No. 15-209

In the Supreme Court of the United States

ALICIA BRUMANT, PETITIONER

v.

LORETTTA LYNCH, U.S. ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over petitioner's unexhausted claim that the immigration judge (IJ) and Board of Immigration Appeals (Board) failed to inform her that she was potentially eligible for naturalization as a United States citizen.

2. Whether the court of appeals had jurisdiction over petitioner's unexhausted claim that the IJ and Board failed to inform her that she was potentially not an arriving alien, under *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012).

3. Whether petitioner is entitled to government-appointed counsel in immigration proceedings, under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-6) is not published in the *Federal Reporter* but is reprinted at 594 Fed. Appx. 273. The opinions of the Board of Immigration Appeals (Pet. App. 8-17) and the immigration judge (Pet. App. 18-24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2015. A petition for rehearing was denied on May 8, 2015 (Pet. App. 7). The petition for a writ of certiorari was filed on August 4, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes an alien who is ordered removed from the United States to seek judicial

review of the order of removal, but "only if * * * the alien has exhausted all administrative remedies available to the alien as of right," 8 U.S.C. 1252(d)(1). Here, the court of appeals concluded that petitioner had not exhausted various claims in proceedings before the immigration judge (IJ) and Board of Immigration Appeals (Board), and the court therefore held that it lacked jurisdiction over those claims. Pet. App. 3-4. The court also rejected petitioner's claim that she was deprived of an asserted constitutional right to government-appointed counsel in her immigration proceedings. *Id.* at 5-6.

1. Under the INA, administrative proceedings to determine whether an alien may remain in the United States typically begin before an IJ. 8 U.S.C. 1229a(a). In such a hearing, the IJ is required by regulation to inform the alien of her "apparent eligibility" for "any of the benefits enumerated in [Chapter V of Title 8, of the Code of Federal Regulations]," and to allow the alien "to make application [for such benefits] during the hearing, in accordance with the provisions of [8 C.F.R.] 1240.8(d)." 8 C.F.R. 1240.11(a)(2). Such benefits include cancellation of removal, adjustment of status, the creation of a record of lawful admission for permanent residence, certain waivers of inadmissibility, voluntary departure, asylum, withholding of removal, and the right to representation at no cost to the government. See, *e.g.*, 8 C.F.R. 1240.10(a)(1), 1240.11(a)(1)-(2), (b), and (c)(1)(i). After a hearing, the IJ issues a decision on the alien's removability and eligibility for or receipt of relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a).

The Board hears appeals from decisions of an IJ. 8 C.F.R. 1003.1(b), 1240.15. A party who appeals to the Board "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). If the Board affirms an IJ's order of removal or dismisses an appeal from such an order, the order becomes final. 8 U.S.C. 1101(a)(47)(B); 8 C.F.R. 1241.1(a). An alien is permitted to file one motion to reconsider, which must be filed within thirty days of a final order of removal. 8 U.S.C. 1229a(c)(6)(A), and (B); 8 C.F.R. 1003.2(b)(2).

An alien may seek judicial review of a final order of removal by filing a petition for review in the appropriate federal court of appeals. See 8 U.S.C. 1252(a)(1), (4), and (5). But the INA also provides that the court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). The courts of appeals have generally held that this exhaustion requirement is a constraint on their subject-matter jurisdiction to adjudicate petitions for review of removal orders.[1]

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[1] See, *e.g.*, *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Grullon* v. *Mukasey*, 509 F.3d 107, 112 (2d Cir. 2007), cert. denied, 555 U.S. 813 (2008); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Massis* v. *Mukasey*, 549 F.3d 631, 638-640 (4th Cir. 2008), cert. denied, 558 U.S. 1047 (2009); *Omari* v. *Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559-560 (6th Cir. 2004); *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582-583 (8th Cir. 2005); *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (9th Cir. 2004); *Molina* v. *Holder*, 763 F.3d 1259, 1262 (10th Cir. 2014); *Fernandez-Bernal* v. *Attorney Gen. of the U.S.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); see also *Arobelidze* v. *Holder*, 653 F.3d 513, 516-517 (7th Cir. 2011) (treating exhaustion requirement as

2. Petitioner is a native and citizen of Dominica. Pet. App. 12. On September 2, 1995, she adjusted her status to that of a lawful permanent resident of the United States. *Ibid.* In 2001, Petitioner pled guilty, in Texas court, to possession of a controlled substance in violation of Texas law. *Id.* at 13, 21. After attempting to reenter the United States following a subsequent trip abroad, the Department of Homeland Security initiated removal proceedings against petitioner based on her controlled-substance conviction. *Id.* at 11-12; see 8 U.S.C. 1182(a)(2)(A)(i)(II).

Petitioner conceded her removability as charged. Pet. App. 21. She first appeared in immigration court in Miami, Florida, in January 2010. *Id.* at 22. She was granted a change of venue to Houston, Texas, and eventually obtained a total of eight continuances. Administrative Record (A.R.) 243, 248, 257, 265, 271, 277, 282, 288-290, 295. The purpose of those continuances was to enable petitioner to secure legal counsel and to file a state habeas corpus action seeking to have her state conviction vacated pursuant to this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). Pet. App. 12-13, 22-23. That decision held that a lawyer representing an alien in connection with a guilty plea to a criminal offense has a duty to advise the alien about the risk of deportation arising from the conviction. *Padilla*, 559 U.S. at 374.

In February 2012, after more than two years of continued removal proceedings, the IJ denied petitioner's request for a further continuance. Pet.

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mandatory, but not jurisdictional); *Fonseca-Sanchez* v. *Gonzales*, 484 F.3d 439, 443-444 (7th Cir. 2007) (treating exhaustion requirement as jurisdictional).

App. 12-13. The IJ noted that the basis for the further continuance was to secure counsel and to seek to have her controlled substance conviction overturned under *Padilla*, and that those same objectives had been the basis of all of the continuances that petitioner had already been granted over the preceding years. *Ibid.* The IJ found no justification for any further delay in light of the fact that "no tangible steps have been made towards filling the *Padilla*-type action." *Id.* at 23. The IJ granted petitioner's alternative request for voluntary departure. *Id.* at 23-24.

3. Petitioner appealed the IJ's denial of her request for a further continuance to the Board. In March 2012, petitioner also finally filed an application in Texas state court for a writ of habeas corpus seeking to overturn her 2001 controlled-substance conviction under *Padilla*. Pet. App. 12. The state court denied that petition in July 2013. Pet. 4 n.1.

In November 2013, the Board dismissed petitioner's appeal of the IJ's removal order. Pet. App. 12. The Board explained that the IJ had reasonably concluded that there was no "good cause" for an additional continuance. *Id.* at 13. It emphasized the multiple continuances that the IJ had previously granted, petitioner's delay in filing the habeas application, and the fact that her Texas conviction remained final, for immigration purposes, "unless and until it is overturned by a criminal court." *Id.* at 13-15.

4. Petitioner filed with the Board a motion to reconsider its dismissal of her appeal. In that motion, petitioner reasserted her claim that the IJ had abused his discretion in denying her request for a further continuance. Pet. App. 9. She also argued, for the first time, that (1) she had been deprived of an assert-

ed constitutional right to government-appointed counsel, and (2) she should not be removed due to her potential eligibility for naturalization as a United States citizen. *Id.* at 9-10.

In March 2014, the Board denied petitioner's motion for reconsideration. Pet. App. 8-11. The Board noted that most of petitioner's arguments had already been considered—and rejected—in its original decision dismissing her appeal. *Id.* at 9. It also pointed out that petitioner had submitted no evidence showing that her state-court effort to overturn her 2001 conviction had been successful, and that the conviction accordingly remained final. *Id.* at 11.

As to petitioner's new claims regarding the right to government-appointed counsel and potential eligibility for naturalization, the Board held that "these arguments are not properly raised for the first time in a motion to reconsider." Pet. App. 9. The Board nonetheless went on to explain that, on the merits, petitioner was incorrect to assert that this Court's decision in *Padilla* guaranteed her a right to government-appointed counsel in removal proceedings. *Id.* at 10. The Board further noted that petitioner had cited no legal authority supporting her eligibility for United States citizenship, and it stated that "the Board has no jurisdiction over applications for naturalization" and that it could "see no reason to terminate [the removal proceedings] on this basis as [petitioner's] conviction remains final for immigration purposes." *Id.* at 10-11.

5. Petitioner filed timely petitions for review of the Board's decisions dismissing her appeal and denying reconsideration. Pet. App. 3. As relevant here, she argued that (1) the IJ had violated her constitutional due process rights and 8 C.F.R. 1240.11(a)(2) by fail-

ing to inform her that she qualified for naturalization; (2) the IJ and Board had likewise failed to inform her that she might not have the status of an arriving alien under this Court's decision in *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012); and (3) the Board erred in denying the existence of a right under *Padilla* to government-appointed counsel in her removal proceedings. Pet. Supp. C.A. Br. 11-19.

The court of appeals dismissed the petitions for review. Pet. App. 6. The court explained that petitioner had failed to exhaust her claim based on the IJ's alleged failure to inform her of her potential eligibility for naturalization, both in her initial appeal to the Board and in her motion to reconsider. *Id.* at 3. It noted that petitioner's claim "raises a procedural error that could have been corrected by the [Board]." *Ibid.* The court concluded that petitioner's failure to exhaust her administrative remedies as to those claims deprived the court of jurisdiction to consider the claims on the merits under 8 U.S.C. 1252(d)(2). *Ibid.* The court also dismissed her *Vartelas* argument for lack of jurisdiction based on her failure to exhaust that argument before the Board. *Id.* at 4.

Finally, the court of appeals rejected—on the merits—petitioner's assertion of a constitutional right to government-appointed counsel, in immigration proceedings, under *Padilla*. Pet. App. 5-6. In doing so, the court cited "longstanding authority" holding that there is no Sixth Amendment right to counsel in immigration proceedings. *Id.* at 6 (citing, *e.g.*, *Mai* v. *Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006). The court also concluded that petitioner did not suffer a Fifth Amendment due process violation based on the absence of counsel because her proceedings were fun-

damentally fair, noting that "[t]he IJ granted [Petitioner] numerous continuances to obtain counsel." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-17) that the court of appeals erred in concluding that it lacked jurisdiction to consider her arguments based on the IJ and Board's failures to inform her of her potential eligibility for naturalization and of the potential applicability of *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012), to her case. She further contends (Pet. 18-24) that the court erred in rejecting her contention that she had a right to government-appointed counsel in her immigration proceedings under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). The court correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review of the unpublished, nonprecedential decision below is therefore unwarranted.

1. Petitioner contends (Pet. 9-17) that the court of appeals erred in holding that it lacked jurisdiction to consider her argument that the IJ violated her due process rights and 8 C.F.R. 1240.11(a)(2) when he failed to inform her of her potential eligibility for naturalization as a United States citizen. That argument lacks merit, and petitioner is wrong to assert that the decision below creates a circuit conflict.

a. Section 1252(d)(1) is clear and unambiguous. It states that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). By its plain terms, Section 1252(d)(1) expressly limits the court's authority to review removal orders. Because Congress has "clear-

ly stated" that the exhaustion requirement "cabin[s]" the "power" of the appellate courts, *United States* v. *Wong*, 135 S. Ct. 1625, 1632 (2015) (brackets and quotation marks omitted), it qualifies as jurisdictional. See note 1, *supra* (citing circuit cases).

Petitioner does not deny that Section 1252(d)(1)'s exhaustion requirement is jurisdictional. Nor does she deny that she failed to exhaust her claim that the IJ erroneously failed to inform her of her potential eligibility for naturalization. Instead, she argues (Pet. 9-10) that the exhaustion requirement does not apply (1) to constitutional claims, or (2) to situations in which the agency fails to comply with a regulatory obligation to inform an alien of a particular avenue of relief under Section 1240.11(a)(2). Neither argument has merit.

First, it is settled law that Section 1252(d)(1)'s exhaustion requirement applies to claims alleging violations of procedural due process that the Board could have corrected if the alien had raised the claim at the appropriate time.[2] Petitioner ignores the uniform conclusion of the courts of appeals to that effect. Instead, she cites (Pet. 10) this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for the

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[2] See, *e.g.*, *Indrawati* v. *U.S. Atty. Gen.*, 779 F.3d 1284, 1298-1299 (11th Cir. 2015); *Gaye* v. *Lynch*, 788 F.3d 519, 528 (6th Cir. 2015); *Xing Yang Yang* v. *Holder*, 770 F.3d 294, 299 (4th Cir. 2014), as amended (Nov. 5, 2014); *Lima* v. *Holder*, 758 F.3d 72, 81-82 (1st Cir. 2014); *Sola* v. *Holder*, 720 F.3d 1134, 1135-1136 (9th Cir. 2013); *Mambwe* v. *Holder*, 572 F.3d 540, 551 (8th Cir. 2009); *Ghaffar* v. *Mukasey*, 551 F.3d 651, 655 (7th Cir. 2008); *Severino* v. *Mukasey*, 549 F.3d 79, 83 (2d Cir. 2008); *Vicente-Elias* v. *Mukasey*, 532 F.3d 1086, 1094 (10th Cir. 2008); *James* v. *Gonzales*, 464 F.3d 505, 513 n.46 (5th Cir. 2006); *Bonhometre* v. *Gonzales*, 414 F.3d 442, 448 (3d Cir. 2005), cert. denied, 546 U.S. 1184 (2006).

sweeping proposition that "[t]he doctrine of exhaustion does not apply to constitutional challenges." But this Court made no such broad statement in *Mathews*. Rather, the Court addressed only a waivable (*i.e.*, non-jurisdictional) exhaustion requirement under the Social Security Act, see *id.* at 328-330 (discussing 42 U.S.C. 405(g)), and the case involved a collateral claim (the right to a predeprivation hearing) that could have been lost if judicial review had been postponed, see *id.* at 330-332. The Court's analysis of the Social Security Act's exhaustion requirement in those particular circumstances has no direct bearing on the proper interpretation or application of Section 1252(d)(1), the statutory provision at issue here.

Second, petitioner is wrong in contending (Pet. 9) that Section 1252(d)(1)'s exhaustion requirement does not apply when the IJ fails to notify the alien of the potential avenues of relief identified in Section 1240.11(a)(2). Section 1252(d)(1)'s text does not create any such exception to the exhaustion requirement. Moreover, there is no reason why such a procedural error could not be corrected on appeal to the Board. Given that the exhaustion requirement applies to claims that the IJ violated an alien's procedural due process rights under the Constitution, it would be anomalous to create an exception to the exhaustion requirements for claims that merely allege a violation of Section 1240.11(a)(2).

Even if petitioner were correct that Section 1252(d)(1)'s exhaustion requirement contains an implicit exemption for claims alleging violations of Section 1240.11(a)(2), that exemption would not help her here. Petitioner argues that the IJ violated Section 1240.11(a)(2) by failing to notify her of her potential

eligibility for naturalization as a United States citizen. But naturalization is not among the "benefits enumerated in [Chapter V of Title 8 of the Code of Federal Regulations]," and it cannot be sought or obtained "during the hearing [before the IJ], in accordance with the provisions of [8 C.F.R.] 1240.8(d)." 8 C.F.R. 1240.11(a)(2). Rather, naturalization is governed by Chapter I of Title 8 of the Code of Federal Regulation, see 8 C.F.R. 301.1-392.4, and it may only be obtained by filing an application with the United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS), see 8 C.F.R. 310.2. As the court of appeals correctly explained, neither the IJ nor the Board has authority to adjudicate any claim that petitioner may have had for naturalization. Pet. App. 4-5. For those reasons, the IJ did not violate Section 1240.11(a)(2) by failing to inform her of any potential eligibility for naturalization. Petitioner thus was subject to Section 1252(d)(1)'s exhaustion requirement even if—as she asserts—that exhaustion requirement generally does not apply to Section 1240.11(a)(2) notification errors.

b. Petitioner asserts (Pet. 7-9, 11, 13) that the court of appeals' reliance on Section 1252(d)(1) to foreclose jurisdiction over her claim that the IJ erred in failing to notify her of potential eligibility for naturalization conflicts with various decisions of the Second, Fourth, Seventh, and Ninth Circuits. She is mistaken. None of the cited decisions held that Section 1252(d)(1)'s exhaustion requirement does not apply to claims alleging that the IJ erred by failing to comply with Section 1240.11(a)(2).

In *United States* v. *Sosa*, 387 F.3d 131, 136 (2d Cir. 2004), an alien sought to collaterally attack the validi-

ty of a removal order that formed the basis of his subsequent criminal conviction for illegally reentering the United States following removal, in violation of 8 U.S.C. 1326. Section 1326 allows such collateral attacks, but only in circumstances where "the alien exhausted any administrative remedies that may have been available to seek relief against the order." 8 U.S.C. 1326(d)(1). The court recognized a narrow exception to Section 1326(d)(1)'s exhaustion requirement in circumstances where the alien's waiver of his right to judicial review of the underlying removal order was not knowing or intelligent, including in circumstances where the IJ had failed to inform the alien of his right to seek discretionary relief from deportation. *Sosa*, 387 F.3d at 136. Notably, however, the Court's statutory analysis turned on its view that Section 1326(d)(1) was intended "as a response to, and codification of," this Court's holding in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987). *Sosa*, 387 F.3d at 136. As the *Sosa* court noted, *Mendoza-Lopez* held that "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Ibid.* (quoting *Mendoza-Lopez*, 481 U.S. at 838).

There is no conflict between *Sosa* and the court of appeals' decision in this case. The Second Circuit's holding and rationale applied only to the exhaustion requirement set forth in Section 1326(d)(1). Unlike that criminal provision, Section 1252(d)(1) was not intended to codify *Mendoza-Lopez*, and it would not prevent petitioner from collaterally challenging the

validity of her removal order in a circumstance where that order is a necessary element of a criminal offense. The Second Circuit itself emphasized that *Sosa*'s holding was limited to Section 1326(d)(1), noting that the general rule is that statutory exhaustion requirements are "not subject to exceptions" and that Section 1326(d)(1) departs from that general rule because Congress intended to codify *Mendoza-Lopez*. *Sosa*, 387 F.3d at 136.

Nor is there any conflict between the court of appeals decision here and the Fourth Circuit's decision in *Barnes* v. *Holder*, 625 F.3d 801 (2010). See Pet. 11, 13. In that case, the Fourth Circuit addressed 8 C.F.R. 1239.2(f), which authorizes an IJ to terminate removal proceedings "to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." The court upheld the Board's longstanding interpretation of Section 1239.2(f) as applying "only * * * if the alien presents an affirmative communication from [DHS] confirming that he is prima facie eligible for naturalization." *Barnes*, 625 F.3d at 802; see *id.* at 803-807 (deferring to Board's analysis in *In re Victor Acosta Hidalgo*, 24 I. & N. Dec. 103 (B.I.A. 2007), and noting uniform agreement of all other circuits to have addressed the issue).

The decision below does not conflict with *Barnes* or violate Section 1239.2(f). *Barnes* establishes that—if petitioner had presented an affirmative communication from DHS indicating that she was prima facie eligible for naturalization—the IJ would have had authority to terminate the removal proceedings under

Section 1239.2(f). 625 F.3d at 802. But DHS made no such communication in this case, and therefore Section 1239.2(f) is not implicated. Nothing in *Barnes* supports petitioner's contention that Section 1252(d)(1)'s exhaustion requirement does not apply to claims alleging that the IJ failed to comply with the notification requirements set forth in Section 1240.11(a)(2).

Petitioner's reliance (Pet. 7, 9) on the Seventh Circuit's decisions in *Kossov* v. *INS*, 132 F.3d 405 (1998), and *Asani* v. *INS*, 154 F.3d 719 (1998), is also misplaced. In *Kossov*, two aliens were ordered to be deported to Russia despite the fact that their asylum application and removal proceedings concerned deportation to Latvia. 132 F.3d at 408. The court of appeals held that their failure to appeal to the Board the IJ's determination that they should be deported to Russia did not bar them from raising that issue on judicial review. *Id.* at 407-408. The court acknowledged the general rule requiring exhaustion, but found that in "the peculiar circumstances presented [t]here"—in which the aliens, the IJ, and the Board all manifested confusion over the nature of the asylum request—applying the exhaustion doctrine would "severely prejudice[]" the aliens' rights to seek asylum and constitute a "fundamental failure of due process." *Ibid.*

To be sure, the *Kossov* court did note that the aliens had not been informed that they had the right to seek asylum in the United States and to introduce evidence to challenge their deportation to any country specified as a possible deportation destination—including, in that case, Russia—as required by 8 C.F.R. 242.17(c)(2) (1991). 132 F.3d at 408. But it

did not announce a categorical rule that failure to comply with such regulatory requirement would always constitute a similar "fundamental failure of due process" and thereby excuse an alien's failure to exhaust the claim. *Ibid.* On the contrary, the court emphasized that "[w]ere it not for the peculiar circumstances presented here," the exhaustion requirement would bar jurisdiction over the aliens' claim. *Ibid.* The *Kossov* rationale does not apply to petitioner's claim here, which did not involve the same sort of widespread confusion that was at issue in that case.

Nor does the decision below conflict with *Asani*. There, the Seventh Circuit remanded the case—at the suggestion of the Immigration and Naturalization Service—to allow the alien to file a motion for reconsideration seeking suspension of deportation. 154 F.3d at 727-729. In doing so, however, the court expressly declined to reach the question presented here, *i.e.*, whether the exhaustion requirement applies to an alien's claim that the IJ violated a regulatory duty to inform him of his right to seek relief from deportation. *Id.* at 727 ("We need not reach the question of whether Asani's failure to raise the IJ's error before the [Board] may have prevented us, by virtue of the doctrine of exhaustion of administrative remedies, from considering the issue * * * ."); see Pet. i. There is accordingly no conflict between *Asani* and the court of appeals' decision in this case.

Finally, petitioner invokes the Ninth Circuit's decision in *Duran* v. *INS*, 756 F.2d 1338 (1985). But the alien in *Duran* filed a motion to reopen with the IJ that raised the claim that she sought to advance in her petition for review. The court of appeals did not address the exhaustion requirement, perhaps because

the alien had raised the claim (albeit in the context of her motion to reopen) with both the IJ and the Board. See *id.* at 1341-1342. Petitioner is mistaken to assert (Pet. 7, 9) that *Duran* directly implicates exhaustion and conflicts with the decision below.

2. Petitioner also contends (Pet. 10, 14-17) that the court of appeals erred in holding that it lacked jurisdiction to consider her argument that the IJ and Board violated her due process rights and 8 C.F.R. 1240.11(a)(2) by failing to inform her of a "reasonable possibility" that she might not have been properly classified as an arriving alien under this Court's decision in *Vartelas*, *supra*. That argument fails for essentially the same reasons noted above. Section 1252(d)(1) contains no exception to the exhaustion requirement that applies in those circumstances. See pp. 8-11, *supra*.

Petitioner's argument also fails on the merits. Section 1240.11(a)(2) requires an IJ to inform an alien of his or her "apparent eligibility" for "any of the benefits enumerated in [Chapter V of Title 8, of the Code of Federal Regulations]." It does not require the IJ to advise the alien of any and all potential legal arguments that may help her defend against a charge of removability, and petitioner offers no reason why it covers the *Vartelas* argument that she sought to raise for the first time in the court of appeals. Moreover, as petitioner herself acknowledges (Pet. 10 n.7, 14), *Vartelas* was not decided until March 2012—which was *after* the IJ issued the removal order. Pet. App. 21. The IJ's failure to anticipate this Court's subsequent decision in *Vartelas* did not violate Section 1240.11(a)(2). And although petitioner also faults the

Board for not advising her of *Vartelas*, Section 1240.11(a)(2) by its terms applies only to the IJ.

In any event, *Vartelas* does not support petitioner's challenge to removal. That case addressed a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. 1101(a)(13)(C)(v), ensuring that a returning lawful permanent resident of the United States may not be admitted into the country if he has committed one of the criminal offenses identified in 8 U.S.C. 1182(a)(2). 132 S. Ct. at 1483-1484. This Court held that the provision was not retroactive, and thus was inapplicable when the criminal offense at issue was committed prior to IIRIRA's enactment in 1996. *Id.* at 1483-1492. Here, petitioner was convicted of possessing a controlled substance in 2001, five years after IIRIRA became law. Her reliance on *Vartelas*'s retroactivity analysis is therefore misplaced.

3. Petitioner argues (Pet. i, 18-24) that the IJ and Board violated an asserted constitutional right to government-appointed counsel in her immigration proceedings under the Fifth and Sixth Amendments, as well as this Court's decision in *Padilla*, *supra*. She is mistaken, and the court of appeals' rejection of her argument does not conflict with any decision of this Court or of any other court of appeals.

The Sixth Amendment right to counsel applies only in "criminal prosecutions." U.S. Const. Amend VI. Immigration proceedings are civil, not criminal, in nature. See, *e.g.*, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country."). It follows that aliens have no Sixth Amendment right to government-appointed counsel in

immigration proceedings. Nor does any such right flow from the Fifth Amendment's general guarantee of due process. The courts of appeals have long recognized that there is no such constitutional right under either the Fifth or the Sixth Amendment.[3]

Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by the counsel of his choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654. There was no violation of that statutory right here. The IJ granted petitioner multiple continuances in which to obtain counsel, stretching over the course of nearly two years. Pet. App. 6. Petitioner does not allege any violation of her statutory right to counsel. See Pet. i (raising only a constitutional claim); see also Pet. App. 6 (noting that proceedings before the IJ were not fundamentally unfair, in light of the IJ's repeated allowances of time for petitioner to obtain counsel).

Petitioner is wrong to suggest that this Court's decision in *Padilla* supports her assertion of a constitutional right to government-appointed counsel in immigration proceedings. *Padilla* held that when a criminal defendant is an alien, a criminal defense counsel's duty of effective assistance in connection

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[3] See generally, *e.g.*, Pet. App. 6 (citing cases); *Leslie* v. *Attorney Gen. of the U.S.*, 611 F.3d 171, 181 (3d Cir. 2010); *Guerrero-Santana* v. *Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007); *Romero* v. *INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Dakane* v. *U.S. Atty. Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2004); *Al Khouri* v. *Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004); *Gandarillas–Zambrana* v. *Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir.), cert. denied, 516 U.S. 806 (1995); *Castaneda–Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993); *Michelson* v. *INS*, 897 F.2d 465, 467-68 (10th Cir. 1990).

with plea proceedings includes the duty to "inform her client whether his plea carries a risk of deportation." 559 U.S. at 374. Failing to do so, or providing professionally unreasonable advice on the removal consequences of the plea, may constitute deficient performance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), thereby satisfying the first prong of the ineffective-assistance inquiry. See 559 U.S. at 366-374. But *Padilla* did not purport to overrule the longstanding rule that immigration proceedings are civil actions, and it does not support petitioner's argument that such proceedings qualify as "criminal prosecutions" subject to the Sixth Amendment. See U.S. Const. Amend. VI. The court of appeals correctly rejected petitioner's *Padilla* claim, Pet. App. 6, and it does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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