No. 10-1295

In the Supreme Court of the United States

RAVIDATH RAGBIR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to remand petitioner's case to the Board of Immigration Appeals for reconsideration in light of *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), after the court had rejected petitioner's argument that the immigration proceedings were inconsistent with *Nijhawan*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted in 389 Fed. Appx. 80. The opinions of the Board of Immigration Appeals (Pet. App. 12a-20a) and the immigration judge (Pet. App. 21a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2010. A petition for rehearing was denied on November 22, 2010. On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 21, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Trinidad and Tobago, was admitted to the United States as a lawful permanent resident on February 15, 1994. Pet. App. 21a. Petitioner thereafter became involved in a scheme to procure fraudulent loans from an Illinois bank. *Id.* at 3a-4a. On September 12, 2001, following a jury trial in the District of New Jersey, petitioner was convicted on six counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. Pet. App. 3a-4a, 21a. The district court sentenced petitioner to 30 months of imprisonment, to be followed by three years of supervised release, and ordered that he and a co-defendant would be jointly and severally liable to pay $350,001 in restitution. Administrative Record (A.R.) 202-205.

2. a. In May 2006, the government commenced removal proceedings against petitioner. Pet. App. 21a. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. 1227(a)(2)(A)(iii). The Act defines "aggravated felony" to include "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), as well as conspiracy to commit such an offense, 8 U.S.C. 1101(a)(43)(U).

Petitioner conceded that he had been convicted of an offense involving fraud or deceit, but contested whether the loss had exceeded $10,000. Pet. App. 22a. At a hearing on June 7, 2006, the parties discussed the issue of what evidence would be necessary to establish the loss amount. A.R. 71-89. Petitioner's counsel argued that Second Circuit precedent precluded the immigration

judge (IJ) from considering the presentence report for that purpose. A.R. 88-89. But petitioner's counsel suggested that he would like to obtain certain pre-and post-trial hearing transcripts that, in his view, would shed light on the issue. A.R. 84. The IJ said that counsel was "welcome" to get those documents. A.R. 84, 85. The IJ was skeptical, however, that the documents would ultimately be necessary, since other documents, such as the indictment and the restitution order, might by themselves be sufficient to establish the loss amount. *Id.* at 84-85. The IJ accordingly declined to "put [the matter] over for months so that [counsel] can get the plea minutes," but stated that "[i]f it's necessary," he would reconsider the issue of a continuance at the next hearing, scheduled for June 21, 2006. A.R. 86-87.

Petitioner's counsel never again raised with the IJ the issue of obtaining or introducing additional documents about the loss amount. The June 21 hearing was continued until July 10 to give the government an opportunity to obtain a copy of the superseding indictment from the criminal case. A.R. 91-101. At the July 10 hearing, the government supplemented the record, which already contained the criminal judgment, with a copy of the superseding indictment and the presentence report. A.R. 103; 152-205. At no point in either hearing did petitioner's counsel submit any evidence relating to the criminal conviction, state that he desired to do so, or seek a continuance to obtain such evidence. A.R. 91-101, 103-141.

b. The IJ issued a written opinion concluding that the government had proved the requisite amount of loss by clear-and-convincing evidence and ordering petitioner's removal. Pet. App. 21a-33a; see 8 U.S.C. 1229a(c)(3) (specifying evidentiary standard). Observing that "sev-

eral courts of appeals consider the [presentence report] to be unreliable" for the purpose of determining loss, the IJ confined his inquiry to the judgment of conviction and the superseding indictment. Pet. App. 25a; see *id.* at 29a n.2.

The IJ found that the judgment "would be sufficient in itself to prove that respondent is subject to removal as charged." Pet. App. 26a (emphasis omitted). The judgment contained a restitution order stating that the probation office had determined that "full restitution" would be $426,083.03 but that the parties had stipulated to the lesser amount of $350,001. *Ibid.* The IJ reasoned that the "provisions of the restitution order in the Judgment clearly reflect that the restitution is repayment of loss incurred by the victim of the criminal offenses for which respondent was convicted." *Id.* at 29a.

The IJ additionally found that the superseding indictment likewise supported the government's case. Pet. App. 30a-32a. The IJ observed that the indictment alleged that over $480,000 had been involved in the wire transactions for which petitioner had been convicted. *Id.* at 30a. The IJ noted that this charged amount was more than the $426,083.03 loss figure in the judgment, but reasoned that "several possible factors" explained the difference, including the possibility that a portion of the money involved in the fraudulent wire communications was never actually loaned out by the victim bank. *Ibid.* The IJ also observed that petitioner's "conspiracy conviction alleges a loss of 'more than $400,000.'" *Id.* at 31a; see A.R. 154.

3. Petitioner, still represented by counsel, sought review from the Board of Immigration Appeals (Board). His brief to the Board mentioned in passing, in the statement of facts, counsel's initial request for a continu-

ance to obtain plea and sentencing transcripts. A.R. 19. The brief did not, however, argue that the IJ had made any error in that regard, or that any additional evidence existed that might refute the loss amount found by the IJ. The brief instead argued (among other things) that only a narrow category of evidence regarding loss amount could be considered, because circuit precedent limited the agency to examining only the fact of conviction, rather than the particular circumstances of petitioner's offense conduct. A.R. 25-28; see Pet. App. 15a n.2 (noting that petitioner had argued that the IJ "impermissibly relied in part upon the Presentence Investigation Report in the criminal case to find him removable"). Petitioner also argued that the superseding indictment and judgment were insufficient to prove the loss amount involved in his criminal conviction. A.R. 24-29.

The Board affirmed the IJ's order. Pet. App. 12a-20a. It concluded, as had the IJ, that "the superseding indictment and the order of restitution imposed against [petitioner] in the criminal judgment establish by clear and convincing evidence that the offenses of which he was convicted occasioned a loss of more than $10,000 to the victim." *Id.* at 18a.

4. Petitioner filed a petition in the court of appeals for review of the Board's decision. After the agency proceedings had concluded, but before the court of appeals had considered the case, this Court decided *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). *Nijhawan* held, contrary to preexisting Second Circuit precedent, that IJs are not limited only to a narrow class of documents (*e.g.*, charging documents and explicit jury or judicial findings) to determine the loss amount involved in an alien's prior fraud conviction. *Id.* at 2302-2304. Petitioner's

brief to the court of appeals, in addition to arguing that the government had failed to meet its burden of proof on loss amount (Pet. C.A. Br. 21-42), argued in the alternative that the case should be remanded so that he could present additional loss-amount evidence (*id.* at 42-51).

The court of appeals denied the petition for review in an unpublished summary order. Pet. App. 1a-11a. As to the sufficiency of the evidence, the court "detect[ed] no error in the agency's conclusion that, taken together, the indictment, judgment of conviction, and restitution order of $350,001 'for this loss' constituted clear and convincing evidence of losses greater than $10,000." *Id.* at 9a. The court acknowledged that "restitution in a fraud case can include compensation for uncharged conduct closely related to the scheme" and that this case apparently included some uncharged conduct. *Id.* at 7a. Petitioner, however, "point[ed] to nothing in the record that precluded the agency, as a matter of law, from making a clear and convincing finding that the $350,001 restitution order included more than $10,000 attributable to the crimes of conviction." *Ibid.* The court additionally observed that even though the Board had not relied on the presentence report, "that document could be read to indicate that *all* of the restitution ordered reflected loss from the crimes of conviction." *Id.* at 7a n.5. And the court added that petitioner "points to no evidence—and advances no theory—that supports his urged inference that the indicted loans were repaid nearly in full while the uncharged loans inflicted essentially unmitigated losses." *Ibid.*

As to petitioner's procedural argument, the court of appeals concluded that "nothing in *Nijhawan* requires the agency to consider any particular document, nor does the record here support the argument that the

[Board] denied [petitioner] a fair opportunity to challenge the government's case or to introduce relevant evidence." Pet. App. 10a. The court observed that at the June 7 hearing, the IJ had "expressly granted [petitioner], who was represented by counsel, permission to obtain sentencing and related transcripts if he so wished. Despite repeated adjournments, [petitioner] failed to obtain such transcripts or to introduce other evidence in opposition to the government's loss calculations." *Ibid.* "Further," the court continued, petitioner "points to no evidence indicating that no more than $10,000 of the ordered $350,001 restitution amount was attributable to the crimes of conviction." *Ibid.* "In the absence of any indication that the agency's determination of loss exceeding $10,000 was not adequately supported by the record," the court stated, "we decline to remand for further proceedings." *Ibid.*

ARGUMENT

Petitioner asks this Court to address the circumstances under which *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), requires a reviewing court to remand "[w]hen an agency commits a legal error." Pet. i. But the court of appeals' decision does not present that question, because the court did not find that the agency committed any legal error in petitioner's case. The court of appeals' decision, moreover, is unpublished and does not conflict with any decision of this Court or another court of appeals. Certiorari should accordingly be denied.

1. Petitioner seeks review of an issue that the court of appeals never faced and did not decide. His question presented expressly presupposes that the agency's resolution of his case conflicted with this Court's decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), and asks

this Court to decide whether the court of appeals was required to remand for further agency proceedings in light of that supposed "legal error." Pet. i. But the court of appeals found no such error. Rather, it explicitly rejected petitioner's argument that "he was not afforded a fair opportunity to contest the loss amount consistent with the standards articulated in *Nijhawan*." Pet. App. 9a.

The court of appeals explained that "[c]ontrary to [petitioner's] argument, * * * nothing in *Nijhawan* requires the agency to consider any particular document, nor does the record here support the argument that the [Board] denied [petitioner] a fair opportunity to challenge the government's case or to introduce relevant evidence." Pet. App. 10a. The court observed that the IJ had "expressly granted" petitioner the opportunity to procure the additional evidence ("sentencing and related transcripts") that petitioner had suggested that he might want to introduce. *Ibid.*; see A.R. 84-85. "Despite repeated adjournments," however, petitioner "failed to obtain such transcripts or to introduce other evidence in opposition to the government's loss calculations." Pet. App. 10a; see pp. 2-3, *supra*.

Because the court of appeals found no error under *Nijahawan* (or legal error of any other sort), this case does not present the question on which petitioner seeks review. Nor is there any basis for this Court to grant certiorari and itself determine whether any legal error occurred in the agency proceedings. First, petitioner has not asked the Court to review the court of appeals' conclusion regarding the scope of *Nijhawan*, but has instead simply assumed a contrary conclusion in his question presented. "Only the questions set out in the petition, or fairly included therein, will be considered by

the Court." See Sup. Ct. R. 14.1(a). Second, petitioner does not even argue the *Nijhawan* issue in the body of the petition. And even if he had, that still would not be sufficient to present the issue for this Court's review. See, *e.g.*, *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (citation and brackets omitted). Finally, the *Nijhawan* issue does not merit certiorari. Whether or not the unique procedural history of this case raises any issue of a possible error under *Nijhawan* is neither an "important matter" of continuing significance nor a question on which petitioner has identified a circuit conflict. Sup. Ct. R. 10(a).

2. Overlooking the court of appeals' threshold rejection of his *Nijhawan* argument, petitioner and his amici focus on the court of appeals' secondary conclusion that remand to the agency was not warranted "[i]n the absence of any indication that the agency's determination of loss exceeding $10,000 was not adequately supported by the record." Pet. App. 10a. They suggest that the court of appeals' decision not to remand this case to the Board conflicts with several decisions of this Court. They identify no case, however, that would require a remand in these circumstances.

a. Petitioner primarily argues (Pet. 12-14) that the court of appeals' decision conflicts with the principle announced in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), that a court is "powerless to affirm * * * administrative action by substituting what it considers to be a more adequate or proper basis" for that action. He does not, however, contend that *Chenery* prohibits a re-

viewing court from affirming agency action when, as here, it finds no error in the agency proceedings.

In any event, even in cases where there may be some technical legal error, this Court has declined to order remands that "would be an idle and useless formality." *Morgan Stanley Capital Group Util., Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008) (quoting *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion)). The Court has explained that "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *Ibid.* (quotation marks and citation omitted). Petitioner suggests (Pet. 16-18) that this exception to *Chenery*'s general remand rule should be cabined to the precise factual scenarios in which the Court has applied it. But the principle itself is more general, and the Court has not limited its cases to their facts in the manner proposed by petitioner.

Petitioner does not meaningfully challenge the court of appeals' conclusion (Pet. App. 10a) that a remand would produce the same outcome. He implies in his statement of facts (Pet. 5-7) that the superseding indictment, judgment of conviction, and restitution order were insufficient to prove the amount of loss caused by the counts of conviction, rather than by other related conduct. But he has already had the opportunity to make that argument to the IJ, to the Board, and to the court of appeals, and all of those decisionmakers found that the aforementioned materials provided clear-and-convincing evidence of the requisite loss. Pet. App. 9a, 18a, 26a. Petitioner offers no more than a passing suggestion that there may be additional evidence that might rebut that determination. See Pet. 10 (asserting, without citation, that mortgage deeds could show the indicted loans

were "well collateralized" and that "payments" of an unspecified amount "had been made on these loans"). If such evidence in fact existed, petitioner could have moved to reopen the agency proceedings to present it, see 8 U.S.C. 1229a(c)(7), or at the very least could have mentioned it in the court of appeals in support of his request for a remand. Instead, he "point[ed] to no evidence—and advanc[ed] no theory—that supports his urged inference that the indicted loans were repaid nearly in full while the uncharged loans inflicted essentially unmitigated losses." Pet. App. 7a n.5; see *id.* at 10a (stating that petitioner "points to no evidence indicating that no more than $10,000 of the ordered $350,001 restitution amount was attributable to the crimes of conviction").

Furthermore, to the extent additional evidence would be considered on remand, the court of appeals observed that a critical piece of such evidence—the presentence report—"could be read to indicate that *all* of the restitution ordered reflected loss from the crimes of conviction." Pet. App. 7a n.5. As the court of appeals explained:

> Under the heading "Loss Amounts," the [presentence report] states: "The total amount of fraudulent loans is $831,788.01, reflecting the *$426,048.03 loss pertaining to the indicted fraudulent loans*, and the additional $405,739.98 in loans admitted by [petitioner]." Under the heading "Restitution," the [presentence report] states that restitution "in the amount of $426,048.03 is outstanding," providing a figure precisely matching losses caused solely by the indicted loans. Similarly, the judgment of conviction states that by stipulation of the government, "full restitution determined by probation ([$]426,083.03)

> was not ordered," another apparent reference, albeit with a typographical error, to losses attributable to indicted conduct.

Ibid. (citations omitted); see A.R. 184, 197, 206.

Petitioner also briefly posits (Pet. 19) that a remand would be useful because it would allow the agency to determine in the first instance whether *Nijhawan* "requires a showing that the $10,000 loss resulted from a single count of conviction rather than, as was found below here, from all counts combined." The agency would not, however, need to make such a determination in this case. Among other things, the agency found that the conspiracy conviction alone involved sufficient loss to support removal by itself. Pet. App. 12a-13a (noting IJ's decision finding removability based on both 8 U.S.C. 1101(a)(43)(M), as well as conspiracy to commit such an offense, 8 U.S.C. 1101(a)(43)(U)).

b. Petitioner and his amici also suggest that the court of appeals' decision conflicts with three other decisions of this Court: *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam); *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam) (*Ventura*); and *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009). Pet. 14; Administrative Law Professors Amicus Br. 12-15. That suggestion is incorrect.

This case does not present the remand question posed in *Ventura* and *Thomas*. In *Ventura*, the Ninth Circuit had reversed the Board's determination that an alien was ineligible for asylum because the persecution he alleged before he left Guatemala was "not 'on account of' a 'political opinion.'" 537 U.S. at 13 (citation and emphases omitted). The government had argued before the IJ that the alien was independently ineligible for relief because conditions had improved in Guatemala since his departure. *Ibid.* The Board had not considered that al-

ternative argument, "[a]nd both sides asked that the Ninth Circuit remand the case to the [Board] so that it might do so." *Ibid.* Instead, the Ninth Circuit decided the question for itself, "holding that the evidence in the record failed to show sufficient change." *Id.* at 14. This Court held that the Ninth Circuit erred by reaching out to decide a question that had not been decided by the Board, concluding that the court of appeals should have "remand[ed] [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16.

Thomas presented a similar situation. The aliens there sought asylum because they said they feared persecution based on their race and on their membership in a particular "social group"—their family. 547 U.S. at 184. The Board found them ineligible for asylum, "responding to [their] primarily race-related arguments." *Ibid.* The Ninth Circuit held that the Board had not adequately considered the aliens' alternative basis for asylum, namely, their family ties. *Ibid.* The court of appeals then went on to decide that question on its own, holding that "the particular family at issue * * * fell within the scope of the statutory term 'particular social group' and that the '[aliens] were attacked and threatened because they belong to [that] particular social group.'" *Id.* at 184-185. This Court held that the Ninth Circuit had erred by not remanding that question to the agency, which "ha[d] not yet considered whether [the] family present[ed] the kind of 'kinship ties' that constitute a 'particular social group'" under the immigration laws. *Id.* at 186.

In both *Ventura* and *Thomas*, the Ninth Circuit erred by deciding a question that had not been previously addressed by the Board. Here, by contrast, the

court of appeals reviewed a decision that the agency had actually made—that petitioner's offense was an aggravated felony that qualified him for removal. The court of appeals rejected petitioner's contention that the Board's determination was reached by legal error, and additionally concluded that there was no possibility of a different outcome on remand. Nothing in *Ventura* or *Thomas* required the court of appeals to remand in those circumstances.

Nor does the court of appeals' decision conflict with this Court's decision in *Negusie*. In that case, the Board had incorrectly believed that one of this Court's prior decisions dictated the answer to a particular statutory question. 129 S. Ct. at 1162. This Court remanded the case "for the agency to interpret the statute, free from error, in the first instance." *Ibid.* The Court additionally noted that, depending on the standard that the Board chose to adopt, it "may be prudent or necessary for the Immigration Judge to conduct additional fact-finding." *Id.* at 1168.

This case, however, does not involve a statutory-interpretation error of the sort at issue in *Negusie*. As already explained, the court of appeals here did not find any legal error at all. Although *Negusie* emphasized, as did *Gonzales* and *Ventura*, that remand should be the ordinary course when an agency applies an incorrect legal standard, none of those decisions dictates that a remand is necessary in the particular circumstances of this case.

3. Petitioner also contends (Pet. 3) that the "circuits are in disarray on the application of the *Chenery* doctrine in cases where an agency commits an error of law." See Pet. 19-28; see also Administrative Law Professors Amicus Br. 19-23. However, as already explained, this

case does not present a vehicle for resolving such a conflict, because the court of appeals identified no legal error in the agency's consideration of petitioner's case.

In any event, even by petitioner's own accounting (as well as that of his amicus), there is at least some precedent in every court of appeals for declining to remand in circumstances where the outcome of the remand is clear. Pet. 20-26 & n.11; Administrative Law Professors Amicus Br. 19-23; see p. 10, *supra* (discussing this Court's exceptions to the *Chenery* doctrine). Although petitioner asserts that the law within many circuits is inconsistent, any such internal inconsistencies would be for the courts of appeals themselves, rather than this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Moreover, different results in different cases, both within and without a particular circuit, are to be expected, because "whether remand is necessary in a case is dependent on the facts and legal posture of that particular case." *Lin* v. *Mukasey*, 517 F.3d 685, 694 n.12 (4th Cir. 2008). Petitioner identifies no instance in which another court of appeals reached a different result in a case with facts and a legal posture materially identical to this one.

Petitioner focuses in particular (Pet. 26-28) on two cases that, in his view, demonstrate "a more specific conflict * * * with respect to the precise issue in this case: whether remand to the agency is required after an intervening change of law, particularly one—like this Court's decision in *Nijhawan*—that allows or requires the consideration of new evidence by the agency." Neither case conflicts with this one.

One case is *Leia* v. *Ashcroft*, 393 F.3d 427 (3d Cir. 2005). In that case, the IJ refused to allow the alien to

introduce certain documents into evidence because they had not been authenticated pursuant to a certain regulation. *Id.* at 430. The IJ also refused to consider certain expert testimony on the alien's behalf potentially relevant to the authentication issue. *Id.* at 434. The Board affirmed. *Id.* at 433. While the alien's petition for review was pending, the Third Circuit held in a separate case that the regulation relied upon by the agency was "not the exclusive means of authenticating records" and "not an absolute rule of exclusion." *Id.* at 434 (quoting *Liu* v. *Ashcroft*, 372 F.3d 529, 533 (2004)). The Third Circuit applied that holding in *Leia*, and consequently remanded the case for consideration of the expert testimony and a new ruling as to whether the excluded documents should have been admitted. *Id.* at 435.

Unlike in *Leia*, the IJ in this case did not exclude or refuse to consider proffered evidence. To the contrary, the IJ told petitioner that he was "welcome" to procure the only additional evidence that petitioner suggested would be relevant. A.R. 84-85; see Pet. App. 10a. *Leia* does not suggest that the Third Circuit would require a remand in this circumstance.

The other case highlighted by petitioner is *Kawashima* v. *Holder*, 615 F.3d 1043 (9th Cir. 2010), cert. granted, No. 10-577 (May 23, 2011). In that case, the agency concluded, pre-*Nijhawan*, that two aliens had been convicted of crimes of fraud or deceit resulting in loss of more than $10,000 and ordered their removal. *Id.* at 1051-1052. The Ninth Circuit's original consideration of that case was also pre-*Nijhawan*. In that original decision, the Ninth Circuit concluded, reviewing only materials considered to be part of the "record of conviction," that the government had sufficiently proven the loss amount for one of the aliens (Mr. Kawashima) but not

the other (Mrs. Kawashima). *Kawashima* v. *Gonzales*, 503 F.3d 997, 1002-1004 (2007).

After some additional appellate proceedings, see *Kawashima*, 615 F.3d at 1050-1051, the Ninth Circuit issued a new opinion post-*Nijhawan*. It again concluded that the government had proven sufficient loss with respect to Mr. Kawashima's conviction, and it denied review without a remand. *Id.* at 1054-1055. That disposition is similar to the court of appeals' disposition of this case. As to Mrs. Kawashima, the court adhered to its original conclusion that the administrative record did not prove loss of more than $10,000, and it remanded to the agency "so that the agency may determine, in the first instance, what additional types of evidence it may consider under [the *Nijhawan* standard] and so that the government may have the opportunity to introduce evidence to meet this standard." *Id.* at 1056.

Petitioner errs in suggesting that the disposition of Mrs. Kawashima's case conflicts with the disposition of his own. In Mrs. Kawashima's case, the Ninth Circuit found error in the agency's determination that the administrative record proved sufficient loss. In petitioner's case, by contrast, the court of appeals "detect[ed] no error in the agency's conclusion that, taken together, the indictment, judgment of conviction, and restitution order of $350,001 'for this loss' constituted clear and convincing evidence of losses greater than $10,000." Pet. App. 9a. The Ninth Circuit's decision to remand in *Kawashima* to allow the agency to correct its error does not suggest that it would remand if, as in this case, it found no error at all.

Finally, because the cases are materially different, there is no reason for the Court to hold this case now that it has granted certiorari in *Kawashima*. The ques-

tion presented in *Kawashima* concerns the issue of whether certain tax offenses can ever qualify as aggravated felonies under 8 U.S.C. 1101(a)(43)(M). This case, by contrast, does not involve a tax offense. There is no reason to believe that the Court's disposition of the question of statutory interpretation in *Kawashima* would have any bearing on whether remand was required in this legally, factually, and procedurally dissimilar case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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