No. 23-5572

IN THE
Supreme Court of the United States

JOSEPH W. FISCHER,
Petitioner,
v.
UNITED STATES,
Respondent.

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

Brief *Amicus Curiae* of America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

On January 6, 2021, a crowd protesting the manner by which the 2020 presidential election was conducted assembled at the U.S. Capitol building where Congress was exercising its role in certifying the electoral vote. Among those charged for the events of that day was Petitioner Joseph Fischer. Fischer had attended a rally at the Ellipse, and then headed home. After hearing about the events that were transpiring at the Capitol, he returned to the District, entering the Capitol for four minutes when he returned handcuffs that an officer had dropped, conversed with another

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

officer, patted an officer on the shoulder, was pushed into a police line, was pepper sprayed, and left. *See* Pet. Cert. at 4-5.

Fischer, along with Garret Lang and Edward Miller, were charged, *inter alia*, with violation of 18 U.S.C. § 1512(c) (a provision in the Sarbanes-Oxley Act of 2002 amending the statute entitled "Tampering with a witness, victim, or an informant"):

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

Both courts below focused on the proper interpretation of the word "otherwise." The district court dismissed the indictments against each of the three defendants for violating 18 U.S.C. § 1512(c)(2), since there was no allegation relating to documents:

> the word "otherwise" links subsection (c)(1) with subsection (c)(2) in that subsection (c)(2) is best read as a catchall for the prohibitions delineated in subsection (c)(1).... As a result, for a defendant's conduct to fall within the ambit of subsection (c)(2), the defendant must

> "have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." [*United States v. Fischer*, 2022 U.S. Dist. LEXIS 45877, *10 (D.D.C. 2022).]

The D.C. Circuit Court reinstated the indictments, over a strong dissent. Two judges ruled that "§ 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)." *United States v. Fischer*, 64 F.4th 329, 336 (D.C. Cir. 2023). Although concurring, Judge Walker made clear that the statute could apply to obstructive conduct only if the *mens rea* element of the word "corruptly" applies to the defendant's actions. In dissent, Judge Katsas noted that the statute in question was part of the Sarbanes-Oxley Act, enacted in the wake of the Enron document-shredding scandal, to punish destruction of evidence. *Id.* at 376 (Katsas, J., dissenting). He argued that subsection (c)(2) must be read in conjunction with (c)(1), as a limited catch-all covering any acts to destroy or tamper with evidence not covered under (c)(1). *Id.* at 376.

SUMMARY OF ARGUMENT

The Biden Administration has consistently described what happened at the U.S. Capitol on January 6, 2021 as an "insurrection" against the U.S. Government by the supporters of President Trump. The term "insurrection" was carefully chosen to evoke a vision of an violent effort to overthrow the

government. Congress enacted a specific statute to punish insurrection against the United States which carries a serious maximum sentence of 10 years. However, a 10-year sentence apparently was not sufficient for the Biden Justice Department, because, as President Biden claims: "This was an armed insurrection."[2] Thus, prosecutors apparently cast about for another crime with a heavier sentence with which to charge the Trump supporters. They landed on an obscure provision of the Sarbanes-Oxley Act of 2002, enacted to address financial scandals associated with Enron and other companies — 18 U.S.C. § 1512(c)(2). By taking the phrase "official proceeding" entirely out of context, it has indicted hundreds, including Petitioner Fischer, for a crime that carries a sentence twice what Congress provided for insurrections — 20 years. Allowing this strained reading to stand can be expected to lead to further weaponization of the Justice Department, such as the use of this statute to base a prosecution of Congressman Jamaal Bowman for the false fire alarm he set to delay proceedings on the House floor, should the Biden Administration be turned out in the next election.

The court of appeals failed to examine the individual activities of Petitioner Fischer, rather describing him as a member of a "mob," and thus, seemingly sharing collective guilt, deserving

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[2] The claim of an "armed insurrection" is belied by the fact that the only person killed on January 6, was Air Force veteran and Trump supporter, Ashli Babbitt, who was fatally shot by a Capitol Hill policeman for no apparent reason.

punishment not necessarily for what he did, but for what the "mob" did. The court of appeals admitted that there was no precedent in any other court for using § 1512(c)(2) as done here. A strong dissent refused to sanction this twisting of the text of this financial crimes statute and explained how it would lead to irrational results. These concerns were ignored by the two judges in the majority, who had no problem with either allowing the Department of Justice to use an inapplicable statute, or potentially impose a 20-year sentence on a person who clearly went to the Capitol to protest, not to riot.

The dissent also noted that "advocacy, lobbying, and protest before the political branches is political speech that the First Amendment squarely protects.... Thus, 'to assert that all endeavors to influence, obstruct, or impede the proceedings of congressional committees are, as a matter of law, corrupt would undoubtedly criminalize some innocent behavior." *Fischer* at 378 (Katsas, J., dissenting). The two-judge majority wholly ignored this warning, putting at risk those who seek to exercise their First Amendment protected rights to speech, assembly, and petition at the seat of Government.

ARGUMENT

I. THE CIRCUIT COURT'S EXPANSIVE INTERPRETATION OF SARBANES-OXLEY REQUIRES REVIEW.

The Biden Administration has described the activities of January 6, 2021 as an attempted

"**insurrection**" by supporters of President Trump.[3] Over time, the rhetoric only has increased. Last September, President Biden Tweeted: "Donald Trump and MAGA Republicans are a threat to the very soul of this country...."[4] Last week, *Newsweek* reported that: "the FBI co-authored a restricted report ... in which it shifted the definition of AGAAVE ('anti-government, anti-authority violent extremism') from 'furtherance of ideological agendas' to 'furtherance of political and/or social agendas.' For the first time, such groups could be so labeled because of their politics." *Id*.

The term "insurrection" was no doubt carefully chosen to evoke the image of an attempt to overthrow the government. A modern dictionary definition is "an act or instance of revolting against civil authority or an established government."[5] Since the Government deliberately chose the word "insurrection" to describe the events of January 6, one would expect that the Government would charge hundreds of January 6 defendants with the federal crime of insurrection. The law enacted to punish "Rebellion or insurrection" is 18 U.S.C. § 2383 which carries a maximum prison term of **10 years**. Reliable information about the number of

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[3] *See, e.g.,* Remarks By President Biden To Mark One Year Since The January 6th Deadly Assault On The U.S. Capitol, *The White House* (Jan. 6, 2022) ("This wasn't a group of tourists. This was an armed insurrection.").

[4] W. Arkin, "Donald Trump Followers Targeted by FBI as 2024 Election Nears," *Newsweek* (Oct. 4, 2023) (emphasis added).

[5] "Insurrection," *Merriam-Webster Dictionary*.

persons charged with different offenses committed on January 6 is difficult to find. However, as best as can be understood from databases maintained by the U.S. Attorney for D.C. and National Public Radio, **no defendants have been charged with insurrection**.[6] On the other hand, hundreds of defendants have been charged with the anti-shredding subsection of Sarbanes-Oxley. *See* Pet. Cert. at 21. Could this be because Sarbanes-Oxley carries a much more severe, maximum **20-year** prison term? This difference in sentence severity gives prosecutors powerful incentive to disregard the federal criminal statute enacted by Congress which correlates directly with its "insurrection" theory in favor of a new interpretation of Sarbanes-Oxley.[7]

Federal prosecutors may enjoy significant latitude in selecting which federal crimes to charge, choosing from among various applicable statutes, and may make that choice based on the harshness of the sentence. However, this Court already has warned not to give broad meaning to § 1519 in determining the meaning of a "tangible object" as "'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is

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[6] Capitol Breach Cases, *U.S. Attorneys Office, D.C.*; "The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history," *NPR*.

[7] Similarly, it has been reported that at least 10 defendants were charged with "seditious conspiracy," which also carries a 20-year maximum sentence. *See* T. Finn & D. Barnes, "OathKeepers leader, 10 others charged with 'seditious conspiracy' in Jan. 6 Capitol attack," *NBC News* (Jan. 13, 2022).

clear and definite.'" *Yates v. United States*, 574 U.S. 528, 548 (2015). In addition, federal prosecutors should not be allowed to ignore the precise statute which Congress enacted to punish the crime which they have told the American people was committed on January 6 in favor of a novel interpretation of another statute simply to achieve a more punishing sentence.[8]

If Section 1512(c)(2) is now allowed to apply as urged by the Government, will Congressman Jamaal Bowman (D-NY) be charge for having "corruptly ... obstruct[ed] ... or impede[d] [an] official proceeding, or attempt[ed] to do so" when he pulled a congressional fire alarm on September 30, 2023. Bowman's excuse ("I thought the alarm would open the door") fooled no one. At the time, House Democrat leader Hakeem Jeffries (D-NY) was delaying House proceedings through a technique known as the "magic minute," which allows the opposition leader to speak for as long as desired. The strategy was designed to prevent House passage of a Republican spending bill (without Ukraine funding), so as to allow Senators time to first pass its Democrat spending bill (with Ukraine funding). As widely reported, Congressman Bowman chose an illegal means to help, as he "pulled the fire alarm to delay the official proceedings of the House of

[8] Even under the government's insurrection theory, its search for the harshest possible punishment violates the wise counsel of Thomas Jefferson when he said that governments should be "mild in their punishment of rebellions" because these protests are a "medecine necessary for the sound health of government." Thomas Jefferson letter to James Madison (Jan. 30, 1787).

Representatives ... to help buy the Democrats time."[9] The Government's reading of the statute adopted below has no limiting principle, and is dangerous weapon to put into the hands of any federal prosecutor.

II. THE CIRCUIT COURT'S VIEW OF THE SARBANES-OXLEY STATUTE WAS COLORED BY A FABRICATED JANUARY 6 NARRATIVE.

A. The Circuit Court Accepted the Government's Narrative about January 6.

The D.C. Circuit assumed the correctness of the Department of Justice narrative of January 6 on all points: "[T]housands of supporters of **the losing candidate**, Donald J. Trump, **converged** on the United States Capitol **to disrupt** the proceedings. The Trump supporters **swarmed** the building, overwhelming law enforcement officers.... The chaos wrought by **the mob** forced members of Congress to stop the certification and flee for safety." *Fischer*, 64 F.4th at 332 (emphasis added). The Court used the terms "riot" or "rioters" six times and "mob" four times to refer to the Trump supporters. Fischer was treated as though he was just another member of a "mob." However, from the perspective of the Trump supporters, most did not believe Trump really was the losing candidate, they went to the Capitol to protest

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[9] *See, e.g.,* M. Boyle, "Jamaal Bowman threw signs warning door was emergency only on floor before pulling fire alarm," *Breitbart* (Sept. 30, 2023); *see also* "To 'Open Door' and Totally Not Disrupt the Democrat Process," *ZeroHedge* (Oct. 1, 2023).

(not disrupt), and they assembled at (not converged at and swarmed) the Capitol. Trump and his supporters were blamed even though the riot began while Trump was still speaking at the Ellipse.[10] Never did the court use the words "protest" or "rally" to describe the events of that day.

Rather than examining Fischer's actions individually, the circuit court seems to treat him as being culpable for the actions of everyone in the "mob." This prejudgment about his participation in a "mob" appear to have led to a series of arbitrary rulings. The court found to be irrelevant the fact that Fischer arrived at the Capitol after Congress recessed, and therefore that he could not have caused the suspension of the vote certification process. *Id.* at 333, n.1. The court found it irrelevant that courts outside of the District of Columbia, where the insurrection narrative did not color their interpretation, viewed the law differently — admitting that "outside the January 6 cases brought in this jurisdiction, there is **no precedent** for using § 1512(c)(2) to prosecute the type of conduct at issue in this case." *Id.* at 339 (emphasis added). The court even concluded that the standard of "corrupt" intent set out by Justice Scalia — that there would be a "'hope or expectation of either ... benefit to oneself or a benefit of another person'" — was met solely because of January 6 defendants' "alleged intentions of helping their preferred candidate

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[10] *See* "The Capitol Riot: A Chronology," *National Security Archive.*

overturn the election results."[11] *Id.* at 340. *See Fischer* at 351 (Walker, J., dissenting in part) explaining that the Court's interpretation of "corruptly" would apply to any person joining the "throng outside Congress because he was angry at the nation's elites." Judge Walker also explained how the majority opinion "creates odd outcomes, as anyone convicted of harassing and hindering a witness under (d)(1) could also be convicted under (c)(2) — despite the 17-year sentencing disparity between the two. Compare 18 U.S.C. § 1512(c) ('not more than 20 years') with § 1512(d) ('not more than 3 years')." *Fischer* at 360. And, as Judge Katsas explained, the line break between section (1) and (2) does not affect the meaning, and the statute's actus reus covers both sections, and section (2) is not a free standing prohibition, as the government has persuaded the court of appeals. *See id.* at 369 (Katsas, J., dissenting). The Petitioner was entitled to having his case heard and decided by a neutral tribunal, unaffected by politics and emotion.

B. The Insurrection Narrative Has Dominated the Landscape.

It is considered by some to be heresy to question the official state narrative as to what happened on January 6, 2021. Within hours of the events of January 6, the nation's mainstream media began to characterize the rioting that occurred that day at the Capitol as an "insurrection" designed to overthrow the

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[11] Citing *United States v. Aguilar*, 515 U.S. 593, 616-17 (1995) (Scalia, J., concurring in part and dissenting in part).

government of the United States.[12] This "insurrection" was described by Vice President Kamala Harris as great a national disaster as the attacks suffered at Pearl Harbor or September 11, 2001.[13] The comparison suffers from the fact that only one person died on January 6 — Air Force veteran Ashli Babbitt, who was shot by a Capitol Police officer to whom she was no threat. By contrast, almost 2,500 Americans were killed at Pearl Harbor and the nation plunged into World War II, and on 9/11, the World Trade Center towers collapsed and the Pentagon was attacked, resulting in the death of nearly 3,000 Americans.

House Speaker Nancy Pelosi barred the House minority leader from appointing Republican members to the House Select Committee on January 6 ("J6 Committee") who had not pre-committed to the insurrection narrative before that Committee's

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[12] *See, e.g.,* "The Washington Post releases 'The Attack: Before, During and After,' an investigation of the Jan. 6 Capitol insurrection and its aftermath," *Washington Post* (Oct. 31, 2021); M. Cohen, "Timeline of the coup: How Trump tried to weaponize the Justice Department to overturn the 2020 election," *CNN* (Nov. 5, 2021) (calling the January protest an "insurrection" and a "coup"); "Read the final report from the Jan. 6 committee," *PBS* (Dec. 23, 2022); L. Broadwater, "Jan. 6 Panel Accuses Trump of Insurrection and Refers Him to Justice Dept," *New York Times* (Dec. 19, 2022).

[13] C. Patteson, "Harris slammed for comparing Capitol riot to 9/11, Pearl Harbor attacks," *New York Post* (Jan. 6, 2022).

investigation began, and thus the falsehoods and hyperbole in its report were politically pre-ordained.[14]

In this atmosphere, it appears that the circuit court was so committed to punish everyone near the perceived "insurrection" that it glossed over not only facts of the *Fischer* case — in which no reasonable person would find support for a 20-year sentence — but also the text, history, and purpose of the Sarbanes-Oxley Act. The court conceded that "[t]hat 'Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents.'" *Id.* at 346 (quoting *Yates v. United States* at 535-36). Yet despite its acknowledgment of Congress' intent to punish the destruction of evidence in an official proceeding, the court allowed the government to twist the destruction of evidence statute to use against protestors at a political demonstration.

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[14] *See, e.g.,* P. Sperry, "Lies, Damned Lies, and the Jan. 6 Committee," *Epoch Times* (Aug. 8, 2022) (J6 Committee chairman Rep. Bennie Thompson accused protestors of "'savagely beating and killing law enforcement officers'"); S. Arnold, "Jan. 6 Committee Caught 'Lying and Altering Evidence,'" *TownHall.com* (June 12, 2022) (J6 Committee investigation falsified text messages between Rep. Jim Jordan (R-OH) and Trump chief of staff Mark Meadows); Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol at 77, 586 (calling the Capitol protest a "violent uprising" and a "coup").

However, in our divided nation, there is another side to the story, which is believed by half of America.[15] On January 6, 2021, most Trump supporters traveled to the Capitol to exercise their constitutional rights to speak, to assemble, and to petition government. While some engaged in conduct deserving of prosecution, most listened to speeches, held signs, and joined with other like-minded Americans near what Congress once called "the People's House," in order to "peacefully and patriotically" petition government — only to be punished as "enemies of the state" at the hands of a politicized and weaponized Justice Department — thus far with the sanction of courts. To be sure, a riot occurred at the Capitol, but with the shocking failure or refusal of authorities to prepare for the protest,[16] Congress' concealment of surveillance videos, and the Government's failure to prosecute in a meaningful way some of those who demonstrably incited the riot, how it was triggered cannot yet be known.[17]

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[15] *See, e.g.,* M. Basham, "CBS Buries Poll Results Showing Most Americans of Both Parties Think Jan 6 Was 'A Protest That Went Too Far'," *Daily Wire* (Jan. 6, 2022).

[16] *See* S. Sund, Courage Under Fire: Under Siege and Outnumbered 58 to 1 on January 6, (Blackstone Publishing: 2023).

[17] It is more than curious that the riot broke out as details of electoral irregularities in Arizona, Pennsylvania, and Georgia were about to be presented to Congress and a national television audience. "The Capitol Riot: A Chronology," *National Security Archive* (Senator James Lankford (R-OK) at 11:17 am; Rep. Sean Marshall (R-KS) at 12:04 pm). Once the riot started, the presentations were stopped. Thus, the rioters caused the protest to have "had the exact reverse effect of what they wanted: an

Not just in *Fischer*, but again and again, courts ruling on cases involving January 6 defendants appear to have bought into the existential threat "insurrection" narrative. Judge Reggie Walton, in sentencing defendant Lori Vinson, stated that "[d]emocracies die, and we've seen it in the past, when the citizens rise up against their government and engage in the type of conduct that happened on January 6."[18] Judge Amy Berman Jackson told defendant Karl Dresch that he was an "enthusiastic participant" in an attempt "to subvert democracy, to stop the will of the people and replace it with the will of the mob."[19] Judge Randolph Moss stated that the Capitol incursion "threatened not only the security of the Capitol, but democracy itself." *Id.* Judge Tanya Chutkan, described as "the toughest punisher" and labeled the protest as "trying to violently overthrow the government."[20] "Chutkan has often has [sic] handed down prison sentences in Jan. 6, 2021, riot

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audit of the 2020 presidential election," which would have been completely orderly and lawful. J. Kelly, January 6: How Democrats Used the Capitol Protest to Launch a War on Terror Against the Political Right at 7 (Bombardier Books: 2022).

[18] M. Cohen and H. Lybrand, "'We're getting all kinds of threats': Judge says defiant US Capitol rioters are fueling threats from Trump supporters," *CNN* (Oct. 22, 2021).

[19] T. Sneed, "US Capitol riot judges step up as the conscience of democracy while lawmakers squabble," *CNN* (Aug. 13, 2021).

[20] M. Kunzelman and A. Richer, "In Jan. 6 cases, 1 judge stands out as toughest punisher," *Associated Press* (June 12, 2022).

cases that are harsher than Justice Department prosecutors recommended."[21]

The prosecutions and punishment should fit the crime committed, uninfluenced by emotion, and certainly not dominated by a irrational fears inspired by a partisan, political narrative. The myriad of federal statutes in existence provided prosecutors with ample bases to prosecute real crimes occurring that day, without the grafting a new meaning onto a 20-year old statute in a manner never envisioned by Congress.

III. THE CIRCUIT COURTS' READING OF SECTION 1512(c)(2) CRIMINALIZES PROTECTED FIRST AMENDMENT ACTIVITIES.

The court below ignored any concerns about how its reading of Section 1512(c)(2) would have a chilling effect on speech, petition, and assembly. However, this problem did not escape the notice of Judge Katsas, who, in dissent, noted, "advocacy, lobbying, and protest before the political branches is political speech that the First Amendment squarely protects.... Thus, 'to assert that all endeavors to influence, obstruct, or impede the proceedings of congressional committees are, as a matter of law, corrupt would undoubtedly criminalize some innocent behavior.'" *Fischer* at 378 (Katsas, J., dissenting). Judge Katsas' concerns have been proven correct, as *Newsweek* reports that "[t]he federal

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[21] M. Kunzelman, "Judge assigned to Trump's Jan. 6 case is a tough punisher of Capitol rioters," *Associated Press* (Aug. 2, 2023).

government believes that the threat of violence and major civil disturbances around the 2024 U.S. presidential election is so great that it has quietly created a new category of extremists that it seeks to track and counter: Donald Trump's army of MAGA followers."[22]

The Court of Appeals' interpretation of § 1512 bears an eerie resemblance to Woodrow Wilson's infamous "Sedition Act" of 1917. "[T]he act made it illegal to 'convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.' That sweeping language effectively criminalized most forms of anti-war speech."[23] As with § 1512, the Sedition Act imposed up to 20 years in prison. *Id.* Protected speech can be harshly critical of government. As Justice Douglas put it, "Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy...." *Colten v. Ky.*, 407 U.S. 104, 122 (1972) (Douglas, J., dissenting). As this Court has stated:

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[22] W. Arkin, "Donald Trump Followers Targeted by FBI as 2024 Election Nears," *Newsweek* (Oct. 4, 2023).

[23] D. Root, "When the Government Declared War on the First Amendment," *Reason* (Oct. 2017).

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.... There is no room under our Constitution for a more restrictive view. [*Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added).]

This Court has rightly recognized that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental ... [and] cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). And, in 1875, this Court recognized:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances ... is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. [*United States v. Cruikshank*, 92 U.S. 542, 552 (1875).]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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