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No. 24-____

IN THE
Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ, *Petitioner*,
v.
MERRICK B. GARLAND, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether issues resolved *sua sponte* by the Board of Immigration Appeals are exhausted under 8 U.S.C. § 1252(d)(1) for purposes of judicial review.

PARTIES TO THE PROCEEDING

Petitioner is Alma Aracely Castaneda-Martinez. Respondent is the Attorney General of the United States, Merrick B. Garland.

STATEMENT OF RELATED PROCEEDINGS

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

- *Castaneda-Martinez v. Garland*, No. 22-191 (U.S.) (order issued May 30, 2023, granting, vacating, and remanding).

- *Castaneda-Martinez v. U.S. Att'y Gen.*, No. 21-10115 (11th Cir.) (remand opinion issued Nov. 13, 2024; initial opinion issued Nov. 15, 2021, with rehearing *en banc* denied March 17, 2022).

- *Castaneda-Martinez v. Garland*, No. 21A739 (U.S.) (May 19, 2022, order granting application extending time to file prior petition until August 12, 2022).

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's November 13, 2024, opinion on remand (Pet.App.1a) is unreported but available at 2024 WL 4763926. This Court's May 30, 2023, order granting, vacating, and remanding (Pet.App.27a) is available at 143 S. Ct. 2558. The Eleventh Circuit's November 15, 2021, initial opinion (Pet.App.11a) is unreported but available at 2021 WL 5298894. The Eleventh Circuit's March 17, 2022, order denying *en banc* review (Pet.App.25a) is unreported. The Board of Immigration Appeals' December 23, 2020, order dismissing the appeal (Pet.App.21a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on November 13, 2024.

STATUTORY PROVISION INVOLVED

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

INTRODUCTION

The circuit courts are openly divided on an issue of statutory interpretation that has a significant impact on important administrative proceedings: whether issues resolved *sua sponte* by the Board of Immigration Appeals ("BIA") are exhausted under 8 U.S.C. § 1252(d)(1) for purposes of judicial review. Section 1252(d)(1) states that a federal court "may review a final order of removal only if ... the alien has exhausted all administrative remedies available to the alien as of right." Accordingly, courts often hold they are precluded from reviewing any issue that was not exhausted.

The Eleventh Circuit has long held that an issue the BIA resolves *sua sponte* is not exhausted, and thus the court cannot review it, even though that issue often is dispositive to the case and may preclude review of any other objections to the BIA's ruling, as well. *See Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250–51 (11th Cir. 2006).

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

In the case below, the Eleventh Circuit refused to consider Petitioner's challenge to the *sole* basis on

which the BIA denied relief, because the court concluded that issue had been resolved *sua sponte* by the BIA. The Immigration Judge found Petitioner credible and did not dispute that she had suffered persecution after a gang murdered several of her family members and then relentlessly pursued her and even raped her friend's 16-year-old daughter to "punish" Petitioner. On appeal, the BIA concluded there was no nexus between a protected social group and Petitioner's persecution, which precluded all relief. But when Petitioner challenged the BIA's decision at the Eleventh Circuit, the court held it lacked authority to review that core nexus issue solely because the BIA had resolved it *sua sponte*.

The Eleventh Circuit's rule threatens the integrity of immigration proceedings. "An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped." *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers).

As explained below—and as the government did not dispute during prior proceedings before this Court—this issue arises in over 100 cases a year across the circuit courts, and this case presents an ideal vehicle to resolve it. Moreover, although this case involves the BIA, there is nothing unusual about § 1252(d)(1)'s exhaustion provision, and the

Eleventh Circuit's rule could metastasize to other administrative decisions—ranging from veterans issues, to IRS claims, to Indian trust management—thereby providing an incentive for agencies to shield their decisions from judicial review.

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

STATEMENT OF THE CASE

A. Immigration Court

Petitioner Castaneda-Martinez is a native and citizen of Honduras. In September 2018, an Immigration Judge ("IJ") held a hearing on Petitioner's I-589 application for withholding of removal and relief under the Convention Against Torture ("CAT"). CMAR30–38.[1] At the end of that hearing, the IJ found Petitioner credible, stating that her testimony was "candidly responsive," "consistent," and "especially detailed." CMAR32. Petitioner testified that when she was in Honduras, a gang called Los Chentes (associated with MS-13) was extorting a "tax" from her uncle, who owned a small grocery store. CMAR103–06. When the uncle stopped paying and encouraged other businesses to

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

do the same, two members of Los Chentes arrived at the store and shot him three times, killing him in front of Petitioner. CMAR106–12. One of the gang members warned Petitioner that if she ever spoke about the murder, she was "going to pay double." CMAR111.

Petitioner quickly moved in with her sister-in-law. Several months later, her uncle's cousin Omar Marchado Bonilla convinced Petitioner to report the murder, CMAR113–16, but Los Chentes found out and soon shot Omar 10 to 15 times, killing him, too. CMAR118–19.

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

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

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

B. Board of Immigration Appeals

In August 2020, Petitioner appealed to the Board of Immigration Appeals, where she argued that being a "snitch" who tried to report gang violence to the police qualified as membership in a particular social group. CMAR16–17, 24–26. She continued that her attempt to file a police report "was one of the central reasons, if not the main reason, why she was persecuted." CMAR26; *see also* CMAR 54.

On December 23, 2020, the BIA dismissed the appeal. The BIA addressed the merits of the nexus issue, finding there was an insufficient link between Petitioner's persecution and a particular social group because "the events described by the applicant appear to concern a personal dispute or vendetta." Pet.App.22a. That holding was dispositive of Petitioner's withholding of removal claim.[2]

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

C. Eleventh Circuit: Initial Proceedings

Petitioner sought review in the Eleventh Circuit and challenged the BIA's ruling regarding nexus. But the court held that it lacked authority to consider that issue, even though it formed the sole basis on which the BIA had rejected Petitioner's withholding claim. Pet.App.7a–10a. The court explained that Petitioner failed to adequately raise the nexus issue in her briefing at the BIA—i.e., the BIA had resolved the merits of that issue *sua sponte*—and thus subsequent judicial review was precluded. Pet.App.9a–10a.

Petitioner sought rehearing *en banc*, which the Eleventh Circuit denied. Pet.App.26a.

D. This Court and Remand Proceedings

Petitioner sought review by this Court, which granted, vacated, and remanded for further review in light of *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), which held that 8 U.S.C. § 1252(d)(1)'s exhaustion rule is not jurisdictional. Pet.App.27a.

On remand, the Eleventh Circuit again held that Petitioner's case must be dismissed because her "core" nexus claim was unexhausted even though the BIA had addressed it *sua sponte*, and even though it was the sole basis for rejecting Petitioner's claim at the BIA. Pet.App.10a. Although the exhaustion statute did not impose a jurisdictional requirement after *Santos-Zacaria*, dismissal was mandatory

because the government had argued lack of exhaustion. Pet.App.9a.

The Eleventh Circuit once again acknowledged its longstanding precedent that a claim is unexhausted—and thus unreviewable—"even if the BIA *sua sponte* addressed" and resolved that claim. Pet.App.8a.

REASONS FOR GRANTING THE PETITION

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

First, the circuit courts are openly divided on the question presented, with half a dozen expressly rejecting the Eleventh Circuit's rule. *See* Part I, *infra*. During the prior round of cert-stage briefing in this case, the government never disputed this split.

Second, the question presented arises frequently. As estimated below (and as the government has never disputed), over a hundred circuit cases across the country involve this issue every year. The Eleventh Circuit itself has an extensive immigration docket and has invoked its "*sua sponte* exhaustion rule" approximately a hundred times since 2006. *See* Part II.A, *infra*.

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

Fourth, the Eleventh Circuit's rule is especially problematic due to a combination of factors: (1) these agency proceedings can provide life-changing relief from persecution or even torture; (2) the inability to challenge an issue resolved *sua sponte* frequently renders moot all other challenges to the BIA's decision; (3) it is often unclear precisely on which basis an IJ actually denied relief; and (4) the rule is mandatory whenever the government invokes it. *See* Part II.C, *infra*.

Fifth, this case is an excellent vehicle for resolving this issue, as it was squarely presented and has now been invoked *twice* by the Eleventh Circuit in these proceedings to foreclose judicial review. *See* Part II.D, *infra*.

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

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

The Court should grant the petition.

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

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

the prior cert-stage proceedings in this case, the government never disputed this split. *See* Mem. for Resp., *Castaneda-Martinez v. Garland*, No. 22-191 (Nov. 15, 2022).

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

The Eleventh Circuit has long held that § 1252(d)(1) bars judicial review of any issue that the BIA resolved *sua sponte*. *Amaya-Artunduaga*, 463 F.3d 1247.

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

isolation; rather, each is presented in the context of argument." *Id.* Accordingly, "[r]equiring exhaustion allows the BIA to consider the niceties and contours of the relevant arguments, thereby fully considering the petitioner's claims and compiling a record which is adequate for judicial review." *Id.* (cleaned up).

Even though the issue arises only when the BIA itself has deemed the record sufficient to resolve an issue, the Eleventh Circuit reasoned that when "the BIA addresses an issue *sua sponte*, ... we cannot say the BIA fully considered the petitioner's claims, as it had no occasion to address the relevant arguments with respect to the issue it reviewed, nor can we say there is any record, let alone an adequate record, of how the administrative agency handled the claim in light of the arguments presented." *Id.* at 1250–51.

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

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

The Eleventh Circuit applied this rule twice in the proceedings below, refusing to address the core—

indeed, the sole and dispositive—issue of whether there was a nexus between a protected social group and Petitioner's persecution. Pet.App.9a, 18a.

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

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

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

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

Third Circuit. In *Bin Lin v. U.S. Attorney General*, 543 F.3d 114 (3d Cir. 2008), the Third Circuit recognized the "disagreement among our sister circuits" on the issue but rejected the Eleventh Circuit's view, holding instead that the court could "address the IJ's adverse credibility determination because the BIA considered the issue *sua sponte*." *Id.* at 123–24; *see also Aguilar v. Att'y Gen. U.S.*, 107 F.4th 164, 169 (3d Cir. 2024) (re-affirming rule).

Fourth Circuit. In *Portillo Flores v. Garland*, 3 F.4th 615 (4th Cir. 2021) (*en banc*), the majority of the Fourth Circuit's *en banc* court agreed with the "circuits [that] have found a claim exhausted 'whenever the agency has elected to address in sufficient detail the merits of a particular issue,' even if the agency raised it *sua sponte*." *Id.* at 633 (quoting the First Circuit's decision in *Mazariegos-Paiz*, 734 F.3d at 63). The six-judge dissent, however, declined to join that holding and concluded that the argument at issue had not been exhausted. *Id.* at 648 (Quattlebaum, J., dissenting).

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

that 8 U.S.C. § 1252(d)(1) requires." *Id.* at 644 (cleaned up).

Sixth Circuit. In *Khalili v. Holder*, 557 F.3d 429 (6th Cir. 2009), the Sixth Circuit noted the circuit split, expressly rejected the Eleventh Circuit's view, and instead "follow[ed] the majority of circuit courts in finding appellate jurisdiction to review issues raised *sua sponte* by the BIA" because, "[i]n such cases, the BIA's action waives that issue's exhaustion requirements." *Id.* at 435.

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

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

Ninth Circuit. The Ninth Circuit has long held that any issue resolved *sua sponte* by the BIA is

deemed exhausted under § 1252(d)(1). *See Abebe v. Gonzalez*, 432 F.3d 1037, 1041 (9th Cir. 2005) (*en banc*).

Tenth Circuit. In *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007), Judge Tymkovich, writing for the panel, "respectfully disagree[d]" with the Eleventh Circuit's rule and held that issues resolved *sua sponte* by the BIA are deemed exhausted. *Id.* at 1119–22. The Tenth Circuit provided a lengthy discussion of why the Eleventh Circuit's rule is wrong, noting that "[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all § 1252(d)(1) requires." 503 F.3d at 1120.

II. THIS CASE MERITS REVIEW.

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

In the prior cert-stage proceedings in this case, the government never disputed that the question presented arises with great frequency in the circuit courts generally and in the Eleventh Circuit specifically.

1. In recent years, circuit courts have reviewed between 3,500 and 6,400 BIA decisions each year,[3] and questions of proper exhaustion loom large in nearly every case because § 1252(d)(1) imposes a mandatory claims-processing rule.

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

The Eleventh Circuit invoked its rule in at least 31 cases from 2017 through mid-2024, i.e., about five times per year. [4] Extrapolating based on the respective caseloads of administrative appeals across the circuits with immigration dockets, this translates

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[3] Admin. Off. of the U.S. Cts. ("AOUSC"), *Federal Judicial Caseload Statistics 2023*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 (noting that in the year ending March 31, 2023, there were 4,450 administrative agency appeals to the circuit courts, of which 79% were appeals of BIA decisions); AOUSC, *Federal Judicial Caseload Statistics 2021*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 (noting that in in the year ending March 31, 2021, there were 7,491 administrative agency appeals to the circuit courts, of which 85% were appeals of BIA decisions).

[4] A sample of these cases is cited below in Part II.A.2.

to over a hundred circuit cases nationwide *each year* involving an issue the BIA resolved *sua sponte*.[5]

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

2. This issue also arises frequently within the Eleventh Circuit itself, which has one of the busier immigration dockets in the country given its geographic location and large population. A Westlaw search reveals that the Eleventh Circuit has invoked its *sua sponte* exhaustion rule approximately a hundred times to preclude judicial review since announcing that rule in 2006.[6]

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

- "Although the [BIA] *sua sponte* addressed whether Sri Lanka could and would protect Srikanthavasan, that 'does not alter our

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[5] *See* AOUSC, *Table B-5—U.S. Courts of Appeals Statistical Tables for The Federal Judiciary* (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2021/12/31 (using 2021 figures as a mid-point value for the 2017 to 2024 timeframe).

[6] For example, a search of "*sua sponte*" in the same paragraph as "exhaust!" and "*Amaya-Artunduaga*" hits on over 100 cases just in the Eleventh Circuit.

conclusion' regarding our lack of jurisdiction" over that issue. *Srikanthavasan v. U.S. Att'y Gen.*, 828 F. App'x 590, 596 (11th Cir. 2020).

- "The Board did consider that issue *sua sponte*. But issues raised by the Board *sua sponte* are not administratively exhausted." *Linyushina v. U.S. Att'y Gen.*, 826 F. App'x 731, 736 n.5 (11th Cir. 2020).
- "The Board's *sua sponte* consideration of those claims does not vest us with jurisdiction." *Ruiz v. U.S. Att'y Gen.*, 773 F. App'x 1081, 1082 (11th Cir. 2019).
- "[T]his Court lacks jurisdiction to consider [petitioner's argument], notwithstanding the fact that it was the basis for the BIA's decision." *Domingo Ramirez v. U.S. Att'y Gen.*, 755 F. App'x 957, 958 (11th Cir. 2019).
- "[A]lthough the BIA addressed the relocation issue anyway, that does not provide us with jurisdiction." *Osorio-Zacarias v. U.S. Att'y Gen.*, 745 F. App'x 335, 340 (11th Cir. 2018).
- "That the BIA chose to address *sua sponte* the IJ's adverse credibility determination does not change our conclusion about the scope of our jurisdiction." *Baracaldo-Zamora v. U.S. Att'y Gen.*, 729 F. App'x 908, 911 (11th Cir. 2018).
- "The fact that the BIA *sua sponte* addressed the adverse credibility determination does not cure the lack of exhaustion." *Luchina v. U.S. Att'y Gen.*, 687 F. App'x 907, 915 (11th Cir. 2017).

- "To the extent the BIA did review *sua sponte* the IJ's conclusion that Petitioner failed to demonstrate a lack of proper notice, the BIA's voluntary act does not change our conclusion about what was put to the BIA by Petitioner and about the scope of our jurisdiction." *Rodriguez-Martinez v. U.S. Att'y Gen.*, No. 22-12003, 2023 WL 3563131, at *2 (11th Cir. May 19, 2023).

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

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

1. No further percolation is needed. Nearly every circuit has weighed in. *See* Part I, *supra*. And there is no realistic chance the Eleventh Circuit will self-correct. That court denied *en banc* review in earlier proceedings below, despite being presented with the weight of authority from other circuits. *See* Pet.App.26a. In fact, the Eleventh Circuit has been aware for years that it is an outlier but has steadfastly stuck with its rule: "This Court seems to be alone in holding that we have no jurisdiction to review issues the BIA *sua sponte* addresses on administrative appeal." *Molina-Salazar v. U.S. Att'y Gen.*, 773 F. App'x 523, 525 n.2 (11th Cir. 2019).

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

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

2. Further, the interest in maintaining uniformity in circuit practice is equally implicated by both "lopsided" and "even" splits, which presumably explains the Court's past practice of granting certiorari when even *one* "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, this Court routinely grants *certiorari* despite "lopsided" splits or where there is no split at all. *See, e.g.*, *Thompson v. Clark*, 141 S. Ct. 1513 (2021) (granting *certiorari* on 7-1 split); *Gundy v. United States*, 588 U.S. 128, 135 (2019) (noting grant even though the circuit courts agreed 12-0); *Pereira v. Sessions*, 585 U.S. 198, 207 & n.4 (2018) (resolving 6-1 split); *Coleman v. Tollefson*, 575 U.S. 532, 536–37 (2015) (noting grant in 8-2 split); *Chambers v. United States*, 555 U.S. 122, 125 (2009) (resolving 10-2 split).

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

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

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

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

As Justice Kennedy stated, "An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in

accordance with the rule-of-law principles often absent in the countries they have escaped." *Kenyeres*, 538 U.S. at 1305. But the rule of law means little if it allows a bureaucratic agency to deny such important relief *sua sponte* and simultaneously escape judicial review.

And the result is even worse when the BIA *sua sponte* denies relief on what amounts to an alternative ground. The Eleventh Circuit holds that this precludes review not just of the issue resolved *sua sponte* but also of other potentially meritorious arguments that were undoubtedly exhausted. For example, if the BIA rejects the petitioner's argument about membership in a particular social group and then *sua sponte* rules that the petitioner did not make a sufficient showing of a nexus, the Eleventh Circuit cannot review *either* of those rulings because the BIA's *sua sponte* alternative finding about nexus is insulated from judicial review and independently precludes a grant of relief. The Eleventh Circuit has even acknowledged this result yet continues to apply its rule anyway. *See Leiva-Hernandez v. U.S. Att'y Gen.*, No. 20-14163, 2021 WL 3012652, at *3 (11th Cir. July 16, 2021).

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

2. The Eleventh Circuit's rule is especially illogical in the context of determinations about whether there is a nexus between persecution and a

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

This explains why the BIA often *sua sponte* addresses issues like nexus or particular social group. Where the BIA itself is not confident enough to say that particular aspect was forfeited, it makes little sense for a court subsequently to second-guess the BIA and conclude that the petitioner failed to preserve a challenge to an ambiguous IJ ruling.

3. Although this exhaustion requirement is no longer jurisdictional after *Santos-Zacaria*, it remains a mandatory claims-processing rule, meaning the Court must invoke it whenever the government requests (and can even invoke it *sua sponte*), meaning the court is forbidden from looking at the underlying merits of the BIA's ruling, even when it is directly contradicted by precedent or unsupported by substantial evidence.

D. This Case Presents an Ideal Vehicle.

This case presents an ideal vehicle to resolve the question presented because the Eleventh Circuit's decisions below stated that the court could not review Petitioner's challenge precisely because the BIA had resolved the nexus issue *sua sponte*. Pet.App.9a, 18a. The decision below acknowledged that this meant the "core issue" in the case—indeed, the sole basis on which the BIA denied relief to Petitioner—could not be judicially reviewed, and thus her entire case failed. Pet.App.10a.

Further, although this Court would not reach the underlying merits of the BIA's rulings, it is worth noting that Petitioner was deemed credible at the Immigration Court and provided harrowing testimony of how she was relentlessly pursued—at incredible cost—due to her willingness to testify against Los Chentes, and her membership in a family that had opposed gang extortion, which the IJ apparently did not dispute would amount to past persecution. In short, this is certainly not a weak case that would necessarily be denied relief on the merits even absent the Eleventh Circuit's exhaustion rule.

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

As this Court has noted, administrative exhaustion requirements can be imposed by statute,

by regulation, and even by courts themselves. *Carr v. Saul*, 593 U.S. 83, 88 (2021). Although Petitioner's cases arise in the context of BIA decisions, there is nothing unique about § 1252(d)(1)'s exhaustion provision, nor was the Eleventh Circuit's rationale specific to the BIA.

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

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

III. THE ELEVENTH CIRCUIT'S RULE IS WRONG.

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

I.B, *supra*. That is because, "by addressing an issue on the merits, an agency is expressing its judgment as to what it considers to be a sufficiently developed issue." *Mazariegos-Paiz*, 734 F.3d at 63.

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

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

experience and expertise"). But again, it is nonsensical to say the BIA lacked a full opportunity to consider an issue or compile an adequate record when the BIA chose to address and resolve the merits of an issue. As other circuits have correctly concluded: "Where the BIA has issued a decision considering the merits of an issue, even *sua sponte*, these interests have been fulfilled." *Sidabutar*, 503 F.3d at 1121. By consciously deciding not to deem the issue forfeited and instead addressing it on the merits, the "agency here had sufficient opportunity to correct its own errors." *Bin Lin*, 543 F.3d at 126.

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

2. The Eleventh Circuit also failed to consider how textually anomalous its rule is. Section 1252(a) provides for "[j]udicial review of a final order of removal," 8 U.S.C. § 1252(a), indicating that the BIA's decision is what a circuit court must review, and that review does not turn on whether, in the court's view, the parties' administrative briefing adequately raised a particular issue.

Further, Congress knows how to impose a strict party presentment requirement for exhaustion of administrative remedies. *See, e.g.*, 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the [Securities and Exchange] Commission, for which review is sought under this section, may be considered by the court *unless it was urged before the Commission* or there was reasonable ground for failure to do so.") (emphasis added). But § 1252(d)(1) contains no such language.

* * *

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

CONCLUSION

The petition for a writ of certiorari should be granted.

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