NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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No. 18-4033

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AZAL MEHDI SALEH,

Petitioner,

v.

WILLIAM P. BARR, Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BEFORE: CLAY, STRANCH, and MURPHY, Circuit Judges.

CLAY, Circuit Judge. Azal Mehdi Saleh petitions this Court to review the Board of Immigration Appeals' orders finding that she is deportable due to an aggravated felony conviction and denying her application for deferral of removal under the Convention Against Torture. *See* 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii); 8 C.F.R. §§ 1208.17, 1208.18. Petitioner contends that she did not commit the crime of aggravated felony sexual abuse of a minor, permitting her deportation under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), and that the Board of Immigration Appeals violated her due process rights.

For the reasons set forth below, we **DISMISS IN PART** and **DENY IN PART** this petition for review.

BACKGROUND

Factual Background

Petitioner is a native and citizen of Iraq, who was admitted to the United States in 2010 as a refugee under 8 U.S.C. § 1157(c). In 2011, her status was adjusted to that of a lawful permanent resident.

On April 28, 2016, Petitioner was convicted of one count of Criminal Sexual Conduct in the Fourth Degree, Victim Between Ages 13-16, in violation of Mich. Comp. Laws § 750.520e(1)(a), pursuant to a plea of *nolo contendere*. Shortly thereafter, Respondent began removal proceedings against Petitioner pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of aggravated felony sexual abuse of a minor.

Petitioner's alleged history in Iraq was traumatic. In her testimony and a declaration before the Immigration Judge ("IJ"), Petitioner testified to the following facts. As a child growing up in Iraq, she was seriously physically abused by her parents, and eventually was either abandoned or removed from her home. When living in either a shelter or a rehabilitation center thereafter, she met an employee who forced her into prostitution. She was then repeatedly raped and physically abused. After escaping the employee's control, Petitioner sought assistance from law enforcement. She was held in jail by Iraqi authorities, though not harmed. She was subsequently tried in court for an unidentified offense,[1] but was not sentenced. Petitioner then obtained refugee status and came to the United States in 2010, where she was placed with a foster family in Michigan.

In the United States, Petitioner began attending church, converted from Islam to Christianity, and was baptized. While living with her foster family, Petitioner was again raped.

[1] Evidence in the Board of Immigration Appeals record does not make clear what offense Petitioner was alleged to have committed. We are therefore unable to confirm if she was tried based on her forced prostitution.

She was later forced back into prostitution, and she became pregnant when her trafficker forced her to have sex with his brother. Petitioner gave birth to her daughter after escaping her trafficker's control.

Petitioner later moved in with her case worker, Debbie. While there, Debbie's granddaughter accused Petitioner of sexual assault, and Debbie reported her. Though Petitioner contests the truth of these allegations, she pleaded guilty to Criminal Sexual Conduct in the Fourth Degree, Victim Between Ages 13-16, the offense that prompted the instant removal proceedings. *See* Mich. Comp. Laws § 750.520e(1)(a). Petitioner suggests she did so because her attorney told her that her offense would be viewed as a misdemeanor and there would be no consequences.

Procedural History

In her removal proceedings, Petitioner argued, *inter alia*, that her conviction was not aggravated felony "sexual abuse of a minor" based on which she was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and that she was entitled to protection from removal under the Convention Against Torture ("CAT"), pursuant to 8 C.F.R. § 1208.17(a). Petitioner contended that she would be tortured upon removal to Iraq because of her identity as a female, Christian, Westernized, single mother without family support and with a history of forced prostitution and a criminal record that identifies her as having engaged in homosexual activity. In support of her claims, Petitioner presented a plethora of documentary evidence, her own testimony, and the testimony of witness Rebecca McDonald, the president of Women at Risk, International, an organization in which Petitioner took part. Petitioner presented Ms. McDonald as an expert witness on human trafficking, but the IJ permitted McDonald's testimony only as a lay witness, finding Petitioner had not claimed she would again be subject to human trafficking and that expert testimony on that point was not required. On November 22, 2016, the IJ denied Petitioner relief and ordered her removal to Iraq.

Petitioner then appealed to the Board of Immigration Appeals ("BIA"). On May 8, 2017, the BIA affirmed the IJ's finding that Petitioner's crime was an aggravated felony and remanded Petitioner's case to the IJ for additional findings of fact as to the likelihood of Petitioner's torture by the Iraqi government, noting that the IJ had addressed only Petitioner's evidence suggesting she would be tortured by ISIS. The parties submitted additional documentary evidence on that issue, and the IJ held an evidentiary hearing at which Ms. McDonald was permitted to testify as an expert. The IJ again denied relief in an order dated April 3, 2018. The Board affirmed that decision in an order dated September 27, 2018. Petitioner then filed timely motions to reconsider and reopen the BIA's decision, which the BIA denied. Petitioner did not seek this Court's review of those denials. In this timely petition for review, Petitioner seeks review of the BIA's May 8, 2017 and September 27, 2018 orders.

DISCUSSION

I. Jurisdiction

The Immigration and Nationality Act ("INA") provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission [to the United States] is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). It further provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii)," except insofar as a petition for review "filed with an appropriate court of appeals" raises "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(C)–(D). A BIA denial of deferral of removal is a final order of removal. *Ventura-Reyes v. Lynch*, 797 F.3d 348, 358 (6th Cir. 2015). Accordingly, this Court has jurisdiction to review constitutional claims or questions of law raised by Petitioner in her petition for review. "'[W]hether the BIA correctly considered, interpreted, and weighed the evidence presented' is not

a constitutional issue or question of law." *Shabo v. Sessions*, 892 F.3d 237, 239 (6th Cir. 2018) (quoting *Arestov v. Holder*, 489 F. App'x 911, 916 (6th Cir. 2012)).

II. Standard of Review

We review questions of law asserted in accordance with 8 U.S.C. § 1252(a)(2)(C)–(D) *de novo*. *Id.* at 239–40. "Where the BIA reviews the immigration judge's decision and issues a separate opinion, rather than summarily affirming the immigration judge's decision, we review the BIA's decision as the final agency determination. To the extent that the BIA adopted the immigration judge's reasoning, however, we also review the immigration judge's decision." *Shaya v. Holder*, 586 F.3d 401, 405 (6th Cir. 2009) (citation omitted in original) (quoting *Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009)). Here, the BIA issued two separate opinions reviewing IJ decisions, the latter of which explicitly adopted the IJ's decision. (RE-7, Admin. R., at 3–5, 329–34.)

III. Analysis

A. Petitioner's Aggravated Felony Determination

"[M]atters involving the BIA's construction of a particular statute" are questions of law that this Court has jurisdiction to review. *Shabo*, 892 F.3d at 239 (quoting *Arestov*, 489 F. App'x at 916). Petitioner's claim required the BIA to construe 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1101(a)(43)(A), and therefore this Court is not without jurisdiction on that basis.

This Court has nevertheless repeatedly found that 8 U.S.C. § 1252(d)(1) "provides that federal courts are without jurisdiction to hear an immigration appeal when administrative remedies have not been exhausted." *E.g.*, *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004) (citing *Perkovic v. INS*, 33 F.3d 615, 619 (6th Cir. 1994)); *see also* 8 U.S.C. § 1252(d)(1). Although the concurrence raises the question of whether we should continue to consider the exhaustion

requirement as jurisdictional, we are bound to do so here. We have explained that there are three primary reasons for this exhaustion requirement:

> (1) to ensure that . . . the agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims; (2) to avoid premature interference with the agency's processes; and (3) to allow the BIA to compile a record which is adequate for judicial review.

Bi Xia Qu v. Holder, 618 F.3d 602, 609 (6th Cir. 2010) (alteration in original) (quoting *Ramani*, 378 F.3d at 559).

Before the IJ and BIA, Petitioner did argue that her crime was not an aggravated felony that makes her deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). However, she more specifically argued that her crime was not a categorical match for the aggravated felony of "sexual abuse of a minor" because the Michigan statute defining her crime was not divisible and included many different grounds for finding a violation, some of which did not involve sexually abusing a minor.

Petitioner makes a different argument in her opening brief on appeal, contending that her crime is not categorically included within "sexual abuse of a minor" because Michigan law does not allow for an affirmative defense of mistake of age, while federal law purportedly does. (Pet'r Br. at 9–14.) Because of our exhaustion requirement, this Court is without jurisdiction to hear the appeal of a petitioner who has not advanced an argument before the BIA. *See, e.g.*, *Ramani*, 378 F.3d at 559 ("Neither Ramani's notice of appeal to the BIA, nor his BIA appeal brief, advanced his current argument that the IJ misused certain evidence. . . . By failing to properly present these claims to the BIA, Ramani failed to exhaust his administrative remedies on these issues."); *Gazeli v. Session[s]*, 856 F.3d 1101, 1106–1107 (6th Cir. 2017) (finding this Court "lack[s] jurisdiction to consider Petitioners' alternative argument" as to a claim because "Petitioners never asked the BIA" to consider that argument); *Weerasinghe v. Ashcroft*, 134 F. App'x 26, 28 (6th Cir. 2005)

(finding no jurisdiction where the petitioner had presented general challenge on issue, because more specific current arguments were not presented to the BIA); *Nozadze v. Sessions*, 740 F. App'x 476, 485 (6th Cir. 2018) (finding no jurisdiction over CAT claim because the petitioner "now raises a different argument" than before the BIA).

Notably, Petitioner's argument is heavily grounded in the Supreme Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), which was handed down on May 30, 2017. This was after the BIA's May 8, 2017 order dismissing Petitioner's argument that her crime did not constitute an aggravated felony, but before the BIA's final order in Petitioner's case was handed down on September 27, 2018. This Court has reached the merits of a petitioner's claim on similar facts, finding that petitioners are not required to file a motion to reconsider with the BIA based on court decisions handed down after the BIA issues a decision on the merits of an issue but prior to this Court's review. *See Parlak v. Holder*, 578 F.3d 457, 463 (6th Cir. 2009). However, *Parlak* is distinguishable from the case at bar.

In *Parlak*, the petitioner argued that the holding of a newly-issued Sixth Circuit decision changed the level of *mens rea* the government must show in order for an alien to be deportable because of fraud or misrepresentation of fact in his applications for admission. *Id.*; *see also* 8 U.S.C. § 1182(a)(6)(C)(i). Petitioner in this case does not contend that the holding of *Esquivel-Quintana v. Sessions* modified "sexual abuse of a minor" in a manner relevant to this proceeding, but only that it showed that the Court looks to 18 U.S.C. § 2243 to aid in defining "sexual abuse of a minor" under the INA. (Pet'r Br. at 10–13.) The argument that 18 U.S.C. § 2243 should inform a court's understanding of her crime was readily available prior to *Esquivel-Quintana v. Sessions*, as that statute has been in effect for decades and clearly describes a federal offense of "Sexual abuse of a minor or ward." 18 U.S.C. § 2243. This Court looked to that statute to inform its

interpretation of 8 U.S.C. § 1101(a)(43)(A), the provision which identifies "sexual abuse of a minor" as an aggravated felony under the INA, well before Petitioner presented her case to the IJ and BIA. *See United States v. Rojas-Carillo*, 159 F. App'x 630, 634 (6th Cir. 2005). Allowing a petitioner to assert a new, unexhausted argument on appeal simply because an intervening court case brought the argument to her attention would undermine the BIA's authority to construe and apply our immigration laws. *See Bi Xia Qu*, 618 F.3d at 609.

Moreover, in *Parlak*, the BIA's decision had addressed the issue that the petitioner disputed: while he contended that he must have made a willful misrepresentation of fact with an "intent to deceive," the BIA had affirmed the IJ's findings that it must "be 'deliberate and voluntary,' but need not include an 'intent to deceive.'" 578 F.3d at 463. The BIA in the instant case has not addressed the question of whether "sexual abuse of a minor" requires knowledge of that minor's age.

This case presents a quintessential example of why we require petitioners' claims to be exhausted. The BIA is entitled to "a full opportunity to consider a petitioner's claims," *Bi Xia Qu*, 618 F.3d at 609 (citation omitted), and has not had that opportunity with respect to Petitioner's current argument. Petitioner could have included this argument in her motion to reconsider or reopen and, if rejected by the BIA, then raised this argument before this Court. She did not do so. Considering Petitioner's argument for the first time on appeal would interfere with the BIA's processes, *see Bi Xia Qu*, 618 F.3d at 609, by suggesting that petitioners can circumvent those processes and raise new arguments in their petition for review before this Court, rather than in any filing or motion before the BIA. Finally, this Court lacks an adequate record to ground its review, *see id.*, as the BIA has not clearly addressed whether knowledge of a victim's age is necessary to

find "sexual abuse of a minor" under the INA. This Court is without jurisdiction to hear Petitioner's instant argument and, accordingly, we do not reach its merits.

Petitioner asserts two additional arguments relevant to this claim in her reply brief. First, she contends that the statute defining her crime included multiple means of committing the crime, which extend beyond the categorical definition of "sexual abuse of a minor" under the INA. (Pet'r Reply Br. at 4–9.) As previously acknowledged, Petitioner did assert this argument before the BIA. Second, Petitioner contends in her reply brief that the Michigan law under which she was convicted covers contact not occurring "for sexual arousal, gratification, purpose, or done in a sexual manner." (Pet'r Reply Br. at 7–8.) She did not raise this argument before the BIA. "[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) (alteration in original) (quoting *United States v. Still*, 102 F.3d 118, 122 n.7 (5th Cir. 1996)). For this reason—and because Petitioner's argument about non-sexual contact was also not exhausted—we also do not reach the merits of these arguments.

After considering whether Petitioner's arguments were appropriately exhausted and preserved, we are left with no arguments available for review. Accordingly, we dismiss Petitioner's claim that her crime was not an aggravated felony.

B. Petitioner's Burden of Proof

Petitioner argues on appeal that the BIA erroneously applied the burden of proof applicable when petitioners assert interdependent probabilities of torture under the CAT. Whether the BIA applied the correct burden of proof in considering Petitioner's CAT claims is a question of law that this Court has jurisdiction to review. *Shabo*, 892 F.3d at 239. Petitioner has both exhausted this issue before the BIA and properly preserved it. She argued before the BIA that the IJ improperly applied the burden of proof applicable to an applicant alleging that a chain of events

would result in her torture. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) (holding that an argument is preserved if a litigant (1) states "the issue with sufficient clarity to give the court and opposing parties notice that it is asserting the issue" and (2) provides "some minimal level of argumentation in support of it") (citation omitted). Petitioner objects to that burden again before this Court. (Pet'r Br. at 18–27.)

An applicant seeking relief from removal under the CAT bears the burden of demonstrating that it is "more likely than not" that she would be tortured if deported to her country of removal. 8 C.F.R. § 1208.16(c)(2); *see also* 8 C.F.R. § 1208.18(a) (defining "torture"). In assessing whether an applicant has met this burden, "all evidence relevant to the possibility of future torture shall be considered . . . ." 8 C.F.R. § 1208.16(c)(3). This Court recently addressed how to determine whether an applicant has established that it is more likely than not that she would be tortured if deported to the country of removal in *Shakkuri v. Barr*, No. 18-4189, 2019 WL 3074750 (6th Cir. July 15, 2019). While *Shakkuri* is not binding upon this Court, it clearly explains and applies the burden of proof applicable here. We therefore treat it as highly persuasive.

Shakkuri explained that two rules can be derived from the CAT framework. *Id.* at *3. The first rule applies where an applicant has alleged independent probabilities of torture, "such as torture from multiple entities or for multiple reasons . . . ." *Id.* at *4. In that circumstance, "the probability of torture from all entities and for all reasons must be considered in the aggregate." *Id.* at *3 (citing *Tran v. Gonzales*, 447 F.3d 937, 944 (6th Cir. 2006)). An applicant has met her burden if she is able to demonstrate that "the cumulative probability of torture"—from all entities and for all reasons—"exceeds 50%." *Id.* (quoting *Kamara v. Attorney Gen. of the U.S.*, 420 F.3d 202, 213 (3d Cir. 2005)). Accordingly, an applicant can still bear her burden "*even if* the probability of torture from each entity, or for each reason, taken alone, does not exceed 50%." *Id.* (citing *Kamara*,

420 F.3d at 214). The second CAT rule applies where an applicant has alleged interdependent probabilities of torture, "such as torture that results from a hypothetical chain of events." *Id.* at *4. To meet her burden in that circumstance, an applicant must show that "each event in the chain must be more likely than not to occur. Otherwise, it is impossible for the chain of events as a whole to be more likely than not to occur." *Id.* (citing *In re J.F.F.*, 23 I&N Dec. 912, 917 (BIA 2006)). These rules are neither inconsistent nor mutually exclusive. *Id.* In some cases, "an applicant might allege *both* independent *and* interdependent probabilities of torture." *Id.* In those cases, both rules apply. *Id.*

This is such a case. Petitioner has alleged multiple characteristics that would lead to her torture upon deportation to Iraq: her status as a single mother, her criminal record reflecting homosexual experiences, her Christianity, her Westernized appearance, and her experience as a victim of sex trafficking. In her brief, Petitioner contends that the BIA must consider her probability of torture for all reasons in the aggregate. We agree. Petitioner also contends that the BIA erred by considering her probability of torture as a chain of events. We disagree. Petitioner's argument is unavailing for a few reasons.

First, Petitioner herself portrayed the independent factors that could lead to her torture in an interdependent form before the BIA. *See Shakkuri*, 2019 WL 3074750 at *5 (finding BIA appropriately applied burden applicable to interdependent factors where Petitioner asserted factors in interdependent form). Petitioner argued that "her 'immigration file' will cause her to be questioned at the airport in Iraq, and that she will be scrutinized as a foreigner who left the country (with her Western mannerisms and her inability to speak the language fluently) and that her history will eventually become known," then noted that she could be viewed as a prostitute "considering how the Iraqi government views unwed mothers and victims of sexual trafficking," and so "she

has a clear probability of torture if she is removed." (RE-7, Admin. R. at 35.) Petitioner further contended that "[t]he chain of events [she] fears—detention upon arrival for being a single, unwed mother with a criminal record, leading to subsequent torture—[is] more likely than not to occur." (*Id.* at 36.)

Indeed, Petitioner's arguments before the BIA suggested that her objections to the IJ's application of the burden were not that her torture did not depend on a chain of events, but that her torture depended on a chain of events acted out by some other party and that her chain of events was not "hypothetical," but "clearly probab[le]." (*See id.* at 34 (noting difference between her case and *J-F-F-* was that the former "involved a chain of events, each of which were contingent upon the respondent's future actions," whereas events leading to her probable torture were "contingent upon the actions of the Iraqi government, and [her] identity and past actions which cannot be changed"); *id.* at 35 (arguing she did not demonstrate merely a "hypothetical chain of events," but showed "clear probability" of imprisonment).) Petitioner does not make the former argument on appeal; as for the latter, this Court does not have jurisdiction to weigh the evidence and determine whether Petitioner showed that her torture is clearly probable, *see Shabo*, 892 F.3d at 239.

Second, the BIA did address the independent probabilities of torture Petitioner alleges in cumulative form. The BIA here noted that Petitioner attempted to show through evidence that she would be "identified and questioned due to, among other issues, her felony conviction, her child born out of wedlock, her conversion to Christianity and her western attitude." (RE-7, Admin. R. at 4.) Rather than assessing whether Petitioner would be picked up for each reason individually, the BIA took account of the independent reasons Petitioner may be identified in total in its analysis. The BIA then looked to the likelihood that Petitioner's history of forced prostitution (which Petitioner argues makes her a felon under Iraqi law) would be discovered after she was identified

because of these characteristics. (*Id.*) This is the same chain of events that the IJ addressed and that Petitioner endorsed in her brief before the BIA. (*Id.* at 35, 91–94.) The BIA concluded that Petitioner had not shown it was more probable than not that, after being identified, she would be detained because of her prior forced prostitution. (*Id.* at 4 ("[The record] does not support that it is more likely than not that the respondent will be considered to be a prostitute who will be detained, and will be tortured as a result by the Iraqi government") (citing Admin. R. at 91–96).) The BIA thus found that at least the third step in Petitioner's hypothetical chain of events was not more likely than not to occur. Petitioner therefore did not establish that each step in her chain of events was more likely than not to occur, and she did not meet her burden of showing that it was "more likely than not" that she would be tortured. *See Shakkuri*, 2019 WL 3074750, at *5 (finding BIA appropriately applied burden where it denied the petitioner's claim upon finding that one event in his alleged chain of events was not more likely than not to occur).

Finally, the BIA did not fail in its obligation to consider all the evidence Petitioner presented in so finding. *See* 8 C.F.R. § 1208.16(c)(3). As acknowledged, "'whether the BIA correctly considered, interpreted, and weighed the evidence presented' is not a constitutional issue or question of law" that this Court has jurisdiction to consider. *Shabo*, 892 F.3d at 239 (quoting *Arestov*, 489 F. App'x at 916). While "[f]actual errors can qualify as legal errors when 'important facts have been *totally overlooked* and others have been *seriously mischaracterized*,'" *id.* at 239–40 (quoting *Ventura-Reyes v. Lynch*, 797 F.3d 348, 360 (6th Cir. 2015)), that is not the case here. The BIA walked through the evidence Petitioner presented regarding her likelihood of torture (RE-7, Admin. R. at 4), and even gave Petitioner an additional opportunity to develop that evidence in an evidentiary hearing (*see id.* at 334). The BIA need not discuss each piece of evidence individually in order to reassure this Court that it has met its duty to "consider the issues raised,

and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Koyo v. Barr*, 768 F. App'x 320, 327 (6th Cir. 2019) (quoting *Scorteanu v. INS*, 339 F.3d 407, 412 (6th Cir. 2003)). And the question of whether the BIA correctly credited and weighed that evidence is beyond our jurisdiction.

Because the BIA did not assign or apply an incorrect burden of proof, we thus deny relief based on this issue. While we are mindful of the danger Petitioner faces upon deportation and sympathetic to her plight, we cannot find legal error where there is none. And although we may or may not agree with the BIA's assessment of Petitioner's probability of torture, that question is beyond our purview.

C. Petitioner's Evidentiary Standard

On appeal, Petitioner asserts that the BIA applied "an impossible evidentiary standard" by requiring her to show that similarly situated women had been tortured in Iraq, since "Iraq has not been accepting returnees like Ms. Saleh for decades." (Pet'r Br. at 15–18.) Whether the BIA held Petitioner to the correct evidentiary standard is a question of law, and this Court therefore has jurisdiction to review it. *See Shabo*, 892 F.3d at 240. Petitioner exhausted this issue before the BIA and preserved it for appeal. She argued on appeal that the IJ had required her to "show a near certainty of torture based on a specific reason," noted the dearth of evidence available to her, and argued that "she did not need to show that . . . a specific threat has been directed towards her, only that a similar person in similar circumstances would face the same probability of torture . . . ." (RE-7, Admin. R. at 30–31, 33–36); *see Huntington Nat'l Bank*, 574 F.3d at 332 (holding that an argument is preserved if a litigant (1) states "the issue with sufficient clarity to give the court and opposing parties notice that it is asserting the issue" and (2) provides "some minimal level of argumentation in support of it"). She revisits the issue now.

In its order denying Petitioner's application for deferral of removal under the CAT, the IJ found that the Iraq Country Report submitted into evidence lacked "any evidence that women returning from the United States have been persecuted or harmed by the Iraqi government"; stated that "there is *no concrete evidence* that establishes a direct threat of torture against Iraqi women deportees similarly situated to respondent as defined for purposes of CAT relief, or to respondent specifically"; and found that "general violent country conditions do not establish that it is more likely than not that respondent, in particular, would be tortured as required by the Sixth Circuit." (RE-7, Admin. R. at 93, 95–96.) The BIA noted in its review of the IJ decision that Petitioner's expert "was unable to cite a single example of a woman returning to Iraq being detained and subject to torture," and that the record also didn't provide any such example. (*Id.* at 4.)

We conclude that the BIA applied the correct evidentiary standard in assessing Petitioner's claim. To qualify for withholding of removal under the CAT, an applicant must demonstrate a "particularized threat of torture." *Almuhtaseb v. Gonzales*, 453 F.3d 743, 751 (6th Cir. 2006) (quoting *Castellano-Chacon v. INS*, 341 F.3d 533, 551 (6th Cir. 2003)). This must be more than general allegations of a threat against a group that the applicant belongs to. *See, e.g.*, *id.* (evidence that "Israelis have detained and tortured Palestinians . . . do[es] not show that it is 'more likely than not' that Almuhtaseb herself would be subject to such treatment"); *Chen v. Holder*, 394 F. App'x 252, 258 (6th Cir. 2010) (finding showing that members of applicant's church had been tortured, in light of other evidence, did not suffice to demonstrate a "particularized threat" against the applicant).

The IJ and the BIA applied this standard in assessing Petitioner's evidence. (*See* RE-7, Admin. R. at 96 (assessing evidence that it is "more likely than not that respondent, in particular,

would be tortured").)[2] While the BIA did not explicitly state that it was assessing whether Petitioner had shown a "particularized threat," its analysis suggests that it applied that standard, as it considered whether Petitioner's evidence showed a threat to individuals like her, including women, Christian converts, and those returning to Iraq. (*See id.* at 4.)

Neither case law nor the record supports Petitioner's conclusion that she was held to an "impossible evidentiary standard." (Pet'r Br. at 15.) Petitioner cites *Tran v. Gonzales* for the proposition that a petitioner's due process rights are implicated when the BIA requires a petitioner to show that "other returnees faced torture when, in fact, [the country of removal] was not accepting returnees at that time." (Pet'r Br. at 16.) In actuality, this Court found in *Tran* that a petitioner's due process rights are implicated when the BIA applies an inappropriate standard of review or fails to identify the standard of review it is applying. 447 F.3d at 944. The Court did not address the *Tran* petitioner's argument that "the BIA placed an impossible burden on him—a burden to prove that other returnees faced torture when, in fact, [the country of removal] does not accept returnees." *Id.* Thus, *Tran* does not support Petitioner's proposition, and is otherwise inapposite because the BIA here applied the correct standard in its review of the IJ's findings of fact: clear error. *See id.* at 943 ("The BIA reviews an IJ's findings of fact for clear error."); (RE-7, Admin. R. at 4 ("Based on our review of the evidence of record, we conclude that the findings of the Immigration Judge are not clearly erroneous.").)

[2] Notably, the IJ also looked for evidence that others "similarly situated" to Petitioner were tortured. (RE-7, Admin R. at 95.) This analysis is more typically applied to assess whether an applicant is eligible for withholding of removal under the INA, rather than the CAT. *See* 8 C.F.R. § 1208.16(b)(2)(i). While this Court does not generally use the language "similarly situated" in assessing a particularized threat, it is appropriate for an IJ to assess whether others like a petitioner were tortured, as this is "evidence relevant to the possibility of future torture," 8 C.F.R. § 1208.16(c)(3). Moreover, Petitioner herself conceded that this was an appropriate consideration. (RE-7, Admin. R. at 35–36 (stating Petitioner must show "that a similar person in similar circumstances would face the same possibility of torture").)

While we agree that it would be problematic to require Petitioner to show that Iraqi women deportees specifically had been tortured, given the limits of the evidence available on that population, we need not decide whether holding a petitioner to such an evidentiary standard would constitute reversible error, because the record suggests that Petitioner was not held to the standard she alleges. Although both the IJ and the BIA did look for evidence that Iraqi women deportees had been tortured, each also looked for evidence that a broader group was subject to torture by the Iraqi government. For example, the BIA considered the source of "problems [] faced by women or Christian converts" and whether there was evidence that Petitioner's expert's female colleagues traveling to Iraq had been detained, (RE-7, Admin. R. at 4), suggesting it would have considered evidence of torture of such groups relevant to whether Petitioner had met her evidentiary burden. Likewise, the IJ discussed evidence of torture against "women without male escorts," prostitutes, women, and trafficking victims as broader groups. (*Id.* at 93–96.) While Petitioner correctly notes that at least her expert's colleagues "do not possess [all] the same incriminating characteristics" as she does (Pet'r Br. at 17), the BIA considered evidence beyond just that.

Thus, we conclude that the BIA and IJ held Petitioner to the correct evidentiary standard, and we deny relief on this question. Any further conclusions are beyond this Court's purview, as we are not permitted to address whether the IJ and BIA properly concluded that the evidence was insufficient. *Shabo*, 892 F.3d at 239.

CONCLUSION

For the reasons set forth above, we **DISMISS IN PART** and **DENY IN PART** the petition for review.

MURPHY, Circuit Judge, concurring. I concur in the court's opinion and write only to express uncertainty about the nature of the exhaustion requirement in 8 U.S.C. § 1252(d)(1). Section 1252(d)(1) indicates 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." *Id.* With one exception, our cases have repeatedly called this requirement a jurisdictional limit on our power to consider unexhausted issues rather than a non-jurisdictional "claims-processing" rule. *See, e.g.*, *Gazeli v. Sessions*, 856 F.3d 1101, 1106–07 (6th Cir. 2017); *Montanez-Gonzalez v. Holder*, 780 F.3d 720, 722, 724 (6th Cir. 2015); *Camaj v. Holder*, 625 F.3d 988, 992 (6th Cir. 2010); *Gor v. Holder*, 607 F.3d 180, 185–86 (6th Cir. 2010); *Madrigal v. Holder*, 572 F.3d 239, 243 (6th Cir. 2009); *King v. Holder*, 570 F.3d 785, 790 n.4 (6th Cir. 2009); *Liu v. Holder*, 560 F.3d 485, 493–94 (6th Cir. 2009); *Khalili v. Holder*, 557 F.3d 429, 433 (6th Cir. 2009); *Sterkaj v. Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *Hassan v. Gonzales*, 403 F.3d 429, 432–33 & n.4 (6th Cir. 2005); *Hasan v. Ashcroft*, 397 F.3d 417, 419–20 (6th Cir. 2005); *Csekinek v. INS*, 391 F.3d 819, 822–23 (6th Cir. 2004); *Ramani v. Ashcroft*, 378 F.3d 554, 558–60 (6th Cir. 2004); *cf. Perkovic v. INS*, 33 F.3d 615, 619 (6th Cir. 1994); *but see Al-Najar v. Mukasey*, 515 F.3d 708, 713 n.2 (6th Cir. 2008).

The "jurisdictional" label has "considerable practical importance for judges and litigants." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Courts must ensure themselves of their subject-matter jurisdiction on their own initiative. *Id.* So if the exhaustion mandate were jurisdictional, we would have a duty to consider whether a petitioner had exhausted an issue even if the government failed to assert an exhaustion argument—indeed, even if the government intentionally waived the argument. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822–23 (6th Cir. 2015). Similarly, we could not bypass such a jurisdictional requirement and proceed to the merits even when it would be easier to reject a petitioner's claim on its merits than to decide

whether the petitioner had exhausted the claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998); *cf.* 28 U.S.C. § 2254(b)(2).

I see reasons to doubt this jurisdictional view of § 1252(d)(1). For the last 15 years, "the Supreme Court has been on a mission to rein in profligate uses of 'jurisdiction,' a word with 'many, too many, meanings.'" *Herr*, 803 F.3d at 813 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006)). The word "jurisdictional" is "generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019). The Court has thus criticized older opinions for using stray "jurisdictional" language to describe statutory requirements that, while mandatory, do not limit a court's adjudicative power. *See Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam). Since this clarification, the Court has repeatedly found that many preconditions to sue are not "jurisdictional" within the narrow sense of the word. *See Fort Bend Cty.*, 139 S. Ct. at 1849–50.

While our court has generally "picked up on the [Supreme Court's] message," *Herr*, 803 F.3d at 814, we have yet to do so in this context. Our initial decisions characterizing § 1252(d)(1) as jurisdictional largely predate the Supreme Court's clarification of the jurisdictional label. *E.g.*, *Ramani*, 378 F.3d at 558–60. Since then, we have continued to treat § 1252(d)(1) as jurisdictional merely by citing our earlier decisions without considering the effect, if any, of the Supreme Court's intervening instructions. *E.g.*, *Gazeli*, 856 F.3d at 1106–07; *Liu*, 560 F.3d at 494.

Yet our earlier decisions rest on logic that is hard to reconcile with those instructions. These decisions suggest that § 1252(d)(1) is jurisdictional because its *statutory* mandate—unlike a *court-created* mandate—originates with Congress. *Ramani*, 378 F.3d at 559. I agree that § 1252(d)(1) is more mandatory than the judicially created exhaustion rules that come with

freewheeling judicial exceptions. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 751–52 (6th Cir. 2019). But just because exhaustion is *mandatory* does not make it *jurisdictional*. That is the entire point of the Supreme Court's cases. It has made this very point for requirements resembling § 1252(d)(1)'s exhaustion rule. To list a few examples, it has held that the following requirements are not jurisdictional: The Clean Air Act's requirement that a party must raise an argument in public comments before asserting it in court, *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511–512 (2014); Title VII's requirement that a party must file an EEOC charge before bringing suit, *Fort Bend Cty.*, 139 S. Ct. at 1850; and the Copyright Act's requirement that a party must register a work before asserting an infringement claim, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157, 163–64 (2010). Elsewhere, we too have recognized that the Supreme Court's framework "applies to exhaustion requirements no less than it does to" other claims-processing rules. *Herr*, 803 F.3d at 822.

Language in our cases aside, I'm not sure § 1252(d)(1)'s text can be read to establish a jurisdictional limit. To be sure, this text—"[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"—does impose a condition on the *court's* "review." *Id.* Congress thus wrote it differently from exhaustion mandates that impose conditions on a *plaintiff's* right to sue—e.g., "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *see* 7 U.S.C. § 6912(e). But § 1252(d)(1) does not mention jurisdiction, and I fail to see a "'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Henderson*, 562 U.S. at 436 (quoting *Arbaugh*, 546 U.S. at 515–16). Indeed, courts usually "regard exhaustion as an affirmative defense," not a jurisdictional requirement. *Jones v. Bock*, 549 U.S. 199, 212 (2007). And other subsections in § 1252—unlike § 1252(d)(1)—do explicitly address jurisdiction. *See*

Reed Elsevier, 559 U.S. at 164–65. Section 1252(a)(1) provides the initial jurisdictional grant, saying that "[j]udicial review of a final order of removal" shall be governed by the rules in chapter 158 of Title 28, which give circuit courts jurisdiction over petitions for review from agency actions. 28 U.S.C. §§ 2342, 2349; *Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015). Section 1252(a)(2) then carves out certain immigration orders from this grant of jurisdiction in unmistakable language: "no court shall have jurisdiction to review . . . ." 8 U.S.C. § 1252(a)(2)(A)–(C). Section 1252(d)(1) contains no similar language, and courts presume that Congress acts intentionally when using differing language across subsections. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Treating § 1252(d)(1)'s exhaustion requirement as jurisdictional also conflicts with the Supreme Court's instruction that "[j]urisdictional rules should be clear" and easy to administer. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted); *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). A requirement to exhaust administrative remedies generally compels a party to "complete the administrative review process in accordance with the applicable [agency's] procedural rules." *Jones*, 549 U.S. at 218 (quoting *Woodford v. Ngo*, 548 U.S. 81, 88 (2006)). If Congress meant for this mandate to be jurisdictional, a court's adjudicative power would turn on an agency's rules and precedents for raising issues—rules and precedents that could change over time. *See Island Creek*, 937 F.3d at 750–51; *cf. Kucana v. Holder*, 558 U.S. 233, 252 (2010). A jurisdictional rule is not easy to administer if it requires courts to become experts on such internal agency processes as whether a petitioner has adequately "identif[ied] the findings of fact, the conclusions of law, or both, that are being challenged" in the notice of appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.3(b).

All of this said, I recognize that most circuit courts continue to treat this exhaustion requirement as jurisdictional. *See Sunoto v. Gonzales*, 504 F.3d 56, 59 (1st Cir. 2007); *Hoxha v.*

Holder, 559 F.3d 157, 159 n.3 (3d Cir. 2009); *Cabrera v. Barr*, 930 F.3d 627, 631 (4th Cir. 2019); *Vazquez v. Sessions*, 885 F.3d 862, 867–68 (5th Cir. 2018); *Martinez Carcamo v. Holder*, 713 F.3d 916, 925 (8th Cir. 2013); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004); *Molina v. Holder*, 763 F.3d 1259, 1262–63 (10th Cir. 2014); *Alim v. Gonzales*, 446 F.3d 1239, 1253 (11th Cir. 2006). But, like our cases, most of these decisions do not confront the Supreme Court's recent jurisprudence in this area. And, regardless, a circuit split already exists. The Seventh Circuit has long followed the Supreme Court's lead when interpreting § 1252(d)(1). It holds that "[e]xhaustion is a condition to success in court but not a limit on the set of cases that the judiciary has been assigned to resolve." *Korsunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006) (Easterbrook, J.); *see Chavarria-Reyes v. Lynch*, 845 F.3d 275, 279 (7th Cir. 2016); *Abdelqadar v. Gonzales*, 413 F.3d 668, 670–71 (7th Cir. 2005); *cf. Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 120 (2d Cir. 2007). That strikes me as the better reading.

One last point. This distinction between jurisdictional and mandatory rules will not matter in many cases. After all, a court generally must enforce a mandatory rule (just as much as a jurisdictional one) when a party properly invokes it. *See Ross*, 136 S. Ct. at 1856–57; *EME Homer*, 572 U.S. at 512. In this case, for example, the government timely raised its exhaustion defense and Azal Mehdi Saleh provided no basis for excusing the requirement to exhaust her arguments with the Board of Immigration Appeals. Whether jurisdictional or mandatory, this exhaustion requirement forecloses Saleh's new arguments before this court. *Cf. Hoogerheide v. IRS*, 637 F.3d 634, 639 (6th Cir. 2011). But this distinction will matter in future cases (when, for example, the government fails to raise an exhaustion defense). In such a case, I would be open to addressing the impact of the Supreme Court's recent precedent on the nature of 8 U.S.C. § 1252(d)(1)'s

exhaustion requirement. *Cf. Palencia v. Barr*, No. 18-4170, 2019 WL 5692681, at *2 n.1 (6th Cir. Nov. 4, 2019).