



National Immigration Litigation Alliance

Immigrant justice through the courts

Practice Advisory¹

Exhaustion of Administrative Remedies in Petitions for Review

May 25, 2023

Introduction

On May 11, 2023, the Supreme Court, in *Santos-Zacaria v. Garland*, 598 U. S. __, __ S. Ct. __, 2023 WL 3356525 (2023), addressed 8 U.S.C. § 1252(d), the statutory exhaustion provision governing immigration petitions for review of removal orders. This advisory first explains what statutory exhaustion under § 1252(d) is and how it is distinct from issue exhaustion before the Board of Immigration Appeals (BIA), a form of exhaustion not addressed in *Santos-Zacaria*. Next, the advisory explains the Court’s two holdings: first, that § 1252(d) is a non-judicial, claim-processing rule subject to waiver and forfeiture; and second, that noncitizens are not required to file motions to reconsider (or motions to reopen) of removal orders to satisfy § 1252(d)(1). The advisory also includes practical suggestions regarding application of the decision and its impact on prior exhaustion case law.

1. What is the difference between statutory exhaustion and issue exhaustion?

There are generally two types of exhaustion in petitions for review: statutory exhaustion and issue exhaustion. The statute governing exhaustion is 8 U.S.C. § 1252(d), which provides:

(d) Review of final orders.

A court may review a final order of removal only if—

(1) the [noncitizen] has exhausted all administrative remedies available to the [noncitizen] 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

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the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

Section 1252(d), specifically the language in subsection (d)(1), was at issue in *Santos-Zacaria*. The Court held that motions to reconsider or reopen are not “administrative remedies” that are available to noncitizens “as of right” because the BIA has discretion to review these motions and will proceed to decide the merits of such motions only if it agrees to review. In contrast, in removal proceedings under 8 U.S.C. § 1229a, the BIA has no discretion to refuse to adjudicate an appeal of an immigration judge (IJ) decision. As such, appealing an IJ decision of a removal order to the BIA is an administrative remedy “as of right” that must be exhausted.²

Issue exhaustion is a doctrine under which courts only review issues if they first were presented to an agency in administrative proceedings. *See generally Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021). In the immigration context, the rationale behind issue exhaustion is that courts should avoid reviewing an issue *before* the BIA has had an opportunity to attempt to remedy it. *Castaneda-Suarez v. INS*, 993 F.2d 142, 145 (7th Cir. 1993); *Zhong v. U.S. Dep’t of Justice*, 480 F.3d 104, 124-25 (2d Cir. 2006). In addition, circuit courts generally want the benefit of the BIA’s opinion and complete record for judicial review. *Id.* Issue exhaustion is subject to exceptions permitting courts to review an issue not raised before the BIA. Each circuit has case law governing these exceptions.³

Santos-Zacaria interpreted the statutory requirement that individuals exhaust all administrative remedies available “as of right,” not issue exhaustion. The case involved a claim that the BIA impermissibly engaged in factfinding that only an IJ could perform. Because that particular claim could *not* have been raised to the IJ or in the appeal filed with the BIA, the Court did not address issue exhaustion before the BIA. Indeed, the Court expressly stated that it was not “address[ing] more generally what obligations noncitizens have to present specific issues when appearing before the agency.” *Id.* at *11 n.10.

Importantly, therefore, nothing in *Santos-Zacaria* changes the obligation to raise all knowable claims before the BIA to prevent the Attorney General, through the Office of Immigration Litigation (OIL), from arguing in his answering brief that the noncitizen failed to exhaust an issue that the BIA could have reviewed and potentially remedied. As discussed further below,

² If an individual is subject to reinstatement under 8 U.S.C. § 1231(a)(5) or an administrative removal order under 8 U.S.C. § 1238(b), and an IJ affirms an asylum officer’s denial of a reasonable fear claim, there is no right to appeal to the BIA. 8 C.F.R. § 1208.31(g)(1). Thus, § 1252(d)(1) cannot require an administrative appeal in such cases.

³ Some examples include where: (a) raising the issue would be futile (e.g., because the BIA is bound by precedent), *see, e.g., Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 895-96 (9th Cir. 2021) (and other circuits’ cases collected there); (b) the BIA lacks authority to adjudicate the claim (e.g., because the BIA lacks authority to rule on the constitutionality of a statute or regulation), *see, e.g., Farrokhi v. INS*, 900 F.2d 697, 700-01 (4th Cir. 1990); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam); or (c) the BIA addressed the issue even though it was not raised by the parties, *see, e.g., Mazariegos-Paiz v. Holder*, 734 F.3d 57, 62-63 (1st Cir. 2013); *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018).

however, *Santos Zacaria* now makes clear that if the government does not argue that the noncitizen failed to exhaust, the government has forfeited that objection.

2. What are the facts and procedural history of *Santos-Zacaria v. Garland*?

The case stems from a decision by the Fifth Circuit U.S. Court of Appeals, dismissing in part a petition for review of a BIA decision filed by a petitioner subjected to a reinstatement order issued by the Department of Homeland Security (DHS)⁴ under 8 U.S.C. § 1231(a)(5). After DHS reinstated the petitioner’s final order, she established a reasonable fear of persecution. *Santos-Zacaria v. Garland*, 22 F.4th 570 (5th Cir. 2022). In withholding-only proceedings, the IJ denied the petitioner’s applications for withholding of removal and protection under the Convention Against Torture (CAT), and the BIA affirmed. *Id.* at 572. The petitioner then filed a petition for review within 30 days of the BIA’s decision.⁵

Before the Fifth Circuit, the petitioner argued, in part, that the BIA had engaged in impermissible factfinding in affirming the IJ’s decision and should have remanded the case to the IJ for further factfinding. *Santos-Zacaria*, 22 F.4th at 573. Although neither party raised the issue, the Fifth Circuit *sua sponte* held that it lacked jurisdiction to review the impermissible factfinding claim because the petitioner had failed to exhaust the claim by raising it in a motion to reconsider which, according to the court, was required by § 1252(d)(1).

3. What did the Supreme Court hold in *Santos-Zacaria v. Garland*?

The Supreme Court granted certiorari on two questions: first, whether § 1252(d) is a jurisdictional or claim-processing rule, and second, whether the petitioner was required to file a motion to reconsider to satisfy § 1252(d)(1). The Court ruled in the petitioner’s favor on both questions.

As to the first question, the Court held that § 1252(d)(1) is not jurisdictional; rather, it is a claim-processing rule subject to waiver and forfeiture. *Santos-Zacaria*, 2023 WL 3356525 at *4-8.

As to the second question, the Court held that § 1252(d)(1) does not require a noncitizen to file a motion to reconsider to “exhaust[] all administrative remedies available . . . as of right” in order

⁴ The Supreme Court’s decision states that “[a]n Immigration Judge within the Department of Justice entered an order reinstating Santos-Zacaria’s prior removal order and denying the protection she sought.” 2023 WL 3356525 at *3. This is wrong. Only DHS—not IJs—may issue reinstatement orders. *See* 8 C.F.R. § 241.8(a).

⁵ Neither the Fifth Circuit nor the Supreme Court questioned the timeliness of the petition for review. However, attorneys are advised that the Second Circuit has held that petitions for review of reinstatement orders must be filed within 30 days of the reinstatement order, not the conclusion of reasonable fear or withholding-only proceedings. *See Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022). The Department of Justice is seeking to expand this holding to other circuits, arguing that this outcome is warranted by Supreme Court case law that postdates earlier circuit decisions finding in favor of the later deadline. NILA has a practice alert on *Bhaktibhai-Patel* available on the [practice advisory page](#) of NILA’s website, which will be updated soon.

for a court to review a claim presented in a petition for review. *Id.* at *8-11.

The Supreme Court’s decision to vacate the Fifth Circuit’s exhaustion holding was unanimous. Justice Alito, joined by Justice Thomas, filed a concurring opinion noting that, because § 1252(d)(1) does not require a motion to reconsider to exhaust administrative remedies, he would not have reached the jurisdictional issue. *Id.* at *11 (Alito, J., concurring).

4. What was the Court’s rationale for holding that § 1252(d)(1) is not jurisdictional?

As an initial matter, jurisdictional rules govern a court’s adjudicatory authority. *See generally Santos-Zacaria*, 2023 WL 3356525 at *4. They are mandatory, not subject to equitable exceptions, and can be raised at any time by a party or the court. By contrast, non-jurisdictional or claim-processing rules “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” *Id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Claim-processing rules are subject to equitable exceptions including forfeiture and waiver, *id.* at *8; *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), and equitable tolling, *Holland v. Florida*, 560 U.S. 631, 645-46 (2010); *Matter of Morales-Morales*, 28 I. & N. Dec. 714, 716-17 (BIA 2023).

In correcting lower courts’ misuse of the term “jurisdictional,” the Supreme Court repeatedly has instructed courts to apply a clear-statement test to distinguish jurisdictional rules from non-jurisdictional ones: courts may “treat a rule as jurisdictional ‘only if Congress clearly states that it is.’” *Santos-Zacaria*, 2023 WL 3356525 at *4 (quoting *Boechler, P.C. v. Comm’r of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022)).

In *Santos-Zacaria*, the Court found that Congress did not clearly state that § 1252(d)(1) is a jurisdictional rule for two reasons. First, the Court concluded that the statute “imposes an exhaustion requirement, which is a quintessential claim-processing rule.” *Id.* at *4. Second, the Court found that § 1252(d)(1)’s language “differs substantially from more clearly jurisdictional language in the related statutory provisions [in the INA].” *Id.* at *5.⁶ Because § 1252(d)(1) is a non-jurisdictional, claim processing rule, if neither party raises administrative exhaustion as a bar in a petition for review, exhaustion may be forfeited or waived, and a court of appeals may review the claim.

After finding § 1252(d)(1) non-jurisdictional, the Court proceeded to address the government’s counterarguments. First, the Court rejected the government’s reliance on the provision’s reference to “court” and “review” as jurisdictional language, reasoning that claim-processing rules can likewise be addressed to courts and that the provision also speaks to the noncitizen’s obligation to exhaust. *Id.* at *6. The Court also eschewed the government’s claim that the Court had deemed the predecessor version of § 1252(d)(1) to be jurisdictional in *Stone v. INS*, 514 U.S. 386 (1995), and *Nken v. Holder*, 556 U.S. 418 (2009), finding that those cases pre-dated the Court’s case law emphasizing the clear statement rule, and neither specifically addressed the

⁶ For more background on the clear-statement rule and its application, please see the [amicus brief](#) submitted in *Santos-Zacaria* by NILA and the Constitutional Accountability Center.

exhaustion provision. *Id.* at *6-7. Lastly, the Court dismissed the government’s effort to attach significance to § 1252(d)(1)’s placement in 8 U.S.C. § 1252, which governs judicial review of petitions for review, by pointing out that the existence of *some* jurisdictional provisions in § 1252 does not establish that *all* its provisions are jurisdictional. *Id.* at *7.

5. What are the key take-away points from the Court’s holding that § 1252(d)(1) is a claim-processing rule?

“Because § 1252(d)(1)’s exhaustion requirement is not jurisdictional, it is subject to waiver and forfeiture.” 2023 WL 3356525 at *8. Simply stated, this means that, on petition for review, *if* petitioner raises a claim in the opening brief and OIL fails to argue in the answering brief that the claim was not exhausted, OIL has forfeited that objection/defense. The court of appeals then does not lack jurisdiction under § 1252(d)(1) and can adjudicate the merits of the claim absent the applicability of a different bar or impediment to review.

For example, in Ms. Santos-Zacaria’s case before the Fifth Circuit, OIL did not argue that her impermissible factfinding claim was unexhausted. Having failed to raise that argument, OIL forfeited the exhaustion defense. The Fifth Circuit, therefore, erred when it refused to review the claim.

The Court’s holding that § 1252(d)(1) is a non-jurisdictional, claim-processing rule abrogates decisions of the First, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as the Fifth Circuit, all of which had previously (erroneously) held that the statute was jurisdictional. *See, e.g.,* *García-Cruz v. Sessions*, 858 F.3d 1, 7 (1st Cir. 2017); *Lin v. Att’y Gen.*, 543 F.3d 114, 120 & n.6 (3d Cir. 2008); *Massis v. Mukasey*, 549 F.3d 631, 638 (4th Cir. 2008); *Ramani v. Ashcroft*, 378 F.3d 554, 558-59 (6th Cir. 2004); *Molina v. Whitaker*, 910 F.3d 1056, 1061 (8th Cir. 2018); *Alvarado v. Holder*, 759 F.3d 1121, 1127 & n.5 (9th Cir. 2014); *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283-84 (10th Cir. 2019); *Alim v. Gonzales*, 446 F.3d 1239, 1253 (11th Cir. 2006). Likewise, *Santos-Zacaria* abrogates the Second Circuit’s rule that § 1252(d)(1) was jurisdictional as to “exhaustion of remedies,” but not as to “the separate requirement of exhaustion of issues.” *Zhong v. U.S. Dep’t of Justice*, 480 F.3d 104, 119-22 (2d Cir. 2007).

Relatedly, the courts of appeals have held that the bar to reopening a prior order that DHS has reinstated pursuant to 8 U.S.C. § 1231(a)(5) is jurisdictional, without undertaking the clear-statement analysis employed by the Supreme Court in *Santos-Zacaria* and other recent cases. NILA is actively litigating this issue in petitions for review in the Second and Ninth Circuits and is open to co-counseling or providing amicus support on this issue in other cases. Please email trina@immigrationlitigation.org to connect with NILA on this issue.

6. What was the Court’s rationale for holding that motions to reconsider (and reopen) are not required to exhaust remedies under 8 U.S.C. § 1252(d)?

Motions to reconsider and motions to reopen are related procedural mechanisms. Motions to reconsider are intended to present “errors of law or fact” in a prior agency decision and motions to reopen are intended to present “new facts.” 8 U.S.C. § 1229a(c)(6)-(7). The *Santos-Zacaria* Court noted that reconsideration was the “pertinent” motion because the petitioner “allege[d] the

Board committed an error of law,” 2023 WL 3356525 at *8 n.8, but the decision discusses both types of motions and its rationale should also apply to both.

In holding that these motions are not required to satisfy § 1252(d)(1), the Court found that they are not “remedies available . . . as of right” because they are discretionary. “As of right,” according to Black’s Law Dictionary, said the Court, means review “[b]y virtue of legal entitlement.” 2023 WL 3356525 at *8 (alternation in original). In other words, “review is guaranteed, not contingent on permission or discretion” and a court “has no discretion to deny review.” *Id.* (quoting Black’s Law Dictionary 121 (11th Ed. 2019)). The Court contrasted review that requires “permission,” such as “Appeals by Permission” under Federal Rule of Appellate Procedure 5, and petitions for certiorari review to the Supreme Court, with review that is “as of right,” such as appeals under Federal Rule of Appellate Procedure 3. *Id.*⁷

Specifically, the Court concluded that the Board’s review of motions is discretionary based on the regulatory language in effect today and at the time of § 1252(d)(1)’s enactment, providing that “[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board.” 2023 WL 3356525 at *8-9 (quoting 8 C.F.R. § 1003.2(a); citing, *inter alia*, 61 Fed. Reg. 18904 (1996)) (alternation in original).⁸ Therefore, the Court found that the BIA’s decision “whether to ‘affirm, modify, or reverse the original decision,’” which occurs only if the BIA grants a motion to reconsider or reopen, is also discretionary. *Id.* (quoting 8 C.F.R. § 1003.2(i)).

The Court then went on to reject the government’s arguments that a motion to reconsider is a remedy “as of right.” The Court first rejected the government’s plain-language argument that, because a noncitizen has a statutory right to file a motion to reconsider, the motion is “as of right,” describing the argument as “unnatural” and finding that it would render the phrase superfluous. *Id.* at *9. The Court next rejected the government’s argument that § 1252(d)(1) applies only to remedies made discretionary by regulation, and not statute, finding that the INA “draws no such line” and reasoning that—in either case—the review in question is not “available . . . as of right.” *Id.* at *9-10. Noting that the statute *required* that an individual seeking to challenge a final order of removal file a petition for review within 30 days of the order—that is, prior to any decision on a motion to reopen or reconsider—the Court further concluded that interpreting the statute as also requiring exhaustion by a motion to reopen or reconsider before a court could review “would render the statutory scheme incoherent” because “it would . . . flood

⁷ Because the BIA does not have discretion to deny review of an appeal of an IJ decision in removal proceedings under 8 U.S.C. § 1229a, appealing to the BIA is a remedy that is available “as of right” and must be exhausted before a circuit court will exercise jurisdiction over a petition for review. *See also supra* n.2.

⁸ Although the Court reasoned that “regulation and historical practice had already firmly established Board reconsideration and reopening as discretionary,” 2023 WL 3356525 at *10, the Court did so without taking into consideration the fact that Congress could have, but did not, elect to codify *any* discretionary agency authority over motions to reopen or reconsider. *See* 8 U.S.C. § 1229a(c)(6), (7). This omission is significant as some motions do not involve any discretionary elements, such as motions based on lack of removability and/or non-discretionary forms of relief. Members may contact NILA for strategic assistance on these challenges.

the courts with pointless premature petitions” over the BIA’s underlying decisions raising unexhausted issues. *Id.* at *10.

The Court also criticized the government for arguing for a rule that “would require [a motion] only *sometimes*: when the noncitizen is raising an issue not previously presented to the agency.” *Id.* at *10.⁹ The Court reasoned that nothing in the statutory text suggests that “seeking reconsideration can qualify” as a remedy available as of right “sometimes and not others.” *Id.* at *11; *see also id.* (“The Government’s position presents a world of administrability headaches for courts, traps for unwary noncitizens, and mountains of reconsideration requests for the Board (filed out of an abundance of caution by noncitizens unsure of the need to seek reconsideration).”).¹⁰

7. What are the key take-away points from the Court’s holding that motions to reconsider are not required to satisfy § 1252(d)(1)?

In a petition for review challenging a BIA decision, filing a motion to reconsider or reopen is not required in order to exhaust administrative remedies under 8 U.S.C. § 1252(d)(1). This is true even if an individual challenges an issue not previously presented to the agency because, for example, it stems solely from the BIA’s decision itself, like a challenge to the BIA’s decision to conduct its own factfinding rather than remanding for the IJ to do so in the first instance, *id.* at *10-11, or a claim that the BIA acted ultra vires by allowing a temporary board member to sign a removal order, *see, e.g., Ayala Chapa v. Garland*, 60 F.4th 901, 905 (5th Cir. 2023).

The Court’s decision in *Santos-Zacaria* abrogates decisions of the First, Eighth, and Tenth Circuits, as well as the Fifth Circuit, that have required the filing of a such motions to exhaust impermissible factfinding claims. *See, e.g., Meng Hua Wan v. Holder*, 776 F.3d 52, 57 (1st Cir. 2015) (requiring motion to reconsider an impermissible factfinding claim); *Mencia-Medina v. Garland*, 6 F.4th 846, 848-49 (8th Cir. 2021) (same, requiring motion to reopen or reconsider); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (same).

Importantly, however, practitioners still must assess the viability of filing a motion to reconsider or reopen in conjunction with a petition for review. There may be strategic reasons why such motions are beneficial if there is a viable basis, including providing the ability to seek a stay of removal from the BIA in conjunction with a motion, increasing the noncitizen’s chances of a favorable decision, providing a hook for seeking an alternative resolution to the petition in mediation through either prosecutorial discretion or judicial administrative closure, and/or teeing up a second petition for review later, either consolidated or freestanding—depending on the court’s and agency’s timing.

Furthermore, although the Supreme Court discussed motions to reopen and reconsider as “discretionary,” *see* 2023 WL 3356525 at *8-10, the law governing standards of review for petitions for review of the denial of such motions in the courts of appeals remain unchanged.

⁹ Such a rule was previously endorsed by some circuits, *see infra* Q.7.

¹⁰ Legal services providers also expressed these concerns in an [amicus brief](#).

Courts generally review statutory motions to reopen or reconsider denials for abuse of discretion but must review legal and constitutional claims de novo review.¹¹

8. How can counsel raise *Santos-Zacaria*'s motion to reconsider holding in petitions for review pending before the courts of appeals?

The mechanism for raising *Santos-Zacaria*'s motion to reconsider holding in petitions for review pending in the courts of appeals depends on the procedural posture of the case.

If the case is in active briefing, counsel can raise *Santos-Zacaria* in their opening and/or reply brief. If the court has not yet issued a decision, counsel can submit a short citation of supplemental authorities pursuant to Federal Rule of Appellate Procedure 28(j). Counsel may file a "28(j)" letter at any time after the close of briefing, including after oral argument. If the court denied the petition for review but the 45-day period in which to seek rehearing or rehearing en banc has not lapsed or has been extended, counsel may wish to petition for rehearing. *See generally* Fed. R. App. P. 35, 40. If the court denied the petition for review and the rehearing period has lapsed, petitioners may wish to consider a motion seeking to recall the mandate, *see* Fed. R. App. P. 27, 41, or a petition for writ of certiorari, *see* Sup. Ct. R. 13.

9. How can counsel raise *Santos-Zacaria*'s motion to reconsider holding in cases pending before the BIA?

After the Supreme Court granted certiorari in *Santos-Zacaria*, some attorneys filed motions to reconsider BIA decisions either to comply with then existing circuit precedent or out of an abundance of caution. Counsel now can file a Statement of New Legal Authorities to the BIA alerting it to the *Santos-Zacaria* decision and its impact on the necessity of those pending motions. *See* BIA Practice Manual, Ch. 4.6(g)(1).

Counsel may wish to allow the BIA to adjudicate those motions or withdraw the motions. However, even if the motion is not withdrawn, there may be an argument that such protective motions should not count against the noncitizen's one statutorily permitted motion to reopen or reconsider pursuant to 8 U.S.C. § 1229a(c)(6) or (7). Thus, in any future motion to reopen or reconsider, counsel may wish to argue that the numeric limitation on such motions should be equitably tolled in light of the erroneous circuit court decision and/or government position in briefing before the Supreme Court that prompted the filing of the protective motion.¹²

¹¹ *See, e.g.,* *Aponte v. Holder*, 610 F.3d 1, 4 (1st Cir. 2010); *Luna v. Holder*, 637 F.3d 85, 102 (2d Cir. 2011); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 153-54 (3d Cir. 2007); *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 815 (5th Cir. 2020); *Preçetaj v. Sessions*, 907 F.3d 453, 457 (6th Cir. 2018); *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016). Judicial review over denials of sua sponte motions is more complex. For more information, see The Basics of Motions to Reopen EOIR-Issued Removal Order (April 2022), available on the [practice advisory page](#) of NILA's website.

¹² For more information on tolling of the numeric limitation on motions, see The Basics of Motions to Reopen EOIR-Issued Removal Order (April 2022), available on the [practice advisory page](#) of NILA's website.