In the Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by holding—*consistent with two other circuits and in conflict with* at least three other circuits—that federal courts are categorically incompetent to review a Board of Immigration Appeals decision denying a motion to reopen removal proceedings *sua sponte*, even where that decision applies a legal standard, on the ground that such decisions are "committed to agency discretion by law."

2. *Whether the Eighth Circuit erred by* disregarding the BIA's stated grounds for its decision, in conflict with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other circuits.

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The opinion of the Eighth Circuit is reported at 604 F.3d 546 and is reproduced at App.1a-14a. The opinion of the Board of Immigration Appeals is reproduced at App.28a-31a.

JURISDICTION

A divided panel denied rehearing on August 27, 2010, and rehearing en banc was denied on September 17, 2010. Justice Alito extended the time for filing this petition to and including January 18, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND REGULATIONS

Chapter 7 of the Administrative Procedure Act ("APA"), is titled "Judicial Review" and provides in relevant part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. §701(a)(1)-(2).

The text of the relevant regulatory provisions is reproduced in the Appendix at App.20a.

STATEMENT OF THE CASE

This case involves Ana Ochoa's timely motion to reopen her removal proceedings, on the ground that evidence critical to her application for immigration relief was omitted because of her former counsel's ineffective assistance. The Board denied that motion on the merits, and the Eighth Circuit refused to review the Board's decision. Finding BIA's treatment of

Ochoa's motion "unclear," the court proceeded to interpret the motion for itself, and somehow concluded that Ochoa's concededly timely motion to reopen was actually a limited request that BIA exercise its discretionary authority to reopen "*sua sponte*." Indeed, the court of appeals made quite clear that it would have recharacterized the motion as one seeking *sua sponte* relief even if the Board had clearly treated it as one filed as of right. The court's assertion of authority to affirm an agency based on a rationale not stated by the agency—and even a rationale affirmatively rejected by the agency—violates bedrock principles of administrative law under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and its progeny.

Having construed the motion as one requesting that the Board reopen "*sua sponte*," the court proceeded to hold that such decisions are categorically immune from judicial review under the APA because they are "committed to agency discretion by law," even though the Board's decision in this case turned on its application of familiar (and frequently reviewed) legal standards concerning ineffective assistance of counsel. That aspect of the Eighth Circuit's decision deepens an intractable circuit split on the reviewability of Board decisions denying motions to reopen *sua sponte*, an important and recurring question of law. It is also plainly wrong. If it were correct, then this Court's recent decision in *Kucana v. Holder*, 130 S.Ct. 827 (2010), was merely a rhetorical exercise. Although this Court in *Kucana* decided only that IIRIRA is no bar to judicial review of BIA's reopening decisions, the logical consequence of the Eighth Circuit's decision is that the Board's decision in that case was nevertheless

unreviewable for a different reason—*i.e.*, that it was committed to agency discretion under the APA.

Statutory and Regulatory Framework

Under Section 240A(b) of the Immigration and Nationality Act ("INA"), an otherwise removable alien may nevertheless avoid deportation if she qualifies for cancellation of removal. To qualify for cancellation of removal, an alien must demonstrate: (1) physical presence in the United States for a continuous period of not less than ten years immediately preceding the date of the application; (2) good moral character during that period; (3) that she has not been convicted of a disqualifying offense; and (4) that the removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States." 8 U.S.C. §1229b(b)(1)(D).

An alien may file, as of right, one motion to reopen removal proceedings within ninety days of a final administrative decision by the Board of Immigration Appeals ("BIA" or "Board"). *See* 8 U.S.C. §1229a(c)(7); *see also* 8 C.F.R. §1003.2(c)(2). Attorney General regulations provide that the BIA also "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. §1003.2(a). That same regulation provides that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." *Id.*

Facts and Procedural History

Ms. Ochoa is a native and citizen of Mexico who entered the United States in 1991 and has since resided

principally in Marshalltown, Iowa. A.R.138.[1] She and her husband have two United States citizen children, Viridiana and Guillermo, and another son, Cesar, whom they brought to the United States as an infant. *Id.*; App.24a.

In 2004, after Ochoa had lived in the United States for almost 14 years, the government commenced removal proceedings against her. Ochoa admitted the government's factual allegations and conceded removability, but applied for cancellation of removal and, in the alternative, voluntary departure, under INA §§240A(b)(1) and 240B(b).

At a hearing on her applications before an Immigration Judge ("IJ"), Ochoa testified that her son Guillermo, then seven years old, suffered from medical problems caused by lead poisoning when he was two years old. A.R.168-69. Ochoa's then-counsel, Mr. Ta-Tu Yang ("Yang"), declared that Guillermo's condition was "new to [him]" and requested additional time to secure and submit related evidence. A.R.175. The IJ deferred ruling on Yang's request. A.R.175-76. When the IJ asked Ochoa why she had not previously discussed Guillermo's condition with her attorney, she explained that she did not "think it was necessary." A.R.187.

The government opposed Yang's request for additional time to submit corroborating evidence. The government attorney remarked that "a medical problem" is "one of the *prime pieces of evidence* to show hardship" for a cancellation application, and that it "should have been fully inquired on a number of

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[1] "A.R." refers to the Administrative Record, No. A79-587-385 filed with the BIA.

different ways when the case was being prepared." A.R.188 (emphasis added). The IJ agreed, observing that "these are things that are so material and so central to the claim that [they] ... should have been advanced earlier." A.R.189. The IJ then denied counsel's request for additional time to submit corroborating evidence of Guillermo's disability. A.R.189-90.

The IJ found that Ochoa had good moral character, continuous physical presence in the United States for more than ten years, and no criminal record, thus satisfying three of the four eligibility criteria for cancellation of removal. A.R.202. The IJ further acknowledged Board precedent indicating that Ochoa would have been a "'strong applicant'" for cancellation of removal if she had demonstrated that she had a "'child with very special health issues, or compelling special needs in school.'" A.R.204 (quoting *Matter of Monreal*, 23 I.&N. Dec. 56, 63 (B.I.A. 2001)). The IJ determined, however, that "[t]he record does not compel the conclusion ... that [Ochoa] has demonstrated that her removal would create exceptional and extremely unusual hardship" for Guillermo. *Id.* That was so, the IJ explained, because Ochoa had "not submitted any evidence to either corroborate" her testimony regarding Guillermo's needs and disabilities "or to develop them as exceptional and extremely unusual hardship factors." A.R.205. The BIA affirmed. A.R.206.

After obtaining new counsel, and well within the ninety-day deadline prescribed by 8 C.F.R. §1003.2(c), Ochoa filed a motion to reopen based on the ineffective assistance of her prior counsel. *See* App.22a-27a. The motion referred to 8 C.F.R. §1003.2(a), which sets forth "[g]eneral" provisions governing such motions and also

provides that BIA may reopen a case "at any time" in response to party's motion or "on its own motion." App.20a. Ochoa's motion stated that she "ha[d] satisfied the requirements set by the Board of Immigration Appeals for filing a motion to reopen based on an ineffective assistance of counsel claim pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)." App.23a. The motion explained that Ochoa's former attorney had failed to elicit key information and compile corroborating evidence related to her son's disability, and that she was prejudiced by her attorney's deficient performance. App.26a. Her motion also contained a grammatically confused request "that the Board of Immigration Appeals (BIA) this case on their own motion to Reopen." [Sic.] App.10a.

In support of her motion, Ochoa submitted a bar complaint she had filed against her prior counsel and an affidavit describing his deficient handling of her case, in accordance with 8 C.F.R. §1003.2(c)(1) and *Lozada*. Ochoa also tendered evidence regarding the effects of Guillermo's lead poisoning, including medical records documenting his diagnosis and treatment; evidence of his resulting learning disabilities; and evidence regarding the disadvantages faced by special education students in Mexico. *See* A.R.55-135.

The Board found that Ochoa's motion to reopen her removal proceedings was "timely." App.28a. It also acknowledged that Ochoa had "complied with the requirements set forth in *Matter of Lozada*" and confessed to being "troubled by evidence indicating that [Guillermo] suffered from educational problems stemming from ... lead poisoning at the age of two." App.29a-30a. But the Board nonetheless denied Ochoa's motion on the merits, concluding summarily

that she had failed to demonstrate ineffective assistance of counsel. The Board noted Ochoa's admission "that she did not think the lead poisoning issue was necessary to her case" and evidence that Guillermo's "lead levels have diminished" and were now "in the normal range." *Id.* The Board did not acknowledge Ochoa's evidence that learning disabilities from lead poisoning persist notwithstanding diminished lead levels in the body, and never addressed Ochoa's contention that counsel had an obligation to advise and inquire about matters relevant to her application, including her children's medical conditions.[2]

Having rejected her ineffective assistance claim, the Board concluded that Ochoa had failed to demonstrate that "the new evidence presented" could not have been presented at her earlier hearing, as required by 8 C.F.R. §1003.2(c)(1), which governs motions to reopen by a party. App.29a.

Ochoa filed a petition for review in the Eighth Circuit, arguing that the BIA abused its discretion in denying her motion to reopen. But a divided panel refused to review the BIA's action—for abuse of discretion or otherwise. The panel majority

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[2] In response to Ms. Ochoa's complaint against Yang, the Iowa Supreme Court Board of Professional Ethics and Conduct stated that her allegations, if true, "perhaps would be 'ineffective assistance of counsel,'" but because they were not sufficiently egregious "to warrant a disciplinary sanction for ethical misconduct," the Board declined to take further action. Petitioner's Br. at 21-22 (8th Cir. Jan. 28, 2008); *id.* at Exhibit. 3. It is a matter of public record that Mr. Yang *has* been officially reprimanded by the Board for neglect of a client's immigration matter on at least one occasion. *Iowa Supreme Court Board of Professional Ethics and Conduct v. Ta-Tu Yang*, No. 02-0087, Order of Public Reprimand (Feb. 26, 2002).

acknowledged that the BIA "may have treated Ochoa's motion" as one filed by a party as of right "under the rubric of 8 C.F.R. §1003.2(c)," a treatment that would have been reviewable under *Kucana* and longstanding 8th Circuit precedent. But the panel majority nonetheless construed Ochoa's motion for itself and concluded that the motion was best interpreted as a request that the BIA reopen the case "*sua sponte* ... under §1003.2(a)." App.6a. On that basis the panel majority held that it was precluded from reviewing the BIA's order denying the motion, under pre-*Kucana* circuit precedent holding that decisions not to reopen removal proceedings *sua sponte* are "committed to agency discretion by law" under 5 U.S.C. §701(a)(2). App.6a-7a. "[W]e see no way around *Tamenut* [*v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (en banc)], given Ochoa's express reliance on §1003.2(a) ...." App.8a. Because it relied on what it viewed as a categorical exclusion from judicial review, the panel majority never considered the fact that the BIA's decision in this case turned on a familiar—and routinely reviewed—ineffectiveness-of-counsel inquiry.

Judge Colloton dissented in part. App.8a-14a. The task of the federal court, he explained, is to "review the BIA's decision, not Ochoa's motion." App.11a. Although Ochoa's motion cited 8 C.F.R. §1003.2(a), and did not explicitly invoke 8 C.F.R. §1003.2(c), the BIA had "clear[ly]" (and correctly) treated the motion as one by a party. *Id.* For example, the BIA had explicitly found the motion "timely"—which makes sense only if the motion is one by a party—and had explicitly applied the legal standard applicable to party-filed motions to reopen. *Id.* Indeed, "[t]here is not even a hint in the BIA's decision ... that it

considered whether to exercise its 'limited discretionary powers' to reopen cases on its own motion." *Id.* Accordingly, Judge Colloton concluded that the BIA had properly reached the merits of Ochoa's timely motion, and the Eighth Circuit therefore had a responsibility to review the BIA's denial of that motion under the familiar abuse-of-discretion framework. App.11a-12a. Moreover, Judge Colloton observed, "[t]he Attorney General recognize[d] that the agency's decision on the motion to reopen is judicially reviewable" and the government "concede[d] that [the court] should review [it] for abuse of discretion." App.11a.

Turning to the merits, Judge Colloton determined that the BIA's decision must be vacated for "fail[ure] to give a rational and reasoned explanation for its decision." App.12a. "The BIA's cursory decision on Ochoa's motion cannot withstand even this deferential review," he concluded, because it was "not responsive to Ochoa's argument that [her] counsel had a professional obligation to *inquire* about matters that would assist in making a case for cancellation of removal, and that counsel should have *elicited* the information about lead poisoning from Ochoa." App.13a. The BIA also neglected to address "whether it believed that differences between special education services available in Mexico and in the United States would amount to 'exceptional and extremely unusual hardship' for [Guillermo] if his mother were removed to Mexico." *Id.* Because the BIA "failed to render a reasoned decision," Judge Colloton would have "remand[ed] the case for further proceedings with respect to Ochoa's claim of ineffective assistance of counsel." *Id.*

Ochoa sought panel rehearing and rehearing en banc, arguing that the panel had erred in determining that her timely motion to reopen was actually a request that BIA reopen the case on *its own* motion, and by construing Ochoa's motion independently rather than reviewing the BIA's resolution of that motion on its own terms, as required by *Chenery*. Pet'n for Reh'g or Reh'g En Banc at 6-9 (8th Cir. July 26, 2010). Ochoa further argued that this Court's recent decision in *Kucana* undermined the Eighth Circuit precedent holding that BIA decisions not to reopen a case *sua sponte* are "committed to agency discretion by law" and thus shielded from judicial scrutiny. *Id.* at 12-15.

In response, the government conspicuously declined to defend the panel's characterization of the BIA's decision, stating only that "*to the extent that* the panel accurately determined that Ochoa filed a motion to reopen requesting that the Board reopen sua sponte, the panel did not err in applying" circuit precedent. Opp. to Pet. for Reh'g at 2, 4 (8th Cir. Aug. 19, 2010) ("Reh'g Opp.") (emphasis added). The government did not address Ochoa's argument that the panel's decision contravened *Chenery*. The panel denied rehearing. App.17a.

Judge Colloton dissented from the denial of panel rehearing. He took the government to task for "utterly fail[ing] to address" the "lead argument in Ochoa's petition for rehearing"—"that the panel erred by mischaracterizing the BIA's action on Ochoa's motion to reopen as a refusal to act *sua sponte*, rather than as a denial of a timely motion to reopen filed by a party." *Id.* "Because the government acknowledged in its brief on appeal that the BIA's decision is reviewable for abuse of discretion, and then declined in its response to the petition for rehearing to defend the key premise of

the panel's decision," he would have granted panel rehearing. *Id.* The court of appeals denied rehearing en banc. App.18a.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit held that BIA's decision denying Ochoa's motion to reopen was "committed to agency discretion by law" under §701(a)(2). It held that review was barred categorically because the motion was one to reopen *sua sponte*, even though the BIA's decision in this case turned on its application of legal standards, and not the sort of weighing of policy and other factors that is characteristic of a purely discretionary decision. The Eighth Circuit thereby aligned itself with the Fourth and Sixth Circuits in conflict with decisions of at least three other courts of appeals.

The Eighth Circuit's holding rests principally on the fact that the relevant regulation, "8 C.F.R. §1003.2(a), provides no guidance as to the BIA's appropriate course of action ... and specifies no standards for a court to use to cabin the BIA's discretion." That holding cannot be reconciled with this Court's precedents. In *Kucana*, this Court held that the jurisdiction-stripping provision of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. §1252(a)(2)(B)(ii), does not preclude review of a BIA decision denying a party's motion to reopen removal proceedings. The Court rejected the argument that such decisions are made "discretionary" under IIRIRA via the Attorney General's regulations. In so holding, this Court reaffirmed the strong presumption in favor of judicial review and emphatically rejected the notion that "the Executive [has] a free hand to shelter its own decisions

from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S.Ct. at 840. Section 1003.2(a), the regulation on which the Eighth Circuit relied in this case is the very same regulation that was the focus of this Court's analysis in *Kucana*. If the Eighth Circuit were correct therefore, this Court's decision in *Kucana* was an empty exercise, for the BIA's denial of the motion at issue in *Kucana* itself would be "committed to agency discretion by law" and immune from judicial scrutiny. Nothing in this Court's decision suggests that result. To the contrary, this Court noted the long history of federal appellate-court review of such decisions and refused to ascribe to Congress an intent to strip the courts of that historically-exercised jurisdiction.

Nevertheless, because *Kucana* specifically reserved judgment as to whether §701(a)(2) prevents review of BIA decisions denying a request that it reopen *sua sponte*, *see Kucana*, 130 S.Ct. 839 n.18, the lower courts have resisted even the most forceful invitations to revisit pre-*Kucana* circuit precedent applying §701(a)(2) to bar judicial review of agency decisions deemed discretionary by regulation—even though their reasoning cannot be reconciled with *Kucana* or the *Heckler* line of cases construing §701(a)(2)'s narrow scope.

The question whether BIA's "*sua sponte*" decisions are categorically unreviewable is recurring and important, affecting the proper balance between the Executive and the Judiciary. The disagreement among the courts of appeals on this issue also reflects a broader, longstanding confusion among the courts of appeals concerning the scope of §701(a)(2). This

Court's intervention is necessary to resolve the circuit conflict and provide needed guidance to the lower courts on the limitations of §701(a)(2) more generally. And this case provides an appropriate vehicle for that review. Had this case arisen in the First, Second, or Third (and likely the Seventh) Circuits, Ochoa's petition for review would have been entertained on the merits. This Court should grant the Petition to resolve the circuit split and ensure uniformity with its decisions.

2. The decision below also conflicts squarely with this Court's decision in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and the decisions of other courts of appeals faithfully applying *Chenery*. The court acknowledged that the BIA "may have treated Ochoa's motion under the rubric of 8 C.F.R. §1003.2(c)," which governs timely motions by a party, because "BIA noted that Ochoa's motion is 'timely,' a determination pertinent under §1003.2(c)," and "used *Matter of Coelho* ... as its governing legal standard in evaluating Ochoa's evidence." App.6a. But it somehow concluded, nevertheless, that "the Board's treatment of the motion [wa]s unclear...." *Id.* Without deciding how the BIA actually treated Ochoa's motion, the court of appeals proceeded to construe the motion for itself, and determined that Ochoa's failure to cite §1003.2(c), coupled with her use of the phrase "*sua sponte*," transformed her concededly timely motion to reopen into a limited request for *sua sponte* reopening. Indeed, the court made clear that it would have recharacterized Ochoa's motion, just the same, had BIA clearly treated it as a timely motion by a party.

That utter disregard for the BIA's treatment of Ochoa's motion flies in the face of this Court's

admonition in *Chenery* that the propriety of agency action must be evaluated based on the rationale proffered by the agency itself. If the basis for an agency's decision is "unclear," this Court's precedents dictate that the proper course is a remand to the agency for further explanation. 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." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The court of appeals' error on this score is sufficiently plain and egregious that summary reversal is warranted. *See, e.g., INS v. Ventura*, 537 U.S. 12, 16 (2002).

Summary reversal on this issue is especially appropriate because the panel majority's construction of Ochoa's motion is utterly implausible, and it served to deprive Ochoa of the judicial review to which she is entitled. The government had no trouble deciphering what was clear as day on the face of the BIA's decision—that Ochoa's motion to reopen was a timely motion by a party, and that BIA's decision to deny it was therefore (uncontroversially) subject to judicial review under the familiar abuse-of-discretion framework. *See* Resp't Br. at 8 (8th Cir. Mar. 31, 2010). Indeed, when asked for a response to Ochoa's petition for rehearing, the government could not bring itself to defend this aspect of the panel's decision. *See* Reh'g Opp. at 2, 4; App.8a (Colloton, J., dissenting from denial of panel rehearing).

The Petition should be granted, and the case should be set for briefing and argument or summarily reversed.

I. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT CONFLICT ON WHETHER BIA DECISIONS DENYING MOTIONS TO REOPEN *"SUA SPONTE"* ARE CATEGORICALLY UNREVIEWABLE

Under §701(a)(2) of the APA, federal courts may not review agency action "committed to agency discretion by law." How to determine whether final agency action falls within that bar on judicial review is the subject of considerable debate among the lower courts.

This Court has held that §701(a)(2) "is a very narrow exception ... applicable in those rare instances where 'statutes are drawn in such broad terms that in any given case there is no law to apply,'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752 at 26 (1945)), or where there are no "meaningful standard[s] against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This Court explained in *Heckler* that §701(a)(2) imports pragmatic, "common law" principles governing the judicial review of agency action. *Id.* at 831-33. A court determining whether agency action is "committed to agency discretion by law" must consider whether that action is of a type that "tradition, case law, and sound reasoning" would place beyond judicial scrutiny. *Id.* at 831.

Here, having determined that Ochoa's motion to reopen was solely a request for BIA to reopen her case *sua sponte*, the Eighth Circuit held that BIA's decision was "committed to agency discretion by law" under §701(a)(2). The court held that review is precluded

categorically when the BIA addresses motions to reopen *sua sponte*, and it therefore never considered that the BIA's denial of reopening in this particular case turned on the application of familiar legal standards rather than a weighing of policy or other factors that are characteristic of purely discretionary decisions. In so holding, the Eighth Circuit aligned itself with the Fourth and Sixth Circuits in conflict with decisions of at least six other courts of appeals. Had this case arisen in any of those other circuits, Ochoa's petition for review would have been entertained on the merits. This threshold jurisdictional question is a recurring one of great significance, and this Court's precedents cast serious doubt on the Eighth Circuit's holding. This Court should grant this Petition to resolve the circuit split and ensure uniformity with its decisions.

A. The Decision Below Deepens An Entrenched Circuit Conflict Concerning Whether BIA's Denial Of A Motion To Reopen *Sua Sponte* Is Categorically Exempt From Judicial Review

In *Kucana*, this Court expressly reserved the question of whether a denial of a motion to reopen *sua sponte* is "committed to agency discretion by law," observing that eleven courts of appeals had so concluded. *Kucana*, 130 S.Ct. at 839 n.18. Although perhaps superficially aligned, the courts of appeals had in fact adopted materially different approaches to the §701(a)(2) question where, as here, the agency's decision turns on questions of law. The lower courts' division has persisted after *Kucana*, and the

entrenched circuit conflict warrants this Court's immediate intervention.

With the decision below, the Eighth Circuit has joined the Fourth and Sixth Circuits in holding that review is never available for denials of *sua sponte* reopening—even in cases, like this one, that involve questions of law. *Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009) (stating categorically that there is no jurisdiction to review *sua sponte* denials of reopening); *Gor v. Holder*, 607 F.3d 180, 187 (6th Cir. 2010) (same).

At least three other circuits (the First, Second, Third) have held that review of such decisions *is* available in cases where the BIA decision rests on a legal determination, and another (the Seventh) has strongly indicated that it shares that view. *See Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) ("[W]here the Agency may have declined to exercise its *sua sponte* authority because it misperceived the legal background ..., remand to the Agency for reconsideration in view of the correct law is appropriate."); *Duarte-Ceri v. Holder*, 2010 WL 4968689, at *2 (2d Cir. 2010) (same); *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) (due process claim reviewable under *Heckler* even though BIA's decision not to reopen *sua sponte* generally is not); *Cruz v. Attorney General*, 452 F.3d 240, 250 (3d Cir. 2006) (dividing denials of *sua sponte* reopening into two categories, "unreviewable decision[s] to grant discretionary relief and reviewable decision[s] that alien is legally *ineligible* for discretionary relief") (citing *Pinho v. Gonzalez*, 432 F.3d 193 (3d Cir. 2005) (emphasis added)); *see also Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006) (Posner, J.) ("no law to apply" doctrine bars review only when "the Board's

order that was sought to be reviewed was indeed based on an exercise of uncabined discretion rather than on the application of a legal standard"; in any event, the doctrine "has been superseded in the immigration context" by the INA), *cert. denied*, 552 U.S. 826 (2007); *Munoz de Real v. Holder*, 595 F.3d 747, 750 (7th Cir. 2010) (reviewing BIA's refusal to reopen *sua sponte* for abuse of discretion).[3]

This circuit conflict has persisted since *Kucana* and shows no signs of abatement. Several circuits have explicitly declined to revisit their *sua sponte* reopening precedents in light of *Kucana*. *See* App.6a n.3 (*sua sponte* decisions categorically unreviewable even after *Kucana*); *Gor*, 607 F.3d at 197 (*en banc* court declined to revisit circuit precedent in light of *Kucana*, despite panel opinion urging court to do so); *Neves v. Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (concluding, on remand from this Court in light of *Kucana*, that *Kucana* "does not affect" circuit precedent concerning the

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[3] Although the Eighth Circuit remarked in dicta in *Tamenut* that federal courts "generally do have jurisdiction over any colorable constitutional claim," 521 F.3d at 1005, it did not have to reach that question because it found that Tamenut had not raised such a claim. And the circuit precedent cited in *Tamenut* for this proposition did not involve a motion to reopen (*sua sponte* or otherwise). Nor does *Tamenut*'s holding carve out an exception for review where the BIA has decided other questions of law. Thus, the Eighth Circuit's holding in this case—that it may not review for abuse of discretion BIA's rejection of Ochoa's ineffective assistance claim—aligns the Eighth Circuit with the Sixth and Fourth, against the weight of authority.

The Fifth Circuit appears to have taken yet a third approach, reviewing such decisions only when they raise a colorable constitutional claim. *See Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009).

reviewability of BIA decisions on motion to reopen *sua sponte*); *Gashi v. Holder*, 382 F. App'x 21, 23 (2d Cir. 2010) (Because *Kucana* "declined to reach the issue," circuit precedent "remains good law."); *Ozeiry v. Attorney Gen*, No. 09-3828, 2010 WL 3920522, at *2 (3d Cir. 2010) (same); *Jaimes-Aguirre v. U.S. Attorney Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010) (same). Notably, in *Neves*, the government had "recommended that the case be granted, vacated, and remanded in light of *Kucana*," 613 F.3d at 33, and this Court obliged, *Neves v. Holder*, 130 S.Ct. 3273 (2010).

Because BIA's decision denying Ms. Ochoa's motion to reopen was based on the agency's legal conclusions that Ochoa had not demonstrated ineffective assistance of counsel and had not satisfied 8 C.F.R. §1003.2(c), her petition for review would have been considered on its merits in the majority of circuits that have addressed the issue. This Court should grant the Petition to resolve the circuit conflict.

B. The Eighth Circuit's Holding Cannot Be Reconciled With This Court's Precedents

In *Tamenut v. Mukasey*, relied on by the court of appeals in this case, the BIA had denied Tamenut's untimely motion to reopen removal proceedings, which invoked BIA's authority to "reopen ... on its own motion," "at any time," "any case in which it has rendered a decision." 8 C.F.R. §1003.2(a); *see* 521 F.3d at 1002.[4] The BIA had "acknowledged it retained

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[4] Two separate panels of that court had previously concluded that it did not, *Recio-Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir. 2006), and *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162 (8th Cir. 2005).

'limited discretionary powers' under §1003.2(a) to reopen proceedings on its own motion, but stated that this power is confined to 'exceptional situations,' and concluded that Tamenut's situation did not merit this relief." *Tamenut*, 521 F.3d at 1002.

Addressing its jurisdiction, the Eighth Circuit concluded that IIRIRA's jurisdiction-stripping provision did not preclude review. *Id.* at 1003. The court perceived "*no[] material difference*" in that regard "between the BIA's decision to deny a party's motion to reopen and the BIA's decision to refuse a party's request that the agency reopen proceedings on its own motion." *Id.* (emphasis added).

Having determined (correctly, *see Kucana*, 130 S.Ct. at 831) that IIRIRA posed no obstacle to its review, the court of appeals then considered whether review was nevertheless precluded by §701(a)(2). *Tamenut*, 521 F.3d at 1003. The court first noted that the "statute governing motions to reopen speaks only to motions filed by a party," and that the relevant regulation, "8 C.F.R. §1003.2(a), provides no guidance as to the BIA's appropriate course of action ... and specifies no standards for a court to use to cabin the BIA's discretion." *Id.* at 1004. The court added that "[t]he use of permissive and discretionary language in the first sentence of §1003.2(a) further supports the inference that the agency action is unreviewable." *Id.* Finally, although the BIA had held that "it may reopen proceedings on its own motion in 'exceptional situations,'" and although "agency decisions about the presence of 'exceptional circumstances,' a similar phrase, are reviewable for abuse of discretion in some contexts, ... there is no statutory, regulatory, or case-law definition of 'exceptional situation' applicable to the

BIA's *sua sponte* power under §1003.2(a)." *Id.* at 1004-05.

Judge Beam dissented. In his view, the body of agency law reopening cases in "exceptional circumstances[,] ... combined with case law pertaining to when exceptional circumstances have been found[,] ought to be sufficient for us to unearth a meaningful standard of review." *Id.* at 1006 (Beam, J., dissenting). Judge Beam cautioned that "[g]iving unfettered authority to administrative agencies to strip our jurisdiction is a slippery slope," and one that need not be tread, in light of the "'strong presumption in favor of judicial review of administrative action.'" *Id.* at 1007 (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)).

1. BIA's *Sua Sponte* Reopening Decisions Are Reviewable Under *Kucana* and *Heckler*

In *Kucana*, this Court held that the jurisdiction-stripping provision of IIRIRA does not bar judicial review of a BIA decision denying an alien's motion to reopen removal proceedings. 130 S.Ct. at 834. Reasoning from the text, structure, and history of that statute, and mindful of the strong presumption favoring review of agency action, this Court held that §1252(a)(2)(B)(ii) bars review only of decisions made discretionary by the INA itself, and not of decisions made discretionary by regulations promulgated pursuant to the INA. Otherwise, this Court observed, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions "discretionary." *Kucana*, 130 S.Ct. at 840.

The BIA's authority to reopen proceedings—*sua sponte* or otherwise—is made discretionary by

regulation. Under *Kucana*, IIRIRA does not bar judicial review of such decisions. *Id.* at 831. The Court in *Kucana* "express[ed] no opinion" on whether the APA might nevertheless bar federal-court review of "the Board's decision not to reopen removal proceedings *sua sponte*." *Id.* at 839 n.18 (citing *Tamenut*). But *Kucana*'s reasoning refutes the position of the Fourth, Sixth, and Eighth Circuits that all such decisions are categorically unreviewable. Indeed, the logic of *Kucana* suggests strongly that appellate courts may generally review such decisions.

The very same statute that provided for appellate jurisdiction over the reopening determinations at issue in *Kucana* provides for appellate jurisdiction over *sua sponte* reopening determinations. *See* 8 U.S.C. §1252 (providing generally for jurisdiction over orders of removal and exceptions thereto). And the very same regulation that placed the decision to reopen "within the discretion of the Board" in *Kucana* applies to *sua sponte* determinations as well. *See* 8 C.F.R. §1003.2(a). Indeed, the regulation does not make *any* distinction between "*sua sponte*" reopening and reopening in response to a timely motion.

Section 1229a(c)(7)(A) states that "[a]n alien may file one motion to reopen proceedings under this section." The Attorney General has interpreted that provision to permit a second motion to reopen based on "changed circumstances arising in the country" of removal. 8 C.F.R. §1003.2(c)(3)(ii). *Kucana* involved such a motion. *See* 130 S.Ct. at 841 n.2 (Alito, J., concurring in the judgment) ("Petitioner challenges the denial of his *second* motion to reopen ....") (citing U.S. Brief) (emphasis added). But the Attorney General surely could revise the regulation to conform to the

statutory minimum of "one motion to reopen" as of right. The consequence would be that a successive motion to reopen—like Mr. Kucana's—would fall under BIA's authority to reopen "on its own motion" "at any time." 8 C.F.R. §1003.2(a). If the Eighth Circuit were correct that all such reopening decisions are categorically unreviewable, the Attorney General could accomplish by regulation precisely the result rejected in *Kucana* (rendering the decision on Kucana's second motion unreviewable).

Whatever else is true, *Kucana* makes clear that the terms of the Attorney General's regulation are not dispositive. *See generally* U.S. *Kucana* Br.; U.S. *Kucana* Reply Br. (Nov. 3, 2009). Yet, the basis of the Eighth Circuit's holding is precisely that §1003.2(a) defines the BIA's discretion over *sua sponte* reopening so broadly that it precludes judicial review under the APA. *See Tamenut*, 521 F.3d at 1003-04.

In holding that the appellate courts retain jurisdiction to review the BIA's equally unfettered discretion to deny motions to reopen by a party, *Kucana* nowhere suggests that review of those decisions might be impeded by the APA because of a dearth of meaningful standards to apply. *Cf. Overton Park*, 401 U.S. at 410. And rightly so: the courts of appeals "routinely review BIA decisions denying motions to reopen without encountering any obstacle created by a lack of meaningful standards of review." *Gor*, 607 F.3d at 197 (Cole, J., concurring). As this Court noted in *Kucana*, "[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." 130 S.Ct. at 834 (citing *Dada v. Mukasey*, 128 S.Ct. 2307, 2314-15 (2008)). Indeed, "[t]his Court has ultimately

reviewed reopening decisions on numerous occasions." *Id.* (collecting cases).

Congress obviously was well aware of this long tradition of appellate-court review of such decisions. Section §1252(b)(6) of the INA requires a court of appeals to consolidate a petition for review of a denial of reopening with a petition for review of the underlying removal order. 8 U.S.C. §1252(b)(6). As the government pointed out in *Kucana*, "[t]here would have been no need to provide for consolidation if the denial of a motion to reopen were not reviewable at all," U.S. *Kucana* Reply Br.18, whether due to IIRIRA or §701(a)(2)'s bar.

Nothing in this Court's decisions construing §701(a)(2) suggests that there is a distinction between timely and untimely motions to reopen—all of which are governed by the same "discretionary" regulation—that would render the latter categorically immune from judicial scrutiny. There is just as much "law to apply" in the *sua sponte* context as there is on review of a denial of a party's timely motion to reopen. *Overton Park*, 401 U.S. at 410.

Whether timely or untimely, there is no standard for when BIA is "*required* to reopen proceedings on its own motion." *Tamenut*, 521 F.3d at 1005 (emphasis added). The ultimate "decision to grant or deny a motion to reopen is within the discretion of the Board," and the Board may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. §1003.2(a). Nor would review intrude upon the Executive's prerogative to make the ultimate determination, as "'a matter of grace, ... whether aliens can stay in the country or not.'" *Kucana*, 130 S.Ct. at 837 (quoting Tr. of Oral Arg. at 14). As with the

reopening decision held reviewable in *Kucana*, a decision to deny a motion to reopen *sua sponte* is an "adjunct ruling[]" that "ordinarily ... touches and concerns only the question whether the alien's claims have been afforded a fair hearing." *Id.* Accordingly, *sua sponte* reopening determinations are not of a "like kind" with the "'substantive decisions" that Congress expressly committed to executive discretion by statute. *Id.* (*e.g.*, waivers of inadmissibility based on certain criminal offenses, §1182(h), or based on fraud or misrepresentation, §1182(i), and other substantive determinations). Accordingly, the mere fact that the ultimate substantive decision whether to allow an alien to remain in the country may be unreviewable does not counsel against review "to ensure 'that aliens [a]re getting a fair chance to have their claims heard.'" *Id.* at 837 (quoting Tr. of Oral Arg. at 17).

Nor does the Board's refusal to reopen *sua sponte* turn on complex questions of agency resource allocation. *Heckler*, 470 U.S. at 831-32. And unlike the agency decision not to undertake enforcement action held unreviewable in *Heckler*, a BIA decision refusing to reopen *sua sponte* occurs after the culmination of a removal proceeding, which produces an administrative record that "provides a focus for judicial review." *Id.* at 832.

Decisions on a motion to reopen *sua sponte* are cut of the same cloth as various other decisions that the federal courts review with regularity in both administrative and non-administrative arenas. The decision to deny reopening is susceptible to abuse-of-discretion review, *see Kucana*, 130 S.Ct. at 840; whether the motion is timely or not does not transform BIA's decision into one that "involves a complicated

balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831.

2. *Heckler* does not preclude review to the extent that an agency has resolved a question of law

Even if *sua sponte* reopening decisions were not generally reviewable, *Heckler* is no bar to review where an agency decides questions of law. In *Heckler*, this Court applied §701(a)(2) and held that the FDA's refusal to initiate enforcement action was not susceptible to judicial review. That decision was "attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.*

Other decisions holding that §701(a)(2) bars review are of a similar ilk. In *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), for example, the Court held that an agency's allocation of funds in a lump-sum appropriation was unreviewable, because "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances ... in what it sees as the most effective or desirable way." The Court otherwise has "limited the exception to judicial review provided by 5 U.S.C. §701(a)(2) to cases involving national security, such as *Webster v. Doe*, [486 U.S. 592 (1988),] and *Department of Navy v. Egan*, [484 U.S. 518 (1988),] or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring).

Outside of these distinct, policy-based areas in which the courts "have long been hesitant to intrude," *id.* at 819, this Court has refused to declare the federal

courts incompetent to perform appellate review except in those rare circumstances when it has concluded that there is effectively " 'no law to apply' " to the question, *id.* (quoting *Overton Park*, 401 U.S. at 410). In evaluating whether there is "no law to apply," the Court has focused on whether a given decision can be evaluated under a "judicially administrable standard of review." *Id.* at 820.

"*Sua sponte*" decisions of the character at issue here—denying reopening on the ground that the applicant failed to meet a legal standard established by case law, regulation, or statute, or decisions raising a colorable constitutional question— are different in kind from the sort of agency *in*action that this Court refused to review in *Heckler*. Such decisions are also not akin to questions of prosecutorial discretion, or matters of policy typically outside the traditional review authority of the courts. They instead involve issues in the heartland of judicial competence that affect an individual's liberty and thus "infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S. at 832. Several circuits correctly conclude that they are reviewable, and the Eighth Circuit's contrary holding should be reversed.

At a bare minimum, the decision at issue in this case is reviewable. Even assuming that a single obtuse sentence in Ochoa's timely motion to reopen can be read to invoke solely the BIA's *sua sponte* authority, the BIA's decision denying that motion is in all material respects identical to the BIA decision held reviewable in *Kucana*. Unlike the mine run of cases involving BIA *sua sponte* decisions, this case does *not* implicate an agency's discretion to forgive an untimely filing; both the BIA and the court of appeals explicitly

acknowledged that Ochoa's motion was timely. This case does involve, however, BIA's application of legal standards—including the ineffectiveness-of-counsel inquiry—that are well suited to this Court's review. The fact that Ochoa incanted the phrase "*sua sponte*" in her motion does not make the BIA's review any more discretionary, or somehow result in less "law to apply." The Eighth Circuit's categorical refusal to consider the character of the *BIA's decision* it was asked to review thus contravenes this Court's decisions irrespective of whether *sua sponte* denials (or even a subset of such denials) are generally reviewable.

C. The Petition Presents A Recurring Issue Of National Importance

This case involves the power of the federal courts to entertain a challenge to final BIA action where the Board's decision raises legal issues that the courts are well-equipped (and designed) to evaluate. The question presented goes to the proper balance of power between the Judiciary and the Executive. This court has frequently granted certiorari in like cases where lower courts have adjudged themselves incompetent to review entire categories of final agency action. *See, e.g., Kucana v. Holder*, 129 S.Ct. 2075 (2009) (granting certiorari over the government's opposition); *cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 644 (1990) (certiorari granted "because of the significant administrative law questions raised").

Moreover, the context in which this question arises counsels in favor of this Court's review. "'[D]eportation is a drastic measure and at times the equivalent of banishment or exile.'" *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951). This Court has very recently reminded that reopening is an

"'important safeguard'" designed to "'ensure a proper and lawful disposition'" of an alien's case. *Kucana*, 130 S.Ct. at 834 (quoting *Dada*, 128 S.Ct. at 2318). Whether a subset of such motions is categorically disentitled to the equally important safeguard of judicial scrutiny is a question worthy of this Court's plenary review.

The Eighth Circuit's deeply flawed decision reflects a longstanding and broader confusion in the lower courts as to the scope of §701(a)(2)'s narrow exception to judicial review of final agency action. Despite this Court's pronouncements on the subject, the courts of appeals remain hopelessly confused about how to determine whether agency actions are "committed to agency discretion by law" and thus unreviewable. *See, e.g.*, Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 734-40 (1990).

The lower courts' widespread confusion about the scope of §701(a)(2) has also led to conflicting conclusions concerning the reviewability of other types of BIA action—for example, decisions to deny administrative closure or affirm without opinion. *Compare Hernandez v. Holder*, 606 F.3d 900, 904 (8th Cir. 2010) and *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118 (9th Cir. 2009) (holding they are not reviewable) *with Cantu-Delgadillo v. Holder*, 584 F.3d 682, 686 (5th Cir. 2009); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 243 (6th Cir. 2007); *Vahora v. Holder*, 626 F.3d 907, 919 (7th Cir. 2010) ("The decision to continue a matter ... simply is not the sort of decision that 'involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise.'") (quoting *Heckler*, 470 U.S. at 831, 832). *Compare*

Haoud v. Ashcroft, 350 F.3d 201, 206 (1st Cir. 2003); *Smriko v. Ashcroft*, 387 F.3d 279, 291 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *with Kambolli v. Gonzales*, 449 F.3d 454, 460-65 (2d Cir. 2006); *Tsegay v. Ashcroft*, 386 F.3d 1347, 1353-56 (10th Cir. 2004); and *Ngure v. Ashcroft*, 367 F.3d 975, 981 (8th Cir. 2004).

The lower courts' confusion about §701(a)(2) is of course not confined to the BIA context, but affects the courts' appellate review of agency action generally. Granting review in this case will afford this Court an opportunity to provide much needed guidance to the lower courts on the proper limits of §701(a)(2)'s narrow exception to judicial review.

II. THE EIGHTH CIRCUIT'S DECISION CONTRAVENES *CHENERY*

The court of appeals acknowledged that the BIA "may have treated Ochoa's motion under the rubric of 8 C.F.R. §1003.2(c)," which governs timely motions by a party, because "BIA noted that Ochoa's motion is 'timely,' a determination pertinent under §1003.2(c)," and "used *Matter of Coelho* ... as its governing legal standard in evaluating Ochoa's evidence." App.6a. But it somehow concluded, nevertheless, that "the Board's treatment of the motion [wa]s unclear." *Id.* Without finally deciding how the BIA treated Ochoa's motion, the court of appeals proceeded to construe the motion for itself, and determined that Ochoa's failure to cite §1003.2(c), coupled with her use of the phrase "*sua sponte*" transformed her concededly timely motion to reopen into a limited request for *sua sponte* reopening. Perhaps most remarkably, the court stated that it would have reached the same result even if it were

clear that "the BIA addressed the merits of Ochoa's claim under a §1003.2(c) analysis." App.8a.

As Judge Colloton's dissenting opinions recognize, the court of appeals' decision blatantly disregards the stated basis of the BIA's decision and construes Ochoa's motion in a manner that defies common sense. The BIA's finding that Ochoa's motion to reopen was "timely" makes sense only if it interpreted her motion as one by a party, as such motions must be filed within 90 days of a final Board decision. The BIA also addressed the merits of Ochoa's motion with reference to regulations and precedent that govern such motions. And, as Judge Colloton observed, there is not a even a "hint" in the BIA's decision that it considered (even in the alternative) whether it should exercise its discretionary authority to reopen *sua sponte* (in stark contrast to the decision at issue in *Tamenut*, on which the court of appeals relied). App.11a; *see Tamenut*, 521 F.3d at 1003-04.

The court of appeals' holding squarely contravenes *Chenery*. Under *Chenery* and its progeny, this Court has long adhered to the "simple but fundamental rule of administrative law" that a court is "*powerless* to ... substitut[e] what it considers to be a more adequate or proper basis" for an agency's explanation of its action. *SEC v. Chenery Corp.* 332 U.S. 194, 196 (1947) (*"Chenery II"*) (emphasis added). Because a "judicial judgment cannot be made to do service for an administrative judgment," *Chenery I*, 318 U.S. at 88, agency action must stand or fall "'on the same basis articulated in the order by the agency itself,'" *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)). Accordingly, the court of appeals was

not free to construe Ochoa's motion afresh as a request for *sua sponte* relief.

Because the Eighth Circuit's decision squarely contravenes this Court's most fundamental holdings concerning the limits of judicial power, it would warrant summary reversal or plenary review even if it were an isolated, aberrant decision. It cannot be so swiftly dismissed, however. Several circuit courts, including the Eighth Circuit, have repeatedly demonstrated a willingness to affirm agency action on grounds not relied upon by the agency, in conflict with *Chenery* and the decisions of other circuits. *See, e.g.*, *Otter Tail Power Co. v. STB*, 484 F.3d 959, 963 (8th Cir. 2007) (holding that a party waived an argument by raising it "fatally late" before the agency, even though the agency had resolved the issue on its merits); *BNSF Ry. Co. v. STB*, 604 F.3d 602, 604 (D.C. Cir. 2010) (affirming STB decision on administrative forfeiture grounds not relied on by the Board, even though the Board had resolved the argument on its merits); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) (agency finding that complaint is "timely" does not prevent agency's counsel from asserting timeliness defense in subsequent litigation); *but see Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001) ("[W]hen an agency decides the merits of a complaint" court may not avoid review on procedural grounds) (citing *Chenery II*); *Abebe v. Gonzales* 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc) (court may not avoid consideration of an issue on administrative forfeiture grounds when the agency "has ignored a procedural defect and elected to consider an issue on its substantive merits"); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1120 (10th Cir. 2007) (same).

Even if the BIA's decision were "unclear," as the

court of appeals found, this Court's decisions command that the proper course would have been to remand to the agency for further explanation. This Court has emphasized "an important corollary of" *Chenery*'s bedrock rule: "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Chenery II*, 332 U.S. at 196. An appellate may not "guess at the theory underlying the agency's action," *id.* at 196-97, because an agency's "action must be measured by what [it] did, not by what it might have done." *Chenery I*, 318 U.S. at 93-94. This Court has on numerous occasions summarily reversed decisions that disregard *Chenery*'s admonition. *See, e.g., INS v. Ventura*, 537 U.S. 12, 16 (2002) (summarily reversing court of appeals for failure "'to remand to the agency for additional investigation or explanation'") (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and citing *Chenery II*); *Gonzalez v. Thomas*, 547 U.S. 183, 186 (2006) (summarily reversing where court of appeals contravened *Chenery* and *Ventura* by "'conduct[ing] a *de novo* inquiry into the matter being reviewed and ... reach[ing] its own conclusions,'" rather than remanding to the agency); *cf. Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 92-93 (1978) (summarily reversing where court of appeals' holding was based on either a "mistaken" characterization of Board's decision or "exceeded the scope" of its authority to review Board action).

Other circuits have hewed to this fundamental rule of administrative law in indistinguishable circumstances, and the Eighth Circuit's decision thus creates a direct circuit conflict. *See, e.g., Cruz*, 452 F.3d at 250 (remanding to BIA for further explanation where "presented with a 'jurisdictional conundrum' in

that we have no way of knowing whether the BIA declined to exercise its *sua sponte* authority on a reviewable or non-reviewable basis") (citing *Ventura*); *Haoud*, 350 F.3d at 205 (remanding for clarification of the grounds of BIA's decision).

The court of appeals' failure to heed *Chenery*'s command is especially egregious because its own construction of Ochoa's motion is not plausible—one might even say it was "arbitrary or capricious"—and served to deprive her of the federal-court review to which she is entitled under this Court's decisions. Indeed, when asked for a response to Ochoa's petition for rehearing, the government conspicuously declined to defend this aspect of the decision. *See* Reh'g Opp. at 2, 4; App.8a (Colloton, J., dissenting from denial of panel rehearing).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument or summarily reversed.

Respectfully submitted,

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