

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**

—◆—
**BRIEF OF THE IMMIGRANT DEFENSE
PROJECT, NORTH MANHATTAN COALITION
FOR IMMIGRANT RIGHTS, ET AL., AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

—◆—
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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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INTERESTS OF *AMICI CURIAE*¹

Amici consist of community groups, civil rights organizations, and immigrant justice organizations. As groups that work closely with immigrants, their families and their communities, we have a profound interest in ensuring that the rights of immigrants facing removal are protected and that immigrants are provided fair procedures throughout those proceedings. Detailed statements of interest for each organization are appended after the conclusion of this brief.



SUMMARY OF ARGUMENT

The “ordinary remand rule” requires courts of appeals to review agency decisions based solely on the grounds upon which the agency ruled rather than undertaking a *de novo* review of matters upon which the agency did not rule. *INS v. Ventura*, 537 U.S. 12, 16-17 (2002); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947). Because of the individual liberties at stake, violations of the ordinary remand rule in the immigration context can contravene the

¹ Letters of consent have been filed with the Clerk of the Court. Under Rule 37.6, *amici* state that no counsel for the party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

fundamental fairness and due process guaranteed to immigrants in removal proceedings.

In this case, the Second Circuit has both violated the ordinary remand rule and, in doing so, contravened the petitioner's fundamental right to present relevant evidence. *Amici* concur with petitioner that the Second Circuit erred by refusing to remand this case to the Board of Immigration Appeals ("BIA") to apply, in the first instance, the new and broader evidentiary standards this Court established in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). In *Nijhawan*, this Court broadened the scope of evidence relevant to assessing the loss threshold of 8 U.S.C. § 1101(a)(43)(M)(i), which defines "aggravated felony" as including an offense involving fraud or deceit in which the loss is greater than \$10,000. The Court held that "the statute foresees the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims." *Nijhawan*, 129 S. Ct. at 2303. In so ruling, this Court overruled the narrow evidentiary standards that were prevailing in the Second Circuit (among others). In this case, the BIA applied pre-*Nijhawan* narrow evidentiary standards that have since been overruled. Rather than remanding the case for further proceedings following *Nijhawan*, however, the Second Circuit affirmed the BIA's aggravated felony determination based on an incomplete record established under the pre-*Nijhawan* standards. As a result, the Second Circuit denied

petitioner's right to fundamentally fair procedures before the agency.

Certiorari should be granted to address this issue of great importance to immigrants nationwide. Fundamental fairness requires that immigrants be given an opportunity to present evidence to the agency when a new standard of law applies. Under a proper reading of the ordinary remand rule, a reviewing court cannot uphold an agency's order where the wrong standard has been applied. *See, e.g., Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974). Indeed, adherence to the ordinary remand rule should be most robust in cases where the agency applied an incorrect evidentiary standard in ordering a person's removal, given the procedural protections that must govern removal proceedings.

Additionally, the court's uneven approach to remand in cases like this highlights the need for this Court to grant certiorari. The vast majority of agency decisions reviewed in the courts of appeals originate from the BIA. The ambiguity that persists in the circuit courts of appeals on how strictly to apply the ordinary remand rule has had detrimental effects on immigrants. As a result, the thousands of immigrants who enter removal proceedings every year are forced to operate on a terrain riddled with uncertain standards of judicial review. Given the stakes at issue in immigration proceedings – *i.e.*, fundamental issues of personal liberty – this ambiguity cannot persist.



ARGUMENT

I. CERTIORARI IS WARRANTED TO ENSURE FUNDAMENTALLY FAIR PROCEDURES FOR IMMIGRANTS WHO SEEK TO SUBMIT EVIDENCE UNDER NEW EVIDENTIARY STANDARDS.

This Court recently ruled that the statute defining aggravated felony as fraud of more than \$10,000, 8 U.S.C. § 1101(a)(43)(M)(i), “foresees the use of fundamentally fair procedures,” including the right to rebut the government’s evidence. *Nijhawan*, 129 S. Ct. at 2303. In this case, however, the Second Circuit refused to remand to the BIA to allow petitioner to present evidence regarding the loss amount of his fraud conviction. As a result, the Second Circuit’s decision violates the ordinary remand rule, as well as statutory and constitutional rights to a fair hearing, and contravenes the express holding of this Court in *Nijhawan*. If the ordinary remand rule is to have any meaning in this context, it must at least apply to cases like this one, where an immigrant seeks the opportunity to submit evidence under the correct legal standard that the agency failed to apply.

A. Agency Decision-Making in Removal Proceedings Is Wide-Ranging and Implicates Fundamental Liberties.

A removal proceeding presents numerous opportunities for agency decision-making, all of which occur within the complex substantive and procedural

framework of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.* The BIA is faced with questions of law and fact related to both an immigrant’s removability as well as any applications for relief from removability.

Without question removing an immigrant from this country has harsh consequences. “This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.” *Woodby v. INS*, 385 U.S. 276, 285 (1966); *see also Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948)); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (noting that removal “may result also in loss of both property and life; or of all that makes life worth living”).

As a result, a removal proceeding, although a civil and not a criminal proceeding, nevertheless “visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.” *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Indeed, the proceeding itself may visit great hardship, since immigrants may be administratively detained for years while their cases are on appeal. *See Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 & n.3 (9th Cir. 2010) (noting alien had already been detained for more than four years at time of

remand). By any standard, the individual stakes of immigration proceedings are high.

Petitioner in the present case is a lawful permanent resident. It is the government's burden to establish removability by "clear and convincing evidence" if the immigrant has been lawfully admitted to the United States, including immigrants with lawful permanent resident status. 8 U.S.C. § 1229a(c)(3)(A). By statute, Congress defined numerous grounds for removability, including for example, immigrants who violate their conditions of entry, 8 U.S.C. § 1227(a)(1)(C), immigrants who engage in smuggling (except in cases of family reunification), § 1227(a)(1)(E), and immigrants who are addicted to drugs, § 1227(a)(2)(B)(ii).

Relevant to petitioner's case, an immigrant is also removable if the government establishes by clear and convincing evidence that an immigrant was previously convicted of an "aggravated felony." § 1227(a)(2)(B)(ii). The INA defines "aggravated felony" to include many offenses ranging from receipt of stolen property, 8 U.S.C. § 1101(a)(43)(G), to forging a passport, § 1101(a)(43)(P). If an immigrant is convicted of any offense defined as an aggravated felony – and there are hundreds of sections, subsections, and cross references defining offenses as aggravated felonies – then that prior conviction can be used to establish an immigrant's removability.

An aggravated felony determination may not only establish an immigrant's removability but also can determine an immigrant's eligibility for relief from

removal. Immigrants have the burden of establishing that they are both eligible for relief and satisfy the standards for that relief. 8 U.S.C. § 1229a(c)(4)(A). Under the INA, if an immigrant is convicted of an aggravated felony, he is categorically ineligible for asylum regardless of his risk of persecution, 8 U.S.C. § 1158(b)(2), and categorically ineligible for cancellation of removal regardless of his ability to show positive equities, 8 U.S.C. § 1229b(a)(3). There are no exceptions for immigrants who have served in the military, who have United States citizen family members, or who otherwise face extreme hardship or personal danger. As a result, the BIA's ruling on whether a prior conviction constitutes an aggravated felony has a cascading impact on the rights of immigrants in the removal process. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (“[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”).

B. Immigrants in Removal Proceedings Are Entitled to Procedural Protections, Including Presenting Relevant Evidence.

Removal proceedings are the forum for presenting evidence on these important issues related to removability. When a court of appeals affirms a removal order by applying a new evidentiary standard in the first instance – rather than remanding the case to the BIA – the immigrant is denied the ability to develop

and present new evidence that might satisfy that new evidentiary standard. As a result, it is especially important that the ordinary remand rule be applied when there is a new evidentiary standard and an immigrant requests an opportunity to present new evidence.

Because of the fundamental liberties at stake in removal proceedings, this Court has stated that “[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.” *Bridges*, 326 U.S. at 154. Those procedural protections to be meticulously safeguarded are both statutory and constitutional. Under the INA, “the alien shall have a reasonable opportunity to examine the evidence against the alien [and] to present evidence on the alien’s own behalf.” 8 U.S.C. § 1229a(b)(4)(B).

Additionally, immigrants in removal proceedings are constitutionally guaranteed fair procedures and due process. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Chew v. Colding*, 344 U.S. 590, 596-97 (1953) (“[A] lawful permanent resident . . . may not be deprived of his life, liberty or property without due process of law.”); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903); *Chen v. Holder*, 578 F.3d 515 (7th Cir. 2009) (“[D]ue process requires, among other things, that an applicant receive a meaningful opportunity to be heard”) (quoting *Kerciku v. INS*, 314 F.3d 913, 917 (7th Cir. 2003) (per curiam)); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (“The Fifth Amendment’s due process

clause mandates that removal proceedings be fundamentally fair”); *cf.* *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (describing motion to reopen as an “‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings”) (quoting *Dada v. Mukasey*, 128 S. Ct. 2307 (2008)).

The ability to present relevant evidence unquestionably stands as one of the substantial rights guaranteed to immigrants facing charges of removability. *See, e.g., Yamataya*, 189 U.S. at 100-01; *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (to afford immigrants due process, the admission of evidence must be “fundamentally fair”). Where immigrants are deprived of a fair opportunity to present relevant evidence that counters the government’s basis for alleging removability, due process concerns undeniably militate in favor of remand.

For instance, in *Naing Tun v. Gonzales*, 485 F.3d 1014, 1016-17 (8th Cir. 2007), the petitioner, a member of a Burmese minority group, applied for relief under the INA alleging past torture and persecution as well as a fear of future persecution. The immigration judge excluded several items of evidence, including a physician’s affidavit that “would have explained how scars and markings on Petitioner’s body . . . were consistent with claims of torture at the hands of Burma’s ruling military regime,” and an affidavit from an expert on country conditions, which attested to a “critical, contested issue in the case.” *See id.* at 1017. The immigration judge denied the petitioner’s application, and the BIA affirmed.

On appeal, the Eighth Circuit concluded that to ensure the immigrant received a “fair hearing,” “the immigrant must be given the opportunity to fairly present evidence, offer arguments and develop the record.” *Id.* at 1025. The Eighth Circuit reasoned that although traditional rules of evidence do not apply in immigration proceedings, “[t]o comport with the requirements of due process, evidence must be probative and its admission . . . fundamentally fair.” *Id.* (internal quotations omitted, ellipsis in original). Applying these principles of due process and fairness, the Eighth Circuit reversed the decision of the BIA and remanded, with the caveat that “proper consideration must be given to” the petitioner’s evidence of abuse. *See id.* at 1031.

Immigrants’ rights to present all relevant evidence and thereby avail themselves of full and fair proceedings before the BIA are all the more important when an intervening change in law provides immigrants with an opportunity to present newly admissible evidence contesting the government’s proof of removability. In *Chen*, the petitioner, a Chinese citizen, applied for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”) based on his wife’s involuntary abortion as a result of the Chinese government’s “coercive family planning policy.” 578 F.3d at 516. The petitioner filed his application for asylum at a time when the BIA interpreted 8 U.S.C. § 1101(a)(42)(B) to confer automatic refugee status on the spouses of persons forced to abort a pregnancy. *Id.* The petitioner’s claims for

relief under the INA were, therefore, based exclusively on his wife's forced abortion. *Id.*

Following an adverse ruling from the immigration judge, the petitioner appealed to the BIA. While his appeal was pending, however, the United States Attorney General (the "AG") reversed the BIA's standing interpretation of 8 U.S.C. § 1101(a)(42)(B), a change that rendered spouses ineligible for automatic refugee status based on a forced abortion. *Id.* at 517. The AG's new interpretation of the statute required the petitioner to prove that he suffered persecution because of his own resistance to Chinese coercive family planning policy. *Id.* Based on this change in the law, the BIA found that the petitioner failed to provide evidence that he had suffered persecution on account of his own resistance to Chinese policy and dismissed the petitioner's appeal. *Id.*

On appeal, the Seventh Circuit reversed the BIA and remanded. *Id.* Acknowledging that it is unusual for the BIA to "confer *automatic* refugee status based on only one fact," the court reasoned "that was the state of the law" when the petitioner filed his application for relief. *Id.* Based on its conclusion that the petitioner "did not have the opportunity for a fair hearing," the court remanded to the BIA for further proceedings. *Id.* at 516, 518. The Seventh Circuit noted that the petitioner had a statutory right "to present evidence on [his] own behalf," *id.* at 517, and reasoned that the petitioner was "entitled to [a] chance" to establish eligibility for relief under the Act specifically by presenting evidence which, under the

standards existing at the time of his application, “he never knew he was supposed to gather,” *id.* at 518.

C. The Second Circuit’s Failure to Remand Petitioner’s Case Denied Petitioner a Fundamentally Fair Hearing.

The principles underlying the Seventh Circuit’s decision in *Chen* apply with even greater force where the agency never had an opportunity to consider the change in law at all, and thus was unable to even consider what additional evidence would be relevant under the new standard. By failing to follow the ordinary remand rule, the Second Circuit here made “a determination of judgment which an administrative agency alone is authorized to make,” *Chenery II*, 332 U.S. at 196, and refused to permit the immigrant an opportunity to present evidence that he had no reason to gather under the erroneous standard the agency previously applied.

The Second Circuit, unlike the Seventh Circuit in *Chen*, did not remand petitioner’s case to the BIA following a change in law. Although *Chenery* requires that courts not create post-hoc rationalizations for unlawful agency actions, the Second Circuit ruled on petitioner’s aggravated felony status even though the BIA had improperly limited the record developed under evidentiary standards that were later determined by this Court in *Nijhawan* to be too narrow. Rather than ruling based on the incomplete records,

the Second Circuit should have, in accord with *Chenery*, remanded the case to the BIA.²

Petitioner was found removable based on the BIA's determination that he was previously convicted of an aggravated felony, namely a fraud offense causing a loss of more than \$10,000. 8 U.S.C. § 1101(a)(43)(M)(i). The BIA, however, indisputably applied an erroneous legal standard in petitioner's case, improperly limiting the evidence admissible to determine his removability. Citing the Second Circuit's decision in *Ming Lam Sui v. INS*, 250 F.3d 105, 119 (2d Cir. 2001), the BIA applied a narrow evidentiary approach to determine whether petitioner was previously convicted of fraud of more than \$10,000, which required the BIA to determine both that petitioner's offense was for fraud and that the loss amount was more than \$10,000, based on only a limited set of records from the prior court of conviction, such as the charging papers, jury instruction, etc. Based only on limited records, the BIA determined that the government established by clear and convincing evidence that petitioner's prior conviction was a fraud of more than \$10,000.

² This case is different from a case where the agency is seeking a remand when it has already had a full and fair opportunity to develop the factual record under applicable legal standards. In those cases where the government merely seeks a second bite at the apple, remand serves no purpose and unfairly delays the just resolution of the legal questions at issue.

While petitioner’s case was on appeal in the Second Circuit, the Supreme Court decided *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), which holds that although a categorical approach applies to determining whether the prior offense was a fraud, a non-categorical, circumstance-specific approach applies to determining whether the fraud caused more than \$10,000 in loss. 129 S. Ct. at 2302. The circumstance-specific approach does not limit the immigration court’s consideration of documents or other evidence outside of the prior criminal court’s record. In so ruling, this Court rejected expressly the imposition of strict “evidentiary limitations” on determining the loss amount. *Id.* Thus, under the circumstance-specific approach, petitioner’s right to present rebuttal evidence (*see* 8 U.S.C. § 1229a(b)(4)(B)) is broader than it was under the approach taken by the BIA in this case.³

After the *Nijhawan* decision and because the BIA had applied a narrower evidentiary approach rather than the circumstance-specific approach, petitioner sought a remand to allow an evidentiary hearing before the immigration court affording him the right to present additional evidence. The Second Circuit denied petitioner’s request for remand by examining

³ To be clear, the *Nijhawan* decision does not lighten the government’s burden of proof. The government must still establish removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). And the immigrant still has a right to rebut that evidence. 8 U.S.C. § 1229a(b)(4)(B). The *Nijhawan* decision merely expands the universe of evidence that could be used to support either the government or the immigrant.

the facts in the record below *de novo* under the new circumstance-specific approach set forth in *Nijhawan*. The Second Circuit’s failure to remand denied petitioner the opportunity to present evidence relevant under the new legal standard – evidence which he had no reason to present previously under the categorical approach. Where a legal error and a change in legal standard have deprived an immigrant of a fundamentally fair opportunity to contest his removability, the ordinary remand rule requires a remand.⁴

As a result, application of the ordinary remand rule in this context more fully realizes the promise of the statutory and constitutional protections afforded to immigrants in removal proceedings: an immigrant is only provided with a fundamentally fair hearing if he can present relevant evidence under the proper legal standard. These procedural protections ensuring

⁴ Unlike the *Chenery* rule addressed in petitioner’s brief, which could apply equally to evidence offered by the government or the immigrant, the fundamental fairness argument runs only in favor of the immigrant. The government is not denied due process by its own legal errors, and government personnel are not subject to continuing detention while the errors are worked out on remand. Indeed, in cases where an immigrant is detained for a prolonged period (if, for example, government errors have led to repeated remands), *Chenery* remand in favor of the government may directly conflict with the due process rights of the immigrant. See *Zadvydas*, 533 U.S. at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem”). By contrast, a *Chenery* remand where the immigrant petitioner seeks to present evidence to the agency under a new legal standard ensures fundamental fairness for the immigrant facing removal.

that immigrants receive a fair hearing before the agency are consistent with *Chenery's* admonition that reviewing courts should remand following an agency error rather than allowing the agency to present post-hoc rationalizations following its error. As a result, the Second Circuit erred by not remanding petitioner's case in light of the intervening change of law.

II. CERTIORARI IS WARRANTED TO RESOLVE THE UNEVEN APPLICATION OF THE REMAND RULE.

As set forth in the petition, the circuit courts have adopted a wide array of inconsistent approaches to the ordinary remand rule. *See* petition at 20-28. Because of both the quantity of appeals from removal proceedings and the stakes at issue for immigrants in those appeals, the lower courts' inconsistency disproportionately impacts removal proceedings. Further, the disarray among (and within) the courts of appeals undercuts the due process rights of immigrants facing removal as the courts' varying remand standards are easily manipulated or improperly influenced.

Immigration rulings represent the vast majority of agency determinations reviewed by the courts of appeals. For instance, from 2006 to 2010, the courts of appeals reviewed 51,450 agency determinations. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts, 2010 Annual Report of the Director, 96. Of those

appeals, 45,582 (over 85%) originated from the BIA. *Id.*

Data collected from BIA appeals demonstrates the plight of immigrants faced with inconsistent application of the remand rule. For example, from 2004 to 2005, an immigrant seeking asylum in the Fourth Circuit had a 1.9% chance of obtaining remand on appeal, while in the Seventh Circuit an immigrant had a 36.1% chance of obtaining remand. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* 296, 363 (Nov. 2007). The authors of this study correctly reasoned that there is “no rational reason why a person living in Illinois, Indiana or Wisconsin should have an 1800% greater chance of winning her asylum appeal than a person living in Virginia, Maryland, West Virginia, and the Carolinas.” *Id.* Instead, the disparity in remand rates appears to be “somehow linked to regional culture, which apparently affects federal appellate judges as well as other citizens.” *Id.* at 364. A “meticulous” protection of immigrants’ due process rights certainly demands more than an inconsistent rule swayed by the vagaries of “regional culture.” *See Bridges*, 326 U.S. at 154. A clear articulation of the remand rule from this Court would go far toward ending these improper regional variations.

While the ill-effects of inconsistency in application of the remand rule are borne by immigrants, the loosely-fashioned contours of the remand rule also have proven unworkable for the courts of appeals

charged with applying it. This difficulty is evidenced by the frequency with which circuit judges find themselves in heated disagreement over application of the remand rule.

Almaghzar v. Gonzales, 457 F.3d 915 (9th Cir. 2006), stands as irrefutable evidence of the difficulties among circuit judges engendered by uncertainty surrounding application of the remand rule. There, a majority of the Ninth Circuit affirmed the district court's denial of a Yemeni petitioner's petition for a writ of habeas corpus based on alleged errors committed by the IJ and the BIA. *Id.* at 917-18. Among other errors, the petitioner alleged that the BIA committed reversible error in refusing to permit his application for relief under the CAT. *Id.*

A majority of the Ninth Circuit concluded, among other things, that the petitioner failed to establish his right to relief under the CAT. *Id.* at 923. Judge Fisher, however, strongly dissented and counseled his colleagues that remand was the only appropriate course. *Id.* at 924. Judge Fisher reasoned that the BIA failed to address Yemen's country conditions and incorrectly applied the IJ's adverse credibility determination from the petitioner's asylum hearing to his claims for relief under the CAT. *Id.* at 925-26.

In Judge Fisher's view, "the majority treads on dangerous ground by deciding the CAT issue in the first instance without being informed by an intervening BIA decision on the matter." *Id.* at 927 (citing *Ventura*, 537 U.S. at 12). Echoing this Court's

rationale in *Ventura*, Judge Fisher reasoned that a remand should be ordered to determine how the BIA would address country conditions evidence and the IJ's credibility determination in light of those conditions. *Id.*; see also *Ventura*, 537 U.S. at 16-18.

The Ninth Circuit and its judges are not alone in their inconsistent application of the remand rule. For instance, in *Bhattarai v. Holder*, 408 Fed. Appx. 212 (10th Cir. 2011), the majority of the Tenth Circuit inappropriately failed to remand despite the BIA's failure to consider changed country conditions that would have supported the petitioner's applications for relief from removal. In that case, after over-staying a diplomatic visa, a Nepalese petitioner applied for asylum and withholding of removal based on disfavored political membership. *Id.* at 213. The immigration judge denied all relief. *Id.* at 214.

The petitioner appealed and requested that the BIA order a remand to supplement the record with evidence of changed country conditions. *Id.* at 214. When the BIA upheld the immigration judge's determination, the petitioner moved to reopen his case to introduce, among other things, evidence that a communist-party member had been elected Prime Minister of Nepal such that he had a reasonable fear of future persecution if forcibly returned to that country. *Id.* The BIA rejected the petitioner's motion. *Id.* at 215.

On appeal, a majority of the judges on the petitioner's Tenth Circuit panel found no error and

affirmed the BIA's ruling. Judge Lucero, however, dissented based on the court's failure to remand petitioner's case. *Id.* at 219-24. Noting that the BIA's factual determinations were made "before the Maoist revolutionary party, formerly listed by the United States as a foreign terrorist organization, became the ruling government of Nepal," Judge Lucero concluded that remand was appropriate. *Id.* at 220-21. This conclusion was premised not only on this Court's precedent but also on prior Tenth Circuit precedent applying the remand rule and reaching the opposite result. *See id.* (citing, *inter alia*, *Chenery*, 318 U.S. at 88, *Ventura*, 537 U.S. at 16, and *Mickevicuite v. INS*, 327 F.3d 1159, 1162 (10th Cir. 2003)).

Most alarmingly for immigrant petitioners, some courts have reacted to confusion over the application of the ordinary remand rule by carving out exceptions to the rule even where there is no dispute that the agency erred below. For example, in 2005 and 2006, the Second Circuit developed a futility exception to the ordinary remand rule, denying numerous immigrant petitioners remand. *See Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 395 (2d Cir. 2005) (holding that the court of appeals will "affirm, *despite IJ errors*, when [it] can confidently predict that the IJ would necessarily reach the same result absent errors") (emphasis added); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338-39 (2d Cir. 2006) ("If the reviewing court undertakes to determine whether remand would be futile, it should assess the entire record and determine whether, based on the strength

of the evidence supporting the error-free findings and the significance of those findings, it is clear that the agency would adhere to its decision were the petition remanded.”); *Qyteza v. Gonzales*, 437 F.3d 224, 228 (2d Cir. 2006); *Tu Lin v. Gonzales*, 446 F.3d 395, 403 (2d Cir. 2006). Other courts of appeals have sporadically applied the futility exception to deny immigrants remand. *See, e.g., Yi Ni v. Holder*, 613 F.3d 415, 429 n.10 (4th Cir. 2010) (citing *Xiao Ji Chen*, 471 F.3d at 339); *Karimijanaki v. Holder*, 579 F.3d 710, 721 (6th Cir. 2009) (same).

Though the futility exception focuses on the “error-free” portion of the record before the agency, the concept of an error-free portion of the record is inapplicable in a case, like this one, where the record is incomplete. In this case, the weight of the error-free portions of the record can be assessed only when compared to the evidence that became relevant following the intervening change in law. As a result, it cannot be futile to grant remand to an immigrant seeking the opportunity to submit such evidence in the first instance.

Chenery is very clear on this point: “[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” *Chenery I*, 318 U.S. at 88. *Chenery* sought primarily to safeguard the integrity of administrative decision-making, but in immigration cases, fundamental fairness and due process

concerns provide an equally compelling reason to insist on remand, especially when a new evidentiary standard allows the submission of additional evidence by the immigrant. The Second Circuit decision in this case is based on a false deference to the result reached by the agency without adequate consideration of either *Chenery's* protection of the administrative process or the fundamental rights of the petitioner.

◆

CONCLUSION

The petition for certiorari should be granted to resolve the above-enumerated inconsistencies in application of the remand rule. Clarification of that rule is necessary to ensure that the due process and fairness guaranteed to petitioner – and all immigrants in removal proceedings – are strictly safeguarded in future proceedings.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The **Advocates for Human Rights** (“The Advocates”) is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates engages more than 600 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates provides pro bono legal assistance to indigent asylum seekers and to immigrant detainees in the Upper Midwest and advocates for the reform of the U.S. detention and deportation system. The Advocates has a strong interest in seeing that the United States construe legal protections for noncitizens in a way that is consistent with international human rights standards.

American Gateways (formerly the Political Asylum Project of Austin) was founded in 1987 as a response to the legal needs of the large number of Central American refugees arriving at the Texas border in the 1980s. American Gateways provides legal representation and advocacy to thousands of indigent and low income immigrants throughout central Texas before the Department of Homeland Security and the Immigration Courts. American Gateways also provides information and education to the immigrant community in order to empower individuals to advocate for

themselves and their families and to keep them informed about their rights and responsibilities. American Gateways represents hundreds of immigrant detainees who have criminal convictions and has an interest in ensuring that all of the immigrants that it serves are afforded a full and fair opportunity to be heard and present all relevant evidence when in removal proceedings.

The **Center for Constitutional Rights** (“CCR”) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

Detention Watch Network (“DWN”) is a national coalition of organizations and individuals working to educate the public and policymakers about the United States immigration detention and deportation system and advocate for reform so that everyone who comes to our shores receives fair and humane treatment. DWN has a direct interest in upholding the rights of people detained by the uneven application of immigration laws.

Heartland Alliance’s National Immigrant Justice Center (“NIJC”) is a non-profit organization, accredited by the Board of Immigration Appeals to provide immigration assistance since the late 1970s. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through

legal services, policy reform, impact litigation, and public education. In fiscal year 2010, NIJC provided critical legal representation and education to more than 10,000 asylum seekers, refugees, survivors of domestic violence, detained immigrants, victims of human trafficking, and other immigrants facing removal and family separation.

The **Immigrant Defense Project** (“IDP”) is a non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes and therefore has a keen interest in ensuring that such immigrants are afforded a full and fair opportunity to submit relevant evidence in removal proceedings based on any past criminal proceedings.

The **Immigration and Refugee Rights Clinic** (“IRRC”) is a program within Main Street Legal Services of CUNY School of Law. Over the last two decades IRRC has served hundreds of immigrants in the New York area and has worked toward our mission of training new attorneys to provide law in the service of human needs. In spite of the fact that immigration proceedings have been deemed civil in nature, the most basic liberty interests are at stake. IRRC has an interest in ensuring due process and fundamental fairness in immigration proceedings.

Judson Memorial Church was founded in 1890 by distinguished preacher and church leader Edward Judson who envisioned the Greenwich Village church as an institution to serve the growing population of

Italian immigrants in Lower Manhattan through health, nutrition, education, and recreational programs, as well as vibrant worship and religious instruction. From its founding, the role of the church has been to be a faith-based institution that responds to the societal issues of its time and place by working and advocating for progressive change, with special attention to the needs of people that many mainstream churches tend to overlook or find undeserving. A leader in faith-based immigrant rights advocacy in New York City, Judson Memorial Church upholds the moral imperative to welcome the stranger, actively seeking to change immigration laws that deny due process and break up families.

National Immigration Project of the National Lawyers Guild (“NIP/NLG”), established in 1980, is a national membership organization of lawyers, law students, legal workers, and jailhouse lawyers working to defend and expand the rights of all immigrants in the United States and to ensure the fair administration of the immigration and nationality laws. For nearly a quarter century, NIP/NLG has provided technical assistance to immigration lawyers on defenses to removal, use of immigration waivers, and the immigration consequences of criminal conduct. The NIP/NLG has a direct interest in ensuring that the Immigration and Nationality Act is interpreted consistently and that noncitizens receive a full and fair opportunity to present their cases before the immigration courts and the Board of Immigration Appeals.

New Immigrant Community Empowerment (“NICE”) is a community-based, non-profit organization that works to ensure that new immigrants can build social, political, and economic power in their communities and beyond. NICE was founded in 1999 when local activists came together in response to anti-immigrant billboards posted by the racist Project USA in the borough of Queens. Today, its organizing and grassroots advocacy efforts focus on immigrant and workers’ rights, immigrant access, and immigrant civic engagement. NICE envisions a world where all people live and work with dignity and justice, and believes that all immigrants should have a right to a fundamentally fair hearing when facing removal.

The **New York Immigration Coalition** (“NYIC”) is an umbrella policy and advocacy organization for nearly 200 groups in New York State that work with immigrants and refugees. The NYIC aims to achieve a fairer and more just society that values the contributions of immigrants, fosters their leadership, and provides a vehicle for collective action for New York’s diverse immigrant communities.

Northern Manhattan Coalition for Immigrant Rights (“NMCIR”) was founded in 1982 as a community response to the influx of immigrants settling in Northern Manhattan and the Bronx. Every year, NMCIR helps keep thousands of immigrant families together by providing free and affordable, personalized support around a vast array of family-based immigration petitions. NMCIR helps the immigrant

community build visibility and political power via voter registration, civic education, and supporting its member-driven advocacy campaigns around deportation issues. NMCIR has an interest in ensuring that the immigrants it serves have a full and fair opportunity to be heard when facing removal.

The **Riverside Church** is an interracial, interdenominational and international church built by John D. Rockefeller, Jr. in 1927. By its mission, The Riverside Church is committed to action for peace and justice, and has a heritage of offering shelter, accompaniment, assistance, and protection to the most vulnerable, including refugees, asylum seekers, and immigrants facing deportation. The 1200-member Riverside Church in Morningside Heights has committed itself to supporting and advocating for immigration laws and policies that are welcoming, fair, humane, and just, making sure that immigrants in removal proceedings are treated with fairness and due process.
