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 ON BEHALF OF NATIONAL IMMIGRATION AND CRIMINAL DEFENSE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of national immigration and criminal defense organizations as *amici curiae* in support of petitioners in *Kawashima v. Holder*, No. 10-577.[1] Collectively, these organizations provide legal services, educational resources, and support to immigrants, criminal defendants, and attorneys. In serving those communities, *amici* organizations have a special interest and expertise concerning the intersection of immigration law and criminal justice, and have an acute awareness of the need for clear and fair application of the law to immigrants accused or convicted of criminal offenses and subject to immigration consequences as a result.

The **American Immigration Lawyers Association** ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The **Immigrant Defense Project** ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes, and therefore has a keen interest in ensuring that immigration laws relating to criminal case dispositions are correctly interpreted. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and re-

lied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60); *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (No. 05-547); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

Heartland Alliance's **National Immigrant Justice Center** ("NIJC") is a Chicago-based organization working to ensure laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 non-citizens per year, and represents hundreds of non-citizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost trainings and consultation to criminal defense attorneys representing non-citizens, advising them

on likely immigration consequences resulting for their clients from various potential dispositions in the criminal case; NIJC also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings. Because of the severity of the immigration consequences for non-citizens, NIJC has a strong interest in ensuring criminal convictions have consequences that are reasonable, predictable, and publicly known.

The **National Immigration Project** ("NIP") of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of IMMIGRATION LAW AND CRIMES and three other treatises published by Thomson-West. NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court.

The **National Legal Aid & Defender Association** ("NLADA"), founded in 1911, is this country's oldest and largest non-profit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training, and the development of nationally applicable standards. NLADA promotes the fair, transparent, efficient, and uniform admini-

stration of criminal justice, and serves as the collective voice for both civil legal services and public defense services throughout the nation.

SUMMARY OF ARGUMENT

Petitioners are permanent resident aliens who have resided in the United States since leaving Japan in 1984. In 1997, petitioners each pleaded guilty to one count of making a false statement on a tax return, in violation of 26 U.S.C. § 7206. The former Immigration and Naturalization Service ordered them removed to Japan on the ground that their convictions constituted an "aggravated felony" as that term is used in the Immigration and Nationality Act ("INA"). The Ninth Circuit affirmed the removal orders, holding that petitioners' offenses qualify as aggravated felonies.

The Ninth Circuit's decision was incorrect and must be reversed. The INA's definition of aggravated felony does not include tax code offenses other than tax evasion. The INA provides that aggravated felonies include offenses "involv[ing] fraud and deceit in which the loss to the victim or victims exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(i)), but goes on *in that same sentence* to single out, for treatment as an aggravated felony, the offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(ii)). Even if (M)(i) were assumed in the abstract to be broad enough to encompass tax code offenses involving revenue loss to the government, it cannot be read in isolation. And the specific treatment of tax evasion—the most serious of the revenue offenses—in

(M)(ii) gives it obvious relevance to the interpretive question raised by this case.

To determine the meaning of (M)(i), courts must therefore consider the impact of (M)(ii), which can be evaluated by use of established canons of statutory interpretation. And all such applicable canons point to the same conclusion: that Congress did not intend tax code offenses other than tax evasion to be treated as aggravated felonies. *First*, the rule against superfluities requires that effect be given to each clause of a statute so that none is rendered mere surplusage. (M)(ii) would be entirely superfluous if "offenses involv[ing] fraud and deceit" applied to tax code offenses, because every conviction for tax evasion requires fraudulent or deceitful conduct. *Second*, a more specific provision takes precedence over a general provision, and Congress is presumed to have acted intentionally when including particular language in one provision and excluding it elsewhere. (M)(ii) singles out a specific tax code offense for treatment as an aggravated felony, signaling that it—and not the more general fraud and deceit offenses provision—controls which tax code offenses qualify as aggravated felonies. That conclusion is confirmed by the fact that (M)(ii) applies specifically to "*revenue* losses," while (M)(i) applies more generally to "losses".

Finally, to the extent that any ambiguity remains, the rule of lenity would require that the ambiguity be resolved in favor of the alien and/or criminal defendant. Because designating a crime an aggravated felony carries extremely serious immigration consequences, the immigration rule of lenity ap-

plies. Moreover, because the definition of aggravated felony has both civil and criminal consequences, the criminal rule of lenity also applies.

ARGUMENT

The Government has taken the position that fraud or deceit is a necessary element of petitioner's convictions under 26 U.S.C. § 7206 for wilfully making (or aiding in the making of) a return or statement under penalty of perjury that the individual does not believe to be true as to every material matter. It is far from clear that is the case: § 7206, unlike the § 7201 crime of tax evasion, contains no requirement that the individual intended anyone believe the false statement or that the false statement be an attempt to avoid taxes. This Court, in any event, need not decide whether fraud or deceit is a necessary element of a § 7206 conviction.

The Court instead can resolve this case based on the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). That principle compels the conclusion that Section 1101(a)(43)(M)(i) of Title 8, which treats as an "aggravated felony" an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," excludes tax code offenses resulting in revenue losses to the government. Such crimes instead are addressed by the immediately ensuing provision, Section 1101(a)(43)(M)(ii), which alternatively treats as an "aggravated felony" an offense that is "described in section 7201 of Title 26 (relating to tax evasion) in

which the loss to the Government exceeds $10,000." The latter provision defines the universe of tax code offenses against the federal government that qualify as aggravated felonies, and it would have little—if any—purpose if it did not perform that function. At the very least, the question whether (M)(i) encompasses tax code offenses, notwithstanding (M)(ii), has no clear answer, in which case long-settled principles of lenity dictate reading (M)(i) to exclude tax crimes like the ones at issue here.

I. THE PLAIN MEANING OF THE STATUTE CANNOT BE DISCERNED BY LOOKING TO A SINGLE PROVISION IN ISOLATION

Section 1101(a)(43)(M)(i) cannot be viewed in isolation. It must instead be interpreted in light of the context in which it is found and the text that surrounds it. (M)(ii), which immediately follows (M)(i), identifies a single tax code offense for treatment as an aggravated felony. That provision has obvious relevance to the question whether (M)(i) encompasses lesser tax code offenses. The Ninth Circuit thus erred by refusing to consider (M)(ii) before reaching its erroneous conclusion as to the meaning of (M)(i).

A. (M)(ii) Is Plainly Relevant To The Question Whether (M)(i) Applies To Revenue Offenses

8 U.S.C. § 1101(a)(43) classifies a number of offenses as aggravated felonies. This list includes, in Subparagraph (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.

The "loss to the victim or victims" to which (M)(i) refers, if read in strict isolation, might arguably be broad enough to encompass tax code offenses involving fraud or deceit that result in revenue loss to the government. But in (M)(ii)—which was enacted at the same time—Congress went on to single out a particular fraud crime, involving revenue losses to the government, for special treatment.

Because tax evasion necessarily involves fraud and deceit (a point discussed in greater detail *infra*), there would have been no need to specify that tax evasion was an aggravated felony if (M)(i) captured tax code offenses. And it is exceedingly unlikely that Congress would have intended to "leave subparagraph [(M)(ii)] with little, if any, meaningful application." *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009) (rejecting an interpretation of (M)(i) that would have had a similarly extreme limiting effect). Plainly, then, it would be inappropriate to assess whether (M)(i) applies to tax code offenses without considering the interrelationship between (M)(i) and (M)(ii). *See Davis*, 489 U.S. at 809 ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum.").

There is ample reason that Congress might have

wanted, in (M)(ii), to single out tax evasion as the sole tax code offense to be accorded treatment as an aggravated felony. In light of the extremely serious immigration consequences attached to aggravated felonies, discussed *infra*, Congress may well have intended to distinguish tax evasion—"the gravest of offenses against the revenues"—as the only tax code offense deserving of that treatment. *See Spies v. United States*, 317 U.S. 492, 499 (1943). As the "capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law," *Boulware v. United States*, 552 U.S. 421, 424 (2008) (quoting *Spies*, 317 U.S. at 497) (alterations in original), Congress has already allocated more serious criminal consequences to tax evasion than to any other tax code offense.[2] Similar treatment in the immigration context would be expected.

This Court has previously confronted an analogous question of interpretation of a definitional provision in the INA. 8 U.S.C. § 1101(h) defines "serious criminal offense" as:

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohib-

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[2] *Compare* § 7201 (maximum 5 years of imprisonment for tax evasion) *with* § 7206 (maximum 3 years of imprisonment for filing or assisting the filing of a false statement under penalty of perjury) and § 7207 (maximum 1 year of imprisonment for filing a false statement).

> ited substances if such crime involves personal injury to another.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Government argued that a DUI causing bodily injury was a "crime of violence" under the broad language of 18 U.S.C. § 16 ("an offense that has as an element the use . . . of force" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). This Court, however, unanimously held that Congress had not intended DUI offenses to be crimes of violence, in part because of the structure of §1101(h):

> 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 [§ 1101(h)(3)] practically devoid of significance. As we must give effect to every word of a statute wherever possible, the distinct provision for these offenses under [§ 1101(h)] bolsters our conclusion that § 16 does not itself encompass DUI offenses.

Leocal, 543 U.S. at 12.

That interpretation meant that some offenses to which (h)(3) did not directly apply (for example, DUI offenses that did not result in personal injury) would be excluded from a general provision that on its face might have applied to them. But this Court nonetheless determined that Congress' specific inclusion

of *some* DUI offenses evinced an intent to exclude *all other* DUI offenses. So too here: the specific inclusion of one tax code offense in (M)(ii)—*i.e.*, the "capstone" offense of tax evasion—evinces an intent to exclude all other (and lesser) tax code offenses. *See Nijhawan*, 129 S. Ct. at 2301 (describing (M)(ii) as "the internal revenue provision"). At the very least, any assessment of the meaning of (M)(i) must take into account the interrelationship between (M)(i) and (M)(ii), and must recognize that the latter provision bears materially on the scope of the former.

B. The Meaning Of (M)(i) Cannot Be Discerned By Looking To That Provision In Isolation

The Government, like the Ninth Circuit majority below, contends that "'the clear language' of Subparagraph (M)(i) . . . includes petitioners' convictions to the extent that their offenses 'involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000.'" Br. in Opp. 13 (internal citations omitted; alterations in original). *See also* Pet. App. 19a. In essence, the Government argues that the revenue loss provision (M(ii)) casts no doubt on the meaning of the general loss provision (M(i)) because "loss" is clear if one simply ignores the reference to "revenue loss" in the second half of the sentence. This reasoning disregards basic principles of statutory interpretation.

To reach the conclusion that subsection (M)(i)'s meaning is plain from a literal reading of the text, both the Government and the Ninth Circuit examined the provision without regard to the very next clause, (M)(ii), which singles out a specific tax code

offense for treatment as an aggravated felony. To be sure, if (M)(i) were considered in isolation, "loss" might arguably include revenue loss and "victim" might arguably include the United States Government. But this Court has repeatedly held that the plain meaning of a statutory clause cannot be discerned without considering the language that surrounds it: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

The surrounding text is particularly important where, as here, the interpretive dispute centers on the breadth of a particular word or phrase. As this Court recently reaffirmed, "construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1179 (2011). Rather, a "word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

The Ninth Circuit below ignored this Court's clear and consistent direction to consider the surrounding text. Instead, it held that (M)(i)'s meaning

was plain *before considering the impact of (M)(ii).* In the court's view, "the text of subsection (M)(i) [ ] categorizes an offense as an aggravated felony as long as it includes two elements, 'fraud and deceit' and loss to the victim in excess of $10,000. No further limitations are imposed." Pet. App. 19a. And although the court went on to acknowledge that "*there are many reasons why Congress might have included subsection (M)(ii)* even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i)," *id.* (emphasis added), it nonetheless applied none of the traditional interpretive canons—such as the canon against superfluity—to determine Congress' intent in enacting (M)(ii).

This Court recently considered and rejected just such an approach:

> The dissent says that the antisuperfluousness canon has no place here because "there is nothing ambiguous about the language of § 3501(a)." But this response violates "the cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) . . . [T]he dissent's point that subsection (a) seems clear when read in isolation proves nothing for the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. When subsection (a) is read in context, there is no avoiding the question, "What could Congress

> have been getting at with both (a) and (c)?"

Corley v. United States, 129 S. Ct. 1558, 1566 n.5 (2009). A provision's meaning may appear clear when read in isolation from a closely related provision. But Congress' intent can be fairly discerned only by examining all of the language it used.

II. ESTABLISHED CANONS OF STATUTORY INTERPRETATION COMPEL THE CONCLUSION THAT "AGGRAVATED FELONY" DOES NOT INCLUDE FILING A FALSE TAX RETURN

Because statutory provisions must be read in context, the Ninth Circuit should have looked to traditional canons of statutory interpretation to determine (M)(ii)'s effect on (M)(i). All applicable interpretive canons compel a finding that petitioners' convictions do not qualify as aggravated felonies.

A. The Rule Against Superfluities Compels The Narrower Interpretation of (M)(i)

1. The interpretation of (M)(i) adopted by the Ninth Circuit violates the rule against superfluities: "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." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp 181-186 (rev. 6th ed. 2000)). *See also Corley*, 129 S. Ct. at 1566 (describing the rule against superfluities as "one of the most basic interpretive canons"); *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (describing it as a "cardinal rule"). A conviction for tax evasion

necessarily requires a showing of fraud or deceit. Congress would have understood—and assumed—as much when it enacted (M)(i) and (M)(ii). Indeed, the primary definition of "tax fraud" when Congress enacted Subsection (M) was the "[f]ederal offense of willfully attempting to evade or defeat the payment of taxes due and owing. [Internal Revenue Code] 7201." BLACK'S LAW DICTIONARY 661 (6th ed. 1990).

Because tax evasion necessarily involves fraud or deceit, (M)(ii) would be wholly redundant if (M)(i) applied to tax code offenses. The rule against superfluities thus compels adopting an interpretation of (M)(i) that avoids that result—*viz.*, an interpretation under which (M)(i) excludes tax code offenses against the federal government, and leaves to (M)(ii) the task of defining the universe of tax code crimes qualifying as aggravated felonies. *Cf. Nijhawan*, 129 S. Ct. at 2302 (rejecting an interpretation of (M)(i) that would leave that provision with "little, if any, meaningful application").

2. The Government seeks to avoid application of the rule against superfluities by suggesting that "tax evasion can entail, but does not necessarily require, proof of fraud or deceit." Br. in Opp. 10. That is incorrect. Section 7201 defines tax evasion as "willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof." 26 U.S.C. § 7201. With respect to tax evasion, willfulness is the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted). And this Court has held that attempting to evade or defeat taxation requires a willful *com-*

mission, not simply an omission. *Sansone v. United States*, 380 U.S. 343, 351-52 (1965).

Because tax evasion requires more than simply refusing to file a return or to pay taxes, *id.*, there is no "honest" tax evasion in which an individual truthfully or mistakenly reports (or remains silent regarding) their tax liability and/or ability to pay taxes due. Some attempt to mislead, misrepresent, conceal, or give a false impression, with the intent of depriving the government of revenue to which it is entitled, is a prerequisite for every tax evasion conviction.[3] For that reason, an individual convicted of criminal tax evasion is estopped from denying civil tax fraud under 26 U.S.C. § 6653: "Because the attempt to evade tax is the gravamen of fraud . . . [s]uch identity of criminal tax evasion and civil tax fraud for purposes of collateral estoppel has been repeatedly sustained by the courts." *Wright v. Comm'r*, 84 T.C. 636, 642 (1985); *see also Anderson v. Comm'r*, 2009 Tax Ct. Memo LEXIS 45, 60-61 ("convictions for filing a false return under section 7206(1) . . . do[] not prove civil tax fraud," while the attempt "'to evade or defeat any tax' under section 7201 [is] a conviction that does prove fraud").

The Government cannot have it both ways. It cannot say that a crime of tax evasion under § 7201 does not necessarily involve fraud or deceit at the

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[3] Deceit is defined as "[t]he act of intentionally giving a false impression" or "[a] false statement of fact made . . . with the intent someone else will act upon it," while fraud is "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." BLACK'S LAW DICTIONARY 465, 731 (9th ed. 2009).

same time that it argues that a lesser crime of making a false statement does necessarily involve fraud or deceit. This Court has held that "the elements involved in 26 U. S. C. § 7207 [willful filing of a document known to be false or fraudulent] . . . are *a subset of the elements in 26 U.S.C. § 7201* [tax evasion]," *Schmuck v. United States*, 489 U.S. 705, 720 n.11 (1989) (emphasis added) (citing *Sansone v. United States*, 380 U.S. 343, 352 (1965)), and thus that false or fraudulent filing is a lesser-included offense of tax evasion. *See Sansone*, 380 U.S. at 352-53.[4] Lesser-included offenses by definition cannot require proof of any element not also an element of the greater crime. Thus, if the Government were correct in its argument that fraud or deceit is a necessary element of the crime of making a false statement, then it cannot avoid the conclusion that fraud or deceit is likewise a necessary element of tax evasion.

That conclusion is consistent with this Court's articulation of the sorts of conduct that would support an inference of tax evasion: "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal*." *Spies*, 317 U.S. at 499 (emphasis added). The Court thus assumed that tax

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[4] Section 7207, like § 7206, criminalizes the willful making of a false statement, but § 7207 imposes lesser penalties because it does not require that the false statement be made under penalty of perjury.

evasion encompassed only conduct that would "mislead or conceal." *Id.*; *see also United States v. Johnson*, 319 U.S. 503, 511-12 (1943) (describing systemic tax evasion as a "continuous course of fraudulent conduct").

The Government has yet to identify a single situation in which tax evasion would involve neither fraud nor deceit. Indeed, the Government makes no contention that the authorities it cites (Br. in Opp. 11) did not involve fraud or deceit. *See Johnson*, 319 U.S. at 517-18 (widespread conspiracy to conceal profits of illegal gambling business); *United States v. Mal*, 942 F.2d 682, 685 n.3 (9th Cir. 1991) (falsely claiming exemption from withholding in an attempt to avoid taxation); *United States v. Gordon*, 242 F.2d 122, 123-24 (3d Cir. 1957) (conspiring with an IRS agent who filed a false report about a taxpayer and then persuaded the taxpayer to pay purportedly outstanding taxes to the conspirators rather than the IRS).

Critically, moreover, even if the Government could identify some remote circumstances in which tax evasion would involve neither fraud nor deceit, the rule against superfluity would still apply. That rule forbids any interpretation of M(i) that would "render [M(ii)] *insignificant*," even "if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added). As this Court has explained, a statute should be construed in a manner "that no part will be inoperative or superfluous, void *or insignificant*." *Hibbs*, 542 U.S. at 101 (emphasis added); *see also Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988) (refusing to adopt

an interpretation that would render a statutory provision "substantially redundant"). The possibility that there exists some manufactured, hypothetical circumstance in which tax evasion would fail to involve fraud or deceit thus would afford no basis for disregarding the rule against superfluity.

3. The majority below recognized the superfluity engendered by its interpretation of (M)(i), but declined to apply the rule against superfluity because "there are many reasons why Congress might have included subsection (M)(ii) even though many, if not all, of the tax offenses it describes would fall within the scope of subsection (M)(i) . . . '[s]ubsection (M)(ii) may have been enacted simply to make certain—even at the risk of redundancy—that tax evasion qualifies as an aggravated felony.'" Pet. App. 19a-20a (quoting then-Judge Alito's dissenting opinion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004)). But had Congress simply wished to make certain that tax evasion was captured by the definition of aggravated felony, it could have easily included language to that effect.[5] And because this

[5] The tax evasion statute, § 7201, itself illustrates Congress' ability to designate intentional redundancies. This Court has rejected the argument that a more general statute criminalizing false statements was intended to exclude such statements from the acts that constitute tax evasion, because, "[b]y providing that the sanctions [for tax evasion] should be 'in addition to other penalties provided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952) (internal citation omitted). By contrast, (M)(ii) includes no language indicating that it is intentionally superfluous, although there are a variety of ways in which Congress could have signaled that intent if it had wished to do so (*e.g.*

Court "presum[es] that Congress legislates with knowledge of our basic rules of statutory construction," *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), the Court should presume that Congress would have indicated any intention on its part to enact an entirely superfluous provision. Congress gave no such indication here.

More fundamentally, the entire purpose of applying settled canons of statutory interpretation is to establish ground rules for discerning congressional intent where the plain text alone fails to dictate an answer. Here, for instance, Congress *might* have intended to enact a redundant provision in case some as-yet unknown situation arose in which tax evasion would fall outside (M)(i). Conversely, Congress *might* have enacted (M)(ii) because it wanted to single out tax evasion as the sole revenue offense that qualifies as an aggravated felony. The rule against superfluities provides the courts with a means of choosing among these competing might-haves. Neither the Ninth Circuit nor the Government has provided a sound basis for abandoning that long-settled canon in favor of their preferred interpretation of Congress' intent.

B. The More Specific Language Of (M)(ii) Takes Precedence Over The General Language of (M)(i)

1. A second canon of interpretation reinforces the propriety of reading M(i) to exclude tax code offenses: "However inclusive may be the general lan-

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"notwithstanding (M)(i), tax evasion is an aggravated felony even if there is no proof of fraud or deceit").

guage of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (internal quotation omitted; alteration in original); *see also Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (internal quotation omitted; emphasis in original). This "basic principle of statutory construction" applies "particularly when the two [provisions] are interrelated and closely positioned." *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981).

A close cousin of the specific-governs-the-general rule is the presumption that, "[w]here Congress includes particular language in one section of a statute but omits it in another," Congress "acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23, (1983)). *See, e.g.*, *id.* (that a statute refers to "jurisdiction" rather than "jurisdiction to render judgment" is significant where the latter was used in related statutes); *Bailey v. United States*, 516 U.S. 137, 146 (1995) (adopting a less expansive definition of "use" of a firearm because Congress had in other statutes included both "used" and "intended to be used").

Here, accordingly, Congress' specific reference to

"revenue losses" in (M)(ii)—immediately following its use of the more general term "losses" in (M)(i)—must be viewed as a deliberate choice. And the provision that is specific to "revenue losses" singles out tax evasion alone as an aggravated felony.

2. The Government concedes the applicability of the specific-governs-the-general canon. It contends, though, that "the specific reference to 'tax evasion' in Subparagraph (M)(ii) would govern more general references, but only with regard to the category of offenses to which it speaks (tax evasion)." Br. in Opp. 12. This Court, however, does not interpret specifically-worded statutory provisions in such a constrained manner.

In *Leocal*, for instance, the Court considered the interrelationship between a provision defining the term "serious criminal offense" to encompass "any crime of violence" and a provision defining the same term alternatively to encompass a particular subcategory of DUI offenses. 543 U.S. at 12 (construing 8 U.S.C. § 1101(h)(2)-(3)). The Court held that the latter, specific provision meant that the former provision fails to encompass DUI offenses at all, not merely the subcategory of DUI offenses covered by the specific provision. *Id.*

Here, correspondingly, M(ii)'s specific reference to the offense of tax evasion supports construing M(i) to exclude all tax code offenses, in deference to Congress' specification that a particular tax code offense—tax evasion—qualifies as an aggravated felony. *Accord HCSC-Laundry*, 450 U.S. at 4-5 (501(c)(3) tax exemption for charitable organizations does not apply to a non-profit hospital laundry ser-

vice even though that organization falls within the general 501(c)(3) definition, because 501(e) specifically lists exempt hospital service organizations and is silent as to hospital laundries); *Preiser v. Rodriguez*, 411 U.S. 475, 488-89 (1973) (habeas statute does not simply govern habeas claims, but also precludes § 1983 claims challenging criminal convictions and sentences).

The Government also notes (Br. in Opp. 12) that (M)(i) captures a number of fraud offenses involving "loss" to the government, such as "offenses involving conspiracy to defraud the United States, theft in federally funded programs, fraud in connection with a health-care-benefit program, and contract fraud against the United States." As a result, the Government asserts, M(i) "may indeed encompass offenses resulting in losses to the government." *Id.*

That rationale misperceives the basis for applying the specific-controls-the-general rule in this case. The material, specific reference in M(ii) is "*revenue* loss," not mere "loss" of any kind. And the import of M(ii)'s specific reference to "revenue loss" is that M(i) should be construed to exclude offenses involving "revenue loss" to the Government, not "loss" of any kind to the Government. Petitioners' argument therefore has no effect on whether M(i) encompasses offenses involving other types of "loss" to the Government, such as contract fraud, embezzlement, and theft from federally funded programs. The salient point instead is that M(i) fails to encompass offenses involving "*revenue* loss" to the Government—*viz.*, tax code offenses. Congress specified in M(ii) that only *one* offense causing "revenue" loss to the Govern-

ment qualifies as an aggravated felony: the "capstone" tax code offense of tax evasion. There is no cause for construing the more general provision—M(i)—in a manner undermining Congress' specification in M(ii).

III. PRINCIPLES OF LENITY REQUIRE RESOLVING ANY REMAINING AMBIGUITY IN PETITIONERS' FAVOR

The rule against superfluities and the canon that the specific controls the general fully suffice to resolve the proper understanding of M(i). But even assuming, *arguendo*, that any ambiguity remains, principles of lenity compel construing M(i) to exclude tax code offenses from its scope.

1. The rule of lenity requires that ambiguities in immigration statutes be resolved in favor of the alien:

> We resolve the doubts in favor of [the narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile . . . . since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). Basic principles of fairness and due process require that individuals face that "drastic measure" only if they were on clear notice that their crime could give rise to this severe punishment. Because

"[d]eportation is always a harsh measure"—and all the more so for individuals like the petitioners, who have lived in this country for more than 25 years—courts apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Errico*, 385 U.S. 214, 225 (1966).

The consequences that attend the designation of an offense as an aggravated felony are particularly serious. An alien convicted of an aggravated felony is, *inter alia*: subject to expedited removal (8 U.S.C. § 1228(a)); ineligible for the main discretionary waiver of removal (8 U.S.C. § 1229b); ineligible for asylum (8 U.S.C. §§ 1158(b)(2)(A)(ii) and (b)(2)(B)(i)); ineligible to gain readmission to the United States (8 U.S.C. § 1182(a)(9)(A)); and is generally unable to obtain judicial review of his or her removal order (8 U.S.C. § 1252(a)(2)(C)). Moreover, an alien arrested after an aggravated felony conviction is subject to mandatory detention during removal proceedings (8 U.S.C. § 1226(c)). In light of these significant consequences, lenity is particularly appropriate.

2. In addition to the rule of lenity that applies in the immigration context, the *criminal* rule of lenity fortifies the conclusion that petitioners' convictions fail to qualify as aggravated felonies. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself," and serves two important goals: "the tenderness of the law for the rights of individuals; and [ ] the plain principle that the power of punishment is vested in

the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also United States v. Hayes*, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority."); *Scheidler v. NOW, Inc.*, 537 U.S. 393, 409 (2003) ("[A] significant expansion of the law's coverage must come from Congress, and not from the courts."). These principles are safeguarded by a simple rule of construction: "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The rule is fully applicable when the interpretive question arises in a civil suit, so long as the statute in question has criminal consequences in other circumstances: "The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the [statute] has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("It is not at all unusual to give a statute's ambigu-

ous 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. The lowest common denominator, as it were, must govern.")

That is the situation here. Under 8 U.S.C. § 1326(b)(1)-(2), the definition of aggravated felony in 8 U.S.C. 1101(a)(43) determines the maximum sentence for an alien who unlawfully re-enters the country after being removed: aliens removed pursuant to conviction of an aggravated felony are subject to imprisonment for twice the duration as those removed for non-aggravated felonies. Similarly, under the sentencing guidelines, the sentence for unlawfully entering or remaining in the United States increases by 8 levels for those convicted of an aggravated felony, as compared with 4 levels for those convicted of any other felony. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2010). The application notes that accompany that guideline specify that aggravated felony is to be defined as it is in 8 U.S.C. § 1101(a)(43). The question whether an offense qualifies as an aggravated felony under (M)(i) thus indisputably has criminal consequences. As this Court has explained, "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal*, 543 U.S. at 11-12 n.8. Any lingering ambiguity, in short, must be resolved in petitioners' favor.

3. The Government argues (Br. in Opp. 13-14) that the rule of lenity is inapplicable because it would usurp the BIA's authority to resolve statutory

ambiguities in the INA. But as this Court has explained: "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." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The rule of lenity is one of the "traditional tools of statutory construction" routinely applied by courts, and this Court has specifically identified it as one of the rules of construction that renders a statute unambiguous and forecloses deference to any contrary interpretation by an agency. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005) (Court of Appeals erred in failing to give *Chevron* deference to agency interpretation because "the court invoked no other rule of construction (*such as the rule of lenity*) requiring it to conclude that the statute was unambiguous to reach its judgment") (emphasis added). In fact, this Court has found that the rule of lenity would require any ambiguity in a criminal statute to be construed in favor of an alien facing deportation for conviction of an aggravated felony even though the BIA had reached a contrary conclusion as to the statute's meaning. *See Leocal*, 543 U.S. at 3, 11 n.8; *see also Thompson/Center Arms*, 504 U.S. at 517-518 n.9 (applying the rule of lenity despite an agency's contrary interpretation of the challenged provision). Deference is particularly inappropriate where, as here, interpretation of the challenged provision turns in large part on substantive questions of tax law, an area outside of the BIA's expertise. *See Ki Se Lee*, 368 F.3d at 224-25 n.10. Consequently, no

deference would be owed the BIA's decision, and the rule of lenity requires that any lingering doubt be resolved in favor of petitioners.

CONCLUSION

For the foregoing reasons and those stated in petitioners' brief, this Court should reverse the judgment below.

Respectfully submitted,

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