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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
BRYAN S. BEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS 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 questions presented are as follows:

1. Whether a conviction for a felony tax offense under 26 U.S.C. 7206(1) or (2) can constitute an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i).

2. Whether the court of appeals lacked authority to remand petitioner Fusako Kawashima's case for further agency consideration of whether she has been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) in light of *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Abreu-Reyes v. *INS*, 292 F.3d 1029 (9th Cir. 2002) 15

Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) . . . 11

Arguelles-Olivares v. *Holder*, 130 S. Ct. 736 (2009) 10, 14

Arguelles-Olivares v. *Mukasey*, 526 F.3d 171 (5th Cir. 2008), cert. denied, 130 S. Ct. 736 (2009) 14, 15, 16

Balogun v. *United States Att'y Gen.*, 425 F.3d 1356 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006) . . . 12

Considine v. *United States*, 683 F.2d 1285 (9th Cir. 1982) 15

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 11

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 14

INS v. *St. Cyr*, 533 U.S. 289 (2001) 12

Ki Se Lee v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004) 6, 11, 13, 15

Navarro-Lopez v. *Gonzales*, 503 F.3d 1063 (9th Cir. 2007) 7

Negusie v. *Holder*, 129 S. Ct. 1159 (2009) 14

Nijhawan v. *Holder*, 129 S. Ct. 2294 (2009) 2, 3, 7, 8, 12, 13

Cases—Continued: Page

Nijhawan v. *Mukasey*, 129 S. Ct. 988 (2009) 7
Spies v. *United States*, 317 U.S. 492 (1943) 10
United States v. *Bishop*, 412 U.S. 346 (1973) 15
United States v. *Gordon*, 242 F.2d 122 (3d Cir.), cert. denied, 354 U.S. 921 (1957) 10
United States v. *Hayes*, 129 S. Ct. 1079 (2009) 13
United States v. *Johnson*, 319 U.S. 503 (1943) 10, 11
United States v. *Mal*, 942 F.2d 682 (9th Cir. 1991) 10
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 11
Wright v. *Commissioner*, 84 T.C. 636 (1985) 15

Statutes and rules:

8 U.S.C. 1101(a)(43) 9
8 U.S.C. 1101(a)(43)(M) 2
8 U.S.C. 1101(a)(43)(M)(i) . . . . *passim*
8 U.S.C. 1101(a)(43)(M)(ii) . . . . *passim*
8 U.S.C. 1182(c) (1994) 5
8 U.S.C. 1227(a)(2)(A)(iii) 2
8 U.S.C. 1229a(c)(3)(A) 3
26 U.S.C. 7201 . . . . 8, 9, 10, 11
26 U.S.C. 7206(1) . . . . *passim*
26 U.S.C. 7206(2) . . . . *passim*
Fed. R. App. P.:
Rule 41(a) 16
Rule 41(d)(1) 17

Miscellaneous:

Black's Law Dictionary (9th ed. 2009) 15

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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), each of which was withdrawn, are reported at 593 F.3d 979, 530 F.3d 1111, and 503 F.3d 997. The decisions of the immigration judge (A.R. 47-48, Pet. App. 101a-106a, 107a) and the Board of Immigration Appeals (Pet. App. 108a, A.R. 165, and Supp. A.R. 2-3) are unreported.[1]

[1] The court of appeals considered petitions for review of the agency decisions ordering petitioners' removal and refusing to reopen their proceedings. "A.R." refers to the administrative record filed in 9th Cir. No. 04-74313 (pertaining to orders affirming removal). "Supp. A.R." refers to the administrative record filed in 9th Cir. No. 05-74408 (pertaining to denials of reopening).

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010, and a petition for rehearing en banc was denied on the same day (Pet. App. 2a). The petition for a writ of certiorari was filed on November 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who has been admitted to the United States and is subsequently convicted of an aggravated felony is subject to removal from the United States upon the order of the Attorney General. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the term "aggravated felony" is defined as including

> 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).

Two years ago, this Court held that, unlike the reference to "fraud or deceit" in Subparagraph (M)(i), the $10,000-loss threshold in that subparagraph "does not refer to an element of the fraud or deceit crime," and should be evaluated on the basis of a "circumstance-specific" approach rather than a "categorical" or "modified categorical" approach. *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298, 2300-2303 (2009). In *Nijhawan*, the petitioner had been convicted of conspiring to commit fraud, but the jury in his criminal trial did not make any find-

ings about the amount of loss to the victims of the fraud. *Id.* at 2298. The Court nevertheless concluded that Nijhawan had been convicted of an aggravated felony under Subparagraph (M)(i) and that the immigration judge (IJ) properly relied on sentencing-related material from the 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. 129 S. Ct. at 2303.

2. Petitioners here, 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. 101a. They operated restaurants incorporated in California, and were part owners of those corporate entities. *Id.* at 118a-119a, 128a-129a. In August 1997, petitioners were convicted upon guilty pleas of violating the Internal Revenue Code: Akio Kawashima was convicted 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), and his wife, Fusako Kawashima, was convicted of assisting him in preparing a false corporate tax return, in violation of 26 U.S.C. 7206(2), for the same tax year. Pet. App. 2a, 90a, 95a. Petitioners' plea agreements, executed in July 1997, each included an acknowledgment that the tax return was false as to a material matter; that the petitioner did not believe the return to be true and correct as to a material matter; and that the petitioner acted willfully. *Id.* at 117a, 123a-124a, 127a, 133a-134a.[2] Each plea agree-

[2] The petition appendix reprints petitioner Fusako Kawashima's plea agreement, Pet. App. 125a-134a, even though the court of appeals correctly stated that, unlike her husband's plea agreement, it was not part of the record before the court of appeals or the Board of Immigration Appeals, *id.* at 22a, 24a, 94a.

ment also included a stipulation that the "total actual tax loss" associated with their offenses was $245,126. *Id.* at 120a, 131a.

In August 2000, the Immigration and Naturalization Service (the predecessor to the Department of Homeland Security (DHS)) charged each petitioner with having been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i) and (ii), and with being deportable based on those convictions. Pet. App. 102a. Appearing through counsel, petitioners admitted that they had been convicted of violating Section 7206(1) or (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 deportability, and moved to terminate the proceedings. Pet. App. 102a-103a; A.R. 161, 189. In an oral decision issued on February 14, 2001, the IJ sustained the charges of deportability and ordered petitioners removed to Japan. Pet. App. 103a.

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

On August 16, 2004, the Board affirmed the orders of removal without separate opinion. Pet. App. 108a; A.R. 165.

4. On August 27, 2004, petitioners filed a single petition for judicial review, which was docketed as the first document in Ninth Circuit No. 04-74313. In the caption, the petition for review listed both Akio Kawashima and

Fusako Kawashima as "Petitioners" and included the agency file number from both of their cases. 9th Cir. No. 04-74313 Doc. 1. The text of the petition read as follows: "Mr. & Mrs. Kawashima hereby petition the court for review of the appended Order of the Board of Immigration Appeals, entered on August 16, 2004, which dismissed his [*sic*] appeal on Immigration Judge's June 24, 2003, decision denying their application for Cancellation of Removal." *Ibid.* Attached to the petition were the Board's two orders affirming the order of removal pertaining to each petitioner. *Ibid.*

That petition for review was later consolidated with a separate petition for review that petitioners filed, docketed as Ninth Circuit No. 05-74408, which challenged the Board's intervening denial of petitioners' motion to reopen proceedings to permit them to apply for discretionary relief from removal (Supp. A.R. 2-3).[3]

As relevant to the petition for a writ of certiorari, the court of appeals ultimately denied the petition for review of the order of removal with respect to Akio Kawashima, but, with respect to Fusako Kawashima, the court granted the petition and remanded for further proceedings in light of this Court's decision in *Nijhawan*. Pet. App. 23a, 27a, 31a.

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

---

[3] Petitioners filed a motion to reopen with the Board in April 2005. In that motion, petitioners asserted that they had pleaded guilty in April 1996 and requested a grant of discretionary relief from removal under 8 U.S.C. 1182(c) (1994) (repealed 1996). The Board issued a written decision denying that motion in June 2005. Supp. A.R. 2-3. In this Court, petitioners have not renewed their challenge to the Board's disposition of the motion to reopen.

under 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 15a-20a. The court held that both of petitioners' convictions were for "offense[s] that 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 opinion did not change between the court's successive opinions. See *id.* at 38a-42a, 86a-90a. Those successive 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 Akio Kawashima's case by the stipulation in his plea agreement regarding "the total actual tax loss" resulting from his crime. Pet. App. 93a. The court observed that Fusako 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. It refused to remand for further consideration or submission of documents pertaining to her, observing that, under circuit precedent, "the government should not have a second bite at the apple." *Id.* at 96a.

On July 1, 2008, the court of appeals granted petitioners' petition for rehearing. 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. Pet. App. 60a-66a. The court explained that it had reconsidered its decision in view of a Ninth Circuit en banc decision concerning a different ground of removability within the Immigration and Nationality Act (INA) that was issued the day after the initial decision in this case. *Id.* at 54a (citing *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc)). In light of that decision, the court ruled that the $10,000-loss threshold could not be proved by considering matters beyond the elements of the offense of conviction, and reasoned that, because loss to a victim or victims was 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. 61a-66a.[4] 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 satisfied by the elements of that offense. See Pet. App. 13a. In its decision on the merits in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), this Court expressly rejected the view that the court of appeals had taken in its July 1, 2008, opinion

---

[4] Judge O'Scannlain, joined by Judge Callahan, filed a specially concurring opinion. Pet. App. 68a-82a. In Judge O'Scannlain's view, the court's superseding opinion "faithfully applie[d]" circuit precedent, *id.* at 68a, but it compelled an "illogical result * * * in this particular case," *id.* at 72a. Judge O'Scannlain suggested that the Ninth Circuit's "reformulation of the modified categorical approach" was not a "reasonabl[e] interpret[ation]" of the INA and should be reconsidered. *Id.* at 81a-82a.

in this case. See *id.* at 2298 (citing *Kawashima II* 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 Akio 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 was 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 Fusako 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 this Court's intervening decision in *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. In a footnote, the court addressed petitioners' contention (in a supplemental brief) that Fusako Kawashima's case was no longer before the court be-

cause neither party had sought rehearing with respect to her as opposed to Akio Kawashima after the court's initial decision in September 2007. *Id.* at 45a n.8. The court rejected that argument, stating that, because its mandate had not issued, its judgment "remain[ed] subject to modification, either at the request of a party or *sua sponte*," and her case was still pending before the court and subject to decision in light of *Nijhawan*. *Ibid.*

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) defines the universe of tax offenses that might constitute aggravated felonies under 8 U.S.C. 1101(a)(43). Pet. App. 6a-10a.

ARGUMENT

1. Petitioners renew their contention (Pet. 13-15, 19-24, 29-33) that felony tax offenses other than violations of the tax-evasion statute, 26 U.S.C. 7201, cannot qualify as "aggravated felon[ies]" under 8 U.S.C. 1101(a)(43)(M)(i), even if they involve fraud or deceit in which the loss to the victim exceeded $10,000. While that issue has precipitated a narrow disagreement among three circuits, the decision below is correct and the narrow circuit split does not warrant review at this time. Last Term, the Court denied certiorari on this

question in *Arguelles-Olivares* v. *Holder*, 130 S. Ct. 736 (2009) (No. 08-1494), and the same result is warranted here.

a. Petitioners contend that the reference to tax evasion in Subparagraph (M)(ii) prevents any other federal felony tax offense from being an aggravated felony under Subparagraph (M)(i). In the course of that argument, petitioners rely on three canons of statutory construction, but none of them supports the conclusion they draw in this case.

First, petitioners contend (Pet. 18-22) that the canon against superfluities should be applied to limit the universe of tax felonies that may constitute aggravated felonies to those offenses covered by Subparagraph (M)(ii), because Subparagraph (M)(ii) would otherwise be rendered superfluous. But that argument relies on the incorrect assumption that the tax-evasion offenses covered by Subparagraph (M)(ii) are entirely subsumed within the fraud or deceit offenses covered by Subparagraph (M)(i). The offense of tax evasion can entail, but does not necessarily require, proof of fraud or deceit; it requires only that a person "willfully attempt[] *in any manner* to evade or defeat" a tax. 26 U.S.C. 7201 (emphasis added); see also *United States* v. *Johnson*, 319 U.S. 503, 515 (1943) ("The false return filed on March 15th was only one aspect of what was a process of tax evasion."); *United States* v. *Mal*, 942 F.2d 682, 688 (9th Cir. 1991) (noting that an offense under Section 7201 can be accomplished "in any manner") (quoting *Spies* v. *United States*, 317 U.S. 492, 499 (1943)); *United States* v. *Gordon*, 242 F.2d 122, 125 (3d Cir.) ("to conclude that the willful filing of a false report or return is the only way 'to evade or defeat any tax' is to give too narrow a construction to a statute which was intended to be more

comprehensive") (citing *Johnson*, 319 U.S. at 515)), cert. denied, 354 U.S. 921 (1957). As a result, even if many tax offenses—including many tax-evasion offenses—involve fraud or deceit and thus also fall within the language of Subparagraph (M)(i), Congress still had reason to add Subparagraph (M)(ii) to capture any instances of tax evasion that do not fall within Subparagraph (M)(i) because 26 U.S.C. 7201 does not include fraud or deceit as an element. See *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting). When a provision is not superfluous, the canon against superfluities does not apply. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (canon does not apply where construction of statutes "would not render one or the other wholly superfluous"); *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (canon lends "sparse support" to challenge when challenged construction "does not necessarily render" provision superfluous). Thus, the court of appeals correctly rejected this argument, concluding that "there are many reasons why Congress might have included [Subparagraph] (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of [Subparagraph] (M)(i)." Pet. App. 19a.

Second, petitioners invoke (Pet. 22-23) the canon that the "specific governs the general," arguing that the reference in Subparagraph (M)(ii) to a "revenue loss to the Government" is specific and prevents offenses involving such losses from falling within the reference in Subparagraph (M)(i) to a "loss to the victim." But this Court has explained that it understands this canon of statutory construction "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v.

Howe, 516 U.S. 489, 511 (1996) (citation omitted). As in *Varity Corp.*, there is no reason to suppose that Congress intended its inclusion of a specific additional category of offenses in the definition of aggravated felony to serve as a *limitation* on other categories that apply by their terms—especially when the definition of aggravated felony "has always been defined expansively." *INS* v. *St. Cyr*, 533 U.S. 289, 295 n.4 (2001). Here, the specific reference to "tax evasion" in Subparagraph (M)(ii) would govern more general references, but only with regard to the category of offenses to which it speaks (tax evasion).

In addition, to the extent that petitioners assume (Pet. 21-22) that any offense involving "loss to the Government" (as opposed to some other "victim") must fall within Subparagraph (M)(ii) if it is to be an aggravated felony, that assumption is refuted by this Court's decision in *Nijhawan*. There, the Court reasoned from the proposition that several fraud offenses involving losses to the government would fall within the scope of Subparagraph (M)(i). See 129 S. Ct. at 2301 (citing, *inter alia*, offenses involving conspiracy to defraud the United States, theft in federally funded programs, fraud in connection with a health-care-benefit program, and contract fraud against the United States); see also *Balogun* v. *United States Att'y Gen.*, 425 F.3d 1356, 1360-1361 (11th Cir. 2005) (holding that conviction for embezzling and conspiring to embezzle more than $10,000 from the United States government was an aggravated felony under Subparagraph (M)(i)), cert. denied, 547 U.S. 1113 (2006). Accordingly, Subparagraph (M)(i) may indeed encompass offenses resulting in losses to the government.

Third, petitioners contend (Pet. 23, 29-33) that any ambiguity in the statute should be construed in their favor, as aliens who stand to be removed from the United States. Yet, because the other canons of statutory construction they invoke do not have the effects they claim, there is no such ambiguity. To the contrary, "the clear language" of Subparagraph (M)(i), *Ki Se Lee*, 368 F.3d at 227 (Alito, J., dissenting), includes petitioners' convictions to the extent that their offenses "involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." 8 U.S.C. 1101(a)(43)(M)(i); see also Pet. App. 17a.[5]

Moreover, although petitioners suggest (Pet. 29) that a disagreement in the circuits (or among judges within individual circuits) establishes that Subparagraph (M)(i) "is clearly ambiguous[] as an empirical matter," that proposition would have required a different result in *Nijhawan*, which resolved a circuit split by affirming the judgment and sustaining the alien's removal, see 129 S. Ct. at 2298. And this Court does not even apply such a rule in the context of criminal cases. See, *e.g.*, *United States* v. *Hayes*, 129 S. Ct. 1079, 1083 n.3, 1088-1089 (2009) (finding the rule of lenity inapplicable because statute, while "not a model of the careful drafter's art," was not ambiguous, even though the circuits had divided on the underlying question). In any event, even if there were any ambiguity, the Attorney General has authority under the INA to resolve statutory ambiguities in the

[5] Petitioners mistakenly assert (Pet. 23) that the court of appeals "disregard[ed], without explanation * * * , the principle[] * * * that unclear statutes affecting deportation should not be construed against an alien." The court of appeals squarely addressed the point, stating that the canon "is inapplicable where, as in this case, the statutory language is clear." Pet. App. 19a n.6.

first instance. See, *e.g.*, *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (finding statutory provision ambiguous, but remanding to the Board for it to address the question in the first instance, rather than deferring to 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). A rule requiring that ambiguity be resolved in the alien's favor would usurp the interpretive authority of the Attorney General that this Court has confirmed in *Aguirre-Aguirre* and *Negusie*.

Thus, the court of appeals correctly concluded that a felony tax offense other than tax evasion may be an aggravated felony under Subparagraph (M)(i).

b. Although petitioners correctly state that there is a division in the courts of appeals about whether tax offenses other than tax evasion may be aggravated felonies under Subparagraph (M)(i), only three circuits have spoken to the question. Compare Pet. App. 16a-20a (holding that they may be); *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 174 (5th Cir. 2008) (same), cert. denied, 130 S. Ct. 736 (2009), with *Ki Se Lee*, 368 F.3d at 222-225 (3d Cir.) (holding that they may not be). Last Term, this Court denied certiorari on the question in *Arguelles-Olivares*, 130 S. Ct. 736. Only one circuit (the Ninth Circuit, in this case) has addressed the question since this Court's decision in *Nijhawan*, which construed Subparagraph (M)(i). Thus, the narrow disagreement in the courts of appeals may be resolved without further intervention of this Court. Accordingly, review by this Court now would be premature.

2. Petitioners also contend (Pet. 16, 24-29) that their convictions for violating 26 U.S.C. 7206(1) and (2) do not

satisfy Subparagraph (M)(i) because those crimes do not include fraud or deceit as an element. With respect to that question, the decision below is correct and has occasioned no disagreement in the courts of appeals. Indeed, none of the opinions on which petitioners otherwise rely for their initial argument embraced this argument. Every one of those cases involved a conviction under Section 7206(1), but none of the opinions concluded that such an offense does not involve fraud or deceit; they reasoned instead that Subparagraph (M)(ii) addresses the only tax offenses that may be aggravated felonies. See Pet. App. 3a-12a (Graber, J., dissenting from denial of rehearing en banc); *Arguelles-Olivares*, 526 F.3d at 182-184 (Dennis, J., dissenting); *Ki Se Lee*, 368 F.3d at 222-225; *Abreu-Reyes* v. *INS*, 292 F.3d 1029, 1037-1038 (9th Cir. 2002) (Paez, J., dissenting).

The court of appeals correctly observed that the elements of 26 U.S.C. 7206(1) and (2) require the government to prove that the defendant signed or assisted in creating a "false" tax return "willfully" (*i.e.*, with specific intent to provide a false statement). Pet. App. 22a-24a. Petitioners do not dispute that. See Pet. 27. Their argument rests entirely on the premise that Section 7206(1) and (2) do not require proof of a specific intent to *defraud*. See Pet. 24-29 (discussing, principally, *United States* v. *Bishop*, 412 U.S. 346 (1973), *Considine* v. *United States*, 683 F.2d 1285 (9th Cir. 1982), and *Wright* v. *Commissioner*, 84 T.C. 636 (1985)). But, even assuming that is true, it could not change the fact that the willful falsity that is indisputably required by Section 7206(1) and (2) is the very definition of "deceit." See, *e.g.*, *Black's Law Dictionary* 465 (9th ed. 2009) (defining "deceit" as "1. The act of intentionally giving a false impression," and "2. A false statement of fact made

by a person knowingly or recklessly"). Accordingly, petitioners' offenses "unquestionably 'involve[d] fraud or deceit.'" *Arguelles-Olivares*, 526 F.3d at 173.

3. Finally, petitioners contend (Pet. 33-36) that the court of appeals lacked jurisdiction to alter its judgment with respect to Fusako Kawashima after this Court's decision in *Nijhawan* because, under Federal Rule of Appellate Procedure 41(a), the court of appeals should have released the mandate associated with its judgment about her seven days after its initial decision in September 2007. The decision below on this ground (Pet. App. 23a n.7) is case-specific and correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is thus unwarranted.

Petitioners' argument apparently proceeds on the assumption that Fusako Kawashima had a petition for review of her removal order that was separate from that of her husband, and that she consequently had a separate case pending in the court of appeals that could be disposed of through a separate judgment and order. See Pet. 33-34; see also Pet. 8 ("The Kawashimas timely filed separate petitions for review."); *ibid.* ("[T]he Ninth Circuit denied Mr. Kawashima's petition."); Pet. 9 ("The Government did not seek rehearing of the Court's decision granting Mrs. Kawashima's petition."). That premise is not supported by the record. Although the Board disposed of petitioners' appeal of the IJ's decision by separate orders pertaining to each petitioner, petitioners chose to file a single petition for review in the court of appeals, attaching both Board orders. See pp. 4-5, *supra* (describing the single petition for review filed on August 27, 2004, to initiate proceedings in the court of appeals). Petitioners never amended their petition or asked the court of appeals to sever their cases.

Because there was thus only one "case" before the court of appeals, Rule 41(d)(1) of the Federal Rules of Appellate Procedure dictated that, when Akio Kawashima filed "a petition * * * for rehearing en banc," that petition had the effect of "stay[ing] the mandate until disposition of the petition or motion." Fed. R. App. P. 41(d)(1). The same thing was true when the government later filed a timely petition for rehearing of the court's second decision issued in July 2008.

None of the authorities petitioners cite (Pet. 35-36) suggests otherwise, because they each stand for the simple proposition that a case becomes final when a party fails to appeal or when the appeal is concluded. None of those cases involved a situation in which a party failed to pursue further review against one adversary but not against another.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
BRYAN S. BEIER
Attorneys

APRIL 2011