No. 10-577

IN THE
Supreme Court of the United States

AKIO AND FUSAKO KAWASHIMA,
Petitioners,
v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE JOHNNIE M. WALTERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus, Johnnie M. Walters, served as the Commissioner of Internal Revenue from 1969-1971, and as the Assistant Attorney General for the Tax Division of the U.S. Department of Justice from 1971-1973.[1] Mr. Walters also served for many years on the Commissioner's Advisory Board, the national committee that advises the Internal Revenue Service on tax policy and administration. During his sixty-year career, which began in the Office of the Chief Counsel of the Internal Revenue Service, Mr. Walters has advocated for increased IRS efficiency, tax system reforms, and vigorous prosecution of corporate tax fraud.

Based on his decades of service and experience, including at the highest levels of U.S. tax policy and enforcement, Mr. Walters believes that the outcome of this case will have a substantial effect on the reach of our nation's criminal tax laws and the ability of the Internal Revenue Service and the Tax Division to enforce those laws.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision that a violation of 26 U.S.C. § 7206(1) or (2) is an "aggravated felony" sufficient to trigger deportation under 8 U.S.C. § 1101(a)(43)(M) should be reversed.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. In accordance with Rule 37.6, amicus states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than amicus or his counsel, has made a monetary contribution to the preparation or submission of this brief.

I. The Ninth Circuit's opinion rests on the incorrect premise that *all* "willful" tax violations involving "false" information—including those arising under Section 7206(1) or (2), and many other federal, state, and local tax codes—necessarily involve the type of "fraud or deceit" demanded by Section 1101(a)(43)(M)(i). The criminal tax laws do not treat crimes involving the "willful" provision of "false" information as interchangeable and synonymous with those involving "fraud or deceit" under the immigration laws.

The Ninth Circuit erred in concluding that Section 7206(1) and (2) require proof of fraud or deceit. Unlike a conviction of tax evasion under Section 7201—which proves criminal fraud and estops a taxpayer from denying civil fraud—convictions under Section 7206(1) or (2) do not necessarily require proof of either.

The Ninth Circuit's decision renders Section 1101(a)(43)(M)(ii) superfluous. The Ninth Circuit attempted to explain this result away by speculating that Congress may have added subparagraph (M)(ii) to make clear that Section 1101(a)(43)(M) covers every case of tax evasion—based on its understanding that the crime of tax evasion does not necessarily involve "fraud or deceit." But that misstates the law. Section 7201 is the only federal tax code provision that covers convictions for tax evasion, and *every* case of tax evasion under Section 7201 necessarily requires proof of fraud or deceit.

II. The Ninth Circuit's decision will lead to the deportation of legal permanent residents for almost *any* criminal tax offense, including numerous offenses arising under federal, state, and local tax laws, and even for misdemeanors. That result is contrary to Congress's stated purpose in enacting Section 1101(a)(43)(M),

which was to reserve the extreme sanction of deportation solely for the most severe type of tax crime—i.e., a conviction for tax evasion under Section 7201.

As a practical matter, the Ninth Circuit's decision will effectively preclude most plea deals for "willful" tax crimes involving "false" information alleged against legal permanent residents—who are far more likely to demand a trial, rather than admit guilt (even under a lesser offense) and face certain deportation. This drastic change will hamper the government's ability to enforce our tax laws effectively.

ARGUMENT

Under 8 U.S.C. § 1227(a)(2)(A)(iii), a legal permanent resident is deportable if convicted of an "aggravated felony"—which Congress expressly defined as, among other crimes:

> an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000[.]

8 U.S.C. § 1101(a)(43)(M). Examining the structure and settled interpretation of Title 26—commonly known as the Internal Revenue Code—clarifies why Congress structured Section 1101(a)(43)(M) to separate the crime "described in section 7201 of title 26 (relating to tax evasion)" in subparagraph (M)(ii) from other crimes of "fraud or deceit" in subparagraph (M)(i). Together these two provisions reserve the grave sanction of deportation for only those tax evasion crimes that fall within the scope of Section 7201, which itself imposes

the most severe penalties for any violation of the Internal Revenue Code.

The Ninth Circuit, however, held that any "willful" tax crime involving "false" information is an "aggravated felony" sufficient to trigger deportation under Section 1101(a)(43)(M)(i)—including violations of Section 7206(1) and (2) of the Internal Revenue Code, which require proof only that a person (1) "willfully" provided a document "made under the penalties of perjury" that he or she did "not believe to be true and correct as to every material matter," or (2) "willfully" helped prepare a document that is "fraudulent *or* is false as to any material matter." 26 U.S.C. § 7206(1)-(2) (emphasis added). The Ninth Circuit's interpretation is flawed as a matter of tax law, inconsistent with the expressed intent of Congress, and contrary to public policy.

I. THE NINTH CIRCUIT'S MISREADING OF TITLE 26 IS SIGNIFICANT AND EXPANSIVE

The Ninth Circuit assumed that a violation of 26 U.S.C. § 7206(1) or (2) "necessarily" satisfies the "fraud or deceit" requirement of Section § 1101(a)(43)(M)(i) because such violations "require the government to prove either that the defendant 'willfully' subscribed to a statement in a tax return he did not believe to be true, or that the defendant 'willfully' aided and assisted in the making of a false or fraudulent return." *Kawashima* v. *Holder*, 615 F.3d 1043, 1052 (9th Cir. 2010). This attempt to equate the tax code's requirement of willfulness in providing false information with the immigration code's requirement of "fraud or deceit" fails. In fact, the Ninth Circuit's ruling to the contrary means that *all* of the numerous other "willful" federal, state, and local criminal tax violations requiring the provision

of "false" or "not … true" information would also satisfy the "fraud or deceit" requirement of Section 1101(a)(43)(M)(i).[2]

A. Tax Crimes Requiring "Willfulness" Do Not "Necessarily" Satisfy The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

The statutory language at issue does not demonstrate any Congressional intent that proof of "willfulness" in committing a tax offense could serve as proof of "fraud or deceit" under the immigration laws. In the Internal Revenue Code, Congress distinguished criminal tax offenses "in ways that do not turn on the meaning of the word 'willfully,'" and instead "used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." *United States* v. *Bishop*, 412 U.S. 346, 358, 359-360 (1973). The tax code therefore reflects a choice by Congress to require proof of "willful" behavior for many tax crimes, only some of which also require proof of "false" behavior *or* fraud or deceit.[3] Indeed, this Court has defined the concept of

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[2] The Fifth Circuit similarly has held that "'[w]illfully' and knowingly signing and filing a false federal tax return unquestionably 'involves fraud or deceit'" under Section 1101(a)(43)(M)(i). *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 173 (5th Cir. 2008). In *Lee* v. *Ashcroft*, the Third Circuit held that a violation of Section 7206(1) is *not* an aggravated felony under Section 1101(a)(43)(M)(i), but the majority did not reach the issue of whether "willfully" providing "false" information under the tax laws establishes "fraud or deceit" under the immigration laws. 368 F.3d 218, 225 (3d Cir. 2004). *But see id.* at 226 (Alito, J., dissenting).

[3] *See, e.g.*, 26 U.S.C. § 7201 (concerning "[a]ny person who *willfully* attempts in any manner to *evade* or defeat any tax"); *id.* § 7202 (concerning "[a]ny person … who *willfully* fails to collect or *truthfully* account for any pay over such tax"); *id.* § 7203 (concern-

"willfulness" in the criminal tax code without even discussing "fraud" or "deceit." *See Cheek* v. *United States*, 498 U.S. 192, 201 (1991) ("Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."). Thus, the "willfulness" requirement alone in a tax crime does not "necessarily" satisfy the "fraud or deceit" requirement of Section 1101(a)(43)(M)(i).

B. Tax Crimes Requiring "False" Information Do Not "Necessarily" Satisfy The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

The Ninth Circuit assumed that every conviction under Section 7206(1) or (2) "necessarily involve[s] 'fraud or deceit,'" because a conviction under those provisions requires proof of "willfulness" in combination with proof of providing "false" or "not … true" informa-

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ing "[a]ny person … who *willfully* fails to pay such estimated tax or tax"); *id.* § 7204 (concerning "any person … who *willfully* furnishes a *false* or fraudulent statement or who willfully fails to furnish a statement"); *id.* § 7205(a) (concerning "[a]ny individual … who *willfully* supplies *false* or fraudulent information, or who willfully fails to supply information"); *id.* § 7205(b) (concerning "any individual [who] *willfully* makes a *false* certification"); *id.* § 7206(1) (concerning "[a]ny person who … *willfully* makes and subscribes any [document] … made under the penalties of perjury, and which he does not believe is *true*"); *id.* § 7206(2) (concerning "[a]ny person who … [*w*]*illfully* aids or assists in, or procures, counsels, or advises the preparation or presentation of [any document] … which is fraudulent or is *false* as to any material matter"); *id.* § 7207 (concerning "[a]ny person who *willfully* delivers or discloses … [documents] known by him to be fraudulent or *false*") (all emphases added).

tion. *Kawashima*, 615 F.3d at 1055. This assumption ignores the construction of "fraud," "deceit," and "falsity" in the prosecution of tax crimes under Title 26.

Courts have carefully distinguished the proof of fraud or deceit required for a tax evasion offense falling under Section 7201 from the proof required for "lesser" tax crimes, such as tax offenses under Section 7206(1) or (2). Crucially, a conviction for tax evasion under Section 7201 "conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel." *Gray* v. *Commissioner of Internal Revenue*, 708 F.2d 243, 246 (6th Cir. 1983); *see also United States* v. *Dale*, 991 F.2d 819, 858-859 (D.C. Cir. 1993) (per curiam) (referring to convictions under § 7206 as "lesser included offenses" when compared to "the 'capstone' section 7201 tax evasion convictions").

Indeed, the Ninth Circuit itself has made clear that convictions under Section 7206 do not require proof of a willful attempt to evade a tax or other fraudulent intent, unlike Section 7201: "Because section 7206(1) does not require a willful attempt to evade tax, *a conviction under section 7206(1), without more, does not establish fraudulent intent.*" *Considine* v. *United States*, 683 F.2d 1285, 1287 (9th Cir. 1982) (emphasis added). For that reason, taxpayers convicted of a crime under Section 7206(1) or (2), such as the Petitioners, are free to argue in a later civil proceeding that their tax crime did not involve fraud. *Id.*; *Wagner* v. *Commissioner*, No. 7602-88, 1996 WL 436201, at *5-6 (T.C. Aug. 6, 1996).

Nor do convictions under Section 7206(1) or (2) "necessarily" require proof of intent to deceive. Like convictions under 18 U.S.C. § 1001 (for making a false

statement to a federal official),[4] a conviction under Section 7206(1) or (2) requires proof of falsity, materiality, and willfulness—but does not require intent to deceive as an element of the crime. *United States* v. *Yermian*, 468 U.S. 63, 69 (1984) (Section 1001 "contains no language suggesting any additional element of intent, such as … with the intent to deceive the federal government."); *United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) (interpreting § 1001 by relying on *Yermian* and stating that "the Supreme Court has itself rejected the claim that an 'intent to deceive' is required"); *United States* v. *Hills*, 618 F.3d 619, 638 (7th Cir. 2010) (holding that to convict under § 7206(1), "the government must demonstrate the existence of four elements beyond a reasonable doubt: (1) the defendant made or caused to be made a federal income tax return that she verified was true; (2) the return was false as to a material matter; (3) the defendant signed the return willfully[,] … knowing it was false; and (4) the return contained a written declaration that it was made under penalty of perjury"); *United States* v. *Ali*, 616 F.3d 745, 755 (8th Cir. 2010) (holding that to convict under § 7206(2), the government must show "(1) the defendant aided, assisted, procured, counseled, advised or

[4] Section 1001(a)(2) of Title 18 provides: "[w]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully … makes any materially false, fictitious, or fraudulent statement or representation … shall be fined." A conviction under Section 1001(a)(2) requires proof that "(1) the defendant made a statement; (2) the statement was false; (3) the defendant knew the statement was false; (4) such statement was relevant to the function of a federal department or agency; and (5) the false statement was material." *United States* v. *Algee*, 599 F.3d 506, 512 (6th Cir. 2010).

caused the preparation and presentation of a return; (2) the return was fraudulent *or* false as to a material matter; and (3) the act of the defendant was willful." (emphasis added)).[5]

In other words, convictions under Section 7206(1) or (2) do not *necessarily* "involve[] fraud or deceit" under Section 1101(a)(43)(M)(i), because neither "fraud" nor "deceit" is an element of proof required for those convictions. *See Conteh* v. *Gonzales*, 461 F.3d 45, 59 (1st Cir. 2006) ("An offense with a scienter element of either intent to defraud or intent to deceive categorically qualifies as an offense involving fraud or deceit" under § 1101(a)(43)(M)(i).). A conviction under Section 7206(1) requires proof that a document was false, not that it was fraudulent; conviction under Section 7206(2) requires proof that a document was false *or* fraudulent, rather than requiring proof of fraud. Unlike convictions under Section 7201—which *necessarily* involve proof of criminal, and thus civil, fraud—a conviction under Section 7206(1) or (2) is not even proof of civil fraud, let alone criminal fraud. The Ninth Circuit erred by ruling to the contrary.

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[5] In *Arguelles-Olivares*, the Fifth Circuit similarly reasoned that Section 1101(a)(43)(M)(i) includes tax crimes beyond those set forth in Section 7201 because such "tax felonies involv[e] fraud and deceit and the same amount of loss to the Government." 526 F.3d at 174. That argument fails for the same reasons set forth above—i.e., although a conviction for tax evasion under Section 7201 requires proof of an intent to defraud or deceive, convictions under Section 7206(1) or (2), and many other "willful" tax laws, do not.

C. The Ninth Circuit's Ruling Renders Section 1101(a)(43)(M)(ii) Superfluous Because The Crime Of Tax Evasion Necessarily Satisfies The "Fraud Or Deceit" Requirement Of Section 1101(a)(43)(M)(i)

Responding to a claim by the dissent that its decision would render Section 1101(a)(43)(M)(ii) superfluous, the Ninth Circuit speculated that Congress might have included that provision "just to ensure that no tax evasion case fell outside subsection (M)'s definition of an aggravated felony" or because "Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because 'fraud' and 'deceit' are not specific elements of that offense." *Kawashima*, 615 F.3d at 1054. However, neither hypothesized reason finds support in the tax code.

To the contrary, it has long been settled that every tax evasion case must be prosecuted under Section 7201, and that every tax evasion conviction under Section 7201—known as the "tax fraud statute"—must have proof of "fraud or deceit." *Klein* v. *Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989) (explaining conviction for tax evasion under Section 7201 "collaterally estops a taxpayer from denying fraud for purposes of a § 6653(b) civil tax case involving the same years"); *Gray*, 708 F.2d at 246 (holding that a conviction for tax evasion under Section 7201 "conclusively establishes fraud" and collecting cases); *see* Internal Revenue Manual 9.1.3.3.2.1 (explaining that tax evasion involves "deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events or to make things seem other than they are"), *available at* http://

www.irs.gov/irm/part9/irm_09-001-003.html (last visited Aug. 12, 2011).[6] Therefore, *every* conviction for tax evasion under Section 7201 *necessarily* involves proof of fraud or deceit, and a government "victim"[7]—i.e., each of the (non-monetary) elements set forth in Section 1101(a)(43)(M)(i).

Accordingly, contrary to the Ninth Circuit's suggestion, the only reason for Congress to list tax evasion as a separate deportable offense in Section 1101(a)(43)(M)(ii) was to single out tax evasion as the only tax crime severe enough to warrant the extreme punishment of deportation. *See Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481 (2010) (characterizing deportation as a "particularly severe 'penalty'" (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893)); *Spies* v. *United States*, 317 U.S. 492, 497 (1943) (identifying tax evasion as "[t]he capstone of [the] system of sanctions … calculated to induce … fulfillment of every duty under the income tax law" and "the serious and inclusive [criminal tax] felony"); *see also Boulware* v. *United States*, 552 U.S. 421, 424 (2008) (repeating that tax evasion is the "capstone" tax crime, even after the enactment of the current version of § 7206); *Dale*, 991 F.2d at

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[6] The elements required for conviction of tax evasion under Section 7201 are proof of "willfulness; the existence of a tax deficiency; … and an affirmative act constituting an evasion or attempted evasion of the tax." *Sansone* v. *United States*, 380 U.S. 343, 351 (1965) (internal citations omitted).

[7] *See Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005) ("[O]nly the government can be victimized by tax evasion."); *United States* v. *Presbitero*, 569 F.3d 691, 707 (7th Cir. 2009) ("The government is a victim in all tax fraud cases[.]"); *United States* v. *Fleming*, 128 F.3d 285, 288 (6th Cir. 1997) ("In tax fraud cases, we consider the United States Treasury the victim.").

858-859 (discussing "the 'capstone' section 7201 tax evasion convictions").

The Ninth Circuit's decision to the contrary improperly renders Section 1101(a)(43)(M)(ii) superfluous. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (quotation marks omitted)).

II. THE NINTH CIRCUIT'S ENLARGEMENT OF SECTION 1101(a)(43)(M)(i) IS MASSIVE AND DISRUPTIVE

As a practical matter, by sweeping *all* "willful" and "false" tax crimes into Section 1101(a)(43)(M)(i), the Ninth Circuit's decision will lead to the deportation of legal permanent residents convicted of almost any criminal tax offense with a loss of over $10,000 under federal, state, and local laws—including misdemeanors.

A. Expanding Section 1101(a)(43)(M)(i) To Include All "Willful" And "False" Tax Violations Will Lead To Deportation For Violators Of Most Federal, State, And Local Tax Crimes

The U.S. tax code imposes willfulness and falsity requirements for a variety of tax offenses beyond Section 7206(1) and (2)—including for failure to truthfully account for and pay over collected taxes under Section 7202, furnishing a false W-2 statement to an employee under Section 7204, providing false withholding information to an employer under Section 7205, and filing

false documents under Section 7207.[8] The required willfulness and falsity is the same for these statutory provisions as for Sections 7206(1) and (2). *See Bishop*, 412 U.S. at 359-360 ("Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula."); *see, e.g.*, *United States* v. *Holecek*, 739 F.2d 331, 335 (8th Cir. 1984) (equating falsity under Sections 7205 and 7206). Even Section 7203, which provides for a misdemeanor conviction for willful failure to file a return or other violations, may therefore "involve fraud or deceit" under the Ninth Circuit's interpretation. Violations of Sections 7203 and 7207, despite being misdemeanors, can be considered "aggravated felonies" under the immigration laws.[9]

The same result applies to state and local tax codes, because Congress did not limit the scope of deportable "offenses" under Section 1101(a)(43)(M)(i) to *federal* crimes. *See Ferreira* v. *Ashcroft*, 390 F.3d 1091, 1096-1097 (9th Cir. 2004) (holding that a state-law offense

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[8] *See, e.g.*, 26 U.S.C. § 7202 ("willfully fails to collect or truthfully account for and pay over such tax"); *id.* § 7204 ("willfully furnishes a false or fraudulent statement"); *id.* § 7205(a) ("willfully supplies false or fraudulent information"); *id.* § 7207 ("willfully delivers or discloses to the Secretary any … document, known by him to be fraudulent or to be false as to any material matter").

[9] Offenses qualifying as "aggravated felonies" under 8 U.S.C. § 1101(a)(43) include *misdemeanors* as well as felonies. *See Biskupski* v. *Attorney Gen.*, 503 F.3d 274, 279-281 (3d Cir. 2007) (holding that a misdemeanor violation of 8 U.S.C. § 1324(a)(2)(A) qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)); *see also Padilla*, 130 S. Ct. at 1488-1489 (Alito, J., concurring) (noting that "the term 'aggravated felonies' can include misdemeanors" under 8 U.S.C. § 1101(a)(43) (quoting McWhirter, American Bar Ass'n, *The Criminal Lawyer's Guide To Immigration Law: Questions And Answers* 146 (2d ed. 2006))).

with an intent to defraud or deceive element categorically qualified as an offense involving fraud or deceit under Section 1101(a)(43)(M)(i)). Therefore, under the rationale applied by the Ninth Circuit, legal permanent residents would be deportable for numerous state and local criminal tax crimes—many of which are based on the federal tax code, and therefore specify a wide variety of "willful" and "false" tax crimes. *See, e.g.*, Del. Code Ann. tit. 30, § 574 (directed to a "person" who "willfully makes and subscribes" a return or document that the person "does not believe to be true and correct as to every material matter"); D.C. Code § 47-4106 (same); Ala. Code § 40-29-114 (same); Va. Code Ann. § 58.1-1815 (punishing a person who "willfully fails to collect or truthfully account for and pay over" certain taxes).

Furthermore, the same result applies to corporate criminal tax provisions. Under 26 U.S.C. § 7701(a)(1), a "person" includes a corporation, and 26 U.S.C. § 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Under the Ninth Circuit's holding, all federal, state, and local "willful" corporate criminal tax violations involving false information also would lead to deportation of corporate officers or employees via Section 1101(a)(43)(M)(i).

That outcome would be especially extreme given that many of the federal, state, and local "willful" offenses for providing "false" information are *misdemeanors*. For instance, Section 7207 provides that it is a misdemeanor for "[a]ny person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be

fraudulent *or* to be false as to any material matter" (emphasis added). A violation of Section 7203 is also a misdemeanor that could "involve fraud or deceit" under the Ninth Circuit's expansive ruling, merely because Section 7203 punishes the willful failure to file a tax return, pay taxes, pay estimated taxes, keep required records, or supply required information—a provision for which prosecutions have increased eight percent in the last year alone. *See* Transactional Records Access Clearinghouse, *Prosecutions for April 2011* (July 19, 2011), *available at* http://trac.syr.edu/tracreports/bulletins/tirs/monthlyapr11/fil/ (last visited Aug. 12, 2011).

Similarly, in California it is a misdemeanor to willfully provide false information when applying to reduce a property tax assessment. Cal. Rev. & T. Code § 1610.4. Under North Dakota law, knowingly making a false statement when filing an estate tax return is a misdemeanor. *See* N.D. Cent. Code § 57-37.1-16. And in Columbus, Ohio, knowingly filing a false municipal tax return is a fourth-degree misdemeanor punishable by a $250.00 fine. *See* Columbus, Oh., City Code § 361.31(a)(4), (b), (d). Under the Ninth Circuit's ruling, *all* of these different federal, state, and local tax offenses would justify deportation under Section 1101(a)(43)(M)(i).

In many of these cases, the monetary ($10,000 loss) threshold set in Section 1101(a)(43)(M) will not prevent deportation—given that common misstatements under Section 7206 and other "willful" tax crimes involving false information can easily result in a $10,000 total tax loss. A tax revenue loss calculation can span as many as six years, with the total "loss" to the government

calculated as the aggregate tax losses for all such years.[10] For example, a California resident who commits a misdemeanor by willfully providing false information in an attempt to lower property taxes, or a resident of Columbus, Ohio, who makes a misdemeanor false statement on a municipal tax return, easily could cause a loss to the government of $3,000 in taxes per year for four years, or over $10,000 in taxes in just one year.[11]

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[10] *See* 26 U.S.C. § 6531(2), (3), (5) (setting six-year statute of limitations for violations of §§ 7201, 7206(1) and (2), and 7207); *id.* § 6531 (setting three-year statute of limitations for other tax crimes); *see, e.g.*, *United States* v. *Clarke*, 562 F.3d 1158, 1160 (11th Cir. 2009) (noting that "[a] federal grand jury subsequently returned a three-count indictment charging Clarke with willfully filing false tax returns for tax years 2000 (Count One), 2001 (Count Two), and 2002 (Count Three), all in violation of 26 U.S.C. § 7206(1)").

[11] As another example, if a hypothetical legal permanent resident taxpayer with $40,000 of taxable income in 2010 willfully and falsely claimed to be a "head of household" with a "dependent" (because, for instance, the taxpayer lived with his or her domestic partner and the partner's child), the government would suffer a yearly revenue loss of approximately $1,700. This estimate is based on an extra head of household exemption of $2,700, an extra dependent exemption of $3,650, and a resulting marginal tax rate of 15% rather than 25%. *See* 26 U.S.C. §§ 2(b), 152; *see also* IRS Publication 501, at 9, 23 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p501.pdf (last visited Aug. 12, 2011); IRS Publication 17, at 256-258 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (last visited Aug. 12, 2011). If the taxpayer also had wrongfully claimed these same exemptions for each of the five prior years as well, the tax loss to the government would exceed $10,000—leading to deportation under the rationale of the Ninth Circuit.

Stretching the scope of Section 1101(a)(43)(M) to cover these many different tax crimes would be inconsistent with Congress's purpose in enacting that provision. When expanding the definition of an "aggravated felony" in 1993, Congress made clear that it wanted "to include … immigration related crimes such as alien smuggling, *specified white collar crimes* and various other *extremely serious crimes*." 140 Cong. Rec. H11291, H11293 (daily ed. Oct. 7, 1994) (statement of Rep. Mazzoli) (emphases added).[12] It did just that by "specifying" the white collar offense of tax evasion in Section 1101(a)(43)(M)(ii). At the same time, it did nothing to even remotely suggest that it intended to include all types of "willful" tax crimes involving the provision of "false" information, including misdemeanor offenses, as "other extremely serious crimes" covered by Section 1101(a)(43)(M)(i). Likewise, in 1996, when lowering the loss threshold for Section 1101(a)(43)(M)(ii) from $200,000 to $10,000, Congress explained that it was doing so "for crimes of tax evasion *and* fraud and deceit." H.R. Conf. Rep. No. 104-828, at 223 (1996) (emphasis added). Notably, Congress did *not* say it was doing so "for crimes of fraud and deceit, such as tax evasion," as the Ninth Circuit's construction suggests.

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[12] Before 1993, an "aggravated felony" under Section 1101(a)(43) included "murder, any illicit trafficking in any controlled substance …, or any illicit trafficking in any firearms or destructive devices …, any offense … relating to laundering of monetary instruments[], or any crime of violence … for which the term of imprisonment imposed … is at least 5 years, or any attempt or conspiracy to commit any such act" in violation of federal, state, or foreign law. 8 U.S.C. § 1101(a)(43) (1992).

In the end, by blurring distinctions between "extremely serious crimes" involving "fraud or deceit" on the one hand, and "lesser" federal, state, and local "willful" false information tax crimes (including mere misdemeanors) on the other hand, the Ninth Circuit has imposed a tax regime with "penalties"—namely deportation—that are far more severe than Congress ever intended.

B. The Ninth Circuit's Decision Will Impede Tax Enforcement

Expanding the list of deportable "aggravated felonies" to include all federal, state, and local tax convictions for willfully providing false information will further complicate tax enforcement at the federal, state, and local levels by reducing the frequency of plea agreements for tax offenses and increasing the frequency of tax enforcement trials.

For example, it often is far easier for the government to obtain a conviction under Section 7206(1) or (2)[13] than under Section 7201—in part, because Section

[13] Over the last five years, violations of Section 7206 have been among the most frequently prosecuted tax crimes. *See* Transactional Records Access Clearinghouse, *Prosecutions for April 2011* (July 19, 2011), *available at* http://trac.syr.edu/tracreports/bulletins/tirs/monthlyapr11/fil/ (last visited Aug. 12, 2011). Section 7206(1) criminalizes the willful submission of any materially false information on a tax return—such as misstatement of the source of any income, *see United States* v. *DiVarco*, 484 F.2d 670, 672-673 (7th Cir. 1973), omission of any income, *see Siravo* v. *United States*, 377 F.2d 469, 471 (1st Cir. 1967), or any other information a jury finds material, *see United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995) (holding that materiality is a question for the jury under 18 U.S.C. § 1001); *Neder* v. *United States*, 527 U.S. 1, 19-20 (1999) (noting that *Gaudin* requires a jury to determine materiality in Title 26 cases). Further, a conviction

7201 requires proof of both a tax deficiency and fraud, while Section 7206(1) and (2) do not. *See Sansone*, 380 U.S. at 351; *United States* v. *Olgin*, 745 F.2d 263, 272 (3d Cir. 1984); *Considine*, 683 F.2d at 1287; *United States* v. *Taylor*, 574 F.2d 232, 234 (5th Cir. 1978). And while both provisions impose the same financial penalties (up to $100,000 for an individual and $500,000 for a corporation), Section 7206 provides for significantly less maximum jail time (three years versus five years).

For these reasons, the government has historically utilized Section 7206 as a mechanism to obtain plea deals for tax offenses that would have been difficult to prove as tax evasion under Section 7201.[14] This compromise allows the government to secure imprisonment and steep financial penalties under Section 7206, while allowing the accused taxpayer to face a maximum sentence under Section 7206 that is significantly shorter

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under Section 7206(2) does not even require proof of knowledge that information provided on a tax return was false. *See* 26 U.S.C. § 7206(2) (allowing conviction for aiding in submitting a false return "whether or not such falsity or fraud is with the knowledge or consent of the person" presenting the return).

[14] From 2003 to 2010, the Tax Division of the Department of Justice has authorized between 1,100 and 1,400 criminal tax prosecutions per year, with a conviction or plea bargain rate of 95% or more. Tax Division, U.S. Dep't of Justice, FY 2012 Congressional Budget 24-25, *available at* http://www.justice.gov/jmd/2012 justification/pdf/fy12-tax-justification.pdf (last visited Aug. 12, 2011). Deciding to prosecute a federal tax evasion or tax falsity case requires many levels of review, including review by Internal Revenue Service agents and counsel, by the Tax Division of the U.S. Department of Justice, and by a U.S. Attorney. *See* Walters, *IRS Intelligence Division Operating Procedures: From 1040 Through Criminal Trial*, N.Y.U. 32d Ann. Inst. Fed. Tax'n, vol. 2, at 1195 (S. Theodore Reiner ed., 1974).

than the maximum sentence under Section 7201. Similarly, the government has allowed convictions for misdemeanor violations of Section 7207, rather than convictions under applicable felony criminal tax provisions, to reward cooperation with criminal tax investigations.[15]

But under the Ninth Circuit's ruling, legal permanent residents accused of any "willful" federal, state, or local tax crime involving false information will almost surely risk going to trial and possibly serving jail time—rather than plead guilty to a "lesser" crime with no or reduced jail time, but still get deported. *See Padilla*, 130 S. Ct. at 1483 ("Preserving the client's right to remaining in the United States may be more important to the client than any potential jail sentence." (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 323 (2001))). A legal permanent resident accused of willfully providing false information in violation of a federal, state, or local criminal tax provision (even for misdemeanors) is unlikely to accept *any* plea deal at the risk of deportation, thereby complicating tax enforcement at the federal, state, and local levels. The Ninth Circuit's erroneous broadening of Section

[15] The Criminal Tax Manual of the Department of Justice describes this policy. "A misdemeanor prosecution under Section 7207 may be appropriate, however, for a defendant who cooperates fully, if the case involves an isolated false document and there are mitigating circumstances, such as evidence that the defendant immediately confessed when questioned about the document. This exception particularly applies to a lower-echelon participant in a wider scheme who agrees to cooperate fully and provide substantial assistance in the investigation and prosecution of another individual." Dep't of Justice, Criminal Tax Manual 16.06 (2008), *available at* http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2016.htm (last visited Aug. 12, 2011).

1101(a)(43)(M)(i) to reach all willful tax crimes involving falsity will thus introduce uncertainty and resistance into the settlement process, make government use of plea agreements more difficult and less frequent, create an enforcement backlog for the government and those accused of tax offenses, and interfere with efficient administration of the tax laws.

The Ninth Circuit's ruling is a matter of grave concern to those interested in the settled structure of our nation's criminal tax laws, and to those interested in the ability of the Internal Revenue Service and the Tax Division of the Department of Justice to enforce those laws. By unnecessarily sweeping all "willful" federal, state, and local tax offenses involving the provision of false information into the definition of an "aggravated felony" under Section 1101(a)(43)(M)(i), the Ninth Circuit's ruling will impede the enforcement of the tax laws, contrary to Congress's stated purposes.

CONCLUSION

The court of appeals' decision that a violation of 26 U.S.C. § 7206(1) or (2) is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) should be reversed.

Respectfully submitted.

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