

No. 11-1460

In the Supreme Court of the United States

LINDA AWAND AND HOWARD AWAND, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly defined 26 U.S.C. 7203's willfulness element in the jury instructions by stating that it required proof of a voluntary and intentional violation of a known legal duty, without requiring proof that petitioners knew it was a "criminal duty."
2. Whether 26 U.S.C. 7203's proscription against failing to pay income taxes on time is void for vagueness as applied to petitioners because of an Internal Revenue Service pamphlet that counseled timely payment of taxes to minimize interest and penalties.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is available at 467 Fed. Appx. 609.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2012. A petition for rehearing was denied on March 6, 2012 (Pet. App. 11). The petition for a writ of certiorari was filed on June 4, 2012. 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 District of Nevada, petitioners were convicted of four counts of willful failure to pay income tax when due, in violation of 26 U.S.C. 7203. Pet. App. 2.

Petitioner Howard Awand was sentenced to 48 months of imprisonment, *id.* at 6, and petitioner Linda Awand was sentenced to 36 months of imprisonment, *id.* at 9. Both petitioners were ordered to pay \$2,475,086 in restitution to the Internal Revenue Service (IRS). *Id.* at 6, 9-10. The court of appeals affirmed. *Id.* at 1-4.

1. From 2001 to 2004, petitioners earned nearly \$7 million with a corresponding tax liability they did not satisfy of more than \$2.6 million. Gov't C.A. Br. 1, 5. During that time period, petitioners spent more than \$2.7 million on home renovations, \$800,000 on antiques, \$160,000 on a Bentley automobile, \$60,000 on wine, and \$87,000 on petitioner Howard Awand's 2004 birthday party. *Id.* at 1, 5-6. When petitioners learned that they were under investigation, they filed late returns for tax years 2001 through 2004, along with partial payments of about \$206,000. *Id.* at 6.

2. On July 13, 2009, petitioners were each charged with four misdemeanor counts of willful failure to pay income tax in violation of 26 U.S.C. 7203. Gov't C.A. Br. 3.

At trial, petitioners objected to the district court's failure to instruct the jury that in order to convict petitioners it had to find not only that they knew it was unlawful not to pay their taxes but also that they knew that it was a criminal offense not to do so. Pet. App. 3. The district court overruled this objection and gave the following instruction regarding 26 U.S.C. 7203's willfulness element:

To act willfully means to act voluntarily with intent to violate a known legal duty and not as a result of accident or negligence.

Conduct is not willful if it is based on accident, mistake, inadvertence, or due to a good faith misunderstanding as to the requirements of the law. Additionally, mere negligence and gross negligence are not sufficient to constitute willfulness under the law.

* * *

[T]o meet * * * its burden of proof, it is necessary for the government to prove beyond reasonable doubt that each of the defendants knew of his or her legal duty to pay income taxes and that each of them voluntarily and intentionally violated that duty at the time that it arose.

Gov't C.A. Br. 21.

The jury convicted petitioners on all four counts. Pet. App. 5, 8. The district court sentenced Linda Awand to 36 months of imprisonment (consisting of consecutive sentences of 12 months on three of the counts, with a concurrent sentence of 12 months on the fourth) and Howard Awand to 48 months of imprisonment (consisting of four consecutive 12-month sentences). *Id.* at 6, 9. The district court also ordered petitioners to pay \$2,475,086 in restitution to the Internal Revenue Service. *Id.* at 6, 9-10.

3. The court of appeals affirmed. Pet. App. 4.

The court rejected petitioners' as-applied vagueness challenge to 26 U.S.C. 7203. Pet. App. 2. The court noted that petitioners did "not argue that they were unaware that failure to pay taxes is prohibited by § 7203" but instead "claim[ed] the IRS duped them into believing that failure to pay taxes when due resulted in only civil, and not criminal, consequences." *Ibid.* The court explained, however, that petitioners "failed to show that

they actually relied on explicit IRS statements or reasonably relied on the past imposition of merely interest and civil penalties following earlier noncompliance with filing and payment deadlines.” *Ibid.* Moreover, the court concluded that “[n]either the terms of the statute nor [petitioners’] interpretation of their reach, even if truly based on a subjective interpretation which they derived from how the IRS responded in the past, suffices for a successful as-applied vagueness challenge.” *Ibid.*

The court of appeals also rejected petitioners’ claim that “there is insufficient proof to sustain their conviction because the government failed to show they knew that late payment is a crime.” Pet. App. 3. The court explained that “[t]o convict of willful misconduct, the government need show only that the defendant intentionally and voluntarily violated a known legal duty.” *Ibid.* (citing *Cheek v. United States*, 498 U.S. 192, 201 (1991)); see *ibid.* (“It is not an essential element of the crime that a defendant know his actions can result in criminal sanctions.”). In this case, “[t]he evidence, including [petitioners’] past history of late filings and payment, plus [petitioner] Howard Awand’s admission that he knew he had a duty to pay his taxes, showed that [petitioners] were well aware of their duties.” *Ibid.*

ARGUMENT

1. Petitioners renew their contention (Pet. 6-14) that, in order to prove that a violation of 26 U.S.C. 7203 is “willful[],” the government must establish not only that a defendant knew that failure to pay taxes on time was unlawful but also that the violation was punishable as a crime. That contention lacks merit.

a. In *Cheek v. United States*, 498 U.S. 192 (1991), this Court specifically addressed the willfulness requirement in criminal tax statutes, including 26 U.S.C. 7203. As an initial matter, the Court noted that “[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.” 498 U.S. at 199. In the context of certain criminal tax offenses, however, the Court explained that “Congress has * * * softened the impact of the common-law presumption by making specific intent to violate the law an element.” *Id.* at 200.

Accordingly, the Court in *Cheek* concluded that “the standard for the statutory willfulness requirement” in criminal tax statutes “is the voluntary, intentional violation of a known legal duty.” 498 U.S. at 201 (citing *United States v. Pomponio*, 429 U.S. 10 (1976), and *United States v. Bishop*, 412 U.S. 346 (1973)) (internal quotation marks omitted). A defendant’s “good-faith belief that he was not violating any of the provisions of the tax laws” therefore negates willfulness. *Id.* at 202.

The district court’s willfulness instruction in this case was entirely consistent with *Cheek*. The court instructed the jury that, in order to convict petitioners, it had to find that they each “knew of his or her legal duty to pay income taxes and that each of them voluntarily and intentionally violated that duty at the time that it arose.” Gov’t C.A. Br. 21. The court also instructed the jury that “[c]onduct is not willful if it is based on accident, mistake, inadvertence, or due to a good faith misunderstanding as to the requirements of the law.” *Ibid.*

Notwithstanding the consistency of the jury instruction with the language *Cheek* used to describe the willfulness requirement, petitioners contend that *Cheek* “left open” whether the statute’s willfulness element

required knowledge not only of the “duty to pay tax when due” but also of the fact that “it is a crime not to pay tax on time.” Pet. 10 (emphasis omitted). In fact, the later requirement would be irreconcilable with *Cheek*’s reasoning.

The Court in *Cheek* explained that, by allowing criminal punishment of only “willful[]” violations of the tax laws, Congress intended to ensure that “a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained,” would not “become a criminal by his mere failure to measure up to the prescribed standard of conduct.” 498 U.S. at 200 (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)). Individuals like petitioners, who know of their legal duty but consciously choose to flout it, are not within that group Congress sought to protect, regardless of whether they knew the particular consequences that could flow from their conscious decision to violate the law.

Petitioners attempt to find support for their novel argument in *Ratzlaf v. United States*, 510 U.S. 135 (1994), but they misapprehend the Court’s holding in that case. *Ratzlaf* addressed the necessary intent for a violation of 31 U.S.C. 5322 (1988), which, among other things, established criminal penalties for individuals who “willfully” violated the prohibition on “structuring” transactions to avoid financial institutions’ federal reporting requirements. 510 U.S. at 137 (citing 31 U.S.C. 5322(a) and 5324(3)). The district court in *Ratzlaf* had “instructed the jury that the Government had to prove defendant’s knowledge of the banks’ reporting obligation and his attempt to evade that obligation, but did not have to prove defendant knew the structuring was unlawful.” *Id.* at 137-138.

This Court in *Ratzlaf* held that the district court had erred and that the willfulness element in 31 U.S.C. 5322 (1988) required “proof that the defendant knew not only of the bank’s duty to report cash transactions in excess of \$10,000, but also of his duty not to avoid triggering such a report.” 510 U.S. at 146-147. *Ratzlaf* is entirely consistent with *Cheek*; both construe the willfulness elements at issue as requiring proof that the defendant knew that his conduct violated a legal duty. See *id.* at 149; *Cheek*, 498 U.S. at 201.*

Petitioners contend (Pet. 10) that “it is clear” that when the Court in *Ratzlaf* stated the government had to prove the structuring defendant knew his conduct “was unlawful” the Court actually meant that he knew his conduct “was a crime.” The Court in *Ratzlaf*, however, did not establish any such equivalence, and petitioners cite no decision of any court that has interpreted *Ratzlaf* in that way. Indeed, the Court has subsequently explained that its decisions in both *Ratzlaf* and *Cheek* were “motivated” by “[t]he danger of convicting individuals engaged in apparently innocent activity.” *Bryan v. United States*, 524 U.S. 184, 195 (1998). A defendant who consciously chooses to violate a known legal duty is not engaged in “innocent activity,” whether or not violations of that duty are criminally punishable.

* If the two cases had construed their willfulness elements differently, *Cheek*, not *Ratzlaf*, would control here because only *Cheek* construed the statute under which petitioners were convicted. See *Ratzlaf*, 510 U.S. at 141 (noting that the word “willful” “is a word of many meanings” that requires consideration of statutory context) (internal citation omitted); see *United States v. Zehrbach*, 47 F.3d 1252, 1262 (3d Cir.) (noting that, in *Ratzlaf*, the Court emphasized that “its decision was particular to the plain meaning of the statute then before it”), cert. denied, 514 U.S. 1067 (1995).

Petitioners also cite (Pet. 13) *Lambert v. California*, 355 U.S. 225, 228 (1957), claiming that it required the government in this case to establish that petitioners were aware that the legal duty they knew they were violating was criminally enforceable. But *Lambert* did not involve interpretation of a statutory willfulness element. Rather, the statute invalidated in that case criminalized the failure of convicted felons to register, and the Court held that the law’s application of strict liability to seemingly innocent conduct violated due process. *Id.* at 228-229. *Lambert* is inapposite here, where the statute at issue requires proof of willfulness and where petitioners acknowledged that they knew they had a duty to pay their taxes.

b. Petitioners do not claim any conflict in the courts of appeals on the construction of 26 U.S.C. 7203’s willfulness requirement. In fact, the courts of appeals have consistently rejected claims analogous to that advanced by petitioners. See, e.g., *United States v. Allen*, 670 F.3d 12, 18 (1st Cir. 2012) (rejecting contention that “the government’s burden was to prove that the defendants knew of the *particular* statutes and regulations obligating them to pay income taxes and file returns”); *United States v. Cavins*, 543 F.3d 456, 457-459 (8th Cir. 2008) (same).

2. Petitioners argue (Pet. 14-23) that 26 U.S.C. 7203 is void for vagueness as applied to them because of certain IRS letters and publications they say imply that failure to pay taxes will not be criminally prosecuted. Petitioners do not claim any conflict in the courts of appeals on this question, and their contention lacks merit.

Petitioners do not contend that 26 U.S.C. 7203 is void on its face, nor could they. A statute is void for vagueness if it “fails to give a person of ordinary intelligence

fair notice that his contemplated conduct is forbidden by the statute” or if “it encourages arbitrary and erratic arrests and convictions.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (citation omitted). The constitutionality of an allegedly vague statutory standard “is closely related to whether that standard incorporates a requirement of *mens rea*.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Due process concerns about notice are “ameliorated” when a statute contains a scienter requirement. See *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The legal obligation to timely pay taxes due in 26 U.S.C. 7203 clearly provides notice of what is required. Moreover, as discussed above, the statute includes a *mens rea* requirement. Indeed, petitioners acknowledge (Pet. 22) that they knew that they had a legal duty to pay their taxes when due, and they do not attempt to argue that they did not know how to conform their behavior to the requirements of 26 U.S.C. 7203.

Instead petitioners claim (Pet. 21-22) that a defendant’s uncertainty as to the particular *consequences* of clearly forbidden conduct is sufficient to find a statute vague as applied. In support of that novel contention, petitioners cite *Cox v. Louisiana*, 379 U.S. 559 (1965), and *Raley v. Ohio*, 360 U.S. 423 (1959), but neither of those cases applies to petitioners’ circumstances. In *Cox* and *Raley*, the Court reversed convictions of defendants who had relied upon erroneous assurances from public officials that their conduct was *lawful*. *Cox*, 379 U.S. at 569-571; *Raley*, 360 U.S. at 426. No such communications are at issue here.

Petitioners cite (Pet. 17-21) an “IRS Official publication” in support of their claim that they were led to believe that they would not be prosecuted for their know-

ing failure to pay their taxes on time. That publication was neither admitted into evidence nor mentioned at trial, and petitioners never demonstrated that they ever read or relied upon it. See Gov't C.A. Br. 13; see also Pet. App. 2 (Petitioners "failed to show that they actually relied on explicit IRS statements or reasonably relied on the past imposition of merely interest and civil penalties following earlier noncompliance with filing and payment deadlines."). In any event, the publication nowhere advises taxpayers that it is lawful to pay taxes late, and petitioners received a letter from the IRS, which was admitted into evidence, that alerted them to the possibility of both civil and criminal prosecution. Gov't C.A. Br. 14. Petitioners can offer no evidence of a communication from a public official that led them to believe that they were acting in conformity with the law, and there was no due process defect in their convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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