No. 16-1144

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

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner Carlo J. Marinello, II.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented to its filing.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax enforcement requires uniform, predictable, and comprehensible distinctions between lawful business practices and felonies. The College submits this *amicus* brief because it is deeply concerned that the existing split of authority on the elements of the federal felony in 26 U.S.C. § 7212(a) deprives taxpayers and their advisors of a national standard of uniform applicability. Moreover, the Second Circuit's broad reading of the residual clause of § 7212(a) creates an all-purpose tax felony that reaches the entire spectrum of administration of the tax code without requiring willfulness or an affirmative act. If this Court allows the decision below to stand, the carefully-drawn distinctions between lawful and unlawful conduct enacted by Congress and interpreted by the courts in decades of jurisprudence will be swept away and

replaced by a tax enforcement system where everyone is subject to prosecutorial whim.

SUMMARY OF ARGUMENT

The concerns expressed by Judges Jacobs and Cabranes in the dissent from denial of *en banc* rehearing are neither imaginary nor hyperbolic. Their warning that "[i]f this is the law, nobody is safe," Pet. App. 42a, is both accurate and particularly ominous for the Fellows of the College who have devoted their careers to assisting taxpayers with tax planning and representing taxpayers in a vast array of interactions with the Internal Revenue Service ("IRS"). The Second Circuit's sweeping construction of the residual clause of § 7212(a), which makes it a felony to "in any other way corruptly . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of [the tax code]," *United States v. Marinello*, 839 F.3d 209, 218 (2d Cir. 2016), presents a very real threat of wrongful prosecution of taxpayers and their advisors because it erases any discernable distinction between lawful conduct and felony obstruction and vests prosecutors with discretion to replace the specific tax crimes enacted by Congress with an all-purpose tax felony.

The College encourages the Court to grant the Petition for a Writ of Certiorari because the difference between the Sixth Circuit's appropriately tailored reading of § 7212(a) and the expansive construction adopted by the First, Second, Ninth, and Tenth Circuits is profound and has important practical consequences for day-to-day business

activities of taxpayers and their advisors. A definitive ruling from this Court is necessary to serve justice and to preserve an effective national tax enforcement system based on uniform, predictable, and comprehensible rules.

ARGUMENT

I. A Broad Reading of the Residual Clause Grants Prosecutors Too Much Discretion.

A. *Congress Enacted a Tax Enforcement System that Distinguishes Lawful Conduct, Misdemeanors, and Felonies.*

Federal tax crimes other than § 7212(a) share certain attributes that create a coherent tax enforcement scheme. With very few well-defined and limited exceptions for taxpayers in special roles,[2] the tax felonies require willful commission of an affirmative act. *See* 26 U.S.C. § 7201 (tax

[2] There are two types of willful failures to act that Congress specifically chose to treat as felonies rather than misdemeanors: the willful failure of a withholding agent to collect, account for, and pay over tax, which is a felony under § 7202, and the willful failure of a person engaged in a trade or business to comply with the currency transaction reporting requirements, which is a felony under § 7203. There is also one misdemeanor in the tax code that does not specifically require willfulness. If a person required to collect, account for, and pay over tax fails to do so, and receives a hand-delivered notice of such failure and the requirement to withhold and pay over additional taxes, continued failure to comply constitutes a misdemeanor under § 7215. In each of these situations, the taxpayer subject to enhanced penalties has special duties prescribed by Congress.

evasion), § 7206(1) (filing a fraudulent return), § 7206(2) (aiding and assisting in preparation of a false return). The common failures to act – failure to pay tax, failure to file a return, failure to keep records, and failure to supply information – are all misdemeanors under 26 U.S.C. § 7203. The § 7203 misdemeanors, like the tax felonies, require willfulness. In the tax enforcement system enacted by Congress, there are only narrowly tailored exceptions to the general rule that a non-willful violation of the tax code may subject a taxpayer to various levels of civil penalties, a willful failure to act may be prosecuted as a misdemeanor, and only a willful affirmative act may be prosecuted as a felony.

In construing the tax crimes enacted by Congress, the courts have recognized the importance of giving taxpayers fair notice of where the lines are drawn between lawful conduct and a crime and have further refined those lines. This Court has long recognized that in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *United States v. Bishop,* 412 U.S. 346, 360-361 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943)). Over the course of decades, both this Court and the Courts of Appeals have established significant jurisprudence discerning the finer points of the willfulness standard that is the defining characteristic of tax

crimes.[3] In *Spies v. United States*, 317 U.S. 492 (1943), this Court also recognized the importance of the line between the tax misdemeanors and felonies, explaining that "[w]illful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax . . . lifts the offense to the degree of felony." 317 U.S. at 499.

The tax enforcement system enacted by Congress and interpreted by the courts creates predictable and comprehensible distinctions between lawful conduct, misdemeanors, and felonies. Congress could not have intended the residual clause of § 7212(a) to serve as a wildcard that gives prosecutors the power to trump the principles that form the foundation of our tax enforcement system.

B. *The Second Circuit's Reading of the Residual Clause Erases the Lines Drawn by Congress.*

The Second Circuit's sweeping construction of the residual clause of § 7212(a) allows felony prosecution of a taxpayer for a non-willful failure to act that could potentially make any aspect of the IRS' job

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[3] *See, e.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (defining willfulness as the "voluntary, intentional violation of a known legal duty"); *Cheek v. United States*, 498 U.S. 192 (1991) (finding a good-faith misunderstanding of the law negates willfulness even if it is objectively unreasonable); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991) (reversing with instructions to acquit defendant who failed to report as income money she received because she had no fair warning that her conduct might subject her to criminal tax liability).

harder, even if the impact on the IRS is remote and unforeseeable. Through its broad reading of the residual clause, the Second Circuit erased the lines Congress drew between conduct that warrants criminal prosecution as opposed to civil penalties (willfulness), and conduct that rises to the level of a felony as opposed to a misdemeanor (an affirmative act), across the entire spectrum of administration of the tax code.

In administering the tax code, the IRS plays every conceivable role: lawmaker when it promulgates regulations and rulings; administrator when it processes returns and payments; investigator when it conducts civil audits or criminal investigations; settlement officer when the Office of Appeals considers a disagreement between the taxpayer and examiner; litigator when attorneys in the Office of Chief Counsel represent the IRS in adversarial court proceedings; decision-maker when it rules on Private Letter Ruling requests; and ethics board when it creates rules for practice before the IRS and enforces those rules through its Office of Professional Responsibility. Countless types of acts or omissions could impede the IRS in one of its myriad roles. By converting any one of those countless acts or omissions into a felony, the Second Circuit's unbounded reading of the residual clause renders the rest of the tax enforcement system obsolete.

The Second Circuit's interpretation of the residual clause creates an all-purpose tax felony that reaches the entire spectrum of administration of the tax code without requiring willfulness or an affirmative act. This sweeping construction gives

prosecutors the power to erase and re-draw the lines that Congress and the courts carefully drew between lawful conduct and a tax crime, and between a misdemeanor and a felony. Reading § 7212(a) so broadly impermissibly shifts the balance of power between "the legislature, the prosecutor, and the court in defining criminal liability." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

C. *Erasing the Lines Between Lawful Conduct and Felony Obstruction Unjustly Endangers Taxpayers and Their Advisors.*

By eliminating the predictable and comprehensible distinctions taxpayers and their advisors rely on in conducting their affairs, the Second Circuit's expansive interpretation of § 7212(a) creates a material risk of felony prosecution without fair warning. This Court has "traditionally exercised 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." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citations omitted)). If the Second Circuit's reading of § 7212(a) stands, there is no longer any discernable line between lawful efforts to minimize tax liabilities and felony obstruction of the IRS.

As Judge Learned Hand wrote for the Second Circuit long ago, "[a]ny one may so arrange his

affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (citing *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873); *Bullen v. Wisconsin*, 240 U.S. 625, 630 (1916)), *aff'd*, 293 U.S. 465 (1935). There is a consensus that "[t]ax avoidance is entirely legal and legitimate." *Indmar Prods. Co. v. Commissioner*, 444 F.3d 771, 780 (6th Cir. 2006) (quoting *Estate of Kluener v. Commissioner*, 154 F.3d 630, 634 (6th Cir. 1998)). For both taxpayers and their advisors, however, lawful efforts to minimize tax liabilities now carry a risk of felony prosecution at a prosecutor's whim.

Although the list of lawful acts or omissions that could be charged as a felony under the Second Circuit's reading of § 7212(a) is long, there are two compelling examples specifically described in the *Marinello* opinion. In the decision below, the panel found that "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." 839 F.3d at 224. These two examples effectively illustrate how the panel's broad reading of § 7212(a) unjustly endangers both tax lawyers and taxpayers.

Lawyers representing taxpayers in IRS audits frequently make good faith decisions to withhold from the IRS materials it requests. The IRS request may be unlawfully broad, or it may seek information protected by the attorney-client privilege, or the act

of producing the requested materials may require the taxpayer to incriminate himself in violation of the Fifth Amendment. In other cases, the negligence of a client or the lawyer may result in an innocent omission of material that could advantage the IRS. In either case a prosecutor could argue that the omission was corrupt because it secures an unlawful advantage (a lower tax liability) for another (the taxpayer-client), and that the failure to provide the materials had the effect of impeding the IRS. As the law stands in the Second Circuit, the lawyer faces felony charges under § 7212(a) if she fails to produce the requested materials, but may get disbarred for violating her duty of confidentiality to her client if she produces the materials against the client's wishes.

Tax lawyers face a unique ethical conflict exacerbated by the Second Circuit's sweeping construction of § 7212(a). Tax lawyers owe duties of confidentiality and zealous advocacy to their clients, but also an ill-defined duty to the tax system that may morph depending on whether the tax lawyer is engaged in planning, audit defense, litigation, or any other type of interaction with the IRS, or whether the IRS is playing the role of law-maker, investigator, litigation adversary, or any of its other myriad roles. Defining the duties owed to the IRS in each context, and striking the right balance between those duties and often conflicting duties owed to taxpayer clients, is no easy feat. Indeed, the scope of these duties and appropriate resolution of the inevitable conflicts between them are the subject of

significant dispute and consternation.[4] These are muddy waters for even the most experienced tax lawyers, and the Second Circuit's reading of § 7212(a) grants prosecutors discretion to decide that a lawyer's attempt to strike the right balance was not only erroneous, but also that the lawyer's omission had the effect of impeding the IRS so that she may be charged with felony obstruction. Tax lawyers already forced to sail between Scylla and Charybdis to comply with their ethical obligations should not face the additional threat of felony prosecution on one side of the strait.

As demonstrated by the decision below, the waters are no less dangerous for taxpayers. Taxpayers frequently fail to document or provide a proper accounting of business income and expenses for reasons that have nothing to do with obstructing the IRS. The substantiation requirements in the tax code are both detailed and extensive, challenging the

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[4] *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721, 2725 (2016) (describing the longstanding debate over the tax lawyer's role and arguing that, although the lawyer has a duty to the system, "concrete guidance" on the scope of that duty is needed); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847, 851 (1999) (recognizing the contested question of how a tax lawyer's duties conflict and arguing that there is no discrete duty by the lawyer to the tax system); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681, 688 (1997) (taking the position that when a lawyer's two duties collide, the duty to the system takes priority).

ability of many taxpayers who make an earnest effort to comply. The taxpayer's alleged failure to meet the substantiation requirements in the tax code is the subject of a large volume of IRS audits and resulting civil litigation where either the correct tax liability or civil penalties or both are at issue. Converting those civil disputes into felony charges whenever a prosecutor chooses to allege that the taxpayer's sloppiness results from an intent to secure an unlawful advantage in the form of a reduced tax liability strips away the distinctions Congress defined between the tax felonies, misdemeanors, and civil violations, and renders meaningless the voluminous jurisprudence interpreting those distinctions.

The Sixth Circuit correctly expressed concern that a broad application of § 7212(a) could "open[] the statute to legitimate charges of overbreadth and vagueness" and reluctance to construe the statute to impose criminal liability on a defendant who "may have had no idea that conduct such as the failing to maintain records (before his tax returns were even filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *United States v. Kassouf*, 144 F.3d 952, 958 (6th Cir. 1998). When the link between the alleged endeavor and the due administration of the tax code becomes too speculative, there is a real question of whether the defendant could have the requisite intent to obstruct. *See, e.g.*, *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (requiring a nexus between the alleged obstructive act and the investigation or

proceeding for purposes of the omnibus clause of 18 U.S.C. § 1503).

If the decision below stands, prosecutors outside the Sixth Circuit will have unfettered discretion to bring felony charges against anyone who makes the IRS' job harder in any way. Judges Jacobs and Cabranes correctly found that the panel in the decision below "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." Pet. App. 41a. As this Court unanimously reaffirmed in *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016), "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Yet by reading out of the statute any requirement that one be aware of an IRS proceeding, the decision below allows prosecutors to look back with hindsight to identify any past omission that may have had the effect of securing an advantage for the taxpayer, and use that omission to extend the criminal net without any evidence of a willful, affirmative act.

II. The Existing Circuit Split on the Elements of a Federal Felony Deprives Taxpayers and Their Advisors of a National Standard of Uniform Applicability.

The College agrees with the Petitioner that there is an acknowledged circuit split, with the Sixth Circuit recently reaffirming its interpretation of § 7212(a) in *United States v. Miner*, 774 F.3d 336, 342-45 (6th Cir. 2014), and the Second Circuit

embracing decisions from the First Circuit, Ninth Circuit, and Tenth Circuit rejecting that construction. Pet. 11-12. The College also seeks to underscore Petitioner's argument that "further difference in interpretation is unjust." Pet. 13. This is not a trivial or inconsequential split in the circuits. Allowing this split to continue subjects taxpayers and their advisors to unequal treatment that fundamentally violates our system of justice because there is no national standard of uniform applicability defining the elements of a federal felony.

The status quo is untenable for individual taxpayers, businesses, and the lawyers and other advisors who assist them not only in their interactions with the IRS but also in day-to-day business decisions. A business owner in northern Ohio who wants to open a new location less than an hour's drive away in western New York should not have to consider whether doing so would subject her to an increased risk of felony prosecution if she fails to keep records the IRS considers sufficient. Lawyers handling business transactions should not have to determine the potential venues where a client may be subject to jurisdiction before giving advice about document retention.

Although certain classes of taxpayers are subject to heightened penalties because they owe special duties to the system, *e.g.*, withholding agents, taxpayers in the United States should not be divided into classes subject to heightened penalties because of where they live or do business. This situation threatens fundamental notions of fairness at the heart of our system of justice. This Court, therefore,

should grant the petition and define a uniform, predictable, and comprehensible national standard for prosecution under the residual clause of § 7212(a).

CONCLUSION

For the foregoing reasons, the College respectfully encourages the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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