No. 16-1144

IN THE

Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* CAUSE OF ACTION INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.3, Cause of Action Institute ("CoA Institute") and National Association of Criminal Defense Lawyers ("NACDL") respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute's *amicus* brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice system, protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*,

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1. In accordance with Supreme Court Rule 37.3, CoA Institute notified the counsel of record for all parties and all parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute and NACDL financially contributed to preparing this brief.

2. CoA Institute, *About*, http://www.causeofaction.org/about (last visited Sept. 8, 2017).

United States v. Black, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this Court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017); *Overton v. United States*, No. 15-1504 (2017).

Amicus curiae NACDL is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in ensuring the fair and just development of basic criminal law principles, including limits on prosecutorial discretion and upholding *mens rea* requirements. NACDL believes that this case presents an appropriate vehicle for the Court to clarify the prosecutorial limits and *mens rea* requirements of the "omnibus clause" of 26 U.S.C. § 7212(a).

SUMMARY OF ARGUMENT

Tucked away in the text of a statute punishing those who use force or threats to intimidate or impede Internal Revenue Service ("IRS") agents, is what has become known as the "omnibus clause"—words that, when strung together, punish "[w]hoever . . . corruptly . . . obstructs or impedes . . . or endeavors to obstruct or impede . . . the due administration of [the tax code]." 26 U.S.C. § 7212(a).

For nearly three decades after the statute's passage this clause languished unused, with the first reported appellate decision invoking it not appearing until 1981. *United States v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981). Prior to that case, the government had actually taken the position that "thus far all prosecutions [under 26 U.S.C. § 7212] have involved the use of force, violence or threats" because "the legislative history of section 7212 indicates that its purpose was to prevent intimidation or impeding of Internal Revenue Service agents by force or threats of force." *United States v. Henderson*, 386 F. Supp. 1048, 1056 (S.D.N.Y. 1974).

Now, the omnibus clause, a felony containing a lower "corruptly" *mens rea* requirement than the "willful" violations required of most tax code misdemeanors, and a possible three-year sentence, is routinely added to prosecutions under Title 26. In 2014, alone, the omnibus clause was the debate of at least thirteen reported cases, a number that does not include countless other indictments that were filed that same year.[3] Its current prominence is

3. *See, e.g.*, *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Taylor*, 550 Fed. App'x. 135 (3d Cir. 2014); *United States v. Saoud*, 595 Fed. App'x. 182 (4th Cir. 2014); *United States v. Weiss*, 754 F.3d 207 (4th Cir. 2014); *United States v. Johnson*, 571 Fed. App'x. 205 (4th Cir. 2014); *United States v. Herder*, 551 Fed. App'x. 257 (6th Cir. 2014); *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014); *United States v. Castaldi*, 743 F.3d 589 (7th Cir. 2014); *United States v. Trimble*, 12 F. Supp. 3d 742 (E.D.Pa. 2014); *United States v. Croteau*, No. 2:13-CR-121, 2014 U.S. Dist. LEXIS 170025 (M.D.Fla. Dec. 9, 2014); *United States v. Blake*, No. 12-CR-104, 2014 U.S. Dist. LEXIS 136049 (E.D.Tenn. Sept. 26, 2014); *United States v. Kozak*, No. 12-CR-344, 2014 U.S. Dist. LEXIS 40983 (D.Neb. Feb. 7, 2014); *United States v. Moleski*, No. 12-CR-811, 2014 U.S. Dist. LEXIS 3905 (D.N.J. Jan. 13, 2014).

unsurprising as the majority interpretation of the statute covers such a broad swath of conduct that even many specifically-enumerated criminal offenses within the tax code could constitute obstruction.

In this case, failure to provide an accountant with documents, throwing away receipts, and cashing business checks were just a few of the routine actions considered to qualify as obstruction of the tax code, even though Mr. Marinello had no knowledge of the future investigation the IRS would undertake at the time of his purportedly criminal action. Pet. App. 4a, 15a.

This Court has routinely cabined criminal statutes within their proper textual context where the outer bounds of statutory interpretation threaten vagueness and fail to provide fair notice to ensure that everyone indicted under a statute knows he was violating the law. *See*, *e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2367 (2016); *Yates*, 135 S. Ct. at 1074; *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995). These *mens rea* requirements are essential to our criminal law jurisprudence. As such, this Court has never left the outer bounds of a statute up to prosecutorial discretion. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 408, 412 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions). The omnibus clause, as applied in a majority of the circuits, runs counter to these blackletter principles. It should join the list of statutory clauses properly cabined by this Court.

As currently interpreted in the First, Second, Ninth, and Tenth Circuits, any act or omission done "corruptly"

that impeded the IRS's ability to administer the tax code, at any point, constitutes obstruction of the tax code, regardless of whether the defendant knew there was any investigation or specific IRS action pertaining to that individual. *See United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016); *United States v. Sorenson*, 801 F.3d 1217, 1225–26 (10th Cir. 2015); *Floyd*, 740 F.3d at 32; *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005).

Respondent asserts the administration of the tax code is "continuous, ubiquitous, and universally known to exist," and that every person is on notice that the government is always executing the tax code. *See* Gov't Br. in Opp'n to Pet. for Cert. ("BIO") at 9. Yet, it nonetheless argues that any constitutional vagueness concerns are assuaged by the *mens rea* requirement in the statute, meaning that the defendant acted "corruptly." BIO at 11. Circuit courts have also taken false comfort in the bounds placed on the omnibus clause by the requirement that the defendant have acted "corruptly."

As a practical matter, this *mens rea* requirement does little to cure vagueness concerns or restrict the omnibus clause's application. To act "corruptly" is to act "with intent to gain an unlawful advantage or benefit for oneself or for another." *Sorenson*, 801 F.3d at 1225 (citing *United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2014)); *see, e.g.*, *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1539–40 (11th Cir. 1991).

As currently interpreted, the omnibus clause applies regardless of whether the defendant knew his act or

omission was obstructing the IRS, regardless of whether that act or omission actually did obstruct the IRS in its administration of the tax code, regardless of whether the defendant knew the benefit he ultimately obtained was unlawful, and regardless of whether the act or omission is otherwise completely legal. Importantly, because the definition of "corruptly" requires only that the defendant acted to obtain an unlawful benefit, and the courts have held that the obstruction of the IRS's administration of the tax code can be at some point in the future, the government does not even need to prove that the defendant actually knew he was obstructing the IRS when he performed the complained-of act or omission.

This Court should adopt the reading of the statute supported by Petitioner and cabin the omnibus clause to the context of the statute within which it lies—one directed at punishing those who use force, threats, or corrupt actions to obstruct specific IRS officials or known IRS investigations. The position adopted by Petitioner is backed not only by the text of the statute but also by years of jurisprudence from this court limiting the application of criminal statutes in order to avoid vagueness and ensure meaningful *mens rea* requirements.

STATEMENT OF THE CASE

In *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016), the United States obtained an indictment against Mr. Carlo J. Marinello, II, under 26 U.S.C. § 7212(a)'s "omnibus clause" of the criminal portion of the tax code, which, in relevant part, makes it a felony to "in any other way corruptly . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of [Title 26]."

Pet. App. 6a–7a. Although the tax code expressly sets forth numerous felonies, and requires the government to prove that the defendant "willfully" violated those statutes, *see, e.g.*, 26 U.S.C. § 7201 *et seq.*, the government argued, and the Second Circuit agreed, that Mr. Marinello could be guilty of the felony of corruptly obstructing or impeding the administration of the tax code by performing acts as common as "failing to maintain corporate books and records for . . . his small business," "failing to provide [his] accountant with complete . . . information related to [his] personal income," and "discarding business records" because he performed these acts and omissions with the intent to obtain an unlawful benefit—not paying taxes. *See* Pet. App. 6a–7a, 32a–35a.

The Second Circuit declined to adopt the holding in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), as affirmed in *United States v. Miner*, 774 F.3d 336 (6th Cir. 2014), which would have required the government to prove that the defendant took action to impede or obstruct a pending IRS action in order to obtain a conviction under the omnibus clause. Pet. App. 23a–25a. Rejecting the Sixth Circuit's concerns of vagueness and overbreadth, the Second Circuit stated that the term "corruptly" sufficiently restricts the reach of the omnibus clause. Pet. App. 27a. Mr. Marinello filed a Petition for a Writ of Certiorari from the Second Circuit, which this Court granted. *Marinello v. United States*, 137 S.Ct. 2327 (Mem), 85 U.S.L.W. 3602 (U.S. June 27, 2017) (No. 16-1144).

ARGUMENT

I. This Court has routinely cabined broadly-drafted criminal statutes that are vague or lack meaningful *mens rea* requirements.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). The fair notice requirement extends to both criminal and civil cases. *See, e.g.*, *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). It ensures that Congress speaks clearly when proscribing conduct, so that police, prosecutors, judges, and juries are not impermissibly delegated lawmaking authority to be supplied on an *ad hoc* and subjective basis. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

In *McDonnell v. United States*, this Court rejected an argument similar to the one the government is making here, that "'Congress used intentionally broad language'" in defining an "official act" in the bribery statute. 136 S. Ct. at 2367 (internal citation omitted). Rather, making a reference to the "standardless sweep" of the government's broad reading, this Court held that the government's expansive interpretation of "official act" failed to provide fair notice about the conduct proscribed and would encourage arbitrary and discriminatory enforcement. *Id.* at 2373.

Here, too, the government's request for a broad reading of the omnibus clause would place the statute on constitutionally-infirm ground. For this reason, the Court should adopt the interpretation urged by the Petitioner.

A. The omnibus clause raises vagueness concerns.

The government's interpretation of the omnibus clause does not give ordinary people fair notice of what conduct is actually illegal. Here, conduct as common as throwing away receipts, failing to keep books and records, failing to give an accountant "complete" information, "cashing business checks," and using business receipts to pay personal expenses were deemed by the government, and found by a jury, to obstruct or impede the IRS's "due administration" of the tax code. *See* Pet. App. 6a–7a.

The question for this Court is whether the average taxpayer would know that *not* doing something—like *not* giving their accountant a record showing their recent $200 profit from an eBay sale of their old record collection—was felony obstruction of the IRS's administration of the tax code. Certainly, the taxpayer might know that this $200 is probably revenue and that he should probably report it to his accountant. And in this scenario, the failure to send this income to his accountant would, at least plausibly, impede the IRS's ability to levy and collect taxes on that money in the future. But this is the constitutional weakness with the proffered interpretation by the government—it doesn't actually require that the taxpayer know, for instance, that not reporting $200 to his accountant would then or later obstruct or impede any IRS agent's "administration of the tax code" in a manner that could constitute a felony.

This was particularly the concern of the dissent below, that the broad interpretation and application of the statute would allow any prosecutor to say "[s]how me the man, and I'll find you the crime." Pet. App. 49a; *see also Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting) (quoting Attorney General Robert H. Jackson, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

This Court must, if it can, construe an Act of Congress so as to preserve it, rather than invalidate it as unconstitutionally vague. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973). Thus, this Court has routinely exercised its authority to narrowly construe a statute in order to avoid vagueness problems associated with an overly expansive interpretation. The most analogous example is this Court's interpretation of the similarly-worded obstruction of justice statute. *Aguilar*, 515 U.S. at 599–600 (interpreting the obstruction of justice "omnibus clause" to require a nexus in time, causation, or logic with a judicial proceeding, such that the defendant must have acted with an intent to influence a known judicial or grand jury proceeding). But other examples abound.

In *McNally v. United States*, for example, this Court curtailed the use of the mail and wire fraud statute to prosecute cases where the mail or wires were used to deprive the public of "intangible rights." 483 U.S. 350, 360 (1987).[4] When Congress responded by amending the

4. Prior to this holding, courts of appeals had interpreted the mail-fraud statute's prohibition of "any scheme or artifice to defraud" to include deprivations of not only money or property,

code to state that the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services, 18 U.S.C. § 1346, this Court again stepped in to interpret the statute to avoid vagueness. *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). The Court limited the honest services fraud statute to classic bribery and kickback schemes that made up the bulk of the pre-*McNally* case law, but prohibited a more expansive reading of the statute. *Id.* at 408–09 (stating that "[r]eading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise due process concerns underlying the vagueness doctrine" and holding "that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law"); *see also Arthur Andersen LLP*, 544 U.S. at 703 (overturning the conviction of the corporation where the government failed to prove the company knowingly broke the law or acted to obstruct a specific proceeding when it continued to implement its routine document destruction policy and cautioning that this Court has traditionally exercised restraint in assessing the reach of federal criminal statutes).

Similarly, in *Yates v. United States*, this Court invoked the rule of lenity and noted that the doctrine

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but also of intangible rights. *See, e.g.*, *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941). These holdings created the "honest services" doctrine, which eventually resulted prosecutions for the use of the mail system in depriving tax payers, and eventually even corporations, of an employee or official's "honest services." In *McNally*, this Court narrowly interpreted the mail fraud statute as "limited in scope to the protection of property rights," 483 U.S. at 360, and expressly stated that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.*

was particularly relevant where the government urged a "reading of [18 U.S.C.] § 1519 that exposes individuals to 20-year prison sentences for tampering with any physical object that might have evidentiary value in any federal investigation into any offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil." 135 S.Ct. at 1088 (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning[.]")); *see Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)).

This Court's prior rulings require it to reject the government's argument for a broad reading of the statute here.

B. The government's interpretation of the omnibus clause invites its arbitrary enforcement.

Petitioner's position is simple and based in the text. The interpretation advanced by the government impedes clarity and uniform enforcement. Prior to 1981, Respondent took the position that the entire 26 U.S.C. § 7212 statute should only be used in cases where the defendant used physical force or threats of force against an IRS official. Indeed, the government even represented this position to the courts. *Williams*, 644 F.2d at 699 n.12 (in a case of first impression, discussing the government's prior position and stating that "[a]t one time the Government contended that § 7212 applied only to conduct involving force or threats of force," but that "the Government in the

present case has characterized its position in Henderson as 'timid.'") (citing *United States v. Henderson*, 386 F. Supp. 1048, 1055–56 (S.D.N.Y.1974)).

A review of the Department of Justice's ("DOJ") Criminal Tax Manual ("CTM") demonstrates the hodgepodge of varying positions the government has taken on when and how the omnibus clause should be used. A 1989 directive explicitly advised against bringing Section 7212(a) charges in garden variety tax evasion or false return cases, stating that: "[t]he omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense." Kathryn Keneally, *Column: White Collar Crime*, 21 Champion 25, 25 (1997) (citing Dep't of Justice Tax Division Directive No. 77 (July 7, 1989), Dep't of Justice, Criminal Tax Manual [hereinafter CTM] §§ 3-29–3-30 (1988 ed.)).

Indeed, for many years the DOJ Tax Division did not even have jurisdiction within the agency to prosecute crimes under section 7212(a). U.S. Att'ys Manual § 6-4.211 (1988), *available at* http://bit.ly/2xTfnAx (stating that "[t]he Assistant Attorney General, Tax Division, has responsibility for all criminal proceedings arising under the internal revenue laws except . . . corrupt or forcible interference with an officer or employee acting under the internal revenue laws (26 U.S.C. § 7212(a))").

In the 2001 version, the CTM stated that "the use of the 'omnibus' provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—*typically conduct designed to impede or obstruct an audit or criminal tax investigation*. CTM § 17.02 (2001 ed.), *available at* http://coainst.org/2epqSqQ.

In the 2004 edition of the CTM, the DOJ Tax Division expanded the scope of recommended use to prosecute "large-scale obstructive conduct involving the tax liability of third parties," even occurring pre-investigation. *Sorensen*, 801 F.3d at 1227 (citing CTM § 3.00 (2004 ed.)) and stating that the Tax Division advised its personnel that a charge under § 7212(a)'s omnibus clause would be "particularly appropriate" for "corrupt conduct that is intended to impede an IRS audit or investigation" and "[could] also be authorized" for "large-scale obstructive conduct involving the tax liability of third parties," even occurring pre-audit or pre-investigation). Neither of these enforcement policies effective in 2001 and 2004, if followed, would have included the offense charged under the omnibus clause in this case.

The language restricting the omnibus clause to conduct designed to impede an audit or investigation was eventually removed from the CTM altogether. *See* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L. J. 255, 302 (2009). The current version of the CTM reflects the unbounded interpretation offered by Respondent. By the recommendation in the current version of the CTM, "[s]ection 7212(a) applies broadly to the variety of conduct used to attempt to prevent the IRS from carrying out its lawful functions" and applies to any defendant seeking "to avoid the proper assessment and payment of taxes." CTM § 17.02 (2012 ed.), *available at* http://bit.ly/2vPiiIa.

Even while the CTM cautioned federal prosecutors to constrain the use and expanse of the omnibus obstruction statute, the government succeeded in convincing courts that the application of the statute was almost boundless.

Indeed, contrary to admonitions from this Court, lower courts have expressly interpreted the omnibus clause *broadly*. *See Sorenson*, 801 F.3d at 1225–26 ("[W]e have cited favorably other cases broadly interpreting § 7212(a)'s omnibus clause."); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) ("[T]he inclusion of the omnibus 'in any other way' and 'the due administration of this title' language encourage a broad rather than narrow construction.") (internal citation omitted); *Popkin*, 943 F.2d at 1538.

And with this broad interpretation have come inconsistencies in the manner in which the statute is applied. Under the analysis proffered by the government, a misdemeanor offense of willfully failing file a return (for which Mr. Marinello was also found guilty) could also be the very act or omission constituting obstruction of the due administration of the tax code. Certainly, it is hard to imagine any willful failure to file a tax return that would not also hinder the IRS's ability to levy taxes and otherwise administer the tax code.

The government challenges this assertion as being "doubted" by the Second Circuit, BIO at 13, and refers this Court to the 2012 CTM, which highlights the DOJ's "policy" to charge failures to file tax returns as standalone offenses and not as obstructive acts. BIO at 13 (citing CTM § 17.04(2) (2012 ed.), *available at* http://bit.ly/2vPiiIa).

The government's position in this case highlights yet another instance in which the broad interpretation of the omnibus clause results in arbitrary enforcement before the lower courts. In fact, stand-alone tax offenses have already been charged as omnibus obstruction on numerous

occasions where those same stand-alone offenses were also charged as separate counts in the indictment. *See United States v. Biller*, No. 06-CR-14, 2007 U.S. Dist. LEXIS 7156, *29–30 (N.D. W. Va. Jan. 31, 2007) ("At trial, the Government proved beyond a reasonable doubt that Biller submitted false income tax returns for tax years 1999, 2000, 2001 and 2002. The Court finds that the filing of false income tax returns is one method by which Biller corruptly endeavored to obstruct or impede the due administration of the Internal Revenue Code."); *United States v. Armstrong*, 974 F. Supp. 528, 540 (E.D. Va. 1997)[5] ("While some of the charged acts in Count I may constitute independent criminal offenses, such as violations of § 7206(1), they are also corrupt acts that could impair or obstruct the administration of the tax laws."); *United States v. Toliver*, 972 F. Supp. 1030, 1037 (W.D. Va. 1997) (holding, in accordance with what the government argues here, that since a violation of 26 U.S.C. § 7206 requires proof that the defendant acted "willfully" and a violation of the omnibus clause under 26 U.S.C. § 7212 requires that the defendant have only acted "corruptly," the statutes have different elements and therefore it is not duplicative to charge 7206 violations as both stand-alone counts and obstructive acts under the omnibus clause); *see also United States v. Daugerdas*, No. S3-09-Cr-581, 2011 U.S. Dist. LEXIS 14912, at *5 (S.D.N.Y. Feb. 7, 2011) (holding that multiple tax charges against an individual may be the predicate for a single violation of the IRS obstruction statute).

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5. In its opinion in this case below, the Second Circuit cited *United States v. Armstrong* approvingly for a different proposition. *Marinello*, 839 F.3d at 225 n.16.

And while charging the violation of a tax statute as the "corrupt act" that obstructed or impeded the IRS is readily accepted in the Fourth Circuit, such a theory has been rejected out of hand by other courts. *See United States v. Wood*, 384 Fed. App'x. 698 (10th Cir. 2010); *United States v. Mathis*, No. CR-1-97-15, 1997 U.S. Dist. LEXIS 24049 (S.D. Ohio June 2, 1997). Accordingly, while the government here agreed to remove the violation of 26 U.S.C. § 7203 from the indictment in order to avoid duplicity concerns, other defendants have not been so lucky. The threat of arbitrary enforcement under the government's interpretation of the statute is not theoretical, it already occurs within the circuits that have adopted the broad reading of the statute proffered by the government here. Even in the Second Circuit, lower courts have questioned the propriety of the interpretation offered by Respondent and which is now the law of the circuit. *United States v. Willner*, No. 07-CR-183, 2007 U.S. Dist. LEXIS 75597, at *14–17 (S.D.N.Y. Oct. 11, 2007) ("Although both sides purport to rely on the plain language of § 7212(a), that language plainly does not provide a clear answer. Were the Court writing on a clean slate, something could be said for an interpretation that read the 'administration' of the Internal Revenue Code as referring to specific IRS functions or proceedings.").

The inconsistency is even more profound when a prosecutor opts not to pursue a stand-alone offense and, instead, alleges the same conduct that could give rise to a stand-alone charge as conduct constituting obstruction.

As this Court ruled, "we must construe [an imprisonment] statute in light of the background rules of the common law in which the requirement of some *mens*

rea for a crime is firmly embedded." *Staples v. United States*, 511 U.S. 600, 605 (1994) (internal citation omitted); *see also Morissette v. United States*, 342 U.S. 246, 250–52 (1952). With a few exceptions, this Court has adopted a presumption in favor of construing criminal statutes to require proof of an evil state of mind. *See*, *e.g.*, *Arthur Andersen LLP*, 544 U.S. at 705; *Aguilar*, 515 U.S. at 599; *United States v. X–Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples*, 511 U.S. at 600; *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Cheek v. United States*, 498 U.S. 192 (1991); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978).

The *mens rea* requirements of most of the substantive offenses of the criminal tax code are exacting. Most of the substantive offenses in the tax code contain the requirement that the defendant have acted "willfully" to commit the accused crime. A "willful" violation occurs where the defendant actually knew the terms of the statute and that his conduct violated the statute. *Cheek*, 498 U.S. at 201. As the Supreme Court noted in *Cheek*, the tax law's complexity and potential for ensnaring the innocent require "the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201, 205. The lower "corruptly" *mens rea* requirement of the omnibus clause presents prosecutors with an opportunity to charge conduct as "obstruction" without having to overcome the difficulty of proving any willful code violation.

The government's position does nothing to truly address this concern, that the omnibus clause swallows up and renders moot most other provisions of the criminal tax

code. Indeed, the current version of the CTM, published in 2012, lays out the endless possibilities for use of the omnibus clause by prosecutors. CTM § 17.04(2) (2012 ed.), *available at* http://bit.ly/2vPiiIa.

The CTM highlights that "[a]n endeavor may be corrupt even when it involves means that are not illegal in themselves," *id.* § 17.04(1); "the means by which a defendant can 'endeavor' to impede the due administration of the internal revenue laws are unlimited," *id.* § 17.04(2); "[t]he acts themselves need not be illegal," *id.* § 17.04(1); and, "[t]he defendant need not seek a financial benefit in order to satisfy the element of acting 'corruptly.'" *Id.*

Even in so stating, the bulk of the appellate cases referenced in the CTM necessarily involved, by the nature of the facts of each case, defendants who actually knew they were being audited or investigated by the IRS. *Id.* (collecting cases, most of which involved a defendant targeting a specific IRS agent or seeking to interfere with a specific collection action, auction of taxpayer property, or audit); *see United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004) (filing fraudulent petition to place IRS revenue agent assigned to girlfriend's case into involuntary bankruptcy); *United States v. Valenti*, 121 F.3d 327, 331–32 (7th Cir. 1997) (making statements designed to persuade witnesses not to talk to IRS employees or cooperate with an IRS investigation); *United States v. Madoch*, 108 F.3d 761, 762 (7th Cir. 1997) (executing multiple bogus refund schemes); *United States v. Workinger*, 90 F.3d 1409, 1411, 1414 (9th Cir. 1996) (submitting false financial statements to IRS officers); *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995) (attempting to interfere with an auction

of the taxpayer's property to pay a tax debt by filing a *lis pendens* action and distributing copies of the notice to prospective buyers); *United States v. Dykstra*, 991 F.2d 450, 451–53 (8th Cir. 1993) (filing fraudulent Forms 1099 claiming that defendant paid compensation to IRS employees involved in a collection action against him); *United States v. Martin*, 747 F.2d 1404, 1410–11 (11th Cir. 1984) (filing a false complaint against an IRS Revenue Agent investigating the taxpayer).

For this reason, Petitioner's proposed reading would merely bring the statute back to what even the DOJ stated it was just sixteen years ago: as a statute reserved for conduct "*typically . . . designed to impede or obstruct an audit or criminal tax investigation*." CTM § 17.02 (2001 ed.). As the Court did in *Skilling*, it should limit the application of the statute to the "core" of § 7212 cases typically covered by the omnibus clause.

II. The "corruptly" *mens rea* requirement does not protect the statute from vagueness concerns or constitute a meaningful *mens rea* requirement.

The government argues that any constitutional vagueness concerns are assuaged by the *mens rea* requirement of the statute. The government further asserts that the definition of "corruptly" as supplied by the courts, does plenty to inform the average person about the type of conduct that is criminal in the IRS's omnipresent administration of the tax code.

As a practical matter, however, the "corruptly" *mens rea* requirement does little to cure vagueness concerns or restrict the omnibus clause's application. In many ways,

the requirement that the defendant have acted corruptly serves as a *mens rea* requirement in name only.

The term "corruptly" is not defined in the tax code. *See* 26 U.S.C. § 7701 (listing definitions). However, under the definition adopted by most circuit courts, to act "corruptly" is to "act with intent to gain an unlawful advantage or benefit either for oneself or for another." *See United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985); *Sorenson*, 801 F.3d at 1225; *Saldana*, 427 F.3d at 305; *Kelly*, 147 F.3d at 177; *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *United States v. Hanson*, 2 F.3d 942, 946–47 (9th Cir. 1993); *Popkin*, 943 F.2d at 1540.

Dismissing overbreadth and vagueness concerns, many courts, including the Second Circuit here, take comfort in the illusory prosecutorial limits they derive from the statutorily-undefined requirement that the defendant have acted "corruptly" to obstruct the administration of the tax code. Pet. App. 27a; *Marinello*, 839 F.3d at 222 ("other courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach only to conduct that is committed "corruptly"'") (internal citation omitted); *Kelly*, 147 F.3d at 176 (rejecting vagueness and overbreadth challenges to 7212(a) and agreeing with five other circuits in 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)).

A. Whether the defendant had the "intent to obtain an unlawful benefit" depends on whether the benefit was unlawful, not on whether the defendant *knew* the benefit was unlawful.

The requirement that the defendant act "corruptly," as currently interpreted by some circuit courts, does not expressly require proof that the defendant *knew* the benefit he sought was unlawful. The "corruptly" *mens rea* requirement equates to a *mens rea* requirement in name only. It fails to comport with this Court's routinely-espoused scienter requirement. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (stating that it is a basic principle that "'wrongdoing must be conscious to the criminal'" and "a defendant must be 'blameworthy in mind' before he can be found guilty") (internal citations omitted); *Gonzales v. Carhart*, 550 U.S. 124, 149–50 (2007) (stating that *mens rea* requirements "alleviate vagueness concerns" and "narrow the scope of the prohibition and limit prosecutorial discretion").

In *United States v. Sorenson*, the defendant used a trust scheme to reduce his taxable assets by $1.5 million. He was indicted on one count—obstructing the administration of the tax code. At trial, Sorenson insisted that he did not know that the use of the trusts or the reduction in tax liability was unlawful and asked the district court to instruct the jury that, to find him guilty, it must find that he *knew* the use of the trust scheme was illegal. 801 F.3d at 1229–30. The court refused to give the instruction and the Tenth Circuit affirmed, stating that "as in *Williamson*, we need not decide" whether the "definition of 'corruptly' already requires knowledge of illegality." *Id.* at 1230.

As the dissent below warned, the line between "aggressive tax avoidance" and "corrupt obstruction" can be hard to discern and is often not clear. Pet. App. 45a. Under the "corruptly" standard, as it is currently applied, criminality hinges on the prosecutor's ability to show a benefit was unlawful, rather than the mental state of the defendant at the time of the act or omission. *See* Julie R. O'Sullivan, *Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal "Code" is a Disgrace: The Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 673 (Winter 2006) ("While it would be impossible—and counterproductive—to attempt to stamp out all prosecutorial discretion, there is clearly a point beyond which the code's empowerment of prosecutors is harmful . . . [and] many former prosecutors like me—believe that we have passed that tipping point by a substantial margin.").

B. Even legal acts or omissions can be criminal.

The majority of circuits also hold that under the "corruptly" standard, even lawful conduct is criminal if done with the intent to obtain an unlawful benefit. *See Wilson*, 118 F.3d at 234 (stating that "[e]ven legal actions [can] violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others"); *Bostian*, 59 F.3d at 479 (posting an enlarged copy of a *lis pendens* violated 7212(a) where intended to impede the government's efforts to sell seized property); *Popkin*, 943 F.2d at 1540 (creating a company violated 7212(a) where "at least one intent in creating the corporation was to secure an unlawful benefit on his client"); *accord United States v. Kahre*, No. 05-CR-121, 2009 U.S. Dist. LEXIS 39473, at *9–11 (D. Nev. Apr. 20, 2009) (while buying

property in a family member's name is not, in and of itself, illegal, defendants could properly be convicted under § 7212(a) if they were motivated by a desire "to secure an unlawful benefit for oneself or for another"); *Biller*, 2006 U.S. Dist. LEXIS 100493, at *13 ("'The acts themselves need not be illegal. Even legal actions violate § 7212(a) if the defendant commits them to secure an unlawful benefit for himself or others.'") (citing *United States v. Bostian*, 59 F.3d 474, 479 (4th Cir. 1995)).

This Court has cautioned that restraint in assessing a federal criminal statute's reach is particularly important where the act underlying the conviction is, by itself, innocuous. *Arthur Andersen LLP*, 544 U.S. at 703–04.

Under the Second Circuit's panel decision here, even doing nothing at all can be criminal if done with an intent to obtain an unlawful benefit. *Marinello*, 839 F.3d at 225 (holding that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code"); *see also Armstrong*, 974 F. Supp. at 531 (alleging the defendant 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, 1996 U.S. Dist. LEXIS 18976, at *5–6, (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").

The current application of the "corruptly" standard fails to narrow the statute's broad sweep or address this Court's perennial concerns about providing fair warning

of what constitutes criminal conduct. *See Arthur Andersen LLP*, 544 U.S. at 703.

C. The "unlawful benefit" does not need to be a tax benefit.

Under the law in some circuits, the "unlawful benefit" sought by the defendant does not even need to be a benefit under the tax code. In other words, the omnibus clause could be used to prosecute a person who obstructs the administration of Title 26 with the intent to seek *any* unlawful benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1098 (8th Cir. 2016) (rejecting the argument that "'the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage'") (internal citation omitted); *Saldana*, 427 F.3d at 305 (holding that 7212(a) does not require that the defendant obtain benefits or advantages "under the tax laws" and upholding the conviction where Saldana filed reports with the IRS documenting false transactions with targeted individuals in astronomical amounts in the hope it would lead the IRS to audit those individuals); *United States v. Bowman*, 173 F.3d 595, 596–97 (6th Cir. 1999) (affirming a defendant's conviction for violation of § 7212(a) when the defendant had filed false 1099 and 1096 forms for the sole purpose of intimidating and harassing his creditors and finding that the defendant's conduct fell within the ambit of § 7212(a)'s proscribed conduct even though he sought no financial advantage or benefit for himself under the tax laws).

In this regard, under current authority from the lower courts, the omnibus clause of section 7212(a) has reached far beyond conduct directed at IRS employees.

See Keneally, *White Collar Crime*, *supra*, at 26, 28 (stating that "somewhat troubling[ly], however, the government and some courts have . . . expanded[ed] the reach of Section 7212(a) to circumstances in which the harassing conduct was not directed at IRS employees, but at other government employees or private citizens," notwithstanding the DOJ Tax Division's policy directive (current as of 1997), limiting prosecutions to "conduct directed at IRS personnel in the performance of their duties, or in the context of an on-going investigation or proceeding").

Title 26 covers all individuals and entities and governs transactions ranging from nonprofit creation, 26 U.S.C. § 501 *et seq.*, to financing presidential campaigns, 26 U.S.C. § 9001 *et seq.*, and taxing the sale of firearms. *See* 26 U.S.C. § 5801 *et seq.* Without even a requirement that the unlawful benefit obtained by the defendant be related to the tax code, and no requirement that the defendant actually *intended* to obstruct the administration of the tax code, *see* Part II.D *infra*, it is easy to imagine the myriad of conduct that could ultimately be alleged in an indictment to have impeded the administration of Title 26. Under Respondent's interpretation, an indictment under the omnibus clause could follow from any civil violation by a nonprofit, any regulatory violation for a gun sale, or a campaign finance infraction. *See United States v. Yagow*, 953 F.2d 423, 425–27 (8th Cir. 1992) (noting only that the defendant sought a *financial* advantage, not an advantage under the *tax laws*, by filing fraudulent IRS forms where defendant sent fraudulent IRS forms to individuals involved in repossessing his property during a bankruptcy action and to individuals involved in a state prosecution against his son for alcohol possession); *United*

States v. Allison, 264 Fed. App'x. 450, 451 (5th Cir. 2008) (upholding a conviction under the omnibus clause where the defendant filed IRS forms indicating that the police officer, city officials, and municipal judge involved in a traffic case against him had received billions of dollars in cash to presumably obtain a benefit in his case against them).

Similarly, prosecution under section 7212(a) does not require proof of a tax deficiency. *See Giambalvo*, 810 F.3d at 1097; *Floyd*, 740 F.3d at 32 ("A conviction for violation of section 7212(a) does not require proof of . . . a tax deficiency.").

D. The act or omission need not even actually obstruct or impede the administration of the tax code or be carried out with the intent to obstruct or impede the administration of the tax code.

In *Popkin*, one of the seminal § 7212 circuit court cases relied upon by the government, there was no evidence that the only act charged in the redacted indictment—creating a California corporation for another person to disguise the character of illegally earned money and repatriate it—either actually did obstruct, or was intended to obstruct, the due administration of the Internal Revenue Code. 943 F.2d at 1538. Instead, the court held that that Popkin acted corruptly "because at least one intent in creating the corporation was to secure an unlawful benefit for his client." *Id.* at 1540.

At the time, money laundering was not a crime, and as the dissent in *Popkin* pointed out:

> [T]he indictment alleges only that the defendant created a corporate entity for the purpose of disguising illegal income in violation of Title 26. The indictment does not allege and the Government even now does not satisfactorily explain how this without more violates the tax laws. Although the illegal nature of the funds would have been successfully concealed, [the third party] still could have paid any tax obligations owed on the money without violating the tax laws at all.
>
> [. . .]
>
> The court's interpretation of this section of the tax law has the effect of virtually eliminating the word "corruptly" from the statute. The statute requires that the defendant must "corruptly" obstruct or endeavor to obstruct the execution of the tax laws. This should mean something more than just obstructing the execution of the laws as a matter of fact. There is nothing inherently "corrupt" about the formation of a corporation.

Id. at 1541–42 (Roney, J., dissenting). By the government's reading of the statute, there is simply no nexus between the "corrupt" act or omission and any actual obstruction or intent to obstruct the administration of the tax code at the time of that act or omission. *See Aguilar*, 515 U.S. at 599 (holding that under section 1503 the act must have a "relationship in time, causation, or logic" or the "natural and probable effect" of interfering with the due administration of justice).

The Respondent seeks to nullify this requirement by its argument that individuals are always on notice that the IRS is administering the tax code and should thus always be aware of their potential to obstruct it. *See* BIO at 9. This argument has been rejected by at least one court. *See United States v. Ogbazion*, No. 15-CR-104, 2016 U.S. Dist. LEXIS 143358, at *47–50 (S.D. Ohio Oct. 17, 2016) (applying Sixth Circuit law, rejecting the government's argument that defendant did have knowledge that his conduct would obstruct an IRS action because his company had "hundreds of locations, hundreds of employees, and by its nature, [was] continually subject to IRS scrutiny and review" and dismissing the count brought under the omnibus clause). And it further highlights the need for this court to cabin the omnibus clause's application to cases where the defendant had knowledge of an IRS action, audit, or investigation. *See Kassouf*, 144 F.3d at 955. The statute is simply too broad as applied by the majority interpretation, and should be narrowed by this Court.

CONCLUSION

For the foregoing reasons, the Court should vacate Mr. Marinello's conviction under the omnibus clause of 26 U.S.C. § 7212(a), reverse the Second Circuit, and remand for proceedings consistent with this Court's order.

Respectfully submitted,

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