No. 04-1575

In the Supreme Court of the United States

THEOPHILE CARTY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JOHN ANDRE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether willfully failing to file a return with the intent to evade a tax, in violation of Cal. Rev. & Tax Code § 19406 (West 1992), is a "crime[] involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 395 F.3d 1081. The decisions of the Board of Immigration Appeals (Pet. App. 12a) and the immigration judge (Pet. App. 13a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. A petition for rehearing was denied on April 13, 2005. The petition for a writ of certiorari was filed on May 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native of Anguilla and a citizen of the United Kingdom. He entered the United States in

1965 and became a lawful permanent resident in 1975. In 1996, petitioner was convicted in California court of the felony offense of willfully failing to file state income-tax returns with the intent to evade taxes for the years 1991 and 1992, in violation of Cal. Rev. & Tax Code § 19406 (West 1992).[1] For those crimes, he was sentenced to 90 days of house arrest and three years of probation, and was ordered to make payment of all past taxes due. In 2001, petitioner was convicted in federal court of the felony offense of attempted bribery of a public official, in violation of 18 U.S.C. 201(b)(1). For that crime, he was sentenced to 18 months of imprisonment. Pet. App. 2a, 13a-14a.

2. The Immigration and Naturalization Service[2] thereafter commenced removal proceedings, alleging that petitioner was removable under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien convicted of two or more crimes involving moral turpitude. Pet. App. 2a.[3] The

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[1] Section 19406 provides, in relevant part, that

> [a]ny person who * * * willfully fails to file any return or to supply any information with intent to evade any tax imposed by this part * * * is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both such fine and imprisonment.

[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

[3] Section 1227(a)(2)(A)(ii) provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

immigration judge (IJ) rejected petitioner's contention that the tax offenses were not crimes involving moral turpitude; denied his request for cancellation of removal; and ordered him removed to Anguilla. *Id.* at 13a-24a. The Board of Immigration Appeals (BIA) agreed with the IJ that the tax offenses were crimes involving moral turpitude and dismissed petitioner's appeal. *Id.* at 12a.

3. A divided panel of the court of appeals dismissed petitioner's petition for review. Pet. App. 1a-11a.

a. The court of appeals concluded that the offense of failure to file a return with intent to evade a tax is a crime involving moral turpitude, and that the court therefore lacked jurisdiction over petitioner's challenge to the removal order under 8 U.S.C. 1252(a)(2)(C). Pet. App. 1a-7a.[4] The court explained that there are two types of crimes of moral turpitude, "those involving fraud and those involving grave acts of baseness or depravity," and that an offense "falls within the first category" if intent to defraud is an "essential element" of the offense. *Id.* at 3a-4a (quoting *Goldeshtein* v. *INS*, 8 F.3d 645, 647 (9th Cir. 1993)). The court held that the California offense satisfies that requirement, because "[i]ntent to defraud is implicit in willfully failing to file

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[4] Section 1252(a)(2)(C) provides, in relevant part, that

> no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed * * * any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Section 1227(a)(2)(A)(i), in turn, provides that an alien convicted of a crime involving moral turpitude within a certain period after the date of admission, and "for which a sentence of one year or longer may be imposed," is deportable.

a tax return with the intent to evade taxes." *Id.* at 4a-5a.

In so holding, the court of appeals reasoned that, unlike a defendant who willfully structures transactions, an offense that has been held not to involve moral turpitude, petitioner did not deprive California of "mere information"; his willful failure to file tax returns was an attempt "to deprive the government of revenue—or, in other words, to obtain a free pass on taxes." Pet. App. 5a (citing *Goldeshtein*, 8 F.3d at 649). The court also observed that the "closest analog" to Section 19406 is 26 U.S.C. 145(b) (Supp. V 1939), which prohibited the willful attempt "in any manner to evade or defeat any tax," and that a violation of Section 145(b) has been held to be a crime involving moral turpitude. Pet. App. 5a (discussing *Tseung Chu* v. *Cornell*, 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957), and *Chanan Din Khan* v. *Barber*, 253 F.2d 547 (9th Cir.), cert. denied, 357 U.S. 920 (1958)). Finally, the court relied on the fact that "the terms 'evasion' and 'fraud' have been treated interchangeably by California and the federal government." *Id.* at 6a (citing Cal. Rev. & Tax Code § 6485 (West 1998) and 26 U.S.C. 6653(2)).

b. Judge Canby dissented. Pet. App. 8a-11a. He said that he "would be willing to accept" the majority's holding "[a]s a matter of first impression," but that, in his view, the court's precedent "requires a contrary result." *Id.* at 8a. According to the dissent, in holding that violation of Section 145(b) involves moral turpitude, the court in *Tseung Chu* and *Chanan Din Khan* relied, not on "the face of the statute itself" or on "the mere fact of conviction," but on "a specific allegation of fraud" in the charging instrument. *Ibid.* Since there was "no such allegation" here, Judge Canby would have granted

the petition for review and reversed the decision of the BIA. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-8) that the California offense of willfully failing to file a return with intent to evade a tax is not a crime involving moral turpitude. The court of appeals correctly held otherwise, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As petitioner acknowledges (Pet. 5), "a crime [of] which fraud is an ingredient involves moral turpitude." *Jordan* v. *De George*, 341 U.S. 223, 227 (1951). The definition of fraud is "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Black's Law Dictionary* 685 (8th ed. 2004). Petitioner contends (Pet. 5-6) that his failure to file tax returns does not involve fraud, because one who fails to disclose material information commits fraud only when he has a duty to disclose. But petitioner was under a legal obligation to disclose his income by filing a tax return, and his willful failure to do so, with the intent to evade taxes, thus amounted to fraud. The court of appeals' decision is therefore correct.

2. The decision below is the only one of which we are aware that addresses the question whether the California offense at issue here is a crime involving moral turpitude. It is consistent, however, with decisions of other circuits holding that other tax-evasion offenses involve moral turpitude. See *Wittgenstein* v. *INS*, 124 F.3d 1244, 1246 (10th Cir. 1997) (New Mexico crime of willfully attempting to evade or defeat any tax

or the payment thereof); *Costello* v. *INS*, 311 F.2d 343, 348-349 (2d Cir. 1962) (federal offense of willfully attempting in any manner to evade or defeat any tax), rev'd on other grounds, 376 U.S. 120 (1964).

The sole lower-court authority on which petitioner relies (Pet. 4) is *United States* v. *Carrollo*, 30 F. Supp. 3 (W.D. Mo. 1939). Any conflict between a district court decision and the court of appeals' decision in this case, however, does not provide a basis for certiorari. See Sup. Ct. R. 10. In any event, *Carrollo* rested on the premise that a crime involving moral turpitude must "evidenc[e] baseness, vileness, or depravity of moral character." 30 F. Supp. at 7. This Court's subsequent decision in *De George* rejected that view, 341 U.S. at 226, and held that any crime of which fraud is an "ingredient," *id.* at 227, 232, is a crime involving moral turpitude.

3. Petitioner's principal contention (Pet. 4-7) is that the court of appeals' decision conflicts with *United States* v. *Scharton*, 285 U.S. 518 (1932), which held that the federal offense of attempt to evade taxes was governed by the general three-year limitation period applicable to tax crimes, rather than the special six-year limitation period applicable to tax crimes that involve "defrauding or attempting to defraud" the government (*id.* at 520 n.2) (quoting 18 U.S.C. 585 (Supp. V 1931)). For at least two reasons, the decision in this case is not inconsistent with *Scharton*. First, unlike the federal statute at issue there (see *id.* at 520 n.1), the California statute at issue here requires a willful failure to file a tax return—*i.e.*, a failure to disclose information that the law requires to be disclosed. Second, the decision in *Scharton* was based on interpretive canons that are not relevant here: the canon that "an excepting clause" is to

be "narrowly construed"; and the canon that a provision "ha[ving] to do with statutory crimes" is to be "liberally interpreted in favor of repose." *Id.* at 521-522. The court of appeals thus correctly distinguished *Scharton* on the ground that it involved a "narrow construction applied to statute of limitations issues." Pet. App. 4a n.5. Indeed, even the dissenting judge recognized that "*Scharton*'s result depended in part on a strict standard of construction applicable to the extended limitations provision," and that the decision in that case therefore "does not directly control the outcome of [petitioner's] case." *Id.* at 11a.

Citing this Court's decision in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1948), petitioner also contends (Pet. 7-8) that the court of appeals' decision is inconsistent with the canon of construction prohibiting courts from "assum[ing] that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" (*Fong*, 333 U.S. at 10). But petitioner does not cite any decision that applies that canon in deciding whether fraud is an "ingredient," *De George*, 341 U.S. at 227, 232, of an offense like the one at issue here, much less a decision that relies on the canon as a basis for reaching the result that petitioner advocates. In any event, even if petitioner is correct that "reading 'evade' to exclude 'defraud' is at least one of 'several possible meanings' of the[] word[]" (Pet. 8), his argument ignores the fact that the statute at issue here requires not only an intent to evade taxes but the willful failure to file a return. That statutory language does not have "several possible meanings."

CONCLUSION

The petition for a writ of certiorari should be denied.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JOHN ANDRE
Attorneys

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