

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CARL J. MARINELLO, II, )  
                                ) Petitioner, )  
                                ) v. ) No. 16-1144  
UNITED STATES, )  
                                ) Respondent. )  
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CARL J. MARINELLO, II, )  
 Petitioner, )  
 v. ) No. 16-1144  
 UNITED STATES, )  
 Respondent. )

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Washington, D.C.

Wednesday, December 6, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

MATTHEW S. HELLMAN, Washington, D.C.; on behalf  
 of the Petitioner

ROBERT A. PARKER, Assistant to the Solicitor General,  
 Department of Justice, Washington, D.C.; on  
 behalf of the Respondent

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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-1144, Marinello versus  
5 United States.

6 Mr. Hellman.

7 ORAL ARGUMENT OF MATTHEW S. HELLMAN

8 ON BEHALF OF THE PETITIONER

9 MR. HELLMAN: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 When Congress made it a felony to  
12 obstruct the due administration of the tax  
13 code, it was not creating an all-purpose tax  
14 crime; it was borrowing from a statute that  
15 prohibited the obstruction of a pending  
16 proceeding.

17 This Court normally presumes that  
18 borrowed language carries its meaning with it.  
19 And that has to be the case here, for without  
20 that limitation, obstruction would swallow up  
21 the other crimes that Congress simultaneously  
22 enacted and, in particular, it would obliterate  
23 the careful line that Congress drew between  
24 misdemeanors and felonies.

25 Indeed, the government's

1 interpretation is so broad that it would chill  
2 entirely legitimate conduct that Congress never  
3 intended to penalize.

4 JUSTICE GINSBURG: What -- what --  
5 what lawful conduct would the government's  
6 reading put at risk?

7 MR. HELLMAN: Certainly. There's a  
8 whole range because obstruction, on their  
9 definition, is so broad. For example, you  
10 could imagine a situation -- I'll take an  
11 everyday taxpayer, someone who pays their  
12 gardener, say, in cash, which is one of the  
13 predicate acts in this case as well. Paying in  
14 cash isn't necessarily illegal under the tax  
15 laws, but the test that the government would  
16 have is, by paying someone in cash, you're --  
17 you're making it harder for the IRS to assess  
18 perhaps your tax liability or perhaps the tax  
19 liability of the person that you are paying.  
20 And at that question -- at that point, the only  
21 question that remains is mens rea, why did you  
22 do it? Did you do it for the purpose of  
23 obtaining an unlawful benefit? And even --  
24 that benefit need not even be your own under  
25 the government's reading; it could be the

1 benefit of the gardener.

2 Or to take another example, imagine a  
3 taxpayer who says I'm going to keep every  
4 document the law requires under the code. I'll  
5 keep every document but no documents more. If  
6 the IRS ever came back and looked at that  
7 person's tax position, they might say your  
8 failure to keep these documents that -- that  
9 aren't otherwise required hindered us in our  
10 ability to assess your taxes.

11 At that point, again, the only  
12 question becomes the why, the mens rea. And  
13 with a felony prosecution on the line and with  
14 so many acts, the actus reus being so broad,  
15 anything that hinders the IRS's ability to  
16 carry out a code, obstructs --

17 JUSTICE SOTOMAYOR: My problem is that  
18 I have -- a second question.

19 MR. HELLMAN: Sure.

20 JUSTICE SOTOMAYOR: I have a lot of  
21 hypotheticals under your definition of what  
22 this section means that wouldn't be covered.  
23 So how about if an individual knows that the  
24 IRS is in the presence of -- press -- in the  
25 process of assessing his taxes and he in some

1 way obstructs that process, or an agent -- the  
2 agent in 2004 called the defendant and said:  
3 You know, I'm deciding whether to open an  
4 investigation. I haven't, but I'm just  
5 thinking about it. I understand you have this  
6 business, and I don't see any tax returns.

7 And your client answered the way he  
8 first did: I make less than \$1,000. I don't  
9 have to file. And the agent closes the  
10 investigation -- closes the file and says: I'm  
11 not going to investigate this.

12 Under your theory, that direct  
13 obstruction would not be actionable?

14 MR. HELLMAN: It would be several  
15 other crimes. As -- as you describe it, it  
16 sounds like tax evasion, if there's a  
17 deficiency and an evasive act in connection  
18 with it. It could be a false statement to the  
19 IRS. But Congress knows how to write a pending  
20 proceeding requirement.

21 If you think back to the statute at  
22 issue in Arthur Andersen, Section 1512, another  
23 obstruction statute that applies in cases of  
24 corruption to proceedings, that 1512(f), which  
25 Congress enacted as part of Sarbanes-Oxley,

1 says the proceeding need not be pending or even  
2 about to be instituted.

3 Now, this Court --

4 JUSTICE SOTOMAYOR: Well, wait a  
5 minute, yes, it can do that sometimes.

6 MR. HELLMAN: It can do that.

7 JUSTICE SOTOMAYOR: It doesn't other  
8 times.

9 MR. HELLMAN: It doesn't other times.  
10 And --

11 JUSTICE SOTOMAYOR: So is this one of  
12 those other times?

13 MR. HELLMAN: Well, I think the -- the  
14 right way to understand it is Congress is --  
15 the "need not be pending" language was a  
16 product of a 1980s revision to the statute and  
17 really started to apply to documents in  
18 Sarbanes-Oxley.

19 JUSTICE SOTOMAYOR: Do you think the  
20 word "administration" -- "due administration of  
21 this title," does any work in the  
22 interpretation? It seems to me that one could  
23 say that the example I gave is an actual  
24 affirmative act by the agency. It is -- the  
25 agent is calling and doing his work under the



1 Act but that what you do outside of interacting  
2 directly with the agency is more omission,  
3 which is not the administration of the Act.

4 Could that line be drawn?

5 MR. HELLMAN: I don't -- that's  
6 certainly not the line the government is  
7 offering, but -- but --

8 JUSTICE SOTOMAYOR: It's not the line  
9 the government's offering --

10 MR. HELLMAN: Is offering.

11 JUSTICE SOTOMAYOR: -- but yours is --  
12 your broadness is sweeping up a lot of conduct  
13 that I think could be perceived as active  
14 obstruction of the work of -- the direct work  
15 of the agency. An agent calls you and you  
16 mislead them.

17 MR. HELLMAN: Well, a couple  
18 responses. As I said, those are covered by  
19 other crimes in the statute, false statements.  
20 Could even be covered by the officers clause of  
21 this statute. But I think that the key for  
22 this is, in some sense, and I think the point  
23 of your question is, not paying your taxes,  
24 failing to file a return, failure to make a  
25 payment, we would concede is in some sense

1 obstruction of the administration of the code,  
2 but that can't be what Congress had in mind for  
3 this statute because we know what they thought  
4 the penalty for those crimes should be. They  
5 should be a misdemeanor. Those people should  
6 not be branded as felons. It's wrong, it's a  
7 crime, but it's a misdemeanor punishable by one  
8 year.

9           And, you know, essentially, on one  
10 page of the code, they're calling this conduct  
11 a misdemeanor. And then, on the government's  
12 view, actually, it turns out that -- it turns  
13 out to be felony obstruction. And these are  
14 provisions that were the product of an intense,  
15 multi-year process of reforming the tax code,  
16 where Congress specifically debated back and  
17 forth between the House and the Senate about  
18 whether some of these crimes should be  
19 classified as misdemeanors or felonies.

20           And so I think when you're trying to  
21 read a statute as a whole -- and here the need  
22 to do that is at its apex because we're not  
23 talking about different provisions that were  
24 enacted over a series of decades. This was  
25 Congress's concerted attempt to codify and

1 calibrate the penalties that it wanted.

2 And then to find out that actually  
3 everything turns out to be a felony because in  
4 every -- any act that violates a tax law could  
5 in some sense be meant -- understood to be  
6 obstructing the administration of the code,  
7 that's not a plausible way to read a statute.

8 JUSTICE ALITO: Mr. Hellman, I --

9 CHIEF JUSTICE ROBERTS: Do you suggest  
10 --

11 JUSTICE ALITO: I'm sorry.

12 CHIEF JUSTICE ROBERTS: You -- you  
13 raised that specter in -- in your brief. In  
14 your experience, is that happening on the  
15 ground? I mean, is it the case that you find  
16 indictments always -- excuse me -- always  
17 tacking on charges under this provision?

18 MR. HELLMAN: Yes, Your Honor. And I  
19 -- and I think the tax amici and other amici  
20 who have filed in this case speak to that.

21 I took a look -- and this is just my  
22 own personal review of the cases -- in the --  
23 beginning in the -- really in the '90s and then  
24 in the 2000s, you start to see 7212 obstruction  
25 charges brought in -- there's hundreds of

1 cases. You can go online and just look for  
2 where those charges have been brought, even in  
3 reported cases.

4 And as we discuss in the brief, the  
5 predicates are -- are now becoming ones in  
6 which failure to file a return is becoming a  
7 predicate, failure to pay taxes is becoming a  
8 predicate.

9 JUSTICE BREYER: Well, suppose -- to  
10 go to your first example.

11 MR. HELLMAN: Please.

12 JUSTICE BREYER: I just often wondered  
13 this. I think -- remember the gardener?

14 MR. HELLMAN: Yes.

15 JUSTICE BREYER: Well, suppose you  
16 hire somebody to shovel your snow off your  
17 steps --

18 MR. HELLMAN: Sure.

19 JUSTICE BREYER: -- every three weeks  
20 or so or every week or -- and the gardener does  
21 some gardening, burns some leaves, and you pay  
22 him more than \$600 over the year.

23 MR. HELLMAN: Right.

24 JUSTICE BREYER: Then I guess you're  
25 required to file a 1099 for them.

1 MR. HELLMAN: That's right, which is  
2 they --

3 JUSTICE BREYER: I know -- I don't  
4 know people who do. I mean, maybe everybody in  
5 the country is a law breaker. But I -- but I  
6 mean, if -- if their interpretation is correct,  
7 in your view, that would give them the power in  
8 their discretion to indict, I won't say half  
9 the country, but -- but a -- but a very  
10 significant number of people, is that right?

11 MR. HELLMAN: Yes, that -- that is  
12 correct.

13 JUSTICE BREYER: If they know of this  
14 requirement and if they want to help the  
15 gardener or whatever.

16 MR. HELLMAN: That's correct. And I  
17 think another --

18 JUSTICE BREYER: And that is right,  
19 you're sure that's right?

20 MR. HELLMAN: I -- I -- yes, that is  
21 correct --

22 JUSTICE BREYER: All right.

23 MR. HELLMAN: -- because it comes down  
24 to -- to the mens rea of the -- of the person  
25 who's filling out that form.

1 JUSTICE BREYER: Well, they want to  
2 help the gardener and they know about it.

3 MR. HELLMAN: That's right. And I  
4 think another --

5 JUSTICE ALITO: Well, Mr. Hellman, I  
6 -- I mean, I share the -- your -- your concern  
7 that if this statute is read in its broadest  
8 possible literal sense, it has a really  
9 staggering sweep, but I wonder if your  
10 interpretation really solves the problem  
11 because can't the same sorts of things happen  
12 after a proceeding has commenced?

13 Let's say somebody is being audited  
14 and eventually the person comes up with the  
15 records that the auditor needs, but they're all  
16 scrambled up, and it looks like -- and -- and  
17 the person is -- is late in providing them and  
18 misses meetings and just is very difficult.

19 You could get the same situation  
20 there, couldn't you?

21 MR. HELLMAN: I suppose you could, but  
22 there's a difference as to why I think the  
23 statute ought to tolerate prosecution in that  
24 scenario, which is where there's been a formal  
25 notice of audit and someone has been given

1 questions by the government and needs to  
2 respond in a reasonable manner to them.

3           You can understand why Congress wanted  
4 to make that a crime distinct from, maybe on  
5 top of, other crimes that a person has  
6 committed. But if we're talking about the  
7 maintenance of records prior to the initiation  
8 of that proceeding, then there are many other  
9 crimes that do cover recordkeeping and, of  
10 course, your obligation to pay taxes.

11           But those are generally, with the  
12 exception of tax evasion, generally not  
13 felonies and they generally have a lower  
14 sentence than the one here.

15           So I do take your point that there  
16 could be the potential for abuse, even under  
17 our interpretation, but I do think that it's  
18 significantly narrowed just for the reasons  
19 that I said.

20           JUSTICE GORSUCH: Mr. --

21           JUSTICE KAGAN: Mr. Hellman, there are  
22 obvious reasons to search for a limiting  
23 interpretation here.

24           MR. HELLMAN: Yes.

25           JUSTICE KAGAN: I guess the question

1 is why your limiting interpretation? And  
2 obviously you talked about this in your brief.  
3 But I just want to give you an opportunity now  
4 to try to convince me, because right now I feel  
5 as though it comes out of thin air. It doesn't  
6 have any grounding in the text of the statute.

7 And I guess I'm not seeing quite how  
8 the precedent gets you there. So --

9 MR. HELLMAN: Absolutely. I think the  
10 -- the key reasons why we would think that  
11 Congress had 1503 in mind when it was talking  
12 -- when it was enacting 7212 are the following:  
13 You've got a statute, 1503, enacted just a few  
14 years before, six years before. It doesn't  
15 just talk about obstruction of the due  
16 administration of something.

17 It's got that two-part structure with  
18 officers in the first half, administration in  
19 the second. It's got those same verbs, to  
20 impede or intimidate the officer, or impede or  
21 obstruct the proceeding.

22 And you also have the same means by  
23 which you're doing it. So you put that all  
24 together and, on top of that, the fact that  
25 there's nothing unusual about obstruction



1 proceed -- obstruction statutes having  
2 proceedings as their focus.

3 There are several obstruction statutes  
4 after 1503 in the code that all talk about  
5 obstruction of proceedings.

6 So -- so, when you talk about  
7 obstruction of the due administration, it's  
8 sort of a natural marriage of that concept to  
9 proceedings.

10 Now, there's no legislative history  
11 that speaks to this one way or the other. We  
12 certainly concede that.

13 JUSTICE GINSBURG: But wasn't there  
14 the predecessor of 1503? It was oriented  
15 toward courts.

16 MR. HELLMAN: It -- it was expressly  
17 -- said, obstruction in a court, in effect,  
18 that's correct. But when Congress recodified  
19 that statute six years before 7212, they said  
20 that they were not making any substantive  
21 changes.

22 So that was the language on the shelf,  
23 if you wanted to have a two-part obstruction  
24 statute: one for the officers, one for the due  
25 administration.

1           It's really the model. And I don't  
2 think that word choice can be explained by --  
3 by coincidence. And then, of course, you have  
4 the problem of, again, what would -- the  
5 government's alternative interpretation puts a  
6 code that would stretch across this, you know,  
7 this entire table, any violation of it, which  
8 is potentially a felony.

9           If I would, I wanted to go back to one  
10 other way in which -- and this is not just an  
11 omissions point, this is an affirmative acts  
12 point -- 7205 in the tax code.

13           If anybody's ever been an employee in  
14 this country, when you start your job, you fill  
15 out the W-4 form where you say how many  
16 dependents you have, which controls how much  
17 withholding your employer will take out of your  
18 -- your paycheck.

19           I, too, know many people who don't put  
20 down the true number of dependents that they  
21 have in order to affect the withholding that  
22 they get. In some sense, that is an unlawful  
23 benefit. Money's being -- not being withheld  
24 that should be. But we know that Congress  
25 wanted to punish that as a misdemeanor, not a

1 felony.

2 Now --

3 CHIEF JUSTICE ROBERTS: You think a  
4 lot of people do that? I mean, you've got  
5 three children and they say they've got five?

6 MR. HELLMAN: In my experience --  
7 well, in any case --

8 CHIEF JUSTICE ROBERTS: Well, your  
9 experience because --

10 (Laughter.)

11 MR. HELLMAN: -- experience -- I -- I  
12 was responding to Justice --

13 CHIEF JUSTICE ROBERTS: I mean, people  
14 who get caught come to you. So, in your  
15 experience, you see a lot of them.

16 (Laughter.)

17 MR. HELLMAN: Right. There may be a  
18 category problem there. I -- I agree.

19 JUSTICE GINSBURG: Yeah, there are  
20 people who list their dogs as dependents.

21 MR. HELLMAN: Well, I'll defer to  
22 Justice Ginsburg on that.

23 (Laughter.)

24 JUSTICE BREYER: I wasn't thinking of  
25 those people. I just think that there are

1 many, many, many, many regulations in the code  
2 that are -- seem to be quite trivial to an  
3 ordinary person. And they might, in fact, not  
4 pay that much attention to every form and,  
5 moreover, maybe they even want to help the  
6 gardener. All right?

7 Now, I think there are many such  
8 people in the 1099 case, but I don't know.  
9 That's why I asked you whether it was an  
10 appropriate example.

11 MR. HELLMAN: And I do believe that it  
12 is one.

13 JUSTICE GORSUCH: Well, Mr. Hellman,  
14 what role should lenity play here, if any?

15 MR. HELLMAN: Well, I think this  
16 Court's decisions in Aguilar and Arthur  
17 Andersen sort of point the way in that  
18 direction.

19 We haven't made a constitutional  
20 argument in this case that it would be  
21 unlawful, unconstitutional for Congress to  
22 write a statute, the statute that the  
23 government says they wrote here. But --

24 JUSTICE GORSUCH: Saving that for the  
25 next case.

1           MR. HELLMAN: We'll save that for the  
2 next case. But what we have most definitely  
3 argued in this case is that, as the Court  
4 explained in Aguilar, before this Court will  
5 assume that Congress meant to felonize every  
6 immoral act under the sun, we're going to want  
7 them to say that a little bit more clearly than  
8 they -- than they did in the statute.

9           JUSTICE BREYER: But how did they in  
10 Aguilar? I mean, I took -- I read the language  
11 in Aguilar and I thought it was very helpful to  
12 your case. The statute's identical --

13          MR. HELLMAN: Yes.

14          JUSTICE BREYER: -- virtually, except  
15 administration of justice instead of  
16 administration of this title.

17          MR. HELLMAN: Correct.

18          JUSTICE BREYER: And then it's quite  
19 limited how they interpreted it. But I -- I'm  
20 not totally clear as to what significance --  
21 they said something about a nexus --

22          MR. HELLMAN: Yes.

23          JUSTICE BREYER: -- but a nexus to  
24 what? I mean, and -- and --

25          MR. HELLMAN: Sure.

1 JUSTICE BREYER: -- what's your  
2 understanding of that?

3 MR. HELLMAN: So, as I read Aguilar,  
4 it's a nexus to a pending proceeding. So, in  
5 that case, the defendant lied, that was  
6 conceded to an FBI agent, but it wasn't clear  
7 that those statements were ever going to get  
8 into court into a grand jury proceeding. They  
9 might or might not in the words of the Court.

10 And what the court --

11 JUSTICE BREYER: So your argument is  
12 nexus to a pending proceeding, interpreted with  
13 the same language except it says administration  
14 of justice should lead us to say nexus to a  
15 pending proceeding in a statute that's  
16 identical, but the words are administration of  
17 this title.

18 MR. HELLMAN: Yes.

19 JUSTICE BREYER: Is that the argument?

20 MR. HELLMAN: That is.

21 JUSTICE BREYER: All right.

22 MR. HELLMAN: And, again, to respond  
23 to Justice Gorsuch's question, the Court has  
24 proceeded carefully with lenity in mind when it  
25 -- when it's looked at a statute that the

1 government has said covers everything that one  
2 might want to punish, but doesn't clearly say  
3 that that is what we intend to punish, and both  
4 considerations of fair notice and, as the Court  
5 put it, deference to the prerogatives of  
6 Congress suggests that a more narrow  
7 interpretation is called for.

8 JUSTICE KAGAN: Well, is that what  
9 lenity means? This -- for sure this is a broad  
10 statute.

11 MR. HELLMAN: Yes.

12 JUSTICE KAGAN: It doesn't seem very  
13 ambiguous. You know, lenity, usually we're  
14 looking for a grievous ambiguity, sort of like  
15 the last case where it's like, I don't know,  
16 you could read it this way, you could read it  
17 that way. What do we do?

18 But that's not this statute. This  
19 statute, taken on its face, is just ungodly  
20 broad.

21 MR. HELLMAN: I understand the Court's  
22 lenity doctrine to say that once you apply the  
23 normal tools of statutory interpretation, if  
24 you're really left with good arguments on both  
25 sides, there's real ambiguity, important

1 ambiguity.

2 In a criminal case, you go with the  
3 less harsh interpretation. And I do --

4 JUSTICE GORSUCH: So -- so, for  
5 example, if we are left with some ambiguity as  
6 to your Aguilar analogy, that's when you would  
7 suggest perhaps lenity might be a tiebreaker?

8 MR. HELLMAN: Yes -- yes, I do. And  
9 -- and with respect to Justice Kagan's  
10 question, I think that these words read in  
11 isolation do suggest breadth. But reading them  
12 in isolation isn't the -- the only step  
13 obviously of statutory interpretation.

14 We have to look at it in context. And  
15 this is an incredibly strong case where context  
16 ought to matter, where you have Congress  
17 intentionally trying to bring together in one  
18 place, I believe is the phrase they used, all  
19 of the disparate tax crimes and recalibrate  
20 them as they saw fit.

21 So, again, the statute, read in  
22 isolation, I certainly take the point that it  
23 -- it looks broad and strong and "ungodly  
24 broad," to use your phrase, but that isn't the  
25 end of the statutory analysis. And once you do



1 all of the steps -- you look to where the  
2 language comes from, you look to what it might  
3 mean in context with other provisions right  
4 next door to it -- at that point, we suggest --  
5 we think we have the better of the argument,  
6 but at a minimum, at a bare minimum, there are  
7 competing interpretations that -- where the  
8 rule of lenity might apply.

9 JUSTICE SOTOMAYOR: There -- there is  
10 something to be done about the context that  
11 this was drafted in. As I look at the first  
12 half of this statute --

13 MR. HELLMAN: Yes.

14 JUSTICE SOTOMAYOR: -- "Whoever  
15 corruptly or by force or threats of force  
16 (including any threatening letter or  
17 communication) endeavors to intimidate or  
18 impede any officer or employee of the U.S.  
19 acting in an official capacity" --

20 MR. HELLMAN: Yes.

21 JUSTICE SOTOMAYOR: -- "... or in any  
22 way corruptly or by force or threat of force,  
23 (including any threatening letter or  
24 communication) obstructs or impedes, or  
25 endeavors to obstruct or impede, the due

1 administration of this title." All of that  
2 seems to be geared towards some affirmative act  
3 aimed at an agent or the agency.

4 That's where I got my earlier --

5 MR. HELLMAN: Yes.

6 JUSTICE SOTOMAYOR: -- differentiation  
7 between --

8 MR. HELLMAN: Yes.

9 JUSTICE SOTOMAYOR: -- a affirmative  
10 act and an omission act because that doesn't  
11 have the flavor of force or threat of force or  
12 threatening, all of the sort of active, violent  
13 or active, obstructive --

14 MR. HELLMAN: Right.

15 JUSTICE SOTOMAYOR: -- behavior that  
16 the examples set forth.

17 MR. HELLMAN: I think I understand  
18 your question better now. And I have a couple  
19 of responses.

20 I don't think the omission limitation  
21 will get -- will make sense of the tax criminal  
22 code for a couple of reasons. One, there are  
23 several misdemeanor offenses under the code  
24 that are not omission offenses; they are  
25 affirmative act offenses. And Congress showed

1 a lot of thought: Making a false statement in  
2 connection with your taxes -- that's an  
3 affirmative act -- is a misdemeanor unless  
4 you -- unless you make that statement under the  
5 penalty of perjury. That is the difference  
6 between Section 7207 and Section 7206,  
7 subsection (1).

8 That distinction between bad kinds of  
9 false statements, affirmative acts, is  
10 obviated, obliterated, by an interpretation of  
11 obstruction that says, when you make a false  
12 statement to the government, it has the effect  
13 of hindering, even if you didn't make it under  
14 the penalty of perjury. You might have made it  
15 not in that connection.

16 So I don't think that an  
17 omissions-based approach makes -- you know,  
18 gets --

19 JUSTICE GORSUCH: Well, does it get us  
20 part of the way there, though? Because the  
21 officer clause, as Justice Sotomayor suggests,  
22 you have to actually hinder something the  
23 officer is doing. And could that same spirit  
24 or thought be thought to apply in the  
25 administration as well, that the IRS has to be

1 doing something? Your preceding thought is a  
2 -- is a doing, it is a thing; it is not just  
3 merely -- I think the IRS speaks of the  
4 pervasive, continuous, brooding omnipresence of  
5 --

6 MR. HELLMAN: Yes. Right.

7 JUSTICE GORSUCH: -- of tax  
8 liabilities, that there's an implication from  
9 the officers clause that there's something more  
10 going on. Am I -- maybe that's not entirely  
11 helpful.

12 MR. HELLMAN: Well, what I would say  
13 is if -- if the thought is by limiting  
14 obstruction to any affirmative act that hinders  
15 the IRS in any way, you have not brought the  
16 statute --

17 JUSTICE GORSUCH: No, no, no. No, no,  
18 limiting it to some affirmative act going on by  
19 the agency, I think, is what Justice Sotomayor  
20 was suggesting, that the agency has to be doing  
21 something other than merely passively receiving  
22 taxes.

23 MR. HELLMAN: Well, and, of course,  
24 all of the conduct or omissions in this case  
25 are not in that context.

1 JUSTICE GORSUCH: Correct.

2 MR. HELLMAN: So --

3 JUSTICE GORSUCH: It's -- it's a  
4 friendly amendment.

5 (Laughter.)

6 MR. HELLMAN: Then that's not the rule  
7 we have adopted or endorsed to the Court, but  
8 -- and, again, you would have some other --

9 JUSTICE SOTOMAYOR: I have difficulty  
10 getting to what you have --

11 MR. HELLMAN: Right.

12 JUSTICE SOTOMAYOR: -- because you  
13 haven't, as Justice Kagan pointed out, given us  
14 anything in the language to anchor this in. At  
15 least --

16 MR. HELLMAN: Right.

17 JUSTICE SOTOMAYOR: -- Justice -- it  
18 appears Justice Gorsuch and I are trying to  
19 look at the language.

20 MR. HELLMAN: So what I would say in  
21 response to that is we would accept -- because  
22 there is no act in question here that falls  
23 within that rule. So, if you're asking me do I  
24 think that -- you know, would we accede to  
25 that, yes, we would.

1                   But I would point out that --

2                   JUSTICE SOTOMAYOR: A win is a win is  
3 a win.

4                   MR. HELLMAN: A win is a win, for  
5 certain, but I just want to be -- be certain  
6 that the Court fully appreciates that the line  
7 between when the IRS is doing something and not  
8 doing something at times can be a little bit  
9 blurry. And so, you know, I'd want to think  
10 about your proposal, but in any case, the --  
11 the key part is unless there's a proceeding --

12                   JUSTICE SOTOMAYOR: You just helped  
13 the government a lot with that statement.

14                   MR. HELLMAN: I hope I did not.

15                   (Laughter.)

16                   MR. HELLMAN: The -- our submission to  
17 this Court is that the government's  
18 interpretation in this case cannot be correct.  
19 We have offered language that comes directly  
20 from a predecessor statute dealing with  
21 proceedings, but I understand the Court's point  
22 that you might define proceedings a little more  
23 broadly than we do --

24                   JUSTICE GORSUCH: I'm not even arguing  
25 with you.

1 MR. HELLMAN: Yeah.

2 JUSTICE GORSUCH: I'm just suggesting  
3 that the officers clause might be a source of  
4 some aid to you.

5 MR. HELLMAN: Agreed.

6 JUSTICE GORSUCH: That's all I'm  
7 doing.

8 MR. HELLMAN: Absolutely agreed.  
9 Absolutely agreed.

10 Now, the other part I wanted to make  
11 sure I -- I said before I sat down was the  
12 government's interpretation in this case,  
13 although they push it now, is not one that they  
14 had invoked for nearly 30 years after the  
15 statute was enacted.

16 Although they claim it's -- there is  
17 no ambiguity, there is no need for lenity, this  
18 is a -- an interpretation that really came into  
19 fruition in the '90s, and with increasing  
20 frequency in -- in many, many cases, this is  
21 now being charged.

22 And if the Court has no further  
23 questions, I will reserve the rest of my time  
24 for rebuttal. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Parker.

3 ORAL ARGUMENT OF ROBERT A. PARKER

4 ON BEHALF OF THE RESPONDENT

5 MR. PARKER: Mr. Chief Justice, and  
6 may it please the Court:

7 I'd like at the very outset to address  
8 several of the things that my friend just said.  
9 He -- he suggested that entirely lawful conduct  
10 would come within this statute. We think that  
11 that is incorrect. He suggested that this  
12 statute swallows all of the other misdemeanor  
13 provisions of the code. We think that that is  
14 incorrect.

15 And I -- I want to just take a moment  
16 to explain why we think --

17 JUSTICE SOTOMAYOR: So how about the  
18 one example he does give? People go into  
19 shelters thinking they might be legal, might  
20 not. I'm going to role my dice. Would that be  
21 a corrupt intent?

22 MR. PARKER: I -- I don't believe  
23 so --

24 JUSTICE SOTOMAYOR: Why?

25 MR. PARKER: -- because there is not



1 the specific intent to obtain an unlawful  
2 advantage. You have to not only be intending  
3 to advantage yourself but know that there --  
4 that the advantage is unlawful.

5 And so that -- that, I think, goes  
6 directly to the --

7 JUSTICE GORSUCH: Well, Justice --  
8 Justice Breyer's snow shoveler, all right, I --  
9 I think you -- he's a felon under your  
10 interpretation because the -- the person who's  
11 paying him knows that, above \$600 or whatever  
12 it is, I have to file a 1099. I'm not doing it  
13 -- I'm doing it for an unlawful advantage for  
14 the snow shoveler. I know it. I'm a -- I'm a  
15 federal felon.

16 MR. PARKER: Well --

17 JUSTICE GORSUCH: For my -- for my  
18 friend's son's snow shoveling business.

19 MR. PARKER: Well, I --

20 JUSTICE GORSUCH: Right?

21 MR. PARKER: I think that that --

22 JUSTICE GORSUCH: I mean, the answer  
23 is yes, I think, isn't it?

24 (Laughter.)

25 MR. PARKER: That -- that circumstance

1 may come within the scope of the statute.

2 JUSTICE GORSUCH: I'm waiting for a  
3 yes or a no. You can just -- it may come  
4 within the scope. So that's a yes?

5 MR. PARKER: Yes. Yes, but I think  
6 that the --

7 JUSTICE GORSUCH: Okay. All right.

8 MR. PARKER: I think it -- it bears  
9 explanation as to why. I mean, first, I think  
10 that the threshold is actually \$2,000.

11 JUSTICE BREYER: Well, the reg I saw  
12 said 600.

13 MR. PARKER: But -- well, but that's  
14 if you're a business employing an independent  
15 contractor, so an -- an individual. But -- but  
16 I don't want to -- I don't think that that  
17 matters. The -- the point, though, is if you  
18 --

19 JUSTICE GORSUCH: How -- how is  
20 somebody supposed to know when they're going to  
21 be in trouble here? Because it seems like  
22 paying cash --

23 JUSTICE BREYER: Uh-huh.

24 JUSTICE GORSUCH: -- can sometimes be  
25 a problem. That was part of the indictment and

1 -- and the jury instructions here. Or keeping  
2 records, failure to keep records --

3 JUSTICE BREYER: Right.

4 JUSTICE GORSUCH: -- that you didn't  
5 -- that aren't lawfully obliged to be kept.

6 JUSTICE BREYER: You realize everybody  
7 in this audience now knows about the 1099 form,  
8 right?

9 (Laughter.)

10 MR. PARKER: Well, they -- they may be  
11 kept out of trouble as a result. But I -- I  
12 think that the point -- there are a couple of  
13 points that I think are important to make.

14 The first is the mens rea requirement  
15 of this statute, as in all obstruction  
16 statutes, is critical, and it is very exacting.  
17 So --

18 JUSTICE GORSUCH: The government made  
19 some similar arguments in the honest services  
20 case, that everything can be cured by a mens  
21 rea requirement. We don't need to worry about  
22 actus reus. We'll tell you about the actus  
23 reus when we get there. We'll create a common  
24 law of honest services.

25 And here it seems to me that's what

1 the government's parallel -- parallel argument,  
2 that we're not going to tell you what  
3 qualifies. We'll find out later.

4 And sometimes it's going to be simply  
5 paying cash. Sometimes it's not going to be  
6 keeping records. And -- and I just wonder are  
7 we going to wind up in the same place, that you  
8 drive this thing to such enormous breadth in  
9 its interpretation that you're -- you're  
10 inviting a vagueness challenge at the back end?

11 MR. PARKER: I -- I disagree with  
12 that, Justice Gorsuch, and I'd like to just  
13 take a moment to explain why.

14 So there are a number of limiting  
15 features of this statute that provide  
16 protection against precisely what you are  
17 explaining. And I think there are really three  
18 of them.

19 The first is there has to be a natural  
20 tendency to obstruct. This is the objective  
21 factual nexus that Aguilar says is baked into  
22 the term "endeavor." There's at least that.

23 JUSTICE GORSUCH: And paying cash is  
24 enough, though, under the government --

25 MR. PARKER: No, not necessarily.

1 JUSTICE GORSUCH: Well, it is in this  
2 case.

3 MR. PARKER: Actually, no. I don't  
4 think that that --

5 JUSTICE GORSUCH: That's -- that's in  
6 the jury instructions.

7 MR. PARKER: The -- the -- paying cash  
8 was one of the means of the obstructive  
9 endeavor.

10 JUSTICE GORSUCH: Right.

11 MR. PARKER: It was a -- a factual way  
12 that the individual was engaging in obstructive  
13 conduct. But you then have to determine that  
14 on the overall facts of this case there was a  
15 natural tendency of that act to obstruct.

16 You also have to show that the  
17 individual intended, specifically intended to  
18 obstruct the -- the administration of the code.

19 And then third --

20 JUSTICE ALITO: But before you go on,  
21 what do you do with the term "impede"?

22 MR. PARKER: Well, I -- I think that  
23 the term "impede" is largely coextensive with  
24 the term "obstruct." In fact --

25 JUSTICE ALITO: Well, I don't know

1       whether it is.  The -- the dictionary  
2       definition of "impede" is:  Interfere with or  
3       slow the progress of.

4                So anything that makes the work of the  
5       IRS more difficult impedes the work of the IRS.

6                MR. PARKER:  I -- I -- well, I would  
7       disagree with the statement that anything that  
8       makes the work of the IRS more difficult.  And  
9       I think this goes to what I was just about to  
10      say.

11              JUSTICE ALITO:  Why?  Why?  Why do you  
12      disagree with that?  On what basis?

13              MR. PARKER:  So -- so you have -- you  
14      have to have the natural tendency to obstruct.  
15      You then have to have proof.

16              JUSTICE ALITO:  You have the mens rea.  
17      What do you have besides the mens rea?

18              MR. PARKER:  Well, you -- you then  
19      have to be acting corruptly, which means that  
20      you have to have the specific intent to obtain  
21      an unlawful advantage.

22              JUSTICE ALITO:  That's the mens rea.  
23      What do you have besides the mens rea?

24              MR. PARKER:  Let's -- so let's say  
25      that you are engaged in lawful conduct, you're

1 paying people in cash, or you have structured  
2 your corporate form in a way that may make it  
3 more complicated for the IRS to figure out what  
4 your income and expenses are.

5 Those things do not have a natural  
6 tendency to obstruct in and of themselves  
7 because there is nothing that says that the  
8 administration of the code has to be made  
9 maximally easy.

10 The only reason that those would end  
11 up having a -- an obstructive effect is if you  
12 pair them with efforts to mislead or deceive  
13 the IRS into believing that the situation is  
14 not as it appears for an unlawful advantage.  
15 So in the --

16 JUSTICE ALITO: Well, where does this  
17 come from in the language of the statute? I  
18 mean, this -- that's what troubles me about  
19 this. If I read "impede" to mean what it means  
20 in ordinary language, slow the progress of, you  
21 don't even have to impede. It's enough that  
22 you endeavor to impede.

23 The only limiting thing I see here is  
24 "corruptly." And, you know, the old, you know,  
25 the old saying, it's lawful for taxpayers to

1     avoid taxes but not to evade taxes.  So the  
2     line is -- the line can be very -- can be very  
3     thin.

4             MR. PARKER:  I'm not sure actually  
5     that it is all that thin.  And I think that the  
6     -- what -- what is important to remember here  
7     is that there has to be an effort to actually  
8     convert that completely lawful conduct into  
9     something that has the natural tendency to  
10    obstruct or impede the IRS in an unlawful  
11    manner to obtain an unlawful benefit.

12            JUSTICE ALITO:  Well, let me just give  
13    you a variation of the hypothetical that's  
14    already been given.

15            So somebody -- somebody offers to  
16    clean my gutters, and he says \$100 cash, \$125  
17    if you pay me by check.  Is that a violation of  
18    this?

19            MR. PARKER:  No, not at all.

20            JUSTICE ALITO:  Why -- why not?

21            MR. PARKER:  Well, because there --  
22    there is no --

23            JUSTICE ALITO:  What if I -- what if I  
24    -- you know, I understand why he's going to  
25    give me the discount by paying by cash, because



1 he doesn't want to report it.

2 MR. PARKER: Well, again, I think that  
3 you would then have to pair that with other  
4 efforts to deceive the IRS, as you did here. I  
5 mean, Mr. Marinello --

6 JUSTICE ALITO: Why? Why isn't that  
7 sufficient in itself?

8 MR. PARKER: Because there's no  
9 natural tendency of the mere fact that you give  
10 him \$100 in cash to obstruct anything. What  
11 becomes obstructive about that is if that is  
12 then not reported to the IRS or is falsely  
13 reported to the IRS and --

14 JUSTICE SOTOMAYOR: I know he's not  
15 going to report, and he doesn't report.

16 MR. PARKER: Well, I think that if --  
17 if you actually have the -- the subjective  
18 specific intent that you are giving him this  
19 money with the intent that he is not going to  
20 report it to the IRS, and you are engaged in a  
21 common endeavor to -- to obstruct the IRS's  
22 ability to duly administer the code, I think --

23 JUSTICE KAGAN: But doesn't everybody  
24 know -- doesn't everybody know when they're  
25 given an offer like this, you know, I'd rather

1 have cash than a check, doesn't everybody know  
2 why people would rather have cash than a check?

3 MR. PARKER: Well, that may be true,  
4 but, again, I -- this is I think precisely why  
5 these sorts of things, A, are -- are not  
6 charged under this statute but, B, I think  
7 would be incredibly difficult to charge under  
8 this statute.

9 JUSTICE BREYER: Why? Why? I mean,  
10 that's -- you have used several times the words  
11 "specific intent." So is it the -- specific  
12 intent to me in the law means knowledge that  
13 the particular action is unlawful.

14 MR. PARKER: Uh-huh.

15 JUSTICE BREYER: So are you saying the  
16 government's position is we cannot under this  
17 statute prosecute any person for anything he  
18 does unless that person knows that what he is  
19 doing, such as giving money to a person in  
20 cash, will be used to provide a benefit to that  
21 person that is unlawful, he knows that doing  
22 this, what he is doing, is unlawful, and unless  
23 he knows that, the statute does not permit  
24 prosecution?

25 MR. PARKER: I -- I think that that is

1 accurate. I mean, you --

2 JUSTICE BREYER: No, don't think it's  
3 accurate. I want to know if the government of  
4 the United States is saying this statute does  
5 not permit us to prosecute any person, unless  
6 that person knows that the action he is taking  
7 -- I'm repeating myself -- such as giving the  
8 money in cash, breaks the federal law, and he  
9 also knows that what he is doing in giving that  
10 money breaks the federal law?

11 MR. PARKER: Well, he has --

12 JUSTICE BREYER: If he does not know  
13 both of those things, he cannot be prosecuted  
14 under this statute. Now, I'm interested in the  
15 position of the United States, on that question  
16 of interpretation, it is an interpretation of  
17 the word "corruptly."

18 MR. PARKER: Yes. Both of the things  
19 that --

20 JUSTICE BREYER: Yes, the answer is  
21 the position of the United States is what I  
22 just said is correct. No one can be prosecuted  
23 unless both those things are true?

24 MR. PARKER: Both of those things, I  
25 think, are -- are entirely subsumed by the

1 definition of corruptly. You have to have the  
2 specific intent --

3 JUSTICE BREYER: All right. I would  
4 like a yes or a no answer to the question.

5 MR. PARKER: Yes. I mean, as I said  
6 --

7 JUSTICE BREYER: The answer is yes.  
8 Okay. Thank you. That's helpful.

9 MR. PARKER: Certainly. So --

10 JUSTICE GINSBURG: Well, may I ask you  
11 another question about this statute? The  
12 charge is that it would make any tax crime a  
13 misdemeanor, felony, you could tack this  
14 obstruction charge onto any tax crime in the  
15 code and then you just get an additional  
16 penalty.

17 Is that so? Let's say -- well, let's  
18 take tax evasion, tax fraud. Wouldn't those  
19 also qualify as obstruction?

20 MR. PARKER: Tax evasion may because  
21 there you are willfully attempting to obtain --  
22 to evade a tax deficiency, although the -- the  
23 -- if you can prove tax evasion, there's little  
24 reason to prove obstruction.

25 However, all of the other ones, the

1 answer is no. If you look at the elements of  
2 Section 7212, they are different than the  
3 elements that you will find in any other  
4 criminal provision in the -- in the Internal  
5 Revenue Code.

6 They require corruption. They require  
7 an intent to obstruct. Other provisions  
8 require willful actions or willful failures to  
9 act that may --

10 JUSTICE KAGAN: Is that the only  
11 difference; it's just the mens rea difference?

12 MR. PARKER: Well, I think that's --  
13 yes, I mean, you also must have a natural  
14 tendency to obstruct. And, for example,  
15 failing to report your income, withholding that  
16 information that you are lawfully required to  
17 provide I think has that natural tendency.

18 But if you look at these other  
19 provisions, take, for example, failure to file  
20 a tax return, there are going to be individuals  
21 -- and, in fact, I would wager to say that  
22 there are probably a large number of  
23 individuals -- who do not file their tax  
24 returns for reasons that have nothing to do  
25 with a specific intent to obtain an unlawful

1 advantage. They may say --

2 JUSTICE KAGAN: Like what? Like what?

3 CHIEF JUSTICE ROBERTS: Well --

4 JUSTICE GORSUCH: Really?

5 MR. PARKER: They may say sometimes I  
6 owe a small amount of tax. Sometimes I get a  
7 small refund. It's just not worth it to file.

8 CHIEF JUSTICE ROBERTS: Why is --

9 MR. PARKER: In that circumstance,  
10 there's no intent to obtain that unlawful  
11 advantage because you don't know whether you're  
12 going to be advantaged or not.

13 I think the same thing could be said  
14 of, you know, failure to keep records. You  
15 destroy all of your records because they're  
16 just sitting around and it makes you upset to  
17 have so many records in your house.

18 There's nothing -- maybe that is a  
19 willful violation of a misdemeanor provision,  
20 but it wouldn't qualify under Section 7212  
21 under any definition --

22 JUSTICE GORSUCH: It is a -- it is a  
23 remarkable --

24 CHIEF JUSTICE ROBERTS: But you -- you  
25 understand the concern on the other side, I

1 guess, which is, I think you used the word  
2 "cantankerous" in your brief, is that right,  
3 that some people are just cantankerous, and  
4 they're just not going to file.

5 MR. PARKER: Yes.

6 CHIEF JUSTICE ROBERTS: Perhaps that's  
7 a fairly small number of people compared to the  
8 situation where it is not terribly difficult  
9 for an assistant U.S. attorney to prove that  
10 something was done corruptly as opposed to  
11 willfully.

12 MR. PARKER: Well, I --

13 CHIEF JUSTICE ROBERTS: It's kind of  
14 like the discussion we were having, that it is  
15 not hard to prove that paying in cash rather  
16 than a check when you get a discount was for a  
17 purpose to give a -- a lawful advantage.

18 MR. PARKER: Well, I don't --

19 CHIEF JUSTICE ROBERTS: An unlawful  
20 advantage.

21 MR. PARKER: I would -- I'm not sure  
22 that it's correct to say that these are rare  
23 cases. I would say that they are not, as a  
24 general matter, prosecuted, and so they don't  
25 result in published opinions; but I would say

1 that -- I would say that the -- the main  
2 concern here with kind of this  
3 over-criminalization of the tax code, I don't  
4 think actually plays out in practice.

5 Our -- I can represent to the Court  
6 that our internal data indicates that  
7 obstruction charges are brought in  
8 approximately 4 percent of criminal tax cases.

9 CHIEF JUSTICE ROBERTS: Is it -- is it  
10 still -- 4 percent. Is it still the published  
11 policy of the Department to charge to the  
12 maximum extent reasonably possible?

13 MR. PARKER: I -- I believe that we,  
14 as a general matter, do seek out the most  
15 serious charge. However, especially in the --

16 JUSTICE KAGAN: I thought that there  
17 was new guidance saying exactly that in the  
18 last year.

19 MR. PARKER: Yes. I believe that  
20 that's correct. However, my -- my point would  
21 be -- I don't think that there's any  
22 requirement that this particular provision be  
23 charged in any given case --

24 JUSTICE KENNEDY: Suppose we were --

25 MR. PARKER: -- because of all the



1 limitations.

2 JUSTICE KENNEDY: Suppose we were to  
3 conclude that 80 percent of criminal tax  
4 misdemeanor violations could be accompanied by  
5 the felony charges contained within this  
6 statute.

7 Would that be cause for our Court to  
8 be concerned?

9 MR. PARKER: Well, I'm not sure that  
10 it would necessarily be cause for concern. I  
11 think that would be surprising.

12 However, I would note that, as this  
13 Court has explained in many cases, there is  
14 substantial overlap as a factual matter between  
15 the misdemeanor and felony provisions of the  
16 Internal Revenue Code. The Court has --

17 JUSTICE KENNEDY: You do not --

18 MR. PARKER: -- repeatedly said --

19 JUSTICE KENNEDY: You -- you do not  
20 think we should be concerned if 80 percent of  
21 tax misdemeanor violations can be increased to  
22 a felony under this statute? That's not a  
23 cause for concern?

24 MR. PARKER: Well, again, I'm -- I'm  
25 not --

1 JUSTICE KENNEDY: Yes -- yes or no.

2 MR. PARKER: I don't think it is, only  
3 because Congress has specifically provided an  
4 interlocking web of criminal penalties in this  
5 area. And it has done so precisely because we  
6 have a self-reporting system of taxation --

7 JUSTICE BREYER: The self --

8 MR. PARKER: -- that depends upon --

9 CHIEF JUSTICE ROBERTS: Just to be  
10 clear, it's not -- my line of questioning is  
11 not to suggest bad faith on the part of the --  
12 of the Department, but instead to suggest that  
13 that concern may have motivated Congress --  
14 should motivate a narrower understanding of  
15 what Congress intended in -- in this particular  
16 provision.

17 MR. PARKER: Well, I -- I think that  
18 that's a fair point, Mr. Chief Justice, but I  
19 think that it does not motivate the adoption of  
20 the limiting construction that Petitioner is  
21 proposing.

22 Remember, Petitioner's --

23 JUSTICE GORSUCH: On -- on that -- on  
24 that score, the verbs "obstruct" and "impede,"  
25 along with "corruptly," the adverb, you

1 normally expect there to be an object to them.  
2 I have to -- have to -- because it is specific  
3 intent, as Justice Breyer pointed out, and  
4 you've conceded.

5 I have to know about some thing and I  
6 have to intend to obstruct or impede that  
7 thing. And the government's interpretation of  
8 that thing, as I understand it, in its words is  
9 the continuous, ubiquitous, and universal  
10 collection of taxes.

11 Is -- is that an object that's  
12 reasonably inferred? Can one -- can one intend  
13 -- know of and intend to impede or obstruct,  
14 corruptly or otherwise, something that's  
15 continuous, ubiquitous, and universal?

16 MR. PARKER: Well, respectfully,  
17 Justice Gorsuch, I don't think that that is  
18 what we were saying. I --

19 JUSTICE GORSUCH: I think that's out  
20 of --

21 MR. PARKER: We're not saying --

22 JUSTICE GORSUCH: -- your brief in  
23 opposition, right?

24 MR. PARKER: Those -- but those words  
25 refer to the understanding of individuals about

1 the fact that tax administration occurs on a  
2 routine and predictable schedule.

3 JUSTICE GORSUCH: But -- but don't  
4 those -- don't those verbs imply that there's  
5 something more direct as the object of my  
6 actions than -- than something that's  
7 continuous, ubiquitous, and universal?

8 MR. PARKER: Well, certainly I think  
9 that's true. I think that you have to be --

10 JUSTICE GORSUCH: Okay. That's  
11 helpful. Thank you.

12 MR. PARKER: -- specifically intending  
13 to obstruct the administration of the code.  
14 And the only point that we're making is that  
15 administration, unlike in the case of the due  
16 administration of justice, which involves  
17 discrete proceedings that many Americans will  
18 go their entire lives without having a  
19 connection to, the due administration of the  
20 Internal Revenue Code occurs on a routine and  
21 predictable schedule that people know is coming  
22 and can reasonably foresee.

23 JUSTICE BREYER: But you are --

24 MR. PARKER: I think there are --

25 JUSTICE BREYER: -- if you want, I

1 want this answer. I don't want to interrupt  
2 your answer, but I want you to augment it.

3 And you started to do that when you  
4 started to talk about just what you were  
5 talking about. Look, if I put it differently,  
6 three principles:

7 One, the Chief Justice, I think,  
8 enunciated, and I -- it sounds comical if I'm  
9 going to say it, but -- but it's very  
10 important; it is not an appropriate way of  
11 interpreting a statute.

12 Look, perfect criminal statute, it is  
13 a crime to do wrong in the opinion of the  
14 attorney general. Don't worry, we'll interpret  
15 it properly.

16 Even if you do interpret it properly,  
17 no. The answer under the Constitution, I  
18 think, is no.

19 The second principle is right here in  
20 Aguilar, both of them, the second and third.  
21 "We have traditionally exercised restraint in  
22 assessing the reach of a federal criminal  
23 statute, both out of deference to the  
24 prerogative of Congress and out of concern that  
25 a fair warning should be given to the world in

1 language that the common world will understand  
2 of what the law will do, if a certain line is  
3 passed."

4           From those principles, they conclude  
5 that a statute identically worded to this one  
6 but for the word justice instead of title  
7 requires a nexus be shown to a specific grand  
8 jury or jury proceeding, a -- a court  
9 proceeding, even though, of course, you can  
10 read the word justice to include the  
11 investigators and many other things.

12           All right. They're saying, in effect,  
13 you take those same principles, that same  
14 limiting restriction, and do the same analogous  
15 thing here.

16           Now, why not?

17           MR. PARKER: I think there are a  
18 number of reasons not to do that. First of  
19 all, I think that the -- as I just explained,  
20 the due administration of justice has always  
21 been understood to be something that occurs in  
22 discrete proceedings, unlike the administration  
23 of the Internal Revenue Code; but I think that  
24 that is confirmed by the history of Section  
25 1503.

1           The predecessor statute to Section  
2   1503 specifically said that it only applied to  
3   the obstruction of officers or witnesses in any  
4   court of the United States or the due  
5   administration of justice therein.

6           Now, when Congress recodified that  
7   provision in 1948, it modified the wording, but  
8   as this Court has repeatedly explained, that  
9   1948 recodification was not intended to have  
10  any substantive effect on any of the provisions  
11  in the code.

12           JUSTICE GORSUCH:  But Congress  
13  legislates against the backdrop of what's out  
14  there.  And what -- what was out there was our  
15  interpretation of those words requiring a nexus  
16  to an active proceeding, something more than --  
17  something more definite than something that's  
18  continuous, ubiquitous and universal.

19           MR. PARKER:  Well --

20           JUSTICE GORSUCH:  And -- and the  
21  Congress that passed this statute had that  
22  interpretation in its back pocket at the time;  
23  right?

24           MR. PARKER:  Well, I -- but I would  
25  disagree with that because in none of this

1 Court's cases, in Pettibone, in Aguilar, Arthur  
2 Andersen, any of them did this Court ever  
3 suggest that it is the phrase "due  
4 administration," not the phrase "due  
5 administration of justice," that carries that  
6 connotation.

7           And I would also note that if that is,  
8 in fact, what Congress intended, it is very  
9 strange because Congress had just a few years  
10 earlier enacted the statute that is now Section  
11 1505, cited in our brief.

12           And that statute was specifically  
13 enacted to do exactly what -- what you're  
14 suggesting, Justice Gorsuch. It was enacted to  
15 extend the provisions of Section 1503 to  
16 pending proceedings before agencies of the  
17 United States. And that is what it says.

18           If the Petitioner's interpretation  
19 were correct, then I think that there's really  
20 no reason for Congress to have enacted that,  
21 and it would also be awfully strange for  
22 Congress not to have borrowed that language.

23           But I would also note that there are a  
24 number of -- as I -- getting back to the point  
25 I was making previously, there is no reason to



1     adopt his particular limiting construction,  
2     which, frankly, I think has no basis in the  
3     text, and --

4             JUSTICE KAGAN:  Mr. -- Mr. Parker --

5             MS. PARKER:  -- does not solve these  
6     problems.

7             JUSTICE KAGAN:  Can -- can I go back  
8     to the question of -- of -- of the Department's  
9     prosecution policy?

10            And, you know I -- could you tell me,  
11     number 1, what the current state of the  
12     Department's guidance is as to whether  
13     prosecutors are -- are told to prosecute to the  
14     maximum extent allowed by law; and, number 2,  
15     whether that would mean in this case that here  
16     I am a prosecutor and I think that some action  
17     falls within 7212, that I would be precluded  
18     from proceeding instead under 7203 or 7205 or  
19     7207.

20            MR. PARKER:  My understanding is it is  
21     certainly the Department's position as a  
22     general matter that prosecutors should be  
23     charging the most serious offense that is  
24     readily provable on those facts.

25            I -- I -- I couldn't say whether in

1 any given case that would mean that  
2 Section 7212 would have to be charged because,  
3 as I said before, the facts of each case are  
4 going to be different and they're going to make  
5 the ability to prove Section 7212 more or less  
6 possible.

7 And there are going to be a number of  
8 cases where I think 7212 isn't even possible  
9 to -- even to allege. And so I -- I think that  
10 -- I'm not sure that it's --

11 JUSTICE KAGAN: Yes, but I guess what  
12 I was saying is that if a prosecutor could  
13 proceed under 7212, that the prosecutor is  
14 being instructed that she must proceed under  
15 that section.

16 MR. PARKER: If -- if -- if the facts  
17 of that case render a 7212 charge readily  
18 provable, then, yes, I think that prosecutors  
19 would do that, but I -- I also think that that  
20 is not borne out by -- a concern that that is  
21 going to lead to just these sorts of charges  
22 becoming common and ubiquitous doesn't  
23 necessarily translate because, as I said, our  
24 understanding is that it's only about 4 percent  
25 of cases.

1           And that includes the most recent data  
2           from this -- from this year. And so --

3           CHIEF JUSTICE ROBERTS: Counsel, you  
4           used the phrase "readily provable." I just  
5           want to as a question of fact, is that -- is  
6           that the term that's used or is that your  
7           summary of what you understand?

8           MR. PARKER: I -- I don't exactly  
9           remember the term that is used, but certainly  
10          the government has to satisfy itself that it  
11          can prove beyond a reasonable doubt in that  
12          case that that crime has occurred.

13          I -- I also, though, want to get back  
14          --

15          JUSTICE ALITO: Well, before you move  
16          off that point, why should we be comforted by  
17          the fact that prosecutorial discretion can be  
18          used in applying a statute, if this is a  
19          statute, with a really broad reach so that it  
20          reaches a lot of rather trivial conduct?  
21          Doesn't that make the situation worse rather  
22          than better? So then the prosecutors can  
23          decide where they want to use this.

24          MR. PARKER: I -- I don't think that  
25          it does. I mean, I think that the government

1 has the -- the responsibility to enforce  
2 Congress's statutes.

3 And if Congress has provided that this  
4 particular conduct is criminal, then I think  
5 that that is appropriate. I don't think that  
6 there is anything that is particularly  
7 standardless or vague or -- or otherwise  
8 uncertain about this particular statute.

9 JUSTICE GINSBURG: May I ask you, this  
10 was, I think, brought up by the opposing side.  
11 It is about 7212(b).

12 So the crime is rescuing seized  
13 property. Rescuing seized property carries a  
14 two-year penalty. Could the government tack on  
15 to that 7212(a), obstruction of the  
16 administration of the IRS -- IRC, so then --  
17 which is a three-year maximum?

18 MR. PARKER: I -- I suppose that if  
19 the government could prove that the person did  
20 so with corrupt intent, and I think that that's  
21 the main difference, obviously, between those  
22 two provisions, in addition to the different  
23 statutory penalties, if we could prove that,  
24 then I think that would be available.

25 I'm not sure why the government would

1 want to tack one on to the other. I mean, this  
2 would all end up being charged as obstruction  
3 anyway, and so I'm not sure why that would make  
4 sense, but I -- I think it's possible.

5 There are -- there are --

6 JUSTICE GINSBURG: Well, it would --  
7 if -- if it is the highest penalty, it's three  
8 years under 7212(a) and only two years under  
9 7212(b).

10 MR. PARKER: Uh-huh.

11 JUSTICE GINSBURG: So, with a maximum  
12 charging, why wouldn't the --

13 MR. PARKER: Well, because I think we  
14 would simply proceed under Section 7212(a),  
15 because that is the -- carries the higher  
16 potential penalty.

17 I -- I would like to, in -- in the  
18 time I have remaining, just be sure to make two  
19 points.

20 The first is the Petitioner's proposed  
21 limiting construction, as we've said, it  
22 doesn't come -- it doesn't have a basis in the  
23 text, but that doesn't mean that there aren't  
24 other potential limiting constructions that  
25 this Court could adopt, either in this case or

1 in another appropriate case.

2 I think, Justice Sotomayor, you  
3 alluded to the possibility of excluding pure  
4 omissions from -- from the scope of the statute  
5 to try to differentiate between the misdemeanor  
6 provisions and this one.

7 The Court actually engaged in a very  
8 similar analysis in Spies. That was the tax  
9 evasion case where it determined that  
10 omissions, pure omissions at least, would not  
11 qualify.

12 And I think that that may be an  
13 appropriate limiting construction here. No one  
14 has suggested that. And I think the reason  
15 Petitioner hasn't is because it wouldn't really  
16 help him.

17 The only two means of the endeavor in  
18 this case that were charged as failures to act,  
19 if you look at the evidence, it was clear that  
20 he was engaged in clear affirmative actions of  
21 destroying his records and other things. So  
22 that's one point I'd like to make.

23 And the second is one of the main  
24 problems here is that obstruction will --  
25 obstruction at the front end will often prevent

1 the government from being able to charge  
2 appropriate offenses on the back end. And this  
3 case demonstrates that perfectly.

4 The government would have brought a  
5 tax evasion charge in this case but for the  
6 fact that Mr. Marinello so destroyed his  
7 records that it was unable to prove beyond a  
8 reasonable doubt that there was an actual tax  
9 deficiency.

10 And so what I think Petitioner's  
11 proposed construction would do is it would  
12 effectively allow individuals to evade their  
13 taxes and then obstruct their way down to a  
14 misdemeanor charge, or if they are particularly  
15 good at it, maybe obstruct their way out of  
16 criminal penalties at all.

17 And the government could do nothing  
18 about it, unless the individual actually  
19 happened to be obstructing a pending audit or  
20 investigation.

21 Audits and investigations are types of  
22 administration, but the Internal Revenue Code  
23 contains an entire subtitle called "Procedure  
24 and Administration" that lists in sequential  
25 chapters all of the different types of

1 administration that occur.

2 That includes the gathering of  
3 information that taxpayers must self-report.  
4 It includes the calculation and assessment of  
5 taxes, the collection of taxes.

6 It would be very strange, I think, for  
7 Congress to have specified that with such --  
8 with such clarity and then to have intended by  
9 referencing the due administration of this  
10 title to cut out all of that administrative  
11 functions and only focus on audits and  
12 investigations.

13 JUSTICE GINSBURG: You gave the  
14 example of the omission that Justice Sotomayor  
15 brought up. What else could limit the  
16 potentially huge scope of this provision?

17 MR. PARKER: Well, I think that -- I  
18 mean, I -- I don't mean to repeat myself, but I  
19 do think, Justice Ginsburg, that a rigorous  
20 enforcement of the mens rea requirement does  
21 that.

22 And this Court has repeatedly said  
23 that in the obstruction context, rigorous  
24 enforcement of mens rea requirements is what  
25 separates individuals who do not have or have



1 not committed culpable conduct from those who  
2 do.

3 And I don't think that this  
4 obstruction provision -- may I conclude? I  
5 don't think this obstruction provision should  
6 be treated any differently.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Hellman, four minutes remaining.

11 REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN

12 ON BEHALF OF PETITIONER

13 MR. HELLMAN: Thank you, Mr. Chief  
14 Justice. Just a few quick points.

15 I want to begin with the misdemeanors,  
16 the willful misdemeanors in the code. I think  
17 I heard my friend on the other side suggest  
18 that it could very well be that a highly  
19 substantial number of those misdemeanors would  
20 qualify as obstruction, which is in itself a  
21 problem.

22 And, again, it requires this Court to  
23 think that the crimes that the Congress made  
24 the centerpiece of the code, these willful  
25 offenses, really are only meant for the

1 idiosyncratic case in which somebody  
2 intentionally violates the law but not for any  
3 particular benefit.

4           In the context of willful tax  
5 violations, I think in the substantial majority  
6 of cases, if not all, you're going to have a  
7 prosecutor who can say this was done for a  
8 reason, some unlawful benefit, which need not  
9 even be financial.

10           Second, as to the safeguards that the  
11 mens rea requirement offers, in a world in  
12 which not consulting fully with an accountant,  
13 paying in cash, not keeping all records, can  
14 become obstruction, if they're done for the  
15 wrong reason, then you really are leaving it up  
16 to the prosecutor, who is required under  
17 current charging rules to charge as  
18 aggressively as possible, to decide what was in  
19 the defendant's mind.

20           Not every case goes to trial. Very  
21 few cases go to trial. With a felony  
22 conviction in the balance, you're going to find  
23 that this gives enormous leverage, even more so  
24 than they currently have, to prosecutors.

25           Third, there's a suggestion here that

1 the government needs this broad interpretation;  
2 otherwise, wrongdoing will go unpunished.

3           They can't point to a single case  
4 since 1954 where that was the case. It is  
5 certainly not the case here, where the  
6 government told the jury repeatedly that Mr.  
7 Marinello had substantial gross income and took  
8 substantial personal income from that.  
9 Exhibits 21 and 22 below and pages 516 to 518  
10 make that point very clearly.

11           Fourth, the omissions theory as an  
12 alternative way of limiting this. Again, that  
13 doesn't make sense of the statutes that are  
14 misdemeanors, like forcible rescue, like  
15 willful false statements, that are affirmative  
16 acts but less punishment than the -- than the  
17 7212 obstruction charge.

18           The last thing I want to say is we  
19 believe that based on the heritage of this  
20 language and the fact that obstruction statutes  
21 typically are focused on proceedings, that is  
22 the interpretation we've offered to the Court.

23           But as Justice Gorsuch and Justice  
24 Sotomayor pointed out, there are other ways of  
25 reading the officers clause in conjunction with

1 the administration clause to come up with a  
2 more limited standard that does not cover any  
3 of the context -- conduct in this case, act or  
4 omission.

5 So, for those reasons, we would ask  
6 the Court to reverse.

7 JUSTICE GINSBURG: So, what is it?  
8 What do you derive from the officer clause?

9 MR. HELLMAN: I -- I'm sorry?

10 JUSTICE GINSBURG: What -- what is the  
11 limit that you are now proposing?

12 MR. HELLMAN: The limit that I am  
13 understanding Justice Sotomayor and Justice  
14 Gorsuch to be suggesting is, if you are -- if  
15 your obstructive act or omission is in the  
16 context with some interaction with the IRS,  
17 not, say, failing to talk to an accountant on  
18 your own time, not paying someone in cash in  
19 your own home, but in some interaction with the  
20 IRS, that could be a limitation; that would  
21 limit it.

22 I think --

23 JUSTICE GINSBURG: An -- an  
24 interaction, although no audit, no proceeding  
25 is yet under way?

1 MR. HELLMAN: Yes, that -- yes, that  
2 is the rule. Now, I think that if in practice,  
3 if you applied that, it would start to look an  
4 awful lot like a proceeding requirement, maybe  
5 a little bit broader around the edges, maybe a  
6 little bit more flexibility, but it would be in  
7 -- in substance kin to it.

8 JUSTICE BREYER: And you're suggest --

9 JUSTICE GORSUCH: And you think it's  
10 preferable given its heritage and for other  
11 reasons?

12 MR. HELLMAN: Yes. Yes.

13 JUSTICE BREYER: If -- if so, I think  
14 you're suggesting work with the word in the  
15 statute, "administration." That's the word?

16 MR. HELLMAN: Yes.

17 JUSTICE BREYER: All right. So, if I  
18 start working with that word, do you have on  
19 the top of your head two or three cases or  
20 something I might read?

21 MR. HELLMAN: Well, I think if you  
22 look at --

23 JUSTICE BREYER: Aguilar, but what  
24 else?

25 MR. HELLMAN: Sure. Sure. Aguilar,

1 and if you look at the jury instructions in  
2 cases that have interpreted other obstruction  
3 statutes that apply to proceedings, which is  
4 never a defined term in those statutes, I don't  
5 have a case name for you, you'll see that they  
6 start to look like things like an audit where  
7 you have an individualized assessment or  
8 enforcement of some obligation enforceable by a  
9 subpoena power.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 11:59 a.m., the case in  
14 the above-entitled matter was submitted.)

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## Official

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