No. 16-1144

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Section 7212(a) of the Internal Revenue Code includes the following provision:

> Whoever corruptly or by force … endeavors to intimidate or impede any officer … of the United States acting in an official capacity under this title, *or in any other way corruptly or by force … endeavors to obstruct or impede[] the due administration of this title*, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both ….

26 U.S.C. § 7212(a) (emphasis added).

The question presented is whether § 7212(a)'s residual clause, italicized above, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct.

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The opinion of the Second Circuit (Pet. App. 1a-39a) is reported at 839 F.3d 209. The order denying rehearing *en banc* and the dissent from denial of *en banc* review (Pet. App. 40a-50a) is reported at 855 F.3d 455. The trial court's order (Pet. App. 51a-57a) denying Petitioner's motion for acquittal is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on October 14, 2016. A timely petition for rehearing *en banc* was denied on February 15, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7212(a) of Title 26 provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both.

INTRODUCTION

The Internal Revenue Code was overhauled in 1954 to create a coherent set of criminal offenses governing tax-related misconduct. This case is about whether the government is correct that Congress nonetheless chose to supplant and expand the dozens of defined offenses in the code by creating an all-purpose tax crime: the felony tax obstruction statute, 26 U.S.C. § 7212(a).

Section 7212(a) punishes those who "corruptly or by force … impede any officer … acting in an official capacity under [the Code], or in any other way corruptly or by force … obstruct[] … the due administration of [the tax code]." The relevant language of the provision replicates an existing obstruction statute limited to acts aimed at impeding ongoing "proceedings." But according to the government, the due administration of the tax code is "continuous, ubiquitous, and universally known to exist," and thus § 7212(a) criminalizes any "corrupt" act or omission that has the effect of hindering the IRS in any way. BIO at 9.

That reading of § 7212(a) is doubly untenable. In the first place, it upends the tax code's taxonomy of crime, most notably by transforming the code's core misdemeanors into felonies. For example, at the same time it enacted § 7212(a), Congress decided that the willful failure to maintain certain kinds of documents or file a tax return should be a misdemeanor. Yet as this case shows, the government contends that failing to maintain those documents or file a tax return can also be charged as felony obstruction, exposing the defendant to triple the prison sentence authorized by Congress. Similarly, no one disputes that tax evasion or tax

perjury are crimes, but those statutes require proof of specified elements. Under the government's interpretation, however, it can avoid its burden to prove those elements by relying on tax obstruction charges instead.

Equally egregious is the fact that the government's interpretation chills all sorts of *legitimate* personal and business behavior and poses the very real threat of prosecutorial abuse this Court has recognized in cases like *United States v. Aguilar*, *Arthur Andersen LLP v. United States*, *McDonnell v. United States*, and others. Individuals and businesses make decisions every day that may in some way make it harder for the IRS to assess or collect taxes, such as organizing a business through a subsidiary or making payments in cash. Indeed, on the government's view an individual need not *do* anything at all to be guilty of obstruction. As this case shows, an obstruction charge can rest solely on not keeping records or failing to give complete information to an accountant. With an essentially limitless range of obstructive acts and omissions to choose among, an aggressive prosecutor will have little trouble alleging that a defendant acted "corruptly," *e.g.*, in order to hinder the IRS's assessment of the defendant's tax obligations. As the dissenters below concluded, "[i]f this is the law, nobody is safe." Pet. App. 42a.

The reality is that Congress did not intend tax obstruction to be the code's *uber*-crime. Section 7212(a)'s due administration provision, like the statute it was modeled on, is concerned with the specific and important wrong of intentionally obstructing an IRS *proceeding*, such as by providing false information in

response to an audit. As this Court's holdings teach, Congress does not surreptitiously criminalize broad swaths of otherwise lawful conduct in the residual provisions of more limited offenses, particularly where doing so would undercut core provisions of the same act.

Petitioner Marinello was not charged with or convicted of felony tax evasion, and he does not challenge his misdemeanor convictions for having failed to file his tax returns. But he does challenge his felony obstruction conviction under § 7212(a), which was premised on his failure to maintain records and other acts and omissions not taken in the context of any IRS proceeding or investigation. This Court should give § 7212(a) its proper construction and reverse the conviction and judgment below.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the current tax obstruction statute, 26 U.S.C. § 7212(a), as part of its comprehensive overhaul of the Internal Revenue Code in 1954. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855. The predecessors of § 7212(a) covered only the use of force against IRS officers. The earliest predecessor – Section 38 of the Internal Revenue Service Act of 1864 – provided:

> That if any person shall forcibly obstruct or hinder any assessor or assistant assessor, or any collector or deputy collector, revenue agent or inspector, in the execution of this act, or of any power and authority hereby vested in him, or shall forcibly rescue, or cause to be rescued, any

> property, articles, or objects, after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending shall, upon conviction thereof, for every such offence, forfeit and pay the sum of five hundred dollars, or double the value of property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court….

Internal Revenue Service Act of 1864, ch. 173, § 38, 13 Stat. 223, 238.

Congress next addressed tax obstruction in the 1939 Internal Revenue Code. Those 1939 amendments split the prior obstruction provision into two separate subsections—one dealing with force against IRS officers and the other dealing with forcible rescues of seized property. Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436. According to that revised provision:

> If any person shall … (1) … [f]orcibly obstruct or hinder any collector, deputy collector, internal revenue agent, or inspector, in the execution of any power and authority vested in him by law, or (2) … [f]orcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of $500, … or be imprisoned for a term not exceeding two years, at the discretion of the court.

Id.

Congress adopted the present-day obstruction statute including the residual clause in 1954 as part of comprehensive revisions to the tax code. That amendment punished those who "corruptly or by force or threats of force … endeavor[ ] to intimidate or impede any officer or employee of the United States acting in an official capacity under this title or in any other way corruptly or by force or threats of force … obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title …." Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 855.

The House and Senate Reports explained that the amended language including the residual clause was intended to ensure that IRS officers were protected from more than just forcible obstruction. The Reports characterized the expanded § 7212(a) as "similar" to 18 U.S.C. § 111, which criminalized assaults against federal employees engaged in the performance of their duties, but with "amplified" protections for IRS employees to "cover[ ] all cases where the officer is intimidated or injured; *that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws*." S. Rep. No. 83-1622, at 147 (1954), *as reprinted* in 4621, 4782 (emphasis added); H.R. Rep. No. 83-1337 at 108 (1954), *as reprinted* in 1954 U.S.C.C.A.N. 4017, 4135-36.

Other portions of the House and Senate Reports likewise described § 7212(a) as being concerned with protecting officers from threats and corrupt solicitation: "[The new language] provides for the punishment of threats or threatening acts *against agents of the*

Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, *on account of the performance by such agents or officers or employees of their official duties*," and "will also punish the corrupt solicitation *of an internal revenue employee*." S. Rep. No. 83-1622, at 604, 1954 U.S.C.C.A.N. at 5254 (emphasis added); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.AN. at 4574-75; *see also* S. Rep. No. 83-1622, at 587, 1954 U.S.C.C.A.N. at 5236-37 (characterizing the "offense described in section 7212 (a)" as "relating to intimidation *of officers and employees of the United States*" (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same).

The new § 7212(a) was just one part of a complex set of revisions in which Congress eliminated and consolidated a number of tax offenses that had previously been scattered throughout the tax code and that set forth different penalties for similar conduct. As part of the legislative process, Congress placed most of the criminal provisions in what is now Chapter 75 of the Code, and then debated and revised the penalties applicable to the felonies and misdemeanors set forth in that chapter. *See* 26 U.S.C. §§ 7201-7345; H.R. Rep No. 83-1337 at 108, 1954 U.S.C.C.A.N. at 4135 ("In this chapter all criminal offenses are brought together….").

For example, prior to the 1954 revisions the willful failure to file a tax return was a misdemeanor subject to at most one year in prison. The House bill proposed to elevate that offense to a felony subject to a maximum of five years in prison. The Senate version rejected the House changes, and the Conference acceded to the

Senate version, keeping the offense as a misdemeanor, codified at 26 U.S.C. § 7203. H.R. Rep. No. 83-1337, at A424, 1954 U.S.C.C.A.N. at 4572; S. Rep. No. 83-1622, at 147, 601-02, 1954 U.S.C.C.A.N. at 4782, 5251; H.R. Rep. No. 83-2543, at 82 (1954) (Conf. Rep.). The Conference Committee also accepted other Senate amendments including reductions to the sentences provided in the House bill for making false or fraudulent statements under § 7206 and the maximum fines for other offenses. *Id.* at 81–82.

There appear to have been only two reported cases involving a prosecution under § 7212(a)'s residual clause in the first two decades after the provision was enacted. In one of the earliest cases, *United States v. Henderson*, 386 F. Supp. 1048, 1055 (S.D.N.Y. 1974), the government took the position that § 7212(a) "applies only to acts or threats of physical violence" against the IRS and its employees. *Id.* The government began to expand its use of § 7212(a)'s residual clause in the 1980's and 1990's to include prosecutions of "garden-variety tax evasion or false return cases." Robert S. Fink and Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions—Is Congress the Only Cure?*, 88 J. Tax'n 356, 358 (1998); *see also* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255, 300–01 & n.210 (2009) (noting that § 7212(a) prosecutions "blossomed" in the 1990s).

B. Statement of Facts

1. Factual Background And Proceedings In The District Court.

Petitioner Carlo J. Marinello, II, owned and operated a freight service business in western New York that couriered items between the United States and Canada. Pet. App. 2a. Marinello did not maintain business records or file corporate or personal income tax returns from approximately 1992 through 2010. Pet. App. 2a. In 2004, the IRS investigated Marinello for tax evasion on the basis of an anonymous tip. Pet. App. 4a. The IRS subsequently closed that investigation because it could not determine whether any unreported income was significant. Pet. App. 4a. Marinello had no knowledge of that investigation. Pet. App. 4a.

In 2009, the IRS reopened its investigation. On June 1, 2009, IRS agents interviewed Marinello at his home. Pet. App. 5a. During that interview, he admitted that he had failed to file tax returns, used business income to pay for personal expenses, and destroyed bank statements and business records. Pet. App. 5a. In 2012, following the investigation, a superseding indictment filed in the United States District Court for the Western District of New York charged Marinello with nine counts of tax-related offenses for conduct that he engaged in prior to learning of any IRS investigation. Pet. App. 6a.

Specifically, eight of those counts charged Marinello with misdemeanors under 26 U.S.C. § 7203 for willfully failing to file timely personal income and corporate tax returns for the years 2005 through 2008. Pet. App. 6a. The remaining count charged Marinello with violating 26

U.S.C. § 7212(a)'s residual clause. Marinello was not charged with felony tax evasion, 26 U.S.C. § 7201, nor was he charged with the misdemeanor of failing to maintain tax documents, 26 U.S.C. § 7203.

In support of the felony § 7212 charge, the superseding indictment alleged that Marinello had, from approximately January 2005 until approximately April 15, 2009: (1) failed to maintain corporate books and records; (2) failed to provide his accountant with complete and accurate information related to his personal income and the income of his business; (3) destroyed, shredded, and discarded business records; (4) cashed business checks received for services rendered; (5) hid business income in personal accounts; (6) transferred assets to a nominee; (7) paid employees with cash; and (8) used business receipts and funds from business accounts to pay personal expenses.[1] Pet. App. 6a-7a. There was no allegation that Marinello lied to investigators or otherwise obstructed the IRS after investigators contacted him in June 2009.

Marinello ultimately went to trial in 2014. Over his objection, the district court instructed the jury that proof beyond a reasonable doubt of any one of the eight obstructive acts or omissions alleged in the indictment would be sufficient to find Marinello guilty under § 7212(a), and that the jury need not agree on which of

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[1] In the original indictment, the government also charged Marinello with § 7212(a) obstruction based on his failure to file a tax return. The government dropped that charge only after Marinello moved to strike it as duplicative of the misdemeanor failure-to-file count. Pet. App. 7a n.1.

the eight acts or omissions had been proved. Pet. App. 9a.

The jury convicted Marinello on all counts. The district court sentenced Marinello to thirty-six months' imprisonment for violating § 7212(a), twelve months' imprisonment for each of the remaining eight misdemeanor counts—all sentences to be served concurrently—and one year of supervised release. Pet. App. 15a; *see also* Amended Judgment, ECF No. 130, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015). The court also ordered Marinello to pay $351,763.08 to the IRS in restitution. Pet. App. 15a.

Marinello moved for a judgment of acquittal or new trial under Federal Rules of Criminal Procedure 29 and 33 on the ground, *inter alia*, that the phrase "the due administration of this title" in section 7212(a) refers exclusively to pending IRS investigations, and that a defendant may be convicted under the statute only if he knowingly interferes with such an investigation. Pet. App. 10a. The trial court denied that motion and held that "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Pet. App. 51a-57a.

2. Proceedings In The Second Circuit.

Marinello timely appealed. As relevant here, he challenged his conviction under § 7212(a) on the ground that guilt under the residual clause requires knowledge of a pending IRS action or investigation—a fact the government had not proved. Pet. App. 15a. He urged the Second Circuit to adopt the Sixth Circuit's interpretation of § 7212(a), which held, in *United States*

v. Kassouf, 144 F.3d 952 (6th Cir. 1998), that the statute's reference to "due administration of the Title requires some pending IRS action" – such as a subpoena or audit – "of which the defendant was aware." *Id.* at 957 & n.2.

The Second Circuit rejected the Sixth Circuit's interpretation. It held that the statute covers any corrupt act or omission that obstructs or impedes any activity under the tax code. Pet. App. 25a-26a. In so holding, the court acknowledged that in *United States v. Aguilar* this Court had previously held that a nearly identical provision prohibiting corrupt efforts to obstruct or impede "the due administration of justice," 18 U.S.C. § 1503(a), *did* require a defendant to know that his actions would affect judicial or grand jury proceedings. Pet. App. 20a-21a (discussing *United States v. Aguilar*, 515 U.S. 593, 598-600 (1995)). The Second Circuit distinguished *Aguilar*, however, on the ground that § 7212(a) prohibits interfering with the "due administration of this title [*i.e.*, the Internal Revenue Code]" rather than the "due administration of justice." Pet. App. 24a. According to the Second Circuit, that "difference indicates that the statutes carry different meanings" and that § 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities." Pet. App. 24a-25a (emphasis in original) (quoting *United States v. Willner*, No. 07 Cr. 183(GEL), 2007 WL 2963711, at *5 (S.D.N.Y. Oct. 11, 2007)).

The Second Circuit acknowledged the Sixth Circuit's concern that such a reading would expose a defendant to felony charges for "conduct which was legal (such as

failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." Pet. App. 22a (quoting *Kassouf*, 144 F.3d at 957). But it held that concerns about the sweep of the statute were unwarranted because the statute required the defendant to have acted "corruptly," which it defined as seeking to obtain an "unlawful advantage or benefit either for one's self or another." Pet. App. 27a, 18a.

Marinello sought rehearing *en banc*, which was denied over a sharp dissent authored by Judge Jacobs and joined by Judge Cabranes. The dissent warned that by rejecting the Sixth Circuit's interpretation, the panel had "cleared a garden path for prosecutorial abuse." Pet. App. 41a. It argued that there was no material difference between § 7212(a) and the residual clause at issue in *Aguilar*, and that the panel failed to recognize that this Court has repeatedly cast a "cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here)" in cases like *Aguilar*. Pet App. 43a-45a.

Judge Jacobs further rejected the panel's contention that the statute's "corrupt" *mens rea* requirement provided adequate protection, given that corruption could easily be charged by an aggressive prosecutor, and "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. The dissent concluded that the panel's decision threatened allowing a regime where a prosecutor could say "Show me the man, and I'll find you the crime." Pet. App. 49a-50a.

After Marinello filed a timely petition for certiorari, this Court granted review on June 27, 2017. On June 28,

2017, Marinello moved in the district court for bail pending this Court's decision on the merits. The government did not oppose the motion, and the district court granted bail on July 12, 2017.

SUMMARY OF ARGUMENT

Section 7212(a) defines two categories of criminal conduct:

> Whoever **[1]** corruptly or by force or threats of force … endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, **[2]** or in any other way corruptly or by force or threats of force … obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title shall … be … imprisoned for not more than 3 years.

26 U.S.C. § 7212(a).

The question here is whether the second prohibition – "or in any other way corruptly or by force … obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title" – includes acts and omissions not taken against an IRS agent or otherwise in the context of an IRS proceeding such as an audit or investigation.

The government contends that "tax administration is continuous, ubiquitous, and universally known to exist," BIO 9, and therefore any act or omission that may ultimately make the IRS's job more difficult at some later point could be obstructive within the meaning of § 7212(a). That interpretation is as sweeping as it is

incorrect. All sorts of legitimate behavior have the effect of making it more difficult for the IRS to assess an individual's or business's tax liability. An aggressive prosecutor would have little difficulty alleging that such behavior was corrupt, *i.e.*, taken for the purpose of hindering the IRS's ability to assess tax liability or for some other unlawful benefit. And even where a defendant has acted culpably, the government's interpretation upends the careful system of tax offenses and corresponding punishments that Congress created.

The text, structure, and legislative history of § 7212(a) and the criminal provisions of the tax code as a whole confirm that Congress did not bestow such unconstrained powers on prosecutors. Instead, § 7212(a)'s due administration clause is limited to conduct intended to impede an IRS proceeding.

I.A. Beginning with the text of § 7212(a), the "due administration" language Congress employed in the residual clause has long been understood to be limited to instances in which a defendant intentionally interferes with a known proceeding. Section 7212(a)'s language is nearly identical to 18 U.S.C. § 1503's prohibition on "obstruct[ing] or imped[ing] the due administration of justice," which had been on the books in materially similar form since the early 19th century.

As early as 1893, this Court held that this provision required proof not just that the defendant intended to obstruct law enforcement generally, but that he intended to obstruct a judicial proceeding of which he was aware. *Pettibone v. United States*, 148 U.S. 197, 206 (1893). This Court reaffirmed that interpretation in *United States v. Aguilar*, 515 U.S. 593 (1995), holding

that Congress would have spoken much more clearly had it intended to devise something as broad as an all-purpose criminal prohibition on false statements outside the context of judicial proceedings. 515 U.S. at 599.

Congress is presumed to know the judicial interpretation of existing law when it enacts legislation. Moreover, the same concerns that animated this Court's narrower reading of the due administration language in § 1503 apply with equal or even greater force here. The government contends that "due administration" of the tax code is ubiquitous and unceasing – apparently more so even than the "due administration of justice." But that is precisely why this Court ought not assume that Congress intended to impose a felony on anyone who engaged in the vast array of conduct – or inaction – that could be said to impede the IRS. That kind of "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability." *Aguilar*, 515 U.S. at 602.

B. Petitioner's construction of the due administration language is reinforced by the text of § 7212 as a whole. The first part of that provision prohibits intentional interference with IRS officers, namely "corrupt" or "forcible" acts that "intimidate or impede any officer or employee of the United States acting in an official capacity." 28 U.S.C. § 7212(a). This provision requires proof that the defendant knew that he was impeding an IRS agent in the course of his duties, such as through an assault or bribe.

Section 7212(a)'s parallel prohibition against "*or in any other way* corruptly or by force … obstruct[ing] or imped[ing] … the due administration of this title"

encompasses conduct that obstructs the IRS in a comparably direct way. 28 U.S.C. § 7212(a) (emphasis added). If the defendant does not know that he is impeding a particular agent, he must at least know he is impeding a particular IRS proceeding, such as an audit or enforcement action. Indeed, if the residual clause reached every act or omission that could be said to hinder the IRS, there would have been no need to include the first part of the statute dealing with obstruction of officers. Marinello's construction is faithful to the Court's approach to the prohibitions at issue in cases like *McDonnell v. United States* where this Court looked to context to avoid giving unintended breadth to legislation and rendering the other terms of the statute superfluous.

C. Unlike the government's interpretation, petitioner's interpretation also comports with other decisions from this Court interpreting analogous obstruction statutes like *Arthur Andersen LLP v. United States* and *Yates v. United States*. For example, in *Arthur Andersen*, this Court considered a provision that barred corruptly persuading another person to destroy a document to be used in an official proceeding. The Court vacated a conviction on the ground that the jury was not asked to find that the defendant sought the destruction of documents in order to prevent them from being used in a "particular official proceeding." 544 U.S. 696, 708 (2005). Absent that finding, the statute would sweep too broadly and potentially criminalize legitimate document destruction. As the Court put it, "[a] 'knowingly … corrup[t] persaude[r]' cannot be someone who persuades others to shred documents under a

document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* The same considerations that animated those decisions apply here.

D. Finally, the legislative history of § 7212(a) gives no hint of the breadth that the government claims today. To the contrary, the legislative history makes clear that the residual clause was simply intended to ensure that the statute "cover[ed] all cases where the officer is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, *an attempt is made to impede the administration of the internal-revenue laws*." S. Rep. No. 83-1622, at 147, 1954 U.S.C.C.A.N. at 4782 (emphasis added). Other references to § 7212(a) in the legislative history exclusively describe § 7212(a) as a provision concerned with direct harm to or corruption of the IRS and its officers.

II. Another basic interpretative requirement is that a statutory scheme should be read as a whole and harmonized to avoid superfluousness. *Marx v. General Revenue Corp.*, 568 U.S. 371, 386-87 (2013). Petitioner's construction of § 7212(a) meets that requirement because it limits § 7212(a)'s application to the distinct wrong of obstructing an IRS officer or known proceeding. In contrast, the government's interpretation causes § 7212(a) to swallow entire swaths of the criminal tax code, transforming misdemeanors into felonies, eliminating elements of other crimes, and in general serving as an enhancement that could be tacked on to any tax crime. This Court has repeatedly rejected this kind of statutory mission creep –

particularly in the context of tax crimes which are defined in a single collection of laws – and it should do so again here.

A. To begin, the government's interpretation of § 7212(a) allows it to obtain a felony conviction for conduct that Congress expressly defined to be a misdemeanor—or indeed not to be a crime at all. The tax code already contains misdemeanors encompassing conduct like failing to timely file a tax return, failing to maintain required records, and providing false withholding information to an employer. 26 U.S.C. §§ 7203 & 7205. Persons guilty of these misdemeanors are subject to a prison sentence of up to 1 year. Yet under the government's interpretation, all of this conduct – or inaction – could be charged as *felony* obstruction with its statutory maximum of a 3-year sentence. This Court has repeatedly refused to construe the tax code to create substantial overlap between misdemeanor and felony provisions, and the same result is warranted here, particularly because Congress expressly *considered and rejected* elevating some of these misdemeanors to felonies as part of the same 1954 overhaul of the tax code.

B. The government's capacious interpretation of § 7212(a) also frees it from proving the elements specified in other felonies. For example, Congress made it a felony to knowingly make a false statement to the IRS, but only where another element is met, for example where the defendant has made the statement under penalty of perjury. 26 U.S.C. § 7206(1). Absent additional elements, the tax code punishes a false statement only as a misdemeanor. 26 U.S.C. § 7207. But

the requirement that the false statement be made under penalty of perjury to constitute a felony is an empty one under the government's interpretation of obstruction because even unsworn false statements are capable of making it harder for the IRS to assess tax liability.

C. Even where the government does prove all the elements of some other crime, its interpretation of obstruction allows it to tack on that offense in almost every case. There is essentially no scenario in which a defendant who could be charged with tax evasion, tax fraud, or any of the other core felonies in the tax code, could not also be charged with obstruction, increasing his potential sentence and imposing extra pressure to take a plea deal.

III. The government and the court below placed great stress on the fact that § 7212(a) requires proof of "corrupt" obstruction, meaning proof that the defendant acted for some unlawful purpose. That *mens rea* does not meaningfully limit the scope of the statute and a prosecutor's discretion to charge the crime.

For one thing, the requirement to prove corruption does not save the statute from swallowing up the rest of the code's misdemeanors and felonies for the reasons given in Part II. Moreover, corruption is easy to allege in the context of a tax crime. The government's position is that it can look back at a taxpayer's activities and assess whether conduct taken potentially years ago has hindered the IRS in some way. Should the government conclude, say, that their investigation is hindered by the fact that the defendant employed a complex structure for a business transaction or even by the defendant's maintenance of records that government decides at that

later point are inadequate, then a zealous prosecutor will have little difficulty in alleging that these acts and omissions were taken for the purpose of hindering the IRS's ability to assess the defendant's tax liability.

This Court, in cases like *Aguilar* and *Arthur Andersen*, has refused to presume that by employing a *mens rea* of corruption Congress meant to criminalize any and all acts that hinder the government, even if the government could establish that they were taken for a corrupt purpose. The sweep of that construction is just too broad to presume absent a clear statement of Congress's intent, which is wholly absent here.

IV. Finally, to the extent that the Court finds that § 7212(a) is ambiguous, it should apply the rule of lenity and reject the government's construction. That rule is motivated by the concern that a criminal statute should provide fair warning to the world of its scope. This Court should not presume that Congress meant to create a federal felony out of a broad array of conduct undertaken by individuals in their private lives where there is no connection to an IRS officer or proceeding.

ARGUMENT

I. The Text And Legislative History Of Section 7212(a) Demonstrate That It Is Limited To Obstruction Of A Known IRS Proceeding.

A. Section 7212(a)'s "Due Administration" Language Has Long Been Understood To Require Obstruction Of A Proceeding Of Which The Defendant Was Aware.

Statutory construction begins with statutory language and this Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010) (citing authority). When Congress imported the "due administration" language in § 7212(a) it was using venerable phrasing that this Court had authoritatively construed to be limited to obstruction of a *known proceeding*.

Specifically, § 7212(a)'s due administration provision, which was added to its predecessor provision in 1954, parallels almost word-for-word the obstruction of justice provision set out in 18 U.S.C § 1503(a):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, … or corruptly or by threats or force, or by any threatening letter or

> communication, influences, obstructs, *or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be punished as provided in subsection (b).

18 U.S.C. § 1503(a) (emphasis added).

Both § 1503(a) and § 7212(a) have a two-part structure in which the first part reaches whoever "corruptly" or "by threat of force" "endeavors to" "intimidate or impede" individuals carrying out a government function, and the second part reaches whoever "corruptly" or "by threat of force" "endeavors to" "obstruct or impede" the "due administration" of that government function. 18 U.S.C. § 1503(a); 26 U.S.C. § 7212(a). Both provisions expressly prohibit the use of a "threatening letter or communication" and both reach those who merely "endeavor" to accomplish the prohibited conduct as well as those who actually accomplish it. *Id.*

Congress codified § 1503(a) in 1948 (just six years before it adopted § 7212(a)) and similarly worded predecessors had been on the books since well before the Civil War. *See, e.g.*, Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487 (prohibiting "corruptly, or by threats or force, endeavour[ing] to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty," and "corruptly, or by threats or force, obstruct[ing], or imped[ing], or endeavour[ing] to obstruct or impede, the due administration of justice therein").

Ever since this Court's seminal 1893 decision in *Pettibone v. United States*, it has been settled that the

due administration clause required the government to prove not just that the defendant's actions hindered law enforcement generally, or even that they hindered a judicial proceeding in particular, but that the defendant *intended* that his actions hinder a *pending* judicial proceeding. In *Pettibone*, the Court vacated an obstruction conviction against defendants who were accused of violating the terms of injunction. The Court found that although the defendants might be guilty of crimes under state law (they had violated the injunction by assaulting the employees of a competitor) they could not be convicted of obstruction because there was no evidence that they had any "notice or knowledge" of the injunction. 148 U.S. at 204. The Court held that it was "necessary for the *accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein*, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same." *Id.* at 205 (emphasis added).

The meaning of § 1503's parallel clause was thus well-established at the time of § 7212's enactment in light of *Pettibone*. Indeed, when Congress codified § 1503(a) in 1948 it explained that it was making no substantive changes to the provision as it existed at the time of *Pettibone*.[2] H.R. Rep. No. 80-304, at A107 (1947). It is

[2] In its Brief in Opposition, the government suggested, BIO at 8, that *Pettibone* is inapposite because at the time of *Pettibone*, the obstruction statute reached "[e]very person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or

not credible that Congress intended the "due administration" language in § 7212(a) to reach the enormous range of conduct outside the context of a known IRS proceeding, when the same, recently recodified language in § 1503(a) was specifically limited to interference with known judicial proceedings. Instead, when Congress copied "the pertinent portions" of § 1503 into § 7212(a), that "close textual correspondence" indicates that Congress intended a parallel limitation. *Jerman*, 559 U.S. at 590; *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, … it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

This conclusion is reinforced by the Court's more recent analysis of what Congress intended when it enacted § 1503. In *United States v. Aguilar*, 515 U.S. 593 (1995), the Court reaffirmed that obstruction of the due

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impedes, or endeavors to obstruct or impede, the due administration of justice *therein*." *Pettibone*, 148 U.S. at 197 (quoting R.S. 5399) (emphasis added). But when Congress codified that provision in 1948 at 18 U.S.C. § 1503, it omitted the "therein" phrasing merely as one of several "[m]inor changes … in phraseology." H.R. Rep. No. 80-304, at A107 (1947). Thus, when Congress used that revised "due administration" language a few years later in enacting § 7212(a), it presumably intended a "due administration" prohibition of comparable scope to the one employed by § 1503 and its materially identical predecessors. Nor does the government's contention adequately respond to this Court's discussion of § 1503 in *Aguilar*, which concluded that Congress did not intend in § 1503 to reach conduct that lacked a nexus with a judicial proceeding. *See infra*.

administration of justice requires proof of a "nexus" with a judicial proceeding. *Id.* at 599. "[T]he act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* This Court stressed that it would not read the obstruction of justice provision to sweep in every act that could interfere with law enforcement, such as "an investigation independent of the court's or grand jury's authority." *Id.* As such, the Court rejected the government's argument that § 1503 reached a defendant's knowingly false statements to a federal investigator where it was uncertain whether the statements would be used in a judicial proceeding. *Id.* at 600 ("We do not believe that uttering false statements to an investigating agent … who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.").

In so holding, the Court emphasized that it was appropriate to read the due administration provision narrowly because the Court had "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling v. United States*, 473 U.S. 207 (1985), and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' *McBoyle v. United States*, 283 U.S. 25, 27 (1931)." *Id.*

Those same considerations of "deference to the prerogatives of Congress" and "fair warning" that animated the Court's construction of § 1503 apply with equal if not greater force to what Congress intended to accomplish with § 7212(a). If there is any category of

conduct that is potentially broader than conduct interfering with the "due administration" of justice, then it is the government's conception of conduct that interferes with the "due administration" of the tax code. After all, many individuals have only infrequent contact with the justice system. But an American's entire economic life is the subject of the tax code. The government seizes upon this breadth to argue that Congress must have intended to criminalize any kind of conduct that ultimately hinders the IRS, BIO at 9, but precisely the opposite inference is warranted. If Congress intended to criminalize an enormous swath of conduct, it would have said so clearly rather than use language that had traditionally had a far narrower construction. As this Court has "stressed repeatedly," "it is appropriate, before … choos[ing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982)).

Here, Congress has done the opposite of "clearly" sweeping in any and all conduct that could be deemed obstructive – it used statutory language that had long been construed to be limited to the particular wrong of undertaking an obstructive act in the context of a legal proceeding.

B. The Text Of §7212(a) As A Whole Confirms That Congress Intended To Criminalize Obstruction Of A Known IRS Proceeding.

The language of § 7212(a) "as a whole" further confirms that Congress intended the residual clause to be limited to obstruction of a known IRS proceeding.

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). ("[T]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.").

Section 7212(a)'s residual clause is part of a provision that is concerned with intentional interference with IRS officers, namely "corrupt" or "forcible" acts that "intimidate or impede any officer or employee of the United States acting in an official capacity." 28 U.S.C. § 7212(a). This prohibition reaches direct misconduct against IRS officers such as threats of force or attempts to intimidate or otherwise harass. *See, e.g.*, *United States v. Lovern*, 293 F.3d 695, 697 (4th Cir. 2002) (threatening agent with bodily harm); *United States v. Martin*, 747 F.2d 1404, 1406 (11th Cir. 1984) (planting drugs in agent's car). And the statute requires proof not just that the defendant's actions intimidated or impeded an IRS agent, but that the defendant knew he was impeding an IRS agent in the course of his duties. *E.g.*, *United States v. Rybicki*, 403 F.2d 599, 602 (6th Cir. 1968) (statute requires "knowledge that the Internal Revenue agents were such and were engaged in performing their duty"); *United States v. Johnson*, 462 F.2d 423, 428 (3d Cir. 1972).

Against that background, § 7212(a)'s parallel prohibition against "*in any other way* corruptly or by force … obstruct[ing] or imped[ing], … the due administration of this title" encompasses conduct that obstructs in a comparably direct way. 28 U.S.C. § 7212(a) (emphasis added). The residual clause

requires, if not direct interference with a known IRS officer, at least direct interference with a known IRS proceeding, like an audit or investigation. An individual who intentionally gives false information in response to an audit may have violated § 7212(a) even if the individual does not know the particular IRS agent assigned to the audit. But where an individual is ordering her private affairs in an otherwise perfectly legal manner in the absence of any known proceeding – say, by the manner in which she records or does not record information about her business – her conduct is not "obstruction" of the "due administration" of the tax code.[3]

Congress's choice of verbs in § 7212(a) also supports the conclusion that the residual clause is not intended to be "ubiquitous" in scope. First, as noted above, the verbs "obstruct" and "impede" were borrowed from § 1503, which was understood to be limited to proceedings. And second, the repetition of the word "impede" in both clauses of § 7212 indicates that the second clause is not boundlessly broader than the first. In the first clause, "impede" is paired with the verb "intimidate," and directly focused on those known to be IRS employees. Under the government's interpretation, however, Congress used the same word, "impede," in the residual clause to encompass any hindrance at all, direct or

[3] Section 7212(b) is also illuminating on this score. That provision prohibits the "forcible rescue" of property seized by the IRS, which is another form of interference with known and pending IRS enforcement action. 26 U.S.C. § 7212(b). The residual clause is thus surrounded by prohibitions of conduct that directly interferes with the IRS, and should be likewise construed.

indirect, present or future, by act or by omission. It cannot be that Congress limited impediment of an *officer* to actions directly impeding a known officer, while allowing potentially any conduct, no matter how far removed from an interaction with the IRS – to constitute impediment under the residual clause.

Indeed, the very breadth of the government's interpretation establishes its impossibility, because the residual clause would make the rest of § 7212(a) – and likely § 7212(b) as well – entirely superfluous. The "officers" clause prohibits corruptly or forcibly impeding an IRS officer or employee "acting in an official capacity under this title." But if the residual clause of § 7212(a) is read to prohibit *all* corrupt or forcible impeding of the IRS, then there would have been no need to include the "officers" clause in the first place. But the same Congress that added the residual clause not only retained the "officers" clause, but amended it, "amplifying" it to add the corruption and threats prong (and, as discussed below, considered this amendment more worthy of mention than the addition of the residual clause). Congress also retained and amended § 7212(b), forbidding the forcible rescue of property seized by the IRS – which is another offense that would have been superfluous had the residual clause been meant to sweep in all forcible interference with the "ubiquitous" functions of the IRS.

This case is much like this Court's recent decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which the Court applied "the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Id.* at 2368 (quoting *Jarecki v. G.D. Searle &*

Co., 367 U.S. 303, 307 (1961)). While the canon is not "an inescapable rule," it "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* *See also Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) ("A canon related to *noscitur a sociis*, *ejusdem generis*, counsels: 'Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (plurality opinion) (quoting *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003)).

Here, the "company" that the residual clause keeps is a provision requiring direct interference with IRS officers. The clause should, like the "officers" provision, be read to encompass only conduct that directly interferes with an IRS proceeding. Likewise, in *McDonnell*, the criminal provision at issue defined an "official act," *i.e.*, an act necessary to trigger liability under the federal bribery statute, to be "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *McDonnell*, 136 S. Ct. at 2367 (quoting 18 U.S.C. § 201(a)(3)). The government contended that Congress had used "'intentionally broad language'" that "encompasses nearly any activity by a public official" such that even a decision to "arrange a meeting" would

qualify as an "official act." *Id.* (quoting Br. for United States 20-21).

This Court recognized that the broadest interpretation of "any decision or action on any question [or] matter" could encompass a mere decision to hold a meeting, but it declined to give the provision such a broad construction. *Id.* Key to the Court's reasoning was the fact that the "question or matter" language was part of a list containing words like "cause, suit, proceeding or controversy." *Id.* Those latter words typically involved a "formal exercise of governmental power," *id.* at 2372, and the Court concluded that the better reading of a "decision or action" on a matter must likewise "involve a formal exercise of governmental power *that is similar in nature* to a lawsuit before a court, a determination before an agency, or a hearing before a committee," and not just merely a decision to hold a meeting on a topic without more. *Id.* (emphasis added).

So too here. The residual clause is found in the company of a criminal prohibition requiring direct and knowing interference with IRS officers, and thus likewise should be read to be "similar in nature" to the prohibitions in the first clause of the statute, and require direct and knowing interference with an IRS proceeding, lest the residual clause swallow up the other provisions of the statute. *McDonnell*, 136 S. Ct. at 2369 ("If 'question' and 'matter' were as unlimited in scope as the Government argues, the terms 'cause, suit, proceeding or controversy' would serve no role in the statute—every 'cause, suit, proceeding or controversy' would also be a 'question' or 'matter.'").

C. This Court Has Refused To Read Comparable Obstruction Provisions Broadly.

This Court's careful parsing of the due administration clause in *Pettibone* and *Aguilar* are hardly the only cases in which this Court has declined to endorse the government's maximalist interpretations of criminal obstruction statutes.

A good example is *Arthur Andersen LLP v. United States*, in which this Court considered the scope of a criminal provision stating that

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person … to … destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding … shall be fined under this title or imprisoned not more than ten years, or both.

Arthur Andersen, 544 U.S. at 703 (quoting 18 U.S.C. § 1521(b)(2)(A)-(B)).

The jury instructions in that case had allowed the jury to convict the defendant without proving that it sought the destruction of documents in order to prevent them from being used in a "particular official proceeding." *Id.* at 708. The Court explained there were many legitimate reasons that an individual or business would seek to destroy documents, *id.* at 703-04, and – in language that echoed *Aguilar* – that the jury instructions were infirm because they led the jury to believe "that it did not have to find *any* nexus between the 'persua[sion]' to destroy documents and any

particular proceeding." *Id.* at 707. The Court held that "[a] 'knowingly … corrup[t] persaude[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* at 708

Notably, the Court reached this conclusion even though the statute at issue expressly stated that "an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" *Id.* at 707 (quoting § 1512(e)(1)). The Court explained that it is "one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen." *Id.* at 707-08 (quoting *Aguilar*, 515 U.S. at 602).

Section 7212(a), of course, does not include any disclaimer that it applies regardless whether an official proceeding is pending. *Arthur Andersen*'s reasoning therefore applies with even greater force here. There are many legitimate reasons why a taxpayer might not retain documents or might take any number of other steps that have the effect of making the IRS's job more difficult. But absent proof that the individual took those steps for a corrupt purpose with knowledge of a pending proceeding, the individual has not obstructed within the meaning of § 7212(a). Otherwise, the provision would impose liability without "the level of 'culpability … we usually require in order to impose criminal liability.'" *Id.* at 706.

A plurality of the Court applied similar logic in *Yates v. United States*, where it considered another

obstruction statute, enacted as part of the Sarbanes-Oxley financial reform legislation, which provides

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Yates, 135 S. Ct. at 1078 (plurality opinion) (quoting 18 U.S.C. § 1519).

The question in *Yates* was whether this provision applied to a defendant fisherman who had ordered crewmen to toss undersized fish back into the sea in the hope of preventing federal authorities from confirming that he had been harvesting undersized fish in violation of federal law. This Court found that a fish was not a "tangible object" within the meaning of the statute, explaining that "it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." *Id.* at 1079.

Instead, given that the phrase "tangible object" appeared in a list of items whose defining quality was they were capable of storing information (*i.e.*, document, record), the phrase "tangible object" should also be construed to refer to objects that stored information and

not, for example, fish. *Id.* "This is especially true because reading 'tangible object' too broadly could render 'record' and 'document' superfluous." *Id.* at 1089 (Alito, J. concurring). Again, the same considerations apply here: The context of the prohibitions in § 7212 demonstrate that the residual clause is concerned with knowing interference of IRS proceedings, and the government's broader interpretation would "cut [§ [7212(a)] loose from its … mooring[s], " *id.* at 1079, and "render" the rest of the statute's provisions "superfluous," *id.* at 1089 (Alito, J., concurring).

D. The Legislative History of § 7212 Further Confirms That The Government's Interpretation Is Incorrect.

Section 7212's legislative history further confirms that Congress did not intend a vast expansion of the scope of tax obstruction when it added the residual clause in 1954. The 1954 amendments to the tax code were some of the most comprehensive and closely considered pieces of legislation in this country's history. They followed dozens of hearings and generated several lengthy reports that set out Congress's legislative deliberations. *See generally* John F. Witte, *The Politics and Development of the Federal Income Tax* 146 (1985) ("[The bill] entirely rewrote the federal income tax code for the first time since its initial passage in 1913."). That legislative history accompanying the revised Code gives not the slightest hint that Congress intended to create the sweeping obstruction provision the government posits. On the contrary, that history shows that Congress understood and intended the residual clause to be a modest expansion of existing law, focused on

combatting corruption and other forms of direct obstruction of IRS officers.

As recounted above, prior to the adoption of § 7212 in 1954, Congress had enacted tax obstruction statutes that prohibited only "forcible" interference with IRS officers and the forcible rescue of seized property. *See supra* at 5-6. In adopting the expanded terms of Section 7212(a), Congress explained that it had looked to 18 U.S.C. § 111, a criminal provision that prohibited the "assault" of federal employees "while engaged in or on account of the performance of official duties." 18 U.S.C. § 111(a)(1). In the only passage of legislative history directly referring to the "due administration" provision, both the Senate and House Report accompanying § 7212 explained that the new tax obstruction provision was "[a] similar, but amplified, provision … cover[ing] all cases where the officer is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, *an attempt is made to impede the administration of the internal-revenue laws*." S. Rep. No. 83-1622, at 147, 1954 U.S.C.C.A.N. at 4782 (emphasis added); *see also* H.R. Rep. No. 83-1337, at 108, 1954 U.S.C.C.A.N. at 4135-36 (using nearly identical language). In other words, the "due administration" clause was intended to expand the obstruction prohibition to reach forms of interference other than force—*e.g.*, bribery—but was still concerned with direct interference.

The rest of § 7212(a)'s legislative history does not even mention the residual clause as a separate concept. Instead, it consistently describes the new provision as focused on combatting misconduct against IRS officers.

S. Rep. No. 83-1622, at 604, 1954 U.S.C.C.A.N. at 5254 ("[Section 7212] provides for the punishment of threats or threatening acts *against agents of the Internal Revenue Service*, or any other officer or employee of the United States, or members of the families of such persons, *on account of the performance by such agents or officers or employees of their official duties*," and "will also punish the corrupt solicitation *of an internal revenue employee*." (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same). S. Rep. No. 83-1622, at 587, 1954 U.S.C.C.A.N. at 5236-37 (characterizing the "offense described in section 7212 (a)" as "relating to intimidation *of officers and employees of the United States*" (emphasis added)); H.R. Rep. No. 83-1337, at A426, 1954 U.S.C.C.A.N. at 4574-75 (same). Again, there is no hint that Congress intended the due administration provision of § 7212(a) to sweep broadly beyond conduct directly affecting a known proceeding of the IRS or activity of its agents.

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In short, if Congress had intended to dramatically expand the obstruction provision in § 7212 to reach otherwise lawful conduct that could one day make the IRS's job more difficult, it would have said so. Instead, every textual clue in the statute and the accompanying legislative history indicates that Congress intended the residual clause to reach the knowing obstruction of an IRS proceeding, just as its companion clause reaches the knowing obstruction of IRS officers.

II. The Government's Interpretation Cannot Be Reconciled With The Tax Code's Other Criminal Provisions.

The government's sweeping interpretation of § 7212(a) is irreconcilable not just with the provision's text, but with the tax code's many other carefully crafted criminal provisions:

- The tax code sets out numerous misdemeanor offenses. Many of those misdemeanors, including the core prohibitions on failing to file a return and providing false statements to the IRS, could be charged as *felony* obstruction on the government's interpretation of § 7212(a), yielding a substantially higher maximum term of imprisonment and fine.
- The government's interpretation amounts to an all-purpose substitute felony when the government is unable to prove the more demanding elements that Congress required of other key tax felonies. For example, felony tax evasion requires the government to prove that the defendant undertook some affirmative evasive act. With obstruction, the government can obtain a felony conviction simply by relying on an omission.
- Even where the government can prove a tax felony, the government's interpretation would allow it to obtain a tack-on conviction for obstruction in almost every instance. Every conviction for tax evasion could be coupled with a conviction for obstruction as well.

Each provision of a statute should be read to harmonize rather than conflict with, supersede, or be redundant of other provisions. Harmonization is particularly crucial in the context of criminal prohibitions, where Congress's definition of elements and choice of punishment for a crime must be respected, and where what is prohibited must be clear "in language that the common world will understand." *Aguilar*, 515 U.S. at 600 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). This Court has in particular long policed the criminal provisions of the tax code to "give coherence to what Congress has done within the bounds imposed by a fair reading of legislation," and avoid interpretations that "would produce glaring incongruities." *Achilli v. United States*, 353 U.S. 373, 378-79 (1957), *superseded by statute as stated in Sansone v. United States*, 380 U.S. 343 (1965). And this general requirement must hold even greater sway when the several offenses under consideration were all enacted in the same Act, and Congress painstakingly explained its efforts to ensure that the resulting code produced a coherent, unified set of graduated penalties.

The government's interpretation of the residual clause produces those "glaring" – and highly unfair – incongruities, while Marinello's interpretation does not because it limits § 7212(a)'s application to the distinct conduct of knowingly impeding an IRS officer or proceeding.

A. The Code's Core Misdemeanors Become Felony Obstruction Under The Government's Interpretation.

The tax code defines a substantial amount of conduct as misdemeanors or lesser felonies that, under the government's interpretation of the obstruction clause, would double as felonies, or more serious felonies, in contravention of the punishment imposed by Congress for the more specific offense.

Section 7203. Section 7203 of the tax code is a prime example. Under that provision,

> [a]ny person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to [1] make a return, [2] keep any records, or [3] supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7203. These provisions require the government to prove that a defendant knew about the legal duty to pay a tax, keep required records, or supply information, and that he intentionally did not do so. *Cheek v. United States*, 498 U.S. 192, 202 (1991).

If the government is able to prove a misdemeanor under § 7203, it has all it needs to impose a felony punishment for obstruction under its capacious view of § 7212(a). The failure to make a return, keep required records, or supply required information to the IRS surely amounts to an impediment to what the government calls the "continuous, ubiquitous, and universally known to exist" administration of the tax code.

Nor is there any practical difference between the "willful" *mens rea* of § 7203 and the "corrupt" *mens rea* of § 7212(a) that protects defendants in this context. "Willfulness" requires the government to prove "the law imposed a duty on the defendant, that the defendant knew of that duty, and that he voluntarily and intentionally violated this duty." *Cheek*, 498 U.S. at 201; *see also United States v. Bishop*, 412 U.S. 346, 360 (1973) (defining "willfully" as denoting "a voluntary, intentional violation of a known legal duty."). "Corruption" requires the defendant to have "the intent to secure an unlawful advantage or benefit either for one's self or another." Pet. App. 18a (quoting *United States v. Parse*, 789 F.3d 83, 121 (2d Cir. 2015)); *see also United States v. Sorensen*, 801 F.3d 1217, 1225 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22, 31 (1st Cir. 2014).

In the context of taxes, the government will almost always be able to show that a defendant who willfully disregards his duty to pay taxes or any of the other duties imposed by § 7203 has done so to obtain some unlawful advantage. That advantage may often be a financial one but it need not be, as any unlawful benefit will suffice. *United States v. Giambalvo*, 810 F.3d 1086,

1098 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage"). That is presumably why the government acknowledges there is no meaningful difference between the two standards. "[T]he term 'corruptly endeavors' in Section 7212(a) is 'as comprehensive and accurate as if the word "willfully" was incorporated in the statute.'" BIO 12 (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)).

This case is a perfect example of how the government uses § 7212(a) to transform misdemeanor conduct into a felony. Marinello was in fact convicted of misdemeanors under §7203 for the willful failure to file tax returns for which he received a concurrent sentence of twelve months. Amended Judgment, ECF No. 130, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015). But the government chose not to charge Marinello with the willful failure to maintain required records under § 7203. Had it done so, of course, Marinello would have faced the same maximum penalty of one year's imprisonment. Instead, the government took the same allegation and made it a basis for a felony conviction under § 7212(a), for which Marinello was ultimately sentenced to 36 months' imprisonment. *Id.*

The government's conduct is all the more egregious when one considers that if the government had charged Marinello with the misdemeanor crime of failing to maintain records, then it would have had to prove that the IRS actually required him to keep those records. *See* 26 U.S.C. § 7203. But by using § 7212(a) to circumvent the very crime Congress defined to address the failure

to maintain records, the government simultaneously shed part of its burden of proof and tripled Marinello's penalty.

That reading of the statute would be incoherent under any circumstances, but it is particularly so here given that Congress enacted the misdemeanor provisions of § 7203 at the same time it enacted § 7212 as a felony. *See supra* at 8. Indeed, Congress specifically considered and rejected a proposal to elevate to a felony some of the misdemeanor conduct prohibited by § 7203. *See supra* at 8-9. That debate would have been meaningless if the obstruction provision already reached such conduct.

To be sure, there could be instances in which failing to maintain documents would amount to obstruction under § 7212(a), such as when an individual does not maintain such documents after receiving a summons or an audit notification from the IRS. But that conduct – taken in response to a direct inquiry from the IRS – is more culpable than the otherwise legal destruction of documents outside the context of an IRS proceeding. *Cf. Arthur Andersen*, 544 U.S. at 707-08 (holding that requires proof that defendant knowingly and corruptly caused the destruction of documents in connection with an anticipated proceeding). Confining § 7212(a) to intentional interference with an IRS proceeding appropriately reserves the felony charge for the more serious misconduct and prevents § 7212(a) from swallowing up the misdemeanor provisions of § 7203 in their entirety.

Section 7205. Section 7205(a) requires employees to supply truthful tax withholding information to their

employers. 26 U.S.C. § 7205(a) (making it a misdemeanor to "willfully suppl[y] false or fraudulent information, or … willfully fail[] to supply information thereunder which would require an increase in the tax to be withheld under section 3402"). A violation of this section carries a fine of up to $1000 or a prison term of up to one year. *Id.* Section 7205(b) imposes a parallel penalty for willfully making a false certification under certain portions of 26 U.S.C. § 3406(d), which requires disclosures related to interest and dividend backup withholding. 26 U.S.C. § 7205(b).

An employee who willfully provides false tax-related information to her employer almost certainly has done so to obtain an "unlawful benefit" in the form of reduced withholding or a lower tax assessment. Intentionally providing such false information would be obstruction on the government's view, even though the employee had no contact with any IRS agent or even the IRS. While such conduct is criminal, Congress's decision to make it a misdemeanor rather than a felony should be respected.

Section 7207. This provision makes it a misdemeanor to "willfully deliver[] or disclose[]" to the IRS "any list, return, account, statement, or other document, known … to be fraudulent or to be false as to any material matter," punishable by up to one year's imprisonment. 26 U.S.C. § 7207. Congress thus made a deliberate decision to punish false statements to the IRS as a misdemeanor, and to create a separate felony provision, § 7206, for false statements made under aggravated circumstances, such as under penalty of perjury or in connection with a compromise offer. But under the Government's interpretation of § 7212(a), a willful false statement

relating to taxes would almost certainly be regarded as "corrupt," and thus expose a defendant to punishment up to three years' imprisonment.

Section 7212(b). Section 7212 itself is incoherent on the government's interpretation of obstruction. Section 7212(b) prohibits the "forcible rescue" of property seized by the IRS, and authorizes a maximum two-year sentence for violations. 26 U.S.C. § 7212(b). Yet on the government's view, any forcible rescue would amount to obstruction under § 7212(a), exposing the defendant to a three-year sentence instead.

A statutory enactment should be read as a whole to avoid reading out any provisions. *See Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment" (quoting *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (internal quotation marks omitted)); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (similar). *Yates* is particularly instructive on this point. As explained above, in that case, the government contended that 28 U.S.C. § 1519 reached misconduct concerning any and "all physical objects." But Congress had passed another provision, § 1512(c)(1), at the same time as § 1519, that already indisputably extended to all physical objects. The Court explained that "if §1519's reference to 'tangible object' already included all physical objects … then Congress had no reason to enact §1512(c)(1)." *Yates*, 135 S. Ct. at 1085 (plurality opinion). The Court "resist[ed] a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act. *Id.* (*citing Marx v.*

General Revenue Corp., 568 U.S. 371, 386-87 (2013)); *see also McDonnell*, 136 S. Ct. at 2369 ("If 'question' and 'matter' were as unlimited in scope as the Government argues, the terms 'cause, suit, proceeding or controversy' would serve no role in the statute—every 'cause, suit, proceeding or controversy' would also be a 'question' or 'matter.'").

Nor is this the first time this Court has addressed an argument that a felony tax provision should be read to overlap with a misdemeanor provision. In *Achilli v. United States*, 353 U.S. 373 (1957), this Court held that under a prior version of the criminal tax code, a "general administrative provision" making tax evasion a misdemeanor could not apply to income tax evasion in light of Congress's inclusion of a specific felony income tax evasion crime within the then-operative income tax chapter. *Id.* at 379. As the Court described its holding in a later case, "the Court was unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States*, 380 U.S. 343, 348 (1965).

Congress was equally clear in *Spies v. United States*, 317 U.S. 492 (1943). *Spies* held that the evasion felony then codified at 26 U.S.C. § 145(b) required an affirmative act to distinguish it from the failure-to-pay misdemeanor codified at § 145(a). *Id.* at 497. Writing for the Court, Justice Jackson explained that

> [a] felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other

> offenses against the revenue laws. *But it would be unusual and we would not readily assume that Congress by the felony defined in section 145(b) meant no more than the same derelictions it had just defined in section 145(a) as a misdemeanor.*

Id. (emphasis added).

The same considerations apply here. This Court should be equally "unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area" of tax obstruction. *Sansone*, 380 U.S. at 348. Congress's decision to penalize certain specific conduct as a misdemeanor should be respected rather than discarded through a misguided interpretation of § 7212(a).

B. The Government's Interpretation Transforms § 7212 Into An All-Purpose Felony That It Can Use Where It Cannot Prove The Elements Of Other Crimes.

Under the government's construction, § 7212(a) not only enhances misdemeanors to felonies, but also provides a back-pocket secret weapon when the government is unable or unwilling to prove the elements of the felonies that Congress actually defined.

For example, as noted above, § 7206 of the tax code defines a number of crimes related to fraud and false statements in the tax context, each of which carries the same three-year exposure as § 7212(a). But these crimes apply only where the false statements were made in particular circumstances, such as under "penalt[y] of perjury." 26 U.S.C. § 7206. Yet under the government's

interpretation, § 7212(a) would capture the same basic conduct but allow the government to secure a felony conviction and a three-year sentence without having to prove that the statement was made "under the penalties of perjury," *id.* A material falsehood relating to taxes would always affect the "administration" of the tax code, and would presumably always be made in pursuit of an "unlawful benefit" in the form of a lower tax assessment.

The government's reading of § 7212(a) thus vitiates Congress's inclusion of the "under the penalties of perjury" element in § 7206(1), creating precisely the kind of "glaring incongruity" this Court has refused to read into the criminal tax provisions. *Achilli*, 353 U.S. at 379; *see also Yates*, 135 S. Ct. at 1083-84 (concluding that Congress did not intend "to make § 1519 an all-encompassing ban on the spoliation of evidence" because, in part, Congress placed the section within a chapter containing other provisions "prohibiting obstructive acts in specific contexts").

A similar incongruity is presented by the tax evasion statute, 26 U.S.C. § 7201. This section was designed by Congress to serve as the "capstone" to the carefully reticulated set of tax offenses in the 1954 code. *Sansone*, 380 U.S. at 350. To prove tax evasion, the government must establish both an affirmative act of evasion and a tax deficiency. *Id.* at 351. But the government's definition of § 7212(a) would dispense with those requirements, allowing tax obstruction to pinch hit as a junior varsity version of evasion, without any obligation to prove an affirmative act or the existence of a deficiency.

Instead, the government could, for example, obtain a felony obstruction conviction where there was proof only of inaction– *e.g.*, a failure to report income, a failure to keep records, or a failure to provide complete information to an accountant – rather than an affirmative act by the defendant. Similarly, the government could obtain a felony conviction where the defendant's actions simply made it more difficult for the IRS to determine if there had been a deficiency – even absent any proof that the defendant owed any money at all. Allowing the government to obtain an obstruction conviction for, say, "evasive" inaction where there is no proof of a substantial tax deficiency, wrongly creates a crime that Congress never intended.

C. The Government's Interpretation Allows It To Tack A § 7212(a) Charge On To Almost Any Other Core Tax Crime.

Even apart from those instances in which the government could use § 7212(a) to transform a misdemeanor into a felony, or avoid proof of the elements of a felony, the government's reading presents the additional problem that it transforms obstruction into an add-on statute, capable of being charged in conjunction with almost any core tax felony. Tax evasion, as noted, requires the government to prove an evasive act and a tax deficiency. With that proof, a § 7212(a) obstruction charge could be stacked onto every § 7201 prosecution. The same conclusion holds for every conviction under the tax fraud statute. And indeed, the government is increasingly charging obstruction in cases where it charges other felonies. *See, e.g.*, *United States v. Morris*, 3 F. App'x 223, 224 (6th Cir. 2001);

United States v. Anderson, 384 F. Supp. 2d 32, 35 (D.D.C. 2005).

A criminal provision should not be read to be duplicative of a broad swath of more narrowly-defined crimes. *See, e.g.*, *Yates*, 135 S. Ct. at 1085 ("We resist a reading of §1519 that would render superfluous an entire provision passed in proximity as part of the same Act."). That conclusion is particularly warranted in this case given that there is not an iota of evidence that Congress intended § 7212(a) to function as an all-purpose tax crime, capable of being charged in conjunction with other tax felonies or misdemeanor on the books. On the contrary, as discussed above, the text and legislative history of the provision show that Congress intended it to be focused on the specific evils of interfering with IRS officers or known proceedings.

III. Section 7212(a)'s Corrupt *Mens Rea* Requirement Does Not Justify The Government's Interpretation.

In its opposition to certiorari, the government placed substantial weight on the argument that its interpretation of § 7212(a) does not sweep unduly broadly because the statute requires proof of "corrupt" conduct. BIO 11-12. That argument is misguided for several reasons.

First, as explained above, the corrupt *mens rea* requires the government to prove only that the defendant acted to obtain some unlawful benefit. As a result, that *mens rea* does not save the provision from swallowing up the numerous willful misdemeanor crimes in the Code. Because of the essential similarity between

the government's definitions of willfulness and corruption, nearly every instance in which a taxpayer willfully fails to maintain required documents, fails to make a return, or engages in any of other acts that Congress classified as a misdemeanor in the Code could easily be re-characterized as felony obstruction.

Second, as this case shows, imposing a corrupt *mens rea* standard on an amorphous obstruction provision does not meaningfully restrain the sweep of the statute or the potential for prosecutorial abuse. As the dissenters below put it,

> the jury charge allowed [Marinello to be convicted] on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept them and preserved them from destruction, he failed to give them to his accountant …. If this is the law, nobody is safe.

Pet. App. 42a

There truly is no safety in a law that allows a prosecutor to look back and decide that an individual – who violated no other recordkeeping requirement – nevertheless committed a felony by failing to keep more copious records or, even more extraordinarily, failing to give "complete" information to an accountant who did not communicate with the IRS. One could always keep more records or give more information to one's accountant, and those omissions presumably could always be said to hinder the IRS should it choose at some subsequent point to investigate. Indeed, if the statute has the scope articulated by the government, then most

Americans have doubtlessly committed the crime's *actus reus* many times over. At that point, all the prosecutor needs to do is allege that the individual failed to do more because he was seeking to hinder the IRS's assessment efforts or some other unlawful benefit. That is an allegation that is easy to make, and allows an "overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*." Pet. App. 45a.

Recordkeeping is hardly the only sphere in which the government's interpretation of obstruction poses dangers. Individuals and businesses make daily decisions about how they organize their financial undertakings. Congress did not impose a free-standing obligation on taxpayers to make their finances maximally easy for the government to parse. A business, for example, might choose to operate through a complex chain of subsidiaries, which is conduct that is perfectly legal (and common).

Should that otherwise legal decision make it more difficult, however, for the IRS to assess the business's tax liability, the only barrier standing between the taxpayer and a felony conviction is the corruption requirement, which is simple to allege as the government can argue that the defendant's actions were taken for the purpose of avoiding taxes. The result will be that individuals and businesses will shy away from legitimate business activity – including legitimate tax minimization activity – out of concern that their activities could be the subject of a felony obstruction charge. *Cf. McDonnell*, 136 S. Ct. at 2372 (government's broad view of *quid pro quo* "would likely chill federal

officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." (internal quotation marks and citation omitted)).

Third, and relatedly, it is precisely these kinds of concerns that led this Court to construe "corrupt" obstruction provisions narrowly in other cases. For example, the obstruction of justice provision in *Aguilar* prohibited "corrupt[]" obstruction of the "due administration of justice." 515 U.S. at 598 (quoting 18 U.S.C. § 1503). The government argued that the provisions swept broadly to include any false statement to an investigator and that § 1503's obstruction provision did not require the government to prove the statements would be used in a judicial proceeding. But the Court rejected this argument, holding that the statute's "corrupt" mens rea requirement did not give the government carte blanche to charge any conduct that might bear a resemblance to acting "corruptly." 515 U.S. at 597.

Instead, the Court construed the provision to allow the government to prosecute only those "corrupt" acts which have a "nexus," *i.e.*, "a relationship in time, causation, or logic," to judicial proceedings. *Aguilar*, 515 U.S. at 599. Although the government argued the statute pertained to any "corrupt" behavior based on the plain language, the Court found the language "a good deal less clear" than is "usually require[d] in order to impose criminal liability" on a class of conduct as broad as the government sought. *Id.* at 602.

A decade later, this Court again prohibited the government from relying on a "corrupt" *mens rea* element to justify a broad reading of a similar

obstruction statute in *Arthur Andersen*. The case was appealed, in part, based on jury instructions that defined "corruptly" as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." Brief for the United States on Writ of Certiorari at i, *Arthur Andersen*, 544 U.S. 696, 2005 WL 738080. The government argued the instructions sufficiently delineated what actions could be charged under the statute. *Id.* at 26-29, 2005 WL 738080. The Court rejected this view, noting that, "[b]y definition, anyone who innocently persuades another to withhold information from the Government 'get[s] in the way of the progress of' the Government," which effectively "diluted the meaning of 'corruptly' so that it covered innocent conduct." 544 U.S. at 706-07 (alteration in original) (quoting Webster's 3d 1132). Just as in *Aguilar*, this Court held that the government could not prosecute all actions that might be "corrupt," but only those for which there is a nexus between the "corrupt" conduct and a particular proceeding. *Id.* at 696.

In short, by giving obstruction its proper scope – corrupt actions taken directly against IRS officers or in the context of IRS proceedings – the statute is properly limited and tied to the particular misconduct that Congress sought to curb.

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal.

The text, structure, and purpose of § 7212(a) all support Marinello's construction of the statute. But to the extent this Court finds the provision to be

ambiguous, that "ambiguity … should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Section 7212(a) is a felony criminal provision that the government claims covers a broad swath of conduct, including conduct that Congress has expressly specified elsewhere amounts to a misdemeanor. *See Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.")

As this Court has repeatedly explained, particularly in the context of obstruction statutes, "before we choose the harsher alternative, [we] require that Congress … have spoken in language that is clear and definite." *Cleveland*, 531 U.S. at 25 (quoting *United States v. Universal CIT Credit Corp.*, 344 U.S. 218, 222 (1952)); *see also Aguilar*, 515 U.S. at 602 (while literal reading of statute could be read to encompass the government's interpretation, "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability"); *Arthur Andersen*, 544 U.S. at 703 ("We have traditionally exercised restraint in assessing the reach of a federal criminal statutes … out of concern that `a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." (citations and internal quotation marks omitted)); *Yates*, 135 S. Ct at 1088 (applying rule of lenity).

Thus, just as in *Aguilar*, *Arthur Andersen*, and other cases, this Court should require Congress to speak more clearly before it assumes that Congress intended to make a federal felony out of the broad categories of conduct the government seeks.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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September 1, 2017