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

REPLY BRIEF FOR THE PETITIONERS

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800

Thomas J. Whalen*
**Counsel of Record*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin
& Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
twhalen@eckertseamans.com

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Petitioners, Akio and Fusako Kawashima (the "Kawashimas"), herewith submit their Reply to the Opposition Brief of Respondent.*

ISSUES BEFORE THE COURT

The primary issue presented for review involves a direct conflict in the Circuits which is not disputed by the Respondent. (Opp. 14.)

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. However, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court recognized that parts of the aggravated felony statute were not succinct, clear and explicit in defining whether a particular crime was a removable offense.

Where the statute is not clear and explicit, but instead vague and ambiguous, the remedy the Court mandated in *Padilla* does not resolve the issue. In this case, learned judges in the Circuits have disagreed about the application of 8 U.S.C. §

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* Respondent's Brief in Opposition is referred to as "Opposition," and cited as "Opp. __;" the Petition is cited as "Pet. __."

1101(a)(43)(M).[1] With exile and deportation at risk, due process and fair notice require that a statute set forth clearly what is a deportable offense. (Pet. 15-17, 32.) As this Court recently recognized: "[t]o satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010); *see also Black v. United States*, 130 S. Ct. 2963 (2010).

From this fundamental notion of due process and fairness has evolved the rule of lenity. Despite the disputes among and within the Circuits on the application of 8 U.S.C. § 1101(a)(43)(M)(i),[2] the Solicitor General maintains that the statute is clear to avoid the application of the rule of lenity.

The disputed issue in the case at bar is: whether a tax crime conviction under 26 U.S.C. § 7206 was intended by Congress to be an aggravated felony under (M)(i). (M)(i) provides that an aggravated felony is an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." At the same time, 8 U.S.C. § 1101(a)(43)(M)(ii)[3] provides that tax evasion under 26 U.S.C. § 7201 is an aggravated felony when the "revenue loss to the Government exceeds $10,000."

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1 Hereinafter, "(M)."

2 Hereinafter, "(M)(i)."

3 Hereinafter, "(M)(ii)."

The statutory ambiguity of (M) is at the heart of this case. Respondent's Opposition does nothing to reconcile the statutes or justify Petitioners' deportation. The Petitioners' construction is faithful to the honored canons of construction and the rule of lenity is applicable.

ARGUMENT

I. The Solicitor General Fails to Adhere to Well-Established Canons of Statutory Construction in its Interpretation of 8 U.S.C. § 1101(a)(43)(M)(i).

A. 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).

Despite Congress' enactment of (M)(ii) specifying tax evasion as an aggravated felony, the Solicitor General argues that the Kawashimas' tax crimes of conviction under 26 U.S.C. § 7206(1)[4] and (2)[5] are offenses covered by (M)(i) because they are crimes involving "fraud or deceit."

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[4] Hereinafter, "§ 7206(1)."

[5] Hereinafter, "§ 7206(2)."

It is impossible to fathom why tax evasion was specifically designated by Congress as an aggravated felony in (M)(ii) if the offense was already contained in (M)(i) as a crime of "fraud or deceit." The Government's position is directly at odds with the well-established canon of construction which requires that effect be given to all provisions of a statute, so that no part will be inoperative or superfluous. J.D. Shambie Singer, *Statutes and Statutory Construction* (7th Ed. 2007) § 46.6; *see also Corley v. United States*, 129 S. Ct. 1558, 1561 n.5 (2009).

In response, the Solicitor General offers the specious explanation that Congress "might have" added (M)(ii) because fraud is not necessarily an element of the crime of tax evasion and, therefore, tax evasion may not be covered by (M)(i) in some cases. (Opp. 10.) No legislative history or scholarly commentary supports this speculative and unconvincing explanation. The Government has to do better than "might have" when Circuits have vehemently disagreed on the issue, and Petitioners' liberty hangs in the balance after living 27 years in this country.

The Solicitor General argues that (M)(ii) is not superfluous "because 26 U.S.C. § 7201 [tax evasion] does not include fraud or deceit as an element." (Opp. 11.) In fact, tax evasion involves fraud at its core.

In *Spies v. United States*, 317 U.S. 493, 497 (1943), 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 ..."

A § 7201 violation involves willful attempts to defeat and evade a tax, commonly referred to as "tax fraud." *See Black's Law Dictionary* (9th ed. 2009). The only difference between § 7201 and the civil fraud penalty statute, 26 U.S.C. § 6663, is the burden of proof. In fact, at the time of *Spies*, the civil tax fraud statute that imposed a fraud penalty used the same term: "evade." For these reasons, a conviction of tax evasion under § 7201 collaterally estops the taxpayer from contesting the civil fraud penalty. Contrary to the Solicitor General's argument, with "fraud" at the core of tax evasion, that offense would be covered in (M)(i), thereby rendering M(ii) superfluous. For (M)(ii) to have any effect and not be superfluous, Congress must have intended § 7201 to be *the only* revenue offense covered in 8 U.S.C. § 1101(a)(43)(M).

The Government then argues that while tax evasion may not involve "fraud and deceit" and, therefore, would not be covered by (M)(i), the lesser included and clearly less serious tax offense of making a false statement in violation of §§ 7206(1) and (2) does necessarily include "fraud and deceit" and, therefore, is covered by (M)(i). Filing a false statement under §§ 7206(1) and (2) is essentially a tax perjury offense. Section 7206 allows the Government to obtain a tax conviction for underreporting income where the Government lacks sufficient evidence to obtain a conviction for tax

evasion. Accordingly, the Solicitor General's reasoning defies logic: the greater offense does not necessarily involve "fraud or deceit," but the lesser offense necessarily does.

The Government also does not address the fact that Congress made a distinction between "revenue loss to the Government" in (M)(ii) and "loss to victims" in (M)(i). One of the cornerstones of statutory construction is that effect must be given to all words contained in every provision of a statute. Different words in separate provisions of the same statute were inserted for a purpose: "loss" versus "revenue loss." The language used by Congress in (M)(ii) leads inexorably to the conclusion that crimes involving a revenue loss to the Government are covered in (M)(ii).

Sidestepping the issue, the Government states that (M)(i) covers losses "to the Government" when the Government stands like any other victim as to a monetary loss (*e.g.*, embezzlement of Government funds). (Opp. 12.) The cases cited, however, only establish that the Government can be a "victim" in "fraud or deceit" crimes. Critically, none of these cases were tax cases involving "revenue loss to the Government," which, as Petitioners argue, and the statute expressly provides, are covered in (M)(ii).

Harmonizing (M)(i) and (M)(ii) by applying well-established canons of statutory construction leads unavoidably to the conclusions that Judge Graber arrived at in her dissent in the Court below: (M)(i) and (M)(ii) are mutually exclusive, and (M)(ii) covers tax crimes involving revenue losses to the

Government. *See Kawashima v. Holder*, 615 F.3d 1043, 1046-50 (9th Cir. 2010); Pet. App. A, 3a-12a. Accordingly, the only tax crime that is an aggravated felony and a deportable offense is tax evasion in violation of § 7201.

B. The Doctrine of *Ejusdem Generis* Limits (M)(i)'s Applicability to 26 U.S.C. §§ 7206(1) and (2).

The Solicitor General objects to the Petitioners' invocation of the doctrine of *ejusdem generis*, that "the specific governs the general." (Opp. 8.) The Solicitor General cites *Varity Corporation v. Howe*, 516 U.S. 489 (1996), for the proposition that this canon is a warning against applying a general provision when doing so would undermine limitations created by a more specific provision. (Opp. 11-12.) Petitioners agree.

The Court in *Varity*, however, pointed out that the specific provision involved in that case was not a limitation on the general, but rather an additional remedy. *Varity*, at 511. M(ii) is not an additional, separate, standalone provision; it is a parallel provision enacted at the same time as M(i) and both provisions are to be construed together. In effect, Congress pulled "revenue losses" from losses that might otherwise fall within (M)(i), and (M)(ii) became a limitation on (M)(i).

II. The Solicitor General Erroneously Concludes that (M)(i) and (M)(ii) are Clear and Unambiguous and, Therefore, That the Rule of Lenity is Inapplicable.

The Government contends that the split within and between the Circuits is not evidence that the statute is ambiguous, citing *United States v. Hayes*, 129 S. Ct. 1079 (2009). (Opp. 13.) In *Hayes*, there was no express statement, either way, that a split of opinion evidenced an ambiguity. The Court, however, recognized a split in the Circuits on the construction of the statutory provision there involved and reviewed the case. Ultimately, there was a difference of opinion within the Court on the statute's vagueness and the application of the rule of lenity. *See Hayes*, at 1093; *see also Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006) (where that court held that conflicting opinions on the interpretation of the penal statute resulted in a denial of due process and fair notice).

Moreover, the Solicitor General argues that utilizing the rule of lenity to resolve the ambiguities in (M) in the Kawashimas' favor would usurp the interpretive authority of the Attorney General that this Court has confirmed in *INS v. Aguirre-Aguirre,* 526 U.S. 415 (1999) and *Negusie v. Holder,* 129 S. Ct. 1159 (2009). (Opp. 13-14.) As the Court stated in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987) (*quoting Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)), the judiciary is the final authority on issues of statutory construction. *Chevron*, however, applies when the Attorney General makes a factual or

judgmental determination allowed under an immigration statute, as was the case in *Cardoza-Fonseca*. The Government's position in this case would foreclose *any* applicability of the rule of lenity in deportation cases, *i.e.*, if a statutory provision is unclear, the Attorney General would have the unilateral authority to resolve any ambiguity as he saw fit, a principle that must be rejected by the Court on its face.

III. The Split in the Circuits is not "Narrow" and the Kawashimas' Case Warrants Review by this Court.

The Solicitor General argues that the split in the Circuits is not serious enough to warrant review by the Court and "that the narrow disagreement in the Courts of appeals may be resolved without further intervention of the Court." (Opp. 14.) The Solicitor General made the same argument as recently as in 2009 by asking the Court not to review *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), *cert. denied sub nom. Arguelles-Olivares v. Holder*, 130 S. Ct. 736 (2009), which dealt with the same issue. (*See Arguelles-Olivares* Govt. Br. Opp'n 10-11.) Now, this important issue comes to the fore again in a case from the Ninth Circuit. How many similar cases are in the pipeline is unknown, but several people have been deported as a result of at least two Circuits' construction of the statute.

The Government's argument that there is "not enough" of a split misses the point. As shown in the Petition, if the Kawashimas lived and operated their restaurants in Pennsylvania instead of California,

there would be no deportation orders. (Pet. 13.) The Kawashimas, and all others potentially affected by (M), deserve clarity on this ambiguous statute.

Recently, the Court granted review in *Black,* 130 S. Ct. 2963, along with *Skilling*, 130 S. Ct. 2896 and *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010), to determine what conduct Congress rendered criminal by proscribing fraudulent deprivation of the intangible right of "honest services." *Black*, at 2966. Without any apparent conflict among the Circuits, the Court granted certiorari because of the serious vagueness and due process issues arising from 18 U.S.C. § 1346. The case at bar represents an even more compelling need for review by the Court, with the deportation of the Kawashimas imminent, in the face of wide-ranging disagreement in the Circuits as to whether their deportation is lawful under the statute Congress enacted.

The Government in this case is in effect arguing that at least three unlawful deportations (that of the Kawashimas and Arguelles-Olivares) are not enough to warrant consideration by this Court. The Court should reject the Government's position, resolve the ambiguity and the conflict, and, if Petitioners are correct, halt the deportations of the Kawashimas and others in the same position.

IV. Whether Fraud or Deceit is an Essential Element of the Kawashimas' Crimes is Relevant to (M)(i)'s Applicability to Convictions Under § 7206.

The issue in this case is the front end of the issue the Court addressed in *Nijhawan v. Holden*, 129 Sup. Ct. 2294 (2009). In *Nijhawan*, 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. *Id.* at 2302. The Court recognized that the threshold amount is not an element of the crime in most state fraud or deceit statutes. *Id.* at 2305-08. Pursuant to the Court's reasoning in *Nijhawan*, the next logical step is to conclude that unlike the $10,000 loss threshold, fraud or deceit must be an element of the crime of conviction under (M)(i).

In *Nijhawan*, the Court explained that the fraud and deceit crimes covered by (M)(i) are almost exclusively violations of state fraud and deceit statutes. *Id.* at 2302. In contrast, the Court referred to (M)(ii) as the "internal revenue provision." *Id.* at 2301; *see also Spies*, 317 U.S. at 495, 497 (describing tax evasion as a "revenue offense"). The petitioner in *Nijhawan* was convicted of <u>fraud</u>. Fraud, obviously, was an element of the crime of conviction and, therefore, plainly within (M)(i). 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. *See* Plea Agreements, Pet. App. I, 115a; Pet. App. J,

130a. Accordingly, the Kawashimas' crimes of conviction do not fall within the ambit of (M)(i).

The Solicitor General states that "even if there were any ambiguity" in (M)(i), the Court should defer to the Agency's interpretation under *Chevron*. (Opp. 13-14.) To the extent the Agency's construction is relevant at all in a matter of statutory construction, 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); (*see also* Pet. 24-29).

Confronted with undisputed record evidence that the Kawashimas' criminal conviction did not require proof, a finding, or an admission that fraud or deceit was involved, the Solicitor General's response, for lack of a better word, is non-responsive. The Solicitor General merely concludes that the decision below "was correct" and that whether "fraud or deceit" is an essential element of the crime of conviction is not a question that has divided the Circuits. (Opp. 15.) On the contrary, the issue before the Court in this case is whether the Kawashimas' crimes of conviction are within (M)(i). Based upon their plea agreements, there was no admission of fraud or deceit by the Kawashimas. In any event, "fraud or deceit" are not necessary elements of § 7206.

V. The Ninth Circuit Erred in Amending the Judgment *Sua Sponte* in the Case of Mrs. Kawashima on the Ground that the Court's Mandate had not Issued.

The Government argues that because the Kawashimas filed a single petition for review, the Ninth Circuit had the authority to amend Mrs. Kawashima's judgment. (Opp. 16-17.) The single Petition notwithstanding, there are two cases, two petitioners, and two separate crimes of conviction. Mrs. Kawashima's case was resolved more than two years ago and the Government did not seek review or otherwise challenge it. There is no basis, and certainly no authority cited by the Solicitor General, that a judgment can be amended two years later *sua sponte* by the Court because a single petition for review had been lodged. Even the Ninth Circuit claimed no such power.

Having cited no authority for its position, the Solicitor General, in conclusion, claims that Petitioners' legal authority is inapposite. (Opp. 17.) The cases the Solicitor General challenges clearly hold that when the Government declines to seek review, and the judgment is *res judicata*, the case cannot be resurrected.

Disputes are between parties and when resolved, Court intervention is unjustified. The amendment of the judgment as to Mrs. Kawashima was in error and the Court should review the Ninth Circuit's decision in this regard and order the deportation order as to Mrs. Kawashima be set aside.

CONCLUSION

The Petition for a Writ of Certiorari should be granted so that the Court can resolve the split between the Ninth and Fifth Circuits, and the Third Circuit involving a legal issue of significant importance requiring national uniformity.

April 18, 2011

Respectfully submitted,

Thomas J. Whalen*
Mark A. Johnston
Nicholas T. Moraites
Eckert Seamans Cherin &
Mellott, LLC
1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600
* *Counsel of Record*

Edward O.C. Ord
Jenny Lin-Alva
Ord & Norman
233 Sansome Street
Suite 1111
San Francisco, CA 94104
(415) 274-3800