No. 15-595

In the Supreme Court of the United States

JEROLD R. SORENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending IRS action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-55) is reported at 801 F.3d 1217.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55-56) was entered on September 14, 2015. A petition for rehearing was denied on October 8, 2015 (Pet. App. 71-72). The petition for a writ of certiorari was filed on November 4, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Petitioner was sentenced to 18 months of imprisonment, to be fol-

lowed by one year of supervised release. Pet. App. 60-61. The court of appeals affirmed. *Id.* at 56.

1. From 2002 to 2007, petitioner concealed his income and assets from the IRS using a "Pure Trust Organization" program promoted by Financial Fortress Associates (FFA). Pet. App. 2-3. Under the program, petitioner paid FFA to establish six shell trusts that purportedly did not require any Employer Identification Number and therefore could not be "tracked" by the IRS. *Id.* at 5, 9. He also paid Melissa Sugar, FFA's attorney, to open and maintain a bank account under the name "Northside Management," even though petitioner in fact retained control over the account and, as Sugar's purported "administrative assistant," could deposit or withdraw funds as he pleased. *Id.* at 4, 6-7. Petitioner arranged to have his California home, dental practice, and dental equipment—assets that he owned free and clear—retitled in the names of the six trusts. *Id.* at 4-5. He then had his dental practice "pay" the trusts to "rent" those assets. *Id.* at 5. Using this scheme, petitioner deposited his dental income directly into the Northside Management account, illegally deducted the deposited amounts as business expenses on his personal tax returns, and avoided reporting and paying taxes on his true income. *Ibid.* As a result of his use of the pure-trust scheme, petitioner underpaid his taxes for 2002-2007 by more than $1.5 million. *Id.* at 10.

In 2002, petitioner's initial adoption of the pure-trust scheme caused his longtime accountant to cease doing his taxes because, she told him, the IRS considered it to be an illegitimate scheme. Pet. App. 7. In 2003 and 2004, he looked without success for an attorney or CPA unaffiliated with FFA who would validate

the program's legitimacy. *Id.* at 8. By August 2007, petitioner knew that the IRS had recently executed a search warrant at Sugar's law office, but he continued to use FFA's program. *Id.* at 9. That same year, he approached CPA Keith Wilcox to discuss his tax "situation." *Ibid.* Wilcox told petitioner that the FFA trusts were "a complete sham" and helped petitioner prepare amended tax returns, but petitioner ignored Wilcox's advice and did not file the amended returns for another two years. *Id.* at 10. Meanwhile, in 2008, IRS Special Agent Michelle Hagemann sent petitioner a letter by certified mail notifying him that he was the target of a criminal investigation. *Ibid.* Acting on advice he received at an FFA seminar, petitioner refused to sign for Hagemann's letter. *Ibid.* Once petitioner realized that Hagemann was investigating him, he followed FFA's advice and sent Hagemann a questionnaire that requested her personal information, including her home address, birthday, and social security number. *Ibid.*

2. A grand jury charged petitioner with violating 26 U.S.C. 7212(a). Pet. App. 11. Section 7212(a) imposes criminal sanctions on any person who (1) "corruptly * * * endeavors to intimidate or impede any officer of the United States acting in an official capacity under [the Internal Revenue Code]," or (2) "in any other way corruptly or by force or threats of force * * * obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Internal Revenue Code]." 26 U.S.C. 7212(a). The latter portion, known as the "omnibus clause," formed the basis for the charge against petitioner. Pet. App. 11.

In the district court, petitioner proposed a jury instruction stating that, to act "corruptly" within the

meaning of Section 7212(a), he "must have known the advantage or benefit sought was unlawful." Pet. App. 22. The district court declined to give that particular instruction, but it did instruct the jury that "[t]o act 'corruptly' is to act knowingly and dishonestly, with the specific intent to gain an unlawful advantage or benefit either for oneself or for another by subverting or undermining the due administration of the internal revenue laws." *Id.* at 21. The instruction further defined the IRS's "due administration" as including "carrying out its 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." *Id.* at 21-22. Despite the focus of his petition for a writ of certiorari, petitioner did not object to that definition, and he never requested an instruction that would have required proof that he acted with awareness of some pending IRS action or proceeding.

The jury found petitioner guilty, and he was sentenced to 18 months of imprisonment, to be followed by one year of supervised release. Pet. App. 11, 60-61.

3. On appeal, petitioner raised several arguments. As relevant here, he contended that his conduct was more like tax evasion and he should therefore have been charged under 26 U.S.C. 7201 rather than Section 7212(a), Pet. App. 14, and that the district court had erred in refusing to give a jury instruction requiring knowledge of illegality, *id.* at 20.

In the course of his argument that an offense under Section 7212(a) should not be permitted to overlap with the tax-evasion provision, petitioner noted that other courts had construed Section 7212(a) narrowly, and he cited *United States* v. *Kassouf*, 144 F.3d 952

(6th Cir. 1998), which had stated that Section 7212(a)'s reach is limited "to taxpayers with knowledge of a pending IRS action," such as a subpoena, audit, or criminal tax investigation. Pet. C.A. Br. 11. Petitioner acknowledged that the Tenth Circuit had already rejected *Kassouf*'s approach in an unpublished opinion, and he did not request a different result. *Id.* at 12 (citing *United States* v. *Wood*, 384 Fed. Appx. 698, 703-710 (10th Cir. 2010), cert. denied, 562 U.S. 1225 (2011)). In his reply brief, petitioner noted that, since the parties' opening briefs had been filed, the Sixth Circuit had reaffirmed *Kassouf*. Pet. C.A. Reply Br. 4 (citing *United States* v. *Miner*, 774 F.3d 336, 344 (6th Cir. 2014), cert. denied, 135 S. Ct. 2060 (2015)). Nevertheless, he contended only that his conviction should be overturned because Section 7212(a) should not be "extended * * * to duplicate other tax offenses." *Ibid.* He still did not affirmatively contend that the government was required, but had failed, to prove that he had known of a pending IRS action when he corruptly endeavored to obstruct the administration of the tax laws.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1-56. It first rejected petitioner's argument that the government was required to charge his conduct as tax evasion under Section 7201, rather than tax obstruction under Section 7212(a). *Id.* at 12-20. It reasoned that, even if the two provisions covered similar conduct, the government was "free to charge tax obstruction even when the underlying conduct includes (or may be argued to include) tax-evasive conduct." *Id.* at 15. In any event, it explained that "tax evasion and tax obstruction are not identical crimes," because they have different elements (includ-

ing *mens rea*) and provide different penalties (with the penalty for tax evasion being higher). *Id.* at 15-16. The court rejected petitioner's invocation of the Department of Justice's internal guidance about the scope of Section 7212(a)'s omnibus clause—noting that it would not second guess the government's decision about whether tax evasion would have been "readily provable" as a preferable alternative charge against petitioner under that guidance. *Id.* at 16. The court further explained that petitioner's own case "involves obstruction going beyond simply evading his taxes," since he had, "for instance, * * * used FFA's pure trusts with no [Employee Identification Number], which prevented the IRS from tracking them." *Id.* at 17-18. The court recognized that petitioner's conduct in setting up the shell trusts and the Northside Management account was similar to conduct—such as setting up an offshore corporation to avoid taxes—that had previously been held to be obstructive. *Id.* at 18. The court rejected petitioner's contention that the omnibus clause should be limited to "prototypical acts of obstruction" like harassing IRS agents or falsifying documents, because it concluded that petitioner's own charged conduct fell within "the statute's plain language." *Id.* at 19-20.

The court of appeals also rejected petitioner's various contentions that the jury instructions had been erroneous. Pet. App. 20-44. In particular, it held that the district court had not erred in declining to give petitioner's proposed instruction about knowledge of illegality. *Id.* at 21-29. It explained that the instruction actually given "had already required proof of knowledge of illegality," because it required that petitioner's "acts be done 'knowingly and dishonestly.'"

Id. at 23-24. Moreover, the district court's separate instruction about good faith also meant that the jury had "found that [petitioner] did not in good faith believe he was acting within or complying with the law (the entire basis for his defense at trial)." *Id.* at 25.

As the final part of its discussion of the knowledge-of-illegality jury instruction, the court of appeals noted that petitioner "suggests that the government can only charge tax obstruction under § 7212(a) when the defendant knows of a pending IRS investigation or audit." Pet. App. 26. The court recognized that, in *Kassouf*, the Sixth Circuit had adopted such an approach by analogizing Section 7212(a) to the general obstruction-of-justice provision in 18 U.S.C. 1503, which this Court had construed in *United States* v. *Aguilar*, 515 U.S. 593 (1995). Pet. App. 26. The court disagreed with *Kassouf*, finding instead that the two statutes are not "sufficiently similar to apply *Aguilar*'s reasoning to § 7212(a)." *Id.* at 29. The court also explained that its construction of the statute is supported by the jury instruction in this case defining "due administration of the internal revenue laws," which included IRS functions, such as computing the amount of taxes owed, that do not require the IRS to open a proceeding. *Ibid.* The court noted that petitioner had not objected to this jury instruction and had not contended on appeal that it constituted plain error. *Ibid.*

ARGUMENT

Petitioner now contends (Pet. i, 15-18) that the offense of corruptly endeavoring to obstruct the administration of the tax laws in violation of the omnibus clause of 26 U.S.C. 7212(a) requires proof that the defendant knew about a pending IRS action. That

contention lacks merit, and the decision below does not conflict with any decision of this Court. Although a disagreement exists in the courts of appeals, it is thin, and the outlying court—the Sixth Circuit—has not had an appropriate opportunity to reconsider its approach in an en banc proceeding. Moreover, this case would be a poor vehicle for resolution of the question, both because petitioner did not object to jury instructions consistent with the decision below and because he persisted in using FFA's pure-trust-organization scheme even after he became aware of the IRS's investigation into FFA. The Court has previously denied other petitions raising the same question,[1] and nothing supports a different result here.

1. Petitioner errs in contending (Pet. 15-18) that Section 7212(a)'s omnibus clause requires proof that the defendant was aware of a pending IRS proceeding or investigation.

a. Petitioner's construction is not supported by the plain text of the statute, which applies to those who corruptly endeavor to obstruct or impede "the due administration of [the Internal Revenue Code]." 26 U.S.C. 7212(a). As the court of appeals noted, the IRS administers the tax laws in ways that fall short of "initiating a proceeding." Pet. App. 29. Moreover, nothing in the statute's text requires that any IRS proceeding, investigation, or action already be underway when the defendant endeavors to obstruct due administration.

Rather than rely on the statute itself, petitioner principally invokes (Pet. 7-8, 16) an analogy to a dif-

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[1] See *Wood* v. *United States*, 562 U.S. 1225 (2011) (No. 10-7419); *Massey* v. *United States*, 547 U.S. 1132 (2006) (No. 05-8633).

ferent provision that this Court construed in *United States* v. *Aguilar*, 515 U.S. 593 (1995). *Aguilar* considered the "omnibus clause" of a general obstruction-of-justice statute in the Federal Criminal Code, which applies to any person who "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" 18 U.S.C. 1503(a). The Court held that a corrupt endeavor under that provision "must have the 'natural and probable effect' of interfering with the due administration of justice." 515 U.S. at 599 (citation omitted). In particular, the Court concluded that the statute requires a "nexus" in time, causation, or logic between the defendant's obstructing acts and a judicial or grand-jury proceeding. *Id.* at 599-600.

In reaching that conclusion, the Court relied on its previous decision in *Pettibone* v. *United States*, 148 U.S. 197 (1893), about a predecessor to Section 1503(a), which prohibited obstruction of "the due administration of justice" in "any court of the United States," Rev. Stat. § 5399 (1878). In *Pettibone*, the Court held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice *in a court* unless it appears that he knew or had notice that justice was being administered *in such court*." 148 U.S. at 206 (emphases added). Drawing upon that history, *Aguilar* concluded that Section 1503(a) applies to actions taken "with an intent to influence judicial or grand jury proceedings." 515 U.S. at 599. The Court expressly distinguished those judicial proceedings from "some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." *Ibid.*

Aguilar's analysis is not transferrable to Section 7212(a). Section 1503(a) refers to obstruction of "justice," which this Court had previously associated with proceedings "in a court." Section 7212(a), in contrast, refers to obstruction of the "due administration of this title" (*i.e.*, the Internal Revenue Code). 26 U.S.C. 7212(a). As the decision below noted, "[i]n many instances, the IRS does duly administer the tax laws even before initiating" any particular "proceeding" involving a particular taxpayer. Pet. App. 29. No predecessor statute or prior judicial construction supports the addition of an atextual pending-IRS-action requirement or even suggests that someone cannot corruptly endeavor to obstruct or impede an action that the IRS could be expected to take in the future in the course of administering the tax laws. Furthermore, unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist. People are therefore on notice that the Internal Revenue Code is generally being administered by the IRS even when they are not aware of a specific, already-pending proceeding.

b. Petitioner also relies (Pet. 9-10) on *Yates* v. *United States*, 135 S. Ct. 1074 (2015). In *Yates*, the Court interpreted 18 U.S.C. 1519, which prohibits, *inter alia*, the knowing destruction of any "tangible object." The Court concluded that the term "tangible object" did not include the illegally harvested, undersized fish that the defendant had tried to conceal. See 135 S. Ct. at 1088-1089 (plurality opinion); *id.* at 1089-1090 (Alito, J., concurring in the judgment). *Yates* did not discuss what connection Section 1519 may require between a defendant's obstructive acts and a govern-

ment investigation or proceeding, and petitioner does not contend that Section 1519 requires that there be a pending proceeding.[2]

Instead, petitioner simply adverts (Pet. 9-10) to the application in *Yates* of such generic tenets of statutory construction as resolving "textual uncertainty" by considering the statutory context, construing general provisions in light of accompanying specific ones, and avoiding superfluousness. But those principles do not support petitioner's conclusion here.

Indeed, petitioner's own construction of Section 7212(a) would, in that provision's particular context, threaten to render the omnibus clause superfluous. Petitioner suggests that the omnibus clause should be read in light of the statute's preceding clause, which is directed at agents "acting in an official capacity under" the Tax Code. Pet. 10; see also Pet. 16-17 (arguing that the legislative history indicates that Section 7212(a) was intended to reach conduct directed at specific IRS employees). But the statute addresses two types of corrupt endeavors: (1) those intended "to intimidate or impede any officer or employee of the United States acting in an official capacity under this title," and (2) those intended "in any other way" to "obstruct or impede[] the due administration of this title." 26 U.S.C. 7212(a). Unlike the first clause, the omnibus clause does not require action directed to-

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[2] The courts of appeals have declined to extend *Aguilar*'s requirement of a "nexus" to an official proceeding to Section 1519. See *United States* v. *Moyer*, 674 F.3d 192, 209 (3d Cir.), cert. denied, 133 S. Ct. 165 (2012), and 133 S. Ct. 979 (2013); *United States* v. *Kernell*, 667 F.3d 746, 754 (6th Cir.), cert. denied, 133 S. Ct. 259 (2012); *United States* v. *Gray*, 642 F.3d 371, 378 (2d Cir. 2011).

ward any particular IRS agent, as the lower courts have repeatedly recognized.[3]

c. Nor is there any basis for petitioner's repeated suggestions (Pet. 5, 15) that his offense conduct should be addressed only as potentially willful tax evasion in violation of 26 U.S.C. 7201. Petitioner did not just file fraudulent returns claiming false deductions, which could have been sufficient to charge him with tax evasion. He additionally used sham trusts and a nominee bank account to conceal his control over funds giving rise to false deductions, and he thereby impeded the IRS's ability to ascertain and collect his correct tax liability. Cf. *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1129-1130 (2015) (recognizing that "information gathering" is "a phase of tax administration procedure that occurs before assessment, levy, or collection"). As the court of appeals explained, that conduct "involve[d] obstruction going beyond simply evading his taxes," Pet. App. 17, and it constituted a separate offense with a different *mens*

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[3] See *United States* v. *Kelly*, 147 F.3d 172, 175 (2d Cir. 1998) ("[A]lthough the first clause pertains only to conduct directed against a government official, the second or 'omnibus' clause is not so limited."); *United States* v. *Popkin*, 943 F.2d 1535, 1539 (11th Cir. 1991) (The omnibus clause "greatly expands the reach of the statute," and the prohibited act "need not be an effort to intimidate or impede an individual officer or employee."), cert. denied, 503 U.S. 1004 (1992); *United States* v. *Dykstra*, 991 F.2d 450, 452 (8th Cir.) (The omnibus clause "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States government.'") (quoting *Popkin*, 943 F.2d at 1539), cert. denied, 510 U.S. 880 (1993); *United States* v. *Kelly*, 564 F. Supp. 2d 843, 844-845 (N.D. Ill. 2008) (noting that the defendant's reliance on legislative history about the statute's first clause "would render the omnibus clause essentially superfluous").

rea and a *lower* maximum punishment than tax evasion. *Id.* at 15-16, 23-24. Petitioner therefore "obstructed and impeded the IRS in duly administering the tax code." *Id.* at 17-18.

d. Petitioner suggests (Pet. 11) that his pending-IRS-action limitation would assist the lower courts in their supposed "struggle[] to cabin" the reach of the omnibus clause. But the courts have found the necessary limits in the statute's *mens rea*, which requires that the defendant act "corruptly." In this context, that means "acting with an intent to procure an unlawful benefit either for the actor or for some other person," *United States* v. *Floyd*, 740 F.3d 22, 31 (1st Cir.) (citing cases), cert. denied, 135 S. Ct. 124 (2014)—a definition that is even more exacting than the interpretations of the same term as used in 18 U.S.C. 1503(a).[4] In *United States* v. *Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985), the court explained the rationale for that difference. Because Section 1503 "covers only conduct that is related to a pending judicial proceeding," it "presupposes a proceeding the disruption of which will almost necessarily result in an improper advantage to one side in the case." *Id.* at 999. By contrast, "interference with the administration of the tax laws [in violation of Section

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[4] See *United States* v. *Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993) ("'Corruptly' [as used in § 1503(a)] describes the specific intent of the crime and can vary in meaning with the context of the prosecution."); *United States* v. *Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (defining "corruptly" as "with the intent to influence, obstruct, or impede [a pending judicial] proceeding in its due administration of justice"); *United States* v. *Haas*, 583 F.2d 216, 220 (5th Cir. 1978) ("The term 'corruptly' means for an improper motive * * * or 'an evil or wicked purpose.'"), cert. denied, 440 U.S. 981 (1979).

7212(a)] need not concern a proceeding in which a party stands to gain an improper advantage," so "there is no reason to presume that *every* annoyance or impeding of an IRS agent is done *per se* 'corruptly.'" *Ibid.* As a result, the "corrupt endeavors" prohibited by Section 7212(a) include only "those acts done with the intent to secure an unlawful benefit either for oneself or for another," *id.* at 1001—as the jury instructions in petitioner's own case specified, Pet. App. 21.

Similarly, petitioner's rule would not, as he implies in passing (Pet. 13), clarify that obstruction must pertain only to a taxpayer's "own tax violations," as opposed to schemes in which one person acts to obstruct administration of the tax laws applicable to someone else. In fact, petitioner cites (Pet. 12-13) several cases recognizing liability arising from obstruction pertaining to third parties and none suggesting that such scenarios are categorically off limits.[5]

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[5] Petitioner questions (Pet. 13) a distinction drawn in *United States* v. *Williams*, 644 F.2d 696 (8th Cir.), cert. denied, 454 U.S. 841 (1981), between taxpayers and other defendants. But that decision only underscores the independent, non-exclusive nature of Section 7201 tax-evasion and Section 7212(a) obstruction offenses. *Williams* upheld one defendant's Section 7212(a) conviction for assisting others in filing false Forms W-4, but reversed two other defendants' Section 7212(a) convictions for filing their own false tax forms. 644 F.2d at 700-701. The court reasoned that the filing of one's own false Forms W-4 was exclusively covered by the then-effective version of 26 U.S.C. 7205 (1976), which provided that its penalties were "in lieu of any other penalty provided by law." See 644 F.2d at 700. By contrast, the assisting of others' false tax filings was covered by 26 U.S.C. 7206(2), which contained no such exclusivity provision. 644 F.2d at 701. Notably, the tax-evasion statute (which petitioner contends would be a better fit for his conduct) also contains no such exclusivity provision. See 26 U.S.C.

e. Finally, petitioner discusses (Pet. 13-14) the Justice Department's internal guidance about when violations of Section 7212(a) should be charged. As an initial matter, that guidance, intended to direct the exercise of prosecutorial discretion, does not control the judiciary's construction of the statute or create any rights enforceable by a defendant. Pet. App. 17. More importantly, that guidance conspicuously fails to support petitioner's attempt to infer a pending-IRS-action requirement. As petitioner's own quotations demonstrate (Pet. 14), the 1989 version and the 2004 version of the guidance, as well as a 2012 manual, have all specifically contemplated application of the omnibus clause in circumstances that *predate* any particular IRS action. See U.S. Department of Justice, Tax Div. Directive No. 77 (1989) (recognizing that the omnibus clause may be appropriate for conduct "directed at parties who engage in large-scale obstructive conduct involving actual *or potential tax returns* of third parties") (emphasis added); *id.*, Tax Div. Directive No. 129 (2004) (contemplating application of the omnibus clause "to prosecute a person who, *prior to any audit or investigation*, engaged in large-scale obstructive conduct involving the tax liability of third parties") (emphasis added); U.S. Dep't of Justice, *Criminal Tax Manual* § 17.03 (2012 ed.), www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf (same). A requirement that a

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7201. After *Williams*, Congress amended Section 7205 to remove its exclusivity provision, see 26 U.S.C. 7205 (1984); *United States* v. *Brooks*, 174 F.3d 950, 956 (8th Cir. 1999), which strongly suggests that Congress intends for tax offenses to be non-exclusive, such that the potential applicability of another criminal tax statute does not preclude a prosecution for obstruction under Section 7212(a).

defendant must act with knowledge of an ongoing IRS proceeding or investigation would exclude *all* prosecutions of schemes to defeat tax collection—whether or not they involved third parties—simply because they were completed before any audit or investigation was actually launched. That would be inconsistent with each iteration of the Department's guidance.

The decision below was therefore correct in declining to infer a requirement that Section 7212(a) requires proof of the defendant's knowledge of a pending IRS action.

2. As petitioner explains (Pet. 5-6), decisions in the Sixth Circuit conflict with those in the three other circuits that have expressly addressed whether Section 7212(a) requires proof of knowledge of a pending IRS action. Compare *United States* v. *Miner*, 774 F.3d 336, 344-345 (6th Cir. 2014) (finding such proof is necessary in certain cases), cert. denied, 135 S. Ct. 2060 (2015); and *United States* v. *Kassouf*, 144 F.3d 952, 955-958 (6th Cir. 1998) (same), with *Floyd*, 740 F.3d at 32 (1st Cir.) ("A conviction for violation of section 7212(a) does not require proof of * * * an ongoing audit."); Pet. App. 29 (10th Cir.) ("§ 7212(a) does not require an ongoing proceeding when a defendant 'corruptly . . . endeavor[s] to obstruct or impede the due administration of' the tax laws."); *United States* v. *Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) ("[T]he government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under § 7212(a)."), cert. denied, 547 U.S. 1132 (2006); see also *United States* v. *Wood*, 384 Fed. Appx. 698, 704 (10th Cir. 2010) ("[A] defendant may endeavor to obstruct or impede the broad and continuously operating tax code and thereby violate

§ 7212(a) regardless of whether he or she was aware of any pending IRS action or investigation."), cert. denied, 562 U.S. 1225 (2011). In addition, a majority of the circuits that have not expressly considered the question have nevertheless affirmed convictions under the omnibus clause without any indication that the defendants had acted in response to a pending IRS action, investigation, or other proceeding.[6]

The current conflict does not warrant this Court's review. Not only is it comparatively thin, but the Sixth Circuit has vacillated in its approach. Although it first adopted petitioner's proposed rule in its 1998 decision in *Kassouf*, that decision was expressly limited "to its precise holding and facts" the next year, in a decision that upheld a conviction under Section 7212(a)'s omnibus clause for intentionally attempting to trigger an IRS investigation against third parties. See *United States* v. *Bowman*, 173 F.3d 595, 600 (6th Cir. 1999). In light of *Bowman*, even district courts within the Sixth Circuit did not thereafter follow *Kassouf*. See, *e.g.*, *United States* v. *Gilbert*, No. 3:09-CR-57, 2009 WL 2382445, at *3 (W.D. Ky. July 30, 2009) ("The most recent guidance from the Sixth Circuit indicates that an IRS action is not required."). In December 2014, however, the Sixth Circuit upset that

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[6] See *United States* v. *Crim*, 451 Fed. Appx. 196, 200 (3d Cir. 2011), cert. denied, 132 S. Ct. 1869 and 132 S. Ct. 2682 (2012); *United States* v. *Mitchell*, 985 F.2d 1275, 1276-1279 (4th Cir. 1993); *United States* v. *Phipps*, 595 F.3d 243, 244-245, 247 (5th Cir.), cert. denied, 560 U.S. 935 (2010); *Williams*, 644 F.2d at 701 (8th Cir.); *Popkin*, 943 F.2d at 1536-1137 (11th Cir.). Cf. *United States* v. *McLeod*, 251 F.3d 78, 80 (2d Cir.) (affirming sentence for Section 7212(a) conviction not involving a pending IRS action), cert. denied, 534 U.S. 935 (2001); *United States* v. *Madoch*, 108 F.3d 761, 763 (7th Cir. 1997) (same).

settled understanding. In *Miner*, the panel did not independently analyze the question, but it concluded that, notwithstanding *Bowman*, *Kassouf*'s approach remains binding in at least those cases that involve "defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds." 774 F.3d at 345.

The court in *Miner*, however, held that the failure to instruct the jury about the need for a pending IRS action had been "harmless" in that case because there had been "no real dispute" at trial that the defendant had "acted at least with awareness that the IRS was actively investigating his clients when he engaged in most of his conduct." 774 F.3d at 346. The court therefore affirmed Miner's conviction. *Id.* at 351. The affirmance of the conviction made the case less suitable for rehearing en banc, and the government did not seek rehearing.

Petitioner suggests (Pet. 6) that it is "unclear the Sixth Circuit could ever reconsider this issue en banc." In his view (*ibid.*), any "jury instructed as *Miner* requires" would be obliged to acquit in cases that lack evidence of a pending IRS action. But that will not necessarily prevent the issue from arising in future appeals. Jury instructions, whether through inadvertence or otherwise, sometimes fail to conform to circuit precedent. A court might also conclude that *Bowman* continues to control on its precise facts and instruct a jury accordingly. Alternatively, defendants could challenge the sufficiency of the evidence to establish knowledge of a pending IRS proceeding. Moreover, although petitioner correctly notes that the government could not appeal a *mid-trial* acquittal

based on *Miner*, he overlooks the possibility that the government could appeal a district court's pretrial decision to dismiss an indictment on that ground and seek en banc review. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 142 (6th Cir.) (en banc), cert. denied, 517 U.S. 1246 (1996).

Petitioner also says (Pet. 6) that "there is no indication" that the Sixth Circuit would grant en banc review. But several indications suggest such review might be granted in an appropriate case. *Kassouf* was a divided opinion, see 144 F.3d at 960 (Daughtrey, J., concurring and dissenting); the panel in *Bowman* sought to limit *Kassouf* to its facts, see 173 F.3d at 600; and the panel in *Miner* relied on *Kassouf*'s status as binding precedent without endorsing the substance of its reasoning, see 774 F.3d at 344-345. In addition, the Advisory Committee has recognized that a case "may be a strong candidate for a rehearing en banc" when "the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict." Fed. R. App. P. 35 advisory committee's note (1998 Amendment).

Accordingly, action from this Court may not be necessary to extinguish the Sixth Circuit's status as the lone outlier on the question presented.

3. In any event, even if the question otherwise warranted this Court's review, this case would be a poor vehicle for its resolution for two reasons. First, petitioner not only failed to request any jury instruction on the question, but also failed to object to the jury instruction defining the "due administration of the internal revenue laws" as including functions that would not require the opening of a proceeding. Pet.

App. 29. As the court of appeals observed, petitioner did not contend that those errors were plain. *Ibid.*

Second, petitioner asserts (Pet. 6) that he "could not have been convicted in the Sixth Circuit." But he does not substantiate that assertion. In fact, as in the Sixth Circuit's decision in *Miner*, 774 F.3d at 346-347, the failure to instruct the jury on this question could be found harmless in petitioner's case. He was charged with corruptly endeavoring to obstruct the administration of the tax laws in violation of Section 7212(a) "[b]eginning in or around September, 2000, and continuing through in or around May, 2008." D. Ct. Doc. 2, at 1 (Nov. 20, 2013) (Indictment). Before the end of that period—by August 2007, at the latest—petitioner was aware that the IRS had executed a search warrant at the office of the FFA attorney with whom he was executing the scheme. Pet. App. 9. Petitioner nevertheless indisputably "continued to use FFA's" pure-trust program (later explaining that he was "in too deep" and "didn't want to pay the tax"). *Ibid.* In other words, he continued, as charged in the indictment to "act[] as if the [shell trusts] owned assets that he actually controlled" and "caused his [dental practice] to issue checks payable to the [trusts] associated with the Northside bank account to create the appearance that these payments were legitimate deductions, thereby reducing the [practice's] taxable income." Indictment at 3. As a result, application of petitioner's own rule would be unlikely to change the outcome in his case. Further review of the decision below is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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