No. 10-577

In The Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF ON THE MERITS

Petitioners respectfully submit this Reply Brief in response to the Brief of Respondent, Eric H. Holder, Jr., Attorney General.

SUMMARY OF ARGUMENT

The issue in this case is whether the Petitioners' crimes of conviction under 26 U.S.C. § 7206[1] are among the serious "aggravated felonies" Congress designated as deportable crimes.

Petitioners contend that convictions for filing a false statement on a corporate tax return and assisting in the filing of such return in violation of § 7206 of the Internal Revenue Code ("IRC") are not aggravated felonies under 8 U.S.C. § 1101(a)(43)(M).[2]

On issues of statutory construction, the Court has held that courts should first look at the language of a statute to discern Congress' intent. If, upon that first look, the statute on its face is not immediately clear, courts should apply the canons of construction to try to arrive at Congress' intent.

In addition, the Court has held that courts should use every resource available to determine Congress' intent. "The rule of lenity applies only if, 'after seizing everything from which aid can be

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[1] Hereinafter, "§ 7206."

[2] 8 U.S.C. § 1101(a)(43)(M)(i) and (M)(ii) are hereinafter referred to as "(M)(i)" and "(M)(ii)," respectively.

derived,' . . . we can make 'no more than a guess as to what Congress intended.'" *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (*quoting United States v. Wells*, 519 U.S. 482, 499 (1997)).

In its Brief, the Government speculates what may have been in the mind of Congress in enacting (M)(i) and (M)(ii). However, speculation and conjecture are not aids this Court has ever relied upon.

Respondent also misstates the arguments of Petitioners. For example, Petitioners never stated or implied that (M)(i) is clear and unambiguous or that the Kawashimas' crimes of conviction were "within the *plain* meaning of subparagraph (M)(i)." Resp. Br. 13, 21 (emphasis added). To the contrary, Petitioners contend that (M)(i) is anything but "plain" or unambiguous.

Respondent mischaracterizes Petitioners' position in another regard. Respondent maintains that it is Petitioners' position that "the *mere existence* of a 'conflict of interpretation among and within' the lower Courts *requires* this Court to resolve that conflict in its favor." Resp. Br. 40 (emphasis added). Petitioners argued no such thing. What Petitioners wrote is basic common sense—that a conflict of interpretation among learned judges *suggests* that the statute is not all that clear. Petitioners cited *INS v. Errico*, 385 U.S. 214, 218 (1966) for what, it seemed, was this fairly obvious point. The Government, in effect, is arguing that the Court should ignore the fact that Circuit Judges on U.S. Courts of Appeals have strongly disagreed on

the meaning of (M)(i) and (M)(ii) but that two immigrants from Japan should have known what (M) means. Resp. Br. 42.

The Court should reject the Government's position. By applying time-honored canons of construction, and by using other reliable sources, Petitioners submit that (M)(i) was not intended by Congress to cover revenue loss offenses under the IRC, including, specifically, the Kawashimas' crimes of conviction under § 7206. Moreover, the Kawashimas' crimes of conviction under § 7206 did not contain, as an element of the crime, fraud or deceit.

I.

Applying the Canons of Construction, the Only Internal Revenue Code Offense Intended by Congress to be an Aggravated Felony is Tax Evasion Under 26 U.S.C. § 7201.

Petitioners contend that "revenue loss offenses" under the IRC, specifically §§ 7206(1) and (2), are not covered by (M)(i). Petitioners invoke the specific-general canon of construction employed by the Court to discern Congress' intent. In response, the Government has argued that (M)(i) is plain on its face and includes revenue loss offenses. Resp. Br. 12, 21. If (M)(i) did include IRC revenue loss offenses, (M)(ii) would be unnecessary. Logically, the specific would limit the general and revenue loss offenses such as those described in (M)(ii) would not to be included in (M)(i).

Respondent acknowledges the force of this canon by citing *Bloate v. United States*, 130 S. Ct. 1347, 1354 (2010) where the Court held that the "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." Resp. Br. 23. Because revenue loss offenses are specifically dealt with in (M)(ii), this rule compels the conclusion that revenue loss offenses like § 7201 and § 7206 are not included in (M)(i).

Congress has always classified revenue offenses like § 7201 and § 7206 separately from other crimes because of the different legislative goals of IRC sanctions.[3] This Court observed that "Congress has imposed a variety of sanctions for the protection of the system and the revenues." *Spies v. United States*, 317 U.S. 492, 495 (1943).

The Court in *Spies* stated that the purposes of these internal revenue sanctions were to protect incoming Government revenue from loss, to reimburse the Government for investigation expenses and to recoup revenue losses from defaulting taxpayers. *Id.* at 495 (*citing Helvering v. Mitchell*, 303 U.S. 391, 401, 402, 404-06 (1938)).

The Court in *Nijhawan* recognized Congress' separate classification of revenue loss offenses by referring to (M)(ii) as the "internal revenue provision."[4] *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009). IRC Title 26 revenue loss offenses are a different category of crimes than those contained in Title 18. Title 26 revenue loss offenses are directed to the protection of Government revenue.

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[3] The IRC criminal and civil sanctions are to protect revenue. *See Helvering v. Mitchell*, 303 U.S. 391, 401 (1938); *Spies v. United States*, 317 U.S. 492, 495 (1943).

[4] A criminal tax statute, which must be strictly construed, *Comm'r v. Acker*, 361 U.S. 87, 91 (1959), will have the same elements in a tax case as in an immigration case and does not take on new elements as it travels to immigration statutes in Title 8. *Cf. Powell v. Comm'r*, 791 F.2d 385, 389-90 (5th Cir. 1986).

M(ii) specifically covers tax evasion under § 7201. Because § 7201 includes all the statutory duties under the IRC, including breaches of duties under § 7206, it makes no sense that § 7206 and other revenue loss offenses were intended by Congress to be in (M)(i), while § 7201 alone was listed in (M)(ii).

Indeed, (M)(i) involves a different classification of offenses, namely victim crimes and not loss of revenue offenses. The legislative policy of recovery of revenue losses is not grounded on the notion that the Government is a "victim" but on the principle that taxpayers must fulfill their duty under our truthful, self-reporting system and that the Government's revenue must be safeguarded. *See Spies*, 317 U.S. at 497 (emphasizing that tax evasion is "the capstone of a system of sanctions which . . . [was] calculated to induce prompt and forthright fulfillment of every duty under the income tax law . . . .").

Nonetheless, the Government argues that tax-related offenses are in (M)(i), citing the conspiracy statute, 18 U.S.C. § 371,[5] to suggest that a substantive IRC revenue loss offense is also in (M)(i). Resp. Br. 27-29. The issue of whether a defrauding conspiracy under 18 U.S.C. § 371 will be included in (M)(i) stands on its own. Conspiracy to defraud the

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[5] The Government also cited to *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). Resp. Br. 28. There, the conviction was for the agreement with a purpose of impeding, in the future, the ability of the IRS to ascertain the correctness of the transactions at issue, which turned out to be legal. Klein was acquitted of the substantive § 7201 charges.

Government is the essence of the crime. If, as usually happens, like in *Klein*, the conspiracy count is joined with a tax evasion count, the tax evasion count would be within (M)(ii). A conspiracy to defraud the Government by overbilling, for example, might be captured in (M)(i).

The Government further argues that Congress intended the term "aggravated felony" to be interpreted expansively. Resp. Br. 36-37. There is no basis for the Government's claim that Congress intended to deport as many immigrants as possible by shoehorning every conceivable crime into one or another generic crimes under 8 U.S.C. § 1101(a)(43).

The Government also dodges the significance that (M)(ii) deals with "revenue losses to the Government" and (M)(i) deals with "losses to victims," offering a grammar lesson on "qualifying language" and a discussion of the holding in *Nijhawan* regarding the $10,000 threshold. Neither point has anything to do with Petitioners' contention that the different language used by Congress means that Congress intended a different category of offenses to be covered in (M)(ii).

When one simply reads the plain language of (M)(i) with (M)(ii), giving meaning to words like "victim" and "revenue loss to the Government," Petitioners submit that the ordinary reader would conclude that "revenue loss" offenses were not covered in (M)(i).

The Government speculates that Congress may have used the phrase "revenue loss" without intending to "giv[e] rise to the implication that the difference in terminology between (M)(i) and (M)(ii)"

has any significance, and that (M)(i) and (M)(ii) were intended to cover overlapping categories of loss. Resp. Br. 27. The Government concludes that in such a case, there would not be any reason for the specific "revenue loss to the Government." Resp. Br. 27-28. Exactly. The different terms, under basic canons of construction, must mean different things, specifically in this case, a different classification of crimes that Congress intended to cover in (M)(ii).

The Government also speculates that Congress may have "lacked confidence" that (M)(i) would not cover tax evasion in part because of *United States v. Scharton*, 285 U.S. 518 (1932). Resp. Br. 32. The Government misreads *Scharton*. In that case, the Court did not say that fraud was not contained in the tax evasion statute. The Court said quite the opposite:

> There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under § 1114(b), [the predecessor of the tax evasion statute] such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat.

Scharton, 285 U.S. at 521. Whatever one may say about *Scharton*, it has been changed by the amendment to the civil statute of limitations for assessment.

In sum, the Government speculates that Congress reviewed *Scharton*, misread it, and ignored subsequent developments, in particular the well-established doctrine that a conviction of tax evasion collaterally estops the tax evader from denying fraud in a civil assessment proceeding.

After contending that (M)(i) is clear and includes revenue loss offenses, the Government then incomprehensively argues that the specific-general canon is inapplicable "because the statute does not have a specific provision that deals with a whole class of 'tax crimes.'" Resp. Br. 23. This statement highlights the fact that Congress intended only one revenue loss offense to be an aggravated felony, namely § 7201.

Petitioners have invoked the rule against superfluities, arguing if (M)(i) covered tax evasion, (M)(ii) would be superfluous, which indicates Congress' intent that revenue loss offenses like § 7201 are not covered in (M)(i) and, instead, are solely covered in (M)(ii).

The Government argues, however, that statutory provisions which are superfluous or redundant can be ignored because Congress often enacts redundant provisions. Resp. Br. 29, 37. The Government again speculates that "out of an abundance of caution" Congress "may" have added (M)(ii) "even at the risk of creating a *minor* internal redundancy." Resp. Br. 32 (emphasis added). In this case, such speculative redundancy is not at all "minor."

The Court in *Nijhawan* disagreed, stating that (M)(ii) is not to be interpreted to achieve a pointless result. 129 S. Ct. at 2301. To avoid superfluity, the Government asserts that tax evasion does not "necessarily involve fraud or deceit" which would necessarily mean that a § 7201 conviction would not estop the taxpayer from contesting civil fraud. This would be a very positive development for convicted tax evaders.

The Government also speculates that the Court's decision in *Spies* may have raised "reasonable concerns" that "tax evasion" may be accomplished "in any manner." Resp. Br. 33. However, (M)(ii) clearly covers tax evasion, no matter how the tax evasion is committed.

In the end, the Government did conclude that tax evasion captures "'any conduct' that was fraudulent or deceitful." Resp. Br. 34. That being so, if such a crime involving fraud or deceit is covered in (M)(i), why (M)(ii)? That would be superfluous. To honor the canon against superfluity, (M)(i) cannot cover tax evasion.

The Government responds by offering a new canon of construction: that a statute should be construed in light of the possibility that courts might decide cases erroneously. Resp. Br. 35.

The Government further speculates that Congress might have had uncertainty about how (M)(i) would operate in the context of "tax offenses" under state law. Resp. Br. 35. Clearly, if a state or foreign conviction involved revenue loss to the Government based upon elements equivalent to tax

evasion, it would be an aggravated felony. The mistaken premise of the Government is that under state or foreign law a revenue loss offense involving fraud and deceit would be within (M)(i). It would not.

The Government states that (M)(ii) does not refer to the broader category of "tax crimes." Resp. Br. 31. Absolutely correct, for this reason, Congress designated only one IRC revenue loss offense, namely § 7201 in (M)(ii) as an aggravated felony. If Congress wanted to designate § 7206 as an aggravated felony, Congress could easily have done so in (M)(ii).

This Court instructed that courts should use every resource available to correctly construe a statute and discern the intent of Congress. The Government's Response is mostly grounded on speculation and conjecture. This Court has never held that speculation and conjecture are appropriate aids to construe a statute.

Petitioners invoke the Sentencing Guidelines because Congress delegated to the Commission the duty to classify crimes for sentencing purposes and because these guidelines can be a resource for discovering Congressional intent. The Government does not dispute the holding in *Valansi v. Ashcroft* that "courts may look to these sources [including the Sentencing Guidelines] to derive Congress' intent when passing the INA." 278 F.3d 203, 213 (3d Cir. 2002).

The Court is invited to look at Part F of Chapter 2 which was in effect when (M)(i) and (M)(ii)

were enacted into law. Part F dealt precisely with "offenses involving fraud or deceit" and based the sentencing for those offenses on damage to the "victims." The Commission did not include revenue loss offenses in Part F.

There is a separate classification for revenue loss offenses in Part T. The Government attacks Petitioners' point on the basis that Part T "conspicuously fail[s] to use the phrase 'revenue loss'" and uses the term "tax loss." Resp. Br. 39. This ethereal observation hardly addresses the fact that the Guidelines classify separately fraud and deceit offenses and revenue loss offenses consistent with Congress' intent to deter attacks on the Government's revenue.

For all of these reasons, Petitioners respectfully urge the Court to conclude that the Kawashimas' crimes of conviction under § 7206 were not aggravated felonies under (M)(i).

II.

The Petitioners' Crimes of Conviction are not Covered in (M)(i) Because Neither Fraud Nor Deceit is an Element of the Offense.

Petitioners maintain that the revenue loss offenses of which they were convicted do not include either fraud or deceit as an element of the crimes of conviction. Accordingly, §§ 7206(1) and (2) are not "aggravated felonies." Pet. Br. 33-41.

The Government does not dispute that "fraud or deceit" are not elements of the crimes of conviction. Instead, the Government argues that convictions under § 7206 "necessarily involved deceit." Resp. Br. 17. The Government relies largely on *Black's Law Dictionary* which defines "deceit" as: "[a] false statement of fact made by a person knowingly or recklessly . . . with the intent that someone else will act upon it." Resp. Br. 17. The Government grounds its argument on the words "involving"[6] and "false." The Government then makes the leap that crimes that involve falsity

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[6] This Court has interpreted similar wording ("involves conduct that presents a serious potential risk of physical injury to another") in the context of the Armed Career Criminal Act, as requiring courts to look to the elements of the crime and not the specific conduct of the offender. *James v. United States*, 550 U.S. 192, 202 (2007).

necessarily "involve deceit" and, therefore, are covered in (M)(i), all the while conceding that § 7206 does not contain the element of fraud or deceit and that the Government does not have to prove fraud or deceit to obtain a conviction under § 7206.[7] Resp. Br. 19.

This Court and the BIA have made it absolutely clear that the elements of the crimes of conviction control the determination of whether a crime is an "aggravated felony." *See, e.g., Carachuri-Rosendo v. Holder,* 130 S. Ct. 2577, 2587 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)*; In re Babaisakov*, 24 I. & N. Dec. 306, 312 (BIA 2007) (*citing In re Pichardo*, 21 I. & N. Dec. 330, 335 (BIA 1996)). The determination of whether a crime is an aggravated felony does not hinge on what is said in *Black's Law Dictionary*, however reputable that publication may be.

Moreover, for a § 7206 conviction, the Government did not have to prove that the Kawashimas intended the Government to "act upon" the misstatements, as the Government's own "definition" requires. That is a key distinction between perjury offenses and crimes of "deceit." *See, e.g.*, *United States v. Griffin*, 524 F.3d 71, 81 (1st Cir. 2008) ("[I]ntent to induce government reliance on a false statement or to deceive the government is not an element of 26 U.S.C. § 7206(1).").

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[7] In fact, fraud is often equated with deceit. *See, e.g.*, *United States v. Olson*, 576 F.2d 1267, 1271 (8th Cir. 1978) ("Information is fraudulent if it was falsely furnished with the intent to deceive.").

The only intent required for §§ 7206(1) and (2) convictions is "willfullness." *United States v. Bishop*, 412 U.S. 346, 350 (1973). The Government has avoided *Bishop*, which holds that "willfully" is the "voluntary, intentional violation of a known legal duty." *Id.* "Willfully," as defined by the Court in *Bishop*, is completely different from the "deceit" defined by the Government.

The Government also takes issue with Petitioners' citation to *Wright v. Comm'r,* 84 T.C. 636 (1985), as standing for the proposition 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). Resp. Br. 20. The Government argues that "the reason a taxpayer in a civil tax fraud suit is not estopped by a Section 7206(1) conviction from denying an 'underpayment * * * due to fraud' is that it would not have been necessary to prove an underpayment . . . ." Resp. Br. 20. The Government, however, misconstrues the holding in *Wright*. While the Government is correct that "underpayment" is not required in § 7206(1) cases, the Court in *Wright* specifically addressed § 7206(1) cases in which there was an underpayment and still held that a defendant is not collaterally estopped from attacking the basis of said underpayment as being "due to fraud:"

> Because the attempt to evade tax is the gravamen of fraud (*see, e.g., Hebrank v. Commissioner*, *supra* at 642), we concluded in *Amos* that a taxpayer convicted under section 7201 of having attempted to evade or defeat

> a tax for a taxable year is collaterally estopped from denying under section 6653(b) that part of his underpayment for the same year was "due to fraud." . . . However, to have held, as we did in *Considine v. Commissioner*, *supra*, and *Goodwin v. Commissioner*, *supra*, that a conviction for "willfully" making a false statement in an income tax return within the meaning of section 7206(1) estops a taxpayer from denying that any underpayment made for the year of the return was "due to fraud" misapplies the principle of collateral estoppel and creates the semantic confusion warned against in *United States v. Bishop*, *supra*.

Wright, 84 T.C. at 642-43. The ability of the defendant/taxpayer to challenge the "fraud" element in a § 6653 case has nothing to do with underpayment, but has everything to do with the fact that the "intent to evade" (the fraud element found in § 7201 cases) is not present in § 7206 cases.

The Commissioner of Internal Revenue acquiesced in *Wright*. *Comm'r Acquiescence*, 1988–2 CB 1. Courts in subsequent years have consistently followed this holding. *Cox v. Comm'r,* T.C.M. 1985-324, 1985 Tax Ct. Memo LEXIS 307, at *26-27 (July 2, 1985); *McGowan v. Comm'r*, 187 Fed. App'x 915, 917 (11th Cir. 2006).

The idea that § 7206(1) necessarily involves fraud or deceit is contrary to settled precedent. If that were true, a § 7206(1) conviction *would*

collaterally estop the taxpayer from denying civil fraud, which is not the law. *See Considine v. United States*, 683 F.2d 1285, 1287 (9th Cir. 1982); *Wright*, 84 T.C. at 642-643; *Ochs v. Comm'r*, T.C.M. 1986-595, 1986 Tax Ct. Memo LEXIS 15, at *9 (Dec. 22, 1986); *Franklin v. Comm'r*, T.C.M. 1993-184, 1993 Tax Ct. Memo LEXIS 181, at *24 (Apr. 26, 1993).

In this same vein, it should be noted that 26 U.S.C. § 6501(c)(1) provides specifically that there must be an "intent to evade tax" in addition to the filing of a false or fraudulent return for the exception to the three-year statute of limitations for assessment to apply. A § 7206(1) conviction, without more, has been held not to extend the general three-year statute of limitations for assessments and collection under § 6501(c)(1). *See, e.g.*, *McGowan*, 187 Fed. App'x at 916-18 (holding that taxpayer's convictions under §§ 7206(1) and (2) did not establish intent to defraud for § 6501(c)(1) purposes). Under the Government's position, Congress would not have had to add "the intent to evade language" to a § 7206(1) violation to suspend the statute of limitations.

The Government also relies upon *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008) and *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) for the proposition that § 7206 convictions involve "fraud or deceit." Resp. Br. 19. The alien in *Arguelles-Olivares*, however, did "not contest that his conviction under [Section 7206(1)] 'involves fraud or deceit'" (526 F.3d at 183-84 (Dennis, J., dissenting)) and the Court in *Ki Se Lee* did not address the question as it found no need

based on its holding related to statutory construction (368 F.3d at 224). Accordingly, these cases do nothing for the Government.

In his amicus brief, Commissioner Walters offers another analogy which supports Petitioners' argument. Commissioner Walters notes that 18 U.S.C. § 1001 is similar to § 7206(1) and criminalizes the willful making of a false material statement to the Government. Walters Br. 7-8. Like § 7206(1), 18 U.S.C. § 1001 contains no language requiring proof of any additional element, such as an intent to deceive or defraud. In *United States v. Yermian*, the Court held 18 U.S.C. § 1001 "contains no language suggesting any additional element of intent such as a requirement that false statements be knowingly made" with an intent to deceive. 468 U.S. 63, 68 (1984) (citation omitted). As Commissioner Walters points out, it would be a disaster for U.S. tax enforcement if the Government now had to prove fraud or deceit in § 7206 cases. Walters Br. 18-21.

In *Bridges v. United States*, the Court addressed a similar issue. 346 U.S. 209, 222 (1953). The Court held:

> The offense there charged is that Bridges knowingly made a false material statement in a naturalization proceeding. In that offense, as in the comparable offense of perjury, fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it. . . . Under the doctrine of these cases, the suspension

> does not apply to the offense charged, unless, under the statute creating the offense, fraud is an essential ingredient of it. . . . Nothing in § 346 (a)(i) makes fraud an essential ingredient of the offense of making a false material statement in a naturalization proceeding.

Id.; *see also Taylor v. United States*, 495 U.S. 575, 600, 602 (1990) (construing a federal sentencing enhancement statute and holding that the sentencing court should "look only to the fact of conviction and the statutory definition of the prior offense").

As these cases show, neither fraud nor deceit is an essential element of § 7206, and it does not need to be proved by the Government.

Additionally, the Government fails to acknowledge that this case is the logical extension of *Nijhawan*. The issue whether the $10,000 threshold was an *element* of the crime was a core inquiry of the Court. Referring to (M)(ii), the Court stated: "There is no offense 'described in § 7201 of Title 26' that has a specific loss amount as an element." *Nijhawan*, 129 S. Ct. at 2301. Thus, if the revenue loss was an element, the tax evasion provision would be "pointless." *Id.*

The Government in *Nijhawan* had argued that the sole purpose of the "aggravated felony" inquiry is "to ascertain the nature of a prior conviction." *Id.* at 2303. In this case, the "nature" of

§ 7206 is perjury, and neither fraud nor deceit is an element of the crime.

Finally, the Government cites its Criminal Tax Manual as supporting its position that a § 7206 conviction involves deceit based upon the words of "false," "materiality," and "willfulness." Resp. Br. 18. The Government is wrong. An examination of the Department's Manual (as well as the IRS Office of Chief Counsel Tax Division Tax Crimes Handbook (IRS, Office of Chief Counsel, *Tax Crimes Handbook*, 62-80 (2009)), specifically, its extensive discussion of § 7206, is instructive. Resp. Br. 28. The elements are listed, and neither fraud nor deceit is included. The Government has never before asserted that fraud or deceit was either an element of a § 7206 crime or that fraud or deceit is "necessarily" implied or needs to be proven.

The Government is now saying, apparently, that even if fraud or deceit is not alleged or proved, the element of fraud or deceit can be *implied* from filing a materially false tax return. Even before this country was founded and its Courts adopted the common law, fraud and deceit, under *any* circumstance, had to be proved, not "implied."

In summary, neither fraud nor deceit is an element of the Kawashimas' crimes of conviction. The crimes of conviction, therefore, are not covered in (M)(i), and, as such, § 7206 convictions are not aggravated felonies.

III.

The Rule of Lenity Should be Applied in this Case if the Court Finds (M) to be Ambiguous Because the Rule Applies in Both Immigration and Criminal Cases.

The Government argues that the rule of lenity should apply only in criminal cases. Resp. Br. 40-41. The Court has held otherwise: "[Courts must] constru[e] any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

The principle motivating the Court to apply the rule of lenity in criminal and deportation cases is fairness. Lenity is grounded on principles of due process fair notice—that a person should not suffer imprisonment or banishment on the basis of a vague or ambiguous statute. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

If the Court finds (M) to be ambiguous, the Court should apply the rule of lenity in favor of the Kawashimas.

IV.

Aligned with the Rule of Lenity, Constitutional Due Process Fair Notice Requires that Deportation may not be Ordered in a Proceeding that is Based on the Interpretation of an Ambiguous Statute.

Subsection (M) is vague and failed to provide fair notice that Kawashimas' crimes of conviction were deportable offenses. The Government states incorrectly that *Nijhawan* decisively rejected the applicability of due process fair notice principles. Resp. Br. 42. This issue, however, was not raised or considered in *Nijhawan*.

This Court has recently considered the issue of due process fair notice with respect to the vague wording of the mail and wire fraud statutes. *See Skilling v. United States*, 130 S. Ct. 2896, 2929-35, 2939 (2010) (Scalia, Thomas, and Kennedy, JJ., concurring) (agreeing with the majority's conclusion on the ground that the wording "the intangible right of honest services" was vague and violated due process fair notice, outlining in detail the differences of opinions in conflicting circuit cases interpreting this phrase); *Black v. United States*, 130 S. Ct. 2963, 2970-71 (2010) (Scalia, Thomas and Kennedy, JJ., concurring) (stating that the honest services wording was vague and violated due process fair notice).

Due process requires that a person of ordinary intelligence be given notice of what constitutes prohibited conduct and the consequences of that

conduct. *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *see also* Pet. Br. 46 (cases cited therein).

Subsection (M) as enacted does not give such sufficient notice. Persons of ordinary intelligence are not put on fair notice that they have committed and pled guilty to deportable offenses.[8] If anything, (M)(ii) put the Kawashimas on notice that the revenue offenses to which they pled were not deportable offenses.

Due process fair notice issues have arisen repeatedly in tax cases due to the uncertainty and complexity of the tax statutes. Ignorance or mistake of the law is recognized as a defense to civil/criminal tax penalties due to that complexity. *See Cheek v. United States*, 498 U.S. 192, 199-200 (1991). This is an exception carved out of the deeply rooted general rule that ignorance or mistake of the law is no defense. *Id.*

In *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), the court reversed convictions for tax fraud and conspiracy because of the "unsettled legality" of the tax shelter scheme and the lack of

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[8] Linda Greenhouse has written that the subsection is vague. *See* Linda Greenhouse, *Activists by Invitation*, N.Y. Times, June 15, 2011, *available at* http://opinionator.blogs.nytimes.com/2011/06/015/activists-by-invitation/?pagemode=print (stating with respect to subsection (M), "Is that clear? Not to me, and I've read it at least 20 times. Do both clauses apply to tax crimes, or does only the second, which would suggest that the only deportable tax crime is evasion.").

any relevant precedent and regulations and other guidance denied "fair notice." *Id.* at 1428-29.

In Petitioners' case, there was no guidance in the form of case law that their convictions under § 7206 constituted deportable aggravated felonies within (M). The only regulation issued by the DHS did not clarify what conduct is deportable under (M). *See* 8 C.F.R. § 1.1.

If a statute prescribing a civil and/or criminal consequence does not clearly define the conduct subject to such consequence, an agency may not seek to pioneer the law of an ambiguous statute and/or regulation in a criminal prosecution or civil enforcement action and then apply the newly pioneered law to the defendant of that particular enforcement action. *See United States v. Hitachi Am. Ltd.*, 172 F.3d 1319, 1330-31 (Fed. Cir. 1999); *United States v. Ford Motor Co.*, 463 F.3d 1267, 1275-6 (Fed. Cir. 2006). This is precisely what occurred in this case.

The Government dismisses Justice Alito's concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488-1491 (2010) and the dissenting opinions of Justice Scalia in *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) and of Justice Jackson in *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951), Resp. Br. 42 n.18, attempting to distinguish those opinions while ignoring the essence of the Justices' concerns—that due process and fair notice are denied where criminal defendants are convicted and immigrants are deported on the basis of vague and unclear statutes.

On the basis of lack of fair notice, and as a matter of due process, the orders of deportation in this case should be set aside.

V.

Chevron and its Progeny do not Mandate Remand Because it is the Role of the Courts to Resolve Questions of Statutory Construction.

The Court has held that matters of statutory construction are for the courts to resolve, not agencies. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). There is no basis for finding that Congress delegated to the Attorney General the authority to define what particular crimes constitute aggravated felonies.

It is true that *Chevron* deference may be applicable when Congress clearly delegated to the Attorney General the authority to make a determination in the implementation of a statute. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) ("[W]ithholding does not apply, and deportation to the place of risk is authorized" if the Attorney General *determines* that there are serious reasons for considering that the alien has committed a serious nonpolitical crime . . . 8 U.S.C. § 1253 (h)(2)(c).") (emphasis added). Similarly, in *Negusie v. Holder*, the Court held that whether an alien who was compelled to assist in the persecution of prisoners of war can be eligible for asylum or withholding of removal is a policy issue that

Congress put in the hands of the BIA in light of its expertise and experience. 555 U.S. 511, 517 (2009).

Those cases did not involve statutory construction but rather implementation of a provision of a statute delegated by Congress to the Attorney General.

The issue in this case is one of pure statutory construction. The suggestion that Congress delegated to the Attorney General, the chief criminal enforcement official of the Government, through the BIA, the discretion to define, and subsequently enforce, what crimes are deportable is not sustainable.

The Government's broad argument that the determination of what crimes are aggravated felonies should be left to the agency, when taken to its logical conclusion, would result in the elimination of the rule of lenity in deportation cases. As shown above, however, the rule continues to be applicable.

Although there are places where Congress delegated to the Attorney General and the BIA interpretative authority in their implementation of the Immigration and Nationality Act which merits *Chevron* deference, there is no such delegation in the case at bar. Congress did not delegate to the Attorney General the authority to define what crimes are aggravated felonies. As such, remand to the BIA is improper.

CONCLUSION

The judgment of the Ninth Circuit should be reversed with instructions to dismiss the deportation proceedings.

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Respectfully submitted,

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