No. 21-1533

In the Supreme Court of the United States

SERGIO MENCIA-MEDINA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
JESI J. CARLSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that 8 U.S.C. 1252(d)(1) prevented the court from reviewing petitioner's claim that the Board of Immigration Appeals engaged in impermissible factfinding because petitioner had not exhausted that claim through a motion to reconsider.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-9a) is reported at 6 F.4th 846. The decisions of the Board of Immigration Appeals (Pet. App. 12a-16a) and the immigration judge (Pet. App. 20a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2021. A petition for rehearing was denied on January 5, 2022 (Pet. App. 79a). On March 22, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including June 3, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a noncitizen who entered the United States without inspection. Pet. App. 2a.[1] In removal proceedings, he conceded removability but sought cancellation of removal. *Id.* at 3a. An immigration judge (IJ) granted petitioner's application for cancellation of removal, *id.* at 20a-78a, but the Board of Immigration Appeals (Board) reversed, *id.* at 12a-16a. Petitioner sought judicial review, contending that the Board had engaged in impermissible factfinding, *id.* at 3a. The court of appeals determined that judicial review was barred by 8 U.S.C. 1252(d)(1), which provides that "[a] court may review" a removal order "only if" the noncitizen "has exhausted all administrative remedies available to [him] as of right." *Ibid.* The court held that the impermissible-factfinding claim was "unexhausted" because petitioner "failed to raise it before the Board." Pet. App. 3a.

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen may apply for cancellation of removal under 8 U.S.C. 1229b. Section 1229b(b) sets out several categories of noncitizens who may be granted cancellation of removal without satisfying the typical requirements, including those who have "been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident." 8 U.S.C. 1229b(b)(2)(A)(i)(II). Once an IJ has decided whether a noncitizen should be granted cancellation of removal under Section 1229b(b), either the noncitizen or the Department of Homeland Security (DHS) may appeal that decision to the Board. 8 C.F.R.

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

1003.3(a)(1); see 8 U.S.C. 1229a(c)(5) (providing that an IJ "shall inform the alien of the right to appeal [the IJ's] decision"). "The party taking the appeal must * * * specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b).

If the Board determines that a noncitizen's application for cancellation of removal should be denied, the INA grants the noncitizen the right to file a "motion to reconsider" within 30 days of the Board's decision. 8 U.S.C. 1229a(c)(6)(A); see 8 C.F.R. 1003.2(a) and (b)(2). A motion to reconsider "shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2. A noncitizen may also file a motion to reopen based on "new facts that will be proven at a hearing." 8 U.S.C. 1229a(c)(7)(B). A motion to reopen must be filed within 90 days of the Board's decision, unless certain exceptions apply. 8 U.S.C. 1229a(c)(7)(C)(i).

A noncitizen may also petition a court of appeals for judicial review of a final order of removal within 30 days of the order's issuance. 8 U.S.C. 1252(b)(1). But, under Section 1252(d)(1), the court "may review a final order of removal only if [the petitioner] has exhausted all administrative remedies available * * * as of right." 8 U.S.C. 1252(d)(1).

2. Petitioner is a native and citizen of Honduras who first unlawfully entered the United States in 2001 at the age of three. Pet. App. 2a. Several months later, an immigration judge ordered him removed *in absentia* after he failed to appear at his removal proceedings. *Ibid.* In 2019, petitioner successfully moved to vacate his 2001 removal order and reopen his removal proceedings. *Id.* at 3a. In the reopened proceedings, he con-

ceded removability but sought cancellation of removal under 8 U.S.C. 1229b(b)(2)(A)(i)(II), alleging that he was battered as a child by his mother, who is a lawful permanent resident. Pet. App. 39a.

The IJ granted petitioner's application for cancellation of removal. It determined that petitioner had been battered by his mother and that he satisfied the other requirements for cancellation of removal. Pet. App. 39a-75a. The IJ also concluded that "based on the record as a whole," petitioner's application "merits a favorable exercise of discretion," *id.* at 75a, because petitioner's "positive factors outweigh the negative ones," *id.* at 78a.

In the course of her decision, the IJ referenced a series of facts established by the record, including petitioner's 2018 felony adult conviction for terroristic threats, arising from an incident in which he threatened his girlfriend's stepfather with a samurai sword, Pet. App. 50a-51a, and petitioner's juvenile record involving offenses such as theft, domestic assault, and criminal sexual conduct in the third degree, stemming from his impregnation of his 13-year-old girlfriend when he was 17, *id.* at 52a-56a. The IJ also found that petitioner had a history of drug use (including marijuana, methamphetamine, and cocaine, *id.* at 54a) and a history of misconduct while in immigration detention (including "physically resisting corrections officers," *id.* at 56a). But the IJ concluded that such "adverse factors" did not counsel against a favorable exercise of discretion because most of petitioner's offenses were not serious and were committed as a minor, and the offenses were "directly related to" the abuse he suffered from his parents. *Id.* at 75a-77a. The IJ also found a number of "favorable factors," including that petitioner and his family

would "suffer greatly" if he were returned to Honduras, and that he had started a nonprofit and been actively engaged in community service. *Id.* at 77a. "Overall," the IJ found that petitioner's "positive factors outweigh the negative ones," and the IJ therefore granted petitioner's application for cancellation of removal. *Id.* at 78a.

The Board reversed, concluding that petitioner "does not deserve a favorable exercise of discretion" because he "has not met his burden of proof to establish that the positive factors of record outweigh the negative factors." Pet. App. 14a. The Board "acknowledge[d]" that there are "significant favorable factors," *ibid.*, but it observed that there are many "notable negative factors of record," *id.* at 15a, including petitioner's drug use, his impregnation of a 13-year-old, his conviction for threatening his girlfriend's stepfather with a samurai sword, and his misconduct while in immigration detention, *id.* at 15a-16a. "Upon balancing" all of the factors, the Board concluded that the negatives "outweigh the favorable factors of record." *Id.* at 16a.

3. After the Board issued its decision, petitioner sought judicial review from the court of appeals, asserting that the Board had engaged in impermissible fact-finding when it determined that petitioner's application did not merit a favorable exercise of discretion. Pet. C.A. Br. 21-30. Petitioner also filed a motion to reconsider and a motion to reopen before the Board, but neither motion "involve[d] the issues raised" in his petition for judicial review. *Id.* at 17 n.3; see Pet. 12 n.1 (noting that the motion for reconsideration involved "other issues"). Those motions were eventually denied by the Board. Pet. 12 n.1.

4. a. Meanwhile, the court of appeals denied the petition for judicial review. Pet. App. 1a-8a. With respect to petitioner's claim that the Board had engaged in impermissible factfinding, the court observed that, although the Board generally may not engage in factfinding, *id.* at 3a, the Board has "the discretion to weigh [those] factual findings differently," *id.* at 4a (quoting *Waldron* v. *Holder*, 688 F.3d 354, 361 (8th Cir. 2012)) (brackets in original). The court determined, however, that it could not review petitioner's impermissible-factfinding claim because petitioner had not exhausted that claim before the Board as required by 8 U.S.C. 1252(d)(1). Pet. App. 4a-6a.

The court of appeals explained that "Section 1252(d)(1) vests [a] court with jurisdiction to review a final order of removal only if a petitioner has 'exhausted all administrative remedies available to him as of right.'" Pet. App. 4a (brackets omitted). The court then held that "although [petitioner] need not file a motion to reopen or reconsider to exhaust administrative remedies with respect to issues that were raised and decided in [his] appeal to the Board," *ibid.*, he was required to file a motion to reopen or reconsider a claim that had "never been heard by the" Board, *id.* at 5a (quoting *Meng Hua Wan* v. *Holder*, 776 F.3d 52, 57 (1st Cir. 2015)). The court observed that "the core purpose of the exhaustion requirement is frustrated when * * * the [Board's] decision gives rise to a new issue and the alien fails to use an available and effective procedure for bringing the issue to the agency's attention." *Ibid.* (quoting *Wan*, 776 F.3d at 57). Because petitioner "did not move to reopen or reconsider on" the "basis" of his impermissible-factfinding claim, "the issue was never

presented to the Board," and the court therefore did "not consider it." *Id.* at 5a-6a.

The court of appeals also rejected two other challenges that petitioner does not renew in this Court. Pet. App. 6a-8a.

b. Judge Kelly filed a concurring opinion, explaining that she joined the portion of the court's opinion on the administrative-exhaustion question "with the understanding that our holding is limited to a noncitizen's claim, raised for the first time in a petition for review to th[e court of appeals], that the Board of Immigration Appeals engaged in impermissible factfinding." Pet. App. 9a.

ARGUMENT

Petitioner contends (Pet. 15-29) that the court of appeals erred in determining that his claim that the Board engaged in impermissible factfinding is unexhausted under 8 U.S.C. 1252(d)(1).[2] The court of appeals' decision is correct. It does not implicate any division in the circuits. And even if this Court wished to consider the question presented, this case would be a poor vehicle because there is no reason to believe that petitioner would prevail if the court of appeals were to reach the merits of his impermissible-factfinding claim. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly determined that Section 1252(d)(1) precludes review of petitioner's claim

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[2] A petition for certiorari raising a similar question is currently pending before the Court in *Santos-Zacaria* v. *Garland*, No. 21-1436, petition for cert. pending (filed May 10, 2022). Unlike petitioner here, however, the petitioner in *Santos-Zacaria* raises (Pet. 17-18) an additional argument that Section 1252(d)(1) does not prevent a court from reviewing her case because the statute is not jurisdictional.

that the Board engaged in impermissible factfinding because petitioner failed to raise that claim before the Board, even though he could have done so in his motion to reconsider. Pet. App. 3a-6a.

Section 1252(d)(1) provides that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to [him] as of right." 8 U.S.C. 1252(d)(1). The plain text therefore bars a court from reviewing an alleged error in the proceedings before the IJ unless the noncitizen has exhausted his right to appeal that error to the Board. See 8 U.S.C. 1229a(c)(5); 8 C.F.R. 1003.3; see 8 C.F.R. 1003.1(b). And the text similarly bars a court from reviewing an error that was allegedly introduced at a later stage in the proceedings unless the noncitizen has exhausted the "administrative remedies available to [him] as of right" at that stage. 8 U.S.C. 1252(d)(1). Thus, a noncitizen who believes the Board's decision has given rise to a new "error[] of law or fact" must avail himself of the right to present his challenge to the Board by filing a motion to reconsider under 8 U.S.C. 1229a(c)(6), and a noncitizen who believes that "new facts" require a change in the outcome must present those facts to the Board through a motion to reopen under 8 U.S.C. 1229a(c)(7).

Because petitioner alleges that the Board introduced a new error into his proceedings by engaging in impermissible factfinding in its appellate decision, petitioner was required to present that purported "error[]" to the Board in a motion to reconsider. 8 U.S.C. 1229a(c)(6)(C). But petitioner did not do so, even though he filed both a motion to reconsider and a motion to reopen raising *other* issues. See p. 5, *supra*; Pet. App. 5a-6a. As a result, petitioner's impermissible-factfinding

claim was not "exhausted," and the court of appeals was not permitted to "review" it. 8 U.S.C. 1252(d)(1).

b. Petitioner does not dispute that he failed to raise his impermissible-factfinding challenge in his motion to reconsider. Instead, he contends (Pet. 15-29) that it was unnecessary to file a motion to reconsider to exhaust his impermissible-factfinding claim. Each of petitioner's arguments in support of that contention is unpersuasive.

Petitioner first asserts (Pet. 16) that a motion to reconsider is not among the "administrative remedies available to [an] alien as of right," 8 U.S.C. 1252(d)(1), because the Board retains discretion to deny such a motion. But an administrative remedy is "*available* to" a noncitizen "as of right" so long as he has the ability to invoke it. *Ibid.* (emphasis added). The INA clearly provides that a noncitizen "may file one motion to reconsider a decision that [he] is removable." 8 U.S.C. 1229a(c)(6). The possibility that the Board may deny that motion on discretionary grounds does not mean the noncitizen lacks the "right" to make the motion in the first place and does not prevent the remedy from being "available." 8 U.S.C. 1252(d)(1).

Petitioner alternatively asserts that it was not necessary to exhaust his specific claim of impermissible factfinding through a motion to reconsider because the INA requires the exhaustion of remedies, but it does not, in his view, "impose any *issue* exhaustion requirement at all[,] * * * [n]or does any Board regulation." Pet. 16 (citation omitted). That view is incorrect. Both the INA's implementing regulations and the statute itself mandate issue exhaustion. As this Court has observed, an "issue exhaustion" requirement may take the form of a regulation requiring parties to "'lis[t] the spe-

cific issues to be considered on appeal.'" *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (quoting 20 C.F.R. 802.211(a) (1999)) (brackets in original). The regulations governing appeals to the Board follow that model, providing that an appellant "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). And both the statutory and the regulatory provisions governing motions to reconsider similarly require the noncitizen to "specify the errors of law or fact" that he wishes the Board to reconsider. 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2.

Because the INA's issue-exhaustion requirement is imposed by those provisions and not through judicial fiat, petitioner errs in asserting (Pet. 16-21) that the INA's exhaustion requirement is subject to the same exceptions and limitations as the issue-exhaustion requirements that the judiciary imposes on itself. While "judge-made exhaustion" requirements are "amenable to judge-made exceptions," *Ross* v. *Blake*, 578 U.S. 632, 639 (2016), issue-exhaustion requirements imposed by statutes and regulations are not. *Sims*, 530 U.S. at 107-108. Thus, even if courts generally do not require litigants to exhaust issues through motions for reconsideration or rehearing, that principle does not apply to administrative proceedings before the Board.

Petitioner also errs in contending (Pet. 21-22) that the "purposes of exhaustion requirements" are not served by requiring a noncitizen to file a motion to reconsider when the Board purportedly commits "legal error" in the course of reversing an IJ's grant of relief. One of the "main purposes" of an exhaustion requirement is to "giv[e] an agency 'an opportunity to correct its own mistakes.'" *Woodford* v. *Ngo*, 548 U.S. 81, 89

(2006) (citation omitted). A motion to reconsider that raises an impermissible-factfinding claim gives the Board a chance to address the allegation that it has gone beyond the scope of its authority "before it is haled into federal court." *Ibid.* (citation omitted).

Finally, petitioner contends that the court of appeals' decision will "cause petitioners to file protective motions to reconsider" or otherwise introduce inefficiencies into the administrative and judicial review processes. Pet. 23; see Pet. 21-26. But the court of appeals specified that motions to reconsider are *not* necessary with respect to "issues that were raised and decided in the * * * appeal to the Board." Pet. App. 4a. They are only necessary where, as here, the motion to reconsider will give the Board an "opportunity to correct" an alleged mistake that the noncitizen has not previously raised. *Woodford*, 548 U.S. at 89 (citation omitted).

In any event, as petitioner acknowledges, "no amount of policy-talk can overcome a plain statutory command." Pet. 26 (quoting *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1486 (2021)). Section 1252(d)(1) provides that judicial review is permissible "only if * * * the alien has exhausted all administrative remedies available * * * as of right." 8 U.S.C. 1252(d)(1). As every published court of appeals decision to consider the issue has concluded, that statutory condition is not satisfied when the noncitizen failed to present an impermissible-factfinding claim to the Board through a motion to reconsider. See *Santos-Zacaria* v. *Garland*, 22 F.4th 570 (5th Cir. 2022), petition for cert. pending, No. 21-1436 (filed May 10, 2022); *Meng Hua Wan* v. *Holder*, 776 F.3d 52, 57 (1st Cir. 2015); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 & n.6 (10th Cir. 2007).

2. Petitioner contends (Pet. 13-15) that the decision in *Indrawati* v. *U.S. Attorney General*, 779 F.3d 1284 (11th Cir. 2015), establishes a conflict in the circuits on the question presented. Petitioner observes that the court in *Indrawati* refused to "fault" a noncitizen "for not raising an argument about . . . a decision not yet in existence." Pet. 13-14 (quoting *Indrawati*, 779 F.3d at 1299). But *Indrawati* did not discuss whether or when a motion for reconsideration may be required; neither the parties nor the court appear to have considered the availability of that administrative remedy. *Indrawati*, 779 F.3d at 1299. And the Eleventh Circuit has elsewhere held that a noncitizen's failure to "move[] to reopen or reconsider" means that "she has failed to exhaust her administrative remedies." *Alexis* v. *U.S. Att'y Gen.*, 431 F.3d 1291, 1296 (2005).

Moreover, the challenge in *Indrawati* is distinguishable from the one in this case because it did not involve an impermissible-factfinding claim. Rather, *Indrawati* considered a series of other claims brought by a noncitizen, and the court agreed with the government that most of the claims were unexhausted and therefore unreviewable under Section 1252(d)(1). 779 F.3d at 1299. *Indrawati* rejected the government's exhaustion argument only with respect to the noncitizen's claim that the Board's decision did not reflect "reasoned consideration" of the "'issues raised.'" *Ibid.* (citation omitted). That claim is distinct from an impermissible-factfinding challenge because it rests on the assertion that the Board gave insufficient attention to an error the noncitizen already raised, while an impermissible-factfinding challenge rests on the premise that the Board introduced a *new* error into the proceedings by finding new facts.

At least one other court of appeals has recognized a similar distinction. In *Barros* v. *Garland*, 31 F.4th 51, 59-62 (1st Cir. 2022), the court held that a motion to reconsider is unnecessary where a noncitizen alleges that the Board "applied the wrong legal standard to the facts at issue as found by the IJ." *Id.* at 61. But *Barros* reaffirmed the First Circuit's prior decision in *Wan*, which held that a noncitizen was required to file a motion to reconsider to exhaust his claim that the Board "engaged in impermissible factfinding." *Id.* at 60 (citing *Wan*, 776 F.3d at 52). *Barros* explained that courts "often consider[] petitions for review challenging the [Board's] failure to apply binding statutes, regulations or precedent without ever mentioning a requirement that a motion to reconsider be filed." *Id.* at 61. But unlike those claims, which allege that the Board improperly decided an issue before it, an impermissible-factfinding claim alleges that the Board injected new findings into the proceedings, which "'gives rise to a new issue'" that is not "exhausted unless a motion to reconsider is filed with the [Board]." *Id.* at 60-61 (quoting *Wan*, 776 F. 3d at 57).

The Eleventh Circuit could draw a similar distinction between the reasoned-consideration argument at issue in *Indrawati* and the impermissible-factfinding claim at stake in this case when the question is squarely before it. Petitioner contends (Pet. 14) that the court's unpublished decision in *Ullah* v. *U.S. Attorney General*, 760 Fed. Appx. 922, 928-929 (2019) (per curiam), establishes otherwise, but such unpublished decisions do not even bind other panels in the Eleventh Circuit. See 11th Cir. R. 36-2. The published decisions that have considered the issue have concluded that Section 1252(d)(1) bars a court from reviewing an impermissible-factfinding claim

when the noncitizen failed to exhaust that challenge through a motion to reconsider. See p. 11, *supra*.[3]

3. Even if the Court wished to consider the question presented, this case would be a poor vehicle because there is no reason to believe that petitioner would prevail if the court of appeals were to reach the merits of his impermissible-factfinding claim. As the court already recognized, while the Board generally cannot find new facts, it is permitted to weigh the IJ's factual findings when making an ultimate determination about how the agency will apply a discretionary legal standard. Pet. App. 4a; see *Waldron* v. *Holder*, 688 F.3d 354, 361 (8th Cir. 2012). Petitioner invokes (Pet. 25-27) the preamble from the rulemaking that adopted standards for the Board's review of findings of fact determined by an IJ. The Board reviews such factual findings only for clear error. 8 C.F.R. 1003.1(d)(3)(i). But petitioner overlooks that the Board conducts de novo review of "questions of law, discretion, and judgment." 8 C.F.R. 1003.1(d)(3)(ii). Thus, the regulatory preamble from which petitioner

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[3] The Ninth Circuit has stated that Section 1252(d)(1) does not apply "where the challenged agency action was committed by the Board after briefing was completed, because the only remaining administrative remedies for such an action [a]re not available 'as of right.'" *Olivas-Motta* v. *Whitaker*, 910 F.3d 1271, 1280 (2018) (citation omitted), cert. denied, 140 S. Ct. 1105 (2020). But, like *Indrawati*, that case did not concern an impermissible-factfinding claim. Further, the court relied on a line of cases that pre-dated the statutory provisions granting noncitizens the right to move to reconsider or reopen their removal proceedings. See *Castillo-Villagra* v. *INS*, 972 F.2d 1017, 1023-1024 (9th Cir. 1992) (finding that "[t]here [was] no statutory provision for motions to reopen, so reopening was not available to petitioners 'as of right under the immigration laws'") (citation and emphases omitted). Petitioner makes no attempt to rely on the Ninth Circuit in supporting his claim of a circuit conflict. See Pet. 14.

quotes went on to explain that IJs "are better positioned to discern credibility and assess the facts with the witnesses before them; the Board is better positioned to review the decisions from the perspective of legal standards and the exercise of discretion." 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002). Accordingly, even though the Board reviews findings of fact only for clear error, "the 'discretion,' or judgment, exercised based on those findings of fact, and the weight accorded to individual factors, may be reviewed by the Board *de novo*." *Ibid.*

Here, the Board did exactly what it was supposed to do. It considered the same facts found by the IJ—including petitioner's conviction for terroristic threats, his history of drug use, his impregnation of a 13-year-old girl, and his poor conduct in immigration detention—but it determined that petitioner did not warrant a favorable exercise of discretion because it ultimately "balance[d]" those facts differently than did the IJ. Pet. App. 16a; see *id.* at 15a-16a; p. 5, *supra*.

Petitioner's arguments to the contrary are based on a misreading of the Board's decision. Petitioner contends that the Board "made new findings that the incident" in which he threatened his girlfriend's stepfather with a samurai sword "'had caused great pain, and that the family of the victim lived in fear of retaliation.'" Pet. 11 (quoting Pet. App. 15a). But the Board made no such findings. It observed—based on undisputed record evidence—that the "victim impact statement submitted by the victim's wife * * * stated that the respondent had caused great pain, and that the family of the victim lived in fear of retaliation." Pet. App. 15a. In recounting that statement, the Board was not making a finding of its own. And the IJ explained that she had

"carefully considered" all of the admitted evidence—including the records of petitioner's terroristic-threats conviction—"in its entirety regardless of whether specifically mentioned in the text of [her] decision." *Id.* at 22a. It was therefore well within the Board's power to consider the victim impact statement when it was performing its task of weighing the positive and negative factors informing whether petitioner's application warranted a favorable exercise of discretion. As a result, even if petitioner were to prevail before this Court on the question of exhaustion and have his case remanded to the court of appeals, he would be unlikely to prevail on his impermissible-factfinding challenge to the Board's discretionary decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
JESI J. CARLSON
Attorneys

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