Exhaustion of Administrative Remedies in Immigration Cases: Finding Jurisdiction to Review Unexhausted Claims the Board of Immigration Appeals Considers Sua Sponte on the Merits

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Exhaustion of Administrative Remedies in Immigration Cases: Finding Jurisdiction to Review Unexhausted Claims the Board of Immigration Appeals Considers Sua Sponte on the Merits

Larry R. Fleurantin†

Abstract

In order for an appellate court to review an agency action, the action must be final and all administrative remedies must be exhausted. With regard to the exhaustion requirement, the author examines how the majority of circuits have held that federal circuit courts have jurisdiction to review immigration claims considered sua sponte by the Board of Immigration Appeals. However, the Eleventh Circuit seems to be the one outlier finding no jurisdiction, and the author believes the holding in Amaya-Artunduaga v. United States Attorney General to be incorrect and recommends it be overruled.

I. Introduction

Between 2004 and 2005, the federal courts of appeals have issued a series of decisions ruling on petitions for review filed by aliens who failed to raise their claims before the Board of Immigration Appeals (BIA). ¹

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¹ See, e.g., Abebe v. Gonzales, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) (holding that a procedural defect cannot prevent the appellate court from reviewing a claim that the BIA elected to consider on its substantive merits); Hassan v. Gonzales, 403 F.3d 429, 433 (6th Cir. 2005) (same); Singh v. Gonzales, 413 F.3d 156, 160 n.3 (1st
These cases considered the issue of whether the exhaustion requirement is waived if the BIA chooses to reach the merits of a claim it could have summarily dismissed. The number is remarkable primarily because the rulings in those cases were uniformly friendly to aliens. But in 2006, the United States Court of Appeals for the Eleventh Circuit decided *Amaya-Artunduaga v. United States Attorney General*, which found no jurisdiction to review the petition for review due to a lack of administrative exhaustion even though the BIA sua sponte reached the merits of the claim.²

In this Article, the author focuses on whether federal appellate courts have jurisdiction to review immigration claims considered sua sponte by the BIA. Part II discusses the requirement of administrative exhaustion in immigration cases. Part III illustrates the difficulty in balancing the BIA’s duty to administer and interpret immigration laws with the appeals courts’ duty to interpret federal laws. Part III also reviews the Eleventh Circuit’s decision in *Amaya-Artunduaga* and carefully analyzes the court’s decision to deny jurisdiction for lack of administrative exhaustion in cases where the BIA sua sponte considers a litigant’s claims on the merits. Part IV examines the 2009 decision by United States Court of Appeals for the Sixth Circuit in *Khalili v. Holder*,³ in which the court provided a thoughtful and well-reasoned analysis of the basis for its decision finding jurisdiction to review claims where the BIA sua sponte considered the merits of the case.

The goal of this Article is to show that an appellate court would not undermine the autonomy and effectiveness of the BIA by finding jurisdiction to review issues considered sua sponte by the BIA. The Article applies Professor Neil MacCormick’s “Three C’s Theory”: consequence, consistency, and coherence as outlined by Judge Ruggero J. Aldisert.⁴

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² 463 F.3d 1247, 1250 (11th Cir. 2006) (per curiam).
³ 557 F.3d 429, 430 (6th Cir. 2009).
This Article concludes that the Sixth Circuit’s *Khalili* decision meets “the courts’ institutional responsibility respecting consequences, consistency, and coherence.” Therefore, this author urges the Eleventh Circuit to follow *Khalili* and join the majority of circuits, holding that a claimant exhausts her administrative remedy where the BIA sua sponte thoroughly considers the claim on the merits.

II. Administrative Exhaustion in Immigration Cases

The two jurisdictional prerequisites to court review of an agency action are (1) finality and (2) exhaustion of administrative remedies. Generally, a reviewing court lacks jurisdiction if the agency action at issue is not final. A final action is one in which “rights or obligations have been determined or from which legal consequences will flow.”

Jurisdiction will not lie with a reviewing appellate court if a party fails to exhaust all administrative remedies available to him as of right under the Immigration and Naturalization Act (INA). Exhaustion means that

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5 Aldisert et al., *supra* note 4, at 14.
6 557 F.3d at 434.
7 See, e.g., Lopez-Dubon v. Holder, 609 F.3d 642, 644 (5th Cir. 2010) (noting that “[a]lmost every court of appeals will address an issue on the merits when the BIA has done so, even if the issue was not properly presented to the BIA itself”); Lin v. Att’y Gen., 543 F.3d 114, 123 (3d Cir. 2008) (holding that BIA’s sua sponte consideration of claim on the merits sufficiently exhausted the issue to confer jurisdiction to the appellate court to reach the merit of the claim raised in the petition for review); Zine v. Mukasey, 517 F.3d 535, 540-41 (8th Cir. 2008) (finding appellate jurisdiction where the BIA decided to reach the merits of the issue); Sidabutar v. Gonzales, 503 F.3d 1116, 1119-20 (10th Cir. 2007) (If the BIA elects to waive the specificity requirement under 8 C.F.R. § 1003.3(b), then an appellate court retains jurisdiction to review the final order under 8 U.S.C. § 1252(a)(1) (2006)); Ye v. Dep’t of Homeland Sec., 446 F.3d 289, 296-97 (2d Cir. 2006) (per curiam).
9 Sharkey v. Quarantillo, 541 F.3d 75, 87 (2d Cir. 2008).
10 *Id.* at 88 (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).
11 *Id.*; 8 U.S.C. § 1252(d)(1) (2005). The first Supreme Court decision that requires exhaustion of administrative remedies before seeking judicial review is *United States*
“a party must normally [pursue] all available avenues of administrative redress before seeking [appellate] court review.” Courts reason that administrative exhaustion is necessary “to permit the agency to perform its functions using its special expertise and competence; and the notion that the agency should have ample opportunity to correct its own mistakes, hopefully mooting the need for court intervention.” Moreover, courts reason that mandating administrative exhaustion is essential to

v. Sing Tuck. 194 U.S. 161 (1904); see Gabriel J. Chin, Regulating Race: Asian Exclusion and the Administrative State, 37 Harv. C.R.-C.L. L. Rev. 1, 41 (2002). Sing Tuck was an immigration case in which the Supreme Court formulated the exhaustion doctrine and it has been followed ever since. Id. (citing Raoul Berger, Exhaustion of Administrative Remedies, 48 Yale L.J. 981, 981-82 (1939)). According to Professor Chin, the Supreme Court decided several immigration cases that developed “leading precedents upholding administrative authority to determine important individual claims and have been used by state and federal courts to justify administrative action in areas having nothing to do with immigration. As a result, immigration cases are one of the earliest and most important sources of constitutional administrative law.” Id. at 3.

12 Fine, supra note 8, at 9 (citing Pavano v. Shalala, 95 F.3d 147, 150 (2d Cir. 1996)); see Amy L. Moore, Lost in the Maze of Appeals: The Eleventh Circuit’s Review of Decisions by the Board of Immigration Appeals, 38 Sw. L. Rev. 419, 435 (2009) (stating that aliens are required to exhaust all administrative remedies available to them as of right before seeking judicial review). According to Moore, if an alien fails to submit a claim to the BIA, the court will not review the claim for lack of exhaustion because unexhausted claims are outside the jurisdiction of the appellate court. See id.

Fine, supra note 8, at 8. The exhaustion doctrine is rooted in the idea that since Congress has delegated decision making authority to the agency, primary responsibility to decide administrative cases is placed with the agency not the courts. William Funk, Exhaustion of Administrative Remedies—New Dimensions Since Darby, 18 Pace Envtl. L. Rev. 1, 18 (2000). In particular, administrative exhaustion is required where the agency action requiring review involves exercise of discretion or application of agency’s special expertise or allowing the agency to correct its own mistakes and compile a better record for judicial review. See id. Addressing the issue of administrative exhaustion, the Supreme Court has stated “that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.” McCarthy v. Madigan, 503 U.S. 140, 145 (1992). When it comes to the admissions and removal of aliens, Congress has charged the Attorney General with the authority to interpret and administer immigration laws under the INA. 8 U.S.C. § 1103(a) (2007). The specific statutory provision requiring aliens to exhaust their administrative remedies before they seek review in federal courts is found in 8 U.S.C. § 1552(d). Federal courts have enforced the exhaustion requirement, reasoning that the failure to prevent the circumvention of the administrative process would undermine the BIA functions and congest the courts with needless petitions. Kurfees v. INS, 275 F.3d 332, 336 (4th Cir. 2001). Applying the holding of McCarthy, the Fourth Circuit in Kurfees stated that “[t]he rules are clear: before proceeding to federal court, an alien must exhaust his or her administrative remedies.” Id.
promote full development of the record to facilitate judicial review and respect for the integrity of the administrative process to run its course without interruption.14

A court of appeals is generally barred from reaching the merits of a claim that was not raised before the BIA because under 8 U.S.C. § 1252(d)(1) exhaustion is mandatory.15 “[T]he principle of exhaustion

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14 See Fine, supra note 8, at 8; see also Jennifer Callahan Berry, Note, Giving Repose to the Exhaustion Doctrine: An Argument for More Exceptions to Exhaustion of Administrative Remedies in the Context of the University of Minnesota Grievance Procedure, 89 MINN. L. REV. 510, 516 (2004) (“The exhaustion doctrine furthers efficiency interests by allowing agencies to correct their own errors before involving the judiciary. . . . When a claimant exercises the right to judicial review after exhausting the available administrative remedies, courts benefit from the existing administrative record.”) (citing McCarthy, 503 U.S. at 145). For a comprehensive discussion of the policies favoring exhaustion of administrative remedies see Rebecca L. Donnellan, Note, The Exhaustion Doctrine Should Not Be a Doctrine With Exceptions, 103 W. VA. L. REV. 361, 365-69 (2001) (noting that these policies include (1) respecting agency autonomy by allowing the agency the opportunity to resolve an issue first since the agency has the primary responsibility to interpret statutes it is charged to administer, (2) allowing the agency to apply its special expertise, (3) promoting judicial economy where the agency can resolve an issue and moot the need for judicial intervention, and (4) aiding judicial review as the agency develops an administrative record for meaningful judicial review).

Administrative law scholars and courts have identified four specific applications supporting the requirement of administrative exhaustion. Jon C. Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 COLUM. L. REV. 1289, 1307 (1997). According to Professor Dubin, these include (1) congressional delegation of primary responsibility to the agency, (2) protecting agency autonomy by allowing the agency to apply its special expertise and correct its own errors, (3) allowing a more developed record to promote efficient judicial review, and (4) promoting judicial economy by allowing the agency to resolve an issue and therefore moot the need for judicial controversy. Id.; see also Samuel A. Yee, Final Exit or Administrative Exhaustion? The Deported Alien’s Catch-22, 8 ADMIN. L.J. AM. U. 605, 619-20 n.94 (1994) (noting that exhaustion of the appellate procedures is required before an alien can seek review in federal courts and that requiring an alien to exhaust his administrative remedies furthers many important interests).

15 Barron v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2004); see also Larry R. Fleurantin, Immigration Law: Nowhere to Turn—Illegal Aliens Cannot Use the Freedom of Information Act as a Discovery Tool to Fight Unfair Removal Hearings, 16 CARDOZO J. INT’L & COMP. L. 155, 170 (2008) (stating that an alien must exhaust her administrative remedy before she can invoke the jurisdiction of the court of appeals to review a final order of removal). The Eleventh Circuit has repeatedly stated that the exhaustion requirement applies to immigration cases and that if a party fails to raise a claim before the BIA, it lacks jurisdiction to consider the claim even when the BIA considers the claim on the merits. See, e.g., Amaya-Artunduaga v. U.S. Att’y Gen., 463 F.3d
may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.\textsuperscript{16} The Ninth Circuit has said that the exhaustion requirement is inapplicable to substantive due process claims that the BIA has no power to adjudicate in the first place.\textsuperscript{17} For example, an alien need not raise a retroactivity challenge before the BIA in order to seek judicial review if the challenge implicates legitimate due process considerations as the BIA does not have the power to provide relief on substantive due process claims involving retroactivity.\textsuperscript{18} However, due process claims for which the BIA can provide a remedy are subject to the exhaustion requirement.\textsuperscript{19} The Ninth Circuit in \textit{Sanchez-Cruz v. INS} declined to consider a colorable due process claim that the IJ failed to serve as a neutral fact-finder because the court determined that the claim was not exhausted administratively.\textsuperscript{20}

Another exception to the exhaustion requirement is where attempting to exhaust one’s administrative remedy would be “futile or impossible.”\textsuperscript{21}

\textsuperscript{16} \textit{Barron}, 358 F.3d at 678 (citing Rashtabadi v. INS, 23 F.3d 1562, 1567 (1994); Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985)).

\textsuperscript{17} Morgan v. Gonzales, 495 F.3d 1084, 1089-90 (9th Cir. 2007); see also Saravia-Paguada v. Gonzales, 488 F.3d 1122, 1130 (9th Cir. 2007).

\textsuperscript{18} See, e.g., Garcia-Ramirez v. Gonzales, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam).

\textsuperscript{19} \textit{Amaya-Artunduaga}, 463 F.3d at 1251; see also Brezilien v. Holder, 569 F.3d 403, 412 (9th Cir. 2009); De Mercado v. Mukasey, 566 F.3d 810, 815 n.4 (9th Cir. 2009) (finding lack of jurisdiction to review claim of IJ’s failing to preside over proceedings as an impartial adjudicator and thereby denying litigant a full and fair hearing on the ground that alien failed to raise the claim before the BIA, which could have provided relief).

\textsuperscript{20} 255 F.3d 775, 779-80 (9th Cir. 2001).

\textsuperscript{21} See Singh v. Ashcroft, 362 F.3d 1164, 1169 (9th Cir. 2004). In addition to futility, the Supreme Court has carved some other exceptions to the exhaustion requirement. For example, in \textit{McCarthy v. Madigan} the Supreme Court recognized three circumstances where individuals need not exhaust their administrative remedies. 503 U.S. 140, 147-49 (1992); see Donnellan, supra note 14, at 369. These exceptions
In *Frango v. Gonzales*, the Eight Circuit stated that “[t]he strongest case for imposing an exhaustion requirement exists where the administrative proceedings closely resemble a trial.”\(^{22}\) The *Frango* court acknowledged that “proceedings before the [BIA and the IJ] generally are adversarial and employ many of the same procedures used in Article III courts.”\(^{23}\) The court noted that crafting “exceptions to judicially-created exhaustion requirements” are appropriate “where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the . . . administrative agency below.”\(^{24}\) The court stated that a reviewing court may excuse the failure to exhaust “where the party failed to raise an issue because to do so would have been futile.”\(^{25}\) The court reasoned that “[t]here is little reason to think that these limited exceptions would undermine the parties’ respect for the administrative proceeding or impair the efficiency of the agency’s operations. They would, however, help ensure that justice was done.”\(^{26}\) The court denied the petition for review, finding that the alien failed to advance a valid reason to exempt him from the general exhaustion requirement by showing either some other parties raised the issues below or that it would have been futile to pursue the issues before the BIA.\(^{27}\)

The exhaustion requirement is a serious issue that requires careful consideration. The most fundamental question is whether courts must apply a rigid requirement of administrative exhaustion where the BIA had an opportunity to consider a claim on the merits.\(^{28}\) Balancing the

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\(^{22}\) 437 F.3d 726, 728 (8th Cir. 2006) (citing Sims v. Apfel, 530 U.S. 103, 109-10 (2000)).

\(^{23}\) *Frango*, 437 F.3d at 728.

\(^{24}\) *Id.* at 728-29 (quoting Hormel v. Helvering, 312 U.S. 552, 557 (1941)).

\(^{25}\) *Id.* at 729 (citing City Bank Farmers’ Trust Co. v. Schnader, 291 U.S. 24, 34 (1934)).

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) Exempting an alien from the exhaustion requirement where the BIA considered the issues on the merits depends on the thoroughness of the BIA’s review of those issues. Where the BIA summarily affirms the IJ’s denial of an applicant’s withholding
courts’ duty to interpret federal laws consistent with an alien’s constitutional and statutory right to judicial review with the BIA’s duty to interpret and administer immigration laws is a twin goal of Congress that cannot be ignored. However, right of access to federal courts must be safeguarded to ensure that justice is done, especially because many immigrants, including asylum seekers, have appeared before the BIA pro se and “have to navigate through a labyrinth of complex immigration laws.” So the question becomes whether the above-mentioned twin goals may be achieved by the courts’ adhering to the administrative exhaustion requirement without curtailing aliens’ right of access to courts.

The author submits that the exhaustion requirement does not have to be applied rigidly. Federal courts have a duty to interpret the law by following the intent of Congress without doing violence to an alien’s right to be heard in a full and fair hearing. If the BIA has sua sponte chosen to consider a claim on the merits, finding jurisdiction to review such a claim does not undermine the BIA’s autonomy and effectiveness, of removal and CAT claims without a thorough review of the underlying issues, the Eighth Circuit has stated that the exception to the administrative exhaustion does not apply. Rafiyev v. Mukasey, 536 F.3d 853, 859 (8th Cir. 2008); see also Sidabutar v. Gonzales, 503 F.3d 1116, 1122 (10th Cir. 2007) (construing the exception to the administrative exhaustion “narrowly to circumstances where the BIA issues a full explanatory opinion or a discernible substantive discussion on the merits over matters not presented by the alien”).

29 There are several factors favoring judicial review and the most persuasive of which is that aliens seek judicial review in a small percentage of immigration cases, partly because “[i]t is expensive, complicated, and a great deal of trouble for the litigant.” Stephen H. Legomsky, Fear and Loathing in Congress and the Courts: Immigration and Judicial Review, 78 TEX. L. REV. 1615, 1631 (2000). However, argued Professor Legomsky, “the mere prospect of judicial review hopefully encourages more thoughtful, and more rational, decisionmaking [sic] in the first instance. The possibility of judicial review is an added incentive for even the most conscientious administrative adjudicator to make sure he or she has a defensible reason for a contemplated conclusion.” Id. He therefore concludes that “judicial review is most valuable not in the minority of cases that actually get to court, but in the majority that do not.” Id.

30 See Legomsky, supra note 29, at 1631.

31 Fleurantin, supra note 15, at 159; see also David Zhou, Comment, Making Up for Lost Time: A Bright-Line Rule for Equitable Tolling in Immigration Cases, 118 YALE L.J. 1245, 1250-51 (2009) (describing the complexity of the immigration process and stating that the process to preserve an employment discrimination claim is simpler than the process for aliens to preserve and present an asylum claim).

32 Fleurantin, supra note 15, at 168.
especially if the BIA thoroughly addresses the underlying issues.\textsuperscript{33} The following cases illustrate the difficulty in balancing the BIA’s duty to administer and interpret immigration laws with the appeals courts’ duty to interpret federal laws.

III. The Eleventh Circuit as the Hold-Out Court Refusing to Find Jurisdiction in Cases Similar to \textit{Khalili v. Holder}

A. The \textit{Amaya-Artunduaga} Decision

\textit{Amaya-Artunduaga v. United States Attorney General} has been the subject of open criticism by several circuit courts.\textsuperscript{34} In \textit{Amaya-Artunduaga}, the Eleventh Circuit had an opportunity to waive the issue of whether an appeals court has jurisdiction to review a claim that the BIA sua sponte considers on the merits despite the failure of the alien to raise the issue before the BIA.\textsuperscript{35} The court denied the petition, agreeing with the Government that the court lacks jurisdiction to review the alien’s contention that the IJ’s and BIA’s credibility findings were based on speculation and conjecture, minor discrepancies and typographical problems on the ground that the alien failed to challenge the credibility determination before the BIA.\textsuperscript{36}

In reaching its decision, the court found that Amaya-Artunduaga failed to exhaust his administrative remedies when he neglected to raise his credibility issue before the BIA.\textsuperscript{37} However, the court further noted that despite Amaya-Artunduaga’s failure to challenge the IJ’s adverse credibility determination below, the BIA sua sponte addressed the IJ’s credibility determination.\textsuperscript{38} Therefore, the court was confronted with “the

\textsuperscript{33} \textit{See supra} note 28 and accompanying text.

\textsuperscript{34} 463 F.3d 1247 (11th Cir. 2006); \textit{see infra} note 64 and accompanying text.

\textsuperscript{35} \textit{Amaya-Artunduaga}, 463 F.3d at 1249.

\textsuperscript{36} \textit{Id.} at 1249-50.

\textsuperscript{37} \textit{Id.} at 1250 (citing \textit{8 U.S.C.} § 1252(d)(1) (2006); Sundar v. INS, 328 F.3d 1320, 1323 (11th Cir. 2003)).

\textsuperscript{38} \textit{Id.}
question of whether [it has] jurisdiction over a claim when an alien, without excuse or exception, fails to exhaust that claim, but the BIA nonetheless considers the underlying issue *sua sponte*.”39 Having “no clear guidance on this narrow issue from [its] sister circuits,”40 the court applied circuit precedent that clearly stated that it has no jurisdiction to consider claims a petitioner has failed to raise before the BIA unless a cognizable excuse or exception applies.41 Applying the clear dictates of circuit precedent, the court concluded that it lacked jurisdiction to consider Amaya-Artunduaga’s challenge to the adverse credibility determination because Amaya-Artunduaga without excuse or exception failed to raise his adverse credibility challenge before the BIA.42

The court explained that its conclusion is not altered by the fact that the BIA considered the adverse credibility determination *sua sponte*, for adhering to the exhaustion requirement is (1) “to avoid premature interference with administrative processes and to allow the agency to consider the relevant issues,”43 (2) to ensure that the agency has an opportunity to fully consider a party’s claims,44 and (3) to allow the agency to compile an adequate record for judicial review purposes.45

The court found that the BIA did not fully consider Amaya-Artunduaga’s adverse credibility challenge, nor did the BIA compile an adequate record for judicial review.46 Applying the exhaustion requirement in section 1252(d)(1), the court dismissed Amaya-Artunduaga’s challenge to the adverse credibility determination for lack of jurisdiction, thinking that “the goals of exhaustion are better served by [its] declining

39 *Id.*

40 *Id.* (citing Nazarova v. INS, 171 F.3d 478, 489 (7th Cir. 1999) (Manion, J., dissenting)).

41 *Id.* (citing *Sundar*, 328 F.3d at 1323).

42 *Id.* (citing Fernandez-Bernal v. Att’y Gen., 257 F.3d 1304, 1317 n.13 (11th Cir. 2001)). Relying on *Sundar*, 328 F.3d at 1323, the court quoted the decision of the Fourth Circuit in *Kurfees v. INS*, 275 F.3d 332, 336 (4th Cir. 2001), stating that the rules clearly require an alien to exhaust her administrative remedies prior to going to federal courts. *Amaya-Artunduaga*, 463 F.3d at 1250.

43 *Amaya-Artunduaga*, 463 F.3d at 1250 (citing Sun v. Ashcroft, 370 F.3d 932, 940 (9th Cir. 2004)).

44 *Id.* (citing Theodoropoulos v. INS, 358 F.3d 162, 171 (2d Cir. 2004)).

45 *Id.* (citing Dolic v. INS, 899 F.2d 530, 532 (6th Cir. 1990)).

46 *Id.*
to review claims [in which] a petitioner, without excuse or exception, failed to present before the BIA, even if the BIA addressed the underlying issue *sua sponte.*”

The court also disposed of Amaya-Artunduaga’s due process challenge. Citing *Sundar v. INS,* the court recognized that some courts have stated, albeit in dicta, that “‘some due process claims do not require exhaustion, because the BIA does not have the power to adjudicate those claims.’” However, those same courts have held that if the BIA can provide a remedy, the exhaustion requirement applies. The court found that “Amaya-[Artunduaga]’s allegation of a due process violation—that he was denied a full and fair hearing before a neutral fact finder—is precisely the kind of procedural error which requires exhaustion.” The court further noted that the BIA “did not consider the merits of Amaya-Artunduaga’s due process argument” and therefore there was a lack of finality with respect to Amaya-Artunduaga’s due process claim. The court found it lacked jurisdiction to review the due process claim because Amaya-Artunduaga failed to raise it before the BIA. Accordingly, the court denied the petition for review.

The author notes two important observations about the *Amaya-Artunduaga* decision. The first is that *Amaya-Artunduaga* is a per curiam decision. The question becomes whether the *Amaya-Artunduaga*

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47 *Id.* at 1250-51.

48 *Id.* at 1251.

49 *Id.* (quoting *Sundar v. INS,* 328 F.3d 1320, 1325 (11th Cir. 2003)).

50 *Id.* (stating that other circuits have determined that procedural due process claims and procedural errors are the types of due process claims requiring exhaustion before the BIA (citing *Vargas v. INS,* 831 F.2d 906, 908 (9th Cir. 1987))).

51 *Id.* (citing *Abdulrahman v. Ashcroft,* 330 F.3d 587, 596 n.5 (3d Cir. 2003); *Sanchez-Cruz v. INS,* 255 F.3d 775, 780 (9th Cir. 2001)).

52 *Id.*

53 *Id.*

54 *Amaya-Artunduaga,* 463 F.3d at 1251.

55 Per curiam opinions are those that “reflect[] the collective decision of the panel[,] [which] has made an assessment about the appropriate application of the law, and . . . is setting forth its assessment for the Circuit.” Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit,* 32 *Stetson L. Rev.* 247, 252-53 (2003). Judge Wilson further notes that “opinions also are signed per curiam when other members of the panel have an active or significant role in
panel decided that the case did not warrant a full-blown signed and published opinion because "the rule of law and its application to relatively simple facts [were] clear, or [that] the law has been made clear by an appellate decision subsequent to the trial court's judgment."56

Drafting the opinion.” Id. at 253. In the context of published opinions, Judge Wilson states that the audience is broader, noting:

We still write for the district court, the lawyers, and the parties, but we also must write for the bar and the district courts. As this broad audience is not as well informed as the audience of a published opinion, we cannot be as brief and concise. We no longer can focus just upon providing a concise statement of who won, who lost, and why. Now, we must concern ourselves with addressing the state of the law in the Circuit. We must be careful to articulate our holding clearly, and because we are establishing law, we must present our well-reasoned analysis to the audience. We should never lay down a rule of law without providing a clear and comprehensive explanation of how we arrived at our decision.

Id. at 266. Judge Wilson explains further that, in writing a dissenting opinion, he may target the Supreme Court as an opinion reader if he believes the parties will file a petition for writ of certiorari. Id. at 266 n.102.

The Office of Immigration Litigation (OIL), U.S. Department of Justice, conducted a study sample of asylum cases decided by the Eleventh Circuit in published decisions between June 01, 2000 and June 01, 2010. See Lance Jolley, Where O’ Where Has 11th Circuit Gone?—An Exploratory Analysis of the Declining Percentage of Published Asylum-Related Wins, IMMIGR. LITIG. BULL. (U.S. Dep’t of Justice, Washington D.C.), June 2010, at 3. The study included fifty-six cases in its analysis and excluded other cases “if they were later vacated or solely dealt with claims for protection under the Convention Against Torture, jurisdictional issues based on the alien’s status as a criminal, or jurisdictional issues regarding the Board’s denial of sua sponte reopening.” Id. Of the fifty-six cases, fifty involved asylum-related issues and the Government won thirty-four of the fifty-six cases, representing a 61% win rate. Id. Moreover, of the fifty asylum cases, the Eleventh Circuit decided nineteen of them per curiam of which the Government won thirteen. Id. The study found that there is a decline in the Government’s win rate in published asylum cases for the considered period. Id. at 4. The Government is likely to lose if one of the following judges is on the panel that decided the asylum case: Judge Barkett found for the Government in three cases and against it in seven cases; Judge Fay found for the Government in two and against it in six cases. Id. The Government had an equal chance to win or to lose when the following judges decided the cases: Judge Anderson 5/5; Cox 1/1; Judge Kravitch 6/6; Judge Wilson 4/4; and judges sitting by designation 11/11. Id. In this author’s view, what the OIL study shows is that the Eleventh Circuit rarely published its asylum cases, as it only published 56 cases for a ten-year period. Id. When it finally published a case, it did not do so in a full-blown signed published opinion. Id. at 3. Rather, it published per curiam about 38% of those published cases. Id.

56 Aldisert et al., supra note 4, at 9. Based on Judge Wilson’s explanation of when and why opinions are listed as per curiam, one can conclude that Amaya-Artunduaga was a per curiam published decision not because the panel decided the case did not warrant a full-blown signed opinion, but because either Amaya-Artunduaga reflected
Opinion readers know that was not the case because the *Amaya-Artunduaga* panel acknowledged that there was no circuit precedent on the issue of whether the court has jurisdiction to review an unexhausted issue the BIA considers sua sponte on the merits.\(^{57}\) Opinion readers also know that the rule of law and its application to the facts were not clear\(^{58}\) because the *Amaya-Artunduaga* court acknowledged that it has no clear guidance from sister circuits as to how to dispose of the issue.\(^{59}\) Evidently, many courts have cited *Amaya-Artunduaga*,\(^ {60}\) but whether it has been cited for its reasoning remains an elusive question.

While one cannot question the fact that the Eleventh Circuit needed to publish the court’s reasoning in *Amaya-Artunduaga*, it is questionable that the panel decided to issue a published per curiam decision as if a “signed opinion [was] unnecessary.”\(^{61}\) *Amaya-Artunduaga*, although a per curiam decision, is undoubtedly an important published decision that carries precedential weight. However, in the author’s opinion, because the panel reached the wrong result, it is difficult not to question the continued validity of *Amaya-Artunduaga*.

Specifically, it is questionable whether *Amaya-Artunduaga* has “contribute[d] to the progressive development of the law.”\(^{62}\) *Amaya-Artunduaga*’s infirmity lies with its draconian result that fails to provide “legal guidance and clarification of precedent.”\(^ {63}\) No one questions whether *Amaya-Artunduaga* is the law of the Eleventh Circuit; however,
its holding has no persuasive authority outside its circuit, as sister circuits have criticized Amaya-Artunduaga.\textsuperscript{64} Certainly, Amaya-Artunduaga is a case requiring interpretation of the law, but whether it has in fact contributed to the progress of the law is a debatable question for legal historians.

The other important observation about the Amaya-Artunduaga decision that requires close scrutiny is the result reached by the Eleventh Circuit. The Amaya-Artunduaga court acknowledged that it had no clear guidance from other circuits on the narrow issue of whether an appeals court has jurisdiction to review a claim sua sponte considered by the BIA on the merits although the alien fails to raise the issue below.\textsuperscript{65} At the time the Eleventh Circuit decided Amaya-Artunduaga, many other circuits including the First, Second, Sixth, Seventh and Ninth had considered the issue of exhaustion, or the lack thereof, when an alien fails to raise the issue, but the BIA considers the claim on the merits.\textsuperscript{66} This means that, at the time Amaya-Artunduaga was decided, there was in fact guidance on the issue, albeit unclear.

For example, in 2004, the Second Circuit decided Johnson v. Ashcroft.\textsuperscript{67} In that case, the court found that it has jurisdiction to review a claim raised in the petition for review, holding that a procedural defect cannot prevent the court from addressing a claim the BIA chose to consider on the merits.\textsuperscript{68}

It was not long after Johnson that the Sixth Circuit, on March 21, 2005, issued its decision in Hassan v. Gonzales, finding that the BIA waived the alien’s failure to comply with the requirement of specificity since the BIA chose to proceed on the merits.\textsuperscript{69} The analysis was short and to the point. The Sixth Circuit found unconvincing the Government’s argument that the alien failed to exhaust his administrative remedy by

\textsuperscript{64} Amaya-Artunduaga has been criticized by some circuits that have decided the underlying issue. See Khalili v. Holder, 557 F.3d 429, 433 (6th Cir. 2009); Zine v. Mukasey, 517 F.3d 535, 540 (8th Cir. 2008); Liu v. Mukasey, 264 Fed. App’x 530, 533 (7th Cir. 2008); Sidabutar v. Gonzales, 503 F.3d 1116, 1119 (10th Cir. 2007).

\textsuperscript{65} Amaya-Artunduaga, 463 F.3d at 1250.

\textsuperscript{66} See cases cited supra note 1.

\textsuperscript{67} 378 F.3d 164 (2d Cir. 2004).

\textsuperscript{68} Johnson, 378 F.3d at 169.

\textsuperscript{69} 403 F.3d 429, 433 (6th Cir. 2005).
failing to timely file his brief with the BIA, reasoning that “[b]y affirming the IJ’s decision without opinion . . . rather than summarily dismissing [the alien’s appeal],” the BIA’s action “exhausted all the [alien’s] administrative remedies, and thus we have jurisdiction to entertain his petition for review.”

About three months after Hassan was decided, the First Circuit on June 27, 2005 issued its decision in Singh v. Gonzales. While the First Circuit did not provide much analysis to support its finding of jurisdiction, the court explicitly stated its disagreement with the Government’s argument that the court lacked jurisdiction because the alien failed to develop his claim before the BIA. Albeit in a footnote, the court stated that although the alien raised his challenges in a perfunctory manner before the BIA, it had jurisdiction to review the claims because the BIA chose to summarily affirm the IJ’s entire opinion.

By the time the Seventh Circuit issued its decision in Pasha v. Gonzales on December 29, 2005, opinion readers already noticed a trend towards finding jurisdiction to review claims where the BIA elected to reach the merits rather than summarily dismiss them. The Seventh Circuit recognized that the BIA “can choose between dismissing the appeal for failure to comply with the requirement of specificity and waiving the failure and proceeding to the merits” and “it chose the latter” in Pasha. One cannot ignore the fact that Pasha was an affirmation without opinion case decided by a single BIA member, but because the Seventh Circuit cited the decision in Hassan, it suggests that the Seventh Circuit was not concerned about the fact that the BIA did not issue a thorough decision addressing the merits of the alien’s claim.

By the end of December of 2005 when the Ninth Circuit decided Abebe v. Gonzales, it became clear that the trend was to find jurisdiction in cases similar to Singh and Hassan. However, Abebe was particularly

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70 Hassan, 403 F.3d at 433.
71 413 F.3d 156 (1st Cir. 2005).
72 Singh, 413 F.3d at 160 n.3.
73 Id.
74 433 F.3d 530 (7th Cir. 2005).
75 Pasha, 433 F.3d at 533 (citing Hassan, 403 F.3d at 433).
76 See id.
77 432 F.3d 1037 (9th Cir. 2005) (en banc).
important because it was an en banc decision establishing a clear precedent in the Ninth Circuit, which recognized that the BIA could have declined to consider the alien’s argument if it found the argument was procedurally defective, but the BIA chose not to do so.\textsuperscript{78} The court therefore held that a procedural defect cannot prevent an appellate court from reviewing a claim which the BIA elected to consider on its substantive merits.\textsuperscript{79} The court reasoned that since the BIA expressly adopted the IJ’s decision that explicitly discussed Abebe’s challenge on appeal, such express adoption was “‘enough to convince [the court] that the relevant policy concerns underlying the exhaustion requirement—that an administrative agency should have a full opportunity to resolve a controversy or correct its own errors before judicial intervention—have been satisfied.’”\textsuperscript{80}

This line of cases suggests that even if the Eleventh Circuit did not have clear guidance, it should have noticed that the trend was to find jurisdiction in cases similar to \textit{Amaya-Artunduaga}. Because the court found that the BIA did not fully consider Amaya-Artunduaga’s credibility challenge,\textsuperscript{81} at least, the Eleventh Circuit could have qualified its decision by limiting its holding to situations where the BIA did not thoroughly consider the claim on the merits. That would leave the door open to conform \textit{Amaya-Artunduaga}’s holding with other circuits’ decisions such as \textit{Rafiye v. Mukasey}\textsuperscript{82} and \textit{Sidabutar v. Gonzales}.\textsuperscript{83} But the Eleventh Circuit closed the door when it issued many decisions that followed \textit{Amaya-Artunduaga}.\textsuperscript{84}

\textsuperscript{78} Abebe, 432 F.3d at 1041.

\textsuperscript{79} Id.

\textsuperscript{80} Id. (quoting Sagermark v. INS, 767 F.2d 645, 648 (9th Cir. 1985) (citing Socop-Gonzalez v. INS, 272 F.3d 1176, 1186 (9th Cir. 2001))).

\textsuperscript{81} Amaya-Artunduaga v. U.S. Att’y Gen., 463 F.3d 1247, 1249 (11th Cir. 2006).

\textsuperscript{82} 536 F.3d 853 (8th Cir. 2008).

\textsuperscript{83} 503 F.3d 1116 (10th Cir. 2007); see supra note 28 and accompanying text.

\textsuperscript{84} Jimenez v. U.S. Att’y Gen., 367 F. App’x 90 (11th Cir. 2010) (per curiam); Sanchez-Ledesma v. U.S. Att’y Gen., 367 F. App’x 48 (11th Cir. 2010) (per curiam); Ramirez-Aguilar v. U.S. Att’y Gen., 361 F. App’x 992 (11th Cir. 2010); Suwandi v. U.S. Att’y Gen., 359 F. App’x 150 (11th Cir. 2010) (per curiam); Morose v. U.S. Att’y Gen., 356 F. App’x 295 (11th Cir. 2009) (per curiam); see, e.g., Shkambi v. U.S. Att’y Gen., 584 F.3d 1041, 1048 (11th Cir. 2009) (per curiam). The author was appellate counsel for the petitioner in \textit{Morose}.
In reaching its result, the Amaya-Artunduaga court applied clear dictate of circuit precedent that requires an alien to exhaust his administrative remedies before proceeding to federal courts.85 Clearly, the Amaya-Artunduaga panel attempted to justify the result by showing that its holding is grounded in the statute section 1252(d)(1) of the INA and derived from precedent.86 Still, Amaya-Artunduaga was, in the author’s opinion, wrongly decided because it ignored persuasive authority that followed a trend in finding jurisdiction to review unexhausted claims considered sua sponte by the BIA.87

The court was wrong to ignore the decisions from the First, Second, Sixth, Seventh and Ninth Circuits that decided the underlying issue between 2004 and the end of 2005.88 The court failed to cite, let alone discuss, the reason it did not have clear guidance.89 Had the court discussed the noted cases from its sister circuits, it would be hard pressed to distinguish the cases or to explain why its conclusion is not altered by the fact that the BIA considered the adverse credibility determination sua sponte. For example, if the court considered Abebe, it would have to explain why the BIA did not have a meaningful opportunity to consider the underlying issue on the merits or how reviewing the case would have interfered prematurely with the administrative process.90

More importantly, the court would have had to explain whether it disagreed with the reasoning of Abebe that “the relevant policy concerns underlying the exhaustion requirement . . . have been satisfied here.”91 The court was quick to conclude that it lacks jurisdiction to consider Amaya-Artunduaga’s adverse credibility challenge by applying clear dictates of circuit precedent.92 Reading the court’s conclusion without

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85 See Amaya-Artunduaga, 463 F.3d at 1250-51 (citing Sundar v. INS, 328 F.3d 1320, 1325 (11th Cir. 2003); Fernandez-Bernal v. Att’y Gen., 257 F.3d 1304, 1317 n.13 (11th Cir. 2001)).

86 Id. at 1251 (citing 8 U.S.C. § 1252(d) (2005); Sundar, 328 F.3d at 1325; Fernandez-Bernal, 257 F.3d at 1317 n.13).

87 See cases cited supra note 1.

88 See cases cited supra note 1.

89 See Amaya-Artunduaga, 463 F.3d at 1249-51.

90 See Abebe v. Gonzales, 432 F.3d 1037, 1041 (9th Cir. 2005).

91 Abebe, 432 F.3d at 1041 (quoting Sagermark v. INS, 767 F.2d 645, 648 (9th Cir. 1985)) (citing Socop-Gonzalez v. INS, 272 F.3d 1176, 1186 (9th Cir. 2001)).

92 Amaya-Artunduaga, 463 F.3d at 1250-51 (citing Sundar, 328 F.3d at 1325; Fernandez-Bernal, 257 F.3d at 1317 n.13).
putting the decision in context, one would believe that the court had no choice but to follow circuit precedent. But a closer look at the reasoning will show that the circuit precedent the court noted did not involve cases with similar facts to *Amaya-Artunduaga*. The court cited *Fernandez-Bernal v. Attorney General*, but that case did not involve the agency’s consideration of an unexhausted issue reached sua sponte. The court also cited *Sundar v. INS*, but likewise, *Sundar* was not a case involving an unexhausted claim the BIA sua sponte chose to decide on the merits. Therefore, there was no circuit precedent on point that dictated the result in *Amaya-Artunduaga*.

There is no need to quarrel with the fact that the court stated it had no clear guidance on the narrow issue. Had the court considered the decisions handed down by sister circuits between 2004 and 2005, then it would have noticed the trend and perhaps denied review but qualified

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93 See id.

94 See *Sundar*, 328 F.3d at 1325; *Fernandez-Bernal*, 257 F.3d at 1317.

95 257 F.3d 1304, 1307-08 (11th Cir. 2001). In *Fernandez-Bernal*, the alien contended he was eligible for discretionary relief under former 8 U.S.C. § 1182(c), which was repealed by IIRIRA § 1229b(a). See id. at 1317 n.13. The court found that it lacked jurisdiction to consider the claim on the ground that the alien failed to exhaust his administrative remedy, as he failed to raise the issue before the BIA. See id. In reaching its finding, the *Fernandez-Bernal* court cited *Galindo-Del Valle v. Attorney General*, 213 F.3d 594, 599 (11th Cir. 2000) (per curiam) and *Asencio v. INS*, 37 F.3d 614, 615-16 (11th Cir. 1994) (per curiam). But neither of these cases involved the BIA’s sua sponte consideration of an unexhausted issue. See *Galindo-Del Valle*, 213 F.3d at 599; *Asencio*, 37 F.3d at 615-16. Since the BIA did not consider sua sponte the substantive merits of the claim in *Fernandez-Bernal*, the Eleventh Circuit’s reliance on that case to dismiss *Amaya-Artunduaga*’s challenge to the adverse credibility determination is misplaced. See *Amaya-Artunduaga*, 463 F.3d at 1251 (citing *Fernandez-Bernal*, 257 F.3d at 1317 n.13).

96 328 F.3d 1320 (11th Cir. 2003). *Sundar* is a very well-reasoned opinion that found the exhaustion requirement to be jurisdictional. Id. at 1323. It cited the Fourth Circuit’s decision in *Kurfees v. INS* that found the exhaustion requirement to be mandatory and applicable to habeas proceedings. Id. (citing Kurfees v. INS, 275 F.3d 332, 336-37 (4th Cir. 2001)). Nevertheless, *Sundar* does not lend support to the court’s finding of a complete lack of jurisdiction because *Sundar* is binding precedent but not on point to dictate the result in *Amaya-Artunduaga*, especially because *Sundar* did not involve the BIA’s sua sponte consideration of an unexhausted issue. Rather, *Sundar* involved an alien who filed a habeas corpus petition after he had been ordered removed by an immigration judge whose decision the alien failed to appeal before the BIA. Id. at 1321. Clearly, *Amaya-Artunduaga* differs from *Sundar*, and therefore, the Eleventh Circuit’s reliance on that case to dismiss *Amaya-Artunduaga*’s challenge to the adverse credibility determination is misplaced as well.
its decision by reserving judgment if the BIA thoroughly considers an issue sua sponte on the merits. In the author’s view, the Eleventh Circuit should have found the decisions in *Abebe, Hassan v. Gonzales* and *Singh v. Gonzales* to be persuasive to foreclose the result in *Amaya-Artunduaga*.

It would be irresponsible to criticize the Eleventh Circuit for simply reaching the wrong result in *Amaya-Artunduaga* since it did not have clear guidance. However, in retrospect, the Eleventh Circuit did not meet its institutional responsibility when it failed to notice the trend toward finding jurisdiction at the time *Amaya-Artunduaga* was decided in 2006. Giving the benefit of the doubt, it appears that the *Amaya-Artunduaga* court might have reached a different result if it had clear guidance from other circuits. *Amaya-Artunduaga* was decided in 2006. Since then, every circuit that has considered the issue found jurisdiction to review a claim raised in a petition for review if the BIA thoroughly considers the claim on the merits. Since the majority of circuits have found jurisdiction, why does the Eleventh Circuit continue to follow *Amaya-Artunduaga*? The answer lies with the court’s inability to go around “the prior panel precedent rule.”

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97 See cases cited supra note 1.
98 403 F.3d 429 (6th Cir. 2005).
99 413 F.3d 156 (1st Cir. 2005).
100 See cases cited supra note 1.
101 See cases cited supra note 7. The Fifth Circuit in *Omari v. Holder* found that the court does not have the authority to create exceptions to the exhaustion requirement but stated that it might have analyzed the case differently had the BIA considered the unexhausted issue sua sponte. 562 F.3d 314, 322 (5th Cir. 2009). That is precisely what the Fifth Circuit did when it decided *Lopez-Dubon v. Holder*, 609 F.3d 642, 644 (5th Cir. 2010), which joined the majority of circuits. The *Lopez-Dubon* court was persuaded by the decision of the Tenth Circuit in *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007). *Lopez-Dubon*, 609 F.3d at 644. The court quoted *Sidabutar*, which stated “[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that [8 U.S.C.] § 1252(d)(1) requires to confer our jurisdiction.” *Id.* (alteration in original) (quoting *Sidabutar*, 503 F.3d at 1119). *Lopez-Dubon* confirms to date that *Amaya-Artunduaga* is and continues to be the only circuit decision that has found a complete lack of jurisdiction where the BIA sua sponte considers on the merits an issue not properly before the BIA.

102 “The prior panel precedent rule” prohibits a subsequent panel from disregarding the holding of a case with binding force regardless of whether there is “a perceived defect in the prior panel’s reasoning or analysis as it relates to the law in existence at
cinctly summarizes how the Eleventh Circuit can get in line with other circuits to promote uniformity of the law.

B. The Prior Panel Principle Rule: Faithfully Apply *Amaya-Artunduaga* and Then Recommend en banc Review to Overrule *Amaya-Artunduaga*

When the Eleventh Circuit publishes an opinion, "the prior panel precedent rule" applies:

Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court.\(^{103}\)

A litigant urging a panel of the Eleventh Circuit to disregard the holding of or overrule *Amaya-Artunduaga* has an almost impossible task because the prior panel precedent rule prohibits a subsequent panel from doing that.\(^{104}\) Although a subsequent panel of the Eleventh Circuit is bound by the prior panel precedent rule to follow *Amaya-Artunduaga* regardless of whether the majority of circuits have found jurisdiction when it comes to claims sua sponte considered by the BIA, a subsequent panel is not required to agree with the *Amaya-Artunduaga*’s decision.\(^{105}\)

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that time” unless the prior panel holding is overruled by the full court sitting en banc or by the United States Supreme Court. Smith v. GTE Corp., 236 F.3d 1292, 1303 (11th Cir. 2001).

\(^{103}\) *Smith*, 236 F.3d at 1300 n.8 (citing Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997)); see also United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993); NLRB v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. 1981) (“Without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court . . . ”).

\(^{104}\) See Saxton v. ACF Indus., 254 F.3d 959, 960 n.1 (11th Cir. 2001) (en banc); United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc); Smith, 236 F.3d at 1300 n.8; see also Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (adopting as binding precedent Fifth Circuit decisions issued prior to October 1, 1981).

While a subsequent panel may not overrule *Amaya-Artunduaga*, a subsequent panel may question the continued validity of *Amaya-Artunduaga*. The process is to faithfully apply the prior panel’s rule and recommend en banc review. Courts have adhered to the prior panel precedent rule because adherence to judicial precedent has resulted in stability and predictability, which are considered “essential factors in the proper operation of the rule of law.” Even if a panel is convinced that a decision of a prior panel is wrong, the subsequent panel cannot overrule the prior panel’s holding.

The prior panel precedent rule mandates that a subsequent panel follow *Amaya-Artunduaga*, yet a subsequent panel does not have to agree with *Amaya-Artunduaga*’s decision. On the contrary, a subsequent panel may question the continued validity of *Amaya-Artunduaga* as long as the subsequent panel applies *Amaya-Artunduaga*’s holding as required by circuit precedent. *Amaya-Artunduaga* is the law of the Eleventh Circuit.

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106 *Saxton*, 254 F.3d at 960 n.1.
107 *Turner*, 236 F.3d at 649-50 (recognizing that the prior panel misinterpreted the requirements of the Truth in Lending Act, but the subsequent panel faithfully applied the prior decision and recommended en banc review); *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1064 (11th Cir. 2001) (citing United States v. Steele, 117 F.3d 1231 (11th Cir. 1997)). In *Steele*, the court applied the prior panel’s rule notwithstanding that the prior panel misunderstood the statutory requirements for indicting a physician. *Steele*, 117 F.3d at 1234-35.
108 *Johnson*, 273 F.3d at 1066 (Carnes, J., dissenting) (citing Jaffree v. Wallace, 705 F.2d 1526, 1533 (11th Cir. 1983), aff’d, 472 U.S. 38 (1985)). In his dissent, Judge Carnes stated that following the prior panel rule “helps keep the peace, stabilizes our circuit law, and promotes efficiency by enabling us to move on once issues have been decided by a panel.” *Id.*
109 *Id.* (quoting *Bonner*, 661 F.2d at 1209-10 (11th Cir. 1981)).
110 See, e.g., *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir.), cert. denied, 531 U.S. 957 (2000); *Steele*, 147 F.3d at 1317-18 (citing Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997)). In *Saxton*, the panel followed the prior panel rule although the *Saxton* panel was convinced that the prior decision was wrong. 239 F.3d at 1215. Following prompt rehearing en banc, the full court overruled the erroneous decision of the prior panel. *See Saxton*, 254 F.3d at 963-66. Similarly, in *Turner v. Beneficial Corp.*, review sua sponte en banc was granted after the panel faithfully followed a prior panel’s decision that overlooked controlling statutory language and the en banc court overruled the erroneous decision of the prior panel. 242 F.3d 1023, 1028 (11th Cir.), cert. denied, 534 U.S. 820 (2001).
111 See, e.g., *Saxton*, 239 F.3d at 1215; *Turner*, 236 F.3d at 649-50.
112 *Saxton*, 254 F.3d at 960 n.1.
Circuit, but overruling *Amaya-Artunduaga* will serve the judicial system better than adhering to its holding that has no persuasive authority outside the Eleventh Circuit.

Because other circuits have directly or indirectly questioned the validity of *Amaya-Artunduaga*, it is essential to reconsider the case en banc to reach the right result, which is critical in promoting uniformity of the law. Once *Amaya-Artunduaga* is reconsidered en banc, its holding will still have the weight of precedent that will result in stability and predictability. But more important, an en banc decision will have the effect of settled law and therefore foreclose the possibility of the need for Supreme Court review. Unlike in 2006, now there is clear guidance on how to decide the underlying issue. When and if the Eleventh Circuit decides to revisit *Amaya-Artunduaga*, the author urges the court to follow the well-reasoned decision by the Sixth Circuit in *Khalili v. Holder*.114

**IV. The Eleventh Circuit Should Follow *Khalili* and Join the Majority of Circuits**

**A. The Persuasive Nature of the Decision of the Sixth Circuit in *Khalili***

In *Khalili*, the Sixth Circuit considered whether the court lacked jurisdiction to review Khalili’s claim that he would be persecuted by the Jordanian government since Khalili failed to present the issue to the BIA. The court found that the BIA’s raising and ruling on the determination about the Jordanian government exhausted Khalili’s remedies and therefore it had jurisdiction to consider Khalili’s appeal of that issue.

In reaching its finding, the court acknowledged that an alien must present all reviewable issues to the BIA before seeking review of an immigration issue in federal court. To exhaust one’s administrative

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113 See *Khalili v. Holder*, 557 F.3d 429 (6th Cir. 2009).
114 557 F.3d 429 (6th Cir. 2009).
115 *Khalili*, 557 F.3d at 430.
116 *Id.* at 430-31.
117 *Id.* at 432 (citing Sterkaj v. Gonzales, 439 F.3d 273, 279 (6th Cir. 2006)).
remedies, an alien has to reasonably develop the issue in his brief before the BIA. The court cited Lin v. Attorney General, a recent Third Circuit decision noting several circuits have considered the issue of whether the BIA’s sua sponte consideration of an issue not properly before it confers jurisdiction to the appellate court. “Only the Eleventh Circuit finds a complete lack of jurisdiction in a case similar to [Khalili],” stated the court.

Unlike the Amaya-Artunduaga decision, the Khalili court noted that “the majority of circuits have held that where the BIA could have summarily dismissed for failure to raise an issue (or raise with specificity) but nonetheless reached the merits or affirmed the merits of the immigration judge’s decision, the exhaustion requirement is waived and the appellate court has jurisdiction.”

The court found persuasive the decision of the Tenth Circuit in Sidabutar v. Gonzales that “provided analysis supporting appellate jurisdiction,” reasoning that if the BIA elects to waive the specificity requirement that an alien “must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged” under 8 C.F.R. § 1003.3(b), then an appellate court retains jurisdiction to review the final order under 8 U.S.C. § 1252(a)(1). The court noted that both the Third Circuit and the Tenth Circuit had found support for finding jurisdiction.

In particular, the court quoted the Third Circuit that reasoned that the interests relating to “preventing premature interference with agency processes, [giving the agency] an opportunity to correct its

118 Id. at 433 (citing Hasan v. Ashcroft, 397 F.3d 417, 420 (6th Cir. 2005)). If an issue is not exhausted, “that issue is normally deemed to be waived.” Id. (citing Hasan, 397 F.3d at 419-20; Ramani v. Ashcroft, 378 F.3d 554, 560 (6th Cir. 2004)).
119 Id. (citing Lin v. Att’y Gen., 543 F.3d 114, 123 (3d Cir. 2008)).
120 Id. (citing Amaya-Artunduaga v. U.S. Att’y Gen., 463 F.3d 1247, 1250 (11th Cir. 2006) (per curiam) (“finding that the court lacked ‘jurisdiction over a claim when an alien, without excuse or exception, fail[ed] to exhaust that claim,’ even when ‘the BIA nonetheless consider[ed] the underlying issue sua sponte’” (quoting Amaya-Artunduaga, 463 F.3d at 1250))).
121 Id. (citing Zine v. Mukasey, 517 F.3d 535, 540-41 (8th Cir. 2008); Pasha v. Gonzales, 433 F.3d 530, 532-33 (7th Cir. 2005); Abebe v. Gonzales, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc)).
122 503 F.3d 1116 (10th Cir. 2007).
123 Khalili, 557 F.3d at 433-34 (quoting Sidabutar, 503 F.3d at 1116).
124 Id. at 433.
own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review” are fulfilled “where the BIA issued a decision that considers the merits of the issue, even sua sponte.”

The Khalili court explained that the BIA had an “opportunity to apply its experience and expertise without judicial interference” and that the record was adequately developed for review as the BIA addressed the issue independently from the Immigration Judge. The Khalili court therefore followed “the majority of circuit courts in finding appellate jurisdiction to review issues raised sua sponte by the BIA,” finding the Third Circuit’s decision in Lin to be persuasive as it “adopted the position that appellate jurisdiction is even more appropriate in cases in which the BIA has sua sponte reached the merits of an issue.” Finding the BIA’s action by sua sponte consideration of the issue on the merits waives the exhaustion requirement, the Khalili court concluded that it had jurisdiction to review Khalili’s claim of the Immigration Judge determination on the Jordanian government. Nevertheless, the court denied the petition for review, finding that substantial evidence supported the BIA’s determination that Khalili failed to meet his burden of showing that the Jordanian government was unable to protect him.

**B. Joining the Majority of Circuits Will Not Undermine the BIA’s Autonomy and Effectiveness**

The Immigration and Nationality Act requires an alien to exhaust his administrative remedies before seeking review of a removal order. However, when the BIA sua sponte thoroughly considers an issue on the merits, the majority of circuits have found jurisdiction because the BIA’s action exhausts the alien’s administrative remedies. As noted by the

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125 *Id.* at 434-35 (alteration in original) (quoting *Lin*, 543 F.3d at 125).
126 *Id.* at 435.
127 *Id.*
128 *Id.*
129 *Id.* at 436.
131 See cases cited *supra* notes 1, 7.
Khalili court, “[o]nly the Eleventh Circuit finds a complete lack of jurisdiction” even when “the BIA consider[ed] the underlying issue sua sponte.”

In light of development of the law subsequent to Amaya-Artunduaga, the Eleventh Circuit should overrule Amaya-Artunduaga and join the majority of circuits holding that the exhaustion requirement is waived when the BIA chooses to reach the merits of a claim that it could have summarily dismissed for failure to raise the issue in a notice of appeal or brief. Overruling Amaya-Artunduaga will be consistent with the other sister circuits’ decisions that have decided the issue. Particularly, the Sixth Circuit in Khalili provided reasoned analysis why federal courts of appeals have jurisdiction to review unexhausted claims that the BIA chooses to decide on the merits.

The reasoning underlying the result in Khalili was the most significant aspect of the opinion. It represented the perspective of the majority of circuits that would apply a limited exception to the exhaustion requirement to make sure that justice is done in cases where the BIA had an opportunity to consider a claim on the merits. In the court’s view, finding jurisdiction is consistent with the notion that the BIA should have the first opportunity to rule on a claim and to apply its special expertise.

The Khalili court placed much weight on the fact that the BIA had a meaningful opportunity to address the claim and develop a record. The court reasoned that there are no prudential considerations which would restrain an appellate court from addressing the issue because the BIA already addressed the claim and therefore the appellate court’s intervention will not be a premature interference with the agency’s processes by “prevent[ing] deliberate bypass of the administrative scheme.”

132 Khalili, 557 F.3d at 433.
133 Id. (quoting Amaya-Artunduaga v. U.S. Att’y Gen., 463 F.3d 1247, 1250 (11th Cir. 2006) (per curiam)).
134 See id. at 435.
135 See cases cited supra notes 1, 7.
136 Khalili, 557 F.3d at 433-35.
137 Id. at 434-35.
138 Id.
139 Id.
140 Castillo-Villagra v. INS, 972 F.2d 1017, 1024 (9th Cir. 1992) (citing Montes v. Thornburgh, 919 F.2d 531, 537 (9th Cir. 1990)).
Khalili rests on aliens' interest in identifying and correcting errors by immigration judges and the BIA, which has the ultimate responsibility to interpret and administer immigration laws.\textsuperscript{141} The Khalili court expressed a reluctance to enforce the rule relating to issue exhaustion, which is one of the two primary bases for a court of appeals to exercise jurisdiction over a petition for review.\textsuperscript{142}

It should be noted that the Khalili decision was a full blown signed published decision that interpreted the law.\textsuperscript{143} Therefore, it contributes to the progressive development of the law. By the time Khalili was decided, it is safe to say that the rule of law, and its application to the facts, was clear because the majority of circuits has found jurisdiction in a case similar to Khalili.\textsuperscript{144} But the Khalili panel found that a signed published opinion was necessary and there was a need to publish the court's reasoning to establish a clear precedent in the Sixth Circuit and to promote uniformity among the circuits.\textsuperscript{145}

In writing the Khalili opinion, Judge Ransey Guy Cole, Jr. had in mind not only the immigration practitioners and the BIA but also the Eleventh Circuit as secondary consumers of opinion readers.\textsuperscript{146} The opinion writer

\textsuperscript{141} Khalili, 557 F.3d at 434.

\textsuperscript{142} Id. at 435.

\textsuperscript{143} Aldisert et al., supra note 4, at 9.

\textsuperscript{144} See cases cited supra notes 1, 7.

\textsuperscript{145} See Aldisert et al., supra note 4, at 9.

\textsuperscript{146} In 2005, the Sixth Circuit decided Hassan v. Gonzales where the court found jurisdiction to review the petition because the BIA chose to proceed on the merits and affirmed the IJ's opinion. 403 F.3d 429, 433 (6th Cir. 2005). The Khalili decision provided legal guidance and clarified Hassan as a precedent. The analysis in Hassan was short whereas the Khalili court issued a thorough decision that considered at length the well-reasoned decisions from the Third and Tenth Circuits. See also Aldisert et al., supra note 4, at 19. According to Judge Aldisert and his co-authors, the primary market of judicial opinion writing includes two discrete sectors: (1) the actual participants in the appellate court proceedings: “the appellant, the appellee, and the tribunal of the first instance” and (2) “the appellate court as an institution.” Id. at 17. “The bottom line is that opinion writers write for the primary market.” Id. at 19. Although the secondary market is not as important as the primary market, sometimes the opinion writer may consider a secondary consumer such as another circuit court as extremely important, especially if the opinion writer is targeting the decision of another circuit for criticism. See id. 19-20. For example, writing a decision that conflicts with another circuit’s decision requires the opinion writer to keep in mind the other appellate court as an important opinion reader and such awareness encourages the opinion writer to write with greater precision and to achieve an effective final product. See id. at 20.
has immigration practitioners in mind because lawyers tend to use appellate decisions to predict future decisions. As an agency charged to interpret and administer immigration statutes, the opinion writer has the BIA in mind as a secondary consumer that uses appellate decisions as study tools for future decisions. The Eleventh Circuit was likewise targeted as a secondary consumer because the Eleventh Circuit is an institution in the same judicial hierarchy as the Sixth Circuit.

It is not clear whether Khalili intended to change the law in the Eleventh Circuit. What is clear is that Khalili has certainly “contribute[d] to the progressive development of the law” as it has provided “legal guidance and clarification of precedent.” Understanding the persuasive nature of the Khalili decision requires a careful and comprehensive analysis of the opinion to determine whether the Khalili decision meets the Sixth Circuit’s institutional responsibility respecting “consequence, consistency and coherence.”

First, in writing the Khalili decision, Judge Cole considers the consequences that will flow from the decision because Khalili’s “holding not only applies to the present case, but will apply also to future circumstances that incorporate identical or similar facts.” In particular, the court’s responsibility as to consequences is important because the decision affects the rights of the actual participants who are relying on the Sixth Circuit to correct errors of the lower tribunal. But more important, Judge Cole had to consider the effect the Khalili decision will have on the Sixth Circuit as an institution whose job is to set precedents.

147 See Aldisert et al., supra note 4, at 12.
148 See id. at 19.
149 See id.
150 Id. at 12.
151 Id.
152 Aldisert et al., supra note 4, at 18.
153 Id.
154 Charles D. Kelso & R. Randall Kelso, Judicial Decision-Making and Judicial Review: The State of the Debate, Circa 2009, 112 W. VA. L. REV. 351, 352 (2010) (noting that there are four basic styles of judicial decision-making and those include formalism, Holmesian, natural law, and instrumentalism). Among those four theories, natural law is the judicial decision making style that warrants further discussion for the purpose of this Article. According to the authors, natural law puts the “emphasis on judicial precedent and general principles underlying the law.” Id.
and to define the law with clarity since the *Khalili* holding will apply to future cases involving similar facts.  

Second, the *Khalili* decision respects the Sixth Circuit’s responsibility as to consistency. Judge Cole understands that the *Khalili* decision sets a precedent and therefore the opinion must be “consistent with valid and binding legal precepts of the legal system.” In writing the opinion, Judge Cole carefully considered decisions of other sister circuits that decided the issue. Judge Cole understands that reasoned analysis was critical because the principle of stare decisis puts him and his colleagues under an obligation to follow *Khalili*’s holding in deciding future cases involving identical or similar facts.

Third, the *Khalili* decision meets the Sixth Circuit’s responsibility as to coherence. *Khalili* becomes the established law in the Sixth Circuit,

proponents have attempted “to connect specific decisions and doctrines with general principles of law, in what is called ‘reasoned elaboration of the law.’” *Id.* at 356. Natural law judges tend to “pay great respect to prior precedents.” *Id.*

There is no evidence to conclude that the three judges who decided *Amaya-Artunduaga* are natural law proponents. In fact, it would be too simplistic to even argue that anyone on the panel of *Amaya-Artunduaga* is a natural law judge simply because one wants to follow the holding of *Amaya-Artunduaga*. A better explanation is that following *Amaya-Artunduaga* as a circuit precedent is based on the overriding concern that the court, as an institution, should move on once an issue has been decided by a published decision. See Johnson v. K Mart Corp., 273 F.3d 1035, 1066 (11th Cir. 2001) (Carnes, J., dissenting). Accordingly and undoubtedly, a litigant who wants the court to overrule *Amaya-Artunduaga* has a heavy burden. Such a heavy burden of justifying the overruling of *Amaya-Artunduaga*, however, can be met if a litigant persuades a subsequent panel to apply *Amaya-Artunduaga*’s holding faithfully and then recommend en banc review to develop uniform laws among the circuits. *See supra* text accompanying notes 106-10.

155 Aldisert et al., *supra* note 4, at 18.

156 *Id.*

157 *Id.*

158 *See Khalili*, 557 F.3d at 433-35.

159 *See id.; see also* Aldisert et al., *supra* note 4, at 37-38 (discussing the obligation under stare decisis to follow previous decisions unless extraordinary circumstances warrant otherwise).

160 *See Aldisert et al., supra* note 4, at 18 (stating that the opinion “must be coherent with an intelligible value or policy and not measured by a random set of norms”). For a deeper understanding and critical review of legal coherence, see J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993). Professor Balkin explains that
which now can apply Khalili to new cases so that future decisions are in accord with the most coherent account that justifies Khalili as the settled law.\textsuperscript{161} This is perhaps how Professor MacCormick would approach the issue because Professor MacCormick believes that courts should decide cases by interpreting the law and establishing a coherent view of some branch of the law that must be justified in accordance with some coherent set of principles or values.\textsuperscript{162} The Sixth Circuit attempted to realize the value of coherence in its Khalili decision by interpreting the exhaustion requirement not to conflict with other circuits that decided the issue.\textsuperscript{163} Khalili’s criticism of Amaya-Artunduaga was to achieve a form of normative coherence, yet unity of principle cannot be achieved unless all the circuits speak with one voice or any conflict is resolved by the Supreme Court.\textsuperscript{164} Under Khalili, any conflicts relating to interpreting the exhaustion requirement can be resolved “in a principled, reasonable, and nonarbitrary fashion.”\textsuperscript{165} Therefore, one can conclude that Khalili achieves the Sixth Circuit institutional responsibility as to coherence since now there is a precedent that must be followed in deciding future cases in accord with the most coherent account that justifies Khalili as the settled law of the Sixth Circuit.

\begin{quote}
legal coherence is the normative coherence of legal justification. The law (or a part of the law) is coherent if the principles, policies, and purposes that could justify it form a coherent set, which in turn means that all conflicts among them are resolved in a principled, reasonable, and nonarbitrary fashion.
\end{quote}

\textit{Id.} at 115-16. According to Balkin, legal coherence requires consistency of principles and policies, which “must be mutually supportive to the extent that they are consistent with each other, and any potential conflicts among them must be resolved in a consistent and principled manner.” \textit{Id.} at 117.

\textsuperscript{161} It may be presumptuous to argue that Khalili is settled law in the Sixth Circuit because Khalili’s holding can be overruled by the Sixth Circuit sitting en banc or by an intervening Supreme Court decision. Yet, it is doubtful that an en banc court will overrule Khalili, which is a well-reasoned decision that joined the majority of circuits that decided the underlying issue.

\textsuperscript{162} See generally MACCORMICK, supra note 4.

\textsuperscript{163} Khalili, 557 F.3d at 435.

\textsuperscript{164} See Balkin, supra note 160, at 116 (citing Joseph Raz, The Relevance of Coherence, 72 B.U. L. Rev. 273, 286 (1992)). Professor Balkin notes that Professor Raz advocates “stricter requirements of normative coherence” when Raz “suggested that coherence requires unity of principle, so that the legal system would be most coherent if we could imagine it as emanating from a single principle.” \textit{Id.}

\textsuperscript{165} \textit{Id.}
The *Khalili* decision provides a good illustration of why the Eleventh Circuit should follow the Sixth Circuit which provided clear guidance on the issue. Yet, one cannot ignore the fact that the Eleventh Circuit must continue to adhere to *Amaya-Artunduaga*’s holding because of the principle of stare decisis. The binding precedent of *Amaya-Artunduaga* does not mean the case was rightly decided. As a result, the consequences that flow from the holding of *Amaya-Artunduaga* have not been embraced by litigants who must live with them regardless of whether they believe *Amaya-Artunduaga*’s decision is wrong.

When a decision such as *Amaya-Artunduaga* fails to appreciate the negative consequences it has on litigants’ right to petition the appellate court to review their claim considered sua sponte by the BIA, the court as an institution leaves open the door for litigants to question or even challenge the continued validity of the wrongly decided case. That is the problem with *Amaya-Artunduaga* whose result runs afool with the Constitution’s guarantee of due process under the Fifth Amendment, which requires aliens in removal proceedings to receive a full and fair hearing. To be clear, such due process guarantee applies more appropriately to the trial level as opposed to the appellate level, but it is even more important for the appellate court to get it right because appellate court decisions create binding precedents that lower courts must apply to future cases involving identical or similar facts.

The fact that other circuit courts have questioned the validity of the holding of *Amaya-Artunduaga*, continuing to apply the holding certainly undermines litigants’ confidence in the legal system because litigants may feel it is unfair to be denied review of their claim simply

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166 In the context of reasoned opinions, Professor Legomsky states that applying the principle of stare decisis promotes consistency and encourages administrative and judicial adjudicators to make every effort to reach consistent outcomes. Stephen H. Legomsky, *Learning to Live With Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 438 (2007) (noting that stare decisis applies to the BIA with authority to designate decisions as precedents which are bindings on immigrations judges and the DHS).


168 See Kelso & Kelso, *supra* note 154, at 353-54.

169 Lopez-Dubon v. Holder, 609 F.3d 642 (5th Cir. 2010); *Khalili*, 557 F.3d 429; Lin v. Att’y Gen., 543 F.3d 114 (3d Cir. 2008); Mei Mei Liu v. Mukasey, 264 F. App’x 530 (7th Cir. 2008); Sidabutar v. Gonzales, 503 F.3d 1116 (10th Cir. 2007).
by virtue of where they live. Many circuits have mentioned the fact that the Eleventh Circuit is the only circuit to find a complete lack of jurisdiction. As a result, the Eleventh Circuit may feel unduly pressured to revisit Amaya-Artunduaga. But the Eleventh Circuit should take solace in the fact that overruling Amaya-Artunduaga must and will be on its terms—in particular subsequent panels are bound by the holding of Amaya-Artunduaga until the court sitting en banc or the Supreme Court overrules Amaya-Artunduaga. Still, the Eleventh Circuit’s institutional responsibility as to consistency will be better served if it decides on its own to overrule Amaya-Artunduaga as opposed to let the Supreme Court grant review. At least, a decision to overrule Amaya-Artunduaga will be consistent with other sister circuits that have decided the issue. In short, the need of stability and predictability will be preserved by any decision that overrules Amaya-Artunduaga. But especially an en banc decision overruling Amaya-Artunduaga will have the weight of established law that will stabilize the judicial system and assist the lower tribunals and litigants in predicting with accuracy and confidence the result when applying the holding to identical or similar facts in the future.

V. Conclusion

The author’s stated goal in this Article was to show that a decision finding jurisdiction to review issues considered sua sponte by the BIA will not undermine the autonomy and effectiveness of the BIA. This Article’s central claim is that an en banc decision of the Eleventh Circuit

170 E.g., Khalili, 557 F.3d at 433.
171 See cases cited supra notes 1, 7.
172 Publication of judicial and administrative decisions that become precedents reduces the possibility of a different outcome in similar cases since adjudicators apply the concept of stare decisis that offers predictability. Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 299 (2007).
173 In circumstances where the BIA could dismiss an appeal for failure to raise a claim with specificity but chooses to consider its merits, an appellate court should exercise jurisdiction, finding that a limited exception exists to the exhaustion requirement because applying such limited exception would not undermine confidence in the administrative system, nor would such an application interfere with the efficient operations of the BIA. Frango v. Gonzales, 437 F.3d 726, 729 (8th Cir. 2006). In fact, such an application will “ensure that justice [is] done.” Id.
overruling *Amaya-Artunduaga* will be consistent with other sister circuits that have decided the issue. More important, a decision overruling *Amaya-Artunduaga* will promote the Eleventh Circuit’s institutional responsibility to see that its decisions stabilize the judicial system and allow litigants to predict how the court will apply *Amaya-Artunduaga*’s holding with accuracy. Having applied Professor Neil MacCormick’s “Three C’s Theory,” this author concludes that the Sixth Circuit’s decision in *Khalili v. Holder* meets “the courts’ institutional responsibility respecting consequences, consistency, and coherence.”

In the author’s view, the *Khalili* decision should become the dominant legal analysis when it comes to challenges involving administrative exhaustion of claims the BIA chooses to decide on the merits, for it considers well-reasoned decisions by the Third Circuit and the Tenth Circuit to reach its holding. The author recognizes that *Amaya-Artunduaga* has the force of binding precedent and therefore it must be followed unless *Amaya-Artunduaga* is overruled by the Eleventh Circuit sitting en banc or by the Supreme Court. The analysis generates a single method of how to go around the prior panel precedent rule. It simply suggests that a subsequent panel must apply the *Amaya-Artunduaga* holding faithfully and then recommend en banc review. This is the best course of action in order to avoid running afoul of the prior panel precedent rule. Once this procedure is followed, then for the sake of promoting uniformity of the law within the circuits, the Eleventh Circuit could overrule *Amaya-Artunduaga* and join the majority of circuits that found jurisdiction to review claims raised in cases similar to *Khalili*. Such an en banc decision joining the majority of circuits will not undermine the BIA’s autonomy and effectiveness because the BIA had a meaningful opportunity to consider the issue on its substantive merits in the first instance. Furthermore, simply overruling *Amaya-

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174 MacCormick, supra note 4, at 100-28.
175 Aldisert et al., supra note 4, at 14.
176 See supra text accompanying notes 102-03.
178 See Legomsky, supra note 29, at 1631 (arguing that “the mere prospect of judicial review hopefully encourages” an agency to make “more thoughtful, and more rational” decisions in the first place). If the BIA chooses to reach the substantive
Artunduaga will not undermine the need for stability and predictability. Au contraire, it will provide greater weight in stabilizing the judicial system since litigants will have great confidence in predicting the result when the holding is applied to identical or similar facts to Amaya-Artunduaga.

merits of an issue it could have summarily denied, then reviewing such an issue will not undermine the BIA’s autonomy and effectiveness. Au contraire, if the Eleventh Circuit joins the majority of circuits finding jurisdiction to review claims raised in a case similar to Khalili, a precedent overruling Amaya-Artunduaga will be a very important and persuasive factor that will encourage the BIA to make more thoughtful and more rational decisions when it chooses to review on the merits unexhausted claims that it could have dismissed for failure to exhaust one’s administrative remedy. See id. The author agrees with Professor Legomsky that the BIA is likely to make sure that it has a cogent reason for reaching a particular conclusion in light of the fact that BIA members know that the court of appeals will find jurisdiction to review unexhausted claims the BIA reached merits. See id.