

No. 10-577

---

---

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

---

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,  
PETITIONERS

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

---

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

---

**BRIEF FOR THE RESPONDENT**

---

DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

TONY WEST  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

CURTIS E. GANNON  
*Assistant to the Solicitor  
General*

DONALD E. KEENER

BRYAN S. BEIER

*Attorneys*

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

---

---

### QUESTION PRESENTED

In 8 U.S.C. 1101(a)(43)(M), the term “aggravated felony” is defined to include 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.

The question presented is as follows:

Whether petitioners’ convictions for filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. 7206(1) and (2) are aggravated felonies under 8 U.S.C. 1101(a)(43)(M)(i), rendering them removable.

**TABLE OF CONTENTS**

	Page
Opinions below .....	1
Jurisdiction .....	2
Statutory provisions involved .....	2
Statement .....	2
Summary of argument .....	12
Argument:	
Petitioners have each been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(M)(i) .....	16
A. Petitioners’ convictions for willfully making materially false statements to the IRS neces- sarily “involve[d] fraud or deceit” and are thus convictions for aggravated felonies under Subparagraph (M)(i) .....	16
B. No canon of statutory construction warrants a departure from the plain meaning of Subpara- graph (M)(i) .....	21
1. Subparagraph (M)(ii) is not a specific rule that implicitly excludes all “tax crimes” from the scope of Subparagraph (M)(i) .....	23
2. The canon counseling avoidance of superfluities does not support petitioners’ construction .....	29
3. The structure of the Sentencing Guidelines does not indicate that tax offenses cannot involve “fraud or deceit” for purposes of Subparagraph (M)(i) .....	38
4. Principles of lenity do not call for a different result .....	40
Conclusion .....	44
Appendix – Statutory provisions .....	1a

IV

TABLE OF AUTHORITIES

Cases:	Page
<i>Amos v. Commissioner</i> , 43 T.C. 56 (1964) . . . . .	30
<i>Arguelles-Olivares v. Mukasey</i> , 526 F.3d 171 (5th Cir. 2008), cert. denied, 130 S. Ct. 736 (2009) . . . . .	19, 36
<i>Babbitt v. Sweet Home Chapter</i> , 515 U.S. 687 (1995) . . . .	41
<i>Bloate v. United States</i> , 130 S. Ct. 1345 (2010) . . . . .	23
<i>Boulware v. United States</i> , 552 U.S. 421 (2008) . . . . .	26
<i>Bruesewitz v. Wyeth LLC</i> , 131 S. Ct. 1068 (2011) . . . . .	24
<i>Carachuri-Rosendo v. Holder</i> , 130 S. Ct. 2577 (2010) . . .	41
<i>Chevron U.S.A. Inc. v. Echazabal</i> , 536 U.S. 73 (2002) . . . .	24
<i>Connecticut Nat'l Bank v. Germain</i> , 503 U.S. 249 (1992) . . . . .	22, 29, 37
<i>Corley v. United States</i> , 129 S. Ct. 1558 (2009) . . . . .	29
<i>DePierre v. United States</i> , 131 S. Ct. 2225 (2011) . . . . .	42
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008) . . . .	38
<i>D. Ginsberg &amp; Sons, Inc. v. Popkin</i> , 285 U.S. 204 (1932) . . . . .	23
<i>Deal v. United States</i> , 508 U.S. 129 (1993) . . . . .	22
<i>Dolan v. United States Postal Serv.</i> , 546 U.S. 481 (2006) . . . . .	22
<i>Gutierrez de Martinez v. Lamagno</i> , 515 U.S. 417 (1995) . . . . .	37
<i>HCSC-Laundry v. United States</i> , 450 U.S. 1 (1981) . . . . .	24, 25
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999) . . . . .	43
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001) . . . . .	22, 36
<i>Jordan v. De George</i> , 341 U.S. 223 (1951) . . . . .	42

Cases—Continued:	Page
<i>Johnson v. United States</i> , 529 U.S. 694 (2000) . . . . .	15, 41
<i>Ki Se Lee v. Ashcroft</i> , 368 F.3d 218 (3d Cir. 2004) . . . . .	9, 19, 32, 35, 36
<i>Klein v. Commissioner</i> , 880 F.2d 260 (10th Cir. 1989) . . .	30
<i>Lamie v. United States Trustee</i> , 540 U.S. 526 (2004) . . . .	32
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004) . . . . .	31, 41
<i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 131 S. Ct. 2238 (2011) . . . . .	22, 29
<i>Moskal v. United States</i> , 498 U.S. 103 (1990) . . . . .	40
<i>Muscarello v. United States</i> , 524 U.S. 125 (1998) . . . .	15, 41
<i>National Cable &amp; Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005) . . . . .	43
<i>National Cable &amp; Telecomms. Ass’n, Inc. v. Gulf Power Co.</i> , 534 U.S. 327 (2002) . . . . .	29
<i>Navarro-Lopez v. Gonzales</i> , 503 F.3d 1063 (9th Cir. 2007) . . . . .	10
<i>Negusie v. Holder</i> , 129 S. Ct. 1159 (2009) . . . . .	16, 43
<i>Nijhawan v. Attorney Gen.</i> , 523 F.3d 387 (3d Cir. 2008), aff’d, 129 S. Ct. 2294 (2009) . . . . .	40
<i>Nijhawan v. Holder</i> , 129 S. Ct. 2294 (2009) . . . . .	9, 10, 17, 26, 27, 40, 41
<i>Nijhawan v. Mukasey</i> , 129 S. Ct. 988 (2009) . . . . .	10
<i>Padilla v. Kentucky</i> , 130 S. Ct. 1473 (2010) . . . . .	42
<i>Reno v. Koray</i> , 515 U.S. 50 (1995) . . . . .	15, 40
<i>Sansone v. United States</i> , 380 U.S. 343 (1965) . . . . .	26
<i>Spies v. United States</i> , 317 U.S. 492 (1943) . . . . .	15, 33
<i>Sykes v. United States</i> , 131 S. Ct. 2267 (2011) . . . . .	42
<i>United States v. Cheek</i> , 498 U.S. 192 (1991) . . . . .	20

VI

Cases—Continued:	Page
<i>United States v. Hayes</i> , 129 S. Ct. 1079 (2009) . . . . .	40
<i>United States v. Klein</i> , 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958) . . . . .	28
<i>United States v. O’Hagan</i> , 521 U.S. 642 (1997) . . . . .	41
<i>United States v. Pollen</i> , 978 F.2d 78 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993) . . . . .	34
<i>United States v. Scharton</i> , 285 U.S. 518 (1932) . . . . .	14, 32, 33
<i>United States v. Trowsell</i> , 367 F.2d 815 (7th Cir. 1966) . . . . .	34
<i>Valansi v. Ashcroft</i> , 278 F.3d 203 (3d Cir. 2002) . . . . .	39
<i>Varity Corp. v. Howe</i> , 516 U.S. 489 (1996) . . . . .	22, 23, 29
<i>Wright v. Commissioner</i> , 84 T.C. 636 (1985) . . . . .	13, 20, 30
 Treaty, statutes, regulations, and guidelines:	
Convention Against Torture and Other Cruel, In- human or Degrading Treatment or Punishment, <i>adopted</i> Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 . . . . .	4
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-7344, 102 Stat. 4469-4470 . . . . .	2
Armed Career Criminal Act of 1984: 18 U.S.C. 924(e) . . . . .	42
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 . . . . .	3
§ 321(a)(1), 110 Stat. 3009-627 . . . . .	3
§ 321(a)(3), 110 Stat. 3009-627 . . . . .	3
§ 321(a)(4), 110 Stat. 3009-627 . . . . .	3
§ 321(a)(7), 110 Stat. 3009-628 . . . . .	3

VII

Statutes, regulations and guidelines—Continued:	Page
§ 321(a)(10), 110 Stat. 3009-628 .....	3
§ 321(a)(11), 110 Stat. 3009-628 .....	3
§ 321(b), 110 Stat. 3009-628 .....	4
Immigration Act of 1990, Pub. L. No. 101-649,	
§ 501(a), 104 Stat. 5048 .....	3
Immigration and Nationality Act, 8 U.S.C. 1101	
<i>et seq.</i> .....	2
8 U.S.C. 1101(a)(43) (1988) .....	2
8 U.S.C. 1101(a)(43) (Supp. II 1990) .....	3
8 U.S.C. 1101(a)(43) .....	2, 3, 4, 12, 35, 1a
8 U.S.C. 1101(a)(43)(A) .....	36
8 U.S.C. 1101(a)(43)(E) .....	25
8 U.S.C. 1101(a)(43)(F) .....	3, 36, 37
8 U.S.C. 1101(a)(43)(G) .....	3, 37
8 U.S.C. 1101(a)(43)(I) .....	39
8 U.S.C. 1101(a)(43)(J) .....	3, 39
8 U.S.C. 1101(a)(43)(K) .....	39
8 U.S.C. 1101(a)(43)(M) (1994) .....	3
8 U.S.C. 1101(a)(43)(M) .....	41
8 U.S.C. 1101(a)(43)(M)(i) .....	<i>passim</i>
8 U.S.C. 1101(a)(43)(M)(ii) .....	<i>passim</i>
8 U.S.C. 1101(a)(43)(P) .....	3
8 U.S.C. 1101(a)(43)(R) .....	3, 26
8 U.S.C. 1101(a)(43)(S) .....	3, 26
8 U.S.C. 1101(h)(2) .....	31
8 U.S.C. 1101(h)(3) .....	31
8 U.S.C. 1158(b)(2)(A)(ii) .....	4

VIII

Statutes, regulations and guidelines—Continued:	Page
8 U.S.C. 1158(b)(2)(B)(i) .....	4
8 U.S.C. 1182(a)(9)(A)(iii) .....	4
8 U.S.C. 1227(a)(2)(A)(iii) .....	4, 8, 5a
8 U.S.C. 1227b(a)(3) .....	4
8 U.S.C. 1227b(b)(1)(e) .....	4
8 U.S.C. 1229a(c)(3)(A) .....	17
8 U.S.C. 1229b(a)(3) .....	4
8 U.S.C. 1229c(b)(1)(C) .....	4
8 U.S.C. 1231(b)(3)(B)(ii) .....	4
8 U.S.C. 1251(a)(4)(B) (1988) .....	2
8 U.S.C. 1252(b)(4)(A) .....	7
8 U.S.C. 1326 .....	41
Immigration and Nationality Technical Corrections	
Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 .....	3
§ 222(a), 108 Stat. 4322 .....	3
18 U.S.C. 16 .....	36, 41
18 U.S.C. 371 .....	14, 27, 28, 7a
18 U.S.C. 585 (Supp. V 1931) .....	33
18 U.S.C. 924(c)(2) .....	41
26 U.S.C. 501(c)(3) .....	25
26 U.S.C. 1266 (Supp. V 1931) .....	32
26 U.S.C. 6531 .....	33, 7a
26 U.S.C. 6531(1) .....	33
26 U.S.C. 6531(2) .....	33
26 U.S.C. 6653 (1988) .....	30
26 U.S.C. 6653(b)(1) (1982) .....	20
26 U.S.C. 6663 .....	13, 30, 9a

IX

Statutes and guidelines—Continued:	Page
26 U.S.C. 7201 .....	<i>passim</i> , 9a
26 U.S.C. 7206 .....	5
26 U.S.C. 7206(1) .....	<i>passim</i> , 10a
26 U.S.C. 7206(2) .....	<i>passim</i>
8 C.F.R.:	
Section 208.16(d)(2)-(3) .....	4
Section 1208.16(d)(2)-(3) .....	4
United States Sentencing Guidelines:	
Ch. 2:	
Pt. B (2010) .....	38
Pt. F (2000) .....	38
Pt. G (1994) .....	39
Pt. G (2010) .....	39
Pt. T:	
§ 2T1.1(a) (1994) .....	39
§ 2T1.1(a) (2010) .....	21, 39
§ 2T1.4(a) (1994) .....	39
§ 2T1.4(a) (2010) .....	21, 39
§ 2T4.1 (1994) .....	39
§ 2T4.1 (2010) .....	21, 39
App. C Supp., amend. 617 .....	38
Miscellaneous:	
<i>Black's Law Dictionary</i> (9th ed. 2009) .....	17
2 Kenneth E. North, <i>Criminal Tax Fraud</i> (3d ed. 1998) .....	18, 19

Miscellaneous—Continued:	Page
U.S. Dep't of Justice, <i>Criminal Tax Manual</i> (2008 ed.):	
Ch. 12, <a href="http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2012.htm">http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2012.htm</a> . . . . .	18
Ch. 13, <a href="http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2013.htm">http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2013.htm</a> . . . . .	18
Ch. 23, <a href="http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2023.htm">http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2023.htm</a> . . . . .	28

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

---

No. 10-577

AKIO KAWASHIMA AND FUSAKO KAWASHIMA,  
PETITIONERS

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

---

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

---

**BRIEF FOR THE RESPONDENT**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 615 F.3d 1043. Prior opinions of the court of appeals (Pet. App. 32a-52a, 53a-82a, and 83a-100a) are reported at 593 F.3d 979, 530 F.3d 1111, and 503 F.3d 997, respectively. The decisions of the immigration judge (A.R. 47-48, Pet. App. 101a-106a, 107a) and of the Board of Immigration Appeals (Pet. App. 108a, A.R. 165, Supp. A.R. 2-3) are unreported.<sup>1</sup>

---

<sup>1</sup> Petitioners jointly filed two separate petitions for review in the court of appeals. “A.R.” refers to the administrative record filed in 9th Cir. No. 04-74313 (pertaining to the Board’s August 16, 2004 decisions affirming orders that petitioners be removed). “Supp. A.R.” refers to the administrative record filed in 9th Cir. No. 05-74408 (pertaining to the Board’s June 30, 2005 denial of a motion to reopen proceedings).

## JURISDICTION

The order of the court of appeals was entered on August 4, 2010, and a petition for rehearing was denied on the same day (Pet. App. 2a). The petition for a writ of certiorari was filed on November 1, 2010, and granted on May 23, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

## STATEMENT

1. In 1988, Congress first provided that an alien who has been convicted of an “aggravated felony” is deportable 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 only murder, certain drug- and firearms-trafficking offenses as defined in the federal criminal code, and “any attempt or conspiracy to commit” such crimes. 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 1251(a)(4)(B) (1988). Since then, Congress has expanded the INA’s definition of “aggravated felony” several times.

In 1990, Congress expanded the definition 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 the initial version of the 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.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress amended Subparagraph (M) by reducing the loss thresholds from \$200,000 to \$10,000, where they remain today. See IIRIRA § 321(a)(7), 110 Stat. 3009-628. At the same time, it also added “rape” and “sexual abuse of a minor” to Subparagraph (A), see *id.* § 321(a)(1), 110 Stat. 3009-627, and it significantly expanded the reach of other pre-existing categories. For instance, it reduced the term-of-imprisonment thresholds for several categories from five years to one year, where they remain today. See IIRIRA § 321(a)(3), (4), (10), and (11), 110 Stat. 3009-627 to 3009-628; 8 U.S.C. 1101(a)(43)(F), (G), (J), (P), (R) and (S). In addition, IIRIRA expressly provided that the expanded definition of aggravated felony applies

“[n]otwithstanding any other provision of law (including any effective date), \* \* \* regardless of whether the conviction was entered before, on, or after [IIRIRA’s effective date of] September 30, 1996.” 8 U.S.C. 1101(a)(43); see IIRIRA § 321(b), 110 Stat. 3009-628.

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).<sup>2</sup>

2. Petitioners, a husband and wife, are natives and citizens of Japan who were admitted to the United States as lawful permanent resident aliens in 1984. Pet. App. 13a, 101a. They operated restaurants incorporated in California, and were each a part owner of those corporate entities. *Id.* at 118a-119a, 128a-129a.

In 1997, petitioners were convicted, upon guilty pleas, of violating criminal provisions of the Internal Revenue Code. Pet. App. 13a-14a. Mr. Kawashima was convicted on one count of willfully making and subscribing a false corporate tax return for the tax year ending October 31, 1991, in violation of 26 U.S.C. 7206(1). Pet. App. 13a, 116a-117a. Mrs. Kawashima was convicted on

---

<sup>2</sup> 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 (1988), 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 generally barred from seeking re-admission following removal, but that bar is subject to waiver. 8 U.S.C. 1182(a)(9)(A)(iii).

one count of willfully assisting her husband in preparing the same false corporate tax return, in violation of 26 U.S.C. 7206(2). Pet. App. 14a.<sup>3</sup>

In his plea agreement, Mr. Kawashima conceded, among other things, that the relevant tax return “was false as to a material matter,” that he “did not believe the return to be true and correct as to a material matter,” and that he “acted willfully.” Pet. App. 117a, 123a-124a. The parties stipulated that the amount of taxable income that petitioners had “failed to report” to the IRS totaled \$1,034,240 (A.R. 135), and that the “total actual tax loss” for sentencing purposes was \$245,126 (Pet.

---

<sup>3</sup> Section 7206 provides, in relevant part, as follows:

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

\* \* \* \* \*

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

App. 120a).<sup>4</sup> The plea agreement acknowledged that the court could “order [Mr. Kawashima] to pay restitution of \$245,126.” *Id.* at 117a. The parties also stipulated that the specific tax return that was the basis for Mr. Kawashima’s guilty plea had failed to report taxable income of \$76,645. A.R. 135; see also A.R. 130 (same figure included in Count 1 of the information, charging Mr. Kawashima with violating Section 7206(1)). In December 1997, Mr. Kawashima was sentenced to four months of imprisonment, to be followed by one year of supervised release, during which he was specifically ordered to “comply with the rules and regulations of the Immigration and Naturalization Service, and if deported from this country, either voluntarily or involuntarily, not [to] reenter the United States illegally.” A.R. 144.

Mrs. Kawashima was sentenced to four months of imprisonment for her conviction under Section 7206(2). A.R. 6; see also A.R. 131 (Count 2 of the information, charging her with violating Section 7206(2), specifying that she acted “willfully” and that she “knew” that the tax return in question falsely failed to report \$76,645 in income). Her plea agreement is not in the record, but,

---

<sup>4</sup> Petitioners err in claiming (Br. 4 n.3) that the “actual tax loss” stipulated in the plea agreement was “the gross amount of income omitted and not reported on the tax return[s],” and that the amount did not reflect “any allowable deductions.” In fact, the amount expressly took “into account the federal income tax deduction to which each corporation was entitled for California State Tax liability,” Pet. App. 120a-121a, and the calculated “actual tax loss” of \$245,126 was 23.7% of the \$1,034,240 in taxable income that the parties stipulated that petitioners had failed to report to the IRS. See A.R. 135 (containing paragraph 11 of Mr. Kawashima’s plea agreement, which is not reprinted in the petition appendix excerpts and which includes the stipulated amounts of the “taxable income which the government can prove the Kawashimas failed to report” for two corporations for multiple tax years).

like her husband's, it contained concessions about the false nature of the tax return and her willful conduct, as well as the same figures pertaining to unreported income, actual tax loss, and restitution. Pet. App. 127a-131a.<sup>5</sup>

Before their convictions became final, petitioners filed applications to become naturalized citizens. A.R. 6; Supp. A.R. 13. After an interview on May 3, 2000, they were deemed ineligible for naturalization on account of their convictions, and their applications were denied. *Ibid.*

3. In August 2000, the Immigration and Naturalization Service (the predecessor to the Department of Homeland Security (DHS)) charged each petitioner with

---

<sup>5</sup> Although petitioners included excerpts of Mrs. Kawashima's plea agreement in the petition appendix, petitioners now acknowledge (Br. 35 n.17) that, as the court of appeals explained (Pet. App. 24a, 94a) and as the government pointed out in its brief opposing certiorari (at 3 n.2), that document was not part of the record before the court of appeals or the Board of Immigration Appeals. Petitioners invite this Court to take judicial notice of the plea agreement in order to establish that Mrs. Kawashima "admitted to assisting in preparation of a false statement, but not to fraud." Br. 36 n.17. The government believes that judicial notice would be inappropriate and unnecessary. By statute, a "court of appeals shall decide [a petition for review of an order of removal] *only* on the administrative record on which the order of removal is based." 8 U.S.C. 1252(b)(4)(A) (emphasis added). The court of appeals thus correctly remanded the proceeding against Mrs. Kawashima to permit the government to introduce the plea agreement (or other evidence) to establish the loss associated with her offense. Pet. App. 25a-27a. There is, however, no need to consult the agreement to answer the sole question before this Court with respect to Mrs. Kawashima: whether a Section 7206(2) offense may be an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i). As discussed below, the answer to that question depends on the general nature of Section 7206(2) offenses, not the specific circumstances of her individual case.

being removable under 8 U.S.C. 1227(a)(2)(A)(iii), as an alien who had been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (ii). Pet. App. 102a.<sup>6</sup> Appearing through counsel, petitioners admitted that they had been convicted of violating Section 7206(1) and (2), but they denied the allegation that the loss to the victim or the revenue loss to the government exceeded \$10,000, denied the charge of removability, and moved to terminate the proceedings. *Id.* at 102a-103a; A.R. 161, 189. In an oral decision issued on February 14, 2001, the immigration judge (IJ) sustained the charges of removability and ordered that petitioners be removed to Japan. Pet. App. 103a.

4. On initial appeal, the Board of Immigration Appeals (Board) determined that the tape recording of a part of the proceedings before the IJ was defective, preventing its review, and remanded the case for further proceedings. Pet. App. 103a; A.R. 104. On remand, the IJ received additional briefing and argument about petitioners' deportability, ruled that they were deportable as charged, and again ordered that they be removed. Pet. App. 104a-105a; A.R. 47-48.

On August 16, 2004, the Board affirmed the orders of removal. Pet. App. 108a (order pertaining to Mr. Kawashima); A.R. 165 (order pertaining to Mrs. Kawashima).

5. On August 27, 2004, petitioners filed a petition for review of the Board's orders in the court of appeals. As

---

<sup>6</sup> Petitioners assert (Br. 5 n.4) that the lapse of time between their convictions and the initiation of removal proceedings against them "suggest[s] uncertainty within the Department of Justice and INS on whether [petitioners'] crimes of conviction were aggravated felonies." But the pendency of petitioners' applications for naturalization—which were denied the day before the INS issued the notice to appear for the removal proceeding—is a more likely explanation for the timing.

relevant here, the court ultimately denied the petition for review of the order of removal with respect to Mr. Kawashima, but, with respect to Mrs. Kawashima, it granted the petition and remanded for further proceedings in light of this Court's decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). Pet. App. 23a, 27a, 31a.<sup>7</sup>

As the case progressed, the court of appeals issued four opinions. It repeatedly held that offenses under 26 U.S.C. 7206(1) and (2) can qualify as aggravated felonies under 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 15a-20a. The court held that both of petitioners' convictions were for offenses that "necessarily 'involve[] fraud or deceit.'" *Id.* at 17a; see also *id.* at 22a-24a. The court reasoned that, on the basis of "the plain meaning of the statutory language," Subparagraph (M)(i) encompasses tax offenses involving fraud and deceit when the tax loss exceeds \$10,000. *Id.* at 17a. The court acknowledged that a divided panel of the Third Circuit had ruled otherwise in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (2004), but it declined to follow that decision. Pet. App. 17a-20a. Those aspects of the court's decision did not change between its successive opinions. See *id.* at 38a-42a, 86a-90a. The opinions did, however, differ with respect to whether the \$10,000-loss threshold under Subparagraph (M)(i) had been satisfied.

In its initial decision, issued on September 18, 2007, the court of appeals held that the \$10,000-loss threshold was proved in Mr. Kawashima's case by the stipulation in his plea agreement regarding "the total actual tax

---

<sup>7</sup> The court of appeals also denied relief in petitioners' subsequent petition for review, pertaining to the Board's June 2005 denial of petitioners' April 2005 motion to reopen proceedings. See Supp. A.R. 2-3; Pet. App. 27a-30a. In this Court, petitioners have not renewed any challenges to the Board's denial of their motion to reopen.

loss” resulting from his crime. Pet. App. 93a. But the court observed that Mrs. Kawashima’s plea agreement was not in the record and that she had “expressly denied that such loss occurred”; the court thus concluded that the \$10,000-loss threshold had not been proved with respect to her. *Id.* at 94a-96a.

On July 1, 2008, the court of appeals granted petitioners’ petition for rehearing. Pet. App. 53a-54a. The court withdrew its initial opinion and issued a superseding per curiam opinion and judgment in which it granted the petition for review of the order of removal as to both petitioners and ruled that neither petitioner is removable from the United States. *Id.* at 60a-66a. In light of an intervening en banc decision (*Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)), the court held that the \$10,000-loss threshold could not be proved by considering matters beyond the elements of the offense of conviction, and it reasoned that, because loss to a victim is not an element of 26 U.S.C. 7206(1) or (2), petitioners’ offenses could not be aggravated felonies under Subparagraph (M)(i). Pet. App. 54a, 60a-66a. The government petitioned for panel rehearing and rehearing en banc.

While the government’s rehearing petition was pending, this Court granted certiorari in *Nijhawan v. Mukasey*, 129 S. Ct. 988 (2009), to address whether an offense involving fraud could satisfy Subparagraph (M)(i) when the \$10,000-loss threshold could not be established by the elements of that offense. See Pet. App. 13a. In its decision on the merits in *Nijhawan*, this Court expressly rejected the view that the court of appeals had taken in its July 1, 2008, opinion in this case. See 129 S. Ct. at 2298 (citing the decision in this case as part of the underlying circuit split).

On January 27, 2010, after receiving supplemental briefing about the effect of *Nijhawan* on this case, the court of appeals withdrew its second opinion and issued a superseding opinion and judgment. Pet. App. 33a-52a. As it had in its initial opinion, the court held that offenses under 26 U.S.C. 7206(1) and (2) could constitute aggravated felonies under Subparagraph (M)(i), notwithstanding the specific reference in Subparagraph (M)(ii) to tax-evasion offenses under 26 U.S.C. 7201. Pet. App. 38a-42a. The court further held that Mr. Kawashima's offense under Section 7206(1) was one involving fraud or deceit and that the Board had used "fundamentally fair procedures" in finding that the \$10,000-loss threshold had been satisfied, because he had stipulated in his plea agreement that the "total actual tax loss" associated with the offense was \$245,126. *Id.* at 43a-44a.

With respect to Mrs. Kawashima, the court of appeals determined that her offense under Section 7206(2) was also one that "necessarily 'involves fraud or deceit.'" Pet. App. 45a. For purposes of establishing whether the \$10,000-loss threshold had been satisfied, the court recognized that, in light of *Nijhawan*, there might be adequate evidence for the Board to determine that her offense involved a loss exceeding \$10,000. *Id.* at 46a-47a. It thus remanded to the Board for further consideration and receipt of additional evidence concerning whether her conviction satisfied the \$10,000-loss threshold. *Id.* at 47a-49a.<sup>8</sup>

---

<sup>8</sup> The court of appeals rejected petitioners' contention that Mrs. Kawashima's case was no longer before that court because neither party had sought rehearing with respect to her after its initial decision in September 2007. Pet. App. 45a n.8. Petitioners challenged that aspect of the court of appeals' decision in the second question of their petition

On August 4, 2010, the court of appeals denied rehearing en banc and issued a final superseding opinion that was, as relevant here, materially identical to the January 27, 2010, opinion. Pet. App. 2a, 12a-31a.

Judge Graber, joined by Judges Wardlaw and Paez, dissented from the denial of rehearing en banc. Pet. App. 3a-12a. Judge Graber acknowledged that the phrase “loss to the victim or victims” in Subparagraph (M)(i) “is broad enough that it *might* encompass a tax revenue loss to the government.” *Id.* at 3a. In her view, however, when the statute is considered as a whole, Subparagraph (M)(ii) identifies the entire universe of tax offenses that might constitute aggravated felonies under 8 U.S.C. 1101(a)(43). Pet. App. 6a-10a.

#### SUMMARY OF ARGUMENT

A. Petitioners were convicted of violating 26 U.S.C. 7206(1) and (2), which apply when someone willfully makes (or aids in the making of) statements that are false as to a material matter on a federal tax return or other document filed with the IRS. Both of those offenses satisfy the plain meaning of the portion of the definition of aggravated felony appearing at 8 U.S.C. 1101(a)(43)(M)(i), because those offenses “involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] \$10,000.” The elements of each petitioner’s offense of conviction required the government to prove, *inter alia*, that they acted willfully and that the tax return in question involved a false statement about a material matter. Because a falsehood becomes “material” if it bears on the correct computation of tax or has the tendency to impede the IRS in ascertaining or verifying the

---

for a writ of certiorari, but this Court’s writ of certiorari was limited to the first question. See 131 S. Ct. 2900 (2011).

correctness of the tax liability, petitioners' offenses (*i.e.*, their willfully made materially false statements) necessarily "involve[d] \* \* \* deceit" for purposes of Subparagraph (M)(i).

Petitioners contend that their offenses did not necessarily involve fraud or deceit because "a conviction under § 7206(1) does not collaterally estop [a] taxpayer from disputing fraud" in a subsequent civil suit under 26 U.S.C. 6663. Pet. Br. 38 (discussing *Wright v. Commissioner*, 84 T.C. 636 (1985)). But petitioners overstate the effect of the Tax Court's decision in *Wright*, which merely recognized that a conviction under Section 7206(1) cannot establish (for purposes of a civil suit under the statutory predecessor to Section 6663) that a taxpayer made an "underpayment \* \* \* due to fraud," because such an offense does not require any underpayment at all. 84 T.C. at 642-643.

B. Petitioners' principal argument is that, even assuming that offenses under Section 7206(1) and (2) are included within the plain meaning of Subparagraph (M)(i), the presence of Subparagraph (M)(ii), which refers to tax-evasion offenses under Section 7201, but not to other tax-related offenses, implicitly withdraws convictions under Section 7206 and other "tax crimes" from the scope of the aggravated-felony definition in Subparagraph (M)(i). Yet none of the canons of construction that petitioners invoke supports their attempt to draw such negative implications from Subparagraph (M)(ii).

1. Petitioners contend that Subparagraph (M)(ii) is a specific rule that applies to "tax crimes" and thus controls the more general rule governing "fraud or deceit" crimes in Subparagraph (M)(i). But the specific-controls-the-general canon is inapplicable here for several reasons. Subparagraph (M)(ii) is not a specific pro-

vision that deals with a whole class of “tax crimes,” because it mentions only one kind of tax crime (tax-evasion offenses under Section 7201), and it does not suggest, much less define, a broader category of “tax crimes” that is addressed by a supposed negative implication of Subparagraph (M)(ii). Nor can petitioners rely on the reference in Subparagraph (M)(ii) to “revenue loss to the Government,” because that phrase appears in qualifying language that serves to limit the reference to tax evasion, which necessarily involves revenue loss. Petitioners’ reading would also raise practical difficulties about how to categorize other offenses that indisputably involve fraud and taxes, including 18 U.S.C. 371 offenses to defraud the United States. In any event, there is no conflict between the purportedly-tax-crime-specific rule in Subparagraph (M)(ii) and the fraud-or-deceit rule in Subparagraph (M)(i), because they both contain (and have always contained) the same monetary threshold.

2. Petitioners also invoke the canon counseling avoidance of superfluities, but it, too, fails to support their reading of the statute, because Congress would have had good reason to ensure that tax-evasion offenses were included among the list of aggravated felonies, even at the risk of some minor redundancy with Subparagraph (M)(i). Among other things, this Court had, in the context of construing a statute of limitations, previously rejected the government’s argument that “[a]ny effort to defeat or evade a tax is \* \* \* tantamount to and [possesses] every element of an attempt to defraud the taxing body.” *United States v. Scharton*, 285 U.S. 518, 521 (1932). This Court had also taken pains to stress that tax evasion under Section 7201 may occur “in any manner,” and it thus appeared to have held open the possibility that Section 7201 could be vio-

lated by conduct that did *not* have “the likely effect” of “mislead[ing]” or “conceal[ing].” *Spies v. United States*, 317 U.S. 492, 499 (1943). Moreover, other provisions of the aggravated-felony definition overlap with each other to considerable degrees, indicating that there is particularly little reason to conclude that Congress intended to exclude other tax-related crimes from the definition by specifying the inclusion of Section 7201 offenses. Thus, even assuming that some redundancy results from the court of appeals’ construction of Subparagraph (M)(i), this case is one in which the purported negative inferences from Subparagraph (M)(ii) are “too shaky to be trusted” because “Congress could sensibly have seen some practical value in the redundancy of making [something] clear beyond question.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 444-445 (1995) (Souter, J., dissenting).

3. Petitioners also contend that the structure of the Sentencing Guidelines indicates that Congress intended to deal with tax offenses separately from “fraud or deceit” offenses. There simply is, however, no indication that Congress was echoing the Sentencing Guidelines in implicitly drawing such a distinction.

4. Finally, petitioners invoke principles of lenity, but those principles do not support petitioners’ case. This Court has repeatedly rejected the contention that a division in judicial authority establishes that a statute is “ambiguous” for purposes of lenity. See, *e.g.*, *Reno v. Koray*, 515 U.S. 50, 64-65 (1995). Nor does this case involve the kind of “grievous ambiguity” (*Muscarello v. United States*, 524 U.S. 125, 138-139 (1998)) and “equipoise of competing reasons” (*Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000)) that would be required before invoking even the criminal rule of lenity (which is

not applicable here because the relevant part of the aggravated-felony definition is not a criminal statute). In any event, if the Court were to conclude that Subparagraph (M)(i) is ambiguous with respect to its applicability to “tax crimes,” that would still not warrant the disposition that petitioners request (a determination that they cannot be deported, see Pet. Br. 47). Instead, the “proper course” would be to “remand to the agency” to “exercise[] its *Chevron* discretion to interpret the statute” in the first instance. *Negusie v. Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (internal quotation marks omitted).

#### ARGUMENT

#### PETITIONERS HAVE EACH BEEN CONVICTED OF AN AGGRAVATED FELONY AS DEFINED IN 8 U.S.C. 1101(a)(43)(M)(i)

##### A. Petitioners’ Convictions For Willfully Making Materially False Statements To The IRS Necessarily “Involve[d] Fraud Or Deceit” And Are Thus Convictions For Aggravated Felonies Under Subparagraph (M)(i)

The text of 8 U.S.C. 1101(a)(43)(M)(i) defines “aggravated felony” as including an offense that “involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.” With the exception of evidentiary questions in Mrs. Kawashima’s case to be resolved on remand to the agency (see note 5, *supra*; Pet. App. 25a-27a), there is no dispute about whether petitioners’ offenses satisfied the monetary-loss threshold in Subparagraph (M)(i). The corporate tax return underlying their convictions falsely failed to report taxable income of

\$76,645. See p. 6, *supra*.<sup>9</sup> Petitioners contend, however, that the tax offenses of which they were convicted do not satisfy Subparagraph (M)(i) because they did not require, as an element of the offense, a finding of fraud or deceit. Pet. Br. 33-41. But petitioners' offenses of conviction did "involve[] fraud or deceit," because they necessarily entailed a willful violation of petitioners' known legal duty not to make (or aid in the making of) a false statement as to any material matter on a tax return.

1. Petitioners' offenses of conviction necessarily "involve[d] \* \* \* deceit" for purposes of the definition of aggravated felony in Subparagraph (M)(i). The term "deceit" is defined 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." *Black's Law Dictionary* 465 (9th ed. 2009). Petitioners' respective crimes of conviction, by their nature, satisfy that definition, because they required the government to prove that petitioners willfully made materially false statements in the corporate tax return that they filed with the IRS.

Mr. Kawashima was convicted of violating 26 U.S.C. 7206(1). That provision is violated when someone "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a

---

<sup>9</sup> Although petitioners previously maintained that the government could not satisfy the monetary-loss threshold because the amount of the loss had not been an element of their offenses of conviction, that argument is now foreclosed by this Court's decision in *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (holding that IJ properly relied on sentencing-related material from criminal proceeding to establish that the government had satisfied its burden under 8 U.S.C. 1229a(c)(3)(A) of proving by "clear and convincing" evidence a loss in excess of \$10,000).

written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.” 26 U.S.C. 7206(1). There is no dispute that the elements of that offense include a requirement that the document in question was “false as to a material matter,” that the defendant “did not believe the \* \* \* document to be true and correct as to every material matter,” and that he acted “willfully, with the specific intent to violate the law.” U.S. Dep’t of Justice, *Criminal Tax Manual* § 12.05 (2008 ed.), <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2012.htm>; see also Pet. App. 117a (plea agreement, reciting elements of offense); 2 Kenneth E. North, *Criminal Tax Fraud* § 16.56, at 85 (3d ed. 1998).

Mrs. Kawashima was convicted of violating 26 U.S.C. 7206(2). That provision is violated when someone “[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under \* \* \* the internal revenue laws[] of a \* \* \* document, which is fraudulent or is false as to any material matter.” 26 U.S.C. 7206(2). There is no dispute that the elements of the offense include a requirement that “[t]he document was false as to a material matter,” and that the defendant acted willfully. U.S. Dep’t of Justice, *Criminal Tax Manual* § 13.04 (2008 ed.), <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2013.htm>; see also 2 North § 16.67, at 98 (including “falsity,” “materiality,” and “willfulness”).<sup>10</sup>

---

<sup>10</sup> One of the amicus briefs in support of petitioner states that “a conviction under Section 7206(2) does not even require proof of knowledge that information provided on a tax return was false.” Walters Amicus Br. 18-19 n.13. In fact, the statute—which applies to someone other than the one who presents a document—plainly requires that the *defen-*

In light of the elements just described, both of petitioners' offenses entailed willful conduct and a materially false statement. A falsehood is "material" if it "bears on the correct computation of tax" or "if it has the tendency to impede the IRS in ascertaining or verifying the correctness of the taxpayer's tax liability." 2 North § 16.63, at 92. As a result, petitioners' offenses necessarily "involve[d] \* \* \* deceit" for purposes of the aggravated-felony defined in Subparagraph (M)(i). See Pet. App. 22a, 24a; *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008) ("'Willfully' and knowingly signing and filing a false federal tax return unquestionably 'involves fraud or deceit[.]'", cert. denied, 130 S. Ct. 736 (2009); *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting) ("'Fraud' or 'deceit' is a necessary element of 26 U.S.C. § 7206(1)[.]"). Indeed, none of the courts or judges that otherwise agrees with petitioners has done so on the basis of a conclusion that Section 7206(1) or (2) does not "involve[] fraud or deceit."<sup>11</sup>

2. In contending that their offenses did not involve fraud or deceit, petitioners advance two arguments. Both are predicated on non sequiturs, and neither estab-

---

*dant* act "[w]illfully" with respect to the document's being "fraudulent" or "false," though it specifies that the *person presenting the document* need not have "knowledge or consent" of the "falsity or fraud." 26 U.S.C. 7206(2) (emphasis added).

<sup>11</sup> See Pet. App. 8a n.2 (Graber, J., dissenting from denial of rehearing en banc) (not addressing the question but implicitly assuming that tax crimes other than tax evasion may "happen to involve fraud or deceit"); *Arguelles-Olivares*, 526 F.3d at 183-184 (Dennis, J., dissenting) (noting that alien did "not contest that his conviction under [Section 7206(1)] 'involves fraud or deceit' within the meaning of the removability provision"); *Ki Se Lee*, 368 F.3d at 222-224 (not addressing the question).

lishes that petitioners' willfully and materially false representations to the IRS did not constitute deceit.

a. Petitioners claim (Br. 37) that the court of appeals erroneously "equate[d]" willfulness "with fraud and/or deceit." But the relevant point, as the court of appeals made clear (Pet. App. 22a-24a), is not merely that petitioners' actions were willful—which meant that they involved the "voluntary, intentional violation of a known legal duty," *United States v. Cheek*, 498 U.S. 192, 201 (1991)—but also that the statements in the relevant document were materially false.

b. Petitioners also contend (Br. 37-40) that their offenses did not necessarily involve fraud or deceit because "a conviction under § 7206(1) does not collaterally estop [a] taxpayer from disputing fraud" in a subsequent civil suit under 26 U.S.C. 6663 (or its statutory predecessor in 26 U.S.C. 6653 (1988)). Pet. Br. 38 (discussing *Wright v. Commissioner*, 84 T.C. 636 (1985)). But petitioners overstate the effect of the Tax Court's decision in *Wright*.

The civil-fraud statute at issue in *Wright* required the government to prove that the taxpayer had made an "underpayment \* \* \* due to fraud." 84 T.C. at 639 (quoting 26 U.S.C. 6653(b)(1) (1982)). The Tax Court concluded that a conviction under Section 7206(1) does not necessarily establish such an underpayment because, unlike 26 U.S.C. 7201 (which addresses tax evasion), Section 7206(1) can be violated by materially false statements "irrespective of the tax consequences of the falsification." 84 T.C. at 642-643. Thus, the reason a taxpayer in a civil tax fraud suit is not estopped by a Section 7206(1) conviction from denying an "underpayment \* \* \* due to fraud" is that it would not have been necessary to prove an *underpayment*—let alone a willful

one—in the earlier criminal prosecution.<sup>12</sup> *Wright* does not demonstrate that willfully and materially false statements do not involve “deceit.”

Thus, under the plain meaning of Subparagraph (M)(i), petitioners’ convictions under Sections 7206(1) and (2) qualify as aggravated felonies (assuming that the government satisfies its burden on remand with respect to the monetary threshold in Mrs. Kawashima’s case).

**B. No Canon Of Statutory Construction Warrants A Departure From The Plain Meaning Of Subparagraph (M)(i)**

Petitioners’ principal argument (Br. 15-33)—like that of the lower-court judges who have agreed with their conclusion—is that, even if offenses under Section 7206(1) and (2) are encompassed within the plain meaning of Subparagraph (M)(i), the presence of Subparagraph (M)(ii), which refers to tax-evasion offenses under Section 7201 but not to other tax-related offenses, implicitly withdraws convictions under Section 7206 and other “tax crimes” from the scope of the aggravated-felony definition in Subparagraph (M)(i).

---

<sup>12</sup> Of course, even though Section 7206(1) and (2) do not require the government to establish in the criminal proceeding that there was an underpayment of taxes, Subparagraph (M)(i) does require Immigration and Customs Enforcement to establish in a later removal proceeding that there was indeed a loss. That additional requirement thus vitiates objections that Subparagraph (M)(i) should not be triggered by “lesser tax crimes than tax evasion” under 26 U.S.C. 7201. Pet. Br. 24. Indeed, although Section 7201 offenses have a longer statutory maximum sentence (five years) than petitioners’ offenses under Section 7206(1) and (2) (three years), the Sentencing Guidelines otherwise provide for essentially identical treatment. All three offenses have the same base offense level, which depends on the amount of the tax loss, computed from the same table whether the conviction is under Section 7201, 7206(1), or 7206(2). See Sentencing Guidelines §§ 2T1.1(a), 2T1.4(a), 2T4.1.

Petitioners rely on various canons of construction: that statutory language must be construed in context, see, e.g., *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *Deal v. United States*, 508 U.S. 129, 132 (1993); that the Court is reluctant to “apply[] a general provision when doing so would undermine limitations created by a more specific provision,” *Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996); and that statutes are generally construed to avoid superfluities when there is no reason to believe that Congress might have preferred to make something clear even at the risk of being redundant, see, e.g., *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2248-2249 (2011). But all such “canons of construction are no more than rules of thumb that help courts determine the meaning of legislation.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992). Petitioners’ contention that “tax crimes” are categorically excluded from the scope of Subparagraph (M)(i) despite its plain text that includes all offenses involving “fraud or deceit” resulting in a loss exceeding \$10,000 is not supported by any of the canons they invoke. Instead, the context of the entire definition of “aggravated felony” supports the contrary conclusion that Congress meant what it said in the text of Subparagraph (M)(i) and that, in adding further categories to Section 1101(a)(43), it was being inclusive and was expanding, rather than implicitly contracting, that definition’s scope. Cf. *INS v. St. Cyr*, 533 U.S. 289, 295 n.4 (2001) (noting that “the term [‘aggravated felony’] has always been defined expansively, [and] it was broadened substantially by IIRIRA”).

***1. Subparagraph (M)(ii) is not a specific rule that implicitly excludes all “tax crimes” from the scope of Subparagraph (M)(i)***

Petitioners seek to draw a contrast between Subparagraph (M)(i) and Subparagraph (M)(ii) on the ground that the former refers to “loss to the victim or victims” and the latter refers to “revenue loss to the Government.” Br. 17-18. From that difference in phrasing, petitioners infer (Br. 18-19, 25-26) that Congress intended to exclude “revenue loss” offenses from Subparagraph (M)(i) because the more specific reference to “revenue loss” should control the general reference to “loss” in Subparagraph (M)(i). But petitioners’ attempt to read Subparagraph (M)(ii) as an enumeration of all relevant “tax crimes” (Br. 26) is without merit for several reasons.

a. As this Court has explained, it is a familiar proposition that “[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.” *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). The canon is a “warning against applying a general provision when doing so would undermine limitations created by a more specific provision.” *Varsity Corp.*, 516 U.S. at 511.

The specific-controls-the-general canon, however, is inapplicable here, because the statute does not have a specific provision that deals with a whole class of “tax crimes.” Petitioners would have Subparagraph (M)(ii) play that role, but it is, in fact, much narrower than that. Nothing in Subparagraph (M)(ii) actually refers to or demonstrably evokes the category of all “tax crimes” that petitioners assert that it governs. Instead, Sub-

paragraph (M)(ii) identifies just one kind of crime—that “described in section 7201 of title 26 (relating to tax evasion)” —which is in turn further limited to instances “in which the revenue loss to the Government exceeds \$10,000.” Neither part of that definition provides a way to identify what other “tax crimes” should be deemed to be implicitly excluded from Subparagraph (M)(i). Because the first part of the clause refers only to Section 7201 offenses, there is no way to extrapolate from that single point and reliably conclude that the clause represents Congress’s attempt to enumerate all “tax crimes” that qualify under Subparagraph (M)(i) *or* (ii), rather than simply identifying as qualifying under Subparagraph (M)(ii) the category that is actually mentioned in the text (offenses “described in section 7201” relating to “tax evasion”). In other words, Congress’s provision of a single exemplar does not serve as “language suggesting exclusiveness” within a broader category (such as tax crimes), nor as a “series of terms from which an omission bespeaks a negative implication.” *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). Cf. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (noting that, in the context of “a classic and well known triumvirate,” the specific mention of two items implies the intentional exclusion of the third, because “it would be strange to mention specifically only two, and leave the third to implication”).

Although petitioners rely (Br. 26) on this Court’s decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981), the statute there was crucially different, because it did define the category in question as well as specify a series of terms, thus making it reasonable to draw negative implications. In *HCSC-Laundry*, the Court held that an organization that provided laundry services to

hospitals could be denied a tax exemption under 26 U.S.C. 501(c)(3). Although the organization could have satisfied the general criteria for tax-exempt organizations in Section 501(c)(3) itself, the Court held that the organization's eligibility was instead controlled by Section 501(e), which dealt specifically with "cooperative hospital service organizations." See 450 U.S. at 6 ("Congress intended subsection (e) to be exclusive and controlling for cooperative hospital service organizations."). In doing so, however, the Court did not have to invent the category of "cooperative hospital service organizations," because that was the title of Subsection (e). See *id.* at 3 n.3 (quoting statute). In addition, the statute enumerated 12 different activities (not including laundry services) that such an organization could perform and be entitled to treatment as a charitable organization. *Id.* at 5-6. There was thus a textual basis for the Court's conclusion that Congress had specifically addressed qualifying hospital service organizations in Subsection (e), and that the express inclusion of 12 activities in that provision was intended to exclude an activity (such as laundry services) that was obviously "essential to a hospital's operation" and therefore "noticeable for its absence." *Ibid.*

By contrast, the reference here to only a single statutory provision concerning tax evasion does not suggest, much less define, a broader category of "tax crimes" that is addressed by a supposed negative implication of Subparagraph (M)(ii).<sup>13</sup>

---

<sup>13</sup> Petitioners' attempt to make Subparagraph (M)(ii) a self-contained "tax crimes" component of the aggravated-felony definition is further weakened by the presence of other provisions that expressly include tax crimes, see 8 U.S.C. 1101(a)(43)(E) (expressly referring to firearms-related offenses from Internal Revenue Code), or are broad enough to

b. Petitioners seek to remedy that defect by pointing (Br. 25-26) to the second part of the clause, which refers to a “revenue loss to the Government.” But that reference cannot reasonably be read as indicating that Subparagraph (M)(ii) enumerates all the tax crimes that fall within the aggravated-felony definition.

Allowing “revenue loss” to dictate the scope of Subparagraph (M)(ii) misconceives the relationship between the two halves of (M)(ii). As the Court recognized in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the reference to “revenue loss to the Government” in the second half of Subparagraph (M)(ii) “calls for circumstance-specific application” based on the facts of the particular alien’s case and does not depend on the generic nature of the offenses in the first half. *Id.* at 2301. The second half is thus the “qualifying language,” *ibid.*, the purpose of which is to limit the preceding category of offenses (*i.e.*, those “described in section 7201 of title 26 (relating to tax evasion)”). That relationship is also expressed by Congress’s use of the phrase “in which” to introduce “revenue loss to the government.” See *ibid.* (noting that “[t]he words ‘in which’ \* \* \* modify ‘offense’”).

Because the reference to “revenue loss” in Subparagraph (M)(ii) qualifies the reference to Section 7201 offenses, the fact that the phrase is more specific than the one in Subparagraph (M)(i) is unremarkable. The qualifying language in Subparagraph (M)(ii) performs the function of further limiting a category that comprises *only* Section 7201 offenses—which require proof of “the existence of a tax deficiency,” *Boulware v. United States*, 552 U.S. 421, 424 (2008) (quoting *Sansone v.*

---

cover certain tax-related crimes, see 8 U.S.C. 1101(a)(43)(R) (including “forgery”) and (S) (including “an offense relating to \* \* \* perjury”).

*United States*, 380 U.S. 343, 351 (1965))—and thus necessarily result in a revenue loss to the Government. It was therefore entirely appropriate for Congress to use the phrase “revenue loss to the Government,” without giving rise to the implication that the difference in terminology between Subparagraphs (M)(i) and (ii) somehow transforms the latter into the only part of the aggravated-felony definition that may involve losses to the Government resulting from the violation of criminal tax prohibitions. To the contrary, because Subparagraph (M)(i) encompasses a broader and more general category of crimes that extends well beyond situations in which the Government is the victim, it is natural that it would use more general language—“loss to the victim or victims”—to describe the amount of loss necessary to qualify the offense as an aggravated felony. Subparagraph (M)(ii) thus articulates the rule for tax-evasion offenses under Section 7201, but it does not affirmatively speak more broadly than that.

c. Petitioners’ attempt to make it do so—to extrapolate from “tax evasion” to “tax crimes” without any textual directive or guidance—poses practical problems about how to categorize offenses that indisputably involve fraud and taxes. For instance, 18 U.S.C. 371, in relevant part, makes it a crime for two or more persons to “conspire \* \* \* to defraud the United States, or any agency thereof in any manner or for any purpose.” In *Nijhawan*, this Court included Section 371 in the list of “widely applicable federal fraud statute[s]” that it believed should not be excluded from the scope of Subparagraph (M)(i) simply because they contain no “monetary loss threshold” in the definition of the offense. 129 S. Ct. at 2301. Under petitioners’ reading, however, Section 371 offenses would presumably not be included

within the scope of Subparagraph (M)(i) if their monetary losses came in the form of revenue losses to the Government. That would exclude an established kind of Section 371 offense known as a “*Klein* conspiracy,” which is a “conspirac[y] to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the [IRS] in the ascertainment, computation, assessment, and the collection of the revenue; to wit, income taxes.” *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). See generally U.S. Dep’t of Justice, *Criminal Tax Manual* § 23.07[2] (2008 ed.), <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2023.htm>. It would be passing strange to conclude—as petitioners’ logic seems to require—that some conspiracies “to defraud the United States” under Section 371 would “involve[] fraud or deceit” for purposes of Subparagraph (M)(i), while others would not. Moreover, to the extent that a *Klein* conspiracy charge is a recognized alternative to a tax-evasion charge under Section 7201, it would also be odd for the express mention of Section 7201 offenses to have the effect of excluding *Klein* conspiracies from Subparagraph (M) altogether.

d. In any event, even if Subparagraphs (M)(i) and (ii) were seen as prescribing different rules for two overlapping categories of loss, there still would not be any reason for the specific “revenue loss to the Government” qualifier in Subparagraph (M)(ii) to control the more general reference to “loss to the victim or victims” in Subparagraph (M)(i), because there is no conflict between the two loss limitations. Both provisions have always prescribed the same monetary threshold: \$200,000 between 1994 and 1996, and \$10,000 since 1996 (see p. 3, *supra*). Thus, to the extent that an offense involves a

“loss to the victim” that also happens to be “a revenue loss to the Government,” there is no need to choose between the two, as there could be if the revenue-loss threshold were higher. See *National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335-336 (2002) (“It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict.”). If the loss in question exceeds \$10,000, then the monetary-loss threshold contained in either clause is satisfied. As a result, the “rationale” for the greater-controls-the-lesser canon is inapplicable, because allowing a fraud or deceit offense in which the loss exceeds \$10,000 to be treated as an aggravated felony simply would not have the effect of “undermin[ing] limitations created by a more specific provision.” *Varsity Corp.*, 516 U.S. at 511 (citation omitted).

**2. *The canon counseling avoidance of superfluities does not support petitioners’ construction***

As petitioners note (Br. 19), this Court typically seeks to construe statutes in ways that avoid making any parts of them superfluous. It has, however, often recognized that “[t]here are times when Congress enacts provisions that are superfluous.” *Microsoft Corp.*, 131 S. Ct. at 2249 (quoting *Corley v. United States*, 129 S. Ct. 1558, 1572-1573 (2009) (Alito, J., dissenting)); see also *Connecticut Nat’l Bank*, 503 U.S. at 253 (“Redundancies across statutes are not unusual events in drafting”).

Petitioners contend that the practice of construing statutes to avoid superfluities requires the Court to adopt a construction of Subparagraph (M)(i) that does not include tax-evasion offenses under Section 7201,

because such offenses would normally be covered by the reference to “fraud or deceit” in Subparagraph (M)(i), but they are listed separately in Subparagraph (M)(ii). See Pet. Br. 21. As petitioners note (Br. 21), there is a well-established body of case law, arising in the context of civil suits under 26 U.S.C. 6663 (or its statutory predecessor in 26 U.S.C. 6653 (1988)), supporting the proposition that, even though Section 7201 does not use the term “fraud,” a conviction under Section 7201 necessarily entails an “underpayment” of taxes that is “due to fraud” in the sense meant by Section 6663, and that, for purposes of issue preclusion, a prior conviction under Section 7201 establishes in a civil suit that there has been an underpayment due to fraud. See *Wright*, 84 T.C. at 642 (noting that the Tax Court had previously “equated the element necessary for conviction under section 7201 (*i.e.*, an ‘attempt to evade’) with that essential for the imposition of the civil penalty under section 6653(b) (*i.e.*, an ‘underpayment \* \* \* due to fraud’)” (citing *Amos v. Commissioner*, 43 T.C. 50, 55 (1964), *aff’d*, 360 F.2d 358 (4th Cir. 1965)); see also, *e.g.*, *Klein v. Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989). From that unobjectionable premise, however, petitioners make an unwarranted leap to the conclusion that, in order to keep Subparagraph (M)(ii) from being “superfluous, Congress must have intended that M(ii) covers *the only* tax offense which is an aggravated felony, namely tax evasion under § 7201[,] under (M).” Pet. Br. 23. Petitioners’ analysis is flawed for three principal reasons.

a. First, as explained above (see pp. 23-29, *supra*), petitioners erroneously assume that Subparagraph (M)(ii) somehow stands in for all “tax crimes,” even though it mentions only one kind of tax crime (tax eva-

sion). Although petitioners rely (Br. 20) on *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the failure of Subparagraph (M)(ii) to refer generally to “tax crimes” distinguishes it from a statute discussed there. In *Leocal*, the Court considered whether an offense for driving under the influence of alcohol (DUI) is a “crime of violence.” In holding that it is not, the Court found that its conclusion was bolstered by a provision in the INA that defined “serious criminal offense” to mean, in part, “any crime of violence” *or* “any crime \* \* \* of driving while intoxicated or under the influence of alcohol \* \* \* if such crime involves personal injury to another.” 543 U.S. at 12 (quoting 8 U.S.C. 1101(h)(2) and (3)). In *Leocal*, the second provision expressly referred to the relevant category of crimes (DUI offenses) that the Court found to be excluded from the first provision’s reference to crimes of violence. Here, by contrast, Subparagraph (M)(ii) does not refer to the broader category of “tax crimes” identified by petitioners. Nor have they identified any other statutory provision that refers to both “crimes involving fraud or deceit” and “tax crimes,” which might permit an inference, like the one in *Leocal*, that Congress understood the former category to be one that excludes the latter. Subparagraph (M)(ii) therefore does not have the same significance for “tax crimes” that the reference to DUI offenses had in *Leocal*.

Because there is no textual basis for concluding that Subparagraph (M)(ii) has negative implications extending to tax crimes other than tax evasion, petitioners’ construction effectively requires the Court to create an ambiguity in the scope of Subparagraph (M)(ii)—as well as in Subparagraph (M)(i). But the Court has previously rejected that solution to a purported superfluity: “[w]here there are two ways to read the text [and] either

[a word] is surplusage, in which case the text is plain; or [the word] is nonsurplusage \* \* \* , in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate.” *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004).

b. Second, petitioners simply assert without analysis (Br. 23) that there is no “basis at all” for thinking that Congress may have added Subparagraph (M)(ii) out of an abundance of caution, intending to make it clear that tax evasion should be considered an aggravated felony, even at the risk of creating a minor internal redundancy. There are, however, good reasons why Congress might have lacked confidence about whether Subparagraph (M)(i) “would be interpreted as covering all (or any) evasion cases.” *Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting).

As an initial matter, unlike Section 7206(1) and (2), the text of Section 7201 does not actually use words and phrases like “fraud,” or “false,” or “does not believe to be true and correct.” Instead, it speaks only of an “attempt \* \* \* to evade or defeat any tax,” 26 U.S.C. 7201, and thus does not on its face necessarily connote fraud or deceit.

Moreover, Congress could have been given serious pause by this Court’s decision in *United States v. Scharton*, 285 U.S. 518 (1932). *Scharton* held that the federal offense of willfully attempting to evade taxes in any manner (in Section 7201’s statutory predecessor, 26 U.S.C. 1266 (Supp. V 1931)) was governed by the three-year statute of limitations that was generally applicable to tax crimes, rather than the special six-year statute of limitations that was applicable to tax crimes involving “the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or

not, and in any manner.” 285 U.S. at 520 n.2 (quoting 18 U.S.C. 585 (Supp. V 1931)). In the course of doing so, the Court expressly rejected the government’s argument that the six-year limitation period should apply because fraud “is implicit in the concept of evading or defeating” and that “[a]ny effort to defeat or evade a tax is \* \* \* tantamount to and [possesses] every element of an attempt to defraud the taxing body.” *Id.* at 520-521. The Court reasoned that an averment of fraud in a tax-evasion suit “would be surplusage,” because “it would be sufficient to plead and prove a wilful attempt to evade or defeat.” *Id.* at 521.<sup>14</sup>

In addition, reasonable concerns may also have been raised by this Court’s decision in *Spies v. United States*, 317 U.S. 492 (1943), which stressed that Congress had provided that tax evasion “may be accomplished ‘in any manner.’” *Id.* at 499. *Spies* formulated the following list of the kinds of actions that could prove an “affirmative willful attempt” to evade taxes for purposes of Section 7201:

keeping a double set of books, making false entries or alterations, or false invoices or documents, de-

---

<sup>14</sup> Since 1954, the statute-of-limitations provisions in 26 U.S.C. 6531 have made clear that a six-year limitation period applies to Section 7201 offenses. See 26 U.S.C. 6531(2) (prescribing six-year period “for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof”). They have done so, however, only by creating what petitioners would be obliged to consider a superfluity, since the immediately preceding subsection specifies that the same six-year period applies to “offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.” 26 U.S.C. 6531(1). In other words, Section 6531(1) applies to “offenses involving” fraud against the United States, and Section 6531(2) applies to tax-evasion offenses. The parallel to Clauses (i) and (ii) of Subparagraph (M) is quite strong.

struction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, *and any conduct*, the likely effect of which would be *to mislead or to conceal*.

*Ibid.* (emphases added). Even though that list concluded with a catch-all term that would apparently capture “any conduct” that was fraudulent or deceitful, the Court still took pains to specify that its list was offered only “[b]y way of illustration, and not by way of limitation.” *Ibid.* As a result, *Spies* appears to hold open the possibility—because the statute provides that tax evasion can occur “in any manner”—that Section 7201 could be violated without any act of fraud or deceit.

Furthermore, there are, in fact, some lower-court cases indicating that one kind of tax evasion—that pertaining to evasion of payment, rather than evasion of assessment—could occur without any false statements. The paradigmatic example would be that of a taxpayer who, whether or not he filed a truthful tax return, took affirmative steps to evade payment by moving his assets beyond the reach of the IRS. See, e.g., *United States v. Pollen*, 978 F.2d 78, 81-82 (3d Cir. 1992) (describing two counts of indictment charging defendant with “knowingly and willfully attempt[ing] to evade the payment of \* \* \* federal income taxes \* \* \* by ‘placing part of his assets out of reach of the United States Government’ by causing” gold to be brought to a bank in Canada to be transferred to an account in Switzerland), cert. denied, 508 U.S. 906 (1993); *United States v. Trownsell*, 367 F.2d 815, 816 (7th Cir. 1966) (affirming conviction for attempting to evade and defeat the payment of federal income taxes by liquidating assets and causing the proceeds “to be deposited in a bank in Switzerland, thus

placing it beyond the reach of the Government”). In practice, even evasion-of-payment cases involving the transfer of assets beyond the IRS’s reach will almost invariably involve some affirmative acts of fraud or deceit as a factual matter, and the government would certainly be expected to highlight any such acts in proving its criminal case. But, as then-Judge Alito noted in his dissenting opinion in *Ki Se Lee*, even if Congress was “certain that no defendant would ever be convicted of tax evasion without proof of fraudulent or deceitful conduct, the drafters might have been concerned that some courts would hold that tax evasion falls outside the scope of [Subparagraph (M)(i)] because neither ‘fraud’ nor ‘deceit’ is a formal element of the offense.” 368 F.3d at 227.

Finally, Congress may have had uncertainty about how Subparagraph (M)(i) would operate in the context of tax offenses under state or foreign law. Section 1101(a)(43) specifies that the definition of aggravated felony “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.” 8 U.S.C. 1101(a)(43) (penultimate sentence). Thus, even if Congress actually was confident that tax evasion would always be seen as involving “fraud or deceit” in the context of a federal offense under Section 7201 (and therefore could have been included in Subparagraph (M)(i) when viewed in isolation), that confidence would not likely extend to the categorization of tax offenses under state or foreign law. There would thus have been additional reason to prefer a clear incorporation of tax-evasion offenses, notwithstanding the reference in Subparagraph (M)(i) to offenses involving fraud or deceit.

There are, accordingly, quite plausible reasons to believe that Congress enacted Subparagraph (M)(ii) “simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony.” *Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting); see also Pet. App. 19a-20a (same); *Arguelles-Olivares*, 526 F.3d at 173 (5th Cir.) (“We agree with then-Judge (now Justice) Alito’s and the Ninth Circuit’s construction of subsection (43)(M)(i).”) (footnote omitted).

c. Third, within the broader context of the definition of “aggravated felony” in Section 1101(a)(43), there is particularly little reason to conclude that Congress intended to exclude other tax-related crimes from the definition by specifying the inclusion of Section 7201 offenses. The aggravated-felony definition is not only “expansive[.]” *St. Cyr*, 533 U.S. at 295 n.4. It also contains several other provisions that overlap to considerable degrees. For example, Subparagraph (A) refers to “murder, rape, or sexual abuse of a minor,” 8 U.S.C. 1101(a)(43)(A), and Subparagraph (F) refers to “a crime of violence (as defined in [18 U.S.C. 16] \* \* \*) for which the term of imprisonment [is] at least one year,” 8 U.S.C. 1101(a)(43)(F).<sup>15</sup> Because murder and rape typically carry sentences exceeding one year, those two components of the aggravated-felony definition are largely redundant (and rape was added to Subparagraph

---

<sup>15</sup> A “crime of violence” is defined in 18 U.S.C. 16 as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(A) in 1996, six years after crimes of violence had been added to the definition, see pp. 2-3, *supra*). Similarly, Subparagraph (G) includes “burglary offense[s] for which the term of imprisonment [is] at least one year,” 8 U.S.C. 1101(a)(43)(G), even though such offenses are also generally included within Subparagraph (F)’s reference to “crime[s] of violence.”

Because the aggravated-felony definition already includes significant redundancies, it is particularly unlikely that Congress intended for the plain meaning of Subparagraph (M)(i) to be cabined by a negative implication that purportedly arises from the specification in Subparagraph (M)(ii) of one particular offense that was also included.

d. Thus, even assuming that some redundancy results from the court of appeals’ construction of Subparagraph (M)(i), this case is one in which “Congress could sensibly have seen some practical value in the redundancy of making [something] clear beyond question,” which would mean that “there is an explanation for redundancy, rendering any asserted inference from it too shaky to be trusted.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 444-445 (1995) (Souter, J., dissenting). Cf. *Connecticut Nat’l Bank*, 503 U.S. at 256 (O’Connor, J., concurring in the judgment) (“I think it far more likely that Congress inadvertently created a redundancy than that Congress intended to withdraw appellate jurisdiction over interlocutory bankruptcy appeals by the roundabout method of reconferring jurisdiction over appeals from final bankruptcy orders.”).

**3. *The structure of the Sentencing Guidelines does not indicate that tax offenses cannot involve “fraud or deceit” for purposes of Subparagraph (M)(i)***

Petitioners also invoke the Sentencing Guidelines as a kind of ersatz legislative history, claiming (Br. 28-32) that the Guidelines shed some light on Congress’s decision to address tax-evasion offenses in a provision separate from the one addressing offenses involving “fraud or deceit.” In their view, “[i]t is hardly coincidental that Congress used the precise language [that was] found in Part F of [Chapter 2 of] the Sentencing Guidelines (‘fraud or deceit’) in” Subparagraph (M)(i), even though “[t]ax offenses \* \* \* are covered in Part T of [Chapter 2 of] the Guidelines.” Pet. Br. 30-31.<sup>16</sup>

As an initial matter, to the extent petitioners imply (Br. 32 n.16, 32-33) that the Sentencing Guidelines treat convictions for “tax evasion” as being fundamentally different from convictions for “fraud,” that idea is at war with their principal argument that Subparagraph (M)(i) should be construed to contain an implied exception for all tax crimes in order to avoid a redundancy between the reference to “fraud or deceit” in Subparagraph (M)(i) and the reference to Section 7201 offenses in Subparagraph (M)(ii).

In any event, there is no evidence that Members of Congress contemplated the Sentencing Guidelines in the course of deliberating about the amendments to the aggravated-felony definition. Cf. *District of Columbia*

---

<sup>16</sup> Part F of Chapter 2 of the Guidelines, pertaining to “Offenses Involving Fraud or Deceit,” was deleted effective November 1, 2001, and consolidated with provisions pertaining to theft and property destruction in Part B of Chapter 2, which is now entitled “Basic Economic Offenses.” See Sentencing Guidelines App. C Supp., amend. 617.

v. *Heller*, 554 U.S. 570, 605 (2008) (noting that the statements that compose legislative history are “considered persuasive by some” in construing statutes “because the legislators who heard or read those statements presumably voted with that understanding”). Nor is there any reason to believe that the definition of aggravated felony is somehow patterned on the Guidelines. For instance, although the Guidelines group child pornography and prostitution offenses together (and did so when the INA’s list of aggravated felonies was reordered in 1994), see Sentencing Guidelines Ch. 2, Pt. G (1994; 2010), the aggravated-felony definition addresses them in different provisions that are separated by one dealing with racketeering offenses. See 8 U.S.C. 1101(a)(43)(I), (J), and (K). Similarly, although petitioners attach significance to the fact that the Guidelines pertaining to tax crimes do not refer to the government as a “victim” (Br. 31), those same Guidelines also conspicuously fail to use the phrase “revenue loss” that appears in Subparagraph (M)(ii). Instead, they repeatedly refer to “tax loss,” see Sentencing Guidelines §§ 2T1.1(a), 2T1.4(a), 2T4.1 (1994; 2010), which presumably would have been the statutory phrase if Congress had actually been tracking the Guidelines.

It is therefore unsurprising that the only decision petitioners cite (Br. 33) for the proposition that the Sentencing Guidelines may serve as evidence of congressional intent concerning the aggravated-felony definition rejected the argument that the Guidelines’ treatment of an embezzlement offense as one involving “theft” would require that offense to be “treated as a theft offense under § 1101(a)(43)(G) rather than an offense involving fraud or deceit under § 1101(a)(43)(M)(i).” *Valansi v. Ashcroft*, 278 F.3d 203, 213 (3d Cir. 2002).

**4. Principles of lenity do not call for a different result**

Petitioners also invoke principles of lenity, contending that, even if the statutory text does not “clearly exclude[] convictions” under Section 7206(1) and (2) from the scope of Subparagraph (M)(i), the text is at least “unclear and ambiguous” and for that reason must be construed in their favor. Pet. Br. 41. That argument is unavailing.

a. Petitioners contend (Br. 42) that the mere existence of a “conflict of interpretation among and within” the lower courts requires this Court to resolve that conflict in their favor. But this Court has repeatedly rejected petitioners’ approach, explaining that “[a] statute is not “‘ambiguous’ for purposes of lenity merely because’ there is ‘a division of judicial authority’ over its proper construction.” *Reno v. Koray*, 515 U.S. 50, 64-65 (1995) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); see also *United States v. Hayes*, 129 S. Ct. 1079, 1083, 1088-1089 (2009) (noting division among circuits, and within the court of appeals’ decision, before finding the rule of lenity inapplicable in a criminal case).

Nor is a different result warranted in the immigration context simply because one construction of a statute will result in an alien’s removal from the United States. That is illustrated by *Nijhawan*, which, like this case, involved a disagreement among circuits, see 129 S. Ct. at 2298, as well as a divided panel of the court of appeals, see *Nijhawan v. Attorney Gen.*, 523 F.3d 387, 399-406 (3d Cir. 2008) (Stapleton, J., dissenting), aff’d, 129 S. Ct. 2294 (2009). In *Nijhawan*, the petitioner and his amici—who included petitioners here—expressly invoked principles of lenity. See Pet. Br. at 48-50, *Nijhawan*, *supra*; Amicus Br. of Akio Kawashima and Fusako Kawashima at 11-12, *Nijhawan*, *supra*. This Court,

however, adopted the government’s reading of the statute (which had been rejected by some courts of appeals, see 129 S. Ct. at 2298), and it affirmed the decision allowing Nijhawan to be removed. See *id.* at 2304.

b. Even in the criminal context, the threshold question for purposes of applying principles of lenity is whether there is a “grievous ambiguity,” *Muscarello v. United States*, 524 U.S. 125, 138-139 (1998), such that “the equipoise of competing reasons cannot otherwise be resolved,” *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000).<sup>17</sup> Here, there is no such grievous ambiguity or equipoise. Instead, as discussed above, the plain meaning of Subparagraph (M)(i) encompasses petitioners’ offenses, and the canons of construction that petitioners invoke do not warrant their inference that the

---

<sup>17</sup> Petitioners contend (Br. 46) that “the criminal rule of lenity” is applicable here because the definition of aggravated felony “has both immigration and criminal law implications.” In both of the cases they cite, however, the relevant components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010) (noting that “the critical language appears in a criminal statute, 18 U.S.C. 924(c)(2)”); *Leocal*, 543 U.S. at 11 & n.8 (construing the definition of a “crime of violence” in 18 U.S.C. 16, “a criminal statute”). Here, by contrast, the relevant definition is not a criminal statute; it is entirely contained in Section 1101(a)(43)(M), in the INA itself. Moreover, the fact that the definition of aggravated felony could be of collateral relevance in a subsequent prosecution for illegal reentry after removal, see 8 U.S.C. 1326, does not detract from the definition’s principal purpose of providing a basis for civil removability determinations. 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).

mention of one offense in Subparagraph (M)(ii) implicitly withdrew all other “tax crimes” from the definition of aggravated felony. Thus, even if the Court were to conclude that the statute is not “crystalline,” it is still possible “to make far more than a guess as to what Congress intended,” which prevents the rule of lenity from “apply[ing] in [petitioners’] favor.” *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (internal quotation marks omitted).

c. In a variation on their lenity argument, petitioners assert that any category of the aggravated-felony definition that is not “tied to specific statutory violations” (Br. 45) is intrinsically lacking in “clarity and certainty” and that “principles of due process and notice” (Br. 42) therefore preclude it from serving as the basis for removing an alien from the United States. But the opinions they cite (Br. 42-45) do not support that assertion.<sup>18</sup> And it is decisively refuted by *Nijhawan*, which affirmed a removal order predicated on a conviction for an aggravated felony as defined in Subparagraph (M)(i)—the very provision at issue here.

---

<sup>18</sup> Justice Alito’s concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), described several reasons why it may be difficult to determine whether a particular offense is an “aggravated felony” or a “crime involving moral turpitude,” *id.* at 1488-1491, but he did not point to the failure to cross-reference a specific statute, nor did he suggest that either definition should not be enforceable in a removal proceeding. Similarly, the dissenting opinions of Justices Scalia and Jackson that petitioners quote (Br. 44-45) involved different statutes altogether (and failed to persuade the Court not to enforce the statutes in question). See *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (addressing the residual clause in the Armed Career Criminal Act); *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (addressing provision making conviction of a “crime involving moral turpitude” a ground for deportation).

d. In any event, if the Court were to conclude that Subparagraph (M)(i) is ambiguous with respect to its applicability to “tax crimes,” that still would not warrant the disposition that petitioners request (a determination that they cannot be deported, see Pet. Br. 47). Instead, the “proper course” would be to “remand to the agency” to “exercise[] its *Chevron* discretion to interpret the statute” in the first instance. *Negusie v. Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (internal quotation marks omitted).<sup>19</sup>

---

<sup>19</sup> The Board has not yet addressed, in a precedential opinion, whether federal tax crimes other than offenses described in Section 7201 may be aggravated felonies under Subparagraph (M)(i). It is, however, well established that the Board is entitled to deference in construing the INA. See, e.g., *Negusie*, 129 S. Ct. at 1164, 1167 (finding statutory provision ambiguous, but remanding to the Board for it to address the question in the first instance, rather than adopting the narrowing construction offered by the alien); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (reversing decision of court of appeals for its failure to give *Chevron* deference to a decision of the Board). Of course, even if the Court did not follow its “ordinary rule” of remanding to allow the agency to speak in the first instance, *Negusie*, 129 S. Ct. at 1164, a judicial decision predicated on statutory ambiguity would not prevent the Board from later exercising its interpretive discretion in cases involving other parties. See *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005).

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

TONY WEST  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

CURTIS E. GANNON  
*Assistant to the Solicitor  
General*

DONALD E. KEENER  
BRYAN S. BEIER  
*Attorneys*

SEPTEMBER 2011

## 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<sup>5</sup> least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at<sup>5</sup> 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);

---

<sup>5</sup> 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<sup>6</sup>

(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;

---

<sup>6</sup> 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. 18 U.S.C. 371 provides in pertinent part:

**Conspiracy to commit offense or to defraud the United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

\* \* \* \* \*

4. 26 U.S.C. 6531 provides in pertinent part:

**Periods of limitation on criminal prosecutions**

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the prepa-

ration or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

\* \* \* \* \*

5. 26 U.S.C. 6663 provides:

**Imposition of fraud penalty**

**(a) Imposition of penalty**

If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

**(b) Determination of portion attributable to fraud**

If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.

\* \* \* \* \*

6. 26 U.S.C. 7201 provides in pertinent part:

**Attempt to evade or defeat tax**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

7. 26 U.S.C. 7206 provides in pertinent part:

**Fraud and false statements**

Any person who—

**(1) Declaration under penalties of perjury**

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

**(2) Aid or assistance**

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; \* \* \*

\* \* \* \* \*

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.