No. 13-1083

In the Supreme Court of the United States

MINTRA RAGOONATH, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for embezzlement in violation of 18 U.S.C. 656, when circuit precedent required proof that she knowingly participated in a deceptive or fraudulent transaction, constituted a conviction for an offense that "involves fraud or deceit" for purposes of the definition of an 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. 1a-6a) is not published in the *Federal Reporter* but is reprinted at 533 Fed. Appx. 954. The removal order issued by the Department of Homeland Security (Pet. App. 7a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2013. A petition for rehearing was denied on December 6, 2013 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on March 5, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has been

convicted of an "aggravated felony" at any time after being admitted to the United States is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, Congress has defined "aggravated felony" 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). The definition separately includes "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

Under 8 U.S.C. 1228(b)(1), the Secretary of Homeland Security is authorized to determine that an alien who has not been admitted for permanent residence is deportable because of an aggravated-felony conviction, and the Secretary may issue an order of removal to such an alien (in lieu of charging that alien with being deportable in an immigration court under 8 U.S.C. 1229a).[1] As relevant here, the Secretary of Homeland Security has delegated that authority to United States Immigration and Customs Enforcement (ICE). 8 C.F.R. 238.1(b)(1). An alien who has been ordered removed under Section 1228(b)(1) is rendered ineligible for several forms of discretionary relief from removal. 8 U.S.C. 1228(b)(5).

2. a. Petitioner, a native of Trinidad and Tobago, was admitted to the United States in August 1986 in

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[1] The INA generally assigns to the Attorney General the adjudicatory power that was exercised by the Executive Office for Immigration Review in 2003. See 8 U.S.C. 1103(g)(1). The adjudicatory power under 8 U.S.C. 1228(b)(1) was not vested with the Executive Office for Immigration Review at that time. See 8 C.F.R. 238.1 (2002). Accordingly, the statutory reference in 8 U.S.C. 1228(b)(1) to "the Attorney General" is properly understood as referring to the Secretary of Homeland Security, who is broadly vested with enforcement of the INA, see 8 U.S.C. 1103(a)(1).

nonimmigrant status as a dependent spouse of a nonimmigrant student. Administrative Record (A.R.) 49, 52-53, 63. In September 1994, she was indicted in the United States District Court for the Southern District of Florida on a charge that, between December 1992 and July 1994, she "did knowingly, willfully and with intent to injure and defraud said bank, embezzle, abstract, purloin and misapply approximately $32,298.00 of the monies, funds and credits" of Jefferson Bank of Florida, when she was "an officer, agent and employee" of the bank, in violation of 18 U.S.C. 656. A.R. 61 (indictment). After pleading guilty, petitioner was convicted on August 7, 1995, and was sentenced to time served (consisting of one day), placed on supervised release for five years (including six months of home confinement), and ordered to pay $15,111.55 in restitution to the bank. A.R. 56-60 (judgment of conviction).

b. In November 2012, petitioner was apprehended by ICE agents and served with a notice of intent to issue an order for her removal from the United States as provided in 8 U.S.C. 1228(b)(1). A.R. 49-50, 53. In that notice, ICE alleged that petitioner had not been lawfully admitted for permanent residence and that she had been convicted of "Bank Embezzlement in violation of 18 USC 656." A.R. 49. ICE charged that petitioner was therefore deportable because she had been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(M). A.R. 49.

Through counsel, petitioner challenged the characterization of her offense as an aggravated felony, contending that "[e]mbezzlement is more along the lines of theft, not fraud." A.R. 26, 31-32. She also contended that her offense had not involved a loss to

the victims of more than $10,000. A.R. 32. Noting that she did not have the conviction record, petitioner requested a copy from ICE and additional time to respond. A.R. 31. In response, ICE provided a copy of the evidence it relied upon, including, *inter alia*, a copy of the federal indictment and judgment of conviction, a rap sheet, and a "Record of Deportable/Inadmissible Alien" form, which had been completed after petitioner was served with the notice of intent to issue a removal order. A.R. 25, 52-69.

c. In January 2013, an ICE Field Office Director issued a Final Administrative Removal Order "[b]ased upon the allegations set forth in the" notice of intent to issue a removal order and upon the "evidence contained in the administrative record." Pet. App. 7a-8a.

3. Petitioner sought review in the court of appeals, which denied her petition for review. Pet. App. 1a-6a. As relevant here, the court rejected petitioner's contention that her conviction had not been for an aggravated felony, noting that it had previously "held that a conviction under 18 U.S.C. § 656 involves fraud and deceit and is therefore categorically an aggravated felony." *Id.* at 4a (citing *Moore* v. *Ashcroft*, 251 F.3d 919 (11th Cir. 2001)).[2]

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[2] The court of appeals also rejected several other contentions that are not at issue in this Court. In particular, it held that the amount of victim loss that the government had to establish was $10,000, and that the government had established such a loss in light of the order that petitioner pay $15,111.55 in restitution. Pet. App. 4a-6a; see *Nijhawan* v. *Holder*, 557 U.S. 29, 42-43 (2009) (relying on restitution order to find $10,000-loss amount had been satisfied).

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals erred in concluding that her conviction for embezzlement under 18 U.S.C. 656 was for an offense that "involve[d] fraud or deceit" and that it therefore constituted an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i). The court of appeals correctly concluded that petitioner's conviction was for an aggravated felony. There is a potential disagreement in the courts of appeals about whether a conviction under Section 656 will always involve fraud or deceit, or whether that must be established, with respect to each particular conviction, pursuant to the modified categorical approach. But there is no reason to conclude that any court of appeals would treat petitioner's conviction as one that did not involve fraud or deceit, because her conviction required the government to prove that she engaged in a fraudulent or deceitful transaction. Further review is thus unwarranted.

1. Petitioner contends (Pet. 6-7) that an offense under Section 656 categorically involves "theft," rather than "fraud." That contention lacks merit.

Section 656 applies when a bank "officer, director, agent or employee * * * embezzles, abstracts, purloins or willfully misapplies" funds owned by, or entrusted to, the bank. 18 U.S.C. 656. As this Court has explained, the relevant portion of the aggravated-felony definition in Section 1101(a)(43)(M)(i) refers to "offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012). "Deceit" means "the act or process of deceiving (as by falsification, concealment, or cheating)." *Ibid.* (quoting *Webster's Third New International Dictionary* 584 (1993)). "Fraud" refers

to an "instance or an act of trickery or deceit esp[ecially] when involving misrepresentation." *Webster's Third New International Dictionary* 904.

To the extent that petitioner's conviction was for embezzlement (rather than abstracting, purloining, or willfully misapplying bank funds)—and that is how petitioner herself has repeatedly characterized her conviction, both before the agency and the court of appeals[3]—it plainly involved fraud or deceit. As this Court explained long ago, "[e]mbezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Moore* v. *United States*, 160 U.S. 268, 269 (1895); see also *Grin* v. *Shine*, 187 U.S. 181, 189 (1902) ("[I]t is impossible for a person to embezzle the money of another without committing a fraud upon him."); 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.6, at 110 (2d ed. 2003) ("'embezzles' means 'fraudulently converts'"); *Black's Law Dictionary* 599 (9th ed. 2009) (defining embezzlement as "[t]he fraudulent taking of personal property with which one has been entrusted, esp. as a fiduciary").

Petitioner observes (Pet. i, 6-7) that Section 656 does not actually refer to "fraud or deceit," that the provision is "[l]ocated in the Theft chapter of the

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[3] Pet. C.A. Br. 4 ("The removal charge stems from a conviction * * * for embezzlement in violation of [1]8 U.S.C. § 656."); *id.* at 6 ("The administrative removal proceedings arise out of a 1995 conviction for embezzlement."); *id.* at 8 (referring to "Petitioner's conviction for embezzlement by bank employee, in violation of 18 U.S.C. § 656"); *id.* at 18 (noting that petitioner "was not prosecuted for misapplication of bank funds" and that "[t]he judgment refers to 'Bank embezzlement'"); A.R. 4 ("[Petitioner] has a 1994 conviction for embezzlement.").

United States Criminal Code,"[4] and that embezzlement is classified "in a section separate from fraud crimes" in the Sentencing Guidelines and the Model Penal Code. But none of those things is sufficient to overcome the well-established meaning of embezzlement, which clearly involves fraud or deceit. Indeed, this Court rejected similar arguments when it held in *Kawashima* that filing a false tax return is an offense involving fraud or deceit for purposes of the aggravated-felony definition. See 132 S. Ct. at 1172, 1175.

2. Petitioner has identified no court that has adopted her view (Pet. 6-8) that an offense under Section 656 is categorically one involving theft rather than fraud or deceit. Instead, she identifies (Pet. 9-10) decisions from three courts of appeals that applied the modified categorical approach to determine whether a particular conviction under Section 656 had necessarily required proof of fraud or deceit.

In those cases, the need for further inquiry arose in part because, in the context of Section 656's reference to misapplication of bank funds (not embezzlement), the courts of appeals "unanimously agree that § 656 requires the Government to prove that the defendant acted with an intent to 'injure or defraud' the bank or 'deceive' a bank officer." *Bates* v. *United States*, 522 U.S. 23, 30 (1997).[5] Thus, because some convictions

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[4] The chapter is in fact entitled "Embezzlement and theft." 18 U.S.C. Ch. 31.

[5] Both of the decisions that petitioner cites (Pet. 7-8) for an "intent to injure" *mens rea* involved misapplication of bank funds, not embezzlement. See *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); *United States* v. *Docherty*, 468 F.2d 989, 994-995 (2d Cir. 1972). Petitioner suggests in passing (Pet. 8) that this Court might be "unwilling" to endorse an implicit *mens rea* ele-

under Section 656 could rest on an intent to injure a bank, and that intent could conceivably mean the offense does not always involve fraud or deceit, the Second, Third, and Ninth Circuit decisions cited by petitioner (Pet. 9) each undertook a case-specific inquiry to determine whether a particular proceeding culminating in a conviction under Section 656 had required the government to establish fraud or deceit. See *Akinsade* v. *Holder*, 678 F.3d 138, 145-146 (2d Cir. 2012) (assuming that Section 656 is divisible, applying the modified categorical approach, and finding no proof in the record of conviction that the alien had acted with the specific intent to defraud); *Carlos-Blaza* v. *Holder*, 611 F.3d 583, 588-589 (9th Cir. 2010) (holding that Section 656 is divisible into fraud and theft offenses, applying the modified categorical approach, and holding that the alien had been convicted of misapplication of bank funds, which necessarily involved an intent to deceive bank officials); *Valansi* v. *Ashcroft*, 278 F.3d 203, 214-217 (3d Cir. 2002) (holding that "some, but not all, of the convictions under 18 U.S.C. § 656 qualify as offenses involving fraud or deceit," examining the documents associated with the particular conviction, and finding that the government had failed to establish that the alien's "conduct amounted to an intent to defraud rather than to injure her employer"); see generally *Descamps* v. *United States*, 133 S. Ct. 2276, 2283-2285 (2013) (describing the modified categorical approach).

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ment in Section 656, but she does not affirmatively contend that it should overturn the unanimous circuit precedent on that point. Nor did she press such a view in the court below: to the contrary, she contended that the *mens rea* requirement under Section 656 "is either intent to injure or intent to defraud." Pet. C.A. Br. 17.

Petitioner's own conviction would satisfy Section 1101(a)(43)(M)(i)'s definition of aggravated felony in each of those other circuits, because her conviction necessarily required proof of fraud or deceit, even assuming that an embezzlement conviction could be supported by an intent to injure (but not to defraud) the bank. The indictment specifically charged that petitioner "did knowingly, willfully and with intent to injure *and defraud* said bank, embezzle, abstract, purloin and misapply approximately $32,298.00" from the bank. A.R. 61 (emphasis added). Although the administrative record does not include the transcript of petitioner's guilty-plea colloquy, at the times when petitioner was indicted, pleaded guilty, and was convicted, it was well established in the circuit in which she was convicted that, regardless of whether the government sought to prove an intent to defraud or an intent to injure, the intent element under Section 656 was to be "established by proof that the defendant knowingly participated in a *deceptive or fraudulent* transaction." *United States* v. *Morales*, 978 F.2d 650, 653 (11th Cir. 1992) (emphasis added); accord *United States* v. *Blanco*, 920 F.2d 844, 845 (11th Cir. 1991) ("a jury must find that the accused knowingly participated in a deceptive or fraudulent transaction"); *United States* v. *Stefan*, 784 F.2d 1093, 1096 (11th Cir.) ("the government must prove that the accused knowingly participated in a deceptive or fraudulent transaction"), cert. denied, 479 U.S. 855, and 479 U.S. 1009 (1986); *United States* v. *Adamson*, 700 F.2d 953, 965 (11th Cir.) (en banc) ("the government must prove that the defendant knowingly participated in a deceptive or fraudulent transaction") (emphasis omitted), cert. denied, 464 U.S. 833 (1983).

In other words, petitioner's own conviction under Section 656 was necessarily predicated on fraud or deceit, as the INA's aggravated-felony definition requires. See *Moore* v. *Ashcroft*, 251 F.3d 919, 923 (11th Cir. 2001).[6] Accordingly, petitioner would not be entitled to relief even if her removal proceeding had been initiated in the Second, Third, or Ninth Circuits. This case would therefore be an especially poor vehicle for resolving whether Section 656 offenses are always, or only sometimes, offenses that involve fraud or deceit. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2014

[6] Like petitioner, the alien in *Moore* had been convicted in the Southern District of Florida. See Gov't C.A. Br. at 3-4, *Moore*, *supra* (No. 00-10068). The Eleventh Circuit does not appear to have addressed whether a Section 656 conviction would be an aggravated felony if it occurred in a court where no proof of fraud or deceit would be required to establish an intent to injure a bank.