No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR PETITIONER

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

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

Attorneys for Petitioner

220999

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i) and (U) where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million?

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OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 523 F.3d 387 (3d Cir. 2008) and appears in Appendix A to the Petition for Certiorari at App. 1a-42a.[1] The decisions of the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear at App. 44a-51a and App. 52a-61a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2008, and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 17, 2008. App. 62a-63a; JA 3a-4a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii)

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

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1. References preceded by "App." are to the appendix to the Petition for Certiorari, references preceded by "JA" are to the joint appendix and references preceded by an "R." are to the certified administrative record below.

8 U.S.C. § 1101(a)(43)(M)(i)

> The term "aggravated felony" means—an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

8 U.S.C. § 1101(a)(43)(U)

> The term "aggravated felony" means—an attempt or conspiracy to commit an offense described in this paragraph.

PRELIMINARY STATEMENT

In this case the Petitioner Manoj Nijhawan ("Petitioner" or "Mr. Nijhawan") challenges a radical departure from the plain language of the Immigration & Nationality Act of 1952 (the "Act"), 8 U.S.C. §§ 1101 *et seq*., accomplished in large measure by the unwarranted abandonment of the traditional categorical approach used to determine whether an offense for which an alien was convicted falls within a ground of deportation. The asserted basis for deportation here is that Mr. Nijhawan was convicted of an aggravated felony under the Act, a charge that, if sustained, effectively imposes a sentence of lifetime banishment upon this lawful permanent resident alien. This attempt to expand the aggravated felony definition well beyond the language enacted by Congress, and in contravention of settled rules governing statutory construction, should be rejected just as similar attempts to expand the aggravated felony definition were turned back by this Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

STATEMENT OF THE CASE

At issue in this case is what it means for an alien to be convicted of an offense defined in 8 U.S.C. § 1101(a)(43)(M)(i), an issue on which the circuits are deeply divided. In the Second Circuit, where Mr. Nijhawan was convicted, the Court of Appeals has held in cases such as this that the loss requirement under § 1101(a)(43)(M)(i) must be found by the jury. *Dulal-Whiteway v. DHS*, 501 F.3d 116, 128 (2d Cir. 2007). By contrast, the majority decision below from the Third Circuit, where Mr. Nijhawan's deportation proceedings occurred, requires only that loss be "tethered" to the conviction, not that the jury be instructed to find loss in convicting the alien defendant. App. 16a-17a. Resolution of this split among the circuits requires close scrutiny of the plain language chosen by Congress in § 1101(a)(43)(M)(i) and the lower court's abandonment of the traditional categorical approach, which is grounded in that plain language.

A. The Legal Background

As this Court acknowledged in *Lopez*, 549 U.S. at 50-51, being convicted of an aggravated felony imposes very serious immigration consequences. Such a conviction subjects an alien to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) and bars the alien from virtually all forms of relief from removal[2] including cancellation of

2. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, the term "removal" is now used in place of deportation to refer to the expulsion of an alien from the United States. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34n.1 (2006).

removal, voluntary departure and even political asylum. *See*, *e.g.*, 8 U.S.C. § 1229b(3) (alien convicted of aggravated felony ineligible for cancellation), § 1229c(b)(1)(C) (alien deportable for conviction of aggravated felony may not depart voluntarily), and § 1158(b)(2)(A)(ii) and (B)(i) (alien convicted of particularly serious crime barred from asylum and alien convicted of aggravated felony deemed to have been convicted of particularly serious crime). Furthermore, an alien in removal proceedings based on conviction of an aggravated felony is subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(B) throughout those proceedings. *Demore v. Kim*, 538 U.S. 510 (2003). Likewise, an alien removed for conviction of an aggravated felony may never lawfully return to the United States and faces a stiff criminal penalty for returning unlawfully. *See* 8 U.S.C. § 1182(a)(9)(A)(i) and (ii) (deportation for conviction of an aggravated felony constitutes a permanent bar to reentry); 8 U.S.C. § 1326(b)(2) (maximum penalty for illegal reentry after deportation for conviction of an aggravated felony set at 20 years). Finally, an alien convicted of an aggravated felony on or after November 29, 1990 can never establish good moral character for naturalization even if the alien served honorably in the armed forces of the United States during wartime. *See*, *e.g.*, 8 U.S.C. § 1101(f)(8); *Boatswain v. Gonzales*, 414 F.3d 413 (2d Cir. 2005) (aggravated felony bar to good moral character applies to wartime veterans).

Deportation for conviction of an aggravated felony first entered the Act with the passage of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4191 (Nov. 18, 1988). This provision originally included only murder

and trafficking in drugs or weapons within the definition. The aggravated felony provision at issue here in 8 U.S.C. § 1101(a)(43)(M)(i) was first enacted by Section 222 of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 430 and required conviction for a loss in excess of $200,000. Section 321 of IIRIRA reduced the loss element to in excess of $10,000.

These provisions were enacted against the backdrop of what has come to be called the categorical approach. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-88 (2007) (recognizing that courts have uniformly applied the categorical approach in determining whether a conviction falls within a deportable offense under the Act). Indeed, close to a century ago, starting slightly more than a decade after the turn of the 20th century, and over a half-century before being convicted of an aggravated felony became a ground of deportation, both the administrative authorities and the federal courts have employed this approach to determine the immigration consequences for an alien convicted of a crime. *See*, *e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) and *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (Hand, L., J.) for early examples of this approach, and *Matter of Velasquez-Herrera*, 24 I & N Dec. 503, 513 (2008) for a summary of this history. The categorical approach usually involves comparison of the deportation ground with the criminal statute to determine whether all the requirements of the deportation provision are present in the criminal statute. When the criminal statute sweeps more broadly than the ground of deportation, a determination is made to ascertain whether the alien

was convicted under that part of the criminal statute falling within the ground of deportation. *See Duenas-Alvarez*, 549 U.S. at 188-86; *Velasquez;* Rebecca Sharpless, *Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 at 1004 (2008) (hereinafter "Test").

B. Background Facts

1. Mr. Nijhawan's Life in the United States

Mr. Nijhawan has lived in this country for over two decades, raising a family and working as an accountant. R. 275, 309-313. His sole criminal record is the non-violent, white collar conviction involved in this case. R. 275, 309. He was born in India on January 12, 1959 and immigrated to this country as a permanent resident in 1985,[3] with an otherwise positive immigration record until the present proceeding. R. 275, 309-313, 324. He studied accounting and became a licensed CPA. R. 309-313. His wife, Poonam, earned a masters degree in nutrition and home economics and has been enrolled in a special education teaching certificate program. R. 309-313. The couple has two United States citizen sons, both born in this country: Karan, age 18 and Kunal, age 15. R. 309-313. His friends and family have described Mr. Nijhawan as generous, family oriented and a dedicated father, active in his community and in the lives of his children. R. 310-312.

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3. As this Court noted in *Matthews v. Diaz*, 426 U.S. 67, 82 (1976), aliens who have been here as long as Mr. Nijhawan are among "those [permanent residents] who are most like citizens."

2. The Southern District of New York Prosecution

The criminal conviction underlying the removal proceedings here represents Mr. Nijhawan's only criminal record and arose from his employment by Allied Deals, Inc. ("Allied" or the "Company"), a metal trading conglomerate charged with having obtained loans from various banks by misrepresenting the extent of the Company's business. JA 5a-45a. With the title of Deputy General Manager, Mr. Nijhawan provided accounting assistance to Allied as the assistant to Anil Anand, who was the Company's Chief Financial Officer ("CFO"). JA 9a, 10a. Of the 15 defendants originally named in the indictment, five eventually went to trial including Mr. Nijhawan and two managers for the Company.[4] R. 287-288. CFO Anand testified as a government witness at trial.[5] R. 287-288. On May 12, 2004, the jury returned guilty verdicts against the two managers, one metal company officer and Mr. Nijhawan, while acquitting the other metal company officer. R. 287-288.

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4. The other defendants who went to trial were Josielynn Salumbides, the Traffic Manager, Naina Chitroda, the Documentation Manager, and Ashok Shah and Sanjay Rohira, officers at metal companies purportedly doing business with Allied. R. 287-288.

5. On June 28, 2003, CFO Anand had entered a guilty plea under 18 U.S.C. § 1001 (false statements), § 371 (conspiracy to commit bank fraud, mail fraud and wire fraud), § 1344 (bank fraud), § 1956(h) (conspiracy to commit money laundering), and 26 U.S.C. § 7201 (tax evasion) receiving a sentence of time served of some seven months on June 17, 2008. *See United States v. Anand*, 02 Cr. 673 (S.D.N.Y. June 17, 2008) *available at* PACER, www.https://ecf.nysd.uscourts.gov.

The jury convicted Mr. Nijhawan of Counts One and Thirty of the Indictment. Count One under 18 U.S.C. § 371 charged a conspiracy to violate 18 U.S.C. § 1344, § 1341 and § 1343. Count 30 alleged a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). R. 288.

In charging the jury, the District Court repeatedly instructed that no finding of loss or amount of money laundered was necessary to convict. JA 46a, 47a, 52a, 57a. For example, addressing bank fraud under 18 U.S.C. § 1344, the District Court explained that, "The government is not required to prove that the defendant you are considering intended permanently to deprive the banks of their property or that the banks suffered the loss or that the defendant personally profited from his or her acts." JA 47a. The government never requested an instruction on amount of loss or amount laundered, while Mr. Nijhawan's specific request for a charge on loss was refused.[6] The jury returned only a general verdict of guilty. As the evidence below confirmed and the government conceded, Mr. Nijhawan himself received literally nothing from the loan schemes in which Allied was engaged and was simply paid his salary. JA 68a.

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6. This request, subject to judicial notice under Fed. R. Evid. 201(b), is contained at 14a-15a in the appendix to this brief. *See 1 Weinstein's Federal Evidence* § 201.13 (2d ed. 2008). In the Second Circuit prior to *Booker v. United States*, 543 U.S. 220 (2005), the requirement of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for a jury finding on any fact that would increase the maximum sentence was held to apply only to the statutory maximum and not the Sentencing Guidelines. *See*, *e.g.*, *United States v. Norris*, 281 F.3d 357, 360-61 (2d Cir. 2002).

Under the then applicable regime for sentencing established by the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 1B1.3, Application Notes 1-2, the District Court was required to fix the controlling guideline level above the base level[7] by determining the amount of loss for all relevant conduct, not just that for which Mr. Nijhawan was convicted, and to do so under a preponderance of the evidence standard. *United States v. Nathan*, 188 F.3d 190, 204 (3d Cir. 1999) (burden of proof for loss at sentencing is preponderance of the evidence). Faced with the guideline level fixed by USP, Mr. Nijhawan accepted the government's agreement to fix his Sentencing Guidelines level at 38 based upon a total loss in excess of $100 million for *sentencing* purposes in order to obtain the right to seek a downward departure of up to 16 levels, putting his sentencing range at 41 to 51 months. JA 60a-69a. *See Booker v. United States*, 543 U.S. 220, 290 (2005) (Stevens, J., dissenting) ("[A] prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining

7. Since he had no prior criminal record, Mr. Nijhawan's base offense level under the applicable Sentencing Guidelines, namely those as of November 1, 2001, was six, yielding a sentencing range of up to six months imprisonment. R. 308. U.S. SENTENCING GUIDELINES MANUAL, SENTENCING TABLE (2004). In preparing the Presentence Investigation Report ("PSR"), United States Probation ("USP") added 26 levels based on USP's own loss calculations under the Sentencing Guidelines. R. 308. *See Blakely v. Washington*, 542 U.S. 296, 312 (2004), which notes that under a guidelines sentencing regime, sentences may be increased, "based not on facts proved to [the defendant's] peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong."

power than if required to prove the same fact beyond a reasonable doubt."). In addition, as part of his agreement with the prosecution, Mr. Nijhawan had to give up the right to appeal his conviction and sentence including raising constitutional challenges to the Sentencing Guidelines on appeal. JA 66a.

Both the government and the District Court specifically recognized that this agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. Thus at sentencing Mr. Nijhawan's defense counsel advised the District Court that, despite the stipulation for sentencing purposes, Mr. Nijhawan was "looking to reserve on the issue of dollar amounts for another day," in what the District Court expressly recognized would be "another forum." JA 75a, 90a. Defense counsel urged that the total loss for sentencing purposes "overstates the seriousness relative to this defendant. And he would like to reserve the right to argue his responsibility for a total dollar figure in the event he finds himself before an immigration tribunal on that definition of so-called aggravated felony." JA 90a. Likewise, in fixing loss and ordering restitution for sentencing purposes in the amount of $683 million jointly and severally, the District Court held and the government *expressly* agreed that this was not a determination that Mr. Nijhawan had caused a loss in excess of $10,000:

> [DEFENSE COUNSEL]: . . . That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. *That's not a finding of over $10,000 specific to this defendant.*

> THE COURT: I think that's right. Do you agree with that [Assistant United States Attorney ("AUSA")]?
>
> [AUSA]: Yeah, I think it's right Your Honor, just the loss.

JA 97a-98a. (Emphasis supplied).

Furthermore, the District Judge, who had presided over this matter from the beginning, recognized the case to have been a "tragic affair" and observed that " . . . I don't believe I've encountered a defendant who's being sentenced who appears to me more equipped, I guess morally and in other ways, to conclude this sorry affair and to make the most of what lies ahead of [him]." JA 103a. Given the totality of all these circumstances, the District Court granted downward departure and sentenced Mr. Nijhawan to 41 months imprisonment, at the bottom of the applicable guideline under the stipulation. JA 108a.

3. Administrative Proceedings

Removal proceedings commenced against Mr. Nijhawan while he was serving his sentence at Allenwood Low Security Correctional Institution. R. 395-397. The Department of Homeland Security ("DHS") initially charged him as removable under (1) 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense under 18 U.S.C. § 1956(h) with the amounts of funds laundered exceeding $10,000 and (2) 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of an offense that involved fraud or deceit in which the loss to the victim

or victims exceeded $10,000. DHS later amended this second charge to add the conspiracy element under 8 U.S.C. § 1101(a)(43)(U). R. 95, 396. The Immigration Judge sustained both charges in a series of decisions culminating in an order of removal entered February 22, 2006. App. 52a-61a. The Immigration Judge upheld the § 1101(a)(43)(M)(i) charge solely upon the allegations in the Indictment and did not address the jury instructions, which had required no finding of loss to convict Mr. Nijhawan. App. 52a-61a.

On appeal under 8 C.F.R. § 1003.2, the Board handed down a single member non-precedent decision on August 8, 2006 that rested removability solely upon the § 1101(a)(43)(M)(i) and (U) charge.[8] App. 44a-51a. On the issue of loss, the BIA rejected the argument that loss had to be an element of the offense but recognized that loss was not established by the guilty verdict. Instead, the Board decided to "look beyond the finding of guilty to determine the amount of loss in this case." App. 49a. Accordingly, the Board made its own independent factual finding of loss based upon what had happened at sentencing, upheld the § 1101(a)(43)(M)(i) and (U) charge on that basis and declined to reach the § 1101(a)(43)(D) charge.[9] App. 49a-51a.

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8. Under 8 C.F.R. § 1003.1(g) only decisions so designated are considered precedential. *See*, *e.g.*, *Matter of Yanez*, Int. Dec. 3473n.8 (BIA 2002) (en banc) holding that reliance cannot be placed upon non-precedent BIA decisions.

9. *But see* 8 C.F.R. § 1003.1(d)(iv) (BIA may not make factual findings on appeal).

D. The Court of Appeals Opinions: Majority And Dissent

A timely petition for review was filed with the United States Court of Appeals for Third Circuit on August 31, 2006 in accordance with 8 U.S.C. § 1252.[10] After briefing and oral argument on December 11, 2007, a divided panel of the Third Circuit issued majority and dissenting opinions now officially reported at 523 F.3d 387 (3d Cir. 2008). App. 1a—43a. While expressly acknowledging contrary authority from other circuits including most recently *Dulal-Whiteway* from the Second Circuit, Judge Rendell's majority opinion for herself and District Judge Irenas, sitting by designation, declined to follow the categorical approach for determining whether Mr. Nijhawan had been convicted of an offense that involved fraud or deceit in which the loss exceeded $10,000. App. 9a. The majority reached this result by reading the "in which" language in § 1101(a)(43)(M)(i) as taking Mr. Nijhawan's case outside the categorical approach outlined by this Court in *Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). App. 9a. In this connection, the majority viewed the loss requirement as the same kind of "qualifier" as those in other aggravated felony definitions that make an offense an aggravated felony only if the offense is one "for which" a sentence of one year or more has been imposed. Concluding that loss did not have to be

10. Following completion of Mr. Nijhawan's criminal sentence and his transfer to the custody of United States Immigration & Customs Enforcement, the Third Circuit issued a stay of removal on October 4, 2007 that was continued on October 22, 2007 pending disposition of the review petition and further order of the Court. JA 2a.

established when the jury convicted Mr. Nijhawan, the panel majority held instead that loss need only be sufficiently "tethered" to the conviction and then held that such necessary "tethering" had been shown here. App. 16a—17a. Noting the conflict among the Circuits on the loss issue, with both the Second and Ninth Circuits in the opposite corner, the majority found support in the decision by the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006). The majority also expressed policy concerns that to adopt the Petitioner's position would result in far fewer deportations, while dismissing any concern that the rule adopted would result in insurmountable practical difficulties for the Immigration Courts. App. 6a, 9a.[11]

Judge Stapleton's dissent began by noting that the Third Circuit, in line with *Shepard* and *Taylor* as well as other Courts of Appeals, had presumptively applied the categorical and modified categorical approach to aggravated felony determinations. App. 28a—29a. The dissent recognized that this approach begins with what has become known as the "formal categorical approach" involving a comparison between the statute of conviction and the removal provision and, if that does not provide an answer, moves to what all Courts of Appeals describe as a "modified categorical approach." App. 28a—29a. In line with *Shepard* and *Taylor*, the dissent concluded, the modified categorical approach limits analysis to the record of conviction "in order to determine the facts upon which [an alien's] prior conviction actually and necessarily rested." App. 28a. Such an approach, the

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11. The panel majority did not rely on *Matter of Babaisakov*, 24 I & N Dec. 306 (BIA 2007).

dissent concluded, rested squarely upon the plain statutory language, just as with the sentence enhancement provisions in both *Shepard* and *Taylor*, all of which require the person at issue to have been *convicted* of the offense: "The plain language of the [Act], like [the sentence enhancement] mandates that the alien was 'convicted' of the prior offense designated in the [Act] as an 'aggravated felony.' It is not sufficient for the BIA to independently conclude that the alien 'has committed' the prior offense." App. 29a.

The dissent concluded that the approach adopted by the Second, Ninth and the Eleventh Circuits represented the better approach in contrast to that followed by the First Circuit in *Conteh*. The dissent took issue with *Conteh* as holding that the "conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in [§ 1101(a)(43)(M)(i)]." App. 31a n.15. Likewise, the dissent pointed out the flaw in *Conteh*'s reliance upon restitution orders, which were based upon a preponderance of the evidence rather than the clear and convincing standard required for removal orders. App. 31a n.15. The dissent also recognized that the modified categorical approach rested upon fairness concerns and the practical difficulties in having the Immigration Courts retry criminal cases, noting that ". . . if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary." App. 31a. The dissent held that there was no textual support for the panel majority's "tethered" test and found that this new test was not defined here

beyond holding it satisfied, thus creating confusion for the Immigration Judges and the Courts of Appeals in future cases. App. 31a n.15.

Furthermore, the dissent recognized that this case would be the first time an alien would be deported in the Third Circuit for an offense not determined to be an aggravated felony in the adjudication of guilt. App. 37a. Addressing the conviction record in Mr. Nijhawan's criminal case, the dissent pointed out that the jury was not charged to find any loss and that despite the allegations in the indictment, the "jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss." App. 35a-36a. With respect to the restitution order, the dissent held that the order suffered from the same deficiency as in *Dulal-Whiteway* since such orders are based upon a preponderance of the evidence. App. 35a—36a. Similarly, the dissent rejected reliance upon the sentencing stipulation for much the same reasons because

> [t]he stipulation with respect to the application of the Sentencing Guidelines is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.

App. 36a. Even if retention of the convicted conduct requirement would produce fewer deportations, the dissent nevertheless held that its construction of the

Act appeared to be consistent with Congressional intent reflected in the plain language of the Act and was subject to correction by the legislature, if Congress disagreed with the court. App. 36a-37a.

Mr. Nijhawan filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which was denied on July 17, 2008 over the dissent of Judge Ambro, who would have granted rehearing. App. 62a—63a. By order dated July 31, 2008, the Third Circuit granted the Petitioner's motion to stay the mandate. JA 4a. This Court granted certiorari on January 16, 2009. JA 121a.

SUMMARY OF ARGUMENT

Under the plain language the Act, the harsh penalty of deportation for conviction of an aggravated felony, which amounts to a sentence of lifetime banishment, can only be imposed upon an alien who has actually been convicted of such an offense. From the very beginning of legislation authorizing deportation, Congress has sharply distinguished between convictions that render an alien deportable and alleged misconduct that must be proved in deportation proceedings to oust an alien from the United States. Furthermore, in imposing deportation based on conviction, the Act draws a clear line between what was encompassed in the alien's conviction as opposed to what sentence the alien received after conviction. Given the plain language requiring conviction, for nearly a century the federal courts and the administrative authorities enforcing the immigration laws have employed what has come to be known as the categorical approach in determining whether a conviction falls within a ground of deportation.

This approach limits inquiry to, at most, what was established when a jury convicted an alien.

The decision below by a sharply divided panel of the Third Circuit radically departs from the plain language of the Act, the controlling categorical approach in aggravated felony determinations under the Act, and the longstanding distinction in immigration law between conviction and conduct as a basis for removal. Instead, the decision literally permits an alien to be deported based upon conduct for which the jury did not convict him, contrary to the principles established by this Court in *Shepard* and *Taylor*.

Under either the formal categorical approach or the modified categorical approach the decision below should be reversed. Applying the modified categorical approach, the jury was not instructed to find loss and thus Mr. Nijhawan was not convicted of this necessary part of the aggravated felony defined in § 1101(a)(43)(M)(i). With respect to the formal categorical approach, loss was not a necessary legal element of the federal offenses in this case so there was no match between the statutes of conviction and the aggravated felony at issue here. *See Duenas-Alvarez*.

The decision below, however, jettisons the categorical approach based upon a misreading of the plain language of the Act requiring a person to have been convicted of both the fraud or deceit *and* loss components of the aggravated felony defined by § 1101(a)(43)(M)(i), a result fundamentally at odds with *Duenas-Alvarez* and other decisions of this Court

involving the categorical approach. *See*, *e.g.*, *United States v. Rodriquez*, 128 S.Ct. 1783 (2008) and *Begay v. United States*, 128 S.Ct. 1581 (2008). In this connection, moreover, the decision below runs directly counter to the structure of the aggravated felony definitions enacted by Congress and creates an entirely new standard of "tethering" loss to conviction, a novel approach entirely divorced from the statutory language, which requires the alien to have been convicted of the loss. The dissent below correctly recognized that this case would be literally the first time that the Third Circuit had sanctioned deportation for a specified conviction where the alien had not actually been convicted on the ground of deportability. Never has this Court sanctioned deportation under such circumstances.

In relying upon what transpired at sentencing, the decision below fails to recognize that this occurs *after* the jury convicted Mr. Nijhawan and is thus excluded from the plain language of the Act, which looks to a conviction. Indeed, relevant conduct under the Sentencing Guidelines extends beyond what was charged in the criminal case. Such sentencing determinations, whether of loss for sentencing purposes or restitution, are fundamentally at odds with both the requirement that the alien have been *convicted* of the aggravated felony, which presupposes proof beyond a reasonable doubt, and the burden of proof in removal proceedings, which is by clear and convincing evidence. Sentencing determinations, however, are governed by a preponderance of the evidence standard and are made after the jury convicts.

In addition, the decision below overlooked the longstanding rule of lenity or narrow construction most recently reaffirmed by this Court in *Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (2008). This controlling rule requires that any ambiguity in a deportation provision must be resolved in the alien's favor given the harsh consequences of removal. The dissent below and the well-reasoned decisions or dissents in other Circuits make abundantly clear that the relevant statutory provisions should be construed in the Petitioner's favor. The error of the Third Circuit in not applying this rule is underscored by the fact that, while the dissent below establishes clear rules for the prompt resolution of aggravated felony issues in the Immigration Courts, the majority decision writes a prescription for chaos. Already overburdened Immigration Judges will effectively be forced to retry criminal cases in order to render the factual determinations required under the majority opinion, leaving future appellate panels, already beset with bulging immigration dockets, to define and refine the undefined "tethering" standard set by the decision below but not adopted by Congress. In short, the decision below ultimately will force the Immigration Courts into territory this Court has previously considered as forbidden. *See*, *e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt.").

To the extent that the decision below rests upon policy concerns about fewer deportations should the Petitioner's position be accepted, this cannot overcome the plain language of the Act and ultimately presents a matter for Congress, not the courts. Furthermore, these concerns are belied by the many state and federal criminal statutes in the Statutory Appendix requiring loss as an element of the offense. This same error also infects the BIA's decision in *Babaisakov*, which played no part in the decision below. The *Babaisakov* decision also rested upon the erroneous premise that employment of the categorical approach would render § 1101(a)(43)(M)(ii) (conviction under 26 U.S.C. § 7201 involving revenue loss in excess of $10,000) a nullity, when as a matter of law that criminal tax statute does require loss as an element.

The *Babaisakov* decision merits no deference because § 1101(a)(43)(M)(i) forms part of a federal criminal statute, 8 U.S.C. § 1326(b)(2) (illegal reentry after deportation for conviction of an aggravated felony), Furthermore, the Petitioner's position rests upon the plain language of the statute and traditional rules of statutory construction, both precluding any resort to deference to resolve the question presented here.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT REQUIRES THE ALIEN TO HAVE BEEN CONVICTED OF THE OFFENSE DEFINED IN 8 U.S.C. § 1101(a)(43)(M)(i) AND MANDATES APPLICATION OF THE CATEGORICAL APPROACH

The plain language of the Act requires the Petitioner to have been convicted of the loss amount and provides no basis for departing from the time honored categorical approach in determining whether Mr. Nijhawan was convicted of an aggravated felony.

A. The Statutory Language Requires The Alien To Have Been Convicted Of The Loss Amount.

The Act imposes removal only upon an alien *convicted* of an aggravated felony. *See*, *e.g.*, *Lopez v. Gonzales*, 549 U.S. 47 (2006); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (plain meaning controls in construction of the Act). Thus 8 U.S.C. § 1227(a)(2)(iii) could hardly be more explicit in mandating that only "an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied). The plain meaning of this provision of the Act is that it ". . . premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been formally *convicted* of in a court of law." *Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137, 145 (2d Cir. 2008). In contrast to

this plain language chosen by Congress here, the opinion below actually begins by stating that Mr. Nijhawan appeals from a determination by the Board that "he had *committed* an aggravated felony . . . ." App. 2a (emphasis supplied). While Congress certainly knew how to attach adverse immigration consequences to conduct found in removal proceedings to have been committed, the legislature did not do so here. *Compare*, *e.g.*, 8 U.S.C. § 1101(a)(13)(C)(v) (returning permanent resident alien who has committed specified offenses deemed applicant for admission); 8 U.S.C. § 1182(a)(2)(D) (alien who has engaged in prostitution within specified period is inadmissible). Indeed, 8 U.S.C. § 1182(a)(2)(A)(i)(I) even sanctions the exclusion of an alien who admits the essential elements of a crime involving moral turpitude, yet nowhere has Congress allowed for the removal of an alien who admits the elements of a defined aggravated felony. *See*, *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here 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 purposefully in the disparate inclusion or exclusion."). Indeed, as noted above, all other adverse immigration consequences in the aggravated felony context require conviction. *See* 8 U.S.C. § 1229b(3), § 1229c(b)(1)(C), § 1158 (b)(2)(A)(ii) and (B)(i), § 1226(c)(1)(B), § 1182(a)(9)(A)(ii)(II) and 8 U.S.C. § 1326(b)(2).

The Act consistently distinguishes between removability or other adverse action against an alien based upon prior conviction in a criminal proceeding, on the one hand, and removability or other adverse action against an alien based upon alleged misconduct

established in immigration proceedings. *See*, *e.g.*, Test at 680n.2. for a compendium of provisions based on conduct found in removal proceedings).[12] Moreover, this distinction, an integral part of the current Act, runs throughout the entire history of American immigration legislation. For example, the very first legislation providing for the deportation of aliens, enacted by Congress as part of the Alien and Sedition Acts, allowed the President to remove an alien whom he judged "dangerous to the peace and security of the United States," but imposed a bar to naturalization only on aliens who were convicted for not departing as ordered. Act of June 25, 1798, 1 Stat. 570. Similarly the Immigration Act of 1917 provided for deportation of an alien convicted of a crime involving moral turpitude, but had a host of deportation grounds based upon alleged misconduct of contemporary concern such as being an anarchist. *See* Act of February 5, 1917, § 19(a), 39 Stat. 874. Furthermore, deportability based upon a conviction provides certain distinct advantages to the government, for, unlike proceedings based on alleged misconduct, the alien can never relitigate his guilt or innocence in removal proceedings, while the government does not

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12. These provisions of 8 U.S.C. include, for example, § 1182(a)(1)(A)(iv) (drug abuser or addict); § 1182(a)(2)(C) (reason to believe illicit trafficker in controlled substance); § 1182(a)(2)(H) (reason to believe trafficker in persons); § 1182(a)(2)(I) (reason to believe money launderer); § 1182(a)(3) (national security and terrorism); § 1182(a)(3)(E) (Nazi persecution and genocide); § 1182(a)(6)(C) (misrepresentation); § 1182 (a)(10)(C) (international child abductors); 1227(a)(1)(E) (smuggling); § 1227(a)(1)(G) (marriage fraud); § 1227(a)(2)(B)(ii) (drug abuser or addict); § 1227(a)(3) (failure to register and falsification of documents); § 1227(a)(4) (national security).

have to prove the alleged misconduct, only establish the fact of conviction. *See*, *e.g.*, *Lopez-Mendoza*, 468 U.S. at 1038 (1984); Test at 679 n.3 and cases cited.

With respect to what are defined as aggravated felonies under the Act, Congress has required the alien to have been convicted of the defined aggravated felony. Indeed, on the four occasions when Congress has broadened the list of aggravated felonies, Congress has never abandoned the conviction requirement.[13] *See* H.R. Conf. Rep. 101-955 at 6797 (1990). ("[T]he Conference Report broadens the list of serious crimes, *conviction* of which results in various disabilities and preclusion of benefits under the [Act]") (emphasis supplied). Under venerable principles of common law jurisprudence in a case such as this, the jury convicts by returning a guilty verdict and the defendant is then sentenced by the court. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 479n.2 (quoting Blackstone, "After trial and conviction are past, the defendant is submitted to 'judgment' by the court, 4 Blackstone 368—the stage approximating in modern terms the imposition of sentence."); *Black's Law Dictionary* 318 (8th ed. 2003) ("convict" as verb means "To find a person guilty of a criminal offense upon a criminal trial, a plea of guilty or a plea of nolo contendere."). In this connection, Congress certainly can be presumed to have been familiar with these time-honored common law principles,

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13. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003); IRIRA; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (1996); INCTA; Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990).

distinguishing between conviction and sentence in imposing the requirement that an alien have been convicted of an aggravated felony as a prerequisite to removal or other adverse consequences. *See*, *e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Congress presumed to be familiar with relevant background to statute). Furthermore, the presumption that statutes should not be construed in derogation of the common law provides further support for the role of the jury in determining whether an alien has been convicted of an aggravated felony and the separate role of the court in sentencing. *See*, *e.g.*, *Scheidler v. NOW*, 537 U.S. 397, 402 (2003) ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common law meaning.").

Furthermore, the Act defines aggravated felony here in such a way as to leave no doubt that the *entire* definition must be satisfied by conviction. First, the Act requires conviction of the defined offense. Second, 8 U.S.C. § 1101(a)(43)(M)(i) expressly provides that "aggravated felony" includes "an offense *that* . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." (emphasis supplied). In short the plain language employing "that" introduces a restrictive clause defining "offense" to require both: 1) fraud or deceit and 2) the required loss. *See*, *e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* at 765-67 (2d ed. 1995) (restrictive clauses introduced by "that" "[give] essential information about the preceding noun" and "are essential to the grammatical and logical completeness of a sentence.");

William Strunk and E.B. White, *The Elements of Style* at 59 (4th ed. 2000) (relative pronoun "that" introduces restrictive clause); *The Chicago Manual of Style* § 5.202 (15th ed. 2003) ("CMS") ("In polished American prose, *that* is used restrictively to narrow a category or identify a particular term being talked about . . ."). Given the use of the relative pronoun "that" to introduce a restrictive clause ("*that* involves fraud or deceit in which the loss . . . exceeds $10,000"), the plain meaning of this provision is that not only fraud or deceit *but also a loss greater than $10,000* must be established by conviction.[14]

While the decision below relies on the "in which" language to reject this conclusion, this approach rips the "in which" phrase out of the larger context of a restrictive clause beginning with the word "that," contrary to the plain language of the statute, thereby rendering "that" a nullity. This violates the settled rules that every word in a statute must be given meaning and that language must be read in context. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute must be construed so no part rendered superfluous); *McCarthy v. Bronson*, 500 U.S. 136, 139 (2000) ("[S]tatutory

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14. § 1101(a)(43)(M)(i) was added on October 6, 1994 by floor amendment in the Senate to H.R. 783, the bill that would become INCTA, without comment. 140 Cong. Rec. S14557 (Oct. 6,1994). There is no Senate or House report discussing these aggravated felony provisions. This sparse legislative history is consistent with the plain language. *See* 140 Cong. Rec. H11292 (October 7, 1994) (statement by House Subcommittee Chairman Mazzoli notes that the Senate amendment would expand the aggravated felony definition only to include "specified" white collar crimes).

language must always be read in its proper context."). The "in which" language actually reinforces the conclusion that the loss must be inside or embodied in the conviction itself, for that would be the plain meaning of "in," especially as used in a restrictive clause beginning with "that." In other words, the plain language of this restrictive clause is not limited simply to fraud or deceit since "in which" is part of this same restrictive clause setting forth all the requirements for conviction of this aggravated felony. *See also* CMS § 5.202 at 230 ("which" is used restrictively when preceded by a preposition such as "in."). Expressed in simple mathematical terms, the error made by the majority opinion below is akin to multiplying "a" times (b+c) where "a" is conviction and "b" and "c" combined are fraud or deceit plus the loss requirement, and coming up with the answer ab + c, when, of course, the correct answer is ab + ac.

Since the plain language of the Act required Mr. Nijhawan to have been convicted of a loss exceeding $10,000 and the jury was not instructed to find such a loss, despite the request from Mr. Nijhawan's own criminal defense counsel for an such instruction, the removal charge under § 1101(a)(43)(M)(i) should be vacated under the plain language.

B. The Statutory Structure Supports Plain Meaning

The relevant statutory structure supports following the plain meaning of the statute. *See*, *e.g.*, *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2004). Thus when Congress actually intended to use a "qualifier" to denote some component of the aggravated felony definition *after* the alien had been convicted, the legislature employed the "for which" language in such provisions as 8 U.S.C. § 1101(a)(43)(G) (a theft offense "for which the term of imprisonment [is] at least one year"). *See also* 8 U.S.C. § 1101(a)(43)(F) (crime of violence for which the term of imprisonment [is] at least one year); § 1101(a)(43)(R) (offense relating to commercial bribery for which the term of imprisonment [is] at least one year) and § 1101(a)(43)(S) (offense relating to perjury for which the term of imprisonment [is] at least one year). Indeed, this follows the historic distinction reiterated by this Court in *Apprendi* between a jury convicting the defendant and the Court sentencing the defendant. While a jury might well be instructed to find a loss greater than $10,000 in order to convict,[15] a jury would not be called upon to impose a sentence of a year or more. In short, this longstanding distinction in common law jurisprudence between the role of the jury and the role of the court shatters any attempt to conflate the loss amount and a custodial sentence as "qualifiers," a term that appears

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15. As discussed below, the Statutory Appendix cites numerous examples of state and federal statutes where such a charge would be required.

nowhere in the Act. Even if § 1101(a)(43)(M)(i) were considered ambiguous, the salient difference with such other subparts as § 1101(a)(43)(G), grounded in legal history at the heart of the common law distinction between judge and jury, eliminates such ambiguity. *Cf. United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."); *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.) (on certain points "a page of history is worth a volume of logic.").

In any event, Congress simply did not provide in § 1101(a)(43)(M)(i) that an alien be convicted of an offense involving fraud or deceit *for which* loss in excess of $10,000 is determined at sentencing or *for which* restitution in an amount exceeding $10,000 is ordered at sentencing. Likewise Congress most assuredly did not define this aggravated felony as an offense for which a loss exceeding $10,000 was found to be "tethered" at sentencing, a term employed by the Third Circuit panel majority below *but not by Congress*. Indeed, the word "tethered" appears to be wholly absent from even the legislative history of § 1101(a)(43)(M)(i) and, in the end, represents little more than a judicial addition to a statute, contrary to the language chosen by Congress, just as does the reference to a "qualifier." Similarly, Congress did not provide for removal in cases where the loss "associated" with the offense at sentencing exceeded $10,000. The absence of the "for which" language in § 1101(a)(43)(M)(i) here would seem to

represent yet another example of the controlling principle of statutory construction that the inclusion of language in one section and the omission of that language in another was intentional.

Likewise, § 1101(a)(43)(M)(ii) supports application of the plain language and structure of the Act urged here. This provision, enacted together with § 1101(a)(43)(M)(i), defines an aggravated felony that is described in 26 U.S.C. § 7201 in which the revenue loss exceeds $10,000. As this Court made clear in *Boulware v. United States*, 128 S.Ct. 1168, 1172—73 (2008) conviction under 26 U.S.C. § 7201, requires proof beyond a reasonable doubt of a tax deficiency, with some circuits even requiring a substantial deficiency.[16] *See also Sansone v. United States*, 380 U.S. 343, 351 (1965). In short, requiring an alien defendant to have been convicted of the required loss under 8 U.S.C. § 1101(a)(43)(M)(i) is fully consistent with 8 U.S.C. § 1101(a)(43)(M)(ii) since conviction for a loss must be shown under that criminal tax statute as well.

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16. *See*, *e.g United States v. Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000); *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. Koskerides*, 877 F.2d 1129, 1137 (2d Cir. 1989).

C. The Plain Language And Structure of the Act Preclude Reliance Upon Sentencing Determinations

The plain language and structure of the Act highlight the error below in basing loss upon sentencing determinations or orders of restitution entered after the jury has convicted the alien, especially in cases under the Sentencing Guidelines. First, by requiring the alien to be convicted of the loss Congress required this component to be established by proof beyond a reasonable doubt. In this regard, the decision below falls into serious error by holding that the Petitioner's position will improperly raise the burden of proof in removal proceedings, for proof beyond a reasonable doubt is what Congress has required in mandating that the alien be convicted of the loss, not that loss be determined in some post-verdict proceeding. Second, as both the dissent here and in *Conteh* persuasively recognize, the allowance of sentencing determinations or restitution orders to establish loss would actually alter the burden of proof in immigration proceedings, for those orders are based on a preponderance of the evidence and not the clear and convincing standard required for removability. *See*, *e.g.*, *In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990) (recognizing that "disparate burdens of proof foreclose application of the issue preclusion doctrine" and citing with approval the *Restatement (Second) of Judgments* comment that clear and convincing evidence is a sufficiently higher standard than preponderance, so as to prevent a finding made by preponderance to effect collateral estoppel in a case where proof by clear and

convincing evidence is required); *Matter of Carrubba*, 11 I & N Dec. 914 (BIA 1966) (recognizing that clear and convincing is a higher burden of proof than proof by preponderance). In short, the panel majority and not the dissent would radically alter the burden of proof for cases such as this.

In the final analysis, moreover, the ultimate flaw inherent in the decision below with respect to burden of proof is really twofold. First, an aggravated felony determination has been moved from a legal question, with clear, bright lines for resolution, and made into a factual one. *See Conteh v. Gonzales*, 461 F.3d 45, 68 (Hug, J., dissenting) (whether a prior conviction is an aggravated felony is "a pure question of law," which necessarily does not turn on the burden of proof). In other words, since loss, as a matter of law, must have been established in the adjudication of guilt, which requires proof beyond a reasonable doubt, there is no change in the burden of proof in immigration proceedings under the position urged by the Petitioner and adopted by the dissent below, but, instead, adherence to the legal requirement of loss being established by conviction. Test at 1009, which notes this difference. Second, the decision below, in making loss a factual matter found outside the record of conviction under a clear and convincing standard, effectively throttles the legal requirement that loss be established when the jury convicts the alien, which requires proof beyond a reasonable doubt.

Even further divorced from the plain language requiring that the alien be convicted of loss is that under the Sentencing Guidelines loss in fraud cases extends

beyond what was even charged to "relevant conduct," which may comprise conduct that was never charged and conduct for which the defendant was acquitted. U.S.S.G. § 1B1.3, Application Notes 1-2, *Obasohan v. U.S. Attorney General*, 479 F.3d 785, 790 (11th Cir. 2007). Indeed, at least one circuit has held that relevant conduct "may even include losses caused by criminal conduct that cannot be prosecuted because those acts fall outside the statute of limitations." *Obasohan*, 479 F.3d at 790. *See also United States v. Bras*, 483 F.3d 103, 107-08 (D.C. Cir. 2007) ("If a court may rely on *acquitted* conduct when proven by preponderance, reliance on previously *untried* conduct proven under that standard is a fortiori permissible."). Again, the burden of proof necessary to establish relevant conduct is only by a preponderance of the evidence, not beyond a reasonable doubt nor by clear and convincing evidence. *See United States v. Watts*, 519 U.S. 148, 157 (1997).

With respect to restitution under federal practice, the amounts again may be established by a preponderance of the evidence and not proof beyond a reasonable doubt. Two federal statutes apply to restitution: The Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C. § 3663(a)(1)(A), permits federal judges to order restitution "in addition to or . . . in lieu of any other penalties authorized by law," while the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, *requires* restitution for certain offenses, including property crimes "committed by fraud or deceit," *id.* § 3663A(c)(1)(B). These statutes allow a sentencing court to grant restitution even to alleged

victims not named in the indictment. *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996). While restitution under these circumstances remains part of the sentencing process after the jury convicts, two circuits, the Seventh and Tenth Circuits have taken the position that MVRA restitution is a civil remedy, even further divorcing restitution from the requirement that an alien be convicted of loss. *See United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008) ("Restitution under the MVRA is not a criminal punishment, at least not in this circuit."); *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993) (same).

Equally without merit in light of the plain language of the Act, is the reliance upon the sentencing stipulation, for the jury was not instructed to find any loss and this Court held long ago that a verdict cannot be modified by stipulation at sentencing. *See United States v. Norris*, 281 U.S. 619 (1930) (stipulation at sentencing stage "cannot be regarded as evidence upon the question of guilt or innocence. . ."). Moreover, the stipulation, undertaken well after the jury verdict, was entered into with the express reservation of the loss issue for immigration proceedings, as well as the fact that both the government and the District Court agreed at sentencing that Mr. Nijhawan had not caused a loss in excess of $10,000. Furthermore, even though Mr. Nijhawan did forfeit his *Booker* claim in order to secure a downward departure from the guideline level fixed not by the jury but by USP, the fact remains that the sentencing stipulation was the product of a regime held unconstitutional by this Court in *Booker*. *See also Nelson v. United States*, 2008 U.S. LEXIS 872 at 3 (Jan. 26, 2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.").

D. The Categorical Approach Requires Reversal of the Decision Below

Apart from contravening the plain language of the Act, the decision below contravenes the controlling categorical approach to determine whether an offense constitutes an aggravated felony, an approach grounded in the clear requirement that the alien be *convicted* of the deportable offense. As this Court recently reiterated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the categorical approach, summarized in *Taylor* and *Shepard*, has been the uniformly required method for determining whether a particular offense falls within a removable category. *See also Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal*, *supra*; Test at 1004 (2008) (*Duenas-Alvarez* "settled any debate" on applicability of categorical approach to aggravated felony determinations.). While *Taylor* and *Shepard* represent this Court's most comprehensive exposition of the categorical approach, that approach has a much longer pedigree in the immigration context dating back to such seminal cases as *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) and *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (Hand, L., J.), which involved the provisions of immigration law mandating exclusion or deportation of an alien convicted of a crime involving moral turpitude. Thus, *Mylius* limited consideration to the legal elements of the criminal statute involved, citing five basic justifications for this approach: 1) need for uniform application of the immigration law, 2) adjudicative efficiency, 3) prohibition on immigration officers being triers of the fact on underlying crime, 4) interest of the government in avoiding consideration of evidence that

contradicts the conviction, and 5) manifest injustice in treating those convicted of the same crime differently. *See* Test at 993-95. This venerable rule thus rests upon considerations apart from the Sixth Amendment jury trial requirement, though, as discussed below, such concerns also do support the categorical approach since conviction of an aggravated felony is part of a federal criminal statute, 8 U.S.C. § 1326(b)(2). *See also Velasquez-Herrera*, 24 I & N at 513 ("For nearly a century, the Federal circuit courts of appeal have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted* to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.") (emphasis in original); *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 335 (BIA 1996) (when deportability is based upon conviction the categorical approach is the only "workable approach."). *But see Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), *pet. for cert. pending*, No. 08-552 (filed Oct. 23, 2008) and *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2009) (curtailing use of categorical approach on moral turpitude issues).[17]

By the time the Act was passed in 1952, the categorical approach was recognized as controlling in determining whether a conviction fell within a deportable category. *See*, *e.g.*, *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev.

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17. These decisions run counter to the plain language and structure of the Act, overlook the rule of lenity and, on the aggravated felony issue, are at odds with *Duenas-Alvarez*.

643, 656 (1953) (in determining deportability, "[t]he record of conviction is final, and a reviewing court may not go behind the record . . . ."); Test at 995 (categorical approach applied to all grounds of deportability). In short, this recognized approach has provided the backdrop against which immigration legislation has been enacted and re-enacted. Significantly here, Congress added § 1101(a)(43)(M)(i) to the Act in 1994, some four years after *Taylor*, and there is nothing in that legislation to suggest that Congress intended to carve out an exception to *Taylor*. Moreover, by reenacting the conviction provisions of the Act without change, Congress has acquiesced in this well-known approach to construing the Act. *See*, *e.g.*, *Lorillard*, 434 U.S. at 480 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .").

The categorical approach can take two forms in implementing the basic requirement that the alien have been *convicted* of an offense rendering him deportable. The first, sometimes called the formal categorical approach, limits analysis to the fact of conviction and the legal elements of the statutory offense to determine whether those elements are congruent with the elements of the removal ground. *See*, *e.g.*, *Duenas-Alvarez*; *Taylor*, 495 U.S. at 602 (analysis under this approach will "look only to the fact of conviction and the statutory definition of the prior offense."). The second, often called the modified categorical approach, involves criminal statutes broader than the ground of removability and permits a carefully circumscribed inquiry into whether what was established in the

adjudication of guilt would bring the alien within the ground of removability. *Duenas-Alvarez*; *Taylor*, 495 U.S. at 602 (inquiry beyond the statutory elements permitted "in a narrow range of cases where a jury was actually required to find all the elements," of the generic offense at issue.). Thus *Taylor*, which involved a sentence enhancement for a defendant previously convicted of the crime of burglary, defined as illegal entry into a building, gave as an example of the applicability of this approach a state statute that permitted conviction for burglary based upon a break-in into either a building or automobile. Under this approach inquiry could be made into whether the indictment and jury instructions required the jury to find that the defendant had broken into a building in order to convict. Moreover, this Court has made clear that under the modified categorical approach in cases such as this, consideration is limited to what the jury "was actually required to find," in the underlying criminal case. *Taylor*, 495 U.S. at 602.

Similarly, in *Shepard*, 544 U.S. at 21-22, involving a guilty plea, allegedly to a crime of burglary of a building as a basis for sentence enhancement, this Court reversed the First Circuit on the issue of whether the defendant had been convicted of such a burglary offense. This Court rejected reliance upon the fact that the defendant at his federal sentencing had not "seriously questioned" a police report finding that he had broken into a building, holding instead that the modified categorical approach allows offenses to fall within a particular category, based only upon "conclusive records *made or used in adjudicating guilt*." 544 U.S. at 21-22 (emphasis supplied). Two recent decisions by this Court

highlight the critical difference in application of this categorical approach. In *Begay v. United States*, 128 S.Ct. 1581 (U.S. 2008) the issue presented was whether the defendant's prior state convictions for driving under the influence fell within the violent felonies subpart of the sentence enhancement provision in 18 U.S.C. § 924(e)(2)(B)(ii), which defines violent felony to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Even though the sentence enhancement specifically referred to "conduct," this Court nevertheless applied the categorical approach to resolve the issue. 128 S.Ct. at 1587. *See also James v. United States*, 550 U.S.192, 201-02 (2007) (categorical approach used to determine whether state burglary statute falls within "conduct" clause cited above). By contrast, in *United States v. Rodriguez*, 128 S.Ct. 1783 (2008), this Court did not apply the categorical approach where the issue presented was the *term of imprisonment*. Rodriguez faced a federal sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e) for a previous conviction of a "serious drug offense," which was defined as one that prescribes a maximum sentence of ten years. This Court held that state sentencing enhancements could be considered to meet the 10 year requirement. 128 S.Ct. 1790. In short, this Court's precedent, in line with the dissent below and the plain language of the Act, recognizes a sharp distinction between applying the modified categorical approach to determine what was established when the defendant was convicted and in not employing the modified categorical approach when the issue is the sentence imposed. Moreover, in applying this approach, this Court has never sanctioned reliance upon determinations made at sentencing as a substitute for what was established when a defendant was convicted.

1. The Modified Categorical Approach Mandates Reversal

Following *Taylor*, *Shepard* and subsequent authority, inquiry here should be limited to what the jury was instructed to find, since the federal criminal statutes at issue may be read as encompassing both conduct that produces a loss and conduct that does not, or that loss may be considered as an element of the offense under certain circumstances. *See Apprendi*, 530 U.S. at 501-02 (Thomas, J., concurring) (notes uniform authority that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment. . . . Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon the finding of some aggravating fact * * * [t]he aggravating fact is an element of the aggravated crime."); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 185-86 (5th Cir. 2008) (Dennis, J., dissenting) (modified categorical approach would be applied to determine whether a conviction under 26 U.S.C. § 7206(1) (filing false tax return) was an aggravated felony because statute assumed to encompass both offenses that produce a loss and offenses that do not).

Applying the modified categorical approach here makes clear that Mr. Nijhawan was not convicted of an offense within § 1101(a)(43)(M)(i) because the jury, despite the Petitioner's express request, was not instructed to make any finding on loss. In other words, contrary to the requirement of *Taylo*r and *Shepard*, loss was not established in the adjudication of guilt. *See also Dulal-Whiteway*, 501 F.3d at 128 ("[f]or conviction following a trial, the BIA may rely only upon facts

actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions."); *Li v. Ashcroft*, 389 F.3d 892, 898-99 (9th Cir. 2004) (absence of jury instructions to establish loss dooms removal under § 1101(a)(43)(M)(i)). In other words, while the Petitioner may have stipulated to a loss *after* conviction solely to resolve contested sentencing issues under a regime held to be constitutionally defective by this Court in *Booker* and not presumptively reasonable under *Nelson*, the jury was never instructed, as *Taylor* requires, to find any loss. Accordingly, under the modified categorical approach, the decision below should be reversed.

2. The Formal Categorical Approach Requires Reversal

Alternatively, if analysis is limited to the statutory elements for conviction under the federal offenses at issue, reversal is also required. None of those statutes requires any loss for conviction as a matter of law. *Neder v. United States*, 527 U.S. 1, 24 (1999) (reliance and loss not necessary legal elements of 18 U.S.C. § 1341, § 1343 and § 1344). In other words, this case presents an instance where the statutes of conviction lack a necessary component of a ground of removability, namely the element of a loss exceeding $10,000. The cogent concurrence by Chief Judge Kozinski in *Li*, 389 F.3d at 899, explained this important difference under § 1101(a)(43)(M)(i) in a case where the alien had been convicted following a jury trial of offenses that did not require loss as a necessary legal element. That opinion noted, the offense of conviction "simply lacks an element of the generic crime—as when the generic crime requires

use of a gun while the crime of conviction doesn't require a weapon at all. In such circumstances, the crime of conviction can never be narrowed to conform to the generic crime for the simple reason that the jury is not *required*—as *Taylor* mandates—to find all the elements of the generic crime. It's true that some of the counts against petitioner alleged losses greater than $10,000, but since the crimes with which petitioner was charged did not make the amount of loss an element of the crime, the jury had no need to pass on the issue." 389 F.3d at 899. In short, focus on the elements of the generic offense, as in *Duenas-Alvarez*, resolves the issue, for the generic offense defined in § 1101(a)(43)(M)(i) requires loss but the federal criminal statutes here do not.

Accordingly, an alien cannot be removed based upon his conviction under a criminal statute that lacks a necessary element of the deportation provision. Moreover, just as *Shepard* applied the principles of *Taylor* to a guilty plea, so *Kawashima v. Mukasey*, 530 F.3d 111 (9th Cir. 2008), *petition for reh'g en banc pending* Nos. 04-7431 and 05-74407 (filed Sept. 15, 2008), applied the logic of Chief Judge Kozinski's concurrence to a guilty plea under a statute that did not require loss as a necessary legal element. Again, Chief Judge Kozinski's approach is fully consistent with the fundamental distinction between what must be established beyond a reasonable doubt to the jury and what might later be determined as part of the sentencing process, with the only difference from the modified categorical approach being focus on the necessary legal elements for conviction in the underlying offense. Furthermore, application of this simple, bright line rule does not render § 1101(a)(43)(M)(i) a dead letter by any means,

given the host of federal and state statutes in the Statutory Appendix that require loss as a necessary legal element or may trigger application of the modified categorical approach to determine if the jury was instructed to find loss. Indeed, of particular significance here, should be the fact that § 1101(a)(43)(M)(i) is not defined by reference to any particular federal criminal statute, least of all the ones at issue here, but instead sweeps broadly to encompass those state statutes requiring loss as a necessary legal element. Furthermore, as discussed below, this bright line rule obviates the *Apprendi* problem posed by a contrary approach given the role played by § 1101(a)(43)(M)(i) as a determinant of the maximum sentence for illegal reentry under 8 U.S.C. § 1326(b)(2).

E. Policy Arguments Cannot Overcome Plain Language

To the extent that the decision below rests upon concerns about fewer deportations if Petitioner's position is accepted, this represents a policy matter for Congress to address, should such legislative action be deemed necessary in the first place, rather than for an appellate court to create a "tethering test" not enacted by Congress. The short answer to this questionable concern that the plain language of § 1101(a)(43)(M)(i) may sometimes make removal difficult was given by Judge Calabresi in *Gertsenshteyn*, 544 F.3d at 148, when he noted that this "is no reason for immigration courts to renounce the restrictions that . . . the law requires." *See also Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (even if result troubling court must give effect to plain language of the statute, with

correction to come from Congress). Furthermore, adherence to the plain language of the Act would simply underscore the government's need to act in a more coordinated fashion to secure removal of targeted aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court or burdening this Court and the Courts of Appeals with refining and applying non-statutory "tethering" tests. This would hardly seem to place an insurmountable burden and appears comparable to the measures undertaken by the government during the period between *Blakely* and *Booker* to submit sentencing "facts" to the jury. *Booker*, 530 U.S. at 779-780 (Stevens, J., dissenting). *See also United States v. Beguette*, 309 F.3d 448, 450 (7th Cir. 2002) (before *Booker* amount of drugs in narcotics prosecution submitted to jury on special verdict form); *Jalbert v. United States*, 375 F.2d 125, 126 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967) (value of property in prosecution under 18 U.S.C. § 641 submitted to jury). Furthermore, the fact that over 90% of all federal convictions are obtained by guilty pleas serves to highlight the minimum burden involved.[18]

Application of the plain language enacted by Congress simply will not render § 1101(a)(43)(M)(i) a

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18. Of the 79,205 defendants convicted and sentenced in the federal courts in 2008 out of a total of 87,604 defendants, 76,510 were convicted by guilty plea, 296 were convicted in a bench trial and 2,399 were convicted after a jury trial. Disposition Statistics Table D-4. The breakdown for fraud cases shows 11,120 defendants and 10,270 convicted: 9,886 by guilty plea, 22 by bench trials and 362 by jury trial. 2008 Disposition Statistics.

nullity. The Statutory Appendix documents the many state and federal statutes where a charge of loss would be necessary for the jury to convict. Indeed, § 1101(a)(43)(M)(i) is not tied to any specific federal fraud statute, such as 18 U.S.C. § 1341, but rather sweeps broadly using the generic definition of fraud or deceit to encompass both state and federal statutes. *See*, *e.g.*, Colorado Statute § 18-4-409 (second degree aggravated vehicle theft where the vehicle is taken by deception is a class 5 felony, if value of the car exceeds $20,000); Conn. Gen. Stat. § 53a-122 (first degree larceny by false premises, false pretenses, trick or fraud requires value of property taken to exceed $10,000). These are the kinds of statutes to which Congress referred in enacting 8 U.S.C. § 1101(a)(43)(M)(i). In addition to the federal statutes cited in the appendix, a broad range of other federal statutes may have loss determined by jury or plea under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the maximum fine based on loss calculations is sought pursuant to 18 U.S.C. § 3571(d). *See*, *e.g.*, *United States v. LaGrou Distribution Systems*, *Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) (where maximum fine sought, loss must be submitted to jury under *Apprendi*).

Moreover, § 1101(a)(43)(M)(i) is also not the only aggravated felony provision that may be utilized to secure removal for conviction of a white collar offense, even one involving fraud. Under appropriate circumstances, § 1101(a)(43)(G) (theft offense where alien sentenced to imprisonment for a year or more) may be available where, for example, the alien is charged with theft by deception or even simply theft. Likewise, other deportation provisions are available in fraud cases, especially since this Court made clear long ago in *Jordan*

v. DeGeorge, 341 U.S. 223 (1951), that any crime with fraud as a necessary element constitutes a crime involving moral turpitude ("CIMT") *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (deportation for conviction of single CIMT where alien sentence of one year or more *may* be imposed); 8 U.S.C. § 1227(a)(2)(A)(ii)(conviction of two or more CIMT's not arising out of a single scheme without regard to sentence).

In contrast to the panel majority, the dissent sensibly establishes a clear, bright line test grounded in the plain language of the statute, one easy to administer and apply, thus serving to promote the efficient administration of the already overburdened Immigration Courts.[19] The decision below establishes an uncertain "tethering standard" with no statutory foundation, thus dropping the Immigration Courts into uncharted territory to retry criminal cases, with later appellate panels ultimately burdened to further define and refine a test that Congress itself has not adopted. Again, this would seem contrary to the role of Immigration Courts acknowledged by this Court in *Lopez-Mendoza*. Furthermore, as both *Dulal-Whiteway* and the dissent

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19. Some measure of this burden may be seen in the fact that for fiscal year 2007 Immigration Courts nationwide received 334,607 cases and 278,137 of these were removal proceedings. U.S. Department of Justice: Executive Office for Immigration Review, *FY 2007 Statistical Yearbook* at B4 (April 2008). Similarly, for each year from 2003 to 2007, immigration appeals made up the vast majority of all agency appeals to the federal circuits. Admin. Office of U.S. Courts, *Judicial Business 2007*, Table B-33, "U.S. Courts of Appeals, Source of Appeals and Original Proceedings Commenced by Circuit for the 12-Month Periods Ending September 30, 2003 Through 2007" at 98.

recognized, the Immigration Courts are ill equipped to shoulder this added burden. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (declining to apply exclusionary rule in deportation cases because of the unfamiliarity of Immigration Judges and practitioners with criminal law principles).

II. THE RULE OF LENITY OR NARROW CONSTRUCTION REQUIRES REVERSAL AND CHEVRON DEFERENCE SHOULD NOT APPLY

Even if § 1101(a)(43)(M)(i) were considered ambiguous, the rule of lenity or narrow construction should be applied to reverse the decision below. Moreover deference under *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984) has no application, especially since the aggravated felony provision is part of a federal criminal statute.

A. The Rule of Lenity Supports Reversal of the Decision Below

The decision below failed to apply the rule of lenity or narrow construction. This controlling rule has deep roots in immigration law going back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view, and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic

> measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But 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.*

(emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004) (recognizing rule as basis for decision); *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); 3 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language"). Furthermore, the established character of this settled rule[20] of narrow construction has been expressly acknowledged by the Solicitor General. *See Matter of Andrade*, 14 I & N Dec. 651 (1974)(cited memorandum

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20. While this rule has sometimes been referred to as a rule of lenity, the rule is more aptly termed one of narrow construction in line with *Tan*. *See Matter of Crammond*, 23 I & N Dec. 9 (BIA 2001), *vacated on other grounds*, 23 I & N Dec. 179 (BIA 2001) (Rosenberg, J., concurring).

of Solicitor General Robert Bork to INS Commission begins analysis of a deportation issue with the rule that "Deportation statutes, because of their drastic consequences, must be strictly construed," citing *Tan*). The grounding of this rule in the harm to the alien has particular relevance here, for, as the Third Circuit recognized in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), deportation for conviction of an aggravated felony constitutes a sentence of lifetime banishment. *See also Cardoza-Fonseca*, 480 U.S. at 449 ("[d]eportation is always a harsh measure"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living."). Indeed, the severity of harm from deportation rests upon concerns that date back to the founding era with no less an authority than James Madison acknowledging that ". . . if a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, *Writings* 623, "Report on the Alien and Sedition Acts," (Library of America 1999, Jack N. Rakove, ed.). Here both Judge Stapleton's dissent, the persuasive dissents in *Conteh* and *Arguelles-Olivares* and the decisions by the Second, Ninth and Eleventh Circuits validate Mr. Nijhawan's position. Accordingly, a clearer case for application of the rule of narrow construction or lenity could hardly be imagined.

B. Chevron Has No Application Here

To the extent that *Chevron* deference may be urged by the government in light of *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) and the BIA decision in *Babaisakov*,[21] such an argument, advanced by the government in opposing certiorari, would have no merit. *See* Opp. at 11-13.

1. Babaisakov Rests On Serious Errors

The *Babaisakov* decision is fatally flawed in ignoring the plain language of the Act and the rule of lenity and also errs in concluding, 24 I & N Dec. at 314-15, that there are virtually no statutes where loss would be required as a necessary legal element for conviction. Likewise, *Babaisakov* gets matters flatly wrong in relying upon § 1101(a)(43)(M)(ii), 24 I & N Dec. at 314, because conviction under 26 U.S.C. § 7201 does require loss. Furthermore, *Matter of Gertsenshteyn*, 24 I & N Dec. 111 (BIA 2007), a principal mainstay for *Babaisakov* in abandoning the categorical approach and permitting fact-finding beyond the record of conviction to sustain an aggravated felony charge under 8 U.S.C. § 1101(a)(43)(K) (managing prostitution for commercial advantage), has not survived persuasive federal court review. *See Gertsenshteyn*, 544 F.3d at 145.

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21. Handed down before the decision below, *Babaisakov* was not cited by the panel majority, though urged by the government. The Third Circuit does not accord *Chevron* deference to aggravated felony determinations. *Singh v. Ashcroft*, 383 F.3d 144, 151(3d Cir. 2004). Likewise, while citing to *Brand X*, *Babaisakov* acknowledges that the Board will "ordinarily follow" controlling precedent in the Circuit where the case arises. 24 I & N Dec. at 324.

Applying *Babaisakov*, handed down some three years after the conclusion of Mr. Nijhawan's criminal case, would also raise serious problems with respect to the retroactivity of an administrative adjudication that, on its face, does not purport to be retroactive. The BIA even acknowledges that the decision runs contrary to "the weight of authority at the circuit court level," and "represents a departure from the precepts that have been presumed to apply in immigration hearings involving aggravated felony charges arising under § 1101(a)(43)(M)(i) of the Act." 24 I & N Dec. at 316, 322. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (agency may give retroactive force to new rule created by adjudication but "[the] retroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles." Given the acknowledged departure from existing precedent, retroactive application of *Babaisakov* here would seem to run directly counter to those equitable principles acknowledged in the cited *Chenery* decision, especially since *Babaisakov* represents "an abrupt departure from well established practice" and not "merely [an] attempt to fill a void in an unsettled area of law . . . ." *Miguel—Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007), quoting from *Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

Furthermore, *Babaisakov*, in allowing *de novo* factual findings by Immigration Judges, raises a serious challenge to the constitutional requirement of a uniform standard of naturalization embodied in U.S. Const. Art. I, § 8, Cl. 4. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 382 (1971) (holding cited clause imposes an "explicit

constitutional requirement" on naturalization eligibility). Different triers of fact would undoubtedly reach different results under the same statute, thereby undermining the fundamental fairness concerns furthered by a rule that ensures predictability, uniformity and even evidentiary reliability that are a hallmark of the categorical approach applied by this Court in *Taylor*, 495 U.S. at 601-02, but abandoned below. Indeed, as Judge Calabresi wisely observed in *Gertsenshteyn*, 544 F.3d at 146, "practical evidentiary difficulties and potential unfairness associated with looking behind [an alien's offense] of conviction [are] no less daunting in the immigration [context] than in the sentencing context." *See also* Test at 1033-34 (*Babaisakov* approach "is especially impractical when adjudicators are expected to handle a high volume of cases," and "wastes administrative resources and risks becoming 'unworkable,'"). Moreover, this burden would be imposed not only upon Immigration Judges but also, for example, on those administrative officials at United States Citizenship & Immigration Services charged with making good moral character determinations in adjudicating naturalization applications. *See* 8 C.F.R. § 316.3, § 316.4, and § 316.10; Test at 1031-35.

Accepting *Babaisakov* would also create a serious *Apprendi* problem in prosecutions under 8 U.S.C. § 1326(b)(2) involving § 1101(a)(43)(M)(i). If an aggravated felony determination could be made by factual findings on loss in Immigration Court, a sentence for illegal reentry would be enhanced not on the basis of what a jury had necessarily found in convicting the alien, but rather under a lesser standard of proof contrary to *Apprendi* and the requirements of the Sixth

Amendment. Moreover, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) would hardly seem to the contrary, especially after *Apprendi* and *Booker*.[22] *See Shepard*, 544 U.S. at 17 (Thomas, J., concurring) (arguing "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."). Accordingly, *Babaisakov* should be rejected under the rule of construing statutes to avoid constitutional doubt. *See*, *e.g.*, *Jones v. United States*, 526 U.S. 227, 239-40 (1999).

2. Chevron Is Inapplicable

Since deportation for conviction of an aggravated felony is part of a federal criminal statute 8 U.S.C. § 1326(b)(2) punishing illegal reentry, its definitive construction rests with the federal courts and *Chevron* has no application. *See*, *e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."); *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."). The Act, however, does not grant either the Attorney General or the BIA as his delegate, the authority to construe federal criminal

22. In *Almendarez-Torres*, the alien had been convicted of illegal reentry. A bare majority of this Court held that the sentence provided in 8 U.S.C. §1326(b)(2) for reentry after deportation for conviction of an aggravated felony could be applied even though the aggravated felony issue had not been charged to the jury.

statutes. *See* 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 1003.1. *See also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) (*Chevron* does not require judicial deference to executive interpretations of criminal law provisions); *Matter of Carachuri-Rosendo*, 24 I & N Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference; instead we owe deference to the meaning of Federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals.").

In both *Lopez* and *Leocal*, this Court did not even refer to *Chevron* in deciding aggravated felony issues, even though in *Lopez*, for example, the Board had ruled to the contrary in a precedent decision, *Matter of Yanez. See also Leocal*, 543 U.S. at 12n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). By contrast, the provision of the Act[23] at issue in *INS v. Aguirre—Aguirre*, 526 U.S. 415 (1999), where *Chevron* deference was accorded, was not also part of a federal criminal statute, but was freighted with foreign policy concerns about whether an alien's violent crime in a friendly foreign nation constituted a political offense, concerns not remotely present in this case. Moreover, the provision specifically gave the Attorney General the authority to "determine" the political nature of the conviction. *See* 8 U.S.C. §§ 1253(h)(1), (2)(C)(1996).

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23. The provision at issue was then 8 U.S.C. § 1253(h)(2)(c), now 8 U.S.C. § 1251(b)(3)(B)(iii), and barred an alien from withholding of removal if "there are serious reasons for considering that the alien has committed a serious nonpolitical offense outside the United States prior to the arrival of the alien in the United States."

Brand X is inapposite. The telecommunications statute in that case was not part of a federal criminal statute. Moreover, unlike *Brand X*, the Petitioner's arguments here do rest upon the plain language of the statute, to which *Chevron*, by its own terms, does not apply. Traditional rules of construction strongly support Mr. Nijhawan. *Chevron*, 467 U.S. at 842 (traditional rules of statutory construction must be consulted before turning to deference). Indeed, *Brand X* took care to note that no other rule of construction was involved such as the rule of lenity, 545 U.S. at 985, whereas here the rule of lenity or narrow construction is directly applicable.

CONCLUSION

For all the above reasons the decision below should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

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

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

Attorneys for Petitioner

APPENDIX

APPENDIX A — SURVEY OF CRIMES WITH ELEMENT OF FRAUD OR DECEIT AND LOSS TO THE VICTIM OR VICTIMS OF MORE THAN $10,000

FEDERAL - 18 U.S.C. § 668 (theft by fraud from a museum of an object of cultural heritage worth at least $100,000); 18 U.S.C. § 1031 (major fraud against United States where value of property or services in contract is $1,000,000 or more); 18 U.S.C. § 1039 (fraud in connection with obtaining confidential phone records information where violation is part of a pattern of criminal activity involving more than $100,000).

ALASKA - Alaska Stat. § 11.46.120 (theft in the first degree if value of property is $25,000 or more, where theft can be committed by "theft by deception," defined in Alaska St. 11.46.180); § 11.46.130 (theft in second degree if value of property is $500 or more but less than $25,000, where theft can be committed by "theft by deception," defined in § 11.46.180); § 11.46.280 (issuing a bad check is class B felony if face amount of check is $25,000 or more; class C felony if face amount of check is $500 or more but less than $25,000).

ARIZONA - Arizona Rev. Stat. § 13-1802 (E) (theft of property or services with value of $25,000 or more is a class 2 felony; theft of property or services between $4,000 and $25,000 is class 3 felony, where property or services are obtained by misrepresentation, as provided in § 13-1802 (A)(3)); § 13-2109 (credit card transaction record theft, where merchant presents with intent to defraud a credit card transaction record of sale not made by the merchant, is a class 2 felony if value is $25,000 or more; class 3 felony if value is at least $3,000 but less than $25,000)

Appendix A

COLORADO- Colo. Rev. Stat. § 18-4-401(2)(c) (theft by deception is class 4 felony if value is between $1,000 and $20,000); § 18-4-401(2)(d) (theft by deception is class 3 felony if value is $20,000 or more); § 18-4-401(4) (theft by deception twice or more within six months, when aggregate value is between $1,000 and $20,000 is class 4 felony, and class 3 felony if aggregate value is $20,000 or more); § 18-4-409 (aggravated vehicle theft in the first degree, where car taken by deception, is a class 4 felony if value of car is $20,000 or less, and a class 3 felony if value of car is more than $20,000; aggravated vehicle theft in the second degree, where car taken by deception, is a class 5 felony if value of car is $20,000 or more, and a class 6 felony if value of car between $1,000 and $20,000).

CONNECTICUT - Conn. Gen. Stat. § 53a-122 (larceny, which can be committed by false promise or false pretenses (§ 53a-119), is larceny in first degree when value of property or services taken is more than $10,000); § 53a-129b (identity theft is first degree when value of property or services taken exceeds $10,000)

FLORIDA - Fla. Stat. § 812.014 (2)(c)(3) (grand theft of the third degree, and third degree felony, if value of property is $10,000 or more and less than $20,000, where taking of property can be by fraud, misrepresentation, or false promise (§ 812.012)).

Appendix A

ILLINOIS - 720 Ill. Comp. Stat. 5/16G-15 (identity theft of property valued at more than $10,000 but not exceeding $100,000 is a Class 1 felony; if value between $10,000 and $100,000 and property taken from active duty military personnel, it is a Class X felony; if value more than $100,000, it is a Class X felony); 5/16-1 (theft of property exceeding $10,000 and not exceeding $100,000 is a Class 2 felony; theft of property between $100,000 and $500,000 is a Class 1 felony; theft of property exceeding $500,000 is a non-probationable Class 1 felony).

INDIANA - Ind. Code § 35-43-4-2 (receiving stolen property is a Class C felony if value is at least $100,000 and can be committed by creating, confirming, or failing to correct a false impression held by the victim (Ind. Code § 35-43-4-1)); § 35-43-5-3.5 (identity theft is a Class C felony if the fraud or harm caused is at least $50,000); § 35-43-5-7.1 (Medicaid fraud is a Class C felony if harm caused is at least $100,000); § 35-43-5-7.2 (children's health insurance fraud is a Class C felony if harm caused is at least $100,000); § 35-43-5-12 (Check Fraud is a Class C felony if aggregate amount of property obtained is at least $25,000).

IOWA - Iowa Code § 714.2 (theft of property valued at $10,000 or more is theft in first degree and a class C felony); § 714.9 (fraudulent practice in the first degree is fraudulent practice involving money or property worth more than $10,000, and is a class C felony); §715A.6 (fraudulent use of a credit card is a class C felony if value of property or services secured is greater than $10,000).

Appendix A

KANSAS - KAN. STAT. ANN. § 21-3701 (theft, where property can be obtained by deception, of property valued more than $100,000 is a severity level 5 felony; theft of property valued at least $25,000 but less than $100,000 is a severity level 7 felony; theft of property valued between $1,000 and $25,000 is a severity level 9 felony); § 21-3704 (theft of services, where theft can be accomplished by deception or false device, where value is at least $100,000 is severity level 5 felony; theft of services where value is more than $25,000 but less than $100,000 is severity level 7 felony; theft of services where value is more than $1,000 but less than $25,000 is severity level 9 felony); § 21-3707 (giving a worthless check is severity level 7 if amount of check is $25,000 or more; giving a worthless check is severity level 9 if amount of check is between $1,000 and $25,000); § 21-3763 (counterfeiting of the retail value of $25,000 or more is a severity level 7 felony; counterfeiting of the retail value between $1,000 and $25,000 is a severity level 9 felony).

MAINE - ME. REV. STAT. ANN. tit. 17-A, § 353 (theft by unauthorized taking or transfer is a Class B crime if value of property is more than $10,000); 17-A, § 354 (theft by deception is a class B crime if value of property is more than $10,000); 17-A, § 354-A (theft by insurance deception is Class B crime if value of property is more than $10,000); 17-A, § 357 (theft of services, which can be by deception, is Class B crime if value of property is more than $10,000); 17-A, § 703 (forgery with intent to deceive is Class B crime if value of written instrument is more than $10,000).

MICHIGAN - MICH. COMP. LAWS § 750.218 (use of false pretenses with intent to defraud where amount of goods or services involved is $20,000 or more); § 750.219a (obtaining telecommunications services with intent to avoid charge where value of services taken is $20,000 or more); § 750.356 (larceny is a felony if value of property taken is $20,000 or more).

MINNESOTA - MINN. STAT. § 609.527 (identity theft where loss is more than $35,000); § 609.632 (counterfeiting of money where value of currency is more than $35,000); § 609.631 (offering a forged check with intent to defraud where value of check is more than $35,000).

MISSOURI - MO. REV. STAT. § 570.030 (any stealing offense where value is an element of offense is a Class B felony if value is at least $25,000); § 570.223 (identity theft resulting in harm exceeding $50,000 is a class A felony).

MONTANA - MONT. CODE ANN. 45-6-301 (theft of property by embezzlement where property is valued at more than $10,000).

NEW JERSEY - N.J. STAT. ANN. § 2C:21-17(c)(2) (identity theft where value of deprivation is between $500 and $75,000 is a crime in the third degree); §2C:21-17(c)(3) (identity theft where value of deprivation is at least $75,000 is a crime in the second degree).

NEW MEXICO - N.M. STAT. § 30-16-6 (fraud where value of property taken is more than $20,000 is a second degree felony); § 30-16-8 (embezzlement where value of property taken is more than $20,000 is a second degree felony); § 30-16-10 (forgery where value of damage is over $20,000 is a second degree felony); § 30-16-11 (receipt of stolen property where value of property is over $20,000 is a second degree felony); § 30-16-20 (shoplifting where value of property is over $20,000 is a second degree felony); § 30-16-33 (fraudulent use of a credit card where value of property taken is over $20,000 is a second degree felony); § 30-16-36 (receipt of property obtained through a fraudulent credit card transaction, where value of property obtained is over $20,000 is a second degree felony); § 30-44-7 (Medicaid fraud where harm is over $20,000 is a second degree felony).

NEW YORK - N.Y. PENAL LAW § 155.40[1] (grand larceny in the second degree when value of property exceeds $50,000); N.Y. Penal Law § 155.42 (grand larceny in the first degree when value of property exceeds $1,000,000); § 158.25 (welfare fraud in the first degree when value of benefits taken exceeds $1,000,000); § 158.20 (welfare fraud in the second degree when value of benefits taken exceeds $50,000); § 165.73 (trademark counterfeiting, which requires intent to defraud, in the first degree where retail value of counterfeit goods exceeds $100,000); § 176.30 (insurance fraud in first degree where value of property

1. Under New York law, the definition of larceny includes "common law larceny by trick," N.Y. Penal L. § 155.05(2)(a), and larceny "[b]y false promise," N.Y. Penal L. § 155.05(2)(d).

exceeds $1,000,000); § 176.25 (insurance fraud in second degree where value of property exceeds $50,000); § 177.25 (health care fraud in first degree where value of payment wrongfully received exceeds $1,000,000); § 177.20 (health care fraud in second degree where value of payment wrongfully received exceeds $50,000); § 177.15 (health care fraud in third degree where value of payment wrongfully received exceeds $10,000).

NORTH CAROLINA - N.C. GEN. STAT. § 14-90 (embezzlement of property from employment, where value of property is more than $100,000 is Class C felony; § 14-92 (embezzlement of property by public officer where value of property is more than $100,000 is a Class C felony; § 14-91 (embezzlement of State property by public officers where value of property is more than $100,000 is a Class C felony); § 14-93 (embezzlement of funds by financial officers of charitable and religious organizations where value of property is more than $100,000 is a Class C felony); § 14-94 (embezzlement of property by officers of railroad companies where value of property is more than $100,000 is a Class C felony); § 14-98 (embezzlement of partnership funds by surviving partner where value of property is more than $100,000 is a Class C felony); § 14-99 (embezzlement of taxes by officers where value of taxes is more than $100,000 is a Class C felony); § 14-97 (appropriation of partnership funds by partner for personal use where value of funds is greater than $100,000 is a Class C felony); § 14-100 (obtaining property by false pretenses where value of property is more than $100,000 is Class C felony).[2]

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2. Note that under all listed statutes, where the amount stolen is greater than $100,000 the crime is a Class C felony, and where less than $100,000 it is a lesser felony.

Appendix A

NORTH DAKOTA - N.D. CENT. CODE § 12.1-23-05 (theft, which includes theft by false pretenses and embezzlement (N.D. Cent. Code 12.1-23-01), is a Class B felony if value of services or property is valued at more than $10,000); N.D. Cent. Code § 12.1-24-01 (forgery or counterfeiting is a Class B felony if pursuant to scheme to defraud of money or property in excess of $10,000).

OHIO - OHIO REV. CODE. ANN. § 2913.02(B)(2) (theft, which can be accomplished by deception (§ 2913.02(A)(3)), is aggravated theft, a third degree felony, if value taken is between $100,000 and $500,000; theft is aggravated theft, a second degree felony, if value taken is between $500,000 and $1,000,000; theft is aggravated theft, a first degree felony, if value taken is more than $1,000,000); § 2913.05 (telecommunications fraud is a felony of the third degree if value of benefit obtained is more than $100,000); § 2913.11 (passing bad checks valued at $100,000 or more is a felony of the third degree); § 2913.21 (misuse of credit cards, which includes an intent to defraud, when value of property involved is $100,000 or more, is a felony of the third degree); § 2913.31(C)(1)(b)(ii) (forging identification cards, where loss to victim is $100,000 or more, is felony of third degree); § 2913.34(B)(2) (trademark counterfeiting where loss is $100,000 or more is felony of third degree); § 2913.40(E) (Medicaid fraud where value of services obtained is $100,000 or more is felony of third degree); § 2913.45(B)(defrauding creditors is third degree felony where value property involved is $100,000 or more); § 2913.47(C) (insurance fraud where value of false claim is $100,00 or more is third degree felony); § 2913.49 (I)(2)(identity fraud where value of services or property

obtained is $100,000 or more is second degree felony); § 2913.51(C) (receipt of stolen property where property is valued at $100,000 or more is third degree felony).

OKLAHOMA - Okla. Stat. tit. 21, § 1451(B)(4) (embezzlement of $25,000 or more is felony).

OREGON - Or. Rev. Stat. § 164.125(5)(d) (theft of services, which can be accomplished by deception, valued at $10,000 or more is a Class B felony).

PENNSYLVANIA - 18 Pa. Code Stat. § 4105(c)(1) (passing a bad check is misdemeanor of first degree if value between $1,000 and $75,000; passing bad check is felony of third degree if value is $75,000 or more); § 4119(c)(3) (trademark counterfeiting is felony of second degree if value of property or services is more than $10,000).

SOUTH DAKOTA - S.D. Codified Law § 22-30A-17.1 (theft, including theft by deception, of more than $100,000 is aggravated grand theft, a Class 3 felony). Theft is defined to include "[a]ny person who obtains property of another by deception . . ." S.D. Codified Law § 22-30A-3.

TENNESSEE - Tenn. Code Ann. § 39-14-105(4) (theft, including larceny by embezzlement, false pretense, and fraudulent conversion, is a Class C felony if property or services stolen are valued between $10,000 and $60,000); § 39-14-105(5) (theft is a Class B felony if property or services stolen are valued at more than $60,000); § 39-

14-121(f) (passing worthless check punished as determined by value of check, according to values laid out in § 39-14-105); § 39-14-133 (insurance fraud "is punished as in the case of theft," implicitly incorporating the gradations in § 39-14-105). *See* TENN. CODE ANN. § 39-14-101(consolidating embezzlement and false pretense into theft).

TEXAS - TEX. PENAL CODE ANN. § 31.03(e) (theft, including by trick or fraud (§ 31.02), is felony of third degree if value of property stolen is between $20,000 and $100,000; theft is felony of second degree if value of property stolen is between $100,000 and $200,000; theft is felony of first degree if value of property stolen is $200,000 or more); § 31.04(e) (theft of services is felony of third degree if value of service stolen is between $20,000 and $100,000; theft of services is felony of second degree if value of service stolen is between $100,000 and $200,000; theft of services is felony of first degree if value of service stolen is $200,000 or more); § 31.16(c) (organized retail theft is felony of third degree if value involved is between $20,000 and $100,000; organized retail theft is felony of second degree if value involved is between $100,000 and $200,000; organized retail theft is felony of first degree if value involved is $200,000 or more); § 32.23(e) (trademark counterfeiting is felony of third degree if retail value involved is between $20,000 and $100,000; trademark counterfeiting is felony of second degree if retail value involved is between $100,000 and $200,000; trademark counterfeiting is felony of first degree if retail value involved is $200,000 or more); § 32.32(c) (false statement

to obtain property or credit is felony of third degree if value of property or credit is between $20,000 and $100,000; false statement to obtain property or credit is felony of second degree if value of property or credit is between $100,000 and $200,000; false statement to obtain property or credit is felony of first degree if value of property or credit is $200,000 or more); § 32.35(e) (credit card transaction record laundering is felony of third degree if amount of record of sale is between $20,000 and $100,000; credit card transaction record laundering is felony of second degree if amount of record of sale is between $100,000 and $200,000; credit card transaction record laundering is felony of first degree if amount of record of sale is $200,000 or more); § 35.02(c) (insurance fraud is felony of third degree if amount of fraud is between $20,000 and $100,000; insurance fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; insurance fraud is felony of first degree if amount of fraud is $200,000 or more); § 35A.02(b) (Medicaid fraud is felony of third degree if amount of fraud is between $20,000 and $100,000; Medicaid fraud is felony of second degree if amount of fraud is between $100,000 and $200,000; Medicaid fraud is felony of first degree if amount of fraud is $200,000 or more).

VERMONT - VT. STAT. ANN. tit. 13, § 2024(1) (workers' compensation fraud of more than $10,000 carries 3-year maximum penalty).

Appendix A

WISCONSIN - Wis. Stat. § 943.20(3)(c) (theft, which includes theft by deception, of property exceeding $10,000 in value is Class G felony); § 943.41(8)(c) (credit card fraud of an amount more than $10,000 is Class G felony); § 943.50(4)(c) (retail theft of more than $10,000 in property is Class G felony); § 943.91(4) (thefts from and fraud of financial institutions are Class G felonies if amount taken is between $10,000 and $100,000; theft from and fraud of financial institutions are Class E felonies if amount taken is above $100,000).

APPENDIX B — EXCERPTED TRANSCRIPT OF TRIAL IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 10, 2004 (APPRENDI CHARGE REQUEST)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 02 Cr. 673 RMB

S4 02 Cr. 673 RMB

UNITED STATES OF AMERICA,

v.

NARENDRA KUMAR RASTOGI, a/k/a Narendra Kumar, ANIL ANAND, JASPREET BASRA, a/k/a Soniya Basra, MANOJ NIJHAWAN, and UDHAY SHANKAR BALAKRISHNA, a/k/a Udhay Shankar,

NARENDRA KUMAR RASTOGI, GAYA GAYATRINATH, HENRY CHU, JOSIELYNN SALUMBIDES, NAINA CHITRODA, MANOJ NIJAWAN, NIKHIL RASTOGI, UMESH MEISURIA, ASHOK SHAH, PRAVEEN SHARMA, SANJAY ROHIRA, SHAZIA SATTAR, KAUSHIK AMIN, AMIT NANGIA, and UDHAY SHANKAR BALAKRISHNA,

Defendants.

May 10, 2004
8:45 a.m.

Appendix B

Before:

HON. RICHARD M. BERMAN,

District Judge
and a jury

[Commencing at page 2952]

(In open court; jury not present)

MR. FURLONG: Your Honor, Mr. Margolis's rebuttal reminded me of one issue I just wanted to preserve for the record, which would automatically be denied, which is the possibility of an involving [*sic*] Apprendi standard with respect to the amounts involved. Just preserving.

I know the Court would have to deny based on current law an application that the jury consider in its verdict a special interrogatory as to the amount of money my client is responsible for in both Counts 1 and now 3. [*sic*]

THE COURT: OK. I don't read into Apprendi to require that, certainly not as I understand the case law, but your objection is noted.

MR. FURLONG: I'm looking for a change, your Honor. I get that.

THE COURT: Anything else?

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