No. 10-1295

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief is notable for its failure to dispute the central elements of the petition. The government appears to agree with us that the circuits are in disarray, and the law in a state of confusion, on the circumstances in which remand to the agency is necessary when the agency applied the wrong evidentiary standard. See Pet. 19-28. The government also does not dispute that the expansive futility exception applied by the Second Circuit (and by certain other courts of appeals) undermines the *Chenery* principle, improperly substituting judicial for agency judgment. Pet. 30-34.[1] Indeed, the government has itself consistently argued that remand to the agency is *required* in circumstances like those here. And the government could hardly deny that the issue is one of enormous importance.

Instead, the government principally opposes review by arguing (1) that the question presented in the petition isn't really at issue here because the Second Circuit found no legal error in the BIA's ruling and (2) a remand would, in any event, be futile. But these contentions are wrong: Neither they, nor the government's makeweight effort to reconcile the Second Circuit's holding with this Court's decisions, provides a basis for denying review. The question presented in the petition is in the case, was decided below, has bedeviled the lower courts, and is important. It should be decided by this Court.

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[1] The government notes that the decision below is unpublished. Opp. 7. But as we showed in the petition (at 10, 15), and as *amici* law professors also explain (at Br. 20-21), the decision applied settled and expansive Second Circuit law on the *Chenery* futility exception.

A. The Application Of *Chenery*'s Remand Requirement Is Squarely Before The Court.

The government's initial argument is that the question presented in the petition is not really at issue here "because the court [of appeals] did not find that the agency committed any legal error in petitioner's case." Opp. 7. See *id.* at 7-9. But this assertion is self-evidently wrong. The BIA decided this case under the Second Circuit's pre-*Nijhahan* evidentiary standard, which allowed the agency to consider only charging documents and jury or judicial findings in determining the amount of loss.[2] As the government itself recognizes, however, "*Nijhawan* held, contrary to preexisting Second Circuit precedent, that IJs are not limited only to a narrow class of documents * * * to determine the loss amount involved in an alien's prior fraud conviction." Opp. 5. This case therefore is the very paradigm of one in which the agency committed legal error: It decided the case under an erroneously constrained view of the relevant evidence. The question presented in the petition, and upon which the courts of appeals are confused, is whether a reviewing court is bound to remand the case to the agency in precisely such circumstances.[3]

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[2] The government does not contest our submission that the indictment did not charge any loss amount (as opposed to amounts of loan transactions) or our observation that the jury was never required to find—and did not make—any finding of total loss amount. Pet. 5-6.

[3] The government's brief is misleading when it states that the court of appeals "explicitly rejected petitioner's argument that 'he was not afforded a fair opportunity to contest the loss amount consistent with the standards articulated in *Nijhawan*.'" Opp. 8 (quoting Pet. App. 9a). In fact, in the quoted lan-

Here, of course, the Second Circuit chose to make its own review of certain (although by no means all) of the relevant evidence that was not admissible before the BIA, attempting to correct the BIA's legal error by conducting a *de novo* inquiry under a new legal standard. Pet. App. 9a-10a. That review included materials that the BIA explicitly did *not* consider: Although the Second Circuit acknowledged that "the BIA did not rely on the PSR [the Presentence Report]" (Pet. App. 7a n.5), the court nonetheless undertook its own review of and relied on that very document (to the exclusion of other kinds of primary evidence that is now properly admissible after *Nijhawan*).

For this reason, the government engages in sleight-of-hand when it argues that the IJ offered petitioner the opportunity to "procure" additional evidence; that petitioner "had the opportunity" to make an argument relying on *Nijhawan*-type evidence "to the IJ, to the Board, and to the court of appeals"; and that, had helpful extra-record evidence existed, petitioner could have mentioned it to the court of appeals in support of his request for a remand. Opp. 8, 10, 11. In fact, the government concedes (Opp. 6) that all

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guage, the court observed that petitioner *argued* he was not afforded a fair opportunity to contest loss under *Nijhawan*. Pet. App. 9a. The court went on to observe that *Nijhawan* does not require the BIA to consider any particular document and that the record does not show that the BIA denied petitioner "a fair opportunity * * * to introduce relevant evidence." *Id.* at 10a. But the court did not, and could not, suggest that proceedings before the BIA were consistent with *Nijhawan*. While it is true that the BIA did not deny petitioner an opportunity to introduce evidence, that is because—understandably—he did not attempt to introduce evidence that was inadmissible under the then-governing standard.

such evidence was categorically inadmissible and immaterial under the governing pre-*Nijhawan* standard applied by the BIA in the Second Circuit. Petitioner cannot be faulted for declining to advance evidence that was not validly admissible at the time of the agency proceedings or for not urging the Second Circuit to rely on extra-record evidence.

The court of appeals compounded its error of considering evidence not before the agency by affirming the BIA on different grounds than the agency originally advanced. See *Fed. Power Comm'n* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974) ("an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself" (internal quotation marks omitted)). By holding that the agency's decision conformed to *Nijhawan's* circumstance-specific approach, the court necessarily upheld the agency on grounds that differed from those articulated by the BIA. Although nothing in *Nijhawan* requires the agency to consider any particular document, *Nijhawan* does require the agency to develop and review the record in a fashion that was previously *prohibited*. The court of appeals could not have affirmed the BIA under this new standard without both conducting a *de novo* review and agreeing that additional evidence, newly made relevant by *Nijhawan* and not before the agency, could not affect the outcome.

B. Remand In This Case Would Not Be Futile.

The government's other principal argument for opposing review is its contention that "[p]etitioner does not meaningfully challenge the court of appeals' conclusion (Pet. App. 10a) that a remand would produce the same outcome." In support of this assertion, the government notes that petitioner did not point

the Second Circuit to evidence of the sort newly made admissible by *Nijhawan* supporting his position, and that "the court of appeals observed that a critical piece of such evidence—the presentence report—'could be read to indicate that all of the restitution ordered reflected loss from the crimes of conviction.'" Opp. 10-11 (quoting Pet. App. 7a n.5).

But this argument makes our point. The government is assuming the answer to the question presented in the petition: whether this sort of futility analysis, which avowedly depends on the reviewing court's evaluation of evidence not presented to or considered by the agency, is permissible at all. The Second Circuit believes that it is; as we showed in the petition (at 22, 26-28), other courts believe that it is not. And the question is presented in particularly stark form here because the agency's error concerned the controlling evidentiary standard. All agree that, under the rule governing the BIA when it considered petitioner's case, petitioner *could not* rely on evidence of the sort that he now seeks to advance; yet the government faults him for not presenting such evidence to the Second Circuit.

It may be added that, in these circumstances, where the record was developed pre-*Nijhawan*, it is impossible for the government to assure the Court that petitioner would be unable to succeed on remand. In fact, if the case is remanded, petitioner would introduce materials including letters documenting the transfer of deeds from petitioner's co-defendant to the victims of the offense, and letters and affidavits from petitioner's criminal trial counsel contesting the loss calculations in the PSR. Taken together, these and other documents could cast doubt on the loss calculations in the PSR—particularly be-

cause it is the government's burden to show by "clear and convincing evidence" (*Nijhawan*, 129 S. Ct. at 2303) that the actions for which petitioner was indicted resulted in losses in excess of $10,000. But whatever the ultimate outcome of that inquiry, it is not for the government's lawyers and the court of appeals to speculate about the point; this is the clearest sort of case for remand to the BIA, so that the agency is able to consider, in the first instance, what evidence is relevant and what that evidence means. See Pet. 17-19.

C. As The Government Itself Has Suggested In Prior Cases, Remand Is Required In Circumstances Such As Those Here.

When the government does attempt to reconcile the decision below with the Court's decisions in *Gonzales* v. *Thomas*, 547 U.S. 183 (2006), *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002), and *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009), its argument turns on chimerical distinctions. It contends that, in both *Ventura* and *Thomas*, the court of appeals "erred by deciding a question that had not been previously addressed by the Board," while, in this case, "the court of appeals reviewed a decision that the agency had actually made—that petitioner's offense was an aggravated felony that qualified him for removal." Opp. 13-14. But in the circumstances here, this is no distinction at all: In this case, the BIA never addressed the relevant question, which is whether the government made the necessary showing under the *Nijhawan* standard.

Thus, as in both *Ventura* and *Thomas*, the BIA "has not yet considered"(*Thomas*, 547 U.S. at 186) a vital factor in determining petitioner's removability, which surely is a "matter that statutes place primari-

ly in agency hands." *Ventura*, 537 U.S. at 16. Indeed, this case is arguably a more fundamental violation of *Chenery* than either *Ventura* or *Thomas*. The grounds for remand in those cases involved specific legal arguments that had not previously been considered by the agency. See Opp. 12-13. Here, the agency did not even have an *opportunity* to consider all the evidence made relevant by *Nijhawan*. The agency *could not* have applied the correct legal standard, and thus, as emphasized in *Ventura*, 537 U.S. at 16-17, *Thomas*, 547 U.S. at 186-187, and *Negusie*, 129 S. Ct. at 1168, remand is required for the agency to do so, in accordance with its statutory mandate.

Unsurprisingly, the government has itself made precisely this point in other cases. The Solicitor General has consistently argued that courts *must* defer to the Executive by remanding to the agency when it has not had an opportunity to apply the correct legal standard. As the Solicitor General argued in the United States' petition for certiorari in *Thomas*:

> The court's role in immigration cases is one of "review, not of first view," * * * and the * * * decision [not to remand] so far departs from this Court's precedent, the decisions of other courts of appeals, and established principles of administrative law and deference on matters of immigration policy as to warrant this Court's review and correction. Indeed [the court of appeals'] error is so obvious in light of *Ventura* that summary reversal would be appropriate.

Petition for a Writ of Certiorari at 29, *Gonzales* v. *Thomas*, 547 U.S. 183 (No. 05-552), 2005 WL 2875043 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); see also Petition for a Writ of Certi-

orari at 12, *Keisler* v. *Hong Yin Gao*, 552 U.S. 801 (2007) (No. 06-1264), 2007 WL 835007; Reply Brief for the Petitioner at 7, *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (No. 02-29) ("[W]hen the reviewing court decides the correct final result, the court 'usurp[s]' a congressionally delegated administrative function.").

Moreover, the Solicitor General has argued specifically that remand is *required* when the agency has not had a chance to consider evidence under the proper legal standard. Pet. Reply Br. at 4, *Keisler* v. *Hong Yin Gao*, 552 U.S. 801 (2007) (No. 06-1264), 2007 WL 1911532 ("If, as respondent argues, factual findings were critical to her claim, then the Second Circuit had an obligation to remand to permit the record to be reopened for evidence and to allow the IJ to make the requisite factual findings."). If the government was right in those cases, it must be wrong in this one.

D. The Circuits Are In Disarray On The Question Presented.

Finally, the government very notably does not deny either that the courts of appeals are divided on when to remand in the face of agency legal error or that the issue warrants this Court's consideration. Opp. 14-15. It hardly could; the pervasive confusion in the circuits demonstrated in the petition (at 19-28) is, as Judge Calabresi noted, attributable to a lack of guidance from this Court. Pet. 4. As a consequence, the government's contention that the Court nevertheless should deny review in this case rings hollow.

Agreeing that the confusion in the courts is so pervasive that virtually every circuit has internally conflicting precedent, the government asserts that

"any * * * internal inconsistencies would be for the courts of appeals themselves, rather than this Court, to resolve." Opp. 15. But that course makes no sense when appellate judges attribute their disagreement to this Court's failure to settle the matter.[4]

The government also is wrong in denying the particular conflict between the decision below and the holdings of the Third and Ninth Circuits in *Leia* v. *Ashcroft*, 393 F.3d 427 (3d Cir. 2005), and *Kawashima* v. *Holder*, 615 F.3d 1043 (9th Cir. 2010), cert. granted, No. 10-577 (May 23, 2011).[5] The government asserts that *Leia* is distinguishable from petitioner's case because, "[u]nlike in *Leia*, the IJ in this case did not exclude or refuse to consider proffered evidence." Opp. 16. But the evidence upon which petitioner would have relied was inadmissible under the modified categorical standard. While petitioner may have been "'welcome' to procure" additional evidence (Opp. 16), he could not in fact have hoped to rely upon the full range of relevant evidence made admissible by *Nijhawan*. The Second Circuit's refusal to remand on these facts conflicts directly with the Third Circuit's holding in *Leia* that remand was required after a functionally identical change in a relevant evidentiary standard. See 393 F.3d at 435.

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[4] The government also observes that "different results in different cases * * * are to be expected." *Ibid.* But that hardly explains both the widespread confusion in approach *between* courts of appeals and the repeated disagreements *within* appellate panels on the application of *Chenery* in this context. See Pet. 20 & n.8.

[5] We agree with the government that the issue in this case is not related to the question on which the Court has granted review in *Kawashima*. Opp. 17-18.

As for *Kawashima*, the government notes that "the Ninth Circuit found error in the agency's determination that the administrative record proved sufficient loss." Opp. 17. But rather than distinguish *Kawashima*, the government's characterization highlights the conflict. The Second Circuit could not properly have made such a finding here because the record before the BIA was defective.

In fact, the government itself argued in *Kawashima*—when remand was in its interest—that *Chenery* requires a remand so that the BIA can evaluate evidence made newly admissible by *Nijhawan*:

> To the extent that the [petitioners] provide conflicting evidence suggesting that the loss amount is under $10,000, the Court should remand the case back to the BIA to determine, in the first instance, the amount of loss under the new evidentiary standard set forth by the Supreme Court in *Nijhawan* and the BIA in *Matter of Babaisakov*, 24 I. & N. Dec. at 317-21.

Supplemental Brief for Respondent at 7 n.1, *Kawashima*, 615 F.3d 1043 (Nos. 04-74313, 05-74408); see also *Kawashima*, 615 F.3d at 1056 (indicating that the government argued for a remand "so that the government may have the opportunity to introduce evidence to meet [*Nijhawan*'s] standard.").

* * *

There is no dispute about what happened in this case. The BIA found that petitioner's offense had caused a loss of more than $10,000 by applying what we now know to have been an erroneously restrictive evidentiary standard. On appeal, the Second Circuit affirmed that determination by itself considering

evidence that had not been addressed by the agency, and by noting that the incomplete record before the BIA did not contain evidence helpful to petitioner. That holding, which is typical of decisions rendered across the circuits in which courts have assigned themselves the role of agency decision-maker, is fundamentally inconsistent with the principle of *Chenery*. Further review therefore is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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