No. 12-411

In the Supreme Court of the United States

VIJAY K. CHHABRA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' orders denying rehearing and reconsideration conflict with this Court's observation in *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484 n.3 (2012), that "the list of criminal offenses that subject aliens to exclusion remains separate from the list of offenses that render an alien deportable."

2. Whether a tax-evasion offense under 26 U.S.C. 7201 constitutes a crime involving moral turpitude in light of this Court's statement in *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1175 (2012), that fraud is not an express element of that offense.

3. Whether a lawful permanent resident who committed an offense on or after April 1, 1997 that makes him inadmissible should be deemed to be seeking "admission" under 8 U.S.C. 1101(a)(13)(C)(v), because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, abrogated this Court's holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963), that the end of an "innocent, casual, and brief" trip abroad was not an "entry" into the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-28a) is not published in the *Federal Reporter* but is reprinted at 444 Fed. Appx. 493. The decisions of the Board of Immigration Appeals (Pet. App. 14a-19a, 20a-22a) and the immigration judge (Pet. App. 1a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2011. A petition for rehearing was denied on July 3, 2012 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on October 1, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines several classes of aliens who are inadmissible to the United States, including certain criminal aliens. See generally 8 U.S.C. 1182(a)(2) (2006 & Supp. V 2011). As relevant here, that class includes "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I). The INA also specifies classes of aliens who are deportable from the United States, which include, as relevant here, those who have been convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii).

b. When a lawful permanent resident alien (LPR) is found to be removable—whether on a ground of inadmissibility or one of deportability—he may seek discretionary relief in the form of cancellation of removal. See 8 U.S.C. 1229b(a). To be eligible for such relief, however, the alien must demonstrate, *inter alia*, that he has not been convicted of an "aggravated felony." 8 U.S.C. 1229b(a)(3). As relevant here, the term "aggravated felony" is defined as including the following:

> (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;

8 U.S.C. 1101(a)(43)(M).

c. Until 1996, the INA defined an "entry" into the United States as "any coming of an alien into the United States, from a foreign port or place." 8 U.S.C. 1101(a)(13) (1994) (repealed 1996). That definition, however, specified that an LPR returning from abroad would "not be regarded as making an entry into the United States * * * if the alien prove[d] * * * that his departure to a foreign port or place * * * was not intended or reasonably to be expected by him or * * * was not voluntary." *Ibid.* The return of such an alien therefore was not subject to the limitations on admissibility contained in Section 1182.

Construing that definition in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), this Court observed that it did "not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.'" *Id.* at 461. The Court therefore held "that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.* at 462.

In Section 301(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575, Congress replaced the earlier definition of "entry" and specified the circumstances under which an LPR returning to the United States from abroad could be treated as seeking "admission," and therefore subject to restrictions on admissibility contained in Section 1182. The new definition of "admission" provides in relevant part as follows:

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * * * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C. 1101(a)(13).

In 1998, the Board of Immigration Appeals (Board) determined that IIRIRA's definition of "admission" had "expressly preserve[d] some, but not all, of the *Fleuti*

doctrine," and that a returning LPR described in Section 1101(a)(13)(C)(i)-(vi) "shall be regarded as 'seeking an admission' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the *Fleuti* doctrine." *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065-1066 (en banc).

In *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012), this Court held, based on principles of non-retroactivity, that 8 U.S.C. 1101(a)(13)(C)(v) did not apply to a criminal offense, plea, and conviction that took place before IIRIRA (which generally became effective on April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625).

2. Petitioner is a native and citizen of India who initially entered the United States in 1979 as an LPR. Pet. App. 15a. In 1999, he pleaded guilty to (and in 2003 was convicted of) one count of receiving Medicare kickbacks in violation of 42 U.S.C. 1320a-7b(b)(1) and one count of income tax evasion in violation of 26 U.S.C. 7201. Pet. App. 3a. As relevant here, the latter count, as charged in an information, specified that petitioner unlawfully, willfully, and knowingly underreported more than $105,000 of income (*i.e.*, the Medicare kickbacks) on four years of his federal tax returns in order to evade more than $41,000 of federal income taxes. *Id.* at 9a, 27a; Gov't C.A. Br. 6-7.

Sometime after his 2003 conviction, petitioner left the United States. Pet. App. 15a. When he returned in 2006, he was treated as seeking admission under 8 U.S.C. 1101(a)(13)(C)(v), and he was charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an alien who has been convicted of a crime involving moral turpitude. Pet. App. 2a, 15a.

3. Before an immigration judge, petitioner admitted the factual allegations in the Notice to Appear, but denied removability and, alternatively, applied for cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 2a. In August 2008, the immigration judge found that petitioner was removable as charged and that he was statutorily ineligible for cancellation of removal because he had been convicted of an aggravated felony. *Id.* at 13a.

The Board dismissed petitioner's appeal. Pet. App. 14a-19a. With respect to his removability, the Board concluded that petitioner's tax-evasion conviction was for a crime involving moral turpitude, citing previous decisions to that effect. *Id.* at 16a (citing *In re W–*, 5 I. & N. Dec. 759 (B.I.A. 1954), and *Tseung Chu* v. *Cornell*, 247 F.2d 929, 936 (9th Cir.), cert. denied, 355 U.S. 892 (1957)). With respect to petitioner's application for cancellation of removal, the Board emphasized that he "bears the burden of establishing that he meets all applicable eligibility requirements for relief and that he merits a favorable act of discretion." *Id.* at 16a-17a (citing 8 U.S.C. 1229a(c)(4)(A)). "[I]f the evidence indicates that a ground for mandatory denial of the relief may apply, the [applicant] has the burden of proving by the preponderance of the evidence that such ground does not apply." *Id.* at 17a. In light of this Court's intervening decision in *Nijhawan* v. *Holder*, 557 U.S. 29, 42-43 (2009), the Board determined that petitioner's tax-evasion offense was an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(ii) because the record of his conviction demonstrated that the loss to the government from the offense had been more than $10,000. Pet. App. 18a-19a.

Petitioner moved to reopen his case with the Board, arguing that *Nijhawan* required further fact finding on the loss to the government and therefore a new deter-

mination regarding whether he was ineligible for cancellation of removal due to his aggravated-felony conviction. In particular, he contended that the revenue loss should be calculated as of the date of his sentencing, by which point he had reimbursed the government for his tax deficiencies. Pet. App. 21a. The Board denied that motion. *Id.* at 20a-22a.

4. The court of appeals consolidated petitions for review of both of the Board's decisions. Pet. App. 23a-28a. Based on circuit precedent, the court held that willful evasion of income tax under 26 U.S.C. 7201 includes a specific intent to defraud and is therefore a crime involving moral turpitude. Pet. App. 25a. The court also held that petitioner's conviction was for an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(ii), barring cancellation of removal, because the record showed that he had admitted and pleaded guilty to tax evasion with a revenue loss to the United States that exceeded $10,000. Pet. App. 27a.

Petitioner filed a petition for rehearing and a suggestion of rehearing en banc, in which he contended that his tax-evasion offense was not a crime involving moral turpitude and that the court should overrule then-recent circuit precedent holding that IIRIRA had abrogated the *Fleuti* doctrine. Shortly after that petition was filed, this Court decided *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012), in which it held that tax offenses other than tax evasion can be aggravated felonies under 8 U.S.C. 1101(a)(43)(M)(i), even though tax evasion in violation of 26 U.S.C. 7201 is specifically mentioned in the adjoining provision (8 U.S.C. 1101(a)(43)(M)(ii)). The Court rejected the *Kawashima* petitioners' invocation of the presumption against superfluities, finding that "Congress specifically included tax evasion offenses in

[8 U.S.C. 1101(a)(43)(M)(ii)] to remove any doubt that tax evasion qualifies as an aggravated felony." 132 S. Ct. at 1174. In the course of explaining why Congress's "specific mention" of Section 7201 in Section 1101(a)(43)(M)(ii) does not "impliedly limit[] the scope of" the "plain language" of Section 1101(a)(43)(M)(i), the Court noted that "the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit," because "§ 7201 includes two offenses"—evasion of tax assessment and evasion of tax payment—and "it is possible to" commit the latter form of the offense "without making any misrepresentation," by "fil[ing] a truthful tax return" and taking "steps to evade payment." *Id.* at 1175.

On May 1, 2012, the court of appeals denied the petition for rehearing. Pet. App. 29a-32a. In doing so, the court of appeals quoted *Kawashima*'s observation that a conviction under Section 7201 does not "*necessarily* involve fraud or deceit," *id.* at 31a, but the court did not expressly revisit the crime-involving-moral-turpitude aspect of its earlier opinion. Instead, it stated that petitioner's "argument that his conviction was not for a deportable offense fails." *Ibid.* The court also "clarif[ied]" that its discussion of "the definition of aggravated felony" relied on the specific reference to tax evasion in Clause (ii) of 8 U.S.C. 1101(a)(43)(M) rather than the "'fraud or deceit' prong" in Clause (i). Pet. App. 31a.

Petitioner moved for reconsideration, contending that "his conviction for tax evasion, although a ground for removal, is not a ground for inadmissibility." Pet. App. 34a. The court of appeals denied that motion on June 26, 2012, noting that even if petitioner were right about that point, "if he prevails on a determination of inadmissibility, he would still face the prospect of new removal

proceedings for conviction of an aggravated felony." *Ibid.* (internal quotation marks omitted). The court also noted that petitioner's speculative hope that he might in the meantime get his conviction vacated in a coram nobis proceeding did not justify reconsideration. *Ibid.*

On July 3, 2012, the court of appeals denied petitioner's request for rehearing en banc. Pet. App. 35a-36a.

ARGUMENT

The court of appeals' unpublished disposition of this case is nonprecedential and presents no issue warranting review. The petition for a writ of certiorari presents three questions for this Court's review. The first, contending that the court of appeals confused a ground of deportability with a ground of inadmissibility, is based on the particular circumstances of this case and is in any event predicated on an over-reading of the court of appeals' short orders denying rehearing and reconsideration. The second and third questions have precipitated no disagreement in the courts of appeals, and petitioner's proffered answers have no merit. Certiorari should be denied.

1. In its order denying petitioner's petition for panel rehearing, the court of appeals discussed this Court's then-recent decision in *Kawashima* and observed that petitioner's tax-evasion conviction is an aggravated felony and therefore a "deportable offense." Pet. App. 31a. That order denying rehearing, however, did not separately address another issue that had been resolved in the court's original opinion: whether a tax-evasion conviction is a ground of inadmissibility because it is a crime involving moral turpitude. As a result, petitioner characterizes (Pet. 11) the denial of rehearing as a ruling that "effectively amends the [INA] to make conviction of an aggravated felony into a ground of inadmissi-

bility." On that basis, he contends (Pet. 3, 11) that the decision below conflicts with this Court's observation in *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012), that "the list of criminal offenses that subject aliens to exclusion remains separate from the list of offenses that render an alien deportable," and that "a single crime involving moral turpitude may render an alien inadmissible [but] would not render her deportable." *Id.* at 1485 n. 3.

a. Petitioner is, of course, correct that the INA's grounds of inadmissibility and deportability are distinct. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479 (2011) (noting that the two lists are "sometimes overlapping and sometimes divergent"). But the court of appeals did not actually hold otherwise. It said that "[petitioner's] argument that his conviction was not for a deportable offense fails." Pet. App. 31a. While that was something of a non sequitur with respect to the crime-involving-moral-turpitude question (which involves inadmissibility in this context, not deportability), the court's brief order did not state that petitioner could be found to be inadmissible because he had committed an aggravated felony. Nor did it conclude that he could be found to be deportable even though he had not actually been charged with a ground of deportability. Cf. Pet. 12-13. Instead, the court simply proceeded to "clarify" that the aggravated-felony portion of its earlier decision was predicated on Clause (ii) rather than Clause (i) of 8 U.S.C. 1101(a)(43)(M), and then stated that it had concluded that petitioner's "other arguments" were "without merit." Pet. App. 31a. Moreover, the court's later order denying petitioner's subsequent motion for reconsideration demonstrates that it understood his contention that "his conviction for tax evasion, although

a ground for removal, is not a ground for inadmissibility." *Id.* at 34a.

Accordingly, the court of appeals' orders denying rehearing and reconsideration, while somewhat confusing, do not support petitioner's contention (Pet. 11) that the court effectively "ma[d]e conviction of an aggravated felony into a ground of inadmissibility." Rather, in its original decision denying the petition for review, the court specifically sustained the Board's determination that petitioner is inadmissible, and therefore removable, because he had been convicted of a crime involving moral turpitude, Pet. App. 24a-25a, which petitioner acknowledges (Pet. 3) is a proper ground of inadmissibility. See 8 U.S.C. 1182(a)(2)(A)(i)(I). That ruling was not revised by either of the court's subsequent orders.

b. Petitioner also appears to contend (Pet. 13-15) that, in denying his motion for reconsideration, the court of appeals failed to understand that it would not be "futile" for petitioner to continue to challenge the conclusion that he is inadmissible. In petitioner's view (Pet. 14), if he were successful in showing that his tax-evasion offense did not make him inadmissible, he could file an application to adjust his status, notwithstanding his aggravated-felony conviction. The court of appeals, however, did not deny that possibility or state that petitioner had no possible route for relief.

Petitioner's motion for reconsideration had asked the court of appeals to remand to the Board for further consideration of *Kawashima*'s effect on the crime-involving-moral-turpitude analysis; the motion had also explained that "this legally valid challenge to [petitioner's] present removal order affords him time to proceed with his appeal" in a parallel coram nobis proceeding about whether his underlying criminal conviction should

be vacated on the basis of ineffective assistance of counsel. C.A. Doc. 220, at 5 (filed May 10, 2012). The court of appeals' order denying that motion simply observed that "[e]ven if" tax evasion were "not a ground of inadmissibility" (as petitioner contended) and this removal proceeding might therefore terminate in petitioner's favor (after the remand to the Board that petitioner requested), petitioner had acknowledged that he could still be subjected to a new removal proceeding on the ground that his offense was an aggravated felony. Pet. App. 34a. The court also noted that petitioner's hope of getting his conviction vacated in the coram nobis proceeding was "speculative" and did not warrant granting reconsideration simply to give him "time to proceed with" that proceeding. *Ibid.* Neither of those observations was inconsistent with petitioner's current explanation about how he might avoid removal (assuming the crime-involving-moral-turpitude conclusion that made him inadmissible were ultimately reversed). Such statements do not warrant review by this Court.

2. Petitioner also contends (Pet. i, 11-13) that the court of appeals' decision with respect to whether he was convicted of a crime involving moral turpitude conflicts with this Court's statement in *Kawashima* that "the elements of tax evasion pursuant to [26 U.S.C.] 7201 do not *necessarily* involve fraud or deceit." 132 S. Ct. at 1175.

a. Petitioner does not suggest that there is any disagreement in the courts of appeals about the effect of *Kawashima* in this regard.[1] Instead, he asks (Pet. 12) this Court only to remand to allow the court of appeals

[1] It appears that neither the Board nor any court of appeals has addressed whether *Kawashima* affects tax evasion's status as a crime involving moral turpitude.

to consider in the first instance "the impact of *Kawashima* on whether 26 U.S.C. § 7201 defines a [crime involving moral turpitude]." But petitioner already presented that question to the court of appeals in conjunction with his rehearing petition and his subsequent motion for reconsideration. That court expressly acknowledged and quoted the relevant passages from *Kawashima*. Pet. App. 31a. Although the court then clarified the portion of its opinion discussing why petitioner's offense was an aggravated felony, it evidently saw no need to revise or revisit its determination that the offense was also a crime involving moral turpitude. See *id.* at 30a-32a; see pp. 10-11, *supra*. As a result, this is not a case in which a remand would be "potentially appropriate" because "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Greene* v. *Fisher*, 132 S. Ct. 38, 45 (2011) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

b. In any event, *Kawashima* did not alter the morally turpitudinous nature of tax-evasion offenses like petitioner's.

In petitioner's view, *Kawashima* "appears to overrule" (Pet. 11) a previous Second Circuit decision, cited in the decision below (see Pet. App. 25a), which held that a conviction for willful evasion of taxes was a crime involving moral turpitude because "[t]here can be no 'wilful' evasion without a specific intent to defraud." *Costello* v. *INS*, 311 F.2d 343, 348 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 120 (1964). But, as another decision cited by the court of appeals explained, "[e]ven if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if

such intent is implicit in the nature of the crime." *Carty* v. *Ashcroft*, 395 F.3d 1081, 1084 (9th Cir.) (internal quotation marks and citation omitted), cert. denied, 546 U.S. 818 (2005); see also *In re Flores*, 17 I. & N. Dec. 225, 228 (B.I.A. 1980) ("We have held that where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude."). Accordingly, *Kawashima*'s observation that "the *elements* of tax evasion * * * do not *necessarily* involve fraud or deceit" (132 S. Ct. at 1175 (first emphasis added)) does not prevent the crime from involving moral turpitude. *Kawashima* acknowledged, for example, that, even with respect to the one form of tax evasion that it may be "possible" to commit without making a misrepresentation, the offense "will almost invariably involve some affirmative acts of fraud or deceit." *Ibid.* This Court has previously explained that, in order for a statute to "create[] a crime outside the generic definition of a listed crime" in the INA, there must be "a realistic probability, not a theoretical possibility," that the statute would be applied in the assertedly nonconforming fashion. *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Like the alien in *Duenas-Alvarez*, petitioner cannot "point to his own case or other cases in which the * * * courts in fact did apply the statute in the special * * * manner for which he argues." *Ibid.* Nor does the Court's language in *Kawashima* reflect such an application. See 132 S. Ct. at 1179 (Ginsburg, J., dissenting) (noting the government's "conce[ssion] that, to its knowledge, there have been no actual instances of indictments for tax evasion unaccompanied by any act of fraud or deceit").

Moreover, the Second Circuit has previously found that the Board was reasonable—and therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984)—when it concluded that the category of crimes involving moral turpitude sweeps beyond those that involve fraud *per se* and also includes those that "impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means." *Rodriguez* v. *Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006) (quoting *Flores*, 17 I. & N. Dec. at 229). The tax-evasion offense at issue here plainly satisfies that definition on a categorical basis, regardless of whether it involved a specific intent to defraud.

Even if it were necessary to show that petitioner's offense involved fraud, the Board has held that, for purposes of applying a modified categorical approach in the immigration context, criminal statutes defining offenses are divisible, "regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." *In re Lanferman*, 25 I. & N. Dec. 721, 727 (2012).[2] Petitioner's tax-evasion offense readily satisfies that modified categorical approach, because petitioner's offense, as charged, involved fraud. As *Kawashima* explained, the reason that a Section 7201 offense might not "*necessarily* involve fraud or deceit" is that the provision "includes two offenses"—willfully attempting to evade tax *assessment* and willfully attempting to evade tax *pay-*

[2] The Second Circuit has rejected such an approach to divisibility "at least for purposes of" finding a prior conviction for purpose of a mandatory minimum sentence under 18 U.S.C. 2252A(b)(1). *United States* v. *Beardsley*, 691 F.3d 252, 274 (2012).

ment—the latter of which might involve the filing of a "truthful tax return" without "making any misrepresentation." 132 S. Ct. at 1175. Here, petitioner was charged with the former type of the offense. The information specifically stated that petitioner prepared and signed "false and fraudulent United States Individual Income Tax Returns" for four years in which "he failed to report" more than $105,000 of "income he received as kickbacks." Gov't C.A. Br. 6-7. Accordingly, even under the modified categorical approach that this Court has applied in the criminal context in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), which permits consideration of documents such as the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," *id.* at 16, petitioner's offense of conviction involved fraud.[3]

Especially when no court of appeals has addressed whether *Kawashima* overturned long-established precedents treating tax evasion as a crime involving moral turpitude, further review of the question is unwarranted.

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[3] Because the nature of petitioner's offense can be established on the face of the kinds of documents that this Court referred to in *Taylor* and *Shepard*, this case would not require resolution of questions about whether the Board may depart from that sort of categorical analysis when determining whether an offense is a crime involving moral turpitude. See generally *Da Silva Neto* v. *Holder*, 680 F.3d 25, 29-30 & nn.6-7 (1st Cir. 2012) (describing divergent approaches in the courts of appeals); see also *In re Silva-Trevino*, 24 I. & N. Dec. 687, 689-690 (A.G. 2008) (concluding that, in determining whether a crime involves moral turpitude, there may be circumstances in which it is appropriate to examine "evidence beyond the formal record of conviction").

3. Finally, petitioner contends (Pet. 16) that the Court should consider "whether *Fleuti* survives IIRIRA"—in other words, whether an LPR who, after IIRIRA, committed an offense that makes him inadmissible should be deemed to be seeking "admission" under 8 U.S.C. 1101(a)(13)(C)(v), notwithstanding this Court's holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963), that the end of an "innocent, casual, and brief" trip abroad was not an "entry" into the United States. Review of that question is unwarranted. There is no disagreement in the courts of appeals; there is no merit to petitioner's contention that *Fleuti* survived the enactment of IIRIRA in these circumstances; and this case would be a poor vehicle for addressing the question.

a. As petitioner notes (Pet. 4, 16), this Court's recent decision in *Vartelas* "assume[d]" without "decid[ing] that IIRIRA's amendments to § 1101(a)(13)(A) abrogated *Fleuti*." 132 S. Ct. at 1484-1485 n.2.[4] Petitioner does not suggest there is any disagreement in the courts of appeals on the question. Nor is there any. See, *e.g.*, *De Vega* v. *Gonzales*, 503 F.3d 45, 48 (1st Cir. 2007); *Camins* v. *Gonzales*, 500 F.3d 872, 880 (9th Cir. 2007); *Malagon de Fuentes* v. *Gonzales*, 462 F.3d 498, 500-506 (5th Cir. 2006); *Tineo* v. *Ashcroft*, 350 F.3d 382, 389-399 (3d Cir. 2003).

b. As explained at length by those courts of appeals—and by the Board, sitting en banc, see *In re Collado-Munoz*, 21 I. & N. Dec. 1061 (1998)—there is no

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[4] In *Vartelas*, this Court held that the relevant prong of IIRIRA's definition of admission (8 U.S.C. 1101(a)(13)(C)(v)) is not triggered by crimes and convictions that occurred before IIRIRA. See 132 S. Ct. at 1483-1484. That holding is inapplicable here because petitioner's conviction occurred several years after IIRIRA became effective and the underlying offense included post-IIRIRA tax evasion.

merit to suggestions (like petitioner's) that an LPR who satisfies the definition of "admission" contained in 8 U.S.C. 1101(a)(13)(A)(v) should nevertheless be exempt from admissibility analysis under the *Fleuti* doctrine's reference to brief, casual, and innocent trips abroad. In IIRIRA, Congress repealed the definition of "entry" that had been the basis for *Fleuti*, and replaced it with a definition of "admission" that included certain aspects of *Fleuti* but plainly contemplated that LPRs with criminal convictions that would make them inadmissible would be "regarded as seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. 1101(a)(13)(C)(v); see *Vartelas*, 132 S. Ct. at 1484-1485 (describing statutory amendments).

Petitioner contends (Pet. 16) that the Second Circuit's contrary decision in *Vartelas* was inappropriately "[b]ased solely upon *Chevron* deference." As other courts of appeals have concluded, however, the plain meaning of the statute supports the Board's reading, independent of any deference to the Board's decision in *Collado-Munoz*. See, *e.g.*, *De Vega*, 503 F.3d at 48; *Malagon de Fuentes*, 462 F.3d at 501-502; *Tineo*, 350 F.3d at at 395-396. Moreover, petitioner's arguments against giving deference to the Board in this context are unpersuasive. Petitioner contends that the Board cannot decide "the continued validity of a Supreme Court decision" (Pet. 16), but it was Congress, not the Board, that changed the underlying statutory language. Petitioner also contends (*ibid.*) that "*Fleuti* rested upon constitutional underpinnings" about the ties to the Nation that aliens develop when they become LPRs.[5] But

[5] To the extent that *Fleuti* itself invoked the Constitution, the Court simply noted that its construction of the statute avoided the need to decide whether the ground of exclusion for being "afflicted

neither *Fleuti* nor the other cases petitioner cites—*Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Landon* v. *Plasencia*, 459 U.S. 21 (1982)—held, as a constitutional matter, that Congress may not subject returning LPRs to inspection for admissibility, regardless of whether their absence was brief, casual, and innocent. To the contrary, there is no question of Congress's constitutional authority to classify such an alien as one seeking admission, as long as he is provided due process in his removal proceeding. See *Plasencia*, 459 U.S. at 31-32.

c. Even assuming that the continued viability of the *Fleuti* doctrine warranted this Court's review, this case would be a poor vehicle for considering that issue, both because the question was not addressed by any of the decisions below and because petitioner has made no attempt to demonstrate that his absence from the United States would have satisfied *Fleuti*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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with psychopathic personality" was vague and ambiguous as applied to the respondent's homosexuality. 374 U.S. at 451, 463. No such constitutional concern is implicated here.