

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, certainly --

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, what -- if you
22 look around the universe of 1519 prosecutions,
23 what are the -- you know, what might be
24 considered 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. And so, in either of those cases --

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

23 MR. LOSS-EATON: No, you do not have
24 to worry about that, both because, as a legal
25 matter, the conduct would be the same, and also

1 because there is no evidence in the record
2 about where the government's servers actually
3 are or were.

4 JUSTICE BARRETT: Okay. So --

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

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

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

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

1 the statute requires, and that's what we should
2 be focused on in determining venue?

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

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

16 MR. LOSS-EATON: Yes.

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

19 MR. LOSS-EATON: Yes.

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

25 MR. LOSS-EATON: That is exactly

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

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

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

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

25 MR. LOSS-EATON: So the way the Court

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

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

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

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

24 JUSTICE GORSUCH: Counsel, we have the
25 government's late-breaking argument that

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

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

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

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

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

16 JUSTICE GORSUCH: He falsified the
17 original -- the duplicates are duplicates. He
18 didn't falsify anything in the duplicates?

19 MR. LOSS-EATON: Exactly.

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

23 MR. LOSS-EATON: Yes, I think that's
24 fair, Your Honor. And -- and -- and -- and
25 this is not to say, by the way, that he

1 couldn't potentially violate some other statute
2 by actually communicating the document
3 directly.

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

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

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

18 JUSTICE KAVANAUGH: What if he had --

19 JUSTICE ALITO: The situation --

20 JUSTICE KAVANAUGH: Go ahead.

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

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

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

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

1 precisely the effect that Congress enacted the
2 statute to proscribe.

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

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

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

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

25 And then Lamar cites Burton, and

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

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

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

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

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

1 assertion of authority, almost a sort of overt
2 act, to actually manifest the impersonation.

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

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

16 JUSTICE ALITO: Okay. I get your
17 point.

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

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

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

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

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

23 There's no offense there because he
24 didn't have the intent to deceive at the time
25 when he created the document?

1 MR. LOSS-EATON: I think that's right,
2 Your Honor. I mean, it's an unusual scenario,
3 and I have a hard time imagining how it might
4 ever come up. But the statute says you have to
5 act knowingly and you have to have the intent
6 when you falsify the document.

7 I'm not aware of any cases where the
8 Court has said that a later manifestation of
9 intent that didn't exist when the actus reus
10 was committed could satisfy a crime.

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

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

1 falsification, which Mr. Abouammo did entirely
2 in Seattle.

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

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

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

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

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

25 MR. LOSS-EATON: Because the intent is

1 where you are, and it's not conduct. And, as I
2 said, the Court has always focused on conduct
3 elements. But, again, even if you want to look
4 more broadly at elements, all of the elements
5 were committed in Seattle.

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

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

15 JUSTICE KAVANAUGH: Don't you have to
16 show that here?

17 MR. LOSS-EATON: No. You just have to
18 show that the --

19 JUSTICE KAVANAUGH: Intent -- you have
20 to -- there are two different mens reas --

21 MR. LOSS-EATON: Yeah.

22 JUSTICE KAVANAUGH: -- in the statute,
23 right? There's the knowingly altering, et
24 cetera, falsifying, and then with the intent to
25 impede, obstruct, or influence the

1 investigation or proper administration of any
2 matter.

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

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

7 JUSTICE KAVANAUGH: Which means an
8 effect, intent to cause an effect, I think.

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

15 JUSTICE JACKSON: Why is that? Why
16 are you making that distinction?

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

22 JUSTICE KAVANAUGH: So, if you --

23 MR. LOSS-EATON: And I --

24 JUSTICE KAVANAUGH: Keep going.

25 JUSTICE JACKSON: Go ahead.

1 JUSTICE KAVANAUGH: Sorry.

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

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

22 JUSTICE KAVANAUGH: So -- so the
23 intent to cause an effect elsewhere is not
24 enough to get venue elsewhere? So, you know,
25 mailing a bomb elsewhere and the statute's

1 written in terms of you put it in the -- in the
2 mail with the intent to kill someone elsewhere,
3 and that's all the statute is about, the
4 "elsewhere" is not good enough?

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

7 JUSTICE KAVANAUGH: Correct.

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Alito?

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

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

23 MR. LOSS-EATON: I don't know that
24 this Court has ever squarely held that, but the
25 Sixth Amendment on its face says that trial

1 shall be held where the crime, singular, is
2 committed. And I understand the courts always
3 to have read that as it suggests, to mean that
4 venue must be done on a count-by-count
5 basis.

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

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

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Counsel, Congress
23 did, in 1512(c), require the government to
24 prove that a federal investigation was impeded
25 because of the defendant's conduct, correct?

1 MR. LOSS-EATON: Right.

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

5 MR. LOSS-EATON: Yes.

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

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

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

25 JUSTICE SOTOMAYOR: And that's what

1 they do.

2 MR. LOSS-EATON: Yes.

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

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

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

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

20 JUSTICE SOTOMAYOR: Exactly.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 Justice Kavanaugh?

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

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

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

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

17 JUSTICE KAVANAUGH: What if he was
18 interviewed in Canada, in Vancouver?

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

25 So I think, there, it might depend on,

1 say, where he had been apprehended or brought
2 into the country, but, certainly, venue
3 would -- there would be a place to have venue
4 in the U.S. for that act.

5 JUSTICE KAVANAUGH: Constitutionally
6 but not under this scenario, this statute?

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

10 JUSTICE KAVANAUGH: I'm talk -- I'm
11 back to 1519 now.

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

14 JUSTICE KAVANAUGH: Mm-hmm.

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

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

23 MR. LOSS-EATON: If the offense were
24 prosecutable at all, I think venue would not be
25 an obstacle because it would be allowed under

1 the provisions that govern where someone
2 commits an offense outside of the United
3 States.

4 JUSTICE KAVANAUGH: Okay. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Justice Jackson?

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

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

22 MR. LOSS-EATON: Yes. So I think
23 Armour Packing tells us essentially how the
24 continuing offense doctrine works in this
25 context, and that is that where the essential

1 offense conduct, so essentially the actus reus,
2 continues or extends from one place to another,
3 then venue is proper in each of those places.

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

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

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

24 MR. LOSS-EATON: Yes. So Lamar was
25 charged -- there are two prongs to that

1 statute --

2 JUSTICE JACKSON: Yes.

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

6 JUSTICE JACKSON: Right.

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

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. LOSS-EATON: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Yang.

17 ORAL ARGUMENT OF ANTHONY A. YANG

18 ON BEHALF OF THE RESPONDENT

19 MR. YANG: Mr. Chief Justice, and may
20 it please the Court:

21 Petitioner falsified -- knowingly
22 falsified an invoice with the specific intent
23 to obstruct an FBI investigation he knew was
24 occurring in the Northern District of
25 California. He then manifested that intent --

1 manifested his obstructive intent and affected
2 the investigation by transmitting the document
3 to the FBI by e-mail.

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

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

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

25 And where that conduct is intended to

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

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

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

21 JUSTICE THOMAS: Well, Mr. Yang, this
22 is not conspiracy, so could you -- is there
23 anything that is done by Petitioner in
24 California? He drafted the e-mail -- the
25 invoice in Seattle and he transmitted the

1 invoice from Seattle. Now there's nothing left
2 but the receipt by the FBI.

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

13 JUSTICE THOMAS: What is that
14 precisely?

15 MR. YANG: Well, that was the
16 e-mailing. And --

17 JUSTICE THOMAS: But he e-mailed it --
18 he transmitted it from Seattle.

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

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

7 CHIEF JUSTICE ROBERTS: Mr. --

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

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

20 So, under your interpretation, that
21 would still be allowed, right?

22 MR. YANG: No.

23 CHIEF JUSTICE ROBERTS: The Boston Tea
24 Party takes place entirely in Boston, but it
25 causes effects back in England. And so why

1 can't you say it's all right to take them to
2 England?

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

10 CHIEF JUSTICE ROBERTS: Well, I don't
11 think --

12 JUSTICE GORSUCH: The whole point --
13 the whole point of treason -- I -- I'm sorry.

14 CHIEF JUSTICE ROBERTS: No, no, go
15 ahead.

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

19 MR. YANG: I -- I --

20 JUSTICE GORSUCH: -- what the Chief
21 is -- let -- let -- let's hypothesize.

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

24 JUSTICE GORSUCH: If -- if you
25 might -- if you might. Let's work with my

1 hypothetical.

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

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

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

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

22 Now aiming at the --

23 JUSTICE GORSUCH: So, if it were -- if
24 it were an inchoate offense in America then,
25 okay, a conspiracy offense, an inchoate

1 offense, then they could have been tried in
2 England?

3 MR. YANG: No. This is -- this is, I
4 think --

5 JUSTICE GORSUCH: Is that your theory?

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

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

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

24 But that's not what the colonists were
25 upset about. The colonists were upset about

1 actions taken here that have direct effect
2 here, that the only connection was a kind of
3 vague dignitary offense of -- of treason.
4 That's different.

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

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

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

25 Look at Blackstone. It spells out the

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

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

20 And so the concern, I think, with your
21 theory is that because the government controls
22 the location of the investigation, you would
23 end up with the same kind of troubling dynamic
24 that the essential elements of the crime you
25 admit in terms of the actus reus is happening

1 in one location, but to the extent that the
2 person intends to affect an investigation in
3 the United States, the United States says,
4 well, our investigation was happening in San
5 Francisco or New York or wherever.

6 MR. YANG: We don't just -- we don't
7 say it -- the investigation preceded --

8 JUSTICE JACKSON: Or it was. Fine.
9 Fine, but you --

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

11 JUSTICE JACKSON: But you concerned
12 that --

13 MR. YANG: Like, it already had to
14 exist.

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

23 But the underlying issue, all of the
24 alleged foreign interference and espionage and
25 whatnot that Mr. Abouammo was allegedly engaged

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

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

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

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

13 MR. YANG: Yes.

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

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

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

22 MR. YANG: No, I under- -- I
23 understand that.

24 JUSTICE JACKSON: The statute that I'm
25 positing is the same, that all he has to do is

1 falsify the document and intend to do so, the
2 falsification, where he is.

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

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

9 JUSTICE BARRETT: What if the --

10 JUSTICE JACKSON: It's just --

11 MR. YANG: No, no, no.

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

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

23 JUSTICE BARRETT: And, Mr. Yang, that
24 doesn't matter -- let's see. How important is
25 this continuing intent to your argument? Are

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

5 MR. YANG: It would.

6 JUSTICE BARRETT: Okay.

7 MR. YANG: It would. We --

8 JUSTICE BARRETT: How does this
9 change --

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

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

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

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

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

22 JUSTICE BARRETT: Sure.

23 MR. YANG: So you could prosecute it
24 in Seattle. The question is whether you could
25 also prosecute it elsewhere. Crimes aren't

1 always commit -- aren't always committed in one
2 place.

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

11 MR. YANG: Yeah.

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

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

21 JUSTICE BARRETT: And do.

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

24 JUSTICE BARRETT: But the statute
25 doesn't require that, right?

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

2 JUSTICE BARRETT: On your theory of --

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

5 JUSTICE BARRETT: Okay.

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

11 JUSTICE BARRETT: Yeah.

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

14 JUSTICE BARRETT: Yeah. Yeah.

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

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

22 MR. YANG: More is required.

23 JUSTICE KAGAN: -- if I understand you
24 correctly, you're -- you're saying that
25 Mr. Loss-Eaton is just using the wrong test.

1 If -- if he tells us look to essential conduct
2 elements, you're saying you agree, if you look
3 to essential conduct elements, he wins. You
4 shouldn't look to essential conduct elements.

5 MR. YANG: Yes.

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

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

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

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

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

20 MR. YANG: Mm-hmm.

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

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

25 JUSTICE KAGAN: So what is going to

1 get you venue where you want venue?

2 MR. YANG: So --

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

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

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

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

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

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

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

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

15 JUSTICE GORSUCH: Well, that's --

16 MR. YANG: But -- but -- but --

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

22 MR. YANG: Well, that's different.
23 That's -- that's actually a different --

24 JUSTICE GORSUCH: Mr. Yang, please.

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

1 JUSTICE GORSUCH: Mr. Yang, thank you.

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

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

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

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

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

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

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

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

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

23 JUSTICE JACKSON: So --

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

1 JUSTICE ALITO: No.

2 JUSTICE KAVANAUGH: Go ahead.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: All right.

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

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

16 MR. YANG: It -- it was.

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

22 MR. YANG: It is the same statute.

23 JUSTICE ALITO: -- with -- right.

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

1 JUSTICE ALITO: Yeah, right, with the
2 fish and the tangible objects.

3 MR. YANG: Yeah. Yeah, yeah.

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

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

13 (Laughter.)

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

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

1 that.

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

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

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

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

1 JUSTICE JACKSON: Mr. Yang, how do
2 you -- how -- how do you account for Cabrales
3 if you're right? Why doesn't that case come
4 out differently?

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

11 We have a forward-looking crime --

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

15 MR. YANG: It's --

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

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

1 completed by others in Missouri. There was a
2 money-laundering offense that was not looking
3 back. It was -- you know, it was after the
4 fact related to it, but it was in Florida.

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

9 MR. YANG: Right.

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

13 MR. YANG: Yes, there was.

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

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

1 qualified as venue.

2 Seems that this is -- that statute is
3 completely comparable to this one and talks
4 directly about intent not being adequate to
5 house venue.

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

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

16 MR. YANG: No, it's slightly
17 different.

18 JUSTICE SOTOMAYOR: That's what you
19 told Justice Kagan.

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

1 to the investigation to obstruct the
2 investigation. In Johnson, the Court --

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

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

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

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

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

21 JUSTICE BARRETT: But, here, you just
22 make the document and you're done. And if I
23 understood you, I just want to be clear that I
24 understood when we were talking before and when
25 you were talking to Justice Kagan that you're

1 conceding that venue would not lie if he had
2 the intent to obstruct the investigation in San
3 Francisco and created the document harboring
4 that intent and put it in his drawer. You
5 said, I think, correct me if I'm wrong, that
6 venue would not lie in California.

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

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

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

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

25 MR. YANG: Produce the obstruction or

1 something close to it.

2 JUSTICE BARRETT: Well, presumably, he
3 could have been prosecuted under an
4 obstruction-of-justice statute then.

5 MR. YANG: Well, he could have, as
6 well as under the intent.

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

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

15 JUSTICE BARRETT: Yeah. Are you an
16 Android guy?

17 MR. YANG: I am an Android guy.

18 (Laughter.)

19 MR. YANG: I'm sorry. I -- I'm really
20 sorry.

21 JUSTICE BARRETT: Okay.

22 MR. YANG: I was an old engineer.
23 It's -- it's --

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

1 MR. YANG: Right, right.

2 JUSTICE BARRETT: It just kind of goes
3 over the home Internet.

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

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

17 MR. YANG: Yeah.

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

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

1 If --

2 JUSTICE KAGAN: And where is that in
3 the statute?

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

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

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

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

1 1519 because of the statutory intent element.

2 I'd like to also clarify a few things
3 about 1512 and Lamar.

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

7 MR. YANG: That would be an offense.

8 JUSTICE KAVANAUGH: I got that.

9 (Laughter.)

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

13 JUSTICE KAVANAUGH: Just where could
14 he be prosecuted?

15 MR. YANG: Well, that would have to be
16 in -- in Seattle.

17 JUSTICE KAVANAUGH: Even though --

18 MR. YANG: Even though he had the
19 intent.

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

24 MR. YANG: Well, you know what,
25 actually --

1 JUSTICE KAVANAUGH: Can I just finish
2 the question?

3 MR. YANG: Yeah. Yeah, yeah.

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

8 MR. YANG: Yeah.

9 JUSTICE KAVANAUGH: And I thought your
10 theory --

11 MR. YANG: You know --

12 JUSTICE KAVANAUGH: -- might be you
13 could be prosecuted in either place, but --

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

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

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

1 MR. YANG: Yes. I think --

2 JUSTICE KAVANAUGH: Let me just make
3 sure --

4 MR. YANG: Yeah.

5 JUSTICE KAVANAUGH: -- I'm clear on
6 what your theory is not.

7 MR. YANG: Yes.

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

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

15 JUSTICE KAVANAUGH: And that's not in
16 the text.

17 MR. YANG: -- the Court understood its
18 venue decisions --

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

23 MR. YANG: Mm-hmm.

24 JUSTICE JACKSON: -- that he had
25 upstairs?

1 MR. YANG: Yeah.

2 JUSTICE JACKSON: And he threw it in
3 the shredder when he went upstairs instead of
4 creating it.

5 MR. YANG: Yeah.

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

10 MR. YANG: Well --

11 JUSTICE JACKSON: -- into the
12 investigation versus --

13 MR. YANG: -- there --

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

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

20 JUSTICE JACKSON: -- as to what your
21 theory is doing.

22 MR. YANG: I think the difference is
23 and may -- we may well argue that that's
24 covered, but there is a difference, which is,
25 when you intend -- when you are sending it to

1 the Northern District of California, you know
2 it's just like shooting a bullet to the
3 Northern District of --

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

8 MR. YANG: Yeah.

9 JUSTICE JACKSON: -- we have one piece
10 left.

11 MR. YANG: I understand.

12 JUSTICE JACKSON: It's a document that
13 we cannot find.

14 MR. YANG: I understand. I
15 understand. And we would --

16 JUSTICE JACKSON: So he knows that
17 the --

18 MR. YANG: -- we would likely run that
19 argument that their venue is proper --

20 JUSTICE JACKSON: He knows --

21 MR. YANG: Yeah.

22 JUSTICE JACKSON: -- that the
23 California investigation needs the document
24 that he is hiding. Now I appreciate this is
25 about falsification, but, in my hypothetical, I

1 don't understand why his intent to withhold or
2 remove or destroy this document wouldn't
3 count --

4 MR. YANG: We --

5 JUSTICE JACKSON: -- under your theory.

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

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

16 JUSTICE JACKSON: All right.

17 JUSTICE BARRETT: Mr. Yang, if you --

18 JUSTICE JACKSON: My final question --
19 go ahead. Go ahead.

20 JUSTICE BARRETT: If -- if you -- if
21 you lost this case and we didn't want to rule
22 out the hypothetical that Justice Alito gave
23 you about fraud where it arrives -- it's
24 somewhere else, it seems to me that if we -- we
25 would not rule out that scenario if we simply

1 looked at the statute and said the crime was
2 complete when he created the document, and, you
3 know, it was irrelevant for purposes of the
4 statute that he e-mailed it to the agents, that
5 leaves open the question that Justice Alito
6 said, which is the -- the more significant one.

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

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

24 CHIEF JUSTICE ROBERTS: Thank you.

25 MR. YANG: -- Congress has a lot of

1 authority to define offenses.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 Justice Alito?

6 Justice Sotomayor?

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

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

12 JUSTICE SOTOMAYOR: So --

13 MR. YANG: It's not an element of the
14 offense.

15 JUSTICE SOTOMAYOR: So how do we --
16 who decides it?

17 MR. YANG: Well, your Court -- the
18 case law, the Court's case law -- your --

19 JUSTICE SOTOMAYOR: I thought that we
20 had a case not so long ago about what happens
21 if an element's not submitted to a jury.

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

1 What we're saying, however --

2 JUSTICE SOTOMAYOR: Just answer my
3 question. Who decides that issue?

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

11 JUSTICE SOTOMAYOR: But what of the
12 charges --

13 MR. YANG: We know that from
14 conspiracy.

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

22 So this is now a new step in this
23 venue.

24 MR. YANG: No. The -- if there
25 were -- in this case, there was no request for

1 a jury instruction. If there's not a request
2 for a jury instruction and a jury finding
3 venue, there is no need for it.

4 JUSTICE SOTOMAYOR: All right.

5 MR. YANG: But you could in a future
6 case if you requested it. They just didn't
7 request it.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

13 MR. YANG: The Ninth Circuit, I think,
14 isn't focusing as much on the -- kind of the
15 doctrinal basis of having an intent and an
16 effect in the district. I -- I think they were
17 just looking at the statutory intent element
18 but weren't fleshing it out. Ours is a
19 refinement. We don't think our position is
20 that inconsistent, at least in the context of
21 this case, with the Ninth Circuit's.

22 But they -- you know, they didn't have
23 the same briefing as you have here in terms of
24 fleshing out what the -- the significance of
25 the statutory intent element and what that

1 means for the nature of the crime that is
2 committed when you're analyzing venue.

3 JUSTICE KAGAN: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh?

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

12 MR. YANG: Yeah. No. There -- there
13 is a question about whether 1512(i), certainly,
14 the -- the prong that's relevant is -- and this
15 is reproduced at page 32 of our brief. It's in
16 the first paragraph towards this bottom third.
17 Venue is proper in the district in which the
18 official proceeding, whether or not pending or
19 about to be instituted, was intended to be
20 effected.

21 JUSTICE KAVANAUGH: Right.

22 MR. YANG: Right? So that is an
23 intent -- like, you have to intend the district
24 to be effected, where -- where to proceed. So
25 that is -- arguably, you could read that one of

1 two ways. You could say all that's required is
2 an intent. Your focus, you know it's happening
3 in the Northern District of California, you
4 intend it; that's enough. That's different
5 than our position here. We would defend that
6 that's --

7 JUSTICE KAVANAUGH: Correct. I got
8 that.

9 MR. YANG: That -- we would -- we
10 would -- we would --

11 JUSTICE KAVANAUGH: But, for 1512(i),
12 that's enough, right?

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

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

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. YANG: Right? And then it -- we
25 don't quote this part, but it says, you know,

1 they're providing jurisdiction where the
2 obstruction is felt. Where the obstruction is
3 felt, that evokes the question of whether
4 actually the effect is required too. And so
5 there's a -- there's an interpretive question.

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

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

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

24 So Chapter 63, which you discussed at
25 some length in Pugin, I think, the -- Congress

1 has specifically addressed venue for purposes
2 of 1503 and 1512 and 1512(i), but there are
3 other provisions where there are inchoate
4 attempt crimes there too.

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

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

22 JUSTICE KAVANAUGH: Okay.

23 MR. YANG: -- crimes take place.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

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

8 MR. YANG: Not on this statute
9 because, unlike 1512(i), if you --

10 JUSTICE BARRETT: But it would under
11 1512(i) --

12 MR. YANG: If you construe --

13 JUSTICE BARRETT: -- intent to cause
14 effects is enough?

15 MR. YANG: If you view 1512(i) as only
16 requiring just the intent, not the effect, then
17 we would say yes, that would be a -- that would
18 be a sufficient basis for venue so that this --
19 so this -- this case has both constitutional
20 questions and it has statutory questions, and
21 the two are always intertwined because the
22 question for venue is where is the crime
23 committed, but the question of what the crime
24 is requires understanding what Congress
25 intended for the crime.

1 Now the crime is -- we know this
2 cannot be the case. The crime is more than the
3 offense elements. We know that to be the case.
4 We know that to be the case from conspiracy.
5 Overt acts traditionally aren't --

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

12 MR. YANG: The Pinkerton liability
13 point is important, and what it does is it
14 sweeps in actions that you don't do because
15 they're of co-conspirators, but it doesn't
16 change the nature of what's the -- the inchoate
17 offense. The reason the offense continues is
18 because it's not an agreement to just say we're
19 coming to an agreement. It's an agreement with
20 the specific intent to do more, to commit this
21 further crime.

22 JUSTICE BARRETT: Okay. Let me put --

23 MR. YANG: That's the same thing that
24 we have here.

25 JUSTICE BARRETT: Okay. One other

1 question. Has the statute of limitations on
2 this offense expired?

3 MR. YANG: I actually --

4 JUSTICE BARRETT: If you don't know.
5 I was just wondering if we could be --

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

8 JUSTICE BARRETT: Yeah.

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

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

20 JUSTICE BARRETT: This one, okay.
21 Thanks.

22 MR. YANG: So, in terms of practical
23 retrial, that would weigh as a factor that we
24 would consider.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: In the case of U.S.
3 versus Rodriguez-Moreno in 1999, at Footnote 2,
4 we noted that "the government argues that venue
5 may also be permissibly based upon the effects
6 of a defendant's conduct in a district other
7 than the one in which the defendant performs
8 the acts constituting the offense."

9 MR. YANG: Yes.

10 JUSTICE JACKSON: And we went on to
11 say, "we express no opinion as to whether the
12 government's assertion is correct."

13 MR. YANG: Yes.

14 JUSTICE JACKSON: So here today, do
15 you at least concede that you're asking us for
16 a new rule?

17 MR. YANG: We don't think it's new
18 because we think it's rooted in cases like --

19 JUSTICE JACKSON: No, but the Court
20 reserved it in this prior case and said we
21 express no opinion as to it. So today you're
22 asking us to apply or to adopt the rule that
23 you previously offered and that we expressed no
24 opinion on, is that correct?

25 MR. YANG: Yes. But just because

1 Rodriguez-Moreno didn't express an opinion on
2 it doesn't mean that there aren't prior cases
3 that speak to the issue, like Lamar, like Ford,
4 which in the extraterritorial context, which
5 the question's basically the same, which is --

6 JUSTICE JACKSON: Right, but as --

7 MR. YANG: -- did the offense occur in
8 the jurisdiction --

9 JUSTICE JACKSON: -- as of 19- -- as
10 of 1999, the Court had not understood itself to
11 have answered that question and the government
12 was offering it and we said we're expressing no
13 opinion, correct?

14 MR. YANG: No. I think that's
15 over-reading it. Expressing no opinion is
16 different from saying we haven't resolved the
17 question.

18 JUSTICE JACKSON: Thank you.

19 MR. YANG: It's just not resolving it
20 there.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. YANG: Thank you.

24 CHIEF JUSTICE ROBERTS:
25 Mr. Loss-Eaton, rebuttal?

1 REBUTTAL ARGUMENT OF TOBIAS S. LOSS-EATON
2 ON BEHALF OF THE PETITIONER

3 MR. LOSS-EATON: So I think my friend
4 really hung his hat on the analogy to
5 conspiracy. His silver bullet in his view is
6 that you can be tried anywhere an overt act is
7 undertaken further if it's a -- a conspiracy,
8 even for conspiracies where an overt act is not
9 an element.

10 And the problem with that view, in
11 addition to the points that various members of
12 the Court have made about conspiracy being a
13 unique, ongoing collective enterprise, is that
14 if you look at the cases in which the Court
15 adopted that rule for conspiracy, it did not
16 think about it at all in the terms that my
17 friend is describing.

18 In Hyde in 1912, the Court first
19 allowed venue for conspiracy where an overt act
20 was committed even though the conspiracy was
21 formed elsewhere, and, there, an overt act was
22 an element.

23 But the Court explained the integral
24 role of the overt act in giving the conspiracy
25 life and continuing it forward, and it quoted a

1 New York case from the 1830s that said,
2 wherever the conspirators act, there, they
3 renew or, perhaps to speak more properly, they
4 continue their agreement.

5 So, in allowing venue based on overt
6 acts, the Court conceptualized the overt act as
7 itself being the agreement in a real sense
8 because an agreement without any overt acts
9 really doesn't matter. It doesn't do anything.

10 And so then, in Trenton Pottery and
11 Socony-Vacuum, which are the two cases that the
12 Court was summarizing in Whitfield, which the
13 government cites so many times in its briefs,
14 the Court then applied Hyde to conspiracies
15 where an overt act was not an element,
16 essentially with no real analysis beyond
17 saying, yes, that's still true here.

18 In Socony-Vacuum, the Court said that
19 the overt acts supplied part of the continuous
20 cooperation necessary to keep the conspiracy
21 alive. So I think it's very clear from those
22 opinions that the Court conceptualized of an
23 overt act, whether required as a standalone
24 element or not, as being part of the actus reus
25 of the conspiracy itself.

1 And it was on that basis that the
2 Court allowed venue. And, of course, here,
3 that is not true for the effects that the
4 government is vaguely asserting happened in San
5 Francisco.

6 Beyond that, my friend returned a few
7 times to the analogy of someone aiming a gun
8 from Seattle at San Francisco and pulling the
9 trigger. To the extent Mr. Abouammo was aiming
10 anything at anybody, it was at the people who
11 were sitting in his living room in Seattle.

12 Whether the investigation was ongoing
13 in San Francisco or anywhere else I suspect was
14 probably not top of mind. There were federal
15 agents sitting in his living room in Seattle
16 and he wanted them to go away and so, to that
17 extent, I think, Justice Barrett, it is the
18 same as the AirDrop analogy or printing out the
19 paper and handing it to them. His conduct was
20 in Seattle and it was directed at people who
21 were in Seattle.

22 Nor is conspiracy an inchoate offense
23 in any other way. The literal dictionary
24 definition of an inchoate offense is
25 solicitation, attempt, conspiracy. This is

1 none of those.

2 This is not an attempt offense because
3 it applies only to a specific kind of conduct
4 and not to a substantial step of whatever type.
5 And it's not an attempt offense because it
6 doesn't incorporate any objective offense whose
7 elements you would have to think about.

8 And I do think that distinguishes a
9 lot of the hypotheticals that the Court asked
10 about. Justice Alito, the -- the hypothetical
11 that you raised about fraud that is attempted
12 to be committed by transmitting a document. I
13 think, under most of the fraud statutes, and,
14 certainly, once you start thinking about
15 attempt, there's no problem with venue there on
16 our theory as long as that transmission is part
17 of the actus reus that you're talking about.

18 And for an attempted fraud, it would
19 be because that would be a substantial step.
20 It might even be fraud itself depending on what
21 the effects were. So I don't think those kinds
22 of situations are implicated.

23 I do also want to emphasize, of
24 course, all we're talking about here is where
25 this crime can be tried. There's a temptation

1 sometimes when you're talking about these
2 issues to think that we're trying to immunize
3 the conduct from prosecution.

4 That is not what's going on here. All
5 we're talking about is the appropriate place of
6 trial, and that is where the offense was
7 committed.

8 A lot of the Court's questions, I
9 think, underscore the problems with the
10 government's rule. I think, you know, fully
11 80 percent of the questions that I heard were
12 just trying to figure out what the government's
13 rule is, how it works, and what relationship,
14 if any, it has to the statutory text.

15 And I think Mr. Yang's answers
16 underscore that it is deeply unclear, the
17 relationship to the actual statutory text and
18 elements is extremely attenuated, and, as you
19 were getting at, Justice Sotomayor, it's very
20 unclear how it would actually work.

21 The facts that the government wants
22 you to rely on to uphold Mr. Abouammo's
23 conviction here were not charged in the
24 indictment and they were never found by the
25 jury. On what basis then can you uphold the

1 conviction even on the government's theory?
2 And even if you adopt that theory for future
3 cases, does that mean the government now has to
4 charge those facts in the indictment and prove
5 them at trial?

6 It is a much simpler approach that
7 will do no violence to the law simply to say
8 what the Court has always said: We are looking
9 to where you committed the essential conduct
10 elements of the offense, and, here, all of the
11 essential conduct elements were committed in
12 Seattle.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:22 a.m., the case
17 was submitted.)

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