No. 08-495

In the Supreme Court of the United States

MANOJ NIJHAWAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 523 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 44a-51a) and the immigration judge (Pet. App. 54a-55a, 56a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2008. A petition for rehearing was denied on July 17, 2008 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on October 14, 2008. The petition for a writ of certiorari was granted on January 16, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. In 1988, Congress first provided that an alien who has been convicted of an "aggravated felony" is removable from the United States. At that time, Congress defined the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to include murder, certain drug- and firearms-trafficking offenses as defined in the federal criminal code, and "any attempt or conspiracy to commit" the itemized acts. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-7344, 102 Stat. 4469-4470; see 8 U.S.C. 1101(a)(43) and 1227(a)(2)(A)(iii) (1988). Since then, Congress has expanded the INA's definition of "aggravated felony" on a number of occasions.

In 1990, Congress expanded the definition of "aggravated felony" by adding "any offense described in section 1956 of title 18 (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 5048; see 8 U.S.C. 1101(a)(43) (Supp. II 1990).

In the Immigration and Nationality Technical Corrections Act of 1994 (ITCA), Pub. L. No. 103-416, 108 Stat. 4305, Congress revamped the structure of 8 U.S.C. 1101(a)(43) by listing the different aggravated felonies in separate subparagraphs. It also added several new offenses, including one at issue in this case:

> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000.

8 U.S.C. 1101(a)(43)(M) (1994); see ITCA § 222(a), 108 Stat. 4322. At the time, an alien convicted of an aggravated felony after admission was rendered deportable, 8 U.S.C. 1251(a)(2)(A)(iii) (1994), but could in some circumstances seek a discretionary waiver of deportation, see *INS* v. *St. Cyr*, 533 U.S. 289, 295-297 (2001).

The definition of "aggravated felony" was further expanded in two statutes enacted in 1996: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(e), 110 Stat. 1277, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 321(a) of IIRIRA added more categories and expanded the reach of preexisting categories. Among other things, it reduced the loss thresholds in Section 1101(a)(43)(M)(i) and (ii) from $200,000 to $10,000; it reduced the term-of-imprisonment threshold for several categories from five years to one year; and it expressly made the definition of aggravated felony applicable "regardless of whether the conviction was entered before, on, or after [IIRIRA's effective date]." IIRIRA § 321(a)-(b), 110 Stat. 3009-627 to 3009-628; 8 U.S.C. 1101(a)(43)(F), (G), (J), (M), (P), (R) and (S) (Supp. II 1996).

An alien "convicted of an aggravated felony" is deportable under 8 U.S.C. 1227(a)(2)(A)(iii) and is also ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and

(b)(1)(C), asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

2. a. Petitioner is a native and citizen of India who entered the United States as an immigrant in July 1985. Pet. App. 55a. In 2002, he was arrested and indicted in the Southern District of New York for his involvement in a massive "fraudulent scheme to obtain hundreds of millions of dollars in loans from numerous major banks." J.A. 16a; see Pet. App. 2a. Count 1 of the indictment charged petitioner and 14 co-defendants under 18 U.S.C. 371 with conspiring to commit mail fraud, wire fraud, and bank fraud (in violation of 18 U.S.C. 1341, 1343, and 1344) in connection with a scheme to defraud various United States and foreign financial institutions between 1998 and 2002. J.A. 6a-29a. Count 30 charged petitioner and his co-defendants under 18 U.S.C. 1956(h) with conspiracy to commit money laundering, in connection with the laundering of proceeds derived from the scheme charged in Count 1. J.A. 30a-41a.

According to the indictment, petitioner and his co-conspirators "fraudulently induced" numerous major banks (the Victim Banks) "to issue a number of loans through an elaborate series of misrepresentations" intended to make the banks believe they were financing

[1] An aggravated-felony conviction, however, does not disqualify an alien from withholding of removal, unless it is deemed to be for "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). An alien with an aggravated-felony conviction may obtain deferral, but not withholding, of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore, an alien convicted of an aggravated felony is barred from seeking readmission following removal, but that bar is subject to waiver. 8 U.S.C. 1182(a)(9)(A)(iii).

several companies' overseas purchases of non-ferrous metals, when the purported buyers and sellers did not exist or were shell corporations controlled by the co-conspirators. J.A. 13a-14a, 16a-20a. When the Victim Banks began investigating the defaults on their loans, petitioner and his co-conspirators "undertook a series of steps to conceal the fraud and continue the scheme," including

> (i) providing the Victim Banks with various false explanations for their customers' loan defaults, (ii) arranging for persons in the United States, India and elsewhere falsely to pose as customers during interviews with representatives of the Victim Banks, and (iii) fabricating credit reports and correspondence to create a false appearance that the purported suppliers and customers were bona fide companies, when in fact they were not.

J.A. 19a-20a.

Petitioner was the Deputy General Manager of Allied Deals Inc., one of the New Jersey metal-sales brokers (Companies) at the center of the scheme. J.A. 6a, 10a. He "provided accounting assistance to the Companies, and represented the Companies in negotiations with the Companies' banks." *Id.* at 10a. The evidence at trial demonstrated that petitioner was in charge of creating fraudulent customer files, he instructed Allied Deals's staff to generate trade references and other documents such as letters from sham customers asking for more time to pay back loans, and he provided bankers and auditors with documents containing lies and misrepresentations to induce additional loans. Admin. R. 294.

After a jury trial, petitioner was convicted of the two conspiracy counts with which he had been charged. Pet.

App. 2a-3a; J.A. 111a-112a. The federal statutes he had conspired to violate do not require proof of any particular amount of loss to the victim or victims, see 18 U.S.C. 371, 1341, 1343, 1344, 1956(h), so the jury did not find any particular amount of loss in reaching its verdict, see Pet. App. 3a.[2] In a sentencing agreement with the government, however, petitioner stipulated that "the loss from the offense exceeds $100 million," and he acknowledged that statement under oath at sentencing. J.A. 63a, 86a-87a.

The district court sentenced petitioner to a 41-month term of imprisonment. J.A. 113a. It also ordered petitioner to pay $683,632,800.23 in restitution—the amount of the "[l]oss" indicated in the judgment of conviction—jointly and severally with his co-defendants. J.A. 117a-118a; Pet. App. 3a.

b. While petitioner was serving his sentence, the Department of Homeland Security (DHS) instituted removal proceedings against him. Pet. App. 3a. DHS alleged that petitioner was removable for, *inter alia*, having been convicted of offenses that qualify as "aggravated felon[ies]." 8 U.S.C. 1227(a)(2)(A)(iii). In particular, the charge referred to a money-laundering offense

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[2] Petitioner asserts (Br. 8, 28, 41, 14a) that he sought and was refused a special verdict from the jury as to the amount of loss for which he was personally "responsible." To support that assertion, he invites (Br. 8) the Court to take judicial notice of a colloquy from his criminal case that was not included in the portions of the trial transcript introduced into evidence in the removal proceeding, and therefore not addressed in the administrative and judicial proceedings below. It would be inappropriate to do so in light of 8 U.S.C. 1252(b)(4), which requires judicial review of removal orders to proceed on the basis of the administrative record, with an exception not relevant here. In any event, as discussed below, see pp. 50-51, *infra*, the colloquy does not affect the analysis in this case.

in violation of 18 U.S.C. 1956 in which the amount of the funds exceeded $10,000 (see 8 U.S.C. 1101(a)(43)(D)), and an offense involving fraud or deceit in which the loss to the victim or victims exceeded $10,000 (see 8 U.S.C. 1101(a)(43)(M)(i)). Pet. App. 3a.[3] The charge was later amended to allege that petitioner was also removable as an "aggravated felon[]" under Subparagraph (U) of Section 1101(a)(43) for "attempt[ing] or conspir[ing] to commit" offenses described in Subparagraphs (D) and (M)(i). Admin. R. 95.

Contesting his removability, petitioner filed a motion to terminate proceedings. Pet. App. 46a. The immigration judge denied petitioner's motion, concluding that his conviction qualified as an aggravated felony under 8 U.S.C. 1101(a)(43)(D), (M)(i) and (U). Pet. App. 56a-61a. The immigration judge later ordered petitioner removed to India. *Id.* at 54a-55a.

c. The Board of Immigration Appeals (Board or BIA) affirmed the determination that petitioner had been convicted of an aggravated felony, as defined in Sections 1101(a)(43)(M)(i) and (U).[4] Pet. App. 44a-51a. The Board first concluded that petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualified as an offense involving fraud or deceit. *Id.* at 47a. The Board also concluded, based on the record evidence, that petitioner's conviction was for a fraud "in which the loss to the victim or victims exceed-

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[3] Petitioner was also initially charged with removability under 8 U.S.C. 1227(a)(2)(A)(i), concerning certain crimes of moral turpitude, but that charge was withdrawn by DHS during the course of the proceedings. Pet. App. 46a n.1; Admin. R. 62-64.

[4] The Board did not address whether petitioner was also removable for having been convicted of an aggravated felony defined in 8 U.S.C. 1101(a)(43)(D). See Pet. App. 51a.

[ed] $10,000." *Id.* at 48a-50a. The Board rejected petitioner's argument that his conviction was not an aggravated felony because the jury was not required to find, as an element of the offense, a loss exceeding $10,000. *Id.* at 48a. It reasoned that the loss threshold does not refer to an element of the offense, but rather is "used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of [Section 1101(a)(43)]." *Ibid.* The Board also noted that, "given the breadth of the federal and state fraud statutes," "[t]o read the $10,000 loss requirement as a necessary element of the crime would virtually negate the fraud ground" of removability—a result that Congress "could not reasonably have intended." *Ibid.* Looking to petitioner's sentencing stipulation that the loss exceeded $100 million, as well as the judgment of conviction directing payment of more than $683 million in restitution to the Victim Banks, the Board concluded that petitioner had been convicted of an aggravated felony, as defined by 8 U.S.C. 1101(a)(43)(M)(i) and (U). *Id.* at 50a-51a.

d. The court of appeals affirmed. Pet. App. 1a-43a. The court agreed with the Board that petitioner's fraud conspiracy conviction was for an offense that "involve[d] fraud," *id.* at 5a-7a, and that, because petitioner's indictment, sentencing stipulation, judgment of conviction, and restitution order clearly established that "the loss to the victim or victims exceed[ed] $10,000," he had been convicted of an "aggravated felony" as defined in Subparagraphs (M)(i) and (U), *id.* at 7a-26a.

The court of appeals rejected petitioner's argument that, under this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), the determination whether his fraud offense was one "in which the loss exceeded

$10,000" must be made only on the basis of facts that were necessarily found by a jury or admitted by the defendant in entering a guilty plea. Pet. App. 9a-26a. The court explained that those decisions—which concerned whether prior state burglary convictions triggered federal-criminal-sentencing provisions contained in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)—were inapplicable here, because the loss criterion in Subparagraph (M)(i), unlike the reference to burglary in ACCA, does not describe a required element of a generic offense. Instead, the court explained that Subparagraph (M)(i) "invite[s] inquiry into the facts underlying the conviction at issue," Pet. App. 12a (quoting *Singh* v. *Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004)), and it noted that its case law had "consistently treated the amount of loss as a qualifier rather than an element of the crime," *id.* at 14a. The court thus concluded that the inquiry under Subparagraph (M)(i) appropriately considers whether the record evidence establishes a loss exceeding $10,000, and whether the loss was "particularly tethered" to the specific offense of conviction charged to be an aggravated felony. *Id.* at 16a (quoting *Knutsen* v. *Gonzales*, 429 F.3d 733, 739-740 (7th Cir. 2005)); see *id.* at 26a.

The court of appeals noted that because "[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element," the rule petitioner urged "would render § 1101(a)(43)(M)(i) largely inoperative, for rarely will a defendant be convicted of a fraud offense with loss as an element found by the jury or explicitly admitted to in a guilty plea." Pet. App. 25a. Finally, the court concluded, petitioner's rule is unjustified by practical considerations concerning ease of proof, since "[i]t is well within the competence of a court to

examine the record for clear and convincing evidence of loss caused by the conduct of conviction." *Id.* at 26a.

The court of appeals recognized that, in some cases, a restitution order, for example, might not establish the appropriate amount of loss because it could be "calculated on the basis of uncharged or unconvicted conduct." Pet. App. 17a. The court had no difficulty concluding, however, that, in light of "the indictment, judgment of conviction, and [sentencing] stipulation," the offense for which petitioner was convicted had entailed a loss exceeding $10,000. *Ibid.*

Judge Stapleton dissented. Pet. App. 27a-43a. In his view, 8 U.S.C. 1227(a)(2)(A)(iii), which mandates that an alien be "convicted" of an "aggravated felony," "requires a comparison of the *prior conviction* to the generic definition of the pertinent aggravated felony—in this case, §§ 1101(a)(43)(M)(i) and (U)." Pet. App. 29a. That inquiry, he concluded, must be limited to an examination of "the facts upon which the petitioner's prior conviction actually and necessarily rested." *Id.* at 28a; see *id.* at 29a, 33a, 43a. Because, "[i]n this case, loss was not an element of the crime of conviction," and the jury was therefore not required to find any particular loss in order to convict, Judge Stapleton concluded that petitioner's fraud offense was not an "aggravated felony." *Id.* at 33a-36a, 43a.

SUMMARY OF ARGUMENT

Petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud—which was accompanied by a stipulation that losses to the victims exceeded $100 million and resulted in a restitution order for $683 million—qualifies as an "offense that * * * involves fraud or deceit in which the loss to the victim or victims

exceeds $10,000" under 8 U.S.C. 1101(a)(43)(M)(i) and (U). It therefore renders petitioner removable as a convicted aggravated felon pursuant to 8 U.S.C. 1227(a)(2)(A)(iii).

A. The text of Section 1101(a)(43)(M)(i) does not require the $10,000-loss threshold to be an element of the offense of conviction. Although it contains two restrictive clauses—one requiring the offense to "involve[] fraud or deceit" and the other requiring a loss exceeding $10,000—only the first refers to a necessary element of a qualifying offense. Some of the other definitions of "aggravated felony" in Section 1101(a)(43) require that offenses have a certain factor "as an element," but Congress did not use such language with respect to the loss threshold of Subparagraph (M)(i). Moreover, that provision must be construed *in pari materia* with Subparagraph (M)(ii), which contains an almost identical loss criterion, but would be rendered a nullity under petitioner's construction, because the only offense enumerated there—federal tax evasion under 26 U.S.C. 7201—does not have as an element any specific amount of loss to the government. Other parts of Section 1101(a)(43) likewise contain narrowing or qualifying factors that are not elements of underlying offenses, thereby reinforcing the conclusion that adjudicators may look beyond the elements of the offense in appropriate circumstances to determine whether a prior conviction was for an aggravated felony.

B. Petitioner's construction of Subparagraph (M)(i), by dramatically and unnaturally constraining the scope of the statute, would frustrate Congress's intent to remove criminal aliens. His reading would apply to only a handful of uncommon federal fraud offenses and would categorically exclude almost every one of the fraud pro-

visions that the federal government most often invokes in the criminal context (*e.g.*, mail fraud, wire fraud, bank fraud, conspiracy to defraud the government, and others). Petitioner's construction would also apply to relatively few state-law fraud offenses. He lists scattered provisions in 28 States that his reading would assertedly include, but many of them are outside the heartland of "fraud," and only 11 States have any $10,000 thresholds. Petitioner's coverage of an odd patchwork of federal and state fraud offenses makes his construction untenable. See *United States* v. *Hayes*, 129 S. Ct. 1079, 1087 (2009).

C. Permitting the loss criterion—a nonelement removability factor—to be established in removal proceedings in ways other than through the statutory elements of the offense is fully consistent with the INA, which does not mandate an elements-based categorical approach. This Court's decision in *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), did not address the applicability of the categorical approach. Moreover, in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), which involved criminal sentencing enhancements, the Court addressed constitutional concerns that are inapplicable in civil removal proceedings. The Court also evinced a concern for the practical difficulties of requiring sentencing courts to evaluate facts associated with prior convictions. The Attorney General and the Board, by contrast, have reasonably decided that it is appropriate to undertake a broader factual inquiry in administrative removal proceedings in certain circumstances.

D. If any ambiguity about the meaning of Section 1101(a)(43)(M)(i) remains, the Attorney General's construction of that statutory provision is entitled to deference. The issue does not turn on the interpretation of a

criminal statute, and it is thus within the Attorney General's and Board's interpretive authority. Petitioner's contention that any ambiguities should be resolved in the alien's favor would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance. To the extent that a conviction for an aggravated felony is a predicate for a sentence enhancement for an alien's illegal reentry under 8 U.S.C. 1326(b), any constitutional concerns under *Apprendi* would be avoided by allowing the jury in the subsequent proceeding to make a determination of the loss associated with the prior offense beyond a reasonable doubt. Cf. *Hayes*, 129 S. Ct. at 1087.

E. The loss to victims in the offense for which petitioner was convicted vastly exceeded $10,000. Based on petitioner's stipulation at sentencing that the loss from the fraud exceeded $100 million, the $683 million restitution order, and the lack of any indication that the stipulation or restitution order were based on inappropriate factors, the Board appropriately concluded that there was clear and convincing evidence that petitioner's conviction fell within the definition of an aggravated felony under Subparagraphs (M)(i) and (U).

ARGUMENT

A FRAUD CONSPIRACY IN WHICH THE VICTIMS LOST MORE THAN $100 MILLION, AS SHOWN BY A SENTENCING STIPULATION AND AN UNCONTROVERTED RESTITUTION ORDER, IS AN "AGGRAVATED FELONY" UNDER 8 U.S.C. 1101(a)(43)(M)(i) AND (U)

Under 8 U.S.C. 1227(a)(2)(A)(iii), an alien is removable if he has been "convicted of an aggravated felony," which includes "conspir[ing] to commit" an "offense that * * * involves fraud or deceit in which the loss to

the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i) and (U). Petitioner does not dispute either that he was convicted of conspiring to commit an "offense * * * involv[ing] fraud or deceit" under 8 U.S.C. 1101(a)(43)(M)(i) and (U) or that the total losses inflicted on the victim banks as a result of the conspiracy exceeded $683 million. Instead, he denies that his conviction satisfied those provisions (and thus that he is removable) because the amount of loss was not an element of the conspiracy offense of which he was convicted, and so the jury in his criminal prosecution was not required to find the amount of loss. As the court of appeals correctly ruled, however, the "loss to the victim" in Subparagraph (M)(i) refers not to an element of the underlying criminal offense but to the circumstances of the case. It therefore may be established in a removal proceeding by considering information such as a sentencing stipulation or an order of restitution.

That conclusion is supported by the text, structure, and purposes of the relevant provisions of the INA, and by practical considerations in their enforcement. If there is any ambiguity on the point, however, it is resolved by deference to the Attorney General's reasonable interpretation of the INA, under which the amount of loss need not have been an element of the underlying fraud offense and may be proved in the manner it was in this case. As this Court recently reaffirmed, "[i]t is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'" *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009) (quoting *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). If "Congress has directly spoken to the precise question at issue," "that is the end of the matter," but "if the statute is silent or ambiguous with respect to the specific issue," the Attor-

ney General's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).

A. The Text And Structure Of Section 1101(a)(43) Demonstrate That The Amount Of "Loss" In Subparagraph (M)(i) Need Not Be Determined As Part Of The Prior Adjudication Of Guilt

An alien must be "convicted" of an aggravated felony to be removable on that ground. See 8 U.S.C. 1227(a)(2)(A)(iii). But that does not mean that every aspect of the INA's definition of aggravated felony must be an element of the underlying criminal offense. To the contrary, the text and structure of Section 1101(a)(43) establish that the amount-of-loss component of Subparagraph (M)(i) need not be an element of the fraud offense of which the alien was previously convicted.

1. Subparagraph (M)(i) does not require the amount of loss to victims to be an element of the underlying fraud offense

a. Section 1101(a)(43)(M)(i) contains two restrictive clauses. While both serve a limiting purpose, they do so in different ways. The first restrictive clause, beginning with the relative pronoun "that," refers to the immediately preceding noun "offense" and specifies that an offense may be treated as an aggravated felony if it "involves fraud or deceit." The Board regarded that component of the definition as a necessary element of a qualifying offense. The second restrictive clause, beginning with "in which," in turn confines the qualifying crimes to those of such a scale as to result in a loss of more than $10,000 to one or more victims. The latter clause naturally directs inquiry to the facts of the case, rather than the statutory elements of the offense.

b. Congress knew how to require that a characteristic of an aggravated felony be an element of the offense if that had been its intention. Indeed, some parts of Section 1101(a)(43) incorporate definitions that refer specifically to an "element" of an offense. In Subparagraph (F), Congress included "a crime of violence" in the definition of aggravated felony. 8 U.S.C. 1101(a)(43)(F). That definition cross-references 18 U.S.C. 16, which expressly includes "an *offense that has as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a) (emphasis added). Similarly, Subparagraph (E)(ii) of the aggravated-felony definition incorporates "an offense described in" 18 U.S.C. 924(h), which concerns the "transfer[] [of] a firearm, knowing [it] will be used to commit a crime of violence (as defined in subsection (c)(3))." Section 924(c)(3) in turn defines "crime of violence" to include "an offense that is a felony and * * * *has as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A) (emphasis added).

If Congress had wanted to reach the result urged by petitioner, it similarly could have written Subparagraph (M)(i) to refer to "an offense that involves fraud or deceit and *has as an element* a loss to the victim or victims that exceeds $10,000." But it did not do so. This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [the Court's] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *ICE*, 543 U.S. 335, 341 (2005); see *United States* v. *Hayes*, 129 S. Ct. 1079, 1084-1085 (2009) (distinguishing between Congress's disparate use

of "element" and "elements" in offense-defining provisions). The decision to define some aggravated felonies with express reference to elements of the underlying offense but not to use a similar method in describing the loss threshold in Subparagraph (M)(i) should not be disregarded by judicial construction. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

c. Petitioner argues (Br. 22-23) that, by using the word "convicted" in provisions of the INA that make aliens who are aggravated felons removable, Congress required each characteristic of the aggravated-felony definition to be an element of the offense.[5] That argument is without merit. The requirement in 8 U.S.C. 1227(a)(2)(A)(iii) that an alien have been "convicted" of an "aggravated felony" says nothing about whether all of the qualifying criteria mentioned in the "aggravated felony" definitions in 8 U.S.C. 1101(a)(43)—including the loss criterion of Subparagraph (M)(i)—must be elements of the relevant offense. The reference to an "offense" in Subparagraph (M)(i), as modified by the phrase "involves fraud or deceit," is sufficient to satisfy the requirement of a conviction appearing in Section 1227(a)(2)(A)(iii). The $10,000-loss criterion need not

[5] Although petitioner asserts (Br. 23) that "all * * * adverse immigration consequences in the aggravated felony context require conviction," a few references to "aggravated felony" in the INA do not so require. For example, Congress required procedures to be established for dealing with individuals "arrested * * * for" or "charged with" aggravated felonies. 8 U.S.C. 1226(d)(1)(A) and (B). The Attorney General is required to "give priority to the Federal incarceration of undocumented criminal aliens who have *committed* aggravated felonies." 8 U.S.C. 1231(i)(4) (emphasis added). And the Attorney General is required to "take into custody any alien who * * * is deportable by reason of having *committed* any offense covered in [8 U.S.C. 1227(a)(2)(A)(iii)]." 8 U.S.C. 1226(c)(1)(B) (emphasis added).

also be an element of the aggravated felony defined in Subparagraph (M)(i) in order to give meaning and purpose to the term "convicted" appearing in either Section 1227(a)(2)(A)(iii) or in other parts of the INA referring to convictions for aggravated felonies.

Indeed, the Court recently reached a similar conclusion in *Hayes*, *supra*, with regard to the federal statute, 18 U.S.C. 922(g)(9), barring firearm possession by a person previously "convicted" of a "misdemeanor crime of domestic violence." The Court held that, while the underlying misdemeanor must have a use-of-force element, the other criterion mentioned in the definition (*i.e.*, that the offense be "committed by" a person who has a specified domestic relationship with the victim) need not be an element of the underlying offense. 129 S. Ct. at 1084-1089.

d. Petitioner contends (Br. 26-27) that, within Subparagraph (M), all of the text in Clause (i) (*i.e.*, "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000") is a single, indivisible restrictive clause, because it appears after the word "that." In his view, the Board and the court of appeals "render[ed] 'that' a nullity" by concluding that only the phrase "involves fraud or deceit" must be reflected in an element of the offense of conviction. But the word "that" was given full meaning by the Board and court of appeals, by limiting a covered "offense" to one that "involves fraud or deceit."

In fact, it is petitioner who has inappropriately made words in the statute superfluous. See *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (observing that the Court is "obliged to give effect, if possible, to every word Congress used") (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). While the word "that" is of

course used to introduce restrictive clauses, so too—as petitioner concedes—is the prepositional phrase "in which." See Pet. Br. 28 (citing *The Chicago Manual of Style* § 5.202, at 230 (15th ed. 2003)). Petitioner ignores the latter restrictive clause in Subparagraph (M)(i), which qualifies the particular "fraud or deceit" offenses that are of sufficient magnitude to be considered aggravated. If Congress had intended to make the fraud and loss components of Clause (i) equal halves of a single restriction, it is unlikely to have used the words "in which" to introduce the loss component in a *separate* clause. It instead could easily have used language that combined the two into a single clause referring to an offense "that involves fraud or deceit *and* a loss" exceeding $10,000. Cf. Pet. Br. 18.

2. Subparagraph (M)(ii), which must be construed* in pari materia *with Subparagraph (M)(i), is not amenable to petitioner's categorical approaches

It is a "cardinal rule that statutory language must be read in context." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004) (internal quotation marks and brackets omitted). Here, strong cues about the meaning of Subparagraph (M)(i) are provided by Subparagraph (M)(ii), which is immediately adjacent, closely related, identically structured, and similarly phrased. Subparagraph (M)(ii) applies to an offense that "is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(ii). Section 7201 does not contain as an element that the loss to the Government exceeded $10,000. Thus, the loss threshold in Subparagraph (M)(ii) cannot be read to refer to an

element of the offense of conviction, because that reading would render Subparagraph (M)(ii) a nullity.

It follows that the parallel loss threshold in Subparagraph (M)(i) should not be read to refer to an element of the offense. Subparagraph (M)(ii) shares the same lead-in language ("an offense that—") with Subparagraph (M)(i). In both provisions, that lead-in is followed by a verb phrase that generally defines the offense ("involves fraud or deceit," or "is described in section 7201 of title 26 (relating to tax evasion)"), and that verb phrase is in turn followed by a loss provision introduced by "in which." Indeed, Subparagraphs (M)(i) and (ii) are the only two parts of Section 1101(a)(43) that include the words "in which." That fact alone counsels in favor of adopting a single construction that can reasonably be borne by both of them. But the argument for construing them *in pari materia* is made even stronger by their common history. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972). Subparagraphs (M)(i) and (ii) were both originally enacted by a single section of ITCA in 1994, and they were both amended in the same way by a single section of IIRIRA in 1996, which reduced the loss amounts from $200,000 to $10,000. See p. 3, *supra*.

Petitioner nevertheless contends that Subparagraph (M)(ii) "supports" the interpretation he urges, because a conviction under the only tax-evasion offense mentioned in that provision "requires proof beyond a reasonable doubt of a tax deficiency." Pet. Br. 31 (citing *Boulware* v. *United States*, 128 S. Ct. 1168, 1173 (2008), and *Sansone* v. *United States*, 380 U.S. 343, 351 (1965)). But the burden of proving a tax deficiency does not require the government to meet any specific monetary threshold. And petitioner does not explain how a requirement that tax evasion include a showing of "a" tax

deficiency—or even "a substantial" deficiency, which some courts of appeals have mentioned—is consistent with his proposed construction of the "in which" clause.[6] Neither of those alternatives would create a threshold of $10,000 that would need to be found by a jury or admitted in a guilty plea. See, *e.g.*, *United States* v. *McKee*, 506 F.3d 225, 235-236 (3d Cir. 2007) (referring to the need to show a "substantial deficiency," but explaining that "the government need not allege or prove the precise amount of additional tax due and owing"). As a result, no prosecution under Section 7201 would satisfy petitioner's proposed "categorical approach," which would be met only when the underlying crime had "the element of a loss exceeding $10,000." Pet. Br. 42-43. Nor would a prosecution under Section 7201 satisfy petitioner's proposed "modified categorical approach," which could be met only if the "jury 'was actually required to find'" a loss in some amount exceeding $10,000. *Id*. at 39 (quoting *Taylor*, 495 U.S. at 602). The absence of a specific minimum threshold for a tax deficiency under Section 7201 means there is no reason in a case brought under that provision for a jury to find (or a guilty plea to include) *any* precise amount of loss to establish a violation.

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[6] *Boulware* noted an apparent division in the courts of appeals about "whether the Government must prove the tax deficiency is 'substantial.'" 128 S. Ct. at 1173 n.2 (citing *United States* v. *Daniels*, 387 F.3d 636, 640-641 & n.2 (7th Cir. 2004), cert. denied, 544 U.S. 911 (2005)). As the Seventh Circuit noted in the cited opinion, some decisions have "mention[ed] a substantial tax deficiency as an element of tax evasion," but "no court has held that an insubstantial tax deficiency is not punishable under 26 U.S.C. § 7201." 387 F.3d at 640 n.2. At least one prior decision referring to a "substantial" deficiency had concluded that "a deficiency of just over $3,000 was sufficient." *Id.* at 640 (discussing *United States* v. *Davenport*, 824 F.2d 1511, 1516-1517 (7th Cir. 1987)).

Thus, petitioner's proposed construction of the loss requirement introduced by "in which" in Subparagraph (M)(i), if applied to the parallel loss requirement in Subparagraph (M)(ii), would result in no qualifying federal offenses at all—even though the aggravated felonies included in Subparagraph (M)(ii) are defined exclusively by reference to a specific federal statute. That result, which would be nothing short of absurd, should be avoided. See *United States* v. *Wilson*, 503 U.S. 329, 334 (1992).[7]

3. Other provisions in Section 1101(a)(43) also contain narrowing or qualifying factors

Although Subparagraph (M)(ii) is most parallel to Subparagraph (M)(i), other features of Section 1101(a)(43) reinforce the textual bases for concluding that the amount of loss is a qualifying factor that limits the definition of the offense without having to be an element itself.

Petitioner concedes (Br. 29) that Congress included some qualifying factors in the INA's aggravated-felony definitions that need not be treated as elements of the underlying offenses. Subparagraph (G), for example, refers to "a theft offense * * * or burglary offense *for*

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[7] While Subparagraph (M)(ii) also applies to state and foreign offenses that are comparable (save for jurisdictional aspects) to 26 U.S.C. 7201, see 8 U.S.C. 1101(a)(43) (penultimate sentence), it would be bizarre to define those offenses by reference to a federal statute that is itself excluded from the definition, and to do so with a provision that says the term "applies to an offense described in this paragraph whether in violation of Federal or State law." *Ibid*. See *Lopez* v. *Gonzales*, 549 U.S. 47, 58 (2006) (declining to adopt a construction of "drug trafficking crime" that would exclude a federal crime but include a similar state crime if the State had "chose[n] to punish [the] given act more heavily").

which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (emphasis added), and other provisions are similarly structured. See 8 U.S.C. 1101(a)(43)(F), (R) and (S). As petitioner notes (Br. 29), a jury "would not be called upon to impose a sentence of a year or more," which means those qualifying factors do not have to be elements. Petitioner nevertheless attempts (Br. 30-31) to distinguish those limitations from the loss component in Subparagraph (M)(i) on the ground that they begin with the phrase "for which"—a phrase he contends is altogether different from the "in which" employed in Subparagraph (M)(i). That difference simply cannot bear the weight petitioner places on it. The underlying structure—of introducing the loss threshold or prior-sentence threshold with a restrictive clause beginning with a preposition—is identical, and it is more natural to say that someone was sentenced "for" an offense than "in" an offense. See *Deal* v. *United States*, 508 U.S. 129, 134-135 (1993) (when Congress "uses slightly different language to convey the same message * * * it uses slightly different language that means the same thing") (internal quotation marks and emphasis omitted).

Although not discussed by petitioner, Section 1101(a)(43) also includes other provisions—introduced by phrases other than "for which" or "in which"—that contain limiting factors not easily seen as elements of underlying offenses. For instance, Subparagraphs (N) and (P) refer to certain alien-smuggling and document-fraud offenses "except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)." 8 U.S.C. 1101(a)(43)(N) and

(P). The facts in the "except" clause are case-specific and beyond the scope of the elements of the enumerated offenses. Subparagraph (O) refers to enumerated offenses of improper entry by an alien or reentry by a removed alien, but further limits the category by requiring the offense to be "*committed by an alien who* was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph," 8 U.S.C. 1101(a)(43)(O) (emphasis added). That language too requires offender-specific facts that would not be elements of the underlying offenses. Finally, Subparagraph (K)(ii) refers to "an offense that * * * is described in [18 U.S.C. 2421, 2422, or 2423] (relating to transportation for the purpose of prostitution) *if committed for commercial advantage*." 8 U.S.C. 1101(a)(43)(K)(ii) (emphasis added). But only one of those three enumerated federal statutes (18 U.S.C. 2423(d)) contains an element relating to commercial advantage.

The appearance of such qualifying and limiting factors supports the conclusion that adjudicators may look beyond the elements of the offense in appropriate circumstances to determine whether a prior conviction is a removable offense. The loss thresholds in Subparagraph (M) present another such circumstance.

B. Requiring The Amount Of Loss To Be An Element Of A Fraud Offense Under Subparagraph (M)(i) Would Unnaturally Constrain The Statute's Scope

1. When Congress amended the definition of aggravated felony in 1994 and 1996, it intended to address what it concluded were serious problems associated with criminal aliens' presence in the United States. It expanded the range of convicted conduct that would ren-

der aliens removable, and, in the case of aggravated felonies (like those in Subparagraph (M)(i)), the range of convicted conduct that would preclude discretionary relief from removal. See S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995) ("America's immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem."); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i) (aggravated-felony conviction renders alien ineligible for asylum), 1229b(a)(3) and (b)(1)(C) (aggravated felony conviction renders alien ineligible for cancellation of removal).

The legislative history of the 1996 amendments to the INA identifies three particular concerns about the government's failure to remove more criminal aliens. First, criminal aliens' ongoing presence in the United States undermined the Nation's immigration policies and control of its borders. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 111 (1996); S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996). Second, criminal aliens who had not been timely removed were "a serious threat to our public safety." 140 Cong. Rec. 4985 (1994) (statement of Sen. Roth); see H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-7 (1995) (explaining that, as a result of past congressional and Executive Branch policies, "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them"). Third, the government's failure to remove criminal aliens was, as a result of their recidivism, imposing a "significant cost * * * on our society." H.R. Rep. No. 22, *supra*, at 6-7; see S. Rep. No. 48, *supra*, at 1, 9 (estimating that confining criminal aliens

cost state and federal taxpayers at least $724 million annually).

Those concerns show that Congress's repeated expansion of the definition of aggravated felony between 1988 and 1996 was based on its determination that "[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General." S. Rep. No. 249, *supra*, at 7.

2. In light of Congress's manifest intention of significantly broadening the category of crimes that would be treated as "aggravated felonies" under the INA, the Board and the court of appeals both appropriately took into account that requiring the amount of loss to be an element of a fraud offense for purposes of Subparagraph (M)(i) would have decimated its reach. Pet. App. 25a, 48a.

Petitioner responds to that argument by purporting to identify (Br. 44) a "host" of federal and state statutes that contain as an element or sentencing factor a loss threshold of at least $10,000. But his list (Pet. Br. App. 1a-12a) shows the opposite of what he intends: In adding a category of crimes involving "fraud or deceit," Congress could not have meant to bring within the scope of Section 1101(a)(43) only a tiny handful of federal offenses and an odd patchwork of offenses in barely half the States.

a. The list of federal fraud or deceit crimes that petitioner identifies as being included within his reading of Subparagraph (M)(i) is vanishingly small. From the universe of federal fraud offenses, he identifies (Pet. Br. App. 1a) only three that have a purported loss threshold of more than $10,000: 18 U.S.C. 668 (theft by fraud of a

major artwork worth at least $100,000); 18 U.S.C. 1031 (contract fraud against the United States); and 18 U.S.C. 1039(d) (enhanced penalty for certain frauds in obtaining confidential phone records).

None of the three statutes petitioner cites involves—or, since 1994, has involved—a threshold of $200,000 or $10,000. So none of them corresponds to the criteria established by Subparagraph (M)(i) in either 1994 or 1996. The only loss threshold contained in Section 1031—a sentence enhancement for a "[m]ajor fraud against the United States"—is some 50 times greater than the current threshold in Subparagraph (M)(i).[8] Similarly, the loss threshold for a case involving the theft of a major artwork under Section 668 is 10 times the current amount in Subparagraph (M)(i).[9]

The third provision petitioner identifies, Section 1039, relates to fraud in connection with obtaining confi-

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[8] The actual offense in Section 1031(a) does not include any element requiring a loss. The offense occurs when a defendant executes a scheme to defraud the United States in connection with a government contract or subcontract worth at least $1 million. 18 U.S.C. 1031(a)(1). There need not be *any* loss to the United States, much less one exceeding a specific threshold. See, *e.g.*, *United States* v. *Reitmeyer*, 356 F.3d 1313, 1320 (10th Cir. 2004) (holding that Section 1031(a)(1) "does not require an individual to actually obtain money in order to 'execute' a scheme to defraud the United States"). Section 1031(b) provides for an increased statutory fine when the gross loss to the government exceeds $500,000, 18 U.S.C. 1031(b), and Section 1031(d) contemplates that a court might impose a fine of "up to twice the amount of the gross loss," 18 U.S.C. 1031(d).

[9] It is not clear from the face of 18 U.S.C. 668 whether the prohibited conduct would be "theft" under Section 1101(a)(43)(G), whether it would be "fraud or deceit" under Section 1101(a)(43)(M)(i), or whether it could be both. See *In re Garcia-Madruga*, 24 I. & N. Dec. 436, 438-440 (B.I.A. 2008) (distinguishing between "theft" and "fraud" offenses in Section 1101(a)(43) on the basis of consent to a taking of property).

dential phone records information, and he refers to a sentence enhancement that is triggered by "a pattern of any illegal activity involving more than $100,000." 18 U.S.C. 1039(d). But that monetary amount is not necessarily the loss that victims suffer, and in any event it far exceeds the loss threshold in Subparagraph (M)(i). Furthermore, because Section 1039 was first enacted in 2007, see Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, § 3(a), 120 Stat. 3569, it could not have been a statute that Congress had in mind when it enacted and later amended Subparagraph (M)(i).

Petitioner (Br. 46) and one of his amici (NACDL Br. 16) also mention the possibility that a jury could make a finding of loss as a predicate for a fine under 18 U.S.C. 3571(d), which provides an alternative maximum fine, for offenses involving pecuniary gain or loss, of "not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." In the case of a felony, however, where the default maximum fine is $250,000, there would be no need for that alternative maximum unless the loss exceeded $125,000, see 18 U.S.C. 3571(b)(3)—far in excess of the $10,000-loss threshold in Subparagraph (M)(i). Moreover, Congress would have had no reason to expect when it enacted and then amended Subparagraph (M)(i), years before this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Jones* v. *United States*, 526 U.S. 227 (1999), that juries would make loss findings for use in calculating alternative maximum fines. Indeed, even now it is not clear that such a fine must be based on a jury's finding of loss. See *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009) (listing the "imposition of statutorily prescribed

fines and orders of restitution" as among the functions performed by trial judges to which "*Apprendi*'s rule" may not extend).

Petitioner's flawed list of federal offenses is underwhelming in isolation, but it is especially revealing when compared with the many kinds of federal fraud offenses that, no matter how massive in execution, would be categorically excluded from being an aggravated felony under his reading. Those offenses include not only the significant provisions at the root of petitioner's own conspiracy conviction—18 U.S.C. 1341 (mail fraud), 1343 (wire fraud), and 1344 (bank fraud)—but also nearly all of the other significant criminal fraud provisions invoked by the federal government. See, *e.g.*, 18 U.S.C. 371 (conspiracy to defraud the government), 666 (theft in federally funded programs), 1028 (fraud in connection with identification documents), 1029 (fraud in connection with access devices), 1030 (fraud in connection with computers), 1347 (health care fraud), and 1348 (securities fraud).

Thus, in the federal context, comparing the extensive list of excluded offenses with the very few that could be covered by petitioner's approach (albeit not at the $10,000 threshold, and not in ways that Congress would have contemplated) amply bears out the court of appeals' conclusion that petitioner's approach would render Subparagraph (M)(i) "largely inoperative." Pet. App. 25a; see also *id.* at 48a (Board decision); *In re Babaisakov*, 24 I. & N. Dec. 306, 314-315 & n.6 (B.I.A. 2007). The strikingly underinclusive assortment of federal fraud offenses that would be included in Subparagraph (M)(i) under petitioner's reading—even after Congress lowered the threshold to only 5% of its former level in 1996—makes his construction wholly implausible as a matter of congressional intent. Among all the aliens who had been con-

victed of federal fraud offenses by 1994 or 1996, it is absurd to think that Congress's use of the phrase "involves fraud or deceit" was intended to apply only to those who had stolen major works of art worth at least $100,000, or had qualified for an enhanced sentence for a subcategory of procurement fraud under 18 U.S.C. 1031(b). Adopting petitioner's reading of Subparagraph (M)(i) would effectively mean that Congress had used an elephant-sized hole to house a mouse, which has no more to recommend it as a reasonable construction of a statute than the reverse form of disproportionality. Cf. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001); see *Hayes*, 129 S. Ct. at 1089 (rejecting defendant's interpretation of definition of "misdemeanor crime of violence" in part because it would not include federal misdemeanors).

b. Petitioner also provides (Pet. Br. App. 1a-12a) a list of state crimes that purportedly qualify under his construction of Subparagraph (M)(i). But that list of scattered provisions in only 28 States has its own flaws, and would not in practice reflect the sort of "bright line test" that he promises would be "easy to administer and apply." Pet. Br. 47; see also *id*. at 43, 44, 47.

Petitioner's list only reinforces the court of appeals' observation that "[m]ost fraud statutes * * * do not contain loss as an element or require that a jury find loss or a defendant plea to a specific loss amount." Pet. App. 25a. Nearly half of the States are entirely unrepresented in petitioner's list even now. See *Hayes*, 129 S. Ct. at 1087 & n.8 (rejecting interpretation of "misdemeanor crime of domestic violence" that "would have been a dead letter in some two-thirds of the States from the very moment of its enactment" and would still be inapplicable in "about one-half of the States" today) (quotation marks omitted).

Some States, moreover, are represented by only a single kind of offense—and sometimes not even an offense in the heartland of "fraud," but rather a post-1994 creation like identity theft. See, *e.g.*, N.J. Stat. Ann. § 2C:21-17(c)(2) and (3) (West Supp. 2008). Many of the offenses are "theft" offenses that may be covered by Subparagraph (G) rather than Subparagraph (M)(i). See note 9, *supra*. And the vast majority of the dollar thresholds do not come from offense definitions themselves, but from felony-classification schemes, in which the thresholds vary widely from State to State. Only 11 States in petitioner's list (Connecticut, Florida, Illinois, Iowa, Maine, Montana, Oregon, Pennsylvania, Tennessee, Vermont, and Wisconsin) have any $10,000 thresholds.

Fundamentally, petitioner's list reveals a patchwork of coverage, where many million-dollar frauds would fail to qualify in most States, while $11,000-frauds would qualify in others, but only when felony-classification brackets were appropriately aligned and addressed by juries. While some "state-by-state disparity" might well be expected when Congress has defined an aggravated felony in "generic terms," *Lopez* v. *Gonzales*, 549 U.S. 47, 58-59 (2006), petitioner's reading makes it far too unlikely that a criminal alien's conviction for fraud or deceit would be accompanied by a jury finding that would establish a loss exceeding $10,000. By contrast, the national "uniformity" that petitioner purports to seek (Br. 52-53) will be much easier to achieve if immigration courts are able to ask and answer one consistent question across all kinds of fraud convictions: Did the loss to the victims exceed $10,000?

3. Tacitly conceding the narrow and haphazard nature of the coverage of fraud or deceit offenses provided by his reading of the statute, petitioner claims (Br. 45)

that the lack of breadth could be counterbalanced if prosecutors would simply *act as if* the amount of loss were an element of fraud offenses, thereby laying the groundwork for potential immigration proceedings implicating the aggravated-felony definition. He proposes (*ibid.*) that the government "simply * * * need[s] to act in a more coordinated fashion to secure removal of targeted aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court." But the proposition that criminal prosecutions and immigration proceedings should be "more coordinated" to remedy the problem posed by petitioner's reading is flawed for several reasons.

First, as a solution to the narrow coverage of "fraud or deceit" crimes provided under his reading of Subparagraph (M)(i), any increased coordination would come far too late. It could be implemented only prospectively in new prosecutions initiated in the shadow of a decision from this Court rejecting the approach to calculating loss that is currently used by the Board and approved by several courts of appeals. A prospective-only solution would run counter to Congress's manifest intention when it expanded the definition of "aggravated felony" in 1996 and expressly made the new definition applicable to prior convictions. See 8 U.S.C. 1101(a)(43) (final sentence) ("Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). Congress plainly intended the provision to be effective even when applied to aliens who were convicted before prosecutors could have decided to alter their typical practices in anticipation of collateral immi-

gration consequences to which defendants might be exposed.

Second, even in the case of federal criminal proceedings, Congress has specifically and repeatedly acted to prevent criminal proceedings from being altered in order to effect the immigration consequences of a conviction. For example, to eliminate judicial intrusion in matters of deportation, the Immigration Act of 1990 expressly abolished a criminal sentencing judge's pre-existing authority to make a recommendation against deportation to the Attorney General. See § 505(a), 104 Stat. 5050. Later, in IIRIRA, Congress responded to judicial decisions that had interpreted 18 U.S.C. 3583(d) (permitting supervised release "subject to deportation") as providing for judicial orders of deportation, by clarifying that a hearing before an immigration judge is the "exclusive procedure" for determining whether an alien may be deported from the United States. See IIRIRA § 304(a)(3), 110 Stat. 3009-589; 8 U.S.C. 1229a(a)(3); see also, *e.g.*, *United States* v. *Romeo*, 122 F.3d 941, 942-944 (11th Cir. 1997). In doing so, Congress demonstrated its intent to foreclose criminal trial courts from involvement in determinations about the immigration consequences of convictions. Especially against that background, it makes no sense to propose that prosecutors and judges in criminal proceedings should be hampered by matters that are not the subject of those proceedings simply to make it easier for collateral immigration-specific issues to be later "sorted out in Immigration Court." Pet. Br. 45.[10]

[10] Petitioner suggests (Br. 45) that his proposed solution would be akin to the process that the government used of submitting "sentencing 'facts'" to juries in the period between this Court's decisions in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Of course, the factors that led the government to

Third, petitioner's suggestion (Br. 45) that "the government[]" should "insist[] upon loss amounts in plea agreements or in guilty verdicts" is a non-starter with regard to state criminal proceedings. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 933 (1997) (quoting *New York* v. *United States*, 505 U.S. 144, 188 (1992)). Indeed, such reliance on state executive officials to implement federal immigration policy would implicate federalism concerns, by imposing costs on state governments and diffusing accountability for enforcement of immigration law. See *id*. at 922-923, 928.

C. Because The Amount Of Loss Need Not Be An Element Of A Fraud Offense Under Subparagraph (M)(i), It Need Not Be Established Under A "Categorical Approach" Akin To That In *Taylor* And *Shepard*

Petitioner's principal argument is that, because an alien must be "*convicted* of [a] deportable offense," the "categorical approach" that was "summarized in" *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), is the "uniformly required method for determining whether a particular offense falls within a removable category." Pet. Br. 36. But neither the INA, this Court's prior cases, nor the Board's prior practice establishes that the loss component of Subparagraph (M)(i) (or other qualifying criteria in other provisions of Section 1101(a)(43)) must be satisfied in accordance with the categorical method that this

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undertake such a considerable burden in anticipation of a need to preserve the *criminal* convictions entered in the very same proceedings from potential *constitutional* infirmities are not present in this case, which involves collateral issues in future civil immigration proceedings.

Court has applied in the context of recidivism enhancements in criminal-sentencing proceedings.

As the Attorney General has determined, the INA is "silent on the precise method that immigration judges and courts should use to determine if a prior conviction" renders an alien removable from the United States, and he has reasonably decided not to mandate the categorical approach for *all* criteria that define aggravated felonies under Section 1101(a)(43). *In re Silva-Trevino*, 24 I. & N. Dec. 687, 693 (A.G. 2008) (addressing crimes involving moral turpitude). And the Board has specifically declined to follow the categorical approach for the loss threshold in Subparagraph (M)(i). *In re Babaisakov*, *supra*.

1. The INA does not mandate a categorical approach

As discussed above, the text and structure of Section 1101(a)(43) demonstrate that the amount of loss need not be an element of an aggravated-felony offense under Subparagraph (M)(i). So too do the practical consequences of petitioner's contrary reading, which would dramatically narrow the provision's reach in ways that Congress could not have intended.

a. Petitioner nevertheless claims that *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), has already "settled any debate on applicability of [the] categorical approach to aggravated felony determinations." Pet. Br. 36 (internal quotation marks omitted; citing Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 1004 (2008) (Sharpless)). That cannot be true; there was no "debate" in *Duenas-Alvarez* about whether to apply a categorical approach to the aggravated-felony provision at issue there, which referred in

relevant part to "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). The parties in the case did not contend otherwise, and this Court did not itself construe the statute on that question. Instead, the Court simply observed that "the lower courts uniformly have applied the approach this Court set forth in *Taylor*." *Duenas-Alvarez*, 549 U.S. at 186. Of course, there is no such uniformity with regard to the question in this case, since three circuits, including the court below, have endorsed departures from the categorical approach "when deciding how to classify convictions under [the INA] criteria that go beyond the criminal charge—such as the amount of the victim's loss [under Subparagraph (M)]." *Ali* v. *Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008), petition for cert. pending, No. 08-552 (filed Oct. 23, 2008); see *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 177-178 (5th Cir. 2008); Pet. App. 22a-26a.

More importantly, because the statement in *Duenas-Alvarez* did not even purport to establish this Court's view of "the *best* reading" of Section 1101(a)(43)(G), it could not, *a fortiori*, have constituted a holding that "the statute unambiguously requires" application of the categorical approach, preventing any contrary determination by the Attorney General, the Executive Branch official entrusted with responsibility for interpreting the INA. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 984-985 (2005).[11]

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[11] In arguing that a categorical approach generally applies to Section 1101(a)(43), petitioner also relies (Br. 2, 36) on *Lopez* v. *Gonzales*, *supra*, and *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). While those decisions both tacitly employed a categorical approach, neither cited *Taylor* or *Shepard*, or stated that a categorical approach was compelled by Section 1101(a)(43). Moreover, both cases dealt with aspects of the

b. Petitioner also contends (Br. 36-37) that "the categorical approach" has a "pedigree in the immigration context" that made it "controlling in determining whether a conviction fell within a deportable category." In fact, the early cases he cites were strictly limited to a single area of deportability or excludability: that based on a conviction for a "crime involving moral turpitude" (CIMT). See *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022, 1022-1023 (2d Cir. 1931); *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 862-863 (2d Cir. 1914).[12]

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aggravated-felony definition that were directly incorporated from definitional sections of the federal criminal code (the definition of a "crime of violence" in 18 U.S.C. 16 and the definition of a "drug trafficking crime" under 18 U.S.C. 924(c)). *Lopez*, 549 U.S. at 52-53; *Leocal*, 543 U.S. at 4-5.

[12] Petitioner's additional sources (Br. 37-38) show only that a kind of categorical analysis was established for CIMTs. See *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 656 (1953); see also Sharpless 994-995 & nn.56-57. Those sources cite no case applying a "categorical approach" outside the CIMT context before the 1988 enactment of the original "aggravated felony" deportation ground, and they cite only one case before the 1994 amendment adding the "fraud or deceit" definition of aggravated felony. See *id.* at 996 n.61. That case, *In re Alcantar*, 20 I. & N. Dec. 801 (B.I.A. 1994), applied a categorical approach in assessing the "crime of violence" aggravated-felony provision mainly because it was defined by federal criminal statutes (including the phrase "has as an element"), to which the courts had already applied the categorical approach. See *id*. at 809-812. Meanwhile, at least two other decisions show that the Board was in fact willing to look to facts underlying certain convictions to determine whether aliens were deportable. See *In re Chow*, 20 I. & N. Dec. 647, 649-650 (B.I.A.) (citing alien's admission in Immigration Court that a weapon was automatic to establish that firearms conviction would have rendered alien deportable), aff'd, 12 F.3d 34 (5th Cir. 1993); *In re P–C–*, 8 I. & N. Dec. 670, 671-674 (B.I.A. 1960) (apparently accepting that only the record of conviction should be considered, but taking a broad view of the record, looking to law-enforcement affidavit and

Even if Congress had contemplated that any categorical approach used in the CIMT context, but see *In re Silva-Trevino*, *supra*, might also be used with aggravated-felony definitions, that would not suggest a different result in this case. The phrase "crime involving moral turpitude" corresponds here only to the phrase "offense that * * * involves fraud or deceit" in Subparagraph (M)(i). That parallel could not resolve the question of how to satisfy *additional* limitations like the $10,000-loss threshold. The relevant backdrop for that further determination would have been the INA provisions generally governing the resolution of factual issues in deportation hearings. See 8 U.S.C. 1252(b) (1982) (providing for the "present[ation] and recei[pt] [of] evidence" by a special inquiry officer in deportation proceedings, and for an additional immigration officer to "present evidence" and to "examine * * * witnesses in the proceedings"); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("A decision of deportability need be based only on 'reasonable, substantial, and probative evidence.'") (quoting 8 U.S.C. 1252(b)(4)).

2. The considerations that supported the categorical approach in* Taylor *and* Shepard *do not apply in removal proceedings

While the categorical approach in *Taylor* and *Shepard* has some relevance to the manner in which some components of the statutory provisions at issue here might be construed, nothing in those cases mandates that it be

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laboratory analysis to determine whether substance involved in guilty plea conviction was a narcotic; noting an Attorney General opinion about an earlier statute stating that "facts must be examined upon which the violation of law is based") (quoting *In re L–*, 5 I. & N. Dec. 169, 172 (A.G. 1953)).

applied in deciding how to determine a loss under Subparagraph (M)(i).

In *Taylor*, the Court addressed the Armed Career Criminal Act, which provides a sentence enhancement for any person who violates 18 U.S.C. 922(g) after three prior convictions for serious drug offenses or violent felonies, including, as relevant in that case, "burglary." See 495 U.S. at 578-579; 18 U.S.C. 924(e)(2)(B)(ii). Reviewing the history and background of ACCA, the Court determined that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," namely, an offense that has "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598.

The Court then turned to the question of how to determine whether a prior conviction qualified as "burglary" under that definition. Based on the language, history, and purpose of ACCA, the Court held that it "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The Court also expressed concern about "the practical difficulties and potential unfairness of a factual approach." *Id.* at 601. It concluded that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602.

Later, in *Shepard*, the Court held that *Taylor*'s categorical approach governs the identification of generic offenses following guilty pleas, as well as convictions fol-

lowing jury verdicts, for purposes of ACCA sentencing. The Court concluded that, where a prior conviction was the result of a guilty plea, the sentencing court may look only to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. A plurality of the Court explained that it was "limit[ing] the scope of judicial factfinding on the disputed generic character of a prior plea" in order "to avoid serious risks of unconstitutionality" presented by the need—in light of the intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)—for a jury to find "any disputed fact essential to increas[ing] the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25-26.

Taylor and *Shepard* govern the range of documents that a court may consult to determine whether a defendant's criminal record merits imposition of an enhanced sentence under ACCA. But those holdings are not controlling with respect to the INA—a different statute with different language, purposes, and history, which support and invite a more factual inquiry when determining whether a prior conviction qualifies as a removable offense.

a. The "potential unfairness of a factual approach"—first identified in *Taylor* and later elaborated in *Shepard* by the plurality—is rooted in the need to prevent judges applying ACCA in criminal-sentencing proceedings from assuming a role constitutionally reserved for jurors. *Taylor*, 495 U.S. at 601-602; *Shepard*, 544 U.S. at 24-26. Those Sixth Amendment concerns are not present in civil immigration proceedings. *Lopez-Mendoza*, 468 U.S. at 1038 (observing that "various protections that apply in the context of a criminal trial do not apply in a

deportation hearing"); see *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)).

b. The "practical difficulties inherent in looking into underlying circumstances" identified by *Taylor* and *Shepard* were concerns of *judicial* economy: saving sentencing courts the burden of collateral trials. *Shepard*, 544 U.S. at 20, 23; *Taylor*, 495 U.S. at 601-602. Whether such "practical difficulties" militate against a more searching inquiry in the context of administrative removal proceedings, however, is a question for the agency itself. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978) ("[T]he agency should normally be allowed to exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence.") (internal quotation marks and citations omitted). Here, Congress has assigned the Attorney General primary responsibility for conducting removal proceedings, and he has delegated that authority to the Board, members of which act as his delegates in the cases that come before them. See 8 U.S.C. 1103(g); 8 C.F.R. 1003.1(a)(1); *Negusie*, 129 S. Ct. at 1163-1164. The Attorney General and the Board in turn have expressly considered whether to undertake a broader factual inquiry in removal proceedings in particular situations.

In *In re Babaisakov*, *supra*, the Board addressed whether it should consider matters beyond the elements of the offense in precisely this context, and did not note any "practical difficulties," concluding that extrinsic evidence might be considered, rather than limiting its review to the record of conviction. The Board held that in

aggravated-felony cases under Subparagraph (M)(i) an adjudicator must make: (1) a categorical inquiry into whether the conviction is for a crime involving fraud or deceit, and (2) an "ordinary evidentiary inquiry" into whether the loss exceeded $10,000. 24 I. & N. Dec. at 322. The Board explained that the categorical and modified categorical approaches under *Taylor* apply when the relevant statute "demands a focus exclusively on the elements of a prior conviction," but that they do not apply to the "nonelement" factor of victim loss. *Id.* at 309. The Board disagreed with courts of appeals that "constrain[] [the] inquiry to the record of conviction if the search involves aspects of the crime that go beyond the elements of the offense." *Id.* at 317. Accordingly, the Board held that, where an aggravated-felony determination requires a factfinder to establish a nonelement factor, the factfinder may look to "any evidence, otherwise admissible in removal proceedings, including witness testimony," bearing on that factor. *Id.* at 320-321.

More recently, the Attorney General, in a published opinion addressing inadmissibility, found "the Board's analysis in [*Babaisakov*] persuasive and appropriate" to the CIMT context as well. *Silva-Trevino*, 24 I. & N. Dec. at 702. He expressly considered "whether the administrative burdens associated with inquiries beyond the record of conviction should preclude such inquiries * * * and conclude[d] that those burdens should not." *Ibid.* Although taking into account the potential effects on "administrative efficiency," the Attorney General concluded that an "inquiry beyond the record of conviction would result in more accurate determinations of who falls within the scope of the statute, and would better accord with the statute's demands for individualized adjudications." *Ibid.*; see also *In re Gertsenshteyn*, 24 I. & N.

Dec. 111, 116 & n.8 (B.I.A. 2007) (acknowledging the existence of some burden on the agency in determining whether a prior conviction was "committed for a commercial advantage" under Section 1101(a)(43)(K)(ii), but noting that it is a similar inquiry "as to whether an offense is a 'particularly serious crime' for purposes of the bar to asylum and withholding of removal."), vacated and remanded, 544 F.3d 137 (2d Cir. 2008); *In re Mendez-Moralez*, 21 I. & N. 296, 303 n.1 (B.I.A. 1996) (observing that immigration judges and the Board "look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted."). Nothing in the INA forecloses that reasonable approach adopted by the Attorney General and the Board.

3. The Attorney General's approach preserves the appropriate burden of proof for immigration proceedings

Contrary to petitioner's assertions (Br. 32-35), allowing immigration judges to consider documents prepared at a criminal sentencing does not lower the burden of proof in immigration proceedings. As the Board has correctly determined, evidence proving facts under a preponderance standard may in certain situations also establish proof that is clear and convincing. *Babaisakov*, 24 I. & N. Dec. at 319-320. But the Board and the Attorney General have shown appropriate sensitivity to the different burdens of proof in the two different kinds of proceedings. The Attorney General cautioned in *Silva-Trevino* that "allowing inquiry beyond the record of conviction does not mean that the parties would be free to present 'any and all evidence bearing on an alien's conduct leading to the conviction.'" 24 I. & N. Dec. at 703.

Rather, "[t]he sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Ibid.*; see also *Babaisakov*, 24 I. & N. Dec. at 321.[13]

It is petitioner's position of insisting that the loss threshold be found by the criminal jury or necessarily admitted in a guilty plea that would effectively alter the government's burden of proof in civil removal proceedings, raising it to one of beyond a reasonable doubt. That would be inconsistent with the INA, which provides that:

> In the [removal] proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. 1229a(c)(3)(A).

Moreover, petitioner's concern (Br. 33-35) that restitution orders and sentencing considerations may generally include considerations "beyond what was even charged to 'relevant conduct'" is rebutted by the Board and courts of appeals, which have appropriately required the loss to be tied to the specific counts covered by the conviction.[14]

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[13] The Attorney General and the Board have thus indicated their awareness of, and intention to avoid, the problem of readjudicating guilt—a problem petitioner stresses (Br. 20, 47), but which simply does not arise in this case.

[14] Consistent with the Board's consideration of the different burdens of proof and whether the loss is tied to the convicted conduct, courts of appeals, including the court below, have required that the loss be tethered or tied to the conviction on which removability is based before removability can be established. See, *e.g.*, Pet. App. 16a-19a; *Obasohan* v. *United States Att'y Gen.*, 479 F.3d 785, 789 & n.9 (11th Cir. 2007);

D. Any Statutory Ambiguity Must Be Resolved By Deferring To The Attorney General's Reasonable Interpretation

As discussed above, the text and structure of Section 1101(a)(43) establish that the amount of loss in Subparagraph (M)(i) need not be an "element" of the underlying aggravated-felony offense. And petitioner's contrary reading would dramatically and inappropriately constrain the statute's scope on the basis of a categorical approach that was developed in a different context to satisfy constitutional and other concerns that are not present here. To the extent, however, that the Court concludes that the INA is ambiguous in relevant part, it should defer to the Board's clear determination that, in Subparagraph (M)(i), "the $10,000 loss threshold is a limiting or aggravating factor that need not be tied to an element of any criminal statute." *Babaisakov*, 24 I. & N. Dec. at 316; see Pet. App. 48a. As discussed above, the Board's interpretation, which has been approved by the Attorney General, is at the very least reasonable.

Although it is well established that the Attorney General's reasonable interpretation, and thus the Board's interpretation, of the INA is entitled to substantial deference from courts, see *Negusie*, 129 S. Ct. at 1163-1164, petitioner urges the Court to impose a narrow construc-

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Conteh v. *Gonzales*, 461 F.3d 45, 61-62 (1st Cir. 2006), cert. denied, 127 S. Ct. 2003 (2007); *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 106-108 (3d Cir. 2006); *Knutsen* v. *Gonzales*, 429 F.3d 733, 736-740 (7th Cir. 2005); *Munroe* v. *Ashcroft*, 353 F.3d 225, 227 (3d Cir. 2003); *Khalayleh* v. *INS*, 287 F.3d 978, 979-980 (10th Cir. 2002). Therefore, contrary to petitioner's contention (Br. 47), the requirement that the loss be tethered or tied to the offense is not "uncharted territory." Rather, it is consistent with the text of the statute, which requires a fraud or deceit offense "in which" the loss to the victim exceeds $10,000.

tion favoring aliens (Br. 48-50) and to conclude that *Chevron* deference is inapplicable here (Br. 51-56).

1. Contrary to petitioner's argument (Br. 48-50), the Attorney General's reasonable construction of the statute should not be disregarded based on the proposition that ambiguities should be resolved in favor of the alien.[15] Even the rule of *criminal* lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463-464 (1991) (internal quotation marks, brackets, and citations omitted). In the immigration context, any application of similar principles must come only *after* the Attorney General has had an opportunity to interpret the relevant statutory provision and the courts have given appropriate deference to that interpretation. Any other approach would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance. Thus, in *Negusie*, the alien urged that a statutory provision should be construed in his favor and the Court concluded that the provision was ambiguous, 129 S. Ct. at 1164, but it did not then adopt a narrowing construction that favored the alien. Instead, it remanded to the agency to adopt its own construction. *Id.* at 1167. Here, administrative deference likewise takes prece-

[15] In support of his argument, petitioner quotes (Br. 50) James Madison's Report on the Alien and Sedition Acts, which described banishment as a "punishment," but he omits mention of Madison's concern that banishment was being imposed in that context "on persons *convicted of no personal offence* against the laws of the land." James Madison, *Writings* 623 (Jack N. Rakove ed. 1999) (emphasis added). That is certainly not the case here.

dence over petitioner's proposal to resolve ambiguities in his favor, although, in light of *Babaisikov*, there is no need to remand to determine the Board's formal construction of the loss threshold in Subparagraph (M)(i).

2. Petitioner suggests (Br. 52) that deference to the Board's published decision in *Babaisakov* is inappropriate because that decision marked a change in the law and came after his sentencing proceeding.[16] In fact, the construction of Subparagraph (M)(i) articulated in *Babaisakov*—which essentially mirrored the one reached in petitioner's own proceeding before the Board, see Pet. App. 48a—does not raise retroactivity concerns. Petitioner does not even attempt to articulate how he satisfies the many variables that would be relevant to a retroactivity inquiry, including that he "relied on the former rule." *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). It is difficult to see how he relied at the time of his sentencing on the prior practice that he attributes to the Board. By his own account, he now claims (Br. 35) to have "entered into" the sentencing stipulation on the assumption that "the loss issue" was being "reserv[ed]" for resolution in the "immigration proceedings." But he also argues exactly the opposite: that the *only* "loss" determination that can ever matter in immigration proceedings is one that is made *before* sentencing, during the guilt phase, in the prior criminal proceeding.

3. Petitioner also argues (Br. 54) that *Chevron* is inapplicable here because the aggravated-felony definition is "part of a federal criminal statute * * * punishing illegal reentry." That assertion is based on the fact

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[16] Petitioner did not argue retroactivity concerns in the court of appeals or his petition-stage briefs in this Court.

that an aggravated-felony conviction can affect an alien's sentence for illegal reentry following a prior removal. 8 U.S.C. 1326. Generally, the maximum sentence for illegal reentry is a two-year term of imprisonment, but that term can be increased to 20 years if the prior removal was subsequent to a conviction for an aggravated felony, see 8 U.S.C. 1326(a) and (b)(2)—a factor this Court has held is not an element of the offense. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 226-227 (1998).[17] Petitioner's argument fails for several reasons.

First, the aggravated-felony definition at issue here is unlike the ones addressed in the decisions on which petitioner relies (Br. 55). In those cases, the relevant components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code (the definition of a "crime of violence" in 18 U.S.C. 16 and the definition of a "drug trafficking crime" in 18 U.S.C. 924(c)(2)). *Lopez*, 549 U.S. at 52-53; *Leocal*, 543 U.S. at 4-5. Here, by contrast, the relevant definition is entirely contained in Section 1101(a)(43), in the INA itself.

Second, the principal purpose of Subparagraph (M)(i) and the other self-contained definitions in Section 1101(a)(43) is to provide a basis for civil removability determinations. Petitioner's rationale would allow the tail to wag the dog, by denying the Attorney General the deference to which this Court has held he is entitled just because the definition of aggravated felony entrusted to his application under the INA might one day be of collat-

[17] The United States Sentencing Guidelines authorize an eight-level upward adjustment in a defendant's offense level for illegal reentry if the defendant was convicted of an "aggravated felony," as defined in the INA, before a prior removal from the United States. § 2L1.2(b)(1)(C) & comment. (n.3(A)).

eral relevance in a separate criminal prosecution. In an analogous context, the Court has held that agency interpretations issued in the administration of a regulatory statute are entitled to deference even though the statute may sometimes be enforced in criminal prosecutions. See *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 703, 704 n.18 (1995); see also *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (granting *Chevron* deference to an SEC rule in a criminal case). Consistent with those principles, the lower courts have correctly recognized that the Board is owed deference for its interpretations of other aggravated-felony definitions found to be ambiguous, such as the reference to "sexual abuse of a minor" in 8 U.S.C. 1101(a)(43)(A).[18]

Deferring to the Board's interpretation here would obviate any potential for different constructions in the removal and criminal-sentencing contexts. In either context, the same construction would apply: the loss threshold is not an element of the crime itself, but instead qualifies which criminal convictions involving fraud or deceit are to be classified as aggravated felonies. There would be no "*Apprendi* problem" (Pet. Br. 44, 53) in any subsequent criminal proceeding under Section 1326 for illegal entry—even assuming *Almendarez-Torres*, *supra*, does not control the resolution of that question—as long as the jury in that later proceeding made a determination of the

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[18] See, *e.g.*, *James* v. *Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008); *Gattem* v. *Gonzales*, 412 F.3d 758, 764 (7th Cir. 2005); *Espinoza-Franco* v. *Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005); *Bahar* v. *Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 940 (7th Cir. 2001). But see *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1157 & n.7 (9th Cir. 2008) (finding *Chevron* deference inapplicable, in part because the statutory reference to "sexual abuse of a minor" is not ambiguous).

loss associated with the prior offense beyond a reasonable doubt (or the defendant waived his right to have that question decided by a jury). Cf. *Hayes*, 129 S. Ct. at 1087.

E. The Loss To Victims In Petitioner's Offense Vastly Exceeded $10,000

In addressing whether his offense was one in which the loss to victims actually exceeded $10,000, petitioner says almost nothing aside from the fact that his criminal jury was not required to find an amount of loss associated with the conspiracy of which he was convicted.

Petitioner claims (Br. 35) that "both the government and the District Court agreed at sentencing that [he] had not caused a loss in excess of $10,000." But that misstates the record. The transcript of the sentencing proceeding reveals that the government and the district court simply agreed with defense counsel's statement that "the entire $683 million loss" was associated with the fraud offense, and that, because petitioner was jointly and severally liable for "the entire scheme," there had been no separate determination that he was personally "responsible for" any particular portion of that loss. J.A. 97a-98a. Thus, the prosecutor agreed with defense counsel's statement that there was no "finding of over [$]10,000 specific to this defendant," because, as the prosecutor said, $683 million was "[j]ust the loss" associated with the fraud. *Ibid.*; see also J.A. 118a (portion of judgment stating that the "Total Loss" was $683,632,800.23).

Because each conspirator is responsible for acts within the scope of a conspiracy, see generally *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997), there was no criminal-law reason to parcel out responsibility for vic-

tims' losses among individual conspirators. Moreover, petitioner's requested instruction on "loss" (Br. 41) was also unrelated to the aggravated-felony definition at issue in the immigration proceeding, because the "loss" under Subparagraph (M)(i) must, under any reading, relate to one of the nouns that precedes it—either the "offense," the "fraud," or the "deceit"—and not just the alien's own personal role. Petitioner does not argue otherwise.

There is no evidence to suggest that petitioner's sentencing stipulation and restitution order were based on other "relevant conduct" (Pet. Br. 33-34), or "unreliable evidence of what actually happened in [his] past conviction" (ACLU Br. 17), or anything else petitioner and his amici believe in the abstract to be inappropriate (Asian Am. Justice Ctr. Br. 18 (criticizing restitution orders and pre-sentence investigation reports as unreliable)). The sentencing stipulation and restitution order are thus persuasive evidence that petitioner was convicted of an offense "in which the loss to the victim or victims exceeded $10,000." Indeed, since petitioner has never in the course of his immigration proceedings suggested that the actual loss was anything less than those massive amounts, it was appropriate for the Board to conclude that there was clear and convincing evidence that his conviction fell within the definition of an aggravated felony under Subparagraphs (M)(i) and (U).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101(a)(43) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

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[5] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

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[6] So in original. Probably should be followed by a semicolon.

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. 1227(a)(2)(A) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

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

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

* * * * *

3. 8 U.S.C. 1326(a) and (b) provide:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such ali-

en shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

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[1] So in original. The period probably should be a semicolon.