No. 08-495

IN THE

Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

REPLY BRIEF

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The government acknowledges the existence of a square conflict among the circuits on departing from the categorical approach in aggravated felony determinations under 8 U.S.C. § 1101(a)(43)(M)(i). Opp. at 11 ("As petitioner correctly notes, and as the court below also acknowledged, other courts of appeals have taken different approaches to the question."). The government nevertheless opposes certiorari on the wholly speculative ground that this conceded conflict, one that makes the Petitioner eligible for naturalization in the circuit where he was convicted but deportable in the circuit where his removal proceedings occurred, *may* resolve itself at some unspecified time in the future in light of this Court's decision in *National Cable v. Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) and the decision by the Board of Immigration Appeals in *Matter of Babaisakov*, 24 I & N Dec. 306 (2007). Opp. at 11—13. Even apart from the purely hypothetical nature of this argument in the face of an admitted circuit split, *Brand X*, as this reply will demonstrate, has no application here, for the Petitioner's claim rests upon the plain language of the statute and is governed by a special rule of statutory construction, namely the rule of lenity or narrow construction, not applicable to the regulatory scheme at issue in *Brand X*, and overlooked by the government in opposing certiorari. Furthermore, unlike the telecommunications statute at issue in *Brand X*, the aggravated felony provision here forms an integral part of a federal criminal statute, 8 U.S.C. § 1326(b)(2) (re-entry after conviction of an aggravated felony), to which *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984) is inapplicable. *See, e.g., 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).

While the government also addresses the merits, these arguments provide no cogent basis for declining review in the face of an acknowledged split among the circuits. In particular, the government's claim that following the plain language of 8 U.S.C. § 1101(a)(43)(M)(i), as the Second and Ninth Circuits have done, would render this provision lifeless is belied by the many state and federal criminal statutes that include specific loss elements. A sample is set forth in the appendix accompanying this reply. These criminal statutes are plainly what Congress had in mind in enacting the plain language of 8 U.S.C. § 1101(a)(43)(M)(i)

A. *An Acknowledged Circuit Split Exists*

The government concedes that a definite circuit split exists. Opp. at 6, 12. This recognized divergence creates radically different standards for removability and contravenes the Founders' intent embodied in U.S. Const. Art. I, § 8, Cl. 4 to establish a uniform rule of naturalization. Furthermore, this split also creates different standards for punishment under 8 U.S.C. § 1326(b)(2) (re-entry after conviction of an aggravated felony), a matter of no small moment given the fact that the current Sentencing Guidelines provide for at least an eight level enhancement and a maximum term of 20 years. *See* U.S.S.G. § 2L1.2(b)(1)(C).

In the face of this conceded split, the government resists certiorari on the speculative ground the present conflict *may* resolve itself in light of *Brand X* and

Babaisakov[1]. First, the government can point to no authority to suggest that the resolution of this conflict has actually happened with respect to the aggravated felony issue presented here. Indeed, in *Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008), handed down after both *Babaisakov* and *Brand X*, the Second Circuit had no difficulty in reversing the underlying Board precedent in *Matter of Gertsenshteyn*, 24 I & N Dec. 111 (BIA 2007), which had abandoned the categorical approach and permitted 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). Moreover, the Board decision in *Matter of Gertsenshteyn* had been a principal mainstay for the holding in *Babaisakov*, 24 I & N Dec. at 312 that loss, like commercial advantage in *Gertsenshteyn*, could be determined by independent fact-finding beyond what was established in the adjudication of guilt. In short, presented with the reasoning underpinning *Babaisakov*, the Second Circuit, where Mr. Nijhawan was convicted, has continued to adhere to the same categorical approach exemplified by *Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007)[2]. Likewise, *Kawashima v. Mukasey*, 530

[1] Ironically, this BIA decision underscores the breadth of the Circuit split in noting that the weight of Circuit court authority runs against the Board and the decision ". . . represents a departure from precepts that have been presumed to apply in immigration hearings involving aggravated felony charges arising under [8 U.S.C. §1101(a)(43)(M)(i)]." 24 I & N Dec. at 316, 322.

[2] Certainly *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) signals no departure from *Dulal-Whiteway*, for *James* did not

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F.3d 111 (9th Cir. 2008), *petition for reh'g en banc pending* Nos. 04-7431 and 05-74407 (filed Sept. 15, 2008), handed down after both *Babaisakov* and *Brand X* directly contravenes the decision below.

Second, *Brand X* itself does not support the government's speculative contention. First, unlike the situation in *Brand X*, the Petitioner's arguments here rest upon the plain language of the statute, to which *Chevron* deference does not apply. Second, *Brand X* itself took care to note that no other rule of construction such as the rule of lenity was applicable, 545 U.S. at 985, whereas here the rule of lenity or narrow construction is directly applicable though ignored by the government in opposing certiorari. Third, the telecommunications statute at issue in *Brand X* was not part of a federal criminal statute, where *Chevron* analysis would not be applicable in the first place. *See, e.g., Crandon,* 494 U.S. 152, 177 (1990) (Scalia, J. concurring); *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."). Conviction for an aggravated felony is an essential element of the federal criminal statute punishing illegal reentry and therefore its

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involve a departure from the categorical approach to permit fact-finding beyond the record of conviction but rather whether the modified categorical approach applied where a criminal statute defined only one generic offense but might be violated in a manner that would put an alien in a removable category.

definitive construction rests with the federal courts[3]. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 264, 258 (2006); *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."). Indeed in *Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004), for example, this Court did not even refer to *Chevron* in reversing on an aggravated felony issue. By contrast, the provision[4] 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. Reliance upon the plain language of 8 U.S.C. § 1101(a)(43)(M)(i), the rule of lenity and the role of an immigration provision as part a federal criminal statute also serves to distinguish this case from both the decision by a panel of Seventh Circuit in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), *pet. for cert.*

[3] Ironically, *Babaisakov*, which was handed down well before the decision below, was not cited by the panel majority, though urged by the government, while Third Circuit precedent 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*, 24 I & N Dec. at 324, acknowledges that the Board will "ordinarily follow" controlling precedent in the Circuit where the case arises.

[4] 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."

pending, No. 08-552 (filed Oct. 23, 2008) and *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008)[5] both of which concern the meaning of crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i) and do not address the rule of lenity or the role of an immigration statute as part of a federal criminal statute. *Compare 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"). Thus despite the broad language from the panel decision in *Ali* about "administrative discretion," Opp. at 13, this case deals with the plain language of a statute forming part of criminal statute with interpretation guided by a controlling rule of statutory construction.

In short, the government's argument that *Brand X* may resolve the recognized Circuit split represents mere speculation without any solid legal foundation, while the government can point to no single instance where any court of appeals has retreated from an earlier aggravated felony determination based upon *Brand X* and *Babaisakov*.

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[5] While the November 7, 2008 decision in *Silva-Trevino*, which arose in the Fifth Circuit, does endorse *Babaisakov* in dictum, this Parthian foray into recasting a century of jurisprudence on crimes involving moral turpitude is subject to an extensive motion for reconsideration by interested amici contending that the decision was issued without any opportunity for meaningful participation by the alien's counsel or other interested parties. *See* Memorandum of Law of Amici Curiae In Support of Reconsideration available at www.nysda.org/idp/webPages/other.htm.

B. *The Government Cannot Overcome The Plain Statutory Language*

In attempting to defeat certiorari by contesting the merits, the government's arguments founder on the plain language of the statute as well as this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-7 (2007) reaffirming the application of the categorical approach under *Taylor v. United States*, 495 U.S. 575, 599 (1990) to aggravated felony determinations. *See also Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal, supra*, R. Sharpless, "Toward A True Elements Test: Taylor And The Categorical Analysis of Crimes in Immigration Law," 62 U. Miami L. Rev. 679, 1004 (2008) (hereinafter "Test") (*Duenas-Alvarez* "settled any debate" on applicability of *Taylor* to aggravated felony determinations.). Indeed, as the BIA itself has noted the categorical approach has a venerable history that goes back nearly a century. *Matter of Velasquez-Herrera*, 24 I & N Dec. 503, 513 (2008)

> 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). Significantly here, moreover, Section 101(a)(43)(M)(i) of the Immigration & Nationality Act of 1952, as amended (the "Act"), was

enacted in 1994, some four years after *Taylor* as part of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 4305 and there is nothing in that legislation to suggest that Congress intended to carve out an exception to *Taylor*.

Similarly, as the Second Circuit held *Gertsenshteyn*, 544 F.3d at 145, ". . . the [Act] 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." (emphasis in original). Thus 8 U.S.C. § 1227(a)(2)(A)(iii) expressly provides that only ". . . an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied). Moreover, despite the government's truncated reading, Opp. at 9, the plain language of the definition applicable to this case leaves no doubt that the *entire* definition must be satisfied by conviction. Thus Section 101(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). There is simply no plausible way to read the restrictive clause beginning with "that" as not including the loss requirement, a point underscored by the use of "in."

In other words the plain language of this restrictive clause is simply not limited to fraud or deceit, as the government erroneously contends. Opp. at 9, since "in which" is part of this same restrictive clause setting forth all the requirements for conviction of this

aggravated felony. Expressed in simple mathematical terms the government's error would be akin to an argument that multiplying a times (b+c) actually equals ab + c, where a is conviction and b and c combined are fraud and deceit plus the loss requirement, all part of the same restrictive clause that must be satisfied by conviction.

That the plain language of 8 U.S.C. § 1101(a)(43)(M)(i) may sometimes make removal difficult, however, "is no reason for immigration courts to renounce the restrictions that . . . the law requires." *Gertsenshteyn*, 544 F.3d at 148. The government's argument by analogy to 8 U.S.C. § 1101(a)(43)(ii), Opp. at 8, fails to recognize that a necessary requirement for conviction under 26 U.S.C. § 7201 is a tax deficiency or revenue loss with some jurisdictions even requiring a substantial loss. *Boulware v. United States*, 128 S.Ct. 1168, 1172—73 (2008). 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, a point that *Babaisakov*, 24 I & N Dec. at 314, gets flatly wrong, overlooking settled law summarized by this Court in *Boulware*.

Furthermore, applying this provision as written will hardly render this removal ground largely inoperative as the government contends. Opp. at 8. Even the modest survey of federal and state criminal statutes in the appendix confirms that there are host of such statutes where loss, even loss exceeding $10,000 must be established for conviction. *See, e.g.*, Colorado Statute § 18-4-409 (second degree aggravated vehicle theft here

the vehicle is taken by deception is a class 5 felony if value of the care 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). In short, 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*).

With respect to other considerations addressed in the government's decision, the vice inherent in the decision below with respect to burden of proof is really two fold. 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 (1st Cir. 2006) (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 he 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 in the adjudication of guilt, which requires proof beyond a reasonable doubt. Furthermore, by allowing restitution orders to satisfy this requirement, the decision below, as the dissent here and in *Conteh* persuasively recognize, even lowers the burden of proof below clear and convincing for those orders are based on a preponderance of the evidence. *See, e.g., In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990)

Furthermore, even if *Silva-Trevino* can be read as accepting the administrative burden of making loss a factual matter for resolution by the already overburdened Immigration Courts, Opp. at 11, this does not address the burden on the courts of appeals in applying the newly minted "tethering test" adopted below. Test at 1033n. 254 and material cited, which note the burdens imposed on the courts of appeals from immigration appeals. At the same time, however, this sacrifices fundamental fairness concerns in ensuring predictability, uniformity and even evidentiary reliability that are a hallmark of the categorical approach noted by this Court in *Taylor*, 495 U.S. at 601-602, but abandoned below. Indeed, as *Gertsenshteyn*, 544 F.3d at 146 wisely observes, "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 103-34 (*Babaisakov* approach "is especially impractical when adjudicators are expected to handle a high volume of cases," and "wastes

administrative resources and risks becoming 'unworkable.'"). In any event, as urged above, this case presents a clear instance where the statutory language requires loss to be established by conviction rather than found as a fact by the Immigration Courts. Accordingly, unlike *Silva-Trevino*, this is not a case where an added administrative burden must be assumed to vindicate a clear statutory command.

To the extent that that the government seeks to recast the questions presented, Opp. at I, this omits the rule of lenity or narrow construction. Moreover, such recasting places unwarranted emphasis upon the sentencing stipulation, for the jury was not instructed to find any loss and this Court held long ago that a jury 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 . . ." Likewise the government's attempted reformulation also overlooks the fact the both the government and the District Court agreed at sentencing that Mr. Nijhawan had not caused a loss in excess of $10,000. Pet. at 7. In short, the questions presented in the petition were correctly formulated for consideration on certiorari, and the government's attempt to narrow or recast them should be rejected.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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