No. 21-1335

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

JOSE PEDRO SANTOS FARIA BARROS

Petitioner

v.

MERRICK B. GARLAND, Attorney General

Respondent

# BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

ON THE PETITION FOR REVIEW OF
THE ORDER FROM THE BOARD OF IMMIGRATION APPEALS

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## CORPORATE DISCLOSURE STATEMENT

*Amici curiae* the **American Civil Liberties Union of New Hampshire** is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the amici curiae.

*/s/ SangYeob Kim*
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## RULE 29 STATEMENTS

Pursuant to Rule 29(a)(2), counsel for *amici curiae* certify that Petitioner has consented to the filing of this brief. The government takes no position on the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

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## INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union of New Hampshire (ACLU-NH) is the New Hampshire affiliate of the American Civil Liberties Union (ACLU)—a nationwide, nonpartisan, public-interest organization with over 1.5 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH, through its New Hampshire Immigrants' Rights Project, engages in litigation by direct representation and as *amicus curiae* to encourage the protection of immigrants' rights guaranteed under the Immigration and Nationality Act and United States Constitution. In this role, the ACLU-NH has participated in cases concerning statutory and constitutional rights for noncitizens. *See, e.g., Hernandez Lara v. Barr*, 962 F.3d 45 (1st Cir. 2020); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021); *Perez-Trujillo v. Garland*, 3 F.4th 10 (1st Cir. 2021); *Compere v. Nielsen*, 358 F. Supp. 3d 170 (D.N.H. 2019).

On January 24, 2022, this Court issued an order directing the parties to be prepared to discuss at oral argument the question of how *Meng Hua Wan v. Holder*, 776 F.3d 52 (1st Cir. 2015) affects Petitioner's arguments. *See* Order, No. 21-1335 (1st Cir. Jan. 24, 2022). In *Meng Hua Wan*, this Court held that, "when a[] [noncitizen] complains of impermissible factfinding by the BIA, that claim is unexhausted unless and until the [noncitizen] files a timely motion asking the BIA to reconsider its actions." *Id.* at 57. *Amicus* has an interest in this issue. *Amicus*,

on behalf of its client Adekunle Oluwabumwi Adeyanju, has raised a similar argument in another petition for review pending before this Court. *See* Petitioner's Opening Brief, *Adeyanju v. Garland*, Nos. 21-1045 & 21-1616 (1st Cir. Nov. 10, 2021) at 16-17, 22-26.

## SUMMARY OF ARGUMENT

*Amicus* argues that *Meng Hua Wan* is not applicable in this case.[1] The Board of Immigration Appeals (BIA) was squarely presented with and meaningfully considered Petitioner and the Department of Homeland Security's point that the BIA's *de novo* review authority is only available on issues *other than factual findings made by the Immigration Judge*. Because the BIA was on notice of the regulatory requirement, no motion to reconsider was necessary to exhaust this issue.

Further, Petitioner's claim that the BIA engaged in impermissible fact findings was not a new issue before the BIA. Unlike *Meng Hua Wan*, the instant case concerns whether the BIA overturned the IJ's ruling after failing to accept the IJ's factual findings as true. It is undisputed that the regulation does not permit the BIA to engage in *de novo* fact findings to reverse the IJ's ultimate discretionary conclusion.

[1] *Amicus* takes *no position* on the merits of Petitioner's arguments raised in his opening brief.

Thus, the Court should not "consider *Meng Hua Wan* a barrier to reviewing" Petitioner's argument. *Renaut v. Lynch*, 791 F.3d 163, 169 n.4 (1st Cir. 2015).

## ARGUMENT

This Court can address Petitioner's claim that the BIA engaged in impermissible fact finding, as this claim has been exhausted.

Whether administrative remedies have been exhausted is jurisdictional. *See Mazariegos-Paiz v. Holder*, 734 F.3d 57, 62 (1st Cir. 2013). Where an issue was raised before the BIA—even in a perfunctory manner—the exhaustion requirement is met. *See Singh v. Gonzales*, 413 F.3d 156, 160 n.3 (1st Cir. 2005) (rejecting the government's argument that Singh failed to exhaust the administrative remedy because she raised the challenges before the BIA in a perfunctory manner); *Twum v. Barr*, 930 F.3d 10, 22 n.16 (1st Cir. 2019) (finding that Twum satisfied the exhaustion requirement because her past persecution "argument was fairly placed before the BIA" despite no explicit use of "past persecution"). For the purpose of "determining whether an appeal of a particular issue from the BIA's decision has been preserved, [the Court] read[s] the record 'in the light most favorable to petitioner.'" *Xu v. Gonzales*, 424 F.3d 45, 48-49 (1st Cir. 2005).

This Court previously held that, "when a[] [noncitizen] complains of impermissible factfinding by the BIA, that claim is unexhausted unless and until the [noncitizen] files a timely motion asking the BIA to reconsider its actions."

*Meng Hua Wan v. Holder*, 776 F.3d 52, 57 (1st Cir. 2015). In support of this conclusion, *Meng Hua Wan* relied on the Fifth Circuit's decision in *Omari v. Holder*, 562 F.3d 314, 320 (5th Cir. 2009), which held the same. *See Meng Hua Wan*, 776 F.3d at 57; *accord Lasu v. Barr*, 970 F.3d 960, 965 (8th Cir. 2020); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007); *but see Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 640-42 (8th Cir. 2007); *Waldron v. Holder*, 688 F.3d 354, 358, 360-61 (8th Cir. 2012); *Guerra v. Barr*, 974 F.3d 909, 911, 913-16 (9th Cir. 2020); *Padmore v. Holder*, 609 F.3d 62, 65-69 (2d Cir. 2010); *Estrada-Martinez v. Lynch*, 809 F.3d 886, 891, 895-97 (7th Cir. 2015); *Crespin-Valladares v. Holder*, 632 F.3d 117, 121-22, 127-28 (4th Cir. 2011).

Exhaustion has been satisfied here. No motion to reconsider was necessary in this case because—unlike *Meng Hua Wan*—Petitioner and DHS had already squarely put the BIA on notice that the BIA had *de novo* review authority "for all questions of law, discretion, and judgment and all other issues in appeals from decision of Immigration Judges" other than the Immigration Judge's (IJ) fact findings. Pet's BIA Br. at 2 (citing 8 C.F.R. § 1003.1(d)(3)(iii)); DHS BIA Br. at 2 (citing 8 C.F.R. § 1003.1(d)(3)(ii)). By citing the governing regulation 8 C.F.R. § 1003.1(d)(3), the BIA was on sufficient notice of the scope of its authority. Indeed, it appears that Petitioner mistakenly cited 8 C.F.R. § 1003.1(d)(3)(iii) instead of 8 C.F.R. § 1003.1(d)(3)(ii). However, this citation does not change the

fact that the BIA was on notice that it could not engage in fact findings *de novo* under the same regulation. *See* 8 C.F.R. § 1003.1(d)(3)(i). Further, DHS correctly cited 8 C.F.R. § 1003.1(d)(3)(ii). *See* DHS BIA Br. at 2. Indeed, the BIA was well aware of the limited authority it had by citing 8 C.F.R. § 1003.1(d)(3)(ii). BIA Decision at 1.

Because *Meng Hua Wan* does not indicate that the petitioner there put the BIA on sufficient notice that it could not engage in impermissible fact finding, *Meng Hua Wan* is distinguishable from the instant case where the BIA was explicitly on notice of the governing regulation. Thus, the filing of a motion to reconsider was unnecessary for exhaustion purposes.

Further, the question of whether the BIA could engage in *de novo* fact finding was not a new issue that Petitioner had to separately exhaust by filing a motion to reconsider. The critical difference between *Meng Hua Wan* and the instant case is the context. In *Meng Hua Wan*, the petitioner filed a motion to reopen with the agency in which the petitioner later alleged at the petition for review stage that the BIA engaged in impermissible fact findings. In contrast, the BIA, in this case, reversed the IJ's factual findings *de novo* (if Petitioner's contention is correct) in overturning the IJ's ultimate discretionary conclusion. Thus, the fact that the BIA must comply with its own regulation in reversing the IJ's conclusion was not "a new issue." *See Renaut*, 791 F.3d at 169 n.4; *see also*

*Indrawati v. United States AG*, 779 F.3d 1284, 1299 (11th Cir. 2015); *Ullah v. Holder*, 760 F. App'x 922, 929 (11th Cir. 2019) (unpublished) (applying *Indrawati* to the BIA's improper fact-finding claim). It is also axiomatic that motions to reconsider should not be used to rehash legal arguments previously made. *See, e.g., Lane v. Landry*, No. 2:15-cv-036-NT, 2015 U.S. Dist. LEXIS 130826, at *1 (D. Me. Sep. 29, 2015) ("Without employing these [motion to reconsider] standards, the Respondent merely rehashes arguments it previously made to me. The motion to reconsider is, therefore, DENIED.") (explaining First Circuit standard for motions to reconsider).

Indeed, the Fifth Circuit later narrowed the scope of *Omari* in *Dale v. Holder*, 610 F.3d 294 (5th Cir. 2010). *Dale* ultimately held that "no motion to reconsider is necessary" as long as the petitioner makes "some concrete statement before the BIA to which [he] could reasonably tie [his] claims before th[e] court." *Dale*, 610 F.3d at 299 (quoting *Omari*, 562 F.3d at 322). Similarly, Judge Jane Kelly from the Eight Circuit Court of Appeals wrote a concurring opinion in *Mencia-Medina v. Garland*, 6 F.4th 846 (8th Cir. 2021), explaining that her "understanding [of *Lasu* is] that [*Lasu*] holding is limited to a noncitizen's claim, raised for the first time in a petition for review to th[e] court, that the [BIA] engaged in impermissible factfinding." *Id*. at 850.

Recently, this Court also confronted a similar circumstance. *See Perez-*

*Trujillo v. Garland*, 3 F.4th 10 (1st Cir. 2021). In *Perez-Trujillo*, the Court addressed the petitioner's contention that the BIA failed to follow its own precedent—*Matter of Arai*, 13 I. & N. Dec. 494 (BIA 2019)—when it did not undertake an individualized hardship assessment "in reversing the immigration judge's grant of his application for adjustment of status" without requiring a motion to reconsider. *Id*. at 22. Surely, the presented question was not a new issue before the BIA. Similar to *Perez-Trujillo*, the question of whether the BIA engaged in impermissible fact finding, in this case, was not a new issue before the BIA. Thus, no motion to reconsider was necessary for this Court to entertain Petitioner's claims.

## CONCLUSION

For the foregoing reasons, the Court should entertain Petitioner's claims raised in the opening brief.

Dated: January 26, 2022

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 1,577 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

*/s/ SangYeob Kim*
SangYeob Kim (No. 1183553)

Dated: January 26, 2022

## CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on January 26, 2022.

*/s/ SangYeob Kim*
SangYeob Kim (No. 1183553)

Dated: January 26, 2022