

No. \_\_\_\_\_

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IN THE

**Supreme Court of the United States**

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AKIO AND FUSAKO KAWASHIMA,

*Petitioners,*

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that Petitioners' convictions of 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) were aggravated felonies involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and Petitioners were therefore removable.

2. Whether the Ninth Circuit's 2010 amendment of its 2007 final judgment concerning Petitioner Fusako Kawashima violated Federal Rule of Appellate Procedure 41, where the Government did not seek rehearing or other review of that final judgment in 2007.



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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Akio Kawashima and his wife, Fusako Kawashima, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The final opinion of the Ninth Circuit denying Petitioners' motion for rehearing and rehearing *en banc* appears in the appendix (Pet. App. A, 1a-31a)\* to this petition and is reported at 615 F.3d 1043. Also appearing in the appendix are the initial decision of the Ninth Circuit (Pet. App. D, 83a-100a), reported at 503 F.3d 997; the Court's decision following rehearing (Pet. App. C, 53a-82a), reported at 530 F.3d 1111; and the decision withdrawing the Court's prior opinion (Pet. App. B, 32a-52a), reported at 593 F.3d 979.

The decision of the United States Immigration Judge denying Petitioners' motion to terminate (Pet. App. E, 101a-106a), the Immigration Judge's order of removal (Pet. App. F, 107a), and the denial of Petitioners' appeal to the Board of Immigration Appeals (Pet. App. G, 108a) are also included in the appendix to this petition.

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\* Petitioners' Appendix is referred to and cited herein as "Pet App. \_\_, a."

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 27, 2010. Pet. App. B, 32a-52a. The Ninth Circuit denied Mr. and Mrs. Kawashima's petition for rehearing and for rehearing *en banc* on August 4, 2010. Pet. App. A, 1a-31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in the appendix to this petition. Pet. App. H, 109a-114a. Those provisions state in relevant part:

### 8 U.S.C. § 1101(a)(43)(M)

[an aggravated felony is] 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 §7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000.

**26 U.S.C. § 7206**

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.

## **Federal Rule of Appellate Procedure 41**

Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

## STATEMENT OF THE CASE

Akio Kawashima and Fusako Kawashima (the “Kawashimas”) are natives and citizens of Japan.<sup>1</sup> The Kawashimas were admitted to the United States as lawful permanent residents on June 21, 1984. The Kawashimas established a successful Japanese Restaurant in California, Cho Cho San, owned by Nihon Seibutsu Kagaku Center, Inc. (“NSC”). Mr. Kawashima owned a portion of the shares of NSC. In 1992, Mr. Kawashima signed a U.S. Corporate Tax return on behalf of NSC for the tax year ending October 31, 1991, under the penalty of perjury.

In 1997, Mr. Kawashima was charged with subscribing to a false statement on a corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of § 7206(2).<sup>2</sup> On August 11, 1997, Mr. Kawashima pled guilty to one count in violation of § 7206(1). Also, on August 11, 1997, Mrs. Kawashima pled guilty to one count in violation of § 7206(2).

In his plea agreement negotiated by his counsel, Mr. Kawashima stipulated that he “knew that the return was materially false in that it failed

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<sup>1</sup> Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

<sup>2</sup> All references to code sections are to Title 26 unless otherwise noted.

to report all of the taxable income that NSC earned during the taxable year ended October 31, 1991.” Pet. App. I, 119a. In her plea agreement, Mrs. Kawashima stipulated that she “acted willfully in assisting her husband to underreport income” on the corporate tax return. Pet. App. J, 130a.

Mr. Kawashima stipulated that the total actual tax loss was \$245,126.<sup>3</sup> The plea agreement for sentencing purposes further stipulated that Mr. Kawashima could be ordered to pay that amount in restitution. However, in their plea agreements, there was no admission of fraud or deceit by either Mr. Kawashima or Mrs. Kawashima.

On August 3, 2000, the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security) issued separate notices to appear, alleging that Mr. and Mrs. Kawashima were removable (deportable)<sup>4</sup> because their convictions under §§ 7206(1) and (2)

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<sup>3</sup> The “actual tax loss” for sentencing purposes as stated in the plea agreement was the gross amount of income omitted and not reported on the tax return. “Actual tax loss” for sentencing purposes does not include any allowable deductions to arrive at a net income figure against which the applicable tax rate is applied, which then would constitute the “actual” revenue loss to the Government. *United States v. Valentino*, 19 F.3d 463, 466 (9th Cir. 1994) (unclaimed allowable depreciation deduction not considered for a 7206(1) conviction); *United States v. Chavin*, 316 F.3d 666, 677 (7th Cir. 2002) (unclaimed allowable deductions not considered).

<sup>4</sup> Aliens convicted of an aggravated felony after admission are deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i).<sup>5</sup>

Section 1101(a)(43)(M) defines “aggravated felony” as:

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 notices did not allege that the Kawashimas’ convictions constituted aggravated felonies for tax evasion under 8 U.S.C. § 1101(a)(43)(M)(ii).<sup>6</sup>

After a removal hearing, the Immigration Judge (“IJ”) concluded that Mr. and Mrs. Kawashima’s convictions of these tax offenses were “aggravated felonies” under (M)(i) and ordered them removed to Japan. The Kawashimas appealed the decision. The Board of Immigration Appeals (“BIA”) at first remanded because of procedural defects. After further proceedings, the IJ denied the Kawashimas’ motion to terminate the proceeding and ordered them removed. Pet. App. E, 106a. The

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<sup>5</sup> Hereinafter, “(M)(i).”

<sup>6</sup> Hereinafter, “(M)(ii).”

BIA affirmed, adopting the IJ's decision. Pet. App. G, 108a.

The Kawashimas timely filed separate petitions for review in the United States Court of Appeals for the Ninth Circuit. The Kawashimas sought review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen, which were consolidated under 8 U.S.C. § 1252(b)(6). In a decision filed September 18, 2007, the Ninth Circuit denied Mr. Kawashima's petition, holding that the Kawashimas' convictions under §§ 7206 (1) and (2) "necessarily 'involve fraud or deceit'" because the provisions require the Government to prove that the Kawashimas acted "willfully." *Kawashima v. Gonzales*, 503 F.3d 997, 1000 (9th Cir. 2007) ("*Kawashima I*"). Pet. App. D, 92a. The Ninth Circuit held that the language of (M)(i) was clear. *Id.* at 89a. The Court also held that the Government was a qualifying "victim," that the tax loss in excess of \$10,000 satisfied the monetary "loss" requirement of (M)(i), and concluded that "because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end." *Id.* at 87a. Notwithstanding, the Court acknowledged that the United States Court of Appeals for the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004). *Id.* at 88a.<sup>7</sup>

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<sup>7</sup> The Ninth Circuit agreed with the dissent of Judge (now Justice) Alito in *Ki Se Lee* which concluded that "the plain text of (M)(i) did not preclude the inclusion of tax offenses within its definition of aggravated felonies." Pet. App. D, 88a (citing *Ki Se Lee*, 368 F.3d at 226).

As to Mrs. Kawashima, the Court granted the petition because under the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), the Court was unable to conclude that Mrs. Kawashima's conviction resulted in a loss to the Government in excess of \$10,000. *Id.* at 94a-95a.

The Kawashimas then petitioned the Ninth Circuit for rehearing, which was granted. The Court, in a *per curiam* decision, withdrew its 2007 decision and held that, using the modified categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), (M)(i) required that the crime of conviction establish a loss in excess of \$10,000, which the Kawashimas' convictions did not so establish. *Kawashima v. Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) ("*Kawashima II*"). Pet. App. C, 66a. Accordingly, the Kawashimas were not to be deported.

The Government then filed a petition for rehearing with respect to *only* Mr. Kawashima. The Government did not seek rehearing of the court's decision granting Mrs. Kawashima's petition. While the Government's petition for rehearing was pending, this Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted sub nom. Nijhawan v. Mukasey*, 129 S. Ct. 988 (2009). The Government then requested the Ninth Court to stay any consideration of its petition for rehearing until this Court decided *Nijhawan*. After the Court issued its decision in *Nijhawan v. Holder*, 129 S Ct. 2294 (2009), the Ninth Circuit

ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the pending Kawashima case.

After receiving supplemental briefs, the Ninth Circuit withdrew its prior decision in *Kawashima II* and held that the tax convictions of Mr. and Mrs. Kawashima were aggravated felonies, subject in Mrs. Kawashima's case to an evidence review indicating that the loss to the Government was in excess of \$10,000. *Kawashima v. Holder*, 593 F.3d 979, 981, 985-87, 989 (9th Cir. 2010) ("*Kawashima III*"). Pet. App. B, 33a, 43a-46a, 52a. The Court held that "according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds \$10,000 constitute aggravated felonies under subsection (M)(i)." *Id.* at 39a (citing *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008), cert. denied sub nom. *Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009)). This Court in *Nijhawan* held that the crime of conviction under 8 U.S.C. § 1101(a)(43) does not require the factfinder deciding guilt to find a loss of \$10,000 as an element of the crime. *Nijhawan*, 129 S Ct. at 2298. It is rather a "particular circumstance" which can be determined by the evidence in the case. *Id.*

Accordingly, Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's removal order was denied. Pet. App. B, 52a. The Court also remanded Mrs. Kawashima's case to the BIA, even though the Government never sought rehearing of the Court's 2007 decision in *Kawashima II* in which the Ninth Circuit granted Mrs. Kawashima's petition and found her non-removable. *Id.* In its

decision, the Ninth Circuit stated that “although it is true that the Government did not ask us to reconsider our resolution of Mrs. Kawashima’s case, we are entitled to do so as we have not yet issued our mandate in this case. As such, our decision remains subject to modification, either at the request of a party or *sua sponte*.” *Id.* at 45a n.8. With respect to Mrs. Kawashima, the Ninth Circuit remanded her case to the BIA “so that it may determine in light of the Supreme Court’s holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the Government as a result of Mrs. Kawashima’s crime.” *Id.* at 49a.

The Kawashimas timely filed a petition for rehearing and rehearing *en banc* which was denied on August 4, 2010. The Court ordered that its opinion in *Kawashima III* be withdrawn and the Court filed a new opinion contemporaneously with the filing of the Order denying rehearing. *Kawashima v. Holder*, 615 F.3d 1043, 1046 (9th Cir. 2010) (“*Kawashima IV*”). Pet. App. A, 2a.

The Ninth Circuit, for the most part, reiterated its holding in *Kawashima I* and *Kawashima III*, that the crimes of which the Kawashimas were convicted were aggravated felonies under (M)(i). The Court also held that while judgment was entered in favor of Mrs. Kawashima in 2007, which the Government did not seek to review in its petition for rehearing, the Court could *sua sponte* “amend the judgment” in 2010 because it had not issued its mandate. Pet. App. A, 23a n.7. The Court reversed its decision in *Kawashima II* that Mrs. Kawashima should not be deported and

remanded the case to the BIA to determine whether the evidence in the record was sufficient to establish the total loss to the Government as a result of Mrs. Kawashima's crime. *Id.* at 27a.

Three judges of the Ninth Circuit dissented from the denial of the rehearing *en banc*. *Id.* at 3a-12a.

## REASONS FOR GRANTING THE PETITION

The Kawashimas face deportation due to the Ninth Circuit's erroneous interpretation of 8 U.S.C. § 1101(a)(43)(M)(i) which is in direct conflict with a decision of the Third Circuit. As a result, if Mr. and Mrs. Kawashima were residents of Pennsylvania, New Jersey or Delaware, the plea agreements to which they stipulated would have concluded the proceeding with finality and resulted in no further punishment, having paid their debt for any wrongdoing. Instead, they face in addition the irreversible sanction of exile because of an ambiguous statute which has divided Circuit Judges of the United States Courts of Appeals.

The crimes to which the Kawashimas pled guilty did not have fraud or deceit as an element of the crime of conviction and, therefore, cannot fall within the ambit of M(i). In any event, the application of the time-honored rules of statutory construction point to a conclusion that tax evasion is the only tax crime which Congress designated as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M). At worst, this is a classic case for the application of the rule of lenity in the face of this ambiguous statute in favor of the alien.

Accordingly, this Court needs to bring uniformity to this important national immigration issue. In this case, the Ninth Circuit has rendered a decision on an issue of national importance in direct conflict with the decision of the Third Circuit in *Ki Se Lee*, 368 F.3d 218 (3d Cir. 2004). Sup. Ct. R. 10(a). Further, the Ninth Circuit in this case, and

the Third and Fifth Circuits in separate decisions, have decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). For these reasons and the reasons set forth herein, this petition for certiorari should be granted.

## I.

**In Conflict with the Third Circuit,  
the Ninth Circuit Erred in Holding  
that the Kawashimas' Convictions  
under 26 U.S.C. §§ 7206(1) and (2)  
were Aggravated Felonies  
Pursuant to 8 U.S.C. §  
1101(a)(43)(M)(i).**

The issue in this case is whether tax crimes of which the Kawashimas were convicted under 26 U.S.C. §§ 7206(1) and (2) are “aggravated felonies” under 8 U.S.C. § 1101(a)(43)(M)(i). The Ninth Circuit acknowledged a Circuit split on this issue, noting “[w]e recognize that a divided panel of the Third Circuit reached a contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004).” *Kawashima IV*, Pet. App. A, 39a.

Every Circuit that has ruled on this issue has divided on the issue. *See, e.g., Ki Se Lee*, 368 F.3d 218, 225 (3d Cir. 2004) (Alito, J., dissenting); *Arguelles-Olivares*, 526 F.3d at 180 (Dennis, J., dissenting); *Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003). Furthermore, the division of views on this issue is magnified by the strong dissenting

opinion of Judge Graber (joined by Judges Wardlaw and Paez) in the case at bar, dissenting from the denial of the Kawashimas' request for a rehearing *en banc*. See *Kawashima IV*, Pet. App. A, 3a-12a. The ambiguities concerning this important federal statute are further illustrated by the fact that the Ninth Circuit has issued no less than four opinions in this case (*Kawashima I* through *IV*).

**A. 8 U.S.C. § 1101(a)(43)(M)(i) is Unclear and Ambiguous.**

Although the Ninth Circuit holds to the view that (M)(i) is “clear and unambiguous,” the difference of opinion among the Circuits certainly demonstrates otherwise. Last term, the Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), held that the consequences of deportation are so catastrophic that a defendant is denied effective assistance of counsel under the Sixth Amendment if his criminal attorney does not advise him of the consequence of pleading guilty to an offense where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant’s] conviction.” 130 S. Ct. at 1483 (citation omitted). The Court recognized:

There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain . . . . When the law is not succinct and straightforward (as it is in many of the scenarios stated by Justice Alito), a criminal defense attorney need do no

more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.

*Id.*

In his concurrence, joined by the Chief Justice, Justice Alito stated, “[m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving *moral turpitude or aggravated felonies*.” *Id.* at 1488 (Alito, J., concurring) (quotation omitted) (emphasis in original). Justice Alito further stated that, “determining whether a particular crime is an ‘aggravated felony’ or a ‘crime involving moral turpitude [(CIMT)]’ is not an easy task.” *Id.* (citation omitted). The Court in *Padilla*, as well as the Concurring Justices, agreed that deportation is a “particularly severe penalty” requiring advice of counsel and that with the advice of counsel, a defendant can plead guilty to a non-removable, lesser included offense. *Id.* at 1481 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

There is nothing in the record, one way or the other, as to whether the Kawashimas plea-bargained to a tax offense that they believed was not a removable offense. The Kawashimas’ plea agreements did not contain any admission that fraud or deceit was involved, which are not necessary elements for conviction under § 7206(1), or § 7206(2). Indeed, in line with the observations of Justice Alito

in *Padilla*, counsel to the Kawashimas in the criminal proceeding may very well have negotiated guilty pleas to §§ 7206(1) and (2) so that the Kawashimas would not be subject to deportation for tax evasion. As Justice Alito correctly pointed out, whether a particular crime falls “under a broad category of crimes” like (M)(i) “is not an easy task.” *Padilla*, 130 S. Ct. at 1488. Petitioners submit that (M)(i) is not “clear and explicit” and that the Ninth Circuit was wrong to hold that (M)(i) was clear and unambiguous.

The decision of the Ninth Circuit is an important, disputed question of law that this Court should address and bring uniformity to the law. It is also vitally important to the Kawashimas, who have been in the United States since 1984 and who are now on the brink of being deported because they pled guilty to tax crimes which, it is submitted, are not aggravated felonies under (M)(i), a statute which is not “succinct, clear and explicit.”

The dissent of Judge Graber to the denial of Petitioners’ petition for rehearing *en banc* in this case articulates, in very strong and cogent terms, why 8 U.S.C. § 1101(a)(43)(M) is not clear and unambiguous on the issue of whether convictions under §§ 7206(1) and (2) were intended by Congress to be within (M)(i). Pet. App. A, 3a-12a.

**B. The Ninth Circuit Failed to Apply Long-Established Canons of Statutory Construction to Determine the Intent of Congress.**

This Court has held, as a cardinal rule of statutory construction, that a statute should be considered as a whole and that significance and effect be accorded to every word. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). As Professor Singer has written in his text:

It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all provisions so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to preserve all the words of the statute.

J.D. Shambie Singer, *Statutes and Statutory Construction* § 46.6 (7th ed. 2007) (quotations and citations omitted); *see also Corley v. United States*, 129 S. Ct. 1558, 1561, n.5 (2009) (it is a “cardinal rule that a statute is to be read as a whole”) (*quoting King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)); *FDA v. Brown & Williamson Tobacco Corp.*,

529 U.S. 120, 132 (2000) (“[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

Ignoring these bedrock principles of statutory construction in reaching its decision in *Kawashima IV*, the Ninth Circuit focused solely on (M)(i), as if (M)(ii), a parallel provision, did not exist. Section (M)(i) deals with general “losses” from fraud and deceit claims; (M)(ii) applies to specific losses, namely “revenue losses to the Government.” Pet. App. A, 6a. As Judge Graber pointed out in her dissent, “[t]he panel forcefully defends its conclusion that the meaning of subsection (i) is ‘plain’ for the simple reason that each and every other indication of congressional intent points to the opposite conclusion: Congress intended subsection (ii), and not subsection (i), to cover tax crimes.” *Id.* As Judge Graber also observed, to ignore a parallel provision as if it does not exist is simply contrary to basic principles of statutory construction. *Id.* at 6a-8a.

If a conviction of tax evasion “necessarily” involved fraud or deceit under § 7201 and was intended to be included in (M)(i), (M)(ii) would be rendered superfluous. Judge (now Justice) Alito advanced in *Ki Se Lee* that Congress may have added (M)(ii) specifically to cover tax evasion in violation of § 7201, because that tax crime may not be covered in (M)(i). *Ki Se Lee*, 368 F.3d at 227 (Alito, J., dissenting). Judge Alito noted that neither fraud nor deceit was an essential element of tax evasion and that “leading cases interpreting the language [of the tax evasion statute] do not hold that fraud or deceit is an element of the offense.” *Id.*

Similarly, the Government, in opposition to the petition for writ of certiorari in *Arguelles-Olivares*, also took the position that 26 U.S.C. § 7201 does not include fraud or deceit as an element of the offense. (Govt. Br. Opp'n at 9.)<sup>8</sup>

Thus, it is completely illogical to say that convictions under § 7201 involving an attempt to evade (*de facto* fraud) may not be covered in (M)(i), but §§ 7206(1) and (2) convictions are covered in (M)(i) which do not have fraud or deceit as an element of the crime.

The Ninth Circuit recognized that its construction of (M)(i) rendered (M)(ii) superfluous, but speculated, without any legislative or statutory basis at all, that it was *conceivable* that Congress intended a superfluous provision, in disregard of long established canons of statutory construction, to determine the intent of Congress. *Kawashima IV*, Pet. App. A, 19a-20a.

The Ninth Circuit's speculation is unavailing, for the reasons set forth by Judge Paez in his *Abreu-Reyes* dissent:

[A]s the statute reflects, Congress drew a distinction between tax offenses and other crimes involving fraud and deceit. Congress then targeted only the more

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<sup>8</sup> The petitioner in *Arguelles-Olivares* sought review by this Court primarily on the issue which was subsequently resolved by this Court in *Nijhawan*, 129 S Ct. 2294 (2009).

egregious act of tax evasion, and only when the loss to the government exceeds \$ 10,000, as sufficiently serious to warrant removal. . . . If Congress intended for tax crimes other than tax evasion to constitute aggravated felonies when the loss to the government exceeds \$ 10,000, it could have easily defined an aggravated felony in 8 U.S.C. § 1101(a)(43)(M)(ii) as any “tax offense in which the revenue loss to the Government exceeds \$ 10,000” or identified each relevant section of Title 26.

292 F.3d 1029, 1037-38 (citations omitted) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966. Giving effect to both (M)(i) and (M)(ii), as the Third Circuit held in *Ki Se Lee* and as Judge Graber advocated in this case, supports the conclusion that (M)(ii) deals with the only tax crime that is an “aggravated felony,” namely tax evasion.

As a matter of construction, (M)(i) addresses “loss” to a victim or victims, while (M)(ii) addresses “revenue loss” to the Government. The express language is indicative of two separate categories of crimes. Subsection (M)(i) addresses crimes based upon fraud and deceit in which victims suffer a loss in excess of \$10,000. Subsection (M)(ii) does not describe the Government as a “victim.” Congress carefully chose to describe the crime of tax evasion as one involving a revenue loss to the Government. Although some cases have inappropriately described

the Government as a “victim” in tax cases, (M)(ii) does not.

A corollary to the canon that a statute should not be construed to make any provision superfluous is the rule that general words followed by specific words limit the breadth of the general words. Illustrative of this principle is this Court’s decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981). In that case, this Court upheld the IRS denial of a § 501(c)(3) exemption application on the basis of § 501(e), stating that: “... it is a basic principle of statutory construction that a specific statute ... controls over a general provision ... particularly when the two are interrelated and closely positioned ... .” *Id.* at 6. In this case, (M)(ii) limits (M)(i) or, stated another way, (M)(ii) pulls tax offenses involving “revenue losses” like § 7201 from “general losses” to victims. “The doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can be given effect, all parts of a statute can be construed together and no words will be superfluous.” See Singer, *supra*, § 47.17 (citations omitted). Section (M)(i) deals with losses resulting from criminal/tort-like actions based upon fraud or deceit and not revenue losses to the Government, which is addressed by M(ii). The different description of “loss” in these parallel provisions, as well as the rule of statutory construction that the “specific governs the general,” point to the conclusion that tax crimes

involving a revenue loss to the Government are not within (M)(i), but are covered in (M)(ii).<sup>9</sup>

The Ninth Circuit's reasoning, and therefore holding, in *Kawashima IV* has not changed since *Kawashima III*. Given the stakes for the Kawashimas, their fate in the Ninth Circuit has rested on a construction of a statute in violation of long-established canons of statutory construction. Furthermore, as Judge Graber stated: "The panel's interpretation is inconsistent with other canons of construction, including the standard caveat that the specific governs over the general and the rule that an ambiguous statute should be construed in the alien's favor." *Kawashima IV*, Pet. App. A, 5a. The Ninth Circuit disregards, without explanation or basis, the principles of this Court that unclear statutes affecting deportation should not be construed against an alien.

It should also be noted the Ninth Circuit in *Kawashima IV* chose not to reiterate the dubious principle of law invoked in *Kawashima III*, as applicable to these aliens on the brink of deportation. "That because [the Ninth Circuit's]

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<sup>9</sup> In *Nijhawan*, this Court had occasion to look at (M)(i) and (M)(ii) in the context of examples of a circumstance specific approach. 129 S. Ct. at 2301-02. The Court referred to (M)(ii) as "the internal revenue provision." *Id.* at 2301. Regarding (M)(i), this Court said "[w]e recognize, as petitioner argues, that Congress might have intended subparagraph (M)(i) to apply almost exclusively to those who violate certain state fraud and deceit statutes. So we have examined state law." *Id.* at 2302. This Court listed the kind of tort-like crimes based upon fraud and deceit which would be captured by (M)(i).

interpretation does not lead to an absurd or unreasonable result, our inquiry must end.” *Kawashima III*, Pet. App. B, 39a. This principle is contrary to this Court’s emphatic jurisprudence that courts must apply the long-established canons of statutory construction to arrive at the intention of Congress. A court’s construction of a statute which is not “absurd” or not “unreasonable” is not sufficient.

**C. The Crimes to Which the Kawashimas Pled Guilty did not Involve Fraud or Deceit.**

The Ninth Circuit found that because Mr. Kawashima acted “willfully” with specific intent to violate the law, his conviction under § 7206(1) “necessarily involved fraud or deceit.” See *Kawashima I*, Pet. App. D, 87a, 92a.; *Kawashima IV*, Pet. App. A, 22a (citing *Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting)). Such a holding is contrary to the seminal tax case of *United States v. Bishop*, 412 U.S. 346 (1973). In *Bishop*, this Court held that “willfully” is an element of *all* tax crimes in 26 U.S.C. §§ 7201-7207. *Bishop*, 412 U.S. at 361. However, this Court has never said, in *Bishop* or in another case, that “willfully” equates with fraud and/or deceit.

Guided in part by this Court’s decision in *Bishop*, the Tax Court in *Wright v. Commissioner*, 84 T.C. 636 (1985), and then the Ninth Circuit in *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982), reversed their own previous decisions and held that fraud is not a necessary element of §

7206(1), a holding in which the Commissioner of Internal Revenue has acquiesced. Commissioner's Acquiescence, 1988-2 C.B. 1, 1988 IRB Lexis 3924. The Ninth Circuit stated in *Considine*:

The Supreme Court acknowledged in *Bishop* that sections 7201 and 7206 (1) each require "willful" perpetration of a different act. 412 U.S. at 360 n.8, 93 S. Ct. at 2017 n.8. The express language of section 7201 requires an intent to avoid tax (a legitimate synonym for fraud). Section 7206 (1) (false return), however, does not require any fraudulent intent. Because section 7206 (1) does not require a willful attempt to evade tax, a conviction under Section 7206 (1) without more, does not establish "fraudulent intent."

683 F.2d at 1287 (citations omitted). The Tax Court in *Wright* found that a conviction under § 7206(1) does not collaterally estop the taxpayer from disputing fraud, which is a required element of 26 U.S.C. § 6653 (b)(1):

[T]he intent to evade taxes is not an element of the crime charged under section 7206 (1). Thus, the crime is complete with the knowing, material falsification, and a conviction under section 7206 (1) does not establish as a matter of law that the taxpayer violated the legal duty with an intent, or in an attempt, to evade taxes.

84 T.C. at 643 (citations omitted); *see also* Laurence Goldfein and Farley P. Katz, *Expanded Application of 7206(1) Includes the Failure to Report Gross Receipts*, 52 J. Tax'n 94 (1980) (discussing the pre-*Considine* analysis of § 7206).

In reaching its decision in *Kawashima IV*, the Ninth Circuit cited its prior decision in *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990), where the court said: “The Supreme Court has repeatedly held that in order to make out a ‘willful violation’ of section 7206(2) the government must prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws.” Pet. App. A, 24a. In *Salerno*, the Ninth Circuit cited numerous Supreme Court cases for this proposition, none of which held that “willfulness” is “fraud.” 902 F.2d at 1432. In fact, this Court has never expressly held that fraud or deceit was an element of a tax crime.

Most courts and commentators, including the U.S. Tax Court, regard a violation of § 7201, “tax evasion,” as a case of “*de facto*” fraud, that “fraud” is found in the “intention to evade.” *See, e.g., Chen v. Commissioner*, T.C.M. 2006-160, 2006 Tax Ct. Memo LEXIS 163, at \*8 (August 8, 2006). In contrast, Section 7206(1) is the traditional vehicle used by the Government when it does not have sufficient evidence to establish “tax evasion” under § 7201, characterized by this Court as “the capstone of a system of sanctions” calculated to induce compliance with the income tax law. *Spies v. United States*, 317 U.S. 492, 497 (1943); *accord Boulware v. United*

*States*, 552 U.S. 421, 424 (2008). “Willfulness” in attempting to evade or defeat any tax has been viewed as tax fraud. However, a violation of § 7206(1) is not. Simply stated, a conviction under either §§ 7206(1) or (2) does not “necessarily” implicate fraud or deceit.

In *Wright*, the Tax Court recognized that § 7201 contained a fraud element in that the taxpayer attempted to evade taxes. 84 T.C. at 642 (citation omitted). Section 7206 serves a different purpose as the Tax Court stated:

In a criminal action under section 7206(1), the issue actually litigated and necessarily determined is whether the taxpayer voluntarily and intentionally violated his or her known legal duty not to make a false statement as to any material matter on a return. The purpose of section 7206(1) is to facilitate the carrying out of [the IRS’s] proper functions by punishing those who intentionally falsify their Federal income tax returns and the penalty for such perjury is imposed irrespective of the tax consequences of the falsification.

*Id.* at 643 (citations omitted).

Looking at the language §§ 7206(1) and (2), it can be seen that these subsections are essentially perjury statutes in the context of tax enforcement. Revenue loss to the Government or to any one else is

immaterial. *See United States v. Di Varco*, 484 F.2d 670, 672-73 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (where the correct income was reported but the source of the income was falsely reported).

In fact, the Government, as did the Third Circuit in *Bobb v. Attorney General*, took the same position that Petitioners argue in this case, that an intent to defraud or deceive must be an element of a crime covered by (M)(i). 458 F.3d 213, 219 (3d Cir. 2006). In the same vein, the Third Circuit in *Nugent v. Ashcroft*, “determined that Nugent’s theft by deception fell within the purview of subsection (M)(i) *because* it required the Commonwealth to prove fraud and deceit.” 367 F.3d 162, 178 (3d Cir. 2004) (emphasis added); *see also Valansi v. Ashcroft*, 278 F.3d 203, 217 (3d Cir. 2002).

Mr. Kawashima pled guilty to “willfully” making a false statement on a corporate tax return, and Mrs. Kawashima pled guilty to “willfully” assisting her husband. There was no finding or admission of fraud or deceit by the Kawashimas in their plea agreements. For the Government’s part, the Government was not required to establish fraud, or obtain a stipulation of fraud, for convictions under either §§ 7206(1) and (2), and the Government did not do so in this case. The plea agreement, negotiated with the Government for both Kawashimas, did not admit fraud or deceit, and such an admission or stipulation was not a prerequisite to a conviction under §§ 7206(1) or (2).

As neither fraud nor deceit are essential elements of a conviction under §§ 7206(1) and (2),

and as neither of the Kawashimas admitted an intent to defraud, the Kawashimas' convictions do not come within (M)(i), even if tax crimes were included in (M)(i)'s scope. However, a conviction of an attempt to evade taxes has been recognized as fraud. Accordingly, as discussed *supra*, if a tax crime based upon fraud or deceit was intended by Congress to be included in (M)(i), there was no need to include a § 7201 conviction in (M)(ii) as an aggravated felony. Rather, Congress made tax evasion, the “capstone” of tax crimes, the only tax crime which is an aggravated felony deserving of deportation.

**D. The Ninth Circuit Violated the Rule of Lenity in Construing the Ambiguous Statutory Provision of 8 U.S.C. § 1101(a)(43)(M)(i) Against the Kawashimas.**

The Ninth Circuit's conclusion that (M)(i) is clear and unambiguous is incorrect. The fact that there was a direct conflict between *Ki Se Lee* and the Ninth Circuit evidences uncertainty of application. It is well-settled that lingering ambiguities in deportation statutes should be construed in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Given the split between the Third and Ninth Circuits, as well the divided panels in the Third, Fifth and Ninth Circuits which have heard this issue, Subsection (M)(i) is clearly ambiguous, as an empirical matter, and the rule of lenity must apply.

In *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), this Court rejected an administrative interpretation of a deportation provision and unanimously resolved the ambiguity in the alien’s favor, holding:

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

*Id.* at 10 (citation omitted) (emphasis added); see also *St. Cyr*, 533 U.S. at 320 (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at 449 (recognizes the “special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien”). The rule of lenity is to be applied “when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute.” *United States v. Shabani*, 513 U.S. 10, 17 (1994).

Deportation for conviction of an aggravated felony constitutes a sentence of life-time banishment. See *Cardoza-Fonseca*, 480 U.S. at 449

("[d]eportation is always a harsh measure"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (deportation is a "drastic measure" where the "stakes are considerable for the individual"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living").

In the recent decision of *United States v. Hayes*, 129 S. Ct. 1079 (2009), this Court considered whether a prior conviction for battery violated the federal Gun Control Act of 1968's prohibition on possession of a firearm by convicted felons to include persons convicted of "a misdemeanor crime of domestic violence" pursuant to 18 U.S.C. § 922(g)(9). *Hayes*, 129 S. Ct. at 1082. The issue was whether Hayes's prior conviction qualified as a predicate offense under U.S.C. § 922(g)(9) because West Virginia's generic battery law did not designate a domestic relationship between aggressor and victim as an element of the offense. *Hayes*, 129 S. Ct. at 1083. The Court, after reviewing express language and legislative history of the statute, held that a domestic relationship need not be a defining element of the predicate offense. *Id.* at 1088. Writing in dissent, Chief Justice Roberts (joined by Justice Scalia) observed that "[t]his is a textbook case for application of the rule of lenity." *Id.* at 1093 (Roberts, C.J., dissenting). The Chief Justice reasoned that the rule of lenity should apply where there was no fair warning to the offender because there was nothing wrong with the conduct in question (firearm possession) if the prior misdemeanor (battery) was not covered by the statute:

If the rule of lenity means anything, it

is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority.

*Id.*

In the present case, the Kawashimas should not be subject to deportation for failing to conduct an exhaustive survey of interpretations of (M)(i) prior to pleading guilty to §§ 7206(1) and (2) offenses. Indeed, such a search would not have provided them with any clarity on the issue. The Kawashimas present “a textbook case for application of the rule of lenity.”

In addition, the ambiguity of the statute, 8 U.S.C. § 1101(a)43(M), and the existing conflict among three circuits, raise fundamental issues of due process and fair notice. With exile and deportation at issue, due process and fair notice require that a statute clearly set forth prohibited conduct. No criminal or civil enforcement action may be brought under a vague statute or a statute’s “new” interpretation. *See, for example, Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1331 (D.C. Cir. 1995).

As a matter of fair notice and due process, the Court should apply the rule of lenity. The penalties would be severe and irreversible for the Kawashimas if the rule of lenity were not applied in their cases. Where doubt exists, as in this case, as to the scope of (M)(i) in light of (M)(ii), the Court should apply the

“rule of lenity” and construe the statute in favor of the immigrant. *Fong Haw Tan*, 333 U.S. at 10.

## II.

### **The Ninth Circuit Erred in Amending Mrs. Kawashima’s Judgment in 2010, Where the Government did not Seek Rehearing or Other Review of That Judgment in 2007.**

Federal Rule of Appellate Procedure 41(a) states that “unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.” The mandate is ministerial and issues when 7 days has passed after the judgment was entered, if no petition for rehearing or motion for a stay is made. Rule 41(b) further provides that a Court’s mandate *must* issue 7 days after the time to file a petition for rehearing expires. Pet. App. H, 144a. The 1994 amendments to Appellate Rule 41 replaced the word “shall” with “must” and the 1998 amendments recasting the rule retained the imperative “must.”

After *Kawashima II*, a judgment in favor of Mrs. Kawashima and a copy of the Court’s opinion was issued within days of the opinion. The Government petitioned for rehearing of the decision as related to Mr. Kawashima, *but not as related to Mrs. Kawashima*. According to Rule 41, when the Ninth Circuit entered a judgment in 2007 granting Mrs. Kawashima’s petition, a mandate should have

automatically issued when 7 days passed and neither a timely petition for rehearing nor a motion to stay the mandate had been filed by the Government. However, the Ninth Circuit has now held that its failure, or the failure of the clerk, to issue a mandate in Mrs. Kawashima's case in 2007 permitted the Court *sua sponte* to amend the judgment in 2010 because, the Ninth Circuit says, the "mandate" had not issued. Pet. App. A, 23a n.7. The Ninth Circuit held that it has jurisdiction to modify the judgment where the Court has not issued its mandate. *Id.* It is the view of the Ninth Circuit, therefore, that if a court does not issue its mandate for 2 years, as in the case at bar, the court can modify the judgment at any time in complete disregard of Rule 41.

The Ninth Circuit's failure, or its clerk's failure, to issue the mandate in accordance with Rule 41, when the government declined to seek review or rehearing, brought finality to the litigation between the parties. The Ninth Circuit's *sua sponte* interference with this result is without support in the Rule or in the rulings of this Court.

As claimed support for its action, the Ninth Circuit relied upon *Finberg v. Sullivan*, 658 F.2d 93, 96 n.5 (3d Cir. 1980) (*en banc*), which in turn cited and relied upon *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977). Pet. App. A, 23a n.7. Apart from the fact that these decisions were rendered before the 1994 and 1998 amendments to Rule 41, in each of these cases, the mandate was stayed after a motion for a stay was made, so the parties could appeal or seek review. Thus, the judgments in *Finberg* and

*Alphin* were not final pending a decision by this Court and were subject to modification due to a change in the law in the interim. *See also First Gibraltar Bank FSB v. Morales*, 42 F.3d 895, 897-98 (5th Cir. 1995) (mandate stayed preventing the case from becoming final.)

The Government's decision not to file a petition for rehearing in Mrs. Kawashima's case rendered the disposition of her case a finality for *res judicata* and *collateral estoppel* purposes. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 (2009); *see also Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (Kennedy, J., plurality); *id.* at 1843 (Breyer, J., dissenting). As the text writers Wright, Miller & Cooper have stated: "many cases establish the rule that once the time for appeal has run, a final judgment of a trial court or an intermediate appellate court is *res judicata* without regard to the fact that appeal might have been taken to a higher court." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4433 (2d ed. 2002). In an analogous decision of the Court, *United States v. Munsingwear*, 340 U.S. 36 (1950), the United States declined to appeal a judgment and the Court held that the judgment was subject to the doctrine of *res judicata*:

In this case, the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. ... The case is therefore one where the United States,

having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it providing terminal points for litigation.

*Munsingwear*, 340 U.S. at 40; see also *New Haven Inclusion Cases*, 399 U.S. 392, 480-81 (1970).

When the Ninth Circuit issued its opinion in *Kawashima II*, the Government had the option to petition for rehearing in Mrs. Kawashima's case, file a notice of appeal, or move to stay the mandate. The Government did none of these things and the mandate should have issued automatically according to Rule 41.

Rule 41 could not be clearer. The holding of the Court in *Munsingwear* could not be clearer. The Ninth Circuit's opinion is contrary to a holding of this Court and Federal Rule of Appellate Procedure 41, binding on the United States Courts of Appeal, as well as litigants. The Court should review the Ninth Circuit's decision on this issue.

## CONCLUSION

The Ninth Circuit decision in this case directly conflicts with the decision of the Third Circuit, which this Court should resolve in the interest of uniformity. The Ninth Circuit, in the face of an ambiguous statute, ignored and dismissed application of this Court's time honored canons of statutory construction and instead chose to speculate

as to the intent of Congress. What is worse, the Ninth Circuit ignored the rule of lenity and bypassed Federal Rule of Appellate Procedure 41(a) to reach a result that imperils the Kawashimas.

The petition for a writ of certiorari should be granted so that the Court can resolve the split between the Ninth and Third Circuits on a legal issue of significant importance requiring national uniformity.

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