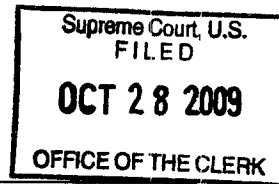


No. 08-1494



In The  
**Supreme Court of the United States**

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JOEL ARGUELLES-OLIVARES,

*Petitioner,*

v.

ERIC HOLDER, et al.,

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**REPLY BRIEF FOR THE PETITIONER**

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SIMON AZAR-FARR  
*Counsel of Record*  
SIMON AZAR-FARR & ASSOC.  
2313 North Flores  
San Antonio, TX 78212  
(210) 736-4122

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**REPLY BRIEF FOR THE PETITIONER**

1. Petitioner, Joel Arguelles, sought certiorari in this case to resolve two circuit splits touching the removal of aliens from this country.

2. The first question presented, whether a conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1) qualifies as an aggravated felony under section 101(a)(43)(M)(i) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(43)(M)(i), remains the subject of a circuit split. Mr. Arguelles respectfully urges this Court to grant certiorari in order to resolve this split due to its legal and practical importance.

3. While this petition was pending, the second of the two splits was resolved by this Court's opinion in *Nijhawan v. Holder*, 557 U.S. \_\_\_, 129 S. Ct. 2294 (2009).

a. Mr. Arguelles no longer seeks certiorari to resolve the second question presented, namely whether the *Taylor-Shephard* modified categorical approach must be applied to determine whether an alien has been convicted of an aggravated felony under INA § 101(a)(43)(M)(i).

b. Instead, Mr. Arguelles seeks a remand and order to conduct an evidentiary hearing to determine whether (a) sufficient evidence was presented, and whether (b) that evidence was submitted in a fundamentally fair procedure, according to the

dictates under *Nijhawan*, 557 U.S. at \_\_\_, 129 S. Ct. at 2303 (slip op. at 11-12).

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## ARGUMENT

### **A. The Circuit Split Regarding Whether Filing a False Tax Return Constitutes an Aggravated Felony Should Be Resolved as It Is Important Legally and Practically.**

1. As the Respondent concedes (Resp. Opp. at 7), the first question presented is the subject of a circuit split: whether a conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1) qualifies as an aggravated felony under INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M). The Third Circuit holds *no*, while the Fifth Circuit holds *yes*.

a. This split is important *legally* because the proper application of three canons of statutory interpretation are at issue. Two of these three canons – that the specific governs the general, and that statutes are to be read to avoid surplusage – are applied broadly; the third – that ambiguities are to be read to favor the alien – applies in the majority of cases interpreting the Immigration and Naturalization Act (INA). Congress, the courts, aliens, and the attorneys who advise aliens all rely on having a clear understanding of how these canons are applied.

Here, the Third and Fifth Circuits apply the rules in diametrically opposed fashions, and come to opposite conclusions regarding the applicability of

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INA § 101(a)(43)(M) to tax-code violations. If the Third Circuit is correct, the only tax-code violation which can lead to removal is the capstone of tax violations – tax evasion. If the Fifth Circuit’s reading of that section is correct, an alien may be removable as an aggravated felon for a far greater range of conduct, including filing a false tax return.

b. This split is important to resolve *practically* because an alien found to have been convicted of an aggravated felony is permanently barred from re-entry to the United States. In Petitioner’s case, this will result in his separation from his U.S. citizen wife and young children, his removal from this country which has been his home since 1977, and the loss to the United States of a successful small-business owner and citizen who has paid all tax restitution in full. For other aliens, removal from the United States will depend, not on their conduct alone, but in which state they reside – an entirely arbitrary factor which should play no role in such a major consequence as permanent exile from their adopted land.

2. The Respondent argues against certiorari, saying the split is a “narrow conflict,” as only two circuits have decided whether subparagraph (M)(ii) precludes a tax offense other than tax evasion from being an aggravated felony under (M)(i). (Resp. Opp. at 8).

This Court has never counted noses to determine if a sufficient number of circuit courts have weighed in on a question before granting certiorari. *See, e.g.,*

*Hinck v. United States*, 550 U.S. 501 (2007) (split between Fifth Circuit and Federal Circuit); *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007) (split between Fifth and Ninth Circuits); *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (no circuit split regarding interpretation of a federal statute by the Eleventh Circuit).

3. The Respondent further suggests that the disagreement “may be resolved by either of those courts,” and that, in the alternative, this Court “should wait for further developments if other circuits are confronted with the issue.” (Resp. Opp. at 11).

Resolution by the Third and Fifth Circuits is not likely. The Fifth Circuit denied a petition for panel rehearing and also declined to rehear the case *en banc*. And the Third Circuit’s holding, in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (CA3 2004), has been praised as “well reasoned” by Judge Dennis in his dissent to the Fifth Circuit’s opinion below. (Revised Op. at 22). There is no indication either court of appeals is inclined to reverse itself.

Waiting for “further developments” in other circuits is likely to lead only to further confusion. And as noted above, while this is an abstract question of law for the courts, and waiting for further development might, at that level, make sense, for the aliens affected, resolution of this question determines whether they are permitted to remain in this country with their families, or will be banished forever.

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4. The Fifth Circuit's interpretation of INA § 101(a)(43)(M) is incorrect, and should be corrected. Judge Dennis, in his dissent in the opinion below, described the majority as "abandon[ing] . . . well-established basic principles" of statutory construction, in contrast with the Third Circuit's "well-reasoned" decision which "fully comports with the traditional tools used in the holistic endeavor of statutory construction." (Revised Op. at 22 (J. Dennis, dissenting)). The Fifth Circuit's holding also ignores Congress's intent to punish more severely the "capstone" tax crime of tax evasion than lesser crimes such as filing a false tax return. For these reasons, it is not correct on the merits, and the case warrants review and correction by this Court.

**B. The Second Question Presented Having Been Resolved, Petitioner Respectfully Seeks Remand and an Order to Conduct an Evidentiary Hearing under the New Standards Announced in *Nijhawan***

Petitioner sought certiorari to review the Fifth Circuit's holding in the case below regarding whether Congress intended for INA § 1011(a)(43)(M)(i) to apply only to convictions under statutes that included a monetary loss to a victim in excess of \$10,000 as an element of the offense.

This Court recently issued its opinion in *Nijhawan v. Holder*, in which it held that "Congress did not intend subparagraph (M)(i)'s monetary

threshold to be applied categorically, i.e., to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." 557 U.S. at \_\_, 129 S. Ct. at 2202 (slip. op. at 10).

This question having thus been resolved, Petitioner withdraws that portion of his petition for certiorari regarding the second question presented.

Instead, if the Court should decide to deny certiorari on the first question, Petitioner respectfully seeks remand to the court below for an evidentiary hearing in accordance with the standards described in *Nijhawan*. These standards require "the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims." *Nijhawan*, 557 U.S. at \_\_, 129 S. Ct. at 2203 (slip. op. at 11). They also require that the evidence that the Government offers meets a "clear and convincing" standard. 8 U.S.C. § 1229a(c)(3)(A). And further, the loss amount must be tethered to offense of conviction; the amount cannot be based on acquitted or dismissed counts or general conduct. *Nijhawan*, 557 U.S. at \_\_, 129 S. Ct. at 2203 (slip. op. at 12) (citing *Alaka v. Attorney General of United States*, 456 F.3d 88, 107 (CA3 2006); *Knutson v. Gonzales*, 429 F.3d 733, 739-740 (CA7 2005)).

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The evidence submitted to show the loss amount in Petitioner's case was a pre-sentence report (PSR) which included a table purporting to contain, *inter alia*, the "additional tax due/owing" for 1999. This table showed that amount to be in excess of \$10,000. As Judge Dennis noted in his dissent, "the PSR's 'proof' of Arguelles's 1999 tax liability amounts to nothing more than an unsourced and unverified chart that is not accompanied by IRS documents or raw data that provide any indication as to how these numbers were calculated or even who specifically performed the calculations." (Revised Op. at 32, n.10). Judge Dennis further explained that:

The majority's characterization of Arguelles as having agreed to certain facts relating to the loss amount for the 1999 tax year is supported only by self-serving references to the probation officer's statements in the PSR and its addendum. The majority does not – because it cannot – point to any statement in the record of conviction by which Arguelles admitted to or failed to object to the factual statements contained in the PSR, as the Government did not include a transcript of the plea colloquy or the sentencing hearing in the immigration record, in addition to not including the Factual Basis and Plea Agreement.

(Revised Op. at 31, n.9).

An evidentiary hearing which comports with this Court's recently-announced requirement under *Nijhawan* of "the use of fundamentally fair

procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims” is necessary to protect the Petitioner’s right to due process in his removal hearing.

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### CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can resolve the circuit split regarding whether filing a false tax return constitutes an aggravated felony.

Further, remand in order to adhere to the standards of *Nijhawan* is appropriate in the event that this Court should decide to deny certiorari on the first question presented.

Respectfully submitted,

SIMON AZAR-FARR

*Counsel of Record*

SIMON AZAR-FARR & ASSOC.

2313 North Flores

San Antonio, TX 78212

(210) 736-4122

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