No. 13-1410

In the Supreme Court of the United States

GABRIELA CORDOVA-SOTO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1231(a)(5), if the Secretary of Homeland Security finds that an alien has unlawfully reentered the United States after having been removed, then "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under" the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, "and the alien shall be removed under the prior order at any time after the reentry." The question presented is:

Whether the court of appeals contravened the principle of judicial review enunciated in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), by addressing the applicability of Section 1231(a)(5) to petitioner's motion to reopen her original removal proceedings after her removal order was reinstated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-18a) is reported at 732 F.3d 789. The decisions of the Board of Immigration Appeals (Pet. App. 38a-42a) and the immigration judge (Pet. App. 28a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2013. A petition for rehearing was denied on February 21, 2014. Pet. App. 3a-4a. The petition for a writ of certiorari was filed on May 22, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may file a motion

to reopen removal proceedings based on previously unavailable material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (BIA or Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(a) and (c) (BIA); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). An alien is entitled to file only one such motion to reopen, and the motion generally must be filed within 90 days after entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). IJs and the BIA have discretion in adjudicating motions to reopen, and may deny such a motion "even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(3); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

b. When an alien who has been removed or who departed voluntarily under an order of removal illegally reenters the United States, the Department of Homeland Security (DHS) has the authority to reinstate the prior removal order and execute it again. 8 U.S.C. 1231(a)(5); 8 C.F.R. 241.8(a); see *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 34-35 (2006).[1] In

[1] Section 1231(a)(5) grants this authority to the Attorney General, but under 6 U.S.C. 557 the reference to the Attorney General is deemed to include the Secretary of Homeland Security, who has

those circumstances, "the prior order of removal is reinstated from its original date," and it "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). Moreover, "the alien is not eligible and may not apply for any relief under [the INA]." *Ibid.*[2]

For purposes of judicial review, "an order reinstating a prior removal order is 'the functional equivalent of a final order of removal.'" *Dinnall* v. *Gonzales*, 421 F.3d 247, 251 n.6 (3d Cir. 2005) (quoting *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003)). Thus, judicial review of a reinstatement order is subject to the 30-day time limit for filing a petition for review provided in 8 U.S.C. 1252(b)(1), a time limit that is "mandatory and jurisdictional." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (citation omitted).

2. Petitioner is a native and citizen of Mexico. Pet. App. 5a. She illegally entered the United States in 1978 and subsequently adjusted her status to that of a lawful permanent resident. *Id.* at 6a. Petitioner was then convicted of several crimes in Kansas, including felony possession of methamphetamine, theft, and forgery. *Ibid.* As a result of those convictions, DHS charged petitioner with being removable as (1) an aggravated felon, see 8 U.S.C. 1227(a)(2)(A)(iii); (2) an alien convicted of two crimes involving moral turpitude, see 8 U.S.C. 1227(a)(2)(A)(ii); and (3) an alien

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assumed responsibility for carrying out immigration enforcement functions. See 6 U.S.C. 251(2).

[2] Despite this broad bar to relief, an alien subject to a reinstated removal order may seek withholding of removal based on a reasonable fear of persecution or torture. 8 C.F.R. 208.31, 241.8(e); see 8 C.F.R. 241.8(d) (implementing statutory exceptions to Section 1231(a)(5) for certain narrow classes of aliens).

convicted of a controlled substance offense, see 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 6a-7a.

After consulting with a legal aid organization, petitioner waived her right to a hearing, admitted that she was removable as charged, and stated that she would not seek any form of relief from removal. Pet. App. 7a. In particular, petitioner signed a stipulated request for the issuance of a final removal order, in which she waived her right to be represented by counsel in the removal proceedings, waived her right to a hearing, admitted all factual allegations in the charging document, conceded all charges of removability, waived any right to apply for relief from removal, waived her right to appeal the removal order, and attested that she had executed the stipulation "voluntarily, knowingly, and intelligently." *Ibid.*; A.R. 359-362.

Based on that stipulation, the IJ found petitioner removable as charged and ordered her removed to Mexico. Pet. App. 19a-20a. The removal order specifically warned petitioner that she was prohibited from entering or attempting to enter the United States at any time and that she would be required to obtain permission from the Attorney General in order to reapply for admission. A.R. 361. The IJ entered the removal order on November 8, 2005, and petitioner was removed to Mexico on November 10, 2005. Pet. App. 19a-20a, 21a.

3. Five years later, DHS officials discovered that petitioner was living illegally in the United States. Pet. App. 8a. DHS issued a notice of its intent to reinstate the prior removal order under 8 U.S.C. 1231(a)(5). Pet. App. 21a-23a. In response, petitioner submitted a sworn statement that she had reentered

the United States on November 27, 2005, less than three weeks after her removal. A.R. 291. Petitioner acknowledged that she had not applied to the Attorney General for permission to reenter the United States. *Ibid.* An immigration officer, after "review[ing] all available evidence, the administrative file and any statements made or submitted in rebuttal," reinstated petitioner's prior order of removal. Pet. App. 21a-23a.

4. Petitioner filed a petition for review of the reinstatement order in the Tenth Circuit. Among other things, she argued that her original removal order was defective because she received poor legal advice about whether she was removable and whether she was eligible for relief from removal. The Tenth Circuit denied the petition, holding that although it could review DHS's determination that the statutory criteria for reinstatement had been met, it lacked jurisdiction to review petitioner's challenges to her original removal order. *Cordova-Soto* v. *Holder*, 659 F.3d 1029 (10th Cir. 2011). The court explained that 8 U.S.C. 1231(a)(5) provides that a removal order that has been reinstated "is not subject to being * * * reviewed," and further noted that petitioner's request for review of the original removal order was jurisdictionally barred under 8 U.S.C. 1252(b)(1) because it was not filed within 30 days after the entry of that order. 659 F.3d at 1031-1032. This Court denied a petition for a writ of certiorari. 133 S. Ct. 647 (2012).

5. On January 24, 2012, while her petition for a writ of certiorari remained pending, petitioner filed a motion with the IJ seeking to reopen her original removal proceedings. Pet. App. 30a. She contended that reopening was warranted because the stipulated

removal order entered against her in November 2005 was defective, as she had not knowingly, voluntarily, and intelligently waived her rights. *Ibid.* In particular, she argued that she was not aware of pending litigation that would establish that her conviction for possession of methamphetamine was not an aggravated felony. *Id.* at 30a-31a; see *Lopez* v. *Gonzalez*, 549 U.S. 47 (2006). Petitioner still would have been removable because of her criminal record, but she argued that without an aggravated felony she would have been eligible to apply for cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 30a-31a. She also argued that her stipulated order of removal was defective because it did not contain a finding that her waiver of her rights was knowing, voluntary, and intelligent. *Id.* at 30a; see 8 C.F.R. 1003.25(b).

The IJ denied the motion to reopen on multiple grounds. Pet. App. 28a-35a. First, the IJ held that the motion was untimely, "as it was filed more than six years after entry of a final administrative order" and thus well after the 90-day statutory deadline. *Id.* at 32a; see 8 U.S.C. 1229a(c)(7)(C)(i). The IJ also rejected petitioner's claim that she was entitled to equitable tolling, explaining that she had not exercised diligence in seeking legal relief from the original removal order and had instead engaged in impermissible self-help by unlawfully reentering the country. Pet. App. 32a. Second, the IJ concluded Section 1231(a)(5) deprived the immigration court of jurisdiction to entertain the motion to reopen by providing that, once a removal order is reinstated, that order is "not subject to being reopened or reviewed." *Id.* at 33a (emphasis omitted) (quoting 8 U.S.C. 1231(a)(5)). Third, the IJ concluded that even setting aside these threshold bars, the mo-

tion to reopen should be denied on the merits because petitioner failed to establish that the stipulated order of removal was defective, as it was based on legal advice that was accurate when provided and there was otherwise no indication that her agreement to that order was not knowing, voluntary, and intelligent. *Id.* at 33a-34a. Finally, the IJ held that petitioner had not established the extraordinary circumstances required to justify sua sponte reopening of the original removal order, and that the immigration court lacked discretion to grant such relief in any event. *Id.* at 34a.

The BIA dismissed petitioner's administrative appeal in a brief order. Pet. App. 38a-42a. The Board noted that the IJ had relied on "multiple grounds" in denying relief. *Id.* at 40a. The Board then specifically endorsed the IJ's finding that petitioner's motion was untimely. *Id.* at 40a-41a. It further agreed that equitable tolling was not available, as petitioner failed to establish any circumstance that "could possibly excuse the lateness of the motion." *Id.* at 41a. Finally, the Board agreed with the IJ that petitioner's case did not present any exceptional circumstances warranting sua sponte reopening. *Id.* at 41a.

6. The court of appeals denied a petition for review. Pet. App. 5a-18a. The court began by explaining that "[b]ecause the Board agreed with the immigration judge's multiple grounds for denying the petition," the court would "review the immigration judge's order as supplemented by the Board's decision." *Id.* at 12a. The court then agreed with the IJ's determination that Section 1231(a)(5) barred petitioner's motion to reopen. *Id.* at 12a-18a. The court explained that the plain language of the statute provides that once a removal order is reinstated, it "is not subject to

being reopened." 8 U.S.C. 1231(a)(5); see Pet. App. 12a-14a. The court therefore held that this case "fall[s] squarely within the terms of [Section] 1231(a)(5)." Pet. App. 16a. The court rejected petitioner's argument that Section 1231(a)(5)'s bar on reopening applies "only while the reinstatement process is underway" but not after it is completed, explaining that no such limitation appears in the statutory text. *Id.* at 13a-14a. And the court concluded that because the BIA "[l]ack[ed] the authority to reopen a removal order after its reinstatement, the Board did not err by denying [petitioner's] motion to reopen." *Id.* at 18a.

7. Petitioner filed a petition for rehearing en banc, which the court of appeals denied with no judge requesting a vote. Pet. App. 3a-4a.

ARGUMENT

Petitioner contends (Pet. 10-18, 33) that the court of appeals contravened the principle of judicial review articulated in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*), by upholding the BIA's decision based on 8 U.S.C. 1231(a)(5), a ground that petitioner asserts was not relied upon by the Board. She urges the Court to grant review of that issue and summarily reverse. That claim should be rejected because the court of appeals' decision is entirely consistent with *Chenery* and its progeny. Petitioner does not appear to seek this Court's review of the merits of the court of appeals' interpretation of Section 1231(a)(5), but she nonetheless sets out an argument (Pet. 26-32) that the court of appeals' reading was erroneous. The court of appeals' interpretation, however, was correct and does not squarely conflict with any decision by another court of appeals. It thus would not warrant

further review even if petitioner had sought review on that ground. Moreover, this case would be a poor vehicle in which to take up either of these issues because petitioner's motion to reopen was foreclosed on independent grounds. Further review is unwarranted.

1. In *Chenery I*, this Court articulated the "fundamental rule of administrative law" that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*). If the grounds relied upon by the agency "are inadequate or improper," then "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Ibid.* Petitioner contends (Pet. 10-18, 33) that the court of appeals contravened that principle by affirming the BIA's decision based on Section 1231(a)(5). But that question is not presented here because the court of appeals interpreted the BIA's decision as adopting all of the IJ's grounds for denying petitioner's motion to reopen, including the Section 1231(a)(5) bar on which the court itself relied. In any event, this Court has made clear that a reviewing court may affirm an agency's action based on a ground not relied upon by the agency where, as here, the court concludes that the agency lacked authority to reach any other result. There is thus no merit to petitioner's assertion that the decision below is inconsistent with this Court's recent decisions concerning remands to the BIA in the immigration context.

a. Petitioner's *Chenery* argument rests on the premise that the BIA did not rely upon the Section

1231(a)(5) bar invoked by the court of appeals. See Pet. 10 (asserting that the court of appeals "decid[ed] a complicated statutory interpretation question rather than reviewing only the grounds given by the [BIA]"). But as petitioner acknowledges in a footnote (Pet. 8 n.4), the court of appeals concluded that "the Board agreed with the [IJ]'s multiple grounds for denying the petition," and the court therefore "review[ed] the [IJ]'s order as supplemented by the Board's decision." Pet. App. 12a.[3] Because the IJ's order unquestionably included a determination that Section 1231(a)(5) barred petitioner's motion to reopen, *id.* at 33a, the *Chenery* doctrine is not implicated here. Consistent with *Chenery* and its progeny, the court of appeals upheld an administrative decision based on one of "the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196.

Petitioner briefly contends (Pet. 8 n.4) that the court of appeals was wrong to conclude that the BIA had adopted all of the grounds relied upon by the IJ. But that claim—made only in a footnote in the petition's statement—does not raise any legal question about the proper application of *Chenery* or any question of broader importance meriting this Court's review. Instead, it presents only a narrow dispute about the proper reading of the BIA's opinion in this partic-

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[3] The court of appeals' review of the IJ's order as supplemented by the BIA's decision is consistent with precedent in the Seventh Circuit and in other courts of appeals. See, *e.g.*, *Sam* v. *Holder*, 752 F.3d 97, 99 (1st Cir. 2014) ("Where the BIA has deferred to or adopted the IJ's reasoning, we review the IJ's decision, as supplemented by the BIA."); *Georgieva* v. *Holder*, 751 F.3d 514, 519 (7th Cir. 2014) (same); see also *Secaida-Rosales* v. *INS*, 331 F.3d 297, 305-306 (2d Cir. 2003) (collecting cases).

ular case. That factbound question does not warrant this Court's review even if petitioner were correct that the court of appeals misread the BIA's opinion. In any event, the Board dismissed petitioner's appeal in a short opinion by a single Board member, and it noted the IJ's "'multiple grounds' for denying the motion to reopen." Pet. App. 40a, 42a n.4. The Board did not specifically discuss Section 1231(a)(5), but under the circumstances it was not unreasonable for the court of appeals to conclude that the Board had adopted all of the grounds relied upon by the IJ, not just those that the Board specifically discussed in its opinion.

b. In any event, petitioner's *Chenery* argument would fail even if she were correct that the court of appeals relied on a ground not passed upon by the BIA. *Chenery* precludes a court from invading "the domain which Congress has set aside exclusively for the administrative agency" by making in the first instance "a determination or judgment which an administrative agency alone is authorized to make." *Chenery II*, 332 U.S. at 196. The *Chenery* principle thus provides that a court "may not affirm *on a basis containing any element of discretion*—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court." *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (emphasis added).

In this case, the court of appeals did not affirm the BIA's decision on any ground containing an element of discretion reserved to the Board. Instead, the court concluded that Section 1231(a)(5) unambiguously foreclosed petitioner's motion to reopen, such that the

BIA "lack[ed] the authority to reopen [the] removal order" even it had wished to do so. Pet. App. 18a; see *id.* at 16a (explaining that petitioner's motion to reopen "fall[s] squarely within the terms of [Section] 1231(a)(5)"). Given that determination, no remand would have been required even if the Board had not adopted the IJ's interpretation of Section 1231(a)(5). As this Court has explained, "[t]he *Chenery* doctrine has no application" where a reviewing court concludes that the agency "was *required*" to reach the result that it did. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 544 (2008) (*Morgan Stanley*). In such circumstances, a remand to allow the agency to provide a different justification for the legally required result is unnecessary because it "'would be an idle and useless formality. *Chenery* does not require that [courts] convert judicial review of agency action into a ping-pong game.'" *Id.* at 545 (quoting *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766-767 n.6 (1969) (opinion of Fortas, J.)).

Petitioner concedes (Pet. 13) that *Morgan Stanley* "may be read to support" the court of appeals' decision in this case. But she implies (Pet. 13-14) that the relevant portions of the *Morgan Stanley* opinion are dicta, dismissing them as "statements" or "language." That characterization is inaccurate. In *Morgan Stanley*, the administrative order under review provided one justification, but the agency "change[d] its tune" and defended the order on a different ground in this Court. 554 U.S. at 544. The Court expressly relied on that new rationale in upholding the agency's order, explaining that the fact that the agency "provided a different rationale for the necessary result is no cause for upsetting its ruling." *Id.* at 545. This aspect of the

Court's reasoning was essential to its conclusion and cannot be dismissed as mere dicta. See *id.* at 544-545; see also *id.* at 568 (Stevens, J., dissenting) (criticizing the Court for upholding the agency's decision even though the agency "offered a justification in court different from what it provided in its opinion.") (citation omitted).

Morgan Stanley's holding that *Chenery* is inapplicable when a court concludes that the agency was required by statute to reach the result it did is also consistent with *Chenery* itself. The purpose of the *Chenery* doctrine is to prevent courts from "intrud-[ing] upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery I*, 318 U.S. at 88. Both of this Court's decisions in *Chenery* therefore limited the remand requirement to circumstances in which a court considers "a determination or judgment which an administrative agency alone is authorized to make." *Chenery II*, 332 U.S. at 196; accord *Chenery I*, 318 U.S. at 88 (the rule applies where an administrative order "is valid only as a determination of policy or judgment which the agency alone is authorized to make"). The rule thus does not apply where, as here, a court concludes that the unambiguous terms of the statute required the agency to reach the same result.

This Court's subsequent decisions have drawn the same line, explaining that the *Chenery* rule applies to "discretionary order[s]," *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962), or "if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference," *Fort Stewart Sch.* v. *Federal Labor Relations Auth.*, 495

U.S. 641, 651-652 (1990). Judge Friendly's leading article on *Chenery* takes a similar view, explaining that a remand "is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result." Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 211.[4]

In this case, the court of appeals concluded that, under Section 1231(a)(5), the BIA "lack[ed] the authority to reopen a removal order after its reinstatement." Pet. App. 18a. Having done so, the court acted properly in affirming the BIA's decision on that basis even if the BIA's decision were understood not to have adopted the IJ's conclusion: Because the court of appeals concluded that the BIA had no authority to reach a contrary result, a remand would have been "an idle and useless formality." *Morgan Stanley*, 554 U.S. at 545 (quoting *Wyman-Gordon Co.*, 394 U.S. at 766-767 n.6 (opinion of Fortas, J.)).

c. Petitioner does not argue that the court of appeals' decision implicates any conflict among the circuits regarding the proper application of *Chenery*. See Pet. 16-18. Instead, she contends (Pet. 10-18) that

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[4] See also, *e.g.*, *American Meat Inst.* v. *USDA*, No. 13-5281, 2014 WL 3732697, at *6 (D.C. Cir. July 29, 2014) (en banc) ("'[T]he *Chenery* doctrine * * * has no application to' agency actions required by statute.") (quoting *Morgan Stanley*, 554 U.S. at 544); *Grabis* v. *OPM*, 424 F.3d 1265, 1270 (Fed. Cir. 2005) ("*Chenery* does not apply if there is no room for the agency to exercise discretion in deciding the legal issue under review."); *Sierra Club* v. *EPA*, 325 F.3d 374, 380 (D.C. Cir. 2003) (*Chenery* "is inapplicable when the agency's conclusion is one 'to which it was bound to come as a matter of law.'") (quoting *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989)).

this Court should summarily reverse based on *Chenery* and three recent cases in which this Court has held that particular immigration matters must be addressed in the first instance by the BIA rather than by a court of appeals. See *Negusie* v. *Holder*, 555 U.S. 511 (2009); *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam); *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam). In each of those cases, however, this Court ordered a remand because it concluded that the Board was not legally required to reach a particular result. See *Negusie*, 555 U.S. at 517, 523 (concluding "that the statute has an ambiguity that the agency should address in the first instance" in an exercise of its "*Chevron* discretion"); *Thomas*, 547 U.S. at 186 (explaining that "[t]he matter requires determining the facts and deciding whether the facts as found fall within a statutory term"); *Orlando Ventura*, 537 U.S. at 17-18 (rejecting the court of appeals' conclusion that no remand was required because the record evidence "compelled a [particular] finding" by the Board, and holding instead that the relevant evidence was "at most, ambiguous" and that a remand could also lead to a different result through "presentation of further evidence"). Accordingly, *Negusie*, *Thomas*, and *Orlando Ventura* are entirely consistent with the established rule that no remand is required where—as in this case and in *Morgan Stanley*—a reviewing court concludes that the agency would be compelled by statute to reach the same result on remand.[5]

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[5] Petitioner also relies (Pet. 17) on a number of cases in which this Court, on the government's petition, granted a writ of certiorari, vacated the decision below, and remanded for further consideration in light of *Thomas* or *Orlando Ventura*. See *Keisler* v. *Hong Yin Gao*, 552 U.S. 801 (2007); *Gonzales* v. *Tchoukhrova*, 549

2. Petitioner does not appear to seek this Court's review of the merits of the court of appeals' interpretation of Section 1231(a)(5), instead arguing (Pet. 10-12, 33) that the Court should summarily reverse in light of the asserted *Chenery* error in addressing Section 1231(a)(5) at all. But petitioner nonetheless sets out an argument (Pet. 26-32) that the court of appeals' interpretation is erroneous and inconsistent with a decision of the Ninth Circuit. That argument lacks merit. The court of appeals correctly concluded that Section 1231(a)(5) bars the reopening of a reinstated removal order even after the alien has been removed from the country again, and its decision does not squarely conflict with any decision by another court of appeals—indeed, it appears that no other court of appeals has addressed the application of Section 1231(a)(5) in a case involving an alien who filed a motion to reopen after being removed pursuant to a reinstated removal order.

a. Section 1231(a)(5) provides that if the Secretary of Homeland Security finds that an alien has illegally reentered the country after having been removed, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." As the court of appeals explained, petitioner's motion to reopen "fall[s] squarely within" that unambiguous prohibition on reopening a reinstated

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U.S. 801 (2006); *INS* v. *Silva-Jacinto*, 537 U.S. 1100 (2003); *INS* v. *Yi Quan Chen*, 537 U.S. 1016 (2002). Those cases are distinguishable on the same ground as *Thomas* and *Orlando Ventura* themselves. The same is true of *Bolieiro* v. *Holder*, 731 F.3d 32 (1st Cir. 2013). In that case, the First Circuit remanded to the BIA only because it could not conclude that the Board was bound to reach the same result on remand. *Id.* at 41 ("[W]e cannot say that [the alien]'s attempts to obtain relief are doomed.").

removal order. Pet. App. 16a. Petitioner was removed in 2005; she unlawfully reentered the country shortly thereafter; her original removal order was reinstated; and petitioner moved to reopen that removal order in contravention of Section 1231(a)(5). *Id.* at 15a-16a. Petitioner seeks to escape that straightforward conclusion on several grounds, all of which lack merit.

First, petitioner contends (Pet. 27-28) that the only purpose of Section 1231(a)(5) is "to expedite the reremoval of a person who returns without permission after being removed," Pet. App. 14a (citation omitted), and that the statutory bar on reopening ceases to serve that function once the alien has been removed again. But as this Court has explained, the amendments adopting the current version of Section 1231(a)(5) sought not only to expedite the removal of aliens who reentered the country unlawfully, but also to "invest [the reinstatement process] with something closer to finality." *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 39-40 (2006). Section 1231(a)(5) continues to serve that interest in finality where, as here, it bars an alien who unlawfully reentered the country from reopening a reinstated removal order after the alien has again been removed.

Second, petitioner contends that Section 1231(a)(5)'s bar on reopening ceases to apply once an alien has been removed because it is phrased in the present tense, providing that the removal order "is not subject to being reopened." Pet. 28 (emphasis omitted). But as the court of appeals observed, many permanent bars in the INA are also phrased in the present tense. Pet. App. 13a-14a; see 8 U.S.C. 1182 (defining numerous bars to admissibility by providing

that any alien who meets specified criteria "is inadmissible"). And the conclusion that Section 1231(a)(5) establishes a permanent bar is reinforced by the Dictionary Act, which provides that "unless the context indicates otherwise * * * words used in the present tense include the future as well as the present." 1 U.S.C. 1.[6]

Third, petitioner contends (Pet. 29-30) that reading Section 1231(a)(5) as a permanent bar would create a conflict with 8 U.S.C. 1182(a)(9)(C) because Section 1231(a)(5) provides that an alien who illegally reenters the country "is not eligible and may not apply for any relief under [the INA]," whereas Section 1182(a)(9)(C) provides that certain individuals who have illegally reentered the country may be granted relief from inadmissibility. No such conflict exists. Section 1182(a)(9)(C)(i) provides that an alien who "has been unlawfully present in the United States for an aggregate period of more than 1 year" or who "has been ordered removed" is inadmissible if the alien "enters or attempts to reenter the United States without being admitted." Under Section 1182(a)(9)(C)(ii) and (iii), DHS may grant exceptions or waivers to that bar on admissibility in particular

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[6] Petitioner also notes (Pet. 29) that in an unrelated provision, Congress provided that ineligibility for certain relief would be "permanent[]." 8 U.S.C. 1158(d)(6). But it does not follow, as petitioner would have it, that any bar not expressly labeled as permanent is merely temporary. To the contrary, as the court of appeals explained, "[w]hen a bar is designed to be less than permanent" the INA "specifies how long the bar lasts." Pet. App. 14a; see, *e.g.*, 8 U.S.C. 1182(a)(9)(a)(i). And nothing in the statutory text supports petitioner's view that Section 1231(a)(5)'s bar on motions to reopen ceases to apply once the alien has been removed again.

circumstances. But there is no inconsistency between those exception or waiver provisions and the court of appeals' interpretation of Section 1231(a)(5) as a permanent bar on reopening a reinstated removal order. The court of appeals did not address the scope of Section 1231(a)(5)'s bar on "any relief under [the INA]" or consider whether it would extend to the relief available under Section 1182(a)(9)(C). Cf. *Fernandez-Vargas*, 548 U.S. at 35 & n.4 (stating that Section 1231(a)(5) "generally forecloses discretionary relief *from the terms of the reinstated order*" and noting that aliens subject to reinstated removal orders may receive certain forms of protection (emphasis added)). And even if petitioner were correct that the court of appeals' decision means that an alien in her situation is not eligible for relief from inadmissibility under Section 1182(a)(9)(C), that would not render the exceptions or waivers in that provision superfluous or inoperative. Section 1182(a)(9)(C) applies to all aliens who, having been unlawfully present for more than one year in the aggregate or having been ordered removed, thereafter "enter[] or attempt[] to reenter the United States without being admitted." Section 1231(a)(5), in contrast, denies relief only to aliens who reenter the country and then have their original removal orders reinstated. Cf. *Lattab* v. *Ashcroft*, 384 F.3d 8, 21 (1st Cir. 2004) ("The mere fact that [Section 1231(a)(5)] precludes a subset of aliens from taking advantage of [relief otherwise available under another statutory provision] does not create a conflict [with that other provision].").

Fourth, petitioner contends that reading Section 1231(a)(5) as a permanent bar on reopening a reinstated removal order conflicts with the reopening

statute, which petitioner asserts "affords every noncitizen the right to file 'one motion to reopen'" removal proceedings. Pet. 30 (quoting 8 U.S.C. 1229a(c)(7)(A)). Petitioner further contends (Pet. 18-26) that the ability to file a motion to reopen is an important safeguard, particularly for aliens who are removed through expedited or other streamlined proceedings. But the INA does not establish an absolute right for an alien to file a motion to reopen, regardless of the alien's delay or misconduct. To the contrary, Section 1229a(c)(7)(C)(i) itself generally requires a motion to reopen to be filed within 90 days. And Section 1231(a)(5), which expressly limits reopening of reinstated removal orders, simply provides that an alien forfeits her right to file a motion to reopen if she reenters the country unlawfully rather than seeking relief through legal means. As the court of appeals explained, an alien in petitioner's situation has available "extensive procedures to protect her rights and interests," including "a reasonable opportunity to move to reopen" after the entry of her original removal order. Pet. App. 14a-15a. Petitioner is barred from seeking reopening under Section 1231(a)(5) only because she declined to avail herself of those protections and instead "engage[d] in unlawful self-help by simply sneaking back into the country." *Id.* at 15a. There is no injustice or unfairness in that result.[7]

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[7] Petitioner suggests in passing (Pet. 31-32) that the court of appeals' interpretation of Section 1231(a)(5) raises constitutional difficulties, but she does not develop that argument in any detail. Moreover, her constitutional argument appears to focus on a question not presented here—the extent to which an alien has a "constitutional * * * right to mount a collateral attack [on the original removal order] in the reinstatement proceeding." Pet. 32.

b. The court of appeals' interpretation of Section 1231(a)(5) does not conflict with any decision by another court of appeals. Indeed, it appears that no other court has addressed the application of Section 1231(a)(5) in a case like this one. Petitioner asserts (Pet. 27, 30-32) that the decision below is "squarely * * * contrary" to the Ninth Circuit's decision in *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484 (2007) (en banc). But *Morales-Izquierdo* addressed an entirely different question: the validity of a regulation that allowed immigration officers, rather than IJs, to reinstate removal orders under Section 1231(a)(5). See *id.* at 487-488. The Ninth Circuit rejected an alien's challenge to the regulation, concluding that it was "a valid interpretation of the INA" and that it raised no constitutional difficulties as applied in that case. *Id.* at 495-498.

Petitioner is correct that, in one section of its opinion, the Ninth Circuit appeared to assume that the alien would be able to move to reopen a reinstated removal order after being deported again, *Morales-Izquierdo*, 486 F.3d at 497-498, stating that Section 1231(a)(5)'s bar on reopening applies only "during the course of the reinstatement process," *id.* at 498. But the Ninth Circuit did not explain the basis for that

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As the court of appeals explained, some circuits have left open the possibility that, in some circumstances, an alien should be allowed to raise constitutional challenges to an underlying removal order "while the reinstatement order is under review." Pet. App. 16a-17a. Here, however, petitioner seeks to attack her original removal order not in the context of reinstatement proceedings, but rather through a motion to reopen filed "after the review of the reinstatement is complete," *id.* at 17a, and from outside the United States. Petitioner identifies no constitutional difficulty with Section 1231(a)(5)'s bar on reopening in such circumstances.

apparent assumption or attempt to reconcile it with the text of Section 1231(a)(5), which contains no such temporal limitation. And the Ninth Circuit had no occasion to do so because *Morales-Izquierdo*, unlike this case, did not involve a motion to reopen a reinstated removal order—rather, it arose from a petition for review of the reinstatement order. See *id.* at 488-489. Because *Morales-Izqueirdo* arose in a different procedural posture and did not analyze the question presented here, the statements on which petitioner relies do not create any conflict warranting this Court's review.

3. Finally, this case would be a poor vehicle in which to consider the issues petitioner raises because her motion to reopen is barred on independent grounds.

First, a motion to reopen generally must be filed "within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). Petitioner's motion is untimely because "it was filed more than six years after entry of a final administrative order." Pet. App. 32a. And as both the BIA and the IJ explained, petitioner neither satisfies any of the statutory exceptions to the 90-day deadline nor qualifies for equitable tolling. *Id.* at 32a, 40a-41a. Indeed, instead of diligently pursuing her legal rights, petitioner unlawfully reentered the country, concealed herself from immigration authorities, and sought legal relief from her original removal order only after she was discovered. Petitioner has identified no authority supporting the application of equitable tolling in such circumstances.

Second, as the IJ explained, petitioner's motion to reopen would fail on the merits in any event "because

she has failed to show that the stipulated order of removal is defective." Pet. App. 33a. Petitioner consulted with a legal services organization prior to waiving any right to apply for relief and any challenges to her removal order, and her stipulation included all of the records of the convictions establishing that she was removable as charged. *Id.* at 6a-7a; A.R. 164, 372-394. Regulations expressly permit an IJ to enter a stipulated removal order "without a hearing and in the absence of the parties" based on the IJ's own "review of the charging document, the written stipulation, and supporting documents, if any." 8 C.F.R. 1003.25(b). The IJ in this case conducted that review and concluded that "[b]ased upon [petitioner's] admissions, the charges of removal are sustained by evidence that is clear and convincing." A.R. 358.[8]

[8] As the court of appeals observed, Pet. App. 17a-18a, the IJ was required to "determine that [petitioner's] waiver [wa]s voluntary, knowing, and intelligent." 8 C.F.R. 1003.25(b). But there was ample basis in petitioner's statements in the stipulation to conclude that she voluntarily, knowingly, and intelligently waived her rights. Pet. App. 7a; see A.R. 359-362. Petitioner thus cannot demonstrate any prejudice from the IJ's failure to make an express finding to that effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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