Georgia Law Review

Volume 55 | Number 2 Article 7

2021

Judicial Review in Expedited Removal Proceedings: Applying Sims v. Apfel to Assess the Role of Issue Exhaustion

Emily C. Snow
University of Georgia School of Law

JUDICIAL REVIEW IN EXPEDITED REMOVAL PROCEEDINGS: APPLYING *SIMS V. APFEL* TO ASSESS THE ROLE OF ISSUE EXHAUSTION

Emily Carden Snow[*]

For noncitizens in expedited removal proceedings, obtaining judicial review of removal orders is an uphill battle. Some barriers to judicial review are statutory: noncitizens must first exhaust their administrative remedies, and they may seek review only in a federal circuit court of appeals. Other barriers are judicial—i.e., imposed by courts, not statutes.

A circuit split has emerged over one of these judicially imposed barriers to judicial review. Some courts have held that expedited removal proceedings do not accommodate legal challenges to removal. In those circuits, noncitizens preserve the opportunity for judicial review even when they do not raise a legal challenge during those proceedings. Other courts have held that noncitizens must contest the legal grounds for their removal during expedited removal proceedings. This circuit split has fragmented the judicial review process for expedited removal orders, with detrimental effect.

In Sims v. Apfel*, the U.S. Supreme Court provided a framework for assessing the propriety of a judicially imposed issue-exhaustion requirement. Central to the Court's analysis was the degree to which administrative proceedings are inquisitorial rather than adversarial. But expedited removal proceedings are neither inquisitorial nor adversarial, and they offer far fewer procedural protections than full removal proceedings. This Note argues that, under* Sims*, requiring issue exhaustion is inappropriate in appeals from expedited removal proceedings. In the absence of a statutory mandate, circuit courts should not construct an additional barrier to judicial review by imposing an issue-exhaustion requirement.*

---

[*] J.D. Candidate, 2021, University of Georgia School of Law; M.Sc., 2014, London School of Economics and Political Science; B.A., 2013, Wake Forest University. This Note is dedicated to my late grandfather, Buddy Snow (J.D., 1961, University of Georgia School of Law).

TABLE OF CONTENTS

I. INTRODUCTION

Suppose a noncitizen, who has been convicted of a crime, is placed in expedited removal proceedings. Their crime was not violent, but under the governing immigration law, it is considered an "aggravated felony." After moving through the administrative process and receiving a final removal order, the noncitizen wishes to contest, in a federal circuit court of appeals, the legal question that their conviction was an aggravated felony. Can that circuit court review the agency's decision, or has the noncitizen failed to exhaust their administrative remedies by not raising this legal issue during the expedited removal proceedings?

Over the past few decades, legislation in the United States has increasingly narrowed the scope of judicial review over immigration proceedings.[1] One practice, in particular, has advanced this trend: the administrative-exhaustion requirement. The obligation to exhaust administrative remedies before appealing a matter to the federal courts is a core tenet of administrative law.[2] The administrative-exhaustion requirement is neither new[3] nor without justification: it serves important purposes of "protecting administrative agency authority and promoting judicial efficiency."[4]

The requirement of exhausting administrative remedies takes on particular significance in the context of immigration law. One

---

[1] *See infra* Part II.A.

[2] *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144–45 (1992) ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts."), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66, *as recognized in* Woodford v. Ngo, 548 U.S. 81, 84–85 (2006) (explaining that the Prison Litigation Reform Act "strengthened [the] exhaustion provision" in response to a flood of prisoner litigation in federal courts).

[3] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (explaining "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

[4] Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1307 (1997); *see also* Toni M. Fine, *Appellate Practice on Review of Agency Action: A Guide for Practitioners*, 28 U. TOL. L. REV. 1, 8 (1996) (noting that the exhaustion requirement furthers several policies, including "the desire to permit the agency to perform its functions using its special expertise and competence," the ability of agencies to correct mistakes without court intervention, and the fostering of "respect for the integrity of the administrative process").

reason is that the space for judicial review of removal orders is already slim, so any additional barrier to obtaining judicial review—even one as routine as the exhaustion of administrative remedies—looms large.[5] Another reason is that the circuit courts disagree on the standard for noncitizens to exhaust administrative remedies before seeking judicial review of a removal order.[6] This circuit split means that some appellate courts will exercise judicial review over a removal order even when a noncitizen did not raise a legal challenge to their removal during the administrative proceedings below, while other courts will decline to exercise review because they believe that their jurisdiction is improper.[7] Yet similarly situated noncitizens, distinguished only by the circuit court before which they happen to appear, should be entitled to the same measure of judicial review.

This Note considers a narrow category of individuals facing removal from the United States: noncitizens who are not lawful permanent residents and who have been convicted of a crime deemed to be an "aggravated felony" under the Immigration and Nationality Act (the INA).[8] This specific category, because of these noncitizens' legal status, faces "expedited removal."[9] As the name suggests, expedited removal is an accelerated process managed by the Department of Homeland Security (DHS) in which noncitizens are denied the standard hearings and procedural protections that other noncitizens usually receive—including those who are similarly convicted of aggravated felonies.[10] This Note further

---

[5] *See, e.g.*, Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1615–16 (2000) (observing the "tormented relationship between immigration and judicial review" and noting phenomena, including "court-stripping legislation," that evince "a clear though qualified pattern of genuine discomfort—on the parts of both Congress and the judiciary—with the notion of a significant judicial role in immigration matters").

[6] *See infra* Part II.C.

[7] *See infra* notes 12–15 and accompanying text.

[8] *See generally* Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2018); *see also id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43) (defining "aggravated felony").

[9] *Id.* § 1228(b) (authorizing an expedited removal process for noncitizens convicted of aggravated felonies and who are "not lawfully admitted for permanent residence" to the United States).

[10] *See* Etienne v. Lynch, 813 F.3d 135, 138–39 (4th Cir. 2015) (discussing the procedural distinctions accompanying removal of noncitizens charged with removability for an

considers noncitizens facing expedited removal who wish to challenge the classification of their conviction as an "aggravated felony" before a federal circuit court, despite their failure to raise this issue during the initial expedited removal proceedings.

The federal circuit courts diverge on whether the expedited removal procedure affords noncitizens the opportunity to contest the legal basis for their removal, or whether it accommodates factual challenges alone.[11] Some circuits have held that the administrative process that precedes expedited removal does *not* afford noncitizens an opportunity to challenge the legal grounds of their removal.[12] As a result, noncitizens who do not—or *cannot*—challenge the legal basis for their removal during these administrative proceedings have not failed to exhaust administrative remedies and thus have not lost the opportunity for judicial review.[13] Other circuits, in contrast, have held that noncitizens *do* have the opportunity to raise legal challenges during expedited removal proceedings.[14] For those circuits, not raising a legal challenge to removability constitutes a failure to exhaust administrative remedies sufficient to deprive the reviewing circuit

---

aggravated felony conviction and noncitizens charged with removability for an aggravated felony conviction who have not been lawfully admitted to the United States for permanent residence); *see also infra* Part II.B.*2*.

[11] *See* 8 U.S.C. § 1228 (2018) (providing for the expedited removal of noncitizens convicted of committing aggravated felonies).

[12] *See, e.g.*, *Etienne*, 813 F.3d at 141–42 ("[W]e cannot say that DHS's expedited removal procedures offer an alien the opportunity to challenge the legal basis of his or her removal."); Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013) (holding that the noncitizen did not fail to exhaust administrative remedies because the expedited removal proceeding "did not provide [him] with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to expedited removal"); *cf.* Aguilar-Aguilar v. Napolitano, 700 F.3d 1238, 1243 n.5 (10th Cir. 2012) (declining to adopt a broad reading of "administrative remedy" and noting that "[a]n administrative remedy in the removal context denotes a means by which an alien . . . may seek redress from an adverse agency decision").

[13] *See, e.g.*, *Valdiviez-Hernandez*, 739 F.3d at 187 ("The relevant statutes and corresponding regulations therefore did not provide [the noncitizen] with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to expedited removal. As such, [he] did not fail to exhaust his administrative remedies.").

[14] *See, e.g.*, Malu v. U.S. Att'y Gen., 764 F.3d 1282, 1289 (11th Cir. 2014) (finding that the noncitizen "could have but failed to exhaust the argument that she was not an aggravated felon"); Escoto-Castillo v. Napolitano, 658 F.3d 864, 866 (8th Cir. 2011) (finding that the noncitizen's "failure to raise [an] alleged error of law to the agency preclude[d] [the court's] review of the issue").

court of jurisdiction to consider that legal challenge when raised on appeal.[15]

Federal circuit courts thus disagree on whether a noncitizen has effectively exhausted their administrative remedies when they do not raise a legal challenge to their removal during an expedited removal proceeding but do so on appeal before a circuit court. What is missing from this analysis, however, is consideration of the proper scope of the administrative-exhaustion requirement as a prerequisite to judicial review of expedited removal orders. A variation on the traditional requirement of exhausting administrative remedies is the requirement of exhausting issues.[16] By requiring noncitizens to raise legal challenges to their removal during expedited removal proceedings, circuit courts impose an *issue* exhaustion requirement—above and beyond the administrative *remedy* exhaustion requirement—that is not present in the judicial review statute.[17]

This Note argues that circuits requiring issue exhaustion impose an unjustified barrier to judicial review. Part II provides an overview of immigration legislation in the United States, expedited removal proceedings, and the judicial review process for expedited removal orders. Part II also assesses the circuit split on exhaustion of administrative remedies and evaluates this case law in terms of issue exhaustion. Part III discusses the difference between exhausting administrative remedies and exhausting issues and presents the U.S. Supreme Court's framework for issue exhaustion, *Sims v. Apfel*. Part IV applies the *Sims* approach to expedited removal cases, assesses the circuit courts' rationales for issue exhaustion, and considers the proper role of the judiciary in imposing such a requirement absent a statutory mandate. Part V concludes.

---

[15] *See, e.g.*, *Malu*, 764 F.3d at 1288 (noting that a noncitizen "must exhaust all administrative remedies by rebutting the charges—including the conclusion of law that [they are] an aggravated felon—before the Department [of Homeland Security]").

[16] To exhaust administrative remedies, "a petitioner [must] ask an administrative agency for relief before filing [their] action in a federal court." *Id.* at 1287 (citing Sims v. Apfel, 530 U.S. 103, 107 (2000)). To exhaust issues, "a petitioner [must] raise specific issues before the agency before raising those issues in federal court." *Id.* (citing *Sims*, 530 U.S. at 107).

[17] *See* 8 U.S.C. § 1252(d)(1) (2018) (granting jurisdiction for review only if "the [noncitizen] has exhausted all administrative *remedies* available to [them] as of right" (emphasis added)).

II. BACKGROUND

A. IMMIGRATION LEGISLATION IN THE UNITED STATES

The cornerstone of immigration law in the United States is the Immigration and Nationality Act.[18] Although nearly seventy years old, the INA "remains the centerpiece of United States immigration law, providing the modern statutory framework for controlling the exclusion, admission[,] and removal of non-citizens."[19] With the enactment of the INA, "declaratory and injunctive relief replaced habeas corpus as the principal vehicle for obtaining judicial review of a deportation decision."[20] Amendments to the INA in 1961 allowed noncitizens to seek judicial review of removal orders either by petitioning a federal court of appeals or by seeking habeas corpus in a federal district court, depending on the nature of the proceeding.[21] This scheme for judicial review lasted until 1996, when Congress passed both the Illegal Immigration Reform and Immigrant Responsibility Act (the IIRIRA)[22] and the Antiterrorism and Effective Death Penalty Act (the AEDPA),[23] which "together significantly altered the jurisdictional scheme for federal review of immigration orders."[24]

The AEDPA yielded two significant consequences for judicial review of immigration orders. First, it eliminated the provision of the INA that allowed noncitizens in certain proceedings to seek habeas corpus relief.[25] Second, it limited circuit courts' ability to

---

[18] *Id.* §§ 1101–1537.

[19] Sara A. Rodriguez, Note, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 488 (2006).

[20] Legomsky, *supra* note 5, at 1623.

[21] *See* Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 62 (2010) ("Congress amended the INA to include a judicial review provision that made . . . exclusion orders reviewable by habeas petition in the district courts.").

[22] Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 & 18 U.S.C.).

[23] Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, & 34 U.S.C.).

[24] 14A ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3664 (4th ed. 2019), Westlaw FPP.

[25] *Id.*

exercise "direct review jurisdiction" over final removal orders for noncitizens facing removal on criminal grounds.[26] These changes deprived noncitizens facing removal due to criminal convictions of the right to judicial review.[27]

The IIRIRA took these limitations on judicial review one step further by "expand[ing] the bar on review of criminal orders of removal and add[ing] additional jurisdictional bars."[28] Further, "one of Congress's principal goals in enacting [the] IIRIRA was to expedite the removal of [noncitizens] who have been convicted of aggravated felonies."[29] In 2005, the REAL ID Act loosened the stringent limitations on judicial review of final removal orders issued to certain classes of noncitizens.[30] The REAL ID Act "amended the INA to insert a savings clause permitting most noncitizens with otherwise barred claims to obtain direct appellate court review of 'constitutional claims or *questions of law*.'"[31] Under this provision, noncitizens previously precluded from seeking judicial review of final orders of removal could now do so, provided that their petition for review raised a constitutional claim or issue of law.[32]

---

[26] *Id.*

[27] *See* Sharpless, *supra* note 21, at 63 (noting that the AEDPA "repealed judicial review for noncitizens determined to be deportable under most criminal grounds of removal").

[28] *Id.*; *see also* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 616 (2005) (explaining that, with the IIRIRA's passage, "Congress limited [circuit] court jurisdiction to review decisions in removal cases in which the [noncitizen] has committed specified criminal offenses").

[29] Zhang v. INS, 274 F.3d 103, 108 (2d Cir. 2001); *see also* Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration (referring to the IIRIRA as "a bundle of provisions with a single goal: to increase penalties on immigrants who had violated [U.S.] law in some way (whether they were unauthorized immigrants who'd violated immigration law or legal immigrants who'd committed other crimes)").

[30] Pub. L. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 U.S.C.).

[31] Sharpless, *supra* note 21, at 65 (quoting 8 U.S.C. § 1252(a)(2)(D) (2006)); *see also* 8 U.S.C. § 1252(a)(2)(D) (2018) ("Nothing in subparagraph (B) or (C) . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals . . . .").

[32] *See* Sharpless, *supra* note 21, at 65 ("The savings clause in the REAL ID Act . . . restor[es] review over questions otherwise barred from judicial review but only in so far as the questions are legal rather than factual.").

B. EXPEDITED REMOVAL AND JUDICIAL REVIEW

1. The Expedited Removal Process. The Department of Homeland Security consists of several government entities responsible for immigration enforcement, including Customs and Border Protection, Immigration and Customs Enforcement, and United States Citizenship and Immigration Services.[33] DHS administers a number of programs that "permit the agency to remove or deport a person from the United States without undertaking the formalized and exhaustive removal hearing."[34] Some legal scholars have termed these programs "speed deportation"[35] and refer to the procedures accompanying them as "shadow proceedings,"[36] language that reflects both their cursory and often extrajudicial nature. The rationale supporting these rapid deportations is one of government efficiency; in fact, DHS appears to rely on speed removals far more than any other immigration procedure.[37]

One such program, expedited removal, "applies to noncitizens who are not permanent residents of the United States and have been classified by DHS as convicted of an aggravated felony."[38]

---

[33] Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 5 (2014).

[34] *Id.* at 2.

[35] *Id.* at 6.

[36] Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 186 (2017).

[37] *See* Wadhia, *supra* note 33, at 3 (noting that 82.8% of removals in 2013 "were comprised of expedited removals and reinstatements," while only 17% of noncitizens who were deported "were removed following a removal order issued by an immigration judge within the Executive Office for Immigration Review"); Jay M. Zitter, Annotation, *Validity, Construction, and Application of 8 U.S.C.A. § 1228 Governing Expedited Removal of Aliens Convicted of Committing Aggravated Felonies*, 32 A.L.R. Fed. 2d 509, Art. I, § 2 (2020) (noting that the concept of "aggravated felony" in the administrative removal process "was designed to provide as few barriers as possible to the removal of dangerous aliens and thereby make the system run more efficiently").

[38] Wadhia, *supra* note 33, at 6–7; *see also* 8 U.S.C. § 1228 (2018). Terminology for different types of expedited removal programs varies across the literature. For the sake of simplicity, this Note uses "expedited removal" to refer to a situation in which a noncitizen is placed in "expedited proceedings" under 8 U.S.C. § 1228(a)(3) (2018). For an example of a different term used for this program, see Wadhia, *supra* note 33, at 6 (referring to expedited removal as "administrative removal"). DHS manages two additional variations of accelerated deportation programs, but they are beyond the scope of this Note. One applies to individuals who arrive at the United States border or within one hundred miles of the border without

Under this process, noncitizens who have been convicted of an offense that the INA considers to be an "aggravated felony"[39] face expedited removal and are "not entitled to procedural safeguards such as appeals, judicial discretion, and asylum, which may prolong or forestall his or her deportation."[40]

The INA[41] and its accompanying regulations[42] provide the framework for the expedited removal process. Traditionally, when a noncitizen faces removal for an aggravated felony conviction, they must "be afforded a hearing before an [Immigration Judge], where the [noncitizen] may contest the factual or legal basis of [their] removability."[43] Immigration Judges (IJs) must be attorneys and are appointed by the Attorney General.[44] However, noncitizens who have not been admitted lawfully to the United States face a different outcome when charged with removability on the grounds of an aggravated felony conviction: "the INA authorizes an expedited removal process, without a hearing before an IJ."[45]

---

sufficient documentation or with fraudulent documentation. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (2018). The second, known as "reinstatement," applies to individuals reentering the United States "without authorization after having departed the United States voluntarily or under a previous removal order." Wadhia, *supra* note 33, at 6; *see also* 8 U.S.C. § 1231(a)(5) (2018). *See generally* Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 13, 13 n.32 (2019) (collecting works by legal scholars and describing different terminology used to describe the "'shadow' deportation system").

[39] *See* 8 U.S.C. § 1227(a) (2018) (describing classes of "deportable aliens"). Any noncitizen falling into the categories outlined in this statutory provision is subject to removal "upon the order of the Attorney General." *Id.* One such category includes noncitizens who have been convicted of aggravated felonies. *Id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43) (defining "aggravated felony"); *cf.* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483 (2007) (noting that "one concept—the 'aggravated felony'—has accounted for the steadiest and most expansive growth in the range of crimes that give rise to removal").

[40] Zitter, *supra* note 37, Art. I, § 2.

[41] 8 U.S.C. § 1228(b) (2018).

[42] 8 C.F.R. § 238.1 (2020).

[43] Etienne v. Lynch, 813 F.3d 135, 138–39 (4th Cir. 2015) (first citing 8 U.S.C. §§ 1229, 1229a; and then citing 8 C.F.R. § 1240.10(c)).

[44] *See* 8 U.S.C. § 1101(b)(4) (2018) (defining "immigration judge").

[45] *Etienne*, 813 F.3d at 139; *see also* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1497 Chart 3 (1997) (depicting the expedited removal process).

Instead of an IJ, a deciding service officer presides over expedited removal proceedings.[46] The officer does not have to be an attorney and is not appointed by the Attorney General.[47] DHS must provide a noncitizen who meets the statutory requirements of expedited removal with "reasonable notice of the charges, notice of [their] right to be represented by counsel at no expense to the government, the right to inspect, examine and rebut evidence, and service of the record in person or by mail."[48]

Noncitizens facing expedited removal receive a "Notice of Intent to Issue a Final Administrative Removal Order" (Notice of Intent), marking the beginning of expedited removal proceedings.[49] A noncitizen may contest removability by providing a written response to the Notice of Intent "rebutting the allegations supporting the charge and/or requesting the opportunity to review the Government's evidence."[50] The deciding service officer then determines removability based on this written response.[51] If the noncitizen did not respond within a ten-day period and the evidence establishes removability to a "clear, convincing, and unequivocal" degree, then the officer will issue a Final Administrative Removal Order.[52] If the noncitizen's rebuttal is insufficient or does not raise a genuine issue of material fact, the deciding service officer may issue a Final Administrative Removal Order if the evidence nonetheless establishes a "clear, convincing, and unequivocal" case for removability.[53]

---

[46] *See* 8 C.F.R. § 238.1 (2020) (outlining the process by which a deciding service offer assesses the removability of a noncitizen in an expedited removal proceeding).

[47] *See id*. § 238.1(a) (omitting such prerequisites in defining "Deciding Service officer").

[48] Wadhia, *supra* note 33, at 9; *see also* 8 U.S.C. § 1228(b)(4) (2018) (defining rights provided to noncitizens who are not lawful permanent residents and subject to expedited removal proceedings).

[49] Wadhia, *supra* note 33, at 9. The Notice of Intent provides the noncitizen with information about the following: grounds for their removal; options for seeking legal counsel; the opportunity to seek withholding of removal based on a fear of persecution or torture in the country of removal; the right to inspect the evidence supporting the Notice of Intent; and the opportunity to rebut the charges within ten days after service of the Notice of Intent. 8 C.F.R. § 238.1(b)(2)(i) (2020).

[50] 8 C.F.R. § 238.1(c)(1) (2020).

[51] *Id*. § 238.1(d).

[52] *Id*. § 238.1(d)(1).

[53] *Id*. § 238.1(d)(2)(i).

If the rebuttal does raise a genuine issue of material fact, the deciding service officer can either procure "additional evidence from any source" or commence full removal proceedings before an IJ.[54] Converting expedited removal proceedings to full removal proceedings relies on the deciding service officer's finding that the noncitizen is "not amenable to removal."[55] Significantly, only "genuine issue[s] of material fact"—not questions of law or legal challenges—are sufficient to warrant the collection of additional evidence or the conversion to full immigration proceedings.[56]

2. Judicial Review of Expedited Removal Orders. Noncitizens in immigration proceedings before an IJ may appeal Final Administrative Removal Orders to the Board of Immigration Appeals (BIA);[57] noncitizens in expedited removal proceedings do not have that option. They are limited to appealing Final Administrative Removal Orders directly to a federal circuit court.[58] Furthermore, the AEDPA and the IIRIRA severely limit judicial review of final removal orders issued to noncitizens convicted of crimes.[59] As a general matter, circuit courts do not have jurisdiction to review final orders of removal issued to noncitizens removable for having committed a criminal offense, including an aggravated felony.[60] But recall that the REAL ID Act includes a savings clause for judicial review of "constitutional claims or questions of law."[61] One such question of law that merits judicial review is the

---

[54] *Id.* § 238.1(d)(2)(ii)(A).

[55] *Id.* § 238.1(d)(2)(iii).

[56] *Id.* § 238.1(d)(2)(ii)(A).

[57] *See id.* § 1003.1(b)(3) (describing the appellate jurisdiction of the Board of Immigration Appeals as encompassing "[d]ecisions of Immigration Judges in removal proceedings").

[58] *See* 8 U.S.C. 1252(a)(2)(C)–(D) (2018) (barring courts from exercising "jurisdiction to review any final order of removal against [a noncitizen] who is removable by reason of having committed a criminal offense," but permitting noncitizens to seek "review of constitutional claims or questions of law" if a petition is "filed with an appropriate court of appeals").

[59] *See supra* Part II.A.

[60] *See* 8 U.S.C. § 1252(a)(2)(C) (2018) ("[N]o 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) . . . ."); *id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[61] *See* 8 U.S.C. § 1252(a)(2)(D) (2018) ("Nothing in subparagraph (B) or (C) . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals . . . .").

classification of a noncitizen's criminal conviction as an "aggravated felony."[62]

Noncitizens seeking review of Final Administrative Removal Orders are thus limited to seeking review of constitutional claims or questions of law alone.[63] Furthermore, noncitizens must exhaust all administrative remedies available "as of right" for a circuit court to exercise jurisdiction over a petition for review.[64] For a remedy to be available "as of right," an agency must be able to "give unencumbered consideration to whether relief should be granted."[65] The requirement of exhausting administrative remedies "means that 'a party must normally [pursue] all available avenues of administrative redress before seeking [appellate] court review.'"[66] Thus, to obtain judicial review of a Final Administrative Removal Order, a noncitizen must ground their petition in either a constitutional claim or a question of law, and they must have

---

[62] Courts have exercised jurisdiction "to review as a question of law whether a petitioner's prior offense qualifies as an aggravated felony." Flores-Vega v. Barr, 932 F.3d 878, 882 (9th Cir. 2019); *see also* Castendet-Lewis v. Sessions, 855 F.3d 253, 260 (4th Cir. 2017) (holding that, in the context of immigration law, "[w]hether a crime is an aggravated felony is a question of law that [the court] reviews de novo"); Escoto-Castillo v. Napolitano, 658 F.3d 864, 865 (8th Cir. 2011) (stating that judicial review of a final order of removal includes "whether the [noncitizen] was in fact convicted of an aggravated felony"). If a noncitizen challenges the classification of their conviction as an "aggravated felony" on appeal before a circuit court, the court will compare the elements of the crime in the statute under which the noncitizen was convicted with the elements as described in the immigration statute. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 260 (2012) (explaining the process employed by federal courts and administrative agencies to "determine[] the immigration consequences of a prior conviction"); 8 U.S.C. § 1101(a)(43) (2018) (defining "aggravated felony" under the INA). This method is termed the "categorical approach" and involves an examination of "the language of the statute of conviction and not the particular facts underlying an individual's conviction." MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2:55, Westlaw COLLATC (database updated Oct. 2018).

[63] 8 U.S.C. § 1252(a)(2)(D) (2018).

[64] *Id.* § 1252(d)(1) ("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 . . . .").

[65] Sun v. Ashcroft, 370 F.3d 932, 942 (9th Cir. 2004) (quoting 8 U.S.C. § 1252(d)(1)).

[66] Larry R. Fleurantin, *Exhaustion of Administrative Remedies in Immigration Cases: Finding Jurisdiction to Review Unexhausted Claims the Board of Immigration Appeals Considers Sua Sponte on the Merits*, 34 AM. J. TRIAL ADVOC. 301, 303–04 (2010) (alterations in original) (quoting Fine, *supra* note 4, at 8).

exhausted all of their administrative remedies prior to petitioning the appropriate circuit court.

C. CIRCUIT SPLIT: THE ROLE OF ISSUE EXHAUSTION IN EXPEDITED REMOVAL CASES

The federal circuit courts have failed to adopt a uniform approach for what a noncitizen in expedited removal proceedings must do to sufficiently exhaust their administrative remedies such that a circuit court will exercise jurisdiction to review a removal order. This circuit split has serious ramifications. Procedural safeguards in expedited removal proceedings, and opportunities for judicial review of their outcomes, are already slim, magnifying any added barrier to obtaining judicial review.[67] The following two cases illustrate the differing approaches taken by the circuits.

1. Etienne v. Lynch*: Declining to Require Issue Exhaustion*. In *Etienne v. Lynch*, the Fourth Circuit held that noncitizens in expedited removal proceedings are not required to exhaust all issues before raising them on appeal before a circuit court.[68] In that case, DHS served Eddy Etienne with a Notice of Intent and commenced expedited removal proceedings against him on the grounds of a conviction for conspiracy.[69] After receiving a Final Administrative Removal Order, Etienne filed a petition for review with the Fourth Circuit Court of Appeals.[70]

In that petition, he argued—for the first time—that his conviction did not constitute an "aggravated felony" and that DHS incorrectly found him removable.[71] He contended that expedited removal proceedings do not allow noncitizens to raise legal challenges to their removal, instead only permitting factual challenges.[72] Because of this, Etienne claimed to have "no

---

[67] *See, e.g.*, Koh, *supra* note 36, at 182–83 (noting that "the procedural protections available in immigration court strike many as insufficient when compared to the human consequences at stake with deportation").

[68] Etienne v. Lynch, 813 F.3d 135, 142 (4th Cir. 2015) (holding that the noncitizen "was not required to raise his legal challenge to removal in order to meet the exhaustion requirement of . . . 8 U.S.C. § 1252(d)(1)").

[69] *Id.* at 137.

[70] *Id.*

[71] *Id.* at 138.

[72] *Id.*

opportunity during administrative removal to challenge the classification of his . . . conspiracy conviction as an 'aggravated felony,' and therefore he [had] not failed to exhaust his administrative remedies."[73]

The government disagreed. They argued that the relevant regulations allowed DHS officers to assess noncitizens' legal challenges to their removability during expedited removal proceedings and that these regulations required "the [noncitizen] to raise any such challenge before DHS or forfeit that claim for failing to exhaust administrative remedies."[74]

The Fourth Circuit agreed with Etienne, finding that expedited removal proceedings deny noncitizens the opportunity to challenge the legal basis of removal.[75] The court reasoned that "the language of the expedited removal regulations, read in context with the INA and associated regulations, seems to indicate that only factual challenges to [a noncitizen's] removability may be raised in expedited removal proceedings."[76] The court also analyzed the physical Notice of Intent form that DHS provides to noncitizens facing expedited removal, remarking that the form "offers no obvious opportunity to raise a legal challenge."[77]

Because expedited removal proceedings do not accommodate legal challenges to removal, the Fourth Circuit concluded that Etienne had not failed to exhaust his administrative remedies and that it had jurisdiction to consider his challenge to the legal grounds of his removal.[78]

2. Malu v. U.S. Attorney General*: Requiring Issue Exhaustion. Malu v. U.S. Attorney General* factually resembles *Etienne*, but the court concluded differently on the question of administrative

---

[73] *Id.*

[74] *Id.* at 140.

[75] *Id.* at 141.

[76] *Id.* The court further reasoned that "[t]he procedures that are explicitly available to the deciding DHS officer after an alien responds to the Notice of Intent contemplate a 'genuine issue of material fact' that the officer may attempt to cure by gathering additional evidence." *Id.* (citing 8 C.F.R. § 238.1(d)(2)).

[77] *Id.* at 141.

[78] *Id.* at 142. The court went on to consider the merits of Etienne's appeal and ultimately affirmed the removal order because his conviction for conspiracy constituted an "aggravated felony" within the meaning of the INA. *Id.* at 145.

exhaustion.[79] Biuma Claudine Malu was charged with simple battery in 2011.[80] DHS classified that crime as an aggravated felony and initiated expedited removal proceedings after issuing Malu a Notice of Intent.[81]

Before the Eleventh Circuit, Malu argued, for the first time, that the basis for the expedited removal proceedings against her was without merit because simple battery should not be classified as an "aggravated felony" under the INA.[82] In response, the government contended that by failing to raise the grounds of her removability during administrative proceedings, Malu failed to exhaust her administrative remedies regarding that issue and was subsequently barred from raising it on appeal.[83]

Malu contended that she was obliged only to move through each phase of administrative proceedings—not to "exhaust specific issues" during those proceedings—in order to exhaust her administrative remedies as required by the INA.[84] Malu relied on *Sims v. Apfel*,[85] in which the U.S. Supreme Court declined to impose an issue-exhaustion requirement in Social Security proceedings.[86] Yet the Eleventh Circuit summarily dismissed Malu's argument: "*Sims* does not help Malu."[87] The court held that Malu failed to exhaust her administrative remedies "because she failed to contest the *only* ground for her expedited removal: whether her prior conviction for simple battery was an aggravated felony."[88] The Eleventh Circuit remarked that in expedited removal proceedings, "it would be nonsensical to limit the alien's rebuttal to allegations of fact, but save for later any rebuttal to conclusions of law."[89] Unlike the Fourth Circuit, the Eleventh Circuit held that

---

[79] Malu v. U.S. Att'y Gen., 764 F.3d 1282, 1284 (11th Cir. 2014) (denying the noncitizen's petition for review because she "failed to exhaust her argument that she did not commit an aggravated felony").

[80] *Id.* at 1285.

[81] *Id.*

[82] *Id.* at 1287.

[83] *Id.*

[84] *Id.*

[85] 530 U.S. 103, 107–08 (2000).

[86] *Malu*, 764 F.3d at 1287.

[87] *Id.*

[88] *Id.* at 1287–88.

[89] *Id.* at 1288.

noncitizens can—and indeed, must—exhaust all issues, including those of a legal nature, during expedited removal proceedings before raising them on appeal.[90]

III. ADMINISTRATIVE REMEDY EXHAUSTION AND ISSUE EXHAUSTION

A. CONCEPTIONS OF ADMINISTRATIVE EXHAUSTION

The role of administrative agencies within the three-branch system of government "requires that the judiciary tolerate a certain amount of agency discretion by giving considerable deference to agency action."[91] Agency actions are presumptively subject to review by the courts, but this "considerable deference" to agencies has placed limits on judicial review of their actions.[92] First, courts may only review *final* agency actions.[93] To be "final," an agency action generally must "have some direct, binding, and immediate impact on the parties."[94] Second, courts may only review agency actions when a party has exhausted all options for redress offered by the agency—a requirement known as the "doctrine of exhaustion of administrative remedies."[95]

Exhausting administrative remedies "generally requires a party to go through all the stages of an administrative adjudication before going to court."[96] Obliging a party to complete all phases of an

---

[90] *Id.* at 1289.

[91] Fine, *supra* note 4, at 2; *see also* 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed. 2019), Westlaw ADMLP ("Exhaustion doctrine 'serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.'" (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66, *as recognized in* Woodford v. Ngo, 548 U.S. 81, 84–85 (2006))).

[92] Fine, *supra* note 4, at 3 ("[T]here is a general presumption of court reviewability of agency action. The right to judicial review of final actions of administrative agencies is well-established, both at common law and as a matter of statutory right.").

[93] *Id.* at 7 ("As a general matter, only agency action that is 'final' is reviewable." (quoting 5 U.S.C. § 704 (1994)); *see also* Administrative Procedure Act, 5 U.S.C. § 704 (2018) (limiting judicial review to "final agency action for which there is no other adequate remedy in a court").

[94] Fine, *supra* note 4, at 7.

[95] *Id.* at 8.

[96] Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 111 (2018).

administrative process promotes finality by "ensur[ing] that the agency action being challenged is the final agency position."[97] Requiring the exhaustion of administrative remedies also allows the agency to exercise its specialized expertise in the resolution of the matter and relieves burdens on the judicial system by preemptively settling disputes that do not require court intervention.[98]

A "new permutation" of the traditional doctrine of administrative remedy exhaustion involves "situations where a petitioner for judicial review did follow all the steps of the administrative appeals process, but . . . failed to raise in that process the issues now sought to be litigated in court."[99] This "permutation," a requirement of administrative "issue exhaustion," obliges a party to exhaust all possible *issues* before an administrative agency prior to raising those issues before a court on judicial review.[100] Courts generally will not address an issue on judicial review that was not raised by the party before the agency during administrative proceedings.[101]

---

[97] *Id.*

[98] *See id.* (explaining further the benefits of "remedy exhaustion" for both the agency and the courts).

[99] *Id.*; *see also* 4 KOCH & MURPHY, *supra* note 91, § 12:21 ("[Issue exhaustion] blocks a party from litigating a particular issue on judicial review of agency action unless that issue was raised before the agency.").

[100] *See* William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since* Darby, 18 PACE ENV'T L. REV. 1, 11 (2000) ("'Issue exhaustion' is a term that refers to the need to raise an issue with an administrative agency before raising it on judicial review."). While this Note uses the term "issue exhaustion," other terms are used interchangeably to refer to this doctrine as well. *See* 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8364 (2d ed. 2020), Westlaw FPP (noting that courts also refer to this doctrine as "issue waiver" or "administrative waiver").

[101] *See* Nuclear Energy Inst., Inc. v. Env't Prot. Agency, 373 F.3d 1251, 1297 (D.C. Cir. 2004) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review."). This rule has exceptions, though: "Courts have excused a requirement of issue exhaustion where 'issues by their very nature could not have been raised before the agency,'" or where raising the issue would have been futile. 33 WRIGHT & MILLER, *supra* note 100, § 8364 (quoting Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164, 1170 (D.C. Cir. 1994)).

B. *SIMS V. APFEL* FRAMEWORK FOR JUDICIALLY IMPOSING ISSUE EXHAUSTION

In *Sims v. Apfel*, the U.S. Supreme Court analyzed the propriety of a judicially imposed issue-exhaustion requirement in a petition for appeal arising from a claim for Social Security benefits.[102] In that case, the relevant statutes and regulations governing the petitioner's request for review did not require issue exhaustion.[103] Writing for the majority, Justice Clarence Thomas noted that courts occasionally require issue exhaustion even without a statutory mandate: "The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts."[104]

The Court observed that "[w]here the parties are expected to develop the issues in an adversarial administrative proceeding, it seems . . . that the rationale for requiring issue exhaustion is at its greatest."[105] Proceedings under the Social Security Act (SSA) rely on an "investigatory model" of decisionmaking, rather than a judicial model based on an adversarial procedure.[106] In an SSA proceeding, an administrative law judge "investigate[s] the facts

---

[102] Sims v. Apfel, 530 U.S. 103, 107 (2000).

[103] *Id.* at 108 ("[Social Security Act] regulations do not require issue exhaustion."). The Court noted that issue-exhaustion requirements "are largely creatures of statute." *Id.* at 107; *see also* Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 121 (2d Cir. 2006) (providing examples of statutes with express issue-exhaustion requirements). When codified in a statute, a "requirement of issue exhaustion may be jurisdictional, in which case it is not waivable by the government." 33 WRIGHT & MILLER, *supra* note 100, § 8364. An issue-exhaustion requirement may be merely "mandatory" when it "amounts to a claims-processing rule." *Id.* The government may waive a mandatory, but not a jurisdictional, issue-exhaustion requirement. *See* 33 WRIGHT & MILLER, *supra* note 100, § 8316 ("Any statutory scheme that creates a path for judicial review will contain various grants and limits on the availability of such review. Courts and litigants must determine which of these provisions are jurisdictional and which are not. This distinction is important because non-jurisdictional provisions may be subject to waiver . . . .").

[104] *Sims*, 530 U.S. at 108–09; *see also* 4 KOCH & MURPHY, *supra* note 91, § 12.22 ("In the absence of statutory or regulatory controls, courts, too, impose issue exhaustion requirements as a prudential matter.").

[105] *Sims*, 530 U.S. at 110.

[106] *Id.* (plurality opinion) ("The most important of [the SSA's modifications of the judicial model] is the replacement of normal adversary procedure by . . . the 'investigatory model.'" (alterations in original) (quoting BERNARD SCHWARTZ, ADMINISTRATIVE LAW 470 (4th ed. 1994))).

and develop[s] the arguments both for and against granting benefits."[107] The Social Security Appeals Council determines whether to review a case by reference to a form completed by petitioners; the form is short, providing only three lines to explain the request for review, and is accompanied by a notice that it should take about ten minutes to complete.[108]

The Court did not impose an issue exhaustion requirement in *Sims*.[109] In a portion of the opinion with only a plurality of votes, Justice Thomas observed that—given the inquisitorial nature of SSA proceedings—"the general rule [of issue exhaustion] makes little sense in this particular context."[110] *Sims* thus emphasized the nature of administrative proceedings—i.e., as inquisitorial or adversarial—in determining the appropriateness of judicially imposed issue-exhaustion requirements in the absence of a statutory jurisdictional requirement.

IV. ISSUE EXHAUSTION IN EXPEDITED REMOVAL CASES

The express language of the IIRIRA does not require issue exhaustion.[111] Noncitizens are required only to "exhaust[] all administrative remedies available to [them] as of right" before petitioning a court of appeals for judicial review.[112] Courts have confronted the question of whether the administrative-exhaustion requirement in 8 U.S.C. § 1252(d) encompasses issue exhaustion

---

[107] *Id.* at 111.

[108] *See id.* at 112 (providing a description of Social Security Appeals Council proceedings and concluding that the brief nature of the form "strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review").

[109] *Id.* ("[W]e hold that a judicially created issue-exhaustion requirement is inappropriate.").

[110] *Id.* (alteration in original) (quoting Harwood v. Apfel, 186 F.3d 1039, 1042 (8th Cir. 1999)).

[111] *See, e.g.*, Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 120 (2d Cir. 2006) ("[T]he language of § 1252(d)(1) . . . does not expressly proscribe judicial review of issues not raised in the course of exhausting all administrative remedies."); Etchu-Njang v. Gonzales, 403 F.3d 577, 582 (8th Cir. 2005) (acknowledging that "the plain language of § 1252(d)(1) could be read to require only exhaustion of *remedies* available as of right" rather than both remedies and issues). However, the court in *Etchu-Njang* concluded that there were "good reasons to require" issue exhaustion on other grounds. *Id.* at 583.

[112] 8 U.S.C. § 1252(d) (2018) (outlining the exhaustion requirement for expedited removal proceedings).

when a noncitizen fails to raise an issue during expedited removal proceedings but proceeds to do so on appeal before a federal circuit court. Those courts, however, have failed to reach a consensus.[113] Specifically, those courts have disagreed on whether a failure to contest the classification of a conviction as an aggravated felony during the administrative phase of expedited removal proceedings constitutes a failure to exhaust administrative remedies.[114] Interestingly, these cases rarely refer to "issue exhaustion" when considering whether this failure precludes the issue from consideration on judicial review.[115] One court noted that "[t]he opportunity to raise a legal challenge"—such as the proper classification of a prior conviction—could be considered "one of the 'steps that the agency holds out' and therefore an administrative remedy that must be exhausted."[116] Other courts have held, however, that "[w]hether a crime is an aggravated felony is a question of law that [they] review de novo" on appeal.[117] That circuit courts routinely consider the classification of a conviction as a

---

[113] *See supra* notes 12–15 and accompanying text. Courts have considered whether this same administrative-exhaustion requirement encompasses an obligation to exhaust issues in full immigration proceedings, i.e., when a noncitizen fails to raise an issue in a hearing before the BIA but proceeds to do so on appeal before a circuit court. *See, e.g.*, Alvarado v. Holder, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) ("We note that some circuits have held that *issue* exhaustion, as opposed to exhaustion of administrative *remedies*, is not a statutory jurisdictional requirement, but a judicially created case processing rule, allowing courts the 'discretion' to 'choose to review [petitioners'] arguments not previously made to the BIA.'" (alteration in original) (quoting Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 118–22 (2d Cir. 2006))).

[114] *See supra* Part II.C.

[115] *See, e.g.*, Etienne v. Lynch, 813 F.3d 135, 142 (4th Cir. 2015) (noting that the petitioner "was not required to raise his legal challenge to removal in order to meet the *exhaustion requirement* of . . . 8 U.S.C. § 1252(d)(1)" (emphasis added)); Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013) (holding that the petitioner "did not fail to exhaust his *administrative remedies*" (emphasis added)). *But cf.* Malu v. U.S. Gen., 764 F.3d 1282, 1287–89 (11th Cir. 2014) (addressing *Sims v. Apfel* and its framework for issue exhaustion, but ultimately framing its holding in terms of the noncitizen's failure to exhaust administrative remedies rather than issues); Escoto-Castillo v. Napolitano, 658 F.3d 864, 866 (8th Cir. 2011) (holding "that failure to exhaust administrative immigration remedies precludes merits review of the unexhausted issue").

[116] *Etienne*, 813 F.3d at 142 (quoting Woodford v. Ngo, 548 U.S. 81, 90 (2006), *superseded by statute*, Pub. L. No. 104-134, 110 Stat. 1321 (1996), *as recognized in* William Loveland Coll. v. Distance Educ. Accreditation Comm'n, 347 F. Supp. 3d 1, 12 (D.D.C. 2018)).

[117] Castendet-Lewis v. Sessions, 855 F.3d 253, 260 (4th Cir. 2017).

question of law—rather than a remedy that could have been pursued during administrative proceedings—militates in favor of analyzing these cases as concerning issue-exhaustion, rather than remedy-exhaustion, requirements.

This section will consider the appropriateness of judicially imposing an issue-exhaustion requirement in expedited removal cases. First, it will assess expedited removal proceedings in the *Sims v. Apfel* framework. Second, it will examine the differing approaches of the circuits as exemplified in *Etienne* and *Malu*. Finally, this section recommends judicial deference in the matter of imposing issue exhaustion in appeals of expedited removal orders.

A. APPLYING *SIMS V. APFEL*

Immigration proceedings typically have the adversarial characteristics that would make "an issue-exhaustion requirement . . . 'an important corollary' of any requirement of exhaustion of remedies."[118] Noncitizens facing removal for an aggravated felony conviction in both full removal proceedings[119] and expedited removal proceedings receive notice of the commencement of such proceedings.[120] Standards of evidence and burdens of proof in immigration proceedings "bear a strong resemblance to [those used in] judicial trials."[121] Noncitizens facing removal may "defend against removability" and seek several remedies.[122]

---

[118] Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 121 (2d Cir. 2006), *amended by* 480 F.3d 104 (2d Cir. 2007) (quoting Sims v. Apfel, 530 U.S. 103, 107 (2000)).

[119] "Full removal proceedings" refers to non-expedited removal proceedings in which a noncitizen is afforded a hearing before an IJ and is entitled to appeal the IJ's determination before the BIA. *See* 8 U.S.C. § 1229a (2018) (outlining the requirements of removal proceedings). Part IV compares full immigration proceedings and expedited removal proceedings but does not consider the applicability of issue exhaustion to appeals from full immigration proceedings.

[120] *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 698 (6th Cir. 2002) ("Consistent with the adversarial nature of judicial proceedings, a deportation proceeding is commenced with a 'Notice to Appear,' . . . a charging document or complaint-like pleading, which vests jurisdiction with the immigration court. . . . This document must . . . put the non-citizen on notice of the charges against him." (citations omitted)). A "Notice to Appear" is analogous to a "Notice of Intent." *See* 8 C.F.R. § 238.1(b)(2)(i) (2020) (stating that a Notice of Intent shall "constitute the charging document" and "include allegations of fact and conclusions of law").

[121] *Detroit Free Press*, 303 F.3d at 698.

[122] *Id.*

Yet fundamental differences exist between full immigration proceedings and expedited removal proceedings.[123] Noncitizens in full immigration proceedings are entitled to contest their removability in the first instance before an IJ, who is required to be a lawyer.[124] In *Detroit Free Press v. Ashcroft*, the Sixth Circuit analogized judicial trials and immigration proceedings, and included in its comparison that "[r]emoval proceedings are presided over by immigration judges."[125] The regulations governing hearings before an IJ expressly contemplate the resolution of legal questions.[126]

Compare this process to the proceedings accompanying expedited removal. Those proceedings are conducted by a deciding service officer, who need not be a lawyer.[127] In *Valdiviez-Hernandez v. Holder*, the Fifth Circuit noted that noncitizens "do not appear before an IJ, nor can they appeal an adverse decision to the BIA," which inhibits noncitizens' ability to raise legal challenges to their removability during expedited removal proceedings.[128] The regulations governing expedited removal proceedings make no mention of "issues of law."[129] In response to an insufficient rebuttal from a noncitizen or a genuine issue of material fact, a deciding service officer may gather additional evidence from any source.[130] This "investigative" duty recalls the inquisitorial model of

---

[123] *See* DANIEL KANSTROOM, AFTERMATH 65 (2012) ("[Expedited removal] authorizes administrative immigration officials to completely avoid formal immigration court proceedings and to simply order people deported due to the conviction of an 'aggravated felony.' . . . Individuals are simply notified of the charges and are given ten days in which to respond to a DHS deportation and removal officer. Procedural safeguards are rather minimal." (footnote omitted)).

[124] *See* 8 U.S.C. § 1101(b)(4) (2018) (defining "immigration judge").

[125] *Detroit Free Press*, 303 F.3d at 699.

[126] *See* 8 C.F.R. § 1240.10(c) (2020) ("If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no *issues of law* or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent." (emphasis added)).

[127] *Id.* § 238.1(a) (2020) (defining "Deciding Service officer"); *cf.* Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013) ("[The petitioner] further argues that DHS officers are not trained to interpret immigration statutes to the extent of an IJ or the Board of Immigration Appeals . . . .").

[128] *Valdiviez-Hernandez*, 739 F.3d at 187.

[129] *See generally* 8 C.F.R. § 238.1 (2020).

[130] *Id.* § 238.1 (d)(2)(ii)(A).

decisionmaking that characterized Social Security proceedings in *Sims* and led the Court to not require issue exhaustion.[131]

Expedited removal proceedings are neither non-adversarial nor inquisitorial in nature. But a comparison of the characteristics of expedited removal with those of full immigration proceedings suggests that the former gravitates toward factfinding, rather than the resolution of legal and factual issues, while the latter are equipped to do both. Expedited removal proceedings are more properly characterized as quasi-adversarial, and this nuance is significant. The U.S. Supreme Court has explained that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding."[132] In expedited removal proceedings, that analogy does not stretch far enough. Because expedited removal proceedings bear little resemblance to judicial trials—with their robust procedural protections and capacity to resolve factual *and* legal issues—courts should exercise caution before imposing an issue-exhaustion requirement when reviewing petitions for review from expedited removal cases.

B. ACCOMMODATING LEGAL CHALLENGES

An additional reason that circuit courts should not impose an issue-exhaustion requirement is that the expedited removal process essentially excludes consideration of questions of law. One question of law that a noncitizen facing expedited removal can raise on a petition for review is the classification of their conviction as an "aggravated felony."[133] Since the term's introduction into immigration law in the late 1980s, an "aggravated felony" has shifted from a narrowly tailored concept to a broad, ever-growing "colossus."[134] Legislative amendments enacted in the 1990s and 2000s so broadened the contours of an "aggravated felony" that it

---

[131] Sims v. Apfel, 530 U.S. 103, 110–11 (2000) (plurality opinion).

[132] *Id.* at 109 (majority opinion).

[133] *See supra* note 62.

[134] *See* Legomsky, *supra* note 39, at 483–84 (discussing the "stead[y]" and "expansive growth" of the term "aggravated felony").

"need no longer be either aggravated or a felony."[135] The term's expanding reach and "the severe consequences that follow the labeling of a crime as an aggravated felony" render all the more critical the opportunity to raise a legal challenge—particularly to the classification of a conviction—on judicial review.[136]

In cases where a noncitizen did not challenge the classification of a conviction during expedited removal proceedings, subsequent circuit courts have considered whether those noncitizens failed to exhaust their administrative remedies by failing to exhaust that issue before raising it on appeal. In *Etienne*, the Fourth Circuit emphasized that expedited removal proceedings do not accommodate legal challenges.[137] The Notice of Intent that initiates those proceedings supports this conclusion. A noncitizen may respond to the Notice of Intent by checking one of four boxes to contest her deportation.[138] Only one box, which permits the noncitizen to attach documents supporting the contested removal, could possibly accommodate a challenge to the classification of an aggravated felony.[139]

Per the Eleventh Circuit, limiting a noncitizen's response to the Notice of Intent to factual issues alone would be "nonsensical."[140] Yet, nonsensical or not, that is precisely the limitation imposed by the Notice of Intent. The Eleventh Circuit agreed with the government's observation that "the regulations make clear that the charges in the notice of intent include both 'allegations of fact and conclusions of law' that the alien may rebut."[141] That the Notice of Intent must "include allegations of fact and conclusions of law" is a far cry from an administrative procedure that affords sufficient opportunity to a noncitizen to present a legal challenge.[142] The Fourth Circuit and others similarly aligned present significantly

---

[135] *Id.* at 484–85.

[136] *Id.* at 485–86.

[137] Etienne v. Lynch, 813 F.3d 135, 141–42 (4th Cir. 2015) ("[W]e cannot say that DHS's expedited removal procedures offer an alien the opportunity to challenge the legal basis of his or her removal.").

[138] *Id.* at 139.

[139] *Id.* (showing a form with a checkbox stating that the noncitizen is "attaching documents in support of [their] rebuttal and request for further review").

[140] Malu v. U.S. Att'y Gen., 764 F.3d 1282, 1288 (11th Cir. 2014).

[141] *Id.* (quoting 8 C.F.R. § 238.1(b)(2)(i)).

[142] 8 C.F.R. § 238.1(b)(2)(i) (2020).

more persuasive interpretations of the expedited removal process and its requirements—or lack thereof—with regard to administrative exhaustion.

C. SITUATING ISSUE-EXHAUSTION REQUIREMENTS

When expedited removal orders are appealed to circuit courts, judicial deference—i.e., refusing to require that noncitizens exhaust issues in the absence of a statutory mandate—is the proper approach; this is evidenced by the fact that solutions to the issue-exhaustion conundrum are unlikely to emanate from the judiciary. In *Etienne*, for example, the Fourth Circuit noted that its opinion does not preclude "DHS from changing [the form accompanying the Notice of Intent] to make it clear that DHS wishes to require aliens to raise legal arguments in expedited removal proceedings."[143] Resolving the proper scope of the issue-exhaustion requirement is a project for the legislature. The legislation governing expedited removal makes no mention of issue exhaustion.[144] Courts responded to this silence by requiring noncitizens to contest the legal grounds of their removal in proceedings that are fundamentally ill-suited to accommodate legal challenges.[145] An ideal solution would be legislative action to change the nature of expedited removal proceedings to better accommodate legal challenges by noncitizens. In the absence of such action, courts should refrain from constructing additional barriers to judicial review of an expedited removal order.

---

[143] *Etienne*, 813 F.3d at 142.

[144] *See supra* note 111 and accompanying text.

[145] *Compare Malu*, 764 F.3d at 1288 (imposing an issue-exhaustion requirement because "the regulations make clear that the charges in the notice of intent include both 'allegations of fact and conclusions of law' that the alien may rebut" (quoting 8 C.F.R. § 238.1(b)(2)(i))), *and* Escoto-Castillo v. Napolitano, 658 F.3d 864, 866 (8th Cir. 2011) ("We have repeatedly held that failure to exhaust administrative immigration remedies precludes merits review of the unexhausted issue."), *with Etienne*, 813 F.3d at 141–42 (declining to impose an issue exhaustion requirement because the court "[could not] say that DHS's expedited removal procedures offer an alien the opportunity to challenge the legal basis of his or her removal"), *and* Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013) (finding an issue-exhaustion requirement inappropriate because "[t]he relevant statutes and corresponding regulations . . . did not provide Valdiviez with an avenue" to raise a legal challenge).

The question of issue exhaustion in expedited removal cases may eventually be posed to the U.S. Supreme Court.[146] Should that occur, the Court will likely consider the role of judicial deference in its reasoning. Those considerations, along with an analysis of expedited removal proceedings under *Sims* and an assessment of the circuit courts' rationales, should weigh in favor of eliminating an issue-exhaustion requirement as a prerequisite to judicial review of removal orders in expedited removal cases.

V. CONCLUSION

Throughout the past several decades, immigration legislation in the United States has increasingly narrowed the scope of judicial review over removal proceedings.[147] In light of this trend, the few spaces that remain open to noncitizens for seeking judicial review of removal orders are important to preserve. Noncitizens confronted with final orders of removal following expedited removal proceedings face an uphill battle in challenging the factual or legal grounds of their removal in court. The hurdles that these noncitizens face as they pursue judicial review vary by circuit. Some require a noncitizen to exhaust all issues, including the legal grounds of their removal, during expedited removal proceedings. Other circuits do not, on the grounds that doing so is not even possible. In *Sims v. Apfel*, the U.S. Supreme Court provided a framework for analyzing whether judicially imposed issue exhaustion is an appropriate requirement.[148] As quasi-adversarial proceedings, expedited removal proceedings fall into a gray area

---

[146] *See, e.g.*, Quinteros v. Att'y Gen. of the U.S., 945 F.3d 772, 781 n.23 (3d Cir. 2019) (declining to "wade into this circuit split" because the agency considered the noncitizen's legal challenge *sua sponte*). The U.S. Supreme Court, however, may inevitably have to "wade into this circuit split." *Id.*

[147] *Cf.* 14A MILLER, *supra* note 24, § 3664 ("Since the 1990s, the judicial review of immigration orders has been a source of significant political and legal controversy."). As recently as 2020, the Court upheld the judicial review provision of 8 U.S.C. § 1252(e)(2), which "limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus." *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1966, 1983 (2020) (holding that "§ 1252(e)(2) does not violate due process"). That particular judicial review provision is not at issue in this Note, but the Court's recent ruling further evinces the shrinking space for judicial review of removal orders.

[148] 530 U.S. 103, 110 (2000).

under that framework. The accelerated nature of these proceedings, the lack of procedural protections for the individuals facing removal, and the vulnerability of those individuals militate in favor of eliminating, rather than expanding, the administrative-exhaustion requirement.