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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH W. FISCHER,)
Petitioner,)

v.) No. 23-5572

UNITED STATES,)
Respondent.)

- - - - -

Washington, D.C.

Tuesday, April 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

JEFFREY T. GREEN, ESQUIRE, Bethesda, Maryland; on behalf of the Petitioner.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-5572, Fischer versus United States.

Mr. Green.

ORAL ARGUMENT OF JEFFREY T. GREEN

ON BEHALF OF THE PETITIONER

MR. GREEN: Mr. Chief Justice, and may it please the Court:

Congress enacted 1512(c) in 2002 in the wake of the large-scale destruction of Enron's financial documents. The statute therefore prohibits the impairment of the integrity or availability of -- of information and evidence to be used in a proceeding. In 2002, Congress hedged a little bit and added Section (c)(2) to cover other forms of impairment, the known unknowns, so to speak. It was, after all, the dawn of the Information Age.

Until the January 6th prosecutions, Section 1512(c)(2), the "otherwise" provision, had never been used to prosecute anything other than evidence tampering, and that was for good reason. This Court has said that "otherwise,"

1 when used in a criminal statute, means to do
2 similar conduct in a different way.

3 The government would have you ignore
4 all that or disregard all that and instead
5 convert (c)(2) from a catchall provision into a
6 dragnet. One of the things that that dragnet
7 would cover is Section (c)(1). Our construction
8 of the statute at least leaves (c)(1) and (c)(2)
9 to do some independent work.

10 The January 6th prosecutions
11 demonstrate that there are a host of felony and
12 misdemeanor crimes that cover the alleged
13 conduct. A Sarbanes-Oxley-based, Enron-driven
14 evidence-tampering statute is not one of them.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Mr. Green, how do we
17 determine what these two provisions have in
18 common? Do we look after the "otherwise" or
19 before and why?

20 MR. GREEN: We -- you look at before,
21 Justice Thomas, and you look at the kinds of
22 manner in which documents and records are to be
23 impaired, and then you look after to see what
24 the effect is. But I would submit that the
25 effect is the same, right, in order to cause the

1 impairment of the integrity of the evidence
2 that's to be used in a proceeding or to prevent
3 its availability.

4 So we look back and we look forward.

5 JUSTICE THOMAS: Wouldn't it be just
6 as easy to look at (c) -- at the (c)(2) and then
7 ask what it has in common with (c)(1) and use
8 (c)(2)'s provisions as the basis for that
9 similarity?

10 MR. GREEN: No, because (c)(2) speaks
11 to the effect of the actions that the
12 "otherwise" clause covers. So, in other words,
13 we look at (c)(1) and we see that Congress is
14 concerned about documents and records and other
15 objects and things that are done to those to
16 impair the integrity of those, and the effect of
17 that is to obstruct. And so (c)(2) omits that
18 object and verb section.

19 JUSTICE THOMAS: But you could just as
20 easily say that Congress is really concerned
21 about things that obstruct, influence, or impede
22 official proceedings, and that's (c)(2). So why
23 isn't that the basis for the similarity?

24 MR. GREEN: Well, because of the --
25 the presence of the "otherwise" provision. So

1 "otherwise," as I mentioned -- and "otherwise,"
2 this Court has said, means to do similar conduct
3 in a different way. So what we've got here is
4 -- is the impairment of evidence being done in a
5 different way.

6 JUSTICE SOTOMAYOR: I'm sorry. I -- I
7 thought was, yes, doing it in a different way,
8 so let me give you an example. There is a sign
9 on the theater: You will be kicked out of the
10 theater if you photograph or record the actors
11 or otherwise disrupt the performance.

12 If you start yelling, I think no one
13 would question that you can be expected to be
14 kicked out under this policy, even though
15 yelling has nothing to do with photograph or
16 recording. The object that the verb is looking
17 at, the verbs are looking at, is the
18 obstruction. It's not the manner in which you
19 obstruct; it's the fact that you've obstructed.

20 Isn't that the structure of this
21 provision?

22 MR. GREEN: It is, Your Honor. It --
23 it's -- it's in part the structure of the
24 provision. But what -- what your hypothetical
25 omits is that there is a specific reticulation,

1 I guess it's called, of all of the different
2 sorts of things that might be done to evidence
3 to begin with.

4 JUSTICE SOTOMAYOR: Except that --

5 MR. GREEN: There's a long --

6 JUSTICE SOTOMAYOR: -- what's
7 fascinating about (1), which is not about (2),
8 is that (1) doesn't require you to have actually
9 impeded the proceeding. (1) requires you to
10 have that intent, but you don't actually have to
11 accomplish the intent. (2) requires you to
12 accomplish the intent. And so that's a very
13 different articulation of what the object of (2)
14 is. The object of (2) is the actual disruption
15 of the proceeding.

16 MR. GREEN: Well, I would respectfully
17 disagree because both --

18 JUSTICE SOTOMAYOR: Well, why? Look
19 at the language.

20 MR. GREEN: Yeah.

21 JUSTICE SOTOMAYOR: "Alters, destroys,
22 mutilates, or conceals a record." I do that in
23 my home, and I do it anticipating that it might
24 be needed. All I have to do is have the intent
25 to impair. By that very language, I don't have

1 to have an actual proceeding that I've impaired.

2 On (2), you need an actual proceeding
3 to impair.

4 MR. GREEN: I guess I'm -- I guess I'm
5 a little confused, Justice Sotomayor, because,
6 as I read this, I would think that the
7 government would say that any attempt at (1) is
8 also covered by the statute, and I'm not sure
9 that I would disagree. So I'm not -- I don't
10 think that there has to be an actual impairment.

11 JUSTICE SOTOMAYOR: No, I do think,
12 under (1), you don't need an actual impairment.
13 Under (2), you do.

14 MR. GREEN: Okay. Well, or --

15 JUSTICE SOTOMAYOR: If you read it --

16 MR. GREEN: But -- but (2) says or
17 attempts --

18 JUSTICE SOTOMAYOR: -- the -- the verb
19 requires you to actually obstruct the proceeding
20 in (2). Nowhere in (1) do you actually have to
21 obstruct.

22 MR. GREEN: Well, in -- in -- in (2),
23 you -- you only have to attempt to do the things
24 that -- that are in (2).

25 JUSTICE SOTOMAYOR: No, otherwise

1 obstructs or impedes or attempts to, yes.

2 MR. GREEN: Yes.

3 JUSTICE BARRETT: Counsel, can I ask
4 you whether -- let's -- let's imagine that we
5 agree with you. On remand, do you agree that
6 the government could take a shot at proving that
7 your client actually did try to interfere with
8 or, under (c)(1) -- or, actually, no -- sorry --
9 under (c)(2), obstruct evidence because he was
10 trying to obstruct the arrival of the
11 certificates arriving to the vice president's
12 desk for counting? So there would be an
13 evidence impairment theory?

14 MR. GREEN: I'm quite sure that my
15 friend would take a shot, Your Honor, but I
16 would -- I would -- I would say no, and the
17 reason why is that this statute prohibits
18 operation on -- on specific evidence in some
19 way, shape, or form.

20 Attempting to stop a vote count or
21 something like that is a very different act than
22 actually changing a document or altering a
23 document or creating a fake new document.

24 JUSTICE BARRETT: Well, he's
25 obstructing evidence in my hypothetical. I

1 mean, he's not actually altering the -- the vote
2 certificates, which is why I corrected myself
3 and said under (c)(2). I mean, would that be
4 different than someone, say, in a trial or a
5 criminal proceeding trying to prevent evidence
6 that was going to be introduced in the
7 proceeding from making it there? So I'm -- I'm
8 imagining him acting on the certificates, not
9 the act of counting them.

10 MR. GREEN: Well, again, I think they
11 can try it, but I -- I don't think that we're
12 talking about trying to impair just anything
13 other than the evidence itself. We're trying to
14 obstruct a proceeding, and there's questions
15 about what "proceeding" means here, as Your
16 Honor doubtless knows.

17 But what the government would
18 essentially be doing, as you noted, is
19 converting what they've charged in (c)(2) to a
20 (c)(1) type of crime.

21 JUSTICE BARRETT: Well, no, no, no,
22 no, no. (c)(2) -- I mean, as I -- maybe I'm
23 misunderstanding your argument, but I thought
24 your argument was that (c)(2) picks up other
25 things, but they just have to be

1 evidence-related.

2 So, in the hypothetical I'm giving
3 you, it's evidence-related because it's focused
4 on the certificates, but it's obstruct, obstruct
5 or impede, say, the certificates arriving to the
6 vice president's desk insofar as the goal was to
7 shut down the proceeding and therefore interfere
8 with the evidence reaching the vice president.

9 MR. GREEN: I -- I still -- that's
10 closer. It's definitely closer. But, if you
11 zoom out and look at all of 1512 in order to
12 understand what kinds of impairment we're
13 talking about, we are talking about or Congress
14 is prohibiting the kinds of impairments that
15 actually change documents that actually affect
16 their integrity.

17 If it's just impeding or delaying,
18 we'd submit actually that that is not part of
19 1512(c). Delays are mentioned in five other
20 parts of 1512 but not in (c).

21 JUSTICE JACKSON: But -- but, Mr. --
22 Mr. Green, if -- if -- if Justice Barrett is
23 wrong, then what work is (c)(2) doing? I mean,
24 it seems like you've just now re-articulated
25 only the theory of (c)(1) and you're saying that

1 you have to make it into (c)(1) in order to
2 be -- you know, to have this statute apply.

3 So can -- can you help me at least
4 understand under your theory what additional
5 thing does (c)(2) offer?

6 MR. GREEN: Let's -- let's look at the
7 verbs of (c)(1), which are alter, destroy,
8 mutilate, and conceal, and let's think about
9 their antonyms. So one instead of destroy would
10 be actually to create. So one could use some
11 sophisticated computer program, we've heard an
12 awful lot about AI, and we've heard about the
13 possibility of deepfake photographs.

14 So I -- I think you would violate
15 (c)(2) if you created a photograph that
16 established your alibi in -- in some extremely
17 sophisticated way that would get it admitted
18 into evidence or make it -- or you submit it for
19 evidence would probably be where the crime
20 occurs.

21 JUSTICE JACKSON: So you're saying
22 there are other things other than particularly
23 altering, destroying, mutilating, or concealing,
24 but it has to be limited to a record?

25 MR. GREEN: Not necessarily, because,

1 I mean, one other example if I might, Your
2 Honor, would be not to conceal but to disclose.
3 So, if I disclosed a witness list in a large
4 multi-defendant drug trial, my purpose in doing
5 that, though I haven't altered the document,
6 would be to intimidate the witnesses or prevent
7 their attendance. That, on our submission,
8 would also violate (c)(2).

9 JUSTICE JACKSON: All right. Can I
10 just ask you one other question just so that I
11 can fully understand your theory? You keep
12 using the term "evidence," and that does not
13 appear in the statute. The statute, (c)(1) says
14 "record, document, or other object."

15 Now I appreciate that, you know,
16 evidence can be such a thing, but you can
17 imagine a world in which those two are
18 different. So where does evidence come in in
19 your theory and why is it there?

20 MR. GREEN: Well, the -- the -- the
21 title of the statute refers to tampering with
22 witnesses, victims, and informants. But along
23 with wictims -- excuse me, witnesses, victims,
24 and informants comes evidence that they provide,
25 whether in the form of testimony or whether in

1 the form of documents.

2 JUSTICE JACKSON: No, I understand.
3 But the statute, the provision we're talking
4 about here, does not use the term "evidence."
5 And so -- and instead or in addition, it uses
6 the term "official proceeding," which is
7 elsewhere defined not in terms of, you know,
8 court proceedings or investigations. It's just
9 a proceeding, you know, before Congress.

10 So is it your -- is it your argument
11 that the only thing that this provision covers
12 is something that is tantamount to evidence in
13 an investigation or trial?

14 MR. GREEN: It is, Your Honor. And
15 we're not limiting it -- our -- our position
16 does not limit it to documents or records. I
17 would submit (c)(1), which we say carries into
18 (c)(2) through the "otherwise" clause, when it
19 says "other object," is pretty broad.

20 And it need not be -- as -- as -- as
21 1512(f) provides, it need -- it need not be
22 admissible to you, (f) -- yeah, (f), it need not
23 be admissible. So it -- it could cover things
24 like electronic records. It could cover
25 communications. It could cover emails. It

1 could cover all kinds of things that we think
2 get used by fact finders in a formally convened
3 hearing.

4 JUSTICE KAGAN: I mean, just to take
5 you --

6 JUSTICE ALITO: What about --

7 JUSTICE KAGAN: -- back to --

8 JUSTICE ALITO: Just a quick question.
9 What about the Second Circuit's decision in U.S.
10 versus Reich, where what was involved was not
11 evidence, it was a forged court order. Would
12 that fall within (c)(2)?

13 MR. GREEN: Yes, we -- we think that
14 does fall within (c)(2). And I think anything
15 that is falsified in this operative way that is
16 used to obstruct a proceeding would -- would be
17 covered by (c)(2).

18 JUSTICE ALITO: All right. Thank you.

19 MR. GREEN: Yes.

20 JUSTICE KAGAN: Just to take you back
21 to the -- the question that Justice Thomas
22 started you with, I mean, there, it seems to me
23 there are two choices here, and you could read
24 this as "otherwise obstructs a proceeding" or
25 "otherwise spoils evidence."

1 And you're using it to say "otherwise
2 spoils evidence" with, you know, "spoils" being
3 all those verbs. But it doesn't say that. It
4 says "otherwise obstructs a proceeding." There
5 are plenty of ways to write the statute that you
6 want to write. You could just say otherwise
7 affects the integrity or availability of
8 evidence in an official proceeding. You could
9 combine official proceeding with evidence in
10 other ways, you know, one with -- you could
11 replicate the mens rea that (c)(1) has.

12 I mean, there are ways in which (c)(2)
13 -- multiple ways in which the drafters of (c)(2)
14 could have made it clear that they intended
15 (c)(2) to also operate only in the sphere of
16 evidence spoliation. But it doesn't do that.
17 All it says is "otherwise obstructs, influences,
18 or impedes."

19 MR. GREEN: It -- it -- certainly, the
20 statute could be written more precisely. Any
21 statute could be written more precisely.

22 JUSTICE KAGAN: Well, it's not a
23 question of precisely. The question is what is
24 this "otherwise" -- this is what Justice Thomas
25 said at the beginning -- what is this

1 "otherwise" taking from (c)(1)? Of course,
2 there's commonality that's involved in an
3 "otherwise." There's both commonality and
4 difference.

5 But what is the commonality that
6 (c)(2) is drawing from (c)(1)? It tells you
7 what the commonality is. The commonality is
8 that the things that fall into (c)(2) also have
9 to obstruct, influence, or impede. But what
10 (c)(2) does not say, really does not say, is
11 everything in (c)(2) also has to spoil evidence.

12 MR. GREEN: But this Court has said
13 that "otherwise" in a criminal statute means
14 similar conduct, so we --

15 JUSTICE KAGAN: Similar conduct,
16 obstruction of a proceeding, different ways of
17 carrying out that similar conduct, which is
18 obstruction of a proceeding.

19 The statute tells you what the similar
20 conduct is right on its face.

21 MR. GREEN: Well, respectfully,
22 Justice Kagan, the statute tells you what the
23 effect is. The conduct that's specified in
24 (c)(1) is altering, destroying, mutilating, or
25 concealing a document, record, or other object.

1 And so a drafter of this statute could
2 easily omit something like that and would omit
3 something like that for the sake of economy and
4 also to hedge because we know that what comes
5 before might not be exactly the same as after,
6 so we're not going to repeat what we said there,
7 but we're going to use a connector like
8 "otherwise" to -- to demonstrate that we're
9 talking about similar conduct.

10 And I would submit, Your Honor, that
11 if you look at (c)(2) alone, that is -- please.

12 JUSTICE KAGAN: What's your best case
13 for this, like, going backward and trying to
14 find language that does not appear in the
15 "otherwise" provision and trying to incorporate
16 it into the "otherwise" provision?

17 MR. GREEN: Well, I think Begay is our
18 best case for sure.

19 JUSTICE KAGAN: And that's not --

20 MR. GREEN: Yates is also.

21 JUSTICE KAGAN: -- a very good
22 advertisement, I would think. I mean, what
23 Begay does is exactly that. So you have a very
24 good case there. And it was a complete failure.
25 You know, Begay said we look back at this other

1 -- at this thing that Congress, you know, did
2 not use in the "otherwise" provision and we
3 derive various things from it and we put it in.
4 It was purposeful, violent, and aggressive. And
5 then, a few years later, we said, where did that
6 come from? We made it up, and we get rid of the
7 whole thing.

8 So that's not a great advertisement
9 for rewriting a statute to -- to -- you know, to
10 take an "otherwise" provision that says what it
11 says and turn it into an "otherwise" provision
12 that says something else.

13 MR. GREEN: We would submit that Begay
14 was abrogated on other grounds, Your Honor, and
15 the other grounds are the Court -- the members
16 of the Court could not decide between an
17 assessment of the types of things that came
18 before "otherwise" versus the level of risk.

19 And when that began to play out in
20 complicated cases like Chambers and many others
21 involving escape from a halfway house, it became
22 a -- the Court said, an untenable proposition to
23 figure out what a potential harm to another
24 person might be looking at what came before.
25 That doesn't --

1 JUSTICE ALITO: Well --

2 MR. GREEN: That doesn't --

3 JUSTICE ALITO: I'm sorry, Mr. -- Mr.
4 Green. Go ahead, finish your sentence.

5 MR. GREEN: Yeah, but that doesn't --
6 that doesn't mean that the Court's holding about
7 how to construe a statute and its significant
8 holding about "otherwise" was abrogated in and
9 of itself as a result of the cases that came
10 after Begay.

11 JUSTICE ALITO: Well, I -- I'm not a
12 fan of Begay. Some of us perceived at that time
13 that there were problems, different problems,
14 with what the Court did there.

15 But I -- I think there's a point in
16 the colloquy that you've been having. The
17 specific types of conduct that are enumerated in
18 (1), alter, destroy, mutilate, conceal a record,
19 document, et cetera, et cetera, have two things
20 in common. One, they all involve documents or
21 objects, and they also all involve the
22 impairment of the object's integrity or
23 availability for use in an official proceeding.

24 So the similarity could be either of
25 those things. And so I -- I think that you may

1 be biting off more than you can chew by
2 suggesting, if you are indeed suggesting, that
3 the "otherwise" clause can only be read the way
4 you read it. One might say it can certainly be
5 read the way the government reads it, and that
6 might even be the more straightforward reading.

7 But it is also possible to read a
8 clause like this more narrowly, and Judge Katsas
9 provided an example of that in his opinion. If
10 you have a statute that says anyone who kills or
11 injures or assaults someone or otherwise causes
12 serious injury, commits a crime, you wouldn't
13 think that that applies to defamation.

14 So it could be read your way. So then
15 I think you have to go on to some other
16 arguments and explain why your reading is better
17 than the government's reading.

18 MR. GREEN: Certainly. And I would
19 submit, Your Honor, that there are plenty of
20 other reasons why our reading is the better
21 reason. And I'm not going to contest or bite
22 off more than I can chew and say that the
23 government's reading of (c)(2) is implausible.

24 We think it's unsound, but it's
25 unsound for the additional reasons that if one

1 zooms out and looks at what the prohibited
2 conduct is in 1512 generally, we are talking
3 about interference or operation on forms of
4 evidence and testimony that -- that obstruct a
5 proceeding. That's what 12 is all about
6 generally.

7 And I would submit, Your Honor, too
8 that as the briefing indicates, ejusdem generis
9 and -- and noscitur a sociis, those two
10 venerated Latin canons, also operate in our
11 favor here, as well as the broader context of
12 Chapter 73 and -- and -- and Section 15. All of
13 these things are about doing things that -- that
14 -- that obstruct a proceeding. And 1512 and
15 1512(c) zero in on witnesses and evidence.

16 JUSTICE ALITO: Well, you have other
17 arguments. You have surplusage arguments. You
18 have arguments about the breadth of the
19 government's reading of the provision. Do you
20 want to say anything about those?

21 MR. GREEN: Right. So, with respect
22 to surplusage, Your Honor, I would refer to
23 Judge Katsas's opinion, as you did, in
24 particular in the Joint Appendix at page 88,
25 which lists out all of the different provisions

1 in Section 1512. Fifteen of the 21 would be
2 subsumed by the government's reading of (c)(2).

3 The government's reading of (c)(2), I
4 remind the Court, is so broad that it would
5 cover anyone who does something understanding
6 that what they are doing is wrong in some way
7 that in any way influence, impedes, or obstructs
8 an official proceeding of any type.

9 JUSTICE KAGAN: Well, Mr. Green, I
10 think that this --

11 MR. GREEN: Maybe limited by federal.

12 JUSTICE KAGAN: -- this -- this --
13 there's a good case that this provision --
14 everybody knew it was going to be superfluous
15 because it was a provision that was meant to
16 function as a backstop. It was a later-enacted
17 provision. Congress had all these statutes all
18 over the place. It had just gone through Enron.

19 What Enron convinced them of was that
20 there were -- there were gaps in these statutes.
21 And they tried to fill the gaps. They tried to
22 fill the particular gap that they found out
23 about in Enron. And then they said, you know,
24 this is a lesson to us. There are probably
25 other gaps in this statute.

1 But they didn't know exactly what
2 those gaps were. So they said, let's have a
3 backstop provision. And this is their backstop
4 provision. And, of course, in that circumstance
5 -- I mean, superfluity is very often a good
6 argument when it comes to statutory
7 interpretation, but it's not a good argument
8 when Congress is specifically devising a
9 backstop provision to fill gaps that might
10 exist -- they don't exactly know how they exist,
11 but they think that they probably do exist -- in
12 a preexisting statutory scheme. And that's what
13 this provision is intended to do.

14 MR. GREEN: Respectfully, Your Honor,
15 a close reading of Yates, both the majority
16 opinion and the dissenting opinion, demonstrates
17 that this Court thought that 1519 was the
18 backstop. That was supposed to be the omnibus
19 provision. And the Court was fighting over what
20 the meaning of "tangible object" was in 1519.
21 But that was meant to plug the hole that
22 Congress --

23 JUSTICE SOTOMAYOR: Counsel, I -- I
24 have such a hard time with the superfluity
25 argument because this entire obstruction section

1 is superfluity. There isn't one provision you
2 can point to -- you just said it, you can point
3 to 1512 and you have 1519, which says
4 destruction of evidence. How are they
5 different? They're really not. You can point
6 to any series -- any provision and point to
7 superfluity in this -- in this -- in this
8 section, 1512 and otherwise.

9 So we go back to Justice Kagan's
10 position, which is what you don't have is a
11 freestanding "otherwise obstructs, influence, or
12 impedes any official proceeding." I don't see
13 why that's not the backstop that Congress would
14 have intended and it's the language it used.

15 MR. GREEN: Well, it's an awfully odd
16 place to put it, isn't it, I mean, in a
17 subsection of a subsection in the middle back of
18 the statute, to -- to include a provision --

19 JUSTICE SOTOMAYOR: Well, I mean, as
20 you -- as --

21 MR. GREEN: -- that seemingly --

22 JUSTICE SOTOMAYOR: -- but there's
23 nothing about --

24 MR. GREEN: -- takes over 15 of the 21
25 other provisions.

1 JUSTICE SOTOMAYOR: The one thing that
2 Justice Kagan pointed to, which is clear, they
3 wanted to cover every base, and they didn't do
4 it in a logical way, but they managed to cover
5 every base.

6 MR. GREEN: Well, I think you can
7 reconcile -- I mean, again, that's what the
8 Court said about 1519 in -- in Yates. And I
9 don't understand how it is that the government
10 can come before you today and say we need yet
11 another catchall, yet another omnibus crime that
12 will sweep in all kinds of others. We didn't
13 get what we wanted in Section 15, so now we'll
14 go to 1512(c)(2) and see if we can expand that
15 in this way to cover something that it has never
16 covered before.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 MR. GREEN: And --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: We've never had a
25 situation before where there's been a situation

1 like this with people attempting to stop a
2 proceeding violently. So I'm not sure what a
3 lack of history proves.

4 MR. GREEN: Well, I'm -- I'm not sure
5 that that's true. I'd point to the Hatfield
6 Courthouse problems in -- in -- in -- in
7 Portland, Oregon. But let's -- let's also look
8 at what the Court has said in so many different
9 cases, in -- in Dubin, in Bond, in Yates, in
10 Kelly. All of these cases --

11 JUSTICE SOTOMAYOR: But, there, there
12 was a difference in the use of words. Here,
13 "otherwise obstructs, influences, or impede,"
14 you might have a problem with breadth. And the
15 government can address that. But it's not
16 unclear what those words mean.

17 MR. GREEN: But the government has no
18 way to address its problem with breadth because
19 --

20 JUSTICE SOTOMAYOR: Well, we can let
21 them answer that.

22 MR. GREEN: Okay.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?
25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: If it were just
2 the language in (c)(2) and so said "whoever
3 corruptly obstructs, influences, or impedes,"
4 (c)(2), without the word "otherwise," if that
5 were the whole provision, do you acknowledge
6 that the language would then be applied properly
7 to a situation like this?

8 MR. GREEN: Unfortunately, no, and the
9 reason for that is that, again, applying all the
10 other canons and -- and applying the whole-text
11 canon and zooming out and looking at the -- at
12 1512, we would submit that (c)(2) should still
13 be read in the way we have suggested that it be
14 read, as something that is an evidence
15 impairment statute.

16 I think also, as I mentioned, the
17 Latin canons, the surplusage problem that (c)(2)
18 would create, all of those would still obtain if
19 it sat there by itself without the "otherwise."
20 The "otherwise" is the icing on the cake.

21 And, finally, Justice Kavanaugh, I
22 would mention that, as I mentioned to Justice
23 Barrett, there's an issue --

24 JUSTICE KAVANAUGH: Well, let me
25 just -- if you didn't have (c)(1), you just had

1 (c)(2) without the "otherwise." I'm not sure I
2 was clear on that.

3 MR. GREEN: Oh, okay. Well, in that
4 case, I think it gets even harder. But I would
5 still say, if we look at what 1512 is about and
6 if we look at this Court's cases on broad,
7 implausible -- plausible but broad readings of
8 criminal statutes not being what the Court
9 adopts when there's an available narrow reading
10 because Congress can fix that, we would still
11 say that (c)(2) doesn't perform the massive
12 dragnet function that the government submits.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: Yeah, I have a
17 question about the phrase in (c)(1), the
18 specific intent. Do you agree it's specific
19 intent with the intent to impair the object's
20 integrity? Okay.

21 What is your view about how that
22 parenthetical applies to (c)(2), if at all?
23 Like, do you think that that intent requirement
24 carries over to (c)(2)?

25 MR. GREEN: The corruptly intent

1 requirement?

2 JUSTICE BARRETT: Not -- not
3 corruptly. The "with the intent to impair the
4 object's integrity or availability for use in an
5 official proceeding."

6 MR. GREEN: Yes, we do, Your Honor.

7 JUSTICE BARRETT: So it carries over.
8 How --

9 MR. GREEN: And we'd say that's the
10 object of -- of -- of the overarching mens rea.

11 JUSTICE BARRETT: But how can that be?
12 I mean, it seems like that, you know, (c)(2)
13 would read awfully oddly then. It would be
14 "otherwise obstructs, influences, or impedes any
15 official proceeding with the intent to impair
16 the object's integrity or availability for use
17 in an official proceeding"? That would be your
18 position of how it would read?

19 MR. GREEN: Well, I think that's
20 right. I mean, it's -- it's awkward. I mean,
21 there's no doubt that it's an awkward statute,
22 but, if you -- if you do the operation that I
23 talked about earlier, which is we're just going
24 to use "otherwise" to replace the verbs and the
25 nouns in (c)(1), then -- then the statute makes

1 perfect sense.

2 With respect to intent, I mean, I
3 think Your Honor makes an excellent point, which
4 is that this intent is a specific form of
5 intent. The "corruptly," which has been
6 construed to be the mens rea up there, is not
7 different than -- at least on this reading, is
8 not -- is not -- or on the accepted reading by
9 the D.C. Circuit right now is not different
10 than -- than some form of specific intent.

11 JUSTICE BARRETT: So "corruptly" is
12 redundant?

13 MR. GREEN: It seems like it's getting
14 to be, yes.

15 JUSTICE BARRETT: Okay. Thank you.

16 MR. GREEN: That's true. And our
17 submission is that "corruptly" should mean
18 something different. So should "proceeding."
19 That's how you marry 1512 with 1519.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I'm just still
23 wondering if your theory about this provision
24 might be too narrow in a sense because you've
25 got evidence going and spoliation in a sense.

1 What I -- what I'm trying to work out
2 in my mind is whether you would still have a
3 decent argument if this 1512 language is read to
4 prohibit the corrupt tampering with things that
5 are used to conduct an official proceeding with
6 the intent of undermining the integrity of the
7 thing or access to the thing and thereby
8 obstructing the proceeding.

9 It's not just evidence. It's an
10 official proceeding. (c)(1) is an example of,
11 you know, the corrupt tampering with certain
12 things. And (c)(2) broadens it out a bit. It's
13 not just documents and records.

14 What do you think about that?

15 MR. GREEN: Well, I think that's --
16 that's a correct reading, Your Honor. I mean,
17 we -- as -- as -- as 1512(f) demonstrates, it
18 doesn't -- you know, 1512(f) we would submit
19 actually supports our position because it says
20 the evidence need not be admissible or free of a
21 privilege claim.

22 Now what would that mean about what
23 the statute is addressing if it's not evidence?
24 But (c)(2) has been applied, and -- and
25 occasionally (c)(1) has been applied.

1 JUSTICE JACKSON: In a non-evidentiary
2 way?

3 MR. GREEN: Yeah, to -- to -- to
4 things that could become evidence, to the
5 efforts to shape someone's grand jury testimony
6 --

7 JUSTICE JACKSON: All right. Let me
8 --

9 MR. GREEN: -- to answers to
10 interrogatories.

11 JUSTICE JACKSON: -- let me ask you
12 about the question that Justice Barrett asked
13 before.

14 You know, you -- you suggested that it
15 has to be to the document, but -- in other
16 words, the -- the -- the activity has to be
17 actually to the document. But I don't know why
18 that's the case under (c)(2).

19 Justice Alito says, well, one of the
20 commonalities between (c)(1) and (c)(2) could be
21 the impairment of the object's integrity or
22 availability.

23 Justice Barrett posits a scenario in
24 which you have someone who is impairing the
25 availability by doing something to prevent the

1 object from getting to the proceeding. Why
2 wouldn't that count under (c)(2)?

3 So this is -- this is, you know,
4 preventing Congress from counting the electoral
5 votes, for example. Let's say it's being done.
6 She says it's in an envelope going to the -- the
7 vice president's desk and someone does something
8 to impair or prevent that from happening. Why
9 isn't that what (c)(2) could cover?

10 MR. GREEN: Well, first, it's not
11 affecting the integrity of the document, Your
12 Honor, or -- or the -- or --

13 JUSTICE JACKSON: Availability is also
14 in the statute.

15 MR. GREEN: Availability it says too,
16 but, as I mentioned earlier, simply delaying the
17 arrival of evidence at the courthouse --

18 JUSTICE JACKSON: No, not delay.
19 Let's say the person steals the envelope and
20 takes it away.

21 MR. GREEN: Then it gets harder, I
22 agree. If they steal the envelope, they take it
23 away, they rip up, all of those things, which is
24 certainly not what happened here, and it's not
25 in the indictment, the -- the ballots or the --

1 the vote count is not even in the indictment.

2 JUSTICE JACKSON: Well, we -- we
3 wouldn't have to decide that.

4 MR. GREEN: Right.

5 JUSTICE JACKSON: We could send it
6 back if we clarified that that is what the
7 statute means. I'm trying to understand if you
8 agree that that's what the statute could mean.

9 MR. GREEN: No, I don't agree that
10 that's what the statute could mean.

11 JUSTICE JACKSON: Why not?

12 MR. GREEN: The reason is that if you
13 look at 1512, it is about a direct effect or, in
14 some senses, an indirect effect but in a limited
15 way on evidence that's to be used in a
16 proceeding, right, and -- and "proceeding," as I
17 mentioned earlier --

18 JUSTICE JACKSON: So as to limit its
19 availability. So what --

20 MR. GREEN: So as to limit its
21 availability.

22 JUSTICE JACKSON: -- I'm suggesting
23 is, in (c)(2), if you're doing something to
24 limit its -- to -- to limit its availability,
25 why doesn't it count?

1 MR. GREEN: Because we're limiting the
2 availability of its use by a fact finder in a
3 proceeding. Again, that's the way to marry
4 1519, which covers all kinds of investigations
5 and all kinds of other events, with 1512.

6 1512 is talking about evidence that's
7 going to a formal convocation, some kind of a
8 hearing, before the Congress or before any other
9 body --

10 JUSTICE JACKSON: Thank you.

11 MR. GREEN: -- as the language says.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. GREEN: Thank you.

16 CHIEF JUSTICE ROBERTS: General
17 Prelogar.

18 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

19 ON BEHALF OF THE RESPONDENT

20 GENERAL PRELOGAR: Mr. Chief Justice,
21 and may it please the Court:

22 On January 6th, 2021, a violent mob
23 stormed the United States Capitol and disrupted
24 the peaceful transition of power. Many crimes
25 occurred that day, but in plain English, the

1 fundamental wrong committed by many of the
2 rioters, including Petitioner, was a deliberate
3 attempt to stop the joint session of Congress
4 from certifying the results of the election.
5 That is, they obstructed Congress's work in that
6 official proceeding.

7 The government accordingly charged
8 Petitioner with violating Section 1512(c)(2), an
9 obstruction offense that directly reads onto his
10 conduct.

11 The case as it comes to this Court
12 presents a straightforward question of statutory
13 interpretation: Did Petitioner obstruct,
14 influence, or impede the joint session of
15 Congress?

16 The answer is equally straightforward.
17 Yes, he obstructed that official proceeding.
18 The terms of the statute unambiguously encompass
19 his conduct. Petitioner doesn't really argue
20 that his actions fall outside the plain meaning
21 of what it is to obstruct. Instead, he asks
22 this Court to impose an atextual limit on the
23 actus reus. In his view, because Section
24 1512(c)(1) covers tampering with documents and
25 other physical evidence, the separate

1 prohibition in Section 1512(c)(2) should be
2 limited to acts of evidence impairment.

3 But that limit has no basis in the
4 text or tools of construction. His reading
5 hinges on the word "otherwise," but that word
6 means in a different manner, not in the same
7 manner. And the two prohibitions in Section
8 1512(c)(2) aren't unified items on a list where
9 you could apply associated words canons.
10 They're separate provisions. They have their
11 own sets of verbs and their own nouns. They
12 each independently prohibit attempts, which
13 would be duplication that makes no sense on
14 Petitioner's reading. And Congress included a
15 distinct mental state requirement in (c)(1) that
16 it chose not to repeat in (c)(2).

17 Section 1512(c)(2) by its terms is not
18 limited to evidence impairment. Instead, it's a
19 classic catchall. (c)(1) covers specified acts
20 that obstruct an official proceeding, and (c)(2)
21 covers all other acts that obstruct an official
22 proceeding in a different manner. The Court
23 should say so and allow this case to proceed to
24 trial.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: General, there have
2 been many violent protests that have interfered
3 with proceedings. Has the government applied
4 this provision to other protests in the past,
5 and has this been the government's position
6 throughout the lifespan of this statute?

7 GENERAL PRELOGAR: It has certainly
8 been the government's position since the
9 enactment of 1512(c)(2) that it covers the
10 myriad forms of obstructing an official
11 proceeding and that it's not limited to some
12 kind of evidence impairment gloss.

13 JUSTICE THOMAS: Have you -- so have
14 you -- have you enforced it in that manner?

15 GENERAL PRELOGAR: We have enforced it
16 in a variety of prosecutions that don't focus on
17 evidence tampering.

18 Now I can't give you an example of
19 enforcing it in a situation where people have
20 violently stormed a building in order to prevent
21 an official proceeding, a specified one, from
22 occurring with all of the elements like intent
23 to obstruct, knowledge of the proceeding, having
24 the corruptly mens rea, but that's just because
25 I'm not aware of that circumstance ever

1 happening prior to January 6th.

2 But just to give you a flavor of some
3 of the other circumstances where we have
4 prosecuted under this provision, for example,
5 there are situations where we've brought (c)(2)
6 charges because someone tipped off the subject
7 of an investigation to the grand jury's
8 hearings. There was another case where someone
9 tipped off about the identity of an undercover
10 law enforcement officer.

11 And in those situations, there's no
12 specific evidence, no, you know, concrete
13 testimony or physical evidence that the conduct
14 is interfering with. Instead, it's more general
15 obstruction of the proceeding.

16 JUSTICE THOMAS: So --

17 GENERAL PRELOGAR: Justice Alito
18 mentioned the Reich case as well, and that's
19 another one where it was a forged court order
20 that prompted the litigant to dismiss a mandamus
21 petition. But that didn't have anything to do
22 with the evidence that was going to be
23 considered in that proceeding.

24 JUSTICE THOMAS: So what role does
25 (c)(1) play in your analysis?

1 GENERAL PRELOGAR: So we understand
2 1512(c) to split up the world of obstructive
3 conduct of an official proceeding into the
4 (c)(1) offense and into (c)(2). (c)(1) covers
5 everything it enumerates. It's the acts of
6 altering, concealing, destroying records,
7 documents, or other objects. And then (c)(2)
8 would only pick up conduct that obstructs an
9 official proceeding in a different way.

10 So there's no duplication or
11 superfluity on our reading. Instead, Congress
12 was taking this universe and dividing it up into
13 the two separate offenses.

14 And I think that's actually a virtue
15 of our reading as compared to Petitioner's
16 because I have not heard him articulate anything
17 that would fall within (c)(1) that wouldn't also
18 come within (c)(2). So, on his reading, (c)(2)
19 really does just swallow (c)(1) whole.

20 JUSTICE THOMAS: Well, I mean, in the
21 way you're reading it, (c)(1) -- (c)(2) almost
22 exists in isolation, certainly not affected by
23 (c)(1).

24 GENERAL PRELOGAR: We don't deny at
25 all that there is a relationship between the two

1 provisions, Justice Thomas, but it's --

2 JUSTICE THOMAS: What is that
3 relationship?

4 GENERAL PRELOGAR: And the
5 relationship is the one Congress specified in
6 the text. It's what follows the word
7 "otherwise." That is the relevant degree of
8 similarity. What both (c)(1) and (c)(2) have in
9 common is that they -- they aim at conduct that
10 obstructs an official proceeding. (c)(1) does
11 so in one way, tampering with records and
12 documents; (c)(2) does so with respect to all
13 other conduct that in a different manner does
14 that.

15 And I think that this has to be the
16 road the Court goes down to look at what
17 Congress actually prescribed with respect to
18 similarity because, in contrast, if you take up
19 Petitioner's invitation to come up with some
20 atextual gloss from (c)(1) to port over into
21 (c)(2), I don't understand what the Court could
22 look at to guide its determination of exactly
23 what the relevant similarity would be.

24 CHIEF JUSTICE ROBERTS: General, I'm
25 sure you've had a chance to read our opinion

1 released Friday in the Bissonnette case. It was
2 unanimous. It was very short.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: But it
5 explained how to apply the doctrine of ejusdem
6 generis, and it -- what it said is you had
7 specific terms, a more general catchall, if you
8 will, term at the end, and it said that the
9 general phrase is controlled and defined by
10 reference to the terms that precede it.

11 The "otherwise" phrase is more
12 general, and the terms that precede it are
13 "alters, destroys, mutilates, or conceals a
14 record and document."

15 And applying the doctrine as was set
16 forth in that opinion, the specific terms
17 "alters, destroy, and mutilate" carry forward
18 into (2), and the terms "record, document, or
19 other object" carry -- carry forward into (2) as
20 well, and it seems to me that they, as I said,
21 sort of control and define the -- the more
22 general term.

23 GENERAL PRELOGAR: So, Mr. Chief
24 Justice, I think that the statute --

25 CHIEF JUSTICE ROBERTS: And I'm sorry.

1 Just to interrupt --

2 GENERAL PRELOGAR: Oh, yes.

3 CHIEF JUSTICE ROBERTS: -- so I could
4 put out exactly what -- and -- and the
5 "otherwise" means in other ways. It alters,
6 destroys, and mutilates record, document, or
7 other objects that impede the investigation and
8 otherwise, in other ways, accomplishes the same
9 result.

10 GENERAL PRELOGAR: So I think the
11 problem with that approach with respect to 1512
12 is that it doesn't look like the typical kind of
13 statutory phrase that consists of a parallel
14 list of nouns or a parallel list of verbs where
15 the Court has applied ejusdem generis or the
16 noscitur canon.

17 You know, these are separate
18 prohibitions that have their own complex,
19 non-parallel internal structure. And I think,
20 actually, the best evidence that it's hard to
21 figure out how you would divine a degree of
22 similarity between them just based on the word
23 "otherwise" is that there are multiple competing
24 interpretations at issue in this case. You
25 know, Justice Alito touched on them, and they're

1 reflected in the competing interpretations
2 between Judge Katsas on the D.C. Circuit and
3 Judge Nichols on the district court.

4 CHIEF JUSTICE ROBERTS: Competing
5 interpretations of what, which phrase?

6 GENERAL PRELOGAR: So -- and it
7 relates to exactly the -- the question you asked
8 me, which is that Judge Nichols thought that
9 (c)(1) should limit (c)(2), and he looked at it
10 and said, well, the relevant thing about (c)(1)
11 is it deals with records, documents, and other
12 objects, and so that means (c)(2) should be
13 limited only to other acts that impair physical
14 evidence.

15 Meanwhile, Judge Katsas looked at the
16 specific intent requirement in (c)(1), to take
17 action that impairs the availability or use of
18 the evidence, and he divined a broader gloss to
19 put on (c)(2) and said --

20 CHIEF JUSTICE ROBERTS: Well, but
21 that's simply saying --

22 GENERAL PRELOGAR: -- it should be
23 other impairment of all other evidence.

24 CHIEF JUSTICE ROBERTS: Well, they're
25 just applying the same doctrine to different

1 aspects of it. And I think you do that as -- as
2 well. What are the common elements? Alters,
3 destroy, and mutilates a record or document.
4 You have the first few, what you're doing, and
5 what you're doing it to.

6 And you -- and you apply both of those
7 in -- as it said in Bissonnette, controlling and
8 defining the term that follows so that it should
9 involve something that's capable of alteration,
10 destruction, and mutilation and with respect to
11 a record or a document. That -- that's how you
12 -- that's why --

13 GENERAL PRELOGAR: So I actually don't
14 even understand --

15 CHIEF JUSTICE ROBERTS: -- when you --
16 when you apply that doctrine, again, as we did
17 on Friday, it -- it responds to some of the
18 concerns that have been raised about how broad
19 (c)(2) is. You can't just tack it on and say
20 look at it as if it's standing alone because
21 it's not.

22 GENERAL PRELOGAR: So let me respond
23 to that in two ways. I do want to have a chance
24 to address any concerns about breadth. But the
25 more fundamental point, I think, is that I don't

1 even understand Petitioner to be suggesting that
2 you can mix and match the verbs and the nouns
3 from (c)(1) and (c)(2) in this way.

4 Judge Nichols had a more limited view
5 that -- that (c)(2) exclusively focuses on
6 physical objects. It wouldn't apply to things
7 like testimony because of the limitation that he
8 gleaned from (c)(1). Judge Katsas, I think,
9 maybe in line with your question, would
10 interpret it more broadly.

11 And the -- the basic point as a
12 textual matter is that there is nothing in the
13 text of (c)(2) itself to disclose what the
14 relevant similarity from (c)(1) ought to be.
15 Instead, we think the relevant similarity is
16 obstruction of an official proceeding because
17 that's the language Congress chose.

18 JUSTICE GORSUCH: General --

19 JUSTICE KAVANAUGH: The --

20 JUSTICE GORSUCH: -- if that's -- if
21 that's -- if that's the case, what work does
22 "otherwise" do on your theory? Because I think
23 I -- I might, as I'm hearing you, think that
24 "whoever corruptly obstructs, influences, or
25 impedes any official proceeding or attempts to

1 do so" stands alone. And the "otherwise" -- I'm
2 not hearing what work it does. Can you explain
3 to me what work it does on your view?

4 GENERAL PRELOGAR: Yes. So the work
5 that "otherwise" does is to set up the
6 relationship between (c)(1) and (c)(2) and make
7 clear that (c)(2) does not cover the conduct
8 that's encompassed by (c)(1).

9 Now I acknowledge that there would
10 have been --

11 JUSTICE GORSUCH: Beyond that --
12 beyond that, beyond saying, okay, (c)(1) does
13 some things and the whole rest of the universe
14 of obstructing, impeding, or -- or influencing
15 is conducted by (c)(2). Is that a fair summary
16 of your view?

17 GENERAL PRELOGAR: Yes, but there was
18 a good reason for Congress to do it this way.

19 JUSTICE GORSUCH: No, I understand. I
20 just --

21 GENERAL PRELOGAR: It traces to the
22 statutory history.

23 JUSTICE GORSUCH: Yeah, I -- I
24 understand that. I -- I -- I --

25 GENERAL PRELOGAR: And I would just

1 say that --

2 JUSTICE GORSUCH: If I might, so -- so
3 what -- what does that mean for the breadth of
4 this statute? Would a sit-in that disrupts a
5 trial or access to a federal courthouse qualify?
6 Would a heckler in today's audience qualify, or
7 at the state of the union address? Would
8 pulling a fire alarm before a vote qualify for
9 20 years in federal prison?

10 GENERAL PRELOGAR: There are multiple
11 elements of the statute that I think might not
12 be satisfied by those hypotheticals, and it
13 relates to the point I was going to make to the
14 Chief Justice about the breadth of this statute.

15 The -- the kind of built-in
16 limitations or the things that I think would
17 potentially suggest that many of those things
18 wouldn't be something the government could
19 charge or prove as 1512(c)(2) beyond a
20 reasonable doubt would include the fact that the
21 actus reus does require obstruction, which we
22 understand to be a meaningful interference. So
23 that means that if you have some minor
24 disruption or delay or some minimal outburst --

25 JUSTICE GORSUCH: Okay. So -- so --

1 GENERAL PRELOGAR: -- we don't think
2 it falls within the actus reus to begin with.

3 JUSTICE GORSUCH: -- my -- my
4 outbursts require the Court to -- to reconvene
5 after -- after the proceeding has been brought
6 back into line, or the -- the pulling of the
7 fire alarm, the vote has to be rescheduled, or
8 the protest outside of a courthouse makes it
9 inaccessible for a period of time.

10 Are those all federal felonies subject
11 to 20 years in prison?

12 GENERAL PRELOGAR: So, with some of
13 them, it would be necessary to show nexus. So,
14 with respect to the protest --

15 JUSTICE GORSUCH: Assume -- assume --

16 GENERAL PRELOGAR: -- outside the
17 courthouse --

18 JUSTICE GORSUCH: -- I can -- I think
19 -- I think I've shown --

20 GENERAL PRELOGAR: -- we'd have to
21 show that, yes, they were aiming at a
22 proceeding.

23 JUSTICE GORSUCH: Yeah, they were
24 trying to stop the proceeding.

25 GENERAL PRELOGAR: Yes. And then we'd

1 also have to be able to prove that they acted
2 corruptly, and this sets a stringent mens rea.
3 It's not even just the mere intent to obstruct.
4 We have to show that also, but we have to show
5 that they had corrupt intent in acting in that
6 way, and particularly --

7 JUSTICE GORSUCH: We went around that
8 tree yesterday.

9 GENERAL PRELOGAR: I -- I know. I --
10 I -- I heard the argument yesterday, but I guess
11 what I would say is, to the extent that your
12 hypotheticals are pressing on the idea of a
13 peaceful protest, even one that's quite
14 disruptive, it's not clear to me that the
15 government would be able to show that each --

16 JUSTICE GORSUCH: So a mostly peaceful
17 protest --

18 GENERAL PRELOGAR: -- of those
19 protestors had corrupt intent.

20 JUSTICE GORSUCH: -- that actually
21 obstructs and impedes an -- an official
22 proceeding for an indefinite period would not be
23 covered?

24 GENERAL PRELOGAR: Not necessarily.
25 We would just have to have the evidence of

1 intent, and that's a high bar we argue.

2 JUSTICE GORSUCH: Oh, no, they -- I --
3 I'm --

4 GENERAL PRELOGAR: Right.

5 JUSTICE GORSUCH: They intend to do
6 it, all right.

7 GENERAL PRELOGAR: Yes. If they
8 intend to obstruct and we're able to show that
9 they knew that was wrongful conduct with
10 consciousness of wrongdoing, then, yes, that's a
11 1512(c)(2) offense and then we would charge
12 that.

13 JUSTICE KAVANAUGH: What does
14 "corruptly" add in your view?

15 GENERAL PRELOGAR: So "corruptly" adds
16 the requirement that the defendant's conduct be
17 wrongful and committed with consciousness of
18 wrongdoing. And this traces to the Court's
19 decision in Arthur Andersen, where the Court
20 said this is a term with deep historical roots,
21 with a settled meaning, and that it connotes not
22 just knowledge of your actions, which is, you
23 know, the intent to obstruct in this case, but
24 further requires that it be done corruptly.

25 And just to give you a more concrete

1 example of how this has played out in the
2 January 6th prosecutions, I'd point to the jury
3 instruction in the Robertson case, which we
4 refer to and quote in part on page 44 of our
5 brief. There, the jury was instructed that in
6 order to show the defendant acted corruptly, the
7 jury had to -- to conclude that he had an
8 unlawful purpose or used unlawful means or both
9 and that he had consciousness of wrongdoing.

10 So I think that that is an
11 encapsulation of what the jury is asked to
12 decide on top of the mere intent to obstruct.

13 JUSTICE ALITO: General, let me give
14 you a -- a specific example which picks up but
15 provides a little bit more detail with respect
16 to one of the -- the examples that Justice
17 Gorsuch provided.

18 So we've had a number of protests in
19 the courtroom. Let's say that today, while
20 you're arguing or Mr. Green is arguing, five
21 people get up, one after the other, and they
22 shout either "Keep the January 6th
23 insurrectionists in jail" or "Free the
24 January 6th patriots." And as a result of this,
25 our police officers have to remove them forcibly

1 from the courtroom and let's say we have to --
2 it delays the proceeding for five minutes.

3 And I know that experienced advocates
4 like you and Mr. Green are not going to be
5 flustered by that, but, you know, in another
6 case, an advocate might lose his or her train of
7 thought and not provide the best argument.

8 So would that be a violation of
9 1512(c)(2)?

10 GENERAL PRELOGAR: I think it would be
11 difficult for the government to prove that.

12 JUSTICE ALITO: Why?

13 GENERAL PRELOGAR: At the outset, we
14 don't think that 1512(c)(2) picks up minimal, de
15 minimis, minor interferences. We think that the
16 term "obstruct" on its face connotes a
17 meaningful interference with a proceeding that
18 actually blocks --

19 JUSTICE ALITO: Well, it doesn't say
20 -- I'm sorry. (c)(2) does not refer just to
21 obstruct. It says "obstructs, influences, or
22 impedes." Impedes is something less than
23 obstructs.

24 GENERAL PRELOGAR: I think that this
25 is a verb phrase where iteration was obviously

1 afoot.

2 JUSTICE ALITO: Well, okay. But the
3 plain meaning --

4 GENERAL PRELOGAR: And "impedes" is
5 also thought of as --

6 JUSTICE ALITO: You're -- you're
7 preaching the plain meaning interpretation of
8 this provision. The -- the plain meaning of
9 "impede" in Webster's is "to interfere with or
10 get in the way of the progress of, to hold up."
11 In the OED, it is "to retard in progress or
12 action by putting obstacles in the way."

13 So it doesn't require obstruction. It
14 requires the causing of delay.

15 GENERAL PRELOGAR: And if this Court
16 --

17 JUSTICE ALITO: So, again, why
18 wouldn't that fall within -- now you can say,
19 well, we're not going to prosecute that. And,
20 indeed, for all the protests that have occurred
21 in this Court, the Justice Department has not
22 charged any serious offenses, and I don't think
23 any one of those protestors has been sentenced
24 to even one day in prison. But why isn't that a
25 violation of 512 -- of 1512(c)(2)?

1 GENERAL PRELOGAR: We read the actus
2 reus more narrowly. Now perhaps you could look
3 at some of the broader dictionary definitions
4 and adopt a broader understanding of the actus
5 reus. Still, there would be the backstop of
6 needing to prove corrupt intent. I think that's
7 a stringent mens rea, and in the concept of --

8 JUSTICE ALITO: Well, that's not a
9 corrupt intent? They -- they -- it's wrongful.
10 Do you think it's not wrongful to --

11 GENERAL PRELOGAR: I could imagine
12 defendants in that scenario suggesting that they
13 thought they had some protected free speech
14 right to protest. They might say that they
15 weren't conscious of the fact that they weren't
16 allowed to make that kind of brief protest in
17 the Court.

18 And I think it's in a fundamentally
19 different posture than if they had stormed into
20 this courtroom, overrun the Supreme Court
21 police, required the Justices and other
22 participants to plea -- flee for their safety,
23 and done so with clear evidence of intent to
24 obstruct.

25 JUSTICE ALITO: Yes indeed,

1 absolutely. What happened on January 6th was
2 very, very serious, and I'm not equating this
3 with that. But we need to find out what -- what
4 are the outer reaches of this statute under your
5 interpretation.

6 Let me give you another example.
7 Yesterday protestors blocked the Golden Gate
8 Bridge in San Francisco and disrupted traffic in
9 San Francisco. What if something similar to
10 that happened all around the Capitol so that
11 members -- all the bridges from Virginia were
12 blocked, and members from Virginia who needed to
13 appear at a hearing couldn't get there or were
14 delayed in getting there? Would that be a
15 violation of this provision?

16 GENERAL PRELOGAR: It sounds to me
17 like that wouldn't satisfy the proceeding
18 element, nor the nexus requirement --

19 JUSTICE ALITO: Why would it not --

20 GENERAL PRELOGAR: -- and nexus --

21 JUSTICE ALITO: -- why would it not
22 satisfy the proceeding? Let's say they want to
23 get to the Capitol to vote.

24 GENERAL PRELOGAR: Well, if we had
25 clear --

1 JUSTICE ALITO: They want to get to
2 the Capitol --

3 GENERAL PRELOGAR: -- if we had clear
4 evidence that the purpose of the protestors who
5 had set up the blockage somewhere, some distance
6 away from the Court was because they had a
7 specific proceeding in mind, maybe you have the
8 proceeding.

9 But still, the Court has required a
10 nexus, and that's been the requirement in cases
11 like Marinello, Aguilar, and Arthur Andersen,
12 where the Court has said it does real narrowing
13 work because you have to show that the natural
14 and probable effect of the action is to
15 obstruct. There has to be a relationship in
16 time, causation, and logic.

17 But, Justice Alito, the other thing I
18 would say to this set of concerns is that there
19 are other obstruction provisions, including in
20 1503, 1505, the tax obstruction statute, 7212,
21 that use this exact same formulation that the
22 Court has characterized as an omnibus clause and
23 never suggested could be subject to an evidence
24 gloss.

25 So I don't think that to the extent

1 you have concerns about those hypotheticals,
2 your -- your question about what would happen in
3 this courtroom could be covered by 1503.

4 JUSTICE JACKSON: But --

5 GENERAL PRELOGAR: And interpreting
6 this statute ordinarily --

7 JUSTICE ALITO: Well, let --

8 JUSTICE JACKSON: -- what's --

9 GENERAL PRELOGAR: -- isn't going to
10 cure that issue.

11 JUSTICE ALITO: Let me give you one --

12 CHIEF JUSTICE ROBERTS: Go ahead.

13 JUSTICE ALITO: One more example. An
14 attorney is sanctioned under Rule 11 of the
15 Federal Rules of Civil Procedure by filing
16 pleadings, written motions, or other papers for
17 the purpose of causing unnecessary delay or
18 needlessly increasing the cost of litigation.

19 And in a particular case, the judge
20 imposes Article -- Rule 11 sanctions and says,
21 this caused a lot of trouble. I can tell you
22 it -- it -- it cost at least five work days with
23 -- for me personally, all of this unnecessary
24 paper, and it delayed the progress of this
25 litigation, so I'm imposing Rule 11 sanctions.

1 Why doesn't that fall within your
2 interpretation of this provision?

3 GENERAL PRELOGAR: Congress created a
4 specific safe harbor in 1515(c). It's reprinted
5 at page 17A to the appendix of our brief that
6 specifies that advocacy or legal representation
7 that is conducted as part of a proceeding
8 shouldn't be understood as obstruction.

9 So I think Congress was itself trying
10 to draw some lines around participation in a
11 proceeding on the one hand versus external
12 forces that obstruct the proceeding on the other
13 hand.

14 JUSTICE ALITO: It falls within -- but
15 it falls --

16 JUSTICE JACKSON: But Congress --

17 JUSTICE ALITO: -- within the
18 language, doesn't it?

19 JUSTICE JACKSON: Well, can --

20 JUSTICE KAGAN: What kind of evidence
21 do you typically present in these January 6th
22 cases to prove the "corruptly" element?

23 GENERAL PRELOGAR: So the January 6th
24 prosecutions require us to show first that the
25 defendants had knowledge that Congress was

1 meeting in the joint session on that day. We
2 have to show that the defendant specifically
3 intended to disrupt the joint proceeding.

4 And then, with respect to using
5 unlawful means with consciousness of wrongdoing,
6 we have focused on things like the defendant's
7 threats of violence, willingness to use violence
8 here. We allege that Petitioner assaulted a
9 police officer. We have focused on things like
10 preparation for violence, bringing tactical gear
11 or paramilitary equipment to the Capitol.

12 And I want to emphasize, Justice
13 Kagan, that this is a stringent mens rea
14 requirement that has very much constrained the
15 U.S. Attorney's Office. We've charged over
16 1,350 defendants with crimes committed on
17 January 6th, but we've only had the -- only had
18 the evidence of intent to bring charges against
19 350 for a 1512(c)(2) violation.

20 JUSTICE KAGAN: So how do you make
21 that decision? How do you decide which
22 defendants get charged under this statute as
23 opposed to not?

24 GENERAL PRELOGAR: The dividing line
25 has hinged usually on the evidence we have of

1 intent. So we're looking for clear evidence
2 that the defendant knew about the proceedings
3 that were happening in the joint session in
4 Congress that day, clear knowledge of the
5 official proceeding.

6 We've looked for evidence that the
7 defendant specifically intended to -- to prevent
8 Congress from certifying the vote and so used
9 his actions to obstruct that proceeding.

10 And then also, as I mentioned, the --
11 the knowledge of wrongfulness or unlawful
12 conduct can come about with respect to
13 particular preparations that the defendants have
14 made.

15 And, you know, there are a number of
16 cases where, even though we thought we had the
17 evidence beyond a reasonable doubt, there have
18 been acquittals because there was, you know,
19 testimony that was credited that the defendant
20 thought the proceedings were over and wasn't
21 intending to obstruct, or one person thought and
22 said he thought that law enforcement was waving
23 him into the building.

24 So even in situations where we think
25 we have amassed the evidence, we still haven't

1 always been able to sustain these convictions,
2 and it's because of the stringent mens rea.

3 JUSTICE JACKSON: General, can I ask
4 you about your obstruction theory because you
5 said that you see 1512(c) as dividing the world
6 of obstruction and that the -- the nexus between
7 (1) and (2) is the official proceeding and the
8 obstruction of -- of an official proceeding.

9 I guess what I'm concerned about is
10 how you then account for the rest of 1512, where
11 "official proceeding" comes up over and over
12 again, and particular acts that one could view
13 as obstructing the official proceeding, like
14 killing or threatening or intimidating
15 witnesses, is covered so that if we read (c)(2)
16 to be obstructing an official proceeding, I
17 don't -- I don't understand what happens to the
18 rest of those provisions.

19 GENERAL PRELOGAR: So, to the extent
20 you're pressing on the idea that there's
21 surplusage, I -- I don't think that that's true.
22 There is certainly overlap or duplication.
23 That's true on both of the readings in this
24 case.

25 I think, in -- in part, it might even

1 be more true on Petitioner's reading because he
2 says that (c)(2) is likewise focused on all of
3 the evidence impairment ways to obstruct,
4 interfering with testimony, interfering with
5 documents and so forth, and so that very same
6 duplication is going to be present on his
7 reading.

8 But, with respect to superfluity, our
9 interpretation doesn't create any technical
10 superfluity, and that's because each of those
11 other provisions that you cited and -- and, in
12 fact, each of the other provisions of the
13 obstruction laws cover situations that
14 1512(c)(2) wouldn't cover.

15 There are three principal
16 distinctions. The first is that some of them
17 have less than a corruptly mens rea. So, for
18 many of the provisions, they can be violated in
19 ways that wouldn't require the government to
20 prove "corruptly," and it might mean that we
21 could charge particular applications of those
22 provisions under them and not under (c)(2).

23 The second thing is that some of the
24 provisions sweep more broadly than an official
25 proceeding. They apply in a wider range of

1 circumstances. So that would enable us to
2 charge in those situations where we can't
3 actually prove the official proceeding element.

4 And then, third and finally, some of
5 the provisions have a higher penalty
6 specifically because they target more culpable
7 conduct. And that's like 1512(a), the one you
8 referenced about killing a witness. There, the
9 government would charge under that provision
10 because it's subject to higher penalties than
11 (c)(2).

12 JUSTICE JACKSON: All right. Well,
13 let me --

14 CHIEF JUSTICE ROBERTS: General --

15 GENERAL PRELOGAR: So there's no
16 actual superfluity.

17 JUSTICE JACKSON: -- can I ask you,
18 would the -- would the government necessarily
19 lose in the sense that they would not be able to
20 bring charges against some of the people that
21 you have described with Justice Kagan if we
22 looked at (c)(2) as being more limited, perhaps
23 not all the way to evidence, but related to
24 conduct that prevents or obstructs an official
25 proceeding insofar as it is directed to

1 preventing access to information or documents or
2 records or things that the official proceeding
3 would use?

4 I -- I explored with Mr. Green, and --
5 and as did Justice Barrett, the idea that to the
6 extent that there were people who knew that the
7 votes were being counted that day and that's
8 done in a, you know, documentary way in our
9 system, their interfering by storming the
10 Capitol might qualify under even an evidence or
11 document interpretation of (c)(2).

12 Does the government -- what does the
13 government think about that?

14 GENERAL PRELOGAR: Yes, I think that
15 if the Court articulated the standard that way,
16 these would likely be viable charges. And as we
17 note in the last footnote of our brief, we --
18 we've preserved an argument that we could
19 satisfy even an evidence-related understanding
20 of (c)(2), in part because the very point of the
21 conduct, when we have the intent evidence, was
22 to prevent Congress from being able to count the
23 votes, from being able to actually certify the
24 results of the election.

25 Now we'd obviously need to evaluate

1 whether these charges can go forward based on
2 whatever this Court says, and I would very much
3 caution the Court away from any holding that
4 would require specific evidence by the
5 government of, you know, precise electoral
6 certificates or that kind of thing.

7 Here, the -- the point of it would be
8 that the -- those who came to the Capitol and
9 engaged in this criminal conduct to displace
10 Congress violently from -- from where it had to
11 be to count those votes acted with an intent to
12 impair Congress's ability to consider that
13 evidence.

14 JUSTICE SOTOMAYOR: General, the
15 district court and the dissent below had a
16 different variation on the statute and how to
17 read it. You were starting to explain that to
18 the Chief.

19 Could you do it if we accepted the
20 district court's view? I -- I presume that you
21 could do it if we accepted the dissent below,
22 correct?

23 GENERAL PRELOGAR: Yes. So I think --

24 JUSTICE SOTOMAYOR: Yeah. But your
25 whole response to Justice Ketanji -- to Justice

1 Jackson -- sorry -- to Justice Jackson is that
2 it assumes the dissent's view?

3 GENERAL PRELOGAR: I thought that
4 Justice Jackson was potentially proposing even a
5 broader view, including focusing on the
6 availability part and making clear that when the
7 whole point is to prevent the proceeding,
8 including the consideration of evidence in the
9 proceeding, from happening, that could qualify.

10 JUSTICE SOTOMAYOR: Okay.

11 GENERAL PRELOGAR: I think it becomes
12 potentially harder on the Judge Katsas view and
13 especially harder on the Judge Nichols view, and
14 that's precisely because Judge -- Judge Nichols
15 seemed to think that to prove obstruction, it
16 had to be limited to taking action with respect
17 to the documents themselves. And that would be
18 a difficult standard for us to satisfy.

19 JUSTICE SOTOMAYOR: You read our
20 discussion on "corruptly" yesterday. It's
21 clear. You endorsed the Robertson view.

22 Could you tell me what you feel about
23 the Walker view? Judge Walker being part of the
24 majority below. I -- I assume you know that,
25 but --

1 GENERAL PRELOGAR: Yes. So Judge
2 Walker articulated an idea that "corruptly" has
3 to turn exclusively on the government being able
4 to show that the defendant sought to secure an
5 unlawful advantage for himself or someone else.

6 We certainly agree that that's one way
7 for the government to prove corrupt intent.
8 It's a way that has traditionally been deployed
9 in the tax context because the very theory of
10 the case is that the defendant is violating the
11 tax laws or taking efforts to secure an unlawful
12 advantage under the tax laws.

13 But I think that it would be incorrect
14 for the Court to suggest that that's the
15 exclusive mechanism for the government to try to
16 prove "corruptly." You know, there are various
17 other ways where we might have evidence of, as
18 we think we do here, unlawful means, committed
19 with consciousness of wrongdoing, and there's no
20 basis in the common law or in how the term
21 "corruptly" has long been understood to limit
22 the government's ability to prove it only with
23 that one specific way that Judge Walker pointed
24 to.

25 JUSTICE SOTOMAYOR: The draw in this

1 case appears to be the fear that reading the
2 government's view of either yesterday's case or
3 today on its plain terms would make it so broad
4 that somehow that presents a problem. I think
5 the judges below struggled with that by saying
6 that gets addressed in the word "corruptly" and
7 in the nexus requirement, which is the point
8 you've made today.

9 But neither of those two issues were
10 resolved below because that wasn't the question
11 below, correct?

12 GENERAL PRELOGAR: That's right. The
13 only issue that the D.C. Circuit resolved was
14 the meaning of the actus reus.

15 JUSTICE SOTOMAYOR: And the only issue
16 between us is whether we read the words -- how
17 we read these words?

18 GENERAL PRELOGAR: That's right, but I
19 don't want to lose sight of the fact, as your
20 question touched on, that there are inherent
21 constraints built into the other elements of the
22 statute. The nexus constraint is a really
23 critical one. It is the -- the paradigmatic
24 constraint the Court has pointed to to ensure
25 that obstruction statutes don't sweep too

1 broadly and scoop up everyday conduct that might
2 be happening out in the world.

3 It has to have that tight connection,
4 the relationship in time, causation, or logic,
5 with the official proceeding. And, of course,
6 "corruptly," we think, sets a very high bar, as
7 evidenced by the fact as, as I said to Justice
8 Kagan, it's not like we can even prove it with
9 respect to everyone who was in the riot at the
10 Capitol on January 6th.

11 JUSTICE SOTOMAYOR: Thank you.

12 JUSTICE BARRETT: General, are you
13 putting a violence requirement as an overlay on
14 "obstruct, influence, impede"? And I'm -- I'm
15 thinking of some of your answers to Justice
16 Alito's hypotheticals. It seemed like you kept
17 emphasizing the aspect of violence that was
18 present on January 6th. So am -- am I
19 understanding you to say there has to be some
20 sort of violence or no?

21 GENERAL PRELOGAR: No, we don't think
22 that's a requirement under the statute. I think
23 it will clearly be easier for us to satisfy
24 things like the corruptly mens rea when we can
25 point to action here, like assaulting a police

1 officer, that is obviously wrongful, unlawful
2 conduct, and everyone knows that that's a crime
3 and you cannot do that.

4 What I was trying to say to Justice
5 Alito is, in situations where hypotheticals
6 press on the idea that people are engaging in
7 conduct that maybe they think is
8 constitutionally protected, they might be wrong
9 about that, there might not be a First Amendment
10 right that they think they have, but that can
11 demonstrate that they don't have the requisite
12 consciousness of wrongdoing. That would mean we
13 couldn't prove an obstruction charge.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 I'm not quite sure I understood an
17 answer you gave earlier about whether or not
18 you've previously used (c)(2) in -- in this type
19 of case. Have you done that before or not?

20 GENERAL PRELOGAR: We have charged
21 (c)(2) in situations that don't involve evidence
22 impairment, and the litigating position of the
23 Department has long been that, as its plain
24 language suggests, it covers myriad ways of
25 obstructing. I'm not aware of any other factual

1 circumstance or event out in the world where we
2 could have proved all of the elements of Section
3 1512(c)(2) beyond the cases where we've brought
4 those prosecutions. So --

5 CHIEF JUSTICE ROBERTS: Just so I
6 understand, the prosecutions are limited in what
7 way?

8 GENERAL PRELOGAR: They're limited to
9 a requirement that the specific people had in
10 mind an official proceeding. So that would take
11 out the category of hypotheticals --

12 CHIEF JUSTICE ROBERTS: I see. Right.

13 GENERAL PRELOGAR: -- where, you know,
14 maybe you're protesting a branch of government,
15 you're outside this Court, but you don't have
16 this specific argument in mind.

17 And then we would also need to show an
18 intent to obstruct the proceeding and the nexus
19 to the proceeding, and that can take care of,
20 you know, situations where maybe someone's --

21 CHIEF JUSTICE ROBERTS: And you --
22 you've done that --

23 GENERAL PRELOGAR: -- pulling a fire
24 alarm in a different building, but it's not --

25 CHIEF JUSTICE ROBERTS: Yeah, yeah.

1 Excuse me.

2 GENERAL PRELOGAR: -- even where the
3 proceeding happens.

4 CHIEF JUSTICE ROBERTS: In prior
5 cases, you have applied (c)(2) in a situation,
6 what, not involving specific documents?

7 GENERAL PRELOGAR: Correct. So things
8 like tipping off someone to the existence of a
9 grand jury investigation or the identity of an
10 undercover officer or creating a fake court
11 order that has nothing to do with the evidence
12 in the case but is just prompting the litigant
13 to dismiss a pending mandamus petition.

14 CHIEF JUSTICE ROBERTS: And -- and
15 your friend's point -- your friend points to an
16 Office of Legal Counsel opinion from 2019 that
17 -- I haven't looked at it yet, but I will --
18 that says it is consistent with Judge Katsas's
19 opinion below.

20 GENERAL PRELOGAR: So that -- that
21 advice that was offered to the Attorney General
22 and never adopted as a formal position of the
23 Department of Justice related to distinct issues
24 that arose out of the special counsel
25 investigation and distinct issues that involved

1 the Office of the Presidency.

2 I don't think that it would be right
3 to suggest that the memo took any firm stand,
4 although it did suggest that maybe 1512(c)(2)
5 should be understood more narrowly, but it
6 didn't -- it certainly didn't represent any
7 formal adoption of that position, and that would
8 have been inconsistent with how the government
9 has always litigated under (c)(2).

10 CHIEF JUSTICE ROBERTS: What
11 constitutes a formal acceptance of OLC opinions?

12 GENERAL PRELOGAR: I should probably
13 know the answer to that one as a matter --

14 CHIEF JUSTICE ROBERTS: Yeah, I should
15 too, but --

16 GENERAL PRELOGAR: -- of DOJ policy,
17 but what I can tell you is the reason I'm saying
18 that wasn't an official position is because it
19 specifically said there's no need to go down the
20 road of even deciding exactly what 1512(c)(2)
21 covers because, even assuming that it covers the
22 full range of obstructive conduct, the
23 allegations, according to the memo, didn't
24 satisfy the standard there. So it ultimately
25 just punted on the issue and said it's not

1 necessary to engage with that issue further.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 JUSTICE THOMAS: General, the -- you
5 said, as I understand it, that you have applied
6 (c)(2) in previous cases?

7 GENERAL PRELOGAR: That's right.
8 We've applied it in cases that do not fit the
9 evidence impairment model that Petitioner is
10 urging on the Court here. And it's not just
11 (c)(2), Justice Thomas, but it's the omnibus
12 clauses of 1503, 1505, 7212. You know, these
13 are statutes that use the exact same verb
14 phrase, and we --

15 JUSTICE THOMAS: Those are fine, but
16 (c)(2).

17 GENERAL PRELOGAR: Yes.

18 JUSTICE THOMAS: The -- I don't -- I'm
19 not clear as to whether or not -- the specific
20 instances in which you have used (c)(2) because
21 you seem to think that (c) -- or argue that
22 (c)(2) is a standalone provision almost.

23 GENERAL PRELOGAR: We think that it
24 covers the full range of obstructive conduct
25 that's not covered by (c)(1), of course, limited

1 by the requirement of an official proceeding.

2 JUSTICE THOMAS: So, if -- if you have
3 applied (c)(2), have there been previous, other
4 than the D.C. Circuit, previous courts of
5 appeals that have looked at this?

6 GENERAL PRELOGAR: Yes. And the
7 uniform consensus among the court of appeals has
8 been that (c)(2) is not limited by this kind of
9 evidence impairment gloss that Petitioner is
10 asking the Court to read into the statute.
11 There has been no court of appeals that's gone
12 the other way. We cite a string cite of them
13 that have recognized looking at the plain
14 language of this provision that it sweeps in the
15 myriad forms of obstructive conduct.

16 JUSTICE THOMAS: So much of your
17 argument seems to hinge on this being fairly
18 clear, the -- the -- your interpretation of
19 (c)(2).

20 GENERAL PRELOGAR: Yes, we certainly
21 think we have the best of the plain text.

22 JUSTICE THOMAS: Okay. If we think --
23 if -- if -- if I happen to think it's more
24 ambiguous, what would your argument be?

25 GENERAL PRELOGAR: So what I would say

1 is I think that if you look at the terms in the
2 statute themselves, that the plain language of
3 the statute supports our view, but it doesn't
4 end there. And I was -- I have mentioned
5 several times the other provisions in 1503,
6 1505, but we think that's actually really
7 relevant because Congress wasn't writing on a
8 blank slate when it enacted 1512(c)(2).

9 It's not like it just thought of for
10 the first time this verb phrase "obstructs,
11 influences, or impedes." That wasn't taken out
12 of the ether. That was a well-established term,
13 verb phrase, in obstruction law drawn from those
14 other statutes.

15 And as this Court has said many times,
16 when Congress takes a phrase like that, it
17 brings the old soil with it. And so Congress
18 would have clearly known that the courts, this
19 Court and lower courts, had interpreted the
20 omnibus clause in those other statutes to
21 encompass the full range of obstructive conduct.

22 That's also consistent with all
23 precedent, as I mentioned to you earlier, so I
24 think, when you put it all together, there's no
25 real ambiguity here. We -- we clearly have the

1 best reading.

2 And the only other thing, the icing on
3 the cake if I could --

4 JUSTICE THOMAS: Yeah.

5 GENERAL PRELOGAR: -- is that if,
6 actually, what Congress wanted to do was write a
7 statute that focused only on evidence
8 impairment, there was a really clear and obvious
9 way to do it. Congress could have just tacked
10 on a residual clause to (c)(1) that says "or
11 otherwise impairs evidence."

12 It would not have used this oblique
13 reference of "otherwise" and then used a term
14 that had a well-settled meaning in obstruction
15 law to sweep more broadly to try to convey that
16 type of limited scope. It would just be
17 nonsensical for Congress to draft that way
18 because it would be so readily misunderstood.
19 And, in fact, every lower court has understood
20 Congress to have legislated more broadly here.

21 JUSTICE THOMAS: But that's beginning
22 to sound more like a contextual argument, which
23 you seem to eschew in this case.

24 GENERAL PRELOGAR: Well, no, I think,
25 actually, that the statutory context and history

1 does bear weight here, and we think that the
2 roots of this language in those other
3 obstruction provisions help fortify or reinforce
4 how the Court has always understood the plain
5 language.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: You argue that there's
8 a -- an exception for conduct that has only a
9 minimal effect on official proceedings. Where
10 does that come from in the text?

11 GENERAL PRELOGAR: That comes from the
12 verb phrase "obstruct, influence, or impede,"
13 which we think, if you look at dictionary
14 definitions, conveys the type of action that
15 blocks, hinders, makes difficult, persistently
16 interferes with. You know, this is the kind of
17 -- the verbs themselves, we think, inherently
18 contain this limitation.

19 JUSTICE ALITO: There can't be a minor
20 impediment?

21 GENERAL PRELOGAR: I think as a
22 colloquial matter, yes, maybe, but, you know, we
23 think that if you look at what Congress was
24 trying to do as a whole, the lead term here is
25 "obstruct." These were various ways of trying

1 to capture the world of obstructive conduct, and
2 I think that that adequately conveys the idea
3 that some kind of very minimal, de minimis
4 interference doesn't qualify.

5 JUSTICE ALITO: Well, it didn't stop
6 with "obstruct." It added "impede."

7 But what is the meaning of -- how
8 would you define a -- a minimal interference? I
9 suppose a jury would have to be charged on that.
10 In order to prove that the person violated this
11 provision, you must find that the person
12 committed more than, caused, or intended to
13 cause more than a minimal interference.

14 How do you define it?

15 GENERAL PRELOGAR: So I think, you
16 know, to the extent that this would come up in
17 actual prosecutions -- and I'm not aware of
18 any -- but, if this came up, then I think that
19 it would be the defense theory, it's possible
20 that the Court could decide it as a matter of
21 law if, in fact, it was so minimal it doesn't
22 fit within the statutory terms themselves.

23 And I recognize that maybe there could
24 be gray areas about the nature of the
25 obstruction and whether it really satisfies the

1 actus reus. I think that is properly a subject
2 for the jury.

3 JUSTICE ALITO: All right. What about
4 the example I gave you about the five protestors
5 in the courtroom? Is that minimal?

6 GENERAL PRELOGAR: I think that sounds
7 minimal to me. I mean, it sounds to me like, if
8 it hasn't actually forced any substantial halt
9 to these proceedings, it seems like that
10 wouldn't pick up and track. But, you know, the
11 -- the same issue would arise under 1503, which
12 likewise refers to "obstruct, influence, or
13 impede."

14 JUSTICE ALITO: You haven't said
15 anything about the surplusage arguments. Let me
16 just ask you a question or two about that.

17 Suppose someone commits conduct that
18 falls squarely within 1512(d), the person
19 intentionally harasses another person and
20 therefore dissuades that person from attending
21 or testifying in an official proceeding. So
22 you've got a square -- you know, a clear
23 violation of 1512(d) punishable by no more than
24 three years in prison.

25 But, when Congress added 1512(c)(2),

1 which seems to cover exactly that conduct, it
2 said: Well, the punishment shouldn't be -- you
3 could punish that person for up to 20 years.

4 GENERAL PRELOGAR: There's a key
5 difference between 1512(d) and 1512(c) in that
6 (d) doesn't require the intent to obstruct. And
7 so the effect of the defendant's harassment
8 action is to prevent the testimony or the
9 production of the document.

10 But the government has not read that
11 statute to require an actual intent to obstruct,
12 which I think means there are certain factual
13 scenarios where the government might be able to
14 prove a 1512(d) offense without satisfying
15 (c)(2). But I do want to be responsive to the
16 broader concern that there's something anomalous
17 about the 20-year penalty here.

18 Let me say at the outset that no
19 matter which statute the -- the government
20 charges under, with respect to all of the
21 relevant obstruction statutes here, they would
22 be funneled through the same sentencing
23 guideline. So the charging decision wouldn't
24 make a difference with respect to the sentencing
25 range.

1 And the concern you have with the
2 hypothetical arises equally on Petitioner's
3 reading because so too everything that would be
4 covered in 1512(d) falls within his evidence
5 impairment limitation. So I don't think the
6 existence of a statutory max when there's no
7 mandatory minimum should drive intuitions about
8 how to interpret this provision.

9 JUSTICE ALITO: Well, I'm not sure
10 that's the correct interpretation of -- of
11 subsection (d).

12 How about 1512(b), which also has a
13 20-year penalty, but it seems to be completely
14 subsumed by (c)(2).

15 GENERAL PRELOGAR: I think there is a
16 lot of overlap between (b) and (c). I don't
17 deny that. Again, that would be true on either
18 reading because (b) is paradigmatic witness
19 tampering. So, even on Petitioner's
20 understanding of the statute, there would be
21 equal duplication there.

22 What I would say is there's no actual
23 superfluity because there are ways of violating
24 (b) that wouldn't fall within our understanding
25 of (c)(2), including acting in a misleading

1 manner towards someone, which wouldn't
2 necessarily satisfy a corrupt intent definition.

3 JUSTICE ALITO: Really? You think you
4 could knowingly threaten or corruptly
5 persuade -- corruptly mislead someone? I don't
6 understand that argument.

7 GENERAL PRELOGAR: So my recollection
8 is that there are multiple different means of
9 carrying out that offense. Of course, something
10 like threatening or corruptly persuading, that's
11 the kind of duplication I was referring to
12 earlier.

13 But another way you can violate (b) is
14 through intentionally misleading someone. That
15 wouldn't necessarily require corrupt intent.

16 JUSTICE ALITO: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE ALITO: Oh, sorry. One more.

20 CHIEF JUSTICE ROBERTS: Sorry.

21 JUSTICE ALITO: One more question. I
22 was struck by the -- the contrast between your
23 argument here that the Court should read in a
24 minimal exception with the argument that you
25 made earlier this term in Muldrow versus the

1 City of St. Louis, where the question was
2 whether an adverse employment action has to be
3 significant or not.

4 And you said no, it doesn't have to be
5 significant because, "The text likewise admits
6 of no distinction between discrimination that
7 results in a significant or insignificant
8 disadvantage."

9 So, in Muldrow, you told us no, don't
10 read in an atextual requirement of significance,
11 but, here, you seem to be arguing yes, you've
12 got to read in an atextual requirement of
13 something that's more than minimal.

14 GENERAL PRELOGAR: No, that is not our
15 argument here. We are grounding this in the
16 text. So we're not suggesting that there's a
17 basic de minimis principle that applies
18 throughout all the various legal statutes that
19 are out there, not anything like that.

20 Instead, we ground this in a
21 particular understanding of what it means to
22 obstruct and what that word conveys.

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: I know the Reich
2 case because I decided it. However, the tip
3 cases, are they in your briefs?

4 GENERAL PRELOGAR: We cite
5 Ahrensfield. That's the case where a subject of
6 a grand jury investigation was tipped off about
7 the existence of the investigation, but there
8 was no, you know, kind of material impact or --
9 or clear evidence of -- of impairment of the
10 evidence or availability of testimony or
11 physical documents.

12 And there are a number of cases in
13 that line, including -- I don't think we
14 specifically cited -- but it includes the
15 disclosing of the identity of an undercover
16 officer.

17 JUSTICE SOTOMAYOR: Where do I find
18 those?

19 GENERAL PRELOGAR: We would be happy
20 to supply additional citations if you're looking
21 for them. I believe that the D.C. Circuit
22 decision as well cited a range of (c)(2) cases
23 and made clear that they didn't cover evidence
24 impairment.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: Mr. Green referred a
3 few times to 1519 and basically said, well,
4 that's supposed to be the catchall provision,
5 the omnibus provision. You know, why are you
6 asking 1512 to do the same thing that 1519 is
7 supposed to do? So that's one question I have
8 for you.

9 And the other question I have is just
10 you've referred a number of times to other
11 omnibus provisions, 1503, 1505 -- what's the tax
12 one? Seventy?

13 GENERAL PRELOGAR: 7212. 26 U.S.C.
14 7212.

15 JUSTICE KAGAN: If -- if we go down
16 Mr. Green's road in terms of importing other
17 limits from other places in the statute, are any
18 of those likely to be challenged in the same
19 kind of way, or are they written sufficiently
20 differently so that we wouldn't have to worry
21 about that?

22 GENERAL PRELOGAR: So let me take the
23 questions in order.

24 With respect to Petitioner's reliance
25 on 1519 as the catchall here, I understood the

1 Court's decision in Yates to say precisely the
2 opposite. In fact, Yates drew a direct
3 comparison between 1519 on the one hand, which
4 it said was a more narrow obstruction provision
5 based on some of the contextual clues there, and
6 1512(c)(1) on the other hand, which has the
7 phrase "record, document, or other object," and
8 said, well, that's the broad obstruction
9 provision. That's the one that's intended to be
10 codified in this broader prohibition that's
11 aimed at official proceedings, and that (c)(1)
12 language is actually quite broader and would
13 scoop up the entire world of physical objects,
14 in contrast to the narrowing interpretation the
15 Court accepted in Yates.

16 So I don't think the idea that 1519
17 was the broad catchall can in any way be squared
18 with what that statute says or how this Court
19 interpreted it in Yates. And, instead, I think
20 that the -- the example to draw from Yates or
21 the lesson to learn from it is that this Court
22 recognized that Congress was plugging the
23 specific hole in the Enron scandal and it did so
24 with overlapping provisions, 1512(c)(1) and
25 1519, but it was 1512 that the Court pointed to

1 as the place where you would sensibly locate
2 this broader provision that aims at the full
3 range of obstructive acts to catch the known
4 unknowns.

5 With respect to the question -- I'm
6 sorry. Now I'm forgetting the second question.
7 Oh, about the other statutes and whether they
8 would be endangered. I would be concerned about
9 that. I'm sure defendants would try to make
10 arguments. The language, the verb phrase is
11 exactly the same or in different order
12 sometimes, but it's "obstructs, influences, or
13 impedes," and so the relevant verbs in the actus
14 reus would be similar. There are different
15 direct objects there. For example, in 1503,
16 it's the due administration of justice. In
17 1505, it's the administration of the power of
18 Congress's inquiry and investigation.

19 But it's not clear to me whether --
20 whether defendants might seek to try to now
21 artificially limit those -- those clauses beyond
22 their plain terms, even though these kinds of
23 provisions have been in the obstruction law, I
24 think it traces all the way back to 1830, and
25 they've never been understood to have that kind

1 of narrow limitation to evidence impairment or
2 anything else.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: I think the key
8 word in the -- is "otherwise." And trying to
9 figure out what that means under our established
10 principles of statutory interpretation, it would
11 seem to trigger ejusdem generis under the Begay
12 precedent. And you've used the phrase a few
13 times, "catchall provision," as does your brief.
14 And the Scalia-Garner book describes ejusdem
15 generis as how you interpret catchall
16 provisions. So does ejusdem generis apply here
17 or not?

18 GENERAL PRELOGAR: No, we don't think
19 it can sensibly apply here. So the Court has
20 said many times that "otherwise" is a natural
21 way for Congress to create a broad catchall
22 category. And I certainly don't dispute that
23 there can be situations where you have a
24 parallel list of nouns or a parallel list of
25 verbs where the Court might further think that

1 ejusdem generis principles apply.

2 But that's just not how 1512(c) is
3 structured. It has, as I mentioned, its own
4 complex internal structure. You know, you've
5 got the mens rea requirement that's unique to
6 (c)(1), and Congress did not transplant that
7 into (c)(2). That triggers the other canon that
8 when Congress uses disparate language in two
9 adjacent provisions, usually it means something
10 by that.

11 So I think that this just isn't the
12 kind of situation where the Court could sensibly
13 apply ejusdem generis.

14 And the other thing I would say is
15 that, you know, if the Court goes down the road
16 of trying to glean some kind of requirement from
17 (c)(1), the other reason the canon is
18 inapplicable here is that it's not evident on
19 its face what the common attribute would be, and
20 that --

21 JUSTICE KAVANAUGH: Well, that -- that
22 -- that's --

23 GENERAL PRELOGAR: -- relates to the
24 Nichols/Katsas dispute.

25 JUSTICE KAVANAUGH: As you know,

1 that's true in almost every ejusdem generis
2 case, and the -- and the treatise explains that
3 as well, which is it's hard sometimes to figure
4 out what the common link among the words in the
5 -- in the phrase is. So that's -- I don't think
6 that distinguishes -- that point I don't think
7 distinguishes this case from other ejusdem
8 generis cases. But you can respond to that.

9 GENERAL PRELOGAR: But I do think that
10 a plain speaker of English would recognize that
11 usually the common link or the connective tissue
12 is the language that follows the word
13 "otherwise." That's the congressionally
14 approved similarity. That's what (c)(1) and
15 (c)(2) have in common. They both relate to
16 obstructing an official proceeding.

17 And, you know, I recognize that
18 Petitioner has invoked Begay. Your question
19 touched on it. But the statute in Begay, which
20 we think is not the model of statutory
21 interpretation to follow here, the statute
22 itself was -- was relevantly different. It had
23 a list of nouns, and so it was the kind of
24 statute where potentially ejusdem generis could
25 apply.

1 JUSTICE KAVANAUGH: What about the
2 contextual points, a couple of them that I think
3 have come up, but I just want to make sure you
4 have a chance to respond, that it would be odd
5 to have such a broad provision tucked in and
6 connected by the word "otherwise."

7 GENERAL PRELOGAR: I don't think that
8 the placement in the statute is odd at all for a
9 couple of different reasons. One is the point I
10 was trying to make to Justice Kagan about this
11 Court's own recognition that 1512 is one of the
12 big obstruction statutes. This is the statute
13 that is aimed generally at official proceedings.
14 It's not more discrete. And there are other
15 provisions like 1519 and some of the ones that
16 come right before it that are more narrowly
17 confined and are intended to reflect discrete
18 circumstances. That doesn't describe 1512 at
19 all. So, when Congress was trying to broadly
20 prohibit obstruction of official proceedings,
21 1512 was exactly the right place to go.

22 Then Petitioner says, well, Congress
23 buried it in the middle of the -- of the
24 statute. But I -- I think it's actually quite
25 explicable when you look at how the other

1 provisions are structured. 1512(d), which I was
2 discussing with Justice Alito, has a much more
3 minimal penalty and doesn't require the intent
4 to obstruct. So it made sense to put 1512(c)
5 before it but also after 1512(a), which is the
6 most serious obstruction, like killing a
7 witness, punishable by 30 years or up to life.

8 JUSTICE KAVANAUGH: Last question.
9 There are six other counts in the indictment
10 here, which include civil disorder, physical
11 contact with the victim, assault, entering and
12 remaining in a restricted building, disorderly
13 and disruptive conduct, disorderly conduct in
14 the Capitol building. And why aren't those six
15 counts good enough just from the Justice
16 Department's perspective given that they don't
17 have any of the hurdles?

18 GENERAL PRELOGAR: Because those
19 counts don't fully reflect the culpability of
20 Petitioner's conduct on January 6th. Those
21 counts do not require that Petitioner have acted
22 corruptly to obstruct an official proceeding.
23 And, obviously, Petitioner committed other
24 crimes that we've charged and that we're seeking
25 to hold him accountable for.

1 But one of the distinct strands of
2 harm, one of the -- the -- the root problems
3 with Petitioner's conduct is that he knew about
4 that proceeding, he had said in advance of
5 January 6th that he was prepared to storm the
6 Capitol, prepared to use violence, he wanted to
7 intimidate Congress. He said they can't vote if
8 they can't breathe. And then he went to the
9 Capitol on January 6th with that intent in mind
10 and took action, including assaulting a law
11 enforcement officer.

12 That did impede the ability of the
13 officers to regain control of the Capitol and
14 let Congress finish its work in that session.
15 And I think it is entirely appropriate for the
16 government to seek to hold Petitioner
17 accountable for that conduct with that intent.

18 JUSTICE KAVANAUGH: And are the
19 sentences -- the sentence available is longer
20 for this count than for any of the other counts
21 or all of them together?

22 GENERAL PRELOGAR: The statutory
23 maximum is higher, but, after a recent decision
24 in the D.C. Circuit which held that a particular
25 sentencing enhancement doesn't apply, that was

1 the Brock case, I believe the sentencing range,
2 the guidelines range, for the assault count
3 would actually be a higher guidelines range.

4 And just to give you a sense for a
5 typical January 6th defendant, someone who
6 doesn't have a prior criminal history and who
7 committed violent conduct at the Capitol,
8 accepting responsibility, I think the average
9 guidelines range or the range that would yield
10 is 10 to 16 months of imprisonment. For someone
11 who didn't commit violence, it would be six to
12 12 months of imprisonment.

13 We've looked at the average sentences
14 here. There are about 50 that have gone to
15 sentencing -- conviction and sentencing on just
16 a 1512(c)(2) as the only felony. So I think
17 that's the best way to gauge it. This was when
18 the sentencing enhancement did apply, so the
19 ranges were higher. The average sentence among
20 the approximately 50 people is 26 months of
21 imprisonment, and the median has been 24 months.

22 So there's -- there's no reasonable
23 argument to be made that the statutory maximum
24 here is driving anything with respect to
25 sentencing.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: General, I want to
5 ask a clarifying question about the distinction
6 in the government's charging decisions between
7 (c)(1) and (c)(2). Actually, let me make that
8 stronger. Not charging decisions; like what you
9 could charge under the statute.

10 So, as you pointed out to Justice
11 Kavanaugh just now, you know, (c)(1) has this
12 additional mens rea requirement. But, you know,
13 there is overlap. If you read "otherwise
14 obstructs, influences," et cetera, broadly, it
15 would encompass -- you know, frankly, even on
16 the other reading, it would encompass things
17 like "alters, destroys, mutilates," et cetera.

18 But you wouldn't have to prove the
19 extra mens rea. I thought I heard you say, and
20 I just want to clarify, to Justice Jackson
21 earlier in the argument that the government
22 could not charge an alteration, mutilation,
23 concealing a document or physical object under
24 (c)(2). Am I --

25 GENERAL PRELOGAR: That's correct. We

1 usually charge the specific paragraph and so, if
2 the conduct fits within (c)(1), we would charge
3 it under (c)(1), and that would be the proper
4 place to locate the charge.

5 JUSTICE BARRETT: And is that
6 charging, is that prosecutorial discretion, or
7 do you think the statute would permit you to
8 charge it under (c)(2), thereby escaping the
9 specific intent requirement?

10 GENERAL PRELOGAR: Well, let me say
11 that there is a specific intent requirement
12 under (c)(2). So there's no distinction between
13 them in that regard.

14 JUSTICE BARRETT: But it's
15 different than the -- yeah.

16 GENERAL PRELOGAR: It's the intent to
17 obstruct the official proceeding. So you're
18 right that we wouldn't have to prove intent to,
19 you know, mutilate a document or something, but
20 we -- we would still have to show the intent to
21 obstruct the proceeding.

22 You know, this is pressing on honestly
23 what's a difficult question about means versus
24 elements, and I think the best look at -- the
25 best reading of the statute is that these are

1 different elements because they have these
2 different actus reus, they have the different
3 mens rea requirement, the mens rea requirement
4 that's specific to (c)(1). They each
5 independently prohibit attempts. But it's a --
6 it's a hard question ultimately.

7 And if we charged under the wrong
8 paragraph accidentally, I think we could usually
9 say that that was harmless error or else
10 recharge under the correct paragraph.

11 JUSTICE BARRETT: Okay. Let me ask
12 you a question that kind of gets at some of the
13 same points that Justice Alito's questions were
14 getting at.

15 So what if on January 6th the Capitol
16 itself had not been breached, the protest is
17 going on outside the Capitol, "Stop the Steal,
18 Stop the Steal," police are, you know, in
19 megaphones saying, "Disperse, disperse," they're
20 too close to the Capitol, their goal is to
21 impair, impede, stop the proceeding, stop the
22 counting of votes.

23 Does that violate the statute in your
24 view under this "impede" language?

25 GENERAL PRELOGAR: So I think -- I

1 think that one relevant question would be
2 whether we could satisfy the nexus requirement
3 and show that actually the natural and probable
4 effect of that conduct would be to have some
5 effect on what's going on in the Capitol, and in
6 the mine run --

7 JUSTICE BARRETT: Yes. Say you can.
8 You can. Just say you can.

9 GENERAL PRELOGAR: Yes. So if you're
10 assuming that the same thing happened where
11 Congress had to go into recess and couldn't hold
12 the joint session after all --

13 JUSTICE BARRETT: Yes.

14 GENERAL PRELOGAR: -- because there
15 was such a security risk? I think that that
16 probably would be chargeable if we had the
17 intent evidence.

18 Now, as I mentioned before, even with
19 respect to the riot that happened, which was a
20 much more serious breach, we don't have that
21 evidence of intent for everyone.

22 But, if we had, for example,
23 organizers where it was absolutely clear that
24 they were the ring leaders who had intended to
25 obstruct and undertook the action with that

1 specific intent and did so knowing it was
2 wrongful, and especially if they went -- you
3 know, I'm assuming you're saying they're in the
4 unauthorized area right outside the Capitol.

5 JUSTICE BARRETT: Yes.

6 GENERAL PRELOGAR: That is unlawful
7 conduct committed with consciousness of
8 wrongdoing if we have the proof of it.

9 JUSTICE BARRETT: Let's say that I am
10 having a hard time seeing -- accepting your
11 limiting construction of the verbs "obstruct,"
12 "influence," or "impedes," to have this extra
13 element.

14 Tell me why I shouldn't be concerned
15 about the breadth of the government's reading
16 just relying on "corruptly" and the nexus
17 requirement. Should I be concerned or -- or
18 could you just embrace it and say, yeah, there
19 might be some as-applied First Amendment
20 challenges or that sort of thing?

21 I mean, can I -- can I be comfortable
22 with the breadth if that's what I think?

23 GENERAL PRELOGAR: Yes, you can be.
24 You certainly don't have to agree with us that a
25 de minimis hindrance wouldn't qualify. If you

1 thought that this was unqualified and swept
2 broadly to any kind of hindrance whatsoever,
3 there would still be really important limits in
4 the statute. Obviously, you'd have to have the
5 official proceeding.

6 I think the nexus requirement could be
7 somewhat harder to establish in a circumstance
8 where you might not think that the natural and
9 probable effect of the conduct is going to be to
10 obstruct the proceeding.

11 You'd have to show that the defendant
12 knew that the natural and probable effect would
13 do that. You'd still have to show the corruptly
14 mens rea. And as you mentioned, even if you
15 could show all of that, if it were a
16 circumstance that really did infringe on First
17 Amendment rights, there would always be the
18 backstop of an as-applied constitutional
19 challenge.

20 JUSTICE BARRETT: Do you think it's
21 plausible that Congress would have written a
22 statute that broadly? I mean, let's say that I
23 think that Justice Alito's example of the
24 protestors in the courtroom, you know --

25 GENERAL PRELOGAR: Yeah.

1 JUSTICE BARRETT: -- it's -- it's --
2 let's say it's corrupt, and it -- and it impedes
3 the proceeding because we have to go off the
4 bench and things are stopped.

5 Let's say I think that that's covered
6 by the word "impedes" and let's -- there's the
7 nexus, then it's corruptly. Is it plausible to
8 think Congress wrote a statute that would sweep
9 that in?

10 GENERAL PRELOGAR: Yes. I think that
11 there are a lot of legitimate ways to -- to try
12 to voice your dissent if you disagree with what
13 the Court is doing, but one of the ways you
14 cannot do it is come into this courtroom, halt
15 the proceedings, force the Justices to leave the
16 bench, and do it with the intent and the corrupt
17 mens rea. I think that Congress could think
18 that is a severe intrusion on the functioning of
19 our government and want to protect against that.

20 And, again, the 20-year statutory max,
21 of course, is just a max. There's no mandatory
22 minimum. So Congress would have recognized that
23 sentencing courts would use their discretion to
24 tailor the actual sentence to the facts of the
25 that specific offense.

1 JUSTICE BARRETT: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: So you've emphasized
5 several times that Congress wasn't writing on a
6 blank slate in 1512(c). But do you dispute that
7 it was writing against the backdrop of a
8 real-world context?

9 It was in the wake of Enron, there was
10 document destruction, and, you know, there was
11 nothing as far as I can tell in the enactment
12 history as it was recorded that suggests that
13 Congress was thinking about obstruction more
14 generally. They had this particular problem and
15 it was destruction of information that would
16 have -- could have otherwise been used in an
17 official proceeding.

18 So can you just give us a little bit
19 more as to why we shouldn't think of this as
20 being a narrower set of circumstances to which
21 this text relates?

22 GENERAL PRELOGAR: Sure. And, you
23 know, I'd start by saying that we, of course,
24 acknowledge that the immediate impetus for
25 adding 1512 to the statute was to close the

1 Enron loophole. It was a -- a glaring loophole
2 in the coverage of the obstruction laws that it
3 wasn't a crime for you personally to destroy the
4 document and the government had to charge people
5 for instead persuading other people to destroy
6 documents.

7 So that was front of mind for
8 Congress, and Congress wanted to address it. It
9 did address it with (c)(1) and with 1519
10 separately.

11 But I think the best way to look at
12 what Congress was doing in light of that context
13 is to consider the fact that Congress went
14 further and enacted (c)(2). The broader lesson
15 Congress took away from Enron is that when you
16 set out in advance to try to enumerate all the
17 various ways that official proceedings can be
18 obstructed, things will slip through the cracks.
19 You can't always foresee it.

20 JUSTICE JACKSON: Let me just ask you
21 this. Was (c)(2) enacted at the same time as
22 (c)(1)?

23 GENERAL PRELOGAR: Yes, it was.

24 JUSTICE JACKSON: So why couldn't the
25 broadening relate to other ways in which one

1 might prevent a proceeding from accessing
2 information?

3 So one is documents, records, and
4 other objects. But the known/unknown, we don't
5 know, you know, could it be intangible, for
6 example, that (c)(2) is sort of getting at when
7 one gets at physical objects?

8 I guess I'm struggling with leaping
9 from what's happening in (1) in the context in
10 which it was actually enacted to all of
11 obstruction in any form.

12 GENERAL PRELOGAR: So I think the
13 reason why we wouldn't suggest that the context
14 could bear that narrower reading is because of
15 the actual language that Congress used. If it
16 was really just worried about other kinds of
17 record-based, proceeding-based, evidence-based
18 ways of obstructing, then there were easy
19 templates to add that in as a residual clause to
20 (c)(1). There was no need to have this entirely
21 separately numbered prohibition. And especially
22 there was no need to use the well-recognized
23 verb phrase "obstructs, influences, or impedes,"
24 which was clearly drawn from these other omnibus
25 clauses that sweep more broadly.

1 So I think -- you know, we think that
2 it's perfectly consistent with the statutory
3 history here to recognize that after Enron, what
4 Congress thought is we don't want novel ways
5 that we aren't thinking about of obstructing a
6 proceeding to not be a crime. We do want to
7 cover the waterfront of obstructive conduct with
8 the backstop of a corruptly mens rea, the
9 limitation to an official proceeding, and so
10 forth. And that's exactly what the words of the
11 statute say.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Rebuttal, Mr. Green.

16 REBUTTAL ARGUMENT OF JEFFREY T. GREEN

17 ON BEHALF OF THE PETITIONER

18 MR. GREEN: Justice Sotomayor, a
19 defendant who tips off a grand jury witness or
20 tips off the targets of a search warrant is
21 someone who is certainly attempting to impair
22 the integrity or the availability of evidence
23 and would be covered by (c)(2) just as somebody
24 who creates a document and then that document is
25 shown to counsel and counsel withdraws a

1 mandamus petition has, in fact, created
2 something that has caused an interference with
3 an official proceeding.

4 I heard my friend say twice in
5 response to your questions, Justice Gorsuch and
6 Justice Barrett, that (c)(2) would cover
7 peaceful protests as long as she could
8 demonstrate or the government could demonstrate
9 that there was the adequate mens rea and a
10 nexus.

11 As the nexus, let's look at what
12 1512(f) says. "For the purposes of this
13 section, an official proceeding need not be
14 pending or about to be instituted at the time of
15 the offense." There is no nexus. Congress has
16 written it out of the statute right there.

17 If the J6 defendants came on January
18 5th and did all the kinds of things that they
19 did, maybe one would hope, but if it had
20 happened that way, it would still be a (c)(2)
21 violation.

22 With respect to the corruptly mens
23 rea, Justice Kavanaugh, you asked a question
24 yesterday about -- about the fact that mens rea
25 as a break only works at trial because the

1 government's allegations are taken as true at
2 the motion to dismiss stage. And I -- I think
3 that's exactly right.

4 And that's why it's not a break at all
5 or, if it's any kind of break, it's a break on a
6 -- on -- on a go-kart. It's a wooden stick.
7 What it means is that people like Mr. Fischer
8 have to sit and go to trial and seek to -- to --
9 to win on a Rule 29 motion because the
10 government hasn't proved their mens rea.

11 The same is true of First -- First
12 Amendment defenses if peace -- peaceful
13 protestors are charged with (c)(2). My friend
14 referred to 1503 and 1505, other statutes
15 within, and a number of the Justices have
16 pointed out that there are much lower penalties
17 for significant crimes.

18 I would point the Court to 1752, which
19 is civil disobedience in a restricted space,
20 which is what Mr. Fischer is charged with.
21 That's a misdemeanor. If you cause substantial
22 bodily injury, that is a 10-year -- a 10-year
23 maximum penalty. The government wants to
24 unleash a 20-year maximum penalty on potential
25 peaceful protests.

1 That in and of itself is a bad idea
2 because it's going to chill protected
3 activities. People are going to worry about the
4 kinds of protests they engage in, even if
5 they're peaceful, because the government has
6 this weapon.

7 Finally, I think we haven't touched
8 very much on the breadth of influence because
9 that's one of the words that's used in (c)(1)
10 too, and that would all -- not only would it be
11 peaceful protests, it could be advocacy. It
12 could be all kinds of lobbying. Those things
13 would be covered as well, we've -- we've pointed
14 out in our briefs.

15 Then, finally, I would say to the
16 Court let's not forget that civil proceedings
17 are covered here -- we would submit civil
18 evidentiary proceedings -- but civil
19 proceedings. So the government is suggesting
20 that the Court should unleash a 20-year
21 obstruction -- maximum obstruction statute on
22 civil litigation in federal courts.

23 I submit that that is, and we would
24 submit that that is, a very serious tool to put
25 in the hands of prosecutors.

1 We urge that the Court reverse the
2 D.C. Circuit.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:51 a.m., the case
7 was submitted.)

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