No. 12-1051

# In the Supreme Court of the United States

WALTER C. ANDERSON, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
KATHRYN KENEALLY
*Assistant Attorney General*
ROBERT W. METZLER
BETHANY B. HAUSER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether an alternative holding in support of a prior judgment may have issue-preclusive effect in a later proceeding when the prior judgment was independently supported by another holding.

2. Whether this Court's decision in *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012), overturned the body of prior decisions holding that a conviction for tax evasion under 26 U.S.C. 7201 may estop the taxpayer from denying tax fraud, for purposes of the civil fraud penalty imposed by 26 U.S.C. 6663, in a subsequent civil suit.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 698 F.3d 160. The order of the Tax Court addressing cross-motions for summary judgment (Pet. App. 16a-33a) is unreported. An earlier opinion of the Tax Court granting the Commissioner's motion for partial summary judgment in relevant part (Pet. App. 35a-91a) is unreported but is available at 2009 WL 454182.

## JURISDICTION

The judgment of the court of appeals was entered on September 7, 2012. A petition for rehearing was denied on December 6, 2012 (Pet. App. 92a-93a). The petition for a writ of certiorari was filed on February 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In September 2005, a superseding indictment charged petitioner with federal tax evasion, in violation of 26 U.S.C. 7201, for tax years 1995 through 1999; with fraud in the first degree, in violation of D.C. Code § 22-3221(a), for those same years; and with fraud in the evasion of the D.C. use taxes between 1997 and 2001. Pet. App. 2a, 14a n.1. Pursuant to a plea agreement, petitioner pleaded guilty to federal tax evasion for 1998 and 1999 and to fraud in the first degree under D.C. law for 1999, and the other charges were dismissed. *Id.* at 3a, 14a n.1. The tax-evasion charges for 1998 and 1999 stemmed from the government's allegations that petitioner had failed to recognize on his tax returns more than $364 million in income from Gold & Appel Transfer S.A. (G & A)—a British Virgin Islands corporation controlled by petitioner—as well as $575,559 in income from other specified sources. *Id.* at 2a, 25a, 41a-43a.

During the plea colloquy, petitioner's attorney stated that petitioner did not "concede that every fact contained within the indictment is accurate," but that petitioner did "admit[] that over the years [at issue] he retained control over the assets and was required under U.S. law to pay taxes on the gains from those assets." Pet. App. 26a, 47a (emphasis omitted). Counsel also stated that petitioner "admits that he willfully failed to include on his tax returns and to pay a large part of the taxes due and owing by him to the United States for the tax years 1998 and 1999." *Id.* at 26a. Counsel further explained that petitioner "concede[d] that for purposes of computing his sentencing guideline range, the government could prove that the total tax loss was in excess of $100 million." *Id.* at 47a. Petitioner personally con-

firmed that he agreed with his attorney's statements. *Id.* at 47a-48a.

In June 2007, the district court entered judgment reflecting a sentence of 108 months of imprisonment on the federal tax-evasion charges, a concurrent sentence of 48 months on the D.C. fraud charge, and an obligation to pay $22.8 million in restitution to the District of Columbia. Pet. App. 3a; *United States* v. *Anderson*, 545 F.3d 1072, 1075 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 2445 (2009). Petitioner challenged the 108-month term of imprisonment on appeal, contending, as relevant here, that it reflected an unreasonable upward departure from the applicable guidelines range. See *Anderson*, 545 F.3d at 1076-1077. Noting that the district court had characterized petitioner as possibly "the largest tax evader in the history of the country," *id.* at 1077 n.5, the D.C. Circuit affirmed the sentence in light of "the magnitude of [petitioner's] crimes and the need for deterrence." *Id.* at 1077.

2. In July 2007, the Internal Revenue Service (IRS) issued a notice of deficiency to petitioner, determining civil tax deficiencies and fraud penalties for the tax years 1995 through 1999. Pet. App. 3a. The total asserted deficiency was $184 million. *Ibid.* Under 26 U.S.C. 6663(a), the corresponding civil fraud penalty would be equal to 75% of the deficiency, or $138 million for all five years. Pet. App. 3a, 14a n.2.

In February 2009, the Tax Court granted partial summary judgment for the Commissioner and denied petitioner's motion for summary judgment. Pet. App. 34a. In its accompanying opinion, *id.* at 35a-91a, the court explained in relevant part that petitioner's criminal conviction for tax evasion for 1998 and 1999 precluded him from contesting in the civil-fraud proceeding that

he had tax underpayments for those two years that were "due to fraud" (26 U.S.C. 6663(a)).[1] Pet. App. 66a-77a. As an initial matter, the court cited several Tax Court and court of appeals decisions holding that a "taxpayer is collaterally estopped from denying civil tax fraud under section [6663] * * * when convicted for criminal tax evasion under section 7201 for the same taxable year." *Id.* at 68a (citation omitted); see *id.* at 87a-88a n.24.

The Tax Court also rejected five arguments that petitioner had made against the application of collateral estoppel. Pet. App. 69a-75a. It recognized, *inter alia*, that at his plea hearing petitioner had "allocute[d]" to specific facts, including the government's ability to prove a tax loss of more than $100 million. *Id.* at 71a. Although it found that petitioner was estopped from contesting the fraud aspect of the case for 1998 and 1999, the court noted that "the issue of the *amounts* of the deficiencies of tax and penalties in 1998 and 1999 remains for trial," *id.* at 77a, and it further found that collateral estoppel was inapplicable to the claims related to 1995, 1996, and 1997, *id.* at 77a-80a.

After that decision, the Commissioner conceded all tax and penalty issues associated with 1995, 1996, and 1997, explaining that its concession would streamline the case while still allowing the IRS to pursue 80% of the total deficiency and penalties for the five-year period. Pet. App. 4a, 16a-17a. While reserving the question whether G & A's income was attributable to petitioner (see *id.* at 17a), the parties stipulated that G & A had income for 1998 in the amount of $126,350,693.32, and

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[1] The ability to establish fraud was also relevant to extending the statute of limitations on the assessment of a deficiency against petitioner. See Pet. App. 66a-67a; 26 U.S.C. 6501(c)(1).

income for 1999 in the amount of $238,558,402.11 (*id.* at 26a). The parties also stipulated that petitioner had unreported income from Esprit Telecom in the amount of $400,629 for 1999, and unreported interest income from Barclay's Bank in the amounts of $24,760 for 1998 and $16,822 for 1999. *Id.* at 17a. The parties then filed cross-motions for summary judgment or partial summary judgment. *Id.* at 17a-18a, 21a-22a.

In October 2010, the Tax Court denied petitioner's motion for summary judgment and granted in part the Commissioner's motion for partial summary judgment. Pet. App. 16a-33a. The court rejected petitioner's contention that the Commissioner's concessions about 1995, 1996, and 1997 precluded the government from proving its materially similar civil-fraud claims about 1998 and 1999. *Id.* at 17a-21a. The court further held that petitioner was collaterally estopped from disputing that G & A's income for 1998 and 1999 was taxable to him. *Id.* at 22a-26a. It explained that, in accepting petitioner's guilty plea, the district court had necessarily found that petitioner had understated his income for those two years, and that the accompanying stipulation to a loss of at least $100 million meant that the "substantial understatement of income was[,] at least in large part, attributable to unreported income from [G & A]," because the other omissions from income were far too small to account for such a large loss. *Id.* at 24a-25a. The Tax Court added that petitioner's statements at his plea hearing—which conceded his willful failure to pay a large part of the taxes he owed in 1998 and 1999—also precluded him from arguing that G & A's income was not taxable to him. *Id.* at 25a-26a. Because the parties had stipulated to the amounts of that income for those

two years, the only issue remaining for trial was "the character" of that income. *Id.* at 26a.[2]

The parties subsequently stipulated that the total tax deficiency for 1998 was $50,022,418, and that the total tax deficiency for 1999 was $91,475,355. On March 7, 2011, the Tax Court entered its final order imposing fraud penalties. C.A. App. A-74.

3. On appeal, petitioner contended, as relevant here, that the Tax Court had erred in finding that he was collaterally estopped from denying that the G & A income was taxable to him. Pet. C.A. Br. 9-17; Pet. C.A. Reply Br. 3-9. After briefing in the court of appeals had been completed, but before oral argument was held, this Court decided *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012). The Court in *Kawashima* resolved a question about the definition of an "aggravated felony" for purposes of immigration law, but its opinion included a discussion about "the elements of tax evasion pursuant to [26 U.S.C.] 7201." *Id.* at 1175.

The court of appeals requested supplemental memoranda about "the effect, if any, of the decision" in *Kawashima* "on the issues in this case." 11-1704 Docket entry (3d Cir. Mar. 14, 2012). In his supplemental memorandum, petitioner contended that *Kawashima* "suggests that [previously] 'settled law'" about the collateral-estoppel effect of a tax-evasion conviction "may be flawed" because "a conviction under §7201 does not *necessarily* involve fraud." Pet. C.A. Supp. Mem. 2.

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[2] That issue remained for trial because the Tax Court rejected the Commissioner's contention that petitioner was collaterally estopped from arguing that the stipulated amounts of G & A income were taxable to him, not under Subpart F of the Tax Code (as the Commissioner contended), but under some other theory of taxation. Pet. App. 26a-32a.

Accordingly, he urged the court of appeals to "conclude that the doctrine of collateral estoppel should not have been used by the Tax Court to establish civil tax fraud in this case." *Ibid.* The Commissioner's supplemental memorandum explained that petitioner had waived any challenge to the estoppel rule itself in his briefs, even though the question had not previously been resolved in the Third Circuit. Comm'r C.A. Supp. Mem. 4-6. The Commissioner further argued that the estoppel rule is correct, that "*Kawashima* did not disapprove of the estoppel cases, and [that *Kawashima*'s] reasoning does not undermine their rationale, at least not with respect to evasion-of-*assessment* cases." *Id.* at 6, 10.

4. The court of appeals affirmed. Pet. App. 1a-15a. Without mentioning *Kawashima*, the court "agree[d] with the numerous courts that have held that, under the doctrine of collateral estoppel, a conviction for criminal tax evasion conclusively establishes the defendant's civil liability for tax fraud for the same year." *Id.* at 6a. It further explained that petitioner had "admitted in his [guilty] plea that the income of G & A was taxable to him in 1998 and 1999," *id.* at 7a, and that the government "could not have secured his conviction without establishing the taxability of this income," *id.* at 8a. As a result, the court held that petitioner's conviction "did hinge on [the] issue" of the taxability to him of G & A's income. *Ibid.*

The court of appeals observed that its conclusion was "not affected by the fact that [petitioner] was also charged with failing to report income from other sources in 1998 and 1999 * * * the taxability of which could also have substantiated his conviction." Pet. App. 8a. The court explained that it had previously recognized that "all 'independently sufficient alternative findings

should be given preclusive effect.'" *Ibid.* (quoting *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006), cert. denied, 549 U.S. 1305 (2007)). The court further concluded that it was "settled for purposes of this case" that the G & A income was "under Subpart F of the Tax Code," because the large amounts of tax to which the parties had stipulated "would not support [petitioner's] alternate theory that the [G & A] income was capital gains" (that would have been taxable at a lower rate). *Id.* at 8a-9a.[3]

**ARGUMENT**

1. With respect to the first question presented, petitioner contends (Pet. 4-9) that the court of appeals erred in giving issue-preclusive effect to an alternative holding in a prior judgment when the relevant issue was actually litigated and decided but the underlying judgment could have been independently supported by another holding.[4] The approach taken by the court below was entirely reasonable in the context of this case and does not directly conflict with any decision of another court of appeals. Further review of this question is not warranted.

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[3] The court of appeals further found that the Commissioner's previous decision to "concede[] all tax deficiency and penalty issues for 1995, 1996, and 1997" did not preclude the government from proving fraud with respect to 1998 and 1999. Pet. App. 9a. Petitioner does not contest that aspect of the decision below.

[4] Petitioner did not press this argument in the court of appeals—not even in his petition for rehearing en banc, which contended only that the panel decision was contrary to *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012). Nevertheless, because the court of appeals addressed the applicable preclusion principles *sua sponte*, this Court would have discretion to decide the question presented if it believed that the issue otherwise warranted its review. See, *e.g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

a. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). That doctrine protects parties "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action." *Id.* at 153-154. Here, the court of appeals concluded that the judgment against petitioner in his criminal tax-evasion case actually and necessarily depended on a finding that large amounts of income to G & A were taxable to petitioner (and yet went unreported on his tax returns for 1998 and 1999). Pet. App. 8a-9a.

Of principal relevance here, the court of appeals further noted that its conclusion was "not affected by the fact that [petitioner] was also charged with failing to report income from other sources in 1998 and 1999," "the taxability of which could also have substantiated his conviction." Pet. App. 8a. The court invoked circuit precedent (*ibid.*), which had "follow[ed] the traditional view that independently sufficient alternative findings should be given preclusive effect," at least "in the context of alternative holdings that have been actually litigated and decided." *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006), cert. denied, 549 U.S. 1305 (2007).

Petitioner suggests (Pet. 5-6) that the court of appeals' traditional view has been superseded by a change between the Restatement (First) and Restatement (Second) of Judgments. There is, however, no direct conflict in the courts of appeals, which have not generally adopted a rigid rule contrary to the decision below. As

petitioner acknowledges (Pet. 6), the Second, Seventh, Ninth, and Eleventh Circuits have taken the same general position as the Third Circuit. See *Magnus Elecs., Inc.* v. *La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987); *Deweese* v. *Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-1177 (9th Cir. 1981). The Fifth and District of Columbia Circuits have also recognized that giving preclusive effect to alternative holdings may sometimes be appropriate. See *Yamaha Corp. of Am.* v. *United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993); *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981). And, as petitioner acknowledges, the Fourth Circuit has similarly "given preclusive effect to alternative findings that were fully litigated." Pet. 6 n.1; compare *Tuttle* v. *Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (declining to preclude relitigation of an issue resolved in the alternative), cert. dismissed, 529 U.S. 1050 (2000), with *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 993-994 (4th Cir.) (noting "general rule" that alternative findings are not given preclusive effect but precluding relitigation based on an alternative finding), cert. denied, 484 U.S. 913 (1987).

The remaining decisions that petitioner cites do not take a clearly inconsistent view. In *Comair Rotron, Inc.* v. *Nippon Densan Corp.*, 49 F.3d 1535 (Fed. Cir. 1995), the court did not adopt a general rule against issue preclusion based on alternative holdings, but merely held that the availability of issue preclusion would depend on the facts of the case. *Id.* at 1539. As the concurring opinion in *Comair* explained, the alternative finding at issue had not been fully litigated in the previous case,

which would provide an independent basis for denying it preclusive effect. *Id.* at 1539-1540 (Rader, J., concurring). Although the Tenth Circuit in *Turney* v. *O'Toole*, 898 F.2d 1470, 1472 n.1 (1990), declined to preclude relitigation of an issue based on the alternative holdings before it, the court did not analyze competing doctrines or announce a rule that such holdings may never support issue preclusion. The same is true for *National Satellite Sports, Inc.* v. *Eliadis, Inc.*, 253 F.3d 900 (6th Cir. 2001), cert. denied, 534 U.S. 1156 (2002), in which the court precluded relitigation of the "primary" alternative ground for decision but not the "secondary" alternative ground—and did so without elevating that distinction to a doctrinal rule. *Id.* at 910.

In short, although courts of appeals have sometimes declined to give preclusive effect to an alternative holding in a prior decision, none has applied a categorical rule that collateral estoppel never applies in any circumstance involving an alternative holding. There is accordingly little reason to believe that this Court could successfully impose the "unity" petitioner seeks (Pet. 4) by granting his petition for a writ of certiorari.

b. The policy reasons that petitioner invokes do not suggest that he deserves to prevail under his own preferred rule (or under his fallback position). Petitioner contends (Pet. 8-9) that, although the opposing rules that he associates with the First and Second Restatements each "have their own particular strengths and weaknesses," it is ultimately "better" to deny preclusive effect to alternative findings, "especially in cases where there is no incentive to appeal." As a fallback, petitioner suggests (Pet. 9) that a party should be permitted to object to issue preclusion on the ground that "an injustice will result if it is applied." In this case, however,

there is no basis for concluding that petitioner lacked an incentive to appeal the prior judgment, and no reason to think that applying collateral estoppel will result in any injustice.

Petitioner implies (Pet. 8) that he had "no incentive to appeal his conviction" because it could have been sustained on appeal on other grounds. But while petitioner did not appeal his criminal conviction (which resulted from his guilty plea), he did appeal his sentence. See *United States* v. *Anderson*, 545 F.3d 1072, 1075 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 2445 (2009). In pursuing that challenge, petitioner had every incentive in the first proceeding to dispute the amount of the tax loss associated with his offense.

Indeed, the district court in the criminal case noted that the size of the tax loss—which was due almost entirely to G & A's income[5]—was "[t]he focus of the testimony throughout the [sentencing] hearing." *United States* v. *Anderson*, 491 F. Supp. 2d 1, 3 (D.D.C. 2007), aff'd in part and rev'd in part, 545 F.3d 1072 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 2445 (2009). The massive tax loss was ultimately the basis for the district court's upward departure and for the court of appeals' affirmance of petitioner's sentence. *Anderson*, 545 F.3d at 1077. Although petitioner's brief on appeal identified "several mitigating factors" that purportedly would have justified a reduced sentence, petitioner did not dispute that he was accountable for G & A's income. *Ibid.*

Contrary to petitioner's suggestion (Pet. 8), the preclusion analysis in his civil fraud case did not simply focus on the fact of his prior conviction. Rather, the

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[5] G & A's income accounted for more than 99.8% of the unreported income alleged in the indictment for the tax years of conviction (1998 and 1999). Pet. App. 41a-43a.

courts below focused on the size of the tax loss, which was a necessary basis for the sentence component of the prior judgment against him because "[t]he other omissions of income alleged in the indictment"—the ones that petitioner suggests would have been sufficient to support his conviction—were plainly "insufficient" to account for the tax loss in excess of $100 million to which petitioner stipulated for sentencing purposes. Pet. App. 24a-25a; see *id.* at 7a (finding the tax-evasion charges against petitioner "comprehensible only to the extent that" large amounts of G & A's income were "taxable to him in those years").[6] There is accordingly no basis for concluding that "an injustice will result" (Pet. 9) if the G & A component of the criminal judgment is given preclusive effect in the civil fraud case.

2. With respect to the second question presented, petitioner contends (Pet. 9-17) that the court of appeals erred in holding that his conviction for tax evasion precluded him from disputing fraud in this civil tax-fraud

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[6] This is not to say that the actual amount of the loss in the first case had preclusive effect, and the courts below did not conclude that it did. Petitioner asserts (Pet. 8) that the court of appeals believed it was "necessary or essential to [p]etitioner's conviction * * * that *all* of the income of G & A was taxable to him in" 1998 and 1999 (emphasis added). But petitioner conflates two aspects of the court of appeals' analysis. The court of appeals explained that petitioner's conviction sufficed only "to establish the existence of *a* tax deficiency" in those years. Pet. App. 8a (emphasis added). His inability to contest what portion of G & A's income was taxable to him resulted not from his conviction, but from "the parties' subsequent stipulation of the nature and composition of G & A's income." *Id.* at 9a. The Tax Court's opinions also demonstrate that petitioner's conviction precluded him only from contesting that there was *some* underpayment due to fraud, as it held that "the *amounts* of the deficiencies" remained an issue for trial until the parties stipulated to those amounts. *Id.* at 26a, 77a.

proceeding. Petitioner further contends that this aspect of the decision below conflicts with the Court's decision in *Kawashima* v. *Holder*, 132 S. Ct. 1166 (2012). Petitioner does not allege any disagreement in the courts of appeals, and no circuit court has yet discussed *Kawashima*'s effect on the preclusion issue presented here. And, properly understood, *Kawashima* does not cast doubt on the correctness of the court of appeals' decision in this case. Further review on this question is not warranted.

a. In the court of appeals, the parties filed supplemental memoranda before oral argument to address the potential effect of *Kawashima* on collateral estoppel in the tax-fraud context. The court of appeals' opinion, however, did not address *Kawashima*. Instead, the court simply "agree[d] with the numerous courts" that had held—long before *Kawashima*—that "under the doctrine of collateral estoppel, a conviction for criminal tax evasion conclusively establishes the defendant's civil liability for tax fraud for the same year * * * because the elements of evasion under 26 U.S.C. § 7201 and fraud under 26 U.S.C. § 6663 are identical." Pet. App. 6a-7a (citing decisions from four other circuits, dating from 1966 to 1993).

In that regard, the decision below is consistent with that of the only other court of appeals that appears to have addressed a similar collateral-estoppel question since *Kawashima* was decided last year. In *Williams* v. *Commissioner*, 498 Fed. Appx. 284 (4th Cir. 2012), the court applied pre-*Kawashima* circuit precedent in holding that "[a] taxpayer is collaterally estopped from denying civil tax fraud when convicted for criminal tax evasion under 26 U.S.C. § 7201 for the same taxable year." *Id.* at 288-289. Although the government had

discussed *Kawashima* in a pre-argument letter in that case (see 11-1804 Docket entry No. 32 (4th Cir. Apr. 25, 2012)), the court apparently found it unnecessary to explain why *Kawashima* had not altered that settled understanding.

b. Contrary to petitioner's contention (Pet. 9-17), *Kawashima* did not alter the well-established principle that a tax-evasion conviction will preclude a taxpayer from contesting an underpayment due to fraud in a subsequent civil tax-fraud proceeding.

The Court in *Kawashima* held, in the immigration context, that a tax offense other than tax evasion can be an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), even though tax evasion is specifically mentioned in the adjacent provision, 8 U.S.C. 1101(a)(43)(M)(ii). See 132 S. Ct. at 1173-1176. In the course of its statutory-construction analysis, the Court considered and rejected the *Kawashima* petitioners' invocation of the presumption against superfluities, finding that "Congress specifically included tax evasion offenses * * * to remove any doubt that tax evasion qualifies as an aggravated felony." *Id.* at 1174. The Court did not think that Congress's "specific mention" of Section 7201 "impliedly limits the scope of [the] plain language" of the adjacent provision's reference to any offense that "'involves fraud or deceit.'" *Ibid.* (quoting 8 U.S.C. 1101(a)(43)(M)(i)). The Court noted that Congress had some reasons "to doubt that a conviction under § 7201" "necessarily entails fraud or deceit." *Ibid.* In particular, the Court explained that in *United States* v. *Scharton*, 285 U.S. 518 (1932), it had declined to apply an extended statute of limitations for offenses involving fraud to a tax-evasion case. *Kawashima*, 132 S. Ct. at 1174-1175. The Court also noted that Section 7201 "includes two offens-

es"—one involving evasion of tax *assessment*, and one involving evasion of tax *payment*—and observed that it is at least theoretically "possible to" commit the latter form of the offense "without making any misrepresentation," by "fil[ing] a truthful tax return" and taking "steps to evade payment." *Id.* at 1175. The Court therefore concluded that Congress's mention of Section 7201 was simply "intended to ensure that tax evasion * * * was a deportable offense." *Ibid.*

The *Kawashima* Court gave no indication that it meant to upset collateral-estoppel law in the tax context simply by stating that Section 7201 does not "*necessarily* involve fraud or deceit" because evasion-of-payment offenses could in theory be committed without the use of misrepresentations. 132 S. Ct. at 1175. To the contrary, the Court expressly acknowledged the "body of law providing that a conviction for tax evasion under § 7201 collaterally estops the convicted taxpayer from contesting a civil penalty under 26 U.S.C. § 6663(b)." *Id.* at 1174. The parties in *Kawashima* did not argue, and the Court did not suggest, that those decisions were of doubtful validity. To the contrary, the petitioners in *Kawashima* affirmatively invoked that body of law—albeit for reasons that the Court found unpersuasive in the context of its statutory-construction analysis. *Ibid.* And the government had acknowledged the "well-established body of case law" providing that "a prior conviction under Section 7201 establishes in a civil suit that there has been an underpayment due to fraud," Resp. Br. at 30, *Kawashima*, *supra* (No. 10-577).

c. The substance of *Kawashima*'s analysis should not alter the preclusive effect of tax-evasion convictions like petitioner's.

As the Fifth Circuit explained in *Tomlinson* v. *Lefkowitz*, 334 F.2d 262 (1964), cert. denied, 379 U.S. 962 (1965), the criminal tax-evasion statute requires "a specific intent * * * to evade or defeat the payment of income tax," whereas the civil tax-fraud statute requires "a specific purpose to avoid a tax known to be owing." *Id.* at 265 (internal citation, quotation marks, and alterations omitted). In short, "both require a wrongful intent to deprive the Government of taxes owing it." *Ibid.* A person who has been convicted of purposefully or deliberately evading taxes through affirmative acts (producing an underpayment of tax), as required for a tax-evasion conviction under Section 7201, cannot deny that he took those actions, or that in doing so he had the specific intent to evade a tax known or believed to be owing (producing an underpayment of tax), as required for the civil fraud penalty under Section 6663. The continued validity of that analysis has appropriately persuaded several courts of appeals, most recently in this case. Pet. App. 6a-7a; see, *e.g.*, *Blohm* v. *Commissioner*, 994 F.2d 1542, 1554 (11th Cir.1993); *Klein* v. *Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989); *Gray* v. *Commissioner*, 708 F.2d 243, 246 (6th Cir.), cert. denied, 466 U.S. 927 (1983); *Moore* v. *United States*, 360 F.2d 353, 356 (4th Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

Petitioner attempts to discredit *Tomlinson*, *supra*, by arguing that its formulation for criminal willfulness required a "bad purpose or evil motive," Pet. 9-10, which he believes is obsolete in light of this Court's subsequent cases addressing willfulness. But *Tomlinson*'s analysis is equally valid and persuasive under a standard where the relevant "wrongful intent" (334 F.2d at 265) involves a "voluntary, intentional violation of a known legal duty," see *Cheek* v. *United States*, 498 U.S. 192, 201 (1991).

A person who acts with the scienter described in *Cheek* necessarily acts with "a specific purpose to avoid a tax known to be owing." *Tomlinson*, 334 F.2d at 265.

Petitioner also contends (Pet. 11-12) that *Kawashima* "eliminated a major underpinning" for *Tomlinson* by "tak[ing] an expansive view of the [statute-of-limitations] holding" in *Scharton*. But the Court in *Kawashima* did not adopt any view about the extent of *Scharton*. Instead, the Court simply noted that *Scharton*'s reasoning—which had long since been superseded by statute, see 26 U.S.C. 6531(2)—may have given Congress "good reason" to "remove any doubt that tax evasion qualifies as an aggravated felony." 132 S. Ct. at 1174.

Petitioner invokes (Pet. 14) the presumption against superfluities, suggesting that, if tax evasion always entails fraud, then the provision extending the statutes of limitations for assessment and collection "in case of a willful attempt in any manner to defeat or evade tax," 26 U.S.C. 6501(c)(2), would add nothing to the provision that extends those periods for the filing of a "false or fraudulent return with the intent to evade tax," 26 U.S.C. 6501(c)(1). As petitioner acknowledges (Pet. 14), however, the former provision does not apply here because it does not apply to income, estate, or gift taxes. 26 U.S.C. 6501(c)(2) (excluding "tax imposed by subtitle A or B"). Moreover, that provision is not superfluous because one may attempt to evade or defeat tax, even in a case where that attempt involves fraud, without actually filing a false or fraudulent return—especially if the tax being evaded is a stamp tax, which is expressly included in the limitations period at issue, see 26 U.S.C. 6501(a). The counterfeiting of tax stamps could consti-

tute both tax evasion and fraud, even though it would not involve the filing of any false or fraudulent return.

The practical conclusion of *Tomlinson* and its progeny is that, for any set of facts on which the government is able to prove beyond a reasonable doubt that a taxpayer has evaded or defeated a tax within the meaning of 26 U.S.C. 7201, the government will also be able to prove, under the requisite civil standard, that the taxpayer engaged in a course of action amounting to fraud. As the Fourth Circuit has observed, although Sections 6663 and 7201 use different language, "the case-by-case process of construction of the civil and criminal tax provisions has demonstrated that their constituent elements are identical." *Moore*, 360 F.2d at 356. There is consequently "no case * * * where, accepting the truth of the facts leading to conviction for evasion, one could say that there was not sufficient proof for a finding of fraud in the civil case." *Id.* at 355. That is consistent with the *Kawashima* Court's recognition that, even with respect to the one form of tax evasion that it is theoretically "possible" to commit without making a misrepresentation, the offense "will almost invariably involve some affirmative acts of fraud or deceit." 132 S. Ct. at 1175; see *id.* at 1179 (Ginsburg, J., dissenting) (noting the government's concession that "to its knowledge, there have been no actual instances of indictments for tax evasion unaccompanied by any act of fraud or deceit").

d. Even if the bare fact of a tax-evasion conviction were insufficient by itself to show fraud, petitioner was properly precluded from contesting civil fraud here because his own offense, as charged and pleaded, involved fraud. As *Kawashima* explained, the reason that a Section 7201 offense might be viewed as one not "*nec-*

*essarily* involv[ing] fraud or deceit" is that the provision "includes two offenses"—willfully attempting to evade tax *assessment* and willfully attempting to evade tax *payment*—the latter of which might involve the filing of a "truthful tax return" without "making any misrepresentation." 132 S. Ct. at 1175. Here, petitioner was charged with the former type of the offense. The superseding indictment charged that petitioner had fraudulently underreported his taxes by $184 million, principally by fraudulently failing to recognize on his tax returns hundreds of millions of dollars of G & A income that was properly attributable to him. Pet. App. 2a-3a, 40a-43a.

e. The applicability of collateral estoppel is particularly clear on the facts of this case because the preclusive effect of a guilty plea extends to all issues that are necessarily admitted in the plea. See, *e.g.*, *United States* v. *Wight*, 839 F.2d 193, 196 (4th Cir. 1987); *De Cavalcante* v. *Commissioner*, 620 F.2d 23, 28 n.10 (3d Cir. 1980); *United States* v. *Podell*, 572 F.2d 31, 35 (2d Cir. 1978). Petitioner acknowledged at his plea colloquy in the prior criminal case that, for the 1998 and 1999 tax years, he retained control over the G & A assets and was required to pay taxes on the gains from those assets. Pet. App. 26a. Petitioner further acknowledged that he had "willfully failed to include" this income "on his tax returns" and had "willfully failed" "to pay taxes on all of his world wide income." *Id.* at 26a, 66a-67a.[7] In accepting petitioner's plea, the district court accepted the truth of those statements. *Id.* at 45a-58a.

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[7] For 1999, petitioner also pleaded guilty to criminal fraud in the first degree under the laws of the District of Columbia. Pet. App. 14a.

Thus, even if it were possible to commit willful evasion of tax assessment without engaging in civil tax fraud, petitioner's statements during his plea colloquy were judicial admissions that established his liability for the civil violation. This case therefore would be an unsuitable vehicle for considering the general collateral-estoppel effect of tax-evasion convictions in light of *Kawashima*, even if that question otherwise warranted this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
KATHRYN KENEALLY
*Assistant Attorney General*
ROBERT W. METZLER
BETHANY B. HAUSER
*Attorneys*

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