

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AKIO KAWASHIMA, ET UX.,                   :

4                   Petitioners                   :

5                   v.                   :   No. 10-577

6   ERIC H. HOLDER, JR., ATTORNEY                   :

7   GENERAL.                   :

8   - - - - - x

9   Washington, D.C.

10    Monday, November 7, 2011

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12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 11:07 a.m.

15 APPEARANCES:

16 THOMAS J. WHALEN, ESQ., Washington, D.C.; for  
17       Petitioners.

18 CURTIS E. GANNON, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.; for  
20       Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 10-577, Kawashima v. Holder.

5 Mr. Whalen.

6 ORAL ARGUMENT OF THOMAS J. WHALEN

7 ON BEHALF OF THE PETITIONERS

8 MR. WHALEN: Mr. Chief Justice, and may it  
9 please the Court:

10 Mr. and Mrs. Kawashima came here to the  
11 United States as legal immigrants in 1985. And later  
12 on, they pled guilty to filing a false statement under a  
13 corporate tax return. The issue we bring to the Court  
14 is whether that conviction under 26 U.S.C. 7206 is an  
15 aggravated felony, specifically under (M)(i) of the  
16 aggravated felony statute.

17 This Court many times has held that it is  
18 the elements of the crime of conviction that determine  
19 whether a crime is an aggravated felony. And the  
20 elements of 7206 do not change when they go over to the  
21 immigration statute. And the terms of that statute is  
22 basically as the Department of Justice has written in  
23 its Tax Manual. It is basically a tax perjury statute.  
24 If you don't tell the truth, and you know what you're  
25 saying is false, and you do it under oath, that's

1 perjury.

2           There are other statutes, perjury statute,  
3 which in essence says the same thing. And 18 U.S.C.  
4 1001 is also a perjury statute. And none of them  
5 require the Justice Department or a court to determine  
6 whether fraud and deceit was an element of that crime.

7           JUSTICE SCALIA: How would you prove fraud  
8 and deceit beyond proving that the person lied,  
9 intentionally lied? What -- what is added to  
10 intentionally lying to convert that into fraud or  
11 deceit?

12           MR. WHALEN: It's the intention to deceive  
13 or the intention to defraud. And simply --

14           JUSTICE SCALIA: Isn't intentionally  
15 lying -- doesn't that mean that you intend to deceive?

16           MR. WHALEN: It does not, Your Honor.

17           JUSTICE SCALIA: It doesn't?

18           MR. WHALEN: It does not mean, because you  
19 are saying a false -- making a false statement, that  
20 that is evidence of an intent to deceive.

21           JUSTICE GINSBURG: Mr. Whalen, the common  
22 definition of deceit is acting -- intentionally giving a  
23 false impression, intentionally giving a false  
24 impression with the intent that someone will act on it.  
25 So, it seems that's exactly what filing a false return

1 is. You give a false impression of what your income is  
2 with the intent that the IRS will accept it.

3 MR. WHALEN: Justice Ginsburg, the  
4 difference I'm trying to ask the Court to consider, it  
5 is the intent which is an element of fraud and deceit.  
6 Under section 7201, the tax evasion statute, that  
7 includes both a requirement or a finding of fraud and  
8 deceit. Section 7206 does not.

9 JUSTICE GINSBURG: But why isn't it obvious?  
10 What proof would you need? You submit a document  
11 because you want to convey a false impression for  
12 someone to act on. Why do you have to have anything  
13 more than that to establish deceit?

14 MR. WHALEN: Because the requirements, Your  
15 Honor, of 7206 is a finding of -- of simply making a  
16 false statement. That's all that's required. The IRS,  
17 when they go after a taxpayer because they have not  
18 provided -- they have not disclosed all of their income,  
19 the IRS comes in, or rather the Department of Justice,  
20 and all they have to prove is that it's false. They  
21 don't have to prove --

22 JUSTICE KENNEDY: And that it's willful.  
23 And that it's willful.

24 MR. WHALEN: Pardon me, Your Honor.

25 JUSTICE KENNEDY: That it's willful.

1     Whoever willfully makes a false statement.

2                   MR. WHALEN:   Yes, Your Honor, but as this  
3     Court held --

4                   JUSTICE KENNEDY:   So, it's not correct.

5                   MR. WHALEN:   No, Your Honor.

6                   JUSTICE KENNEDY:   Well, correct me if I'm  
7     wrong.  It would seem to me, just from reading the  
8     statute unless we have some gloss on, that if you think  
9     it's true but it's false, from the way you were  
10    indicating, would be a violation.  That's not the way I  
11    read it.  Now, have we said something other than that in  
12    later cases?

13                  MR. WHALEN:   If I may, Your Honor.  This  
14    Court has written in the Spies case, and specifically in  
15    the Bishop case, that in order to be convicted of any  
16    tax offense under the Internal Revenue Code, the IRS or  
17    the Department of Justice must show it was done  
18    willfully.  Willfully is not intrinsic to any -- it's  
19    really intrinsic to all of the tax offenses.  
20    "Willfully" does not mean deceit or fraud.  It simply  
21    means that the IRS cannot bring a criminal information  
22    or indictment against somebody who does something  
23    unintentionally.  They must do it willfully.  
24    "Willfully," as this Court defined in Bishop, is simply  
25    evidence that -- to commit any of these IRS crimes you

1 must -- it must be shown to have been done willfully.

2 JUSTICE SCALIA: You must know that it's  
3 false when you say it. Isn't that what "willfully"  
4 means? You must know that the statement you're making  
5 is false.

6 MR. WHALEN: "Willfully" means  
7 intentionally. The false, I submit --

8 JUSTICE SCALIA: I don't want another  
9 adverb.

10 MR. WHALEN: No. All right.

11 JUSTICE SCALIA: I want you to describe what  
12 it means in the context of a statement. Doesn't it mean  
13 that you have to know that the statement you are making  
14 is false? Isn't that enough for willfulness?

15 MR. WHALEN: That's what -- that -- yes.

16 JUSTICE SCALIA: Okay. Now, you tell me  
17 what deceit involves beyond that.

18 MR. WHALEN: Deceit involves an intention to  
19 induce somebody to act. And what I'm arguing to this  
20 Court is that simply making a false statement under a  
21 tax perjury statute such as we have in this case does  
22 not meaning and does not evidence an intention to  
23 deceive or a finding.

24 JUSTICE SOTOMAYOR: I'm sorry. I'm a little  
25 bit lost here.

1           Your definition of "deceit" is a false  
2   statement with an intent for the other party to rely.  
3   And you don't see that when you file your tax returns  
4   that the government is relying on your statement to  
5   calculate your tax and to ensure that you've paid it?  
6   You don't see any reliance by the government on the  
7   truthful statements there and its collection of taxes?

8           MR. WHALEN: I -- I do see reliance as  
9   generally is what happens. What I'm saying is that 7206  
10   is a perjury statute and the government does not have to  
11   prove, and did not have to prove in this case, anything  
12   more than the -- the income was unreported or the tax --  
13   the tax return was -- was false. If --

14           JUSTICE SOTOMAYOR: So, it also had to prove  
15   that the government relied? Is that what you're saying  
16   the --

17           MR. WHALEN: I'm saying that the  
18   government was -- if the government wanted to prove  
19   fraud or deceit, they -- that would be an element of the  
20   crime of tax evasion --

21           JUSTICE SOTOMAYOR: I'm not even sure why,  
22   because under tax evasion you can be charged with tax  
23   evasion merely for avoiding the payment of tax. You  
24   don't have to make a statement at all. You can take the  
25   money from the bank, withdraw it openly, and stick it in



1 your mattress, refuse to pay, and if somehow they find  
2 your mattress, you can be charged with tax evasion.

3 MR. WHALEN: And the --

4 JUSTICE SOTOMAYOR: Where's the false and  
5 deceit in that?

6 MR. WHALEN: The government would have to  
7 prove fraud or deceit, because an intent to evade is --  
8 the Court -- the -- the government has to prove --

9 JUSTICE SOTOMAYOR: If there's a -- if there  
10 are cases that say otherwise, what does that do to your  
11 argument? Of which there are many that say that the  
12 avoidance of taxes, tax payment, doesn't require an act  
13 of fraud or deceit?

14 MR. WHALEN: I would be surprised by  
15 those --

16 JUSTICE BREYER: Well, suppose somebody  
17 goes -- he goes to a country where we have no  
18 extradition treaty, takes all his assets and writes a  
19 postcard to the IRS every -- once a month saying  
20 ha-ha-ha.

21 (Laughter.)

22 JUSTICE BREYER: I mean, why wouldn't that  
23 be an attempt to evade? That's why he went; he didn't  
24 like to pay his taxes.

25 MR. WHALEN: Then the government would bring

1 an action under the --

2 JUSTICE BREYER: Well, 7201. Why can't  
3 you -- well, why doesn't that violate 7201? I mean, my  
4 simple question really is you are a drafter, imagine you  
5 are a drafter, and you are charged with drafting section  
6 (43). And you read -- you try to get the fraud and  
7 deceit crimes, okay? So now we read 76 -- 7206(1) and  
8 (2). And you see for both of those, you can't be  
9 convicted unless you materially and willfully make a  
10 false statement.

11 So, you think, hey, I don't need a special  
12 section on that one. But then you go to 7201, and you  
13 say, oh, my God, I just thought, somebody might violate  
14 this by going off to some special country, taking all  
15 his assets and writing ha-ha-ha. Now, there's no fraud  
16 and deceit in that. He's totally open about it. But he  
17 sure has evaded it. So, therefore, I better write a  
18 special section.

19 Now, that's the simple-minded argument, but  
20 what's wrong with it?

21 MR. WHALEN: What's wrong with it, Your  
22 Honor, is that what we're talking about is the  
23 aggravated felony statute. And the issue -- and it may  
24 be a narrow one for this Court -- is whether the  
25 conviction under 7206, which does not require anything

1 more than filing of a false statement without any intent  
2 to deceive or defraud -- whether that is an aggravated  
3 felony. And this Court has said time and again that it  
4 is the elements of the offense that determines  
5 aggravated felony.

6           If I may illustrate the point, if -- if a  
7 conviction under 7206 was viewed by this Court as  
8 including fraud and deceit for the reasons many of the  
9 Justices have indicated, that, you know, that when  
10 somebody writes a false tax return, it's got to be  
11 deceit, what that does is that would collaterally estop  
12 a taxpayer from denying fraud and deceit in the civil  
13 collection action.

14           So, this is what Commissioner Walters was  
15 concerned about, why he has filed his brief, that it in  
16 effect would undermine the ability of the government to  
17 get an easy conviction based simply on a false  
18 statement.

19           Similarly, if you are convicted of tax  
20 evasion, the -- the tax evader cannot challenge fraud.  
21 He is collaterally estopped. And as we know, when the  
22 government goes to seek recovery -- that is, getting the  
23 taxes back in a civil proceeding -- there's no statute  
24 of limitations.

25           The intention of Congress is also reflected

1 in the Internal Revenue Code section 6501, where if a  
2 person is convicted under 7206 and the government seeks  
3 to collect the unpaid taxes in an assessment proceeding,  
4 Congress particularly said that where there's a  
5 conviction under 7206, the government has the burden of  
6 proving fraud, which seems to me to be evidence -- or  
7 rather, the government has the -- a duty to prove there  
8 was an attempt to evade the tax. But the conclusion is  
9 the same.

10 If Congress had intended that proof of fraud  
11 and deceit would be in 7206, there would be no reason at  
12 all for Congress to put that in 70 -- 6501.

13 Therefore --

14 CHIEF JUSTICE ROBERTS: I'm sorry. That's  
15 26 U.S.C. 6501?

16 MR. WHALEN: Yes. To be more precise,  
17 6501(c)(1).

18 CHIEF JUSTICE ROBERTS: Okay.

19 MR. WHALEN: That is the exceptions to the  
20 running of the statute of limitations.

21 JUSTICE GINSBURG: Do we have that in the  
22 briefs?

23 MR. WHALEN: I have it in my reply brief. I  
24 don't have the particular statute, but I refer to it in  
25 the reply brief.

1 JUSTICE SCALIA: Do you have the text of it?

2 MR. WHALEN: I --

3 JUSTICE SCALIA: I don't like counsel  
4 getting up here and talking about statutes that they've  
5 never put before us. If you're going to rely on it, we  
6 -- we would like to have the text somewhere.

7 MR. WHALEN: Yes. I apologize for that,  
8 Your Honor.

9 I would like to move to the second part of  
10 my argument, if Your Honor please, that the -- this  
11 Court has been very clear on deciding statutes invoking  
12 canons of construction. And one of the important canons  
13 is that different words have different meanings.

14 So, in (M)(i), we have loss to victim or  
15 victims in excess of \$10,000, and in (M)(ii), we have a  
16 revenue loss to the government in excess of 10,000. And  
17 as this Court said in Nijhawan, referring to (M)(ii),  
18 this is the Internal Revenue provision, a correct  
19 assessment I suggest, and that (M)(i) deals with  
20 injuries or damage to third parties, not to the  
21 government.

22 If you take the government's position that  
23 fraud and deceit crimes are in -- fraud and deceit  
24 revenue crimes are in (M)(i), then (M)(ii) would be  
25 worthless or pointless.

1 JUSTICE SCALIA: Well, why? Because it  
2 wouldn't be pointless if in fact an attempt to evade or  
3 defeat tax does not require a lie, does not require a  
4 willful lie. It would be adding to the -- to the fraud  
5 and deceit offenses, 7201, which does not require a lie.  
6 It just requires, you know, going to Cuba and writing  
7 postcards saying, I know I owe money; I'm just not -- I  
8 just ain't gonna pay it. There's no fraud and deceit  
9 there. It's just what 7201 requires, an attempt to  
10 evade or defeat tax.

11 MR. WHALEN: Well, anyone who leaves the  
12 country with an intent to avoid tax is committing tax  
13 evasion.

14 JUSTICE SCALIA: That's right. That's my  
15 very point.

16 MR. WHALEN: And that is --

17 JUSTICE SCALIA: Without lying -- without  
18 lying -- without making a single lie.

19 MR. WHALEN: What I'm saying is that fraud,  
20 such as you suggest, Your Honor, is going to be an  
21 aggravated felony. It's the only one that Congress  
22 says -- only revenue offense, only offense under the  
23 Internal Revenue Code which Congress designated as an  
24 aggravated felony.

25 What I'm saying is that if tax evasion were

1 also included in (M)(i), then Congress would have  
2 created a useless, pointless provision.

3 JUSTICE SCALIA: Yes. And my point is that  
4 it would not have been included within (M)(i). There is  
5 no way that it could be included with (M)(i), because it  
6 does not involve fraud or deceit. It does not involve a  
7 lie, as 7206 does.

8 MR. WHALEN: 7201 involves, I'm suggesting  
9 that --

10 JUSTICE SCALIA: An attempt to evade or  
11 defeat -- "who willfully attempts in any manner to evade  
12 or defeat any tax." And one can do that without lying.  
13 One can do that by simply not report income, for  
14 example. Or in -- in Justice Breyer's more colorful  
15 example, by going to Cuba. Was it Cuba or somewhere  
16 else?

17 (Laughter.)

18 MR. WHALEN: Well, the point I am trying to  
19 make, Your Honor, is that if your example is an example  
20 of fraud and deceit, which I agree it is, then a crime  
21 of fraud and deceit would not be in (M)(i) because it  
22 would be -- it would already be captured in (M)(i) if  
23 the government's position was upheld.

24 JUSTICE GINSBURG: But the point that was  
25 being made is not that it's fraud and deceit. Quite the

1 opposite. I think Justice Breyer, Justice Sotomayor,  
2 Justice Scalia have tried to get you to focus on the  
3 evasion that involves no false statement at all, evading  
4 payment where you say nothing. What would be the crime  
5 if you simply don't pay your taxes, and you don't file a  
6 return, so you are not filing anything that's false?  
7 Where would that come in the Internal Revenue --

8 MR. WHALEN: That would be a violation of  
9 one of the other Internal Revenue crimes.

10 JUSTICE GINSBURG: Would it be evasion  
11 simply not to report your income?

12 MR. WHALEN: If the government chose to  
13 prove that it was an attempt to evade the tax, it would.  
14 The Internal Revenue's statute and crimes all carry the  
15 duty to -- it's a legal duty we all have of fairly  
16 reporting our income, our deductions, what have you.  
17 It's the same legal duty whether it's in 7201 or 7206.

18 The difference is, in tax evasion, there  
19 must be a proof of fraud or deceit. That's inherent.  
20 From the beginning of this country -- rather, beginning  
21 of the tax statutes, Congress has always separated  
22 revenue statutes from other crimes. In this case,  
23 (M)(i) deals with crimes involving third parties;  
24 (M)(ii) deals with revenue loss crimes to the  
25 government. Only (i) is an aggravated felony.



1 I would like to reserve the remainder of my  
2 time for rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4 Mr. Gannon.

5 ORAL ARGUMENT OF CURTIS E. GANNON  
6 ON BEHALF OF THE RESPONDENT

7 MR. GANNON: Mr. Chief Justice, and may it  
8 please the Court:

9 Congress's specific reference to tax evasion  
10 in subparagraph (M)(ii) of the INA's definition of  
11 aggravated felony did not remove all other tax offenses  
12 from the scope of subparagraph (M)(i).

13 JUSTICE KAGAN: Mr. Gannon, do you think  
14 that you can commit tax evasion without committing  
15 either fraud or deceit, and are there cases that show  
16 that?

17 MR. GANNON: The cases that we cited in our  
18 brief on page 34 that discuss this are ones that are  
19 evasion of payment cases as opposed to evasion of  
20 assessment cases. And those -- those are instances in  
21 which somebody could accurately file a tax return and  
22 say I owe you this amount of money and then take steps  
23 to prevent the IRS from collecting on it, usually by  
24 removing their assets from the IRS's reach.

25 As a factual matter, it so happens that most

1 of those cases will often involve some concealment along  
2 the way. If somebody's taking more than \$10,000 in gold  
3 coins out of the country to take them to a Swiss bank,  
4 they often don't mention that when they're leaving the  
5 country.

6 JUSTICE SCALIA: What about just not filing  
7 a return?

8 MR. GANNON: Just not filing a return is  
9 probably not going to be enough to establish tax  
10 evasion. That would be an offense under 7203, which  
11 doesn't necessarily involve fraud or deceit. The thing  
12 that distinguishes 7201 is the need for the government  
13 to establish that there is an attempt to evade either  
14 the assessment or payment of taxation.

15 JUSTICE KAGAN: I mean, I suppose what  
16 confuses me is that when somebody is convicted of 7201,  
17 they can't -- they're estopped from contesting a civil  
18 fraud suit; isn't that right? And it also counts as a  
19 crime of moral turpitude, which involves fraud. And all  
20 of those things suggest, and I think kind of the cases  
21 as a whole suggest, that tax evasion involves fraud.

22 MR. GANNON: Well, certainly in the context  
23 of the civil tax fraud penalty, the Tax Court has  
24 concluded that intent to evade is synonymous with an  
25 understatement due to fraud. And the reason why it has

1 refused to reach that conclusion in the context of 7206  
2 offenses, like the ones at issue in this case, is  
3 because the 7206 offense does not require the government  
4 to have proved that there was any understatement to  
5 begin with. And so, there could not have been an  
6 understatement due to fraud.

7 I'd also note that it's not at all clear  
8 that in the context of the evasion of payment cases that  
9 I was just discussing in the context of tax evasion,  
10 that the same civil tax fraud penalty would be  
11 applicable there, because the civil tax fraud penalty is  
12 triggered by an understatement of an amount required to  
13 be shown on the return. And, therefore, if it isn't --  
14 if it isn't actually something that's done in the  
15 context of filing a tax return that understates how much  
16 you owe the government, then -- then that may well not  
17 trigger the collateral estoppel effect in the follow-on  
18 civil case.

19 CHIEF JUSTICE ROBERTS: Counsel, what did  
20 you --

21 JUSTICE SOTOMAYOR: Excuse me. Are there  
22 any tax provisions that you think are not covered by the  
23 fraud and deceit section and the tax evasion section?

24 MR. GANNON: You mean --

25 JUSTICE SOTOMAYOR: Any tax crime.

1 MR. GANNON: Any tax crime --

2 JUSTICE SOTOMAYOR: Felonies, I should say.

3 MR. GANNON: There are several tax offenses  
4 that don't necessarily involve fraud or deceit. So,  
5 parts of 7202, which is the willful failure to collect  
6 tax, would not necessarily involve fraud and deceit, but  
7 it also covers failing to truthfully account for  
8 collected tax. So, some of those offenses would involve  
9 fraud or deceit, and it may be divisible. 7203, which I  
10 just mentioned --

11 JUSTICE SOTOMAYOR: Does that fall under tax  
12 evasion, or that's a separate statute?

13 MR. GANNON: That's not tax evasion. The  
14 only thing that counts as tax evasion is 7201.

15 JUSTICE SOTOMAYOR: I cut you off. Which  
16 are the other ones?

17 MR. GANNON: I was saying that I already  
18 mentioned to Justice Scalia that section 7203 -- all of  
19 these offenses I'm talking about are in 26 U.S.C.; 7203,  
20 the willful failure to file a return or to pay tax or  
21 maintain records or supply information doesn't  
22 necessarily involve fraud or deceit. Parts of 7204,  
23 which is failing to furnish a statement to the employee  
24 reflecting the amount of taxes, but not -- but then,  
25 again, I think it could be divisible because it would

1   also apply to furnishing a false statement to your  
2   employee. Even the misdemeanor offense under 7207 for  
3   presenting false documents might be covered for fraud or  
4   deceit, but in practice it's only used when there's --  
5   it's only used when the tax deficiencies are de minimis.  
6   And so, it would never trigger the \$10,000 loss  
7   requirement that (M)(i) would also require us to  
8   establish in order to make it an aggravated felony.

9                   CHIEF JUSTICE ROBERTS: Counsel, what --  
10   what is your answer to your friend's 6501(c)(i)  
11   argument?

12                  MR. GANNON: Well, my answer is that I don't  
13   think it proves really any more than the collateral  
14   estoppel cases in the civil fraud context. The  
15   provision that we're talking about is not reprinted in  
16   any of the briefs, but 6501(c)(1) is an exception that  
17   -- that lifts the limitation on when the IRS can levy an  
18   assessment or seek collection; and it refers to the case  
19   of a false or fraudulent return with the intent to evade  
20   tax. And I think that in context, the reference to a  
21   false or fraudulent return with intent to evade tax is  
22   not something that clearly connotes that Congress is  
23   just speaking to 7206 offenses. It uses not only the  
24   word "fraudulent," but also "the intent to evade tax,"  
25   which I think --

1 CHIEF JUSTICE ROBERTS: Well, no, but I  
2 think your friend's argument, which has some appeal, is  
3 7206 is fraud and false statements. And he said if  
4 you're right that that includes deceit, they wouldn't  
5 have had to add "with the intent to evade tax," which is  
6 what they do in 6501(c)(1).

7 MR. GANNON: Well, I -- I think if you look  
8 to (c)(2), it also refers to a willful attempt in any  
9 manner to defeat or evade tax. So, the next provision  
10 also applies more broadly to 7201 and more closely  
11 tracks the definition in 7201. So, I think just like  
12 the statute of limitations provision that we note,  
13 Congress is probably using a belt and suspenders  
14 approach there, that -- we noted that Congress may well  
15 have had reason to be concerned that 7201 offenses would  
16 not necessarily be seen as having fraud or deceit as an  
17 element of the offense in light of this Court's decision  
18 in Scharton, which was an old case, but it had said that  
19 in the -- in the statute of limitations context, that  
20 the -- the extended statute of limitations that apply to  
21 offenses in which fraud was an element was not triggered  
22 by the statutory predecessor to tax evasion. And so, to  
23 the --

24 JUSTICE KAGAN: But Scharton was a very old  
25 case which had been distinguished away by many courts.

1 It really has no power in the -- in the -- I mean, tell  
2 me if I'm wrong, but --

3 MR. GANNON: Well, to this day section 6531,  
4 which is the statute of limitations provision which we  
5 do reprint in our appendix, includes provisions that  
6 refer not only generally to offenses involving fraud but  
7 also specifically to a tax evasion offense. And so, I  
8 think that the fact that Congress had already felt like  
9 it needed to be expressed, to pull in not just fraud  
10 offenses but also tax evasion offenses in 6531, makes it  
11 unsurprising that they would have pursued a similar  
12 approach here. In addition, I would --

13 JUSTICE KAGAN: I mean, the paradoxical  
14 thing about your argument is that, one, it makes us  
15 think that Congress was just being hypervigilant about  
16 this problem of making sure that tax evasion offenses  
17 were covered, even though tax evasion offenses almost  
18 always do involve fraud or deceit, but Congress was  
19 thinking about these hypothetical possibilities that  
20 maybe there was going to be some conviction out there  
21 that would not involve fraud or deceit, and so Congress  
22 is being super-careful about this; and yet, at the same  
23 time, that Congress is being utterly careless, utterly  
24 clueless about the basic rule of statutory construction  
25 which is that one does not write superfluous language.

1                   MR. GANNON: But, Justice Kagan, we don't  
2 think it's superfluous, in part because of the evasion  
3 of payment cases we're talking about, but I think also  
4 if you look at the context of the rest of paragraph  
5 (43), the aggravated felony definition, you'll see that  
6 there are several other provisions that have significant  
7 overlap in them. And so subparagraph (A) refers to  
8 murder and rape; those would also generally be covered  
9 in crimes of violence in subparagraph (F). The same  
10 thing is true in paragraph (E)(i); it pulls in various  
11 explosives offenses including arson, destruction of  
12 property or building by fire or explosives; that's the  
13 reference to an 8441 --

14                   JUSTICE KAGAN: So, our rule of statutory  
15 construction when it comes to this aggravated felony  
16 statute is that superfluity doesn't matter?

17                   MR. GANNON: No, Justice Kagan, I think that  
18 in context, there is a lot of overlap among the  
19 different provisions in -- in paragraph (43) already,  
20 and I -- I was also going to mention subparagraph (K)(i)  
21 and (ii), which like (M)(i) and (M)(ii), are ones that  
22 have little (i), which has a generic reference there to  
23 offenses associated with managing a prostitution  
24 business, and little (ii) then expressly refers to  
25 certain enumerated Federal statutes, all of which



1 involve transporting individuals for purposes of  
2 prostitution in the case of seeking commercial  
3 advantage.

4 And I think that virtually all of those  
5 offenses would have been included within (K)(i), but  
6 Congress wanted to be sure and, therefore, added  
7 (K)(ii). And as -- as Justice Breyer, I think, pointed  
8 out before, textually it -- it had reason to think that  
9 7206 would be picked up by fraud or deceit here in --

10 JUSTICE GINSBURG: But 7206 is the lesser  
11 offense. I mean, you don't take -- you don't dispute  
12 that the heavier crime is the 7201 crime; that is,  
13 evasion. It gets a more severe penalty. And when  
14 Congress picks out one tax crime and one tax crime only,  
15 why wouldn't we assume that that's what Congress meant  
16 with respect to aggravated felonies? That there's one  
17 tax crime, the most serious tax crime, that fits that  
18 label. And the (M)(i) provision deals with the many,  
19 many statutes that involve loss -- fraud or deceit and  
20 loss to the victim?

21 MR. GANNON: The reason why we don't think  
22 that's appropriate is in part because, as I've  
23 explained, there would -- there is some aspect of which  
24 (M)(ii) is not superfluous. But, more importantly, we  
25 don't think that the specific controls -- the general

1 canon is triggered here, and we don't think that (M)(ii)  
2 talks about a category of tax crimes or tax offenses  
3 more generally, because it only refers to one offense.

4 And so, the cases that Petitioners invoke  
5 here, in order to establish that there is a category  
6 that's being pulled out of (M)(i), are HCSC-Laundry and  
7 Leocal. Those are both cases in which the statute  
8 actually identified the category of offenses in  
9 question, whether it was the cooperative hospital  
10 service organizations in HCSC-Laundry or DUI offenses in  
11 Leocal.

12 And so, here we don't have Congress actually  
13 saying tax offenses are covered by (M)(ii). What it  
14 says is tax evasion is covered by (M)(ii). And --

15 JUSTICE BREYER: But what about -- what  
16 about -- suppose that didn't even exist here, 7201.  
17 Suppose we only had 7206, and the question before us  
18 was, does 7206 fit within the term "aggravated felony";  
19 i.e., does it involve fraud or deceit?

20 So, we read 7206; it doesn't say anything  
21 about fraud or deceit. It says perjury and making a  
22 false statement. So, then we go look up what were the  
23 torts of fraud and deceit. And he's right. Fraud  
24 traditionally requires an intent to get another person  
25 to act, but you don't have to have that intent to

1 violate 7206. And deceit -- it not only involves that;  
2 it also involves the person having acted.

3 So, the traditional tort of deceit, you have  
4 to intend the acts, and he actually has to have acted to  
5 his detriment. Fraud, you have the first of those and  
6 second. You read the statute and say, well, say neither  
7 of those is present here. This is just perjury, which  
8 isn't good, but it's not fraud or deceit. And there we  
9 are, not in the statute. What's the answer to that?

10 MR. GANNON: Well, I don't think that the  
11 common law definitions of fraud and deceit are the ones  
12 that this Court has always applied in the context --

13 JUSTICE BREYER: No, no, not always. But  
14 here we were dealing with a very serious statute,  
15 aggravated felonies. That has terrible consequences for  
16 the persons who fall within it.

17 MR. GANNON: And --

18 JUSTICE BREYER: So -- and in most of these  
19 M's and A's and B's and C's, and so forth, they refer to  
20 statutes by number so most of it, though not all of it,  
21 is very specific. So, when we read these words "fraud"  
22 and "deceit" here, why don't we say fraud and deceit  
23 means fraud and deceit?

24 MR. GANNON: Well, in the --

25 JUSTICE BREYER: The traditional elements.

1           MR. GANNON: In the criminal context, the  
2 Court has recognized that fraud offenses don't require  
3 the government to prove reliance or damages. And that  
4 makes sense. If you think about the tort action, the  
5 classic tort action, you would need to be an injured  
6 plaintiff; and, therefore, you would need to be able to  
7 say I relied on this to my detriment --

8           JUSTICE BREYER: No, no, no.

9           MR. GANNON: -- and I want to recover.

10          JUSTICE BREYER: You have to prove that the  
11 -- the liar intended reliance to -- to his detriment.

12          MR. GANNON: And --

13          JUSTICE BREYER: Which he may or may not  
14 have done. I mean, when you commit -- a person who  
15 commits perjury may or may not have intended that a  
16 victim rely to his detriment. Which you don't have to  
17 prove here.

18          MR. GANNON: We do not have to prove as a  
19 separate element that there's reliance or intended  
20 reliance here, but we do need to prove what we think  
21 satisfies the plain meaning of the term "deceit." We're  
22 not focusing on fraud here but deceit, and that's the  
23 act of intentionally giving a false impression, because  
24 the elements of this offense are making and signing a  
25 return under the penalties of perjury that it is false

1 as to a material matter, that the defendant does not --

2 JUSTICE BREYER: Deceit can mean that.

3 You're absolutely right.

4 MR. GANNON: -- does not believe to be true  
5 or correct, and it's all done willfully.

6 JUSTICE BREYER: No, the tort didn't involve  
7 that. The tort involved the same element of fraud which  
8 you don't want to rely on.

9 MR. GANNON: That -- that's right, and we  
10 think here Congress has used the -- the term --

11 JUSTICE BREYER: Is there any -- is there  
12 any evidence of what -- I mean is there any argument  
13 other than that you just think that and you could argue  
14 the other way? I mean, can we get anywhere?

15 MR. GANNON: Well, I think that Congress did  
16 use the terms disjunctively here. And I think that now  
17 the plain meaning of "deceit" is -- it sort of operates  
18 in the opposite direction of the one that you're talking  
19 about, Justice Breyer. And if you look at the way the  
20 Court in Yermian discussed the difference between an  
21 intent to defraud and intent to deceive, it talks about  
22 an intent to defraud includes actually obtaining  
23 something, whereas an intent to deceive just involves  
24 creating a false impression. And so, I think that  
25 actually the difference can run the other direction in a

1 way that supports the definition that we're relying upon  
2 here.

3 But going back to the point that I was  
4 trying to make about this not ruling out all tax  
5 offenses, Justice Ginsburg, I think that the reference  
6 to 7201 alone doesn't do that, nor do we think the fact  
7 that Congress then added a limited -- limiting language  
8 that said that when the revenue loss exceeds \$10,000, it  
9 would satisfy (M)(ii).

10 JUSTICE KAGAN: Could I make sure,  
11 Mr. Gannon, that I understand your argument about  
12 superfluity? Because when I asked whether (M) -- the  
13 second provision was superfluous, you pointed me to  
14 these evasion-of-payment cases. And you cite two of  
15 them. But then you say even those cases will almost  
16 invariably involve some affirmative acts of fraud. So,  
17 are there, in fact, any cases, evasion of payment or  
18 otherwise, which do not involve some affirmative acts of  
19 fraud?

20 MR. GANNON: Well, I think that's as a  
21 factual matter, Justice Kagan. We were --

22 JUSTICE KAGAN: As a factual matter, are  
23 there any?

24 MR. GANNON: We were observing that as a  
25 factual matter, those evasion-of-payment cases probably

1 would not happen without there being acts of  
2 concealment, but that doesn't --

3 JUSTICE KAGAN: And that's what I'm asking.  
4 As a factual matter, can you point me to any cases that  
5 do not involve affirmative acts of fraud?

6 MR. GANNON: I don't believe that I can, but  
7 I think that to the extent that the Court is looking to  
8 the elements of the offense in 7201, if they're talking  
9 about evasion of payment, that will not necessarily  
10 require deceptive acts of concealment. And so, that's  
11 the reason --

12 JUSTICE KAGAN: I know, but we have a very  
13 active IRS, which prosecutes lots of tax cases, and  
14 you're saying that it just never prosecutes tax cases  
15 under this section that don't involve affirmative acts  
16 of fraud.

17 MR. GANNON: Well --

18 JUSTICE KAGAN: And that makes me wonder why  
19 Congress was so worried about this problem that it  
20 ignored normal rules of statutory interpretation.

21 MR. GANNON: Well -- and I believe that the  
22 reason that they were worried could be because of the  
23 Scharton decision, in which this Court had already said  
24 that evasion does not necessarily require fraud, because  
25 the textual cues in 7201 are much further from fraud and

1   deceit than those in 7206; that there's also -- there  
2   would be less certainty. Even assuming that Congress  
3   was well aware of the established practice at the  
4   Federal level of having 7201 tax evasion cases be  
5   compared with fraud, this is also a provision that  
6   applies to State and foreign offenses. The penultimate  
7   sentence of paragraph (43) says that the term applies to  
8   an offense whether it's in violation of Federal or State  
9   law.

10                   JUSTICE GINSBURG: But that was one of the  
11   problems that was brought up in the amicus brief which  
12   actually you considered, that reading the (M)(i) to  
13   include 7206 offenses would also -- would bring in  
14   offenses that are merely misdemeanors at the State and  
15   local level. It would really swell the category of tax  
16   crimes that lead to deportation. That -- did Congress  
17   really mean to turn misdemeanors into aggravated felons?

18                   And then there was a very practical point  
19   made, that the government is going to be hurt more than  
20   helped by what you are seeking, because we are told that  
21   very often the government will try to make a bargain.  
22   It has a 7201 case, but it's going to be a little hard  
23   to prove. So, they offer as a plea bargain 7206. And  
24   if you -- if your position prevails, we are told, there  
25   will be many, many people who will say: If it's a



1 question of whether I get thrown out of the United  
2 States, I'm going to go to trial; I'm not going to plead  
3 to something that will mean immediately when I serve my  
4 time I will be thrown out of the United States.

5 MR. GANNON: Well, that may well be the  
6 consequence of the definition that Congress has adopted  
7 here of aggravated felony. And I would note that in the  
8 plea agreement that Mr. Kawashima filed in this case,  
9 paragraph 4, which is reprinted on page 117a of the  
10 petition appendix says Mr. Kawashima recognizes that he  
11 may be deported as a result of his conviction. That's  
12 in his plea agreement to the 7206 offense here.

13 And so, it is, to be sure, the case that the  
14 government may well find it more difficult to secure  
15 guilty pleas when an alien is -- is admitting to an  
16 offense that is an aggravated felony. But we think that  
17 that's a consequence of Congress having expanded the  
18 definition. In --

19 JUSTICE BREYER: Let me go up to start with  
20 Justice Ginsburg's first question. I mean, if this  
21 falls within it, 7206, this fraud, what about perjury?  
22 Is every perjury statute within it? And what about  
23 lying to an FBI agent? And what about lying to a  
24 government official, which is -- which is -- you know,  
25 there are all kinds of statutes on that one.

1 MR. GANNON: Well --

2 JUSTICE BREYER: Are all those aggravated  
3 felonies?

4 MR. GANNON: Congress has given us two  
5 different metrics for determining whether those --  
6 whether those offenses are aggravated felonies. If they  
7 involve fraud or deceit and there is loss to the victim  
8 exceeding \$10,000 --

9 JUSTICE BREYER: Yes, yes.

10 MR. GANNON: -- then that it could fall  
11 within (M)(i). If it's perjury statute that doesn't  
12 involve loss or a false statement to an FBI agent that  
13 doesn't involve loss to --

14 JUSTICE BREYER: The government's view is  
15 that, of course, you have to meet the other  
16 requirements. But as far as the words "fraud" or  
17 "deceit" is concerned, aggravated felony picks up every  
18 perjury statute, every lying statute, lying to an FBI  
19 agent, lying to this or lying to that. And has that  
20 been the consistent policy of the immigration service?  
21 Have they deported people where the other two conditions  
22 are fulfilled?

23 MR. GANNON: In the beginning, when the  
24 amount of loss was \$200,000. I think most perjury  
25 offenses don't involve a loss of more than \$10,000 --

1 JUSTICE BREYER: But all I need are a few.  
2 I mean, I just wonder, is it the policy of the INS and  
3 the government to deport people where these other things  
4 are met -- which they would be perhaps rarely; I don't  
5 know -- but to deport them where the crime, the  
6 underlying crime, is perjury, lying to an FBI agent or  
7 lying to other government officials?

8 MR. GANNON: There -- yes, there are such  
9 cases. Sometimes they go under (S), which is the  
10 paragraph for perjury, which was actually not in  
11 existence when (M)(i) was added to the statute. It was  
12 added 2 years later. But, more generally, I would like  
13 to mention that there are other tax offenses --  
14 Justice Scalia.

15 JUSTICE SCALIA: Well, I -- I'm confused by  
16 the \$10,000 requirement. Does that have to be an  
17 element of the offense?

18 MR. GANNON: It does not need to be an  
19 element of the offense. It's a consequence of the  
20 Court's decision in Nijhawan.

21 JUSTICE SCALIA: Just a consequence of the  
22 -- of the fraud or deceit, right?

23 MR. GANNON: It needs to be tied to the  
24 offense of conviction under this Court's decision in  
25 Nijhawan. And most instances where somebody lies to an

1 FBI agent probably don't involve costing somebody more  
2 than \$10,000. And so, I think that it doesn't often  
3 come up in (M)(i). But many other tax offenses are  
4 prosecuted under other provisions that potentially  
5 involve fraud or deceptions and could -- can cost the  
6 government more than \$10,000.

7 And Petitioner's reading of saying that all  
8 tax offenses have to be pulled into (M)(ii) and then  
9 only tax evasion is covered would require the Court to  
10 bifurcate all of these other provisions. And I'm  
11 thinking of, for instance, 18 U.S.C. 371. This is the  
12 provision for defrauding the United States by  
13 obstructing or impeding the IRS in its efforts to  
14 collect taxation. This Court cited 371 as one of the  
15 fraud offenses that it thought was covered by (M)(i) in  
16 the *Nijhawan* decision.

17 The same is true for mail fraud. The  
18 criminal division, the tax division can prosecute tax  
19 cases in which somebody mails a false tax return under  
20 18 U.S.C. 1341. False claims under 18 U.S.C. 287,  
21 conspiracy to false claims under 286, false statements  
22 to the government -- these are all provisions that are  
23 used to prosecute tax offenses. And Petitioner's  
24 reading of saying that all tax crimes are pulled out  
25 would require the Court to bifurcate these offenses and

1 make whether it's an aggravated felony turn on whether  
2 the government has lost revenue as opposed to some other  
3 form of money. And we don't think that that's what  
4 Congress intended when it went to the trouble of just  
5 stating that tax evasion was expressly covered.

6 And going back, Justice Kagan, to your  
7 concerns about superfluity, I do think it's important  
8 that in the context of this statute, there's lots of  
9 other overlap. Congress had reasons to be unsure in  
10 light of the Scharton decision, in light of the  
11 evasion-of-payment cases because, even though as a  
12 factual matter --

13 JUSTICE KAGAN: But it would have been  
14 perfectly easy for Congress to write a provision which  
15 said just in case that you -- you know, just in case  
16 this decision called Scharton has any effect, we mean  
17 tax evasion, too, without writing it in this way that  
18 appears to exclude all other tax offenses.

19 MR. GANNON: I don't see how -- if Congress  
20 wanted to exclude all other tax offenses, I think they  
21 should have put that exception in (M)(i). They should  
22 have said offenses involving fraud or deceit, but not  
23 tax offenses, in which the loss to the victim or victims  
24 exceeds \$10,000. If Congress wanted to make an  
25 exception tax offenses --

1 JUSTICE KAGAN: Well, that's just arguing  
2 against our application of the normal rule of avoiding  
3 superfluity where we can.

4 MR. GANNON: Well, yes. I agree that the  
5 Court avoids superfluity where it can. Here we have  
6 contextual reasons to think that Congress was just  
7 trying to add more offenses to the definition rather  
8 than rule out an entire class. And I also think that  
9 there is no way to avoid the consequence of bifurcating  
10 all of those other provisions under Petitioner's  
11 reading.

12 And so, if you were to say that the  
13 reference to 7201 pulls out all revenue loss offenses,  
14 that would mean that some mail fraud cases against the  
15 government in which the government loses more than  
16 \$10,000 count and some don't. Same for wire fraud.  
17 Same for false statements. Same for false claims,  
18 conspiracy to false claims, and Klein conspiracies under  
19 section 371, which -- which are -- have a great deal of  
20 overlap with 7201.

21 JUSTICE SCALIA: They still wouldn't -- no.  
22 Why? They still wouldn't be tax offenses.

23 MR. GANNON: Well, I -- they would be --

24 JUSTICE SCALIA: I mean, you use the mail to  
25 avoid -- still, what you're being prosecuted for is use

1 of the mail to defraud.

2 MR. GANNON: But the -- I mean, as I  
3 understand Petitioner's argument, it is the fact that  
4 (M)(ii) refers to revenue loss that is the thing that  
5 makes it pull in or define a category of cases involving  
6 tax offenses. And I think that if a mail fraud offense  
7 against the government involved taking -- getting more  
8 than \$10,000 worth of refunds from the government as  
9 opposed to getting more than \$10,000 in an ill-gotten  
10 government contract or government benefits from the  
11 government, that that could still be characterized as  
12 revenue loss.

13 JUSTICE SCALIA: Well, he put it -- he put  
14 it wrong. He should have said -- just tax statutes are  
15 covered.

16 MR. GANNON: Well, that --

17 JUSTICE SCALIA: Then -- then you wouldn't  
18 have to bifurcate, right?

19 MR. GANNON: Then I just don't see how the  
20 reference to a single provision of 7201 refers to all  
21 other tax provisions --

22 JUSTICE SCALIA: Well, it's not just that.  
23 It's -- it's also that -- that (M)(i) says loss to the  
24 victim or victims. And (M)(ii) says the revenue loss to  
25 the government has to exceed 10,000. I mean, in one

1 case, it's the loss to the victim or victims. Why --  
2 why did it use parallel language? Why -- or why did it  
3 say an offense that involves -- an offense in which the  
4 loss to the victim or victims exceeds \$10,000 and (i)  
5 involves fraud or deceit or (ii) is described in section  
6 7201 of Title 26? I mean, if -- if you read it, it  
7 seems to contrast loss to the victim or victims with  
8 revenue loss to the government.

9 And I find it hard to regard the government  
10 as a victim in any of these cases, to tell you the  
11 truth.

12 MR. GANNON: Well, I -- none of the courts  
13 of appeals has had any difficulty concluding that the  
14 government is a victim when it loses more than \$10,000  
15 in a fraud case or, indeed, in a tax evasion case. And  
16 so, here, there is a different phrase, but I think  
17 what's important is that 7201 doesn't define a class of  
18 revenue loss offenses. Instead, it defines a class of  
19 tax evasion offenses. It only refers to the one  
20 statute. And -- and then in that context, where there  
21 has to be a deficiency in order to -- for there to be a  
22 7201 conviction, there must be a tax deficiency. Then  
23 it's natural to talk about the relevant losses being  
24 revenue loss to the government.

25 The phrase in (M)(i) is broader because it



1   also applies to other types of frauds. And I think that  
2   the reference to 7201 alone doesn't indicate Congress is  
3   intending to read out all tax offenses.

4               As Justice Ginsburg mentioned before,  
5   although 7201 has a 5-year maximum statutory penalty,  
6   which is longer than the 3-year maximum that applies  
7   under 7206 and some of the other tax offenses in that  
8   particular chapter of Title 26, as a practical matter  
9   the -- the sentencing guidelines use the same thing, the  
10  -- the same criteria that are both tied to loss. And  
11  more importantly, a lot of these other offenses, like  
12  371 and 1341 and 1343 in Title 18, actually have longer  
13  maximum punishments.

14              So, if the government wants -- has a  
15  particularly big fraud that they want to -- to get after  
16  somebody who has a tax evasion case in which they've  
17  cost the government a great deal of money, it may choose  
18  to proceed under one of the other provisions where it  
19  can get an even greater punishment. And so, just  
20  referring to 7201 as the capstone I don't think allows  
21  it to be a stand-in for all other tax offenses.

22              JUSTICE GINSBURG: There's a technical  
23  aspect of this case I don't understand. Maybe you can  
24  explain it. There was a question about what might be  
25  the revenue loss in -- in the case of the wife. Why

1     should the revenue loss be different?  She's -- she's  
2     convicted of aiding and abetting.

3                 MR. GANNON:  She -- although it's -- the  
4     statute itself refers to aiding, assisting, procuring,  
5     or advising, it's not a traditional aiding and abetting  
6     statute.  It doesn't require there to be an underlying  
7     primary violation.  It's an independent offense.

8                 And so, as it happens in this case, we all  
9     know and it's not disputed that they're for the same  
10    underlying false tax return, the same tax return that  
11    ended in 1991 for one of the corporations that  
12    Petitioners co-owned, but -- but we just didn't have  
13    that evidence in the record.

14                And so, I think even though it's an aiding  
15    and abetting, it's -- it's not a classic aiding and  
16    abetting violation that depends on the husband's  
17    conviction.  She could have been convicted under 7206,  
18    too, even if the husband didn't know anything about the  
19    false numbers that she was providing him from the  
20    restaurant that they were operating.

21                So, if there are no further questions, we'd  
22    urge the Court to affirm the court of appeals.

23                CHIEF JUSTICE ROBERTS:  Thank you, counsel.

24                Mr. Whalen, you have 8 minutes remaining.

25                REBUTTAL ARGUMENT OF THOMAS J. WHALEN

1                   ON BEHALF OF THE PETITIONERS

2                   MR. WHALEN: My colleague mentioned the  
3 Yermian case, which is in our brief, but I failed to  
4 present it to the Court today. And it's a very  
5 important case decided by this Court, which said that  
6 filing a false statement is not -- is not indicative,  
7 not evidence, of an intent to deceive.

8                   Similarly, the Harry Bridges case, as also  
9 decided by this Court, said that -- and the Court held  
10 that making a false statement about Mr. Bridges'  
11 involvement with the Communist Party does not evidence  
12 fraud.

13                  And these cases, I believe, of this Court  
14 control the issue that deceit or fraud is not an  
15 essential element of this crime of conviction.  
16 Following up what Justice Kagan has said or has asked,  
17 that the rules -- canons of construction that the  
18 Petitioner has invoked, the rules of superfluity --  
19 against superfluity; the idea that the court must give  
20 cognizance to different words mean different things;  
21 that is, revenue loss from the government is different  
22 from loss to a victim or victims; and the specific  
23 versus the general.

24                  The answer of the Government is simply  
25 speculation and conjecture of, among other things,

1 courts make the wrong decisions; Congress didn't  
2 understand that tax evasion does involve fraud; and,  
3 therefore, it will be superfluous.

4 The position of the Government in this case  
5 is simply that tax evasion may not be in 72 -- or may  
6 not be in (M)(ii), the reason that -- rather, that fraud  
7 and deceit may not be in tax evasion, but that a lesser  
8 revenue offense is in (M)(i).

9 I would like to remind the Court, as many of  
10 the Justices have indicated, that we're not looking at  
11 an idea of someone who suffers a penalty because -- as a  
12 result of the tax offense. We're talking about  
13 banishment. And we're talking about deportation. And  
14 the statute in which we're -- of which we're involved  
15 should be read in favor -- where the Congress has not  
16 been clear, the statute should be read in favor of the  
17 immigrant.

18 JUSTICE GINSBURG: Although it's not a  
19 criminal statute?

20 MR. WHALEN: Pardon me, Your Honor.

21 JUSTICE GINSBURG: It's not a criminal  
22 statute.

23 MR. WHALEN: This Court in the Fong case  
24 said that the rule of lenity applies to an immigration  
25 case. And the holdings of this Court have been

1 consistent that the rule of lenity applies to both  
2 criminal cases as well as immigration cases. And I  
3 invite the Court to look at the cases we have cited that  
4 the rule of lenity has applied, in fact, to immigration  
5 cases.

6 JUSTICE GINSBURG: There -- there's one  
7 technical feature, too, that I also didn't understand.  
8 The particular tax here in question, the failure to  
9 report was 76-some thousand dollars, but the number that  
10 was given for the total failure to report is over  
11 1 million, and the -- the loss to the IRS at -- is  
12 245,000. Well, the 245,000 loss must refer to more than  
13 the failure to report 76,000.

14 MR. WHALEN: The threshold amount is not an  
15 issue in the case.

16 JUSTICE GINSBURG: I'd just like to know how  
17 we got -- how the 245,000 revenue loss was calculated,  
18 given that the crime that was charged, the failure was  
19 to report only 76,000?

20 MR. WHALEN: I don't know. It was in  
21 negotiations between the government and the Kawashimas.  
22 In any compromise, the government chose only to charge  
23 them with a crime under 7206, which -- and to settle on  
24 that basis. As Justice Alito has mentioned in the  
25 Padilla case quite emphatically, that attorneys

1 representing immigrants deal with the government in  
2 order to avoid deportation. And that -- in this case  
3 whether the Kawashimas in fact had filed false returns  
4 in an attempt to deceive, that was by the boards,  
5 because the government and the taxpayer agreed that  
6 their offense would be solely 7206, which as you read  
7 the elements -- and you can read the Justice Department  
8 handbook which tells you what the elements are, and it  
9 does not include fraud and deceit.

10           If there are no further questions, I --  
11 finally, I would like to mention one case which hasn't  
12 been brought up, which evolved from the questions by the  
13 Justices, and that is a Third Circuit case which we  
14 cited, Nugent, mentioned in response to Justice Breyer's  
15 question, that the Nugent case said that you must  
16 fulfill both elements, that is perjury, (S) under the  
17 statute, and if it's included in fraud and deceit, you  
18 must fulfill the elements of both crimes at issue.

19           And, of course, in this case, the Kawashimas  
20 did not -- were imprisoned for 4 months and did not meet  
21 the statutory requirement for an aggravated felony of 1  
22 year.

23           But in any event, I want -- I would like the  
24 Court to keep in mind that what we are dealing here with  
25 is perjury, and we're not dealing with fraud or deceit,

1 as agreed to by the government and the taxpayer. And  
2 that, I suggest to the Court, should be dispositive in  
3 the decision in this case.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:08 p.m., the case in the  
7 above-entitled matter was submitted.)

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<b>A</b>	32:17 33:7,16 34:2,6,17 37:1 46:21 <b>agree</b> 15:20 38:4 <b>agreed</b> 46:5 47:1 <b>agreement</b> 33:8 33:12 <b>aiding</b> 42:2,4,5 42:14,15 <b>ain't</b> 14:8 <b>AKIO</b> 1:3 <b>alien</b> 33:15 <b>Alito</b> 45:24 <b>allows</b> 41:20 <b>amicus</b> 32:11 <b>amount</b> 17:22 19:12 20:24 34:24 45:14 <b>answer</b> 21:10,12 27:9 43:24 <b>apologize</b> 13:7 <b>appeal</b> 22:2 <b>appeals</b> 40:13 42:22 <b>APPEARAN...</b> 1:15 <b>appears</b> 37:18 <b>appendix</b> 23:5 33:10 <b>applicable</b> 19:11 <b>application</b> 38:2 <b>applied</b> 27:12 45:4 <b>applies</b> 22:10 32:6,7 41:1,6 44:24 45:1 <b>apply</b> 21:1 22:20 <b>approach</b> 22:14 23:12 <b>appropriate</b> 25:22 <b>argue</b> 29:13 <b>arguing</b> 7:19 38:1 <b>argument</b> 1:13 2:2,5,8 3:3,6 9:11 10:19	13:10 17:5 21:11 22:2 23:14 29:12 30:11 39:3 42:25 <b>arson</b> 24:11 <b>asked</b> 30:12 43:16 <b>asking</b> 31:3 <b>aspect</b> 25:23 41:23 <b>assessment</b> 12:3 13:19 17:20 18:14 21:18 <b>assets</b> 9:18 10:15 17:24 <b>Assistant</b> 1:18 <b>assisting</b> 42:4 <b>associated</b> 24:23 <b>assume</b> 25:15 <b>assuming</b> 32:2 <b>attempt</b> 9:23 12:8 14:2,9 15:10 16:13 18:13 22:8 46:4 <b>attempts</b> 15:11 <b>ATTORNEY</b> 1:6 <b>attorneys</b> 45:25 <b>avoid</b> 14:12 38:9 38:25 46:2 <b>avoidance</b> 9:12 <b>avoiding</b> 8:23 38:2 <b>avoids</b> 38:5 <b>aware</b> 32:3 <b>A's</b> 27:19 <b>a.m</b> 1:14 3:2	32:23 <b>based</b> 11:17 <b>basic</b> 23:24 <b>basically</b> 3:22 3:23 <b>basis</b> 45:24 <b>beginning</b> 16:20 16:20 34:23 <b>behalf</b> 2:4,7,10 3:7 17:6 43:1 <b>believe</b> 29:4 31:6,21 43:13 <b>belt</b> 22:13 <b>benefits</b> 39:10 <b>better</b> 10:17 <b>beyond</b> 4:8 7:17 <b>bifurcate</b> 36:10 36:25 39:18 <b>bifurcating</b> 38:9 <b>big</b> 41:15 <b>Bishop</b> 6:15,24 <b>bit</b> 7:25 <b>boards</b> 46:4 <b>Breyer</b> 9:16,22 10:2 16:1 25:7 26:15 27:13,18 27:25 28:8,10 28:13 29:2,6 29:11,19 33:19 34:2,9,14 35:1 <b>Breyer's</b> 15:14 46:14 <b>Bridges</b> 43:8,10 <b>brief</b> 11:15 12:23,25 17:18 32:11 43:3 <b>briefs</b> 12:22 21:16 <b>bring</b> 3:13 6:21 9:25 32:13 <b>broad</b> 40:25 <b>broadly</b> 22:10 <b>brought</b> 32:11 46:12 <b>building</b> 24:12 <b>burden</b> 12:5 <b>business</b> 24:24	<b>B's</b> 27:19 <b>C</b> <b>c</b> 2:1 3:1 22:8 <b>calculate</b> 8:5 <b>calculated</b> 45:17 <b>called</b> 37:16 <b>canon</b> 26:1 <b>canons</b> 13:12,12 43:17 <b>capstone</b> 41:20 <b>captured</b> 15:22 <b>careless</b> 23:23 <b>carry</b> 16:14 <b>case</b> 3:4 6:14,15 7:21 8:11 16:22 19:2,18 21:18 22:18,25 25:2 32:22 33:8,13 37:15 37:15 40:1,15 40:15 41:16,23 41:25 42:8 43:3,5,8 44:4 44:23,25 45:15 45:25 46:2,11 46:13,15,19 47:3,5,6 <b>cases</b> 6:12 9:10 17:15,17,19,20 18:1,20 19:8 21:14 24:3 26:4,7 30:14 30:15,17,25 31:4,13,14 32:4 35:9 36:19 37:11 38:14 39:5 40:10 43:13 45:2,2,3,5 <b>category</b> 26:2,5 26:8 32:15 39:5 <b>certain</b> 24:25 <b>certainly</b> 18:22 <b>certainty</b> 32:2 <b>challenge</b> 11:20
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