

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

AHMAD ABOUAMMO,)
)
 Petitioner,)
)
 v.) No. 25-5146
)
 UNITED STATES,)
)
 Respondent.)

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 25-5146, Abouammo versus United States.

Mr. Loss-Eaton.

ORAL ARGUMENT OF TOBIAS S. LOSS-EATON

ON BEHALF OF THE PETITIONER

MR. LOSS-EATON: Mr. Chief Justice, and may it please the Court:

The question here is whether Mr. Abouammo committed his Section 1519 offense in San Francisco. In Section 1519, Congress created a broad document integrity offense distinct from obstruction that requires no communication, no obstructive effects, and no investigation. Under that broad law, Mr. Abouammo's offense started and ended in a 30-minute window during which he never left his home in Seattle.

He was guilty and his offense was complete the moment he finished creating the false invoice with the requisite intent. Whether he sent it to investigators, whether it affected them in some way, or whether an

1 investigation even existed at all, none of that
2 is relevant to liability under the statute. So
3 the government didn't have to charge any of
4 that in the indictment or prove any of it at
5 trial.

6 But the government now wants to have
7 it both ways. It says the uncharged, unproven
8 effect of Mr. Abouammo's offense means that he
9 committed it in San Francisco. That is wrong.
10 From the common law, through the founding era,
11 and up through this Court's decisions in
12 Cabrales and Rodriguez-Moreno, venue has always
13 turned on the location of the offense's
14 essential conduct. That is the question that
15 this Court's venue cases all ask, even if not
16 always in so many words.

17 Here, Section 1519 has one essential
18 conduct element, falsification, and
19 Mr. Abouammo did that entirely in Seattle.
20 Sending the document to investigators may have
21 been evidence of his intent, but it was not
22 essential for conviction, so it cannot support
23 venue.

24 In arguing to the contrary, the
25 government relies on general out-of-context

1 language from cases addressing very different
2 offenses, and it all but ignores Johnson,
3 Cabrales, and the ratification-era
4 understanding of where similar offenses were
5 committed. With no grounding in statutory
6 elements or text, the government's rule is
7 unclear and unworkable, and accepting that rule
8 for the government's own convenience would
9 swallow the test this Court has always applied.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: So are you saying
12 that if he simply saved the draft to his
13 computer that the crime would have been
14 complete?

15 MR. LOSS-EATON: Yes. Exactly, Your
16 Honor. The only --

17 JUSTICE THOMAS: So how is that?

18 MR. LOSS-EATON: The -- the crime is
19 knowingly falsifying a document with the intent
20 to impede an investigation. The moment he
21 saved the document on his computer, he had done
22 all three of those things. Even if he had
23 never sent it to anyone, if he had thought
24 better of it, if he had deleted it, at that
25 point, all of the elements were satisfied and

1 the offense was completed and it was over.

2 And that is vital for purposes of
3 venue because that's the scope of the inquiry
4 that the Court applies. It asks where did the
5 defendant engage in the essential conduct
6 elements of the offense, to use
7 Rodriguez-Moreno's phrasing. In other words --

8 JUSTICE SOTOMAYOR: How do you prove
9 intent?

10 MR. LOSS-EATON: So, pertinently --

11 JUSTICE SOTOMAYOR: If he didn't send
12 it and never intended to send it, you're
13 defeating your own argument.

14 MR. LOSS-EATON: So, if he hadn't sent
15 it, then, certainly, the government would have
16 a much harder time proving intent, but just as
17 a matter of statutory text and elements, if he
18 had created the document intending to send it
19 to investigators with the hope of impeding the
20 investigation, and then, if he had thought
21 better of it in that moment, say, and he
22 thought this was a terrible idea, what am I
23 doing, and he had deleted the document, he
24 would still have violated the statute and his
25 offense would be over at that point.

1 The text of this -- of this provision
2 is clear as to this. And I -- I don't take the
3 government actually to dispute any of that, by
4 the way. Congress knows how to write an
5 obstruction statute that actually requires some
6 sort of obstructive effect, some sort of nexus
7 with the investigation or the proceeding. And
8 Congress very deliberately didn't do that in
9 Section 1519 because it wanted to capture a
10 broader scope of conduct. Responding to the
11 Enron and Arthur Andersen document-shredding
12 and cooking the books, Congress said we want to
13 be sure that we are sweeping in conduct taken
14 in contemplation of an investigation even if
15 one does not actually exist yet.

16 And so, to that extent, the government
17 actually benefits from the statute's scope
18 because it doesn't have to prove actual
19 communication to investigators or obstructive
20 effects, and those are, therefore, not elements
21 of the statute that are required for a
22 conviction.

23 JUSTICE BARRETT: Counsel, can I --

24 CHIEF JUSTICE ROBERTS: Is there --

25 JUSTICE BARRETT: -- ask you a

1 question --

2 CHIEF JUSTICE ROBERTS: Is there any
3 other -- it just seems very bizarre to me.
4 Is -- is there any other body or -- or statutes
5 that are like that? I mean, the guy does
6 whatever it is to create the document, and he
7 says, oh, that's a crazy idea, and tears it up.
8 You're going to prosecute him?

9 MR. LOSS-EATON: So, practically
10 speaking, of course, it would be relatively
11 difficult for the government to learn about
12 that in the first place. But I think the --
13 the specific scenario that Congress had in mind
14 when it wrote the statute is illuminating, and
15 that is the -- the Enron scandal. And, there,
16 not only were Enron and Arthur Andersen
17 shredding documents, which, of course, doesn't
18 involve any communication with anybody by
19 definition, but they also were keeping a second
20 set of records, not because they had any
21 specific intention of investigators ever seeing
22 them -- I'm -- I'm quite sure they hoped that
23 that was never going to happen -- but,
24 essentially, it was just in case.

25 And so Congress quite deliberately

1 severed the nexus between an actual proceeding,
2 because the statute doesn't even require that
3 there be an investigation or a proceeding, and
4 the conduct.

5 CHIEF JUSTICE ROBERTS: Well, but, I
6 mean, that's a huge conspiracy, you know,
7 affecting all sorts of different people and
8 operations. You're -- you're suggesting the --
9 the same rule would apply in the case that I
10 gave, somebody who, you know, drafts up a
11 falsification, thinks better of it, tears it
12 up. He's -- I mean, how much time is he facing
13 for that?

14 MR. LOSS-EATON: I don't remember
15 offhand what the maximum is, Your Honor, but
16 just as a matter of statutory elements, that's
17 what the text says. And, again, I do --

18 JUSTICE KAGAN: Have courts actually
19 applied it in that way?

20 MR. LOSS-EATON: I don't know --

21 JUSTICE KAGAN: I mean, if you look
22 around the universe of 1519 prosecutions, what
23 are the -- you know, what might be considered
24 the fringe cases?

25 MR. LOSS-EATON: I don't know offhand

1 of a case in which a court has ever considered
2 a scenario where someone just created a
3 document with the intent of impeding the
4 investigation and then never did anything
5 further than that, presumably, because,
6 practically speaking, it's going to be quite
7 difficult for the government to find out about
8 that.

9 But just -- again, if you just turn
10 back to the text, knowingly falsifies a
11 document with the intent to impede, that's --
12 those are the three elements. That's all you
13 have to do. And that is what Mr. Abouammo did.

14 JUSTICE BARRETT: Okay. But, if --if
15 that's -- let -- let's just imagine that it did
16 require -- just -- just work with me here.
17 Let's assume that it did require some kind of
18 communication. The agency -- the agents were
19 in his house, right? They were downstairs.
20 Let's imagine, instead of e-mailing it, he
21 handed it to them.

22 You would still say that all the
23 offense conduct happened in his home in
24 Washington?

25 MR. LOSS-EATON: Absolutely, yes.

1 JUSTICE BARRETT: Okay. How does it
2 change matters, again, just assuming that some
3 kind of communication of the document is
4 required, that he e-mailed it to them, so he
5 could just say, for convenience, I'm just going
6 to go ahead and e-mail you the document as an
7 attachment rather than physically handing it
8 over? In your view, would that change --
9 how -- how might that change matters, if at
10 all?

11 MR. LOSS-EATON: I don't know that --
12 that those scenarios are any different.
13 Assuming that there is some sort of
14 communicative element in the statute, handing a
15 piece of paper to someone versus e-mailing it
16 to them, I think, is communicating to the same
17 extent.

18 And so, in either of those cases --

19 JUSTICE BARRETT: So we don't have to
20 worry anything about a server? This is -- you
21 know, it's -- it's -- it's going to their San
22 Francisco server and -- and their computer
23 there and living on it in some way, right?

24 MR. LOSS-EATON: No, you do not have
25 to worry about that both because, as a legal

1 matter, the conduct would be the same, and also
2 because there is no evidence in the record
3 about where the government servers actually are
4 or were.

5 JUSTICE BARRETT: Okay. So --

6 MR. LOSS-EATON: The government, I
7 think, is -- is hoping that you'll assume that
8 the servers are in San Francisco, but that was
9 never asserted at trial, there's no evidence of
10 it.

11 JUSTICE BARRETT: Okay. So you don't
12 understand, and, obviously, we can ask Mr. Yang
13 this when he stands up, but you don't
14 understand the government to be contesting your
15 interpretation of the statute and that only the
16 creation of the document is required even if
17 you put it in a drawer and never communicate it
18 to anyone?

19 MR. LOSS-EATON: I -- I do not
20 understand the government to contest that, no.

21 JUSTICE JACKSON: And is that
22 because -- and -- and I'll ask the government
23 this -- but is that because both of you are
24 focused on the statutory elements, not so much
25 what the facts were in this particular case

1 about how he transmitted the document but what
2 the statute requires, and that's what we should
3 be focused on in determining venue?

4 MR. LOSS-EATON: That is exactly
5 right, Your Honor. This Court's venue cases
6 have always asked where did you commit the
7 elements of the statutory offense necessary for
8 guilt, in other words, where did you commit the
9 actus reus of the offense.

10 JUSTICE JACKSON: So these questions
11 about, boy, that's a weird offense and a
12 strange actus reus real -- really, it seems to
13 me, isn't dispositive of our consideration
14 here. We have to look at the statute and
15 determine what its actus reus is. And so you
16 say it is, what, falsifying a record?

17 MR. LOSS-EATON: Yes.

18 JUSTICE JACKSON: With the intention
19 that it impede an investigation?

20 MR. LOSS-EATON: Yes.

21 JUSTICE JACKSON: But both of those
22 things, the falsifying the record and,
23 presumably, the intention, occurred in Seattle
24 in this case, and so that's why I think you're
25 saying Seattle is the appropriate venue?

1 MR. LOSS-EATON: That is exactly
2 right, Your Honor. And cases like Cabrales are
3 a perfect illustration of this. In Cabrales,
4 the Court emphasized that we're not asking in a
5 broad sense what did you do in a sort of
6 related factual way. We're looking at the
7 specific statutory proscription that Congress
8 enacted and then we're asking how did the
9 defendant violate it and where did they do so.

10 So, in Cabrales, it was irrelevant to
11 venue that she also had engaged in a drug
12 distribution conspiracy in Missouri for which
13 she was also going to be prosecuted no matter
14 what and that she had been physically present
15 in Missouri for various parts of that scheme or
16 even that she had to know for the substantive
17 money-laundering counts that the money was the
18 proceeds of a specific other offense, which was
19 the criminal conspiracy in Missouri.

20 The Court asked simply, where did she
21 actually commit the acts that constitute the
22 money-laundering offense?

23 JUSTICE KAGAN: The acts or the
24 elements? Is it all elements, or is it some
25 subset of elements?

1 MR. LOSS-EATON: So the way the Court
2 has framed it is essential conduct elements,
3 which I take essentially to mean the actus
4 reus. None of the Court's cases seem to treat
5 intent as part of the venue analysis for these
6 purposes. But I don't know that that would
7 make a difference even if you looked at the
8 intent element, as Justice Jackson said.

9 JUSTICE KAGAN: Do you think that
10 there's a reason to treat those two things
11 differently?

12 MR. LOSS-EATON: I think,
13 historically, commission has been about acts.
14 If you go all the way back to the common law
15 cases or the ratification-era cases, the Court
16 is generally looking at acts or actions,
17 conduct, in the -- in the sense of the actus
18 reus.

19 But -- and I don't know of any example
20 that does look to an intent element, but even
21 if you do, I don't think it changes anything
22 here because, if the intent element was
23 committed anywhere, it was committed where he
24 was. It was committed in Seattle.

25 JUSTICE GORSUCH: Counsel, we have the

1 government's late-breaking argument that
2 there's a separate metadata document that was
3 created in San Francisco. I -- I know you
4 argue that that's forfeited. I -- I wonder
5 whether you would actually be better off having
6 the Court address that, though, because one can
7 imagine that we say it's forfeited in this case
8 while, in every 1519 case to follow, the
9 government's going to say, oh, we have a
10 separate new document with different metadata
11 in our offices and that changes everything, so
12 we'll be right back here. Thoughts?

13 MR. LOSS-EATON: So forfeiture aside,
14 Your Honor, I think that argument has got real
15 problems both legally and factually.
16 Factually, you don't just have to create or
17 falsify a document to commit the actus reus.
18 You have to do so knowingly.

19 And there is absolutely no evidence in
20 the record here at all that Mr. Abouammo
21 knowingly created a copy of a document
22 anywhere, much less in San Francisco, because,
23 as Justice Barrett and I were discussing,
24 there's no evidence about where the server even
25 was. But, if you get past all of that, then

1 you get to the legal question.

2 I'm not aware of any support for the
3 government's position that just e-mailing a
4 copy of an existing false record to someone is
5 a separate act of falsification that can
6 violate the statute. The best analog that we
7 found is the Sixth Circuit case that's cited in
8 our reply which says that at least for Section
9 1001 purposes, faxing and mailing two copies of
10 a false statement are not two separate
11 violations because there's no additional
12 falsehoods or false content.

13 And I think that's consistent with the
14 ordinary meaning of "falsifies," which means
15 essentially to make deceptive. It's the act of
16 introducing falsity.

17 JUSTICE GORSUCH: He falsified the
18 original -- the duplicates are duplicates, he
19 didn't falsify anything in the duplicates?

20 MR. LOSS-EATON: Exactly.

21 JUSTICE GORSUCH: If there's any
22 falsification in the duplicate, it might be the
23 government's metadata?

24 MR. LOSS-EATON: Yes, I think that's
25 fair, Your Honor. And -- and -- and -- and

1 this is not to say, by the way, that he
2 couldn't potentially violate some other statute
3 by actually communicating the document
4 directly.

5 JUSTICE GORSUCH: Oh, goodness. I'm
6 sure there are many out there.

7 MR. LOSS-EATON: I think there
8 probably are. But, for purposes of Section
9 1519, the only act of falsification was the
10 creation of this document on his own computer
11 in his own home.

12 And that was the government's
13 consistent position at trial in its opening
14 arguments, in the Rule 29 argument. The
15 government quite consistently said that the
16 falsification was when he went upstairs and he
17 modified the PDF on his computer, and at that
18 point, the offense was over.

19 JUSTICE KAVANAUGH: What if he had --

20 JUSTICE ALITO: The situation --

21 JUSTICE KAVANAUGH: Go ahead.

22 JUSTICE ALITO: The -- the situation
23 in which someone creates a false document but
24 then never sends it, changes his mind, that
25 person is going to be prosecuted under this

1 statute, that's really fanciful.

2 What is really -- what is going to
3 happen in the real world is that the person
4 creates the document and then sends it. But
5 your -- your argument is that even if this had
6 been e-mailed to San Francisco, e-mailed to a
7 specific address of a person in San Francisco,
8 there would be no crime?

9 MR. LOSS-EATON: That is correct, Your
10 Honor. And I think Johnson is the perfect
11 illustration of why that is. In Johnson, the
12 offense required using the mails for the
13 purpose of sending or bringing into any state
14 contraband. So there was similarly an intent
15 requirement, much like there is here. It was
16 even more closely tied to the interstate
17 communication.

18 And the Court said that does not
19 change the venue analysis. We construe that
20 statute to proscribe only the act of sending,
21 meaning depositing in the mail. And once
22 you've done that, the offense is complete. And
23 so we are -- we don't care, really, that you
24 did that for the purpose of sending something
25 into another state or even that you actually

1 succeeded in doing so, thereby causing
2 precisely the effect that Congress enacted the
3 statute to proscribe.

4 JUSTICE ALITO: What about Lamar
5 versus United States, where the Court held
6 venue is proper in New York for an intent -- a
7 defendant who intended to defraud people
8 located in the state, and the Court held the
9 venue was proper there even though none of the
10 defendant's conduct necessarily occurred in New
11 York and even though the charged offense did
12 not require him to cause any fraud in New York.

13 That seems like pretty much the same
14 case as this one.

15 MR. LOSS-EATON: I don't think so,
16 Your Honor, because Lamar is, just like all of
17 the cases that it was applying, conduct-based.
18 The Court in a single sentence says he might
19 even have been in the Southern District.

20 But, assuming that he wasn't, when he
21 made phone calls pretending to be a
22 Congressman, his impersonation, now I'll use,
23 and this admittedly is a phrase that I know the
24 government likes from Lamar, took effect in the
25 Southern District of New York.

1 And then Lamar cites Burton, and
2 Burton very carefully conducts a conduct-based
3 analysis to ask where the agreement, the legal
4 agreement there was formed, relying on cases
5 like Palliser and Armour Packing.

6 So I think, for Lamar to support the
7 government here, it would have to be doing
8 something completely different from all of the
9 cases that came before or after it.

10 JUSTICE ALITO: Well, we don't know
11 where -- the Court did not know where he placed
12 the phone call from. So let's assume he placed
13 the phone call from Washington. From
14 Washington, he calls somebody in New York and
15 impersonates a government official.

16 The Court says -- and -- and the
17 statute makes it a crime to intend to
18 impersonate a government official. What's the
19 difference between that situation and -- and
20 here, except for the fact that the technology
21 changed?

22 MR. LOSS-EATON: The difference is
23 that there was not only a requirement to act
24 intentionally to try to defraud someone there.
25 The statute, as this Court had just construed

1 it a few months earlier, required some improper
2 assertion of authority, almost a sort of overt
3 act, to actually manifest the impersonation.

4 I know the government says that you
5 could commit the actus reus by standing in
6 front of your mirror in your bedroom. But this
7 Court had held that's not correct, that's not
8 enough. You had to actually do something
9 assertive. And the assertion there was the
10 phone call.

11 And the phone call, under cases like
12 Palliser, happens on both ends. It happens
13 where you physically are, and it happens where
14 you're -- the person you're talking to is. And
15 in that case, the person you were talking to
16 was in New York.

17 And so --

18 JUSTICE ALITO: Okay. I get your
19 point.

20 At what point in time do you think the
21 intent that is required by 1519 has to occur?

22 MR. LOSS-EATON: It -- you -- you ---
23 it has to -- it certainly has to exist when you
24 are falsifying the document. I think you have
25 to have the -- all three elements together, the

1 knowingly, the falsification, and then the
2 impact.

3 JUSTICE ALITO: So you can't withdraw
4 from this offense for one half a second?
5 Someone -- maybe someone creates a false
6 document but never -- says, I'm going to just
7 create this, but I'm not actually going to send
8 it. And then, for one second, he's tempted.
9 I -- I'll actually send this. And then he
10 immediately says, no, that's the wrong thing to
11 do. Too late?

12 MR. LOSS-EATON: I think, there, you
13 would not have an offense because you wouldn't
14 have had the falsification with the intent to
15 impede, which is what the statute requires to
16 coincide. Now, admittedly, these are all
17 pretty, I think, strange --

18 JUSTICE ALITO: Seriously? So he
19 creates the false document not intending to --
20 not intending ever to send it. So his intent
21 at that time is not to do anything -- not to --
22 not to send the thing. But, later, he changes
23 his mind and he says now, oh, I'm actually
24 going to send it.

25 There's no offense there because he

1 didn't have the intent to deceive at the time
2 when he created the document?

3 MR. LOSS-EATON: I think that's right,
4 Your Honor. I mean, it's an unusual scenario,
5 and I have a hard time imagining how it might
6 ever come up. But the statute says you have to
7 act knowingly and you have to have the intent
8 when you falsify the document. I'm not aware
9 of any cases where the Court has said that a
10 later manifestation of intent that didn't exist
11 when the actus reus was committed could satisfy
12 a crime.

13 But, ultimately, though, even if you
14 disagree with me about that scenario, I don't
15 think it makes any difference here because
16 Mr. Abouammo undisputedly had all three
17 elements at the same time when he created the
18 document on his computer. And at that point,
19 the offense was complete.

20 And, again, I don't take the
21 government to actually dispute that. And so
22 that makes this case just like Johnson or just
23 like Cabrales or any number of other precedents
24 where the Court has looked narrowly at the
25 essential conduct, the actus reus, where did

1 you do the thing that Congress proscribed. And
2 the thing that Congress proscribed here was the
3 falsification, which Mr. Abouammo did entirely
4 in Seattle.

5 JUSTICE KAGAN: And if the -- if the
6 statute did require some kind of interference
7 or obstruction, that would have happened in
8 California, is that correct, in San Francisco?

9 MR. LOSS-EATON: I don't know if
10 there's enough in the record to establish that
11 conclusively, but it's certainly plausible.

12 JUSTICE KAGAN: Okay. And if you had
13 an intent to have that happen in San
14 Francisco -- this, I guess, goes back to the
15 question of whether a mens rea element counts,
16 but, if you have the intent that -- that the
17 interference happen in San Francisco, that is
18 enough or that's not enough?

19 MR. LOSS-EATON: Intent alone, where
20 the statute does not actually require an
21 effect, is not enough because that is the
22 statute that we have here. And that's --

23 JUSTICE KAGAN: Because the intent is
24 always where you are, as opposed to I have an
25 intent to make something happen in another

1 place?

2 MR. LOSS-EATON: Because the intent is
3 where you are, and it's not conduct. And as I
4 said, the Court has always focused on conduct
5 elements. But, again, even if you want to look
6 more broadly at elements, all of the elements
7 were committed in Seattle.

8 JUSTICE BARRETT: So you think
9 Congress could -- you just told Justice
10 Kagan intent, unless intent to cause an effect,
11 so you think Congress could say that venue lies
12 some place where you wanted there to be an
13 effect flowing from your conduct just as a
14 matter of intent?

15 MR. LOSS-EATON: If the effect is
16 required for conviction, then yes.

17 JUSTICE KAVANAUGH: Don't you have to
18 show that here?

19 MR. LOSS-EATON: No. You just have to
20 show that the --

21 JUSTICE KAVANAUGH: Intent -- you have
22 to have -- there are two different mens reas --

23 MR. LOSS-EATON: Yeah.

24 JUSTICE KAVANAUGH: -- in the statute,
25 right? There's the knowingly altering, et

1 cetera, falsifying, and then with the intent to
2 impede, obstruct, or influence the
3 investigation or proper administration of any
4 matter.

5 On that latter one, don't you have to
6 show the intent to impede, obstruct, or
7 influence?

8 MR. LOSS-EATON: Yes, you do.

9 JUSTICE KAVANAUGH: Which means an
10 effect, intent to cause an effect, I think.

11 MR. LOSS-EATON: Yes. What -- what
12 I'm saying is that Congress could create venue
13 there in the place of the proceeding if the
14 effect itself were required for conviction, not
15 just the intent to cause it but actually
16 causing it. And that is really --

17 JUSTICE JACKSON: Why is that? Why
18 are you making that distinction?

19 MR. LOSS-EATON: Because, in that
20 situation, at least sometimes the causing the
21 effect is part of the actus reus that actually
22 then satisfies the essential conduct element
23 test.

24 JUSTICE KAVANAUGH: So, if you --

25 MR. LOSS-EATON: And I --

1 JUSTICE KAVANAUGH: Keep going.

2 JUSTICE JACKSON: Go ahead.

3 JUSTICE KAVANAUGH: Sorry.

4 MR. LOSS-EATON: So I -- and,
5 actually, I mean, I do think, honestly,
6 probably the hardest question in this entire
7 area, which this case does not implicate, is,
8 is there a distinction between a statute that
9 requires an effect for conviction but seemingly
10 has a stand-alone element and then a statute
11 that actually describes the actus reus in terms
12 of causing an effect?

13 But, here, we're not in either of
14 those scenarios because an effect of any kind
15 is not required for conviction. So the Court
16 does not have to get into that. My point is
17 simply that there are some situations,
18 certainly, where Congress could create venue
19 quite properly for an obstruction-type offense
20 to the extent that an effect, an obstructive
21 effect or an impeding effect, is actually
22 required for conviction such that it is part of
23 the elements of the offense.

24 JUSTICE KAVANAUGH: So -- so the
25 intent to cause an effect elsewhere is not

1 enough to get venue elsewhere? So, you know,
2 mailing a bomb elsewhere and the statute's
3 written in terms of you put it in the -- in the
4 mail with the intent to kill someone elsewhere,
5 and that's all the statute is about, the
6 "elsewhere" is not good enough?

7 MR. LOSS-EATON: So I'm assuming in --
8 in the hypo the bomb doesn't go off.

9 JUSTICE KAVANAUGH: Correct.

10 MR. LOSS-EATON: So I think then it
11 would depend on the specifics of the statute
12 itself because --

13 JUSTICE KAVANAUGH: I don't think so
14 under your theory. I think there's no venue in
15 the other jurisdiction.

16 MR. LOSS-EATON: So the reason I say
17 that is that cases like -- if you line up
18 Travis, Armour Packing, and Johnson, you've
19 got -- all three of those cases involved
20 sending something from state to state, either
21 in the mails or -- or by shipping. And in one
22 case, the Court says venue only at origin. In
23 another, it says only at destination. And in
24 the third, it says anywhere along the way. And
25 I think what that tells us really is you have

1 to look very carefully at precisely the conduct
2 that Congress proscribed.

3 So I think it would be a little hard
4 to answer that question without actually having
5 the text in front of me. I think it's
6 plausible that that statute could be written in
7 a way that does actually reach past just where
8 the person physically acted.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

13 JUSTICE ALITO: There's a peculiarity
14 about this case because the FBI investigation
15 resulted in several other convictions, and you
16 don't dispute venue for any of them. You --
17 any of those others. You dispute venue only
18 for his attempt to obstruct the investigation.

19 So, if venue is okay for the other
20 charges, why doesn't it suffice for the charge
21 that's at issue here? In other words, does the
22 venue clause require him to face two trials in
23 two venues for charges stemming from the same
24 investigation? Have we ever held that?

25 MR. LOSS-EATON: I don't know that

1 this Court has ever squarely held that, but the
2 Sixth Amendment on its face says that trial
3 shall be held where the crime, singular, is
4 committed. And I understand the Court's always
5 to have read that as it suggests, to mean that
6 venue must be done on a count-by-count
7 basis.

8 Now it doesn't necessarily mean that
9 Mr. Abouammo has to be subjected to two trials.
10 Of course, venue is waivable. That's his
11 right. But it does mean that absent a waiver
12 on his part, each individual count has to be
13 tried where it was committed.

14 And I will note that does not
15 distinguish this case at all from Cabrales.
16 Everything that you could say about why a trial
17 in this case just makes sense in San Francisco
18 could have been said in Cabrales as well,
19 including other charges that were going to be
20 tried there no matter what.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Counsel, Congress
25 did, in 1512(c), require the government to

1 prove that a federal investigation was impeded
2 because of the defendant's conduct, correct?

3 MR. LOSS-EATON: Right.

4 JUSTICE SOTOMAYOR: And it -- and it
5 enacted a venue provision based on those
6 effects, right?

7 MR. LOSS-EATON: Yes.

8 JUSTICE SOTOMAYOR: And so those
9 statutes exist. We have said the same thing,
10 that Congress is free to look at effects, but
11 we're not, meaning absent a congressional
12 statute that permits venue in places other than
13 where conduct is committed, we can't do it,
14 correct?

15 MR. LOSS-EATON: So I think the -- the
16 right way to think about what Congress can do
17 with a venue statute is that it can make sure
18 that venue lies anywhere that an offense could
19 be said to be committed within the meaning of
20 the Constitution, but, of course, it can't go
21 beyond that.

22 And so, certainly, there are ways to
23 violate 1512 or 1503 that involve actual
24 effects, and in those situations, venue would
25 be proper either where the person physically

1 acted or where the proceeding --

2 JUSTICE SOTOMAYOR: And that's what
3 they do.

4 MR. LOSS-EATON: Yes.

5 JUSTICE SOTOMAYOR: Now, with respect
6 to Lamar, one of the elements of the Lamar
7 charge was an -- an -- was an overt act that --
8 that required the use of a communication
9 between people in the impersonation, correct?

10 MR. LOSS-EATON: Yes. Some improper
11 assertion of authority, which I think has to be
12 communicative in some way.

13 JUSTICE SOTOMAYOR: I think the
14 statute used the word "communicative" and so,
15 when the Court in Lamar talked about the person
16 in New York probably being the more -- more
17 proper venue because the communication happened
18 in New York, correct?

19 MR. LOSS-EATON: I -- I think -- I
20 think Lamar is basically just Palliser with a
21 telephone call instead of a letter, yes.

22 JUSTICE SOTOMAYOR: Exactly.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: How are we to
2 think about 1512(i) in this case?

3 MR. LOSS-EATON: So, on our view, and
4 this is actually something that we have in
5 common with the government because the
6 government has this problem too, Section
7 1512(i) is unconstitutional in some
8 applications.

9 On our view, it is unconstitutional
10 where it is applied to prongs of the statute
11 where an effect is not required. And on the
12 government's view, it's unconstitutional
13 whenever an effect is not actually intended and
14 manifested.

15 So there's some daylight there but I
16 think actually not a huge amount. And so, yes,
17 that does mean that in some cases 1512(i)
18 cannot be applied as it is written.

19 JUSTICE KAVANAUGH: What if he was
20 interviewed in Canada, in Vancouver?

21 MR. LOSS-EATON: So, under the
22 Constitution, Congress has plenary authority to
23 decide venue for offenses that are cognizable
24 under U.S. law but that are committed outside
25 of the United States, and it has, in fact, done

1 so.

2 So I think, there, it might depend on,
3 say, where he had been apprehended or brought
4 into the country, but, certainly, venue
5 would -- there would be a place to have venue
6 in the U.S. for that act.

7 JUSTICE KAVANAUGH: Constitutionally
8 but not under this scenario, this statute?

9 MR. LOSS-EATON: Not -- well, not
10 under 1512(i), but there are other venue
11 provisions.

12 JUSTICE KAVANAUGH: I'm talk -- I'm
13 back to 1519 now.

14 MR. LOSS-EATON: So if he had done the
15 same thing in Canada rather than in the U.S.

16 JUSTICE KAVANAUGH: Mm-hmm.

17 MR. LOSS-EATON: So that -- I mean,
18 that, I think, there, would be an
19 extraterritorial jurisdiction question, which
20 would implicate a different set of --

21 JUSTICE KAVANAUGH: Well, under your
22 theory, I just don't think he could be
23 prosecuted under 1519 if the interview had been
24 in Vancouver rather than Seattle, right?

25 MR. LOSS-EATON: If the offense were

1 prosecutable at all, I think venue would not be
2 an obstacle because it would be allowed under
3 the provisions that govern where someone
4 commits an offense outside of the United
5 States.

6 JUSTICE KAVANAUGH: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 JUSTICE JACKSON: So would you
11 encourage us to be thinking about this in terms
12 of identifying this offense as not a continuing
13 offense? Is that how we're supposed to -- I'm
14 just trying to sort out the cases that seem to
15 suggest that there are circumstances in which
16 a -- a crime that is similar to this could be
17 charged in different locations.

18 And you've suggested that those cases
19 are distinguishable on the basis of this
20 continuing offense idea. And I haven't heard
21 you mention that specifically in today's
22 presentation, so I'm just trying to figure out
23 where that fits.

24 MR. LOSS-EATON: Yes. So I think
25 Armour Packing tells us essentially how the

1 continuing offense doctrine works in this
2 context, and that is that where the essential
3 offense conduct, so essentially the actus reus,
4 continues or extends from one place to another,
5 then venue is proper in each of those places.

6 But where the actus reus is committed
7 only in one place, venue is proper only there.
8 So I don't deny that it is possible to violate
9 Section 1519 in a way that would create venue
10 in more than one state. If he had started
11 creating the document in Oregon and then
12 finished it in Washington, probably he could be
13 charged for either of those.

14 But, here, all of the actus reus, the
15 falsification happened in one place. And that
16 is what distinguishes cases like Palliser,
17 Lamar, and Armour Packing because, in each of
18 those cases, the actus reus, whether it was
19 offering the bribe or it was impersonating a
20 federal official or it was the illicit
21 transportation, extended across state lines
22 from one place to another.

23 JUSTICE JACKSON: And you say even
24 Lamar, I mean, demanding or obtaining is in the
25 statute.

1 MR. LOSS-EATON: Yes. So Lamar was
2 charged -- there are two prongs to that
3 statute --

4 JUSTICE JACKSON: Yes.

5 MR. LOSS-EATON: -- one of which
6 doesn't specifically require the -- the
7 demanding or obtaining.

8 JUSTICE JACKSON: Right.

9 MR. LOSS-EATON: But this Court had
10 construed that first prong to require some sort
11 of improper assertion of authority, and, there,
12 it was the telephone call, was the improper
13 assertion of authority.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. LOSS-EATON: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Yang.

19 ORAL ARGUMENT OF ANTHONY A. YANG

20 ON BEHALF OF THE RESPONDENT

21 MR. YANG: Mr. Chief Justice, and may
22 it please the Court:

23 Petitioner falsified -- knowingly
24 falsified an invoice with the specific intent
25 to obstruct an FBI investigation he knew was

1 occurring in the Northern District of
2 California. He then manifested that intent --
3 manifested his obstructive intent and affected
4 the investigation by transmitting the document
5 to the FBI by e-mail.

6 That conduct directed at and having a
7 direct effect in the Northern District of
8 California makes the district a locus of his
9 crime. The Constitution's requirement that
10 venue be where the crime was committed looks
11 beyond the physical location of the defendant
12 and turns on the nature of the crime itself.

13 And our position focuses on the
14 special nature of a Section 1519 offense. It
15 is an inchoate offense that, like conspiracy,
16 is merely a step towards the commission of
17 another crime. The offense has a special type
18 of statutory intent element, not just mens rea
19 but intent -- specific intent to commit another
20 crime, here, the obstruction.

21 That necessarily contemplates, the
22 defendant must contemplate that more must be
23 done to achieve the objective that is required
24 as part of the crime. The conduct that
25 continues to manifest that intent by furthering

1 that objective is part of the crime itself.

2 And where that conduct is intended to
3 produce and directly produces a detrimental
4 effect in that district, the district is proper
5 for venue. Petitioner's conduct manifesting
6 his intent, here, his transmission of the
7 falsified record, is akin to an overt act in
8 furtherance of a traditional conspiracy.

9 That provides a basis for venue.
10 Neither are elements, conduct elements of the
11 offense. Both occur after all the conduct
12 elements are completed. And both are taken to
13 further the intent element objective of the
14 crime. That is the ultimate commission of this
15 other offense.

16 Petitioner's view that venue is proper
17 only when an essential conduct element occurs
18 cannot be squared with the settled rule that
19 venue is proper for conspiracy in any district
20 where any overt act occurs even though the
21 overt act is not an offense element. The same
22 venue rule applies here.

23 JUSTICE THOMAS: Well, Mr. Yang, this
24 is not conspiracy, so could you -- is there
25 anything that is done by Petitioner in

1 California? He drafted the e-mail -- the
2 invoice in Seattle and he transmitted the
3 invoice from Seattle. Now there's nothing left
4 but the receipt by the FBI.

5 MR. YANG: Yeah. We don't dispute
6 that his conduct in the offense itself was
7 completed and could have been prosecuted before
8 he hit the e-mail. We're -- we're not
9 disputing that. Our point is somewhat
10 different, which is, even though, when offense
11 elements have been all satisfied, there's
12 conduct that can still occur that is furthering
13 the specific intent to commit the other crime,
14 that's --

15 JUSTICE THOMAS: What is that
16 precisely?

17 MR. YANG: Well, that was the
18 e-mailing. And --

19 JUSTICE THOMAS: But he e-mailed it --
20 he transmitted it from Seattle.

21 MR. YANG: Mm-hmm. But it was
22 directed specifically at the Northern District
23 of California. He knew the agents were
24 conducting an investigation there and that is
25 where they're from. It's no different than

1 pointing a gun and shooting. He shot the
2 e-mail and he hit Northern California.

3 And so -- but our -- the -- the -- the
4 main point, I think, is that offenses -- the
5 relevant offense conduct, where the crime is
6 committed, can encompass things that happen
7 after the crime can be fully prosecuted. And
8 that's true --

9 CHIEF JUSTICE ROBERTS: Mr. --

10 MR. YANG: -- with conspiracy and with
11 respect to intent, both inchoate crimes that
12 share an essential feature with this crime,
13 which is there has to be specific intent to
14 commit another crime such that the inchoate
15 crime is a step towards that further crime.

16 CHIEF JUSTICE ROBERTS: Mr. Yang, I --
17 I gather it's common ground between the parties
18 that this -- the vicinage clause was added
19 because of Parliament's decision to allow the
20 transport of colonists back to England to be
21 tried there.

22 So, under your interpretation, that
23 would still be allowed, right?

24 MR. YANG: No.

25 CHIEF JUSTICE ROBERTS: The Boston Tea

1 Party takes place entirely in Boston, but it
2 causes effects back in England. And so why
3 can't you say it's all right to take them to
4 England?

5 MR. YANG: I -- I don't think that
6 that's quite right. We're not saying that any
7 kind of incidental effects or kind of dignitary
8 effects that might affect the government would
9 cover. If that were true, any offense against
10 the United States could be tried in D.C., where
11 this is --

12 CHIEF JUSTICE ROBERTS: Well, I don't
13 think --

14 JUSTICE GORSUCH: The whole point --
15 the whole point of treason -- I -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: No, no, go
17 ahead.

18 JUSTICE GORSUCH: -- is aimed at the
19 King, right? I mean -- I mean, it wasn't
20 incidental, I think, is --

21 MR. YANG: I -- I --

22 JUSTICE GORSUCH: -- what the Chief
23 is -- let -- let -- let's hypothesize.

24 MR. YANG: Could I just -- the aim at
25 the King is a slightly different thing.

1 JUSTICE GORSUCH: If -- if you
2 might -- if you might. Let's work with my
3 hypothetical.

4 We have a crime whose intended effect
5 is the King in England, okay? Now, certainly,
6 how the Framers thought of it themselves when
7 they were in the revolution, they were aiming
8 at Parliament and the King and -- and they
9 wanted to depart from them.

10 And the Crown did want to try them in
11 England, and that was considered infamy that
12 led to the Sixth Amendment. And -- and I -- I
13 do want an answer to the Chief's question.

14 Assuming hypothetically that the
15 founders were aiming at the King and Parliament
16 and that was their intended effect, could they
17 have been tried in England under your theory?

18 MR. YANG: No. The offense needs --
19 our theory turns on a specific feature of this
20 type of crime, which is that you have to
21 specifically intend as an element of the
22 offense to commit another crime elsewhere. You
23 know, here's the crime of obstruction.

24 Now, aiming at the --

25 JUSTICE GORSUCH: So, if it were -- if

1 it were an inchoate offense in America then,
2 okay, a conspiracy offense, an inchoate
3 offense, then they could have been tried in
4 England?

5 MR. YANG: No. This is -- this is, I
6 think --

7 JUSTICE GORSUCH: Is that your theory?

8 MR. YANG: No. This -- I want to just
9 take a step back. They rely on Blackstone.
10 Blackstone explains there are seven types of
11 branches of conspiracy.

12 The relevant branch for the colonists
13 would have been taking up arms or waging war,
14 right? The element that they talk about is the
15 first -- first branch of conspiracy. That is
16 where you actually act with the purpose or
17 design to kill the King, literally kill the
18 King. That is a different type of offense.

19 And if you have the overt acts, let's
20 say you -- you actually bring, supply arms or
21 your people go to strike the King, even if you
22 were in part of -- in the United States and
23 they struck the King in England, yes, I think
24 you would, as a co-conspirator or as part of
25 that, would be able to go there.

1 But that's not what the colonists were
2 upset about. The colonists were upset about
3 actions taken here that have direct effect
4 here, that the only connection was a kind of
5 vague dignitary offense of -- of treason.
6 That's different.

7 JUSTICE GORSUCH: I -- I -- I don't --

8 CHIEF JUSTICE ROBERTS: Oh, I don't
9 think that's -- I don't think that's how King
10 George took it. I mean, the -- saying the
11 Boston Tea Party was concerned with effects
12 here and -- and -- I mean, it was intended to
13 send a very specific message to London that we
14 don't want our citizens picked up and taken
15 away. And then they act -- enact a clause in
16 response to that that would prevent precisely
17 that from happening.

18 MR. YANG: Well, I'm not talking about
19 what might have been in the mind of the King.
20 I'm talking about what the law required. And
21 what the law required was there were different
22 parts -- different types of treason with
23 different elements. And what they're talking
24 about about striking the King literally meant
25 killing the King. That was the offense. It

1 was like attempted murder on the King.

2 Look at Blackstone. It spells out the
3 seven branches. They're relying on something
4 different here to conflate the idea of what we
5 have, which is based on the idea that inchoate
6 crimes like conspiracy or attempt can continue
7 beyond the point at which the crime can be
8 prosecuted.

9 JUSTICE JACKSON: But, Mr. Yang,
10 isn't -- isn't really the point of the Chief
11 and Justice Gorsuch's questioning that this
12 clause, the law, the -- the way in which the
13 Constitution developed around this issue was a
14 concern that people were being removed from the
15 area in which they had committed the essential
16 elements of the crime and taken back to
17 England? The government was -- or the -- the
18 Crown was gaining or thought they would gain an
19 advantage by trying them back there rather than
20 here in the colonies and then later here in the
21 United States.

22 And so the concern, I think, with your
23 theory is that because the government controls
24 the location of the investigation, you would
25 end up with the same kind of troubling dynamic,

1 that the essential element of the crime you
2 admit in terms of the actus reus is happening
3 in one location, but to the extent that the
4 person intends to affect an investigation in
5 the United States, the United States says,
6 well, our investigation was happening in San
7 Francisco or New York or wherever.

8 MR. YANG: We don't just -- we don't
9 say -- the investigation preceded --

10 JUSTICE JACKSON: Or it was. Fine.
11 Fine, but you --

12 MR. YANG: No. It preceded his crime.

13 JUSTICE JACKSON: But you concerned
14 that --

15 MR. YANG: It already had to exist.

16 JUSTICE JACKSON: But -- but what I'm
17 suggesting is that you control that. So here's
18 the hypothetical. Suppose that in this very
19 same situation, the United States had decided
20 that 1519 crimes are best prosecuted by the
21 Southern District of New York because they have
22 the most experience, because they think they do
23 better, those prosecutors.

24 But the underlying issue, all of the
25 alleged foreign interference and espionage and

1 whatnot that Mr. Abouammo was allegedly engaged
2 in happened in San Francisco. And they, the
3 United States, sends New York-based agents to
4 his home in Seattle because they're the ones
5 that are doing the investigation, and the same
6 set of facts ensues.

7 Is your view that venue would be
8 proper in the Southern District of New York?

9 MR. YANG: If the agent -- the agents
10 were -- instead of being San Francisco and they
11 were in New York --

12 JUSTICE JACKSON: Yes. They're from
13 New York, the --

14 MR. YANG: Yes.

15 JUSTICE JACKSON: -- the Southern
16 District of -- of New York.

17 MR. YANG: And he -- and he knew they
18 were from New York and he still transmitted it
19 to New York, our position would be --

20 JUSTICE JACKSON: No, no, he trans- --
21 but -- but transmission is not in the statute
22 as a statutory element, right?

23 MR. YANG: No, I understand -- I
24 understand that.

25 JUSTICE JACKSON: The statute that I'm

1 positing is the same, that all he has to do is
2 falsify the document and intend to do so, the
3 falsification, where he is.

4 MR. YANG: Our position is that his
5 relevant conduct for purposes of determining
6 where venue is appropriate continues beyond the
7 completion of the crime, just as --

8 JUSTICE JACKSON: There's no
9 continuation here.

10 JUSTICE BARRETT: What if the --

11 JUSTICE JACKSON: It's just --

12 MR. YANG: No, no, no.

13 JUSTICE JACKSON: -- the New York
14 agents in his living room. And you're
15 saying -- and I just want to be clear. You're
16 saying the -- the United States could try this
17 person in New York because the investigating
18 agents are from New York, even though all
19 relevant conduct in terms of the statute occurs
20 in Seattle?

21 MR. YANG: Yes, because he intended to
22 and specifically did affect the investigation
23 in New York. Let me explain --

24 JUSTICE BARRETT: And, Mr. Yang, that
25 doesn't matter -- let's see. How important is

1 this continuing intent to your argument? Are
2 you saying that -- let's imagine he didn't
3 e-mail it. He just creates it in his house and
4 that's it. You've said that that would violate
5 the statute, right?

6 MR. YANG: It would.

7 JUSTICE BARRETT: Okay.

8 MR. YANG: It would. We --

9 JUSTICE BARRETT: How does this
10 change --

11 MR. YANG: I mean, as a practical
12 matter, we might not be able to ever
13 prosecute it.

14 JUSTICE BARRETT: Well, right. But
15 you're saying it would.

16 MR. YANG: But, yes, it would -- it
17 would violate the statute.

18 JUSTICE BARRETT: So -- so tell me how
19 your venue theory works there.

20 MR. YANG: It -- it wouldn't work
21 there. This -- you always have venue where
22 there's an actus reus, right? We know that.

23 JUSTICE BARRETT: Sure.

24 MR. YANG: So you could prosecute it
25 in Seattle. The question is whether you could

1 also prosecute it elsewhere. Crimes aren't
2 always commit -- aren't always committed in one
3 place.

4 JUSTICE BARRETT: But doesn't the
5 intent, when he could -- okay, so the agents
6 show up at his house. He knows they're
7 investigating in the Northern District of
8 California. So, when he falsifies the document
9 and he's intending to obstruct the
10 investigation, he knows where it's going on.
11 It's just that he puts it in his drawer.

12 MR. YANG: Yeah.

13 JUSTICE BARRETT: Why would your
14 theory be any different?

15 MR. YANG: Our theory relies not only
16 on the intent -- this is -- we're borrowing
17 from Ford's explanation of the Court's venue
18 cases, right, including Lamar. Ford explains
19 that when acts are done outside a jurisdiction
20 but are intended to and do have a detrimental
21 effect --

22 JUSTICE BARRETT: And do.

23 MR. YANG: And do have -- produce
24 the --

25 JUSTICE BARRETT: But the statute

1 doesn't require that, right?

2 MR. YANG: Well, none of this is --

3 JUSTICE BARRETT: On your theory of --

4 MR. YANG: None of this is part of the
5 statutory intent -- elements.

6 JUSTICE BARRETT: Okay.

7 MR. YANG: Our position -- we are
8 accepting that the elements of the offense were
9 satisfied upon falsification. He made it on
10 his computer. We could have prosecuted if we
11 knew about it.

12 JUSTICE BARRETT: Yeah.

13 MR. YANG: We would never know it,
14 but --

15 JUSTICE BARRETT: Yeah. Yeah.

16 MR. YANG: -- yes. Our position is
17 that further action that furthers the intent,
18 that takes -- that seeks to have that intent
19 fulfilled -- remember, the intent is actually
20 to obstruct. You cannot just falsify a
21 document and obstruct.

22 JUSTICE KAGAN: But -- so, Mr. Yang --

23 MR. YANG: More is required.

24 JUSTICE KAGAN: -- if I understand you
25 correctly, you're -- you're saying that

1 Mr. Loss-Eaton is just using the wrong test.
2 If -- if he tells us look to essential conduct
3 elements, you're saying you agree, if you look
4 to essential conduct elements, he wins. You
5 shouldn't look to essential conduct elements.

6 And then you're also saying it's not
7 enough to look to just the intent of the person
8 because the intent of the person -- I mean,
9 tell me if I'm wrong about this -- but is
10 that -- why don't you tell me that first.

11 MR. YANG: I think that's right, but
12 remember, ultimately --

13 JUSTICE KAGAN: You think it's right
14 that that's not enough either?

15 MR. YANG: I'm sorry. But I just
16 wanted to say this --

17 JUSTICE KAGAN: The person has an
18 intent to obstruct a -- an investigation.

19 MR. YANG: Mm-hmm.

20 JUSTICE KAGAN: That still is not
21 going to get you venue where you want venue.

22 MR. YANG: That -- that's not -- yeah,
23 that's not our theory, yes.

24 JUSTICE KAGAN: So what is going to
25 get you venue where you want venue?

1 MR. YANG: So --

2 JUSTICE KAGAN: Because now we're
3 looking outside the statute itself.

4 MR. YANG: I -- I don't think so.
5 You're understanding what the nature of the
6 crime is. Ultimately --

7 JUSTICE KAGAN: Well, the nature of
8 the crime -- I mean, the nature of the crime we
9 usually think is, like, what the crime requires
10 the government to show. It's the elements of
11 the crime.

12 MR. YANG: Let me give you two
13 examples.

14 JUSTICE KAGAN: We can -- we can have
15 a conversation about whether the elements
16 include only conduct elements or also include
17 mens rea, but -- but you're -- you're trying to
18 get us to look to the statute and devise a
19 crime that doesn't appear in the statute and
20 then say, oh, if you think about that crime,
21 we'll have venue in California.

22 MR. YANG: Let me give you two
23 examples, and they're both in the inchoate
24 context because I think that's important. The
25 inchoate -- remember, inchoate crimes that

1 we're talking about are crimes where you have
2 as an element the intent to commit another
3 crime and you know the crime is not -- your --
4 your inchoate crime is not sufficient. More
5 needs to be done because you're not -- you
6 haven't completed the crime. That's the
7 premise.

8 There are two other examples.
9 Conspiracy. Traditionally, the -- the actus
10 reus is the agreement. That's it. The intent
11 is reflected in the agreement to commit another
12 crime. As soon as you form that agreement,
13 right then you can be prosecuted.

14 JUSTICE GORSUCH: Well, that's --

15 MR. YANG: But -- but -- but --

16 JUSTICE GORSUCH: -- that's because
17 conspiracy, Mr. Yang, though, is we impute the
18 actions of your agents to you. And this isn't
19 a conspiracy statute. So let's -- will you
20 answer --

21 MR. YANG: Well, that's different.

22 That's -- that's actually a different --

23 JUSTICE GORSUCH: Mr. Yang, please.

24 MR. YANG: I would just try to --

25 JUSTICE GORSUCH: Mr. Yang, thank you.

1 If you would answer Justice Kagan's
2 question without respect to conspiracy and
3 limit yourself to inchoate offenses, that would
4 be helpful to me and I think probably to her
5 and maybe -- maybe even to your client.

6 MR. YANG: Well, inchoate offenses
7 include conspiracy. They also include attempt.
8 Let -- let me give you an -- an attempt
9 example.

10 In Restont -- Resendiz-Ponce, the
11 Court recognized that you can have multiple
12 substantial steps. What you need for -- the
13 elements of an attempt -- an attempt crime are
14 intent to commit the other crime and a
15 substantial step towards it, right?

16 So, in Resendiz-Ponce, the Court
17 recognized there can be multiple serial
18 substantial steps. At the first substantial
19 step, the crime can be completed, right? I
20 mean prosecuted. You have a substantial step,
21 you have intent.

22 But it continues. Why? Because the
23 idea of the crime is you're trying to do
24 something more than just the attempt. You're
25 trying to complete the other crime. So, if you

1 take another substantial step, that is also
2 going to be a basis for venue even though you
3 could have already been prosecuted. It's
4 because the idea of the crime is you're trying
5 to commit another completed crime.

6 If you make an agreement with others,
7 it's the same thing. You can be prosecuted as
8 soon as the agreement. No actions, overt
9 actions, traditionally defined as conspiracy
10 have to occur, but if they do occur, if you try
11 to manifest your intent, further your intent to
12 achieve your objective, they're still
13 considered part of the crime even though
14 they're not offense elements. That's the whole
15 point, both for attempt and for agreements, you
16 have the same thing.

17 We say it's the same thing here, where
18 there's an inchoate crime with intent to commit
19 obstruction of justice.

20 JUSTICE ALITO: So we know it's an
21 unusual --

22 JUSTICE JACKSON: So --

23 JUSTICE KAVANAUGH: Can I ask a
24 clarifying -- go ahead.

25 JUSTICE ALITO: No.

1 JUSTICE KAVANAUGH: Go ahead.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: All right.

4 MR. YANG: And we're still focusing on
5 intent -- intent -- we're still focused on
6 elements, but we're just focusing on how the
7 statutory intent element, which is special, not
8 just mens rea but, like, intent to commit
9 another crime, something specific, how that
10 gets manifested as part of the crime.

11 JUSTICE ALITO: I -- I -- I just want
12 to try to put this in perspective. So this is
13 an unusual statute and it was enacted in
14 response to Enron, is that right?

15 MR. YANG: It - it was.

16 JUSTICE ALITO: And -- and was it
17 part -- I should -- I can't recall this
18 precisely. Was it part of the same stat -- the
19 same act that included the statute that we had
20 in Yates --

21 MR. YANG: It is the same statute.

22 JUSTICE ALITO: -- with -- right.

23 MR. YANG: Oh, sorry, it's in the
24 same -- yes.

25 JUSTICE ALITO: Yeah, right, with the

1 fish and the tangible objects.

2 MR. YANG: Yeah. Yeah, yeah.

3 JUSTICE ALITO: So it was enacted
4 under circumstances where there was kind of a
5 panic about Enron and maybe Congress didn't
6 draft things as precisely as it should.

7 So, I mean, you're trying to defend
8 this particular conviction, and I understand
9 that. But maybe, when you're told that what
10 you're doing is a violation of the Declaration
11 of Independence --

12 (Laughter.)

13 JUSTICE ALITO: -- you might think
14 about what seems to me the more important point
15 for lasting significance is the situation where
16 there's an intent to commit a fraud and the
17 transmission of the document that would carry
18 out the fraud. That seems to me to be the --
19 the -- the important point.

20 And to say that in that situation
21 there would not be venue in the place where
22 the -- where the -- to which the document was
23 transmitted would be of quite -- quite a bit of
24 importance. So maybe you could talk about
25 that.

1 MR. YANG: I -- I -- I think that's
2 really not that different from what we're
3 saying here because, when you have the
4 statutory intent component that you have to
5 commit another crime, the whole nature of the
6 crime is a step towards, an effort towards
7 completing the other crime.

8 So things that complete the crime,
9 things that complete the obstruction, like the
10 transmission, when it's directed at a specific
11 place, it actually has an effect there, is
12 properly considered part of the crime for
13 purposes of venue. That is our -- that is our
14 position.

15 And it's a little bit shocking that
16 you could have this specific intent as an
17 element that we proved, no doubt, he's
18 intending to obstruct this investigation in the
19 Northern District of California.

20 And he shoots off his e-mail, just
21 like shooting a gun at Northern District of
22 California, to achieve that objective, and
23 venue is not proper in the Northern District of
24 California, it's a surprising result.

25 JUSTICE JACKSON: Mr. Yang, how do

1 you -- how -- how do you account for Cabrales
2 if you're right? Why doesn't that case come
3 out differently?

4 MR. YANG: Yeah. Thank you. Cabrales
5 is -- this is over two pages of the opinion
6 they emphasize the money laundering there is
7 committed after the fact of the early drug
8 crime. It's an act -- it's a backwards
9 looking.

10 We have a forward-looking crime --

11 JUSTICE JACKSON: But -- but -- but
12 isn't -- isn't the -- wasn't the government's
13 argument in that case that it was related?

14 MR. YANG: It's --

15 JUSTICE JACKSON: Whether it was after
16 it temporally, they -- they connected -- I
17 mean, this is why the government said, we can
18 do this in Missouri, because the money
19 laundering that she engaged in in Florida is
20 connected to --

21 MR. YANG: And Cabrales says that the
22 test is not related, but Cabrales does not
23 say -- here, we have a different offense.
24 There, the relationship was backwards. It was
25 completed by others in Missouri. There was a

1 money-laundering offense that was not looking
2 back. It was -- you know, it was after the
3 fact related to it, but it was in Florida.

4 JUSTICE SOTOMAYOR: So, Mr. Yang, how
5 do you deal -- let's do it with a
6 forward-looking one. How do you distinguish
7 Johnson?

8 MR. YANG: Right.

9 JUSTICE SOTOMAYOR: There, the crime,
10 I never knew there was a Federal Denture Act.

11 MR. YANG: Yes, there was.

12 JUSTICE SOTOMAYOR: Okay. Which made
13 it illegal "to use the mail" to fabricate a
14 document for the purpose of sending or bringing
15 into another state any denture prepared by the
16 person not licensed to practice dentistry in
17 the state into which the denture is sent.

18 And we said in that case that purpose
19 or intent to do an act is not measured by the
20 final destination where the dentures were
21 received, which, by the way, is the only place
22 where the illegality could have happened, but
23 that only sending the item from Chicago
24 qualified as venue.

25 Seems that this is -- that statute is

1 completely comparable to this one and talks
2 directly about intent not being adequate to
3 house venue.

4 MR. YANG: We think that Johnson is
5 different in -- in an important way. It -- the
6 nature of the offense was understood to be
7 simply placing it in the mail with the idea
8 that it's going to go forward, but nothing
9 further had to be done.

10 JUSTICE SOTOMAYOR: You told me that
11 the nature of this offense is the creation of
12 the document with the intent in Chicago. If he
13 had never mailed it, he would still be guilty.

14 MR. YANG: No, it's slightly
15 different.

16 JUSTICE SOTOMAYOR: That's what you
17 told Justice Kagan.

18 MR. YANG: The -- the offense here,
19 it's not just any kind of mens rea. It is
20 intent -- it's a specific intent to have --
21 commit a further crime. There are more things
22 that have to happen for that further crime to
23 happen. It has to be -- it has to come to the
24 investigation to obstruct the investigation.
25 In Johnson, the Court --

1 JUSTICE SOTOMAYOR: But you don't have
2 to prove obstruction. You didn't have to
3 prove --

4 MR. YANG: That -- that is true.

5 JUSTICE SOTOMAYOR: -- anything about
6 the other state -- well, you did have to prove
7 that it was illegal.

8 MR. YANG: That's why we are -- that's
9 why our position is that the actual conduct but
10 conduct that is manifesting the express intent
11 element to commit another crime by advancing --
12 trying to commit the other crime is part of
13 this offense.

14 That is different from Johnson
15 because, in Johnson, the Court construed it as
16 simply placing the thing in the mail and you're
17 done. That's not the case with an inchoate
18 offense.

19 JUSTICE BARRETT: But, here, you just
20 make the document and you're done. And if I
21 understood you, I just want to be clear that I
22 understood when we were talking before and when
23 you were talking to Justice Kagan that you're
24 conceding that venue would not lie if he had
25 the intent to obstruct the investigation in San

1 Francisco and created the document harboring
2 that intent and put it in his drawer. You
3 said, I think, correct me if I'm wrong, that
4 venue would not lie in California.

5 MR. YANG: But the -- yes, but the
6 difference is, when you do have additional
7 conduct which is manifesting the intent in
8 order to achieve that further crime, the -- the
9 obstruction, which you need to because you
10 can't just --

11 JUSTICE BARRETT: No, but I under --
12 I -- I guess I just want to know why -- if --
13 if your theory -- I thought your theory was
14 about where you intended the effects to occur.
15 So why isn't venue sufficient in California if
16 he just put it in his drawer?

17 MR. YANG: Our theory is that you not
18 only have to intend it, but you actually have
19 to -- your action has to produce it.

20 JUSTICE BARRETT: So would -- your
21 action has to actually produce the effect?
22 That's not the --

23 MR. YANG: Produce the obstruction or
24 something close to it.

25 JUSTICE BARRETT: Well, presumably, he

1 could have been prosecuted under an
2 obstruction-of-justice statute then.

3 MR. YANG: Well, he could have, as
4 well as under the intent.

5 JUSTICE BARRETT: Would it have been
6 different under your theory if he had
7 AirDropped the document to the FBI agents as
8 opposed to e-mailing it? Because then it would
9 have all happened --

10 MR. YANG: I don't use AirDrop, but I
11 think that's an Apple product that -- that,
12 like, you -- you upload it somewhere?

13 JUSTICE BARRETT: Yeah. Are you an
14 Android guy?

15 MR. YANG: I am an Android guy.

16 (Laughter.)

17 MR. YANG: I'm sorry. I -- I'm really
18 sorry.

19 JUSTICE BARRETT: Okay.

20 MR. YANG: I was an old engineer.

21 It's -- it's --

22 JUSTICE BARRETT: It just means that
23 you send the document and it's not e-mailed.

24 MR. YANG: Right, right.

25 JUSTICE BARRETT: It just kind of goes

1 over the home Internet.

2 MR. YANG: Yeah, it shouldn't matter.
3 The ultimate destination that you're intending
4 to get to is what matters. The fact that it
5 might be on a server somewhere, what you're
6 trying to do is send it to the FBI agent that
7 you know is investigating in Northern District
8 of California from Northern District of
9 California entirely.

10 JUSTICE KAGAN: You have to know that
11 the investigation is taking place in that
12 district? Suppose you just know that there's
13 an investigation someplace out there that is
14 taking place. You intend to obstruct it.

15 MR. YANG: Yeah.

16 JUSTICE KAGAN: You intend to cause
17 these effects wherever this investigation is
18 occurring. What then?

19 MR. YANG: Our theory is that a crime
20 has committed, under 1519, there is a crime,
21 but our theory of venue would not apply. So
22 the venue that -- only venue you would be able
23 to prosecute there is where the actus reus is.
24 If --

25 JUSTICE KAGAN: And where is that in

1 the statute?

2 MR. YANG: It's -- it's --

3 JUSTICE KAGAN: I mean, I keep to
4 looking to the statute to try to figure out how
5 it's connected to your theory of venue, and the
6 answer is it's really not.

7 MR. YANG: Well, I think the
8 connection to the statute is through the
9 statutory intent element. Remember, you have
10 to specifically intend to commit the other
11 crime. You have to specifically intend to
12 obstruct justice. And that's the same as with
13 inchoate crimes generally.

14 When you intend to commit a further
15 act -- a further crime and you have to take --
16 there's more things that have to be done. If
17 you take those other things after your first
18 substantial step in an attempt or after the
19 forming of the agreement, which is the crime,
20 by the way, in conspiracy, through an overt
21 act, those things count for venue because it's
22 part of the overall offense conduct as
23 construed. We think that's the same thing for
24 1519 because of the statutory intent element.

25 I'd like to also clarify a few things

1 about 1512 and Lamar.

2 JUSTICE KAVANAUGH: If he just
3 shredded documents in his house, what are --
4 what's your theory?

5 MR. YANG: That would be an offense.

6 JUSTICE KAVANAUGH: I got that.

7 (Laughter.)

8 MR. YANG: Right. We would not be
9 able to -- our theory, again, is based on
10 Lamar.

11 JUSTICE KAVANAUGH: Just where could
12 he be prosecuted?

13 MR. YANG: Well, that would have to be
14 in -- in Seattle.

15 JUSTICE KAVANAUGH: Even though --

16 MR. YANG: Even though he had the
17 intent.

18 JUSTICE KAVANAUGH: Intent. Because
19 on the text of the statute, I guess to follow
20 up on other questions, I thought it was conduct
21 --

22 MR. YANG: Well, you know what,
23 actually --

24 JUSTICE KAVANAUGH: Can I just finish
25 the question?

1 MR. YANG: Yeah. Yeah.

2 JUSTICE KAVANAUGH: Conduct with the
3 intent to cause an effect elsewhere. Conduct
4 in one place with the intent to cause an
5 obstructive effect elsewhere.

6 MR. YANG: Yeah.

7 JUSTICE KAVANAUGH: And I thought your
8 theory --

9 MR. YANG: Yeah.

10 JUSTICE KAVANAUGH: -- might be you
11 could be prosecuted in either place. And --

12 MR. YANG: I'm sorry. Destruction is
13 a little bit weird. Destruction of a document.
14 That's a harder question because it is unlike
15 where you're actually affirmatively placing the
16 document into the investigation.

17 And so I think our position would be a
18 little harder. We might well argue that that
19 would be covered, but I think it would be a
20 fair amount harder.

21 JUSTICE KAVANAUGH: But your theory,
22 as articulated here, wouldn't cover it, I
23 gather. I mean --

24 MR. YANG: Yes. I think --

25 JUSTICE KAVANAUGH: Okay. Let me just

1 make sure --

2 MR. YANG: Yeah.

3 JUSTICE KAVANAUGH: -- I'm clear on
4 what your theory is not.

5 MR. YANG: Yes.

6 JUSTICE KAVANAUGH: Your theory is not
7 that conduct in one place with the intent to
8 cause an obstructive effect in another is good
9 enough to prosecute you in that other place?

10 MR. YANG: Right. You also need to
11 actually produce an effect at the other place.
12 You actually have -- this is -- this is how --

13 JUSTICE KAVANAUGH: And that's not --

14 MR. YANG: -- the Court understood its
15 venue decisions --

16 JUSTICE JACKSON: So why isn't
17 shredding doing it? I mean, what if the --
18 what -- what if these agents arrived at his
19 house in Seattle looking for a document --

20 MR. YANG: Mm-hmm.

21 JUSTICE JACKSON: -- that he had
22 upstairs.

23 MR. YANG: Yeah.

24 JUSTICE JACKSON: And he threw it in
25 the shredder when he went upstairs, instead of

1 creating it.

2 MR. YANG: Yeah.

3 JUSTICE JACKSON: I don't understand
4 there to be, under your theory, a material
5 difference between placing a falsified document
6 into the --

7 MR. YANG: Well --

8 JUSTICE JACKSON: -- into the
9 investigation.

10 MR. YANG: There --

11 JUSTICE JACKSON: -- versus removing
12 one from the investigation, from the standpoint
13 of your theory. So going back to what Justice
14 Kavanaugh just said, I -- i -- I'm now
15 completely baffled --

16 MR. YANG: Well, I -- I think --

17 JUSTICE JACKSON: -- as to what your
18 theory is doing.

19 MR. YANG: I think the difference
20 is -- and we may well argue that that's
21 covered, but there is a difference, which is
22 when you intend -- when you are sending it to
23 the Northern District of California, you know
24 it's just like shooting a bullet to the
25 Northern District --

1 JUSTICE JACKSON: No, he knows because
2 the agents from California arrived at his -- at
3 his house saying we're doing an investigation
4 and, you know what --

5 MR. YANG: Yeah.

6 JUSTICE JACKSON: -- we have one piece
7 left.

8 MR. YANG: I understand.

9 JUSTICE JACKSON: It's a document that
10 we cannot find.

11 MR. YANG: I understand. I
12 understand. I just -- We would --

13 JUSTICE JACKSON: So he knows but the
14 --

15 MR. YANG: We would like run that
16 argument that venue is proper --

17 JUSTICE JACKSON: He knows --

18 MR. YANG: Yeah.

19 JUSTICE JACKSON: -- that the
20 California investigation needs the document
21 that he is hiding. Now, I appreciate this is
22 about falsification, but in my hypothetical, I
23 don't understand why his intent to withhold or
24 remove or destroy this document wouldn't count
25 --

1 MR. YANG: We --

2 JUSTICE JACKSON: -- under your theory.

3 MR. YANG: We would -- it may. It
4 may, but it's different. Our case is easier
5 here because he's doing something affirmative
6 as -- as opposed to preventing something from
7 getting to the investigation. Right?

8 There is a different -- there is a
9 distinction. We may well argue that that is --
10 that is -- that destruction of documents where
11 you specifically know where you're preventing
12 it from going --

13 JUSTICE JACKSON: All right.

14 JUSTICE BARRETT: Mr. Yang -- go
15 ahead.

16 JUSTICE JACKSON: One final question
17 -- go ahead.

18 JUSTICE BARRETT: If you -- if you
19 lost this case, and we didn't want to rule out
20 the hypothetical that Justice Alito gave you
21 about fraud where it arrives -- it's somewhere
22 else, it seems to me that if we -- we would not
23 rule out that scenario if we simply looked at
24 the statute and said the crime was complete
25 when he created the document, and, you know, it

1 was irrelevant for purposes of the statute that
2 he e-mailed it to the agents. That leaves open
3 the question that Justice Alito said, which is
4 the -- the more significant one.

5 MR. YANG: Yeah. I think if you were
6 to construe what the nature of the crime is and
7 say that there's nothing beyond, that's true.
8 That would distinguish this case, for instance,
9 from 1512(i) because 1512(i)'s venue provision,
10 the express venue provision, applies to
11 attempted obstruction. 1512(c)(2), which
12 Justice Sotomayor was talking about, does not
13 simply address effected obstruction. It also
14 expressly provides attempts to obstruct.

15 So it's the same kind of situation we
16 have here. This is like a specific means of
17 attempt. So if Congress in 1512(i)
18 specifically is telling you what the offense
19 is, and that's different from this case, that
20 would be -- if you reserve that, then you allow
21 for Congress to define the offense because --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MR. YANG: -- Congress has a lot of
24 authority to define offenses.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Who decides this
6 additional element that's not in this statute,
7 that you have to intend to produce an effect in
8 a particular place?

9 MR. YANG: It -- it's not an element.

10 JUSTICE SOTOMAYOR: So --

11 MR. YANG: It's not an element of the
12 offense.

13 JUSTICE SOTOMAYOR: So how do we --
14 who decides it?

15 MR. YANG: Well, your Court -- the
16 case law, the -- your --

17 JUSTICE SOTOMAYOR: I thought that we
18 had a case not so long ago about what happens
19 if an element is not submitted to a jury.

20 MR. YANG: Okay. But there's a
21 distinction. There is a question about what
22 offense conduct creates a crime. Those are
23 elements. We're not saying this is an element.
24 What we're saying, however --

25 JUSTICE SOTOMAYOR: Just answer my

1 question. Who decides that issue?

2 MR. YANG: Well, you decide what
3 elements of the offense are by construing a
4 statute. But our position is not that this is
5 an element. Our position is that the -- the
6 crime that is committed, when you understand
7 what the crime is, the crime doesn't have to be
8 limited to offense elements.

9 JUSTICE SOTOMAYOR: But what of the
10 charges --

11 MR. YANG: We know that from
12 conspiracy.

13 JUSTICE SOTOMAYOR: When you read a
14 charge to a jury that a crime was committed in
15 the Southern District of New York, if a
16 defendant says this crime wasn't, we usually
17 say to the jury tell us whether it was
18 committed in New York or not. We don't let the
19 judge decide it generally.

20 So this is now a new step in this
21 venue.

22 MR. YANG: No. The -- if there
23 were -- in this case, there was no request for
24 a jury instruction. If there's not a request
25 for a jury instruction and a jury finding

1 venue, there is no need for it --

2 JUSTICE SOTOMAYOR: All right.

3 MR. YANG: -- but you could in a
4 future case, if you requested it. They just
5 didn't request it.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Could you tell me,
9 Mr. Yang, what the difference is between your
10 theory and the Ninth Circuit's theory?

11 MR. YANG: The Ninth Circuit, I think,
12 isn't focusing as much on the -- kind of the
13 doctrinal basis of having an intent and an
14 effect in the district. I -- I think they were
15 just looking at the statutory intent element
16 but weren't fleshing it out. Ours is a
17 refinement. We don't think our position is
18 that inconsistent, at least in the context of
19 this case, with the Ninth Circuit's. But they
20 -- you know, they didn't have the same briefing
21 as you have here in terms of fleshing out what
22 the -- the significance of the statutory intent
23 element and what that means for the nature of
24 the crime that is committed when you're
25 analyzing venue.

1 JUSTICE KAGAN: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: 1512(i), your
6 friend on the other side suggested that you
7 think part of that might be unconstitutional.
8 And I -- I didn't think that was correct, and I
9 want to make sure that's not correct. Yeah.

10 MR. YANG: Yeah. Yeah. There --
11 there is a question about whether 1512(i),
12 certainly the -- the prong that's relevant is
13 -- and this is reproduced at page 32 of our
14 brief. It's in the first paragraph towards
15 this bottom third. Venue is proper in the
16 district in which the official proceeding,
17 whether or not pending or about to be
18 instituted, was intended to be affected.

19 JUSTICE KAVANAUGH: Right.

20 MR. YANG: Right? So that is an
21 intent -- like you have to intend the district
22 to be affected, where -- where to proceed. So
23 that is -- arguably, you could read that one of
24 two ways. You could say all that's required is
25 an intent. You're focusing, no, it's happening

1 in the Northern District of California, you
2 intend it; that's enough. That's different
3 than our position here. We would --

4 JUSTICE KAVANAUGH: Correct. I got
5 that.

6 MR. YANG: That -- we would -- we
7 would --

8 JUSTICE KAVANAUGH: For 1512(i),
9 that's enough, right?

10 MR. YANG: And we would -- I'm -- I
11 guess you get to make this call, but I suspect
12 we will defend that as a constitutional
13 exercise of defining a crime.

14 But you could also construe that. If
15 you look at the legislative history, which we
16 cite later down on the page, they talk
17 specifically about killing a witness in
18 Maryland, where the prosecution -- where there
19 was a -- he was scheduled to testify in D.C.,
20 right?

21 JUSTICE KAVANAUGH: Mm-hmm.

22 MR. YANG: Right? And then it -- we
23 don't quote this part, but it says, you know,
24 they're providing jurisdiction where the
25 obstruction is felt. Where the obstruction is

1 felt. That evokes the question of whether
2 actually the effect is required too. And so
3 there's an -- there's an interpretive question.

4 If you interpret it only to require
5 intent, it's different. We still would defend
6 it. But you could also require -- interpret it
7 to be exactly what we're saying here, which is
8 you intend and have an effect in the district.

9 JUSTICE KAVANAUGH: And then if you do
10 not prevail in this case, obviously one of the
11 concerns in writing the opinion will be ripple
12 effects. Here's your opportunity to tell us,
13 in the event you don't prevail, what your
14 concerns about for the next case. You've
15 covered a little of that with Justice Alito, I
16 think.

17 MR. YANG: Yeah. I -- I -- I think
18 this really comes up a lot in these kinds of
19 inchoate crime types of theories, particularly
20 in the context of obstructions of justice,
21 attempted obstructions of justice.

22 So Chapter 63, which you discussed at
23 some length in Pugin, I think, the -- Congress
24 has specifically addressed venue for purposes
25 of 1503 and 1512 and 1512(i), but there are

1 other provisions where there are inchoate
2 attempt crimes there too.

3 Our view is that because Congress was
4 simply resolving a circuit conflict in the --
5 in the favor of the majority as clarifying
6 where the offense was, that should be
7 understood, you have to construe 1512 -- excuse
8 me, 1519 in the corpus of that body of law and
9 construe it similarly.

10 Now it's possible you could construe
11 it differently. And if that's the case, then
12 our argument would not -- would not get us to
13 home. But if you were to simply construe this
14 provision saying Congress hasn't spoken to the
15 nature of the offense as it has done in 1512(i)
16 with respect to 1503 and 1512, that would leave
17 open the door for Congress to clarify, speak
18 more clearly with respect to where it thinks
19 these inchoate --

20 JUSTICE KAVANAUGH: Okay.

21 MR. YANG: -- crimes take place.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Just a clarifying

1 question that I hope is very simple. Did I
2 understand you correctly to say that you don't
3 think the intent to cause effects is enough to
4 create venue in the place where the actus reus
5 occurred?

6 MR. YANG: Not on this statute,
7 because unlike 1512(i) --

8 JUSTICE BARRETT: But it would under
9 1512(i) --

10 MR. YANG: If you --

11 JUSTICE BARRETT: -- intent to cause
12 effects is enough.

13 MR. YANG: If you view 1512(i) as only
14 requiring just the intent, not the effect, then
15 we would say yes, that would be a -- that would
16 be a sufficient basis for venue.

17 So that this -- so this case has both
18 constitutional questions and it has statutory
19 questions. And the two are always intertwined
20 because the question for venue is where is the
21 crime committed, but the question of what the
22 crime is requires understanding what Congress
23 intended for the crime.

24 Now, the crime is -- we know this
25 cannot be the case. The crime is more than the

1 offense elements. We know that to be the case.
2 We know that to be case from conspiracy. Over
3 --

4 JUSTICE BARRETT: Justice Gorsuch is
5 right, conspiracy is a different kind of crime.
6 I mean it is continuing and then you can be
7 prosecuted for any of the acts within the scope
8 of the conspiracy, committed by a
9 co-conspirators.

10 MR. YANG: The Pinkerton liability
11 point is important. And what it does is it
12 sweeps in actions that you don't do because
13 they're on co-conspirators but it doesn't
14 change the nature of what the encoded offense.
15 The reason the offense continues is because
16 it's not an agreement to just say we're coming
17 to an agreement.

18 It's an agreement with specific intent
19 to do more, to commit this further crime.

20 JUSTICE BARRETT: Okay. Let me --

21 MR. YANG: That's the same thing that
22 we have here.

23 JUSTICE BARRETT: Okay. One other
24 question. Has the statute of limitations on
25 this offense expired?

1 MR. YANG: I actually --

2 JUSTICE BARRETT: If you don't know.

3 MR. YANG: I actually don't know. If
4 you're asking whether we would retry him --

5 JUSTICE BARRETT: Yeah.

6 MR. YANG: -- you know, that decision
7 has not been made but I'll give you one fact
8 that may counsel against it, which is he was
9 sentenced to 42 months of imprisonment for all
10 six of his offenses, including this.

11 There was a sentencing error that the
12 Ninth Circuit remanded for. And so even though
13 upholding all the offenses, it went back for
14 resentencing and by that time he already served
15 all 42 months, including the sentence for this
16 crime.

17 JUSTICE BARRETT: This one, okay.

18 MR. YANG: So in terms of practical
19 retrial, that would weigh as a factor that we
20 would consider.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: In the case of U.S.
24 versus Rodriguez-Moreno in 1999, footnote 2, we
25 noted that "the government argues that venue

1 may also be permissibly based upon the effects
2 of a defendant's conduct in a district other
3 than the one in which the defendant performs
4 the acts constituting the offense."

5 And we went on to say, "we express no
6 opinion as to whether the government's
7 assertion is correct."

8 MR. YANG: Yes.

9 JUSTICE JACKSON: So here today, do
10 you at least concede that you're asking us for
11 a new rule?

12 MR. YANG: We don't think it's new
13 because we think it's rooted in --

14 JUSTICE JACKSON: No, but the Court
15 reserved it in this prior case and said we
16 express no opinion as to it. So today you're
17 asking us to apply or to adopt the rule that
18 you previously offered and that we expressed no
19 opinion on. Is that correct?

20 MR. YANG: Yes. But just because
21 Rodriguez and Moreno didn't express an opinion
22 on it, doesn't mean there aren't prior cases
23 that speak to the issue, like Lamar, like Ford
24 which in extraterritorial context, which the
25 question's basically the same, which is --

1 JUSTICE JACKSON: Right, as of --

2 MR. YANG: -- did the offense occur --

3 JUSTICE JACKSON: -- as of 1999 -- as
4 of 1999, the Court had not understood itself to
5 have answered that question and the government
6 was offering it and we said we're expressing no
7 opinion. Correct?

8 MR. YANG: No. I think that's
9 over-reading it. Expressing an opinion is
10 different from saying we haven't resolved the
11 question.

12 JUSTICE JACKSON: Thank you.

13 MR. YANG: This is not resolving it
14 there.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Loss-Eaton, rebuttal?

18 REBUTTAL ARGUMENT OF TOBIAS S. LOSS-EATON

19 ON BEHALF OF THE PETITIONER

20 MR. LOSS-EATON: So I think my friend
21 really hung his hat on the analogy to
22 conspiracy. His silver bullet in his view is
23 that you can be tried anywhere an overt act is
24 undertaken further if it's a -- a conspiracy,
25 even for conspiracies where an overt act is not

1 an element.

2 And the problem with that view, in
3 addition to the points that various members of
4 the Court have made about conspiracy being a
5 unique ongoing collective enterprise, is that
6 if you look at the cases in which the Court
7 adopted that rule for conspiracy, it did not
8 think about it at all in the terms that my
9 friend is describing.

10 In Hyde in 1912, the Court first
11 allowed venue for conspiracy where an overt act
12 was committed, even though the conspiracy was
13 formed elsewhere. And there an overt act was
14 an element.

15 But the Court explained the integral
16 role of the overt act in giving the conspiracy
17 life and continuing it forward and it quoted a
18 New York case from the 1830s that said,
19 wherever the conspirators act, there they renew
20 or perhaps to speak more properly they continue
21 their agreement.

22 So in allowing venue based on overt
23 acts, the Court conceptualized the overt act as
24 itself being the agreement in a real sense
25 because an agreement without any overt acts

1 really doesn't matter. It doesn't do anything.

2 And so then in Trenton Pottery and
3 Socony-Vacuum, which are the two cases that the
4 Court were summarizing in Whitfield, which the
5 government cites so many times in its briefs,
6 the court then applied Hyde to conspiracies
7 where an overt act was not an element,
8 essentially with no real analysis beyond saying
9 yes, that's still true here.

10 In Socony-Vacuum, the Court said that
11 the overt acts supplied part of the continuous
12 cooperation necessary to keep the conspiracy
13 alive. So I think it's very clear from those
14 opinions that the Court conceptualized of an
15 overt act, whether required as a standalone
16 element or not, as being part of the actus reus
17 of the conspiracy itself.

18 And it was on that basis that the
19 Court allowed venue. And of course here that
20 is not true for the effects that the government
21 is vaguely asserting happened in San Francisco.

22 Beyond that, my friend returned a few
23 times to the analogy of someone aiming a gun at
24 Seattle from San Francisco and pulling the
25 trigger. To the extent Mr. Abouammo was aiming

1 anything at anybody, it was at the people that
2 were sitting in his living room in Seattle.

3 Whether the investigation was ongoing
4 in San Francisco or anywhere else I suspect was
5 probably not top of mind. There were federal
6 agents sitting in his living room in Seattle
7 and he wanted them to go away and so to that
8 extent, I think Justice Barrett, it is the same
9 as the Air Drop analogy or printing out the
10 paper and handing it to them. His conduct was
11 in Seattle and it was directed at people who
12 were in Seattle.

13 Nor is conspiracy an inchoate offense
14 in any other way. The literal dictionary
15 definition of an inchoate defense is
16 solicitation attempt, conspiracy. This is none
17 of those.

18 This is not an attempt defense because
19 it applies only to a specific kind of conduct
20 and not to a substantial step of whatever site.
21 And it's not an attempt -- offense because it
22 doesn't incorporate any objective offense whose
23 elements you would have to think about.

24 And I do think that distinguishes a
25 lot of the hypotheticals that the Court asked

1 about. Justice Alito, the -- the hypothetical
2 that you raised about fraud that is attempted
3 to be committed by transmitting a document. I
4 think under most of the fraud statutes, and
5 certainly once you start thinking about
6 attempt, there's no problem with venue there on
7 our theory, as long as that transmission is
8 part of the actus reus that you're talking
9 about.

10 And for an attempted fraud, it would
11 be because that would be a substantial step.
12 It might even be fraud itself, depending on
13 what the effects were. So I don't think those
14 kinds of situations are implicated.

15 I do also want to emphasize, of
16 course, all we're talking about here is where
17 this crime can be tried. There's a temptation
18 sometimes when you're talking about these
19 issues to think that we're trying to immunize
20 the conduct from prosecution.

21 That is not what's going on here. All
22 we're talking about is the appropriate place of
23 trial and that is where the offense was
24 committed.

25 A lot of the Court's questions, I

1 think, underscore the problems with the
2 government's rule. I think, you know, fully
3 80 percent of the questions that I heard were
4 just trying to figure out what the government's
5 rule is, how it works, and what relationship if
6 any it has to this statutory text.

7 And I think Mr. Yang's answers
8 underscore that it is deeply unclear, the
9 relationship to the actual statutory text and
10 elements is extremely attenuated and, as you
11 were getting at, Justice Sotomayor, it's very
12 unclear how it would actually work.

13 The facts that the government wants
14 you to rely on to uphold Mr. Abouammo's
15 conviction here were not charged in the
16 indictment and they were never found by the
17 jury. On what basis then can you uphold the
18 conviction even on the government's theory?
19 And even if you adopt their theory for future
20 cases, does that mean the government now has to
21 charge those facts in the indictment and prove
22 them at trial?

23 It is of much simpler approach that
24 will do no violence to the law simply to say
25 what the Court always said, we are looking to

1 where you committed the essential conduct
2 elements of the offense and here all of the
3 essential conduct elements were committed in
4 Seattle.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:22 a.m., the case
8 was submitted.)

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