No.

In the Supreme Court of the United States

RAVIDATH RAGBIR,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Board of Immigration Appeals (BIA) held petitioner removable from the United States by applying a narrow evidentiary standard that this Court later rejected in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). On subsequent review of the BIA's decision, the Second Circuit declined to remand the case so that the agency could consider, in the first instance, whether petitioner was removable in light of evidence made relevant by *Nijhawan*. Instead, the court itself concluded that petitioner could not prevail under the new standard, and therefore held remand to the agency unnecessary. The question presented is:

When an agency commits a legal error—especially one involving application of the wrong evidentiary standard—in what circumstances may a reviewing court apply the new legal standard in the first instance, rather than remanding in accord with *SEC* v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ravidath Ragbir respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-11a) is reported at 389 Fed. Appx. 80. The decision of the Board of Immigration Appeals (App., *infra*, 12a-20a) and the decision of the Immigration Judge (App., *infra*, 21a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2010. The court of appeals denied petitioner's motion for rehearing on November 22, 2010. On February 10, 2011, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until April 21, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title 8, U.S. Code § 1227 provides in relevant part:

> **(a) Classes of deportable aliens**
>
> Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
>
> * * *
>
> **(2)(A)(iii) Aggravated felony**

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

2. Title 8, U.S. Code § 1101 provides in relevant part:

> (a)(43) The term "aggravated felony" means—
>
> * * *
>
> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; * * *
>
> (U) an attempt or conspiracy to commit an offense described in this paragraph.

STATEMENT

This case presents a question of administrative law that has created a clear conflict between several courts of appeals and pervasive confusion among the others: when a change of law—particularly one that governs an evidentiary standard—occurs after an initial agency decision, may a reviewing court itself apply the new law, or must the court instead remand the case so that the agency may apply the new legal standard in the first instance?

Petitioner, a native of Trinidad and Tobago, is a lawful permanent resident of the United States who is presently subject to removal proceedings following a single criminal conviction that occurred more than ten years ago. The Board of Immigration Appeals (BIA) determined that petitioner was subject to removal because his crime involved a loss of more than $10,000, as is required for removal under the governing statutory standard. But following the

BIA's decision and while the matter was on review before the court of appeals, this Court substantially broadened the range of evidence that could be considered by an immigration judge (IJ) and the BIA when determining whether an immigrant's crime in fact involved the requisite loss of more than $10,000. See *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). Despite this new legal standard, however, the court below decided there was no "realistic possibility" that petitioner could prevail, and accordingly refused to let the agency decide in light of evidence made newly relevant by *Nijhawan* whether petitioner's crime involved a loss greater than $10,000.

The decision of the court of appeals was wrong. In *SEC* v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194 (1947), this Court reaffirmed a "simple but fundamental rule of administrative law": "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Id.* at 196. A reviewing court therefore may not reach a decision on a basis never considered by the agency. See *ibid.* But that is just what the Second Circuit did in this case.

Moreover, the Second Circuit's blithe disregard of *Chenery* is not an aberration. The circuits are in disarray on the application of the *Chenery* doctrine in cases where an agency commits an error of law. Some courts of appeals reject the Second Circuit's approach in cases (like this one) involving a change in the evidentiary standard governing the agency's decision. In other cases of legal error, other circuits follow the Second Circuit by routinely refusing to

remand so that agencies may first address the import of changed legal or evidentiary rules. Still others have articulated no discernible standard at all to govern agency review in such circumstances. This confusion has led judges regularly to complain that their fellow judges are making decisions that a "reviewing court is not authorized to make" or "misread[ing]" *Chenery*, or that their colleagues' holdings are "fundamentally incompatible with" *Chenery*, are "antithetical to our [judicial] role," or "do[] exactly what *Chenery* forbids."[1]

And this confusion has come about because, as Judge Calabresi explained, "the extent to which * * * questions may be resolved by a Court of Appeals, without first remanding to the agency for its consideration, has not been clearly settled by the Supreme Court." *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 338 n.2 (2d Cir. 2007) (en banc) (Calabresi, J., concurring in part and dissenting in part) (citing conflicting opinions of the Second, Fourth, and Ninth Circuits). Because the issue is one of enormous importance, arising with great frequency in cases that themselves typically have considerable significance, this Court should settle the matter now.

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[1] *Rasiah* v. *Holder*, 589 F.3d 1, 9 (1st Cir. 2009) (Lipez, J., dissenting); *Hussain* v. *Gonzales*, 477 F.3d 153, 160 (4th Cir. 2007) (Hamilton, J., dissenting); *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 337 (2d Cir. 2007) (en banc) (Calabresi, J., concurring in part and dissenting in part); *Japarkulova* v. *Holder*, 615 F.3d 696, 704 (6th Cir. 2010) (Martin, J., dissenting in part); *Bhattarai* v. *Holder*, No. 09-9541, 2011 WL 304789 at *10 (10th Cir. Feb. 1, 2011) (Lucero, J., dissenting).

A. Agency Proceedings

In 2006, the Department of Homeland Security (DHS) began removal proceedings against petitioner pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(M)(i) and 1101(a)(43)(U), alleging that he had been convicted of an aggravated felony involving a fraud causing a loss of more than $10,000.[2] App., *infra*, 1a-2a. The removal proceedings stemmed from petitioner's conviction after trial in 2000 for wire fraud and conspiracy involving several fraudulent loan applications. App., *infra*, 15a.

To establish petitioner's removability, DHS was required to demonstrate by clear and convincing evidence a loss of at least $10,000 stemming from the conduct for which petitioner was convicted. *Nijhawan*, 129 S. Ct. at 2303. Although the indictment alleged transactions involving more than $400,000 in loans from a financial institution, the indictment did not allege an amount of *loss* (as distinct from the face value of the loans).[3] Nor did

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[2] Section 1101(a)(43)(M)(i) lists as an aggravated felony warranting removal an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"; Section 1101(a)(43)(U) lists as an aggravated felony "an attempt or conspiracy to commit an offense" that otherwise qualifies as an aggravated felony.

[3] The indictment alleges loans of "more than $400,000" and identifies six loans in the total amount of $494,488.23. Superseding Indictment at 3, 9, *United States* v. *Kosch*, No. 00-121 (WGB) (D.N.J. May 19, 2000) (listing Counts Two through Seven involving loans of $69,595.13, $10,050, $124,882.65, $73,131.52, $35,000, and $181,828.93, respectively). Apart from alleging that the loans were fraudulently obtained, none of the counts of the indictment allege non-payment or any loss amount resulting from the conduct covered in the scheme.

the law require the jury to determine the losses stemming from any of the loans alleged in the indictment to have been fraudulently obtained. *Nijhawan*, 129 S. Ct. at 2298.

Following the trial and before sentencing, the government contended that in accordance with the United States Sentencing Guidelines, petitioner should be liable for certain loan transactions for which he had not been indicted or convicted.[4] For purposes of calculating an order of restitution, petitioner and the government agreed on a total restitution amount of $350,001. App., *infra*, 6a. The restitution order included not just losses from the six loans that formed the basis for petitioner's conviction, but also those from eleven additional loans for which petitioner had *not* been convicted. The scope of the agreed-upon restitution order was in keeping with law providing that a restitution order may encompass losses stemming not only from transactions that formed the basis for conviction, but also from transactions closely related to the conduct of conviction. See, *e.g.*, *United States* v. *Kones*, 77 F.3d 66, 69-70 (3d Cir. 1996) (noting that restitution statute allows sentencing court to "order restitution for any harm directly caused by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern, even though such conduct is

[4] See, *e.g.*, *Edwards* v. *United States*, 523 U.S. 511, 514 (1998) (noting that federal criminal sentences may be based on "*both* conduct that constitutes the 'offense of conviction,' *and* conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction'" (quoting U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)-(2)) (citations omitted)).

not the specific conduct that is the basis of the offense of conviction" (internal quotation marks omitted)).

The sentencing judge ultimately imposed an order of restitution of $350,001, and this order was incorporated into the court's written judgment of conviction. See Judgment in a Criminal Case at 5, United States v. Ragbir, No. 00-121-2 (D.N.J. Sept. 26, 2001). The restitution order does not distinguish between losses resulting from the six loans that were charged in the indictment and those stemming from the eleven unindicted loans that also were used as a basis for calculating the restitution order. *Ibid.*

Although the jury made no finding of loss and the restitution order did not distinguish between losses from conduct that was, and was not, charged in the indictment, the IJ in petitioner's removal proceedings concluded that the loss from petitioner's crime of conviction was more than $10,000. App., *infra*, 25a. In reaching this result, the IJ recognized that the "modified categorical" approach followed by the courts allowed consideration only of the official record of conviction; the IJ interpreted this to include only the indictment and the judgment of conviction (which included the restitution order). App., *infra*, 26a-27a; see also *Ming Lam Sui* v. *INS*, 250 F.3d 105, 117-118 (2d Cir. 2001); *Dulal-Whiteway* v. *U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 128-129 (2d Cir. 2007). He did not rely on documents containing additional circumstance-specific information. App., *infra*, 25a-33a. Having made this determination, the IJ ordered petitioner removed from the United States. App., *infra*, 33a.

On appeal, the BIA similarly concluded that "the superseding indictment and the order of restitution

imposed against the [petitioner] in the criminal judgment establish by clear and convincing evidence that the offenses of which he was convicted occasioned a loss of more than $10,000 to the victim." App., *infra*, 18a. Like the IJ, the BIA relied for this conclusion on an indictment that did not allege loss and a restitution order that was based in part on transactions for which petitioner was not actually convicted. Because the then-prevailing modified categorical standard restricted the agency to relying only on official conviction records, petitioner could not rely upon additional evidence beyond the record of conviction to rebut the IJ's finding of loss.

B. Court Of Appeals Proceedings

Petitioner sought review of the BIA decision in the Second Circuit. But while his case was pending before the court of appeals, this Court decided *Nijhawan*, 129 S. Ct. 2294.

1. In *Nijhawan*, this Court considered what categories of evidence an IJ may review when determining, under 8 U.S.C. § 1101(a)(43)(M)(i), whether a particular conviction resulted in a loss of more than $10,000. Three aspects of the Court's ruling in *Nijhawan* are significant to petitioner's case.

First, *Nijhawan* rejected the "categorical" approach, which looked only to whether a loss of $10,000 or more was a definitional element of the criminal offense. 129 S. Ct. at 2299-2300. Instead, *Nijhawan* adopted a "circumstance-specific" approach, concluding that an IJ may look beyond the crime's formal elements and examine "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion" to

determine whether clear and convincing evidence showed that the crime caused a loss greater than $10,000. *Nijhawan*, 129 S. Ct. at 2302.

Second, *Nijhawan* rejected a "modified categorical approach" that would have restricted an IJ to considering only official conviction records when deciding what amount of loss resulted from the crime of conviction. *Id.* at 2302-2303. Instead, *Nijhawan* placed no explicit limitation on what evidence an IJ might consider to determine whether the loss exceeded $10,000.

Third, *Nijhawan* made clear that the "loss" at issue must specifically tie to a count of conviction. *Id.* at 2303 ("[A]s the Government points out, the 'loss' must 'be tied to the specific counts covered by the conviction.'"). *Nijhawan* thus foreclosed an IJ from considering "acquitted or dismissed counts or general conduct" in addition to the actual conduct of conviction in determining loss. *Id.* (citing *Alaka* v. *Att'y Gen. of the U.S.*, 456 F.3d 88, 107 (3d Cir. 2006)).

2. Following the *Nijhawan* decision, petitioner sought remand of his case to the agency so that he could introduce circumstance-specific evidence, beyond the indictment and official judgment of conviction, to establish that his offense did not cause a loss of more than $10,000. But the court of appeals denied the request. Although the court recognized that *Nijhawan* "abrogated this court's precedent limiting agency review in this context to records of conviction," the court also opined that "nothing in *Nijhawan* requires the agency to consider any particular document." App., *infra*, 10a. And the court faulted petitioner for "point[ing] to nothing in the record that precluded the agency, as a matter of law,

from making a clear and convincing finding that the $350,001 restitution order included more than $10,000 attributable to the crimes of conviction" (App., *infra*, 7a)—although the court did not indicate how such evidence would have been admissible under its since-repudiated modified categorical approach.[5] The court further noted that "'[w]e are not required to remand where there is no realistic possibility that, absent the errors, the IJ or BIA would have reached a different conclusion.'" App., *infra*, 10a (quoting *Cao He Lin* v. *U.S. Dep't of Justice*, 428 F.3d 391, 401 (2d Cir. 2005)). The court therefore denied the petition for review, upholding the BIA's decision. App., *infra*, 11a.

Consequently, petitioner did not have the opportunity to seek the agency's consideration of evidence newly permitted by *Nijhawan*. This would have included mortgage deeds showing that the loans in the indictment were well collateralized as well as evidence that payments had been made on these loans. Taken together and in light of the burden on the agency to establish removability by clear-and-convincing evidence, this information could have cast serious doubt on the conclusion that the conduct charged in the counts of conviction caused losses of more than $10,000.

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[5] In a footnote, the court of appeals cited portions of the presentence report to bolster its conclusion concerning losses resulting from the counts of conviction. App., *infra*, 7a n.5. But in accord with the Second Circuit's pre-*Nijhawan* categorical rule, neither the IJ nor the BIA had relied upon the presentence report as a basis for their decisions.

REASONS FOR GRANTING THE PETITION

It is fundamental under *Chenery* that judicial review of agency action must be based solely on the grounds invoked by the agency. This rule requires that a case be remanded to the agency when a court determines that the agency applied an incorrect legal standard, so that the court is *reviewing*, and not *making*, either agency policy or factual determinations that are within the exclusive purview of the agency. And this case is the paradigm of one in which remand to the agency is required under *Chenery.* The IJ and BIA applied an incorrect evidentiary rule; the BIA should be permitted to consider, in the first instance, what types of evidence now may be taken into account under *Nijhawan*; and petitioner should be permitted to have the BIA consider evidence that was excluded by the Second Circuit's prior, and now-repudiated, modified categorical rule. In nevertheless refusing to remand this case, the holding below is the latest in a line of decisions in which the Second Circuit departed from the central principle of *Chenery*.

Beyond that, the decision in this case contributes to an extraordinary, pervasive, and deeply disturbing uncertainty across the circuits about whether the *Chenery* doctrine means what it says. Some courts of appeals, like the Second Circuit in this case, apply a broad futility exception, refusing to remand cases to the agency—even when the agency was held to have misinterpreted the controlling law—whenever the court believes it obvious how the agency would rule under the correct legal standard. Others, in contrast, will remand to the agency in all but the most exceptional cases, with some finding remand necessary in circumstances virtually identical to

those in this case. And many circuits have been so inconsistent in their rulings that it is simply impossible to predict when they will remand to allow an agency to respond to a determination that it committed legal error.

This confusion affects thousands of cases a year, as administrative appeals have grown to make up nearly one-fifth of the docket of the federal courts of appeals. And it erodes a central principle of administrative law, as courts are increasingly making, rather than reviewing, agency decisions. Further review by this Court accordingly is warranted.

I. THE DECISION BELOW VIOLATES THE *CHENERY* DOCTRINE.

A. When A Court Determines That Agency Action Is Premised On Legal Error, The Matter Generally Must Be Remanded To The Agency.

The *Chenery* doctrine states a "simple but fundamental rule of administrative law":

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Chenery II, 332 U.S. at 196; see also *SEC* v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 88 (1943). A half century after the doctrine was announced, *Chenery* "remains a bedrock principle of federal administrative law" (Gary Lawson, *Federal Administrative Law* 362 (5th ed. 2009)) that "continues to be cited with approval by the Court." Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 433 (6th ed. 2006); see, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (summarily reversing court of appeals for failure to comply with *Chenery* in an immigration case); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (same).

Chenery makes clear that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that [the agency's] action was based." *Chenery I*, 318 U.S. at 87. Because "a judicial judgment cannot be made to do service for an administrative judgment" (*id.* at 88), "[a] court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Ventura*, 537 U.S. at 16 (internal quotation marks omitted).

Indeed, it is among the "fundamental principles of judicial review of agency action" that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Light & Power Co.* v. *Lorion*, 470 U.S. 729, 743 (1985) (internal quotation marks omitted). For this reason, a court of appeals "cannot accept appellate counsel's post hoc rationalizations for agency action" or engage in its own creative reconstruction of the record;

instead, "an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *Fed. Power Comm'n* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974) (internal quotation marks omitted).

In light of these fundamental constraints on judicial review, when a reviewing court concludes that an agency order is based on legal error, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16). Such remands allow agencies in the first instance to articulate clearer and more informed standards of administrative action. See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1167-1168 (2009) (discussing reasons for the "ordinary remand" rule).

The decision below, however, ignored this fundamental principle: it upheld the decision of the BIA even though the legal standard applied by the agency had been superseded by this Court's decision in *Nijhawan*. This was error. As then-Judge Alito has noted, even "[i]f the [agency] reached a result that we believe to be correct, but relied upon an incorrect view of the law in so deciding, we are obligated to remand to allow the [agency] to reconsider its decision under the correct legal standard." *RNS Servs., Inc.* v. *Sec'y of Labor*, 115 F.3d 182, 189 (3d Cir. 1997) (Alito, J., dissenting) Therefore, although a court may believe that "the agency would *most likely* reach the same decision on remand"—as did the Second Circuit in this case—such a belief "is no reason not to follow *Chenery* and its progeny." *Id.* at 189 n.2.

B. The Expansive Futility Exception To *Chenery* Applied By The Second Circuit Is Insupportable.

1. In nevertheless declining to remand, the court below concluded that returning the case to the agency would be futile "[i]n the absence of any indication that the agency's determination of loss exceeding $10,000 was not adequately supported by the record." App., *infra*, 10a. This holding followed Second Circuit precedent, under which "[t]he overarching test for deeming a remand futile" is whether a "reviewing court can 'confidently predict' that the agency would reach the same decision absent the errors that were made." *Xiao Ji Chen* v. *U.S. Dep't of Justice*, 471 F.3d 315, 339 (2d Cir. 2006) (quoting *Cao He Lin*, 428 F.3d at 395). The en banc Second Circuit applied this principle in *Shi Liang Lin*, 494 F.3d at 313-315, declining to remand to the BIA despite the majority's determination that the agency used an incorrect legal standard when evaluating a claim. In doing so, the court rejected the dissenting complaint of Judge Calabresi that the Second Circuit's rule disregards "the obvious importance of the ordinary remand rule in the immigration context," "preclude[s] the BIA from interpreting [the statute's] general provisions in the first instance," and "is fundamentally incompatible with the spirit of" *Thomas* and *Ventura*. *Id.* at 336-339 (Calabresi, J., concurring in part and dissenting in part) (internal quotation marks omitted). Judge Calabresi was correct; the Second Circuit majority is wrong.

As *Chenery I* made clear, "an order may not stand if the agency has misconceived the law." *Chenery I*, 318 U.S. at 94. "If a reviewing court

agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency * * * might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC* v. *Akins*, 524 U.S. 11, 25 (1998); see also *Rapanos* v. *United States*, 547 U.S. 715, 786-787 (2006) (Kennedy, J., concurring in the judgment) ("[A] remand is again required to permit application of the appropriate legal standard."). As Judge Friendly explained, "[t]here are those cases where * * * the real trouble is that the agency has misconstrued the statute," and in those cases "there *must* be reversal * * *." Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 223 (emphasis added).[6]

The Court has recognized only two exceptions to the *Chenery* remand rule for agency legal errors: where the error was essentially "dictum" that "had no bearing on the final agency action that respondents challenge" (*Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007)); and when the agency "lucked out" by "provid[ing] a

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[6] In contrast to the demanding *Chenery* remand standard articulated by this Court in the context of agency legal errors, *Chenery* principles have a more "limited office" with respect to challenges focused solely on an agency's errors of fact. See, *e.g.*, *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486, 518 n.10 (1968); Friendly, *supra*, at 205-206 (noting that the error in *Penn-Central* was that of "erroneous findings" rather than one of applying the "correct governing standard," and stating that in the event of agency legal error "*Chenery* would have required the district court to reverse and remand."); *id.* at 223 (distinguishing between the remand standards applicable to agency errors of law and of fact).

different rationale for the necessary result" that was otherwise legally "*required*," and therefore remand would be an "'idle and useless formality'" because the agency would have no discretion, *as a matter of law*, to exercise on remand. *Morgan Stanley Capital Grp. Inc.* v. *Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-545 (2008) (quoting *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-767, n.6 (1969) (plurality opinion)). Otherwise, when the agency has applied the wrong legal standard, *Chenery* does not license federal judges to deny a remand based simply upon their prediction that the agency would rule the same way under the correct legal standard.

2. Against this background, the holding below is insupportable. It did not involve a quibble over immaterial, subsidiary factual findings: the BIA erred as a matter of law when it followed then-controlling precedent by restricting the range of evidence the agency could consider in determining the amount of loss. As even the court below acknowledged, *Nijhawan* "abrogated this court's precedent limiting agency review in this context to records of conviction." See App., *infra*, 10a.

Nor does the agency's legal error qualify for either of the narrow exceptions to the *Chenery* legal-error remand rule. The error was not "dicta"; the BIA did not advance an alternative ground establishing petitioner's removability. And, especially because this particular legal error *excluded* consideration of relevant evidence, it is impossible to say that the agency "lucked out" and reached the legally required result. The Second Circuit could not permissibly assess the futility of presenting newly admissible evidence that was never considered by the agency.

In fact, "every consideration that classically supports the law's ordinary remand requirement does so here." *Ventura*, 537 U.S. at 17. On remand, "the agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the * * * law * * *." *Ibid.*

The exercise of agency discretion in this case is more than just a theoretical possibility. Now that a wider range of evidence may be considered in determining the amount of loss, the agency must consider both the extent to which a restitution order suffices to establish the loss and the types of evidence that may be considered in making that determination.[7] Indeed, in the wake of *Nijhawan* the BIA itself has not yet settled on the proper use of restitution orders for determining loss in removal hearings. See *In re Stadler*, No. A029 978 620, 2010 WL 1250976, at *4 (B.I.A. Feb. 26, 2010) ("[T]he amount of loss noted in the restitution order is insufficient [to prove removability] under the intervening precedent [including *Nijhawan*] * * *."); *In re Relvas*, No. A034 758 717, 2009 WL 2981793 (B.I.A. Aug. 31, 2009) (finding a restitution order sufficient to prove loss where there was no concern that the order reflected losses from unindicted conduct); *In re Simeon*, No. A099 103 477, 2009 WL 2171604 (B.I.A. July 8, 2009) (relying on a restitution order and admissions of guilt for a finding of removability).

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[7] The BIA itself may have to remand the case to the IJ for a *Nijhawan* hearing.

Moreover, *Nijhawan* states that "the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime *on a specific occasion*." 129 S. Ct. at 2302 (emphasis added). The agency will need to determine whether this requires a showing that the $10,000 loss resulted from a single count of conviction rather than, as was found below here, from all counts combined. The Second Circuit's decision, however, prevents the agency from addressing this important legal issue in petitioner's case. The BIA accordingly should have the opportunity in the first instance to evaluate the full range of evidence and legal considerations that are made newly relevant by *Nijhawan*.

II. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE APPLICATION OF THE *CHENERY* REMAND REQUIREMENT.

The Second Circuit's disregard for *Chenery* principles is itself a serious enough matter to warrant intervention by this Court. But confusion about the meaning of *Chenery* is not limited to the Second Circuit. The Third and Ninth Circuits have rejected the Second Circuit's expansive futility exception to the *Chenery* remand requirement in the precise circumstances presented here: when an intervening change in the law broadens the range of evidence that may be considered by the agency. And more generally, the courts of appeals are in disarray about when to remand in the face of agency legal error. Some courts have aligned themselves with the Second Circuit's broad futility approach, while others have not. Still other circuits have exhibited deep-seated confusion about the application of *Chenery*. The outcome has been uncertainty and wildly

inconsistent results. It therefore is not surprising that, in almost every circuit, there has been at least one recent dissenting opinion by a judge complaining about his or her court's misunderstanding of the *Chenery* remand requirement.[8] Clarification of the law by this Court accordingly is needed.

A. The Circuits Are Deeply Confused About How To Apply The Futility Exception To The *Chenery* Remand Rule.

1. As we have noted, the Second Circuit applies a futility exception to the remand requirement when the judges believe that they "can confidently predict that the agency would reach the same decision absent the errors * * *." *Xiao Ji Chen*, 471 F.3d at 339; see also App., *infra*, 10a. The Fourth, Fifth, Sixth, and Eleventh Circuits often apply similar

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[8] See, *e.g.*, *Bhattarai*, 2011 WL 304789 at *7 (Lucero, J., dissenting); *Japarkulova*, 615 F.3d at 704 (Martin, J., dissenting in part); *Kyong Ho Shin* v. *Holder*, 607 F.3d 1213, 1224 (9th Cir. 2010) (Wallace, J., dissenting); *Rasiah*, 589 F.3d at 9 (Lipez, J., dissenting); *Forest Guardians* v. *U.S. Forest Serv.*, 579 F.3d 1114, 1131-1132 (10th Cir. 2009) (McConnell, J., dissenting in part); *Shi Liang Lin*, 494 F.3d at 337 (Calabresi, J., dissenting in part); *Hussain*, 477 F.3d at 158-159 (Hamilton, J., dissenting); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1136, 1143 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting in part, and Wardlaw, J., dissenting separately); *Almaghzar* v. *Gonzales*, 457 F.3d 915, 927-928 (9th Cir. 2006) (Fisher, J., dissenting in part); *Zhao* v. *Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (Garza, J., dissenting in part); *Dia* v. *Ashcroft*, 353 F.3d 228, 267 (3d Cir. 2003) (en banc) (Stapleton, J., dissenting in part); *RNS Servs.*, 115 F.3d at 188 (Alito, J., dissenting); *Arkansas AFL-CIO* v. *FCC*, 11 F.3d 1430, 1445 (8th Cir. 1993) (en banc) (Gibson, J., dissenting).

remand rules.[9] They frequently have done so, however, over spirited dissents complaining that "[t]he majority's application of harmless error is antithetical to our role because, in this case, there is no agency interpretation * * * to which we may defer in the face of reasoned analysis" (*Japarkulova* v. *Holder*, 615 F.3d 696, 704 (6th Cir. 2010) (Martin, J., dissenting in part)) or that the majority "misreads *Ventura* and *Thomas*" and "creates an exception to the ordinary remand rule that swallows the rule." *Hussain* v. *Gonzales*, 477 F.3d 153, 160-161 (4th Cir. 2007) (Hamilton, J., dissenting).[10]

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[9] See, *e.g.*, *Hussain*, 477 F.3d at 158 (no remand when it would be a "mere formality"); *Enriquez-Gutierrez* v. *Holder*, 612 F.3d 400, 407 (5th Cir. 2010) ("Even if there is a reversible error * * *, affirmance may be warranted 'where there is no realistic possibility that, absent the errors, the . . . BIA would have reached a different conclusion.'" (citing *Cao He Lin*, 428 F.3d at 401)); *Japarkulova*, 615 F.3d at 701; *Rabbers* v. *Comm'r of the Soc. Sec. Admin.*, 582 F.3d 647, 654-655, 661 (6th Cir. 2009); *Karimijanaki* v. *Holder*, 579 F.3d 710, 721 (6th Cir. 2009) ("[A] remand is not required where such a gesture would be futile." (citing *Xiao Ji Chen*, 471 F.3d at 339)); *Calle* v. *U.S. Att'y Gen.*, 504 F.3d 1324, 1330 (11th Cir. 2007) (citing *Hussain*, 477 F.3d at 155).

[10] The law in these circuits has not been entirely consistent, however. Some decisions have taken a narrower approach to the futility exception. See, *e.g.*, *Nken* v. *Holder*, 585 F.3d 818, 821-823 (4th Cir. 2009) (remanding, despite the government's argument that there was sufficient basis to affirm, because "[e]stablished precedent dictates that a court may not guess at what an agency meant to say, but must instead restrict itself to what the agency actually did say"); *BizCapital Bus. & Indus. Dev. Corp.* v. *U.S. Comptroller of the Currency*, 467 F.3d 871, 874 (5th Cir. 2006) ("That the [agency] is likely to deny the request after properly applying its regulations does not render remand a mere formality."); *Berhane* v. *Holder*, 606 F.3d 819,

2. In contrast, the Third Circuit is significantly less willing to substitute its views for those of the agency than are the Second, Fourth, Fifth, Sixth, and Eleventh Circuits. In the Third Circuit, the usual rule is that, "[i]f we take issue with the application of law to [a petitioner's] case, we will defer to the authority granted an agency by Congress and remand to the [agency] for the appropriate consideration." *Quao Lin Dong* v. *Att'y Gen. of the U.S.*, No. 09-2524, 2011 WL 1086610, at *3 (3d Cir. Mar. 25, 2011). As then-Judge Alito put it for the court, "[w]e are *obliged* to remand to the agency to reconsider and reweigh the facts, rather than attempting to undertake that task ourselves." *Gui Cun Liu* v. *Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (emphasis added); see also *Silva-Rengifo* v. *U.S. Att'y Gen.*, 473 F.3d 58, 71 (3d Cir. 2007) (the court "must remand to the BIA to give the BIA the first opportunity to apply the correct standard").[11]

3. Other circuits—including the First, Seventh, Ninth, Tenth, and D.C. Circuits—have been so inconsistent in their agency remand decisions that it

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825 (6th Cir. 2010) (remanding to the BIA "for further consideration and further explanation"); *Valderrama* v. *U.S. Att'y Gen.*, 335 Fed. Appx. 919, 924 (11th Cir. 2009) (requiring remand given BIA's legal error in failing to address petitioner's due process argument).

[11] Even the Third Circuit, however, has not been entirely consistent in requiring remand to the agency, at least in older decisions. See *RNS Servs.*, 115 F.3d at 188, 192 (denying remand to agency over dissent of then-Judge Alito declaring that "*Chenery* * * * mandates a remand to the Commission" given that "it is perfectly clear that the Commission did not base its decision on [the correct] legal standard").

is nearly impossible to identify how those courts apply the futility exception to *Chenery*. In the First Circuit, for example, the majority in *Rasiah* v. *Holder*, 589 F.3d 1 (1st Cir. 2009), upheld the BIA's denial of asylum, while a vigorous dissent argued that the case should have been remanded to the BIA. *Id.* at 9 (Lipez, J., dissenting) ("[T]he majority's opinion appears to be driven by a conviction that remand would be futile because Rasiah's pattern or practice claim would likely be rejected by the BIA. However, the reviewing court is not authorized to make that determination in the first instance."). But this decision came *after* the en banc holding in *Castaneda-Castillo* v. *Gonzales*, 488 F.3d 17 (1st Cir. 2007); there, consistent with Judge Lipez's *Rasiah* dissent, the court required "a remand to allow the matter to be considered anew under the proper legal standards," given that the agency's decision rested "upon a misunderstanding of the legal elements of persecution." *Id.* at 22.

The Seventh Circuit sometimes applies the futility exception when it has "confidence" about the outcome of a remand. See, *e.g.*, *Borovsky* v. *Holder*, 612 F.3d 917, 921 (7th Cir. 2010). But in other, similar cases, that court will order a remand. See *Mengistu* v. *Ashcroft*, 355 F.3d 1044, 1046-1047 (7th Cir. 2004) (Posner, J.) (remanding in accordance with *Chenery* when the BIA had not reached grounds agency counsel raised in the court of appeals); *cf.* *Chen* v. *Holder*, 578 F.3d 515, 518 (7th Cir. 2009) (requiring remand from the BIA to the IJ after a change in the governing evidentiary standard "[b]ecause the BIA dismissed Chen's claim based on the lack of evidence that he never knew he was supposed to gather").

Ninth Circuit precedent is equally confused. In *Kawashima* v. *Holder*, 615 F.3d 1043, 1056 (9th Cir. 2010), applying post-*Nijhawan* standards as in the present case, the court required remand to the agency to decide whether the immigrant's crime resulted in a loss greater than $10,000.[12] But in other cases, remand has been denied despite legal error or intervening developments in the law. See, *e.g.*, *Halim* v. *Holder*, 590 F.3d 971, 980 (9th Cir. 2009); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (declining to remand, over separate dissents from Judges Wardlaw and Kozinski); *Almaghzar* v. *Gonzales*, 457 F.3d 915, 927 (9th Cir. 2006) (refusing to remand despite Judge Fisher's dissent that "the majority treads on dangerous ground by deciding the [Convention Against Terrorism] issue in the first instance without being informed by an intervening BIA decision").

In the Tenth Circuit, cases including *Carpio* v. *Holder*, 592 F.3d 1091, 1103 (10th Cir. 2010), and *Allen* v. *Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004), have required remand, citing *Chenery*. See *Allen*, 357 F.3d at 1145 ("[T]o the extent a harmless-error determination rests on legal or evidentiary matters not considered by the ALJ, it risks violating the general rule against post hoc justification of administrative action."). But in *Bhattarai* v. *Holder*, No. 09-9541, 2011 WL 304789 at *5-6 (10th Cir. Feb. 1, 2011), the majority departed from the *Carpio* and *Allen* rule and affirmed the BIA without remand—

[12] See also pp. 27-28, *infra*, for further discussion of the *Kawashima* decision.

over Judge Lucero's complaint that "[t]he majority does exactly what *Chenery* forbids. It usurps the agency's role by reevaluating the evidence presented to the BIA." *Id.* at *10 (Lucero, J., dissenting).

Finally, the D.C. Circuit displays equal confusion. In some cases, the court articulates a broad understanding of the futility exception from remand. See, *e.g.*, *Riordan* v. *SEC*, 627 F.3d 1230, 1233 (D.C. Cir. 2010) (citing a harmless error exception to deny remand when "the evidence * * * was utterly overwhelming on most issues"). Yet, in other cases, a seemingly narrower futility exception has been applied, though panels have sharply disagreed over the proper interpretation of *Chenery*. See, *e.g.*, *PDK Labs. Inc.* v. *DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) ("[I]t is important to remember that if we find that an agency's stated rationale for its decision is erroneous, we cannot sustain its action on some other basis the agency did not mention."); *id.* at 809 (Roberts, J., concurring in part) (finding remand futile and explaining that "*Chenery* does not require futile gestures" (quoting *Illinois* v. *ICC*, 722 F.2d 1341, 1348 (7th Cir. 1983))); *Prill* v. *NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("Because the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale. Accordingly, we remand this case under the principles of *SEC v. Chenery* * * *."); *id.* at 959 (Bork, J., dissenting) ("[T]he Board's alleged mistakes, if they existed, would be harmless error * * *.").

In short, in several circuits it is impossible to identify a prevailing standard for when to apply the futility exception. The Third Circuit has more

consistently applied a quite limited futility exception. Other courts have generally applied a significantly broader exception. And even in those circuits where the prevailing standard seems relatively clear, factually similar cases have come out differently, with dissents routinely issued. This confusion both across and within the courts of appeals can be remedied only by this Court.

B. The Circuits Are Split On Whether Remand To The Agency Is Required After An Intervening Change Of Law Allowing The Introduction Of New Evidence.

In addition to contributing to the pervasive confusion and division among the circuits on the general application of *Chenery*, the decision below highlights a more specific conflict that divides the Second Circuit from the Third and Ninth Circuits with respect to the precise issue in this case: whether remand to the agency is required after an intervening change of law, particularly one—like this Court's decision in *Nijhawan*—that allows or requires the consideration of new evidence by the agency.[13] Wholly apart from the broader disarray in the courts of appeals, this conflict should be resolved by the Court. The matter is one of considerable importance, as the Second and Ninth Circuits have,

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[13] The Seventh Circuit has also held that remand *from the BIA to the IJ* is categorically required after "the proverbial rug [i]s pulled out from under [the immigrant]'s feet" through an intervening change in the governing evidentiary standard that allows new evidence to be introduced before the IJ. *Chen*, 578 F.3d at 517.

by far, the Nation's largest immigration and administrative review dockets.[14]

Here, the Second Circuit declined to remand to allow petitioner to introduce additional evidence before the agency, as *Nijhawan* now allows. By contrast, in *Kawashima*, 615 F.3d 1043, the Ninth Circuit remanded to the BIA—at the government's urging—to allow the agency to reconsider under *Nijhawan* the removability of an immigrant for her commission of a crime alleged to involve a loss of more than $10,000. *Id.* at 1057 ("[W]e remand to the BIA so that it may determine, in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the government.").[15] Thus, the Ninth Circuit, in virtually identical circumstances, has

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[14] Between October 2009 and September 2010, the Ninth Circuit heard 3325 administrative appeals, including 3169 BIA appeals; the Second Circuit heard 1357 administrative appeals, including 1299 BIA appeals. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* 97, 100. Together, these two courts of appeals and the Third Circuit heard more than two-thirds of all administrative appeals in the United States, and nearly three-quarters of all BIA appeals. See *id.* at 96-97, 99-100.

[15] In *Kawashima*, the Ninth Circuit declined to grant a *Nijhawan* remand for the immigrant's husband, on the ground that he had specifically stipulated as part of a plea agreement to a tax loss of more than $10,000. 615 F.3d at 1055. Here, by contrast, petitioner did not plead guilty, and to the extent he stipulated to a restitution amount, as discussed above the stipulation did not distinguish between his conduct of conviction and additional conduct for which he was neither charged nor convicted.

come to precisely the opposite conclusion from that reached by the Second Circuit in this case.[16]

Similarly, in *Leia* v. *Ashcroft*, 393 F.3d 427 (3d Cir. 2005), the Third Circuit held that an intervening change of law affecting the standard for introducing documentary evidence required remand to the agency when the agency had previously excluded such evidence. See *id.* at 435 ("Remand, of course, is appropriate in situations where, as in the case here, a court of appeals has made a legal determination * * * that fundamentally upsets the balancing of facts and evidence upon which an agency's decision is based.").

Thus, although the law in the Ninth Circuit is confused in some respects, as we have shown (pp. 23-24, *supra*), the Ninth Circuit and the Third Circuit have held that remand to the agency is required when there is an intervening change of law affecting the relevant evidentiary standard. By contrast, the Second Circuit does not require remand in precisely the same situation. This Court should grant review to redress these conflicting precedents.

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[16] In *Halim*, 590 F.3d at 971, a decision that predated *Kawashima*, the Ninth Circuit concluded that a remand to the agency was not required despite an intervening change of law, but in that case there was no potentially relevant new evidence that petitioner sought to introduce on remand as a result of the new standard. See *id.* at 980; see also *ibid.* (Cudahy, J., concurring) ("[U]nder other circumstances, this matter should be remanded to the Board to consider the effect of [cases] decided since the Board dealt with the present case. * * * Such a remand would be futile here, however, in light of the IJ's finding * * * leaving no basis for evidentiary analysis.").

III. THIS CASE INVOLVES A RECURRING ISSUE OF GREAT IMPORTANCE.

In light of the pervasive confusion in the courts of appeals, clarification of the *Chenery* principles—in particular, of the circumstances when remand to the agency is, and is not, required after a change in the controlling legal or evidentiary standard—is imperative. Cases involving agency review make up a substantial portion of the courts of appeals' dockets, and such cases themselves often involve issues of substantial practical importance. Uncertainty about the rule governing the disposition of such cases is leading both to inconsistent outcomes and to the erosion of important administrative law principles.

A. The Federal Courts Routinely Must Decide Whether To Remand To Agencies After A Change Of Law Or Legal Error.

Every day, federal courts must review agency decisions and determine whether agency errors necessitate a remand. Such cases make up a large part of the dockets of the federal courts of appeals, particularly in the immigration context. From October 2005 through September 2010, there were 45,582 appeals from the BIA, constituting more than 15% of the courts of appeals' docket. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* 96. When other administrative appeals are included, cases involving review of agency action make up more than 17% of the appellate docket. See *ibid.* In the Second and Ninth Circuits, immigration appeals alone constitute approximately a third of the docket. See *id.* at 97, 100.

A substantial portion of these administrative appeals involves potential *Chenery* remands. From October 2009 through September 2010 alone, 216 administrative appeals to the courts of appeals decided on the merits were remanded to the agency (*id.* at 111 tbl.B-5), and it stands to reason that remand was considered but not ordered in numerous other cases.

Without clear direction from this Court about what *Chenery* requires, these cases will continue to be decided in an unpredictable, ad hoc manner, with similarly situated litigants facing different outcomes in different circuits—and even within the same circuit.

B. The Second Circuit's Expansion Of The Futility Exception Undermines The Foundations Of Administrative Law.

The *Chenery* doctrine serves as a part of the "bedrock * * * of federal administrative law." Lawson, *supra*, at 362. It ensures that judges are reviewing, and not making, agency policy, and favors the development of clearer and more informed standards of agency action. See, *e.g.*, *Negusie*, 129 S. Ct. at 1167-1168. Yet the Second Circuit's expansion of the futility exception to *Chenery* threatens to "dissolve the *Chenery* doctrine in an acid of harmless error." *Spiva* v. *Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (Posner, J.).

Although the Second Circuit evidently thinks otherwise, the *Chenery* remand rule is not dependent upon judges' predictions about likely results on remand. That is clear from the facts of *Chenery* itself. After *Chenery I*, as Judge Friendly has noted, "any lawyer worth his salt" knew that the Chenery

Corporation would lose. Friendly, *supra*, at 203. Yet, despite that confidence about the ultimate result, the *Chenery* Court ordered a remand and the doctrine the case spawned remains a "fundamental rule of administrative law." *Chenery II*, 332 U.S. at 196. See, *e.g.*, *Thomas*, 547 U.S. at 186; *Ventura*, 537 U.S. at 16. Because the benefits of *Chenery* remands accrue even when the agency reaches the same result the second time around, "[t]hat the agency would *most likely* reach the same decision on remand is no reason not to follow *Chenery* and its progeny." *RNS Servs.*, 115 F.3d at 189 n.2 (Alito, J., dissenting). That is so for several reasons.

First, remands help ensure that agencies articulate clear (and correct) legal standards. See, *e.g.*, *Ventura*, 537 U.S. at 17. Clear standards play at least two crucial roles. They guide petitioners and ensure agency consistency by helping clarify the rules governing both legal and evidentiary burdens, thereby allowing for fundamentally fair adjudications—an essential goal given the very high stakes in many administrative (and particularly immigration) proceedings. They also are vital to "preserv[ing] the meaningful quality of judicial review." Friendly, *supra*, at 223; see, *e.g.*, *Chenery I*, 318 U.S. at 94 ("[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."). As the *Ventura* Court noted, *Chenery* remands allow the agency to engage in "informed discussion and analysis," which in turn "help a court later determine whether [an agency's] decision exceed[ed] the leeway that the law provides." *Ventura*, 537 U.S. at 17.

The Second Circuit's approach frustrates both of these aims. In contrast to this Court's careful

approach, courts that disregard *Chenery* and "rush to reach a result" (*Shi Liang Lin*, 494 F.3d at 343 (Calabresi, J., concurring in part and dissenting in part)), undermine the long-term clarity of agency decision-making. Specifically, by failing to remand cases in the event of agency legal error, a reviewing court "preclude[s] the agency from thinking deeply and fully about [a] matter," which is "the very thing * * * *Chenery II* is meant to make the agency do." *Ibid.* Moreover, under the Second Circuit standard, agencies are denied the opportunity to "make qualification and exceptions" to their orders (*RNS Servs.*, 115 F.3d at 189 n.2 (Alito, J., dissenting) (quoting *Slaughter* v. *NLRB*, 794 F.2d 120, 128 (3d Cir. 1986))—an opportunity of which agencies are likely to take advantage. See, *e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1047-1048 (finding that agencies made either a major or minor change to their decisions after remand roughly 40-45 percent of the time). As we have noted (p. 17, *supra*), just such guidance is needed from the BIA in the wake of *Nijhawan*.

Second, beyond promoting the articulation of clear agency standards, *Chenery* has significant implications for judicial deference and the separation of powers. Its principle ensures that agencies make the decisions "that statutes place * * * in agency hands" (*Ventura*, 537 U.S. at 16), by guaranteeing that courts are reviewing, and not making, agency policy. Similarly, *Chenery* serves as a prerequisite for "the conditions for judicial deference to agency action" (*Spiva*, 628 F.3d at 353 (Posner, J.) (quoting Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 1021 (2007))) by

ensuring that agencies (and agency experts)—not agency appellate counsel—are making policy choices.

Chenery's importance here flows logically from all of the theories justifying judicial deference to agencies. While the precise basis for deference has long been debated,[17] deference to administrative agencies has been justified by reference to agency expertise, democratic accountability, or a congressional intent to empower the agency. See, *e.g.*, *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); James M. Landis, *Administrative Policies and the Courts*, 47 Yale L.J. 519, 535-537 (1938). Weakening *Chenery*, and thereby transferring power from specialized (and accountable) agency policymakers to agency appellate counsel, undermines the case for deference on any of these grounds.

As Judge Posner has noted, Congress, when it delegates, does not intend to empower government appellate lawyers to make agency policy decisions:

> The government implies that if the administrate law judge's opinion consisted of two words * * * a persuasive brief could substitute for the missing opinion. That is incorrect. It would displace the responsibility that Congress has delegated to the [agency]—the responsibility not merely to gesture thumbs up or thumbs down but to articulate reasoned grounds of decision based

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[17] Compare, *e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, with David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201.

> on legislative policy and administrative regulation—into the Justice Department, which represents the agency in the courts.

Spiva, 628 F.3d at 353.

The Second Circuit thus disregarded fundamental principles of administrative law, upsetting the critical balance between courts and agencies and limiting the agency's ability to articulate clear standards. Because errors of this sort occur often across the circuits, and because confusion in this crucial area of the law is manifest, review by this Court is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2011

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of August, two thousand ten.

PRESENT: ROBERT D. SACK,
REENA RAGGI,
GERARD E. LYNCH,
Circuit Judges.

RAVIDATH RAGBIR,
Petitioner,

v. No. 07-1187-ag

ERIC HOLDER, U.S. ATTORNEY GENERAL,
Respondent.

APPEARING FOR PETITIONER:	ADA AÑON and JULIE MAO, Legal Interns (Alina Das, *on the brief*), Washington Square Legal Services, Inc., New York, New York.
FOR RESPONDENT:	Tony West, Assistant Attorney General, Terri J. Scadron, Assistant Director, Manuel A. Palau, Trial Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals ("BIA" or "Board") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED.

Petitioner Ravidath Ragbir, a native and citizen of Trinidad and Tobago, seeks review of a March 14, 2007 order of the BIA affirming the August 4, 2006 decision of the Immigration Judge ("IJ") finding him removable as an aggravated felon pursuant to subsections M and U of section 101(a)(43) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(43)(M), (U). See In re Ravidath Lawrence Ragbir, No. A044 248 862 (B.I.A. Mar. 14, 2007), aff'g No. A044 248 862 (Immig. Ct. N.Y. City Aug. 4, 2006); see also 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

Although federal courts generally lack jurisdiction to review final agency orders of removal based on an alien's conviction of an aggravated felony, see Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 164 (2d Cir. 2006), we retain jurisdiction to review constitutional claims or questions of law, including whether a specific conviction constitutes an aggravated felony, which we review de novo, see 8 U.S.C. § 1252(a)(2)(D); Almeida v. Holder, 588 F.3d 778, 783 (2d Cir. 2009). Where, as here, the BIA issues an opinion, that opinion becomes the basis for our review. See Dong Gao v. BIA, 482 F.3d 122, 125 (2d Cir. 2007). We review the IJ's reasoning only to the limited extent it was adopted by the BIA.[1] See generally Ming Xia Chen v. BIA, 435 F.3d 141, 144 (2d Cir. 2006) (discussing BIA's various "techniques in affirming IJ decisions" and corresponding scopes of appellate review). In applying these standards, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision.

1. The Aggravated Felony Determination

Ragbir was convicted, following a jury trial, of six counts of wire fraud and one count of conspiracy to commit wire fraud, see 18 U.S.C. §§ 1343, 371, arising from a scheme to defraud the Household

[1] Contrary to the government's argument, this is not a case where the BIA adopted the IJ's reasoning and offered additional commentary. Cf. Mahmood v. Holder, 570 F.3d 466, 469 (2d Cir. 2009). Rather, the BIA issued an independent opinion, relying on the IJ's reasoning only briefly in support of its conclusion that the IJ properly admitted into evidence a facsimile of the superseding indictment.

Finance Corporation ("HFC"), an Illinois-based lending institution, by procuring fraudulent loans. Ragbir does not challenge the fact of his conviction. Rather, he contends that the government failed to demonstrate by clear and convincing evidence that his crimes caused losses of more than $10,000, as required to render him an aggravated felon under 8 U.S.C. § 1101(a)(43)(M), (U) (classifying as aggravated felony any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" or any attempt or conspiracy to commit such an offense).[2] Ragbir challenges the agency's determination of this amount on the grounds that (1) the IJ improperly admitted into evidence an uncertified facsimile of the superseding indictment on which Ragbir was tried, which charged a fraudulent scheme exceeding $400,000; and (2) even if the indictment was properly admitted, the evidence adduced by the government was insufficient to carry its burden. Neither argument is persuasive.

a. The Admissibility Challenge

In challenging the admission of the indictment facsimile, Ragbir relies on 8 U.S.C. § 1229a(c)(3)(C) and related caselaw holding that an electronic record

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[2] Ragbir's argument that the government was required to demonstrate the loss amount by "clear, unequivocal, and convincing" evidence, Pet'r's Br. at 22 (emphasis in original) (quoting Berenyi v. Dist. Dir., 385 U.S. 630, 636 (1967)), is foreclosed by a 1996 amendment to the INA that eliminated the word "unequivocal" from the applicable standard, see 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a); Nijhawan v. Holder, 129 S. Ct. 2294, 2303 (2009) (recognizing application of clear and convincing evidence standard); Pierre v. Holder, 588 F.3d 767, 773 (2d Cir. 2009) (same).

of conviction must be certified before it "shall be admissible as evidence to prove a criminal conviction." 8 U.S.C. §1229a(c)(3)(C); see also Sinotes-Cruz v. Gonzales, 468 F.3d 1190, 1196 (9th Cir. 2006). The cited authority is inapposite as the superseding indictment was not offered to prove the fact of Ragbir's conviction, which Ragbir conceded. Rather, the government offered the document as some evidence that the resulting losses exceeded $10,000. Cf. Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 129 n.9 (2d Cir. 2007) (suggesting that "proof of criminal conviction" referenced in 8 U.S.C. § 1229a(c)(3)(B) means proof of "the existence of the conviction, not the factual basis underlying the conviction"), abrogated on other grounds by Nijhawan v. Holder, 129 S. Ct. 2294 (2009).

Evidence is generally admissible in removal proceedings provided that it does not violate the alien's right to due process, a standard satisfied "if the evidence is probative and its use is fundamentally fair, fairness in this context being closely related to the reliability and trustworthiness of the evidence." Aslam v. Mukasey, 537 F.3d 110, 114 (2d Cir. 2008) (internal quotation marks omitted); see also 8 U.S.C. § 1229a(c)(3)(A) ("No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."). Here, the proffered indictment facsimile was probative, though not determinative, of loss amount,[3] and we detect no unfairness in the IJ's

[3] While intended loss does not necessarily equate to actual loss, in this case, when the amount charged in the indictment is considered together with the ordered restitution of $350,001,

determination that the document – which matched the crimes of conviction, bore the stamp of the court clerk, and was produced following the IJ's instruction that the government obtain a copy from the clerk of the district court – was what it purported to be. We note further that Ragbir's counsel did not challenge the accuracy of the information contained in the document; indeed, he stated that "it appears legitimate." J.A. at 125; see Zerrei v. Gonzales, 471 F.3d 342, 346 (2d Cir. 2006) (rejecting challenge to admissibility of document where, inter alia, petitioner did not challenge accuracy of information contained therein).

Accordingly, we identify no legal error in the IJ's admission of the facsimile indictment.

b. The Sufficiency Challenge

In finding by clear and convincing evidence that Ragbir was convicted of a fraud causing losses exceeding $10,000, the agency relied on (1) the superseding indictment, which charged Ragbir with fraudulent wire communications involving amounts totaling more than $480,000; and (2) a judgment of conviction requiring Ragbir to pay $350,001 in restitution, described as "the total amount due to the victim for this loss." Judgment at 5. Ragbir argues that these documents were insufficient as a matter of law to prove the requisite loss amount because restitution orders can, and here likely did, include losses arising from uncharged, related conduct. We disagree.

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the totality of the evidence supports a clear and convincing finding of a loss from the crimes of conviction exceeding $10,000. See infra Part 1.b.

While restitution in a fraud case can include compensation for uncharged conduct closely related to the scheme, see 18 U.S.C. § 3663(a)(2); United States v. Kones, 77 F.3d 66, 70 (3d Cir. 1996),[4] and while the Presentence Investigation Report ("PSR") references uncharged conduct, Ragbir points to nothing in the record that precluded the agency, as a matter of law, from making a clear and convincing finding that the $350,001 restitution order included more than $10,000 attributable to the crimes of conviction.[5]

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[4] Because Ragbir was convicted of fraud in the District of New Jersey, we cite Third Circuit authority in determining the potential scope of the restitution order at issue.

[5] Although the BIA did not rely on the PSR, that document could be read to indicate that all of the restitution ordered reflected loss from the crimes of conviction. Under the heading "Loss Amounts," the PSR states: "The total amount of fraudulent loans is $831,788.01, reflecting the $426,048.03 loss pertaining to the indicted fraudulent loans, and the additional $405,739.98 in loans admitted by Ragbir." PSR ¶ 33 (emphasis added). Under the heading "Restitution," the PSR states that restitution "in the amount of $426,048.03 is outstanding," providing a figure precisely matching losses caused solely by the indicted loans. Id. ¶ 108. Similarly, the judgment of conviction states that by stipulation of the government, "full restitution determined by probation ([$]426,083.03) was not ordered," another apparent reference, albeit with a typographical error, to losses attributable to indicted conduct. Judgment at 6. Even if, as Ragbir suggests, the ultimate restitution amount was discounted to reflect payments recouped by the victim, Ragbir points to no evidence – and advances no theory – that supports his urged inference that the indicted loans were repaid nearly in full while the uncharged loans inflicted essentially unmitigated losses.

We reject as without merit Ragbir's suggestion that the restitution order's identification of Household Investigations,

This case is thus readily distinguishable from those relied upon by Ragbir in which the record clearly demonstrated that the crimes of conviction did not cause losses in excess of $10,000. See, e.g., Alaka v. Attorney Gen. of the United States, 456 F.3d 88 (3d Cir. 2006); Knutsen v. Gonzales, 429 F.3d 733 (7th Cir. 2005). In Knutsen, a defendant charged with two counts of bank fraud alleging losses of $7,350 and $12,930.96, respectively, pleaded guilty to the first count in exchange for dismissal of the second. 429 F.3d at 735. The court concluded that defendant's stipulation that "total loss from the offense of conviction and relevant conduct exceeded $20,000" was insufficient to meet the $10,000 loss threshold because he "unmistakably pled guilty only to Count One." Id. at 739-40 (emphasis in original) (internal quotation marks omitted). Similarly, the petitioner in Alaka pleaded guilty to a single count of bank fraud causing a loss of $4,716 in exchange for dismissal of related counts tied to additional losses of more than $40,000. 456 F.3d at 92. The Third Circuit held that it was error for the IJ to consider losses arising from dismissed charges in determining the loss amount. Id. at 106-07.

Here, by contrast, Ragbir was convicted of all charges against him pursuant to a superseding

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rather than HFC, as the "payee" of the restitution amount demonstrates an absence of proof that HFC suffered losses. Judgment at 5. Indeed, Ragbir does not argue that "the victim" referenced in the restitution order could plausibly be anyone other than HFC, id., and the order's identification of a different payee, presumably authorized to accept payment on behalf of HFC or its parent corporation, does not somehow break the connection between the indictment and judgment of conviction.

indictment charging a fraudulent scheme totaling more than $480,000.[6] To be sure, the jury was not required to find any particular loss amount, but we detect no error in the agency's conclusion that, taken together, the indictment, judgment of conviction, and restitution order of $350,001 "for this loss" constituted clear and convincing evidence of losses greater than $10,000. See Black's Law Dictionary 636 (9th ed. 2009) (defining clear and convincing evidence as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain"); see also Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 329 & n.7 (2d Cir. 2006) (holding that under 8 U.S.C. § 1252(a)(2)(D) we lack jurisdiction to review agency fact-finding unless the "findings are themselves based on constitutional or legal error").

2. The Alleged Procedural Defect

Ragbir submits that he was not afforded a fair opportunity to contest the loss amount consistent with the standards articulated in Nijhawan v. Holder, 129 S. Ct. at 2303. Nijhawan clarified that (1) the agency must explore the specific circumstances underlying a charged fraud offense in determining whether the INA's $10,000 loss threshold has been satisfied, and (2) in undertaking this review, an IJ may look to evidence beyond the record of conviction, including to sentencing-related materials, provided an alien is given a fair opportunity to dispute the pertinent claim and provided the clear and convincing standard is met.

[6] The only charge on which Ragbir was not convicted was Count Eight, which charged his co-defendant with illegal use of a social security number but did not allege resulting losses.

Id. at 2302-03; accord Lanferman v. BIA, 576 F.3d 84, 89 n.3 (2d Cir. 2009). In so holding, the Supreme Court abrogated this court's precedent limiting agency review in this context to records of conviction. See Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d at 128-34. Contrary to Ragbir's argument, however, nothing in Nijhawan requires the agency to consider any particular document, nor does the record here support the argument that the BIA denied Ragbir a fair opportunity to challenge the government's case or to introduce relevant evidence. On June 7, 2006, the IJ expressly granted Ragbir, who was represented by counsel, permission to obtain sentencing and related transcripts if he so wished. Despite repeated adjournments, Ragbir failed to obtain such transcripts or to introduce other evidence in opposition to the government's loss calculations.

Further, as noted, Ragbir points to no evidence indicating that no more than $10,000 of the ordered $350,001 restitution amount was attributable to the crimes of conviction. In the absence of any indication that the agency's determination of loss exceeding $10,000 was not adequately supported by the record, we decline to remand for further proceedings. See Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 401 (2d Cir. 2005) ("[W]e are not required to remand where there is no realistic possibility that, absent the errors, the IJ or BIA would have reached a different conclusion."); cf. Tian-Yong Chen v. INS, 359 F.3d 121, 127 (2d Cir. 2004) (noting that remand may be appropriate "where the agency's determination is based on an inaccurate perception of the record, omitting potentially significant facts").

3. Conclusion

In sum, we conclude that the BIA properly determined that Ragbir was convicted of an aggravated felony rendering him removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, the pending motion for a stay of removal in this petition is DISMISSED as moot.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX B

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A44 248 862 - New York City

Date: Mar 14 2007

In re: RAVIDATH LAWRENCE RAGBIR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Matthew Guadagno, Esquire

ON BEHALF OF DHS:
Christopher Tod St. John
Assistance Chief Counsel

CHARGES:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony as defined in sections 101(a)(43(M), (U)

APPLICATION: Termination

The respondent, a native and citizen of Trinidad and Tobago and a lawful permanent resident of the United States, appeals the Immigration Judge's August 4, 2006, order finding him removable for being convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and 101(a)(43)(U) of the

Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1101(a)(43)(M), (U). On appeal, the respondent argues that the Department of Homeland Security (the "DHS") failed to prove that the offenses of which he was convicted caused a loss of more than $10,000 to his victim. He further argues that the Immigration Judge's conclusion that he waived his right to apply for relief from removal was arbitrary and capricious, and that the Immigration Judge's "hostile and inappropriate behavior" toward his counsel did not comport with due process. The appeal will be dismissed.

Section 101(a)(43)(M)(i) of the Act includes as an aggravated felony an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. *See generally Ming Lam Sui v. INS*, 250 F.3d 105, 119 (2d Cir. 2001). Section 101(a)(43)(U) of the Act classifies as an aggravated felony a conspiracy to commit an act otherwise designated as an aggravated felony under the Act. It is undisputed that the respondent's offenses involve fraud or deceit within the meaning of section 101(a)(43)(M)(i) of the Act. The sole issue on appeal is whether the DHS has presented sufficient evidence to determine that the amount of loss resulting from the respondent's offenses exceeded $10,000.

We conclude that the DHS has established the respondent's removability by clear and convincing evidence (Exh. 3). *See* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).[1] Initially, we disagree with the

[1] Relying on *Francis v. Gonzales*, 442 F.3d 131 (2d Cir. 2006), the respondent asserts that the DHS is required to prove his removability by clear, *unequivocal*, and convincing evidence. In

respondent that the Immigration Judge could not review the facsimile of the superseding indictment provided by the DHS because it was not certified pursuant to 8 C.F.R. § 1003.41(c). *See also* INA § 240(c)(3)(C) (the substantially identical statutory provision governing admissibility of electronic records to prove criminal convictions in removal proceedings). In that regard, while the statutory and regulatory certification provisions at issue establish a necessarily qualifying standard for authentication of electronically transmitted records of conviction, they do not establish a minimum standard, nor do

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Francis v. Gonzales, *supra*, the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, applied this standard of proof in removal proceedings based on the alien's status as a lawful permanent resident. *Francis v. Gonzales*, *supra*, at 134-35. The Second Circuit derived this burden of proof from *Woodby v. INS*, 385 U.S. 276 (1966), which required the former Immigration and Naturalization Service to establish an alien's deportability in deportation proceedings by "clear, unequivocal, and convincing evidence." 385 U.S. at 286; *see also* 8 C.F.R. § 1240.46(a). The United States Supreme Court's decision in *Woodby v. INS*, *supra*, did not purport to be a constitutional ruling. *See Vance v. Terrazas*, 444 U.S. 252, 266 (1980). Further, thirty years after *Woodby v. INS*, *supra*, was decided, Congress amended the Act by combining the former exclusion and deportation proceedings into a single form of "removal proceedings," and by requiring the DHS to show by "clear and convincing evidence" that aliens like the respondent are removable under a deportability ground in section 237 of the Act. *See* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996); *see also* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). It is well-settled that Congress may set the burden of proof in proceedings to remove an alien from the United States. *See, e.g.*, *Li Sing v. United States*, 180 U.S. 486, 493 (1901).

they bar admissibility of a document that bears adequate proof of what it purports to be, even if it may not meet the precise statutory test that would automatically establish admissibility of the evidence. *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196-97 (9th Cir. 2006). For the reasons discussed by the Immigration Judge, we conclude that the DHS sufficiently showed that the uncertified facsimile of the superseding indictment is what it purports to be and, therefore, was admissible to prove the respondent's conviction (I.J. at 2-3).

Based on the superseding indictment and the judgment of conviction, the amount of loss resulting from the respondent's offenses exceeded $10,000.[2] According to the judgment of conviction, in November 2000 the respondent was convicted by a jury in the United States District Court of New Jersey of six counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2, and one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 (Exh. 3). Count one of the superseding indictment alleged that the respondent and his co-defendant conspired to defraud a lending institution of more than $400,000 by means of materially false and fraudulent pretenses through the transmission of certain wire communications (I.J. at 6; Exh. 5 at 2-3). Counts two through seven of the superseding indictment charged the respondent with making and causing to be made wire communications involving amounts totaling more than $480,000 in furtherance

[2] Accordingly, we need not address the respondent's argument that the Immigration Judge impermissibly relied in part upon the Presentence Investigation Report in the criminal case to find him removable as charged.

of his fraudulent scheme (I.J. at 6; Exh. 5 at 8-9). The judgment of conviction reflects that the respondent was found guilty of all of these counts (Exh. 3). In fact, the only count in the superseding indictment of which the respondent was not convicted involved his co-conspirator's illegal use of a social security number on a loan application, an act which in and of itself did not occasion any loss (I.J. at 3; Exh. 5 at 10).[3]

Moreover, the district court judge imposed restitution, jointly and severally, in the amount of $350,001, to the victim in the case, pursuant to 18 U.S.C. § 3663A (Exh. 3). *See* 18 U.S.C. §§ 3663A(a)(1), (c)(1) (requiring a district court to order restitution from a defendant convicted of an offense against property involving fraud or deceit if an identifiable victim has suffered a loss). The judgment expressly states that this amount represents the total amount due for the victim's "loss" and that "[b]y stipulation the government [sic], full restitution determined by probation ($426,083.03) was not ordered" (Exh. 3).[4] According

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[3] For this reason, *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005), which addresses the distinct issue of whether the total loss may include losses stemming from offenses of which an individual is not convicted, is not relevant here. *See also Alaka v. Attorney General of the United States*, 456 F.3d 88 (3d Cir. 2006). Moreover, we do not construe *Knutsen v. Gonzales*, *supra*, to require an indictment to allege the intended or actual amount of loss caused by the offense of conviction before an individual may be held accountable for a loss.

[4] It is unclear from the criminal judgment why the probationer's loss calculation was less than the monetary amount of the wire transmissions made by the respondent. In any event, that

to the United States Court of Appeals for the Third Circuit, in whose jurisdiction the respondent's conviction occurred, a court's power to order restitution is limited to actual loss. *See United States v. Diaz*, 245 F.3d 294, 312 (3d Cir. 2001). Hence, under applicable law, the district court's order directing the respondent to make restitution in the amount of $350,001 was necessarily based upon the court's conclusion that the respondent's victim had sustained an "actual loss" well exceeding $10,000. *Cf. Munroe v. Ashcroft*, 353 F.3d 225, 227 (3d Cir. 2003) (providing that the amount of restitution ordered as a result of a conviction may be helpful to a court's inquiry into the amount of loss to the victim if the plea agreement or the indictment is unclear as to the loss suffered, but declining to find that the restitution order at issue, which was reduced to alter the consequences of the conviction for immigration purposes, reflected the amount of loss to the victim); *Chang v. INS*, 307 F.3d 1185, 1190 (9th Cir. 2002) (providing that the amount of restitution ordered did not reflect the actual loss to the victim in a case in which the alien and the government expressly stipulated to the amount of loss in the plea agreement, but the alien agreed to pay a greater amount of restitution to the victim as part of the plea agreement). The fact that the district court imposed a joint and several obligation upon the respondent's co-defendant to pay the full amount of the victim's loss does not absolve the respondent of his responsibility for the full amount of that loss. *See* Black's Law Dictionary (8th ed. 2004) (defining joint

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discrepancy does not affect our analysis of whether the respondent's acts occasioned a loss of more than $10,000.

and several liability as "[l]iability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion . . . [t]hus, each liable party is individually responsible for the entire obligation"). We conclude that the superseding indictment and the order of restitution imposed against the respondent in the criminal judgment establish by clear and convincing evidence that the offenses of which he was convicted occasioned a loss of more than $10,000 to the victim.[5]

We reject the respondent's assertion that the Immigration Judge's consideration of the restitution portion of the sentence while evaluating the loss issue amounted to an impermissible reliance upon the factual circumstances surrounding his conviction to establish his conviction of an aggravated felony. This argument overlooks the fact that the $10,000 loss threshold in section 101(a)(43)(M)(i) of the Act is not an element of the underlying fraud crimes for which the respondent was convicted. *See* 18 U.S.C. §§ 2, 371, 1343. Moreover, section 101(a)(43)(M)(i) of the Act does not require the loss threshold to be an element of the crime. *See* INA § 101(a)(43)(M)(i). In that regard, the loss threshold is more akin to the length of sentence provisions found in the other

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[5] The respondent's reliance on *Chang v. INS*, *supra*, is misplaced because the respondent was convicted upon a trial by jury and did not stipulate to the amount of loss. Likewise, *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (holding that the "amount of the funds" phrase in section 101(a)(43)(D) of the Act refers to the amount of money that is laundered rather than the amount of loss suffered by the victims of the underlying criminal activity) has no bearing in this case.

aggravated-felony definitions in the Act. *See e.g.*, INA §§ 101(a)(43)(F), (G), (J). Given the breadth of state and federal fraud statutes, to read the $10,000 figure as a necessary element of the crime would essentially vitiate the fraud ground. Finally, consideration of the restitution mandated by 18 U.S.C. § 3663A was appropriate under the United States Sentencing Guidelines. *See* U.S.S.G. § 5E1.1 (2000) (requiring the sentencing court to enter a restitution order for the full amount of an identifiable victim's loss if restitution is mandated by 18 U.S.C. § 3663A).

We also find no merit in the respondent's contention that the Immigration Judge arbitrarily and capriciously deemed waived his applications for relief. The regulations expressly authorize an Immigration Judge to set filing deadlines and to deem waived the opportunity to file an application if the applicant fails to comply with those deadlines. *See* 8 C.F.R. § 1003.31(c). On June 7, 2006, the Immigration Judge instructed the respondent to file applications for relief for the record by the date of the next hearing and further stated that he would make a finding of removability at that time (Tr. at 67-72). The respondent's counsel indicated that he would submit evidence on the issue and that he would need 3 to 4 weeks to prepare applications for relief from removal (Tr. at 73). Accordingly, the Immigration Judge continued the case to July 10, 2006. At the July 10, 2006, hearing, though, the respondent did not file any applications for relief; he merely filed evidence of positive equities in his case. He then informed the Immigration Court that he would not file any applications because the Immigration Court was not authorized to impose a deadline on a waiver application without first making a finding of

removability (Tr. at 78-81). Under these circumstances, we find no fault in the Immigration Judge's exercise of discretion to set and enforce the filing deadline. We disagree that the Immigration Judge's actions, which in essence allowed the respondent to provide more documentation to the court to complete the record for appellate review, were arbitrary and capricious (Tr. at 70-71), although our review of the discretionary determination is *de novo*, not for abuse of discretion.

Finally, upon review of the record, it appears that the Immigration Judge did express frustration with the respondent's counsel, alleging that the respondent's counsel was interrupting the Immigration Judge, speaking in a loud tone, repeating his legal arguments, and making categorical assertions of law that were incorrect (Tr. at 23, 41, 43-44, 47, 60-61, 63, 79-80, 82). However, we do not believe that the Immigration Judge's behavior was such as to affect the fundamental fairness of the proceedings. The Immigration Judge gave the respondent a fair hearing and issued a thorough and reasoned decision regarding the respondent's removability. Under these circumstances, we find no violation of due process. *See Matter of G-*, 20 I&N Dec. 764, 780-81 (BIA 1993).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

[*signed*]

FOR THE BOARD

APPENDIX C

In the Matter of:

Ravidath RABGIR **File No. A 44-248-862**

Respondent in
Removal Proceedings

DECISION OF THE IMMIGRATION JUDGE

Statement of the case. Respondent was placed in removal proceedings through the Notice to Appear [Exh. 1] dated May 15, 2006. That alleges that he is a citizen by birth of Trinidad and Tobago who was admitted to the U.S. as a lawful permanent resident on February 15, 1994, and that he is subject to removal due to a conviction entered September 12, 2001, in the U.S. District Court for New Jersey, for Wire Fraud and Conspiracy to Commit Wire Fraud, with the loss to the victim(s) alleged to be more than $10,000.

Pleadings of respondent and evidence submitted by DHS. Respondent through counsel admitted the preliminary allegations in the Notice to Appear but denied that he had been convicted as alleged. The Department of Homeland Security submitted a Judgment in a Criminal Case [Exh. 3] and the Superseding Indictment [Exh. 5]. The DHS copy of the Judgment bears a raised seal of the court clerk, but the Superseding Indictment, although reflecting signatures by the foreperson and U.S. Attorney and filing stamps from the District Court, is apparently only a faxed copy received by DHS. (DHS had previously offered the original indictment before the

court pointed out that it did not correspond to the counts reflected in the Judgment, and the case was rescheduled for DHS to obtain a copy of the actual charging document).

Conviction proven as alleged. After examining the seal on the Judgment, respondent's counsel had no further objection to its admission. Accordingly, the court sustained allegation 4 in the Notice to Appear and found that the conduct for which respondent was convicted was that conduct alleged in counts 1 to 7 of the Superseding Indictment. During subsequent discussions on the record, respondent's counsel agreed that the fact of the conviction was undisputed, and that the conviction was for an offense involving fraud or deceit, but that the loss resulting from the offense was still in question. There is no contention that respondent's conviction has been set aside or is on appeal.

Amount of loss to the victim. However, respondent continued to object to the Superseding Indictment due to the lack of an original certifying seal. The court admitted the Superseding Indictment over this objection. The court found that on the record as a whole DHS had presented clear and convincing evidence that the document offered as Exhibit 5 was in fact an accurate copy of the Superseding Indictment under which respondent had been tried.

The factors which led the court to this finding were, first, that the existence of a conviction was established by Exhibit 3. Second, it would be obvious that there must be some document which stated the charges against the criminal defendant. Third, the Judgment reflects that the conviction is based upon a

superseding indictment. Fourth, the Superseding Indictment submitted as evidence corresponds in every way to the Judgment which is known to exist. That is, the information reflected on page one of the Judgment as to defendant's name and case number, the numbering of the counts, the statute referred to in each count (i.e., Count 1s is for conspiracy to commit wire fraud and Counts 2s to 7s are for various counts of Wire Fraud itself), and the dates of the criminal conduct (i.e., the time period reflected under "Date of Offense" in the Judgment, which is identical to the time periods specified in Count 1, paragraph 4, and in Count 2, paragraph 2)—all this information is consistent with the Superseding Indictment offered by DHS. The only obvious variation is that the Judgment does not reflect a conviction on Count 8, which alleged an offense of illegal use of a social security number, nor specifically reflect any other disposition on Count 8. Unlike Counts 1 to 7, Count 8 does not allege any loss which resulted to any victim, so it is reasonable to consider it as unrelated to the issue of loss.

The foregoing factors do not establish with absolute certainty that Exhibit 5 is the charging document under which respondent was tried and convicted, but few factual propositions are proven with total certainty. The court does conclude that the issue is established by "clear and convincing evidence," the standard set by Congress ten years ago. *See* section 240(c)(3)(A), Immigration & Nationality Act [INA]; 8 USC 1229a(c)(3)(A).[1] Prior to amendment in 1996,

[1] Compare subsection (b)(5)(A) of the same section, which requires "clear, unequivocal, and convincing evidence" to

INS had to prove an alien was deportable by the "clear, unequivocal, and convincing standard." The Supreme Court had endorsed that standard of proof as appropriate. *Woodby v. I.N.S.*, 385 U.S. 276 (1966). If a higher court found that the "clear, unequivocal, and convincing" standard still applies due to constitutional considerations, this court still would conclude that the evidence would satisfy that standard as well.

Having admitted Exhibit 5 over respondent's objections, the court considers whether the conviction proven by Exhibits 3 and 5 meets the statutory definition of an aggravated felony as charged in the Notice to Appear. Wire Fraud under 18 U.S.C. 1343 is by its essential nature a crime involving fraud or deceit; Conspiracy to commit Wire Fraud is likewise within the scope of section 101(a)(43)(M)(I) INA, in that it necessarily constitutes a conspiracy to commit a crime involving fraud or deceit. The remaining issue is whether respondent's conviction "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," as required by that statute. The court has concluded that DHS met its burden of proof to establish this point as well.

Evidence as to amount of loss. The statutes under which respondent was convicted would allow a

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establish removability of an alien who fails to appear to a removal hearing after proper notice. The court reads the higher standard of proof for an *in absentia* hearing to reflect Congress's deliberate choice to afford greater procedural protection to an alien at risk of removal in a hearing which is held in his absence.

conviction whether or not there was more than $10,000 loss to the victim of the crime. Therefore, the court can and should refer to the record of conviction to determine what loss, if any, is established. *See, e.g.*, *Stubbs v. Att'y General*, __ F.3d __, 2006 WL 1776462 (3rd. Cir. 2006) [N.J. statute for "endangering the welfare of a minor" included conduct which would not be an aggravated felony, so appropriate to examine the charging instrument]; *compare Singh v. Ashcroft*, 383 F.3d 144, 148 (3rd Cir. 2004) ["sexual abuse of a minor" in definition of aggravated felony is sufficiently clear to be analyzed under the categorical approach].

The record of conviction includes the indictment or charging document, any record of the plea, and the judgment of conviction. In the present case, respondent did not enter a plea of guilty, so the record of his federal conviction includes no written plea agreement. Ironically, respondent's counsel at one point in oral argument seemed to suggest that a written plea agreement was the *only* evidence which the court could use to determine the amount of loss to the victim(s). To accept this argument would encourage any alien accused of a fraud offense to proceed to trial, so that no record would be created which would support this charge of removability. Case law which approves use of the plea agreement to determine the amount of loss to the victim does not establish a principle that no other evidence may be used. The court has refrained from reliance upon the Pre-Sentence Investigation Report, since several courts of appeals consider the PSR to be unreliable for this purpose. Instead, the court limited its inquiry to the Judgment [Exh. 3] and the Superseding Indictment [Exh. 5].

Amount of loss as proven by the Judgment. The court hereby finds that the Judgment [Exh. 3] would be *sufficient in itself to* prove that respondent is subject to removal as charged.

The Judgment reflects that the defendant [respondent here] was sentenced to thirty months imprisonment, concurrent on each count, and ordered to pay restitution in the amount of $350,001.00 [Exh. 3, page 5]. The Restitution order provides

> "The amount ordered represents the total amount due to the victim for this loss. This obligation is joint and several with co-defendant Robert Kosch. The defendant's restitution obligation shall not be affected by any restitution payments made by defendant Kosch ... except that no further payments shall be required after [the total sum has been paid]."

The Statement of Reasons [Exh. 3, "sheet 7"] also reflects that "full restitution is not ordered for the following reason(s): By stipulation the government [sic] full restitution determined by probation (426,083.03) was not ordered." For reasons mentioned below, the court concludes that the order to pay restitution in an amount far greater than $10,000 would be sufficient in itself to prove that respondent's conviction resulted in loss to the victim or victims which renders it an aggravated felony.

Effect of restitution order. What is the meaning of the order that respondent pay restitution? Federal

sentencing statutes *require* an order for restitution in certain criminal cases. Respondent's convictions for Wire Fraud and Conspiracy is subject to this requirement. The federal statute entitled "Mandatory restitution to victims of certain crimes," provides as follows:

(a)

> (1) [W]hen sentencing a defendant convicted of an offense described in subsection (c), the court *shall order, in addition to … any other penalty authorized by law, that the defendant make restitution* to the victim of the offense … .
>
> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered … .

…

(b) The order of restitution *shall require* that such defendant--

> (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--
>
> > (A) return the property to the owner of the property or someone designated by the owner; or
> >
> > (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--
> >
> > > (i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or
(II) the value of the property on the date of sentencing, less
(ii) the value (as of the date the property is returned) of any part of the property that is returned;

…

(c)
(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--
(A) that is--
(i) a crime of violence, as defined in section 16; [or]
(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), *including any offense committed by fraud or deceit* …; and
(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

18 U.S.C. 3663A [emphasis added}. The companion statute provides that the court shall cause the probation department to include in the PSR "information sufficient for the court to exercise its discretion in fashioning a restitution order" and that

the "report shall include, to the extent practicable, a complete accounting of the losses to each victim." Further, these portions of the PSR "shall" be disclosed to both parties. 18 USC sec. 3664.[2]

The provisions of the restitution order in the Judgment clearly reflect that the restitution is repayment of loss incurred by the victim of the criminal offenses for which respondent was convicted. This meaning of the term "restitution" is entirely consistent with its most accepted meaning in ordinary usage: to restore something which has been lost or taken away. The statutes quoted above further show that respondent's required restitution was imposed pursuant to law, and is based upon a calculation of the amount of loss which has been approved by the convicting court.

The court therefore concludes that the Judgment alone would constitute clear and convincing evidence of the loss resulting from the offense for which respondent was convicted.

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[2] Were it not that some courts express dissatisfaction with the Pre-Sentence report as a reliable source of information, the court would suggest that a report prepared by the department of probation to carry out its statutory duties pursuant to this statute, and which must be disclosed to the criminal defendant before sentencing in a federal district court, could be presumed to be sufficiently reliable and accurate to serve as a basis for a finding of removability. See, e.g., *Fierarita* v. *Gonzalez,* 2006 WL 1749989 (9th Cir. 2006) [unpublished], in which the court held that a mandatory restitution order under 18 USC 3663A(c)(l)(A) for payment of over $181,000 was clear and convincing evidence, in itself, that the fraud offense constituted an aggravated felony.

Additional evidence of loss in the charging document. The Superseding Indictment alleges in Count 1, paragraph 4, that respondent and his co-defendant conspired to "defraud HFC and to obtain money and property of HFC totaling more than $400,000 by means of materially false and fraudulent pretenses...". Specific fraudulent transactions are mentioned in the remainder of Count 1, including that "defendant Ravidath Ragbir approved a loan in the amount of approximately $181,828.93, ... knowing that the loan application contained false and fraudulent representations." [Exh. 5, Count 1, paragraph 12(f)]. The charges further set out [Exh. 5, Counts 2 to 7, paragraph 3 at page 8-9] a total of seven wire communications which respondent and his co-defendant caused to be transmitted in furtherance of their fraudulent conduct; these include the transaction mentioned in paragraph 12(f). This court reckons the amounts mentioned in paragraph 3 to total more than $480,000. The reason for the apparent discrepancy between this figure and the "full restitution determined by probation" might be due to several possible factors, including that a small portion of the seven wire communications relate to lines of credit, which seem to be potential losses, rather than actual loans extended by HFC.

In the face of this evidence, respondent asserts a number of reasons why his conviction does not involve the necessary financial loss.

The restitution order is directed to respondent and his co-conspirator "jointly and severally." Respondent's counsel argued in court, and reiterates in his Motion to Terminate of July 28, 2006, that

> Restitution amount in this case cannot be used to determine the actual amount of loss to the victim because it is not "clear, unequivocal and convincing" that Mr Ragbir personally caused loss to the victim in an amount exceeding $10,000, because he is "jointly and severally" liable for the restitution with his co-defendant. Therefore, even assuming that the restitution amount reflects the amount of loss to the victim, it does not establish ... that Mr. Ragbir caused loss to the victim exceeding $10,000."

Motion to Terminate at 5. This argument overlooks the meaning of joint and several liability, and construes it to mean nothing more than joint liability. When a party is jointly and severally liable for a debt or judgment, that part is legally responsible for every penny of the amount owed. If no other person pays any portion of the amount, that party may be required to pay the entire amount.

Further, the argument set out above ignores the nature of respondent's conviction. Respondent's conspiracy conviction alleges a loss of "more than $400,000," as cited above. As one conspirator, respondent is responsible for all of that loss or intended loss. *See Matter of Onyido*, 22 I&N Dec. 552, 554-555 (BIA 1999) [attempted insurance fraud, no actual loss to insurer]. *See also Kamagate v. Ashcroft*, 385 F.3d 144, 150-151 (2d Cir. 2004). The conspiracy is a unitary criminal offense because it requires the joint agreement of the two co-conspirators, and each is responsible for the acts taken by the other in furtherance of the conspiracy. *Pinkerton v. U.S.,* 328 U.S. 640, 647 (1946). As the

Second Circuit pointed out in *Kamagate,* these cases are distinguishable from *Ming Lam Sui* v. *INS,* 250 F.3d 105 (2d Cir. 2001), upon which respondent relies. *Ming* involved a conviction for possession of forged documents with intent to deceive, but the conviction did not reflect either actual loss or an explicit attempt or conspiracy to cause such loss. Therefore it met neither the substantive definition in subsection 10l(a)(43)(M), INA, or the conspiracy definition in subsection 101(a)(43)(U) INA. The conviction of this respondent, as fully disclosed by the record of conviction, involved both actual loss and conspiracy to cause such loss. Either would be sufficient.

Respondent's Motion to Terminate does not directly address the significance of paragraph 3 of Counts 2 to 7 in the Superseding Indictment, which sets out the six specific transactions constituting Wire Fraud for which respondent was convicted. This omission may be a result of misunderstanding; the court notes that the Motion to Terminate refers on page one to respondent having been convicted "of conspiracy to commit wire fraud" and asserts that "he has no other criminal conviction." It is not clear whether respondent has taken into account the clear evidence of the substantive Wire Fraud convictions, and their significance.

Waiver of any relief application.

As there is clear and convincing evidence that respondent is subject to removal as charged, respondent would have the burden to establish eligibility for any form of relief from removal. The case was rescheduled in part to allow respondent to

submit any application for relief, which theoretically might include any application based on fear of persecution or torture upon return to his country of citizenship. At the renewed hearing, respondent tendered a volume of evidence seeking to establish his rehabilitation, good moral character, and value to his family. However, respondent submitted no actual application for relief. The court believes that the evidence submitted constitutes an attempt to sway the court on the purely legal issue of removability by emphasizing discretionary factors which would only be relevant if some discretionary application for relief had been pursued. The court does hold that respondent waived the right to any and all relief applications by failing to submit any within the time allowed by the court. *See* 8 CFR 1103.31(c).

For the foregoing reasons the court has issued the order of removal set out at the head of this Decision.

Signed: 8-4-06 /s/Alan Vomacka

Alan Vomacka, Immigration Judge