Nos. 23-32, 23-94, and 23-5572

In the Supreme Court of the United States

EDWARD JACOB LANG, PETITIONER

v.

UNITED STATES OF AMERICA

GARRET MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH W. FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the indictments in these three cases permissibly included a charge of corruptly obstructing, influencing, or impeding an official proceeding, in violation of 18 U.S.C. 1512(c)(2), based on each petitioner's violent conduct in seeking to prevent the constitutionally and statutorily required congressional examination and ratification of presidential election results.

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OPINIONS BELOW

The opinion of the court of appeals (Lang Pet. App. 1-123) is reported at 64 F.4th 329. In *Miller*, the opinions of the district court (Miller Pet. App. 1a-19a, 20a-60a) are reported at 605 F. Supp. 3d 63 and 589 F. Supp. 3d 60, respectively. In *Fischer*, the opinion of the district court (Fischer Pet. App. 110a-119a) is not published in the

Federal Supplement but is available at 2022 WL 782413.[1] In *Lang*, the order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2023. A petition for rehearing was denied on May 23, 2023 (Lang Pet. App. 124). The petitions for writs of certiorari were filed on July 7, 2023, and July 28, 2023, in *Lang* and *Miller* respectively. In *Fischer*, on August 15, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 5, 2023, and the petition was filed on September 11, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitions for writs of certiorari arise from three criminal prosecutions in the United States District Court for the District of Columbia. In each case, a grand jury returned an indictment charging a single defendant with multiple offenses arising out of the defendant's violent conduct at the U.S. Capitol on January 6, 2021, including one count of corruptly obstructing, influencing, or impeding an official proceeding, in violation of 18 U.S.C. 1512(c)(2). The district court granted each defendant's pretrial motion to dismiss the Section 1512(c)(2) count. Miller Pet. App. 20a-60a; Fischer Pet. App. 110a-119a. The court of appeals consolidated the government's three interlocutory appeals and reversed. Lang Pet. App. 1-123.

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[1] The appendix to the petition for a writ of certiorari in *Fischer* is not consecutively paginated after page 109a. This brief cites the later pages as though they were paginated from that point onward.

1. On January 6, 2021, both Houses of Congress met in a joint session to certify the results of the 2020 presidential election, in accordance with the procedures specified by the Twelfth Amendment of the federal Constitution and the Electoral Count Act, ch. 90, 24 Stat. 373 (3 U.S.C. 1 *et seq.* (2018)).[2] Lang Pet. App. 1. As Congress was undertaking its constitutional and statutory obligations with respect to the certification process, "thousands of supporters of the losing candidate, Donald J. Trump, converged on the United States Capitol to disrupt the proceedings." *Ibid.*

"The mob soon turned violent," as "rioters broke through the protective lines of the Capitol Police, assaulted officers, and shattered windows." Miller Pet. App. 23a; see Staff of Senate Comm. on Homeland Security and Gov't Affairs et al., *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, at 1, 24-26 (2021) (Senate Staff Report). The "chaos wrought by the mob forced members of Congress" and then-Vice President Michael Pence, presiding at the joint session in his role as President of the Senate, to "stop the certification and flee for safety." Lang Pet. App. 2.

In the House chamber where the joint session of Congress had been occurring, police officers "barricaded the door with furniture and drew their weapons to hold off rioters" while Members of Congress and their staff were evacuated to safety. Senate Staff Report 26. Congress was unable to resume the certification proceeding for nearly six hours, as police officers, federal agents, and members of the National Guard worked

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[2] Congress amended the Act in 2022, after the events at issue here. See Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, Div. P, 136 Stat. 5233.

to reestablish control of the Capitol and clear out the "hundreds of people" who had disrupted the joint session. Gov't C.A. App. 226; see *id.* at 190-206.

"The events of January 6, 2021 marked the most significant assault on the Capitol since the War of 1812." *Trump* v. *Thompson*, 20 F.4th 10, 18-19 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 1350 (2022). "The rampage left multiple people dead," *id.* at 15, and injured approximately 140 law enforcement officers—including one who died on January 7 after being sprayed by rioters with bear spray, see Senate Staff Report 29. In the aftermath of the riot, "workers labored to sweep up broken glass, wipe away blood, and clean feces off the walls." *Thompson*, 20 F.4th at 19.

2. Petitioners were each charged in separate federal indictments in the District of Columbia with multiple offenses arising from their participation in the January 6 intrusion on the U.S. Capitol, including one count each of corruptly obstructing, influencing, or impeding an official proceeding, in violation of 18 U.S.C. 1512(c)(2). Section 1512(c) provides:

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

18 U.S.C. 1512(c). As used in Section 1512, the term "official proceeding" includes "a proceeding before the Congress." 18 U.S.C. 1515(a)(1)(B).

The relevant charging language in each indictment was identical. See Lang Pet. App. 6. For example, the grand jury's superseding indictment against petitioner Edward Jacob Lang charged that "[o]n or about January 6, 2021, within the District of Columbia and elsewhere, [he] attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18." Gov't C.A. App. 55 (Count 9); see *id.* at 85-86, 444 (similar language in the operative indictments in *Miller* and *Fischer*).

In addition to the Section 1512(c)(2) count, Lang was also charged with four counts of assaulting a federal officer, in violation of 18 U.S.C. 111(a); three counts of assaulting a federal officer using a dangerous weapon, in violation of 18 U.S.C. 111(a) and (b); one count of civil disorder, in violation of 18 U.S.C. 231(a)(3); one count of disorderly conduct in a restricted area with a dangerous weapon, in violation of 18 U.S.C. 1752(a)(2) and (b); one count of engaging in physical violence in a restricted area with a dangerous weapon, in violation of 18 U.S.C. 1752(a)(4) and (b); one count of disorderly conduct in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(D); and one count of physical violence in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(F). Gov't C.A. App. 51-57.

In a separate indictment, petitioner Joseph Fischer was charged with one Section 1512(c)(2) count and one count each of obstructing or interfering with a law enforcement officer during the commission of a civil disorder, in violation of 18 U.S.C. 231(a)(3); assaulting a federal officer, in violation of 18 U.S.C. 111(a); entering or

remaining in a restricted area, in violation of 18 U.S.C. 1752(a)(1); engaging in disorderly conduct in a restricted area, in violation of 18 U.S.C. 1752(a)(2); engaging in disorderly conduct in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(D); and parading, demonstrating, or picketing in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(G). Gov't C.A. App. 443-447.

In a third indictment, petitioner Garret Miller was charged with one Section 1512(c)(2) count and two counts of obstructing or interfering with a law enforcement officer during the commission of a civil disorder, in violation of 18 U.S.C. 231(a)(3); one count of assaulting a federal officer, in violation of 18 U.S.C. 111(a); two counts of transmitting a threat in interstate commerce, in violation of 18 U.S.C. 875(c); one count of entering or remaining in a restricted area, in violation of 18 U.S.C. 1752(a)(1); one count of disorderly conduct in a restricted area, in violation of 18 U.S.C. 1752(a)(2); one count of impairing ingress or egress in a restricted area, in violation of 18 U.S.C. 1752(a)(3); one count of disorderly conduct in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(D); one count of impeding passage in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(E); and one count of parading, demonstrating, or picketing in the Capitol Building, in violation of 40 U.S.C. 5104(e)(2)(G). Gov't C.A. App. 84-89.

3. The district court granted Miller's pretrial motion to dismiss the Section 1512(c)(2) count. Miller Pet. App. 20a-60a. Although the court agreed with the government that the joint session of Congress on January 6 was an "official proceeding," *id.* at 31a, the court took the view that the conduct alleged in the indictment did not "fit within the scope" of Section 1512(c)(2), *id.* at 22a. The court viewed that provision to be implicitly

limited by the language of Section 1512(c)(1), which makes it a crime to corruptly "alter[], destroy[], mutilate[], or conceal[] a record, document, or other object * * * with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. 1512(c)(1). In the court's view, Section 1512(c)(2) applies only if a defendant took "some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." Miller Pet. App. 59a. The court acknowledged that alternative readings of Section 1512(c)(2) are "possible," *id.* at 45a, but it viewed its document-focused reading as "present[ing] the fewest interpretive problems," *ibid.*, and as the most consistent with the statutory context and history, see *id.* at 46a-58a.

Thus, although Miller's indictment charged him with corruptly obstructing an official proceeding by participating in the events at the Capitol on January 6 that disrupted and delayed the joint session, the district court dismissed the Section 1512(c)(2) count on the ground that it did not allege that Miller personally "took some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence Congress's certification of the electoral vote." Miller Pet. App. 59a. The government moved for reconsideration, contending both that the court's construction of Section 1512(c)(2) was incorrect and that, in any event, dismissal of the Section 1512(c)(2) count was unwarranted because the indictment gave the defendant sufficient notice of his violation even under that document-focused construction. *Id.* at 2a. The court denied the motion, adhering to its view that the indictment was insufficient because "nothing in [the indictment] informs Miller of what actions he is alleged to have taken with

respect to some document, record, or other object." *Id.* at 15a; see *id.* at 1a-19a.

The district court later incorporated its reasoning to similarly grant pretrial motions to dismiss the Section 1512(c)(2) counts against Fischer and Lang. Fischer Pet. App. 110a-119a; Gov't C.A. App. 12 (minute order in *Lang*).

4. The court of appeals consolidated the government's interlocutory appeals, reversed the orders of dismissal, and remanded for further proceedings. Lang Pet. App. 1-123. The court determined that Section 1512(c)(2) "applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1)," and that the district court had erred in construing Section 1512(c)(2) to reach only actions taken with respect to documents, records, or other objects. *Id.* at 11.

a. The court of appeals began by "examining the text of § 1512(c)," which it found to be "unambiguous." Lang Pet. App. 11. It observed that the "commonplace, dictionary meaning" of "'otherwise'" is "'in a different manner.'" *Id.* at 11-12 (citation omitted). And it explained that applying that definition of "otherwise" is consistent with the text and structure of surrounding provisions, which likewise include specific prohibitions and "'catchall'" clauses designed to ensure that obstructive conduct is broadly prohibited. *Id.* at 13 (citation omitted); see *id.* at 12-14. The court further noted that the word "otherwise" is a "natural" way to introduce a catchall provision because that term conveys that the conduct prohibited by the catchall provision "'reaches beyond the specific examples in the preceding sections.'" *Id.* at 14 (brackets and citation omitted).

The court of appeals also observed that the "vast majority of courts interpreting the statute," including every circuit to have considered the issue, has applied Section 1512(c)(2) "to all forms of obstructive conduct that are not covered by subsection (c)(1)." Lang Pet. App. 15. The court rejected petitioner's effort to characterize decisions in other circuits as limited to "evidence impairment." *Id.* at 16 (citation omitted); see *id.* at 15-16 (citing *United States* v. *Reich*, 479 F.3d 179, 185-187 (2d Cir.) (Sotomayor, J.), cert. denied, 552 U.S. 819 (2007)). And the court noted that "no fewer than fourteen" other district judges had rejected analogous pretrial challenges to Section 1512(c)(2) charges in "prosecution[s] of defendants who allegedly participated in the Capitol riot." *Id.* at 17; see *id.* at 17-18 & n.3 (collecting cases).

The court of appeals further explained that reading a document-nexus element into Section 1512(c)(2) was "implausible," including because other provisions in the statutory scheme demonstrate that Congress is more than capable of limiting the reach of an obstruction statute to "document-related misconduct when it wishes to do so." Lang Pet. App. 30; see *id.* at 30-31 (discussing 18 U.S.C. 1505, 1519). The court also observed that a "cramped, document-focused" interpretation of Section 1512(c)(2) would be "dubious" given the "comprehensive" scope of document-related obstruction already covered by Section 1512(c)(1), making it "difficult to envision why a catch-all aimed at even more document-related acts would be necessary as a backstop." *Id.* at 31.

The court of appeals found the district court's invocation of *Begay* v. *United States*, 553 U.S. 137 (2008), in which this Court had interpreted a statutory definition with "a very different structure" than the prohibition at

issue here, to be misplaced. Lang Pet. App. 32; see *id.* at 32-33. The court of appeals also observed that "the *ejusdem generis* and *noscitur a sociis* canons" failed to supply a sound basis for "reject[ing] the natural reading of § 1512(c)(2)." *Id.* at 33; see *id.* at 33-35. And the court noted that, while it "need not consider the legislative history," it had nonetheless reviewed the statute's history and found "nothing * * * inconsistent with" its interpretation. *Id.* at 35; see *id.* at 35-39.

The court of appeals then explained that petitioners' arguments about "surplusage" did not support their construction of the statute. Lang Pet. App. 39. Petitioners contended that "reading subsection (c)(2) broadly renders other, more specific prohibitions, like those in subsection (c)(1), unnecessary." *Ibid.* But the court observed that "'substantial' overlap between provisions 'is not uncommon in criminal statutes,'" *id.* at 40 (quoting *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014)), and that such overlap would also occur under petitioners' approach, see *id.* at 40-41. The court also observed that any overlap is "easily explained by the fact that Congress drafted and enacted" Section 1512(c) "after the rest of § 1512," at which point avoiding any overlap would have required completely rewriting the statute. *Id.* at 41.

b. In a portion of the lead opinion that Judge Walker declined to join, Judge Pan addressed concerns about the potential breadth of the actus reus element by emphasizing that the mens rea element—"corruptly"—imposed an "important limitation[]" on the statute's scope. Lang Pet. App. 19; see *id.* at 19-26. Judge Pan noted that the meaning of "corruptly" was "not the focus of" these appeals and that the district court had declined to construe the term, and she found it

unnecessary in this case to settle on any "particular definition" herself, because "the allegations against [petitioners] appear to be sufficient to meet any proposed definition." *Id.* at 19-20. In particular, Judge Pan observed that under the leading potential formulations, "'corrupt' intent exists at least when an obstructive action is independently unlawful," and petitioners are all charged with "assaulting law enforcement officers while participating in the Capitol riot." *Id.* at 21.

Judge Walker wrote separately to endorse a specific construction of the "corruptly" mens rea element as requiring proof that the defendant acted "with an intent to procure an unlawful benefit either for himself or for some other person." Lang Pet. App. 47 (citation omitted); see *id.* at 46-72. Judge Walker stated that his "vote to uphold the indictments depend[ed]" on that interpretation of the term "corruptly," *id.* at 48 n.1, which both other members of the panel declined to endorse, see *id.* at 22-23 (opinion of Pan, J.); *id.* at 113-115 (Katsas, J., dissenting).

c. Judge Katsas dissented. Lang Pet. App. 72-118. On his view, Section 1512(c)(2) would encompass "only acts that impair the integrity or availability of evidence." *Id.* at 103. Judge Katsas did not endorse any particular definition of the statute's "corruptly" mens rea element. See *id.* at 114.

5. Petitioners sought rehearing en banc, which the court of appeals denied without any noted dissent. Lang Pet. App. 124. The court of appeals did, however, grant petitioners' motions to stay the issuance of its mandate pending the disposition of these petitions. *Id.* at 125-126. Meanwhile, during the pendency of the appellate proceedings, the government dismissed one of the interstate-threat counts against Miller, and he

pleaded guilty to the remaining charges (which did not include the then-dismissed Section 1512(c)(2) charge). 21-cr-119 Judgment 1; see 21-cr-119 D. Ct. Doc. 122, at 1 (Dec. 3, 2022). The district court sentenced Miller to 38 months of imprisonment, to be followed by three years of supervised release, for those offenses. 21-cr-119 Judgment 1-3.

ARGUMENT

Petitioners renew their contention (Lang Pet. 9-14; Miller Pet. 20-24; Fischer Pet. 12-18) that the obstruction charges against them should be dismissed before trial, on the theory that their violent conduct in disrupting a joint session of Congress convened to certify the results of the 2020 presidential election did not violate 18 U.S.C. 1512(c)(2). That contention does not warrant further review, particularly given the interlocutory posture of these cases. The decision below is correct and does not conflict with any decision of this Court. To the extent that petitioners seek review (*e.g.*, Lang Pet. 14-22) of any question concerning the mens rea element for Section 1512(c), any such question is not properly presented here. Neither of the lower courts squarely addressed that element, and it would not provide a basis for sustaining the pretrial dismissal of the obstruction counts. The petitions for writs of certiorari should be denied.

1. As a threshold matter, any review by this Court is unwarranted at this time because these cases are in an interlocutory posture. The district court granted petitioners' pretrial motions to dismiss a single Section 1512(c)(2) count against each of them, the government took interlocutory appeals, and the court of appeals reversed the orders of dismissal and "remand[ed] for further proceedings consistent with [its] opinion." Lang

Pet. App. 45; see *id.* at 2, 7-8. The government is prepared to proceed to trial and to prove beyond a reasonable doubt that petitioners corruptly obstructed, influenced, or impeded the joint session on January 6, or attempted to do so, in violation of Section 1512(c)(2). Those proceedings should be allowed to occur before any further review.

The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to district court "is not yet ripe for review by this Court"); see also, *e.g.*, *Abbott* v. *Veasey*, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J., respecting the denial of certiorari) (noting the "interlocutory posture" as a reason to deny review, and stating that "[t]he issues will be better suited for certiorari" when definitively resolved in final orders); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) (similar). In criminal cases in particular, this Court routinely denies petitions seeking interlocutory review of issues that may be raised after a final judgment, if the defendant is ultimately convicted. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 & n.72 (10th ed. 2013).

The core question that petitioners seek to present—whether their conduct falls within the scope of Section 1512(c)(2)—would be particularly ill-suited for further review because the parties disagree about the conduct at issue. For example, Lang suggests that his prosecution implicates the application of Section 1512(c)(2) to

individuals who did "no more than speak[] out at a protest that evolved into a dynamic conflict." Lang Pet. 3. But the indictment alleges that he "assaulted six Metropolitan Police Department * * * officers, caused bodily injury to one of them, and engaged in * * * physical violence with a bat and shield in a restricted area of the Capitol." Lang Pet. App. 4; see Gov't C.A. App. 52-57.

The government is accordingly prepared to prove at trial that Lang "pushed, kicked, and punched officers" while inside the Capitol for nearly two hours. Gov't C.A. Br. 9. The government's evidence will include an interview of Lang the day after the attack, in which he bragged about fighting officers "face to face" while wearing a gas mask; said that "[i]t was war" and "was no protest"; and claimed to have been on "a mission to have the Capitol building" and to "stop this presidential election from being stolen." *Id.* at 10 (citation omitted). The government is likewise prepared to prove that Miller and Fischer actively took part in a violent occupation of the Capitol, disrupting the joint session of Congress, and that each made inculpatory statements before and after the riot. See *id.* at 9-10; see, *e.g.*, 21-cr-119 Judgment 1 (Miller guilty plea to violent acts).

In dismissing the Section 1512(c)(2) counts before trial, the district court concluded that the indictments failed to give petitioners sufficient notice of the charges against them. Miller Pet. App. 13a-18a. But petitioners have largely abandoned any theory about lack of pretrial notice. Cf. Lang Pet. 14-22. At bottom, their contention is that Section 1512(c)(2) does not prohibit what they did on January 6, and that contention is, at best, premature. If petitioners' scope-of-the-statute question remains live after further proceedings on remand, petitioners could raise that question, along with any other

issues, in a single petition following the entry of final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

Petitioners do not identify any analogous circumstances in which this Court has granted interlocutory review. Instead, they invoke decisions arising from final judgment after a trial. *E.g.*, *Dubin* v. *United States*, 559 U.S. 110, 115 (2023); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1653 (2021); *Marinello* v. *United States*, 138 S. Ct. 1101, 1105 (2018); *McDonnell* v. *United States*, 579 U.S. 550, 564-566 (2016); *Yates* v. *United States*, 574 U.S. 528, 534-535 (2015) (plurality opinion); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 702 (2005); *United States* v. *Aguilar*, 515 U.S. 593, 596-597 (1995). Any review of the question presented here should likewise await further proceedings, which will provide additional legal and factual development and which could ultimately be resolved in petitioners' favor, mooting their current claims.

2. In any event, the decision below is correct, does not conflict with any decision of this Court or another court of appeals, and does not otherwise warrant further review.

a. As the court of appeals recognized, the statutory text, structure, context, and history all refute petitioners' "cramped, document-focused interpretation" of Section 1512(c)(2). Lang Pet. App. 31. Section 1512(c) contains two separately enumerated paragraphs defining different crimes. Paragraph (1) states that a person who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding," commits a federal crime. 18 U.S.C. 1512(c)(1). Paragraph (2), in turn, states that

a person who corruptly "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so," also commits a federal crime. 18 U.S.C. 1512(c)(2). The "commonplace, dictionary meaning of the word 'otherwise'" is "'in a different manner.'" Lang Pet. App. 11-12 (citation omitted); see, *e.g.*, *The American Heritage Dictionary of the English Language* 1246 (4th ed. 2000) ("[i]n another way; differently"); *Webster's Third New International Dictionary* 1598 (2002) ("in a different way or manner"). Accordingly, giving the statute its "natural" reading, Section 1512(c)(2) prohibits corruptly obstructing an official proceeding in a different way or manner than the acts of document alteration, destruction, and concealment targeted in Section 1512(c)(1). Lang Pet. App. 12.

That understanding of the relationship between the two provisions is confirmed by the differing language that Congress used in each. Section 1512(c)(1) comprises two paired lists: a set of verbs ("alters, destroys, mutilates, or conceals") and objects ("a record, document, or other object") that in any combination connote obstructive acts centered on written records and other tangible evidence. 18 U.S.C. 1512(c)(1). By its plain terms, Section 1512(c)(2) is not so limited. Section 1512(c)(2) encompasses conduct ("obstructs, influences, or impedes") directed at the "official proceeding" itself, rather than at specific records or evidence that might be considered at the proceeding. 18 U.S.C. 1512(c)(2). As this Court has explained, the words "obstruct" and "impede" naturally "refer to anything that 'blocks,' 'makes difficult,' or 'hinders.'" *Marinello*, 138 S. Ct. at 1106 (brackets and citations omitted).

It is therefore natural to say that a defendant obstructs an official proceeding by physically blocking it

from occurring—as happened here when petitioners and others violently occupied the Capitol for several hours and thereby prevented the joint session of Congress from doing its work. Like similar language in other obstruction statutes, Section 1512(c)(2) "operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific offense like document destruction, which is listed in (c)(1)." *United States* v. *Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (citation omitted); see *Aguilar*, 515 U.S. at 599 (describing the "Omnibus Clause" in 18 U.S.C. 1503, which uses the same verbs as Section 1512(c)(2), as a "catchall provision"); cf. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 860 (2009) (explaining that a "generally phrased residual clause * * * serves as a catchall for matters not specifically contemplated" elsewhere); *United States* v. *Vastardis*, 19 F.4th 573, 587 (3d Cir. 2021) (interpreting similar language in 18 U.S.C. 1505 as not limited to document-focused conduct).

As the court of appeals recognized (Lang Pet. App. 35), that natural understanding of Section 1512(c)(2) is not only apparent from the statute's text and structure, but is also consistent with the "statute's development and history," which do not support an unstated limitation of Section 1512(c)(2) to evidence impairment. Congress enacted Section 1512(c) in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, following "the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." Lang Pet. App. 35-36 (citation omitted). Although the particular "gap in the U.S. Code" implicated by that prosecution involved documentary evidence, *id.* at 36, it more broadly highlighted

the need to ensure that the criminal code covered the myriad and impossible-to-anticipate ways in which an official proceeding might be obstructed.

The provision of Sarbanes-Oxley enacting Section 1512(c) was accordingly entitled "Tampering with a record *or otherwise* impeding an official proceeding," § 1102, 116 Stat. 807 (emphasis added; capitalization altered), thus reflecting Congress's desire to prohibit both document-focused misconduct and other means or ways of impeding an official proceeding. Cf. *Yates*, 574 U.S. at 540 (plurality opinion). The relevant language was added to "in a floor amendment late in the legislative process," Lang Pet. App. 37, and thus was discussed only in floor statements rather than committee reports. The court of appeals explained that, "[t]o the extent that such statements are useful here, they suggest that § 1512(c) was intended to cover more than just document-related or evidence-impairment crimes." *Id.* at 38; see, *e.g.*, 148 Cong. Rec. 12,517 (2002) (statement of Sen. Hatch).

b. As Miller and Lang appear to recognize, the decision below does not conflict with the decision of any other court of appeals. See Miller Pet. 24 (urging the Court not "to dwell on the absence of a split"); cf. Lang Pet. 22 (identifying only the asserted importance of the issue—and not any circuit conflict—as why "a writ of certiorari is warranted under rule 10(c)") (capitalization and emphasis omitted). And Fischer's suggestion (Pet. 17) that the Fourth and Tenth Circuits have limited Section 1512(c)(2) to evidence-specific obstruction is not supported by the decisions that he cites.

In *United States* v. *Sutherland*, 921 F.3d 421 (2019), cert. denied, 140 S. Ct. 1106 (2020), the Fourth Circuit upheld a Section 1512(c)(2) conviction for obstructing a

grand jury investigation where the defendant had created and distributed false financial documents. See *id.* at 424-429. Although the facts of the case involved document-related obstruction, the Fourth Circuit did not hold—and, indeed, would have had no occasion to hold—that Section 1512(c)(2) is limited to such conduct. The defendant's principal contention was instead that he had not committed a violation of Section 1512(c)(2) because he had caused the falsified documents to be transmitted to a prosecutor, rather than to the grand jury itself. See *id.* at 428-429 (rejecting that contention and holding that the statute encompassed the defendant's conduct even though his obstruction was accomplished in part through the "actions of a third person") (citation omitted). And in *United States* v. *Gordon*, 710 F.3d 1124, cert. denied, 571 U.S. 1010 (2013), the Tenth Circuit upheld a Section 1512(c)(2) conviction involving the attempted falsification of documents, again without holding that the statute prohibits only such conduct. See *id.* at 1148-1152 (rejecting sufficiency challenge, where the defendant attempted to obstruct a civil forfeiture proceeding by creating falsified loan documents). The rejection of the defendants' arguments in those cases does not indicate that either court would accept petitioners' arguments here.

Fischer is also wrong to contend (Pet. 18) that other courts of appeals have "limited the statute's reach to crimes of evidence impairment." As the D.C. Circuit explained below, Fischer's contention rests on taking the facts of those prior cases—all of which, like *Sutherland* and *Gordon*, *upheld* convictions under Section 1512(c)(2)—and treating them as having established the outer legal boundaries of the statutory prohibition, even though the relevant courts could not and did not decide that the

statute would be inapplicable in circumstances like these. See Lang Pet. App. 16 (noting that each court simply found certain evidence-related conduct sufficient for a Section 1512(c)(2) conviction and citing as examples *Petruk*, 781 F.3d at 446-447, and *United States* v. *Volpendesto*, 746 F.3d 273, 286 (7th Cir.), cert. denied, 574 U.S. 936 (2014)); see also *United States* v. *Burge*, 711 F.3d 803, 808-809 (7th Cir.), cert. denied, 571 U.S. 888 (2013); *United States* v. *Phillips*, 583 F.3d 1261, 1265 (10th Cir.), cert. denied, 558 U.S. 1100 (2009); *United States* v. *Carson*, 560 F.3d 566, 584 (6th Cir. 2009), cert. denied, 558 U.S. 1116 (2010). The D.C. Circuit was therefore correct to conclude that no other court of appeals has ever endorsed the construction that petitioners advocate. Lang Pet. App. 15.[3]

c. The decision below also does not "conflict[] with relevant decisions of this Court." Sup. Ct. R. 10(c). Petitioners' asserted conflicts (Miller Pet. 27-31; Fischer Pet. 12-17) largely restate their own flawed merits arguments and do not warrant further review.

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[3] Petitioners previously identified two district court decisions construing Section 1512(c)(2) to be limited to acts with some nexus to documents or other tangible objects. See Lang Pet. App. 18 (citing *United States* v. *Singleton*, No. 06-cr-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006), and *United States* v. *Hutcherson*, No. 05-cr-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006)). The D.C. Circuit reviewed those unpublished district court decisions and found them "unpersuasive." *Id.* at 18 n.4. On the other side of the ledger, every other district judge in the District of Columbia has now rejected the interpretation adopted by the district judge here. See *United States* v. *McCaughey*, 21-cr-40 D. Ct. Doc. 388, at 2 (D.D.C. July 20, 2022) (observing that the order of dismissal in *Miller* has "persuaded no other judge on this question"); Lang Pet. App. 17 & n.3 (collecting cases).

Miller argues that the decision below is "at cross-purposes" with decisions of this Court "reject[ing] 'improbably broad' interpretations of criminal statutes." Pet. 27 (quoting *Bond* v. *United States*, 572 U.S. 844, 860 (2014)). But none of the decisions that he invokes (Pet. 27-31) addressed a statute or conduct similar to the statute and conduct at issue here. See *Dubin*, 599 U.S. at 114 (concluding that using a patient's name or other identifying information to defraud Medicaid by inflating the price of services or goods actually provided to that patient is not aggravated identity theft under 18 U.S.C. 1028A); *Van Buren*, 141 S. Ct. at 1652 (concluding that a police officer did not "exceed[] authorized access" to a computer under 18 U.S.C. 1030(a)(2) when he misused a computer database made available to him for law-enforcement purposes); *McDonnell*, 579 U.S. at 566 (addressing "the term 'official act'" as used in 18 U.S.C. 201); *Bond*, 572 U.S. at 848 (considering whether "an amateur attempt by a jilted wife to injure her husband's lover" violated the prohibition on using chemical weapons in 18 U.S.C. 229). And the Court in those cases applied the same tools of statutory construction that the court of appeals employed below—text, structure, context, and history. See, *e.g.*, *Dubin*, 599 U.S. at 114. That those tools supported giving Section 1512(c)(2) its "natural, broad reading" here, Lang Pet. App. 12, does not suggest any conflict between the decision below and this Court's precedent.

Fischer similarly errs in contending (Pet. 13-15) that the court of appeals failed to adhere to any relevant canons of construction. The court considered the canons that Fischer invokes and persuasively explained why they do not justify adopting his artificially narrow reading of Section 1512(c)(2). Lang Pet. App. 33; see *id.* at

33-35 (discussing *ejusdem generis* and *noscitur a sociis*); *id.* at 39-44 (discussing canon against superfluity, "[t]he 'elephants in mouseholes' principle," and lenity). For example, Fischer contends (Pet. 13-14) that the decision below fails to give effect to the whole text and renders other parts of Section 1512 "surplusage." But the court explained that reading Section 1512(c)(2) as limited to document-related obstruction would similarly render Section 1512(c)(1) largely nugatory. See Lang Pet. App. 31 (finding it "difficult to envision why a catch-all aimed at even more document-related acts would be necessary"). The court also explained that surplusage concerns have "little weight here" because, under any of the competing interpretations, there would still be "numerous" provisions in the obstruction statutes that would overlap with Section 1512(c)(2) to some extent—a circumstance "easily explained" by the statutory history. *Id.* at 40-41.

Contrary to Fischer's assertion (Pet. 15-17), the decision below is also fully consistent with *Yates* v. *United States*, *supra*, and *Begay* v. *United States*, 553 U.S. 137 (2008). In *Yates*, this Court addressed a different obstruction statute, which prohibits "knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519. The Court held that the term "tangible object" in Section 1519 does not encompass fish because that phrase is limited in context to objects similar to records and documents, based in part on the proximity of those terms in a single list ("any record, document, or

tangible object") and the related list of actions proscribed by the statute—*e.g.*, "mak[ing] a false entry," which one may do in a record but not a fish. *Ibid.*; see *Yates*, 574 U.S. at 543-544 (plurality opinion); *id.* at 549-550 (Alito, J., concurring in the judgment). The statute at issue here is worded and structured quite differently. See Lang Pet. App. 34-35.

To the extent that Section 1512(c) contains language redolent of Section 1519, that language is limited to Section 1512(c)(1)—not at issue here—which pairs lists of verbs ("alters, destroys, mutilates, or conceals") and nouns ("a record, document, or other object"). Section 1512(c)(2), however, is broken out into a separate subsection, separated by a semicolon and the disjunctive term "or," and it contains its own list of verbs ("obstructs, influences, or impedes"), all of which are directed at a single object—an "official proceeding." That single object is not confined or connected to documents or other evidence, but is instead a defined term that encompasses a variety of "proceeding[s]." 18 U.S.C. 1515(a)(1). The court of appeals properly gave effect to that "distinct and independent" prohibition. *Aguilar*, 515 U.S. at 615 (Scalia, J., concurring in part and dissenting in part) (rejecting analogous effort to apply the *ejusdem generis* canon to the omnibus clause in Section 1503); cf. *Loughrin* v. *United States*, 573 U.S. 351, 359 (2014) (distinguishing between one fraud statute that consists of "two phrases strung together in a single, unbroken sentence" and another that consists of two clauses with "separate numbers, line breaks before, between, and after them, and equivalent indentation," and stressing that such "visual[]" separation indicates that the two clauses "have separate meanings").

As the court of appeals explained (Lang Pet. App. 32), *Begay* likewise does not support petitioners' effort to import implicit limits into Section 1512(c)(2). The Court there addressed the "residual clause" in the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which appended the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" to a series of four listed crimes that appeared before it without any section break. *Begay*, 553 U.S. at 139-140 (quoting statute). The Court cited a dictionary definition of "otherwise" to mean "'in a different way or manner,'" *id.* at 144 (quoting *Webster's Third New International Dictionary* 1598 (1961))—which is the same definition that the court of appeals applied here, see Lang Pet. App. 11-12. In the particular context of ACCA, the Court concluded in *Begay* that the residual clause's reference to crimes that "otherwise involve[]" conduct presenting a serious risk of injury was best read to refer to crimes different in means or manner from those in the preceding list but still similar in some respects, including by involving "purposeful, 'violent,' [or] 'aggressive' conduct." 553 U.S. at 144-145 (citation omitted).

As explained above, however, the term "otherwise" in Section 1512(c)(2) does not appear at the end of a list of terms with a common theme, but rather at the start of a separate and distinct criminal prohibition. 18 U.S.C. 1512(c)(2). And any potential relevance of *Begay* is further called into question by the Court's subsequent decision holding the residual clause to be unconstitutionally vague—partially in light of the "otherwise" clause as construed in *Begay*. See *Johnson* v. *United States*, 576 U.S. 591, 598-600, 606 (2015).

d. Further review of the scope of Section 1512(c)(2)'s actus reus requirement is especially unwarranted because petitioners' conduct would satisfy even the narrow evidence-focused definition that they (and the dissent below) advocate. See Gov't C.A. Br. 61-67. As the indictments specify (Gov't C.A. App. 55, 85-86, 444), the proceeding that petitioners disrupted was the certification proceeding mandated by the Electoral Count Act. And that Act establishes procedures for addressing a specific type of evidence—namely, certificates of votes from each State.

The Act precisely described the official proceeding's date ("the sixth day of January"), time ("1 o'clock in the afternoon on that day"), and place ("the Hall of the House of Representatives"). 3 U.S.C. 15 (2018). It identified the required attendees (the "Senate and House of Representatives shall meet in the Hall") and the "presiding officer" (the "President of the Senate"). *Ibid.* And it instructed that the President of the Senate "shall * * * open[] * * * all the certificates and papers purporting to be certificates of the electoral votes * * * in the alphabetical order of the States"; that those papers "shall be handed, as they are opened by the President of the Senate," to specified "tellers * * * appointed on the part of the Senate and * * * the House"; that the appointed tellers "shall make a list of the votes as they shall appear from the said certificates," after having "read[] the" certificates "in the presence and hearing of the two Houses"; and that Members may object "in writing." *Ibid.* The Act further provided that, after the two Houses had resolved any objections, the votes were to be counted, followed by a declaration of who has been elected President and Vice President. *Ibid.* And the Act stated that the joint session "shall not be dissolved

until the count of electoral votes shall be completed and the result declared." 3 U.S.C. 16 (2018).[4]

Preventing the Members of Congress from validating the state certificates thus constitutes evidence-focused obstruction. Even on petitioners' narrow view, it would surely violate Section 1512(c)(2) for a defendant to lock evidence in a vault that a factfinder cannot access, thereby preventing the proceeding from occurring. And the conduct here was analogous: it prevented the elected government officials from accessing and counting the certificates of electoral votes as the Electoral Count Act requires. That hundreds of other defendants who occupied the Capitol did much the same thing (Lang Pet. 17; Miller Pet. 20-22; Fischer Pet. 21) is not a reason for further review in these cases. At a minimum, the government should be permitted to present its case to a jury and prove that petitioners obstructed a proceeding by (in part) preventing the relevant decisionmakers from viewing the evidence at the time and place specified for that purpose.

3. Petitioners separately contend (Lang Pet. 14-22; Miller Pet. 25-27; Fischer Pet. 19-21) that the Court should grant further review to address the "corruptly" mental-state element necessary to prove a violation of Section 1512(c). See 18 U.S.C. 1512(c) (providing that "[w]hoever *corruptly*" commits the acts specified in Paragraphs (1) and (2) "shall be fined * * * or imprisoned") (emphasis added). But these cases would be unsuitable vehicles in which to address the "corruptly" element. As petitioners acknowledge, neither the court of appeals nor the district court squarely addressed that element, which was not the subject of any extensive

[4] The Electoral Count Act as amended in 2022 continues to specify analogous procedures. See 3 U.S.C. 15-16.

briefing below. See Lang Pet. App. 20 (opinion of Pan, J.) ("expressing [no] preference for any particular definition of 'corruptly'" because "the allegations against [petitioners] appear to be sufficient to meet any proposed definition of 'corrupt' intent"); *id.* at 106-116 (Katsas, J., dissenting) (declining to adopt any particular definition of "corruptly"); Miller Pet. App. 13a n.3 (district court declining to interpret "corruptly").

Petitioners' arguments on the "corruptly" element have also now been overtaken by the D.C. Circuit's decision in *United States* v. *Robertson*, No. 22-3062, 2023 WL 6932346 (Oct. 20, 2023), which affirmed a final judgment of conviction in another prosecution based on the events at the Capitol on January 6, 2021. See *id.* at *1-*4; cf. Lang Pet. App. 23 (opinion of Pan, J.) (noting that an appeal was pending in *Robertson* at the time of the decision below). In that decision, the D.C. Circuit held "that the jury could have found, consistent with the district court's instructions" on a Section 1512(c)(2) count, "that Robertson acted 'corruptly' based on evidence that he used felonious 'unlawful means' to obstruct, impede, or influence the Electoral College vote certification." *Robertson*, 2023 WL 6932346, at *5. The court explained that "the requirement that a defendant act 'corruptly' is met by establishing that the defendant acted with a corrupt purpose or via independently corrupt means." *Id.* at *7. And the court found sufficient evidence of corrupt means where the defendant's conduct "broke the law in multiple ways," including by using violent force against a police officer. *Id.* at *9.

Even assuming that the court of appeals' definition of "corruptly" would warrant this Court's review, this is not an appropriate vehicle for such review. That is particularly so because the issue would not be outcome-

determinative at this stage. The indictments in each of these three cases allege that the defendants "corruptly" obstructed, influenced, or impeded the joint session on January 6, or attempted to do so. Lang Pet. App. 6. Petitioners do not explain why the indictments were required to allege anything more in order to apprise them of the "essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). Addressing the "corruptly" element would therefore make no difference to the correct disposition of these interlocutory appeals—as illustrated by Judge Walker's acknowledgement that the pretrial dismissal of the Section 1512(c) counts was erroneous even under his view. See Lang Pet. App. 69 (Walker, J., concurring in part and concurring in the judgment). Further review is unwarranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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