No. 23-873

# In the Supreme Court of the United States

CHANTELLE CHARNE ROBBERTSE, PETITIONER

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals erred in upholding an immigration judge's finding that the loss to the victims of petitioner's crime of aggravated identity theft—which petitioner admitted was in furtherance of a wire-fraud scheme resulting in over $475,000 in loss—was proved by clear and convincing evidence to "exceed[] $10,000" under 8 U.S.C. 1101(a)(43)(M)(i).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-9a) is published in the Federal Reporter at 79 F.4th 944. The decision of the Board of Immigration Appeals (Pet. App. 10a-22a) is unreported. The decision and order of the immigration judge (Pet. App. 23a-44a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 21, 2023. A petition for rehearing was denied on November 13, 2023 (Pet. App. 45a). The petition for a writ of certiorari was filed on February 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, renders deportable any noncitizen "who is convicted of an aggravated felony at any time after admission." 8 U.S.C. 1227(a)(2)(A)(iii).[1] Under the INA, "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony. 8 U.S.C. 1101(a)(43)(M)(i).

Whether an offense "involves fraud or deceit" is determined "employ[ing] a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime," *Kawashima* v. *Holder*, 565 U.S. 478, 483 (2012). But this Court has concluded 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." *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009). Instead, in applying that loss-threshold criterion, an adjudicator "must look to the facts and circumstances underlying an offender's conviction." *Id.* at 34. A determination that subparagraph (M)(i)'s monetary threshold is met may therefore be based on "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion," provided that the loss is "'tied to the specific counts covered by the conviction.'" *Id.* at 40-42 (citation omitted). The government bears the burden of establishing a noncitizen's removability "by clear and convincing evidence." 8 U.S.C. 1229a(c)(3)(A).

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

2. Petitioner is a native and citizen of South Africa. Pet. App. 1a. Petitioner was admitted to the United States in 1998 at age three and was granted status as a lawful permanent resident in 2012. *Id.* at 29a. In 2018, a federal grand jury in the United States District Court for the District of Idaho returned a 37-count indictment that charged petitioner and her mother with wire fraud, conspiracy to commit wire fraud, and aggravated identify theft. Administrative Record (A.R.) 605-613. The charges stemmed from a scheme by petitioner and her mother to defraud the California Employment Development Department (CEDD) of over $475,000 using the personal information of over 50 individuals. Pet. App. 1a-2a.

In June 2019, petitioner was convicted, pursuant to a plea agreement, of one count of aggravated identity theft predicated on wire fraud, in violation of 18 U.S.C. 1028A and 18 U.S.C. 2. See Pet. App. 30a, 47a; A.R. 610-612; see also 18 U.S.C. 1028A(c)(5) (referencing wire fraud as a predicate offense). In exchange for that plea, the government agreed to dismiss the other counts of the indictment. Pet. App. 47a.

Petitioner admitted in her plea agreement that at trial the government would prove beyond a reasonable doubt that she "aided and abetted in a scheme to defraud * * * or obtain money or property from CEDD by means of false or fraudulent pretenses, representations or promises"; that she "was aware of a high probability that fraudulent claims * * * were filed with the CEDD" "using the identity of a real person without their knowledge or approval"; and that "[i]n total," petitioner "aided and abetted in defrauding the CEDD of $475,350.28." Pet. App. 49a-50a. Petitioner also agreed to "pay restitution equal to the loss caused to any victim

of the charged offense pursuant to any applicable statute." *Id.* at 51a. Petitioner further acknowledged that "[w]hile arguments may be made in [a removal] proceeding, it is virtually certain" that she "will be removed from the United States." *Id.* at 61a.

Petitioner was sentenced to 24 months of imprisonment, to be followed by a year of supervised release. A.R. 599-600. Petitioner was also ordered, jointly and severally with her mother, to pay $475,350.28 in restitution to CEDD, an amount characterized in the criminal judgment as CEDD's "Total Loss." A.R. 603-604 (emphasis omitted).

3. In 2020, the Department of Homeland Security (DHS) charged that petitioner was removable because her conviction for aggravated identity theft was an aggravated felony "offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" under 8 U.S.C. 1101(a)(43)(M)(i). Pet. App. 2a. In the removal proceeding, DHS submitted the indictment, petitioner's plea agreement, the judgment of conviction, and two summary reports regarding certain aspects of petitioner's criminal scheme. See A.R. 632-684. Petitioner admitted her conviction and that "[t]he loss to the victim in that case was $475,350.28" as alleged in the removal charge against her. A.R. 756; see A.R. 142.

The immigration judge (IJ) found petitioner removable, concluding, as relevant here, that petitioner's offense "did involve an actual loss exceeding $10,000." A.R. 358-359. The IJ explained that, under *Nijhawan*, he could "look at any reliable, available materials and the underlying facts" to determine whether the loss to the victim or victims of petitioner's offense exceeded $10,000. A.R. 357. The IJ acknowledged that the loss "must be connected to specific counts covered by the

conviction—not to acquitted or dismissed charges." *Ibid.* (citing *Nijhawan*, 557 U.S. at 42).

Considering the record, the IJ found that the criminal judgment reflected a "Total Loss" of $475,350.28 and an obligation to make restitution for the same amount. A.R. 358; see A.R. 603-604. The IJ acknowledged that the judgment "did not delineate the specific counts when assigning restitution at sentencing," but he found that the plea agreement reflected petitioner's agreement "to pay restitution equal to the loss caused to any victim of the charged offense pursuant to any applicable statute." A.R. 358-359. After further proceedings, the IJ ordered petitioner's removal. Pet. App. 44a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 10a-22a. With respect to subparagraph (M)(i)'s loss threshold, petitioner argued for the first time on appeal that the amount of funds listed in the specific count of the indictment to which she pleaded guilty ($1003) was the relevant loss. A.R. 34-35; see A.R. 13-15. The Board rejected that argument, finding "no clear factual or legal error in the Immigration Judge's finding that the restitution amount of $475,350.28 was tethered to the conduct of conviction." Pet. App. 17a. The Board observed that "in determining whether the amount of restitution was tied to the * * * conviction, the Immigration Judge was not constrained to look only at one line of the charge in the indictment." *Id.* at 15a. The Board agreed with the IJ that "the uncontroverted conviction record evidence" demonstrated that petitioner had "specifically admitted to aiding and abetting the entire scheme to defraud," and concluded that "the ambit of [petitioner]'s conduct encompassed the entire fraud scheme." *Id.* at 16a-17a.

4. The court of appeals denied a petition for review. Pet. App. la-9a. As relevant here, the court rejected petitioner's contention that the record failed to establish a loss amount greater than $10,000 by clear and convincing evidence, concluding that petitioner "misconstrues the nature of *Nijhawan*'s circumstance-specific approach." *Id.* at 5a; see *id.* at 5a-7a. The court acknowledged that the loss amount "may not relate merely to 'general conduct' that is otherwise unconnected to the count of conviction," nor may it "rest solely on the allegations contained in 'acquitted or dismissed counts.'" *Id.* at 6a-7a (quoting *Nijhawan*, 557 U.S. at 42). But the court emphasized that "general evidence otherwise satisfying the clear-and-convincing standard as to the offense at issue is not somehow infirm or beyond consideration merely because that evidence also relates to the allegations in a dismissed count." *Id.* at 7a. Turning to the facts of petitioner's case, the court determined that two concessions in the plea agreement—that petitioner's "criminal activity served to aid and abet her mother's entire fraudulent scheme as to the much larger amount," and her "expressly consent[ing] to joint liability for restitution" in that amount—"suffice to establish by clear and convincing evidence that her offense caused a loss in excess of $10,000." *Ibid.*[2]

5. The court of appeals denied a petition for rehearing with no noted dissents. Pet. App. 45a.

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[2] The court of appeals additionally concluded that the wire-fraud component of petitioner's offense established the "fraud or deceit" element of the aggravated felony definition. Pet. App. 4a ("easily conclud[ing]" that petitioner's crime involved fraud or deceit because wire fraud is an element of the offense). Petitioner does not challenge that aspect of the decision below in this Court.

## ARGUMENT

Petitioner renews her contention that she is not removable because the "loss to the victim or victims" from her aggravated-identify-theft offense does not "exceed[] $10,000." The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly found that petitioner's removability was established by clear and convincing evidence.

a. An "offense that involves fraud or deceit" is an aggravated felony, rendering a noncitizen removable, when "the loss to the victim or victims exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(i); see 8 U.S.C. 1227(a)(2)(A)(iii). In *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), this Court held that the $10,000 loss-threshold requirement "refer[s] to the specific way in which an offender committed the crime on a specific occasion." *Id.* at 34. Whether the $10,000 loss threshold is satisfied is thus analyzed by applying a "'circumstance-specific'" approach that considers "the facts and circumstances underlying an offender's conviction." *Ibid.* That approach is qualified in two respects. First, "the 'loss' must 'be tied to the specific counts covered by the conviction.'" *Id.* at 41 (citation omitted). Second, the inquiry "is not an invitation to relitigate the conviction itself"; rather, "the 'sole purpose'" of the inquiry "'is to ascertain the nature of a prior conviction.'" *Ibid.* (citation omitted). Applying that approach in *Nijhawan* itself, the Court held that a stipulation made for sentencing purposes and a restitution order, each of which showed that the losses resulting from the conviction at issue exceeded $10,000, con-

stituted clear and convincing evidence of removability "[i]n the absence of any conflicting evidence." *Id.* at 43.

Here, the court of appeals reasonably applied *Nijhawan* in finding that the $10,000 loss-threshold was proved by clear and convincing evidence. The court reasoned that "express admissions, such as those found in a plea colloquy or written plea agreement, carry a general evidentiary value that may suffice" to prove removability, and "sentencing determinations may carry greater weight when considered alongside such evidence." Pet. App. 6a. Citing petitioner's admission "that her criminal activity served to aid and abet her mother's entire fraudulent scheme as to the much larger amount" and her "expressly consent[ing] to joint liability for restitution in" that amount, the court determined that the loss resulting from petitioner's conviction "vastly exceed[ed] the $10,000 threshold." *Id.* at 7a. That case-specific determination is correct and does not warrant further review.

b. Petitioner's challenges to the court of appeals' decision rest on erroneous understandings of the substance of her plea and the elements of her conviction. Without disputing that the record contains clear and convincing evidence that the wire-fraud scheme as a whole caused CEDD losses in excess of $10,000, petitioner contends (Pet. 2) that those losses are not tied to her conviction. In particular, petitioner argues (*ibid.*) that, although "charged with multiple counts allegedly related to an overarching scheme," she was "convicted of only one discrete instance of fraud." Petitioner further contends (Pet. 15-16) that the specific count to which she pleaded guilty articulates as "the resulting loss amount" the much lesser amount alleged to have been withdrawn using one debit card on one specific date.

Petitioner is incorrect. The court of appeals expressly recognized that "mere allegations contained in dismissed counts generally provide little future evidentiary value," and that "little can be said of the elements of acquitted counts other than the fact that a jury failed to find all such elements beyond a reasonable doubt." Pet. App. 6a. The court accordingly did not rely on any of the dismissed wire-fraud counts (which together alleged a total of around $17,000 in unlawful withdrawals) to uphold the removal order. Instead, the court based its conclusion on other highly probative record evidence, namely petitioner's own concessions confirming her complicity in a criminal scheme that produced losses of over $475,000. *Id.* at 2a, 6a; see A.R. 608-610. *Nijhawan* does not require courts, IJs, or the Board to blind themselves to such admissions. To the contrary, the decision in *Nijhawan* itself found that the amount of loss was established by a "stipulation, produced for sentencing purposes," and a "restitution order." 557 U.S. at 42-43.

Moreover, petitioner fails to account for the specific elements of her conviction under 18 U.S.C. 1028A. Section 1028A is a "combination crime," *i.e.*, a crime which "punishes the temporal and relational conjunction of two separate acts." See *Rosemond* v. *United States*, 572 U.S. 65, 75 (2014). Here, the elements of petitioner's offense included that her use of the means of identification was "during" and in "relation to * * * wire fraud." Pet. App. 48a (citation omitted). That element generally requires that "the means of identification specifically *is a key mover* in the criminality." *Dubin* v. *United States*, 599 U.S. 110, 122-123 (2023) (emphasis added). Petitioner's plea agreement therefore specified that the government would prove at a trial that she en-

gaged in identity theft "*to further the wire fraud scheme*" that she was admitting to have aided and abetted. Pet. App. 49a-50a (emphasis added). Far from being "irrelevant" to "the 'offense' of which she was actually 'convicted,'" Pet. 16 (citation omitted), petitioner's admission "that her criminal activity"—*i.e.*, the activity to which she was pleading guilty—"served to aid and abet her mother's entire fraudulent scheme" satisfied an element of her offense and was integral to her guilty plea. And by admitting that her identity theft aided and abetted the wire-fraud scheme, petitioner was also admitting to her participation—without qualification or limitation—in the entire wire-fraud scheme. Nothing in the plea limits the relevant loss to the victims of the entire scheme to the $1003 amount listed in the particular count to which she pleaded guilty.

2. Petitioner contends (Pet. 1-4, 6-13) that the decision below conflicts with decisions from the Third, Seventh and Ninth Circuits, which petitioner characterizes as "refus[ing] to rely on admissions or restitution orders that may sweep more broadly" than the "conduct underlying the actual count(s) of conviction." Pet. 6. To support this claim, however, petitioner relies primarily on pre-*Nijhawan* decisions whose continued relevance is uncertain. For example, the lone Ninth Circuit decision cited by petitioner, *Chang* v. *INS*, 307 F.3d 1185, 1191 (2002), concluded that it was unclear if certain sentencing materials could be considered when determining whether subparagraph (M)(i)'s loss threshold is satisfied. As petitioner concedes (Pet. 10), that uncertainty was resolved by *Nijhawan*, which permits consideration of a broad range of materials, including the "[defendant's] own stipulation" that the fraud involved losses exceeding $10,000. *Nijhawan*, 557 U.S. at 42-43.

In any event, the cases that petitioner cites do not demonstrate that another court of appeals would have reached a different result in her case. *Chang* turned on the fact—not present here—that the plea agreement specified a loss amount lower than the actual loss due to the defendant's fraud or deceit. In particular, Chang's plea agreement included a loss-specification provision the Ninth Circuit described as "definitively establish[ing] that the only offense of which Chang was convicted falls about $9,400 shy of qualifying as an aggravated felony." 307 F.3d at 1190. The Ninth Circuit has subsequently described *Chang* as "stand[ing] for the proposition that a restitution order does not establish the amount of loss when it *directly contradicts* the amount of loss specified in a plea agreement or indictment," and not as "set[ting] forth a rule that immigration judges may not look to a restitution order to determine an amount of loss to a victim." *Ferreira* v. *Ashcroft*, 390 F.3d 1091, 1098 (9th Cir. 2004) (emphasis added). And that court has recently confirmed that where, as here, a plea admits to aiding and abetting "the whole of a large-scale criminal endeavor," the relevant loss to the victim is the total loss resulting from the scheme specified in the plea agreement. *Khalulyan* v. *Garland*, 63 F.4th 1207, 1213 (9th Cir. 2023) (citation omitted).

Petitioner is also mistaken in relying (Pet. 7-8, 13) on the pre-*Nijhawan* decision in *Alaka* v. *Attorney General*, 456 F.3d 88 (3d Cir. 2006), overruled on other grounds by *Bastardo-Vale* v. *Attorney General*, 934 F.3d 255 (3d Cir. 2019) (en banc). In that case, the actual losses tied to the conviction did not exceed $10,000 and the sentencing court ordered restitution only for those losses. See *Alaka*, *id.* at 92. But the court further

found for sentencing purposes that the total intended loss was considerably higher because the conduct as to all the charges was part of a common scheme or plan. On appeal, the Third Circuit interpreted the plea agreement as admitting only the losses specified in the count of the indictment to which the defendant pleaded guilty. The court reasoned that "[a]llowing the loss calculated for sentencing purposes to supersede the amount designated in the plea agreement 'would divorce the $10,000 loss requirement from the conviction requirement.'" *Id.* at 108 (quoting *Chang*, 307 F.3d at 1190). That reasoning has no bearing on petitioner's case, which involves a plea agreement where petitioner admitted to participation in a scheme that produced losses well in excess of $10,000.

Moreover, in post-*Nijhawan* cases the Third Circuit has clarified that *Alaka*'s holding "that an amount agreed to in a plea agreement provides the definitive measure of loss" "does not limit [the] inquiry" when determining the loss to the victim. *Singh* v. *Attorney Gen.*, 677 F.3d 503, 515 n.15 (2012). For example, in *Doe* v. *Attorney Gen.*, 659 F.3d 266 (3d Cir. 2011), the court upheld a finding that a conviction for aiding and abetting a wire-fraud scheme is an aggravated felony where the plea documents stated that the loss amount attributable to the defendant through his participation in the fraudulent scheme exceeded $10,000, even though the documents also specified his plea to a single transaction for less than $10,000. See *id.* at 268. Like petitioner here, Doe had "admitted to aiding and abetting the entire scheme" and the plea agreement "refer[red] to the entire scheme as the underlying crime" that Doe had aided and abetted. *Id.* at 276. Further, the plea agreement confirmed that Doe's "conduct caused between

$120,000 and $200,000 in losses." *Ibid.* The Third Circuit found it "plain" that Doe had been convicted of aiding and abetting the entire fraudulent scheme, and thus "was in fact convicted of committing all of the relevant conduct," not merely the specific conduct stipulated to have been directly committed by him. *Ibid.* As explained above, pp. 8-10, *supra*, the same logic applies in petitioner's case.[3]

For similar reasons, petitioner's citation (Pet. 8-9) of *Knutsen* v. *Gonzales*, 429 F.3d 733 (7th Cir. 2005), fails to indicate that the Seventh Circuit would reverse her removal order. In that decision, the court held that the conviction record did not establish removability where the indictment charged *two* distinct bank-fraud schemes against a single victim and the plea agreement specified that the losses due to the one scheme the defendant was convicted of executing did not exceed $10,000. See *id.* at 738. *Knutsen*'s ruling that the losses attributable to the second (unconvicted) scheme and other relevant

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[3] The two post-*Nijhawan* Third Circuit cases that petitioner cites (Pet. 8) are inapposite. In *Rad* v. *Attorney General*, 983 F.3d 651 (3d Cir. 2020), the court of appeals held that the Board erred when it found the loss-threshold requirement met by "[w]orking backwards from the thirty-five month sentence the District Court imposed," having "surmised" that the court must have assessed the loss at greater than $40,000, and then "presumed it could do the same." *Id.* at 667. The court of appeals observed that the trial court may not have calculated the losses attributable to Rad's conduct, and declared that it had "no assurance that the Court found Rad's crimes to have caused over $10,000 in losses." *Id.* at 669. "[E]xpress[ing] no opinion as to the ultimate outcome," the court remanded for further agency consideration. *Id.* at 670-671. And in *Singh*, the court of appeals' analysis turned on "the unique facts of th[e] case," which showed that "no actual loss occurred" as a result of the offense (a false statement made in a bankruptcy proceeding). 677 F.3d at 506, 518.

conduct could not be included, *id.* at 738-740, is irrelevant here because petitioner's plea admits the losses attributable to the single overarching fraudulent scheme at issue. In such circumstances, the Seventh Circuit has recognized that a plea to a single count involving a loss under $10,000 is "not inconsistent with [a defendant's] having committed an offense that resulted in a loss of more than $10,000." *Clarke* v. *United States*, 703 F.3d 1098, 1099 (7th Cir. 2013) (citing *Nijhawan*, *supra*, and other authorities).[4]

[4] Petitioner briefly suggests (Pet. 12) that the Sixth and Eleventh Circuits would agree that her conviction is not an aggravated felony under subparagraph (M)(i). As petitioner acknowledges, however, neither of those courts has addressed the question presented in this petition. And neither of the decisions that petitioner cites indicates that the Sixth or Eleventh Circuit would have found that the Board erred in petitioner's case. See *Obasohan* v. *Attorney Gen.*, 479 F.3d 785, 786 (11th Cir. 2007) (finding loss threshold not met where prosecution had conceded "there was no loss" from conduct and there was "no basis" to conclude that the "restitution order was based on convicted or admitted conduct"); *Al-Adily* v. *Garland*, 63 F.4th 1065, 1071-1072 (6th Cir. 2023) (reversing removal order where actual loss amount was "obviously below the $10,000 threshold" and immigration court improperly "shifted the burden" of proof to noncitizen).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2024