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IN THE SUPREME COURT OF THE UNITED STATES

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AKIO KAWASHIMA, ET UX., :

Petitioners :

v. : No. 10-577

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL. :

- - - - - x

Washington, D.C.

Monday, November 7, 2011

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Whalen.

ORAL ARGUMENT OF THOMAS J. WHALEN

ON BEHALF OF THE PETITIONERS

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

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

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