No. 08-1494

In the Supreme Court of the United States

JOEL ARGUELLES-OLIVARES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

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

The questions presented are:

1. Whether a conviction for a felony tax offense other than tax evasion in violation of 26 U.S.C. 7201 qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), where the offense involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

2. Whether a conviction for filing a false tax return qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), where petitioner did not dispute a finding in the pre-sentence investigation report that petitioner owed $75,982 in additional taxes during the year in which the false tax return was filed.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 46-85) is reported at 526 F.3d 171. The revised opinion of the court of appeals (Pet. App. 1-45) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 86-93) and the immigration judge (Pet. App. 94-98) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2009. A petition for rehearing was denied on March 5, 2009 (Pet. App. 99-100). The petition for a writ of certiorari was filed on June 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who has been convicted of an aggravated felony is subject to removal from the United States. 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).

Earlier this year, this Court held that the $10,000-loss threshold in Subparagraph (M)(i) does "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 was an alien who had been convicted of a conspiracy to commit fraud, but the jury in his criminal trial did not make any findings about the amount of loss to the victims of the fraud. *Id.* at 2298. The Court nevertheless concluded that he 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 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. Petitioner is a native and citizen of Mexico who was admitted to the United States on April 6, 1977. Pet. App. 94.

In 2003, petitioner pleaded guilty to a felony count of willfully making and subscribing a false tax return for calendar year 1999, in violation of 26 U.S.C. 7206(1). Pet. App. 2, 90, 95. The Pre-Sentence Investigation Report (PSR) explained that petitioner's written plea agreement identified a total tax loss of $248,335 on the basis of petitioner's tax returns for 1996-2000, and more specifically a loss of $75,982 for the return pertaining to 1999. *Id.* at 17, 95-96. Petitioner did not object to the calculations of loss included in the PSR. *Id.* at 17, 90. The district court sentenced petitioner to a 21-month term of imprisonment, to be followed by one year of supervised release. *Id.* at 24-25.

3. In 2004, the Department of Homeland Security (DHS) instituted removal proceedings against petitioner, charging him with having been convicted of an aggravated felony on the basis of his conviction for filing a false tax return. Pet. App. 94-95. Petitioner contested removability for two reasons. First, he argued that a conviction for filing a false tax return cannot be an aggravated felony under Section 1101(a)(43)(M) because its second clause (Subparagraph (M)(ii)) refers to tax evasion and thus forecloses any other tax offense from falling within Subparagraph (M)(i). *Id.* at 96. Second, he argued that the government could not prove that the loss from his offense exceeded $10,000. *Id.* at 95.

a. The IJ sustained the charge of removability against petitioner. Pet. App. 94-98. The IJ ruled that petitioner had been convicted of an aggravated felony as defined in Section 1101(a)(43)(M)(i), because petitioner's conviction under 26 U.S.C. 7206(1) for filing a false tax

return "contain[ed] an element of fraud or deceit" and the loss to the victim (the government) exceeded $10,000. Pet. App. 97. The IJ acknowledged that petitioner's offense did not fall within Subparagraph (M)(ii), which applies only to tax-evasion convictions under 26 U.S.C. 7201, but rejected the proposition that no other felony tax offense could be an aggravated felony under Subparagraph (M)(i). Pet. App. 96-97. In doing so, the IJ disagreed with the majority opinion in *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004), which had concluded otherwise. See Pet. App. 96. Over petitioner's objection, the IJ considered the PSR, and concluded that the uncontested statement that petitioner owed an additional $75,982 in taxes in 1999 established by "clear and convincing evidence" that the loss associated with his tax offense exceeded $10,000. *Id.* at 95-96. The IJ ordered that petitioner be removed to Mexico. *Id.* at 98.

b. Petitioner appealed to the Board of Immigration Appeals (Board), which dismissed his appeal. Pet. App. 86-93.

The Board rejected petitioner's argument that filing a false tax return cannot be an aggravated felony under Subparagraph (M)(i). Pet. App. 87-88. The Board explained that, in this case arising under the Fifth Circuit's jurisdiction, it was not bound by the Third Circuit's decision to the contrary in *Ki Se Lee*, *supra*. Pet. App. 87. It then concluded that "Congress did not exempt tax-related crimes from the aggravated felony definition" in Subparagraph (M)(i), *id.* at 88, in part because it was "persuaded by" (*ibid.*) then-Judge Alito's dissent in *Ki Se Lee*, which reasoned that Congress could easily have added Subparagraph (M)(ii) in order to "be sure that no evasion case fell outside the definition" and to protect against the risk that "some courts would hold

that tax evasion falls outside the scope of [Subparagraph (M)(i)] because neither 'fraud' nor 'deceit' is a formal element of the offense." 368 F.3d at 227. The Board concluded that petitioner's offense—willfully making and subscribing a false tax return—satisfied the "plain meaning" of Subparagraph (M)(i) because it involved making a knowingly false statement. Pet. App. 88.

The Board then found no error in the IJ's decision to admit the PSR into evidence and to rely on it in finding that petitioner's false tax return resulted in a loss exceeding $10,000. Pet. App. 89-93. The Board specifically noted that petitioner had not disputed the information contained in the PSR, and had not disputed that the total loss amount in the PSR came from his written plea agreement. *Id.* at 90. The Board concluded that "the PSR contained material, probative evidence that the loss to the victim * * * was in excess of $10,000," and that using the PSR was "not fundamentally unfair" because petitioner had an "opportunity to object to its contents." *Id.* at 92-93.

4. Petitioner filed a petition for review in the United States Court of Appeals for the Fifth Circuit, which was denied. Pet. App. 1-45.

a. The court of appeals concluded that petitioner's conviction was for an aggravated felony under Subparagraph (M)(i) because his offense necessarily involved fraud or deceit and resulted in losses to the government of more than $10,000. Pet. App. 3-18. The court rejected petitioner's contention that Congress's inclusion of tax-evasion offenses in Subparagraph (M)(ii) excluded other tax offenses from the aggravated-felony definition. *Id.* at 3-9. Like the Board, it agreed with then-Judge Alito's dissent in *Ki Se Lee*, *supra*. Pet. App. 5-6. It explained that "Congress may well have seen [Subpara-

graph M(ii)] as a necessary addition" because "neither fraud nor deceit is a specific element of the crime of tax evasion under 26 U.S.C. § 7201." *Id.* at 6. The court found it "difficult to discern why Congress would want only" tax-evasion crimes "to constitute an aggravated felony, but not tax felonies involving fraud and deceit and the same amount of loss to the Government fisc," when both types of crimes are "serious" and "carry[] the same maximum fine." *Ibid.* Finally, the court noted that Sections 7201 and 7206 define "separate offense[s]" that do not always merge together. *Id.* at 8-9.

The court of appeals also rejected petitioner's contention that the IJ erred in relying on information in the PSR to determine the amount of loss associated with petitioner's offense. Pet. App. 9-20. The court held that its inquiry into the amount of loss was "not confined to the formal categorical approach of *Taylor v. United States*," 495 U.S. 575 (1990). Pet. App. 10-13. The court determined that there was "clear and convincing evidence that the PSR accurately reflected the amount of loss" in this case. *Id.* at 17-19. In reaching that determination, the court observed that petitioner did not object to the PSR before the district court; that, during the probation officer's interview, petitioner agreed with the chart reporting the tax losses by year; and that the district court adopted the PSR's factual findings. *Id.* at 17.

b. Judge Dennis dissented. Pet. App. 21-45. Although he did not think it was necessary to reach the question whether a conviction for filing a false tax return can be an aggravated felony under Subparagraph (M)(i), he found "persuasive[]" the Third Circuit's conclusion in *Ki Se Lee* that "Congress intended to single out tax evasion as the only tax crime meriting removability." *Id.* at 27; see *id.* at 27-32.

Judge Dennis also concluded that the IJ's reliance on the PSR to establish the amount of loss for petitioner's offense was inconsistent with circuit precedent he read as requiring the use of a "modified categorical approach" derived from this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005). Pet. App. 32-45. He concluded that the amount of loss under Subparagraph (M)(i) must be satisfied on the basis of "the record of conviction," but that the PSR was not "considered part of the record of conviction." *Id.* at 39, 42.

ARGUMENT

Petitioner claims (Pet. 36) to have identified "two clear circuit splits" on two different questions. The first question—whether a felony tax offense other than tax evasion can be an "aggravated felony" under 8 U.S.C. 1101(a)(43)(M)(i)—has precipitated a disagreement between the Third Circuit and the Fifth Circuit, but the decision below is correct and the narrow circuit split does not warrant review at this time. The second question—whether the amount of loss under Subparagraph (M)(i) must be established on the basis of a "categorical" approach, without reliance upon documents from the sentencing phase of the criminal trial—was answered by this Court's recent decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). Because this Court unanimously rejected petitioner's arguments, no purpose would be served by further review of his case.

1. Petitioner renews (Pet. 4-5, 39-40) his contention 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). The court of appeals was correct on the merits, and the current narrow conflict does not warrant review.

a. Petitioner identifies three reasons he believes that "[w]ell accepted rules of statutory construction weigh against the Fifth Circuit's determination that [Subparagraph (M)(i)] includes convictions under [26 U.S.C. 7206(1)]." Pet. 39. But none of those reasons is persuasive.

First, petitioner contends (Pet. 4, 39) that the "specific" reference in Subparagraph (M)(ii) to tax evasion governs the "general" reference in Subparagraph (M)(i) to offenses involving fraud or deceit. But this Court has explained that it understands petitioner's "canon ('the specific governs the general') 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). The statute contains no specific rule for "tax offenses" considered more broadly.

Second, petitioner contends (Pet. 5, 39-40) that the court of appeals' construction renders Subparagraph (M)(ii) "surplusage." 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 require, but does not necessarily require, proof of fraud or deceit; it can be accomplished "in any manner." *United States* v. *Mal*, 942 F.2d 682, 688 (9th Cir. 1991) (quoting *Spies* v. *United States*, 317 U.S. 492, 499 (1943)); 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. *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 general language of Subparagraph (M)(i), Congress still had reason to add Subparagraph (M)(ii) to capture tax-evasion offenses, 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). Moreover, the very fact that "Section 7206 is a separate offense that is 'separately punishable' from a violation of [Section] 7201" (Pet. App. 9) further demonstrates that the court of appeals' construction does not render any part of the statute superfluous.

Petitioner's third contention (Pet. 5, 40) is that any ambiguity in the statute should be construed in his favor. Yet, because the other canons of statutory construction he invokes do not have the effects he claims, 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 his conviction for

filing a false tax return, because his offense "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). Even if there were any ambiguity, the Attorney General has authority under the Immigration and Nationality Act to resolve statutory ambiguities in the first instance. See, *e.g.*, *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (finding statutory provision ambiguous, but remanding to the Board of Immigration Appeals 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 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 could be an aggravated felony under Subparagraph (M)(i).

b. In any event, only two circuits have decided whether Subparagraph (M)(ii) precludes a tax offense other than tax evasion from being an aggravated felony under Subparagraph (M)(i). See Pet. App. 27 (Dennis, J., dissenting) ("[T]his Circuit is alone on one side of a circuit split, with the Third Circuit on the other.").[1]

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[1] In *Kawashima* v. *Gonzales*, 503 F.3d 997 (2007), the Ninth Circuit initially held that "tax offenses not covered by [Subparagraph] (M)(ii)'s specific reference to [Section] 7201 qualify as aggravated felonies under [Subparagraph] (M)(i) where the loss exceeds $10,000." *Id.* at 1001. That opinion, however, was withdrawn and superseded by *Kawashima* v. *Mukasey*, 530 F.3d 1111 (9th Cir. 2008). As petitioner notes (Pet. 12, 33), the superseding opinion decided the case on a different basis: that

That disagreement may be resolved by either of those courts. But even if the disagreement persists, this Court should wait for further developments if other circuits are confronted with the issue. Accordingly, review by this Court now would be premature.

2. Petitioner's second question presented (Pet. 4-7, 16-18, 37-38, 40-43) was answered by this Court's recent decision in *Nijhawan*, *supra*. Indeed, the Court specifically cited the decision below as part of the disagreement among the courts of appeals that it was resolving. See 129 S. Ct. at 2298.

Nijhawan held that the amount of loss necessary to establish an aggravated felony under Subparagraph (M)(i) is not to be determined under a "categorical" approach. 129 S. Ct. at 2298-2302. The Court also found that, "[i]n the absence of any conflicting evidence," the government's burden of establishing the amount of loss by clear and convincing evidence in the removal proceeding had been satisfied in that case on the basis of "sentencing-related material." *Id.* at 2303.

Those holdings are sufficient to dispose of petitioner's claims. *Nijhawan* rejected the *Taylor*-based categorical approach supported by petitioner and the dissent below. See Pet. 40-43; Pet. App. 32-38. Moreover, although petitioner impugns the reliability of PSRs in general (Pet. 6, 16-18), he has never disputed the

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Section 7201 offenses are *categorically* excluded from Subparagraph (M)(i) because Section 7201 does not include, as an element of the offense, a loss exceeding $10,000. *Id.* at 1117-1118. That reasoning—which track's petitioners' second question presented rather than his first—was expressly rejected by this Court's decision in *Nijhawan*. See 129 S. Ct. at 2298 (citing *Kawashima*). At the Ninth Circuit's request, the parties in *Kawashima* submitted supplemental briefs on August 20, 2009, about *Nijhawan*'s effect on the case.

PSR's statement that his 1999 tax offense resulted in a loss to the government of $75,982. Pet. App. 17, 90-91. Because that loss was "tied to the specific count[] covered by the conviction," *Nijhawan*, 129 S. Ct. at 2303 (quotation marks omitted), and because petitioner "mentions" no "conflicting evidence," *ibid.*, the court of appeals did not err in concluding that the government had met its burden of proving that the amount exceeded $10,000.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] Even if petitioner were now to contest the $75,982 loss finding, such a factbound objection would not independently warrant further review.