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Kassouf-The Sixth Circuit's Misguided Attempt to Rein in the IRS

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COMMENTS

KASSOUF—THE SIXTH CIRCUIT'S MISGUIDED ATTEMPT TO REIN IN THE IRS

BRIAN VALCARCE*

The omnibus clause of 26 U.S.C. § 7212(a) is a catch-all provision that broadly punishes people who corruptly endeavor to obstruct administration of the Internal Revenue Code. The Sixth Circuit, in United States v. Kassouf*, improperly limited conviction under the omnibus clause to cases where the defendant had knowledge of a pending IRS investigation (a nexus test). The Sixth Circuit is the only circuit today applying this rule, with most others expressly or impliedly rejecting it.*

Even though the Sixth Circuit is an outlier in applying a nexus test, there has been pervasive discussion of the issue recently. There has been a significant increase in circuit court decisions with some judges and commentators staunchly opposing the majority view. Those in opposition to the majority argue that a nexus test is necessary to limit the IRS from abusing a statute that could expand to criminalizing any wrong act in a tax setting as a felony. Recent claims of the IRS abusing its power lend particular weight to this fear of statutory overreach. In fact, after the original draft of this article was written, the Supreme Court granted certiorari in Marinello v. United States *and heard oral argument on this very issue in December 2017.*

This Comment argues that § 7212(a) is unambiguous and contains no statutory requirement of a nexus test. It recommends how the Supreme Court should resolve the issue, by limiting omnibus clause charges to affirmative acts just as other Title 26 felonies are limited. It further argues why Congress

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should act expediently to modify § 7212(a). Limiting the omnibus clause beyond its plain meaning is necessary for fair notice and to prevent felony charges for action meant to be punished as a misdemeanor. Congressional action is sorely needed in this area of the law where the stakes are high.[**]

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[**] As this Comment was in the final stages of publication, the Supreme Court decided and issued its *Marinello* opinion, preempting any recommendations regarding what the Court should do. Marinello v. United States, No. 16-1144, 2018 WL 1402426 (U.S. 2018). In a surprising 7–2 opinion, the Court overturned the Second Circuit and made *Kassouf's* nexus test the law nation-wide. *Id.* at *7. Even though there is no longer a circuit divide and this Comment may be less relevant in advocating for judicial interpretation, the discussion is still important in terms of policy making and legislating. This Comment demonstrates that the Court, while creating precedent that might be good policy, did not correctly interpret legislative intent. In that sense, the plea for Congressional action is now more relevant than ever.

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INTRODUCTION

In *United States v. Kassouf*,[1] the Sixth Circuit held that a "nexus test" is required to convict an individual for criminal tax obstruction under the "omnibus clause" of 26 U.S.C. § 7212(a). The § 7212(a) omnibus clause makes it a felony for any individual who "in any other way [other than through intimidation or impedance of a tax officer or employee] 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 [the Internal Revenue Code]."[2] *Kassouf* held that in order to convict a person of violating the omnibus clause, that person must be aware of an ongoing investigation or proceeding against them.[3] *Kassouf*'s requirement that a person have this awareness has been referred to as a "nexus" test.[4] Other circuits have resisted *Kassouf*'s holding, and confusion exists even within the Sixth Circuit about whether or not *Kassouf* is still good law.[5]

Kassouf imposed a nexus test on omnibus clause violations notwithstanding over fifty years of precedent convictions which applied no such test to the statute.[6] The court's main concern was policy: that without a nexus test, the omnibus clause "would open [people] up to a host of potential liability of conduct that is not specifically proscribed."[7] Since *Kassouf*, courts that have rejected the nexus requirement have been accused of

[1] 144 F.3d 952 (6th Cir. 1998).
[2] 26 U.S.C. § 7212(a) (2012).
[3] *Kassouf*, 144 F.3d at 956–58.
[4] *Id.* at 956–57.
[5] *See infra* Part II (explaining the circuit split).
[6] *See infra* Section I.C. (outlining the history of the omnibus clause).
[7] *Kassouf*, 144 F.3d at 957.

allowing omnibus clause charges to "expand almost infinitely to reach all misconduct that is in any way tax-related,"[8] and of providing an "overzealous or partisan prosecutor [an easy path to] investigate, to threaten, to force into pleading, or perhaps (with luck) to convict anybody."[9] What started as a moderate concern from the *Kassouf* court has since become the aim of more aggressive predictions from those who seem worried that the government is going to use § 7212(a) to punish everyone who so much as forgets to properly store their annual Form 1040. In this way, the imagined slope of prosecutorial abuse of § 7212(a) has been becoming more slippery as warnings of omnibus clause abuse grow direr. This concern is understandable given the somewhat recent concern of abuse of power by the Internal Revenue Service (IRS).[10] However, this Comment principally argues that the *Kassouf* test, whether or not good policy, is not a correct interpretation of § 7212(a).

The arguments and suggestions proposed in this Comment articulate much needed guidance on an issue that is now regularly dividing courts. In just over three years, five different circuit courts have issued opinions on this issue.[11] One of these opinions attempted to clarify the now confusing precedent within the Sixth Circuit.[12] Another resulted in a forceful dissent to an en banc hearing request[13] and a granted petition to the U.S. Supreme Court.[14] This Comment offers not only the first comprehensive analysis of almost two decades of case law since the *Kassouf* holding, but more importantly, it makes the case about why *Kassouf* should be overruled by the Supreme Court while maintaining a different but more important limiting principle. It concludes by advocating for change which can and should only be initiated through the legislative process, by Congress. It advises Congress as to two potential minor alterations to § 7212(a) that could meaningfully

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8 Robert S. Fink & Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress the Only Cure?*, 88 J. TAX'N 356, 356 (1998).

9 United States v. Marinello, 855 F.3d 455, 457 (2d Cir. 2017) (denying rehearing en banc) (Jacobs, C.J., dissenting).

10 *See* John D. McKinnon & Siobhan Hughes, *FBI Launches Probe of IRS*, WALL ST. J. (May 14, 2013), https://www.wsj.com/articles/SB100014241278873242160045784832031 53773048 (describing investigation into IRS practice of inappropriately questioning politically conservative organizations applying for tax-exempt status).

11 United States v. Westbrooks, 858 F.3d 317 (5th Cir. 2017); United States v. Marinello, 839 F.3d 209 (2d Cir. 2016); United States v. Sorensen, 801 F.3d 1217 (10th Cir. 2015); United States v. Floyd, 740 F.3d 22 (1st Cir. 2014); United States v. Miner, 774 F.3d 336 (6th Cir. 2014).

12 *See generally Miner,* 774 F.3d 336.

13 *Marinello*, 855 F.3d at 455 (denying rehearing en banc) (Jacobs, C.J., dissenting).

14 *Marinello*, 839 F.3d 209, *cert. granted*, 137 S. Ct. 2327 (2017) (U.S. June 27, 2017) (No. 16-1144).

limit its scope.

This Comment proceeds as follows: it begins in Part I by providing a brief overview of criminal obstruction statutes and tax crimes to give a general background. It then focuses specifically on the U.S. tax obstruction statute, § 7212, and discusses its omnibus clause. As part of the discussion of § 7212 and its omnibus clause, this Comment briefly discusses the legislative history of the provision followed by noting how courts have narrowed the mens rea term "corruptly."

Part II of this Comment reviews the important circuit court decisions that have resulted in the conflict presently plaguing courts. It begins by describing how the *Kassouf* court, in what it deemed to be an issue of first impression, interpreted the omnibus clause to include a nexus test. It then lists and discusses the many circuit court decisions that have declined to follow the *Kassouf* holding. It also underscores the confusion within the Sixth Circuit. Part III presents arguments discussing why *Kassouf* was wrongly decided. Part IV advocates for solutions. It advises the Supreme Court to reject *Kassouf* and limit the omnibus clause to criminalizing affirmative acts. It then implores Congress to act, by considering what function the omnibus clause should serve within the statutory scheme of criminal tax obstruction and by suggesting minor changes Congress could make to improve the statutory language.

I. THE OMNIBUS CLAUSE OF SECTION 7212

There are many different obstruction statutes that exist within the U.S. Code, including § 7212(a). The different statutes have many similarities but also some stark differences. An understanding of the background of obstruction crimes and tax crimes generally is necessary to fully comprehend § 7212(a) and the role it serves in punishing tax obstruction.

A. CRIMINAL OBSTRUCTION IN THE U.S. CODE

Obstruction is "[t]he act of impeding or hindering something" or "interference."[15] Obstruction statutes criminalize an individual for "impeding or hindering" some governmental function.[16] Various obstruction statutes exist, most within Title 18 of the U.S. Code.[17] Each of these sections

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[15] *Obstruction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[16] *See* John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 51 (2004) (listing the following examples of obstruction: "treason, sedition, perjury, bribery, escape, contempt, false personation, destruction of government property, and assault of a public official . . .").

[17] *See* 18 U.S.C. §§ 1501–1521 (2012) (protecting individuals administering federal processes within the three branches of the U.S. government).

falls within Chapter 73, which defines the crime of "obstruction of justice."[18] Other obstruction statutes exist outside of Title 18, but often serve the same function of protecting government processes.[19] Some of the Title 18 sections are construed broadly to punish any acts that encumber the official activities of government agents.[20] They often focus explicitly on obstructive use of force or a type of written threat against another individual.[21] However, some also contain a catch-all word or phrase, ensuring that the statutes are not limited to only physical or written actions.[22]

Specifically, obstruction of justice is most commonly prosecuted through 18 U.S.C. § 1503 and involves demonstrating proof of three elements: (1) a pending judicial proceeding, (2) defendant's knowledge of the proceeding, and (3) obstruction.[23]

How broadly or narrowly the obstruction statutes should be interpreted has been thoroughly debated within the federal judiciary and at the highest levels.[24] Determining the knowledge requirement, i.e., mens rea, has been particularly problematic.[25] One point of confusion for courts and prosecutors has been the use of the term "corruptly" to describe the mens rea for certain obstruction convictions.[26] Early on, however, the Supreme Court attempted to clarify the issue by holding that obstruction-of-justice mens rea requires specific intent.[27] *Pettibone v. United States* interpreted one of the earliest versions of what is now § 1503, stating "the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability."[28]

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18 *Id.*

19 *E.g.*, 26 U.S.C. § 7212 (2012) (punishing obstruction of the Internal Revenue Code).

20 *See, e.g.*, 18 U.S.C. § 1501 (2012) (criminalizing the knowing and willful obstruction of a federal process server).

21 *See, e.g.*, *id.* § 1503 (making it unlawful to influence or injure court officers or jurors).

22 *See, e.g.*, *id.* § 1501 (2012) (punishing any individual that "assaults, beats, or wounds any officer or other person duly authorized," but also including any obstruction, resistance, or opposition).

23 *See* Leigh Ainsworth et al., *Obstruction of Justice*, 53 AM. CRIM. L. REV. 1551 (2016); Decker, *supra* note 16, at 54.

24 *E.g.*, Yates v. United States, 135 S. Ct. 1074 (2015). In a 5–4 vote, *Yates* reversed an obstruction of justice conviction within 18 U.S.C. § 1519, the Sarbanes-Oxley Act of 2002, after a lengthy debate over the construction of the term "tangible object" within the statute. *Id.* at 1076.

25 *See* United States v. Aguilar, 515 U.S. 593 (1995) (where a divided Supreme Court debated the mens rea required for a conviction under § 1503).

26 Decker, *supra* note 16, at 58.

27 Pettibone v. United States, 148 U.S. 197, 206–07 (1893).

28 *Id.* at 207.

B. TAX CRIMES GENERALLY AND TAX OBSTRUCTION

Most criminal violations of the tax code are prosecuted under one of three sections of the Internal Revenue Code.[29] These three sections include two felonies (tax evasion[30] and filing a false tax return[31]) as well as one misdemeanor: the "[w]illful failure to file [a tax] return, supply information, or pay tax."[32]

A criminal provision of the tax code that is becoming increasingly important is § 7212, titled "Attempts to interfere with administration of internal revenue laws."[33] It specifically criminalizes tax obstruction by individuals.[34] Subsection (a) of the statute punishes (as a felony) an individual who does any of the following:

> [C]orruptly 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.[35]

This subsection separates into two clauses. The first clause of § 7212(a) criminalizes using or threatening force against an IRS officer who is acting on official business.[36] The second clause and the focus of this Comment, often referred to as the "omnibus clause" or the "catch-all" clause,[37] includes any act that "in any other way corruptly or by force or threats of force

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[29] Dante Marrazzo, *Practitioners-Beware the Trojan Horse: The Government Unsheathes an Old Weapon to Target Practitioners for Criminal Tax Offenses*, 13 AKRON TAX J. 85, 86 (1997).

[30] *See* 26 U.S.C. § 7201 (2012) (titled "Attempt to evade or defeat tax").

[31] *See id.* § 7206(1) (a subsection of "Fraud and False Statements"). Crimes under this section have a three-year maximum prison sentence as opposed to five years for tax evasion. *See id.* §§ 7206, 7201.

[32] *Id.* § 7203.

[33] *Id.* § 7212.

[34] One author has hypothesized that all criminal violations in a tax setting are obstructive in nature and could generally be referred to as obstruction crimes. *See* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 HOUS. BUS. & TAX L.J. 260, 264–65 (2009). Townsend argues that all tax crimes involve "attempts to impair or impede the functioning of the IRS in the ascertainment or collection of tax liabilities." *Id.* at 264. He distinguishes them between what he calls the "substantive" tax crimes and two statutes used to punish tax obstruction: 26 U.S.C. § 7212 and 18 U.S.C. § 371 (2012) (the so-called "*Klein* conspiracy"). *Id.*

[35] 26 U.S.C. § 7212(a). Section 7212(a) includes a maximum prison sentence of three years if force is used or one year if the act consists of only threats of force.

[36] It punishes "[w]hoever 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 . . ." *Id.*

[37] *E.g.,* United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998).

(including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Internal Revenue Code]."[38]

C. HISTORY OF SECTION 7212 AND THE OMNIBUS CLAUSE

Section 7212 has its roots in the Revenue Act of 1862, where § 7212's predecessor originally served as a means to punish forceful interference with tax collectors.[39] What came to be known as the omnibus clause was included over ninety years later in the Internal Revenue Code of 1954.[40] The legislative history of its enactment is short, and for the most part, unrevealing.[41] Some have speculated that the omnibus clause language was drawn directly from the omnibus clause of the federal obstruction of justice statute, 18 U.S.C. § 1503, since the wording is nearly identical.[42]

For the first few decades after the enactment of § 7212's predecessor, prosecutors took a more cautious approach than they currently take when using the omnibus clause.[43] The clause was dormant in criminal tax convictions until 1981, when, in *United States v. Williams*, it was used to convict three men of filing false withholding exemption certificates.[44] Whether because prosecutors felt more empowered to use the omnibus clause after *Williams* or because the IRS was looking for new tools to battle increasing tax fraud, the clause started to be used on a much more regular basis after *Williams* was decided.[45]

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[38] 26 U.S.C. § 7212(a).

[39] Revenue Act of 1862, ch. 119, § 28, 12 Stat. 432, 444 (1862); Marrazzo, *supra* note 29, at 87.

[40] Internal Revenue Code of 1954, ch. 75, § 7212(a), 68A Stat. 851, 855 (1954); United States v. Williams, 644 F.2d 696, 699 n.12 (8th Cir. 1981); Marrazzo, *supra* note 29, at 88.

[41] *See* S. Rep. No. 83-1622, at 604 (1954), *as reprinted* in 1954 U.S.C.C.A.N. 4621, 5254 (mainly discussing differences in punishment between when the crime involves force and when it involves threats of force and comparing the statute with 18 U.S.C. § 111 (2012), which does not include "threats of force" as § 7212 does); H.R. Rep. No. 83-1337, at A427 (1954), as reprinted in 1954 U.S.C.C.A.N. 4017, 4574-7 (making no mention of the omnibus clause).

[42] *E.g.*, Townsend, *supra* note 34, at 283–84.

[43] *See, e.g.*, United States v. Henderson, 386 F. Supp. 1048, 1055 (S.D.N.Y. 1974) (detailing the government's argument that § 7212(a) "applies only to acts or threats of physical violence . . .") (internal quotations omitted).

[44] *See* United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981) (explaining that the court's research had uncovered no case law applying the omnibus clause of § 7212(a)). The court upheld the conviction as a legitimate use of the omnibus clause. *See id.* at 701.

[45] *See* Marrazzo, *supra* note 29, at 89–90 (describing more frequent use § 7212(a) by prosecutors and explaining "[a]s tax fraud schemes became more complicated, more difficult to detect, and increasingly difficult to prosecute under the more familiar statutes, the government had to seek innovative approaches to combat tax scofflaws"). The Marrazzo

D. REQUISITE MENS REA FOR OMNIBUS CLAUSE CONVICTIONS

To prosecute an act not involving force or threats of force under § 7212(a), Congress requires a showing that the act was done "corruptly."[46] *United States v. Reeves* was the first case to apply "corruptly" to § 7212(a)'s omnibus clause and went into great detail to discern the legislative intent behind the language.[47] Lester Reeves was convicted under § 7212 for filing a common law lien against a tax investigator.[48] The Fifth Circuit reversed Reeves's conviction, stating "[i]t is unlikely that 'corruptly' merely means 'intentionally' or 'with improper motive or bad or evil purpose.'"[49] Because § 7212(a) also punishes an "endeavor," the *Reeves* court explained that using "corrupt" simply to mean "intentional" would make the word superfluous, since the court concluded that "one cannot 'endeavor' what one does not already 'intend.'"[50] The Fifth Circuit said, "'[c]orruptly' is a word with strong connotations; it is difficult to believe Congress included this 'key' word only to have it read out of the statute or absorbed into the meaning of 'endeavor.'"[51] Instead, the Fifth Circuit found, through review of the legislative history, that "corruptly" was meant to forbid "those acts done with the intent to secure an unlawful benefit either for oneself or for another."[52] The *Reeves* dissent, on the other hand, argued that "corruptly" should be interpreted broadly.[53] Judge Williams emphasized in dissent that corruptly is interpreted under other criminal statutes and should be interpreted in § 7212(a) to include acts that simply have an "improper motive or bad or evil purpose."[54]

Reeves indicated that the "unlawful benefit" achieved is one acquired "under the tax laws."[55] However, this part of the *Reeves* decision has been overruled to require only any broad unlawful benefit.[56] The *Reeves* holding has now been widely accepted among most circuits as the mens rea required

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article speculates that "[t]he government now looks to section 7212(a) in virtually every tax case." See *id.* at 90.

[46] 26 U.S.C. § 7212(a) (2012).

[47] 752 F.2d 995, 998–1000 (5th Cir. 1985).

[48] *Id.* at 996–97.

[49] *Id.* at 998.

[50] *Id.*

[51] *Id.*

[52] United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985).

[53] *Id.* at 1002–04 (Williams, J., dissenting).

[54] *Id.* at 1002 (Williams, J., dissenting).

[55] *Id.* at 1000.

[56] United States v. Saldana, 427 F.3d 298, 305–06 (5th Cir. 2005). The question of whether or not the advantage must be financial in nature arose in *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992), but no court has yet adopted this requirement.

for omnibus clause convictions.[57]

Almost every tax felony and misdemeanor contains the "willful" mens rea standard, making § 7212 an exception with its easier-to-satisfy "corruptly" requirement.[58] For a prosecutor to show that a crime was "willful," he or she must "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."[59] The argument has been made that Congress intended corrupt intent to mean the same thing as willful intent, but courts have rejected this conclusion.[60] The main difference between the two standards is the knowledge of an illegal act under the "willful" standard and the lesser knowledge of unlawful benefit (perhaps even obtained from a legal act) under the "corruptly" standard.[61]

II. THE CIRCUIT SPLIT

Kassouf relied on *United States v. Aguilar*[62] when it split from other circuits and required a nexus test. Since then, a majority of circuit courts have explicitly rejected *Kassouf*, and Sixth Circuit judges have been conflicted on the issue. Following the development of precedent on the nexus test issue is important to understand its legal evolution, the arguments that caused the circuit split, and examples of facts that caused prosecutors to charge individuals under the omnibus clause.

A. *KASSOUF* APPLIES *AGUILAR* TO NARROW THE OMNIBUS CLAUSE

The Sixth Circuit was the first circuit court to take up the question of whether the Government is required to allege knowledge of a formal investigation or proceeding in order to charge a person with tax obstruction under § 7212(a).[63] In *United States v. Kassouf*, James Kassouf was charged

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[57] U.S. DEP'T OF JUST., CRIMINAL TAX MANUAL 118 (2012) (listing cases from the Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have adopted the *Reeves* definition of "corruptly"); *see also* United States v. Miner, 774 F.3d 336, 347 (6th Cir. 2014) (making reference to *Reeves* in discussing the "corruptly" element of § 7212(a)); United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998).

[58] Jenny L. Johnson Ware, *Obstruction and Obscenity: "I Know It When I See It,"* Aug.–Sept. J. TAX PRAC. & PROC. 19, 20 (2017).

[59] Cheek v. United States, 498 U.S. 192, 201 (1991).

[60] *See, e.g.*, United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998) (rejecting "willfulness" as a "necessary element of § 7212(a)").

[61] Ware, *supra* note 58, at 21. Some courts are seemingly incorporating the willful standard through the use of jury instructions that require the jury to show knowledge of illegality while outwardly denying that the two standards are the same. *Id.*

[62] 515 U.S. 593 (1995).

[63] *See* United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998) (stating "[i]ndeed no circuit courts have directly confronted the issue before us today . . ."). Prior to *Kassouf*,

with three different tax crimes, including a violation of § 7212(a)'s omnibus clause.[64] Charges under § 7212(a) were brought based on allegations that *Kassouf* had corruptly obstructed the IRS's ability to track his personal financial activity because he intermingled funds between personal accounts and those of businesses under his control, failed to keep adequate records of those transactions, and omitted them from his personal tax return.[65] *Kassouf* filed for dismissal of the § 7212(a) claim, arguing, among other things, that the prosecution had not adequately pled a violation of the omnibus clause because it did not allege that *Kassouf* had knowledge of an ongoing IRS investigation into his activities.[66] The district court agreed that the prosecution had not adequately stated a claim, and the Sixth Circuit affirmed.[67] The issue was brought before the Sixth Circuit approximately three years after the Supreme Court decided *United States v. Aguilar*.[68] The district court that dismissed *Kassouf*'s claim applied *Aguilar* to limit the use of the omnibus clause.[69]

In *Aguilar*, a federal district court judge, Robert Aguilar, was convicted by a jury of obstruction of justice under 18 U.S.C. § 1503(a).[70] When Judge Aguilar's conviction was overturned by the Ninth Circuit,[71] the Supreme Court granted certiorari to evaluate the omnibus clause in the federal obstruction of justice statute.[72] The Ninth Circuit overturned Aguilar's conviction because no evidence showed that Aguilar had the requisite knowledge that his testimony before investigators (the act which led to his conviction) would be relied upon by a grand jury.[73] The Court upheld the Ninth Circuit's reversal, holding that when prosecutors apply § 1503, which has language similar to § 7212,[74] they are required to show a "nexus," "that the act must have a relationship in time, causation, or logic with [a] judicial

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convictions under the omnibus clause were made without considering whether knowledge of an ongoing investigation or proceeding was in process. *See id.* at 955–56 (listing cases).

[64] *Id.* at 953.

[65] *Id.*

[66] *Id.* at 954.

[67] *Id.* at 953.

[68] 515 U.S. 593 (1995).

[69] United States v. Kassouf, 948 F. Supp. 36, 37–38 (N.D. Ohio 1996).

[70] 515 U.S. at 595.

[71] *See generally* United States v. Aguilar, 21 F.3d 1475 (9th Cir. 1994).

[72] *Aguilar,* 515 U.S. at 595–97.

[73] *Id.* at 601. Judge Aguilar was convicted after making false statements to FBI agents during questioning about his disclosure of a wiretap to an individual under investigation for embezzling funds from a labor union. *Id.* at 595–96.

[74] "Whoever . . . 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." 18 U.S.C. § 1503 (2012).

proceeding[]."[75] In upholding the reversal of Aguilar's conviction, the Court:

> [E]xercised 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.[76]

The Sixth Circuit applied the *Aguilar* reasoning in *Kassouf* and read a nexus requirement into the § 7212(a) omnibus clause.[77] The Sixth Circuit reasoned that bringing a charge of obstruction against a taxpayer who failed to keep adequate financial records for tax purposes, but was not under audit, would give the IRS broad power to prosecute speculative conduct and would allow authority beyond what Congress intended.[78]

B. CIRCUIT COURTS BROADEN THE OMNIBUS CLAUSE

Despite *Kassouf*, the federal government continued bringing charges against taxpayers under the § 7212(a) omnibus clause without fulfilling the *Kassouf* nexus requirement.[79] By ignoring the nexus test, prosecutors paved the way for challenges in other circuits where taxpayers cited *Kassouf* as persuasive precedent[80] as well as challenges by those being prosecuted within the Sixth Circuit who argued that the laws of other circuits should apply.[81] As shown below, taxpayers overwhelmingly lose when citing *Kassouf* in other circuits, and its application within the Sixth Circuit remains uncertain.[82]

1. Other Circuits Disagree with the Nexus Requirement

Other courts have continued to follow pre-*Kassouf* precedent or deny *Kassouf*'s nexus requirement, creating a split with the Sixth Circuit over whether *Aguilar*'s holding applied to § 7212(a).[83] In the Ninth Circuit, the *Massey* decision affirmed a district court conviction where a nexus test was

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[75] *Aguilar*, 515 U.S. at 599.

[76] *Id.* at 600 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931), and citing Dowling v. United States, 473 U.S. 207 (1985)) (internal quotation marks omitted).

[77] United States v. Kassouf, 144 F.3d 952, 957 (6th Cir. 1998).

[78] *Id.* at 957–58. The court said that to hold otherwise "would be permitting 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.

[79] *See, e.g.*, United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005) (citing United States v. Kuball, 976 F.2d 529, 531 (9th Cir. 1992), a pre-*Kassouf* opinion holding that § 7212(a) only required showing that a defendant hoped for financial benefit).

[80] *E.g.*, United States v. Wood, 384 F. App'x 698, 703 (10th Cir. 2010).

[81] *E.g.*, United States v. Bowman, 173 F.3d 595 (6th Cir. 1999).

[82] *See infra* Introduction.

[83] *E.g.*, *Wood*, 384 F. App'x at 703–04 (stating that "[i]n our view, *Kassouf* is not persuasive").

not applied.[84] Shane Massey was convicted under the omnibus clause after he refused to file tax returns for multiple years and made continuous threats of legal action against IRS agents who sought his compliance with tax laws.[85] The *Massey* court rejected the nexus test by citing a Ninth Circuit decision that predated *Kassouf*.[86]

The Tenth Circuit likewise disposed of the *Kassouf* nexus test in *United States v. Wood* by citing *Bowman*, a later Sixth Circuit decision that, as discussed below, put *Kassouf*'s holding into doubt.[87] The Tenth Circuit also rejected the similarity between § 1503(a) and § 7212(a), and agreed with precedent from the Ninth Circuit and other district court opinions rejecting the nexus test.[88] A jury in a Utah district court convicted attorney Thomas Wood of violating the § 7212(a) omnibus clause after he used offshore bank accounts and foreign-issued debit cards to avoid detection by the IRS of taxable income that should have been reported by him and his clients.[89] In comparing § 7212(a) and § 1503(a), the *Wood* court noted that § 1503(a) narrowly defines and even lists conduct that interferes with justice.[90] Section 7212(a), on the other hand, broadly involves impedance or obstruction of administration of the tax code, which could include "any arrangement that permits a taxable entity to avoid reporting income in the taxable year when earned."[91]

The First Circuit in *Floyd* swiftly denied the nexus requirement.[92] It mentioned *Kassouf* in a footnote but denied (perhaps prematurely) that it was still good law in the Sixth Circuit, given *Bowman*.[93]

The Tenth Circuit took up the issue again in its opinion in *United States v. Sorensen*.[94] Jerold Sorensen was convicted of using a "pure trust" scheme

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[84] *Massey*, 419 F.3d at 1010. The *Massey* court made no mention of *Kassouf* or *Aguilar* and swiftly dismissed the nexus requirement. *Id.* ("The law of this circuit establishes that the government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under § 7212(a) . . ."); *see also* United States v. Dain, 258 F. App'x 90, 93–94 (9th Cir. 2007) (explicitly rejecting the *Kassouf* nexus requirement by following *Massey*).

[85] *Massey*, 419 F.3d at 1009.

[86] *Id.* at 1010 (citing United States v. Kuball, 976 F.2d 529, 531 (9th Cir.1992) as precedent that rejected the nexus requirement).

[87] 384 F. App'x 698, 704 (10th Cir. 2012) (citing United States v. Bowman, 173 F.3d 595 (6th Cir. 1999)); *see infra* Introduction.

[88] *Wood*, 384 F. App'x at 704.

[89] *Id.* at 700–01.

[90] *Id.* at 704.

[91] *Id.* (quoting United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991)).

[92] United States v. Floyd, 740 F.3d 22, 31–32 (1st Cir. 2014).

[93] *Id.* at 32 n.4. *See infra* Introduction (discussing why courts considered *Kassouf* to be overruled by *Bowman* and how *Kassouf* remains binding on the Sixth Circuit).

[94] 801 F.3d 1217 (10th Cir. 2015).

to shield business income by using it to pay rent for his personal residence and business assets that had been transferred into trusts he thought to be undetectable by the IRS.[95] Sorensen argued that the court should apply the *Kassouf* nexus test and overturn his conviction since most of the obstructive activity Sorensen engaged in occurred before any investigation or proceeding against him.[96] Nevertheless, the *Sorensen* court followed *Wood* and rejected the nexus test.[97]

A Second Circuit panel heard the issue in *United States v. Marinello*.[98] Carlo Marinello ran a business as a courier of documents and packages.[99] He failed to keep adequate records of his business transactions, shredding most paper evidence of business activities.[100] He paid his employees in cash, keeping no record and hampering the IRS's ability to track their income.[101] He also paid many personal expenses using business cash.[102] An IRS investigation had been initiated into Marinello's business activities, but an agent later recommended closing it because she could not assess the materiality of his income.[103] Marinello had no knowledge of that initial investigation.[104] Marinello was convicted by a jury and later appealed, arguing that the Second Circuit should adopt the *Kassouf* nexus test.[105] The court disagreed, mainly arguing that it did not find sufficient parallelism between § 7212(a) and § 1503(a) to justify applying the *Aguilar* holding to § 7212(a).[106] The court also seemed to set a new precedent in omnibus clause jurisprudence in explicitly holding that taxpayers could violate the omnibus clause through omissions, without proof of an affirmative act.[107]

Although none of the judges on the *Marinello* panel offered a dissenting opinion, an en banc hearing was requested.[108] The Second Circuit, having a reputation for very infrequently granting en banc reviews,[109] unsurprisingly

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[95] *Id.* at 1224.
[96] *Id.* at 1231.
[97] *Id.* at 1232.
[98] 839 F.3d 209 (2d Cir. 2016).
[99] *Id.* at 211.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 211–12.
[103] *Id.* at 212.
[104] United States v. Marinello, 839 F.3d 209, 212 (2d Cir. 2016).
[105] *Id.* at 216–17.
[106] *Id.* at 220–23.
[107] *Id.* at 225.
[108] United States v. Marinello, 855 F.3d 455, 455 (2d Cir. 2017) (denying rehearing en banc) (Jacobs, C.J., dissenting).
[109] *See* Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review In the Second Circuit*, 256 N.Y. L.J. 38 (2016).

denied the request.[110] However, two judges dissented from the denial.[111] One dissenting judge wrote a powerful disagreement with the Second Circuit majority's holding, acknowledging that *Kassouf* "is now distinctly in the minority" and describing the majority's holding as "sign[ing] on to the emerging consensus of error in the circuit courts."[112] The dissent listed five of eight acts enumerated in the *Marinello* jury instructions[113] as violations of the omnibus clause and attributed these items specifically to the familiar charge that without the *Kassouf* nexus test, prosecutorial abuse of the omnibus clause would become rampant.[114] This dissenting opinion predominantly couched its argument in this "slippery slope" policy concern.[115] The Supreme Court granted Marinello's petition for certiorari[116] and heard oral argument on December 6, 2017.[117]

Most recently, the Fifth Circuit took up the issue when Tamny Westbrooks, owner of tax preparation businesses, "grossly inflat[ed]" wage expenses on her tax returns.[118] Prior to *Westbrooks*, the court had implicitly rejected the nexus test requirement, but had reached no conclusion on the persuasiveness of *Kassouf*.[119] The *Westbrooks* court outright rejected *Kassouf*, noting numerous reasons why it "did not correctly interpret section 7212(a)."[120]

The First, Second, Fifth, Ninth, and Tenth Circuits have all now refused to apply the *Kassouf* nexus requirement as outlined above. In addition to these five circuits expressly rejecting *Kassouf*, other circuits have effectively rejected *Kassouf* by declining to include a nexus requirement as an element

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[110] *Marinello*, 855 F.3d at 455 (denying rehearing en banc) (Jacobs, C.J., dissenting).

[111] *Id.*

[112] *Id.* at 456.

[113] The *Marinello* jury was instructed that any of eight separate acts could constitute the actus reus of an omnibus clause violation. United States v. Marinello, 839 F.3d 209, 213 (2d Cir. 2016). Despite the dissent's concern that committing any one of the listed acts alone could have resulted in Marinello's conviction, Marinello was convicted of all eight acts. *See id.* at 214. Therefore, the dissent's apprehension that any single factor on the list could actually meet all elements of an omnibus clause violation can be only hypothetical, since it was a combination of all eight factors that led to Marinello's conviction.

[114] *Marinello*, 855 F.3d at 455 (denying rehearing en banc) (Jacobs, C.J., dissenting) (arguing "[i]f this is the law, nobody is safe . . .").

[115] The dissent also briefly counters an argument made by the Second Circuit panel about the lack of legislative history for the § 7212(a) omnibus clause. *See id.* at 459.

[116] *U.S. v. Marinello*, 839 F.3d 209, *cert granted*, 137 S. Ct. 2327 (2017) (U.S. June 27, 2017) (No. 16-1144).

[117] *See generally* Transcript of Oral Argument, Marinello v. United States, No. 16-1144 (U.S. argued Dec. 6, 2017), 2017 WL 6040470.

[118] United States v. Westbrooks, 858 F.3d 317, 321 (5th Cir. 2017).

[119] *Id.* at 322–23.

[120] *Id.* at 323.

of § 7212(a) omnibus clause prosecutions.[121]

2. *Bowman* Walks Back *Kassouf*

Less than one year after *Kassouf*, a Sixth Circuit panel heard a case in which the prosecution ignored the nexus test created by *Kassouf* in its pleadings.[122] In *United States v. Bowman*, David Bowman was convicted after filing falsified tax forms meant to cause IRS investigations against creditors who were seeking foreclosure and judgements against him.[123] On appeal, Bowman argued that *Kassouf* required the prosecution to demonstrate that the IRS was investigating him.[124] The panel deciding *Bowman* not only refused to apply the nexus test to Bowman's acts, but rejected the notion that *Kassouf* produced a nexus requirement at all.[125] Because the *Kassouf* court left open the possibility of upholding the pre-*Aguilar* § 7212(a) convictions, despite those convictions not having satisfied a nexus standard,[126] the *Bowman* court concluded that *Kassouf* was "limited to its precise holding and facts, and that it cannot be read to encompass the kind of activity for which Bowman was indicted."[127] In doing so, the Sixth Circuit was influenced by a pre-*Kassouf* Ninth Circuit opinion with nearly identical facts.[128] *Bowman* purported to all but eliminate the nexus test as a per se rule and other circuits cited it as having overruled *Kassouf*.[129]

C. SIXTH CIRCUIT AFFIRMS DISTRICT COURT APPLYING *BOWMAN* OVER *KASSOUF*

Not only was the *Bowman* holding persuasive in other circuits, one district court within the Sixth Circuit cited it when refusing to apply the nexus

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[121] Brief for Appellee at 13–14, United States v. Marinello, No. 15-2224 (2d Cir. Dec. 14, 2015) (listing cases from the Third, Fourth, and Eleventh circuits).

[122] United States v. Bowman, 173 F.3d 595, 599 (6th Cir. 1999).

[123] *Id.* at 596–97, 599.

[124] *Id.* at 599.

[125] *Id.* "But *Kassouf* did not, as *Aguilar* did, explicitly impose a 'nexus' requirement." *Id.*

[126] "While these [pre-*Aguilar*] cases may provide some support for a reading of the statute that reaches conduct committed before a defendant was aware of a pending IRS action under the Internal Revenue Code, we decline to extend their holdings to reach the conduct involved in this case." United States v. Kassouf, 144 F.3d 952, 956 (6th Cir. 1998).

[127] *Bowman*, 173 F.3d at 600.

[128] *Id.* at 599 (describing United States v. Kuball, 976 F.2d 529 (9th Cir. 1992), which "affirmed the conviction of a defendant who had filed false 1099 and 1096 forms, the very activity involved in the instant case").

[129] United States v. Miner, 774 F.3d 336, 345 (6th Cir. 2014) (listing cases from other circuits that "have concluded that *Bowman* functionally eviscerated *Kassouf*").

requirement.[130] Richard Gilbert was charged under the § 7212(a) omnibus clause after he "allegedly executed and mailed various fraudulent documents to the [IRS] in an attempt to evade payment of taxes."[131] He filed for dismissal, arguing that no IRS action was in process when the alleged acts occurred.[132] Referencing *Bowman*, the court concluded that "[t]he most recent guidance from the Sixth Circuit indicates than an IRS action is not required."[133] The Sixth Circuit heard an appeal from Gilbert after the trial and affirmed Gilbert's conviction on both counts without any consideration of the issue involving the *Kassouf* nexus test.[134]

D. *MINER* WALKS BACK *BOWMAN*

Despite other courts considering *Kassouf* to have been overruled by *Bowman*, the Sixth Circuit continued to selectively apply the nexus test to convictions under § 7212(a).[135] The future of the omnibus clause nexus requirement and how future Sixth Circuit judges might reconcile *Kassouf* with *Bowman* was uncertain when *United States v. Miner*[136] came before a Sixth Circuit panel in 2014.

Miner had been convicted under the omnibus clause of § 7212(a) and appealed to the Sixth Circuit, arguing that the trial court had failed to include the *Kassouf* nexus test in the jury instructions.[137] Miner had been convicted under the omnibus clause of § 7212(a) for sending frivolous and threatening letters to IRS agents on behalf of clients in an attempt to coerce changes to internal IRS income tax files.[138] The *Miner* court did not expressly acknowledge a conflict between the two previously discussed cases, holding that *Kassouf* was controlling and upholding the validity of the nexus test while simultaneously declining to overrule *Bowman*.[139] Rather, the court posited that *Bowman* might be an exception to *Kassouf*.[140] *Bowman*'s future

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[130] United States v. Gilbert, No. 3:09CR-57-S, 2009 WL 2382445, at *3 (W.D. Ky. July 30, 2009).

[131] *Id.* at *1.

[132] *Id.* at *3.

[133] *Id.*

[134] United States v. Gilbert, 476 F. App'x 434 (6th Cir. 2012).

[135] United States v. McBride, 362 F.3d 360, 372 (6th Cir. 2004). *McBride* mentions the nexus test as a requirement for conviction under the omnibus clause with no mention of *Bowman*. *Id.* This omission, however, could be the result of the fact that McBride knew he was under investigation, and nexus was not an issue. *Id.*

[136] 774 F.3d 336 (6th Cir. 2014).

[137] *Id.* at 342.

[138] *Id.* at 339.

[139] *Id.* at 345 ("[W]here the rationales of *Kassouf* and *Bowman* conflict, we are bound to follow the former, not the latter.").

[140] *Id.* at 344.

is less than certain though, given the *Miner* court's general criticism of its reasoning.[141]

Even though the *Miner* panel expressed an opinion with regards to *Kassouf* and *Bowman*, it was not dispositive because of the harmless error rule.[142] The harmless error rule is a criminal appellate review standard that allows a reviewing court to affirm a lower court opinion when it concludes that an error would not have altered a substantial right of the defendant.[143] The court affirmed Miner's conviction by deciding that omission of a jury instruction describing the nexus requirement was a harmless error at Miner's trial.[144] Ultimately, since the *Miner* court's position on the nexus requirement issue did not result in the reversal of Miner's conviction, future Sixth Circuit decisions may not be bound by *Miner*s's conclusion on the nexus issue because this conclusion was not "necessary to the outcome," and as such, it is non-binding dicta.[145]

E. DISTRICT COURT WITHIN THE SIXTH CIRCUIT APPLIES *MINER*

The *Miner* holding has been used once to apply the nexus requirement and uphold the dismissal of an omnibus clause charge brought in a district court within the Sixth Circuit.[146] Fesum Ogbazion, owner of a tax preparation business, was charged with multiple obstructive acts, including "back-dating, forward-dating, and falsely signing e-file authorization forms; . . . falsely inflat[ing] Schedule C income [for clients]," and creating fraudulent W-2

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[141] The Sixth Circuit stated:

> Thus, *Bowman* rejected *Kassouf* as erecting an inflexible baseline proxy test for intent—awareness of a pending proceeding—that was under-inclusive as applied to the defendant in *Bowman.* But that is exactly the same criticism that the dissents in *Kassouf* and *Aguilar* had made earlier, to no avail . . . . *Bowman,* therefore, is largely predicated upon a rationale that had already lost in this court a year before it was decided.

Id. at 344–45 (citing United States v. Kassouf*,* 144 F.3d 952, 960 (6th Cir. 1998) (Daughtrey, J., dissenting); United States v. Aguilar, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting)).

[142] United States v. Miner, 774 F.3d 336, 346 (6th Cir. 2014).

[143] FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

[144] *Miner*, 774 F.3d at 346. The *Miner* court concluded that omission of the nexus requirement was a harmless error because it found ample evidence in the trial record showing that Miner was aware of an IRS proceeding against him and that correct jury instruction wouldn't have altered the outcome of the trial. *Id.*

[145] Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC, 758 F.3d 777, 781 (6th Cir. 2014) ("If the statement is not necessary to the outcome, it is dicta and nonbinding." (citing United States v. McMurray, 653 F.3d 367, 375–76 (6th Cir. 2011)).

[146] United States v. Ogbazion, No. 3:15-CR-104, 2016 WL 6070365 (S.D. Ohio Oct. 17, 2016).

forms for clients.[147] The government did not allege that Ogbazion had knowledge of the investigation when he committed the obstructive acts, but rather argued that his company's status as an Electronic Return Originator put him on notice of the likelihood of future IRS audits.[148] The court distinguished between a "specific pending IRS action, [and] the mere anticipation of a routine compliance audit."[149] It held that expectation of an audit was not enough and that the government must show something like "a planned IRS audit of which [the defendant] was actually aware."[150]

III. WHY *KASSOUF* WAS WRONGLY DECIDED

For numerous reasons, *Kassouf* should be overruled in all circuits. The plain text of § 7212(a) does not include a nexus test. *Aguilar* is not binding precedent and should not apply to § 7212(a). Despite the need for a limiting principle to § 7212(a), courts should not apply a nexus test to a statute where no such test was intended.

A. THERE IS NO TEXTUAL AMBIGUITY IN SECTION 7212(A)

The fact that Congress specifically drafted § 7212(a) to punish corrupt "endeavors" to obstruct "administration of this title" demonstrates that there is no ambiguity within the omnibus clause, as these words have clear meaning. Where there is no statutory ambiguity, courts are limited in their application of the rule of lenity or their examination of legislative history, where it exists.

1. "Administration of this Title" Has Plain Meaning

The phrase "due administration of this title" within § 7212(a) has purposefully broad application. Congress, no doubt concerned about the government's ability to collect revenue and the increasing availability of tools for taxpayers to avoid paying taxes, expanded the statute beyond its original purpose, which was to prevent force or threats of force.[151] Most notably, Congress expanded the statute by adding the omnibus clause of § 7212(a), which punishes "corrupt" obstruction that occurs "in any other way." Corruptly—"with an intent to give some advantage inconsistent with official duty and the rights of others"[152]—obstructing administration of the tax code "in any other way" is definitively broad.

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[147] *Id.* at *16.
[148] *Id.* at *17.
[149] *Id.* at *18 (internal quotations omitted).
[150] *Id.*
[151] *See supra* Section I.C.
[152] United States v. Winchell, 129 F.3d 1093, 1099 (10th Cir. 1997).

During the *Sorensen* trial, the Tenth Circuit surmised in its jury instruction that the administration of the tax code could encompass anything involving "carrying out [the IRS's] lawful functions to ascertain income; compute, assess, and collect income taxes; audit tax returns and records; and investigate possible criminal violations of the internal revenue laws."[153] To limit the meaning of "administration of this title" sufficiently enough to infer a nexus requirement from the statute requires ignoring acts that corruptly limit certain lawful functions of the tax code as outlined in the *Sorensen* jury instruction quoted above. The nexus test requires defendant knowledge of an ongoing IRS investigation or proceeding.[154] Having to satisfy this requirement excludes any obstructive act that occurs prior to an enforcement proceeding or any act committed by a defendant who is not aware of an enforcement action.

Thus, *Kassouf*'s holding effectively requires the inference that the § 7212(a) omnibus clause was only intended to punish acts that occur while the IRS is "audit[ing] tax returns and records"[155] or "investigat[ing] possible criminal violations," as only these two items from the *Sorensen* jury instructions would satisfy the nexus test's requirement.[156] Drawing this conclusion from the language of the statute requires stretching beyond the language and inferring something that Congress did not express. Certainly, if Congress meant for the § 7212(a) omnibus clause to apply only to acts that corruptly obstruct IRS "proceedings," Congress could have easily added a few simple words to make this legislative intent known.[157] Instead, Congress drafted the statute using the broadest language possible. "Any other way" and "due administration"[158] are not the words that a cautious lawmaker uses to limit the reach of a criminal statute. Rather, they are carefully crafted terms that were more likely used for expansionary purposes, seeing as how the omnibus clause was created specifically for the purpose of expanding §

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153 United States v. Sorensen, 801 F.3d 1217, 1229 (10th Cir. 2015).

154 United States v. Kassouf, 144 F.3d 952, 958 (6th Cir. 1998).

155 It is not immediately obvious that knowledge of a civil investigation such as an IRS audit would satisfy the nexus requirement but the *Kassouf* court, in a footnote, considered civil proceedings to be sufficient. *See id.* at 957 n.2 (defining what types of investigations and proceedings meet the nexus requirement: "[t]his may include, but is not limited to, subpoenas, audits[,] or criminal tax investigations")

156 *See Sorensen*, 801 F.3d at 1229.

157 For example, the omnibus clause of § 7212(a) could have been drafted to punish acts which "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[] or impede[], or endeavor[] to obstruct or impede, *enforcement proceedings within* the due administration of this title" (added hypothetical language emphasized).

158 26 U.S.C. § 7212(a) (2012).

7212(a).[159]

Furthermore, analyzing the statute and considering only the word "administration" shows that a nexus requirement should not be inferred from the statutory language.[160] Administration is defined as "[t]he management or performance of the executive duties of a government, institution, or business; collectively, *all the actions* that are involved in managing the work of an organization."[161] In fact, had Congress meant to require an official proceeding as an element of the crime, it could have merely replaced "administration" with "enforcement." Enforcement, a term with a much narrower meaning, is defined as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement." [162] It is the job of legislators to carefully choose the words that they use, and the fact that Congress used the broader term "administration," instead of a narrower term like "enforcement," indicates the breadth with which it intended § 7212 to be interpreted.

2. *"Endeavor" is Synonymous with Attempt*

"Endeavor" is another term within § 7212(a) that is not friendly to the constructionists who would create a nexus requirement. "Endeavor" means "[a] systematic or continuous effort to attain some goal; any effort or assay to accomplish some goal or purpose."[163] What is not included in the definition of endeavor is any mention of whether or not the "effort" yields success. It is clear from this definition that one can be considered to "endeavor" to do something whether or not that endeavor is fruitful or in spite of failure. Thus, the dictionary definition of "endeavor" can encompass both an act towards some end or an attempted act towards that end.

Putting the term in the context of § 7212(a), however, requires separating a successful act with the attempt towards that act. The statute says "obstructs or impedes, or endeavors to obstruct or impede."[164] This shows that, as used in § 7212(a), "endeavor" is equated only with the attempt and not with the successful act. This must be so because if "endeavor," in the context of § 7212(a), refers to a successful act as well, it would render the

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159 *See infra* Section I.C (discussing the enactment of the omnibus clause).

160 *See, e.g.*, Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1129 (2015) (arguing that "the Federal Tax Code has long treated information gathering as a phase of *tax administration* procedure that occurs before assessment, levy, or collection") (emphasis added).

161 *Administration*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

162 *Enforcement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

163 *Endeavor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

164 26 U.S.C. § 7212(a) (2012).

"endeavor" clause superfluous,[165] as the immediately preceding phrase "obstructs or impedes" already refers to the successful act. The clause in its entirety would effectively read "obstructs or impedes," which simply means acts to obstruct or impede "or acts to obstruct or impede." Surely Congress did not intend to repeat the same functional phrase twice. Thus, "endeavor," in the context of § 7212(a), must refer only to attempts and could otherwise have been written as "obstructs or impedes, or attempts to obstruct or impede." In consideration of this meaning for the word endeavor, a nexus requirement cannot survive.

Even if Congress only meant to punish an act that would obstruct or impede an official investigation or proceeding, an attempt to obstruct a proceeding does not require that an actual proceeding exist at all. The attempt could be mistaken. The *Kassouf* nexus test, on the other hand, requires knowledge of an actual investigation or proceeding.[166] Therefore, the nexus requirement reads the word "endeavor"—as it pertains to the attempt to obstruct a nonexistent proceeding or investigation—right out of the statute. Ultimately, *Kassouf* eliminated the punishment of attempts that were meant to be within the purview of punishable offenses in the § 7212(a) omnibus clause.

Justice Scalia made this argument in the *Aguilar* dissent.[167] The majority in *Aguilar* had a more limited view of the meaning of "endeavor."[168] The majority responded to Scalia by interpreting "endeavor" to only include instances where there was a proceeding and an attempt to obstruct it was somehow frustrated.[169] In contrast, Scalia's interpretation of "endeavor" also included attempts to thwart a non-existent, but anticipated, proceeding.[170] In the majority's own words, it defined "endeavor" as "mak[ing] conduct punishable where the defendant acts with an intent to obstruct justice, and in

[165] It is a fundamental rule of statutory construction that courts should not read a statute in a way that makes some language of the statute superfluous to other language in the statute. *See* Corley v. United States, 556 U.S. 303, 314 (2009).

[166] United States v. Kassouf, 144 F.3d 952, 957 (6th Cir. 1998) (concluding that "due administration of the Title requires some *pending IRS action* of which the defendant was aware") (emphasis added).

[167] United States v. Aguilar, 515 U.S. 593, 609–12 (1995) (Scalia, J., dissenting). Justice Scalia further developed the argument by explaining that factual impossibility is not a valid legal doctrine as applied to facts in *Aguilar*. *Id.* at 593 ("In *Osborn v. United States,* 385 U.S. 323, 333 (1966), we dismissed out of hand the 'impossibility' defense of a defendant who had sought to convey a bribe to a prospective juror through an intermediary who was secretly working for the Government.").

[168] *Aguilar*, 515 U.S. at 601–02. It is interesting to note that the majority felt it necessary to preemptively criticize the dissent's argument related to the construction of "endeavor" before it imparted with its own definition.

[169] *Id.*

[170] *Id.* at 593 (Scalia, J., dissenting).

a manner that is likely to obstruct justice, but is foiled in some way."[171] The Court further used an example to describe the only type of attempt it concluded would violate the statute: "[w]ere a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice."[172] On the other hand, the *Aguilar* majority would not, find guilt where a defendant, who thought he was under investigation, took all the steps necessary to thwart it (including force or threats of force), but it was later determined that no such investigation was in process.[173]

Dividing the term "endeavor"—to refer to attempts that were thwarted but not attempts to obstruct an anticipated but nonexistent IRS action—appears to be parsing the definition of "endeavor" to only include the element that molds with the desired judicial conclusion (the nexus requirement) and disposing of the remainder simply because the word still has "a useful function to fulfill."[174] This conclusion denies the plain meaning of "endeavor," contrary to sound principles of statutory construction. It is an important canon that words should be given their plain meaning.[175] To partition a word's meaning, including instances where it conforms to a desired policy outcome and excluding instances where it does not, is surely an example of a deviation from the plain meaning rule. On this point, the *Aguilar* dissent is more persuasive than the majority opinion.

3. Courts Should Not Apply the Rule of Lenity to Create a Nexus Test

One premise on which *Kassouf* based its holding was the rule of lenity.[176] The Supreme Court defines the rule of lenity as a requirement "under which we must construe ambiguous criminal statutes in favor of the defendant."[177] Lenity, however, for the same reasons that make the statute

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[171] *Id.* at 601–02.

[172] *Id.*

[173] *See supra* note 168 (author's comments regarding the *Aguilar* majority's treatment of "endeavor").

[174] *Aguilar*, 515 U.S. at 601 (describing Justice Scalia's dissenting opinion).

[175] "A fundamental canon of statutory construction instructs that, unless otherwise defined, words are interpreted to take their ordinary, contemporary, common meaning in the absence of persuasive reasons to the contrary." 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed. 2011). *See, e.g.*, F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994).

[176] "In construing § 7212(a) to require a pending IRS action under the code of which the defendant is aware, we are also mindful that courts should interpret statutes that impose criminal liability narrowly to ensure proper notice to the accused." United States v. Kassouf, 144 F.3d 952, 958 (6th Cir. 1998).

[177] Fowler v. United States, 563 U.S. 668, 682 (2011) (Scalia, J., concurring).

unambiguous as described below, does not apply in this situation. The Supreme Court has required that the rule of lenity itself should be strictly construed to situations where "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute."[178] Even if admitting, for argument's sake, that the Sixth Circuit outlier opinions demonstrate some textual ambiguity, there is little-to-no basis whatsoever on which to conclude that the ambiguity is "grievous."[179] This point was driven home during the *Marinello* oral argument, when Justice Kagan challenged the use of the rule of lenity and at one point speculated that the nexus requirement came "out of thin air."[180]

One Supreme Court decision is illustrative in that it declined to apply the rule of lenity to a different statute that was seemingly even more ambiguous than § 7212(a). In the case of *Reno v. Koray*, a prison inmate argued that the definition of "official detention" within the Bail Reform Act of 1984[181] included time spent at a treatment center during bail release.[182] A split existed among federal circuit courts as to whether time spent at a treatment center counted as "official detention" time and the prisoner, Ziya Koray, argued that this disagreement should be viewed as ambiguity that warranted use of the rule of lenity in reducing the length of his sentence.[183] The Court denied use of the rule, stating "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended."[184] The Court was unconvinced that a split of authority created such ambiguity.[185] Ambiguity that exists within § 7212(a), if any, is comparable to that in *Reno* because courts don't have definitive evidence of what Congress intended as evidenced by the circuit split. Similar to the legal landscape in *Reno*, after *Kassouf* was decided, "the overwhelming majority of the Courts of Appeals"[186] decided

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[178] Barber v. Thomas, 560 U.S. 474, 488 (2010) (internal quotations omitted) (emphasis added).

[179] *Grievous*, MERRIAM–WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/grievous (last visited February 18, 2017) (defining "grievous" as "causing or characterized by severe pain, suffering, or sorrow").

[180] Transcript of Oral Argument at 15, 22, Marinello v. United States, No. 16-1144 (U.S. argued Dec. 6, 2017), 2017 WL 6040470.

[181] Pub. L. 98-473, Tit. II, ch. I, 98 Stat. 1976. The referenced language was codified in 18 U.S.C. § 3585(b) (2001).

[182] 515 U.S. 50, 53 (1995).

[183] *Id.* at 64.

[184] *Id.* at 65 (internal quotations omitted).

[185] *Id.* at 64–65 ("A statute is not 'ambiguous' for purposes of lenity merely because there is a division of judicial authority over its proper construction.") (internal quotations omitted).

[186] *Id.* at 53.

not to interpret the statute in the defendant-friendly way.[187] Therefore, lenity is not appropriate in this context.

4. The Legislative History is Not Helpful

Some might argue that where ambiguity exists, courts must attempt to interpret legislative intent by looking to the legislative history. Despite the fact that legislative history often provides little value,[188] as previously noted, there is scant legislative history to look to in attempting to decipher the scope and reach of § 7212(a).[189] Some, however, have argued that the § 7212(a) House and Senate Reports showed intent to cabin § 7212(a) towards actions against "specific IRS agents or investigations."[190] However, a more convincing interpretation of the House and Senate Reports is that they contain no instruction whatsoever on the omnibus clause.[191] It is more persuasive that the reports omit any intent towards the omnibus clause whatsoever because the language from the Senate Report (corresponding with the version that was adopted) which is claimed to be instructive on the omnibus clause, only makes mention of "intimidation or impeding" and does not refer to the "in any other way" language of the omnibus clause.[192] To

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[187] *See supra* Section II.B.1 (describing how the majority of circuit courts have denied implementing the *Kassouf* nexus test).

[188] Justice Jackson provided an apt criticism of legislative history:

> When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

United States v. Pub. Utilities Comm'n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring). *See also* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621(1991) (Scalia, J., concurring) (disclaiming the value of Committee reports in determining legislative intent).

[189] *See supra* Section I.B.

[190] Fink & Rule, *supra* note 8, at 357.

[191] *See* Marrazzo, *supra* note 29, at 88; Townsend, *supra* note 34, at 284 n.107.

[192] The report states:

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

S. Rep. No. 83-1622, at 604 (1954).

infer Congressional intent from one disjointed paragraph contained in a 1954 committee report which does not even quote the relevant language is to stretch a legal argument beyond its logical bounds. The committee report cannot be determinative as to legislative intent.

Even evidence of Congressional intent is unimportant when no textual ambiguity exists within the language of a statute.[193] Thus, it is not problematic that Congress left little legislative history as guidance on how to apply § 7212(a) because the statute is unambiguous. The § 7212(a) omnibus clause punishes any individual who "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."[194] The disputed language, "due administration of this title" and "corruptly . . . endeavors" nowhere requires knowledge of an official proceeding as a prerequisite to violation of the statute. Adding a nexus requirement presupposes ambiguity because of legislative intent of which there is no evidence based on the plain language.

B. *AGUILAR* DOES NOT AND SHOULD NOT APPLY TO SECTION 7212(A)

1. Differences Between Section 1503(a) and Section 7212(a)

The crux of the Sixth Circuit argument that resulted in the § 7212(a) nexus test is the comparison of the omnibus clauses in § 7212(a) and 18 U.S.C. § 1503(a).[195] This comparison is problematic at best since § 7212(a) and § 1503 are two very differently structured statutes, and the omnibus clauses need to be structurally analyzed within their respective statutes. The comparison could start and end with the statutes' titles. Section 7212(a) received the broad title "[a]ttempts to interfere with administration of internal revenue laws" while § 1503's title reads more specifically "[i]nfluencing or injuring officer or juror generally." The titles indicate what the text of the statutes highlight, that § 7212 was written using much broader language than § 1503. In fact, § 1503 is one specific obstruction statute within a long list of obstruction crimes in Title 18, while § 7212 was written to encompass any obstruction of the entirety of Title 26.[196] What is also interesting is that the title of § 1503 indicates that it was meant to limit the statute to the very thing

[193] "It is axiomatic that the starting point in every case involving construction of a statute is the language itself." Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (internal quotation omitted).

[194] 26 U.S.C. § 7212(a) (2012).

[195] United States v. Kassouf, 144 F.3d 952, 957 (6th Cir. 1998).

[196] *See* United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010). The *Wood* court convincingly expressed this argument in refusing to apply a nexus test. *Id.* (citing United States v. Popkin, 943 F.2d 1535, 1541 (11th Cir. 1991)).

that § 7212(a) was argued to have been intended to criminalize, acts against "specific . . . agents or investigations."[197] Section 1503, at least from reading its title, indicates an intention to specifically protect individuals (officers or jurors). Section 7212's title gives no such charge. Surely if Congress had meant for § 7212 to replicate § 1503 in a tax setting, as the argument goes, it would have given it a similar title, e.g., "attempts to interfere with IRS officers or agents."

Another glaring and important difference between the two statutes is the inclusion of the phrase "in any other way" in the omnibus clause of § 7212(a), which is omitted from § 1503(a). Inclusion of this phrase "does not seem to add anything other than to emphasize the broad scope of the omnibus clause."[198] Obstructing or impeding administration of the Internal Revenue Code in any other way semantically includes every possible way one could obstruct or impede that was not previously delineated in the statute. From this, it is difficult to imagine that Congress could have chosen more expansive language or intended a broader application.

Furthermore, as highlighted in *Wood*,[199] § 1503 lists very specific examples of activity that constitutes punishable behavior. For example, the statute bans "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."[200] It also covers an individual who:

> [I]njures 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.[201]

These actions are much more specific than § 7212's broad proscription from acts affecting "due administration of this title." The differences show two different statutes, with two different meanings, which require two different interpretations.

2. Interpretation by Comparing Statutes

It cannot be denied that when interpreting statutes, courts often look to

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[197] *See supra* Section III.A.4 (discussing an argument that Congress intended § 7212(a) to be limited to acts against investigators or agents).

[198] Townsend, *supra* note 34, at 284 n.107.

[199] United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010).

[200] 18 U.S.C. § 1503(a) (2012).

[201] *Id.*

potentially analogous statutes to try and find similar meaning.[202] However, the case of *Bedrock Ltd., L.L.C. v. United States* offers an example of the limitations of this principle.[203] In *Bedrock*, landowners who were attempting to quiet title on land that was previously owned by the government, argued for the interpretation of the term "valuable minerals" in the Pittman Underground Water Act (PUWA) to be analogous to its interpretation of the term "minerals" in another federal statute, the Stock–Raising Homestead Act (SRHA).[204] The court mentioned that the SHRA definition was useful in interpreting the PUWA because of "contemporaneous enactment and analogous purpose" but ultimately concluded that the absence of the term "valuable" gave the statutes two different meanings.[205] *Bedrock* concluded what *Kassouf* denied, that two statutes that may appear to have similar purposes cannot be interpreted identically where Congress did not mirror the language in the two statutes. The difference in the titles between § 7212(a) and § 1503(a) and the specificity existing in § 1503(a) that is absent from § 7212(a) shows more than a difference of a single word. It highlights a purposeful distinction between the scope of the two statutes, much like the term "valuable" gave the SRHA different meaning and different interpretation than the PUWA.

Another argument against trying to compare § 7212(a) with other statutes is that different comparisons can lead to conflicting outcomes. For example, comparison to the crime known as the "Klein conspiracy"[206] led one court to conclude that no nexus requirement exists within the § 7212(a) omnibus clause.[207] *United States v. Willner* discussed how conviction of a "Klein conspiracy" could be obtained from acts which often require no knowledge of an ongoing investigation, such as "active concealment of income by making false entries in books and records, submitting false documents to the IRS, and taking other affirmative acts to impede and obstruct the Treasury Department in the collection of income taxes."[208] The court considered these acts which when committed by more than one person constitute a "conspiracy to obstruct" to be comparable to obstruction under

[202] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970) ("This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times.").

[203] 314 F.3d 1080 (9th Cir. 2002).

[204] *Id.* at 1088.

[205] *Id.*

[206] Violation of 18 U.S.C. § 271 in a tax context is known as a "*Klein* conspiracy," originating from *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied* 355 U.S. 924 (1958). *See* Townsend, *supra* note 34, at 263 n.8.

[207] United States v. Willner, No. 07 CR. 183, 2007 WL 2963711, at *6 (S.D.N.Y. Oct. 11, 2007).

[208] *Id.* at *5 (internal quotations omitted).

the § 7212(a) omnibus clause, absent the requirement that more than one person be involved.[209] In making this comparison, the *Willner* court denied application of a nexus requirement to the § 7212(a) omnibus clause.[210] Section 7212(a) cannot be subject to both *Aguilar*'s and *Willner*'s holdings. It should be interpreted independently.

IV. Resolution of the Issue

For the reasons articulated above, the Supreme Court should not adopt the *Kassouf* nexus test to the § 7212(a) omnibus clause as written. However, without some limiting principle, there is a risk that prosecutors will continue to overuse the omnibus clause, charging a felony for conduct meant to be punished as a misdemeanor.[211] The Court should appropriately interpret the statute as requiring prosecutors to prove an affirmative act for an omnibus clause violation, but the Court's action should end there. Congress, in its lawmaking role, is the appropriate body to clean up the mess that is the omnibus clause of § 7212(a). Congress should decide what role the omnibus clause should play in future tax prosecutions and should change the language of § 7212(a) to limit what is arguably an unconstitutionally vague statute.[212]

A. The Supreme Court Should Interpret the Statute as Written

Marinello presents an opportunity for the Supreme Court to weigh in on the debate about how broadly the omnibus clause should be construed. The Court should perform its role in interpreting the statute according to Congressional intent, regardless of policy arguments. The Court, unlikely to cast the omnibus clause aside as unconstitutionally vague, is more likely to save the statute through some limiting principle.[213] As argued above at length, the *Kassouf* nexus test should not be that principle. Rather, the Court should look to the statutory scheme of tax crimes to limit omnibus clause charges to taxpayers who have performed an affirmative act.

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[209] *Id.* at *6.

[210] *Id.*

[211] *See* Brief for American College of Tax Counsel as Amici Curiae Supporting Petitioner at 23–24, Marinello v. United States, No. 16-1144 (U.S. filed Sept. 9, 2017), 2017 WL 4023122 (noting that failures to act under the tax code are typically misdemeanors and that the "Government's sweeping interpretation of § 7212(a) would make it an outlier in an otherwise coherent tax enforcement system").

[212] *See id*. at 5 (arguing that the government's interpretation of § 7212(a) would make the statute unconstitutionally vague).

[213] *See* U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 571 (1973) ("As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.").

Prior to *Marinello*, some in academia assumed that activity in violation of the omnibus clause is limited to affirmative acts.[214] This is perhaps because, as the New York Council of Defense Lawyers so aptly described,

> [i]n implementing Title 26, Congress sought to distinguish between acts of commission, which could be charged as felonies, and failures to act, which were deemed to merit misdemeanor charges. With the exception of two well-defined and limited situations involving taxpayers performing special roles, neither of which applies in [the *Marinello*] case or the overwhelming majority of Section 7212(a) cases, tax felonies require willful commission of an affirmative act.[215]

Furthermore, courts should interpret statutes enacted as a part of a statutory scheme as having the same meaning as other statutes within that scheme.[216] For this reason, the Court in *Marinello*, should assume Congress meant the omnibus clause of § 7212(a), a felony charge, to punish affirmative acts only and not omissions. This limitation, which would likely result in the remand of *Marinello*,[217] is the only limit that can be provided from a strict interpretation of the statute.

B. CONGRESS SHOULD RETHINK THE ROLE OF THE OMNIBUS CLAUSE

Congress, having enacted an overly broad and potentially unconstitutional criminal felony statute, which has deprived and will continue to deprive individuals of their liberty, should hold hearings to determine what conduct it meant to be punished under the omnibus clause. In doing so, it should consider the plethora of case law, briefs, articles, and other resources that have considered this crime and the role it should play among other criminal provisions. Congress may even want to argue whether an omnibus clause in § 7212(a) is necessary at all, given the numerous other criminal tax provisions within Title 26 and other obstruction charges within Title 18. Regardless of the answer to these questions, Congress is the only appropriate channel through which these decisions should be made. And given the stakes, it should act expediently.

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[214] *See, e.g.*, JOHN A. TOWNSEND ET AL., TAX CRIMES 92 (Paul L. Caron et al. eds., 2d. ed. 2015) (stating "affirmative action must be taken" to meet the "endeavoring" element of the omnibus clause).

[215] Brief for New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner at 10, Marinello v. United States, No. 16-1144 (U.S. filed Sept. 8, 2017), 2017 WL 4023121.

[216] *See generally* 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51.2 (7th ed. 2012) (explaining how statutes should be interpreted by reference to related statutes).

[217] Marinello arguably committed affirmative acts that may have violated the omnibus clause, such as destroying records, paying employees with cash, and transferring assets. United States v. Marinello, 839 F.3d 209, 213 (2d Cir. 2016).

C. EASY AND SIMPLE CHANGES TO THE OMNIBUS CLAUSE ARE NECESSARY

One very simple and necessary change should be made to § 7212(a). "Willfully" should be substituted for "corruptly." This change would eliminate the confusion as to whether an individual has to have knowledge of an illegal act or broad knowledge of some unlawful gain from his or her act.[218] It is unclear why Congress included the lesser "corruptly" mens rea standard, but it was probably a result of mirroring the language from other obstruction statutes.[219] Congress should consider whether a relaxed mens rea standard serves any purpose at all in the prosecution of this obstruction crime, and it should inevitably conclude that taxpayers and law enforcement alike would benefit from a more certain standard.

Congress should also consider whether the omnibus clause should be limited to punishing activity that obstructed a pending investigation or proceeding, a conclusion that is far from foregone. In doing so, it should pay particular attention to *Bowman*, a case where the Sixth Circuit seemed so eager to punish the defendant under the omnibus clause, that it stretched to limit its binding decision in *Kassouf*.[220] *Bowman* is particularly relevant to this decision because it adds the nuance of what punishment is appropriate for a taxpayer who attempts to obstruct an anticipated but not yet realized investigation.[221] If Congress decides that the crime should contain a nexus requirement, it has only to substitute one word within the statute for another: "enforcement" for "administration." As discussed earlier, this would appropriately limit prosecutors to punishing acts that obstruct or impede solely the enforcement function of the IRS.

CONCLUSION

The *Kassouf* and *Miner* opinions have created confusion about the meaning of the omnibus clause of § 7212 within the Sixth Circuit and outside of it. *Kassouf* was wrongly decided on many fronts when it applied bad precedent to a statute that had clear words with plain meaning. *Miner* perpetuated the problem created by *Kassouf* by offering conjecture on an

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[218] *See supra* Section I.D.

[219] *See* Townsend, *supra* note 34, at 283 (concluding that "[w]hen § 7212 was enacted in 1954, it had some predicates in the prior tax law criminalizing forcible conduct to influence tax administration, but § 7212 was drawn virtually verbatim from the general obstruction provisions in the criminal code").

[220] *See* United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999) (holding that "*Kassouf* must be limited to its precise holding and facts").

[221] *Id.* (explaining that Bowman's illegal act was done "for the purpose of causing the IRS to initiate action against a taxpayer").

issue that was not dispositive to its parties. And in exchange for this statutory uncertainty, all that the Sixth Circuit seems to have achieved are a handful of dismissed complaints with one notable overturned conviction.[222]

The Supreme Court should reject *Kassouf*'s nexus test. In doing so, the Court should consider the weight of all the precedent in disagreement with *Kassouf* and it should apply the statute according to its very plain meaning. On the other hand, the Court should look to the statutory scheme of Title 26 and limit the omnibus clause from punishing omissions by requiring some affirmative act. Any other omnibus clause limitations that are necessary should come from Congress, after lengthy debate about how an omnibus clause to § 7212(a) fits into the statutory scheme. Congress can make meaningful change to the omnibus clause through very minor adjustments to the statutory language. Because this crime can result in serious consequences, Congress should act fast in order to put taxpayers on notice of what acts might result in a potential felony charge.

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[222] Note that Kassouf's conviction was overturned but Miner's was not. *See supra* Section II.C (noting that the *Miner* holding was not dispositive).