

**21-1436 SANTOS-ZACARIA V. GARLAND**

DECISION BELOW: 22 F.4th 570

LOWER COURT CASE NUMBER: 19-60355

QUESTION PRESENTED:

After the Board of Immigration Appeals (BIA) denied her application for withholding of removal, petitioner Leon Santos-Zacaria filed a petition for review. Although the government agreed that the court had jurisdiction, the Fifth Circuit *sua sponte* dismissed in part for lack of jurisdiction pursuant to 8 U.S.C. § 1252(d)(1), which requires a noncitizen to exhaust "all administrative remedies available to the alien as of right."

This holding implicates two circuit splits, each of which independently warrants review.

1. Eight circuits hold that Section 1252(d)(1)'s exhaustion requirement is jurisdictional. Two circuits disagree, holding that exhaustion may be waived. Multiple courts and judges have called for further review of this issue. The first question presented is:

Whether Section 1252(d)(1)'s exhaustion requirement is jurisdictional, or merely a mandatory claims processing rule that may be waived or forfeited.

2. Further, petitioner's merits argument is that the BIA engaged in impermissible fact finding. In these circumstances, the Fifth Circuit, along with three other circuits, requires a noncitizen to file a motion to reopen or reconsider with the agency in order to satisfy Section 1252(d)(1)'s requirement that a noncitizen exhaust "remedies available \* \* \* as of right." Two other circuits, recognizing that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board" (8 C.F.R. § 1003.2) disagree. The second question presented is:

Whether, to satisfy Section 1252(d)(1)'s exhaustion requirement, a noncitizen who challenges a new error introduced by the BIA must first ask the agency to exercise its discretion to reopen or reconsider.

CERT. GRANTED 10/3/2022