No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

Attorneys for Petitioner

222302

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REPLY FOR PETITIONER

In urging that loss under 8 U.S.C. §1101(a)(43)(M)(i) must be determined as a factual matter in removal proceedings, the government runs roughshod over the plain statutory language requiring conviction of an aggravated felony. This statutory requirement is satisfied either by (1) conviction of an offense defined to include the requirements of the aggravated felony definition in all cases—the formal categorical approach, or (2) conviction of an offense that may include the requirements of the aggravated felony definition in a particular case, if the guilty plea or jury verdict in that case shows the defendant to have been convicted of the aggravated felony requirements—the modified categorical approach.

The conviction here fails both tests under the categorical approach. First, there is no dispute that the formal categorical approach has not been satisfied. Second, with respect to the modified categorical approach, a jury convicted Mr. Nijhawan and the jury was never instructed to find any loss. Accordingly, Mr. Nijhawan was never convicted of the required loss. At the same time, this result leaves the government free in a proper case to urge that the modified categorical approach has been satisfied, either because loss was established in a guilty plea, the method by which most criminal cases are resolved, or by an appropriate jury instruction on loss in those few criminal cases that go to trial.

Even if the statutory language is considered ambiguous on applying the categorical approach, two

controlling rules of statutory construction require that ambiguity to be resolved in the Petitioner's favor, especially since the aggravated felony provision is both a deportation ground and an integral part of a federal criminal statute. First, an ambiguity in a federal criminal statute must, under the rule of lenity, be resolved against the government. Second, deportation provisions must be narrowly construed in favor of the alien.

ARGUMENT

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE ACT REQUIRE THE ALIEN TO HAVE BEEN CONVICTED OF THE SPECIFIED LOSS IN ACCORDANCE WITH THE CATEGORICAL APPROACH

A. The Text Of Subparagraph (M)(i) Defines "Offense" To Include Loss

The government's attempt to deport Mr. Nijhawan for conviction of an aggravated felony founders on the plain language and structure of the Immigration & Nationality Act of 1952, as amended (the "Act"). While conceding that an alien must be convicted of an aggravated felony to be deportable, and apparently admitting that Mr. Nijhawan was not convicted of the required loss amount under §1101(a)(43)(M)(i), the government nevertheless seeks to sustain a departure from the categorical approach by arguing that the clause beginning with "in which" in (M)(i) constitutes a second restrictive clause, independent of the clause beginning with "that." GBr. 11. Yet the plain language of §1101(a)(43)(M)(i) incorporates the "in which" clause

within the restrictive clause beginning with "that," and this entire clause defines the offense of which an alien must have been convicted. Indeed, having the "in which" language define the preceding words within the clause beginning with "that" would be consistent with antecedent rule. *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (limiting clause modifies noun that clause follows). In other words, the loss requirement beginning with "in which" constitutes a further limitation upon "that involves fraud or deceit," and this entire restrictive clause defines "offense." Since the law requires the alien defendant to have been convicted of this defined offense and Mr. Nijhawan was not convicted of the required loss component of the definition, the removal order cannot stand.

Even accepting the government's argument that there are two separate restrictive clauses, one beginning with "that" and the other beginning with "in which," still dooms the government's argument. A restrictive clause defines the noun to which the clause refers. *The Chicago Manual of Style* §§ 5.202 at 230, 6.31, 6.36, 6.38. (15th ed. 2003) ("CMS"). If "in which" begins a separate restrictive clause and the antecedent rule is not applied, then this second restrictive clause must also restrict and define "offense," a point the government does not appear to dispute. GBr. 11, 14. Accordingly, even under the government's two restrictive clauses approach, both clauses end up defining "offense," leaving no doubt that the alien must have been convicted of fraud or deceit and the required loss.

This plain meaning is not altered by the absence of the word "element." GBr. 16. Indeed, this misconstrues

the Petitioner's argument as limited to the formal categorical approach, which focuses only on the elements of the statutory offense and requires the offense of conviction to encompass the aggravated felony definition in all cases[1] While the government suggests, *e.g.*, GBr. 17, 18, how §1101(a)(43)(M)(i) could have been better drafted to support the Petitioner's position, the words used more than suffice. By contrast, Congress certainly knew how to require facts supporting removability to be found by the Immigration Judges conducting removal proceedings, but did not do so here. Indeed, to achieve the result urged by the government, (M)(i) would have read "an offense—that involves fraud or deceit, when the loss to the victim or victims is found in removal proceedings to have exceeded $10,000."[2]

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[1] To the extent that the government appears to urge that focus on the legal elements of the offense occurs only when Congress uses the word "element" in the aggravated felony definition, GBr. 16, BIA precedent is to the contrary. *See, e.g., Matter of Espinoza*, Int. Dec. 3902 at 8 (BIA 1999)(en banc) (legal elements determine whether misprision is an offense relating to obstruction under subparagraph (S) though "element" not used in this aggravated felony definition).

[2] While the government cites portions of the Act purportedly imposing adverse immigration consequences based upon commission and not conviction of an aggravated felony. GBr. 17n.5, this merely demonstrates that Congress knew how to differentiate between commission and conviction and required the latter for deportation. The cited examples, however, do not bear close scrutiny. *See* 8 U.S.C. §1226(d)(1)(A)—(C) (import is to identify aliens convicted of an aggravated felony for removal proceedings after their release from criminal custody; 8 U.S.C. §1231(i)(4) (refers to

(Cont'd)

The government's reliance upon *Hayes v. United States*, 129 S.Ct. 1079 (2009) is also misplaced. *Hayes* concerned a prosecution under 18 U.S.C. §922(g)(9), which prohibits any individual who has been convicted of a "misdemeanor crime of domestic violence," as defined in 18 U.S.C. §921(a)(33)(A), from owning a firearm. At issue was whether under this statutory definition, the necessary relationship between victim and assailant had to have been established in the prior conviction or could, instead, be proved beyond a reasonable doubt in the firearms prosecution. The statutory definition in 18 U.S.C. §921(a)(33)(A) differs in several material respects from §1101(a)(43)(M)(i). First, §921(a)(33)(A)(i) expressly provides for only one element, the use or attempted use of force, while (M)(i) does not limit the elements to fraud or deceit. Second, having the phrase "committed by" modify "use" would produce the awkward expression of "committing a use." Moreover, placement of the term "committed," set off by a comma, signals a departure from the definition of offense for conviction and establishes a separate factual

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(Cont'd)

"undocumented criminal aliens who have committed aggravated felonies," but must be read together with 8 U.S.C. §1231(i)(3)(A), which defines "undocumented criminal alien," as one who lacks legal status and "has been convicted of a felony or two or more misdemeanors"). Finally, 8 U.S.C. §1226(c)(1)(B) presupposes conviction, otherwise the provision would make no sense since aliens are deportable only for conviction and not commission. *See Demore v. Kim*, 538 U.S. 510, 513 (2003) (the cited section "provides that 'the Attorney General shall take into custody any alien who' is removable from this country because he has been convicted of one of a specified set of crimes").

requirement provable in the firearms prosecution unlike (M)(i). *See, e.g.,* CMS §6.31 at 248 (non-restrictive phrase set off by comma). Indeed, to resemble the definition in *Hayes*, (M)(i) would have to define an offense "that has as an element fraud or deceit, with loss to the victim found to have exceeded "$10,000."

B. Read Together (M)(i) And (M)(ii) Support The Categorical Approach

Subparagraph (M)(ii) strongly supports the Petitioner's reading of subparagraph (M)(i). Thus 26 U.S.C. §7201, the federal tax statute referenced in M(ii), is precisely the kind of statute to which the modified categorical approach normally applies since the deficiency requirement in that statute encompasses revenue losses greater and lesser than $10,000, with removability under M(ii) determined, as under M(i), by whether the required loss was established either by guilty plea or jury verdict. In other words, a guilty plea or jury verdict under a fraud statute may establish a loss greater than $10,000 even though not every conviction under the statute would yield such a loss, just as a tax deficiency exceeding $10,000 under 26 U.S.C. §7201 might be established by a guilty plea or verdict, even though this would not occur in all such prosecutions. Accordingly, requiring loss to be established by conviction in (M)(i) would be fully consistent with (M)(ii) because both contemplate application of the modified categorical approach. Furthermore, the government overlooks its own practice in tax evasion cases, the vast majority of which are resolved by guilty pleas. *See United States Attorney's Manual* §6-4.310 ("The Government

disposes of an overwhelming percentage of all criminal tax cases by entry of a plea of guilty"). Moreover, the Department of Justice has made clear that such plea agreements must include the tax loss involved in the count to which the defendant pleads guilty. U.S. Department of Justice *Criminal Tax Manual* ¶5.01[2] (plea agreements must include all provable tax loss in the case).

C. The Plain Meaning of Subparagraph (M)(i) Is Entirely Consistent With The Remainder of §1101(a)(43)

While citing provisions of §1101(a)(43) requiring a sentence of imprisonment, the government overlooks the fundamental point that a jury may well find a loss amount to convict a defendant but will not sentence a defendant to a term of imprisonment. *Cf. Oregon v. Ice*, 129 S.Ct. 711, 717 (2009) ("The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently"). Accordingly, Congress is not introducing the same concept with slightly different language, but is legislating against a historical divide between court and jury, one that counsels against departure from the categorical approach on the issue of loss under (M)(i).

Additionally, other provisions cited by the government demonstrate that Congress knew how to mandate factual findings in removal proceedings but did not use such language here. The "except" language in subparagraphs (N) and (P) is set off by a comma, and the context could hardly be clearer that this non-restrictive clause does not define the offense of which the alien defendant must be convicted. Similarly,

subparagraph (O) cites two federal statutes already having defined elements and then qualifies the definition by references to facts that, unlike the loss amount in (M)(i), a jury would never be called upon to find to convict. Similarly subparagraph (K) uses the language of "committed," as a possible qualifier, which is simply not employed in (M)(i). *Compare Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137, 145 (2d Cir. 2008) (applies the categorical approach to require that commercial advantage be established by conviction under (K)).

D. Applying The Plain Language Of (M)(i) In Accordance With The Categorical Approach Produces No Unnatural Constraint

The government places unjustified reliance upon the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, passed some two years *after* §1101(a)(43)(M)(i) was first enacted in 1994 by a different Congress. GBr. 24—26. *See O'Gilivie v. United States*, 519 U.S. 79, 89 (1996) ("[V]iew of a later Congress cannot control the interpretation of an earlier enacted statute"). Yet the actual legislative history from 1994, though admittedly sparse, is fully consistent with applying the plain language of (M)(i) in accordance with the categorical approach. *See* PBr. at 27n.14. In the end, the government's argument merely begs the question of whether a particular conviction falls within a ground of removal. Unenacted expressions of Congressional concern in 1996 about the removal of criminal aliens says

nothing about whether a particular conviction falls within a removable category enacted in 1994.[3]

With respect to the need for uniformity, GBr. 31, one consistent question will satisfy this need, namely whether the alien was convicted of a loss exceeding $10,000, a question more easily answered by resort to the alien's guilty plea or jury instructions than reconstruction of the underlying facts of the criminal case many years after the events, especially given the government's position on the full retroactivity of the aggravated felony definition as a removal ground. Indeed, when Congress assertedly mandated full retroactivity for removal purposes, Congress nevertheless legislated against the backdrop of the categorical approach and left the conviction requirement unchanged, strongly suggesting that the legislature resolved the knotty problems presented by retroactivity through the one consistent question presented above, namely whether the alien was convicted of the required loss.

While the government attempts to make much of the assertedly limited applicability of such federal statues as mail fraud, wire fraud or bank fraud, 18 U.S.C. §§1341, 1343, 1344, should the Petitioner's position be adopted, its argument ignores both the fact that the overwhelming majority of federal prosecutions under

[3] Virtually all of the cited legislative history from 1996 concerns the need for detention as part of immigration enforcement, illegal immigration or removal for violation of the immigration law, while saying nothing about the aggravated felony provisions. *See, e.g.,* S.Rep. No. 249, 104th Cong., 2d Sess at 7 (1996).

these provisions are resolved through guilty pleas and that the government, in accordance with past practice, can insist upon loss amounts in any such plea agreements. With respect to those federal statutes where loss greater than $10,000 is a statutory element, the government's skepticism on whether 18 U.S.C. §668 would fall within (M)(i) borders on the nonsensical, for this statute, phrased disjunctively, makes guilty a person "who steals or obtains by fraud" a major artwork, thus allowing federal prosecutors to charge a fraud offense under familiar criminal practice. *See, e.g., United States v. Niederberger*, 580 F.2d 63, 68 (3d Cir. 1978) ("[I]t is settled law that where a statute denounces an offense disjunctively, the offense may be charged conjunctively in the indictment," while "guilt may be established by proof of any one act named disjunctively in the statute"). As for 18 U.S.C. §1031 and §1039, both provide for enhanced penalties based upon loss, [4]and 18 U.S.C. §3571(d), which applies a significantly enhanced fine, would seem miles away from the "statutorily prescribed fine," referenced in passing by dicta from the majority opinion *Ice*, 129 S.Ct. at 719 (2009), which dealt not with enhanced fines but consecutive sentences.

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[4] While the government cites *United States v. Reitmeyer*, 353 F.3d 1313, 1320 (10th Cir. 2004) on 18 U.S.C. §1031, the government's own position in that case, seeking to avoid dismissal on statute of limitations grounds, was that this offense was not complete until the money fraudulently sought from the government was actually provided, thus putting this statute, under the government's own reading, well within M(i) under the modified categorical approach. As for 18 U.S.C. §1039, despite the government's quibble, GBr. 28, victim loss would seem to be the most logical way to read the requirement of $100,000 of illegal activity.

Thus this case is a far cry from the concerns about limited federal coverage expressed in *Hayes*, while it should not be forgotten that (M)(i) presents an aggravated felony provision not defined by reference to any federal statute. *Cf. Ice*, 129 S.Ct. at 718 (quoting from *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government."). The government's resistance to coordinated action to secure removal rests upon dubious authority. GBr. 33. Thus the elimination of judicial recommendations against deportation in 1990, some four years before enactment of (M)(i), says nothing about whether the government should seek a jury charge on loss to insure deportation in an administrative proceeding, nor does elimination of deportation in sentencing.[5] Equally absurd is the government's suggestion that the Petitioner's arguments would somehow require that state officials do anything, while the government's apparent dismay about state involvement in immigration enforcement overlooks the government's past efforts to foster just such involvement under 8 U.S.C. §1357(g), enacted as Section 287(g) of the Act by IIRIRA in 1996. *See, e.g.*,

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[5] Petitioner does not contend that seeking a jury instruction on loss is constitutionally required, only that this procedure would allow the government to follow the plain language of (M)(i) and would hardly seem to place an insurmountable burden upon the government, which previously extolled just such coordinated efforts between criminal and immigration enforcement. See "85 Sentenced for criminal offenses in one day following a coordinated ICE operation in Iowa. *http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm*. (May 20, 2008).

"Delegation of Immigration Authority: Section 287(g)," *www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm* (June 22, 2007).

Additionally, with respect to state offenses, the government fails to recognize that the Petitioner has identified a majority of states, 26 in all, where loss exceeding $10,000 would always be established by conviction, thus satisfying the formal categorical approach. Brief for Petitioner ("PBr.") 1a—12a. Furthermore, this may well understate the case when the modified categorical approach is considered with respect to those state statutes that, following adoption of the Model Penal Code ("MPC"), grade such fraud offenses as theft by deception[6] based upon the amount of loss. *See* American Law Institute, Model Penal Code §§223.1 (gradation based upon loss), 223.3 (theft by deception); 1 Wayne LaFave, *Substantive Criminal Law* §1.1(a) (noting importance of MPC in development of state criminal law). Indeed, New Jersey, whose identity theft statute the government dismisses as assertedly not a heartland example, GBr. at 31 actually illustrates this point. Thus New Jersey has adopted the MPC gradation of offenses with respect to theft by deception based on loss. *See* N.J.S.A. §§2C: 20-2 (loss more than $500 but less than $75,000 a third degree crime; loss greater than $75,000 a second degree crime); 43-6 (maximum sentence for third degree crime between

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[6] *Matter of Garcia-Madruga*, 24 I & N Dec. 436, 440n.5 (BIA 2008) expressly recognizes that theft by deception offenses may fall within §1101(a)(43)(M)(i).

three to five years; maximum sentence for second degree crime between five to ten years).[7]

II. THE GOVERNMENT'S REJECTION OF THE CATEGORICAL APPROACH CONTRAVENES LONGSTANDING PRECEDENT AGAINST WHICH BACKGROUND CONGRESS ENACTED THE AGGRAVATED FELONY PROVISIONS

In rejecting the categorical approach here, the government makes war on nearly a century of precedent. Grounded in sound considerations of fairness, predictability, judicial economy and efficiency, the categorical approach was developed to deal with whether an alien had been convicted of a CIMT and was later applied, without question, to subsequently added grounds of deportation based upon conviction. *See* Rebecca Sharpless, *Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 at 993-96 (2008) (hereinafter "Test"), which summarizes this development. *See, e.g., Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334-35 (BIA 1996) (en banc) ("extrinsic evidence" not allowed to determine whether alien is deportable for firearms offense conviction). Similarly, the Board applied the categorical approach to the aggravated felony classification in a series of decisions.

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[7] Even those states that have not adopted the MPC still provide gradations that put fraud offenses within M(i) under the formal categorical approach or would allow a loss to established under the modified categorical approach. *See, e.g.,* Del. Code tit.11, §§841(c)(1) and (3), 843 (where value of property obtained by fraud is "$1,000 or greater" offense is class G felony; where value is greater $50,000 but less than $75,000 offense is class E felony).

See, e.g., Matter of Sweetser, 22 I & N Dec. 709-712-13 (BIA 1999) and Test at 996n61 and cases cited. This application of the categorical approach occurred against the backdrop of significant changes in the immigration law with Congress leaving this fundamental rule untouched. *See, e.g., King v. St. Vincent's Hosp*. 502 U.S. 215, 221n.9 (1991) (the Court "will presume congressional understanding of . . . interpretive principles").[8]

In short, this is an area of immigration law where, despite the government's argument for a radical

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[8] The government attempts to attack the foundation of the categorical approach by citing three earlier administrative decisions that hardly serve this intended purpose. *Matter of Chow* 20 I & N Dec. 647 (BIA 1993) does say in dicta that the alien admitted the firearm was automatic, but this allegation had been charged in the criminal indictment to which the alien had entered a guilty plea, while deportability was actually sustained under the amended version of the firearms ground of deportability not requiring an automatic weapon. *Compare Matter of Pichardo-Sufren*, 21 I & N Dec. at 336 (Board en banc declined to sustain a firearms deportation charge based upon alien's admission in Immigration Court that the weapon was a firearm, because record of conviction did not establish this fact, citing the same categorical approach used in CIMT determinations). *Matter of PC*, 8 I & N Dec. 670, 674. (BIA 1960) merely holds that, under New York criminal procedure, the affidavit and laboratory analysis were part of the charge on which the alien had been tried and convicted. *Matter of L*, 5 I & N Dec. 169 (A.G. 1953) involves the ground of inadmissibility for suspecting a person to be a narcotics trafficker [now 8 U.S.C. §1182(a)(2)(C)(i)], which does not even require a conviction.

departure from almost a century of precedent, "the slate is not clean." *Galvan v. Press*, 347 U.S. 522, 530 (1954) (Frankfurter, J.). Similarly, the government, which relied on the categorical approach in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), reads that decision much too narrowly, GBr. 35-36, for this Court made clear that "The case before us concerns the application of the framework just set forth [Taylor] to Luis Duenas-Alvarez. . ." Moreover, the government's citation to those provisions of the Act allowing receipt of evidence before the Immigration Court, GBr. 38, merely begs the question of whether loss must be established by conviction.

The government's attempt to brush *Taylor v. United States,* 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) aside, GBr. 40, ignores the fact that fairness and efficiency concerns clearly animate both these decisions, while, as discussed below, Sixth Amendment concerns are also present, given the dual role played by aggravated felony definitions as part of a federal criminal statute, 8 U.S.C. §1326(b). Furthermore, while the Board and former Attorney General Mukasey may have accepted the enhanced burdens on behalf of the Executive Office for Immigration Review,[9] this does not address the burdens imposed upon the federal courts, the United States Citizenship & Immigration Services, United States Immigration & Customs Enforcement, and even the

[9] The latest statistical report after Attorney General Mukasey's departure showed a further increase in the caseload of the Immigration Courts. U.S. Department of Justice: Executive Office for Immigration Review, *FY 2008 Statistical Yearbook* at B7 (April 2009) (total new cases received: 351,477, with 291, 781 of those removal proceedings).

consular officers of the Department of State, all of whom would have to address the aggravated felony issue presented here under the entirely new paradigm of independent factual findings. *See also* Brief of Amici Curiae ACLU, *et al* at 34-37. This new paradigm would also implicate concerns of judicial economy especially as courts struggle to interpret and implement the undefined tethering test. [10]

Finally, on burden of proof, the government gets this issue backward. GBr. 43. In requiring a conviction for deportation, Congress has mandated proof beyond a reasonable doubt as the predicate to removal while the

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[10] None of the cases cited by the government in an effort to paint the tethering test as a garden variety undertaking, GBr. at 44n.14, helps the government very much. Thus *Obasohan v. United States Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007) actually rejects reliance upon a restitution order and *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005) reverses a removal order where the alien had entered a guilty plea to a count charging less than $10,000. *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2001) (Alito, J.) involved an alien who had entered a guilty plea to count charging a loss in excess of $10,000), while *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002) appears to have read the guilty plea to an amount over $10,000. While *Alaka v. Attorney Gen. of the United States*, 456 F.3d 88 (3d Cir. 2006) seems to have involved a jury conviction, the amount charged in the count of conviction was under $10,000 and the issue a jury charge on loss was not reached. Nor was the jury charge issue reached in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), *cert. denied*, 127 S.Ct. 2003 (2007), which was issued over a persuasive dissent and involved a conviction from the Second Circuit, where subsequent authority made clear that the jury had to have been instructed on loss for an (M)(i) charge to be sustained. *See Dulal-Whiteway v. DHS*, 501 F.3d 116, 128 (2d Cir. 2007),

government need only establish the existence of a conviction by clear and convincing evidence. By contrast, reliance upon sentencing or restitution determinations to establish removability, which determinations are governed by a preponderance of the evidence standard, permits removability to be based upon a standard of proof below clear and convincing evidence.

III. BOTH THE CRIMINAL RULE OF LENITY AND THE IMMIGRATION RULE OF LENITY OR NARROW CONSTRUCTION APPLY HERE

If this Court considers §1101(a)(43)(M)(i) ambiguous, two rules of construction require that ambiguity to be resolved in Petitioner's favor and preclude application of *Chevron* deference. The first is the criminal rule of lenity. The second is the rule of lenity or narrow construction for deportation statutes.

A. The Criminal Rule Of Lenity Precludes Application Of Chevron Deference Because The Aggravated Felony Definition Is Integral To A Criminal Statute

The aggravated felony definition contained in §1101(a)(43)(M) forms an integral part of a criminal statute, 8 U.S.C. §1326(b)(2), in addition to defining a removable offense. Accordingly, any ambiguity that the Court might find in the meaning of this dual purpose statute triggers the rule of lenity and not deference to the BIA, which has no role to play in interpreting criminal statutes. The criminal reentry provision, 8 U.S.C. §1326(b)(2) states that the maximum sentence for the federal crime of illegal reentry into the United

States after a prior deportation is increased from 2 years to 20 years for any alien "whose removal was subsequent to a conviction of an aggravated felony." Furthermore, the aggravated felony definition as both a ground of removal and a criminal penalty first entered the Act in the same legislation, Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4191 (Nov. 18, 1988). While the government seeks to downplay the definition of an aggravated felony as of "collateral relevance in a separate criminal prosecution," GBr. 49, the criminal implications are neither speculative nor "collateral." Many thousands of prosecutions for violation of 8 U.S.C. §1326 occur each year.[11]With this number of prosecutions, the definition of the term "aggravated felony"—a definition determining whether a defendant is subject to a sentence *ten times* greater than the usual maximum—has substantial recurring consequences in criminal law.

When a statute such as §1101(a)(43)(M) serves a dual criminal and civil purpose, the statute still must maintain a constant meaning. Giving the "same words a different meaning for each [context] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371 (2005). *See also United States v. Santos*, 128 S.Ct. 2020, 2030 (opinion of Scalia, Souter, Ginsburg, JJ) (lenity an important concern in dual use statutes that have criminal application). Thus, the meaning

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[11] In fiscal year 2008, immigration cases accounted for 51% of all federal criminal cases. TRAC Reports, *www.http://tra.syr.edu/tracreports/crim/201/(visited* April 14, 2009). *See also* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 Hastings L. J. 137, 161-62n.125 (most commonly charged crime is illegal reentry, and in 2005, over 11,000 prosecutions occurred under 8 U.S.C. §1326).

accorded this statute in the civil context will also apply as part of criminal law and must therefore consistent with the principles for interpreting criminal statutes. *See, e.g.*, *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity in interpreting a criminal statute invoked in a civil action). "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Clark*, 543 U.S. at 380. Far from allowing "the tail to wag the dog," GBr. 49, this Court has mandated that in statutory interpretation, "[t]he lowest common denominator . . . must govern." *Clark*, 543 U.S. at 380.

The principle of statutory interpretation in light of the lowest common denominator prevents deference to the BIA's interpretation of this criminal statute. Agency deference occurs in two distinct steps: A court first determines if a statute is ambiguous using all the traditional tools of statutory construction, and then only if ambiguity exists, will a court defer to the implementing agency's construction of the statute if it is reasonable. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). However, when construing a criminal statute, the analysis cannot pass the first step because any statutory ambiguity mandates a construction favorable to the defendant under the rule of lenity, and not deference to the agency. *See, e.g.*, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (applying the rule of lenity to a tax statute in a civil setting when the statutory construction had criminal applications).

This Court's prior cases mandate this conclusion. Thus this Court has twice interpreted the definition of "aggravated felony" in §1101(a)(43) without citing *Chevron* or so much as mentioning the possibility of deferring to the BIA's interpretation of its statute. *Lopez v. Gonzales*, 549 U.S. 47 (2006) (interpreting "illicit trafficking" as an aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (interpreting "crime of violence" as an aggravated felony). In *Leocal*, a civil deportation case, this Court addressed whether a state DUI conviction constituted an aggravated felony. The BIA had determined that a DUI was an aggravated felony because 8 U.S.C. §1101(a)(43)(F) stated that a "crime of violence" as defined in another definitional provision of code, 18 U.S.C. §16, constituted an aggravated felony, and the state DUI conviction at issue was a "crime of violence." A unanimous Court (Rehnquist, C.J.) held that such an offense was not an aggravated felony, relying in part on the rule of lenity: "Even if §16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with §16 in the deportation context, §16 is a criminal statute, and it has both criminal and noncriminal applications." *Leocal*, 543 U.S. at 11 n.8. The Court held that the §16 definitional section, a section not only analogous to §1101(a)(43) in purpose, but also incorporated into §1101(a)(43), must be interpreted in light of the rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Id.*

The government argues that it is of no consequence that this Court has twice, in *Leocal* and *Lopez*,

interpreted the aggravated felony definition without deferring to the BIA's interpretation because those "components of the aggravated-felony definition were incorporated directly from definitional sections of the federal criminal code." GBr. 48. However, this Court explained in *Leocal* that §16 simply provided "a general definition of the term 'crime of violence,'" *id.* at 381, much in the same way §1101(a)(43) provides a general definition of the term "aggravated felony." In essence, the government's argument reduces to the claim that this Court should treat two definitional sections differently in the same context simply because one is located in Title 8 and the other in Title 18 of United States Code. But simply placing a criminal provision outside Title 18 does not kill lenity. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (applying the rule of lenity because of concern regarding a criminal provision of Title 26, 26 U.S.C. §5871).

Indeed, the provision's location in the Act is of no practical consequence to a defendant who receives a twenty year sentence (ten times what he would otherwise) pursuant to the aggravated felony definition in Title 8. Furthermore, neither *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) nor the more recent decision in *Negusie v. Holder*, 129 S.Ct.1159 (2009) support the government's position because neither decision involved a part of the Act that was part of a federal criminal statute.

Attempting to evade the logic of this Court's two decisions interpreting the aggravated felony definition without deferring to the BIA's interpretation, the

government argues that this Court has deferred to agency interpretations of statutes that may be criminally enforced. Yet the two cases cited by the government, *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995) (interpreting regulation issued by the Secretary of the Interior under the Endangered Species Act) and *United States v. O'Hagan*, 521 U.S. 642 (1997) (prosecution for violation of an SEC Rule), involved vastly different statutory schemes. Under the statutory schemes in those two cases, Congress had explicitly provided for a criminal consequence for violating an agency regulation. *See* 16 U.S.C. 1540(b)(1) (providing criminal penalties for an individual who violates "any regulation issued in order to implement" the Endangered Species Act); 15 U.S.C. §78n(e) (defining specific types of securities violations and directing the SEC to "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative" which may include criminal penalties). Thus, in both instances, Congress explicitly delegated authority to the agency to develop regulations that could have criminal consequences, and these cases simply defer to the agency's construction of its own regulations. There is no such delegation here to draft regulations with criminal consequences, and ambiguities thus should not be resolved by *Chevron* deference but rather by the rule of lenity, as in *Leocal*.

The government also argues that deferring to the BIA's interpretation of the criminal provision "would obviate any potential for different constructions in the removal and criminal-sentencing contexts." GBr. 49. However, the government ignores the reality that applying the rule of lenity and holding that aggravated

felonies include only crimes where all necessary factors, such as the loss amount, are proven to the jury would reach that same result with more desirable consequences. That holding would necessarily mitigate any "*Apprendi* problem" because a jury would have previously found all necessary factors to impose a ten-fold sentencing increase. In that respect, application of the rule of lenity instead of deference to the BIA avoids an awkward and impractical consequence. The government concedes that if this Court defers to the BIA, the jury in the *later proceeding* must make a determination of the loss inherent in the *prior offense* beyond a reasonable doubt. GBr. 50. Thus, deference to the BIA shifts the burden of finding the loss amount from the jury that actually tried the first case to a jury that is trying a later, unrelated case. One of the original motivations of the application of the categorical approach was avoiding precisely this situation, where a later jury is forced in essence to retry a prior conviction. *See Taylor*, 495 U.S. at 600-01 (questioning whether allowing a sentencing court to examine facts underlying a conviction would pose problems such as allowing the defendant to produce a trial transcript or witnesses at the later sentencing).

Additionally, applying the rule of lenity instead of deferring to the BIA has the benefit of greater overall consistency in the application of the statute. If federal courts defer to the BIA's interpretation of the statute, criminal sentencing will depend on the BIA's current interpretation of the aggravated felony definition. *See generally Brand X*, 545 U.S. 967 (holding that agencies maintain the power to interpret their statutes even after a federal court's interpretation of statutory

ambiguity). The BIA's interpretation of the meaning of aggravated felony changes. *See, e.g.*, *Leocal*, 543 U.S. at 5 n.2 (noting a changing BIA interpretation of aggravated felonies). Therefore, a defendant could face a higher sentence in one year than he would in another year for the same underlying conviction and the same underlying criminal conduct, due simply to a change in the BIA's position.

B. The Immigration Rule of Lenity Or Narrow Construction Should Apply and Preclude Chevron Deference.

Even if the criminal rule of lenity were held inapplicable, the rule of lenity or narrow construction for deportation provisions should apply and preclude *Chevron* deference. At the outset, of course, resort to *Chevron* deference is not appropriate because the plain language of §1101(a)(43)(M)(i) compels the conclusion urged by Petitioner. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Furthermore, *Chevron* itself requires resort to traditional rules of statutory construction. 467 U.S. 843 n9. *See also Cardoza-Fonseca*, 480 U.S. at 446; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 (traditional tools include textual canons). Indeed, as *McNary v. Haitian Refugee Ctr., Inc*, 498 U.S. 479, 496 (1991) holds "It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."

Among these traditional tools is the rule of lenity of narrow construction enunciated by *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948), which requires deportation

provisions to be narrowly construed so as to give the alien as much protection as possible. Grounded in harm to the alien from deportation,[12]this rule has provided a backdrop to all immigration legislation over the past 60 years and has never been supplanted by Congress. *See also INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. INS*, 376 U.S. 120, 128-29 (1964) (even if construction of deportation provision in doubt, court "would nevertheless be constrained by accepted principles of statutory construction in this area to resolve that doubt in favor the [alien]"). Accordingly, as a traditional canon of statutory construction, this rule should be applied at the step one stage of *Chevron* analysis. *See, e.g.*, John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 Geo. Immig. L.J. 605, 623 (2004) ("To the extent that the rule of lenity . . . is applicable to step one of the *Chevron* analysis, it would tend to serve as the tie-breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]"); *Matter of Small*, 23 I & N Dec. 448, 45 (BIA 2002)

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[12] In seeking to downplay a recognition of this harm dating back to the founding era, GBr. at 46n.15, the government takes James Madison's remarks out of context, for he was actually protesting against deportation provisions allowing the President to remove an alien on suspicion without the safeguards attendant upon a criminal conviction. James Madison, *Writings* 623-624, "Report on the Alien and Sedition Acts," (Library of America 1999, Jack N. Rakove, ed.). Under the government's position, Mr. Nijhawan will be deported without having the conviction required for deportation.

(Rosenberg, J., dissenting) (rule should apply "even to interpretations of the plain language of the statute under the first prong of the test prescribed in *Chevron")*. Even if this rule were applied at the second stage, as suggested by dicta from the majority opinion in *Negusie*, 129 S.Ct. at 1174, albeit in a case not involving either a deportation provision or part of a federal criminal statute, the rule would still mandate that the Board's rule was unreasonable because not the most narrowly tailored interpretation of a deportation provision, a point underscored by *Dulal-Whiteway v. U.S. Dep't of Homeland Security*, 501 F.3d 116, 128 (2d Cir. 2007), which reached the exactly opposite result from *Matter of Babaisakov*[13] 24 I & N Dec. 306 (BIA 2007) in the Circuit where Mr. Nijhawan was convicted.[14]

Two additional factors counsel against deference. First, the actual Board decision here was non-precedential and thus merits no deference. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147,1158 (9th Cir. 2008) (collecting Court of Appeals cases holding no deference due non-precedential BIA decisions); *Matter of Yanez*, Int. Dec. 3473n.8 (BIA 2002) (en banc), *overruled on*

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[13] Since *Babaisakov* formed no part of the decision below, the government's attempt to defeat certiorari by reliance upon that decision gave rise to Petitioner's argument about retroactivity. Moreover *Dulal-Whiteway* highlights the principal vice of retroactivity, for retroactive application of that decision would undermine controlling precedent where Petitioner was convicted.

[14] Certainly nothing in *Negusie* suggests that, as the government apparently urges, lenity should be addressed only after deference has been accorded.

other grounds, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (no reliance can be placed upon non-precedent BIA decisions)[15] Second, *Babaisakov*, 24 I & N Dec. at 306-07 itself involved a guilty plea by the alien in a removal proceeding where the government did not introduce either the plea agreement or plea transcript and did not concern a jury verdict. Thus, at the most elementary level *Babaisakov* is dicta as far as this case is concerned as is *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008), which involved only crimes involving moral turpitude.

C. The Government Misconstrues Sentencing

The government misapprehends what transpired at sentencing, well after the jury had returned a verdict, following no instruction to find any loss. Both the government and the District Court specifically recognized that the agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. PBr. 9—12. Since the

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[15] In seeking to conjure up a parade of horribles, GBr. at 49n. 18, by intimating that acceptance of the Petitioner's position on deference would somehow threaten the BIA's construction of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A), the government fails to note that this presents a separate issue on a pending certiorari petition—one the government opposes—given the conflict among the Circuits on the meaning of 8 U.S.C. §1101(a)(43)(A), including whether Board precedent has actually construed this term in a manner that would merit *Chevron* deference. *See Canales-Matamoros v. Holder*, 2008 U.S. App. LEXIS 14721 (11th Cir. 2008) petition for cert. pending No. 08-643 (filed Nov. 11,2008).

requested instruction[16] was refused and the jury was never instructed to make any finding on loss, there was no occasion to argue that loss should be limited by the share allocated to a specific defendant, especially since the jury convicted without any verdict on loss, whether individually or jointly and severally. Given the absence of any charge on loss, much less a charge that such loss, once found, could be attributed to every member of the conspiracy, *Salinas v. United States*, 522 U.S. 52 (1997) is irrelevant, except for illustrating the minimal conduct required to bring a defendant within the web of a federal conspiracy prosecution.[17] In the final analysis the sentencing proceedings are red herring. The statute requires conviction, the jury was not instructed to find loss, and Mr. Nijhawan was thus not convicted of loss.

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[16] The government does not dispute either the authenticity of the District Court record or that such a record is properly subject to judicial notice, while even the BIA's own regulations permit judicial notice of the contents of official documents as part of the administrative record. 8 C.F.R. §1003.1(d)(3)(iv).

[17] To the extent that the government seeks to inflate Mr. Nijhawan's role, its does so not by reference to the facts the jury was charged to find but rather the Presentence Investigation Report. GBr. 5.

CONCLUSION

The plain language of the statute requires that an alien be convicted of the required loss under the categorical approach. That did not happen here. Even if the plain language is considered ambiguous, the ambiguity should be resolved in the Petitioner's favor under the rule of lenity applicable either to a federal criminal statute or a deportation provision. Accordingly, the decision below should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center
Suite 2600
Newark, NJ 07102
(973) 622-8176

PETER C. SALERNO
208 East 51st Street
New York, NY 10022

Attorneys for Petitioner