

No. 08-495

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**In the Supreme Court of the United States**

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MANOJ NIJHAWAN, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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GREGORY G. GARRE  
*Solicitor General  
Counsel of Record*

GREGORY G. KATSAS  
*Assistant Attorney General*

DONALD E. KEENER  
JENNIFER J. KEENEY  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

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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.

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	6
Conclusion .....	14

## TABLE OF AUTHORITIES

### Cases:

<i>Ali v. Mukasey</i> , 521 F.3d 737 (7th Cir. 2008), petition for cert. pending, No. 08-552 (filed Oct. 23, 2008) .	13, 14
<i>Arguelles-Olivares v. Mukasey</i> , 526 F.3d 171 (5th Cir. 2008) .....	11
<i>Babaisakov, In re</i> , 24 I. & N. Dec. 306 (2007) .....	11, 12
<i>Conteh v. Gonzales</i> , 461 F.3d 45 (1st Cir. 2006) .....	11
<i>Dulal-Whiteway v. DHS</i> , 501 F.3d 116 (2d Cir. 2007) ..	12
<i>Gertsenshteyn v. United States Dep’t of Justice</i> , 544 F.3d 137 (2d Cir. 2008) .....	13
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999) .....	13
<i>James v. Mukasey</i> , 522 F.3d 250 (2d Cir. 2008) .....	13
<i>Kawashima v. Mukasey</i> , 530 F.3d 1111 (9th Cir. 2008), petition for reh’g en banc pending, Nos. 04-74313 and 05-74407 (filed Sept. 15, 2008) .....	12
<i>Knutsen v. Gonzales</i> , 429 F.3d 733 (7th Cir. 2005) .....	5
<i>National Cable &amp; Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005) .....	13
<i>Obasohan v. United States Att’y Gen.</i> , 479 F.3d 785 (11th Cir. 2007) .....	12

## IV

Cases—Continued:	Page
<i>Pichardo-Sufren, In re</i> , 21 I. & N. Dec. 330 (1996) . . . .	10
<i>Shepard v. United States</i> , 544 U.S. 13 (2005) . . . . .	4, 7
<i>Silva-Trevino, In re</i> , 24 I. & N. Dec. 687 (2008) . . . .	11, 12
<i>Singh v. Ashcroft</i> , 383 F.3d 144 (3d Cir. 2004) . . . . .	5, 8, 9
<i>Taylor v. United States</i> , 495 U.S. 575 (1990) . . . . .	4, 7, 8
Statutes:	
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) .	4, 8
8 U.S.C. 1101(a)(43) . . . . .	3
8 U.S.C. 1101(a)(43)(D) . . . . .	2
8 U.S.C. 1101(a)(43)(K)(ii) . . . . .	13
8 U.S.C. 1101(a)(43)(M) . . . . .	8, 9
8 U.S.C. 1101(a)(43)(M)(i) . . . . .	<i>passim</i>
8 U.S.C. 1101(a)(43)(M)(ii) . . . . .	8
8 U.S.C. 1101(a)(43)(U) . . . . .	3, 6
8 U.S.C. 1182(a)(2)(A)(i)(I) . . . . .	12
8 U.S.C. 1227(a)(2)(A)(iii) . . . . .	2, 5
8 U.S.C. 1229a(c)(3)(A) . . . . .	5
18 U.S.C. 371 . . . . .	2
18 U.S.C. 1341 . . . . .	2
18 U.S.C. 1343 . . . . .	2
18 U.S.C. 1344 . . . . .	2
18 U.S.C. 1956 . . . . .	2
18 U.S.C. 1956(h) . . . . .	2
26 U.S.C. 7201 . . . . .	8

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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-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 jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

1. Petitioner is a native and citizen of India who entered the United States as an immigrant in July 1985. Pet. App. 55a. In 2002, petitioner was arrested and in-

dicted for his involvement in a fraudulent scheme to obtain “hundreds of millions of dollars” in loans from banks. *Id.* at 2a (internal quotation marks and citation omitted); see A.R. 283. After a jury trial, petitioner was convicted of conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. 371, and of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 2a-3a, 45a.

The federal bank fraud, mail fraud, and wire fraud statutes do not require proof of any particular amount of loss to the victim or victims, see 18 U.S.C. 1344; 18 U.S.C. 1341; 18 U.S.C. 1343, and the jury did not find any particular amount of loss in reaching its verdict, see Pet. App. 3a. For purposes of sentencing, however, petitioner stipulated that the loss from the fraud conspiracy offense “exceeds \$100 million.” A.R. 264; see Pet. App. 3a. The judgment of conviction indicated that the total loss associated with the offenses was \$683,632,800.23. A.R. 281; see Pet. App. 3a. Petitioner was sentenced to 41 months of imprisonment and ordered, jointly and severally with his co-defendants, to pay restitution in the amount of the loss. A.R. 281-282; see Pet. App. 3a, 45a.

2. 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],” namely, a money laundering offense 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). See 8 U.S.C. 1227(a)(2)(A)(iii) (providing that an alien who commits an aggravated felony is

removable); 8 U.S.C. 1101(a)(43)(U) (providing that conspiracy to commit an offense described in 8 U.S.C. 1101(a)(43) qualifies as an aggravated felony). Contesting his removability, petitioner filed a motion to terminate the proceedings. Pet. App. 46a. The immigration judge (IJ) denied petitioner's motion to terminate, concluding that both of petitioner's offenses qualified as aggravated felonies and thus supported the charges of removability. *Id.* at 56a-61a. The IJ subsequently ordered petitioner removed to India. *Id.* at 54a-55a.

3. The Board of Immigration Appeals (BIA) affirmed, based solely on the charge that petitioner had been convicted of an aggravated felony fraud offense as defined in Section 1101(a)(43)(M)(i). Pet. App. 44a-51a. As an initial matter, the BIA concluded that petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualified as a crime involving fraud or deceit. *Id.* at 47a. The BIA also concluded, based on the record evidence, that petitioner's conviction was for an offense "in which the loss to the victim or victims exceed[ed] \$10,000," 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 47a-50a. The BIA rejected petitioner's argument that his fraud conspiracy conviction did not qualify as a conviction for an aggravated felony because the jury was not required to find loss exceeding \$10,000, reasoning that the loss threshold language is "used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of [Section 1101(a)(43)]." *Id.* at 48a. The BIA 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; Congress, the BIA concluded, "could not reasonably have intended" such a result.

*Ibid.* Looking to petitioner’s sentencing stipulation that the loss exceeded \$100 million, as well as the judgment of conviction indicating that the loss involved was more than \$680 million, the BIA concluded that petitioner had been convicted of an aggravated felony under Section 1101(a)(43)(M)(i). *Id.* at 50a-51a.

4. The court of appeals affirmed. Pet. App. 1a-43a. The court agreed with the BIA 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,” the offense qualified as an aggravated felony under Section 1101(a)(43)(M)(i), *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 involved the requisite loss must be limited to those facts necessarily found by a jury or necessarily admitted by a defendant entering a guilty plea. Pet. App. 9a-26a. The court explained that those decisions, which concerned whether prior state burglary convictions qualified as convictions for “burglary” under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), answered the question by employing a “formal categorical approach,” under which a sentencing court examines only the statutory definition of the offense to determine whether it contains the elements of generic “burglary” under the ACCA, and a “modified” version of that approach, which looks to other documents to determine “the nature of the conviction itself and those elements that the jury necessarily found.” Pet. App. 9a-

12a. In this case, the court of appeals explained, the loss language of Section 1101(a)(43)(M)(i) does not describe a required element of a generic offense, but is, rather, “qualifying” language, *id.* at 8a, that serves as “a limiting provision on crimes that would otherwise qualify,” and “invite[s] inquiry into the facts underlying the conviction at issue,” *id.* at 12a-13a (quoting *Singh v. Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004)). The court concluded that Section 1101(a)(43)(M)(i) thus requires an inquiry into whether the record evidence establishes a loss exceeding \$10,000, and whether the loss was “particularly tethered” to the specific fraud offense alleged 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 a contrary rule would effectively raise the government’s burden in removal proceedings from one of providing “clear and convincing evidence” of an alien’s removability, see 8 U.S.C. 1229a(c)(3)(A), to one of “proof beyond a reasonable doubt.” Pet. App. 24a. Moreover, the court noted, because “[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element,” such a rule “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.” *Id.* at 25a. Finally, the court concluded, such a 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.

Judge Stapleton dissented. Pet. App. 27a-43a. In his view, Section 1227(a)(2)(A)(iii), which requires that an

alien have been “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).” *Id.* at 29a. That inquiry, Judge Stapleton 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 did not qualify as an “aggravated felony” under Section 1101(a)(43)(M)(i). *Id.* at 33a.

#### ARGUMENT

Petitioner renews his contention (Pet. 14-26) that his conviction for involvement in a multi-million-dollar fraud conspiracy does not qualify as a conviction for 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), because the jury was not required to find a particular amount of loss in order to convict. The court of appeals correctly rejected petitioner’s contention, and although its analysis diverges from decisions of other courts of appeals, a recent decision of the Board of Immigration Appeals may serve as a vehicle for resolving any disagreement among the courts of appeals as to the question presented. Further review is not warranted.

1. The court of appeals correctly held that petitioner was convicted of an offense that qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (U), because petitioner was convicted of conspiracy to com-

mit an offense that “involves fraud,” and because petitioner’s sentencing stipulation, criminal judgment, and restitution order clearly established that petitioner’s fraud offense was one “in which the loss to the victim or victims exceeds \$10,000.” 8 U.S.C. 1101(a)(43)(M)(i). See Pet. App. 7a-26a.

a. Petitioner contends (Pet. 17-24) that, in determining whether the loss requirement was satisfied, the court of appeals should have restricted its inquiry “at most[] to what was necessarily established in the adjudication of guilt,” consistent with the “categorical approach” set forth in this Court’s decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). Petitioner’s contention lacks merit.

As the court of appeals explained (Pet. App. 9a-12a), the categorical approach of *Taylor* and *Shepard* governs the range of documents that may be used to establish that a defendant’s prior conviction categorically qualifies as a predicate for a criminal sentencing enhancement, based on an examination of the statutory elements of the defendant’s offense. See *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 16, 26. Neither case involved removal proceedings, and neither decision purported to limit the kinds of evidence that the government may adduce to establish required features of a prior offense other than its elements.

In a removal proceeding involving charges under Section 1101(a)(43)(M)(i), the specificity of the loss requirement language makes clear that loss exceeding \$10,000 is not a required element of the offense of conviction, but is rather “qualifying” language used to identify a subset of fraud offenses that constitute aggravated felonies, Pet. App. 8a, 14a, and therefore “invites inquiry

into ‘the underlying facts of the case,’” *id.* at 12a (quoting *Singh v. Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004)). As the court of appeals noted, a contrary interpretation “would render § 1101(a)(43)(M)(i) largely inoperative,” since “[m]ost fraud statutes, including the federal statutes at issue here, do not contain loss as an element” that must be “found by the jury or explicitly admitted to in a guilty plea.” *Id.* at 25a. The same is true of the other prong of the definition of “aggravated felony” in Section 1101(a)(43)(M), which encompasses any 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), since 26 U.S.C. 7201 likewise does not contain a revenue-loss element. See 26 U.S.C. 7201 (“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall \* \* \* be guilty of a felony[.]”). It is unlikely that Congress intended for the loss requirements of Section 1101(a)(43)(M)(i) and (ii) virtually to nullify those provisions. Cf. *Taylor*, 495 U.S. at 594 (rejecting an interpretation of the term “burglary” in 18 U.S.C. 924(e) that would track the common-law definition, reasoning that few state burglary statutes conform to the common-law definition, and such an interpretation therefore “would come close to nullifying that term’s effect in the statute”).

b. Contrary to petitioner’s contentions (Pet. 19-21), the court of appeals’ conclusion is entirely consistent with the statute’s use of the words “convicted,” “that,” and “in.” As an initial matter, the statutory requirement that an alien be “convicted” of an aggravated felony provides little aid to petitioner, since the court of appeals held that petitioner was removable because of his crimi-

nal conviction for conspiracy to commit fraud. In concluding that petitioner had a qualifying conviction, the court examined the statutory definitions of the federal bank fraud, mail fraud, and wire fraud offenses that formed the basis for the charges against him, and concluded that those statutory definitions *categorically* describe offenses that “involve fraud or deceit,” 8 U.S.C. 1101(a)(43)(M)(i). See Pet. App. 6a-7a. The court’s further conclusion that, as a factual matter, the fraud offense was one “in which the loss to the victim or victims exceeds \$10,000,” *ibid.*, does not mean, as petitioner suggests (Pet. 18 & n.6), that the court determined that he was removable merely because he had *committed* criminal conduct. Rather, having already determined that petitioner had been convicted of an offense that categorically qualifies as an offense involving fraud or deceit, the court, consistent with the language of the statute, then inquired whether the conduct underlying that conviction resulted in victim loss greater than \$10,000.

Nor does the court of appeals’ decision “rip[]” the loss requirement language “out of the larger context of a restrictive clause beginning with the word ‘that’” and thus “render[] ‘that’ a nullity.” Pet. 19. The word “that,” as applied to subparagraph (i) in 8 U.S.C. 1101(a)(43)(M), serves the basic function of identifying crimes “that \* \* \* involve[] fraud or deceit.” The text, beginning with “in which,” then confines the qualifying fraud or deceit offenses to those resulting in a loss of \$10,000 or more. The court’s decision thus appropriately interprets the loss requirement language as a “limiting provision” on fraud offenses “that would otherwise qualify” as aggravated felonies under Section 1101(a)(43)(M)(i). See Pet. App. 13a (quoting *Singh*, 383 F.3d at 161).

And finally, the fact that the loss requirement is introduced by the words “in which” rather than “for which” cannot bear the significance that petitioner (Pet. 20) ascribes to it; the word “in” does suggest that the required loss must be within the scope of the criminal conduct, but that is not, as petitioner suggests, the equivalent of a requirement that the statutory definition of the offense contain a loss *element*, such that a loss finding would necessarily be part of a jury verdict or guilty plea.

c. Petitioner also errs in contending (Pet. 22) that the court of appeals’ decision “radically alter[s] the burden of proof for cases such as this,” because the court relied in part on a restitution order governed by a preponderance of the evidence standard. As the court repeatedly made clear, it applied the requisite “clear and convincing evidence” standard, and found such evidence in the indictment, stipulation, judgment of conviction, and the restitution order, all of which demonstrated that petitioner’s fraud offense involved a loss far exceeding \$10,000. Pet. App. 17a, 24a, 26a. As the court noted, there is “no argument, let alone anything in the record, that [petitioner] was convicted of an offense involving less than \$10,000.” *Id.* at 17a.

d. Petitioner contends (Pet. 23) that the court of appeals’ approach imposes substantial added burdens on courts in removal proceedings. But it is, as the court of appeals noted, “well within the competence of a court to examine the record for clear and convincing evidence of loss caused by the conduct of conviction.” Pet. App. 26a. And although petitioner cites the BIA’s decision in *In re Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (1996), for the proposition that “when deportability is based upon conviction the categorical approach is the only ‘workable

approach,’” Pet. 23, it is notable that the BIA itself has endorsed the approach adopted by the court of appeals. See *In re Babaisakov*, 24 I. & N. Dec. 306 (2007). Moreover, in a recent opinion, the Attorney General expressly rejected the proposition that “the administrative burdens associated with inquiries beyond the record of conviction should preclude such inquiries,” noting that considerations of administrative efficiency must be “secondary to the determination and enforcement of statutory language,” and that, in any event, “[i]mmigration judges are well versed in case management,” and capable of avoiding “relitigat[ion] of the conviction itself.” *In re Silva-Trevino*, 24 I. & N. Dec. 687, 702-703 (A.G. 2008) (internal quotation marks and citation omitted).

2. The court of appeals’ decision in this case is consistent with the decisions of the First and Fifth Circuits. See *Conteh v. Gonzales*, 461 F.3d 45, 55, 59 (1st Cir. 2006); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 177-179 (5th Cir. 2008). As noted above, it is also consistent with the BIA’s recent precedential decision in *Babaisakov*.

In *Babaisakov*, the BIA clarified that the *Taylor* and *Shepard* categorical approach applies in immigration proceedings only insofar as the relevant statute “demands a focus exclusively on the elements of a prior conviction.” 24 I. & N. Dec. at 309. Where the “removal charge requires proof of some fact that is not an element of the predicate offense,” the BIA concluded that the factfinder may consider “any evidence[] otherwise admissible in removal proceedings” that bears on the question. *Id.* at 317, 320-321. Based on the language, history, and purpose of the provision, the BIA held that the loss requirement of Section 1101(a)(43)(M)(i) is such a non-element factor. *Id.* at 309-316. The BIA thus

held that a court considering whether an alien’s offense qualifies as an aggravated felony under Section 1101(a)(43)(M)(i) must make two types of determinations: (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. *Id.* at 322. In his recent decision in *Silva-Trevino*, the Attorney General expressly approved the BIA’s decision in *Babaisakov*, and concluded that immigration judges may also look beyond materials qualified under *Taylor* and *Shepard* to determine whether an alien has been convicted of a “crime involving moral turpitude” under 8 U.S.C. 1182(a)(2)(A)(i)(I). See 24 I. & N. Dec. at 701-702; see also *id.* at 689-690.

As petitioner correctly notes (Pet. 14-15), and as the court below also acknowledged (Pet. App. 9a, 21a-22a), other courts of appeals have taken different approaches to the question. See *Dulal-Whiteway v. DHS*, 501 F.3d 116, 131, 133-134 (2d Cir. 2007) (court must determine whether loss threshold has been met based solely on “information appearing in the record of conviction that would be permissible under the *Taylor-Shepard* approach in the sentencing context”); *Kawashima v. Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) (per curiam) (court may not consult any extrinsic documentation unless monetary loss is an element of the offense of conviction), petition for rehearing en banc pending, Nos. 04-74313 and 05-74408 (filed Sept. 15, 2008); cf. *Obasohan v. United States Att’y Gen.*, 479 F.3d 785, 790-791 (11th Cir. 2007) (restitution order did not discharge government’s burden of establishing an alien’s removability).

Significantly, however, both *Dulal-Whiteway* and *Obasohan* were decided before the BIA issued its precedential decision in *Babaisakov*, which is entitled to

deference under *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), and neither the Second Circuit nor the Eleventh Circuit has since addressed the import of the BIA’s decision in that case.<sup>1</sup> And although the Ninth Circuit panel’s decision in *Kawashima* postdates the BIA’s decision in *Babaisakov*, the panel did not address *Babaisakov* in its per curiam decision. As the Seventh Circuit recently noted, those court of appeals decisions that “predate (or do not notice) *Babaisakov* \* \* \* require reexamination now that the [BIA] has fully developed its own position, for administrative discretion belongs to the agency rather than to the court.” *Ali v. Mukasey*, 521 F.3d 737, 742-743 (7th Cir. 2008) (citing *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)), petition for cert. pending, No. 08-552 (filed Oct. 23, 2008); see *id.* at 743 (deferring to the BIA’s decision in *Babaisakov*). Because the BIA’s

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<sup>1</sup> The Second Circuit has noted the conflict between its decision in *Dulal-Whiteway* and *Babaisakov*. See *Gertsenshteyn v. United States Dep’t of Justice*, 544 F.3d 137, 144 n.7 (2d Cir. 2008); *James v. Mukasey*, 522 F.3d 250, 257 n.8 (2d Cir. 2008). But neither *Gertsenshteyn* nor *James* concerned the scope of evidence a court may consult in determining whether the loss threshold of Section 1101(a)(43)(M)(i) is satisfied, and neither decision addressed the question whether *Babaisakov* requires reexamination of *Dulal-Whiteway*. See *Gertshensteyn*, 544 F.3d at 145-148 (concluding that a court determining whether an offense qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(K)(ii) is limited to considering documents qualified under *Taylor* and *Shepard*); *James*, 522 F.3d at 255, 259 (noting that it remains an open question in the circuit whether the modified categorical approach applies where the alien was convicted under a “statute . . . where only one type of generic conduct . . . is proscribed, but an alien can commit the conduct both in ways that would render him removable . . . and in ways that would not”; and remanding to the BIA to consider the question in the first instance) (internal quotation marks and citation omitted).

precedential decision in *Babaisakov* may prompt other courts to reconsider their resolution of the question, and thus may alter or eliminate any differences between the courts' approaches, this Court's intervention is not warranted at this time.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE

*Solicitor General*

GREGORY G. KATSAS

*Assistant Attorney General*

DONALD E. KEENER

JENNIFER J. KEENEY

*Attorneys*

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