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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) respectively were aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i), rendering Petitioners, Akio and Fusako Kawashima, removable.

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BRIEF ON THE MERITS

Petitioners, Akio Kawashima and his wife, Fusako Kawashima, respectfully submit this Brief on the Merits and ask the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case with instructions to set aside the Orders of Deportation.

OPINIONS BELOW

The final opinion of the Ninth Circuit denying Petitioners' motion for rehearing and rehearing *en banc* appears in the Appendix to the Petition for Writ of Certiorari (Pet. App. A, 1a-31a)* and is reported at *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010). Also appearing in the Appendix to the Petition are the initial decision of the Ninth Circuit (Pet. App. D, 83a-100a), reported at 503 F.3d 997; the court's decision following rehearing (Pet. App. C, 53a-82a), reported at 530 F.3d 1111; and the decision withdrawing the court's prior opinion (Pet. App. B, 32a-52a), reported at 593 F.3d 979.

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

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* Petitioners' Appendix to the Petition for Writ of Certiorari is referred to and cited herein as "Pet App. _, _a."

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 27, 2010. Pet. App. B, 32a-52a. The Ninth Circuit denied Mr. and Mrs. Kawashima's motion for rehearing and for rehearing *en banc* on August 4, 2010. Pet. App. A, 1a-31a.

The Petition for Writ of Certiorari was timely filed on November 1, 2010, and was granted on May 23, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(43), which defines the term "aggravated felony," is included in its entirety in the Statutory Appendix ("St. App.") contained herewith. Also included in the Statutory Appendix are the relevant sections of the Internal Revenue Code, 26 U.S.C. § 7201 and 26 U.S.C. §§ 7206(1) and (2).

The particular statutory provision involved in this case is: **8 U.S.C. § 1101(a)(43)(M)**

> [An aggravated felony is] an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

STATEMENT OF THE CASE

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

In 1997, Mr. Kawashima was charged with subscribing to a false statement on the 1991 corporate tax return, in violation of 26 U.S.C. § 7206(1). Mrs. Kawashima was charged with aiding and assisting in the preparation of a false statement on a tax return, in violation of § 7206(2).[2] On August 11, 1997, Mr. Kawashima pled guilty to one count in violation of § 7206(1). Also, on August 11, 1997, Mrs. Kawashima pled guilty to one count in violation of § 7206(2).

In his plea agreement negotiated by his counsel, Mr. Kawashima stipulated that he "knew

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[1] Aiko Kawashima is referred to as Mr. Kawashima and Fusako Kawashima is referred to as Mrs. Kawashima herein.

[2] All references to code sections are to Title 26 unless otherwise noted.

that the return was materially false in that it failed to report all of the taxable income that NSC earned during the taxable year ended October 31, 1991." Pet. App. I, 119a. In her plea agreement, Mrs. Kawashima stipulated that she "acted willfully in assisting her husband to underreport income" on the corporate tax return. Pet. App. J, 130a. In their respective plea agreements, there was no admission of fraud or deceit by either Mr. or Mrs. Kawashima.

Mr. Kawashima stipulated that the total actual tax loss was $245,126.[3] The Government and the Kawashimas stipulated that the applicable sentencing guideline was 2T1.3 of the Sentencing Guidelines, which covers tax crimes. Pet. App. I, 120a; Pet. App. J, 130a.

On August 3, 2000, almost three years after the pleas were entered,[4] the Immigration and

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[3] The "actual tax loss" as stated in the plea agreement was the gross amount of income omitted and not reported on the tax return for the year of conviction and for other tax years considered relevant for sentencing purposes. "Actual tax loss" for sentencing purposes does not include any allowable deductions to arrive at a net income figure against which the applicable tax rate is applied, which then would constitute the "actual" revenue or tax loss to the Government. *United States v. Valentino*, 19 F.3d 463, 466 (9th Cir. 1994) (unclaimed allowable depreciation deduction not considered for a § 7206(1) conviction).

[4] On April 28, 1995, the Attorney General issued a memorandum to all federal prosecutors entitled "Deportation of Criminal Aliens." *See DOJ Criminal Resource Manual* at 1920-41. The memorandum was

Naturalization Service ("INS") (now the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security) issued separate notices to appear, alleging that Mr. and Mrs. Kawashima were removable (deportable)[5] because their convictions under §§ 7206(1) and (2) constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i).[6]

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designed to effect the "deportation of criminal aliens from the United States as expeditiously as possible." *DOJ Criminal Resource Manual* at 1920. It required aggravated felons to be deported unless "extraordinary circumstances exist" and any exceptions to this policy required written approval of the Department of Justice. *Id.* The Manual in Appendix B set forth a standard plea agreement form, where the immigrant stipulates that he committed an aggravated felony and is deportable. *Id.* at Appendix B. The plea agreement executed by the Government and the Kawashimas in 1997 did not follow this form. The Government waited almost four years to initiate removal proceedings, suggesting uncertainty within the Department of Justice and INS on whether the Kawashimas' crimes of conviction were aggravated felonies.

[5] Aliens convicted of an aggravated felony after admission are deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

[6] Hereinafter, "(M)(i)."

8 U.S.C. § 1101(a)(43)(M)[7] defines "aggravated felony"[8] as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The notices from the INS did not allege that the Kawashimas' convictions constituted aggravated felonies *for tax evasion* under 8 U.S.C. § 1101(a)(43)(M)(ii).[9] The Kawashimas were not convicted of tax evasion as described in 26 U.S.C. § 7201.

After a removal hearing, the Immigration Judge ("IJ") concluded that Mr. and Mrs. Kawashimas' convictions of their respective tax offenses were "aggravated felonies" under (M)(i) and ordered them removed to Japan. The Kawashimas appealed the decision.

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[7] Hereinafter, "(M)."

[8] 8 U.S.C. § 1101(a)(43) lists the offenses that are "aggravated felonies" as subparagraphs (A) through (U) *See* St. App. 1a-5a.

[9] Hereinafter, "(M)(ii)."

The Board of Immigration Appeals ("BIA") at first remanded the case because of procedural defects. After further proceedings, the IJ denied the Kawashimas' motion to terminate the proceeding and ordered them removed. Pet. App. E, 106a. The BIA affirmed, adopting the IJ's decision. Pet. App. G, 108a.

The Kawashimas timely filed petitions for review in the United States Court of Appeals for the Ninth Circuit. The Kawashimas sought review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen, which were consolidated under 8 U.S.C. § 1252(b)(6).

In a decision filed September 18, 2007, the Ninth Circuit denied Mr. Kawashima's petition, holding that the Kawashimas' convictions under §§ 7206(1) and (2) "necessarily 'involve fraud or deceit'" because the provisions require the Government to prove that the Kawashimas acted "willfully." *Kawashima v. Gonzales*, 503 F.3d 997, 1000 (9th Cir. 2007) ("*Kawashima I*"). Pet. App. D, 87a. The Ninth Circuit held that the language of (M)(i) was clear. *Id.* at 89a. The court also held that the Government was a qualifying "victim" and that the revenue loss in excess of $10,000 satisfied the monetary "loss" requirement of (M)(i). The Ninth Circuit concluded that "because such interpretation does not lead to an absurd or unreasonable result, our inquiry must end." *Id.* at 87a.

As to Mrs. Kawashima, the Court granted the petition because the court was unable to conclude that Mrs. Kawashima's conviction resulted in a loss

to the Government in excess of $10,000. *Id.* at 94a-95a.

The Kawashimas then petitioned the Ninth Circuit for a rehearing, which was granted. The court, in a *per curiam* decision, withdrew its 2007 decision and held that (M)(i) required that the crime of conviction must establish a loss in excess of $10,000 as an element of the crime, which the Kawashimas' convictions did not so establish. *Kawashima v. Mukasey*, 530 F.3d 1111, 1118 (9th Cir. 2008) ("*Kawashima II*"). Pet. App. C, 66a. Accordingly, the Kawashimas were not to be deported.

The Government then filed a petition for rehearing. While the Government's petition for rehearing was pending, the Court granted certiorari in *Nijhawan v. Attorney General*, 523 F.3d 387 (3d Cir. 2008), *cert. granted sub nom. Nijhawan v. Mukasey*, 555 U.S. 1131 (2009). The Government then requested the Ninth Circuit to stay any consideration of its petition for rehearing until the Court decided *Nijhawan*. The Government's request for a stay was granted. After the Court issued its decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Ninth Circuit ordered the parties to file supplemental briefs on *Nijhawan*'s impact on the pending Kawashima case.

After receiving supplemental briefs, the Ninth Circuit withdrew its prior decision in *Kawashima II* and held that the tax convictions of Mr. and Mrs. Kawashima were aggravated felonies, subject, in Mrs. Kawashima's case, to an evidence review to

determine that the loss to the Government was actually in excess of $10,000. *Kawashima v. Holder*, 593 F.3d 979, 981, 985-87, 989 (9th Cir. 2010) ("*Kawashima III*"). Pet. App. B, 33a, 43a-46a, 52a. The Ninth Circuit held that "according to the plain meaning of the statutory language, convictions for violating §§ 7206(1) and (2) in which the tax loss to the government exceeds $10,000 constitute aggravated felonies under subsection (M)(i)." *Id.* at 39a (*citing Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008), *cert. denied sub nom. Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009)).

The Court in *Nijhawan* held that the crime of conviction under 8 U.S.C. § 1101(a)(43) does not require the body deciding guilt to find a loss of $10,000 as an element of the crime. *Nijhawan*, 129 S. Ct. at 2298. It is rather a "particular circumstance" which can be determined by the evidence in the case. *Id.*

Accordingly, Mr. Kawashima's petition for review of the BIA's affirmance of the IJ's removal order was denied. Pet. App. B, 52a. With respect to Mrs. Kawashima, the Ninth Circuit remanded her case to the BIA "so that it may determine in light of the Supreme Court's holding in *Nijhawan*, what types of evidence it may consider to determine the total loss suffered by the government as a result of Mrs. Kawashima's crime." *Id.* at 49a.

The Kawashimas timely filed a petition for rehearing and rehearing *en banc* with the Ninth Circuit, which was denied on August 4, 2010. The Ninth Circuit ordered that its opinion in *Kawashima*

III be withdrawn, and the Court filed a new opinion contemporaneously with the filing of the Order denying rehearing. *Kawashima v. Holder*, 615 F.3d 1043, 1046 (9th Cir. 2010) ("*Kawashima IV*"). Pet. App. A, 2a.

The Ninth Circuit, for the most part, reiterated its holding in *Kawashima I* and *Kawashima III*, that the crimes of which the Kawashimas were convicted were aggravated felonies under (M)(i). *Id.* at 23a-24a. The court remanded Mrs. Kawashima's case to the BIA to determine whether the evidence in the record was sufficient to establish the total loss to the Government as a result of Mrs. Kawashima's crime. *Id.* at 27a.

Three judges of the Ninth Circuit dissented from the denial of the rehearing *en banc* in an opinion by Judge Susan Graber. *Id.* at 3a-12a.

SUMMARY OF ARGUMENT

(M)(i) and (M)(ii) of the aggravated felony statute, 8 U.S.C. § 1101(a)(43), must be read together as covering two distinct categories of crimes: fraud or deceit crimes on one hand, and revenue/tax crimes on the other hand. (M)(i) deals with "loss to victim(s);" (M)(ii) deals with "revenue loss" to the Government.

As a matter of statutory construction, different words in parallel provisions of the same statute were inserted by Congress for a purpose. *See Lopez v. Gonzales*, 549 U.S. 47, 55 (2006); *Russello v. United States*, 464 U.S. 16, 23 (1983). Revenue losses suffered by the Government as a result of tax crimes were not intended to be covered by Congress in (M)(i), which instead covers "fraud or deceit" crimes resulting in "losses to victims."

The Court has consistently ruled that effect should be given to all provisions of a statute so that no part of the statute will be superfluous. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558, 1560 (2009); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Tax evasion, among some other tax crimes, has fraud as an element of the crime. (M)(ii), involving tax evasion, would be rendered superfluous if tax evasion also fell within (M)(i).

Giving effect to both (M)(i) and (M)(ii) and rendering no provision superfluous leads inexorably to the conclusion that tax crimes are not covered by

(M)(i), and are only covered in (M)(ii). The canon of statutory construction that the specific limits and controls the general also coalesces with other canons to compel the conclusion that tax evasion is the only tax crime which Congress designated as an aggravated felony under (M).

The Sentencing Commission, established in 1987, works closely with Congress and was delegated by Congress to designate categories of offenses for sentencing purposes. The Commission's separate treatment of fraud or deceit crimes and tax crimes, in coordination with Congress, lends weight to Petitioners' contention that tax crimes were not intended by Congress to be covered in (M)(i) as "offenses involving fraud or deceit" when Congress expanded the definition of "aggravated felony" in 1994.

Applying the canons of statutory construction and considering the categories of crimes designated by the Sentencing Commission, it must be concluded that tax crimes are not covered by (M)(i). Accordingly, the Kawashimas' tax crimes of conviction are not aggravated felonies under (M)(i).

Even if some tax crimes were intended to be covered by (M)(i), the Kawashimas' tax crimes of conviction did not contain fraud or deceit as an element and would not, therefore, be aggravated felonies under (M)(i). The Ninth Circuit was wrong in holding that because the Kawashimas acted "willfully," their convictions necessarily involved "fraud or deceit." "Willfully" is an element of all tax crimes covered in 26 U.S.C. §§ 7201-7207. *See*

United States v. Bishop, 412 U.S. 346, 361 (1973). Willfulness constitutes a voluntary, intentional violation of a known legal duty. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976). Proving willfulness does not establish fraud. *See Pomponio*, 429 U.S. at 12; *Bishop*, 412 U.S. at 361; *Spies v. United States*, 317 U.S. 492, 498 (1943).

Sections 7206(1) and (2), of which the Kawashimas were convicted, are perjury statutes in which "fraud or deceit" are not essential elements. *See Wright v. Comm'r*, 84 T.C. 636, 643 (1985) (acquiesced to by the Commissioner of Internal Revenue).

The crime of conviction under § 7206(1) is complete upon proof that the taxpayer willfully and intentionally made a false statement on his return under the penalty of perjury. Section 7206(2) only requires the showing of "aiding or assisting" in the material falsity. Fraud or deceit is not a necessary element of a crime under either §§ 7206(1) or (2), and the Government did not need to prove a fraudulent intent or an intent to deceive to obtain convictions under § 7206. The Kawashimas' crimes, therefore, are not covered by (M)(i).

If, nevertheless, the Court concludes that (M) is ambiguous, the Court must apply the rule of lenity and construe the statute in favor of the Kawashimas. *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Because (M) is an immigration statute that has criminal law applications, the criminal rule of lenity also applies. *See Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577,

2589 (2010); *Leocal*, 543 U.S. at 12 n.8. Due Process and fair notice require clarity and certainty about what the law requires and forbids. Driven by the Court's constitutional adherence to due process, the rule of lenity has evolved and the Court has applied the rule in a number of immigration cases because it is fundamentally unfair that an immigrant suffer the catastrophic sanction of deportation and banishment grounded on an unclear and ambiguous statute. If the Court does not find that the text of the statute clearly excludes convictions under §§ 7206(1) and (2), the Court must at the very least conclude that (M) is an unclear and ambiguous statute and apply the rule of lenity in favor of the Kawashimas.

For these reasons, the Court should reverse the decision of the Ninth Circuit in this case and remand the case with instructions to set aside the orders of deportation.

ARGUMENT

I.

Applying Time-Honored Canons of Statutory Construction, the Kawashimas' Crimes of Conviction Are Not Offenses "Involving Fraud or Deceit" Under 8 U.S.C. § 1101(a)(43)(M)(i).

Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). Subparagraphs (M)(i) and (M)(ii) are among the crimes listed as "aggravated felonies." *See* 8 U.S.C. § 1101(a)(43)(M). The plain rationale behind this legislation and the term "aggravated felony" is that aliens who commit serious crimes should not be permitted to stay in the United States. However, the Kawashimas did not plead guilty to, and were not convicted of, aggravated felonies as defined by 8 U.S.C. § 1101(a)(43), specifically § 1101(a)(43)(M)(i).

As a matter of law, applying the time-honored canons of statutory construction and fundamental notions of due process and fair notice, the Kawashimas should not be deported from this country and forced to leave their home and restaurant business in California, where they have lived, worked, and raised a family for over the past 25 years.

As the Court stated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*:

> The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent [citing cases]. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. 837, 843 n.9 (1984); *accord Cardoza-Fonseca,* 480 U.S. at 447-448.

In embarking upon the construction of a statute, the starting point is the language employed by Congress. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In this case, (M)(i) addresses "loss" to a "victim" as a result of an offense involving fraud or deceit. On the other hand, (M)(ii) addresses "revenue loss" to the Government. (M)(ii) specifically deals with tax evasion which is tax fraud. If Congress intended that tax fraud be covered in (M)(i), there was no need to enact (M)(ii). (M)(ii) would be superfluous. Similarly, if Congress intended other tax crimes to be "aggravated felonies," Congress could easily have so provided in (M)(ii), rather than singling out tax evasion as an aggravated felony. *See Kucana v. Holder*, 130 S. Ct. 827, 838 (2010).

A. Where Congress Uses Particular Language in One Section of a Statute and Omits it in Another Section, it is Generally Presumed that There Was Reason for the Difference in the Language Used. Congress' Use of "Revenue Loss" in (M)(ii) Indicates that Congress Intended that Violations of Revenue Loss Statutes § 7201 and § 7206 Were Not To Be Covered by (M)(i).

As the Court stated in *Russello v. United States*:

> [Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

464 U.S. 16, 23 (1983) (quotation omitted); *accord Kucana v. Holder*, 130 S. Ct. 827, 838 (2010); *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009); *Lopez v. Gonzales,* 549 U.S. 47, 55 (2006); *Custis v. United States*, 511 U.S. 485, 492 (1994); *Cardoza-Fonseca*, 480 U.S. at 432. In this case, different words in separate provisions of the same statute were inserted for a purpose: loss to a victim or victims in

(M)(i) *versus* revenue loss to the Government in (M)(ii).[10]

The express language of (M)(i) and (M)(ii) is indicative of two separate categories or classifications of crimes. Subsection (M)(i) addresses crimes based upon fraud or deceit in which victims suffer a loss in excess of $10,000. Subsection (M)(ii) deals with tax crimes and does not describe the Government as a "victim." Congress carefully chose to describe the crime of tax evasion as one involving a revenue loss to the Government.

The Ninth Circuit failed to recognize that Congress established two separate classifications of crimes in using the phrase "revenue loss to the Government" in (M)(ii), as distinct from a "loss to victims" in fraud or deceit crimes. The Court in *Nijhawan v. Holder* recognized the difference between (M)(i) and (M)(ii), noting that (M)(i) dealt with fraud or deceit causes of action such as those found under state law. 129 S. Ct. 2294, 2302 (2009). In contrast, the Court referred to (M)(ii) as the "internal revenue provision." *Id.* at 2301.

Congress made a distinction between "loss" and "revenue loss" in (M)(i) and (M)(ii) respectively. The Court should conclude that the distinction made by Congress was intentional and purposeful:

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[10] The use of the word "revenue" is specific to taxes. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 397, 399 (1990) (holding that "revenue bills are those that levy *taxes* in the strict sense of the word . . . .") (emphasis added).

revenue losses suffered by the Government as a result of violations of § 7201 or § 7206 were not intended to be covered by (M)(i). *Cf. Russello*, 464 U.S. at 23.

B. Consistent with the Rule Against Superfluities, if Tax Crimes Involving Fraud or Deceit Were Intended to be Covered in (M)(i), There Would be no Reason for Congress to Enact (M)(ii) in 8 U.S.C. § 1101(a)(43).

The Court has repeatedly held as one of its most basic canons of construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley*, 129 S. Ct. at 1566 (*quoting Hibbs*, 542 U.S. at 101).

In *Corley*, the Court recognized that reading one section of a statute as if another parallel section did not exist, as the Ninth Circuit did in this case, violates the cardinal rule of construction that a statute must be read as a whole. *See Corley*, 129 S. Ct. at 1567 n.5. As Professor Singer has written:

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will

> give force to preserve all the words of the statute.

J.D. Shambie Singer, *Statutes and Statutory Construction* § 46.6 (7th ed. 2007) (quotations and citations omitted).

The Court applied these principles in interpreting parallel provisions of a statute in *Leocal v. Ashcroft,* where the Court held:

> Congress' separate listing of the DUI – causing injury offense from the definition of 'crime of violence' in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave §101(h)(3) practically devoid of significance. As we must give effect to every word of a statute wherever possible, see *Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001), the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses.

543 U.S. 1, 12 (2004).

Ignoring this bedrock principle of statutory construction, the Ninth Circuit focused solely on (M)(i), as if (M)(ii), a parallel provision, did not exist.

As Judge Graber observed in her dissent in *Kawashima IV*, ignoring a parallel provision as if it does not exist is simply contrary to basic principles of statutory construction. Pet. App. A, 6a-8a.

If tax evasion involved fraud or deceit under § 7201 and was covered by (M)(i), (M)(ii) would be rendered superfluous. Justice Alito (then Judge) advanced the proposition in *Ki Se Lee v. Ashcroft* that Congress may have added (M)(ii) specifically to cover tax evasion in violation of § 7201, because that tax crime *may not* be covered in (M)(i). 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting).

Respectfully, tax evasion involves fraud at its core. 26 U.S.C. § 7201 and 26 U.S.C. § 6663, the civil fraud penalty statute, are viewed as identical: that an attempt to evade tax is fraud. *See Gray v. Comm'r*, 708 F.2d 243, 246 (6th Cir. 1983) ("The elements of criminal tax evasion and civil tax fraud are identical."); *Hicks Co., Inc. v. Comm'r*, 470 F.2d 87, 90 (1st Cir. 1972); *Moore v. United States*, 360 F.2d 353, 356 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967); *see also* Kenneth E. North, *Criminal Tax Fraud* § 25.8, 25.11 (3d ed. 1998).

In *Spies v. United States*, the Court stated that tax evasion is "the capstone of a system of sanctions which . . . were calculated to induce prompt and forthright fulfillment of every duty under the income tax law . . . ." 317 U.S. 492, 497 (1943). Tax evasion involves willful attempts to defeat and evade a tax, commonly referred to as "tax fraud." *See Black's Law Dictionary* (9th ed. 2009).

The Court observed in *Spies:*

> If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without an intent to defraud, five percent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the additional is 50 percent thereof.

Spies, 317 U.S. at 496-497.

The Court in *Spies* distinguished the predecessor of § 7201 (§ 145(b)) from misdemeanor revenue offenses. "Willful" applies to all revenue offenses, but § 145(b) (now § 7201) is the "climax of this variety of sanctions . . . the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax." *Spies*, 317 U.S. at 497.

The only difference between § 7201 and the civil fraud penalty statute, § 6663, is the burden of proof. *See id.* at 495. In fact, at the time of *Spies*, the civil tax fraud statute that imposed a fraud penalty used the same term: "evade." *See* Internal Revenue Code of 1939 § 239(b) (current version at 26 U.S.C. § 6663) ("Fraud. – If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).). For this reason, a conviction of tax

evasion under § 7201 collaterally estops the taxpayer from contesting the civil fraud penalty. *See Blohm v. Comm'r*, 994 F.2d 1542, 1554 (11th Cir. 1993); *Gray*, 708 F.2d at 246; *Moore*, 360 F.2d at 355.

It is illogical to conclude that convictions under § 7201 involving an attempt to evade (*de facto* fraud) may not be covered in (M)(i), but convictions under §§ 7206(1) and (2), which do not have fraud or deceit as an element of the crime,[11] are covered in (M)(i). For (M)(ii) to have any effect and not be superfluous, Congress must have intended that M(ii) covers *the only* tax offense which is an aggravated felony, namely tax evasion under § 7201 under (M).

The Ninth Circuit recognized that its construction of (M)(i) "could have" rendered (M)(ii) superfluous but speculated, without any basis at all, that it was *conceivable* that Congress *intended* a superfluous provision, in disregard of long established canons of statutory construction. *Kawashima IV*, Pet. App. A, 19a-20a. The Ninth Circuit's speculation is a baseless exception to the rule that a statute must be read as a whole to guard against a superfluous construction. Judge Paez's dissent in *Abreu-Reyes v. INS* underscores the point:

> [A]s the statute reflects, Congress drew a distinction between tax offenses and other crimes involving fraud and deceit. Congress then targeted only the more egregious act of tax evasion, and only when the loss to

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[11] This is discussed in Point II, *infra*.

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

292 F.3d 1029, 1037-38 (9th Cir. 2002) (citations omitted) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003).

The tax crimes of which the Kawashimas were convicted, violations of 26 U.S.C. §§ 7206(1) and (2), are lesser tax crimes than tax evasion. Section 7206(1) is essentially a tax perjury statute. *See Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966) ("The statute [§ 7206(1)] here involved is a perjury statute."); *see also Mertens Law of Federal Income Tax* § 55A:17 (2008); Darrell McGowen et al., *Criminal Tax Fraud* § 16.55 (2d ed. 1994).

Accordingly, the Ninth Circuit's reasoning defies logic: the greater offense (tax evasion) does not necessarily involve "fraud or deceit," but the lesser offense "necessarily" does.

Giving effect to both (M)(i) and (M)(ii), as the Third Circuit held in *Ki Se Lee* and as Judge Graber

articulated in this case, supports the conclusion that (M)(ii) deals with the only tax crime that is an "aggravated felony," namely tax evasion. As such, the Kawashimas should not be deported as a result of their convictions.

C. The Specific Inclusion of Tax Evasion as an Aggravated Felony in (M)(ii) Limits the Breadth of General Crimes of "Fraud or Deceit" Described in (M)(i).

A corollary to the canon that a statute should not be construed to make any provision superfluous is the rule that general words followed by specific words limit the breadth of the general words.

> The doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute and other legal instruments can be given effect, all parts of a statute can be construed together and no words will be superfluous.

Singer, *supra*, § 47.17 (citations omitted).

The Court's decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981), illustrates this principle. In that case, the Court upheld the IRS denial of a 26 U.S.C. § 501(c)(3) exemption application on the basis of § 501(e), stating that:

> It is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned, both in fact being parts [of the same section].

HCSC-Laundry, 450 U.S. at 6.

In this case, (M)(ii) limits (M)(i). Offenses involving "revenue losses," like § 7201 in (M)(ii), are not included in "losses" to victims in (M)(i).

The different descriptions of "loss" in these parallel provisions, as well as the rule of statutory construction that the "specific governs the general," support the conclusion that tax crimes involving a revenue loss to the Government are not within (M)(i), but are covered in (M)(ii).

The canons of statutory construction dictate that tax crimes (whether a violation of § 7201 or § 7206) are not included in (M)(i) and, therefore, the Kawashimas' tax crimes of conviction are not included in (M)(i).

D. The Sentencing Guidelines Distinguishing Crimes "Involving Fraud or Deceit" from Tax Crimes Support the Proposition that Tax Crimes Were Not Considered by Congress To Be Covered by (M)(i).

Congress made aggravated felonies deportable offenses for the first time through the passage of the Anti-Drug Abuse Act of 1988, which amended the Immigration and Nationality Act. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-44, 102 Stat. 4181, 4469-70 (1988) (codified as amended in scattered sections of 8 U.S.C.). The Anti-Drug Abuse Act defined an aggravated felony as murder, drug trafficking, trafficking in firearms or other destructive devices, or attempting or conspiring to commit these crimes. *Id.*

In 1990, Congress broadened the definition of an aggravated felony to include money laundering offenses and "any crime of violence," other than purely political offenses, punishable by at least five years of imprisonment. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990) (codified as amended in scattered sections of 8 U.S.C.). Congress, through the Immigration and Nationality Technical Corrections Act of 1994, increased the number of "aggravated felonies," including those referred to in subsection (M). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222, 108 Stat. 4305, 4320 (1994) (codified as amended in scattered sections of 8 U.S.C.).

The expansion of the definition of an aggravated felony to include (M)(i) and (M)(ii) came about through an amendment of Senator Alan Simpson of Wyoming to H.R. 783 on October 6, 1994. 140 Cong. Rec. S14400 (daily ed. Oct. 6, 1994) (statement of Sen. Wendell Ford). Senator Simpson's amendment was passed without debate in the Senate and the House. 140 Cong. Rec. S14400 (daily ed. Oct. 6, 1994); 140 Cong. Rec. H11291 (daily ed. Oct. 7, 1994).

The Simpson Amendment's expansion of the definition of "aggravated felonies" to include (M)(i) and (M)(ii) followed previous unsuccessful efforts in the House to pass similar bills. *See* Criminal Aliens Deportation Act of 1993, H.R. 1459, 103d Cong. (1993); Immigration Stabilization Act of 1993, H.R. 3320, 103d Cong. (1993).

Most "aggravated felonies" under 8 U.S.C. § 1101(a)(43) are specific in their description of the particular crime, by reference to a specific penal statute, for example, a violation of 18 U.S.C. §§ 875-877, 1202 (*see* 8 U.S.C. § 1101(a)(43)(H)), 18 U.S.C. §§ 2251, 2251A, 2252 (*see* 8 U.S.C. § 1101(a)(43)(I)), or, as in the case of (M)(ii), a violation of 26 U.S.C. § 7201 (tax evasion). Such is not the case in respect to (M)(i): an "offense involving fraud or deceit in which the loss to the victims or victims exceeds $10,000."

There is nothing in the legislative history that Petitioners could uncover that might shed light on what crimes Congress intended to be covered by (M)(i). However, a review of the Sentencing

Guidelines promulgated by the Sentencing Commission prior to 1994, when (M) was enacted into law, indicates that it is likely that the language of (M)(i) and (M)(ii) was taken from the Sentencing Guidelines by Senator Simpson and the sponsors of previous House Bills. It is also likely that for tax crimes, Congress reviewed Title 26 to determine what tax crimes were serious enough to warrant inclusion in the definition of aggravated felony. Congress decided upon firearms offenses, covered in 8 U.S.C. § 1101(a)(43)(E)(iii), and tax evasion, covered in (M)(ii).

Congress delegated to the Commission the authority to establish "categories of offenses" for which the Commission established a sentencing range. *See* 28 U.S.C. § 994(c); s*ee also Mistretta v. United States*, 488 U.S. 361, 374 (1989). Among these "categories of offenses," the Commission listed "[o]ffenses involving fraud or deceit" to which the sentencing guidelines were applied. *See U.S. Sentencing Guidelines Manual* §§ 2F1.1, 2F1.2 (2000) [hereinafter "U.S.S.G.M."]; Thomas W. Hutchinson et al., *Federal Sentencing Law and Practice* 580-649 (2011).[12]

The category of crimes listed by the Commission in 1987 predated the Simpson Amendment to the Immigration and Nationality Act, which included for the first time in the definition of

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[12] The heading to Part F was "Offenses Involving Fraud or Deceit" effective November 1, 1987.

"aggravated felonies" offenses involving fraud or deceit.[13]

The Sentencing Guidelines are closely monitored by Congress. The Commission was to report to Congress two years after the initial set of sentencing guidelines and annually thereafter. 28 U.S.C. §§ 994(r), (w). Between 1988 and 2010, in addition to the directives to the Commission set forth in the Sentencing Reform Act, 28 U.S.C. §§ 991, 994, Congress continuously influenced sentencing policy by issuing over one hundred formal statutory directives.[14] *See also* 28 U.S.C. § 994 (History; Ancillary Laws and Directives and 2011 Pocket Parts).

In line with (M)(i) and (M)(ii), the Commission established a sentencing guideline for federal offenses involving fraud or deceit and a separate sentencing guideline for tax offenses. It is hardly coincidental that Congress used the precise language found in Part F of the Sentencing Guidelines ("fraud or deceit") in listing the offenses in (M)(i) as aggravated felonies.[15]

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[13] The Court in *Nijhawan* dealt with state fraud or deceit crimes. *See Nijhawan*, 129 S. Ct. at 2302.

[14] The Commission has functioned like the "junior varsity" Congress. *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

[15] Similarly, in 1976, the United States Parole Commission was established with duties of promulgating explicit guidelines for parole decision-making. *See* Parole Commission and Reorganization Act, Pub.L. No. 94-233, 90

Tax offenses, on the other hand, are covered in Part T of the Guidelines. U.S.S.G.M. § 2T1.1. These were the sentencing guidelines to which the Government stipulated in the plea agreements as applicable to the Kawashimas. Pet. App. I, 120a; Pet. App. J, 130a ("[T]he applicable guideline is section 2T1.3 of the Sentencing Guidelines . . . ."). The guideline stipulated to was the tax offense guideline, not the fraud guideline. In Part T, tax evasion (26 U.S.C. § 7201) and filing a false statement (26 U.S.C. § 7206) are addressed with "tax loss" (revenue loss) as the determinant of the sentence. *See* Hutchinson et al., *supra,* at 1025-65.

Critically, nowhere in Part T (for tax crimes) is the Government identified as a "victim." The Commentary to the Guidelines no doubt reflected the Court's holdings in *Spies* and *Bishop*, "that criminal tax prosecutions serve to punish the violator and protect respect for the tax laws" and the Government is not characterized as "a victim." U.S.S.G.M., ch. 2, pt. T, introductory cmt.; *see also* Hutchinson et al., *supra,* at 1026. The loss is described by the Commission as a "tax loss" (a synonym for revenue loss), as distinct from a "loss to a victim." In Part F, "loss" and "victim" are frequently used and "victim" is characterized as referring "to the person or entity

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Stat. 219 (1976). Those guidelines placed offenses into different categories. Fraud offenses were classified separately from "Offenses Involving Revenue" which encompassed "Internal Revenue Offenses" and "Customs Offenses." 28 C.F.R. § 2.20(b).

from which the funds are to come directly." U.S.S.G.M. § 2F1.1.

Where the Government has been defrauded under federal entitlement programs like federal employee compensation benefits, *United States v. Dawkins*, 202 F.3d 711 (4th Cir. 2000), or Medicare, *United States v. Hoffman*, 568 F.3d 1335 (11th Cir. 2009), or Federal Emergency Management Agency (FEMA) programs, *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), or a theft from a federal bank occurs, *Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005), the Government is properly regarded as a "victim." Not in tax cases under the Sentencing Guidelines, however, where the loss is a "tax loss" or "revenue loss" to the Government, as stated in (M)(ii).[16]

The separate treatment of federal offenses involving fraud or deceit and tax crimes by the

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[16] The Sentencing Court determines the applicable offense guideline section for the offense of conviction. *United States v. Lewis*, 161 Fed. App'x 322, 323 (4th Cir. 2006). In this case, both the Sentencing Court and the Government agreed that the Tax Section governed the Kawashima's crimes of conviction. In *United States v. Vucko*, the court held that the fraud and tax convictions were separate and could not be grouped. 473 F.3d 773, 781 (7th Cir. 2007). *See also* U.S. Sentencing Commission, Questions Most Frequently Asked About, Appendix E, Volume VI (December 1, 1992), Question 33, at 1028. ("Can tax evasion (§ 2T1.1) be grouped with fraud (§ 2F1.1) pursuant to § 3D1.2(d)? Answer: No. . . . The fraud table and the tax table are driven by different guideline definitions of 'loss.' Thus, tax evasion and fraud . . . may not be grouped according to rule (d).")

Commission in coordination with Congress lends weight to Petitioners' contention that tax crimes were not intended by Congress to be covered in (M)(i) as an "offense involving fraud or deceit." *See Valansi v. Ashcroft*, 278 F.3d 203, 213 (3d Cir. 2002) (noting that a court may look to Sentencing Guidelines to determine Congressional intent).

Applying the canons of statutory construction and the language employed by Congress, Petitioners submit that tax crimes are not, and were not intended to be, covered by (M)(i). Accordingly, the tax crimes committed by the Kawashimas are not aggravated felonies under (M)(i). The only tax crime which Congress made an aggravated felony in (M) was tax evasion in violation of 26 U.S.C. § 7201, which was not a crime to which the Kawashimas pled guilty.

II.

Even if Tax Crimes Were Intended To Be Covered by (M)(i), the Kawashimas' Crimes of Conviction Did Not Contain Fraud or Deceit as an Element of the Crimes of Conviction and, Accordingly, Are Not Aggravated Felonies Under (M)(i).

Even assuming *some* tax crimes are covered by (M)(i), the tax crimes of which the Kawashimas were convicted under 26 U.S.C. §§ 7206(1) and (2) are not "aggravated felonies." As such, the Kawashimas' crimes of conviction would not fall within (M)(i).

In *Nijhawan v. Holder*, the Court held that for purposes of (M)(i), the $10,000 threshold *was not* an element of the crime of which Nijhawan was convicted. 129 S. Ct. 2294, 2302 (2009). The Court recognized that the threshold amount is not an element of the crime in most state fraud or deceit statutes. *Id.* at 2302. Following the reasoning of the Court in *Nijhawan*, fraud or deceit, unlike the $10,000 loss threshold, must be an element of the crime of conviction to render it a crime of "fraud or deceit" under (M)(i).

In the same vein, the Board of Immigration Appeals in 2007 held that "it is the elements of the crime an alien is actually convicted of, not the crime he or she may have committed, that is determinative of deportability." *In re Babaisakov*, 24 I. & N. Dec. 306, 312 (BIA 2007) (*citing In re Pichardo*, 21 I. & N. Dec. 330, 335 (BIA 1996)).

The petitioner in *Nijhawan* was convicted of conspiracy to commit wire *fraud,* bank *fraud, and* mail *fraud*. Fraud, obviously, was an element of the crimes of conviction and, therefore, the crimes plainly fell within (M)(i). Similarly, in several recent decisions, the Court has held that the elements of the crime of conviction determine whether the crime is an "aggravated felony." For example, in *Carachuri-Rosendo v. Holder*, the Court ruled that the offense which defendant was convicted of, not what he could have been convicted of, controls whether the crime of conviction is an aggravated felony. 130 S. Ct. 2577, 2579 (2010). In that case, the Court held that it is the "record of conviction" and "the conduct actually punished by the state

offense" that controls. *Id.* at 2588; *see also id.* at 2591 (Scalia, J., concurring) ("A defendant is not 'convicted' of sentencing factors, but only of the elements of the crime charged in the indictment.").

In *Leocal v. Ashcroft*, the Court held that, in determining whether the crime of violence was there involved, it must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U.S. 1, 7 (2004); *see also Taylor v. United States*, 495 U.S. 575, 599 (1990) ("[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) ("[A] state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law.").

The Kawashimas' crimes of conviction did not require, as elements of their respective offenses, a finding of fraud or deceit, and the Kawashimas did not admit to "fraud or deceit" in their plea agreements.[17] *See* Pet. App. I, 115a; Pet. App. J,

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[17] The Plea Agreement of Mrs. Kawashima, filed August 11, 1997, has been reproduced on pages 125a-134a of Petitioners' Appendix to the Petition for Writ of Certiorari. The Solicitor General has pointed out that the plea agreement of Mrs. Kawashima was not part of the record before the Ninth Circuit, unlike the plea agreement of Mr. Kawashima, which is in the record. *See also Kawashima I*,

130a. The Kawashimas' crimes of conviction do not fall within the ambit of (M)(i). Section 7206(1) is a tax perjury statute, not a "fraud or deceit" statute.[18] *See Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966); McGowen et al., *supra*, § 16.55 ("the so-called tax perjury statute is codified in § 7206(1) of the Internal Revenue Code"); *Mertens Law of*

Pet. App 93a. Petitioners have no knowledge as to why it was not included in the administrative record before the BIA. However, the Court can take judicial notice of the court record filed in the U.S. District Court for the Central District of California, where judgment of conviction was entered on the plea agreement of Mrs. Kawashima.

The Court may take judicial notice of adjudicative facts such as federal court records and proceedings. *Moore's Federal Practice* § 526.02 (3d ed. 2011); *Federal Procedure, Lawyers Edition* §§ 33.60, 33.63, 33.66 (2010). The test under Rule 201 of the Federal Rules of Evidence is whether an adjudicative fact is "capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also* Charles A. Wright et al., *Federal Practice and Procedure: Evidence* § 5106.4 at 240-243 (2d ed. 2005).

Mrs. Kawashima's plea agreement is relevant because a defendant may be convicted of § 7206(2) by assisting in the preparation of a return "which is fraudulent *or* is false as to any material matter." 26 U.S.C. § 7206(2) (emphasis added). Mrs. Kawashima pled guilty and admitted to assisting in preparation of a false statement, but not to fraud.

[18] It should be noted that 8 U.S.C. § 1101(a)(43)(S), which is the aggravated felony statute that covers crimes "relating to perjury," requires that the term of imprisonment to be "at least one year" to qualify the immigrant-convict for removal. The Kawashimas' sentences were four months.

Federal Income Tax § 55A:17. Fraud or deceit is not an element of a crime in violation of § 7206(1) or (2).

The Ninth Circuit erroneously found that because Mr. Kawashima acted "willfully" with specific intent to violate the law, his conviction under § 7206(1) "necessarily involved fraud or deceit." *See Kawashima I*, Pet. App. D, 87a, 92a; *Kawashima IV*, Pet. App. A, 22a (*citing Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting)). Such a holding is contrary to the seminal tax case of *United States v. Bishop*, 412 U.S. 346 (1973). In *Bishop*, this Court held that "willfully" is an element of *all* tax crimes covered in 26 U.S.C. §§ 7201-7207. 412 U.S. at 361. This Court has never said, in *Bishop* or in any other case, that "willfully" equates with fraud and/or deceit. On the contrary, in referring to § 7206(1), the Court reaffirmed its holding in *Bishop*:

> We did not, however, hold that the term [willfully] requires proof of any motive other than an intentional violation of a known legal duty. . . . '[W]illfully' . . . connotes a voluntary, intentional violation of a known legal duty.

United States v. Pomponio, 429 U.S. 10, 12 (1976) (quotation and citation omitted); *see also Cheek v. United States*, 498 U.S. 192, 201 (1991). Proving willfulness is not proving fraud.

Guided in part by the Court's decision in *Bishop*, the Tax Court in *Wright v. Comm'r*, 84 T.C.

636 (1985), and the Ninth Circuit in *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982), held that fraud is not a necessary element of § 7206(1), a holding in which the Commissioner of Internal Revenue has acquiesced. *See* Commissioner's Acquiescence, 1988-2 C.B. 1, 1988 IRB Lexis 3924. The Ninth Circuit stated in *Considine*:

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

Considine, 683 F.2d at 1287 (citations omitted); *see also Wagner v. Comm'n*, T.C.M. 1996-355, 1996 Tax Ct. Memo LEXIS 356, at *15 (August 5, 1996) (7206(1) does not require proof of fraudulent intent). The Tax Court in *Wright* then found that a conviction under § 7206(1) does not collaterally estop the taxpayer from disputing fraud, which is a required element of 26 U.S.C. § 6663(b)(1):

> [T]he intent to evade taxes is not an element of the crime charged under

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

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

In *Wright*, the Tax Court recognized that § 7201 contained a fraud element in that the taxpayer attempted to evade taxes. *Wright*, 84 T.C. at 642 (citation omitted); *see also Chen v. Comm'r*, T.C.M. 2006-160, 2006 Tax Ct. Memo LEXIS 163, at *8 (August 8, 2006) (*citing Beaver v. Comm'r*, 55 T.C. 85, 92-93 (1970)). Section 7206 serves a different purpose:

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

> returns and the penalty for such perjury is imposed irrespective of the tax consequences of the falsification.

Wright, 84 T.C. at 643 (citations omitted).[19]

The Government in *Bobb v. Attorney General* (as did the Third Circuit) took the same position as Petitioners in this case: that fraud or deceit must be an element of a crime covered by (M)(i). 458 F.3d 213, 219 (3d Cir. 2006). In the same vein, the Third Circuit in *Nugent v. Ashcroft*, determined that Nugent's theft by deception fell within the purview of (M)(i) *because* it required the state to prove fraud or deceit. 367 F.3d 162, 178 (3d Cir. 2004); *see also Valansi v. Ashcroft*, 278 F.3d 203, 217 (3d Cir. 2002) (finding that the plain meaning of (M)(i) defines an aggravated felony as an offense that has fraud or deceit as at least one required element and ruling that defendant's guilty plea to theft and an intent to injure did not equate to acceptance of guilt as to any fraudulent intent).

Mr. Kawashima pled guilty to "willfully" making a false statement on a corporate tax return, and Mrs. Kawashima pled guilty to "willfully" assisting her husband. Fraud or deceit was not an

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[19] Because § 7206 involves perjury, it is irrelevant whether there is a revenue loss to the Government. *See United States v. Di Varco*, 484 F.2d 670, 672-73 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (where the correct income was reported but the source of the income was falsely reported).

element of their crimes of conviction. Also, neither Mr. nor Mrs. Kawashima stipulated that that they committed fraud or deceit in their respective plea agreements. *See* Pet. App. I, 120a; Pet. App. J, 130a; *see Braxton v. United States*, 500 U.S. 344, 351 (1991) (finding that defendant's stipulation in plea agreement to assault and use of a firearm did not "specifically establish" another crime, attempt to kill).

As neither fraud nor deceit are elements of a conviction under §§ 7206(1) and (2), the Kawashimas' convictions do not come within (M)(i), *even if* some tax crimes are within (M)(i)'s scope.

III.

If the Court Concludes that 8 U.S.C. § 1101(a)(43)(M) is Ambiguous, the Court, as a Matter of Due Process and Fair Notice, Should Apply the Rule of Lenity and Construe the Statute in Favor of the Kawashimas and Set Aside the Orders of Removal.

If the Court does not find that the text of the statute clearly excludes convictions under §§ 7206(1) and (2), *see* Points I and II *supra*, the Court must at the very least conclude that (M) is an unclear and ambiguous statute. Every Circuit that has ruled on the construction of (M)(i) and (M)(ii) has been divided. *See*, *e.g.*, *Ki Se Lee*, 368 F.3d at 225 (Alito, J., dissenting); *Arguelles-Olivares v. Mukasey*, 526

F.3d 171, 180 (5th Cir. 2008) (Dennis, J., dissenting); *Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (Paez, J., dissenting), *withdrawn*, 350 F.3d 966 (2003). The division of views on this issue continues in this case in the opinion of Judge Graber (joined by Judges Wardlaw and Paez) dissenting from the denial of the Kawashimas' request for a rehearing *en banc*. *See Kawashima IV*, Pet. App. A, 3a-12a; *cf. INS. v. Errico*, 385 U.S. 214, 218 (1966) (Second and Ninth Circuit split over interpretation of § 241(f) of INA relating to deportation of aliens on ground that alien used fraud to procure entry into the United States suggests that the statute is not clear).

Petitioners argue that any conflict of interpretation should be, upon review, resolved in favor of the Kawashimas. As a matter of due process and fair notice, there should be clarity and certainty about the conduct which mandates deportation and banishment. The conflict of interpretation among and within the Circuits demonstrates uncertainty in the application of (M), which is contrary to the principles of due process and fair notice.

In 1994, Congress dramatically increased the number of aggravated felonies, several of which were vague and uncertain "deportable crimes." Justice Alito noted this fact in his concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

In *Padilla,* the Court held that a defendant is denied effective assistance of counsel under the Sixth Amendment if his criminal attorney does not advise

him of the consequence of pleading guilty to an offense where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for [the defendant's] conviction." *Padilla*, 130 S. Ct. at 1483 (citation omitted).

In his concurrence, joined by the Chief Justice, Justice Alito stated:

> [m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving *moral turpitude or aggravated felonies*.

Id. at 1488 (Alito, J., concurring) (quotation omitted) (emphasis in original). Justice Alito further stated that, "determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude [(CIMT)]' is not an easy task." *Id.* (citation omitted).

Justice Alito's solution was that the alien should have counsel to advise him of the possible consequences of pleading guilty to a particular offense. *Id.* at 1494. Respectfully, this solution falls short because, as the Kawashimas' case bears out, even experienced immigration practitioners and U.S. federal judges have been unable to discern with confidence whether, in certain cases, a crime is deportable or not.

The fault does not lie with either practitioners or the courts. It lies with Congress and its lack of precision on a critical matter of exile or banishment. Congress should have specified what crimes call for deportation, as it did in the case of tax evasion in (M)(ii).

> [Deportation] is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime. . . . We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligent definition of deportable conduct.

Jordan v. De George, 341 U.S. 223, 243, 245 (1951) (Jackson, J., Black, J., and Frankfurter, J., dissenting). The lament of the dissenting Justices in *Jordan* resonates today in Justice Scalia's recent dissent in *Sykes v. United States*:

> Fuzzy, leave-the-details-to-be–sorted-out-by the Courts legislation is attractive to the Congressman who wants credit for addressing a national problem, but does not have the time (or perhaps the votes) to grapple with the nitty gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step – indeed, I think it would be highly responsible – to limit [the statute] to the *named* violent crimes.

180 L. Ed. 2d 60, 87 (2011) (Scalia, J., dissenting) (emphasis added).

When one examines the aggravated felony statute, 8 U.S.C. § 1101(a)(43), most of the aggravated felonies listed are tied to specific statutory violations, leaving no uncertainty or ambiguity about whether a crime that has been committed calls for deportation. The Court in *Padilla,* however, recognized that parts of the aggravated felony statute were not succinct, clear and explicit in defining whether a particular crime was a removable offense. *Padilla*, 130 S. Ct. at 1483. (M)(i) is such a subsection.

This Court has time and again ruled that ambiguities in deportation statutes should be construed in favor of the alien. *See, e.g., Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). In *Fong Haw Tan*, this Court rejected an administrative interpretation of a deportation provision and unanimously resolved the ambiguity in the alien's favor, holding, "[w]e resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* at 10 (citation omitted); s*ee also INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (reaffirming rule); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing the special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); *Errico*, 385 U.S. at 225 ("We resolve the doubts in favor of [the alien] . . . because deportation is a

drastic measure and at times the equivalent of banishment or exile.").

Although the statute at issue is located in the Immigration and Nationality Act, it has both immigration and criminal law implications (*e.g.*, illegal reentry prosecutions pursuant to 8 U.S.C. § 1326) and, therefore, invokes the criminal rule of lenity. *See Carachuri-Rosendo*, 130 S. Ct. at 2589; *Leocal*, 543 U.S. at 12 n.8.

The rule of lenity is to be applied "when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). The important principle underlying the rule of lenity is that fair warning and due notice should be given about a law and what the law requires, in language an ordinary person can understand. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010); *St. Cyr*, 533 U.S. at 321; *United States v. Bass*, 404 U.S. 336, 348 (1971); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). Like the "void for vagueness" doctrine, the rule of lenity arises from the Due Process Clause of the Constitution. The essential purpose of the doctrine is to warn individuals of the consequences of their conduct. *See Williams v. United States*, 341 U.S. 97, 100 (1951) ("Criminal statutes must have an ascertainable standard of guilt or they fall for vagueness.").

Where there is uncertainty in deportation statutes, especially those that have criminal law applications, due process and fair notice demand that the statute be construed in favor of the immigrant.

Thus, if the Court concludes that (M) is ambiguous, it should apply the rule of lenity and find that the Kawashimas were not convicted of aggravated felonies and, therefore, should not be deported.

CONCLUSION

The decision of the Ninth Circuit should be reversed and remanded with instructions to set aside the Kawashimas' Orders of Deportation.

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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

STATUTORY APPENDIX

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STATUTORY APPENDIX

8 U.S.C. § 1101(a)(43)

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—
(i) section 842 (h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
(ii) section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or
(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—
(i) relates to the owning, controlling, managing, or supervising of a prostitution business;
(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—
(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;
(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or
(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) 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;

(N) an offense described in paragraph (1)(A) or (2) of section 1324 (a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325 (a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense
(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and
(ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

26 U.S.C. § 7201
Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206
Fraud and false statements

Any person who –

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.