No. 14-1058

# In the Supreme Court of the United States

PADMASHRI SAMPATHKUMAR, PETITIONER

*v.*

LORETTA E. LYNCH, ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner's conviction under 18 U.S.C. 1014 for knowingly making a false statement for the purpose of influencing a federally insured bank's action on a loan application was for an "offense that * * * involves fraud or deceit" for purposes of the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43)(M)(i).

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 3a-12a) is not published in the *Federal Reporter* but is reprinted at 573 Fed. Appx. 55. The opinion of the Board of Immigration Appeals (Pet. App. 13a-20a) and the decision of the immigration judge (Pet. App. 21a-28a) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on July 25, 2014. A petition for rehearing was denied on November 17, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 17, 2015 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. An alien who has been admitted to the United States and is subsequently convicted of an aggravated felony is subject to removal from the United States upon the order of the Attorney General. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the phrase "aggravated felony" is defined as including 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).

In *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012), the Court held that convictions for willfully making and subscribing a false tax return (in violation of 26 U.S.C. 7206(1)) and for aiding and assisting in the preparation of a false tax return (in violation of 26 U.S.C. 7206(2)) could constitute aggravated felonies under Subparagraph (M)(i) if the $10,000-loss threshold was satisfied, because they were both offenses that "involved 'deceit'" when their elements were evaluated under a categorical approach. 132 S. Ct. at 1172-1173 & n.3. In *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), the Court held that the portion of Subparagraph (M)(i) requiring the government to establish a $10,000 loss "does not refer to an element of the fraud or deceit crime," and should be evaluated on the basis of a "circumstance-specific" approach rather than a "categorical" or "modified categorical" approach. *Id.* at 32, 36, 41.

2. Petitioner is a native and citizen of India whose status was adjusted to that of a lawful permanent resident on May 27, 1998. Pet. App. 23a.[1]

In 2005, petitioner and her husband (who is a naturalized U.S. citizen) were indicted by a grand jury in

[1] Petitioner previously contended she became a naturalized U.S. citizen in 2004, Pet. App. 11a, 23a, but that contention was rejected by the court of appeals, *id.* at 10a-11a, and is no longer at issue.

the United States District Court for the Western District of Pennsylvania on four counts of bank fraud or wire fraud stemming from allegations that, in their attempts to secure financing for a company they owned, they had made false representations to First Merit Bank, to another bank, and to other financiers. See Administrative Record (A.R.) 668-677 (indictment). In 2006, the United States Attorney filed a criminal information charging petitioner and her husband with one count of knowingly making false statements in an application for the purpose of influencing the action of First Merit Bank, a financial institution insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1014 and 2(a).[2] A.R. 665-666 (criminal information).

Petitioner and her husband pleaded guilty to the Section 1014 count, in exchange for which the government moved to withdraw and dismiss the prior indictment. A.R. 608-638 (plea colloquy). The district court explained that the elements of Section 1014 require the government to establish (1) that the defendant "made or caused to be made a false statement or report upon

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[2] Section 1014 provides, in pertinent part, as follows:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, loan, or insurance agreement * * * shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1014. Minor amendments have been made to the provision since petitioner's conviction, but they are not material to the questions in this case.

an application to a bank for a loan"; (2) that the defendant "acted knowingly"; (3) that "the false statement or report was made for the purpose of influencing in any way the bank's action on the loan application"; and (4) that "the false statement or report was made in connection with a loan application to a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation." A.R. 624.

In their guilty plea colloquy, petitioner and her husband admitted that, during the period in question (December 2002 to June 2003), First Merit Bank loaned their company approximately $3.7 million, and that, in connection with those financing transactions, they "submitted false financial statements, tax returns, and other fraudulent documents." A.R. 633-634. The parties stipulated that the loss for purposes of the sentencing guidelines was between $2.5 million and $7 million. A.R. 631.

In 2007, petitioner was sentenced to a 40-month term of imprisonment, to be followed by five years of supervised release. A.R. 598-600 (judgment). Her sentence required her to make more than $10.7 million in restitution to 29 different entities, including a payment of $2,969,694 to First Merit Bank. A.R. 602-603, 607.

3. In 2009, the Department of Homeland Security (DHS) charged petitioner with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), as a result of having been convicted of an aggravated felony, as defined in 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 22a. Appearing through counsel, petitioner admitted that she had been convicted under 18 U.S.C. 1014, but denied that the offense involved fraud or deceit and denied that it resulted in a loss to the victim or victims in an amount exceeding

$10,000. Pet. App. 23a. Petitioner filed a motion to terminate her removal proceedings or, in the alternative, to allow her to adjust her immigration status to that of a lawful permanent resident, with a waiver of inadmissibility if necessary. *Ibid.*

On April 1, 2010, the immigration judge (IJ) granted petitioner's motion to terminate, concluding that DHS had not shown by clear and convincing evidence that petitioner had been convicted of an aggravated felony. Pet. App. 24a-28a. In the IJ's view, an offense under Section 1014 does not involve fraud or deceit because it does not require that the false statement be material or that the defendant have an intent to defraud the bank or that the bank actually rely on the statement to its detriment. *Id.* at 26a-27a.

4. On August 31, 2010, the Board of Immigration Appeals (Board) issued an order vacating the IJ's decision and remanding for further proceedings. Pet. App. 14a. The Board concluded that petitioner's offense did involve fraud or deceit and did result in a loss to victims exceeding $10,000. A.R. 480-483. On remand, the IJ denied petitioner's application for adjustment of status and waiver of inadmissibility on the ground that her aggravated-felony conviction rendered her ineligible for such relief, and ordered that she be removed to India. A.R. 178-180. The Board affirmed the IJ's decision on October 17, 2011. Pet. App. 14a. Petitioner filed a petition for review in the court of appeals, but the court granted the government's unopposed motion to remand the case to the Board for further proceedings in light of this Court's 2012 decision in *Kawashima*, *supra*. Pet. App. 14a-15a.

Upon remand, the Board again dismissed petitioner's appeal on July 22, 2013. Pet. App. 13a-20a. It determined that petitioner had been "convicted of an offense that categorically involves fraud or deceit." *Id.* at 15a. The Board explained that "[a] conviction under 18 U.S.C. § 1014 requires that the person intentionally provide a false statement or report, or willfully overvalue land, property or security for 'the purpose of influencing' the government and financial institutions. Such conduct satisfies the definition of deceit used by the Supreme Court in *Kawashima*." *Id.* at 18a. The Board acknowledged that Section 1014 does not require that the false statement be material, and the offense therefore differs from the false-tax-return offenses at issue in *Kawashima*. *Id.* at 17a. But it noted that *Kawashima* "did not attach a materiality requirement to the definition of deceit," *ibid.*, and instead relied on a dictionary definition of deceit as "the act or process of deceiving (as by falsification, concealment, or cheating)," *ibid.* (quoting *Kawashima*, 132 S. Ct. at 1172, in turn quoting *Webster's Third New International Dictionary* 584 (1993)).

The Board further concluded that petitioner's conviction satisfied the portion of Subparagraph (M)(i) requiring that her offense involve a loss to the victim or victims in excess of $10,000. Pet. App. 19a-20a. It noted that the parties' stipulation at petitioner's guilty plea colloquy of a loss between $2.5 million and $7 million was "sufficient to satisfy the loss requirement" under this Court's decision in *Nijhawan*, *supra*, "even though [the stipulation] may have included losses relating to other misconduct as well as that in the count of conviction." Pet. App. 19a-20a.

5. Petitioner again sought review in the court of appeals, which granted her petition in part and remanded

to permit the Board and the IJ to make further factual findings and legal determinations. Pet. App. 3a-12a.

a. As relevant to the question presented in this Court, the court of appeals held that, under the categorical approach, an offense under Section 1014 "involve[s] deceit." Pet. App. 5a. The court noted that the false-tax-return statute at issue in *Kawashima* "contained the elements that 'necessarily entail[ed]' deceitful conduct: a falsity, that was material, and knowingly and willfully made." *Id.* at 6a (citation omitted; brackets in original). The court found that "[n]early all of these elements are satisfied" by Section 1014, which requires the government to demonstrate "that a defendant acted with the knowledge that the information was false and with the purpose of influencing the action of the institution." *Ibid.*

The court of appeals recognized that "materiality is not an element" of an offense under Section 1014. Pet. App. 6a. But it explained that the government's need to prove under Section 1014 that a false statement was made with the intent to influence a bank "approaches a materiality requirement," and ensures that "there is not a 'realistic probability' that a false statement sufficient for conviction under § 1014 would be trivial." *Id.* at 6a-7a. In any event, the court reiterated that "[w]ith regard to any elements mentioned in *Kawashima* still lacking here, the Supreme Court did not hold that all those elements must be present for subsection (M)(i) to apply." *Id.* at 7a. Accordingly, it "conclude[d] that § 1014 states an offense that involves deceit." *Ibid.*

b. Turning to Subparagraph (M)(i)'s $10,000-loss requirement, the court of appeals held that the Board had procedurally erred by "engag[ing] in impermissible fact finding," and that, in the course of doing so, the

Board had "erroneously relied on the loss amount stipulated by the parties at the plea colloquy," when it should have limited the inquiry to the loss that was "tethered to the count of conviction." Pet. App. 8a & n.2. The court held that, on remand, the IJ would need to "make the necessary factual findings to determine removability." *Id.* at 8a.

c. The court of appeals further concluded that, even if the factual findings on remand establish that petitioner "was convicted of an aggravated felony, she may still be eligible for adjustment of status." Pet. App. 9a. The court stated that the Board and the IJ had failed to determine whether Section 1014 is a "crime involving moral turpitude." *Ibid.* If it is not, then she would not need a waiver of ineligibility under 8 U.S.C. 1182(h); but if it is such a crime, then it would also be necessary to consider whether her eligibility for a waiver "was affected by the numerous trips she took abroad after she had already adjusted to lawful permanent resident status." Pet. App. 9a-10a & n.4. The court thus remanded to allow the agency to make those determinations about whether petitioner would need a waiver of inadmissibility to adjust her status and thereby avoid being removed. *Id.* at 10a.[3]

**ARGUMENT**

Petitioner contends (Pet. 2-6, 14, 22) that, in determining whether her conviction under 18 U.S.C. 1014 for making a false statement to a federally insured bank was for an aggravated felony, the court of appeals erroneously applied the categorical approach by looking beyond the actual legal elements of a Section 1014

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[3] As noted above (see note 1, *supra*), the court of appeals also rejected petitioner's claim that she is a U.S. citizen.

offense and considering facts associated with the crime. She further contends (Pet. 15-19) that the court of appeals erred in finding that an offense may "involve[] * * * deceit" for purposes of 8 U.S.C. 1101(a)(43)(M)(i) even when it does not contain a materiality element. Both of petitioner's contentions lack merit, and the decision below does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court of appeals' decision is interlocutory, and there are additional issues that remain to be determined on remand. Further review is unwarranted.

1. Petitioner's general contention that the court of appeals misapplied the categorical approach turns on her repeated assertions that it looked beyond the actual legal elements of the underlying offense and instead considered facts associated with potential prosecutions for the crime. See, *e.g.*, Pet. 2 ("[T]he decision below jettisoned the categorical approach in favor of examining the facts likely involved in a prosecution under 18 U.S.C. § 1014."); Pet. 3 (The decision "equat[ed] how the government might arguably choose to prosecute a case on the facts with the minimum *legal* elements necessary for conviction."); Pet. 5, 6, 22. But that characterization does not correspond to the court of appeals' analysis, which was confined to what the elements of an offense under Section 1014 necessarily entail.

a. Determining whether an offense is one that "involves fraud or deceit" for purposes of the aggravated-felony definition in 8 U.S.C. 1101(a)(43)(M)(i) requires application of a categorical approach. See *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012). The Court has explained that such an approach "look[s] to the statute defining the crime of conviction, rather than to the specific facts underlying the crime." *Ibid*. Yet, even when focusing on "the minimum conduct criminalized by the * * * statute" that defines the underlying offense, the Court has cautioned that the categorical approach is not "an invitation to apply 'legal imagination' to the [underlying] offense; there must be 'a realistic probability, not a theoretical possibility,'" that the statute would be applied to conduct that would not satisfy the aggravated-felony definition. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

In this case, the court of appeals referred in passing to the lack of any "realistic probability" that a Section 1014 offense would involve a "trivial" offense, "notwithstanding the lack of a materiality requirement." Pet. App. 6a-7a. Petitioner portrays that passing reference as a fatal misstep. In her view, the decision below effectively held that Section 1014 lacks a materiality element as a legal matter but satisfies Subparagraph (M)(i) because it contains a *de facto* materiality requirement. But the court of appeals' reference to the "realistic probability" idea merely reflected the common-sense proposition that, even though materiality *per se* is not an element of a Section 1014 offense, there *is* an actual element of the offense—the requirement that the false statement be made "for the purpose of influencing" the financial institution's actions, 18 U.S.C. 1014—that "approaches a materiality requirement," Pet. App. 6a. That is, in fact, no more than what this Court already observed in *United States* v. *Wells*, 519 U.S. 482 (1997). See *id*. at 499 ("The language makes a false statement to one of the enumerated financial institutions a crime only if the speaker knows the falsity of what he says and intends it to influence the institution. * * * Hence the literal reading of the statute will not normally take the scope of § 1014 beyond the limit that a materiality requirement would impose."). That insight, however, still rests entirely on the elements of a Section 1014 offense, and does not require resort to the facts of the underlying offense. Moreover, the court of appeals did not hold that Section 1014 includes an element that would, in practice, serve as an adequate substitute for materiality. Instead, it squarely acknowledged that "materiality is not an element of" a Section 1014 offense and correctly concluded that *Kawashima* "did not hold that" such an element "must be present for subsection (M)(i) to apply." Pet. App. 6a, 7a.

Given the court of appeals' appropriate focus on the elements of Section 1014, in light of what is necessary for an offense to "involve[] * * * deceit" under Subparagraph (M)(i), the decision below does not substantiate petitioner's concerns about thwarting the categorical approach by "turn[ing] an elements-based inquiry into an evidence-based one." Pet. 6 (quoting *Descamps* v. *United States*, 133 S. Ct. 2276, 2287 (2013)). Nor does it create any "need," as petitioner contends (Pet. 22), for the Court "to clarify" that "the categorical approach considers only the legal elements of the offense, not the underlying facts."[4]

[4] Since the petition was filed, the Court has reiterated that the categorical approach "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli* v. *Lynch*, No. 13-1034 (June 1, 2015), slip op. 6; see *ibid.* ("An alien's actual conduct is irrelevant to the inquiry."); *id.* at 6 n.4 ("Off limits to the adjudicator * * * is any inquiry into the particular facts of the case."). Because those statements are virtually identical to what the Court said in *Kawashima* and *Moncrieffe*, and because the court of appeals here did not ever address

b. For the same reason, petitioner errs in asserting (Pet. 20-21) that the decision below has created a "direct[] conflict[] with decisions from [five] other circuits that have correctly applied the 'realistic probability test' in line with the categorical approach." Petitioner highlights language from those decisions supporting the proposition that a court need not involve itself in legal imagination to find something is a reasonable probability when the conduct covered by the elements of the underlying offense plainly embraces conduct that would not satisfy the elements of the generic offense.[5] But that proposition is inapposite here, where the court of appeals did not conclude that Section 1014's elements extend beyond those of a generic offense involving deceit, and instead concluded that the generic offense does not include the materiality requirement that also is not included in Section 1014.

2. Petitioner's categorical-approach objection also depends on the premise (Pet. 2-3, 15-19, 22) that an offense cannot "involve[] * * * deceit" for purposes of

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the facts of petitioner's actual conduct or the particulars of her behavior, no purpose would be served by vacating the interlocutory decision below for further proceedings in light of *Mellouli*.

[5] See, *e.g.*, *Ramos* v. *United States Att'y Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."); *United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir.) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.") (citation omitted), cert. denied, 552 U.S. 970 (2007).

Subparagraph (M)(i) unless it includes a materiality element. The court of appeals correctly rejected that premise, and there is no circuit conflict concerning the question.

a. Petitioner contends (Pet. 15) that this Court's decision in *Kawashima* held that an offense involving "deceit" must include a "materiality" element. Although the false-tax-return offenses that the Court addressed in *Kawashima* each included a materiality element, see 132 S. Ct. at 1172-1173, the Court did not hold that such an element would always be necessary to establish the presence of deceit, as opposed to being sufficient to do so in combination with the other elements there. Instead, the Court explained that Subparagraph (M)(i) "is not limited to offenses that include fraud or deceit as formal elements," because it "refers more broadly to offenses that 'involv[e]' fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Id.* at 1172 (brackets in original). It then noted that, at the time the provision was enacted, "the term 'deceit' meant * * * 'the act or process of deceiving (as by falsification, concealment, or cheating).'" *Ibid.* (quoting *Webster's Third New International Dictionary* 584 (1993)).

Here, the court of appeals correctly held that petitioner's conviction under Section 1014 involved "deceit" under that definition, because its elements required proof that she "knowingly ma[de]" a "false statement or report * * * for the purpose of influencing * * * the action of" a federally insured bank on a loan application. 18 U.S.C. 1014. In fact, this Court has already characterized Section 1014 as involving a defendant who acts "with intent to mislead" and "seek[s] to deceive" a financial institution. *Wells*, 519 U.S. at 494-495 (quoting *Kay* v. *United States*, 303 U.S. 1, 6 (1938), which was discussing an essentially identical statutory predecessor to Section 1014).[6] That description comports with *Kawashima*'s reference to "deceiving (as by falsification, concealment, or cheating)." 132 S. Ct. at 1172 (citation omitted); see also *Black's Law Dictionary* 465 (9th ed. 2009) (defining "deceit" as "1. The act of intentionally giving a false impression," or "2. A false statement of fact made by a person knowingly or recklessly * * * with the intent that someone else will act upon it.").

Petitioner further contends (Pet. 15) that "materiality" requires proof that a false statement "actually succeeded in producing detrimental reliance." See also Pet. 18. But materiality can exist in the absence of reliance, much less detrimental reliance. Thus, *Neder* v. *United States*, 527 U.S. 1 (1999), recognized that even where federal criminal *fraud* (not deceit) statutes require materiality, the additional "common-law requirements of 'justifiable reliance' and 'damages' * * * plainly have no place" in those criminal contexts. *Id*. at 24-25; see also *Nijhawan* v. *Holder*, 557 U.S. 29, 32, 39-40, 43 (2009) (concluding that convictions under those

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[6] The *Wells* Court's description directly refutes petitioner's suggestion (Pet. 15) that Section 1014 lacks an appropriate specific intent because it does not require "the intent to deceive." To the extent that she objects to its failure to require an "intent to defraud" (Pet. 17), that contention does not correspond to the deceit, rather than fraud, prong of Subparagraph (M)(i). Moreover, *Kawashima* conspicuously failed to include an intent to defraud among its articulation of the elements of the two false-tax-return offenses that it found to be aggravated felonies. 132 S. Ct. at 1172-1173.

federal fraud statutes, *inter alia*, were for aggravated felonies under Subparagraph (M)(i)).[7]

For the same reason, petitioner's resort to discussions of the common-law tort of deceit (Pet. 15-16) is unavailing. And the fact that Congress is able to tailor various fraud or false-statement criminal offenses by expressly adding or omitting particular elements—including materiality or an intent to defraud or deceive, see Pet. 23; Pet. Supp. Br. 1[8]—makes it impossible to extrapolate from those individual crimes to Subparagraph (M)(i)'s generic reference to offenses "involv[ing] * * * deceit." Ultimately, the appropriate touchstone is, as *Kawashima* indicates, the general definition of "deceit," which does not mention a materiality requirement. See p. 13, *supra*.

b. Petitioner does not even suggest that there is any circuit conflict concerning whether Subparagraph (M)(i) requires a materiality element or whether Sec-

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[7] Of course, even in the absence of a detrimental-reliance element, an offense that involves deceit as a categorical matter still will not constitute an aggravated felony under Subparagraph (M)(i) unless it in fact entails a "loss to the victim or victims exceed[ing] $10,000." 8 U.S.C. 1101(a)(43)(M)(i).

[8] Petitioner's supplemental brief acknowledges (at 1) that *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), recognized that the statute at issue there did not incorporate "the common law requirement of an intent to defraud or deceive." *Omnicare* addressed when statements of opinion in a registration statement filed with the Securities and Exchange Commission become "misleading" as a result of "omi[ssions] to state a material fact." 15 U.S.C. 77k(a). That inquiry, about what is "misleading" for purposes of a different statute in a wholly different context, has no meaningful bearing on whether Section 1014 defines an offense involving deceit for purposes of the aggravated-felony definition in the immigration context.

tion 1014 in particular "involves * * * deceit" for purposes of the aggravated-felony definition.

Although petitioner states that there is a circuit conflict "on the meaning of fraud or deceit," Pet. 23 (capitalization modified), she identifies only a disagreement between two circuits about whether an embezzlement conviction under 18 U.S.C. 656 satisfies Subparagraph (M)(i) in a case in which the government proved that the defendant acted with the intent to injure his employer (which is one way to prove the offense) but not with the intent to defraud his employer (another way of proving it). Compare *Moore* v. *Ashcroft*, 251 F.3d 919, 923 (11th Cir. 2001) (finding that a Section 656 offense satisfies Subparagraph (M)(i) because either version of its intent requirement is satisfied by "proof that the defendant knowingly participated in a deceptive or fraudulent transaction"), with *Valansi* v. *Ashcroft*, 278 F.3d 203, 210-211 (3d Cir. 2002) (finding that, in the absence of an intent to defraud, Section 656 does not satisfy Subparagraph (M)(i) because it requires only the taking of assets in the custody of a bank with the intent to injure, without any requirement of "deception").[9] But that thin conflict, which predates *Kawashima* by more than a decade, is primarily about the presence or absence of fraud, rather than deceit. With respect to the latter, Section 656 markedly differs from Section 1014 because it does not require the making

[9] Petitioner invokes (Pet. 6, 23) the Second Circuit's decision in *Akinsade* v. *Holder*, 678 F.3d 138 (2012), which also involved a conviction under Section 656. *Id.* at 140. But *Akinsade* expressly declined to address whether "embezzlement necessarily involves fraud or deceit, regardless of the specific intent with which it is perpetrated," because the government had conceded it needed to establish an intent to defraud. *Id.* at 146.

of a false statement. Accordingly, a decision by this Court about Section 1014 would be unlikely to resolve the disagreement about Section 656.

3. Finally, even if the question presented otherwise warranted the Court's review, this case would be a poor vehicle, because of its interlocutory posture. Although the court of appeals concluded that petitioner's conviction involved "deceit" and therefore satisfies part of the definition in Subparagraph (M)(i), it remanded for further factual and legal determinations by the BIA and the IJ about multiple issues, including whether the government proved that the loss associated with the offense exceeded $10,000. Pet. App. 7a-8a & n.2. If petitioner were to prevail on that question, her conviction would not qualify as an aggravated felony and the charge of removability would not be sustained. *Id.* at 8a. But even if her offense is found to be an aggravated felony, the Board will then need to determine whether it was for a crime involving moral turpitude. *Id.* at 9a. If not, then the agency erred in concluding that she is statutorily ineligible for an adjustment of status that would preclude her removal. *Id.* at 9a-10a. And, even if her offense was a crime involving moral turpitude, the agency would further need to consider whether her eligibility for a waiver "was affected by the numerous trips she took abroad after she had already adjusted to lawful permanent resident status." *Id.* at 10a n.4. Accordingly, the government must prevail on several open issues before petitioner's removal order will be sustained.

Under this Court's usual practice, that interlocutory posture "alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Mount*

*Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting the denial of the petitions for writs of certiorari); *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Of course, if petitioner ultimately loses on all of the questions that must be addressed on remand and remains subject to an order of removal, she would still have the opportunity to reiterate her current contention, together with any other contentions she may raise on petition for review of the Board's decision on remand. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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