**No. 23-**

IN THE

# SUPREME COURT OF THE UNITED STATES

JOSEPH W. FISCHER,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

On Petition for a Writ of Certiorari to the District of Columbia Circuit Court of Appeals

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Did the D.C. Circuit err in construing 18 U.S.C. § 1512(c) ("Witness, Victim, or Informant Tampering"), which prohibits obstruction of congressional inquiries and investigations, to include acts unrelated to investigations and evidence?

## PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellee below, is Joseph W. Fischer.

The Respondent, the appellant below, is the United States of America.

## RELATED PARTIES AND PROCEEDINGS

These cases raise the same issue over the scope of 18 U.S.C. § 1512 (c)(2), and the D.C. Circuit consolidated them for briefing and oral argument:

> *United States v. Miller*, No. 22-3041 (D.C. Cir.) and No. 1:21-CR-00119 (D.D.C.);
>
> *United States v. Lang*, No. 22-3039 (D.C. Cir); and No. 1:21-CR-00053 (D.D.C.).

Edward Lang filed a petition for certiorari on July 11, 2023. *United States v. Lang*, No. 23-32 (U.S.). And Garret Miller filed a petition for a writ of certiorari on July 28, 2023. *Miller v. United States*, No. 23-94. On July 31, 2023, this Court requested that the government respond to Lang's petition.

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## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph W. Fischer, petitions this Court for a writ of certiorari to review the final order of the District of Columbia Circuit Court of Appeals.

## OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023) and reproduced at Petition Appendix ("Pet. App.") 2a-108a.

## JURISDICTION

The court of appeals entered judgment on April 7, 2023, Pet. App. 2a, and then denied rehearing on May 23, 2023. Pet. App. 1a. This Court has jurisdiction over the timely filed petition under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. AMEND. I.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

## STATUTORY PROVISION

> **Tampering with a witness, victim, or an informant**
>
> * * *
>
> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(c)(2).

## INTRODUCTION

The D.C. Circuit's interpretation of the anti-shredding provisions of the Corporate Fraud and Accountability Act of 2002, 18 U.S.C. § 1512(c)(2), presents an important question of federal law affecting hundreds of prosecutions arising from January 6, including the prosecution of former President Donald Trump. *See* Indictment, *United States v. Trump*, No. 1:23-cr-00257-TSC, Doc. 1 at 44 (D.D.C. Aug. 1, 2023). The D.C. Circuit's opinion conflicts with this Court's precedent, diverges from the construction of Section 1512(c) by other courts of appeal, and results—as Judge Katsas observed—in an "implausibly broad" provision that is unconstitutional in many applications. Pet. App. at 66a.

## STATEMENT OF THE CASE

### A. Factual Background

Spurred by President's Trump urging, Petitioner Joseph W. Fischer and a companion attended the Stop the Steal rally on January 6 at the Ellipse. Unlike many of the other attendees, Mr. Fischer did not subsequently march with the crowd to the Capitol. Instead, he and his companion headed home. *See United States v. Fischer*, No. 1:21-CR-00234, Doc. 51 at 4 (D.D.C.). But after learning of the swelling demonstration, Mr. Fischer and his companion drove back to Washington, D.C. *See id*.

Mr. Fischer was not part of the mob that forced the electoral certification to stop; he arrived at the Capitol grounds well after Congress recessed. *See Fischer*, No. 1:21-CR-00234, Doc. 51 at 4.[1] And as Mr. Fischer walked toward the East side of the building, no barricades or fences impeded him. *See id*. He ultimately entered the Capitol around 3:25 p.m. Police video captures Mr. Fischer's conduct inside the building. It reveals, for example, that he pushed his way through the crowd—to about 20 feet inside the building. But as he neared the police line, the swell of the crowd then knocked Mr. Fischer to the ground. Returning to his feet, Mr. Fischer returned lost equipment, a pair of handcuffs, to a Capitol police officer. He talked with an officer, patting him on the shoulder. Then the weight of the crowd pushed Mr. Fischer into the police line. *See id*. With that, the Capitol police pepper sprayed the

[1] The lead opinion ultimately acknowledges this fact. *See* Pet. App. 4a n.1.

protesters, blinding Mr. Fischer. He exited four minutes after entering. *See id.* & Doc. 49 at 3.

### B. The charges and the district court's decision on the scope of Section 1512(c)(2).

A grand jury returned a seven-count indictment. The indictment charged Mr. Fischer with several specific offenses: civil disorder, 18 U.S.C. § 231(a)(3) (Count 1); assaulting, resisting, or impeding certain officers, 18 U.S.C. § 111(a)(1) and (2) (Count 2); entering and remaining in a restricted building or grounds, 18 U.S.C. § 1752(a)(1) (Count 4); disorderly conduct in a restricted building, 18 U.S.C. § 1752(a)(2) (Count 5); disorderly conduct in a capitol building, 40 U.S.C. § 5104(e)(2)(D) (Count 6); and parading, demonstrating, or picketing in a capitol building, 40 U.S.C. § 5104(e)(3)(G) (Count 7). However, as in so many other cases like Mr. Fischer's, the government also charged a violation of Section 1512(c) (Count 3), which prohibits evidence-impairment in connection with, among other things, "a proceeding before the Congress."

Judge Nichols granted Mr. Fischer's motion to dismiss the Section 1512(c) count based on his opinion in *United States v. Miller*, 589 F. Supp. 3d 60 (D.D.C. 2022). *See* Pet. App. 116a. In *Miller*, Judge Nichols construed Section 1512(c) based on its language, structure, history, and the relevant interpretive cannons. At the outset, he emphasized that the court must exercise restraint in assessing the reach of a criminal statute. *Miller*, 589 F. Supp. 3d at 65-66. As for the reach of Section 1512(c), Judge Nichols began by pointing out "that three readings of the statute are possible, but only two are plausible." *Id.* at 67.

The first, advanced by the government, was that subsection (c)(2), which begins with the term "otherwise" and then states, "obstructs, influences, or impedes any official proceeding or attempts to do so[,]" constitutes a "clean break" from subsection (c)(1), setting forth an omnibus clause independent of the preceding subsection. *See id*. at 67-68. But Judge Nichols identified several problems with the government's interpretation. One, it ignored that "otherwise" has several different definitions that imply a relationship with something else. *See id*. at 68. Two, it failed to give meaning to the term "otherwise," rendering it surplusage. *Id*. Three, the government's interpretation conflicted with how this Court had construed "otherwise" in *Begay v. United States*, 553 U.S. 137 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591, 604 (2015), which addressed a different statute but a similar framework. *Miller*, 589 F. Supp. 3d at 68. While acknowledging that other courts had interpreted subsection (c)(2) consistent with the government's position, Judge Nichols viewed this authority as conflicting with this Court's reasoning. *Id*. at 69.

Next, he addressed whether subsection (c)(1) merely provides examples of conduct that violate subsection (c)(2). Judge Nichols acknowledged that this construction gave effect to the term "otherwise" by tethering the subsections through a common link to an "official proceeding." *Id*. at 70. But he found that this construction had its own problems. For example, if the common element is an official proceeding, then "otherwise" is superfluous. *Id*. And both subsections reference official proceedings. *Id*. Judge Nichols explained that the structure of Section 1512(c) cut against construing subsection (c)(1) as merely including examples of conduct

violating (c)(2). In his view, a reasonable reader would not expect the principal (only) offense to be in the second subsection. *Id.*

Finally, Judge Nichols considered whether subsection (c)(2) constituted a residual clause for (c)(1). Under this construction, the word "otherwise" links the two subsections with the commonality being the conduct proscribed in (c)(1). *See id.* at 71. And it squared with this Court's reasoning and holding in *Begay*. *Id.* For instance, subsection (c)(2) ensures that by criminalizing specific acts in (c)(1) that impair evidence, Congress was not underinclusive in proscribing interference with the availability and integrity of all types of evidence. *Id.*

Turning to statutory context, Judge Nichols viewed it as supporting a narrow focus in subsection (c)(2). *See id.* at 73. For instance, he noted that Congress aimed Section 1512's other subsections at discrete conduct in narrow circumstances, like killing a person to prevent their attendance at an official proceeding. *Id.* (citing 18 U.S.C. § 1512(a)(1)(A)). And the title of the section further suggests a narrow evidentiary focus. *Id.* at n.9. Absent such focus, Judge Nichols emphasized that a broad reading would cause "substantial superfluity problems." *Id.* In other words, the majority of Section 1512 would be unnecessary. *Id.*

Looking next to the statutory history, Judge Nichols found that it too reinforced construing subsection (c)(2) as limited to the types of actions described in (c)(1). *See id.* at 74. On this point, he traced the development of Section 1512(c) and observed that it filled a gap, that is, not requiring that the obstructor act through another person. *Id.* at 76.

Last, Judge Nichols recounted the history surrounding Section 1512(c)'s enactment as part of the Sarbanes-Oxley Act of 2002, emphasizing Congress's focus on deterring fraud and abuse by corporate executives. Section 1512(c) followed the notorious cases of Enron and Arthur Anderson, LLP, where documents were shredded to stymie an investigation. *See id.* at 77. In other words, federal authorities could prosecute individuals under Section 1512(c) when they acted alone and before the existence of a proceeding and a subpoena. *Id.*

### C. The Appeal

#### 1. The lead opinion

Judge Pan conceded that there was no precedent for applying Section 1512(c) to conduct unrelated to evidence impairment, and that such application was beyond Congress' expressed purpose in amending that section. *See* Pet. App. 17a, 32a. Yet Judge Pan viewed the terms in Section 1512(c)(2) describing the actus reus to be clear, unambiguous, and supporting a broad reading. *See id.* at 11a-13a. And absent a "grievous ambiguity," Judge Pan did not believe the rule of lenity had any role to play. *See id.* at 38a.

As to the government's argument that the mens rea of "corruptly" limited the statutory reach, Judge Pan demurred. *See id.* at 20a. Because the assault allegations, in her view, satisfied any mens rea standard, Judge Pan did not reach the issue. And she offered that the definition adopted in Judge Walker's concurrence should, for the same reasons, await briefing in a different case. *See id.* at 20a-21a.

Finally, Judge Pan emphasized that the concurring opinion warranted no precedential effect. *See id.* at 22a n.5.

**2. The conditional concurrence**

Judge Walker concurred because the lead opinion's rationale was "not enough to uphold the indictments" in the absence of a definition of the mens rea element. *See* Pet. App. 42a, 63a n.10. Judge Walker repeatedly characterized the government's construction of Section 1512(c)(2)'s act and mental state as "breathtaking" in scope, subjecting it to vagueness and overbreadth concerns. *See id.* at 42a, 43a, 51a, 55a, 60a, 61a, 62a. Judge Walker reasoned that the most efficient way to narrow the lead opinion's construction was through the mens rea element—corruptly. *See id.* at 43a, 51a, 54a-57a, 60a, 62a.

Judge Walker defined corruptly as requiring "proof that the defendant not only knew he was obtaining an 'unlawful benefit' but that his 'objective' or 'purpose' was to obtain that unlawful benefit." *Id.* at 54a. Judge Walker explained that narrowing the mens rea makes sense of subsection (c)(2)'s placement within the statutory scheme. *See id.* at 54a, 56a. Finally, Judge Walker emphasized the conditional nature of his concurrence. *Id.* at 44a n.1 ("Though the district court did not reach the meaning of 'corruptly,' we have no choice. [M]y vote to uphold the indictments depends on it"); 63a n.10 ("If I did not read 'corruptly' narrowly, I would join the dissenting opinion. [G]iving 'corruptly' its narrow, long-established meaning resolves otherwise compelling structural arguments for affirming the district court, as well as the Defendants' vagueness concerns.").

### 3. The dissenting opinion

Judge Katsas concluded that both the government and the lead opinion "dubiously" read the term "otherwise" in Section 1512(c)(2) to mean in a different manner, as opposed to in a manner like the list in subsection (c)(1). Pet. App. 65a. Such reading, Judge Katsas explained, rendered subsection (c)(1) ineffective. *Id.* And it made Section "1512(c) implausibly broad and unconstitutional" in many applications. *Id.* at 66a. Instead, Judge Katsas relied on normal linguistic usage that the verbs preceding "otherwise" help frame and narrow its meaning. *Id.* at 70a. This usage adheres to textualism's goal; that is, not to explore definitional possibilities but to assess how an ordinary person would understand the phrases Congress strung together. *Id.* at 71a.

Judge Katsas also explained that the canons of statutory instruction include avoiding surplusage by giving effect to every clause and word. *Id.* at 71a-72a. Another canon, *ejusdem generis*, cautions that when general words follow specific ones, the general words are construed as embracing only objects like those enumerated. *Id.* at 72a, 88a-89a. Similarly, the canon of *nocitur a sociis* provides that "a word is given precise content by the neighboring words with which it is associated." *Id.* at 72a, 88a-89a (citations omitted). Here, "otherwise" takes meaning from the specific examples preceding it. *Id.* As Judge Katsas recognized, the expansive interpretation advanced by the government and adopted in the lead opinion "would swallow up various other Chapter 73 offenses outside of Section 1512." *Id.* at 84a.

Judge Katsas next noted that the statutory history surrounding Section 1512 and its application in the courts went against the lead opinion's unprecedented expansion of its reach. *See id*. at 91a-93a. Given the ambiguity surrounding the statutory reach and unconstitutional breadth, Judge Katsas believed that the rule of lenity applied. *See id*. at 81a, 102a-03a.

Finally, as for the approach suggested in the concurrence, Judge Katsas lauded the goal of narrowing the government and lead opinion's breathtaking and untenable construction of the statute. *See id*. at 100a. But in Judge Katsas' view, the heightened mens rea requirement that the concurrence proposed would not alter the improbable breadth of the actus reus. *Id*. In other words, Judge Katsas viewed the unlawful benefit mens rea definition as necessary but not sufficient.

#### 4. The mandate

In the wake of these opinions, Mr. Fischer and Miller moved to stay the mandate so that they could seek review in this Court. The Panel granted that request. *United States v. Fischer*, No. 22-2038 at Doc. 2003281.

## REASONS FOR GRANTING THE PETITION

### A. The D.C. Circuit's lead opinion construed Section 1512(c)(2)'s actus reus in a manner that directly conflicts with this Court's statutory construction precedent.

This Court has held that when there are two plausible readings of a statute's scope, "one limited and one near limitless, precedent and prudence require a careful examination of [the statute's] text and structure." *Dubin v. United States*, 143 S. Ct. 1557, 1565 (2023). This precept dovetails with the principle of exercising "restraint in assessing the reach of a federal criminal statute." *United States v. Aguilar*, 515 U.S. 593, 600 (1995); *see also Dubin*, 143 S. Ct. at 1572 (collecting cases). Restraint arises out of deference for Congress and concern for fair warning of what the law proscribes. *See Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018).[2] Here, there is more than one plausible reading of Section 1512(c)(2).

Four judges have reviewed subsection (c)(2), and they arrived at three plausible readings. The district court viewed (c)(2) as limited by (c)(1), thus requiring some action over a document, record, or other object. *Miller*, 589 F. Supp. 3d at 78. But in the D.C. Circuit's lead opinion, Judge Pan viewed (c)(2) as independent of (c)(1) and "encompassing all forms of obstructive acts[,]" even while conceding that her reading of (c)(2) criminalizes acts well beyond those anticipated

[2] Crimes should be "defined by the legislature, not by clever prosecutors riffing on equivocal language." *Dubin*, 143 S. Ct. at 1572 (quoting *United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013)). Correspondingly, the Due Process Clause bars courts from retroactively applying novel judicial constructions "to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)).

by Congress. Pet. App. 13a, 16a.[3] And though Judge Walker agreed in his conditional concurrence that (c)(2) had a "breathtaking scope," he opted to rein it in through a stricter interpretation of the mens rea—acting *corruptly*. Pet. App. 42a, 63a & n.10. Finally, in dissent, Judge Katsas viewed (c)(2) as embracing more than physical evidence (documents and records) but he would limit its range to acts of evidence impairment. Pet. App. 79a.

The D.C. Circuit's lead opinion cannot be squared with *Dubin* and its supporting precedent. *Dubin*, 143 S. Ct. at 1565; *Marinello*, 138 S. Ct. at 1109; *Aguilar*, 515 U.S. at 600.[4] To avoid this precedent, the lead opinion declared that the term "otherwise" in subsection (c)(2) was clear and unambiguous. Pet. App. 11a, 13a.[5] But that declaration too conflicts with precedent from this Court for at least six reasons:

*First*, by reading the term "otherwise" in isolation, and thereby according it an expansive definition, the lead opinion violated this Court's whole-text canon. *See United States v. Briggs*, 141 S. Ct. 467, 470 (2020); *Reno v. Koray*, 515 U.S. 50, 56

[3] On this characterization of Section 1512(c)(2), the Panel agreed. *Cf.* Pet. App. 12a, 13a, 16a (Pan, J.); 42a, 43a, 51a, 55a, 60a, 61a, 62a (Walker, J., concurring); 66a (Katsas, J., dissenting).

[4] *Accord Van Bruen v. United States*, 141 S. Ct. 1648, 1661 (2021); *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-04 (2005); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

[5] The lead opinion also addressed the rule of lenity, characterizing it as only applying when a statute contains a "grievous ambiguity or uncertainty." Pet. App. 38a. But it's far from clear that ambiguity must meet some sort of threshold standard of "grievousness" before the rule of lenity applies. *See Wooden v. United States*, 142 S. Ct. 1063, 1074, 1084-86 (2022) (Gorsuch and Sotomayor, J.J., concurring) (tracing the history of using "grievous" when describing an ambiguity); *accord Abramski v. United States*, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) ("[C]ontrary to the majority's miserly [grievous ambiguity] approach, the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, a reasonable doubt persists regarding whether Congress has made the defendant's conduct a federal crime.") (citations omitted). Resolution of the standard for applying the rule of lenity thus provides another basis for this Court's review.

(1995). In other words, courts must not divorce words from their statutory context, which provides the "primary determinant of meaning." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). This canon has particular import when, as here, the term at issue is capable of more than one meaning and introduces a residual clause. *See Miller*, 589 F. Supp. 3d at 68.

*Second*, this Court has routinely employed the whole-text canon against surplusage. *E.g.*, *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion). Put differently, the interpretation of a statute is directed toward giving effect to every word. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). The D.C. Circuit's lead opinion acknowledged this precedent but discounted it by stating that superfluidity is not by itself enough to require a particular interpretation. Pet. App. 35a. While that's true, it ignores the other part of this Court's surplusage precedent. That is, the surplusage canon is strongest when "an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). Here, the lead opinion's interpretation collapses wholesale parts of Section 1512 (15 offenses) into subsection (c)(2). *See* Pet. App. 82a-83a & n.5.[6] And the lead opinion's interpretation absorbs other Chapter 73 offenses outside Section 1512, including Sections 1503 and 1505. Pet App. 84a. The scope of the superfluidity, alone, warrants this Court's review.

[6] The location of this omnibus offense, in the middle of a statute and in a subsection of a subsection, flouts another of this Court's canons of construction—Congress does not hide elephants in mouseholes. *See Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

*Third*, this Court has used the canon of *ejusdem generis* to construe general words, like "otherwise," when they follow specific words. *E.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). This rule prevents the general words from rendering the specific ones meaningless. *Id.* The lead opinion's interpretation of subsection (c)(2) renders (c)(1) meaningless. *See* Pet. App. 34a-35a, 65a. Again, the lead opinion sidestepped this Court's precedent by treating the rule as inapplicable unless the list of terms directly preceded the general term. Pet. App. 30a. Yet here they are all part of one sentence. *See* 18 U.S.C. § 1512(c)(1-2).

*Fourth*, this Court has regularly applied the associated-words canon—*noscitur a sociis*—to determine statutory scope. *E.g.*, *McDonnell v. United States,* 579 U.S. 550, 568-69 (2016); *United States v. Williams*, 553 U.S. 285, 294 (2008). This rule focuses on the neighboring words to establish the contours of a general term. *See McDonnell*, 553 U.S. at 569. As with the preceding canon, the lead opinion dismissed it based on the view that the associated words were too far away. Pet. App. 30a. But they are in the same sentence.

*Fifth*, this Court has construed other sections of the Sarbanes-Oxley Act to prevent similarly unrestrained readings of its proscriptions. In *Yates*, this Court addressed the scope of 18 U.S.C. § 1519. 574 U.S. at 532. Section 1519 authorizes a prison term of up to twenty years for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

department or agency of the United States . . . ." The question presented was whether a fish counted as a "tangible object" under Section 1519. Writing for the plurality, Justice Ginsburg acknowledged although "[a] fish is no doubt an object that is tangible . . . it would cut Section 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." *Id.* "Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and coverups," the plurality therefore concluded that "[a] tangible object captured by § 1519, . . . must be one used to record or preserve information," and does not include fish. *Id.* In so holding, the plurality rejected the government's "unrestrained reading" of Section 1519 "as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation." *Id.* This Court's intervention is required to correct the D.C. Circuit's "unrestrained reading" of Section 1512(c) which divorces Section 1512(c) from its statutory context as an evidence impairment crime.

*Sixth* and finally, this Court and other courts of appeal have employed the above framework when interpreting analogous residual clauses. For example, in *Begay*, 553 U.S. at 137, this Court considered the scope of the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). The question in *Begay* was whether a driving under the influence ("DUI") offense constituted a crime that, under Section 924(e)(2)(B)(ii), "*otherwise* involves conduct that presents a serious potential risk of physical injury to another." This Court determined that the

proximity of the listed crimes "burglary, arson, extortion, or crimes involving the use of explosives" to a general crime "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another" was enough to "indicate[] that [the 'otherwise' clause] covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142 (emphasis in original). As this Court explained, "[i]f Congress meant . . . the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all." *Id*. And the courts of appeal have followed suit. *E.g.*, *United States v. Brooks*, 610 F.3d 1186, 1200-01 (9th Cir. 2010) (construing "otherwise" in the Sentencing Guidelines as relating to the examples in the preceding subsection).

### B. Other courts of appeal have interpreted Section 1512(c)(2) consistent with the statute's historical roots and legislative purpose.

At least two federal courts of appeal have limited Section 1512(c)(2) to instances of "corporate document-shredding to hide evidence of financial wrongdoing". *Yates*, 574 U.S. at 535-36; *see, e.g.*, *United States v. Sutherland*, 921 F.3d 421, 427 (4th Cir. 2019) (prosecuting based on false loan documents); *United States v. Gordon*, 710 F.3d 1124, 1148-49 (10th Cir. 2013) (backdating agreement purporting to memorialize a sale of stock that never took place). And this is how the district court viewed Section 1512(c)(2) in Mr. Fischer's case. *See Miller*, 589 F. Supp. 3d 76-78.[7]

[7] Correspondingly, the historical definition of an "official proceeding" derives from Sections 1503 and 1505 as involving investigations and evidence. *See* Pet. App. 84a (Katsas, J., dissenting) (citing U.S. Dep't of Just. Crim. Res. Manual § 730 (1997); *United States v. Perez*, 575 F.3d 164, 169 (2d Cir. 2009)).

Four other federal circuits have given a more expansive scope to Section 1512(c)(2). But they have uniformly limited the statute's reach to crimes of evidence impairment. *See, e.g.*, *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009) (making false statements "directly to the grand jury itself" sufficient to satisfy Section 1512(c)(2)); *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (false responses to interrogatories that were filed in the official proceeding sufficient to satisfy Section 1512(c)(2)); *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014) (soliciting information from corrupt cops in order to evade surveillance constituted evidence sufficient for jury to find efforts were "out of desire to influence what evidence came before the grand jury"); *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (seeking to obtain a false statement to be used in pending federal charges sufficient to satisfy Section 1512(c)(2)); and *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009) (disclosing identity of undercover agent to subject of grand jury drug investigation evidence sufficient to find purpose was to thwart evidence from reaching the investigation).[8]

The D.C. Circuit's expansion of Section 1512(c)(2) beyond evidence impairment to protests at the seat of government thus conflicts with the interpretations of other courts of appeal limiting the scope of the same statute.[9]

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[8] The district court criticized the Seventh and Eighth Circuit opinions in *Burge* and *Petruk* for basing their holdings on a misreading of this Court's opinion in *Aguilar*. *See Miller*, 589 F. Supp. 3d at 69 & n.7. The district court then noted that the Seventh Circuit's later decision in *Volpendesto* did not involve a prosecution under Section 1512(c)(2). *See id*. at 69 n.7. The D.C. Circuit's lead opinion, however, relies on *Petruk, Burge*, and *Volpendesto* without acknowledging the district court's criticism. Pet. App. 14a.

[9] Until the January 6 prosecutions, the government similarly viewed Section 1512(c) as confined to acts of evidence impairment. *See generally* Memorandum from Deputy Att'y Gen. Rod Rosenstein &

### C. Section 1512(c)(2)'s scope remains unclear because neither the D.C. Circuit nor the district courts have agreed on a definition of "corruptly," its mens rea element, thus further exacerbating the vagueness and overbreadth concerns.

While some courts have limited Section 1512(c)(2)'s scope by a particular definition of the critical mens rea element—"corruptly"—they have not defined it uniformly. *See Miller*, 605 F. Supp. 3d at 70 n.3. And the D.C. Circuit's lead opinion declined to define it all, even while stating that "corrupt intent" limited Section 1512(c)(2)'s reach. *Compare* Pet. App. 17a-18a *with* Pet. App. 20a. The lead opinion nonetheless acknowledged three potential definitions:

1. Corruptly means conduct that is "wrongful, immoral, depraved, or evil." Pet. App. at 18a (quoting *Arthur Anderson LLP*, 544 U.S. at 705, discussing 18 U.S.C. § 1512(b)).
2. Undertaken with a "corrupt purpose or through independently corrupt means, or both." Pet. App. 18a-19a (quoting *United States v. Sandlin*, 575 F. Supp. 3d 16, 30 (D.D.C. 2021) (citing *United States v. North*, 910 F.2d 843, 942-43 (D.C. Cir. 1990) (Silberman, J., concurring and dissenting in part)).
3. Conduct that involves "voluntarily and intentionally [acting] to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other

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Ass't Att'y Gen. Steven Engle to Att'y Gen. William P. Barr at 2 (June 8, 2018) (asserting that Section 1512(c)(2) is confined to "acts of evidence impairment"); Memorandum from Ass't Att'y Gen. Office of Legal Counsel, Steven Engle & Principal Assoc. Deputy Att'y Gen., Edward C. O'Callaghan to Att'y Gen. William P. Barr at 3 (March 24, 2019) (emphasizing that potentially obstructive conduct did not involve efforts to impair or alter documentary or physical evidence).

benefit to oneself or a benefit of another person." Pet. App. 19a (quoting *Aguilar*, 515 U.S. at 616-17) (Scalia, J., concurring).

In contrast to the lead opinion, Judge Walker addressed the meaning of corruptly, defining it narrowly to avoid rendering Section 1512(c)(2) a "vague and far-reaching criminal provision." Pet. App. 43a. Consistent with Justice Thomas and Justice Alito's dissent in *Marinello*, Judge Walker defined corruptly as "[r]equir[ing] proof that the defendant not only knew he was obtaining an unlawful benefit but that his objective or purpose was to obtain that unlawful benefit." Pet. App. 54a (quoting *Marinello*, 138 S. Ct. at 1114) (Thomas and Alito, JJ., dissenting) (internal quotations omitted). Judge Walker concurred on the condition that Judge Pan accepted his definition, although she declined to do so. Pet. App. at 42a-43a, 63a & n.10 (Walker, J., concurring) ("[M]y reading of 'corruptly' is necessary to my vote to join the lead opinion's proposed holding on 'obstructs, influences, or impedes' an 'official proceeding.' 18 U.S.C. § 1512(c)(2). If I did not read 'corruptly' narrowly, I would join the dissenting opinion.").

Judge Katsas stated that a narrower definition of corruptly was insufficient by itself to narrow the broad *actus rea*. *See id*. at 97-99. In any event, Judge Katsas declined to endorse the mens rea definition proposed in Judge Walker's conditional concurrence, observing that it relied—for the most part—on dissenting opinions. *See id*. at 99a.

The D.C. Circuit panel's internal disagreements over which mens rea definition properly limits Section 1512(c)(2)'s reach is yet another reason for this Court's review.

### D. The scope of Section 1512(c)(2) is a recurring question and this case presents an ideal vehicle for resolving it.

Hundreds of cases have been and will be affected by the scope of Section 1512(c)(2), including a case against the former President. *See generally* 28 Months Since the Jan. 6 Attack on the Capitol (justice.gov); Capitol Breach Cases | USAO-DC | Department of Justice; Indictment, *United States v. Trump*, No. 1:23-cr-00257-TSC, Doc. 1 at 44 (D.D.C. Aug. 1, 2023). In addition, the use of Section 1512(c)(2) outside evidence impairment crimes is an extraordinary and unprecedented extension of the statute's reach. Pet. App. 17a (Pan, J.); 92a (Katsas, J., dissenting). Judge Katsas questioned a construction of subsection (c)(2) that would reach the kinds of advocacy, lobbying, and protest that citizens often employ to influence official proceedings. Pet. App. 94a.

These concerns are not speculative. Already, the broad scope of the D.C. Circuit's interpretation has yielded calls for its use in other contexts. Senator Cotton has begun probing why Justice Department officials have not launched criminal investigations under Section 1512(c)(2) for those protesting gun violence at the Tennessee Capitol and those protesting Representative Jordan's House Judiciary Committee hearing in New York City. *See* Tristan Justice, *Tom Cotton Confronts Deputy Attorney General Over DOJ Double Standards*, The Federalist (April 19, 2023); Forbes Breaking News, *Tom Cotton Asks Deputy AG If DOJ Will Investigate*

*'Democratic Mob' Disrupting Tennessee Legislature*, YouTube (Apr. 19, 2023), https://www.youtube.com/watch?v=DAQ1g5hC824&t=159s. Indeed, Senator Cotton refers to the lead opinion in *Fischer* during his questioning.

Mr. Fischer's case is an ideal vehicle for resolving the issue presented. His petition, in particular, is in the optimal procedural posture as he has not been tried and the mandate in his case has been stayed pending the filing of this petition. Accordingly, a decision from this Court would allow his trial to go forward with the legal questions resolved and, thus, in the most efficient way possible. In addition, the interpretation of Section 1512(c) and its reach are questions of law and thus subject to de novo review. Pet. App. 9a (citing *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014)). There is no extensive record here, nor any disputed facts concerning what happened on the three-minute-49-second video captured in the Capitol. *See United States v. Fischer*, No. 1:21-CR-00234, Doc. 51 at 4 & Doc. 49 at 3. The D.C. Circuit passed upon all of the legal arguments at issue in the case and thus there are no questions of preservation that might otherwise create difficulties. With hundreds of cases awaiting trial and others on direct review, this Court's clarification of the scope of Section 1512 and the required mental state for a violation of the statute would provide critical guidance to district courts, prosecutors, and defense counsel.

## CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of certiorari.

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