional bar. *Ibid.* (citing Pet. App. 10a-13a). In fact, while the dissent found that petitioner's impermissible-factfinding challenge was exhausted, it did not address that challenge on the merits. Pet. App. 10a. The portion of the dissent on which petitioner relies pertains to the distinct question of whether the Board's decision was "supported by substantial evidence." *Id.* at 10a-11a; see *id.* at 10a-13a. The majority also reached the merits of that question and found that "the [Board's] determination that the government rebutted the presumption of future persecution is supported by substantial evidence," *id.* at 6a, and it rejected the dissent's reasoning to the contrary, *id.* at 6a-7a. There is no reason to conclude that the majority would have found the dissent's view of the evidence more persuasive if it had overlooked petitioner's failure to exhaust and proceeded to consider her impermissible-factfinding challenge on the merits.

c. Petitioner alternatively contends (Pet. 23-27) that Section 1252(d)(1) does not apply to her impermissible-factfinding challenge because that challenge could have been raised in a motion to reconsider, and such motions are not a "remed[y] available to the alien as of right." 8 U.S.C. 1252(d)(1). Like the jurisdictional argument, that contention is not outcome determinative because petitioner's impermissible-factfinding argument would not have succeeded even if it had been properly raised.

In any event, petitioner's contention about motions to reconsider is mistaken. The INA grants noncitizens the right to "file one motion to reconsider" within "30 days of the date of the entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(6). Petitioner does not suggest that she lacked that right; she merely asserts that it was not covered under Section 1252(d)(1)

because the Board has discretion to deny a motion for reconsideration even when a party has "made out a *prima facie* case for relief." Pet. 23 (quoting 8 C.F.R. 1003.2(a)). But an administrative remedy is "*available* to" a noncitizen "as of right" so long as she has the "right" to invoke it. 8 U.S.C. 1252(d)(1) (emphasis added). The possibility that the Board may deny a noncitizen's request for relief on discretionary grounds does not mean she lacks the "right" to make the request in the first place. Because that "remedy is available to her," she is required by Section 1252(d)(1) to pursue it with the Board before seeking judicial review.

2. Petitioner contends that this Court's review is warranted because there is division in the circuits as to whether Section 1252(d)(1) is jurisdictional and as to whether a claim may be found unexhausted based on a noncitizen's failure to move for reconsideration. This case does not, however, present any circuit conflict that warrants this Court's intervention.

a. Petitioner asserts (Pet. 10-11) that there is an "irreconcilable circuit split over whether 8 U.S.C. 1252(d)(1) is jurisdictional." But the numerous courts of appeals that have confronted the question have almost universally concluded that Section 1252(d)(1) imposes a jurisdictional bar. See p. 12, *supra*. Petitioner asserts (Pet. 11-12) that the Second and Seventh Circuits have adopted a contrary view, but petitioner is mistaken on both counts.

Petitioner cites several Seventh Circuit cases stating that Section 1252(d)(1) is not jurisdictional. Pet. 11-12 (citing, *e.g.*, *Chavarria-Reyes* v. *Lynch*, 845 F.3d 275, 279 (2016); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 673 (2005)). But the Seventh Circuit has also repeatedly reached the opposite conclusion, citing Section 1252(d)(1)

for the proposition that "[w]hen a petition for review challenges a final order of removal, *we have jurisdiction* only when 'the alien has exhausted all administrative remedies available to the alien as of right.'" *Padilla* v. *Gonzales*, 470 F.3d 1209, 1213 (7th Cir. 2006) (emphasis added; citation omitted); see, *e.g.*, *Chavez-Vasquez* v. *Mukasey*, 548 F.3d 1115, 1118 (2008); *Fonseca-Sanchez* v. *Gonzales*, 484 F.3d 439 (2007); *Shuhaiber* v. *ICE*, 834 Fed. Appx. 282, 283 (2021); *Hong Liu Yang* v. *Lynch*, 611 Fed. Appx. 357, 359 (2015). "It is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Nor has the Second Circuit held that Section 1252(d)(1) is nonjurisdictional. Petitioner herself acknowledges (Pet. 12) that the Second Circuit has expressly recognized that the requirement to exhaust "administrative remedies" is jurisdictional. *Zhong* v. *United States Dep't of Justice*, 480 F.3d 104, 119 (2007). Petitioner asserts (Pet. 12) that the Second Circuit has declined to find that Section 1252(d)(1) imposes a jurisdictional requirement with respect to *issue* exhaustion. *Zhong*, 480 F.3d at 120. But the Second Circuit's position on issue exhaustion is not based on any doubts regarding whether Section 1252(d) is jurisdictional; it is based on the court's idiosyncratic view as to the form of exhaustion Section 1252(d) requires. *Id.* at 121. Petitioner does not contend that any other circuit shares the Second Circuit's position, and any shallow disagreement on the issue does not merit this Court's review.

b. Petitioner has also failed to demonstrate any meaningful disagreement in the circuits regarding whether a claim may be found unexhausted based on a noncitizen's failure to file a motion for reconsideration.

As she recognizes (Pet. 20), multiple courts of appeals have held that a noncitizen must present a claim that the Board engaged in impermissible factfinding through a motion for reconsideration in order for that claim to be exhausted under Section 1252(d)(1). See *Mencia-Medina* v. *Garland*, 6 F.4th 846, 848-849 (8th Cir. 2021), petition for cert. pending, No. 21-1533 (filed June 3, 2022); *Meng Hua Wan* v. *Holder*, 776 F.3d 52, 57 (1st Cir. 2015); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 & n.6 (10th Cir. 2007).[4]

Petitioner contends (Pet. 20) that the Ninth and Eleventh Circuits have reached contrary conclusions, but the decisions she cites cannot establish a circuit conflict. In the Eleventh Circuit, she cites two unpublished decisions, only one of which—*Ullah* v. *U.S. Att'y Gen.*, 760 Fed Appx. 922, 928-929 (11th Cir 2019)—addressed what is necessary to exhaust an impermissible-factfinding challenge. But such decisions do not even bind panels in the Eleventh Circuit. See 11th Cir. R. 36-2. Petitioner also cites a published decision from the Eleventh Circuit refusing to "fault" a noncitizen "for not raising an argument about [procedural flaws] displayed by a decision not yet in existence." Pet. 20 (quoting *Indrawati* v. *U.S. Att'y Gen.*, 779 F.3d 1284, 1299

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[4] The First Circuit recently clarified that its decision requiring a motion to reconsider in *Wan* does not apply where a noncitizen alleges that the Board "misapplied a legal standard" (as opposed to alleging that the Board engaged in impermissible factfinding). *Barros* v. *Garland*, 31 F.4th 51, 59-62 (2022). The court explained that an allegation of impermissible factfinding "spawn[s] something wholly new," which must therefore be exhausted before the Board. *Id.* at 61. An assertion that the Board applied an erroneous standard of review to an argument that the noncitizen presented in its initial appeal briefing to the Board may be viewed as having been exhausted through the initial briefing.

(11th Cir. 2015)). The cited decision, however, did not discuss whether or when a motion for reconsideration may be required; neither the parties nor the court appear to have considered the availability of that remedy. *Indrawati*, 779 F.3d at 1299.

Petitioner observes (Pet. 20) that the Ninth Circuit has held that Section 1252(d)(1) does not apply "where the challenged agency action was committed by the Board after briefing was completed, because the only remaining administrative remedies for such an action [a]re not available 'as of right.'" *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271, 1280 (2018), cert. denied, 140 S. Ct. 1105 (2020). *Olivas-Motta* did not concern an impermissible-factfinding challenge. Even more to the point, the court of appeals' determination that an appeal to the Board is the last remedy available "as of right" was based on a line of Ninth Circuit precedent that originated in its 1992 decision in *Castillo-Villagra* v. *INS*, 972 F.2d 1017, 1023-1024, which has been overtaken by a change in the law. The sole basis for *Castillo-Villagra*'s holding was that, at that time, "[t]here [was] no statutory provision for motions to reopen, so reopening was not available to petitioners 'as of right under the immigration laws.'" *Id.* at 1023 (citation and emphasis omitted). In 1996, however, Congress amended the INA to grant noncitizens a statutory right to move for reconsideration or reopening. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (adding provisions now codified, with further amendments, at 8 U.S.C. 1229a(c)(6) and (7)). The Ninth Circuit has not yet confronted the consequences of that amendment for the reasoning in *Castillo-Villagra*, but when it does, it should join the other circuits that have found that a

failure to move for reconsideration may render a claim unexhausted under Section 1252(d)(1).

3. Finally, even if this Court were inclined to consider the question presented, this case would be a poor vehicle because resolution of that question would not be outcome determinative. As explained above, see pp. 13-15, *supra*, the court of appeals' analysis of petitioner's other argument indicates that it would have rejected petitioner's impermissible-factfinding claim on the merits because that claim boils down to an assertion that the Board may not affirm an IJ decision on other grounds that are supported by the record, a proposition that cannot be squared with the well-established principle that the Board's reasoning may differ from that of the IJ. See *Gomez-Palacios*, 560 F.3d at 358.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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