No. 24-669

IN THE

Supreme Court of the United States

ALMA ARACELY CASTANEDA-MARTINEZ, *Petitioner,*

v.

PAMELA BONDI, *Respondent.*

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government does not dispute there is a circuit split on the question presented, nor that this issue is important and arises often across the country. The government suggests perhaps the court below did not invoke the minority position, but that is demonstrably wrong. The Eleventh Circuit has *twice* now expressly cited, quoted, and relied on its longstanding rule that issues resolved *sua sponte* by the BIA are not exhausted and cannot be reviewed, even when doing so would preclude judicial review of *any* issue in the case.

The government also barely defends the merits of the Eleventh Circuit's rule but does suggest that at least nine circuit courts are currently applying the wrong test. That accusation only strengthens the case for granting review to resolve the split.

I. THE SPLIT IS UNDISPUTED, AND THE DECISIONS BELOW TWICE APPLIED THE MINORITY POSITION.

1. The government does not contest the presence of a circuit split on the question presented—even acknowledging that "other" circuits disagree with the Eleventh Circuit's rule. BIO7. Indeed, half a dozen circuits have expressly acknowledged the split and rejected the minority position, Pet.13.[1]

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[1] Nor does the government suggest any further percolation is needed, or that the Eleventh Circuit might change its rule

The government tries to downplay the split by saying that "sometimes" circuits will deem an issue exhausted when the BIA has *sua sponte* "'elected to address in sufficient detail the merits of [that] particular issue.'" BIO7–8 (quoting *Portillo Flores v. Garland*, 3 F.4th 615, 633 (4th Cir. 2021)). When the government says "sometimes," it apparently means "in dozens of cases every year in every circuit court across the country, except for one—the Eleventh Circuit." Either way, the circuit split is real, entrenched, and undisputed.

2. The government next claims that this case does not implicate the split because other circuits deem an issue exhausted only when the BIA provided a "thorough discussion" of the issue. BIO8. But no circuit requires this—and the government cites none. The government's position is even more extreme than the Eleventh Circuit's.

The government's cited cases stand only for the proposition that the BIA must actually *resolve* the particular issue *sua sponte* (as the question presented expressly states), rather than, say, merely noting the existence of the issue or failing to issue an opinion at all. For example, in *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1239 (10th Cir. 2010) (Gorsuch, J.) (cited at BIO8), the court made clear that issues resolved *sua sponte* by the BIA will be deemed exhausted, in

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(indeed, that court has repeatedly declined to do so, despite recognizing its outlier status, *see* Pet.20).

contrast to "stray or cryptic comments by an agency in the course of its decision," which will not qualify.

Judge Tymkovich's prior opinion in *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007), explains the distinction that the government now disregards: the *sua sponte* exhaustion rule applies "where the BIA issues a full explanatory opinion or a discernible substantive discussion on the merits over matters not presented by the alien. We will not entertain jurisdiction over matters where the BIA summarily affirms the IJ decision *in toto* without further analysis of the issue." 503 F.3d at 1122 (cited favorably by *Garcia-Carbajal*).

That makes sense. An issue is exhausted when the BIA itself analyzes and resolves it—thereby indicating it deemed itself sufficiently informed to make a ruling on it—regardless of whether the BIA then provided a treatise-style explanation.[2]

Turning to this case: the BIA decision here did *resolve* Petitioner's claims—and thus squarely implicates the acknowledged circuit split—because the BIA provided "a discernible substantive discussion on the merits." *Sidabutar*, 503 F.3d at 1122. The government has admitted as much. Its BIO

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[2] Also, the BIA almost never issues the sort of full-dress opinions that the government imagines. In nearly every case, the BIA issues a short opinion that substantively and succinctly resolves the issues, as occurred here. Except in the Eleventh Circuit, such BIA opinions are necessarily sufficient to exhaust any issue the BIA resolved on the merits—and that is the circuit split this Court should resolve.

acknowledges the BIA "added" its own reasoning (BIO8), "explained" its rationale (BIO3), made its own "determination" (BIO6), and "concluded that there was 'no clear error in the [IJ's] findings that gang members were not motivated to harm [petitioner] on account of a protected ground' because 'the events described by the applicant appear to concern a personal dispute or vendetta for a crime committed by gang members'" (BIO3).

The BIA's substantive resolution of the nexus issue was no "stray or cryptic comment[]." *Garcia-Carbajal*, 625 F.3d at 1239. That holding is exactly what Petitioner would be allowed to challenge in any other circuit, even under the government's own cases.

3. The government suggests the Eleventh Circuit's remand opinion "did not mention" its unique exhaustion rule. BIO9. This apparently just misreads the remand opinion, which expressly cites and explains the court's longstanding rule at Petition Appendix page 8, which says the court cannot

> consider a claim raised in a petition for review unless the petitioner had exhausted her administrative remedies with respect to those claims, *even if the BIA sua sponte addressed those claims*, pursuant to INA § 242(d)(1), 8 U.S.C. § 1252(d)(1). *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250–51 (11th Cir. 2006).

Pet.App.8a (emphasis added).

Thus, not only did the court explain its rule, but it even cited the decision creating it (*Amaya Artunduaga*), as well as the supposed statutory basis for it (8 U.S.C. § 1252(d)(1)).

The remand opinion applied that precedent, too. The court "conclude[d], *as we did in our prior opinion*, that [Petitioner] failed to properly exhaust her administrative remedies before the BIA" because she "did not raise and develop her 'core issue' before the BIA," Pet.App.9a–10a (emphasis added), and it did not matter that the BIA had "*sua sponte*" resolved the important nexus issue anyway, Pet.App.6a–8a.

That makes twice now that the Eleventh Circuit has expressly cited, quoted, and applied its rule in this case, both times expressly invoking *Amaya-Artunduaga*. *See* Pet.App.18a (initial opinion stating: "even if the BIA addresses an issue that the petitioner failed to raise in her appeal to the BIA *sua sponte*, the petitioner has still failed to exhaust that claim. *See Amaya-Artunduaga*, 463 F.3d at 1251 ('[W]e think the goals of exhaustion are better served by our declining to review claims a petitioner, without excuse or exception, failed to present before the BIA, even if the BIA addressed the underlying issue *sua sponte*.')."); Pet.App.19a–20a (initial opinion relying on that rule to conclude Petitioner failed to exhaust).

No reading between the lines is necessary. And no other basis for lack of exhaustion is even hinted at in either opinion, nor does the government now suggest one here. Indeed, its briefing at the Eleventh Circuit argued that court should apply its unique rule here.

See Br. for Resp. 15, *Castaneda-Martinez*, No. 21-10115 (11th Cir. June 1, 2021) (arguing court could not "review an unexhausted claim even where the Board *sua sponte* addressed a claim that the petitioner failed to raise on appeal to the Board, *as the Board did here with respect to the nexus finding*") (emphasis added). It makes little sense for the government now to claim the Eleventh Circuit didn't actually do so.

The makeweight nature of these supposed vehicle issues only reenforces the conclusion that the Petition provides a perfect vehicle for resolving the question presented.

II. THE GOVERNMENT DOES NOT DISPUTE THE QUESTION PRESENTED IS WORTHY OF REVIEW.

The government does not dispute that the question presented arises often, is important, and risks metastasizing across the administrative state—all points raised in the Petition. *See* Pet.16–20 (explaining the issue arises more than 100 times per year across the circuits, and has been invoked nearly 100 times in the Eleventh Circuit since it announced its unique rule in 2006); *see id.* at 22–24 (explaining importance of ensuring judicial review in this context); *id.* at 25–26 (noting similar or identical statutory language in a number of other regimes, like Social Security and certain military and healthcare benefits determinations).

Given the likewise-acknowledged existence of the split, and the lower court's repeated invocation and reliance on its precedent on the question presented, *see* Part I, *supra*, every requirement for a grant is met here.

The government suggests that although the Eleventh Circuit's rule is uniquely harsh, it may not be quite as harsh as Petitioner suggests. BIO9. Even if true, there undoubtedly remains a circuit split on the question presented. But the government's argument is wrong, in any event. It claims *Indrawati v. U.S. Att'y General*, 779 F.3d 1284 (11th Cir. 2015), means "the Eleventh Circuit *will* find the exhaustion requirement satisfied in instances where the Board injects a new issue into the case through its decision, even if the alien did not address the issue in its briefing," BIO7, 9. But *Indrawati* held that exhaustion is not required where the claim is premised on a "lack of reasoned consideration displayed by a [BIA] decision." 779 F.3d at 1299. In other words, to exhaust remedies for judicial-review purposes, aliens need not seek reconsideration *at the BIA itself* to raise an issue that the BIA had already addressed *sua sponte*. That simply restates the same proposition this Court held in *Santos-Zacaria v. Garland*, 598 U.S. 411, 415 n.3, 430 (2023) (citing *Indrawati* for that exact proposition). Thus, *Indrawati* does nothing to cabin the Eleventh Circuit's rule—applied long before and after *Indrawati*—that issues resolved *sua sponte* by the BIA will be deemed unexhausted.

III. THE GOVERNMENT BARELY DEFENDS THE MERITS OF THE MINORITY RULE.

The Petition explained that the Eleventh Circuit's *sua sponte* rule is wrong for several reasons. Pet.26–29. *First*, by resolving "an issue on the merits, an agency is expressing its judgment as to what it considers to be a sufficiently developed issue." *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 63 (1st Cir. 2013). As Judge Tymkovich has explained, it makes no sense for a circuit court later to second-guess that agency view. *Sidabutar*, 503 F.3d at 1120 ("Where the BIA determines an issue administratively-ripe to warrant its appellate review, [courts] will not second-guess that determination."). *Second*, the INA provides for "'[j]udicial review of a final order of removal,'" 8 U.S.C. § 1252(a), indicating that the BIA's order (i.e., decision) is what a circuit court must review, including whatever issues the BIA resolved in that order. *Third*, Congress knows how to impose a strict party-presentment requirement for exhaustion of administrative remedies but did not do so here. *See, e.g.*, 15 U.S.C. § 78y(c)(1).

In response, the government addresses none of those points and instead asserts only that Petitioner's "contention lacks merit." BIO7. Legal issues are never exhausted, the government argues, when the "petitioner did not make an objection about the relevant issues before the Board." *Id.* Nine courts of appeals disagree with the government, *see* Pet. 13–16, but the government offers no further argument about why those courts or Petitioner are wrong.

In any event, the government's claim that nine circuits are applying the wrong rule only strengthens the case for granting review here.[3]

[3] The government alternatively suggests holding this case for *Riley v. Bondi*, No. 23-1270, on the theory that it might provide an alternative basis for affirming the decision below. BIO10. The government has never previously raised this theory. In any event, *Riley* will be relevant only if the Court holds both that (1) 8 U.S.C. § 1252(b)(1)'s filing deadline is jurisdictional, and (2) the deadline does not run from the date of an order denying withholding of removal. If *Riley* does not hold both of those things, the government agrees there is no impediment to reaching the question presented. Even if the Court did issue both of those holdings in *Riley*, it should GVR this case so the Eleventh Circuit can address those issues in the first instance, given that the government has never previously raised them.

CONCLUSION

The Court should grant the Petition.

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