No. _____

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR CERTIORARI

Carlo J. Marinello, II, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

OPINIONS BELOW

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 unreported but is available at 2017 WL 640078. 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 be 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

This case presents an important and recurring question of criminal tax liability that has divided the courts of appeals. Section 7212(a) of the Internal Revenue Code makes it a felony to "corruptly or by force … 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 … obstruct[] or impede[] … due administration of this title*." 26 U.S.C. § 7212(a) (emphasis added).

The Sixth Circuit, relying on this Court's interpretation of a nearly identical obstruction statute in *United States v. Aguilar*, 515 U.S. 593 (1995), has interpreted § 7212(a)'s "residual clause," italicized in the paragraph above, to require that the government prove a defendant obstructed a pending Internal Revenue Service (IRS) action or proceeding, such as an investigation or audit, of which the defendant was aware.

In the decision below, the Second Circuit expressly rejected the Sixth Circuit's interpretation and instead joined three other circuits in finding that a defendant may be guilty of obstructing the administration of the tax code even if the defendant has no knowledge of a pending IRS action or proceeding—indeed, even if there is no pending IRS action or proceeding.

It is difficult to overstate the sweep of that interpretation, which unmoors the obstruction statute from any particular IRS investigation and elevates it into a general prohibition on conduct that hinders the IRS in any way. Under the Second Circuit's

construction, any action that could make the IRS's ability to assess and collect taxes more difficult—say throwing away an old business receipt or asking for a tip in cash—could be the basis of a felony obstruction charge if alleged by a prosecutor to be "corrupt." Indeed, this interpretation of § 7212(a)'s residual clause is so broad that it swallows up other tax crimes. It is difficult, for example, to conceive of any act of tax *evasion* or tax *fraud* that could not also be charged as tax *obstruction* on the Second Circuit's reading.

In a sharply worded dissent from the denial of *en banc* review, Judges Jacobs and Cabranes warned, "[i]f this is the law, nobody is safe." Pet. App. 42a. Concerned that the panel opinion "affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed," the dissenters explained that the "line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern," and that the panel's interpretation "serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted." Pet. App. 45a-46a. According to the dissent, the panel had misconstrued the statute as "a prosecutor's hammer that can be brought down upon any citizen," rather than as a "specialized tool" to prevent obstruction of "active IRS investigations." Pet. App. 46a.

This Court's review is warranted to determine the scope of § 7212(a). There is an acknowledged split, with the Sixth Circuit's interpretation standing against decisions from the First, Second, Ninth, and Tenth Circuits. This case is an ideal vehicle to resolve that split

because the issue is squarely presented and dispositive of Petitioner's conviction under § 7212(a). The question is also one of great significance. Everyone is subject to the tax code, and this Court should decide whether Congress intended § 7212(a) to upend the structure of the Code's criminal tax provisions and bestow such broad powers on prosecutors.

Finally, review is warranted because the decision below is incorrect. The text, structure, and purpose of § 7212(a)'s residual provision are analogous to residual or "omnibus" provisions of other obstruction statutes, which this Court has repeatedly cabined. In so doing, the Court has recognized the need to "exercise[] restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, 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.'" *Aguilar*, 515 U.S. at 600 (citation omitted) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). And it has held that it will not interpret such provisions so broadly as to reach any and all conduct that a prosecutor might call "corrupt."

Petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. 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 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.

In support of that 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. Pet. App. 6a-7a.

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 alleged in the indictment—including omissions—would be sufficient to find Marinello guilty under § 7212(a), and that the jury need not agree on which of the eight acts 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, *United States v. Marinello*, No. 1:12-cr-00053-WMS-HBS-1 (W.D.N.Y. July 16, 2015), ECF No. 130. 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 "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Pet. App. 51a-57a.

B. 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 *Aguilar*, 515 U.S. 593). 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," Pet. App. 24a-25a, 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." Pet. App. 27a.

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-46a. 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 a regime where a prosecutor could say "Show me the man, and I'll find you the crime." Pet. App. 49a.

Marinello timely petitioned for review from this Court on March 21, 2017.

REASONS FOR GRANTING THE WRIT

I. This Case Presents A Perfect Vehicle To Resolve The Circuit Split On The Proper Interpretation Of Section 7212(a).

The courts of appeals expressly disagree about the proper scope of § 7212(a). Had Marinello been prosecuted in Ohio rather than New York, he could not have been convicted under § 7212(a) without proof that he had obstructed some IRS action of which he was aware.

Specifically, in *United States v. Kassouf*, the Sixth Circuit held that "due administration of the Title [under § 7212(a)] requires some pending IRS action of which the defendant was aware," including, but not limited to, "subpoenas, audits or criminal tax investigations." 144 F.3d at 957 & n.2. Relying on *Aguilar*, in which this Court interpreted nearly identical language in the obstruction of justice statute, 18 U.S.C. § 1503(a), the Sixth Circuit read the omnibus clause of § 7212(a) as similarly imposing the requirement of a pending action or proceeding of which the defendant was aware. *Kassouf*, 144 F.3d at 956-57. A broader construction of § 7212(a), the Sixth Circuit reasoned, would "permit[] the IRS to impose liability 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." *Id.* at 957.

The Sixth Circuit recently reaffirmed *Kassouf* in *United States v. Miner*, holding that "a defendant may not be convicted under the omnibus clause unless he is 'acting in response to some pending IRS action of which

[he is] aware.'" 774 F.3d 336, 345 (6th Cir. 2014) (quoting *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004)). In doing so, the Sixth Circuit reiterated its reluctance to read § 7212(a) to punish a defendant who "may have had no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *Id.* at 344 (quoting *Kassouf*, 144 F.3d at 958).

Conversely, in this case, the Second Circuit expressly rejected the Sixth Circuit's construction of § 7212(a). As explained above, the Second Circuit held that the residual clause does not require the defendant have any knowledge of any IRS action he is obstructing, and instead reaches any corrupt act or omission that allegedly has the effect of obstructing or impeding any one of the "vast" array of activities that the IRS carries out, such as "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers['] submissions; as well as monitoring taxpayers' compliance with their obligations." Pet. App. 25a.

In so holding, the Second Circuit expressly embraced the decisions of three other courts of appeals that have also rejected the rule adopted by the Sixth Circuit. *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015) (disagreeing with *Kassouf*), *cert. denied*, 136 S. Ct. 1163 (2016); *United States v. Floyd*, 740 F.3d 22, 31-32 & n.4 (1st Cir. 2014) (same); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) ("[T]he government need not prove that the defendant was aware of an ongoing

tax investigation to obtain a conviction under § 7212(a).").

The Court should resolve the circuit split in this case. Further percolation is unnecessary and further difference in interpretation is unjust. As the dialog between the majority opinion and the dissent from denial of rehearing *en banc* makes clear, the arguments on both sides of this issue have been fully aired. There is no possibility of the circuit conflict resolving itself without the Court's intervention. In *Miner*, the Sixth Circuit explicitly reaffirmed its holding in *Kassouf* despite the weight of contrary authority from other circuits. 774 F.3d at 345. The government then declined to file a petition for rehearing *en banc* (after taking an extension of time to consider the issue), and also declined to file a petition for certiorari. Accordingly, the law in the Sixth Circuit is now entrenched in favor of Petitioner's position. Only this Court can resolve the disagreement among the circuits.

Finally, this case is an excellent vehicle for resolving the reach of § 7212(a). As both the majority and the dissenters below made clear, Marinello's conviction for violating § 7212(a) rises and falls on the resolution of the question presented: if the Second Circuit had agreed with the Sixth Circuit's decision in *Kassouf*, Marinello would have prevailed. Indeed, the government acknowledged the point in its Second Circuit brief. Rather than trying to distinguish *Kassouf*, the government acknowledged that "[a] Circuit split exists as to whether the government must prove the defendant was aware of an ongoing tax investigation in order to convict under section 7212(a)," and asked the Court to

"reject the Sixth Circuit's determination" because it "conflicts with three other circuits which have issued decisions which are more consistent with the statutory language." Br. for the United States at 9, *United States v. Marinello*, No. 15-2224 (2d Cir. Dec. 14, 2015).

II. The Question Presented Is Important.

As the dissenters below explained, the question presented is one of singular importance because the Second Circuit's interpretation criminalizes a vast array of conduct that Congress almost certainly did not intend § 7212(a)'s residual provision to reach.

Under the Second Circuit's interpretation, a defendant who does not maintain records at a time when the IRS does not have a pending action against him—let alone undertaking an action of which he is aware—can nonetheless be convicted of a felony of obstructing the administration of the tax code. An aggressive prosecutor could use almost any act or omission—the failure to keep a receipt, the decision to be paid in cash, the choice to use a particular method of bookkeeping—as the basis of an obstruction charge under this interpretation. To be sure, § 7212(a) requires the defendant to have acted "corruptly," but "alleging a corrupt motive is no burden at all" and a negligent or even reasonable error on the part of a taxpayer could be recast in an indictment as an intentional one made for the sake of obtaining an unlawful gain. Pet. App. 45a. As with most criminal charges this vague, few defendants would risk going to trial on a felony count, and instead are likely to accede to some sort of plea deal.

These concerns are particularly pertinent in the tax context where corporate and individual taxpayers may be chilled from using legitimate but aggressive tax avoidance strategies for fear of being convicted on a felony obstruction charge. "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 decision below also warrants this Court's attention because it transforms an obstruction provision into an all-purpose tax crime. Tax fraud and tax evasion are already felonies. 26 U.S.C. § 7206 (tax fraud); 26 U.S.C. § 7201 (tax evasion). Yet under the Second Circuit's ruling, those crimes could in every case be charged as obstruction because they necessarily involve willful wrongful acts to reduce or eliminate the defendant's tax burden. *E.g.*, *Boulware v. United States*, 552 U.S. 421, 431 (2008) ("[T]he substantive provisions defining tax evasion and filing a false return expressly require … willfulness"). Moreover, it is a *misdemeanor* to willfully fail to pay one's taxes. 26 U.S.C. § 7203. The Second Circuit's interpretation would transform every such misdemeanor into a felony obstruction charge.

This Court has long recognized the importance of not giving residual clauses unduly broad readings such that prosecutors can essentially decide which conduct is criminal. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("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."

(quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985))); *Skilling v. United States*, 561 U.S. 358, 416 (2010) ("fair notice of what is prohibited" required to avoid impermissible vagueness); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) ("fair warning" concern animates restraint in interpreting criminal statutes (quotiong *McBoyle*, 283 U.S. at 27)); *Pettibone v. United States*, 148 U.S. 197, 207 (1893) (interpreting a predecessor general criminal obstruction statute as requiring knowledge of an attempted administration of justice). This Court should grant the petition in order to resolve the important question of whether Congress intended to give such unfettered discretion to prosecutors under § 7212(a).

III. The Decision Below Was Wrongly Decided.

Review is also warranted because the Second Circuit misconstrued § 7212(a) by reading it to encompass any corrupt act that in any way undermines the operation of the tax laws. Pet. App. 25a-26a.

In prior cases construing federal criminal statutes, this Court has "stressed repeatedly that 'when choice has to be made between two readings of what conduct Congress has made a crime, 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)). Doing so is warranted "both out of deference to the prerogatives of Congress, 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.'"

Aguilar, 515 U.S. at 600 (citation omitted) (quoting *McBoyle*, 283 U.S. at 27). Applying these principles, this Court has consistently rejected the government's attempts to stretch federal criminal statutes to their broadest possible reach. *See, e.g.*, *Yates*, 135 S. Ct. at 1081-89; *Arthur Andersen*, 544 U.S. at 703-08; *Aguilar*, 515 U.S. at 600.

For example, in *Aguilar*, the statute at issue made it a crime to "corruptly" obstruct or endeavor to obstruct the "due administration of justice." 18 U.S.C. § 1503(a). The government argued that this broad language covered a false statement made to an investigator in the course of an investigation, but the Court rejected that broad interpretation. It instead construed the provision to require that the government prove that a defendant acted "with an intent to influence judicial or grand jury proceedings," and that the defendant's "corrupt" acts had a "nexus," *i.e.*, "a relationship in time, causation, or logic," to judicial proceedings. *Aguilar*, 515 U.S. at 599. As the Court explained, the statute was a "good deal less clear" than the Court "usually require[d] in order to impose criminal liability" on a class of conduct as broad as the government sought. *Id.* at 602.

This case is on all fours with *Aguilar* and this Court's long-standing interpretation of residual clauses. Indeed, § 7212(a)'s residual provision is nearly identical to the residual provision construed in that case. The proper construction of § 7212(a) required the government to prove that Marinello impeded or endeavored to impede an IRS action or proceeding of which he was aware, that is, that there was a "nexus" between his conduct and an IRS enforcement action, such as an audit.

The Second Circuit found *Aguilar* inapposite, but its bases for distinguishing the case are unpersuasive. For instance, it noted that § 1503's residual provision at issue in *Aguilar* follows a series of statutory clauses that "focus principally on grand jury or judicial proceedings." Pet. App. 23a. But § 7212(a)'s residual provision follows a clause that is expressly intended to prohibit actions targeted at *specific* IRS "officer[s] [or] employee[s]" engaged in enforcing the tax code, thus indicating that the provision contemplates obstruction of some specific enforcement activity rather than the abstract operation of the tax laws. *See* Pet. App. 47a.

The Second Circuit also stated, without much elaboration, that nothing in the history of § 7212(a) supported the Sixth Circuit's conclusion. But § 7212(a)'s history strongly indicates that Congress did not intend the sweeping construction the government seeks. The statutes from which § 7212(a) was derived punished those who "forcibly obstruct[ed] or hinder[ed]" a tax assessor or collector in the "execution of" the tax laws and those who "forcibly rescue[d]" property seized by a tax assessor or collector. *See* Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238; Internal Revenue Code of 1939, ch. 34, § 3601(c), 53 Stat. 435, 436.

Congress gave no indication that by incorporating a residual clause it intended to drastically expand the statute's reach to make it a felony to take any "corrupt" act—such as failing to maintain business records—that might someday, somehow interfere with the proper operation of the tax laws. Instead, the House and Senate reports that accompanied the legislation suggested only that Congress intended to broaden the statute to

encompass threats of force and "corrupt[]" acts (*e.g.*, bribery) that interfered with IRS employees' enforcement activities. *See, e.g.*, H.R. Rep. No. 83-1337, at 108 (1954), *reprinted in* 1 Internal Revenue Acts of the United States: The Revenue Act of 1954 with Legislative Histories and Congressional Documents (Bernard D. Reams Jr. ed. 1982).

Had Congress intended to reach corrupt acts that have no nexus to pending IRS enforcement activities and that exhibit no intent to obstruct specific IRS officers and employees engaged in enforcement activities, one would have expected Congress to make that clear. Congress "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

The Second Circuit also rejected, Pet. App. 46a, the Sixth Circuit's concern that a broad reading of § 7212(a)'s omnibus provision could "open[] the statute to legitimate charges of overbreadth and vagueness." *Kassouf*, 144 F.3d at 958. In the Second Circuit's view, § 7212(a)'s *mens rea* requirement, which requires that an action be done corruptly, "sufficiently restricts the omnibus clause's reach." Pet. App. at 27a (quotation marks omitted).

But in *Aguilar*, the inclusion of the same *mens rea* requirement in § 1503 did not assuage this Court's concerns about adopting a broad reading of the statute. As the Court explained, a person who made a false statement without knowledge that it would be used in court might still "inten[d] to obstruct justice," but the statute was a "good deal less clear … than we [have] require[d]" to impose such broad liability, untethered to

the obstruction of any particular proceeding. *Aguilar*, 515 U.S. at 602. Moreover, the "corrupt" requirement does little to rein in § 7212(a)'s scope as a practical matter. As Judge Jacobs explained, "the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Pet. App. 45a. "[*A*]*lleging* a corrupt motive is," also, "no burden at all." Pet. App. 45a.

In sum, the Second Circuit panel adopted an erroneous reading of the residual clause that does not make sense of its text, structure, and purpose. This Court should grant review to clarify that the clause encompasses only corrupt acts and omissions undertaken with awareness of a pending IRS action.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 21, 2017

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,

v.

Carlo J. Marinello, II, Defendant–Appellant.

Docket No. 15-2224

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August Term, 2015

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Argued: February 11, 2016

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Decided: October 14, 2016

Before: Pooler and Sack, Circuit Judges, and Failla, District Judge.[*]

[*] Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

OPINION

Sack, Circuit Judge:

Defendant-appellant Carlo J. Marinello, II, a resident of Erie County in western New York State, owned and operated a freight service that couriered items to and from the United States and Canada. From approximately 1992 through 2010, Marinello neither kept corporate books or records nor filed personal or corporate income tax returns. Following an investigation by the Internal Revenue Service (the "IRS"), he was indicted by a grand jury sitting in the United States District Court for the Western District of New York on nine counts of tax-related offenses that allegedly occurred from 2005 through 2009. A jury found him guilty on all counts. He was sentenced to thirty-six months' imprisonment and one year of supervised release, and ordered to pay $351,763.08 to the IRS in restitution.

Under one of the counts of conviction, Marinello was charged with violating 26 U.S.C. § 7212(a). One portion of the statute imposes criminal liability on one who "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" (i.e., the Internal Revenue Code). *Id.* Another portion, often referred to as the "omnibus clause," imposes criminal liability on one who "in any other way corruptly ... obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title." *Id.* Marinello was charged with violating the omnibus clause.

On appeal, Marinello principally argues that we, like the Sixth Circuit addressing the same issue, should construe the phrase "the due administration of this title" in the omnibus clause to include only a pending IRS action of which a defendant was aware. He contends that his conviction under section 7212(a) cannot stand under this construction because the government offered no evidence at trial that he knew of a pending IRS investigation against him at the time of the actions on which the conviction was based. He also argues that a conviction under the omnibus clause cannot be premised on a defendant's omission, as it may have been in the case at bar, and that the district court committed procedural error during the sentencing proceedings.

We exercise jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and affirm Marinello's conviction and sentence.

BACKGROUND

Factual Background

In 1990, Marinello incorporated Express Courier Group/Buffalo, Inc. ("Express Courier"), a New York corporation. Express Courier maintained a freight service that couriered documents and packages between the United States and Canada. Despite owning and managing the company, Marinello maintained little documentation of his business income or expenses. He shredded or discarded most of the business's records, including bank account statements, employee work statements, gas receipts, and bills. Marinello paid his employees in cash and did not issue

them (or himself) tax documents such as familiar Form 1099s or Form W–2s. He often used Express Courier's funds for personal purposes, including mortgage payments on his residence (made indirectly through weekly cash contributions to his wife) and monthly payments to his mother's senior living center.

In December 2004, the IRS received an anonymous letter purporting to outline some of Marinello's business practices and accusing him of tax evasion. IRS Special Agent Angela Klimczak was assigned to investigate those allegations. Upon reviewing its own records, the IRS discovered that, from at least 1992 onward, Marinello failed to file personal or corporate income tax returns. Ultimately, Agent Klimczak recommended that the investigation be closed because the IRS could not at that time determine whether the unreported income was significant. Marinello had no knowledge of this investigation.

In 2005, Marinello sought the advice of counsel, whom he informed of his failure to file his tax returns. Counsel told Marinello that this failure to file was improper and referred him to an accounting firm for a consultation. Allan Wiegley, a certified public accountant at that firm, told Marinello that he needed to provide records of business receipts and expenses in order to pay corporate taxes with respect to Express Courier and its business. Marinello was unable to do so: He had destroyed or failed to keep the documents.

Marinello met with Wiegley again the following year to discuss a different matter. During the meeting, Marinello stated that he had made no progress in gathering Express Courier's business records. Wiegley

declined to enter into a contract to perform accounting services for Express Courier or Marinello because there was inadequate documentation for him to prepare a corporate tax return. Despite the advice from counsel and two meetings with Wiegley, Marinello did not begin maintaining books and records for Express Courier.

In each of the years 2005 through 2008, Express Courier had generated annual total gross receipts of between $200,718.88 and $445,184. During each of those years, Marinello took approximately $26,000 to $50,000 from Express Courier's business account and spent it in payment of his personal expenses.

The IRS re-opened its investigation of Marinello in 2009. On June 1, 2009, Agent Klimczak conducted an interview of Marinello at his home. He told her that he could not recall the last time he had filed an income tax return. He initially maintained that he did not file tax returns because he thought they were not required for persons who made less than $1,000 per year. He eventually admitted that he had earned more than that amount annually and should have paid taxes, but "never got around to it." Testimony of Angela Klimczak, August 6, 2014, Trial Transcript ("Trial Tr.") at 172 (App'x 181). He stated that he used business income (by cashing checks from Express Courier's customers and depositing a portion of them into his personal bank account) as well as his business bank account to pay for personal expenses. He confirmed that he shredded bank statements and that he did not keep track of Express Courier's income or expenses. He also remembered telling an accountant that he

shredded most of his business records. Marinello explained that he destroyed these documents because "that's what [he had] been doing all along" and that he "took the easy way out." *Id.* at 194 (App'x 203).

Procedural History

On October 16, 2012, in the United States District Court for the Western District of New York, Marinello was charged in a superseding indictment with corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a) (Count One), and willfully failing to file individual and corporate tax returns for calendar years 2005 through 2008, in violation of 26 U.S.C. § 7203 (Counts Two through Nine). Count One alleged that Marinello had violated section 7212(a) by, "among other thing[s]":

(1) failing to maintain corporate books and records for [Express Courier] of which the defendant was an employee, officer, owner and operator;

(2) failing to provide the defendant's accountant with complete and accurate information related to the defendant's personal income and the income of Express Courier;

(3) destroying, shredding and discarding business records of Express Courier;

(4) cashing business checks received by Express Courier for services rendered;

(5) hiding income earned by Express Courier in personal and other non-business bank accounts;

(6) transferring assets to a nominee;

(7) paying employees of Express Courier with cash; and

(8) using business receipts and money from business accounts to pay personal expenses, including the mortgage for the residence in which the defendant resided and expenses related to the defendant's mother's care at a senior living center.

Superseding Indictment, dated October 16, 2012, at 1–2 (App'x 75–76) (formatting altered).[1]

Before trial, Marinello sought an instruction that "the jury ... be unanimous on at least one of the means under which the government ... alleged [that] [he] ha[d] violated [title 26 section 7212(a)]" in order to convict him of that offense. Defendant's Requested Jury Instruction, dated September 25, 2012, at 1 (App'x 41). If any juror harbored a reasonable doubt on any one of the means alleged, the instruction required an acquittal on Count One. *Id.* The government opposed this proposal as a misstatement of the law, contending that it was not required to prove all of the means specified in Count One.

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[1] The original indictment alleged a ninth means of corrupt obstruction under Count One: "failing to file with the [IRS] personal income tax returns and corporate tax returns for Express Courier." Indictment, dated February 14, 2012, at 2 (App'x 25). In response to Marinello's motion to strike this allegation as duplicitous of the remaining counts of the indictment, the government filed the superseding indictment, which removed it.

At a pre-trial conference, the district court (William M. Skretny, *Judge*) reserved ruling on the proposed jury instruction until trial. During that conference, Marinello's counsel represented that there was "no question [that Marinello] did not file his tax returns, corporate and personal," and that he had advised Marinello "to take a plea" to Counts Two through Nine. *See* Transcript of pre-trial conference, October 4, 2012, at 2 (App'x 60). But Marinello declined to plead guilty to Count One, a felony. App'x 60–61.

Marinello subsequently moved for submission to the jury of a special verdict form requiring the jury to indicate whether it found him guilty or not guilty regarding each of the eight means of violating section 7212(a) alleged in Count One of the superseding indictment. By text order, the district court deferred ruling on this request until trial.

At trial, defense counsel conceded that Marinello did not file his tax returns[2] but argued that Marinello could not be convicted on Count One because he lacked the requisite criminal intent under section 7212(a), inasmuch as he did not "corruptly" obstruct or impede the administration of the Internal Revenue Code.[3]

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[2] The parties further stipulated that Marinello did not file with the IRS personal tax returns or corporate tax returns for Express Courier for tax periods 1992 through 2010. August 6, 2014 Trial Tr. at 64 (App'x 140).

[3] As to the remaining counts, Marinello argued that he was not guilty because the government could not prove he "willfully" failed to file his tax returns. August 6, 2014 Trial Tr. at 50 (App'x 127). *See* 26 U.S.C. § 7203 ("Any person required under this title ... to make a return ... who willfully fails to ... make such return ... shall,

Defense counsel further argued that Marinello must have affirmatively "do[ne] something," "[l]ike file a phony return," to be guilty of this offense. August 6, 2014 Trial Tr. at 55 (App'x 132).

Over Marinello's objection, the district court declined to instruct the jury that it had to unanimously agree on at least one of the eight specified means by which Marinello allegedly violated section 7212(a) to find him guilty under that section. No special verdict form was provided to the jury with respect to this offense. Instead, the district court instructed the jury as to the underlying means contained in Count One as follows:

> [T]he indictment alleges multiple methods in which the crime [of violating section 7212(a)'s omnibus clause] can be committed, but the government does not have to prove all of them for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of the obstructive acts listed in the indictment is enough. To return a guilty verdict, all 12 of you must agree that at least one of these has been proved. However, all of you need not agree that the same one has been proved.

August 11, 2014 Trial Tr. at 471 (App'x 433).

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in addition to other penalties provided by law, be guilty of a misdemeanor....").

The jury convicted Marinello on all counts. He then moved for a judgment of acquittal or a new trial under Federal Rules of Criminal Procedure 29 and 33, respectively, which the government opposed.[4] Marinello argued, *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. Employing that construction of the statute, which the Sixth Circuit had previously adopted in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), Marinello contended that he should be acquitted because there was no evidence that he had become aware of the IRS's investigation until his June 1, 2009, interview with Agent Klimczak, which occurred after the offense conduct alleged in the superseding indictment had already taken place.

The district court declined to construe section 7212(a) that narrowly. Noting that a later panel of the Sixth Circuit had limited *Kassouf* to its facts, and that other courts had declined to follow the *Kassouf* court's reasoning, the district court concluded that "[k]nowledge of a pending [IRS] investigation is not an essential element of the crime." Decision and Order at 6–7, *United States v. Marinello*, No. 12 Cr. 53S (W.D.N.Y. June 26, 2015) (App'x 549–50) (citing *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999) and *United States v. Willner*, No. 07 Cr. 183, 2007 WL

[4] Before the defense rested at trial, Marinello also made a motion pursuant to Rule 29, which was denied by oral order.

2963711, at *4, 2007 U.S. Dist. LEXIS 75597 (S.D.N.Y. Oct. 11, 2007) (collecting cases)). In the court's view, "[t]he jury was entitled to infer ... that Marinello acted corruptly to impede or obstruct the due administration of the Internal Revenue laws" by otherwise hindering the collection of taxes due. *Id.* at 6 (App'x 549).

In the defendant's Presentence Investigation Report (the "PSR"), the Probation Office calculated the total tax loss from Marinello's activities as approximately $598,215.53 by applying a percentage-based formula to his gross income from 2005 through 2008. *See* U.S. Sentencing Guidelines Manual (hereinafter, "U.S.S.G.") § 2T1.1(c)(2)(A) (U.S. Sentencing Comm'n 2014) (indicating that this formula should be used "unless a more accurate determination of the tax loss can be made"). The total tax loss resulted in a base offense level of twenty. *See* U.S.S.G. §§ 2T1.1(a)(1), 2T4.1(H)–(I) (specifying, for offenses involving willful failure to file returns, a base offense level of 20 where the tax loss is "[m]ore than $400,000" but not more than $1,000,000). A two-level enhancement to the base offense level was applied because Marinello's conviction under Count One implicated an adjustment for obstructing or impeding the administration of justice. *See* U.S.S.G. § 3C1.1. Marinello was also deemed ineligible for the two-level reduction for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a). In the view of the Probation Office, Marinello had not clearly demonstrated an acceptance of responsibility for his offense conduct in part because he continued to decline to accept responsibility for the obstruction charge and insisted there was a legal basis

to contest this issue. Thus, with a criminal history category of one and a total offense level of twenty-two, Marinello's advisory Guidelines range for sentencing was forty-one to fifty-one months. The Probation Office also determined that Marinello owed the IRS $331,348.08 in corporate income taxes and $20,415 in personal income taxes from 2005 to 2008, and recommended that those amounts be imposed by the court's restitution order.

Marinello filed objections to the findings in the PSR, two of which are relevant to this appeal. First, he argued that the tax loss and restitution amounts were incorrectly calculated. According to Marinello, "a more accurate determination of tax loss c[ould] be made" based on the actual corporate and personal tax returns he ultimately filed, years after the fact, for tax years 2005 through 2008. Objections to the [PSR] and Statement With Respect to Sentencing Factors, dated January 14, 2015, at 2–3 (App'x 514–15) (quoting U.S.S.G. § 2T1.1(c)(2)(A) (emphasis removed)). These returns reflected a tax loss of only $48,890, which would have yielded a base offense level of fourteen instead of twenty. *See* U.S.S.G. § 2T4.1(E). Marinello further asserted that any restitution was also capped at the $48,890 amount.

Second, Marinello urged that the two-level reduction for acceptance of responsibility was applicable.[5] He argued that his conduct merited the

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[5] Marinello did not argue that he was eligible for an additional one-level reduction under U.S.S.G. § 3E1.1(b), nor does he make any argument with respect to this provision on appeal.

reduction because he admitted to keeping poor business records and not paying his taxes; was previously willing to plead to the misdemeanor Counts Two through Nine; and proceeded to trial only to preserve a dispute concerning whether he could be held criminally liable under the section 7212(a) obstruction charge.

In response, the government asserted that there were a variety of inaccuracies in Marinello's proffered tax returns (such as using an incorrect filing status and improperly claiming his mother as a dependent), which rendered them unreliable for purposes of calculating either an alternative tax loss or restitution amount. The government further contended that the two-level reduction for acceptance of responsibility was inapplicable because Marinello was evasive during his discussions with Agent Klimczak at the June 1, 2009, interview, disputed that he acted with the requisite *mens rea* to be convicted under Count One, and stated at the time the PSR was prepared that he did not accept responsibility for the obstruction charge.

In his reply brief, Marinello did not address any of the alleged inaccuracies the government highlighted in his tax returns. He continued to argue, however, that he deserved the reduction for acceptance of responsibility.

During Marinello's sentencing proceedings, the district court concluded that Marinello's alternative calculation of the tax loss and restitution at issue could not be used in light of the discrepancies the government identified in his proffered tax returns. The court therefore adopted the Probation Office's calculations of those figures and denied Marinello's first

objection. His second objection concerning the acceptance of responsibility reduction was also denied based on the court's view that his case was not one of the "rare" situations specified in the Guidelines where the reduction is appropriate even though the defendant exercised his constitutional right to proceed to trial. Transcript of Sentencing ("Sentencing Tr."), July 1, 2015, at 12 (App'x 566) (applying U.S.S.G. § 3E1.1 cmt. 2).

Marinello addressed the court prior to sentencing. He stated that he realized he had made a mistake, but that he did not accept the over half million dollar tax loss calculation by "a probation officer who probably without using an adding machine can't add a column of numbers together." *Id.* at 19 (App'x 573). After the district court observed that Marinello "expressed no remorse whatsoever," Marinello responded:

> I have complete remorse. I have absolutely complete remorse. I was overwhelmed by the job. I was overwhelmed by everything. Business went—turned south. And I tried to keep the company afloat.
>
> I'm 69 years of age. I should be retired, and I'm working every day of the week. Every month the [IRS] gets a check.

Id. at 20 (App'x 574). The government underscored that the defendant's comments demonstrated that he clearly did not accept responsibility for his actions.

Adopting the criminal history category, total offense level, and Guidelines range recommended by

the Probation Office, the district court imposed a below-Guidelines sentence of thirty-six months' imprisonment and one year of supervised release. The district court also imposed restitution in the amount of $351,763.08, as recommended by the Probation Office. Following the entry of an amended judgment, this timely appeal followed.

DISCUSSION

Marinello makes three arguments on appeal. First, he urges us to adopt the Sixth Circuit's interpretation of the phrase "the due administration of this title" in section 7212(a), as set forth in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), which requires the prosecution to establish the defendant's knowledge of a pending IRS action[6] in order to support a conviction under the omnibus clause. Marinello seeks reversal of his conviction on Count One and dismissal of that count from the superseding indictment because there is no evidence that he knew of the IRS's investigation while engaging in the offense conduct alleged.

Second, Marinello contends that a violation of the omnibus clause must be premised on an underlying affirmative act, not on an omission. Because the district court did not charge the jury with the unanimity instruction he requested or provide it with the special verdict form he suggested, he maintains that his conviction on Count One could have been

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[6] Marinello's argument presumably encompasses any pending IRS action and not only an IRS investigation or proceeding concerning the defendant charged with the omnibus clause violation, although he does not clarify this point in his appellate briefs.

improperly based on either of the two omissions alleged in the indictment: failure to keep Express Courier's books and records, and failure to provide complete records of personal and corporate income to his accountant. He seeks reversal and remand for a new trial on that ground if his conviction under section 7212(a) is not otherwise vacated.

Third, Marinello argues that vacatur and remand for resentencing is required because the district court procedurally erred in imposing his sentence. In his view, the district court impermissibly rejected his proffered tax returns as a measure of the tax loss and restitution amounts without further inquiry by way of an evidentiary hearing or supplemental briefing. He also asserts that he was entitled to the two-level reduction to his base offense level for acceptance of responsibility because he offered to plead guilty to the eight counts of willful failure to file tax returns.

I. Standard of Review

A district court's interpretation of a federal criminal statute is a question of law subject to *de novo* review by the Court of Appeals. *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012). A defendant's challenge to a jury instruction is also reviewed *de novo*. *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). We will conclude that the district court committed reversible error if its instruction "either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Id.* (quoting *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006)).

We review the procedural reasonableness of a sentence "under a 'deferential abuse-of-discretion standard.'" *United States v. Jesurum*, 819 F.3d 667, 670 (2d Cir. 2016) (quoting *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). A district court commits procedural error if, as relevant here, it "fails to calculate (or improperly calculates) the Sentencing Guidelines range" or "selects a sentence based on clearly erroneous facts." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013) (quoting *United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012)). Decisions as to the procedures used to resolve sentencing disputes, including disputes concerning an order of restitution, are reviewed for abuse of discretion, *United States v. Maurer*, 226 F.3d 150, 151–52 (2d Cir. 2000) (per curiam) (citing *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996)), and "are within the district court's discretion so long as the defendant is given an adequate opportunity to present his position," *Sabhnani*, 599 F.3d at 257–58.

II. A Pending IRS Action and a Defendant's Knowledge of That Action Are Not Offense Elements Under 26 U.S.C. § 7212(a)'s Omnibus Clause

Section 7212(a) criminalizes certain "[a]ttempts to interfere with [the] administration of internal revenue laws." Under section 7212(a),

> [w]hoever [1] 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* [2] *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 or imprisoned, or both].

26 U.S.C. § 7212(a) (emphases added). The first clause addresses conduct specifically directed toward federal officers or employees in the discharge of their duties under Title 26 of the United States Code—the Internal Revenue Code. The second clause, the "omnibus clause," is a catch-all provision that criminalizes "any other way" of corruptly obstructing or impeding the due administration of the Internal Revenue Code. The term "corruptly" within the meaning of this section encompasses conduct that has "the intent to secure an unlawful advantage or benefit either for one's self or for another." *United States v. Parse*, 789 F.3d 83, 121 (2d Cir. 2015) (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)).

Marinello asks that we conclude, as the Sixth Circuit did in *Kassouf*, that the statutory phrase "the due administration of this title" under the omnibus clause refers exclusively to pending IRS investigations or proceedings, of which a defendant must have knowledge in order to corruptly obstruct or impede them. For the reasons that follow, we decline to adopt this construction.

In *Kassouf*, the defendant was charged with corruptly endeavoring to obstruct and impede the due administration of the tax laws, in violation of section 7212(a). 144 F.3d at 953. He allegedly failed to maintain partnership books and records, transferred business funds into various bank accounts for personal expenditures, and filed false tax returns that did not disclose substantial assets. *Id.* at 953 & n.1. The district court granted the defendant's motion to dismiss the section 7212(a) count from the indictment for failure to state an offense, finding that the government had not alleged as elements of the crime that the defendant had knowledge of a pending IRS proceeding or investigation. *See id.* at 954. On appeal, the Sixth Circuit affirmed, agreeing with the district court that "due administration of the Title requires some pending IRS action"—such as "subpoenas, audits or criminal tax investigations"—"of which the defendant was aware." *Id.* at 957 & n.2.

The Sixth Circuit based its conclusion on a comparison of the omnibus clause with another statute, 18 U.S.C. § 1503. *See id.* at 957. Section 1503, entitled "Influencing or injuring officer or juror generally," provides in relevant part:

> 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 officer who may be serving at any examination or other proceeding before any United States

> magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, *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). Relying on the similarities between the texts of section 1503(a) and section 7212(a), the Sixth Circuit consulted case law interpreting section 1503 for guidance on how to construe "the due administration of this title" under section 7212(a). *See Kassouf*, 147 F.3d at 956–58. In particular, the Sixth Circuit looked to *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), a decision addressing the scope of offense conduct covered by section 1503(a)'s broad prohibition on corrupt efforts to influence, obstruct, or impede the due administration of justice, *see id.* at 598–600, 115 S.Ct. 2357. In *Aguilar*, the Supreme Court limited this provision's reach by imposing "a 'nexus' requirement": To be found guilty of this offense, the "action taken by the accused must be with an intent to influence judicial

or grand jury proceedings." *Id.* at 599, 115 S.Ct. 2357; *see also id.* (describing the nexus requirement as "a relationship in time, causation, or logic" between the defendant's offense conduct and a judicial proceeding). In so deciding, the Supreme Court appeared to assume that "the due administration of justice" under section 1503(a) only applied to pending grand jury or judicial proceedings, in line with the way courts have previously read this statutory phrase.[7] *See id.* The Supreme Court's decision was motivated by a concern that section 1503(a) could sweep too broadly: Not just "*any* act, done with the intent to obstruct the due administration of justice, is sufficient to impose criminal liability"; otherwise, the connection between a defendant's corrupt endeavors and a judicial proceeding could be too attenuated. *See id.* at 602, 115 S.Ct. 2357 (emphasis in original) (ellipsis and internal quotation marks removed). Instead, in order to be convicted of corruptly interfering with the due administration of justice under section 1503(a), a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *Id.* at 599, 115 S.Ct. 2357.

Deeming *Aguilar*'s analysis of section 1503(a) to be instructive, including the Supreme Court's implicit adoption of the longstanding reading of "the due

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[7] *See, e.g.*, *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992) ("Because section 1503 is intended to protect the administration of justice in federal court and those participating therein, due administration of justice has been interpreted as extending only to pending judicial proceedings." (internal quotation marks and citation omitted)).

administration of justice,"[8] the Sixth Circuit interpreted by analogy "the due administration of this title" under section 7212(a) to require, as offense elements, that a defendant (1) have knowledge of (2) "some pending IRS action." *Kassouf*, 144 F.3d at 956-57. Noting again the similar language contained in the two statutes, the court used a canon of construction to find that this similarity permitted it to infer that Congress meant for section 7212(a) to apply to analogous situations. *See id.* at 957–58 (applying the "canon of statutory construction that courts will presume that Congress knew of the prevailing law when it enacted the statute" at issue). The court also expressed its concern that, were the omnibus clause not limited to pending IRS actions, a defendant could be subject to undefined "liability 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." *Id.* at 957; *see also id.* at 958 ("[I]t would be highly speculative to find conduct such as the destruction of records, which might or might not be needed, in an audit which might or might not ever occur, is sufficient to make out an omnibus clause violation." (citation omitted)). The court then affirmed

[8] The independent meaning of "the due administration of justice," however, was never at issue in *Aguilar*—in fact, the defendant there was charged with "corruptly endeavor[ing] to influence, obstruct, and impede [a] *grand jury investigation*." *See id.* at 598–99, 115 S.Ct. 2357 (emphasis added).

the dismissal of the disputed count of the indictment on the basis of the rule it had enunciated.[9] *Id.* at 960.

We think the Sixth Circuit's analogy is inapposite. To begin with, the text of section 1503(a) is distinguishable from section 7212(a) in at least two ways. First, section 1503(a)'s statutory language focuses principally on grand jury or judicial proceedings. Indeed, its prohibition of corrupt endeavors to influence, obstruct, or impede the due administration of justice "follows a long list of specific

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[9] Judge Daughtrey dissented from the majority's conclusion in this regard, noting that no other circuit at the time had required that a defendant knowingly obstruct or impede a pending IRS action in order to be convicted under section 7212(a)'s omnibus clause. *Kassouf*, 144 F.3d at 960–61 (Daughtrey, *J.*, dissenting in part).

> Shortly after *Kassouf* was decided, another panel of the Sixth Circuit suggested its disapproval of this rule by concluding that "*Kassouf* must be limited to its precise holding and facts." *See Bowman*, 173 F.3d at 600; *see also id.* at 599–600 (deciding that "an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct," even though "no IRS proceeding or investigation was underway" when the defendant engaged in the underlying offense conduct). However, the court has more recently stated to the contrary that the rule articulated in *Kassouf* remains the law of the Sixth Circuit. *See United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014) ("[P]ost–*Kassouf* and post–*Bowman*, a defendant may not be convicted under the omnibus clause unless he is 'acting in response to some pending IRS action of which [he is] aware.'" (second brackets in original) (quoting *United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004))), *cert. denied*, —— U.S. ——, 135 S. Ct. 2060, 191 L.Ed.2d 964 (2015).

prohibitions of conduct that interferes with actual judicial proceedings," *United States v. Wood*, 384 Fed.Appx. 698, 704 (10th Cir. 2010), *cert. denied*, 562 U.S. 1225, 131 S.Ct. 1476, 179 L.Ed.2d 315 (2011); *accord Willner*, 2007 WL 2963711, at *4, 2007 U.S. Dist. LEXIS 75597; *see also United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015) (endorsing the reasoning in *Wood*), *cert. denied*, —— U.S. ——, 136 S.Ct. 1163, 194 L.Ed.2d 176 (2016). This list—which specifically mentions jurors, officers of the court, magistrate judges, and committing magistrates, as well as "examination[s] or other proceeding[s]" before a magistrate judge or committing magistrate, "verdict[s]," and "indictment[s]"—supports a reading that tethers the "due administration of justice" to actual grand jury or judicial proceedings. *See* 18 U.S.C. § 1503(a). By contrast, section 7212(a) does not contain any such reference to IRS actions, investigations, or proceedings that would support analogizing it to section 1503(a). Instead, the first part of section 7212(a) refers broadly to attempts to interfere with officers or employees "acting in an official capacity" under the tax code, 26 U.S.C. § 7212(a), which suggests that the omnibus provision similarly applies to the full range of these individuals' official duties.

Second, and most apparent, the statutes employ different statutory phrases: "the due administration of *justice*," 18 U.S.C. § 1503(a) (emphasis added), and "the due administration of *this title*," 26 U.S.C. § 7212(a) (emphasis added). This difference indicates that the statutes carry different meanings. *See Kassouf*, 144 F.3d at 960 (Daughtrey, *J.*, dissenting in part) ("[I]f

Congress wished 26 U.S.C. § 7212(a) to be interpreted in an identical fashion, identical language would have been inserted into that statute."). The plain language of section 7212(a)'s omnibus clause "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities." *Willner*, 2007 WL 2963711, at *5, 2007 U.S. Dist. LEXIS 75597 (emphasis in original). As the Sixth Circuit noted in *Kassouf*, the administration of the Internal Revenue Code "encompass[es] a vast range of activities": "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers['] submissions; as well as monitoring taxpayers' compliance with their obligations." 144 F.3d at 956; *see also Sorensen*, 801 F.3d at 1232 ("[T]he IRS duly administers the internal-revenue laws ... [by] carrying out its lawful functions to ascertain income[and to] compute, assess, and collect income taxes[.]" (internal quotation marks and citation omitted)). In light of these responsibilities, it is apparent that "the IRS does duly administer the tax laws even before initiating a proceeding." *Sorensen*, 801 F.3d at 1232; *see Direct Mktg. Ass'n v. Brohl*, —— U.S. ——, 135 S.Ct. 1124, 1129, 191 L.Ed.2d 97 (2015) ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection."). Thus, it is possible to violate section 7212(a) by corruptly obstructing or impeding the due administration of the Internal Revenue Code "without an awareness of a particular [IRS] action or

investigation" (for instance, "by thwarting the annual reporting of income"). *Wood*, 384 Fed.Appx. at 704.

Section 1503's legislative history also makes clear that Congress intended "the due administration of justice" to refer only to grand jury or judicial proceedings; however, no comparable legislative history points to interpreting "the due administration of this title" under section 7212(a) in a similar manner. A predecessor version of section 1503 criminalized "corrupt [ ] endeavors to influence, intimidate, or impede any witness or officer *in any court of the United States* in the discharge of his duty, or corrupt [ ] ... endeavors to obstruct or impede[ ] the due administration of justice *therein*." *See Pettibone v. United States*, 148 U.S. 197, 202, 13 S.Ct. 542, 37 L.Ed. 419 (1893) (emphases added) (quoting Rev. Stat., Tit. LXX, ch. 4, § 5399 (2d ed. 1878)); *see also Aguilar*, 515 U.S. at 599, 115 S.Ct. 2357 (noting that *Pettibone* "construe[ed] the predecessor statute to § 1503"). Although the word "therein" has since been removed from section 1503(a), there is no indication by Congress that, in so doing, it intended to fundamentally alter the statute's meaning. *See Willner*, 2007 WL 2963711, at *4, 2007 U.S. Dist. LEXIS 75597 ("Nothing about the history of revision of [section 1503] ... indicates that the elimination of the last word ['therein'] was intended to affect the meaning.").

In addition to what we think is a mistaken analogy to section 1503(a), we find unpersuasive the vagueness or overbreadth concern identified in *Kassouf* in support of that court's construction of the omnibus clause. The Sixth Circuit narrowly interpreted "the due

administration of this title" under section 7212(a) in part based on a concern that, were proof of a defendant's awareness of a pending IRS action not otherwise required, a defendant could be subject to punishment for engaging in lawful conduct. *See Kassouf*, 144 F.3d at 957–58. But we have already rejected a similar challenge to section 7212(a) on grounds of vagueness and overbreadth. *See Kelly*, 147 F.3d at 176 (agreeing with five other circuits concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad (citing *United States v. Brennick*, 908 F.Supp. 1004, 1010–13 (D. Mass. 1995))). Moreover, other courts, including the Sixth Circuit, have decided that section 7212(a)'s "*mens rea* requirement" sufficiently "restricts the omnibus clause's reach only to conduct that is committed 'corruptly.'" *United States v. Miner*, 774 F.3d 336, 347 (6th Cir. 2014) (collecting cases), *cert. denied*, —— U.S. ——, 135 S.Ct. 2060, 191 L.Ed.2d 964 (2015).[10]

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[10] To the extent *Kassouf* based its vagueness or overbreadth concern on the Supreme Court's analysis in *Aguilar*, we note that the reliance is likely misplaced. In fashioning the nexus requirement previously discussed, the Supreme Court suggested that its interpretation of the term "corruptly" under section 1503(a) adequately addressed any potential problems of overbreadth, inasmuch as a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *See* 515 U.S. at 599, 115 S.Ct. 2357; *see also id.* at 602, 115 S.Ct. 2357 (concluding that, "if [a man] knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts," the husband could not be

For those reasons, we decline Marinello's invitation to adopt the *Kassouf* rule. Instead, we join three of our sister circuits in concluding that section 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation. *See Sorensen*, 801 F.3d at 1232 (disagreeing with *Kassouf* because section 1503(a) and section 7212(a) "are [in]sufficiently similar to apply *Aguilar*'s reasoning to § 7212(a)"); *United States v. Floyd*, 740 F.3d 22, 32 & n.4 (1st Cir.) (determining that "[a] conviction for violation of section 7212(a) does not require proof of either a tax deficiency or an ongoing audit," and rejecting *Kassouf* (citations omitted)), *cert. denied sub nom. Dion v. United States*, —— U.S. ——, 135 S.Ct. 124, 190 L.Ed.2d 95 (2014); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (stating that "the government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under § 7212(a)"), *cert. denied*, 547 U.S. 1132, 126 S.Ct. 2019, 164 L.Ed.2d 786 (2006).[11] Notably, although we have not explicitly

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convicted under section 1503 because his knowledge of the likely effect on a judicial proceeding is unclear). By raising the specter that the "*due administration*" of the tax code under section 7212(a) could be too vague or overbroad, however, *Kassouf* misconstrues *Aguilar*'s focus on the *mens rea* requirement ("corruptly") as also encompassing a focus on the "due administration" language. We do not read *Aguilar* as expressing any concern regarding, much less tying its holding to, the "due administration" language in section 1503(a).

[11] In addition to the First, Ninth, and Tenth Circuits, the Eleventh Circuit, in a decision that predates *Kassouf*, upheld an attorney's conviction under section 7212(a)'s omnibus clause for creating a

adopted this rule in any previous opinion, we have implicitly applied it by affirming convictions under section 7212(a)'s omnibus clause without discussion of the defendant's awareness of a pending IRS proceeding. *See United States v. McLeod*, 251 F.3d 78, 80 (2d Cir. 2001) (affirming sentence imposed where the defendant helped his clients falsify tax returns), *cert. denied*, 534 U.S. 935, 122 S.Ct. 304, 151 L.Ed.2d 226 (2001); *Kelly*, 147 F.3d at 174–75 (affirming the defendant's conviction for providing a false agreement to the tax authorities to substantiate a deduction on his tax return).

Our conclusion is consistent with at least two other sources. First, in the body of case law that developed within the forty-four years that elapsed between section 7212's enactment in 1954[12] and *Kassouf*'s issuance in 1998, the government assures us (and we have found no reason to doubt) that no court had limited the omnibus clause's application to the corrupt obstruction or impediment of a known and pending IRS action. *See* Appellee's Br. at 19. To the contrary, contemporary model jury instructions for use outside of the Sixth Circuit do not include these criteria as elements of the offense. *See* 3 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 59.05,

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corporation to "disguise the character of [a client's] illegally earned income and repatriate it," even where the attorney had no knowledge that his client was engaged in a "sting operation" with the government against him. *See United States v. Popkin*, 943 F.2d 1535, 1536–37, 1541 (11th Cir. 1991), *cert. denied*, 503 U.S. 1004, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992).

[12] *See* Act of Aug. 16, 1954, ch. 736, 68A Stat. 855.

Instruction 59–32 & cmt. (2016) (containing pattern instructions or formulations for a violation of section 7212(a)'s omnibus clause in the First, Seventh, Tenth, and Eleventh Circuits).

Second, the Department of Justice's internal tax division policy states that the omnibus clause may be used "to prosecute a person who, *prior to any audit or investigation*, engaged in large-scale obstructive conduct involving the tax liability of third parties." U.S. Dep't of Justice, *Criminal Tax Manual* § 17.03 (2012 ed.), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTMChapter17.pdf (last visited August 1, 2016) (emphasis added), *archived at* https://perma.cc/QWW4–DTJL. Pursuant to this policy, a defendant may be charged under the omnibus clause in the absence of a pending IRS action. *See also id.* § 17.04 ("To establish a Section 7212(a) omnibus clause violation, the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code.").

Because we conclude that, under section 7212(a), "the due administration of this title" is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge, we reject Marinello's first argument as without merit.[13]

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[13] In his reply brief, Marinello also raises for the first time an argument that the enactment of a statute in 2002 prohibiting the knowing destruction, alteration, or falsification of records "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

III. An Omnibus Clause Violation May Be Premised on an Omission

Marinello's next argument proceeds in two steps. First, citing *Kelly*, Marinello asserts that an omission cannot form the basis of a conviction under the omnibus clause. Second, to ensure that he was not improperly convicted for a failure to act, he contends that the jury should have been instructed that it was required to unanimously agree on at least one of the underlying means alleged in Count One (two of which pertained to

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department or agency of the United States ..., *or in relation to or contemplation of any such matter*," 18 U.S.C. § 1519 (emphasis added), demonstrates that Congress employs specific language when it prohibits conduct "not predicated upon the existence of any federal action or proceeding," Appellant's Reply Br. at 9. Marinello points to the absence of similar language in 26 U.S.C. § 7212(a) prohibiting corrupt obstruction or impediment "in relation to or contemplation of" an IRS action—which Congress did not add to section 7212(a) in 2002—as support for his theory that a defendant's knowledge of such a pending action is required to violate the omnibus clause. Ordinarily, we do not address an argument that the district court has not previously considered. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (*per curiam*); *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). Even if we did so here, however, we have found no authority that supports Marinello's attempt to create offense elements by contrasting 18 U.S.C. § 1519 with 26 U.S.C. § 7212(a). Moreover, "Congressional inaction," such as the lack of retroactive amendment to section 7212(a) in light of section 1519, "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)).

omissions) and to render a special verdict specifying which of those underlying means it found were met.[14]

In *Kelly*, we described section 7212(a)'s omnibus clause as "render [ing] criminal 'any other' action which serves to obstruct or impede the due administration of

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[14] Marinello further argues in passing that Count One falsely states that "the defendant's accountant" was not provided with complete and accurate records for tax purposes, *see* Superseding Indictment at 1 (App'x 75), because he maintains that no professional relationship existed between him and Wiegley. The record shows that Marinello consulted with Wiegley, although the two did not sign a contract for accounting services. While the superseding indictment's description of Wiegley could have been more precise, we conclude that Marinello's argument fails for at least two reasons. First, assuming that the jury had relied on the allegations pertaining to "the defendant's accountant" in order to convict under Count One, its verdict demonstrates that, based on the evidence introduced at trial, it agreed with the superseding indictment's description of Wiegley as his accountant. Thus, the jury resolved the instant factual dispute in the government's favor. Moreover, if and to the extent that the superseding indictment's description of Wiegley was erroneous, that error is harmless. The jury clearly did not convict Marinello on Count One based solely on his offense conduct in connection with his consultations with Wiegley, whether or not Wiegley was his accountant. Marinello's counsel effectively conceded at trial that Marinello engaged in all of the other means alleged under Count One, *see* August 6, 2014 Trial Tr. at 51–56 (App'x 128–33), and counsel only disputed whether Marinello performed any of the acts or omissions alleged with the requisite corrupt intent. The jury's verdict of conviction demonstrates that it concluded that the government proved such corrupt intent with respect to the other conduct alleged in the indictment, in which Marinello concedes he engaged. Thus, whether or not the alleged omission describing Wiegley as Marinello's accountant was properly before the jury is immaterial.

the revenue laws." 147 F.3d at 175 (quoting 26 U.S.C. § 7212(a)). From this statement, Marinello attempts to extract the principle that a violation of the omnibus clause must be predicated on a defendant's affirmative "action," and not an omission. But *Kelly* did not cabin offense conduct under the omnibus clause in this manner; section 7212(a) broadly prohibits corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the tax laws "in any other way." *See* 26 U.S.C. § 7212(a). We do not see how a defendant could escape criminal liability under the omnibus clause for a corrupt omission that is designed to delay the IRS in the administration of its duties merely because the offense conduct involved an omission. *Cf. Kelly*, 147 F.3d at 177 (approving a jury instruction defining the term "endeavors" under section 7212(a) to mean "to knowingly and intentionally act *or* to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result" (emphasis added)). For example, a defendant surely could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses.[15] While apparently not

[15] We nonetheless recognize that the scope of omissions on which an omnibus clause violation could be based is not limitless. *See Wood*, 384 Fed.Appx. at 708 (suggesting it is "a questionable proposition" that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the "willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203").

as common as prosecutions based on one or more affirmative acts, we are aware of several cases in which the government has prosecuted on the basis of an omission as a means of violating section 7212(a)'s omnibus clause.[16]

We conclude, then, that an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code under section 7212(a). And it follows that Marinello's second argument on appeal is also without merit because the jury could have relied on his alleged failure to keep Express Courier's books and records, or to provide Wiegley with complete and accurate information on his personal and corporate income, as a basis for its conviction on Count One. No unanimity instruction or special verdict form was therefore

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Whatever those limits may be, the omissions at issue here do not exceed them.

[16] *See, e.g.*, *Kassouf*, 144 F.3d at 953 n.1 (alleging the defendant "failed to maintain or cause to be maintained partnership books and records"; "failed to report or cause to be reported substantial amounts of interest earned on [certain] bank accounts"; and transferred property "without making or causing to be made any record of that sale or transfer"); *United States v. Armstrong*, 974 F.Supp. 528, 531 (E.D. Va. 1997) (alleging the defendant "provided false information to, and withheld material information from, his tax return preparer with regard to his travel expense reimbursements and income"); *United States v. Bezmalinovic*, No. S3 96 CR 97 MGC, 1996 WL 737037, at *2, 1996 U.S. Dist. LEXIS 18976 (S.D.N.Y. Dec. 26, 1996) (alleging the defendant failed to report salary payments to certain employees "in any IRS Form W–2" or "to remit to the IRS the [payroll and unemployment] tax[es] due and owing").

required in order to distinguish the jury's assessment of the underlying affirmative actions as opposed to the omissions alleged under this count, because there is no requirement under the statute to make certain that, if Marinello were convicted, the conviction was based solely on an affirmative action and not an omission.

Marinello has not raised in this Court the issue of whether a unanimity instruction or special verdict form is required for any other reason during trials arising out of alleged section 7212(a) omnibus clause violations, and we therefore do not decide or offer an opinion with respect to any such argument. His pretrial filings sought an instruction that the jury unanimously agree on at least one of the eight means alleged in order to convict, as well as a special verdict form requiring that the jury specify its findings on each of those means. However, he does not repeat arguments concerning those requests on appeal. *Cf. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").[17]

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[17] We note nevertheless that while the Ninth Circuit does not appear to object to the use of a unanimity instruction in this context, *see United States v. Murphy*, 824 F.3d 1197, 1201, 1206 (9th Cir. 2016), at least two courts (the Tenth Circuit and a district court in Washington D.C.) have ruled that the instruction is erroneous. *See Sorensen*, 801 F.3d at 1237 (concluding that the district court erred by requiring unanimity on one or more of the listed means, in part because the instruction "ignored the indictment's language charging that [the defendant] violated § 7212(a) 'by the following means, *among others*....'" (emphasis in

IV. The District Court Did Not Procedurally Err In Determining Marinello's Sentence

Finally, Marinello's remaining arguments—that the district court should have conducted further inquiries to calculate the tax loss and restitution amounts, and should have applied the two-level reduction for acceptance of responsibility—do not convince us that the district court committed procedural error meriting resentencing.

Marinello argues that the district court's "cursory review" of his proffered tax returns in arriving at a tax loss of $598,215.53 and a total restitution amount of $351,763.08, without conducting an evidentiary hearing or receiving supplemental submissions, "was unfair and violated his due process rights." *See* Appellant's Br. at 29. But a district court "is not required, by either the Due Process Clause or the federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes.... All that is required is that the court afford the defendant some opportunity to rebut the [g]overnment's allegations." *Sabhnani*, 599 F.3d at 258 (quoting *Maurer*, 226 F.3d at 151–52). Here, Marinello challenged the Probation Office's calculations in his objections to the PSR, attaching his

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original)); *United States v. Adams*, 150 F.Supp.3d 32, 37–38 (D.D.C. 2015) (agreeing with *Sorensen*'s conclusion, and quoting *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) for the proposition that "[a] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime").

personal and corporate tax returns in an effort to show that $48,890 was a more appropriate tax loss and restitution amount. He did not, however, respond on reply to the many inaccuracies the government identified in these returns. The district court considered his objection and, crediting the government's arguments, ultimately rejected it before imposing sentence. Because Marinello was afforded "some opportunity" to dispute the tax loss and restitution amounts, and to respond to the government's arguments with respect to his tax returns, the district court did not abuse its discretion by not obtaining additional information regarding this issue. *See id.*

Nor can we say that the district court abused its discretion by denying Marinello a two-level decrease to his base offense level because he did not "clearly demonstrate[ ] acceptance of responsibility for his offense," a decision to which we accord "great deference on review," *see* U.S.S.G. § 3E1.1(a) & cmt. 5. Marinello's sole relevant contention on appeal is that his "offer[ ] to plead guilty to the failures to file income tax returns" "should have received some consideration in sentencing." Appellant's Br. at 30. But an offer to plead guilty to some counts of an indictment provides limited evidence of acceptance of responsibility; even a defendant who pleads guilty is not guaranteed to receive the adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 cmt. 3.

Moreover, we agree with the district court's conclusion that Marinello's case is not one of the "rare situations" contemplated in the Guidelines in which a

defendant "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial"—for instance, by "go[ing] to trial to assert and preserve issues that do not relate to factual guilt." *See id.* cmt. 2. Marinello proceeded to trial on the theory that he lacked the requisite *mens rea* to commit the omnibus clause violation, an issue of factual guilt. It was only in post-trial briefing that Marinello's legal argument pertaining to the elements of an omnibus clause violation and the *Kassouf* rule was first raised. In our view, it was reasonable for the district court to deny a reduction for acceptance of responsibility in these circumstances. *See id.* (stating the acceptance of responsibility adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse"); *cf. United States v. Melot*, 732 F.3d 1234, 1244–45 (10th Cir. 2013) (concluding that the district court clearly erred in applying the acceptance of responsibility reduction where the defendant went to trial "so he could challenge the *mens rea* element of the crimes charged in the indictment," including a violation of section 7212(a)' s omnibus clause).[18]

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[18] Three additional considerations under U.S.S.G. § 3E1.1 bolster the district court's conclusion on this score. First, "prior to adjudication of [his] guilt," no "voluntary restitution payment" to the IRS had been made. *See id.* cmt. 1(C). Second, Marinello did not timely manifest acceptance of responsibility: He stated that he "never got around" to paying his taxes instead of admitting to his guilt during his interview with Agent Klimczak, August 6, 2014 Trial Tr. at 172 (App'x 181), and he persisted in denying

We therefore conclude that the district court did not commit procedural error by using the manner of calculating the tax loss and restitution amounts that it did, or by deciding not to apply a two-level reduction to Marinello's base offense level for acceptance of responsibility.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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responsibility for the section 7212(a) count while his PSR was being prepared. *See* U.S.S.G. § 3E1.1 cmt. 1(H) (providing that "timeliness" is a consideration for determining whether a defendant has accepted responsibility). Even during the sentencing proceedings, he told the court that the Probation Office "c[ould]n't add a column of numbers together" to calculate the total tax loss, and blamed his misconduct on feeling "overwhelmed by the job." Sentencing Tr. at 19–20 (App'x 573–74). Third, the district court's application of a U.S.S.G. § 3C1.1 enhancement for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct," *see* U.S.S.G. § 3E1.1 cmt. 4. Marinello offers no reason to conclude that this is an "extraordinary case[ ]" warranting "adjustments under both §§ 3C1.1 and 3E1.1." *See id.*

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,

v.

Carlo J. Marinello, II, Appellant.

15-2224

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February 15, 2017

Attorneys and Law Firms

Joseph M. LaTona, Buffalo, NY, for Defendant-Appellant.

Russell T. Ippolito, Jr., Assistant United States Attorney, Buffalo, NY, for James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York,[1] Appellee.

Present: Robert A. Katzmann, Chief Judge, Dennis Jacobs, José A. Cabranes, Rosemary S. Pooler, Reena Raggi, Peter W. Hall, Debra Ann Livingston, Denny Chin, Raymond J. Lohier, Jr., Susan L. Carney, Christopher F. Droney, Circuit Judges.

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting United States Attorney James P. Kennedy, Jr., is automatically substituted for former United States Attorney William J. Hochul, Jr.

ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Dennis Jacobs, *Circuit Judge*, joined by José A. Cabranes, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

DENNIS JACOBS, Circuit Judge, joined by JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing in banc. The panel weighed in on the wrong side of a circuit split, affirmed a criminal conviction based on the most vague of residual clauses, and in so doing has cleared a garden path for prosecutorial abuse.

I

Marinello was convicted at trial on nine counts. Eight of them (for willful failure to file tax returns) raise no issue. The single problematic count is for violating the "omnibus clause" of the criminal portion of the Internal Revenue Code, which makes it a felony to "in any other way corruptly ... obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title." 26 U.S.C. § 7212(a). *Yes*: "this title" is the entire corpus of the Internal Revenue Code—a slow read in 27 volumes of the United States Code Annotated.

The government charged that Marinello violated the omnibus clause in eight different ways. And the district court instructed the jury that it was enough for conviction that Marinello violated the statute in any single one of those several ways—and that the jurors did not need to agree among themselves as to which.

Among the acts listed in the jury charge as violating the omnibus clause are:

- "failing to maintain corporate books and records for Express Courier [his small business]";
- "failing to provide [his] accountant with complete and accurate information related to [his] personal income and the income of Express Courier";
- "destroying, shredding and discarding business records of Express Courier";
- "cashing business checks received by Express Courier for services rendered"; and
- "paying employees of Express Courier with cash."

839 F.3d at 213 (internal brackets omitted). If this is the law, nobody is safe: the jury charge allowed individual jurors to convict 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.

After conviction on all counts, Marinello moved for a new trial on the ground, inter alia, that the omnibus clause applied only to knowing obstruction of an ongoing IRS investigation, not to every possible impediment to the administration of any of the

uncountable provisions of the Internal Revenue Code; and that he therefore should have been acquitted because there was no evidence that he was aware of an IRS investigation.

The district court rejected the argument and the panel affirmed, holding: "under section 7212(a), 'the due administration of this title' is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge." 839 F.3d at 223. Accordingly, the law in the Second Circuit today is that it is a felony to "corruptly" take (or try to take) any of the actions listed above—or to take or try to take any other action that impedes the "due administration" of the Internal Revenue Code.

The Sixth Circuit, alert to the sweep of criminalizable conduct, held that the omnibus clause was limited to cases in which the defendant knew of a pending IRS action. *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998); *United States v. Miner*, 774 F.3d 336, 342–45 (6th Cir. 2014). The Sixth Circuit's view is now distinctly in the minority, and the panel's opinion here signs on to the emerging consensus of error in the circuit courts.

II

Increasingly, the Supreme Court casts a cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here), and has saved such statutes by construing the statutory text to cabin them.

In *United States v. Aguilar*, the Court considered a similarly worded statute concerning grand juror intimidation: the residual clause imposed criminal

liability for one who "corruptly ... endeavors to influence, obstruct, or impede, the due administration of justice." 515 U.S. 593, 599–600, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (interpreting 18 U.S.C. § 1503). To curb the impermissible breadth of the wording, the Court (a) implicitly interpreted "the due administration of justice" to require a court or grand jury proceeding (and thus excluded "an investigation independent of the court's or grand jury's authority"), and (b) explicitly required a "nexus" with a grand jury or judicial proceeding to support criminal liability.

Similar alarm about fair warning and overbreadth animates *Arthur Andersen LLP v. United States*, which recognized and generously construed a knowledge requirement to limit the scope of a statute that criminalized "corruptly persuad[ing]" someone to destroy documents. 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) (interpreting 18 U.S.C. § 1512). For much the same reason, the Supreme Court sharply curtailed so-called honest-services fraud in *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Further, in *Yates v. United States*, the government used a provision of the Sarbanes-Oxley Act criminalizing destruction of evidence to prosecute a poaching fisherman who threw fish overboard; the plurality invoked the rule of lenity to reverse on the ground that, under the statute, a fish was not a "tangible object." —— U.S. ——, 135 S.Ct. 1074, 1088, 191 L.Ed.2d 64 (2015) (interpreting 18 U.S.C. § 1519). And in *Johnson v. United States*, the Court held that the "residual clause" of the Armed Career Criminal Act was so vague that it failed to provide the

constitutionally required fair notice of what conduct it actually punished. —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (interpreting 18 U.S.C. § 924(e)). Most recently, in *McDonnell v. United States*, the Court rejected an expansive view of what qualifies as an "official act" in public corruption cases. —— U.S. ——, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016).

III

The panel opinion in *Marinello* affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed.

The actus reus for this crime is the failure to keep sufficient books and records. The panel opinion likely took comfort in the mens rea requirement that the act or acts be done "corruptly." Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, *alleging* a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*.

The saving requirement that the Sixth Circuit added is that there must have been a pending IRS action of which the defendant was aware. That

measure goes a good way toward setting some bounds. It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.

And what is lost in confining this statute to interference with ongoing proceedings? Failure to pay taxes is already a crime, as is tax evasion. *See* 26 U.S.C. § 7201-7207; 18 U.S.C. § 371. Marinello himself, who is certainly culpable for his tax evasion, was in fact convicted of eight such felonies aside from the single count of violating the omnibus clause. Indiscriminate application of this omnibus clause serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted.

The panel opinion does not consider the risk of prosecutorial abuse at all, and dismisses overbreadth and vagueness in a single paragraph—and that paragraph merely cites other decisions. 839 F.3d at 221–22. Instead, the panel opinion spends pages positing differences between the phrases "due administration of justice" and "due administration of this title," and looking to statutory context and legislative history in an attempt to distinguish the Supreme Court's interpretation of a nearly identical statute in *Aguilar*.

The attempt fails. *Aguilar* looked to the conduct specified in the rest of the statute in construing the omnibus clause of 18 U.S.C. § 1503(a), and the panel opinion seeks to distinguish the omnibus clause here (§ 7212(a)) on that basis. But reading § 7212(a) in context subverts rather than supports the panel's

broad interpretation: a contextual reading demonstrates that § 7212(a) is about impediments to the work of *particular officers and employees* of the IRS, rather than to the work of the IRS in the abstract or in whole. The relevant text of § 7212(a) is as follows, with the omnibus clause italicized:

> 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 ... The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

The Supreme Court construed the *Aguilar* clause to require a grand jury or judicial proceeding because earlier parts of the *Aguilar* statute implicitly require a grand jury or judicial proceeding. By the same token, the text that precedes the omnibus clause here, and is part of the same sentence and subsection, presupposes an identifiable officer or employee. That is because it prohibits corruptly or threateningly attempting "to intimidate or impede any officer or employee of the

United States acting in an official capacity." Statutory cross-references to § 7212(a) in the Internal Revenue Code (which were passed as part of the same legislative act as § 7212(a) itself[1] also presuppose a particular officer or employee who has been impeded. Section 6531(6) describes it as "relating to intimidation of officers and employees of the United States," and section 7601(b) describes it as forbidding "forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties." 26 U.S.C. § 6531(6); 26 U.S.C. § 7601(b).

The same subsection defines "threats of force" in terms that bear upon individual agents, and thereby compels the inference of an ongoing matter: "The term 'threats of force', as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family." 26 U.S.C. § 7212(a). Both the initial clause of § 7212(a) and the omnibus clause ban threats of force; so the omnibus clause also supposes an identifiable IRS officer or employee. Similarly, the one statutory example of obstruction—in each clause of § 7212(a)—is sending a "threatening letter or communication." Inasmuch as there are nearly 80,000 IRS officers or employees, it is scarcely possible a letter (however threatening) that is sent without a named addressee would in any way "impede" the work of this army.[2]

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[1] *See* Internal Revenue Code of 1954, Pub.L. 83–591.

[2] The legislative history, discussed in footnote 3, also backs up the view that § 7212(a) is aimed at obstruction of particular IRS officers or employees.

The same point can be made about the destruction of documents. Unless an investigation is ongoing, it is impossible to point to a particular IRS employee among those 80,000 whose work has been impeded. And only when an IRS investigation is ongoing can one posit, *as the statute itself does*, a particular officer who has been impeded (such as by a taxpayer writing a threatening letter or destroying personal documents)—and that officer is the investigator on the case. Reading § 7212(a)'s omnibus clause in light of the section that precedes it thus leads us back to the requirement of an active investigation.

As to legislative history, the panel relies on its absence to distinguish this case from *Aguilar*. 839 F.3d at 221. That is a thin reed; in any event, there is relevant legislative history for § 7212(a), and it confirms my view.[3]

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[3] The prior version of § 7212(a) only prohibited *forcible* obstruction of IRS officers. Int. Rev. Code of 1939, ch. 34, § 3601(c)(1). When Congress re-wrote the tax code and re-drafted § 7212(a) in 1954, the Senate and House Reports only briefly explained the purpose of § 7212(a) (their explanation for the addition to the statute is in italics):

> Subsection (a) of this section, relating to the intimidation or impeding of any officer or employee of the United States acting in an official capacity under this title, or by force or threat of force attempting to obstruct or impede the due administration of this title is new in part. This section 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.

Finally, unlike the panel, I decline to defer to the Department of Justice's views to determine the scope of a criminal statute. *Id.* at 223.

Even if the majority is correct—even if any limit to the omnibus clause is insupportable—then we should have gone in banc to determine whether such a limitless statute is constitutional. At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, "Show me the man and I'll find you the crime."

This section will also punish the corrupt solicitation of an internal revenue employee.

H.R.Rep. No. 1337, 83rd Cong., 2d Sess. (1954); S.Rep. No. 1622, 83rd Cong., 2d Sess. (1954) (emphasis added). If Congress intended to dramatically expand the scope of the law in the way the panel conceives, the legislative history gives no hint of it.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CARLO J. MARINELLO, II,

Defendant.

DECISION AND ORDER
12-CR-53S

I. INTRODUCTION

On August 12, 2014, a jury convicted Defendant Carlo J. Marinello, II, of obstructing and impeding the due administration of the Internal Revenue laws and failing to file individual and corporate tax returns. (Docket Nos. 81, 87.) Marinello now moves for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure or, alternatively, for a new trial under Rule 33. For the reasons discussed below, Marinello's motion is denied.

II. BACKGROUND

On February 14, 2012, a federal grand jury returned a nine-count indictment against Marinello alleging (1) one count (Count 1) of obstructing and impeding the due administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212 (a), (2) four counts (Counts 2, 4, 6, 8) of failing to file individual tax returns, in violation of 26 U.S.C. § 7203, and (3) four counts

(Counts 3, 5, 7, 9) of failing to file corporate tax returns, in violation of 26 U.S.C. § 7203. (Docket No. 1.) Approximately eight months later, on October 4, 2012, the grand jury returned a similar nine-count superseding indictment, which amended the allegations in Count 1. (Docket No. 29.)

After pretrial motions and proceedings, Marinello went to trial on the superseding indictment, beginning on August 5, 2014. (Docket No. 76.) The six-day trial concluded on August 12, 2014. (Docket No. 81.) Upon the close of proof on August 11, 2014, Marinello moved for a judgment of acquittal, which this Court denied the next day. (Docket Nos. 79, 80.) The jury subsequently found Marinello guilty on all counts. (Docket Nos. 81, 87.)

Following the verdict, Marinello timely filed the instant motion for judgment of acquittal or, alternatively, for a new trial, on September 9, 2014. (Docket No. 92.) The motion is fully briefed. (Docket Nos. 92, 94, 95.) Marinello seeks judgment of acquittal on all counts of conviction due to insufficiency of the evidence. He seeks a new trial on the same basis to avoid a miscarriage of justice.

III. DISCUSSION

A. Marinello's Rule 29 Motion

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2. Count 1

Count 1 of the superseding indictment charged Marinello with obstructing or impeding the due administration of the Internal Revenue laws, in

violation of 26 U.S.C. § 7212 (a). The statute provides as follows:

> **Corrupt or forcible interference.** – 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. The term "threats of force," as sued in this subsection, means threats of bodily harm to the office or employee of the United States or to a member of his family.

The superseding indictment alleges that Marinello violated § 7212 (a) by

> (1) failing to maintain corporate books and records for Express Courier Group/Buffalo, Inc. of which the

defendant was an employee, officer, owner and operator;

(2) failing to provide the defendant's accountant with complete and accurate information related to the defendant's personal income and the income of Express Courier;

(3) destroying, shredding and discarding business records of Express Courier;

(4) cashing business checks received by Express Courier for services rendered;

(5) hiding income earned by Express Courier in personal and other non-business bank accounts;

(6) transferring assets to a nominee;

(7) paying employees of Express Courier with cash; and

(8) using business receipts and money from business accounts to pay personal expenses, including the mortgage for the residence in which the defendant resided and expenses related to the defendant's mother's care at a senior living center.

(Docket No. 29.)

Marinello admits that he engaged in allegations (1), (3), (4), (6), (7), and (8) above, but he argues that the evidence presented at trial was nonetheless insufficient

to sustain his conviction on Count 1, because the government failed to introduce sufficient evidence that he acted with the intent to *corruptly* endeavor to obstruct or impede the due administration of the Internal Revenue laws and failed to establish that he knew that the Internal Revenue Service was investigating him.

To prove a violation of § 7212 (a), the government must establish two elements beyond a reasonable doubt: (1) that the defendant acted corruptly; and (2) that the defendant acted to impede or obstruct the due administration of the Internal Revenue laws. *See* 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-32 (2014). "To act corruptly means to act with the intent to secure an unlawful advantage or benefit either for oneself or for another." 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-33 (2014); *see also United States v. Coplan*, 703 F.3d 46, 72-73 (2d Cir. 2012); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998) (citing *United States v. Hanson*, 2 F.3d 942, 946-47 (9th Cir. 1993)).

The government presented sufficient evidence at trial from which the jury could reasonably infer that Marinello engaged in the alleged conduct to secure an unlawful advantage and to obstruct the due administration of the Internal Revenue laws. For example, Agent Klimczak testified that Marinello was evasive and untruthful when he was interviewed on June 1, 2009. Alan Wiegley, CPA, testified that he advised Marinello not to destroy business records, yet Marinello destroyed them anyway. And along with

other proof admitted into evidence at trial, Marinello admits that he failed to maintain records, destroyed records he had, cashed checks due the corporation, transferred assets to his wife, paid his employees in cash, and used corporate funds for personal expenses. (Affirmation of John Humann, Docket No. 92, ¶ 8.) The jury was entitled to infer from all of these acts, both individually and collectively, that Marinello acted corruptly to impede or obstruct the due administration of the Internal Revenue laws.

Marinello's second argument—that the government failed to establish that he knew that the Internal Revenue Service was investigating him—is also easily disposable. In short, there is no such requirement in the Second Circuit. Knowledge of a pending investigation is not an essential element of the crime. *See* 1 L. Sand, et al., *Modern Federal Jury Instructions-Criminal*, ¶ 59.05, at Instruction 59-32 (2014) (setting forth two elements, neither of which is knowledge of a pending investigation). The case Marinello relies on, *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998), is a Sixth Circuit case that has been limited to its facts in its own circuit and has been rejected by other circuits and at least one district court in the Second Circuit. *See United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999) (limiting *Kassouf* to its facts); *United States v. Willner*, No. 07 Cr. 183 (GEL), 2007 WL 2963711, at *2-*4 (S.D.N.Y. Oct. 11, 2007) (rejecting *Kassouf* and citing cases). The government's proof on each of the two essential elements was thus sufficient to sustain the jury's guilty verdict on Count 1.

For these reasons, this Court finds that Marinello is not entitled to judgment of acquittal on Count 1 of the superseding indictment.

* * * * *

IV. CONCLUSION

For the reasons stated above, Marinello's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial, is denied.

V. ORDERS

IT HEREBY IS ORDERED, that Marinello's Motion for a Judgment of Acquittal, or in the alternative, for a New Trial (Docket No. 92) is DENIED.

SO ORDERED.

Dated: June 26, 2015
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge