No. 10-1448

In the Supreme Court of the United States

VARUGHESE ADACKAMANGAL VARUGHESE,
AKA VARUGHESE VARUGHESE, PETITIONER

v.

ERIC H. HOLDER, JR., 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 the threshold requirement of 8 U.S.C. 1101(a)(43)(D), defining a money-laundering aggravated felony for purposes of determining an alien's removability, is met if the amount of the funds the defendant intended to launder exceeded $10,000, even if no money was actually laundered because the defendant was apprehended in a sting operation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 629 F.3d 272. The opinions of the Board of Immigration Appeals (Pet. App. 9a-12a) and of the immigration judge (Pet. App. 13a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2010. A petition for rehearing was denied on March 2, 2011 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on May 26, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien shall be removed

from the United States if he or she "is convicted of an aggravated felony at any time after admission." 8 U.S.C. 1227(a)(2)(A)(iii). The statute defines "aggravated felony" to include "an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) * * * if the amount of the funds exceeded $10,000." 8 U.S.C. 1101(a)(43)(D). Section 1956, the money-laundering statute, provides for the criminal punishment of any person who,

> with the intent * * * to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity[,] * * * conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity.

18 U.S.C. 1956(a)(3).

2. Petitioner, a native and citizen of India, was admitted to the United States in 1981 as a lawful permanent resident. In 2002, petitioner was arrested as a result of a sting operation and charged with money laundering, in violation of Section 1956(a)(3)(B). Petitioner pleaded guilty. Pet. App. 2a-3a.

At his plea hearing, petitioner, who had run a check-cashing business, testified that he had issued money orders to a man he believed to be connected with drug traffickers. He did so, he said, because the man promised him excess commissions. Petitioner admitted conducting three specific transactions—one involving $30,000, another, $50,000, and a third, $100,000. Pet. App. 3a. Petitioner also admitted that he understood he was helping a drug trafficker hide his connection to illegal drug money by issuing the money orders. Administrative Record (A.R.) 204.

3. Following his conviction, petitioner was charged with removability under 8 U.S.C. 1227(a)(2)(A)(iii). He contested his removability before an immigration judge (IJ), but the IJ found petitioner removable as charged. Pet. App. 13a-25a. The IJ concluded that, because the money-laundering statute under which petitioner had pleaded guilty is silent as to the amount of funds that must be involved, it was proper to consider statements petitioner made during the plea colloquy in determining the amount of funds involved in the offense. *Id.* at 19a-20a. In so doing, the IJ found "clear evidence" that petitioner's offense involved amounts exceeding the $10,000 threshold set forth in Section 1101(a)(43)(D). *Id.* at 20a. Relying on *United States* v. *Santos*, 553 U.S. 507 (2008), petitioner argued that the term "proceeds" in the money-laundering statute means "profits," not "receipts," and he contended that, because his offense involved an undercover government agent, he did not in fact realize any profits. Pet. App. 18a. The IJ rejected that argument, suggesting that petitioner's reasoning "results in writing the attempt and conspiracy provisions of the INA out of the law." *Id.* at 20a.

4. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 9a-12a. The Board agreed with the IJ that it was appropriate to consider the statements petitioner made during his plea colloquy in determining that the amount of funds involved in his offense exceeded $10,000. *Id.* at 10a-12a. The Board also observed that petitioner "was convicted of actual money laundering, not merely an attempt." *Id.* at 11a. "Whether the conviction resulted from a 'sting' operation," the Board explained, "does not affect removabiilty," and therefore the IJ's discussion of attempt and conspiracy was "unnecessary." *Ibid.*

5. The court of appeals denied a petition for review. Pet. App. 1a-8a. Relying on this Court's decision in *Nijha-*

wan v. *Holder*, 129 S. Ct. 2294 (2009), the court held that the phrase "the amount of the funds exceeded $10,000" in Section 1101(a)(43)(D) "refers to the particular circumstances in which an offender committed a . . . crime on a particular occasion." Pet. App. 6a (quoting *Nijhawan*, 129 S. Ct. at 2298). Specifically, the court concluded that the "amount" at issue is the amount of money laundered. *Ibid*. Because petitioner admitted to laundering more than $10,000 on multiple occasions, the court held that the circumstances of his money-laundering conviction involved funds in excess of $10,000. *Ibid*.

The court of appeals rejected petitioner's contention that, under *Santos*, the money-laundering statute's use of the term "proceeds" must mean "profits," and that his conviction was therefore invalid because there can be no "profits" realized in a sting operation. Pet. App. 7a n.3. The court observed that the provision under which petitioner was convicted expressly contemplates sting operations, and it noted that, in any event, a court reviewing a removal decision may not entertain a collateral attack on a criminal conviction. *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner's conviction under 18 U.S.C. 1956(a)(3)(B), based on a guilty plea in which he admitted laundering more than $10,000 on three separate occasions, constituted an "aggravated felony," which is defined in 8 U.S.C. 1101(a)(43)(D) to include "an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) * * * if the amount of the funds exceeded $10,000." Its decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. In *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), this Court construed 8 U.S.C. 1101(a)(43)(M)(i), which parallels Section 1101(a)(43)(D) and provides that the definition of "aggravated felony" includes "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." The Court held that the requirement that the loss exceed $10,000 "does not refer to an element of the fraud or deceit crime" but instead "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." 129 S. Ct. at 2298. The Court also held that, in determining the circumstances of the offense, an IJ may consider "sentencing-related material" as well as "the written plea documents or the plea colloquy." *Id.* at 2302-2303.

Applying the reasoning of *Nijhawan*, the court of appeals correctly held that a determination of whether "the amount of the funds exceeded $10,000" for purposes of the money-laundering aggravated felony, 8 U.S.C. 1101(a)(43)(D), must be based on "a 'circumstance-specific' approach, and not a 'categorical' one," Pet. App. 6a (quoting *Nijhawan*, 129 S. Ct. at 2300). As the court explained, petitioner's plea colloquy reveals that he admitted laundering funds in excess of $10,000. *Id.* at 7a; see A.R. 203-205. Specifically, he admitted issuing money orders in the amounts of $30,000, $50,000, and $100,000. *Ibid*. He believed that the cash used to purchase the money orders was illegal drug money and that he was helping a drug trafficker to move the money without being identified with the drug sales that had generated it. A.R. 204. The court therefore correctly held that petitioner's offense was an "aggravated felony" under Section 1101(a)(43)(D).

2. Petitioner asserts (Pet. 8) that Section 1101(a)(43)(D) requires that "an amount of money exceeding $10,000 actually be laundered." That argument lacks merit. Petitioner

was convicted of money-laundering under Section 1956(a)(3)(B), which is sometimes referred to as the "sting provision" because it requires only that the money at issue be "represented to be the proceeds of specified unlawful activity," whether or not it actually is the proceeds of unlawful activity. See *United States* v. *Magluta*, 418 F.3d 1166, 1176 (11th Cir. 2005), cert. denied, 548 U.S. 903 (2006); compare 18 U.S.C. 1956(a)(1) ("conducts or attempts to conduct such a financial transaction which *in fact* involves the proceeds of specified unlawful activity") (emphasis added), with 18 U.S.C. 1956(a)(3) ("conducts or attempts to conduct a financial transaction involving property *represented to be* the proceeds of specified unlawful activity") (emphasis added). Section 1101(a)(43)(D) provides that an offense described in Section 1956 is an aggravated felony "if the amount of the funds exceeded $10,000." According to petitioner's admissions during the plea colloquy, the amount of funds involved in his offense exceeded $10,000. A.R. 203-205 Because petitioner was convicted under Section 1956(a)(3), which explicitly contemplates a sting operation, all that matters is his intent to launder funds exceeding $10,000 that he believed to be the proceeds of a criminal enterprise—not whether any funds were actually laundered.

Petitioner suggests (Pet. 8) that the decision below conflicts with *Chowdhury* v. *INS*, 249 F.3d 970 (9th Cir. 2001), but that is incorrect. In *Chowdhury*, the Ninth Circuit held that the phrase "amount of the funds" in Section 1101(a)(43)(D) refers to the amount of money that was laundered, not the loss suffered by the victims of the underlying criminal activity. *Id.* at 973-974. That proposition is entirely consistent with the decision below. See Pet. App. 6a (citing *Chowdhury* with approval).

3. According to petitioner (Pet. 10), the court of appeals erred in failing to apply the "criminal rule of lenity" in construing Section 1101(a)(43)(D). That rule does not apply here, however, because a removal proceeding is not a criminal prosecution but rather "a purely civil action to determine eligibility to remain in this country." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

Petitioner relies (Pet. 10) on *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010), for the proposition that the rule of lenity should apply even in a non-criminal removal proceeding. But the portion of that decision to which petitioner refers states that "ambiguities in *criminal statutes* referenced in immigration laws should be construed in the [alien's] favor." *Id.* at 2589 (emphasis added). Here, petitioner contends that Section 1101(a)(43)(D) is ambiguous. That statute is an immigration statute, not a criminal statute, and *Carachuri-Rosendo* is therefore not applicable. The same is true of *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), on which petitioner also relies (Pet. 10), which similarly involved the interpretation of a criminal statute referenced in a civil immigration statute.

Petitioner observes (Pet. 11) that 8 U.S.C. 1326(b)(2) prohibits an alien's reentry after removal based on conviction of an aggravated felony. But that does not convert every immigration statute into a criminal statute for purposes of the rule of lenity. Petitioner has not been charged with the crime of illegal reentry, and that statute has no relevance here.

Finally, petitioner suggests (Pet. 11) that the "rule of lenity or narrow construction for deportation provisions should apply here." He does not, however, suggest how the application of such a rule would have led to a different result. In light of this Court's decision in *Nijhawan*, Section

1101(a)(43)(D) is not ambiguous as it applies to the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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