No. 10-1049

In the Supreme Court of the United States

JOHN LARSON AND ROBERT PFAFF, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that any ambiguity in the application of the "economic substance" doctrine did not negate the jury's finding that petitioners acted willfully in committing tax evasion.

2. Whether the court of appeals correctly held that 26 U.S.C. 7201, which provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax * * * [is] guilty of a felony," may be applied to petitioners because they assisted third-party taxpayers in filing false tax returns.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is available at 407 Fed. Appx. 506.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2010. A petition for rehearing was denied on November 23, 2010 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on February 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners

were convicted on 12 counts of tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced petitioner John Larson to a term of imprisonment of 121 months, to be followed by three years of supervised release, and the court sentenced petitioner Robert Pfaff to a term of imprisonment of 97 months, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-10a.

1. During the mid-1990s, petitioners were tax professionals at the accounting firm KPMG LLP (KPMG). In 1997, they left to establish Presidio Advisors LLC (Presidio), which purported to be an investment advisory company. Their co-defendant Raymond Ruble was a tax partner at the law firm of Brown & Wood LLP. At Presidio, petitioners designed, marketed, and implemented individual tax shelters, primarily in conjunction with KMPG on behalf of KMPG's wealthy clients. In 1998, petitioners and Ruble began developing the tax shelter at issue in this case: Bond Linked Issue Premium Structure (BLIPS). Petitioners designed and implemented BLIPS, and Ruble issued opinion letters that assisted in the operation and marketing of BLIPS. Pet. C.A. Br. 5-8; Gov't C.A. Br. 3-4, 7-9.

BLIPS was designed to look like a seven-year investment program that sought to generate high returns through the use of a particular kind of high-interest loan (called a "premium loan") and foreign currency investments. But in fact all but two of the nearly 200 BLIPS' clients exited the program within two months (and the remaining two clients exited in less than a year). All of those clients thus removed their money not long after investing it, and in the process they generated multi-million dollar paper losses—losses that the clients could use to offset other investment gains, thereby evading

the taxes due on those unrelated investments. According to the government, petitioners and their co-defendants thus designed BLIPS to generate massive, short-term tax deductions while appearing to be a profit-motivated, long-term investment program. Pet. C.A. Br. 9; Gov't C.A. Br. 4-6.

2. Specifically, BLIPS was structured as a three-stage program: Stage I lasted 60 days; Stage II lasted another 120 days; and Stage III extended through the end of the seventh year. At each stage, a client was required to contribute significantly more capital to remain invested in BLIPS. In order to participate in the program and generate a tax loss, a client followed three steps. Gov't C.A. Br. 12-31.

a. First, a client would form a single-member limited liability corporation (LLC-1), which would obtain from one of the banks working with Presidio a large non-recourse loan at a fixed rate with a seven-year term. Only clients who sought to generate a minimum tax loss of $20 million were eligible for BLIPS. Because the amount of the tax loss was tied directly to the amount of the loan, the loans at issue ranged from tens to hundreds of millions of dollars. And because each loan was non-recourse, the issuing bank was limited to seeking repayment from LLC-1, which had essentially no assets. To protect itself, the issuing bank thus would not permit LLC-1 to use or control the loan. None of the loan funds ever left the bank's control. Gov't C.A. Br. 12-15.

To generate the tax loss, LLC-1 would agree to pay the bank an abnormally high interest rate. In return, the bank would agree to extend not only the face amount of the loan, but some additional amount of money called "the loan premium." The loan premium ostensibly approximated the net present value of all the above-mar-

ket interest payments over the seven-year term of the loan. In theory, the bank would recoup its premium over time through the unusually high interest rate on the loan principal. In reality, the amount of the premium was determined by the amount of the tax loss that the client sought to generate. In the event that the loan was prepaid early (as every BLIPS loan was), the loan agreement called for a prepayment penalty to serve the same purpose. Gov't C.A. Br. 14-15.

b. Second, LLC-1 would contribute the funds from both the loan and the loan premium to LLC-2, a partnership in which LLC-1 had a 90% interest and Presidio had a 10% interest as the managing partner. As part of the transaction, LLC-2 assumed the obligation to repay the loan principal but not the loan premium. In addition to the loan funds, LLC-1 would contribute a further amount equal to 7% of the desired tax loss. That amount was paid by the client and was the client's only actual exposure to a potential loss. LLC-2 would then invest a portion of the client's cash fee in foreign currency investments. LLC-2 would not (and, indeed, could not) invest any of the loan funds, because those funds remained in the lending bank's sole control. Gov't C.A. Br. 13-15.

c. Third and finally, the client would exit BLIPS after a brief time. All but two of the nearly 200 BLIPS clients exited the program at the end of Stage I, and the two remaining clients exited before year-end to obtain the benefit of the tax loss. To exit the program, a client would direct Presidio to terminate LLC-1's participation in LLC-2 and redeem LLC-1's partnership interest. The client would then receive a "liquidating distribution" of assets, consisting of either stock or currency (depending on whether the client was seeking to offset

a capital gain or ordinary income). The distribution consisted of whatever remained of the client's seven percent cash fee, less any expenses. Gov't C.A. Br. 16-17 & n.*.

Regardless of the value of those assets, petitioners and their co-defendants claimed that the client's "basis" for tax purposes—or the starting value of LLC-1's partnership interest in LLC-2—was the amount of the loan premium. Under 26 U.S.C. 722 and 752, a taxpayer's basis in a partnership interest is equal to the value of any property and cash contributed to the partnership, less the amount of any liabilities assumed by the partnership. Petitioners and their co-defendants claimed that LLC-2 had assumed the loan principal, but not the loan premium, as a liability. On their view, that loan premium should be treated as money that LLC-1 had invested in the partnership. Because petitioners and their co-defendants took the position that the client's basis for tax purposes was the loan premium, it invariably appeared as if the client had lost many millions of dollars by investing in BLIPS: the amount of the loan premium (the client's putative investment) minus the terminating distribution from LLC-2 (the client's actual return). Gov't C.A. Br. 17-19.

3. Petitioners and their co-defendants' interpretation of the Internal Revenue Code depended on their false characterization of BLIPS as a long-term investment program that required a seven-year premium loan. As an initial matter, the three banks that made BLIPS loans required that the loans be carried on their books only for a short time period, not to exceed the end of the year. The loan funds were required to remain in accounts at the lending banks under those banks' control. The loan funds also were exchanged from dollars into Euros, in order to make it appear as if the funds would

be used for foreign currency investments. Gov't C.A. Br. 20-24.

In addition, the BLIPS investments were not designed to make a profit. Those investments were in "forward contracts" for "pegged" foreign currencies, principally the Hong Kong dollar and the Argentine peso. In essence, Presidio (as the managing partner for each LLC-2) was betting that those foreign currencies, which at the time were pegged to the American dollar would "break the peg" and devalue during the life of the forward contract. But currencies like the Hong Kong dollar and Argentine peso were then relatively stable. Indeed, Presidio chose those currencies because they had a low chance of devaluation and thus forward contracts were cheaper, which was important given the limited funds that each LLC-2 had available. The risk of devaluation was particularly low in the short term, which was the only duration of forward contract that Presidio could afford to purchase. Gov't C.A. Br. 25-30.

4. Together with co-defendant Ruble, petitioners developed and played an important role in the BLIPS program. Ruble authored more than 150 opinion letters in 1999 for BLIPS' clients, each one indicating in boilerplate language that the client had exited at or near the sixtieth day because of the investment's comparative performance. Those letters were based on a template that Ruble had created before BLIPS had any clients. Gov't C.A. Br. 16, 145. Petitioners designed and marketed BLIPS, procured the cooperation of the banks involved, charged the clients fees for participation in BLIPS, implements the actual BLIPS transactions by creating and terminating the LLCs and contracts used in the scheme, conducted the forward currency invest-

ments, and generated the loss reported by the clients on their tax returns. *Id.* at 144-145.

5. On October 17, 2005, the government charged petitioners and their co-defendants through a superseding indictment with a conspiracy to defraud the United States through the development, sale, and implementation of fraudulent tax shelters. The indictment charged petitioners with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; and multiple counts of tax evasion, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2. On December 17, 2008, after a two-month trial, the jury acquitted petitioners of the conspiracy count but convicted them on 12 counts of tax evasion. The district court sentenced petitioner Larson to a term of imprisonment of 121 months, to be followed by three years of supervised release, and the court sentenced petitioner Pfaff to a term of imprisonment of 97 months, to be followed by three years of supervised release. Gov't C.A. Br. 2-3.

6. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-10a. As relevant here, the court held that the district court had correctly charged the jury "that a transaction lacks non-tax economic effect when there is no reasonable possibility that the transaction would result in a profit." *Id.* at 4a (internal quotation marks omitted). The court recognized that it had "in the past affirmed jury instructions stating a narrower definition," *ibid.* (citing *United States* v. *Atkins*, 869 F.2d 135, 140 (2d Cir.) (upholding instruction that transaction has no non-tax economic effect if it is "subject to no market risk"), cert. denied, 493 U.S. 818 (1989)), but the court likewise recognized that "[it had] not held that those instructions state the outer limits of the economic substance doctrine," *ibid.*

Applying that test, the court of appeals held that "[t]he evidence was sufficient to support the convictions." Pet. App. 4a. The court found "sufficient evidence that the transaction lacked any non-tax economic effect," because "[t]estimony described the chances of profiting from the investments as 'basically zero.'" *Id.* at 5a. The court noted that "[c]lients testified that the transactions were marketed solely as tax-avoidance schemes, and that, as clients, they had no non-tax business purpose in executing them." *Ibid*. The court concluded that "BLIPS was designed, marketed, and executed as a tax shelter; and the jury was warranted in concluding that all parties knew BLIPS' profit potential to be nothing more than a pretext." *Ibid.*

The court of appeals rejected petitioners' argument that "'economic substance' law was too vague to support their convictions" and "was not sufficiently 'knowable.'" Pet. App. 5a. The court held that "'knowability,' except perhaps as probative of a defendant's subjective belief in the lawfulness of his conduct, is only relevant insofar as it bears on constitutional vagueness." *Id*. at 5a-6a. According to the court, "[v]agueness of the law does not *ipso facto* negate a jury finding of willfulness." *Id.* at 6a. (citing *United States* v. *Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir.), cert. denied, 462 U.S. 1131 (1983)). The court further held that economic substance law is not only sufficiently clear for constitutional purposes, but "has been applied in criminal cases before" and "is not unsettled in the way" that petitioners contended. *Ibid*.

Finally, the court of appeals disagreed with petitioners' claim that "[their] actions fall outside the ambit of the tax evasion statute, 26 U.S.C. § 7201," because they had helped others evade taxes rather than evading their own taxes. Pet. App. 6a. Section 7201 applies to "[a]ny

person who willfully attempts in any manner to evade or defeat any tax," and the court observed that "[t]he statute's expansive language is not susceptible to [petitioners' proposed] limitation." *Id.* at 6a-7a. The court also noted that "[n]o case interpreting [Section] 7201 appears to have adopted any limit to its reach," and to the contrary "those cases that have considered [Section] 7201's scope have rather expressed it expansively." *Id.* at 7a. The court concluded that petitioners had "involved themselves, with the requisite intent, in a scheme to avoid taxes," and the court found "no statutory basis for excluding [them] from liability under [Section] 7201." *Ibid.*

ARGUMENT

Petitioners claim that this Court should grant certiorari to determine whether the court of appeals correctly held that (1) any ambiguity in the application of the "economic substance" doctrine does not negate the jury's finding that petitioners acted willfully in committing tax evasion (Pet. 13-27), and (2) petitioners violated the federal tax evasion statute, 26 U.S.C. 7201, by assisting third-party taxpayers in filing false tax returns (Pet. 27-30). With respect to both claims, the unpublished decision below is correct and does not conflict with any decision of this Court. In addition, the first claim does not implicate a circuit conflict warranting this Court's review, and the second claim does not implicate any circuit conflict at all. Further review is not warranted.

1. a. It is well-settled that a defendant convicted of tax evasion must have "willfully" attempted to evade a tax that is due, and "willfulness" in this context means a "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 199, 201

(1991). As the court of appeals concluded, objective uncertainty in the law does not necessarily undermine a jury's finding that the defendant acted willfully. See Pet. App. 5a-6a. The Second Circuit first applied that standard in *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, cert. denied, 462 U.S. 1131 (1983). In that case, the defendants argued that their convictions should have been vacated because of the exclusion of expert testimony and omission of jury instructions on the terms of a treasury regulation, which they said thwarted their defense that the applicable tax law did not provide "a clear and definite statement of the conduct proscribed." *Id*. at 96 (citation and internal quotation marks omitted). The court held that any ambiguity in the tax law was irrelevant unless that ambiguity had an effect on the defendants' subjective beliefs. *Id*. at 97.[1]

The Fifth and Sixth Circuits also have adopted that rule. See *United States* v. *Burton*, 737 F.2d 439, 444 (5th Cir. 1984) (holding that at least absent such a high degree of legal uncertainty as to "approach[] legal vagueness," "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received"); *United States* v. *Curtis,* 782 F.2d 593, 599 (6th Cir. 1986) (holding that

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[1] Contrary to petitioners' contention (Pet. 18), the Second Circuit's decision in *United States* v. *Pirro*, 212 F.3d 86 (2000), does not conflict with *Ingredient Technology*. *Pirro* affirmed the dismissal of a portion of an indictment not because the legal duty was ambiguous, but because that part of the indictment did not charge a violation of any legal duty and failed to allege the essential facts of the offense. See *id.* at 91, 95. Even if there were any tension between *Pirro* and *Ingredient Technology*, this Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

evidence of uncertainty in the law is irrelevant unless the ambiguity affected a defendant's subjective belief about the legality of his conduct).

As those courts have recognized, willfulness "relates to the defendant's state of mind," and evidence that a defendant acted willfully must normally be negated by evidence that the defendant subjectively believed that his conduct was lawful. *Curtis*, 782 F.2d at 599.

The requirement that a defendant act willfully is intended to protect from criminal prosecution the ordinary taxpayer who mistakenly believes that his conduct was lawful; it is not intended to protect a defendant who intentionally attempts to exploit a supposed ambiguity in the tax laws. See, *e.g.*, *Sanders* v. *Freeman*, 221 F.3d 846, 855-856 (6th Cir.) ("[The defendant] chose to risk prosecution for tax evasion in exchange for greater profits. That his attempt to exploit the ambiguity in the tax laws failed is not a basis for granting relief."), cert. denied, 531 U.S. 1014 (2000). Petitioners were not innocent victims of a confusing law, and the jury reasonably concluded that they subjectively believed that the BLIPS program was an illegal tax shelter.

b. Petitioners contend (Pet. 13-20) that the decision below conflicts with decisions of the Fourth, Seventh, Ninth, and Eleventh Circuits holding that objective uncertainty in the tax law precludes a finding of willfulness.[2] That conflict is more apparent than real, and

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[2] Petitioners contend (Pet. 14) that the purported conflict arose as a result of this Court's decision in *James* v. *United States*, 366 U.S. 213 (1966), in which the Court reviewed a conviction for failing to report income from embezzled funds. In an earlier decision, *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), the Court had held that embezzled money does not constitute income to the embezzler. In *James*, the Court overruled *Wilcox* but nonetheless reversed the conviction. Petitioners are

none of the cases cited by petitioners precludes the conviction of a defendant who is aware of a legal duty and who voluntarily and intentionally violates it.

In *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974), the defendant was a member of an Indian tribe and she had been advised by the Bureau of Indian Affairs that income derived from her property located on an Indian reservation was not taxable. She nevertheless was charged with failing to report income derived from that property on her federal income tax returns. *Id.* at 1160-1161. Although the court stated that the defendant's "obligation to pay [was] so problematical that [her] actual intent [was] irrelevant," *id.* at 1162, it was clear that the defendant, unlike petitioners, subjectively believed that her income was not taxable based on the advice that she had received from the Bureau of Indian Affairs. *Id.* at 1161 (noting the "undisputed" record that the "local superintendent of the Bureau of Indian Affairs" advised the defendant "that she was not taxable for rental income from her possessory interest in [Eastern Cherokee] band property").

The decision in *United States* v. *Heller*, 830 F.2d 150 (11th Cir. 1987), also provides no support for petitioners'

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correct that no position commanded a majority in *James*, but only three Justices took the position that ambiguity in the tax laws requires dismissal of criminal tax charges, even if the defendant subjectively believed that his conduct was unlawful. *James*, 366 U.S. at 221-222 (plurality opinion). This Court has subsequently characterized *James* as holding simply that "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer has relied in good faith on a prior decision of this Court." *United States* v. *Bishop*, 412 U.S. 346, 361 (1973). That holding does not bear on this case, because the jury reasonably concluded that petitioners subjectively believed their conduct to be unlawful, and no prior decision of this (or any other) Court validated their conduct.

position. In *Heller*, the Eleventh Circuit vacated the defendant's conviction for tax evasion, because the defendant claimed to have used a particular accounting method—"case-closed" accounting—that had been held lawful in a Tax Court decision. *Id.* at 154. The Eleventh Circuit held that the jury should have been instructed that, if the defendant had in fact used case-closed accounting, he had not acted with the requisite willfulness. *Id.* at 155. But *Heller* proceeded on the assumption that the defendant potentially had acted in good-faith reliance on legal authority. *Id.* at 154-155. Here, petitioners can make no such claim, and they point to no authority purporting to uphold BLIPS. To the contrary, as the jury reasonably concluded, petitioners subjectively believed their conduct to be unlawful. *Heller* did not hold that a defendant who correctly believes his conduct to be unlawful can escape liability by claiming that the relevant tax law was ambiguous.

The other cases on which petitioners rely (Pet. 16-17), although they contain language stating that a defendant does not act willfully when the underlying tax law is objectively unclear, also held that the tax obligations in those cases were so unclear as to be unconstitutionally vague in violation of the Fifth Amendment. In *United States* v. *Mallas*, 762 F.2d 361 (1985), the Fourth Circuit reversed the defendants' convictions for tax evasion in a case where Treasury regulations did not clearly resolve the highly technical tax liability question at issue. *Id.* at 363. The court explained that both the government and the defendant had advanced plausible interpretations of whether the claimed deductions were allowable, *id.* at 364, and concluded that the defendants

therefore lacked "fair warning" that their conduct was unlawful, *id*. at 364-365.[3]

And in *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), cert. denied, 466 U.S. 980 (1984), the Ninth Circuit concluded that the convictions of several defendants who had promoted the use of foreign trusts as a means of sheltering income could not withstand a sufficiency challenge because "the legality of the tax shelter program * * * was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." *Id*. at 1425-1428. The Ninth Circuit later clarified that *Dahlstrom*'s holding was based on the premise that the "unsettled nature" of the tax shelter scheme denied the defendants "fair notice" under the Fifth Amendment that their conduct was unlawful, as well as made it "impossible for the defendants to have a specific intent to 'willfully' violate" federal tax law. *United States* v. *Solomon*, 825 F.2d 1292, 1297 (1987), cert. denied, 484 U.S. 1046 (1988). The Ninth Circuit now treats the "willfulness" inquiry as coextensive with the due process vagueness inquiry. See *United States* v. *George*, 420 F.3d 991, 995 (2005) (citing the willfulness standard and then stating: "Without sufficient clarity in the law, taxpayers lack the 'fair notice' demanded by due process so that they may conform their conduct to the law").[4]

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[3] Similarly, in *United States* v. *Harris*, 942 F.2d 1125 (1991), the Seventh Circuit held that the defendants had "no fair warning" that failing to report as income money given to them by a wealthy widower, which they believed to be a gift, would subject them to criminal liability. *Id*. at 1127-1128. The Seventh Circuit specifically stated that its rule was "based on the Constitution's requirement of due process." *Id*. at 1131.

[4] Petitioners note (Pet. 14) that the government filed a petition for a writ of certiorari in *Dahlstrom* seeking resolution of "[w]hether, in a

The due process holdings of those cases demonstrate that they do not present a true conflict with the court of appeals' decision in this case. None of the cases cited by petitioners rests purely on a holding that ambiguity in the law precludes a statutory finding of willfulness, and given the court of appeals' acknowledgment that ambiguity in the tax law would be relevant "insofar as it bears on constitutional vagueness," there is no reason to believe that any of those other cases would have been decided differently in the Second Circuit. Pet. App. 5a-6a. Petitioners have never contended that the economic substance doctrine is so vague that their convictions amount to a due process violation, and the conflict that petitioners identify is therefore more apparent than real. This Court's intervention is not warranted.

c. Even if there were a conflict among the courts of appeals on the question of whether objective uncertainty in the tax law precludes a jury from finding that a defendant acted willfully in evading taxes, this case presents a poor vehicle to resolve that conflict because the parameters of the economic substance doctrine were not objectively unknowable to petitioners. Moreover, petitioners have not demonstrated that the loan-premium transactions had economic substance under any test.

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prosecution of promoters of an unlawful 'tax shelter' program, the absence of a prior statute, regulation, or court decision directly establishing the illegality of the scheme precludes a finding of willfulness as a matter of law." Pet. at I, *Dahlstrom*, *supra* (No. 83-1297). This Court denied the petition, 466 U.S. 980 (1984), and subsequent decisions have made clear that the Ninth Circuit considers ambiguity relevant only to the extent that it renders the law unconstitutionally vague. Petitioners do not contend that the circuits remain in conflict on the specific question presented in *Dahlstrom*.

It is well-settled that a financial transaction may be disregarded for tax purposes if it lacks "economic substance." See, *e.g.*, *Nebraska Dep't of Revenue* v. *Loewenstein*, 513 U.S. 123, 133-134 (1994); *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 576-580 (1978); *Lee* v. *Commissioner*, 155 F.3d 584, 586 (2d Cir. 1998); *James* v. *Commissioner*, 899 F.2d 905, 908 (10th Cir. 1990); *Kirchman* v. *Commissioner*, 862 F.2d 1486, 1492 (11th Cir. 1989). The test that is widely used among the courts of appeals to determine whether a transaction lacks economic substance asks (1) whether the taxpayer was motivated by a business purpose other than obtaining income tax benefits, and (2) whether there is a reasonable possibility that the transaction would result in a profit. *Rice's Toyota World, Inc.* v. *Commissioner*, 752 F.2d 89, 91 (4th Cir. 1985); see also *ACM P'ship* v. *Commissioner*, 157 F.3d 231, 247 (3d Cir. 1998), cert. denied, 526 U.S. 1017 (1999); *Casebeer* v. *Commissioner*, 909 F.2d 1360, 1363 (9th Cir. 1990). Petitioners repeatedly endorsed that formulation of the economic substance doctrine in pretrial filings. Gov't C.A. Br. 70, 113-114.

Furthermore, the opinion letters that were produced and marketed as part of the BLIPS scheme demonstrate that the economic substance doctrine was well-defined and objectively knowable at the time of petitioners' conduct. The opinion letters discussed the relevant case law and concluded that there had to be a "reasonable possibility of profit" for the transaction to have economic substance. Gov't C.A. Br. 112. Ruble's opinion letters framed the key economic substance question as whether the taxpayer has "a *reasonable possibility* of economically benefitting from the transaction without regard to tax benefits," *id.* at 81, and the KPMG opinion

letter states that "the case law applying the business purpose/economic substance doctrine *consistently*" requires "a *reasonable potential* for making a pre-tax profit," *ibid*.

Although petitioners evidently had a clear understanding of what the economic substance doctrine required in the opinion letters and during pretrial proceedings, petitioners later requested a jury instruction stating that a financial transaction lacks economic substance if it involves "no possibility" of making a profit. Gov't C.A. Br. 66-67; Pet. 8. Petitioners now change their formulation again, contending that the economic substance of BLIPS was reasonably debatable because some courts require only that the transaction have "any practical economic effects other than the creation of income tax losses." Pet. 24 (citation omitted).

Petitioners fail to explain, however, how their proposed any-practical-economic-effects test is functionally different from the reasonable-possibility-of-profit test articulated in their opinion letters and by the court of appeals. Nor do petitioners explain how the BLIPS program—in which the participating banks would not permit any of the loan funds to leave the banks' control, and the transactions were not even designed to make a profit, see pp. 3-6, *supra*—had "any practical economic effect" other than to create tax losses for BLIPS' clients. Petitioners thus have not established that the loan-premium transactions at issue had economic substance under the test that they currently espouse.

Petitioners have therefore failed to show how the asserted ambiguity in the law even conceivably affected the lawfulness of petitioners' conduct: there is no reason to believe that their conduct may have been lawful under any legal standard for the economic substance

doctrine. This case therefore does not present a suitable occasion for addressing the relevance of ambiguity in the underlying tax law when the jury expressly finds that the defendant acted willfully.

d. Petitioners' further contention (Pet. 20-21) that the decision below conflicts with this Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007) (*Safeco*), is without merit. In *Safeco*, the Court addressed a provision of the Fair Credit Reporting Act, 15 U.S.C. 1681n(a), that imposes civil liability on anyone who "willfully" fails to provide notice of certain adverse actions to consumers. The *Safeco* Court held that the provision applies to conduct undertaken in reckless disregard of the statutory notice requirement. 551 U.S. at 56-57. In reaching that conclusion, the Court explained that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Id.* at 57.

This Court was careful to explain in *Safeco* that its discussion of willfulness, a word "whose construction is often dependent on the context in which it appears," 551 U.S. at 57 (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)), pertained only to liability under the Fair Credit Reporting Act, *id.* at 58. The Court's statement in a footnote that evidence of subjective bad faith cannot support a finding of willfulness if the defendant's reading of a statute is objectively reasonable, *id.* at 70 n.20, was informed by the Court's conclusion that "in the sphere of civil liability," recklessness entails "conduct violating an objective standard," *id.* at 68. The willfulness standard applied in *Safeco* is far different from the willfulness standard applicable to criminal tax evasion,

where "willfulness" is "the voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201.

2. Petitioners further contend (Pet. 27-30) that they could not be convicted under the federal tax evasion statute, 26 U.S.C. 7201, for helping others to evade their taxes, because that statute applies only to "acts of evasion committed by people actually involved in the filing and/or payment of the tax." Pet. 30. But as the court of appeals recognized, the text of the statute admits of no such limitation. Pet. App. 6a-7a. Section 7201 provides that "*[a]ny person* who willfully attempts *in any manner* to evade or defeat *any tax* * * * [is] guilty of a felony" (emphases added). The statute is thus drafted broadly to reach "any conduct, the likely effect of which would be to mislead or to conceal" any tax liability. *Spies* v. *United States*, 317 U.S. 492, 499 (1943). As this Court explained in *Spies*, "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation." *Ibid*. The court of appeals correctly declined to "constrict the scope" of Section 7201, which provides that tax evasion "may be accomplished 'in any manner.'" *Ibid*.

Petitioners do not cite any authority interpreting Section 7201 to apply only to a defendant's evasion of his own tax liabilities. To the contrary, as the court of appeals noted, "those cases that have considered [Section] 7201's scope have rather expressed it expansively." Pet. App. 7a; see, *e.g.*, *United States* v. *Townsend*, 31 F.3d 262, 267 (5th Cir. 1994) ("[Section] 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of any-

one."), cert. denied, 513 U.S. 1100 (1995); *Tinkoff* v. *United States*, 86 F.2d 868, 876 (7th Cir. 1936) ("Nor is it any defect that the tax attempted to be evaded was that of another. The statute is so framed as to make liable any person who attempts willfully and unlawfully to evade the tax of himself or of any other person."), cert. denied, 301 U.S. 689 (1937).

Petitioners claim that, because they were not "actually involved in the filing and/or payment of the tax," their conduct was too remote from the falsification of those returns to render them liable for tax evasion. Pet. 30. As a legal matter, it does not matter for purposes of Section 7201 whether petitioners participated in the preparation of the actual returns at issue, so long as they attempted "in any manner to evade or defeat any tax." 26 U.S.C. 7201; see, *e.g.*, *United States* v. *Doughty*, 460 F.2d 1360, 1362 (7th Cir. 1972) ("It was unnecessary for defendant's conviction of aiding and abetting that the government prove he helped prepare and file the false return. It was sufficient that he participated in the commission of the offense."); *United States* v. *Frazier*, 365 F.2d 316, 318 (6th Cir. 1966) ("[I]t was not necessary for the Government to prove that [the defendant] had anything to do with the actual preparation or filing of the income tax returns."), cert. denied, 386 U.S. 971 (1967).

As a factual matter, there was sufficient evidence introduced at trial that petitioners had assisted BLIPS' clients in evading their tax liabilities. Although petitioners did not have direct contact with BLIPS' clients, the jury reasonably concluded that their conduct was in no way remote from their tax evasion: petitioners participated in designing and marketing BLIPS, procuring the cooperation of the banks involved, charging the clients fees for participation in BLIPS, implementing the

BLIPS transactions by creating and terminating the LLCs and contracts used in the scheme, conducting the forward currency investments, and generating the loss reported by BLIPS clients on their tax returns. Petitioners' conduct was critical to the ability of Presidio and BLIPS' clients to generate nonexistent tax losses in order to evade offsetting tax liabilities.

Finally, petitioners fail to address the alternative theory submitted to the jury that they aided and abetted in the preparation of the clients' false returns under 18 U.S.C. 2. See Gov't C.A. Br. 146. The district court instructed the jury that it could find petitioners guilty as aiders and abettors if it found that (i) the taxpayer at issue had committed at least one act that would have been an affirmative act of evasion if he had acted with the willful intent to evade taxes and (ii) petitioners were a cause in fact of the taxpayer's actions or played a substantial part in bringing about or causing the taxpayer to file a false return. *Id.* at 155-156. Petitioners do not challenge those instructions before this Court.

Even assuming (incorrectly) that Section 7201 were limited to "acts of evasion committed by people actually involved in the filing and/or payment of the tax," Pet. 30, and that petitioners did not qualify under that test (despite their creation, design, and marketing of BLIPS to the taxpayers, see Gov't C.A. Br. 3-12, 150-151), any rational jury that found guilt under the government's theory of liability would also have found aiding and abetting liability. "One purpose of 18 U.S.C. § 2 is to enlarge the scope of criminal liability under existing substantive criminal laws so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress." *United*

States v. *Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); see Gov't C.A. Br. 156-157. That description would cover petitioners even under their own theory of the case. Accordingly, because any rational jury that convicted petitioners would necessarily have found that petitioners played a substantial role in causing BLIPS' clients to commit affirmative acts of evasion by filing false returns, the claimed error on the scope of Section 7201 is harmless beyond a reasonable doubt. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010) (alternative theory error is subject to harmless-error analysis).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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