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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. )  
- - - - -

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 quest -- 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 reuses being so broad,  
15 anything that hinders the IRS's ability to  
16 carry out a code obstruct --

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 -- in the process of  
25 assessing his taxes and he in some way

1 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 you describe it, it sounds  
16 like tax evasion, if there's a deficiency and  
17 an evasive act in connection with it. It could  
18 be a false statement to the IRS. But Congress  
19 knows how to write a pending proceeding  
20 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: And you  
10 suggest --

11 JUSTICE ALITO: I'm sorry.

12 CHIEF JUSTICE ROBERTS: You -- you  
13 raised that specter in your brief. In your  
14 experience, is that happening on the ground? I  
15 mean, is it the case that you find indictments  
16 always -- excuse me -- always tacking on  
17 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: But go to your first  
10 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 it's right?

20 MR. HELLMAN: Yes, that is correct,  
21 because it comes down to -- to the mens rea of  
22 the -- of the person who's filling out that  
23 form.

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

1 MR. HELLMAN: That's right. And I  
2 think another --

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

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

17 You could get the same situation  
18 there, couldn't you?

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

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

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

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

18           JUSTICE GORSUCH: Mr. --

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

22           MR. HELLMAN: Yes.

23           JUSTICE KAGAN: I guess the question  
24 is why your limiting interpretation? And  
25 obviously you talked about this in your brief.

1 But I just want to give you an opportunity now  
2 to try to convince me, because right now I feel  
3 as though it comes out of thin air. It doesn't  
4 have any grounding in the text of the statute.

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

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

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

20 And you also have the same means by  
21 which you're doing it. So you put that all  
22 together and, on top of that, the fact that  
23 there's nothing unusual about obstruction  
24 proceed -- obstruction statutes having  
25 proceedings as their focus.



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

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

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

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

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

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

23           It's really the model. And I don't  
24 think that word choice can be explained by --  
25 by coincidence. And then, of course, you have

1 the problem of, again, what would -- the  
2 government's alternative interpretation puts a  
3 code that would stretch across this, you know,  
4 this entire table, any violation of it, which  
5 is potentially a felony.

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

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

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

24 Now --

25 CHIEF JUSTICE ROBERTS: Do you think a

1 lot of people do that? I mean, you've got  
2 three children and they say they've got five?

3 MR. HELLMAN: In my experience --  
4 well, in any case --

5 CHIEF JUSTICE ROBERTS: Well, your  
6 experience because --

7 (Laughter.)

8 MR. HELLMAN: I -- I was responding to  
9 Justice --

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

13 MR. HELLMAN: Right. There may be a  
14 category problem there. I -- I agree.

15 JUSTICE GINSBURG: There are people  
16 who list their dogs as dependents.

17 MR. HELLMAN: Well, I'll defer to  
18 Justice Ginsburg on that.

19 (Laughter.)

20 JUSTICE BREYER: I wasn't thinking of  
21 those people. I just think that there are  
22 many, many, many, many regulations in the code  
23 that seem to be quite trivial to an ordinary  
24 person. And they might, in fact, not pay that  
25 much attention to every form and, moreover,

1 maybe they even want to help the gardener. All  
2 right?

3 Now, I think there are many such  
4 people in the 1099 case, but I don't know.  
5 That's why I asked you whether it was an  
6 appropriate example.

7 MR. HELLMAN: And I do believe that it  
8 is one.

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

11 MR. HELLMAN: Well, I think this  
12 Court's decisions in Aguilar and Arthur  
13 Andersen sort of point the way in that  
14 direction.

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

20 JUSTICE GORSUCH: Saving that for the  
21 next case.

22 MR. HELLMAN: We'll save that for the  
23 next case. But what we have most definitely  
24 argued in this case is that, as the Court  
25 explained in Aguilar, before this Court will

1     assume that Congress meant to felonize every  
2     immoral act under the sun, we're going to want  
3     them to say that a little bit more clearly than  
4     they -- than they did in the statute.

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

9             MR. HELLMAN:  Yes.

10            JUSTICE BREYER:  -- virtually, except  
11     administration of justice instead of  
12     administration of this title.

13            MR. HELLMAN:  Correct.

14            JUSTICE BREYER:  And then it's quite  
15     limited how they interpreted it.  But I -- I'm  
16     not totally clear as to what significance --  
17     they said something about a nexus --

18            MR. HELLMAN:  Yes.

19            JUSTICE BREYER:  -- but a nexus to  
20     what?  I mean, and -- and --

21            MR. HELLMAN:  Sure.

22            JUSTICE BREYER:  -- what's your  
23     understanding of that?

24            MR. HELLMAN:  So, as I read Aguilar,  
25     it's a nexus to a pending proceeding.  So, in

1 that case, the defendant lied, that was  
2 conceded to an FBI agent, but it wasn't clear  
3 that those statements were ever going to get  
4 into court into a grand jury proceeding. They  
5 might or might not in the words of the Court.

6 And what the court --

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

14 MR. HELLMAN: Yes.

15 JUSTICE BREYER: Is that the argument?

16 MR. HELLMAN: That is.

17 JUSTICE BREYER: All right.

18 MR. HELLMAN: And, again, in response  
19 to Justice Gorsuch's question, the Court has  
20 proceeded carefully with lenity in mind when it  
21 -- when it's looked at a statute that the  
22 government has said covers everything that one  
23 might want to punish, but doesn't clearly say  
24 that that is what we intend to punish, and both  
25 considerations of fair notice and, as the Court

1 put it, deference to the prerogatives of  
2 Congress suggests that a more narrow  
3 interpretation is called for.

4 JUSTICE KAGAN: Well, is that what  
5 lenity means? This -- for sure this is a broad  
6 statute.

7 MR. HELLMAN: Yes.

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

14 But that's not this statute. This  
15 statute, taken on its face, is just ungodly  
16 broad.

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

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

25 JUSTICE GORSUCH: So -- so, for

1 example, if we are left with some ambiguity as  
2 to your Aguilar analogy, that's when you would  
3 suggest perhaps lenity might be a tiebreaker?

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

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

17 So, again, the statute, read in  
18 isolation, I certainly take the point that it  
19 looks broad and strong and "ungodly broad" to  
20 use your phrase, but that isn't the end of the  
21 statutory analysis. And once you do all of the  
22 steps -- you look to where the language comes  
23 from, you look to what it might mean in context  
24 with other provisions right next door to it --  
25 at that point, we suggest -- we think we have



1 the better of the argument, but at a minimum,  
2 at a bare minimum, there are competing  
3 interpretations that -- where the rule of  
4 lenity might apply.

5 JUSTICE SOTOMAYOR: There -- there is  
6 something to be done about the context that  
7 this was drafted in. As I look at the first  
8 half of this statute --

9 MR. HELLMAN: Yes.

10 JUSTICE SOTOMAYOR: -- "whoever  
11 corruptly or by force or threat of force,  
12 including any threatening letter or  
13 communication, endeavors to intimidate or  
14 impede any officer or employee of the U.S.  
15 acting in an official capacity."

16 MR. HELLMAN: Yes.

17 JUSTICE SOTOMAYOR: "Or in any way  
18 corruptly or by force or threat of force,  
19 including any threatening letter or  
20 communication, obstructs or impedes or  
21 endeavors to obstruct or impede the due  
22 administration of this title," all of that  
23 seems to be geared towards some affirmative act  
24 aimed at an agent or the agency.

25 That's where I got my earlier --

1 MR. HELLMAN: Yes.

2 JUSTICE SOTOMAYOR: -- differentiation  
3 between --

4 MR. HELLMAN: Yes.

5 JUSTICE SOTOMAYOR: -- a affirmative  
6 act and an omission act because that doesn't  
7 have the flavor of force or threat of force or  
8 threatening, all of the sort of active, violent  
9 or active, obstructive --

10 MR. HELLMAN: Right.

11 JUSTICE SOTOMAYOR: -- behavior that  
12 the examples set forth.

13 MR. HELLMAN: I think I understand  
14 your question better now. And I have a couple  
15 of responses.

16 I don't think the omission limitation  
17 will get -- will make sense of the tax criminal  
18 code for a couple of reasons. One, there are  
19 several misdemeanor offenses under the code  
20 that are not omission offenses; they are  
21 affirmative act offenses. And Congress showed  
22 a lot of thought: Making a false statement in  
23 connection with your taxes -- that's an  
24 affirmative act -- is a misdemeanor unless  
25 you -- unless you make that statement under the

1 penalty of perjury. That is the difference  
2 between Section 7207 and Section 7206,  
3 subsection (1).

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

12 So I don't think that an  
13 omissions-based approach makes -- you know,  
14 gets --

15 JUSTICE GORSUCH: Well, does it get us  
16 part of the way there, though? Because the  
17 officer clause, as Justice Sotomayor suggests,  
18 you have to actually hinder something the  
19 officer is doing. And could that same spirit  
20 or thought be thought to apply in the  
21 administration as well, that the IRS has to be  
22 doing something? Your preceding thought is a  
23 -- is a doing, it is a thing; it is not just  
24 merely -- I think the IRS speaks of the  
25 pervasive, continuous, brooding on the presence

1 of --

2 MR. HELLMAN: Yes. Right.

3 JUSTICE GORSUCH: -- of tax  
4 liabilities, that there's an implication from  
5 the officers clause that there's something more  
6 going on. Am I -- maybe that's not entirely  
7 helpful.

8 MR. HELLMAN: Well, what I would say  
9 is if the thought is by limiting obstruction to  
10 any affirmative act that hinders the IRS in any  
11 way, you have not brought the statute --

12 JUSTICE GORSUCH: No, no, no. No, no,  
13 limiting it to some affirmative act going on by  
14 the agency, I think, is what Justice Sotomayor  
15 was suggesting, that the agency has to be doing  
16 something other than merely passively receiving  
17 taxes.

18 MR. HELLMAN: Well, and, of course,  
19 all of the conduct or omissions in this case  
20 are not in that context.

21 JUSTICE GORSUCH: Correct.

22 MR. HELLMAN: So --

23 JUSTICE GORSUCH: It's -- it's a  
24 friendly amendment.

25 (Laughter.)

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

4           JUSTICE SOTOMAYOR:  I have difficulty  
5 getting to what you have --

6           MR. HELLMAN:  Right.

7           JUSTICE SOTOMAYOR:  -- because you  
8 haven't, as Justice Kagan pointed out, given us  
9 anything in the language to anchor this in.  At  
10 least --

11          MR. HELLMAN:  Right.

12          JUSTICE SOTOMAYOR:  -- Justice -- it  
13 appears Justice Gorsuch and I are trying to  
14 look at the language.

15          MR. HELLMAN:  So what I would say in  
16 response to that is we would accept -- because  
17 there is no act in question here that falls  
18 within that rule.  So, if you're asking me do I  
19 think that -- you know, would we accede to  
20 that, yes, we would.

21                 But I would point out that --

22          JUSTICE SOTOMAYOR:  A win is a win is  
23 a win.

24          MR. HELLMAN:  A win is a win, for  
25 certain, but I just want to be -- be certain

1 that the Court fully appreciates that the line  
2 between when the IRS is doing something and not  
3 doing something at times can be a little bit  
4 blurry. And so, you know, I'd want to think  
5 about your proposal, but in any case, the --  
6 the key part is unless there's a proceeding --

7 JUSTICE SOTOMAYOR: You just helped  
8 the government a lot with that statement.

9 MR. HELLMAN: I hope I did not.

10 (Laughter.)

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

19 JUSTICE GORSUCH: I'm not even arguing  
20 with you.

21 MR. HELLMAN: Yeah.

22 JUSTICE GORSUCH: I'm just suggesting  
23 that the officers clause might be a source of  
24 some aid to you.

25 MR. HELLMAN: Agreed.

1 JUSTICE GORSUCH: That's all I'm  
2 doing.

3 MR. HELLMAN: Absolutely agreed.  
4 Absolutely agreed.

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

11 Although they claim it's -- there is  
12 no ambiguity, there is no need for lenity, this  
13 is a -- an interpretation that really came into  
14 fruition in the '90s, and with increasing  
15 frequency in -- in many, many cases, this is  
16 now being charged.

17 And if the Court has no further  
18 questions, I will reserve the rest of my time  
19 for rebuttal. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Parker.

23 ORAL ARGUMENT OF ROBERT A. PARKER  
24 ON BEHALF OF THE RESPONDENT

25 MR. PARKER: Mr. Chief Justice, and

1 may it please the Court:

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

10 And I -- I want to just take a moment  
11 to explain why we think --

12 JUSTICE SOTOMAYOR: So how about the  
13 one example he does give? People go into  
14 shelters thinking they might be legal, might  
15 not. I'm going to role my dice. Would that be  
16 a corrupt intent?

17 MR. PARKER: I -- I don't believe  
18 so --

19 JUSTICE SOTOMAYOR: Why?

20 MR. PARKER: -- because there is not  
21 the specific intent to obtain an unlawful  
22 advantage. You have to not only be intending  
23 to advantage yourself but know that there --  
24 that the advantage is unlawful.

25 And so that -- that, I think, goes



1 directly to the --

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

11 MR. PARKER: Well --

12 JUSTICE GORSUCH: For my -- for my  
13 friend's son's snow shoveling business.

14 MR. PARKER: Well, I --

15 JUSTICE GORSUCH: Right?

16 MR. PARKER: I think that that --

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

19 MR. PARKER: That circumstance may  
20 come within the scope of the statute.

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

24 MR. PARKER: Yes. Yes, but I think  
25 that the --

1 JUSTICE GORSUCH: Okay. All right.

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

5 JUSTICE BREYER: Well, the reg I saw  
6 said 600.

7 MR. PARKER: But -- well, but that's  
8 if you're a business employing an independent  
9 contractor, so an -- an individual. But -- but  
10 I don't want to -- I don't think that that  
11 matters. The -- the point, though, is if you  
12 --

13 JUSTICE GORSUCH: How -- how is  
14 somebody supposed to know when they're going to  
15 be in trouble here? Because it seems like  
16 paying cash --

17 JUSTICE BREYER: Uh-huh.

18 JUSTICE GORSUCH: -- can sometimes be  
19 a problem. That was part of the indictment and  
20 -- and the jury instructions here. Or keeping  
21 records, failure to keep records --

22 JUSTICE BREYER: Right.

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

25 JUSTICE BREYER: You realize everybody

1 in this audience now knows about the 1099 form,  
2 right?

3 (Laughter.)

4 MR. PARKER: Well, they -- they may be  
5 kept out of trouble as a result. But I -- I  
6 think that the point -- there are a couple of  
7 points that I think are important to make.

8 The first is the mens rea requirement  
9 of this statute, as in all obstruction  
10 statutes, is critical, and it is very exacting.  
11 So --

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

19 And here it seems to me that's the  
20 government's parallel -- parallel argument,  
21 that we're not going to tell you what  
22 qualifies. We'll find out later.

23 And sometimes it's going to be simply  
24 paying cash. Sometimes it's not going to be  
25 keeping records. And -- and I just wonder are

1 we going to wind up in the same place, that you  
2 drive this thing to such enormous breadth in  
3 its interpretation that you're -- you're  
4 inviting a vagueness challenge at the back end?

5 MR. PARKER: I -- I disagree with  
6 that, Justice Gorsuch, and I'd like to just  
7 take a moment to explain why.

8 So there are a number of limiting  
9 features of this statute that provide  
10 protection against precisely what you are  
11 explaining. And I think there are really three  
12 of them.

13 The first is there has to be a natural  
14 tendency to obstruct. This is the objective  
15 factual nexus that Aguilar says is baked into  
16 the term "endeavor." There's at least that.

17 JUSTICE GORSUCH: And paying cash is  
18 enough, though, under the government --

19 MR. PARKER: No, not necessarily.

20 JUSTICE GORSUCH: Well, it is in this  
21 case.

22 MR. PARKER: Actually, no. I don't  
23 think that that --

24 JUSTICE GORSUCH: That's -- that's in  
25 the jury instructions.

1           MR. PARKER: The -- the -- paying cash  
2 was one of the means of the obstructive  
3 endeavor.

4           JUSTICE GORSUCH: Right.

5           MR. PARKER: It was a -- a factual way  
6 that the individual was engaging in obstructive  
7 conduct. But you then have to determine that  
8 on the overall facts of this case there was a  
9 natural tendency of that act to obstruct.

10           You also have to show that the  
11 individual intended, specifically intended to  
12 obstruct the -- the administration of the code.

13           And then third --

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

16           MR. PARKER: Well, I -- I think that  
17 the term "impede" is largely coextensive with  
18 the term "obstruct." In fact --

19           JUSTICE ALITO: Well, I don't know  
20 whether it is. The -- the dictionary  
21 definition of "impede" is: Interfere with or  
22 slow the progress of.

23           So anything that makes the work of the  
24 IRS more difficult impedes the work of the IRS.

25           MR. PARKER: I -- I -- well, I would

1 disagree with the statement that anything that  
2 makes the work of the IRS more difficult. And  
3 I think this goes to what I was just about to  
4 say.

5 JUSTICE ALITO: Why? Why? Why do you  
6 disagree with that? On what basis?

7 MR. PARKER: So -- so you have -- you  
8 have to have the natural tendency to obstruct.  
9 You then have to have proof.

10 JUSTICE ALITO: You have the mens rea.  
11 What do you have besides the mens rea?

12 MR. PARKER: Well, you -- you then  
13 have to be acting corruptly, which means that  
14 you have to have the specific intent to obtain  
15 an unlawful advantage.

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

18 MR. PARKER: So let's say that you are  
19 engaged in lawful conduct, you're paying people  
20 in cash, or you have structured your corporate  
21 form in a way that may make it more complicated  
22 for the IRS to figure out what your income and  
23 expenses are.

24 Those things do not have a natural  
25 tendency to obstruct in and of themselves

1 because there is nothing that says that the  
2 administration of the code has to be made  
3 maximally easy.

4 The only reason that those would end  
5 up having an obstructive effect is if you pair  
6 them with efforts to mislead or deceive the IRS  
7 into believing that the situation is not as it  
8 appears for an unlawful advantage. So in the  
9 --

10 JUSTICE ALITO: Well, where does this  
11 come from in the language of the statute? I  
12 mean, this -- that's what troubles me about  
13 this. If I read "impede" to mean what it means  
14 in ordinary language, slow the progress of, you  
15 don't even have to impede. It's enough that  
16 you endeavor to impede.

17 The only limiting thing I see here is  
18 corruptly. And, you know, the old, you know,  
19 the old saying, it's lawful for taxpayers to  
20 avoid taxes but not to evade taxes. So the  
21 line is -- the line can be very -- can be very  
22 thin.

23 MR. PARKER: I'm not sure actually  
24 that it is all that thin. And I think that the  
25 -- what -- what is important to remember here

1 is that there has to be an effort to actually  
2 convert that completely lawful conduct into  
3 something that has the natural tendency to  
4 obstruct or impede the IRS in an unlawful  
5 manner to obtain an unlawful benefit.

6 JUSTICE ALITO: Well, let me just give  
7 you a variation of the hypothetical that's  
8 already been given.

9 So somebody -- somebody offers to  
10 clean my gutters, and he says \$100 cash, \$125  
11 if you pay me by check. Is that a violation of  
12 this?

13 MR. PARKER: No, not at all.

14 JUSTICE ALITO: Why -- why not?

15 MR. PARKER: Well, because there --  
16 there is no --

17 JUSTICE ALITO: What if I -- what if I  
18 -- you know, I understand why he's going to  
19 give me the discount by paying by cash, because  
20 he doesn't want to report it.

21 MR. PARKER: Well, again, I think that  
22 you would then have to pair that with other  
23 efforts to deceive the IRS, as you did here. I  
24 mean, Mr. Marinello --

25 JUSTICE ALITO: Why? Why isn't that



1 sufficient in itself?

2 MR. PARKER: Because there's no  
3 natural tendency of the mere fact that you give  
4 him \$100 in cash to obstruct anything. What  
5 becomes obstructive about that is if that is  
6 then not reported to the IRS or is falsely  
7 reported to the IRS and --

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

10 MR. PARKER: Well, I think that if --  
11 if you actually have the subjective specific  
12 intent that you are giving him this money with  
13 the intent that he is not going to report it to  
14 the IRS, and you are engaged in a common  
15 endeavor to -- to obstruct the IRS's ability to  
16 duly administer -- the code, I think --

17 JUSTICE KAGAN: But doesn't everybody  
18 know -- doesn't everybody know when they're  
19 given an offer like this, you know, I'd rather  
20 have cash than a check, doesn't everybody know  
21 why people would rather have cash than a check?

22 MR. PARKER: Well, that may be true,  
23 but, again, this is I think precisely why these  
24 sorts of things, A, are -- are not charged  
25 under this statute but, B, I think would be

1       incredibly difficult to charge under this  
2       statute.

3                 JUSTICE BREYER:   Why?   Why?   I mean,  
4       that's -- you have used several times the words  
5       "specific intent."   So is it the -- specific  
6       intent to me in the law means knowledge that  
7       the particular action is unlawful.

8                 MR. PARKER:   Uh-huh.

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

19                MR. PARKER:   I -- I think that that is  
20       accurate.   I mean, you --

21                JUSTICE BREYER:   No, don't think it's  
22       accurate.   I want to know if the government of  
23       the United States is saying this statute does  
24       not permit us to prosecute any person, unless  
25       that person knows that the action he is taking

1 -- I'm repeating myself -- such as giving the  
2 money in cash, breaks the federal law, and he  
3 also knows that what he is doing in giving that  
4 money breaks the federal law?

5 MR. PARKER: Well, he has --

6 JUSTICE BREYER: If he does not know  
7 both of those things, he cannot be prosecuted  
8 under this statute. Now, I'm interested in the  
9 position of the United States, on that question  
10 of interpretation, it is an interpretation of  
11 the word "corruptly."

12 MR. PARKER: Yes. Both of the things  
13 that --

14 JUSTICE BREYER: Yes, the answer is  
15 the position of the United States is what I  
16 just said is correct. No one can be prosecuted  
17 unless both those things are true?

18 MR. PARKER: Both of those things, I  
19 think, are -- are entirely subsumed by the  
20 definition of corruptly. You have to have the  
21 specific intent --

22 JUSTICE BREYER: All right. I would  
23 like a yes or a no answer to that question.

24 MR. PARKER: Yes. I mean, as I said  
25 --

1 JUSTICE BREYER: The answer is yes.

2 Okay. Thank you. That's helpful.

3 MR. PARKER: Certainly. So --

4 JUSTICE GINSBURG: Well, may I ask you  
5 another question about this statute? The  
6 charge is that it would make any tax crime a  
7 misdemeanor, felony, you could tack this  
8 obstruction charge onto any tax crime in the  
9 code and then you just get an additional  
10 penalty.

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

14 MR. PARKER: Tax evasion may because  
15 there you are willfully attempting to obtain --  
16 to evade a tax deficiency, although the -- the  
17 -- if you can prove tax evasion, there's little  
18 reason to prove obstruction.

19 However, all of the other ones, the  
20 answer is no. If you look at the elements of  
21 Section 7212, they are different than the  
22 elements that you will find in any other  
23 criminal provision in the -- in the Internal  
24 Revenue Code.

25 They require corruption. They require

1 an intent to obstruct. Other provisions  
2 require willful actions or willful failures to  
3 act that may --

4 JUSTICE KAGAN: Is that the only  
5 difference, it's just the mens rea difference?

6 MR. PARKER: Well, I think that's --  
7 yes, I mean, you also must have a natural  
8 tendency to obstruct. And, for example,  
9 failing to report your income, withholding that  
10 information that you are lawfully required to  
11 provide I think has that natural tendency.

12 But if you look at these other  
13 provisions, take, for example, failure to file  
14 a tax return, there are going to be individuals  
15 -- and, in fact, I would wager to say that  
16 there are probably a large number of  
17 individuals -- who do not file their tax  
18 returns for reasons that have nothing to do  
19 with a specific intent to obtain an unlawful  
20 advantage. They may say --

21 JUSTICE KAGAN: Like what? Like what?

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

25 In that circumstance, there's no

1 intent to obtain that unlawful advantage  
2 because you don't know whether you're going to  
3 be advantaged or not.

4 I think the same thing could be said  
5 of, you know, failure to keep records. You  
6 destroy all of your records because they're  
7 just sitting around and it makes you upset to  
8 have so many records in your house.

9 There's nothing -- maybe that is a  
10 willful violation of a misdemeanor provision,  
11 but it wouldn't qualify under Section 7212  
12 under any definition --

13 JUSTICE GORSUCH: It is a -- it is a  
14 remarkable --

15 CHIEF JUSTICE ROBERTS: But you  
16 understand the concern on the other side, I  
17 guess, which is, I think you used the word  
18 "cantankerous" in your brief, is that right,  
19 that some people are just cantankerous, and  
20 they're just not going to file.

21 MR. PARKER: Yes.

22 CHIEF JUSTICE ROBERTS: Perhaps that's  
23 a fairly small number of people compared to the  
24 situation where it is not terribly difficult  
25 for an assistant U.S. attorney to prove that

1 something was done corruptly as opposed to  
2 willfully.

3 MR. PARKER: Well, I --

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

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

10 CHIEF JUSTICE ROBERTS: An unlawful  
11 advantage.

12 MR. PARKER: I would -- I'm not sure  
13 that it's correct to say that these are rare  
14 cases. I would say that they are not, as a  
15 general matter, prosecuted, and so they don't  
16 result in published opinions; but I would say  
17 that the -- I would say that the main concern  
18 here with kind of this over-criminalization of  
19 the tax code, I don't think actually plays out  
20 in practice.

21 Our -- I can represent to the Court  
22 that our internal data indicates that  
23 obstruction charges are brought in  
24 approximately 4 percent of criminal tax cases.

25 CHIEF JUSTICE ROBERTS: Is it -- is it

1 still -- 4 percent. Is it still the published  
2 policy of the Department to charge to the  
3 maximum extent reasonably possible?

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

7 JUSTICE KAGAN: I thought that there  
8 was new guidance saying exactly that in the  
9 last year.

10 MR. PARKER: Yes. I believe that  
11 that's correct. However, my -- my point would  
12 be -- I don't think that there's any  
13 requirement that this particular provision be  
14 charged in any given case --

15 JUSTICE KENNEDY: Suppose we were --

16 MR. PARKER: -- because of all the  
17 limitations.

18 JUSTICE KENNEDY: Suppose we were to  
19 conclude that 80 percent of criminal tax  
20 misdemeanor violations could be accompanied by  
21 the felony charges contained within this  
22 statute.

23 Would that be cause for our Court to  
24 be concerned?

25 MR. PARKER: Well, I'm not sure that



1 it would necessarily be cause for concern. I  
2 think that would be surprising.

3           However, I would note that, as this  
4 Court has explained in many cases, there is  
5 substantial overlap as a factual matter between  
6 the misdemeanor and felony provisions of the  
7 Internal Revenue Code. The Court has --

8           JUSTICE KENNEDY: You do not --

9           MR. PARKER: -- repeatedly said --

10           JUSTICE KENNEDY: You -- you do not  
11 think we should be concerned if 80 percent of  
12 tax misdemeanor violations can be increased to  
13 a felony under this statute? That's not a  
14 cause for concern?

15           MR. PARKER: Well, again, I'm -- I'm  
16 not --

17           JUSTICE KENNEDY: Yes -- yes or no.

18           MR. PARKER: I don't think it is, only  
19 because Congress has specifically provided an  
20 interlocking web of criminal penalties in this  
21 area. And it has done so precisely because we  
22 have a self-reporting system of taxation --

23           JUSTICE BREYER: The self --

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

25           CHIEF JUSTICE ROBERTS: Just to be

1 clear, it's not -- my line of questioning is  
2 not to suggest bad faith on the part of the --  
3 of the Department, but instead to suggest that  
4 that concern may have motivated Congress --  
5 should motivate a narrower understanding of  
6 what Congress intended in -- in this particular  
7 provision.

8 MR. PARKER: Well, I -- I think that  
9 that's a fair point, Mr. Chief Justice, but I  
10 think that it does not motivate the adoption of  
11 the limiting construction that Petitioner is  
12 proposing.

13 Remember, Petitioner's --

14 JUSTICE GORSUCH: On -- on that -- on  
15 that score, the verbs "obstruct" and "impede,"  
16 along with "corruptly," the adverb, you  
17 normally expect there to be an object to them.  
18 I have to -- have to -- because it is specific  
19 intent, as Justice Breyer pointed out, and  
20 you've conceded.

21 I have to know about some thing and I  
22 have to intend to obstruct or impede that  
23 thing. And the government's interpretation of  
24 that thing, as I understand it, in its words is  
25 the continuous, ubiquitous, and universal

1 collection of taxes.

2 Is -- is that an object that's  
3 reasonably inferred? Can one -- can one intend  
4 -- know of and intend to impede or obstruct,  
5 corruptly or otherwise, something that's  
6 continuous, ubiquitous, and universal?

7 MR. PARKER: Well, respectfully,  
8 Justice Gorsuch, I don't think that that is  
9 what we were saying. I --

10 JUSTICE GORSUCH: I think that's out  
11 of --

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

13 JUSTICE GORSUCH: -- your brief in  
14 opposition, right?

15 MR. PARKER: Those -- but those words  
16 refer to the understanding of individuals about  
17 the fact that tax administration occurs on a  
18 routine and predictable schedule.

19 JUSTICE GORSUCH: But -- but don't  
20 those -- don't those verbs imply that there's  
21 something more direct as the object of my  
22 actions than -- than something that's  
23 continuous, ubiquitous, and universal?

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

1 JUSTICE GORSUCH: Okay. That's  
2 helpful. Thank you.

3 MR. PARKER: -- specifically intending  
4 to obstruct the administration of the code.  
5 And the only point that we're making is that  
6 administration, unlike in the case of the due  
7 administration of justice, which involves  
8 discrete proceedings that many Americans will  
9 go their entire lives without having a  
10 connection to, the due administration of the  
11 Internal Revenue Code occurs on a routine and  
12 predictable schedule that people know is coming  
13 and can reasonably foresee.

14 JUSTICE BREYER: But you are --

15 MR. PARKER: I think there are --

16 JUSTICE BREYER: -- if you want, I  
17 want this answer. I don't want to interrupt  
18 your answer, but I want you to augment it.

19 And you started to do that when you  
20 started to talk about just what we were talking  
21 about. Look, if I put it differently, three  
22 principles:

23 One, the Chief Justice, I think,  
24 enunciated, and I -- it sounds comical if I'm  
25 going to say it, but -- but it's very

1 important; it is not an appropriate way of  
2 interpreting a statute.

3           Look, perfect criminal statute, it is  
4 a crime to do wrong in the opinion of the  
5 attorney general. Don't worry, we'll interpret  
6 it properly.

7           Even if you do interpret it properly,  
8 no. The answer under the Constitution, I  
9 think, is no.

10           The second principle is right here in  
11 Aguilar, both of them, the second and third.  
12 We have traditionally exercised restraint in  
13 assessing the reach of a federal criminal  
14 statute, both out of deference to the  
15 prerogative of Congress and out of concern that  
16 a fair warning should be given to the world in  
17 language that the common world will understand  
18 of what the law will do, if a certain line is  
19 passed.

20           From those principles, they conclude  
21 that a statute identically worded to this one  
22 but for the word justice instead of title  
23 requires a nexus be shown to a specific grand  
24 jury or jury proceeding, a -- a court  
25 proceeding, even though, of course, you can

1 read the word justice to include the  
2 investigators and many other things.

3 All right. They're saying, in effect,  
4 you take those same principles, that same  
5 limiting restriction, and do the same analogous  
6 thing here.

7 Now, why not?

8 MR. PARKER: I think there are a  
9 number of reasons not to do that. First of  
10 all, I think that the -- as I just explained,  
11 the due administration of justice has always  
12 been understood to be something that occurs in  
13 discrete proceedings, unlike the administration  
14 of the Internal Revenue Code; but I think that  
15 that is confirmed by the history of Section  
16 1503.

17 The predecessor statute to Section  
18 1503 specifically said that it only applied to  
19 the obstruction of officers or witnesses in any  
20 court of the United States or the due  
21 administration of justice therein.

22 Now, when Congress recodified that  
23 provision in 1948, it modified the wording, but  
24 as this Court has repeatedly explained, that  
25 1948, recodification was not intended to have

1 any substantive effect on any of the provisions  
2 in the code.

3 JUSTICE GORSUCH: But Congress  
4 legislates against the backdrop of what's out  
5 there. And what was out there was our  
6 interpretation of those words requiring a nexus  
7 to an active proceeding, something more than --  
8 something more definite than something that's  
9 continuous, ubiquitous and universal.

10 MR. PARKER: Well --

11 JUSTICE GORSUCH: And -- and the  
12 Congress that passed this statute had that  
13 interpretation in its back pocket at the time;  
14 right?

15 MR. PARKER: Well, I -- but I would  
16 disagree with that because in none of this  
17 Court's cases, in Pettibone, in Aguilar, Arthur  
18 Andersen, any of them did this Court ever  
19 suggest that it is the phrase "due  
20 administration," not the phrase "due  
21 administration of justice," that carries that  
22 connotation.

23 And I would also note that if that is,  
24 in fact, what Congress intended, it is very  
25 strange because Congress had just a few years

1 earlier enacted the statute that is now Section  
2 1505, cited in our brief.

3 And that statute was specifically  
4 enacted to do exactly what -- what you're  
5 suggesting, Justice Gorsuch. It was enacted to  
6 extend the provisions of Section 1503 to  
7 pending proceedings before agencies of the  
8 United States. And that is what it says.

9 If the Petitioner's interpretation  
10 were correct, then I think that there's really  
11 no reason for Congress to have enacted that,  
12 and it would also be awfully strange for  
13 Congress not to have borrowed that language.

14 But I would also note that there are a  
15 number of -- as I -- getting back to the point  
16 I was making previously, there is no reason to  
17 adopt his particular limiting construction,  
18 which, frankly, I think has no basis in the  
19 text, and does not solve these problems.

20 JUSTICE KAGAN: Mr. Parker, can I go  
21 back to the question of -- of -- of the  
22 Department's prosecution policy?

23 And, you know, could you tell me,  
24 Number 1, what the current state of the  
25 Department's guidance is as to whether



1 prosecutors are -- are told to prosecute to the  
2 maximum extent allowed by law; and, Number 2,  
3 whether that would mean in this case that here  
4 I am a prosecutor and I think that some action  
5 falls within 7212, that I would be precluded  
6 from proceeding instead under 7203 or 7205 or  
7 7207.

8 MR. PARKER: My understanding is it is  
9 certainly the Department's position as a  
10 general matter that prosecutors should be  
11 charging the most serious offense that is  
12 readily provable on those facts.

13 I -- I -- I couldn't say whether in  
14 any given case that would mean that  
15 Section 7212 would have to be charged because,  
16 as I said before, the facts of each case are  
17 going to be different and they're going to make  
18 the ability to prove Section 7212 more or less  
19 possible.

20 And there are going to be a number of  
21 cases where I think 7212 isn't even possible  
22 to -- even to allege. And so I -- I think that  
23 -- I'm not sure that it's --

24 JUSTICE KAGAN: Yes, but I guess what  
25 I was saying is that if a prosecutor could

1 proceed under 7212, that the prosecutor is  
2 being instructed that she must proceed under  
3 that section.

4 MR. PARKER: If -- if -- if the facts  
5 of that case render a 7212 charge readily  
6 provable, then, yes, I think that prosecutors  
7 would do that, but I -- I also think that that  
8 is not borne out by -- a concern that that is  
9 going to lead to just these sorts of charges  
10 becoming common and ubiquitous doesn't  
11 necessarily translate because, as I said, our  
12 understanding is that it's only about 4 percent  
13 of cases.

14 And that includes the most recent data  
15 from this -- from this year. And so --

16 CHIEF JUSTICE ROBERTS: Counsel, you  
17 used the phrase "readily provable." I just  
18 want to as a question of fact, is that -- is  
19 that the term that's used or is that your  
20 summary of what you understand?

21 MR. PARKER: I -- I don't exactly  
22 remember the term that is used, but certainly  
23 the government has to satisfy itself that it  
24 can prove beyond a reasonable doubt in that  
25 case that that crime has occurred.

1           I -- I also, though, want to get back  
2           --

3           JUSTICE ALITO: Well, before you move  
4 off that point, why should we be comforted by  
5 the fact that prosecutorial discretion can be  
6 used in applying a statute, if this is a  
7 statute, with a really broad reach so that it  
8 reaches a lot of rather trivial conduct?  
9 Doesn't that make the situation worse rather  
10 than better? So then the prosecutors can  
11 decide where they want to use this.

12           MR. PARKER: I -- I don't think that  
13 it does. I mean, I think that the government  
14 has the -- the responsibility to enforce  
15 Congress's statutes.

16           And if Congress has provided that this  
17 particular conduct is criminal, then I think  
18 that that is appropriate. I don't think that  
19 there is anything that is particularly  
20 standardless or vague or -- or otherwise  
21 uncertain about this particular statute.

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

25           So the crime is rescuing seized

1 property. Rescuing seized property carries a  
2 two-year penalty. Could the government tack on  
3 to that 7212(a), obstruction of the  
4 administration of the IRS -- IRC, so then --  
5 which is a three-year maximum?

6 MR. PARKER: I -- I suppose that if  
7 the government could prove that the person did  
8 so with corrupt intent, and I think that that's  
9 the main difference, obviously, between those  
10 two provisions, in addition to the different  
11 statutory penalties, if we could prove that,  
12 then I think that would be available.

13 I'm not sure why the government would  
14 want to tack one on to the other. I mean, this  
15 would all end up being charged as obstruction  
16 anyway, and so I'm not sure why that would make  
17 sense, but I -- I think it's possible.

18 There are -- there are --

19 JUSTICE GINSBURG: Well, it would --  
20 if -- if it is the highest penalty, it's three  
21 years under 7212(a) and only two years under  
22 7212(b).

23 MR. PARKER: Uh-huh.

24 JUSTICE GINSBURG: So, with a maximum  
25 charging, why wouldn't the --

1           MR. PARKER: Well, because I think we  
2 would simply proceed under Section 7212(a),  
3 because that is the -- carries the higher  
4 potential penalty.

5           I -- I would like to, in -- in the  
6 time I have remaining, just be sure to make two  
7 points.

8           The first is the Petitioner's proposed  
9 limiting construction, as we've said, it  
10 doesn't come -- it doesn't have a basis in the  
11 text, but that doesn't mean that there aren't  
12 other potential limiting constructions that  
13 this Court could adopt, either in this case or  
14 in another appropriate case.

15           I think, Justice Sotomayor, you  
16 alluded to the possibility of excluding pure  
17 omissions from -- from the scope of the statute  
18 to try to differentiate between the misdemeanor  
19 provisions and this one.

20           The Court actually engaged in a very  
21 similar analysis in Spies. That was the tax  
22 evasion case where it determined that  
23 omissions, pure omissions at least, would not  
24 qualify.

25           And I think that that may be an

1 appropriate limiting construction here. No one  
2 has suggested that. And I think the reason  
3 Petitioner hasn't is because it wouldn't really  
4 help him.

5 The only two means of the endeavor in  
6 this case that were charged as failures to act,  
7 if you look at the evidence, it was clear that  
8 he was engaged in clear affirmative actions of  
9 destroying his records and other things. So  
10 that's one point I'd like to make.

11 And the second is one of the main  
12 problems here is that obstruction will --  
13 obstruction at the front end will often prevent  
14 the government from being able to charge  
15 appropriate offenses on the back end. And this  
16 case demonstrates that perfectly.

17 The government would have brought a  
18 tax evasion charge in this case but for the  
19 fact that Mr. Marinello so destroyed his  
20 records that it was unable to prove beyond a  
21 reasonable doubt that there was an actual tax  
22 deficiency.

23 And so what I think Petitioner's  
24 proposed construction would do is it would  
25 effectively allow individuals to evade their

1 taxes and then obstruct their way down to a  
2 misdemeanor charge, or if they are particularly  
3 good at it, maybe obstruct their way out of  
4 criminal penalties at all.

5 And the government could do nothing  
6 about it, unless the individual actually  
7 happened to be obstructing a pending audit or  
8 investigation.

9 Audits and investigations are types of  
10 administration, but the Internal Revenue Code  
11 contains an entire subtitle called "Procedure  
12 and Administration" that lists in sequential  
13 chapters all of the different types of  
14 administration that occur.

15 That includes the gathering of  
16 information that taxpayers must self-report.  
17 It includes the calculation and assessment of  
18 taxes, the collection of taxes.

19 It would be very strange, I think, for  
20 Congress to have specified that with such --  
21 with such clarity and then to have intended by  
22 referencing the due administration of this  
23 title to cut out all of that administrative  
24 functions and only focus on audits and  
25 investigations.

1 JUSTICE GINSBURG: You gave the  
2 example of the omission that Justice Sotomayor  
3 brought up. What else could limit the  
4 potentially huge scope of this provision?

5 MR. PARKER: Well, I think that -- I  
6 mean, I -- I don't mean to repeat myself, but I  
7 do think, Justice Ginsburg, that a rigorous  
8 enforcement of the mens rea requirement does  
9 that.

10 And this Court has repeatedly said  
11 that in the obstruction context, rigorous  
12 enforcement of mens rea requirements is what  
13 separates individuals who do not have or have  
14 not committed culpable conduct from those who  
15 do.

16 And I don't think that this  
17 obstruction provision -- may I conclude? I  
18 don't think this obstruction provision should  
19 be treated any differently.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Mr. Hellman, four minutes remaining.

24

25



1 REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN  
2 ON BEHALF OF PETITIONER

3 MR. HELLMAN: Thank you, Mr. Chief  
4 Justice. Just a few quick points.

5 I want to begin with the misdemeanors,  
6 the willful misdemeanors in the code. I think  
7 I heard my friend on the other side suggest  
8 that it could very well be that a highly  
9 substantial number of those misdemeanors would  
10 qualify as obstruction, which is in itself a  
11 problem.

12 And, again, it requires this Court to  
13 think that the crimes that the Congress made  
14 the centerpiece of the code, these willful  
15 offenses, really are only meant for the  
16 idiosyncratic case in which somebody  
17 intentionally violates the law but not for any  
18 particular benefit.

19 In the context of willful tax  
20 violations, I think in the substantial majority  
21 of cases, if not all, you're going to have a  
22 prosecutor who can say this was done for a  
23 reason, some unlawful benefit, which need not  
24 even be financial.

25 Second, as to the safeguards that the

1 mens rea requirement offers, in a world in  
2 which not consulting fully with an accountant,  
3 paying in cash, not keeping all records can  
4 become obstruction, if they're done for the  
5 wrong reason, then you really are leaving it up  
6 to the prosecutor, who is required under  
7 current charging rules to charge as  
8 aggressively as possible, to decide what was in  
9 the defendant's mind.

10 Not every case goes to trial. Very  
11 few cases go to trial. With a felony  
12 conviction in the balance, you're going to find  
13 that this gives enormous leverage, even more so  
14 than they currently have, to prosecutors.

15 Third, there's a suggestion here that  
16 the government needs this broad interpretation;  
17 otherwise, wrongdoing will go unpunished.

18 They can't point to a single case  
19 since 1954 where that was the case. It is  
20 certainly not the case here, where the  
21 government told the jury repeatedly that Mr.  
22 Marinello had substantial gross income and took  
23 substantial personal income from that.  
24 Exhibits 21 and 22 below and pages 516 to 518  
25 make that point very clearly.

1           Fourth, the omissions theory as an  
2 alternative way of limiting this. Again, that  
3 doesn't make sense of the statutes that are  
4 misdemeanors, like forcible rescue, like  
5 willful false statements, that are affirmative  
6 acts but less punishment than the -- than the  
7 7212 obstruction charge.

8           The last thing I want to say is we  
9 believe that based on the heritage of this  
10 language and the fact that obstruction statutes  
11 typically are focused on proceedings, that is  
12 the interpretation we've offered to the Court.

13           But as Justice Gorsuch and Justice  
14 Sotomayor pointed out, there are other ways of  
15 reading the officers clause in conjunction with  
16 the administration clause to come up with a  
17 more limited standard that does not cover any  
18 of the context -- conduct in this case, act or  
19 omission.

20           So, for those reasons, we would ask  
21 the Court to reverse.

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

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

25           JUSTICE GINSBURG: What -- what is the

1 limit that you are now proposing?

2 MR. HELLMAN: The limit that I am  
3 understanding Justice Sotomayor and Justice  
4 Gorsuch to be suggesting is, if you are -- if  
5 your obstructive act or omission is in the  
6 context with some interaction with the IRS,  
7 not, say, failing to talk to an accountant on  
8 your own time, not paying someone in cash in  
9 your own home, but in some interaction with the  
10 IRS, that could be a limitation; that would  
11 limit it.

12 I think --

13 JUSTICE GINSBURG: An -- an  
14 interaction, although no audit, no proceeding  
15 is yet under way?

16 MR. HELLMAN: Yes, that -- yes, that  
17 is the rule. Now, I think that if in practice,  
18 if you applied that, it would start to look an  
19 awful lot like a proceeding requirement, maybe  
20 a little bit broader around the edges, maybe a  
21 little bit more flexibility, but it would be in  
22 -- in substance kin to it.

23 JUSTICE BREYER: Are you --

24 JUSTICE GORSUCH: You think it's  
25 preferable given its heritage and for other

1 reasons?

2 MR. HELLMAN: Yes. Yes.

3 JUSTICE BREYER: So I think you're  
4 suggesting work with the word in the statute,  
5 "administration." That's the word?

6 MR. HELLMAN: Yes.

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

11 MR. HELLMAN: Well, I think if you  
12 look at --

13 JUSTICE BREYER: Aguilar, but what  
14 else?

15 MR. HELLMAN: Sure. Sure. Aguilar,  
16 and if you look at the jury instructions in  
17 cases that have interpreted other obstruction  
18 statutes that apply to proceedings, which is  
19 never a defined term in those statutes, I don't  
20 have a case name for you, you'll see that they  
21 start to look like things like an audit where  
22 you have an individualized assessment or  
23 enforcement of some obligation enforceable by a  
24 subpoena power.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.

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

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