No. 23-5572

IN THE
Supreme Court of the United States

JOSEPH W. FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Congress added Section 1512(c) to the Witness, Victim, or Informant Tampering statute to target corporate fraud and abuse involving evidence spoliation that obstructs congressional inquiries and investigations. Paragraph (c)(1) thus punishes anyone who "alters, destroys, mutilates, or conceals" evidence, and paragraph (c)(2)'s residual clause ensures that evidence destroyers cannot evade that prohibition by "otherwise obstruct[ing], influenc[ing], or imped[ing]" official proceedings. But the D.C. Circuit construed the residual clause in (c)(2) as divorced both from Congress' purpose and from paragraph (c)(1), thus transforming this residual clause into a novel omnibus obstruction offense with breathtaking reach.

Does this unprecedented reading of subsection (c)(2) contravene the statute's text, history, and legislative purpose, as well as interpretive canons, and this Court's precedent on the construction of federal criminal statutes?

PARTIES TO THE PROCEEDINGS

The petitioner is Joseph W. Fischer. He is the defendant in the district court and was the appellee in the D.C. Circuit.

The respondent is the United States.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *United States* v. *Fischer*, 64 F.4th 329 (D.C. Cir. 2023) and reproduced at JA 4.

The opinion and order of the United States District Court for the District of Columbia in *United States* v. *Fischer*, No. 1:21-CR-00234 (D.D.C.) are reproduced at JA 132. The district court in *Fischer*, however, relied on its rulings in *United States* v. *Miller*, No. 1:21-CR-00119 (D.D.C.). The *Miller* opinions are reported at *United States* v. *Miller*, 589 F. Supp. 3d 60 (D.D.C. 2022) and *United States* v. *Miller*, 605 F. Supp. 3d 63 (D.D.C. 2022) (denying reconsideration). And they are reproduced, respectively, at JA 145 and 116.

JURISDICTION

The Court of Appeals for the D.C. Circuit entered judgment on April 7, 2023. JA 4. And the D.C. Circuit denied panel rehearing on May 23, 2023. JA 3. Chief Justice Roberts then extended the time to petition for a writ of certiorari until October 5, 2023. The petition was filed on September 11, 2023. This Court thus has jurisdiction under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.

STATUTORY PROVISIONS INVOLVED

The statutory history for the below provisions is included as an addendum to Petitioner's brief.

* * *

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).

* * *

Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress[.]

18 U.S.C. § 1515.

INTRODUCTION

In response to the October 2001 Enron accounting-fraud scandal, Congress designed the 2002 Sarbanes-Oxley Act to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial records.

One such loophole was in 18 U.S.C. § 1512(b)(2), which prohibits inducing others to destroy records, documents, or objects, but does not prohibit someone from acting alone. Section 1512(c) thus criminalized the personal destruction or impairment of records in response to an investigation.

Before the January 6, 2021 prosecutions, prosecutors had never charged Section 1512(c) where the alleged conduct was outside of evidence impairment. See JA 19, 99 (Pan, J. & Katsas, J.). Yet the D.C. Circuit held that subsection 1512(c)(2) sets forth a separate and sweeping obstruction offense disconnected from its textual and historical moorings—*i.e.*, congressional investigations or inquiries and document or evidence impairment. Applying Section 1512(c)(2) to Mr. Fischer's four-minute foray to about 20 feet inside the Capitol after Congress had recessed illustrates what the D.C. Circuit's concurring and dissenting opinions criticized as its "breathtaking" and unconstitutional scope. JA 46-47, 64-65, 67, 71, 87, 102, 109-10 (Walker, J. & Katsas, J.).

This Court should rectify this prosecutorial overreach and limit application of Section 1512(c)(2)—consistent with its text, history, structure, legislative aim, and well-established canons of statutory construction—to evidence spoliation.

STATEMENT OF THE CASE

I. Factual background

Petitioner Joseph W. Fischer and a companion attended the "Stop the Steal" rally on January 6, 2021 at the Ellipse. Mr. Fischer did not then march with the crowd to the Capitol. See Doc. 51 at 4, *United States* v. *Fischer*, No. 1:21-CR-00234 (D.D.C. Nov. 8, 2021). Instead, he and his companion headed home. *Id.* But

after learning of the swelling demonstration at the Capitol, 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 *id.* 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. See JA 197. Police video captured Mr. Fischer's conduct inside the building. See Doc. 93 at 1, *Fischer*, No. 1:21-CR-00234,. The video reveals that he pushed his way through the crowd—to about 20 feet inside the building.[1] But as he neared the police line, the swell of the crowd knocked Mr. Fischer to the ground. After getting back to his feet, Mr. Fischer returned lost equipment, a pair of handcuffs, to a Capitol police officer. The weight of the crowd (one individual in particular) then pushed Mr. Fischer into the police line. See *id.* With that, the Capitol police pepper sprayed Mr. Fischer, blinding him. He exited the Capitol less than four minutes after entering. See *id.* & Doc. 49 at 3.

II. Procedural background

A. The indictment and the district court's ruling, dismissing the Section 1512(c) count.

A grand jury returned a seven-count indictment against Mr. Fischer. The counts included civil disorder, assaulting, resisting, or impeding certain officers, entering and remaining in a restricted building, disorderly conduct, and parading, demonstrating, or picketing in a Capitol building. JA 182-85. But the

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[1] The government's video also contradicts many of Mr. Fischer's social media posts.

government also charged a violation of Section 1512(c),[2] that is, that Mr. Fischer corruptly obstructed, influenced, or impeded an official proceeding—Congress' certification of the Electoral College vote. JA 183. Mr. Fischer moved to dismiss this count. JA 133. 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 JA 140-41.

Judge Nichols found that "three readings of the statute are possible." JA 156. 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 offense independent of the preceding subsection. JA 157-58. The second interpretation is that subsection (c)(1) provides examples of conduct that violates (c)(2). JA 162. The third reads subsection (c)(2) as a residual clause to (c)(1). JA 164. Judge Nichols found that treating (c)(2) as a residual clause avoided surplusage problems, and squared with the statutory context, statutory and legislative history, and this Court's jurisprudence. JA 157-78.

The government appealed.

B. The D.C. Circuit opinions.

A sharply divided panel of the D.C. Circuit reversed. The panel issued a lead opinion, a conditional concurrence, and a dissent. JA 6, 46, 67 & n.10, 70. In her

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[2] The 1512(c) count is a 20-year felony. Under the Sentencing Guidelines, a Section 1512(c) conviction requires an eight-level increase in the offense level. *See* U.S. Sent'g Comm'n, *Guidelines Manual* § 2J1.2(b)(1)(B) (U.S. Sent'g Comm'n 2021). This count thus provides the government with substantial leverage.

lead opinion, Judge Pan conceded that—"outside of the January 6 cases"—there is 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 JA 20-21, 37-38. But Judge Pan viewed the terms in Section 1512(c)(2) to be clear, unambiguous, and supportive of a broad reading. JA 14-17. There was therefore no need to either exercise restraint in construing subsection (c)(2) or to resort to any canons of construction. JA 29-44.[3]

Judge Walker conditionally concurred. JA 67 & n.10. He concluded that the panel had to define the *mens rea* element, "corruptly," to make sense of subsection (c)(2)'s act element. JA 46. Judge Walker defined corruptly as requiring proof that a defendant "act[ed] with an intent to procure an unlawful benefit for oneself or for some other person." JA 58 (quoting *Marinello* v. *United States*, 138 S. Ct. 1101, 1114 (2018) (Thomas, J., dissenting)) (cleaned up). Absent that definition, Judge Walker reasoned that the lead opinion's broad act element coupled with an even broader mental state rendered the statute "breathtaking" in scope and presented vagueness problems. JA 46-47, 55, 64-67. Despite those misgivings, Judge Walker concurred in the judgment, making clear that his "reading of 'corruptly' [wa]s necessary for [his] vote to join the lead opinion's proposed holding on" the act element. JA 67 n.10. Had Judge Walker "not read 'corruptly' narrowly," he "would [have] join[ed] the dissenting opinion." *Id.*

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[3] Alternatively, on the government's argument that the *mens rea* of "corruptly" limited the statutory reach, Judge Pan declined to define corrupt intent. JA 21. Rather, in her view, the assault allegation satisfied any *mens rea* standard. JA 23.

In dissent, Judge Katsas concluded that both the government and lead opinion "dubiously" read the term "otherwise" in Section 1512(c)(2) to mean in a different manner, rather than in a manner like the list in subsection (c)(1). JA 70. Judge Katsas explained that the meaning of "otherwise" in subsection (c)(2) cannot be determined in isolation but must be drawn from context. JA 74. He thus relied on normal linguistic usage to conclude that the verbs preceding "otherwise" help identify and narrow the meaning of what follows. JA 75-77. This usage, he noted, adheres to textualism's goal of assessing how an ordinary person would understand the phrases Congress strung together, rather than exploring definitional possibilities in the abstract. JA 76. And Judge Katsas emphasized that this framework coincides with several canons of construction and corresponds with Section 1512(c)'s statutory history. JA 76-77, 87.

Judge Katsas also observed that the construction urged by the government and employed by the lead opinion "would swallow up various other chapter 73 offenses outside of section 1512." JA 90. In his view, such an interpretation rendered "section 1512(c) implausibly broad and unconstitutional" in many applications. JA 71.

SUMMARY OF THE ARGUMENT

Section 1512(c)'s text targets discrete acts intended to affect the availability or integrity of evidence for use in an official proceeding. So too, Section 1512's structure, context, title, and statutory history make clear Congress' aim: protecting the integrity of investigations and evidence. Likewise, the legislative history tracks this focus and no other. And before the January 6 cases, no court had applied Section 1512(c)(2) to conduct not intended to affect the availability or integrity

of evidence. Nor had a defendant ever been convicted of an obstruction-of-Congress offense outside the context of a legislative inquiry or investigation. Accordingly, because Section 1512(c)'s text, structure, and history leave no doubt that it applies only to evidence spoliation involving a congressional inquiry or investigation, Section 1512(c)(2) does not extend to Mr. Fischer's alleged conduct.

ARGUMENT

The text of Section 1512(c)(2), its broader statutory context, and every tool in this Court's statutory-interpretation toolkit point to the same answer: Section 1512(c)(2) is a residual clause that applies only to acts that affect the integrity or availability of evidence.

I. Basic principles of statutory interpretation demonstrate that Section 1512(c)(2) applies only to acts that affect the integrity or availability of evidence.

A. The text and context of Section 1512(c)(2) make clear its focus on evidence spoliation.

In determining the meaning of a statutory provision, courts look first to the text, giving its words their "ordinary, contemporary, common meaning." *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted). The statutory language, however, "cannot be construed in a vacuum"—"the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Indeed, "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is

used.'" *Reno* v. *Koray*, 515 U.S. 50, 56 (1995) (citation omitted). Thus, when analyzing a "phrase of uncertain reach," courts look not to a "single sentence," but to the "provisions of the whole law." *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (citations omitted).

Section 1512(c)(2)'s text and context make clear that it extends only to evidence spoliation, providing:

> (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[.]

18 U.S.C. § 1512(c)(1)-(2) (emphasis added). The D.C. Circuit's lead opinion and the government seize on the term "otherwise" as decoupling subsection (c)(2) from (c)(1), see JA 15-17, and setting forth a sweeping obstruction offense that applies to obstruction that "bears no relationship to the specific acts of spoliation covered by the first subsection." JA 70 (Katsas, J.). But this reading conflicts with Section 1512(c)(2)'s text and statutory context.

When read not "in isolation" but in view of its "context" and place in the overall statutory scheme, *Reno*, 515 U.S. at 56, Section 1512(c)(2)'s meaning is properly circumscribed by the enumeration of specific obstructive acts in Section 1512(c)(1). The term

"otherwise," as the district court and Judge Katsas recognized, can have a different meaning depending on the context in which it is used. In particular, "the word 'otherwise' can . . . refer to a crime that is similar to the listed examples in some respects but different in others." *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (emphasis omitted), *abrogated on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015). An "otherwise" clause thus "can connote not only difference but also a degree of similarity." JA 79. More still, as the dictionary definitions of "otherwise" show, when used as an adverb, the term implies a relationship to something else—here, subsection (c)(1). This makes sense as the subsections are part of the same sentence, albeit a compound one. JA 86 (Katsas, J.). The term "otherwise" links them together. See JA 80 n.1.

The term "otherwise" links the *actus rei* verbs in subsection (c)(1) and the obstruction covered in subsection (c)(2) and draws its meaning "from th[is] context." *Reno*, 515 U.S. at 56; see also *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 522-23 (2018). As Judge Katsas explained, "in ordinary English usage, the verbs preceding a residual otherwise clause usually do help narrow its meaning." JA 75 (emphasis omitted); see *Yates* v. *United States*, 574 U.S. 528, 537 (2015) (plurality opinion). Section 1512(c)(2)'s placement—following (c)(1)'s list of evidence impairment examples—fits that of a residual clause, not an all-encompassing separate offense that renders (c)(1), among other provisions, irrelevant. See JA 95-96 (Katsas, J.).

The contrary reading by the D.C. Circuit's lead opinion flows from an improper interpretative move that this Court has warned against time and again—analyzing a "phrase of uncertain reach" by looking to a "single sentence" rather than the phrase's context and place in the statutory scheme. *Star Athletica, L.L.C.*,

580 U.S. at 414 (citation omitted); cf. *Yates*, 574 U.S. at 537 (plurality opinion) ("Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words."). Indeed, statutory interpretation seeks to determine "how 'an ordinary speaker of English' would understand the phrases that Congress has strung together," not to "explore the definitional possibilities for isolated words." JA 76 (quoting *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020)). When "otherwise" is properly examined in context rather than uncritically read as simply "incorporat[ing]" its "dictionary meaning," JA 15 (Pan, J.), Section 1512(c)(2) cannot bear the weight of a general omnibus obstruction offense.

Tellingly, until the January 6 prosecutions, the government interpreted Section 1512(c)'s text consistent with the understanding of Judge Katsas and the district court. See*, e.g.,* Memorandum from Ass't Att'y Gen. Office of Legal Counsel, Steven Engel & Principal Assoc. Deputy Att'y Gen., Edward C. O'Callaghan to Att'y Gen. William P. Barr at 3-5 (March 24, 2019) (emphasizing that potentially obstructive conduct did not involve efforts to impair or alter documentary or physical evidence); JA 84, 99 (Katsas, J.).

B. Basic canons of construction confirm Section 1512(c)(2)'s role as a residual clause and its focus on evidence impairment.

Even if Section 1512(c)(2)'s text and context permitted a different construction, the canons of construction confirm its plain meaning.

1. The whole-text canon.

The whole-text canon dovetails with the linguistic analysis of Section 1512's text and context. This canon

"consider[s] the entire text, in view of its structure and of the physical and logical relation of its many parts." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). No one disputes that subsection (c)(1) identifies ways of impairing particular forms of evidence—records, documents, or objects. And (c)(2) then allows for impairment or destruction of other unspecified forms of evidence in the classic manner of a residual clause. Cf*., e.g.*, *Residual,* Black's Law Dictionary (9th ed. 2009). So, (c)(2)—rather than swallowing (c)(1) and rendering it meaningless—captures similar types of evidence that may differ from the types specified in (c)(1)'s net. See JA 76, 83. For example, as Justice Alito has recognized, certain electronic storage mediums or emails may not fall squarely within the definitions of a record, document, or object. See *Yates*, 574 U.S. at 550-51 (Alito, J., concurring).

Viewing subsection (c)(2) as a residual clause is reinforced by its placement within Section 1512(c). Construing (c)(2) in isolation from the surrounding text, which is all part of one sentence, converts it into an all-encompassing, free-standing, obstruction offense. But concealing such a capacious offense in an ancillary provision makes little sense, Congress "does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Rather, construing (c)(2) as a residual clause corresponds with Section 1512's statutory structure and its focus upon discrete acts that impair the availability of victims, witnesses, informants, and evidence for use in a proceeding. See 18 U.S.C. § 1512.[4] It also comports

[4] As the Department of Justice has recognized in other contexts, a "proceeding" is "a formalized process for finding the truth," and obstruction laws protect that process through ensuring the integrity of evidence—testimonial, documentary, or

with Section 1512(c)'s caption within The Corporate Fraud and Accountability Act. See Pub. L. No. 107-204, 116 Stat. 745, 807 § 1101; see also *Yates*, 574 U.S. at 539-40 (plurality) ("[f]amiliar interpretive guides" include captions and titles). And, as explained below, it fits Section 1512 comfortably within Chapter 73's overarching obstruction-of-justice scheme. See *generally* A. Scalia & B. Garner, *supra*, 252-53 ("part of a statute's context is the *corpus juris* of which it forms a part").

2. The canon against surplusage.

When interpreting a statute, courts should give effect to every word and every provision. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Like all canons, avoiding surplusage is not an absolute rule. See *Chickasaw Nation* v. *United States*, 534 U.S. 84, 95 (2001). Yet the D.C. Circuit's lead opinion discounted the surplusage canon entirely, opining that it had no application when a competing interpretation avoids some, but not all surplusage. See JA 40-41 (citing *United States* v. *Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013)). But as Judge Katsas explained, "surplusage is nonetheless disfavored; other things equal, a construction that creates substantially less of it is better than a construction that creates substantially more." JA 93.

The D.C. Circuit's lead opinion and the government's arguments create four levels of surplusage with respect to Section 1512(c). First, as noted, their proposed reading renders the term "otherwise" (a term they themselves rely heavily upon) meaningless as (c)(2) would have the same scope and effect on their reading

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physical. JA 84 (quoting Memorandum from Bill Barr to Deputy Att'y Gen. Rod Rosenstein & Ass't Att'y Gen. Steve Engle at 1 (June 8, 2018)), http://perma.cc/CWX6-GAE9.

if "otherwise" did not appear at all. See JA 72, 158 (Katsas, J. & Nichols, J.).

Second, viewing subsection (c)(2) as an omnibus obstruction offense swallows subsection (c)(1) whole—there would be no need to prohibit as "obstruction" the destruction of specified types of records if *any* act of interference of *any* official proceeding counts as obstruction. Cf. Jason Willick, *Why the Jamal Bowman Fire Alarm Scandal Will Keep Burning*, Wash. Post (Nov. 1, 2023) (debating whether pulling a fire alarm during a congressional session counts as obstruction under the government's interpretation in this case). "The canon against surplusage 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, subsection (c)(1) and (c)(2) are part of the same subsection, the same sentence, have the same *mens rea*, and have the same punishment. While it is true that an evidence-impairment reading of (c)(2) overlaps with (c)(1), the examples in (c)(1) help narrow the statute's reach.

Third, and perhaps most significant, the D.C. Circuit's lead opinion and the government's interpretation of subsection (c)(2) collapses 15 of the 21 offenses in Section 1512 into that subsection. JA 88-89 & n.4 (Katsas, J.) (citing the various provisions of Section 1512 that involve acts that influence and affect official proceedings). For example, "killing a person to prevent his attendance at an official proceeding or to prevent the production of a record, document, or other object in an official proceeding," in violation of Section 1512(a)(1) "would influence or affect an official proceeding." JA 89. Such wholesale surplusage undermines the argument over an omnibus reading of subsection (c)(2). And as Judge Katsas emphasized, it "is even stranger given section 1512's graduated penalty

scheme." JA 89. "By collapsing most of section 1512 into its subsection (c)(2), the government's interpretation would lump together conduct warranting up to three decades of imprisonment with conduct warranting at most three years . . . ." JA 89-90.

Fourth and finally, treating subsection (c)(2) as a separate omnibus offense also absorbs obstruction offenses outside Section 1512 in Chapter 73, such as 1503 (Influencing or injuring officer or juror generally) and 1505 (Obstruction of proceedings before departments, agencies, and committees). In particular, "[u]nder the government's reading of section 1512(c)(2), all 197 words of [Section 1505] are made surplusage by 13 words nested in a subparagraph of a subsection in the middle of section 1512." JA 90.

The D.C. Circuit's lead opinion dismisses these large-scale surplusage problems on the view that "Congress drafted and enacted [Section 1512(c)] after the rest of § 1512." See JA 41 (citing *Yates*, 574 U.S. at 541).[5] In other words, Congress failed to apprehend that there were other offenses on the books covering the same conduct. But adoption of this argument would set a remarkable precedent and create opportunities for subsequent Congresses to enact legislation without regard to confusion, surplusage, and conflict within the criminal laws. Statutes, particularly criminal ones, must be carefully drafted and should be interpreted to provide adequate notice to the ordinary person. See A. Scalia & B. Garner, *supra*, at 179 ("[E]ncouraging courts to ignore sloppily inserted words results in legislative freeriding and increasingly slipshod drafting.").

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[5] The discussion in *Yates*, notably, concerned the placement of Section 1512(c)(1) before Section 1519. *See Yates*, 574 U.S. at 541-42 (plurality).

3. *Noscitur a sociis* and *ejusdem generis*.

"[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008); see also *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995). This interpretive principle prevents one word, *e.g.*, "otherwise," from "giving 'unintended breadth'" to an Act of Congress. See *Gustafson*, 513 U.S. at 575 (citation omitted). A related canon is *ejusdem generis*, which provides that when general words follow specific ones in a statutory enumeration, the general terms are usually construed to embrace things like the specified words. *Yates*, 574 U.S. at 545 (plurality).

The term "otherwise" indicates that subsection (c)(1) relates to (c)(2). The list of examples—records, documents, or objects—thus informs what (c)(2) embraces. The D.C. Circuit's lead opinion discounted these canons, asserting that the general terms do not "immediately" follow the specifics because of the space, paragraph, and semicolon between the two subsections. JA 33-35. But the stylistic use of a line break cannot change the reality that (c)(1) and (2) are part of the same sentence. And a semicolon is a thin reed on which to hang the government's proposed construction. Cf*., e.g.*, *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 250 (1989) (O'Connor, J., dissenting) (noting that, "punctuation is a most fallible standard" to interpret writing and collecting cases recognizing that courts may re-punctuate to give effect to a statute's true meaning (citation omitted)).

Nor is a list necessary for application of the *noscitur a sociis* canon. See A. Scalia & B. Garner, *supra*, at 197. Broader context counts; here, that context would be Congress' targeting of obstruction of records in anticipation of or during a targeted investigation by

Congress or other authorities. See *Yates*, 574 U.S. at 541 n.4 (plurality) ("[I]n Sarbanes-Oxley, Congress added § 1512(c)(1), 'a broad ban on evidence spoliation.'"). Courts have also applied *ejusdem generis* to different statutory constructs. See A. Scalia & B. Garner, *supra*, at 199-200 (collecting cases). Section 1512(c)(2), in the company of (c)(1), thus only prohibits efforts to impair the integrity or availability of evidence for use in an official proceeding.

II. This court's precedent also supports a limited reading of Section 1512(c)(2).

This is not the first time that this Court has been asked to limit the government's overreach involving a provision of the Sarbanes-Oxley Act. In *Yates*, the Court addressed the scope of 18 U.S.C. § 1519. See 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 in *Yates* was whether a fish counted as a "tangible object" under Section 1519. As here, the government argued that the plain text rendered the answer obvious. Writing for the plurality, Justice Ginsburg acknowledged that, although "[a] fish is no doubt an object that is tangible[,] . . . it would cut § 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." *Yates*, 574 U.S. at 532. "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.* at 536. For similar reasons, this Court should reject an unrestrained reading of Section 1512(c)(2) thus securing its textual moorings and Congress' purpose—evidence spoliation. See *id.* at 541-42 & n.4.

Moreover, construing Section 1512(c)(2) as a residual clause tracks how this Court has interpreted analogous statutory language. In *Begay* v. *United States*, 553 U.S. 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 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" (emphasis added). 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; 18 U.S.C. § 924(e)(2)(B)(ii). 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." *Begay*, 553 U.S. at 142. Courts of appeals 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); *United States* v. *Stinson*, 592 F.3d 460, 464-65 (3d Cir. 2010). So too here.

Finally, it is no answer that other courts of appeals, including the D.C. Circuit's lead opinion, here, have accorded a more expansive view to Section 1512(c)(2). See JA 18-19 (Pan, J.). That argument fails for two reasons. First, two of the cases that the government and the D.C. Circuit's lead opinion rely on, *United States* v. *Petruk*, 781 F.3d 438 (8th Cir. 2015), and *United States* v. *Burge*, 711 F.3d 803 (7th Cir. 2013), ground their expansive interpretation of Section 1512(c)(2) on a misreading of this Court's opinion in *United States* v. *Aguilar*, 515 U.S. 593 (1995). JA 161 & n.7. Both *Petruk* and *Burge* quote from early in the *Aguilar* opinion when the Court discussed the structure of the "catchall" or "omnibus" clause in 18 U.S.C. § 1503. See *Petruk*, 781 F.3d at 447; *Burge*, 711 F.3d at 809. But *Aguilar* then rejected a broad reading of the clause, opting to apply "metes and bounds" on the broad language of the catchall provision, exercising restraint over its reach. See *Aguilar*, 515 U.S. at 599-600.[6]

Second, as the D.C. Circuit's lead opinion conceded, the remaining cases it cited in support of an expansive reading of subsection (c)(2) all involve evidence impairment. See JA 19. And that interpretation squares with Mr. Fischer's argument. See *e.g.*, *United States* v. *Beach*, 80 F.4th 1245, 1257 (11th Cir. 2023) (characterizing Section 1512(c)(2) as "prohibit[ing]

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[6] Another case relied on by the government and the D.C. Circuit's lead opinion, *United States* v. *Volpendesto*, 746 F.3d 273 (7th Cir. 2014), *see* JA 18, involved conspiring to obstruct justice and merely relied on *Burge*'s discussion of Section 1512(c)(2). *See Volpendesto*, 746 F.3d at 278, 286.

obstructing an official proceeding by tampering with evidence").[7]

III. The statutory and legislative history of Section 1512(c) support a narrow reading focusing on investigations and evidence.

A. The statutory predecessors to Section 1512(c)(2) confirm its narrow scope and function as a residual clause.

Related obstruction-of-justice provisions in Section 1512(c)(2)'s statutory lineage illuminate its meaning and properly narrow scope. See *United States* v. *Hansen*, 599 U.S. 762, 775 (2023) ("Statutory history is an important part of . . . context."); *United States* v. *Poindexter*, 951 F.2d 369, 380-84 (D.C. Cir. 1991) (discussing the historical development of the obstruction provisions). Put bluntly, Section 1512's lineage, dating back to 1831, reveals that it has never been anything other than an evidence impairment statute that focuses on spoliation. See Statutory Addendum at 1 ("Stat. Add."). Sections 1503, 1505, and 1512 all derive from a 1909 statute (then Section 241) that included two obstruction offenses: (1) influencing, intimidating, or impeding witnesses in court proceedings; and (2) influencing, obstructing, or impeding the "due administration of justice" in those proceedings. *Id*. (citing Act of March 4, 1909, ch. 321, § 135, 35 Stat. 1113 (1909)).

A 1940 successor (Section 241(a)) retained Section 241's two-part *actus reus* structure—separately criminalizing tampering with witnesses and obstructing the

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[7] *Accord 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).

"due administration" of a proceeding—but expanded the proceedings to which Section 241's prohibitions applied. See *Poindexter*, 951 F.2d at 380-81 (citing Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (1940)); Stat. Add. at 1-2. Section 241(a) applied beyond federal courts to: (1) "any proceeding pending before any department . . . or other agency of the United States" and (2) "inquir[ies] or investigation[s] being had by either House, or any committee of either House, or any joint committee of the Congress." Stat. Add. at 2 (citing Section 241(a)). In 1962, Congress amended the title of what had by then become Section 1505 to "Obstruction of *proceedings* before departments, agencies, and *committees*." *Id.* at 3 (citing Antitrust Civil Process Act, 76 Stat. 551 (1962)) (emphases added).

Section 1512 itself emerged from the Victim and Witness Protection Act of 1982 ("VWPA"), and prohibited "various forms of witness tampering, including many activities that were formerly prohibited by §§ 1503 and 1505." *Poindexter*, 951 F.2d at 382; Stat. Add. at 5-6. Its title was, and is, "Tampering with a witness, victim, or an informant." 18 U.S.C. § 1512; Stat. Add at 7. The VWPA also newly used and defined "official proceeding." It meant, among other things, "a proceeding before a judge or court of the United States" and "a proceeding before the Congress." Pub. L. No. 97-291, sec. 4, 96 Stat. 1248, 1252.[8] A Senate Judiciary Committee Report declared that by substituting "official proceedings" for "legal proceedings," the legislators intended to convey that "the statute remain applicable

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[8] On the Senate floor, Senator Heinz, a VWPA sponsor, said that an omnibus clause was "beyond the legitimate scope of this *witness protection* measure. It also is probably duplicative of [o]bstruction of justice statutes already on the books." *Poindexter*, 951 F.2d at 383 (quoting 128 Cong. Rec. 26, 810 (1982)) (emphasis added).

in civil and administrative proceedings, where warranted"—not just in "criminal proceedings." S. Rep. No. 97-532, at 24 (1982). "The term 'official proceeding' is intended to convey th[at] result." *Id.*[9]

Against this backdrop, no support exists in Section 1512's statutory history for reading this provision to extend to interfering with a "proceeding" that does not involve investigations and evidence, the interference with which constitutes the offense. For when Congress defined that term, Section 1512's *actus rei* exclusively concerned witness testimony and evidence. 96 Stat. at 1249-50 (§ 1512(a)-(b)). Consistent with that fact, before January 6, obstruction-of-Congress offenses charged under Sections 241(a), 1505, and 1512 concerned interference with an inquiry or investigation in Congress. *E.g.*, *Poindexter*, 951 F.2d at 383 (witness lying to congressional committee); *United States* v. *Kanchanalak*, 37 F. Supp. 2d 1 (D.D.C. 1999) (destroying records subpoenaed by Congress).

B. The Sarbanes-Oxley amendment did not alter Section 1512(c)'s focus on inquiries or investigations.

The history of Section 1512(c) also unequivocally supports a reading that it is designed to prohibit spoliation of evidence. See *Yates*, 574 U.S. at 541-42 & n.4. In the Sarbanes-Oxley Act of 2002, Congress added subsection (c) to Section 1512 as part of the

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[9] Congress was, essentially, transplanting and expanding a particular framework associated with investigations and inquiries. In this circumstance, the earlier definitional scope comes with it. *E.g.*, *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it")).

Corporate Fraud Accountability Act of 2002. See 116 Stat. at 807, §§ 1101-1102; Stat. Add. at 10-11. "The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." *Yates*, 574 U.S. at 535-36. The Senate Report for the Act identified the so-called Arthur Andersen loophole that Section 1512(c) was designed to "fix":

> [I]n the current Andersen case, prosecutors have been forced to use the "witness tampering" statute, 18 U.S.C. § 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the *shredding*, this legal hurdle might present an insurmountable bar to a successful prosecution.

S. Rep. No. 107-146, at 7 (2002) (emphasis added).

Other provisions in Section 1512 proscribed "indirect" evidence impairment—*e.g.*, Section 1512(b) "made it an offense to 'intimidate, threaten, or corruptly persuade *another person*' to shred documents," *Yates*, 574 U.S. at 536 (plurality) (alterations adopted) (quoting 18 U.S.C. § 1512(b)). Congress added Section 1512(c) to reach *direct* evidence impairment, such as that independently undertaken by the defendant. *Id.* And several senators explicitly explained that it was meant to cover evidence impairment. *E.g.*, 148 Cong. Rec. S6524, S6545 (daily ed. July 10, 2002) (remarks of Senator Lott, introducing the legislation, this "would allow the Government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury

subpoena"); *id*. at S6546 (remarks of then-Senator Biden, recognizing that the legislation makes "it a crime for document shredding"); *id*. at S6550 (remarks of Senator Hatch, noting Section 1512(c) permits the government to prosecute an individual acting alone in destroying evidence before a subpoena is issued).

Nothing in the statutory or legislative history of Section 1512(c) supports the view that Congress intended subsection (c)(2) to reach acts unconnected to evidence, such as a protest at the Capitol. Distinct obstruction crimes in Chapter 73 reflect that when Congress intends to classify political protest as an obstruction offense, it uses language different from that in Section 1512(c). *E.g.*, 18 U.S.C. § 1507 (criminalizing certain "picket[ing] or parad[ing]" outside a judge's residence).

IV. Beyond the *actus rei* elements of Section 1512(c), other elements confirm its evidence focus.

A. The government and the courts have narrowly viewed "proceedings" under Section 1512(c) as involving investigations and evidence.

The Department of Justice's Criminal Resource Manual explains that Section 1512's "proceeding" is simply a "restatement of the judicial interpretation of the word 'proceeding' in §§ 1503 and 1505," with the only difference being that in the latter provisions the proceeding must be pending at the time of the offense. *Official Proceeding*, U.S. Dep't of Just., *Crim. Res. Manual* § 1730 (2018); accord JA 90 n.5 (Katsas, J.).[10] Indeed, the government has previously stipulated that

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[10] *Accord* JA 84 (Katsas, J.) (quoting Memorandum from Bill Barr, "[a] 'proceeding' is a formalized process for finding the truth").

a "parallel should be drawn between" Section 1505 and 1512 in defining "proceeding." See, *e.g.*, *United States* v. *Kelly*, 36 F.3d 1118, 1128 (D.C. Cir. 1994).[11] Other courts have adopted a similar view. *E.g.*, *United States* v. *Perez*, 575 F.3d 164, 168-69 (2d Cir. 2009).

Likewise, in *United States* v. *Ermoian*, 752 F.3d 1165 (9th Cir. 2013), the court held that an FBI investigation does not constitute an "official proceeding" under Sections 1512 and 1515(a). The court distinguished between lay and legal definitions of "proceeding." The lay sense meant "the carrying on of an action or series of actions; action, course of action; conduct, behavior." *Id.* at 1169 (quoting *Proceedin*g, OXFORD ENGLISH DICTIONARY) (alteration adopted). The legal sense: "'the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment;' (2) 'any procedural means for seeking redress from a tribunal or agency;' and (3) 'the business conducted by a court or other official body; a hearing.'" *Id.* (quoting *Proceeding*, BLACKS' LAW DICTIONARY 1241 (8th ed. 2004)) (alterations adopted). The *Ermoian* court found the legal definition more fitting.

When Congress defined "official proceeding," Section 1512's *actus rei* linked to acts intended to interfere with investigations and evidence related to, or used in, such proceedings. And, as the *Poindexter* court explained, the VWPA merely transferred the witness tampering crime from Section 1505 to Section 1512. See *Poindexter*, 951 F.2d at 383. Thus, it does not follow from Congress' decision to not "import" the phrase "inquiry or investigation" into Section 1512 that it intended to expand the preexisting legal definition of

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[11] The current Attorney General, Merrick Garland, argued *Kelly*.

"proceeding" to include assemblies not involving investigations, witnesses, or evidence. It would be nonsensical for Congress to expand the definition of "proceeding" in an obstruction statute to encompass legislative functions unrelated to its power of inquiry and simultaneously create no offense pertaining to those evidence-free "proceedings."

B. The *mens rea* element of "corruptly" in Section 1512(c) does not provide a guardrail to subsection (c)(2)'s "breathtaking" scope.

The D.C. Circuit's lead opinion concedes that its interpretation of Section 1512(c)(2) "extends to a wide range of conduct," but asserts that a narrow construction of corrupt intent "provide[s] significant guardrails for prosecutions brought under the statute." See JA 21. While this concession acknowledges the overbreadth associated with (c)(2)'s *actus rei*, it does nothing to resolve this problem. That is because the lead opinion declined to define "corruptly." JA 24. Instead, the opinion identified three potential definitions, but left in place the government's proposed *mens rea*: "act[ing] 'with a corrupt purpose,' through 'independently corrupt means,' or both." See JA 22-23 (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), *withdrawn and superseded in part on rehearing by* 920 F.2d 940 (D.C. Cir. 1990)).[12]

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[12] After *Fischer*, the D.C. Circuit considered the meaning of "corruptly" under Section 1512(c) in *United States* v. *Robertson*, 84 F.4th 355 (D.C. Cir. 2023). But there, the defendant raised a sufficiency challenge, arguing that the evidence failed to show that he acted corruptly. *See id.* at 363. Addressing this claim, the *Robertson* majority noted both that the district court's

But there are at least three problems with the government's definition. First, Congress did not provide a definition for "corruptly," as it did for § 1505. See 18 U.S.C. § 1515(b). Second, and more important, the meaning of "corruptly" is also context dependent. See *United States* v. *Robertson*, 86 F.4th 355, 366 (D.C. Cir. 2023) (Pan, J.); *id.* at 392 (Henderson, J., dissenting).[13] While equating "corruptly" to acting with any "wrongful" purpose is appropriate in the judicial-obstruction context, that definition takes on unconstitutional vagueness when the proceeding involves a broader category of circumstances and protected conduct. See *Aguilar*, 515 U.S. at 616-17 (Scalia, J., concurring in part and dissenting in part); *North*, 910 F.2d at 882 (per curiam); *United States* v. *Reeves*, 752 F.2d 995, 999 (5th Cir. 1985).

Jury instructions equating "corruptly" with acting "with improper motive or bad or evil purpose" have only applied in the judicial proceeding context, because "where a defendant has endeavored to obstruct a [judicial] proceeding, the 'advantage inconsistent with the duties and rights of others' is so clear that courts have often been willing to impute the desire to

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instruction on the *mens rea* element largely tracked the defendant's proposed instruction and that the defendant's challenge to his jury instructions likely failed to properly present a challenge to the sufficiency of the evidence. *Id.* at 362-64 & n.1. The government, however, asked the court to assess the claim "based on how a properly instructed jury would assess the evidence." *Id.* at 364. In other words, render an advisory opinion. The majority took the bait, issuing an opinion that endeavored to expound upon the definition of "corruptly" in a manner that can be charitably characterized as dicta.

[13] *See also* Eric J. Tamashasky, *The Lewis Carrol Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129, 146-173 (2004) (discussing the varying definitions of "corruptly" in different statutory contexts).

obtain [an unlawful] advantage on a *per se* basis." *Reeves*, 752 F.2d at 998-99. "[M]erely prohibiting 'bad,' 'evil' and 'improper' purposes is very probably insufficient where . . . a statute reaches . . . a broad[er] category of circumstances." *Id*. at 999-1000. Congressional proceedings are classic examples of a broader category of circumstances, for, unlike in judicial proceedings, "[n]o one can seriously question that people constantly attempt, in innumerable ways, to obstruct or impede congressional committees." *North*, 910 F.2d at 882. Thus, in *Poindexter*, the court determined that an any-wrongful-purpose definition of "corruptly" was unconstitutionally vague as applied in the obstruction-of-Congress context. See 951 F.2d at 386.

An any-wrongful-purpose definition of "corruptly" is also unconstitutionally vague here and thus does not limit the reach of the government's construction of Section 1512(c)(2). See JA 46-47, 64-65, 67, 108-09 (Walker, J. & Katsas, J.). Hundreds of protesters who entered the Capitol on January 6 were charged with the Class B misdemeanor of demonstrating in the Capitol, 40 U.S.C. § 5104(e)(2)(G), while hundreds of others who did the same thing, including Fischer, have been charged with felony obstruction. If one "demonstrates" in the Capitol during an "official proceeding," one cannot avoid "influenc[ing]" that proceeding in some manner, or at least that is one's attempted object. 18 U.S.C. § 1512(c)(2). Equating "corruptly" with acting with any "wrongful purpose" fails to appropriately limit the reach of the overly broad *actus rei*. See JA 46-47, 64-65, 67, 102-03 (Walker J. & Katsas, J.).

Those charged under Section 1512(c)(2) and who allegedly acted with a "wrongful purpose" shared that purpose with the misdemeanants who "demonstrated" against electoral vote certification in the Capitol. A "wrongful purpose" definition of "corruptly" thus adds

no clarifying content to the vagueness in the government's decoupling of the Section 1512(c)(2) offense from investigations and evidence.

As the district court noted, the wrongful-purpose or corrupt-means definition is "sufficiently capacious so as not to limit or clarify the *actus reus* charged in the Indictment." JA 127 n.3 (collecting cases). Judge Walker echoed a similar view in his concurring opinion: "[i]f (c)(2) has a broad act element *and* an even broader mental state, then its 'breathtaking' scope is a poor fit for its place as a residual clause in a broader obstruction-of-justice statute." JA 46 (quoting *Van Buren* v. *United States*, 141 S. Ct. 1648, 1661 (2021)).

Third and finally, "corruptly" has a long-standing, common-law definition. See *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part). See *generally* Jeremy N. Gayed, *"Corruptly": Why Corrupt State of Mind Is An Essential Element For Hobbs Act Extortion Under Color Of Official Right*, 78 Notre Dame L. Rev. 1731, 1745-49 (Aug. 2003) (tracing the meaning of "corruptly" at common law). At common law, "corruptly" meant acting "with an intent to procure an unlawful benefit either for [oneself] or for some other person." *Marinello* v. *United States*, 138 S. Ct. 1101, 1114 (2018) (Thomas, J., dissenting) (quoting *United States* v. *Floyd*, 740 F.3d 22, 31 (1st Cir. 2014); citing 21 AM. JUR. 2D, Criminal Law § 114 (2016); Black's Law Dictionary 414 (rev. 4th ed. 1951)). Thus, the common-law definition is the only definition of the *mens rea* element that would properly limit Section 1512(c)(2)'s scope and fit with the obstruction-of-Congress context.[14]

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[14] Congress included "corruptly" in the predecessor statutes to Section 1512. *See* Stat. Add. at 1-4. And as this Court recently explained, "[w]hen Congress transplants a common-law term, the

V. The rule of lenity and the canon of constitutional avoidance resolve any lingering doubt over the breadth of Section 1512(c)(2).

A. The rule of lenity.

When the various canons of construction, statutory history, and legislative purpose leave any doubt over Section 1512(c)(2)'s scope, the rule of lenity applies. See *Bittner* v. *United States,* 598 U.S. 85, 101 (2023) (plurality opinion).[15] The rule of lenity parallels the precept that penal laws are construed strictly. See *United States* v. *Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820). Ambiguities are thus resolved in the defendant's favor. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). And this rule of construction obliges three core constitutional concerns—notice as part of due process, separation of powers, and a preference for liberty. See *United States* v. *Nasir*, 17 F.4th 459, 474 (3d Cir. 2021) (en banc) (Bibas, J., concurring).

The D.C. Circuit's lead opinion declined to apply the rule of lenity, finding that it had no application because Section 1512(c)(2) "is clear and unambiguous." JA 44.[16] But as reflected in the differing judicial

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'old soil' comes with it." *See Hansen*, 599 U.S. at 778-79 (citation omitted).

[15] *Accord Yates*, 574 U.S. at 547-48 (plurality) (applying the rule of lenity to Section 1519 of the Sarbanes-Oxley Act).

[16] The lead opinion also characterized the rule of lenity as only applying when a statute contains a "grievous ambiguity or uncertainty." JA 43 (quoting *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016)). But it is 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*, 595 U.S. 360, 376 (2022) (Sotomayor, J., concurring); *id.* at 392-96 (Gorsuch, 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). In any event, to the extent that

interpretations of subsection (c)(2), as well as the differing positions that the government has taken over the subsection's scope, the rule of lenity is properly applied here.

Finally, ex post facto principles embodied in the Due Process Clause bar 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) (citations omitted). The D.C. Circuit's lead opinion correctly acknowledged that its construction of subsection (c)(2) is unprecedented, see JA 19, 21, for despite decades of protest at the Capitol, no court had ever construed Section 1512(c)(2) to reach conduct unrelated to evidence impairment. Mr. Fischer had no warning, much less "fair warning." *Lanier*, 520 U.S. at 266.

B. The canon of constitutional avoidance.

As the D.C. Circuit's concurring and dissenting opinions emphasize, without a limitation on its reach, Section 1512(c)(2) is both breathtaking in scope and unconstitutional in many applications. See JA 46-47, 64-65, 67, 71, 87, 102, 109-110 (Walker, J. & Katsas, J.). For instance, under the government's view, (c)(2) reaches any act that obstructs, influences, or impedes an official proceeding. And an official proceeding is not, according to the government, confined to an inquiry or investigation. So anything that affects or hinders a proceeding falls within the government's definition. See *Marinello*, 138 S. Ct. at 1106.

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the phrase "grievous ambiguity" means that a court may only resort to the rule of lenity after exhausting the traditional means of interpretation, then it has application here. *See* A. Scalia & B. Garner, *supra*, at 299 ("whether, after all the legitimate tools of interpretation have been applied, 'a reasonable doubt persists'").

But that definition encompasses lobbying, advocacy, and protest, the very mechanisms that citizens employ to influence government. See JA 101 (Katsas, J.). These are all forms of political speech that the First Amendment protects. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949). And "[i]f attempting to influence a congressional committee *by itself* is a crime, we might as well convert all of Washington's office buildings into prisons." *North*, 910 F.2d 882, 942 (Silberman, J., concurring in part).

Nor are these concerns speculative. In the wake of the D.C. Circuit's opinion in *Fischer*, several lawmakers called on the Department of Justice to prosecute protesters and even other lawmakers under Section 1512(c)(2). *E.g.*, Tristan Justice, *Tom Cotton Confronts Deputy Attorney General Over DOJ Double Standards*, The Federalist (April 19, 2023); Willick, *supra*.

Reading Section 1512(c)(2) as an evidence-focused residual clause, aligns its text, context, Congress' intended purpose, avoids these constitutional concerns, and follows this Court's jurisprudence. See *Clark* v. *Suarez Martinez*, 543 U.S. 371, 381 (2005) (explaining constitutional avoidance as resting "on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").[17]

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[17] A similar, though distinct, canon is that of vagueness avoidance, which applies when the statutory language is vague, rather than merely ambiguous. *See* Joel S. Johnson, *Vagueness Avoidance*, 109 Va. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4309894. Here, both the concurring and dissenting opinions in the D.C. Circuit

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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expressed concern over the vagueness of the *mens rea* element, "corruptly." *See* JA 47, 67, 108-09 (Walker, J. & Katsas, J.). The vagueness avoidance canon thus has application to the construction of Section 1512(c). When, as with Sarbanes-Oxley, there is a clearly identifiable legislative goal, a court should treat that goal as establishing the core terms of the statute. Vagueness avoidance allows a court to then adopt a narrow construction of the language at issue "that captures only that core . . . while excising its indeterminate peripheries." Brief for Professor Joel S. Johnson as Amicus Curiae Supporting Petitioner at 16, *Dubin* v. *United States*, 599 U.S. 110 (2023) (No. 22-10).

STATUTORY ADDENDUM

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Act of March 4, 1909, ch. 321, § 135, 35 Stat. 1113 (1909).

§ 241 Attempting to influence witness, juror, or officer

Sec. 135. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or 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 commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

* * *

Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (1940).

§ 241(a) Witnesses before governmental agencies or Congressional committees. Influencing, etc.

Sec. 135. (a) That whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness in any

proceeding pending before any department, independent establishment, board, commission, or other agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress of the United States, or who corruptly or by threats or force, or by any threatening letter or communication shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department, independent establishment, board, commission, or other agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress of the United States shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * *

Act of June 25, 1948, ch. 645, § 1, 62 Stat. 1770 (1948).

§ 1505 Influencing or injuring witness before agencies and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

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 and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

* * *

The Antitrust Civil Process Act of 1962, Pub. L. No. 87-664, 76 Stat. 551 (1962).

§ 1505 Obstruction of proceedings before departments, agencies, and committees.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

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 and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

* * *

The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, §§ 2 & 4 (1982)

Sec. 2. (a) The Congress finds and declares that:

(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal

justice system or simply used as tools to identify and punish offenders.

(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim.

(3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.

(4) Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated.

(5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed.

(6) The victim and witness who cooperate with the prosecutor often find that the transportation, parking facilities, and child care services at the court are unsatisfactory and they must often share the pretrial waiting room with the defendant or his family and friends.

(7) The victim may lose valuable property to a criminal only to lose it again for long periods of time to Federal law enforcement officials, until the trial and sometimes and appeals are over; many times that property is damaged or lost, which is

particularly stressful for the elderly or poor.

(b) The Congress declares that the purposes of this Act are---

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and

(3) to provide a model for legislation for State and local governments.

PROTECTION OF VICTIMS AND WITNESSES FROM INTIMIDATION

Sec. 4. (a) Chapter 73 of title 18 of the United States Code is amended by adding at the end the following new sections:

§ 1512. Tampering with a witness, victim, or an informant - 18 USC 1512.

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to-

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from-

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or

release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct

consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section-

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record. document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance-

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.

§ 1515. Definitions For Certain Provisions

As used in sections 1512 and 1513 of this title and in this section-

the term 'official proceeding' means-

(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, or a Federal grand jury;

(B) a proceeding before the Congress; or

(C) a proceeding before a Federal Government agency which is authorized by law.

* * *

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, §§ 1101 & 1102 (2002)

TITLE XI—CORPORATE FRAUD ACOUNTABILITY

Sec. 1101. Short Title

This title may be cited as the "Corporate Faud Accountability Act of 2002".

Sec. 1102. Tampering With A Record Or Otherwise Impeding An Official Proceeding.

Section 1512 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and

(2) by inserting after subsection (b) the following new subsection:

(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.".