No. 13-11683

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

YASMICK JEUNE,

Petitioner,

v.

LORETTA LYNCH, UNITED STATES ATTORNEY GENERAL

Respondent.

On Petition for Review of the Decision of the Board of Immigration Appeals

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BRIEF OF AMICI CURIAE IN SUPPORT OF REHEARING EN BANC OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As required by Eleventh Circuit Rule 28-1(b), below is a list of persons and entities who may be interested in the outcome of this case:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION AND STATEMENT OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the proposed *Amici Curiae*, the National Immigrant Justice Center (NIJC) and the American Immigration Lawyers Association (AILA), offer this brief in support of rehearing.[1]

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,500 pro bono attorneys, NIJC represents approximately 350 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts. In addition to the cases that NIJC accepts for representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year.

The American Immigration Lawyers Association (AILA) is a national association with more than 14,000 members, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration

[1] No party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this brief; no person other than *Amici Curiae* (including their counsel, their members, and their employees) contributed money intended to fund preparing or submitting the brief. A motion seeking leave to file this brief is being filed concurrently.

laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

Both organizations have a direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to pursue appeals of removal orders. The Court previously received *amicus* briefs addressing the similar issue of whether to treat time and number deadlines for reopening at the Board as jurisdictional. *See Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847 (11th Cir. 2013); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc).

ARGUMENT

As the Supreme Court has noted, "the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. Courts . . . have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). This case involves a circumstance in which some courts have "miss[ed] the critical differences between true jurisdictional conditions and nonjurisdictional limitations." *Id*. *Amici* submit that the Court's case law requiring

issue exhaustion before the Board of Immigration Appeals (BIA) as a jurisdictional matter is a holdover from the prior era of "drive-by jurisdictional rulings," in conflict with other circuits that have declined to adopt a jurisdictional issue-exhaustion rule and contrary to recent Supreme Court precedent requiring more to bar federal-court jurisdiction.

The primary issues presented by this rehearing petition are (a) whether the panel opinion is consistent with case law from this circuit regarding the minimum required in order to administratively exhaust an issue, and (b) whether the Court should recede from previous published case law finding jurisdiction barred over even those issues that the Board has chosen to address and resolve, contrary to every other circuit to consider the question.

Amici agree that those points are appropriate subjects for rehearing at the panel level (for the first issue) or the en banc level (for the second).[2] *Amici* write separately to suggest that if the Court chooses to rehear this case en banc, it may wish to consider the foundational question whether the Court ought to treat *issue* exhaustion—as opposed to exhaustion of administrative *remedies*—as

[2] It appears that the Government has suggested the same to the Supreme Court, arguing that "the Eleventh Circuit is an outlier in holding that a court of appeals lacks jurisdiction over a claim for relief that was not presented to the Board even if the Board has addressed the claim sua sponte." Brief for Respondent in Opposition at 10, *Ido v. Lynch*, 136 S. Ct. 297 (2015) (14-9139); *see also id*. at 13-14 (arguing against *certiorari*, in part, on basis that Ido had not sought rehearing in the Eleventh Circuit). Because the Government brief in *Ido* is not publically available, *Amici* have attached it to this brief.

jurisdictional in the first place. That is, underlying the issues presented by the Petition for Rehearing is a broader question, namely whether section 1252(d)(1) requires, as a *jurisdictional* matter, that an immigration petitioner exhaust all *issues* contained within his or her petition for review. It would be appropriate for the en banc Court to speak more precisely on the exhaustion regime in immigration cases and to align those rules with intervening Supreme Court case law.

As argued below, the Court should decline to reaffirm case law treating this matter as jurisdictional and conform this Court's case law to intervening Supreme Court precedent. The Court should treat *issue* exhaustion as a claims-processing rule rather than a jurisdictional matter.

I. The Question Whether the INA Imposes a Statutory Issue-Exhaustion Requirement Is Ripe for Reconsideration.

The panel found that it lacked jurisdiction to address Jeune's claim, relying on the Court's previous interpretation of section 1252(d)(1) as implicitly imposing a jurisdictional issue-exhaustion requirement on immigration petitioners. *Jeune v. U.S. Att'y Gen.*, 810 F.3d 792, 800 (11th Cir. 2016) (citing *Amaya–Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250-51 (11th Cir. 2006)); *see also Fernandez-Bernal v. U.S. Att'y Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001). The Court applied this exhaustion rule to a noncitizen who had in fact failed to exhaust administrative remedies by bypassing the Board entirely. *Sundar v. INS*, 328 F.3d 1320, 1323 (11th Cir. 2003). But language in that case has become a broader rule.

The Court has since treated *issue* exhaustion as the equivalent of exhaustion of *remedies*, holding that issue exhaustion is a jurisdictional prerequisite. *Fernandez-Bernal*, 257 F.3d at 1317 n.13; *Amaya–Artunduaga*, 463 F.3d at 1250-51. The *Jeune* panel was of course bound by that case law. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("[A] panel cannot overrule a prior one's holding even though convinced it is wrong.").

The Court's case law fails to distinguish between the exhaustion of administrative *remedies* available to a non-citizen and the exhaustion of all *issues* presented in his petition for review—simply assuming that both were required. Case law from other circuits distinguishes between the two. *See Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) (noting case law of various circuits and addressing the distinction). At least two circuits refuse to treat issue exhaustion as jurisdictional.

The Second Circuit, in *Zhong v. U.S. Dep't of Justice*, recognized that any issue-exhaustion requirement was not a statutory limit that operated to constrain the court's subject-matter jurisdiction. 480 F.3d 104, 117-25 (2d Cir. 2007). That court noted that the Supreme Court had squarely addressed the distinction between statutory *issue*-exhaustion and *remedy*-exhaustion requirements and had held that Congress was certainly able of enacting statutory issue-exhaustion requirements if

it desired. *Id.* at 121 (citing *Sims v. Apfel*, 530 U.S. 103, 107 (2000)). It therefore declined to find that section 1252(d)(1) contained an issue-exhaustion requirement. It noted, however, that the failure to find a *jurisdictional* requirement of issue exhaustion did not eliminate the issue-exhaustion requirement. *Id.* at 122 ("[Our] conclusion does not mean, however, that petitioners seeking review of their removal orders are ordinarily excused from issue exhaustion."). Rather, the Second Circuit held that because "8 U.S.C. § 1252(d)(1) does not make issue exhaustion a statutory jurisdictional requirement," the requirement may be excused in some cases, when for example, when the Attorney General waives the issue. *Id.* at 120.

Similarly, the Seventh Circuit declines to treat issue exhaustion as jurisdictional; any issue-exhaustion requirement "is not jurisdictional, but rather is a case-processing rule." *FH-T v. Holder*, 723 F.3d 833, 841 (7th Cir. 2013) (internal quotations omitted). Because the rule is "not a jurisdictional rule in the strict sense that the Supreme Court has emphasized we must follow," it is "subject to waiver, forfeiture, and other discretionary considerations." *Arobelidze v. Holder*, 653 F.3d 513, 517 (7th Cir. 2011) (internal quotations omitted).

It is true that there is case law similar to this Court's case law in other circuits. *See e.g., Sidabutar v. Gonzales*, 503 F.3d 1116, 1118 (10th Cir. 2007); *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008); *Omari v. Holder*, 562 F.3d 314, 324-25 (5th Cir. 2009). But several courts of appeals in which precedent treats

issue exhaustion as a jurisdictional requirement have questioned those holdings. The First Circuit, for example, noted the harsh consequences of interpreting section 1252(d)(1) as imposing an issue-exhaustion requirement—*i.e.*, that the court would be powerless to avoid even "a miscarriage of justice in extreme cases." *Sousa v. INS*, 226 F.3d 28, 31 (1st Cir. 2000). It noted that, "If we were writing on a clean slate, it would be very tempting to treat [a petitioner]'s forfeit of his claim as something less than a jurisdictional objection," but found that it was ultimately "bound by precedent" to hold otherwise. *Id*. Similarly, citing recent Supreme Court decisions, the Third Circuit found "reason to cast doubt upon the continuing validity of our precedent holding that issue exhaustion is a jurisdictional rule," though that panel found itself bound to apply circuit precedent. *Lin v. Att'y Gen.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008). The Eighth Circuit has said the same: "[i]f we were starting from scratch, there would be reason to question whether § 1252(d)(1) by its terms precludes a court of appeals from considering issues that an alien did not present to the agency." *Etchu-Njang v. Gonzales*, 403 F.3d 577, 581 (8th Cir. 2005). Noting the distinction drawn by the Supreme Court between exhaustion of remedies and issues, that Court found that "the plain language of § 1252(d)(1) could be read to require only exhaustion of *remedies* as of right." *Id.* at 582.

In short, the proposition that issue exhaustion is a jurisdictional requirement is considered doubtful even in those circuits that agree with this Court's case law. If the Court grants en banc rehearing in this case to resolve intra-circuit conflict or the conflict between *Amaya–Artunduaga* and all other circuits, it may wish to address this issue in light of intervening Supreme Court case law.

II. The INA Does Not Contain a Jurisdictional Issue-Exhaustion Requirement.

The plain language of the INA's jurisdictional statute provides no suggestion that issue exhaustion is a statutory prerequisite for subject-matter jurisdiction, and the panel in this case erred in so finding. The provision that allegedly imposed this condition, 8 U.S.C. § 1252(d)(1), requires only that a non-citizen have "exhausted all *administrative remedies* available to the alien as of right." As the Eighth Circuit noted, "While some statutes governing judicial review of administrative agency decisions explicitly require exhaustion of issues . . . the exhaustion requirement of § 1252(d)(1) does not do so by its terms." *Etchu-Njang*, 403 F.3d at 581-82.

In effect, the circuits that find an issue-exhaustion requirement in this jurisdictional provision do so by converting the word "remedies" into the phrase "remedies *and issues*"—implying an additional jurisdictional requirement that Congress has not included. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). By contrast, the reading of section 1252(d)(1) adopted by the Second

and Seventh Circuits does no more than take that provision at face value: as requiring that a non-citizen exhaust his administrative *remedies*—that is, the levels of review available to him as of right.[3]

The plain text reading of § 1252(d)(1) as failing to require issue exhaustion is informed by the Supreme Court's reading of a nearly-identical provision in the federal habeas statute, which requires that a petitioner "exhaust[] the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1). This text is similar to the INA's requirement that an immigration petitioner "exhaust[] all administrative remedies available to the alien as of right," 8 U.S.C. § 1252(d)(1). In *Coleman v. Thompson*, the Supreme Court held that the text of the habeas provision contained no issue-exhaustion requirement: "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." 501 U.S. 722, 732 (1991).[4] In other words, language requiring exhaustion of administrative *remedies* does not, standing alone, also require *issue* exhaustion.[5] The same logic applies here.

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[3] As discussed above, while those circuits may nevertheless still impose an issue-exhaustion requirement in the normal course, they do so as a claims-processing rule that is capable of being waived or excused—not a jurisdictional requirement that entirely forecloses judicial review or discretion.

[4] *Coleman* addressed a prior version of the habeas statute, *see* 28 U.S.C. § 2254(b) (1990), but the relevant text remains the same today.

[5] The Court found that the independent and adequate state ground doctrine prevented habeas petitioners from evading exhaustion before state courts. *Id.*

Congress is capable of imposing jurisdictional issue-exhaustion requirements when it deems fit—and when it does, the language does not resemble that found in section 1252(d)(1). In *Woelke & Romero Framing, Inc., v. NLRB*, 456 U.S. 645 (1982), the Supreme Court held that the court of appeals lacked jurisdiction to review objections not raised before the National Labor Relations Board. *Id.* at 665. That decision relied on the plain text of the National Labor Relations Act, providing that "[n]o objection that has not been urged before the Board . . . shall be considered by the court." 29 U.S.C. § 160(e) (1982). The Court held similarly in *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955), interpreting language in the Natural Gas Act providing that "[n]o objection to the order of the Commission shall be considered by the court [of appeals] unless such objection have been urged before the Commission." 15 U.S.C. § 717r(b) (1952). The language used by Congress to impose these issue-exhaustion requirements is not only distinct from the language in the INA, but also quite clear in its imposition of an issue-exhaustion requirement.

Indeed, Congress's ability to fashion detailed provisions governing federal judicial review of immigration cases—and its penchant for doing so—is evident from the numerous other subsections of 8 U.S.C. § 1252. Among other provisions, that statute circumscribes the relief available in federal courts for certain other classes of claims, 8 U.S.C. §§ 1252(e)(1), (f), and sets forth differing standards of

review governing judicial review of a panoply of agency decisions, *id.* § 1252(a)(4). And, notably, the statute strips federal courts of jurisdiction to review an expansive list of specific decisions by the Attorney General, *id.* § 1252(a)(2)(B), as well as appeals brought by certain classes of non-citizens, *id.* § 1252(a)(2)(C). At the same time, the statute specifically preserves jurisdiction over some claims notwithstanding the above provisions. *Id.* § 1252(a)(2)(D). The numerous statutory provisions limiting or channeling federal court jurisdiction over immigration matters leave little doubt that Congress could have inserted into the INA an explicit provision requiring issue exhaustion as a jurisdictional requirement, had it so chosen. Its failure to do so speaks volumes.

The decisions of the Supreme Court requiring a more circumspect view of "jurisdictional" barriers absent clear Congressional intent—and drawing a clear distinction between issue exhaustion and the exhaustion of administrative remedies—foreclose any reading that a statutory issue-exhaustion requirement is implicit in the INA's jurisdictional provision. Moreover, there is a longstanding presumption favoring judicial review in cases reviewing administrative action, and statutes "reasonably susceptible to divergent interpretation" should be interpreted so as to permit jurisdiction. *Kucana v. Holder*, 558 U.S. 233, 251 (2010).

The Supreme Court has undertaken significant effort during the last decade to "draw with greater precision the line between 'jurisdictional' and other legal

rules." *Marin-Rodriguez v. Holder*, 612 F.3d 591, 594 (7th Cir. 2010) (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010); *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009)). These precedents have emphasized, time and again, that courts must be more circumspect in their imposition of barriers to the exercise of subject-matter jurisdiction. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (urging that the label "jurisdictional" apply "not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority").

And, as the Court held in *Arbaugh v. Y & H Corp.*, courts should be particularly circumspect in imposing jurisdictional requirements absent clear guidance from Congress: "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U.S. 500, 515-16 (2006) (citation and footnote omitted). That language cuts even more acutely here, where there is simply no statutory language at all imposing an issue-exhaustion requirement in the first place.

The Supreme Court has applied these precedents to immigration matters. In *Kucana v. Holder*, the Court articulated a "presumption favoring judicial review of administrative action," and held that "[w]hen a statute is reasonably susceptible to

divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." 558 U.S. at 251 (internal quotations omitted). The *Kucana* Court noted that it had "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning preservation of federal court jurisdiction. *Id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)). Accordingly, it declined to find a jurisdictional requirement in a separate part of section 1252. *Id.* at 252-53. Again last term, the Supreme Court reversed a lower court decision which imposed a jurisdictional requirement not present in the text. *Mata v. Lynch*, 135 S. Ct. 2150, 2155 (2015).

These precedents—and the presumption articulated in *Kucana*—make clear that it would be inappropriate to read into section 1252(d)(1) a jurisdictional issue-exhaustion requirement. But that reading is particularly inappropriate in light of the fundamental distinction between the exhaustion of administrative remedies and issue exhaustion. In *Sims v. Apfel*, 530 U.S. 103 (2000), the issue was whether a court of appeals retained jurisdiction to entertain claims by a Social Security claimant who had failed to preserve certain issues when requesting review in an administrative appeal. The Court rejected the notion that an issue-exhaustion requirement was "'an important corollary' of any requirement of exhaustion of remedies." *Id.* at 107. As the Court succinctly put it, "this is not necessarily so." *Id.*

Rather, the Court held that it was sufficient for a claimant to "exhaust administrative remedies"; the claimant "need not also exhaust issues in a request for review by the [Social Security] Appeals Council in order to preserve judicial review of those issues." *Id.* at 112. *Sims* has been overlooked by lower courts which assume that a requirement of administrative exhaustion necessarily includes a requirement of issue exhaustion.

Equally important, *Sims* emphasized the important role of *Congress* in determining when issue exhaustion should be required: "[W]e note that requirements of administrative issue exhaustion are largely creatures of statute." *Id.* at 107. Absent a statutory provision in the Social Security Act that required issue exhaustion—one that Congress was perfectly capable of inserting at any time—the Court was reluctant to impose one judicially.

The requirement of a clear statement from Congress applies with particular force to the present context, which lies at the intersection of *two* sets of precedents disfavoring judicial attempts to expand what is required by statute: precedents that discourage imposing *jurisdictional limitations* absent explicit statutory language doing so, and precedents that discourage imposing *issue-exhaustion* requirements absent explicit statutory language doing so.

* * *

The reasons given by the en banc Court in *Avila-Santoyo* are each applicable in this context: (a) the Supreme Court's general counsel against the "reckless" use of the jurisdictional label; (b) the absence of statutory language requiring issue exhaustion; and (c) the existence of related rules "indicative of a certain degree of flexibility" in application of the test. 713 F.3d 1359-62. Just as the Court in *Avila-Santoyo* revisited case law which inappropriately treated as jurisdiction that which ought to have been a case processing rule, so, too, here.

The plain text of the INA provides no basis to impose issue exhaustion as a jurisdictional requirement. The Court should grant rehearing to recalibrate its case law in this area to bring it into line with the Supreme Court's rules.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully suggest that the Court reconsider whether issue exhaustion in immigration cases is in the nature of a jurisdictional requirement; *Amici* urge a negative answer to that question.

Dated: February 24, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume requirements of Federal Rule of Appellate Procedure 32(a). This brief is 15 pages, contains 3,512 words, as determined by the word-count function of the Microsoft Word 2007 document system used to prepare this brief, including headings, footnotes, and quotations, but excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii). The brief has been prepared in a proportionally spaced font using Microsoft Word 2007 Times New Roman, fourteen-point.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c)(1)(D), Eleventh Circuit Rule 25-3(a), and The Eleventh Circuit Guide to Electronic Filing § 7.2, I hereby certify that on February 24, 2016, I caused a true and correct copy of the foregoing Brief Amici Curiae, together with its exhibit, to be filed through the Eleventh Circuit's Electronic Case Filing System, which will automatically serve a copy of the foregoing brief on the following counsel of record:

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