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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,
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 behalf of the Respondent

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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: Yes.

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

14 MR. HELLMAN: Yes.

15 JUSTICE BREYER: Suppose you hire
16 somebody to shovel your snow off your steps --

17 MR. HELLMAN: Sure.

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

22 MR. HELLMAN: Right.

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

25 MR. HELLMAN: That's right, which is

1 they --

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

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

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

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

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

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

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

25 MR. HELLMAN: That's right. And I

1 think another --

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

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

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

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

25 You can understand why Congress wanted

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

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

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

17 JUSTICE GORSUCH: Mr. --

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

21 MR. HELLMAN: Yes.

22 JUSTICE KAGAN: I guess the question
23 is why your limiting interpretation? And
24 obviously you talked about this in your brief.
25 But I just want to give you an opportunity now

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

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

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

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

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

25 There are several obstruction statutes

1 after 1503 in the code that all talk about
2 obstruction of proceedings.

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

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

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

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

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

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

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

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

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

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

23 Now --

24 CHIEF JUSTICE ROBERTS: Do you think a
25 lot of people do that? I mean, you've got

1 three children and they say they've got five?

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

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

6 (Laughter.)

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

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

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

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

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

18 (Laughter.)

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

1 right?

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

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

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

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

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

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

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

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

4 JUSTICE BREYER: But how did they in
5 Aguilar? I mean, I took -- I read the language
6 in Aguilar and I thought it was very helpful to
7 your case. The statute is identical,
8 virtually, except administration of justice
9 instead of administration of this title.

10 MR. HELLMAN: Correct.

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

15 MR. HELLMAN: Yes.

16 JUSTICE BREYER: -- but a nexus to
17 what? I mean --

18 MR. HELLMAN: Sure.

19 JUSTICE BREYER: -- and what's your
20 understanding of that?

21 MR. HELLMAN: So, as I read Aguilar,
22 it's a nexus to a pending proceeding. So, in
23 that case, the defendant lied, that was
24 conceded to an FBI agent, but it wasn't clear
25 that those statements were ever going to get

1 into court into a grand jury proceeding. They
2 might or might not in the words of the Court.

3 And what the court --

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

11 MR. HELLMAN: Yes.

12 JUSTICE BREYER: Is that the argument?

13 MR. HELLMAN: That is.

14 JUSTICE BREYER: All right.

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

1 JUSTICE KAGAN: Well, is that what
2 lenity means? This -- for sure this is a broad
3 statute.

4 MR. HELLMAN: Yes.

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

11 But that's not this statute. This
12 statute, taken on its face, is just ungodly
13 broad.

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

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

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

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

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

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

1 lenity might apply.

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

6 MR. HELLMAN: Yes.

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

13 MR. HELLMAN: Yes.

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

22 That's where I got my earlier --

23 MR. HELLMAN: Yes.

24 JUSTICE SOTOMAYOR: -- differentiation
25 between --

1 MR. HELLMAN: Yes.

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

7 MR. HELLMAN: Right.

8 JUSTICE SOTOMAYOR: -- behavior that
9 the examples set forth.

10 MR. HELLMAN: I think I understand
11 your question better now. And I have a couple
12 of responses.

13 I don't think the omission limitation
14 will get -- will make sense of the tax criminal
15 code for a couple of reasons. One, there are
16 several misdemeanor offenses under the code
17 that are not omission offenses; they are
18 affirmative act offenses. And Congress showed
19 a lot of thought: Making a false statement in
20 connection with your taxes -- that's an
21 affirmative act -- is a misdemeanor unless
22 you -- unless you make that statement under the
23 penalty of perjury. That is the difference
24 between Section 7207 and Section 7206,
25 subsection (1).

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

9 So I don't think that an
10 omissions-based approach makes -- you know,
11 gets --

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

24 MR. HELLMAN: Yes. Right.

25 JUSTICE GORSUCH: -- of tax

1 liabilities, that there's an implication from
2 the officers clause that there's something more
3 going on. Am I -- maybe that's not entirely
4 helpful.

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

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

15 MR. HELLMAN: Well, and, of course,
16 all of the conduct or omissions in this case
17 are not in that context.

18 JUSTICE GORSUCH: Correct.

19 MR. HELLMAN: So --

20 JUSTICE GORSUCH: It's -- it's a
21 friendly amendment.

22 (Laughter.)

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

1 JUSTICE SOTOMAYOR: I have difficulty
2 getting to what you have --

3 MR. HELLMAN: Right.

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

8 MR. HELLMAN: Right.

9 JUSTICE SOTOMAYOR: -- Justice -- it
10 appears Justice Gorsuch and I are trying to
11 look at the language.

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

18 But I would point out that --

19 JUSTICE SOTOMAYOR: A win is a win is
20 a win.

21 MR. HELLMAN: A win is a win, for
22 certain, but I just want to be -- be certain
23 that the Court fully appreciates that the line
24 between when the IRS is doing something and not
25 doing something at times can be a little bit

1 blurry. And so, you know, I'd want to think
2 about your proposal, but in any case, the --
3 the key part is unless there's a proceeding --

4 JUSTICE SOTOMAYOR: You just helped
5 the government a lot with that statement.

6 MR. HELLMAN: I hope I did not.

7 (Laughter.)

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

16 JUSTICE GORSUCH: I'm not even arguing
17 with you.

18 MR. HELLMAN: Yeah.

19 JUSTICE GORSUCH: I'm just suggesting
20 that the officers clause might be a source of
21 some aid to you.

22 MR. HELLMAN: Agreed.

23 JUSTICE GORSUCH: That's all I'm
24 saying.

25 MR. HELLMAN: Absolutely agreed.

1 Absolutely agreed.

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

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

14 And if the Court has no further
15 questions, I will reserve the rest of my time
16 for rebuttal. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Parker.

20 ORAL ARGUMENT OF ROBERT A. PARKER

21 ON BEHALF OF THE RESPONDENT

22 MR. PARKER: Mr. Chief Justice, and
23 may it please the Court:

24 I'd like at the very outset to address
25 several of the things that my friend just said.

1 He -- he suggested that entirely lawful conduct
2 would come within this statute. We think that
3 that is incorrect. He suggested that this
4 statute swallows all of the other misdemeanor
5 provisions of the code. We think that that is
6 incorrect.

7 And I -- I want to just take a moment
8 to explain why we think --

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

14 MR. PARKER: I -- I don't believe
15 so --

16 JUSTICE SOTOMAYOR: Why?

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

22 And so that -- that, I think, goes
23 directly to the --

24 JUSTICE GORSUCH: Well, Justice --
25 Justice Breyer's snow shoveler, all right, I

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

8 MR. PARKER: So --

9 JUSTICE GORSUCH: For my -- for my
10 friend's son's snow shoveling business.

11 MR. PARKER: Well, I --

12 JUSTICE GORSUCH: Right?

13 MR. PARKER: I think that that --

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

16 MR. PARKER: That circumstance may
17 come within the scope of the statute.

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

21 MR. PARKER: Yes. Yes, but I think
22 that the --

23 JUSTICE GORSUCH: Okay. All right.

24 MR. PARKER: I think it bears
25 explanation as to why. I mean, first, I think

1 that the threshold is actually \$2,000.

2 JUSTICE BREYER: Well, the reg I saw
3 said 600.

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

10 JUSTICE GORSUCH: How -- how is
11 somebody supposed to know when they're going to
12 be in trouble here? Because it seems like
13 paying cash can sometimes be a problem. That
14 was part of the indictment and -- and the jury
15 instructions here. Or keeping records, failure
16 to keep records that you didn't -- that aren't
17 lawfully obliged to be kept.

18 JUSTICE BREYER: You realize everybody
19 in this audience now knows about the 1099 form,
20 right?

21 (Laughter.)

22 MR. PARKER: Well, they -- they may be
23 kept out of trouble as a result. But I -- I
24 think that the point -- there are a couple of
25 points that I think are important to make.

1 The first is the mens rea requirement
2 of this statute, as in all obstruction
3 statutes, is critical, and it is very exacting.
4 So --

5 JUSTICE GORSUCH: The government made
6 some similar arguments in the honest services
7 case, that everything can be cured by a mens
8 rea requirement. We don't need to worry about
9 actus reus. We'll tell you about the actus
10 reus when we get there. We'll create a common
11 law of honest services.

12 And here it seems to me that's the
13 government's parallel -- parallel argument,
14 that we're not going to tell you what
15 qualifies. We'll find out later.

16 And sometimes it's going to be simply
17 paying cash. Sometimes it's not going to be
18 keeping records. And -- and I just wonder are
19 we going to wind up in the same place, that you
20 drive this thing to such enormous breadth in
21 its interpretation that you're -- you're
22 inviting a vagueness challenge at the back end?

23 MR. PARKER: I -- I disagree with
24 that, Justice Gorsuch, and I'd like to just
25 take a moment to explain why.

1 So there are a number of limiting
2 features of this statute that provide
3 protection against precisely what you are
4 explaining. And I think there are really three
5 of them.

6 The first is there has to be a natural
7 tendency to obstruct. This is the objective
8 factual nexus that Aguilar says is baked into
9 the term "endeavor." There's at least that.

10 JUSTICE GORSUCH: And paying cash is
11 enough, though?

12 MR. PARKER: No, not necessarily.

13 JUSTICE GORSUCH: Well, it is in this
14 case.

15 MR. PARKER: Actually, no. I don't
16 think that that --

17 JUSTICE GORSUCH: That's -- that's in
18 the jury instructions.

19 MR. PARKER: The -- the -- paying cash
20 was one of the means of the instructive
21 endeavor.

22 JUSTICE GORSUCH: Right.

23 MR. PARKER: It was a -- a factual way
24 that the individual was engaging in obstructive
25 conduct. But you then have to determine that

1 on the overall facts of this case there was a
2 natural tendency of that act to obstruct.

3 You also have to show that the
4 individual intended, specifically intended to
5 obstruct the -- the administration of the code.

6 And then third --

7 JUSTICE ALITO: Before you go on, what
8 do you do with the term "impede"?

9 MR. PARKER: Well, I -- I think that
10 the term "impede" is largely coextensive with
11 the term "obstruct." In fact --

12 JUSTICE ALITO: Well, I don't know
13 whether it is. The -- the dictionary
14 definition of "impede" is: Interfere with or
15 slow the progress of.

16 So anything that makes the work of the
17 IRS more difficult impedes the work of the IRS.

18 MR. PARKER: I -- I -- well, I would
19 disagree with the statement that anything that
20 makes the work of the IRS more difficult. And
21 I think this goes to what I was just about to
22 say.

23 JUSTICE ALITO: Why? Why? Why do you
24 disagree with that? On what basis?

25 MR. PARKER: So -- so you have -- you

1 have to have the natural tendency to obstruct.

2 You then have to have proof.

3 JUSTICE ALITO: You have the mens rea.

4 What do you have besides the mens rea?

5 MR. PARKER: Well, you -- you then
6 have to be acting corruptly, which means that
7 you have to have the specific intent to obtain
8 an unlawful advantage.

9 JUSTICE ALITO: That's the mens rea.

10 What do you have besides the mens rea?

11 MR. PARKER: So let's say that you are
12 engaged in lawful conduct, you're paying people
13 in cash, or you have structured your corporate
14 form in a way that may make it more complicated
15 for the IRS to figure out what your income and
16 expenses are.

17 Those things do not have a natural
18 tendency to obstruct in and of themselves
19 because there is nothing that says that the
20 administration of the code has to be made
21 maximally easy.

22 The only reason that those would end
23 up having an obstructive effect is if you pair
24 them with efforts to mislead or deceive the IRS
25 into believing that the situation is not as it

1 appears for an unlawful advantage. So in the
2 --

3 JUSTICE ALITO: Well, where does this
4 come from in the language of the statute? I
5 mean, this -- that's what troubles me about
6 this. If I read "impede" to mean what it means
7 in ordinary language, slow the progress of, you
8 don't even have to impede. It's enough that
9 you endeavor to impede.

10 The only limiting thing I see here is
11 corruptly. And, you know, the old, you know,
12 the old saying, it's lawful for taxpayers to
13 avoid taxes but not to evade taxes. So the
14 line is -- the line can be very -- can be very
15 thin.

16 MR. PARKER: I'm not sure actually
17 that it is all that thin. And I think that the
18 -- what -- what is important to remember here
19 is that there has to be an effort to actually
20 convert that completely lawful conduct into
21 something that has the natural tendency to
22 obstruct or impede the IRS in an unlawful
23 manner to obtain an unlawful benefit.

24 JUSTICE ALITO: Well, let me just give
25 you a variation of the hypothetical that's

1 already been given.

2 So somebody -- somebody offers to
3 clean my gutters, and he says \$100 cash, \$125
4 if you pay me by check. Is that a violation of
5 this?

6 MR. PARKER: No, not at all.

7 JUSTICE ALITO: Why -- why not?

8 MR. PARKER: Well, because there --
9 there is no --

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

14 MR. PARKER: Well, again, I think that
15 you would then have to pair that with other
16 efforts to deceive the IRS, as you did here. I
17 mean, Mr. Marinello --

18 JUSTICE ALITO: Why? Why isn't that
19 sufficient in itself?

20 MR. PARKER: Because there's no
21 natural tendency of the mere fact that you give
22 him \$100 in cash to obstruct anything. What
23 becomes obstructive about that is if that is
24 then not reported to the IRS or is falsely
25 reported to the IRS.

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

3 MR. PARKER: Well, I think that if --
4 if you actually have the subjective specific
5 intent that you are giving him this money with
6 the intent that he is not going to report it to
7 the IRS, and you are engaged in a common
8 endeavor to -- to obstruct the IRS's ability to
9 duly administer to the code, I think --

10 JUSTICE KAGAN: But doesn't everybody
11 know -- doesn't everybody know when they're
12 given an offer like this, you know, I'd rather
13 have cash than a check, doesn't everybody know
14 why people would rather have cash than a check?

15 MR. PARKER: Well, that may be true,
16 but, again, this is I think precisely why these
17 sorts of things, A, are -- are not charged
18 under this statute but, B, I think would be
19 incredibly difficult to charge under this
20 statute.

21 JUSTICE BREYER: Why? Why? I mean,
22 that's -- you have used several times the words
23 "specific intent." So is it the -- specific
24 intent to me in the law means knowledge that
25 the particular action is unlawful.

1 MR. PARKER: Uh-huh.

2 JUSTICE BREYER: So are you saying the
3 government's position is we cannot under this
4 statute prosecute any person for anything he
5 does unless that person knows that what he is
6 doing, such as giving money to a person in
7 cash, will be used to provide a benefit to that
8 person that is unlawful, he knows that doing
9 this, what he is doing, is unlawful, and unless
10 he knows that, the statute does not permit
11 prosecution?

12 MR. PARKER: I -- I think that that is
13 accurate. I mean, you --

14 JUSTICE BREYER: No, don't think it's
15 accurate. I want to know if the government of
16 the United States is saying this statute does
17 not permit us to prosecute any person, unless
18 that person knows that the action he is taking
19 -- I'm repeating myself -- such as giving the
20 money in cash, breaks the federal law, and he
21 also knows that what he is doing in giving that
22 money breaks the federal law?

23 MR. PARKER: Well, he has --

24 JUSTICE BREYER: If he does not know
25 both of those things, he cannot be prosecuted

1 under this statute. Now, I'm interested in the
2 position of the United States, on that question
3 of interpretation, it is an interpretation of
4 the word "corruptly."

5 MR. PARKER: Yes. Both of the things
6 that --

7 JUSTICE BREYER: Yes, the answer is
8 the position of the United States is what I
9 just said is correct. No one can be prosecuted
10 unless both those things are true?

11 MR. PARKER: Both of those things, I
12 think, are -- are entirely subsumed by the
13 definition of corruptly. You have to have the
14 specific intent --

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

17 MR. PARKER: Yes. I mean, as I said
18 --

19 JUSTICE BREYER: The answer is yes.
20 Okay. Thank you. That's helpful.

21 MR. PARKER: Certainly.

22 JUSTICE GINSBURG: Well, may I ask you
23 another question about this statute? The
24 charge is that it would make any tax crime a
25 misdemeanor, felony, you could tack this

1 obstruction charge onto any tax crime in the
2 code and then you just get an additional
3 penalty.

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

7 MR. PARKER: Tax evasion may because
8 there you are willfully attempting to obtain --
9 to evade a tax deficiency, although the -- the
10 -- if you can prove tax evasion, there's little
11 reason to prove obstruction.

12 However, all of the other ones, the
13 answer is no. If you look at the elements of
14 Section 7212, they are different than the
15 elements that you will find in any other
16 criminal provision in the -- in the Internal
17 Revenue Code.

18 They require corruption. They require
19 an intent to obstruct. Other provisions
20 require willful actions or willful failures to
21 act that may --

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

24 MR. PARKER: Well, I think that's --
25 yes, I mean, you also must have a natural

1 tendency to obstruct. And, for example,
2 failing to report your income, withholding that
3 information that you are lawfully required to
4 provide I think has that natural tendency.

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

14 JUSTICE KAGAN: Like what? Like what?

15 MR. PARKER: They may say -- they may
16 say sometimes I owe a small amount of tax.
17 Sometimes I get a small refund. It's just not
18 worth it to file.

19 In that circumstance, there's no
20 intent to obtain that unlawful advantage
21 because you don't know whether you're going to
22 be advantaged or not.

23 I think the same thing could be said
24 of, you know, failure to keep records. You
25 destroy all of your records because they're

1 just sitting around and it makes you upset to
2 have so many records in your house.

3 There's nothing -- maybe that is a
4 willful violation of a misdemeanor provision,
5 but it wouldn't qualify under Section 7212
6 under any definition --

7 JUSTICE GORSUCH: It is a -- it is a
8 remarkable --

9 CHIEF JUSTICE ROBERTS: There is a
10 concern on the other side, I guess, which is, I
11 think you used the word "cantankerous," in your
12 brief, is that right, that some people are just
13 cantankerous and they are just not going to
14 file.

15 MR. PARKER: Yes.

16 CHIEF JUSTICE ROBERTS: Perhaps that's
17 a fairly small number of people compared to the
18 situation where it is not terribly difficult
19 for an assistant U.S. attorney to prove that
20 something was done corruptly as opposed to
21 willfully.

22 MR. PARKER: Well, I --

23 CHIEF JUSTICE ROBERTS: It's kind of
24 like the discussion we were having, that it's
25 not hard to prove that paying in cash rather

1 than a check when you get a discount was for a
2 purpose to give a -- a lawful advantage.

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

4 CHIEF JUSTICE ROBERTS: An unlawful
5 advantage.

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

14 Our -- I can represent to the Court
15 that our internal data indicates that
16 obstruction charges are brought in
17 approximately 4 percent of criminal tax cases.

18 CHIEF JUSTICE ROBERTS: Is it still --
19 4 percent. Is it still the published policy of
20 the Department to charge to the maximum extent
21 reasonably possible?

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

25 JUSTICE KAGAN: I thought that there

1 was new guidance saying exactly that in the
2 last year.

3 MR. PARKER: Yes. I believe that
4 that's correct. However, my -- my point would
5 be -- I don't think that there's any
6 requirement that this particular provision be
7 charged in any given case --

8 JUSTICE KENNEDY: Suppose we --

9 MR. PARKER: -- because of all the
10 limitations.

11 JUSTICE KENNEDY: Suppose we were to
12 conclude that 80 percent of criminal tax
13 misdemeanor violations could be accompanied by
14 the felony charges contained within this
15 statute.

16 Would that be cause for our Court to
17 be concerned?

18 MR. PARKER: Well, I'm not sure that
19 it would necessarily be cause for concern. I
20 think that would be surprising.

21 However, I would note that as this
22 Court has explained in many cases, there is
23 substantial overlap as a factual matter between
24 the misdemeanor and felony provisions of the
25 Internal Revenue Code. The Court has --

1 JUSTICE KENNEDY: You do not --

2 MR. PARKER: -- repeatedly said --

3 JUSTICE KENNEDY: You -- you do not
4 think we should be concerned if 80 percent of
5 tax misdemeanor violations can be increased to
6 a felony under this statute? That's not a
7 cause for concern?

8 MR. PARKER: Well, again, I'm -- I'm
9 not --

10 JUSTICE KENNEDY: Yes or no.

11 MR. PARKER: I don't think it is, only
12 because Congress has specifically provided an
13 interlocking web of criminal penalties in this
14 area. And it has done so precisely because we
15 have a self-reporting system of taxation --

16 JUSTICE BREYER: The self --

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

18 CHIEF JUSTICE ROBERTS: Just to be
19 clear, it's not -- my line of questioning is
20 not to suggest bad faith on the part of the --
21 of the Department, but instead to suggest that
22 that concern may have motivated Congress --
23 should motivate a narrower understanding of
24 what Congress intended in this particular
25 provision.

1 MR. PARKER: Well, I think that that's
2 a fair point, Mr. Chief Justice, but I think
3 that it does not motivate the adoption of the
4 limiting construction that Petitioner is
5 proposing.

6 Remember, Petitioner's --

7 JUSTICE GORSUCH: On -- on that score,
8 the verbs "obstruct" and "impede" along with
9 "corruptly," the adverb, you normally expect
10 there to be an object to them. I have to --
11 because it is specific intent, as Justice
12 Breyer pointed out, and you have conceded.

13 I have to know about some thing and I
14 have intend to obstruct or impede that thing.
15 And the government's interpretation of that
16 thing, as I understand it, in its words is the
17 continuous, ubiquitous, and universal
18 collection of taxes.

19 Is -- is that an object that's
20 reasonably inferred? Can one -- can one intend
21 -- know of and intend to impede or obstruct,
22 corruptly or otherwise, something that is
23 continuous, ubiquitous, and universal?

24 MR. PARKER: Well, respectfully
25 Justice Gorsuch, I don't think that that is

1 what we were saying. I --

2 JUSTICE GORSUCH: I think that's out
3 of --

4 MR. PARKER: I -- I think we're not
5 saying --

6 JUSTICE GORSUCH: -- your brief in
7 opposition, right?

8 MR. PARKER: Those -- but those words
9 refer to the understanding of individuals about
10 the fact that tax administration occurs on a
11 routine schedule.

12 JUSTICE GORSUCH: But -- but don't
13 those -- don't those verbs imply that there is
14 something more direct as the object of my
15 actions than -- than something that is
16 continuous, ubiquitous, and universal?

17 MR. PARKER: Well, certainly I think
18 that's true. I think --

19 JUSTICE GORSUCH: Okay. That's
20 helpful. Thank you.

21 MR. PARKER: -- that you have to be
22 specifically intending to obstruct to the
23 administration of the code. And the only point
24 that we're making is that administration,
25 unlike in the case of the due administration of

1 justice, which involves discrete proceedings
2 that many Americans will go their entire lives
3 without having a connection to, the due
4 administration of the Internal Revenue Code
5 occurs on a routine and predictable schedule
6 that people know is coming and can reasonably
7 foresee.

8 JUSTICE BREYER: You are --

9 MR. PARKER: But, I think there are --

10 JUSTICE BREYER: -- if you want, I
11 want this answer. I don't want to interrupt
12 your answer, but I want you to augment it.

13 And you started to do that when you
14 started to talk about, just what we were
15 talking about. Look, if I put it differently,
16 three principles:

17 One, the Chief Justice, I think,
18 enunciated, and I -- it sounds comical if I am
19 going to say it, but it's very important; it is
20 not an appropriate way of interpreting a
21 statute.

22 Look, perfect criminal statute, it is
23 a crime to do wrong in the opinion of the
24 attorney general. Don't worry, we'll interpret
25 it properly.

1 Even if you do interpret it properly,
2 no. The answer under the Constitution, I
3 think, is no.

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

14 From those principles, they conclude
15 that a statute identically worded to this one
16 but for the word justice instead of title
17 requires a nexus be shown to a specific grand
18 jury or jury proceeding, a -- a court
19 proceeding; even though, of course, you can
20 read the word justice to include the word
21 investigators and many other things.

22 All right. They're saying, in effect,
23 you take those same principles, that same
24 limiting restriction, and do the same analogous
25 thing here.

1 Now, why not?

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

11 The predecessor statute to 1503
12 specifically said that it only applied to the
13 obstruction of officers or witnesses in any
14 court of the United States or the due
15 administration of justice therein.

16 Now, when Congress recodified that
17 provision in 1948 it modified the wording, but
18 as this Court has repeatedly explained, that
19 1948 recodification was not intended to have
20 any substantive effect on any of the provisions
21 in the code.

22 JUSTICE GORSUCH: But Congress
23 legislates against the backdrop of what's out
24 there. And what was out there was our
25 interpretation of those words requiring a nexus

1 to an active proceeding, something more than --
2 something more definite than something that's
3 continuous, ubiquitous and universal.

4 MR. PARKER: Well --

5 And -- and the Congress that passed
6 this statute had that interpretation in its
7 back pocket at the time; right?

8 MR. PARKER: But I would disagree with
9 that because in none of this Court's cases, in
10 Pettibone, in Aguilar, Arthur Andersen, any of
11 them did this Court ever suggest that it is the
12 phrase "due administration" not the phrase "due
13 administration of justice," that carries that
14 connotation.

15 And I would also note that if that is,
16 in fact, what Congress intended, it is very
17 strange because Congress had just a few years
18 earlier enacted the statute that is now Section
19 1505, cited in our brief.

20 And that statute was specifically
21 enacted to do exactly what -- what you're
22 suggesting, Justice Gorsuch. It was enacted to
23 extend the provisions of Section 1503 to
24 pending proceedings before agencies of the
25 United States. And that is what it says.

1 If the Petitioner's interpretation
2 were correct, then I think that there's really
3 no reason for Congress to have enacted that,
4 and it would be awfully strange for Congress
5 not to have borrowed that language.

6 But I would also note that there are a
7 number of -- as I -- getting back to the point
8 I was making previously, there is no reason to
9 adopt his particular limiting construction,
10 which frankly I think has no basis in the text,
11 and does not solve these problems.

12 JUSTICE KAGAN: Mr. Parker, can I go
13 back to the question of -- of -- of the
14 Department's prosecution policy?

15 And, you know, could you tell me,
16 Number 1, what the current state of the
17 Department's guidance is as to whether
18 prosecutors are -- are told to prosecute to the
19 maximum extent allowed by law; and, Number 2,
20 whether that would mean in this case that here
21 I am a prosecutor and I think that some action
22 falls within 7212, that I would be precluded
23 from proceeding instead under 7203 or 7205 or
24 7207.

25 MR. PARKER: My understanding is it is

1 certainly the Department's position as a
2 general matter that prosecutors should be
3 charging the most serious offense that is
4 readily provable on those facts.

5 I -- I -- I couldn't say whether in
6 any given case that would mean that
7 Section 7212 would have to be charged because,
8 as I said before, the facts of each case are
9 going to be different and they're going to make
10 the ability to prove Section 7212 more or less
11 possible.

12 And there are going to be a number of
13 cases where I think 7212 isn't even possible
14 to -- even to allege. And so I -- I think that
15 -- I'm not sure that it's --

16 JUSTICE KAGAN: Yes, but I guess what
17 I was saying is that if a prosecutor could
18 proceed under 7212, that the prosecutor is
19 being instructed that she must proceed under
20 that section.

21 MR. PARKER: If -- if -- if the facts
22 of that case render a 7212 charge readily
23 provable, then, yes, I think that prosecutors
24 would do that, but I -- I also think that that
25 is not borne out by -- a concern that that is

1 going to lead to just these sorts of charges
2 becoming common and ubiquitous doesn't
3 necessarily translate because, as I said, our
4 understanding is that it's only about 4 percent
5 of cases.

6 And that includes the most recent data
7 from this -- from this year. And so --

8 CHIEF JUSTICE ROBERTS: And, counsel,
9 you used the phrase "readily provable." I just
10 want to as a question of fact, is that -- is
11 that the term that's used or is that your
12 summary of what you understand?

13 MR. PARKER: I -- I don't exactly
14 remember the term that is used, but certainly
15 the government has to satisfy itself that it
16 can prove beyond a reasonable doubt in that
17 case that that crime has occurred.

18 I -- I also, though, want to --

19 JUSTICE ALITO: Well, before you move
20 off that point, why should we be comforted by
21 the fact that prosecutorial discretion can be
22 used in applying a statute, if this is a
23 statute, with a really broad reach so that it
24 reaches a lot of rather trivial conduct?
25 Doesn't that make the situation worse rather

1 than better? So then the prosecutors can
2 decide where they want to use this.

3 MR. PARKER: I -- I don't think that
4 it does. I mean, I think that the government
5 has the -- the responsibility to enforce
6 Congress's statutes.

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

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

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

22 MR. PARKER: I -- I suppose that if
23 the government could prove that the person did
24 so with corrupt intent, and I think that that's
25 the main difference, obviously, between those

1 two provisions, in addition to the different
2 statutory penalties, if we could prove that,
3 then I think that would be available.

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

9 There are -- there are --

10 JUSTICE GINSBURG: Well, it would --
11 if it was the highest penalty, it's three years
12 under 7212(a) and only two years under 7212(b).

13 MR. PARKER: Uh-huh.

14 JUSTICE GINSBURG: So with a maximum
15 charging, why wouldn't the --

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

20 I -- I would like to, in -- in the
21 time I have remaining, just be sure to make two
22 points.

23 The first is that Petitioner's
24 proposed limiting construction, as we've said,
25 it doesn't come -- it doesn't have a basis in

1 the text, but that doesn't mean that there
2 aren't other potential limiting constructions
3 that this Court could adopt, either in this
4 case or in another appropriate case.

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

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

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

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

1 And the second is one of the main
2 problems here is that obstruction will --
3 obstruction at the front end will often prevent
4 the government from being able to charge
5 appropriate offenses on the back end. And this
6 case demonstrates that perfectly.

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

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

20 And the government could do nothing
21 about it, unless the individual actually
22 happened to be obstructing a pending audit or
23 investigation.

24 Audits and investigations are types of
25 administration, but the Internal Revenue Code

1 contains an entire subtitle called "Procedure
2 and Administration" that lists in sequential
3 chapters all of the different types of
4 administration that occur.

5 That includes the gathering of
6 information that taxpayers must self-report.
7 It includes the calculation and assessment of
8 taxes, the collection of taxes.

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

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

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

25 And this Court has repeatedly said

1 that in the obstruction context, rigorous
2 enforcement of mens rea requirements is what
3 separates individuals who do not have or have
4 not committed culpable conduct from those who
5 do.

6 And I don't think that this
7 obstruction provision -- may I conclude? I
8 don't think this obstruction provision should
9 be treated any differently. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Hellman, four minutes remaining.

13 REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN
14 ON BEHALF OF PETITIONER

15 MR. HELLMAN: Thank you, Mr. Chief
16 Justice. Just a few quick points.

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

24 And, again, it requires this Court to
25 think that the crimes that the Congress made

1 the centerpiece of the code, these willful
2 offenses, really are only meant for the
3 idiosyncratic case in which somebody
4 intentionally violates the law but not for any
5 particular benefit.

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

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

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

1 than they currently have, to prosecutors.

2 Third, there's a suggestion here that
3 the government needs this broad interpretation;
4 otherwise, wrongdoing will go unpunished.

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

13 Fourth, the omissions theory as an
14 alternative way of limiting this. Again, that
15 doesn't make sense of the statutes that are
16 misdemeanors, like forcible rescue, like
17 willful false statements, that are affirmative
18 acts but less punishment than the -- than the
19 7212 obstruction charge.

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

25 But as Justice Gorsuch and Justice

1 Sotomayor pointed out, there are other ways of
2 reading the officers clause in conjunction with
3 the administration clause to come up with a
4 more limited standard that does not cover any
5 of the context -- conduct in this case, act or
6 omission.

7 So for those reasons, we would ask the
8 Court to reverse.

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

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

12 JUSTICE GINSBURG: What -- what is the
13 limit that you are now proposing?

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

24 I think --

25 JUSTICE GORSUCH: An -- an

1 interaction, although no audit, no proceeding
2 is yet under way?

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

10 JUSTICE BREYER: Are you --

11 JUSTICE GORSUCH: You think it's
12 preferable given its heritage and for other
13 reasons?

14 MR. HELLMAN: Yes. Yes.

15 JUSTICE BREYER: So I think you're
16 suggesting work with the word in the statute,
17 "administration." That's the word?

18 MR. HELLMAN: Yes.

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

23 MR. HELLMAN: Well, I think if you
24 look at --

25 JUSTICE BREYER: Aguilar, but what

1 else?

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

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

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

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