No. 23-5572

IN THE

Supreme Court of the United States

JOSEPH W. FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

All agree that Congress enacted 18 U.S.C. § 1512(c)(2) as part of the Sarbanes-Oxley Act of 2002 in direct response to the document shredding loophole involving Enron and Arthur Anderson. Yet the government seeks to sever it from its legislative, historical, and textual moorings. And the government offers four arguments to avoid clarifying this important issue, which affects hundreds of January 6 prosecutions. None holds up.

The government also frames much of its response around Mr. Lang's petition. This effort, unfortunately, leads to several errors respecting the parties' arguments. For example, the government asserts that certiorari should be denied because the parties dispute their conduct, and in support cites Mr. Lang's statement that he did "no more than speak out at a protest," a characterization contradicted by his indictment. Br. Opp. 13–14 (cleaned up). But however Mr. Lang characterizes his conduct, the point is that *Fischer*'s overbroad actus reus definition would cover that conduct. Mr. Fischer's own conduct illustrates the point best—a government video captured his four-minute foray to about 20 feet inside the Capitol and his abrupt exit.

REPLY ARGUMENT

A. The procedural posture of Mr. Fischer's case is of no moment.

The government argues that this Court's review is unwarranted because Mr. Fischer's case is in an interlocutory posture. Br. Opp. 12. But it does not contend that this posture is a jurisdictional obstacle. *See* 28 U.S.C. § 1254(1). Nor does it claim that any fur-

ther factual development is relevant to the resolution of the question presented—the statute either applies to this kind of conduct or it does not, and the D.C. Circuit has held that it does.

So the only question here is whether the question presented is important enough to warrant review now. It is. Two panels of the D.C. Circuit (*Fischer* & *Robertson*) deeply divided over the elements in Section 1512(c)(2)—the actus rei and the mens rea. In those cases, the judges issued five opinions. The scope of Section 1512(c)(2) is vital to hundreds of other January 6 prosecutions, including that involving the former president. For that reason alone, this question has pressing national importance. And if the government's theory were accepted, it could be deployed in countless other contexts.

In other cases, including criminal cases, this Court has granted review in an interlocutory posture. For example, in *Bates* v. *United States*, 522 U.S. 23, 28-29 (1997), this Court granted review after a district court dismissed an indictment and the court of appeals reinstated the prosecution. Indeed, *Bates* presented an argument much like Mr. Fischer's over the required proof and elements of a statute. *See id.* at 29-33. *Bates* reflects that this Court reviews interlocutory decisions when the issue is important and its outcome will help resolve the litigation. *See* Stephen M. Shapiro, et al., *Supreme Court Practice*, ch. 4.4(h), 19 (11th ed. 2019); *id.* at ch. 4.18, 54-56 (collecting cases). That is the case here.

Likewise, in civil cases, this Court has reviewed decisions in an interlocutory posture when, for instance, there is a conflict in the court of appeals. *E.g.*, *Exxon Mobil* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 289-91 (2005) (certiorari granted to resolve circuit conflict on appeal from the denial of a pretrial motion to dis-

miss). This Court has also stepped in when an interlocutory appeal presents a novel issue. *E.g.*, *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990) (explaining that "[n]o other Court of Appeals has decided a case that presents the precise issue we decide here"). And certiorari may be warranted in an interlocutory appeal when the issue is important and central to the litigation. *E.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 105-07 (1976) (outlining the "deliberate indifference" standard involving medical claims).[1]

B. The unprecedented extension of Section 1512(c)(2) in the January 6 prosecutions has divided panels in the D.C. Circuit and diverges from how other courts of appeal have viewed that provision.

The government argues that Judge Pan's interpretation of Section 1512(c)(2) in *Fischer* squares with the statute's history and its construction by other courts. But even Judge Pan acknowledged the unprecedented application of Section 1512(c)(2) to conduct that does not involve document or evidence impairment: "To be sure, outside of the January 6 cases brought in this jurisdiction, there is no precedent for

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[1] Again relying on Lang's petition, the government maintains that the petitioners have abandoned any argument over a lack of pretrial notice. *See* Br. Opp. 14. Not so. Mr. Fischer's petition argued lack of notice and offered examples of the disturbing breadth of Section 1512(c)(2) under the government's interpretation. *See* Pet. 12, 21–22. Indeed, a member of Congress recently set off a fire alarm while leaving a building on the way to the Capitol to vote, prompting calls for prosecution under Section 1512(c)(2). *See* Jason Willick, *Why the Jamal Bowman Fire Alarm Scandal Will Keep Burning*, WASH. POST (Nov. 1, 2023), https://tinyurl.com/mvcswb69. Based on the government's view, there is no way of knowing what conduct or advocacy Section 1512(c)(2) might reach. *See, e.g.*, Pet. App. 94a-95a (Katsas, J., dissenting).

using § 1512(c)(2) to prosecute the type of conduct at issue in this case." *See* Pet. App. 17a.

Moreover, the government ignores that two panels of the D.C. Circuit issued several opinions at odds with each other over the elements and reach of subsection (c)(2). *See* Pet. App. 9a-13a (Pan., J., lead opinion); *id.* at 42a, 54a-63a & n.10 (Walker, J., concurring in part and concurring in the judgment); *id.* at 65a-103a (Katsas, J., dissenting); *United States* v. *Robertson*, No. 22-3062, 2023 WL 6932346, at *4-9 (D.C. Cir. Oct. 20, 2023) (Pan J., lead opinion); *id.* at *19-33 (Henderson, J., dissenting). There is thus no agreement on the scope of Section 1512(c) within the D.C. Circuit, much less outside it.

The government seizes on the first-time nature of the prosecution to emphasize that Mr. Fischer cannot point to a genuine circuit split. But that argument discounts holdings from other circuits on what conduct Section 1512(c)(2) reaches. For example, the Eleventh Circuit recently characterized Section 1512(c)(2) as "prohibit[ing] obstructing an official proceeding by tampering with evidence." *United States* v. *Beach*, 80 F.4th 1245, 1257 (11th Cir. 2023). Indeed, until the January 6 prosecutions, the government similarly regarded Section 1512(c) as confined to acts of evidence impairment. *See generally* Memorandum from Deputy Att'y Gen. Rod Rosenstein & Ass't Att'y Gen. Steven Engel to Att'y Gen. William P. Barr at 2 (June 8, 2018) (asserting that Section 1512(c)(2) is confined to "acts of evidence impairment").[2] Although the government would sugar

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[2] *Accord* Memorandum from Ass't Att'y Gen. Office of Legal Counsel, Steven Engel & Principal Assoc. Deputy Att'y Gen., Edward C. O'Callaghan to Att'y Gen. William P. Barr at 3, 5 (March 24, 2019) (emphasizing that potentially obstructive con-

coat it, there can be no doubt that using Section 1512(c) in the January 6 cases is a new prosecutorial endeavor—and an endeavor that is vast in scope and significant in its impact on pending prosecutions.

The government cites *United States* v. *Petruk*, 781 F.3d 438, 447 (8th Cir. 2015), and *United States* v. *Aguilar*, 515 U.S. 593 (1995), for the proposition that Section 1512(c)(2) operates as a "catch-all" or "[o]mnibus [c]lause" for matters not contemplated elsewhere. *See* Br. Opp. 17. But *Petruk*—like the government's argument here—hinges on a misreading of *Aguilar*. *See United States* v. *Miller*, 589 F. Supp. 3d 60, 69 & n.7 (D.D.C. 2022), *rev'd by United States* v. *Fischer*, 64 F.4th 329 (D.C. Cir. 2023). The language at issue comes at the beginning of the opinion, with this Court ultimately rejecting a broad reading. *See id.* at 69 (citing *Aguilar*, 515 U.S. at 599-600).

The government even retreats to anecdotal legislative history to support its assertion that Section 1512(c)(2) "cover[s] more than just document-related or evidence-impairment crimes." Br. Opp. 18. For this, the government relies upon floor Senator Hatch's statements. *Id.* Here again, even assuming floor statements are relevant evidence of textual meaning, the statement of Senator Hatch undermines the government's position. His comments reference Section 1512 generally before discussing the "new document destruction provision in S. 2010 . . . permit[ting] the government to prosecute an individual who acts alone in destroying evidence." 148 Cong. Rec. S6550 (daily ed. July 10, 2002).

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duct that did not involve efforts to impair or alter documentary or physical evidence is not covered by obstruction-of-justice statutes like § 1512(c)(2)).

Finally, the government contends that *Fischer* is consonant with this Court's decisions and that Judge Pan's opinion adequately considered the canons of construction. Br. Opp. 20. But Fischer cannot be squared with *Dubin* v. *United States*, 599 U.S. 110, 117–18, 129–30 (2023), and Judge Pan's reliance on only the word "otherwise" violates this Court's whole-text canon. *See United States* v. *Briggs*, 141 S. Ct. 467, 470-72 (2020); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("[c]ontext is a primary determinant of meaning").[3] This reading also collapses wholesale parts of Section 1512 (15 offenses) and other Chapter 73 offenses outside Section 1512 into subsection (c)(2), violating the surplusage canon. *See* Pet. App. 82a–84a & n.5. In any event, this argument, like much of the government's opposition, pertains to the merits and thereby only serves to underscore the importance of the question and the need for review.

C. The electoral vote certificates are not "evidence."

Nor can the government plausibly maintain that further review is unnecessary because the electoral vote certificates may be considered "evidence." Br. Opp. 25. The government made this argument below, but no member of the panel accepted it, not even as an alternative holding. Moreover, the government's suggestion that electoral vote certificates are "evidence" (Br. Opp. 25) is a category mistake. Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). A ballot is not created or

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[3] *Accord* Brett M. Kavanaugh, *Fixing Statutory Interpretations*, 129 HARV. L. REV. 2118, 2134-38 (2016).

employed to "prove or disprove" an "alleged fact." *Id.* It is "[a]n instrument, such as a paper or ball, used for casting a vote." *Ballot*, BLACK'S LAW DICTIONARY (11th ed. 2019). Nor, even assuming the vote certificates are evidence, were they impaired in any way by the protestors actions. The *proceeding* was interrupted, but nothing happened to the vote certificates aside from the delay in their counting. If that counts as evidence impairment, then interrupting any trial arguably falls within the statute's scope.

D. The D.C. Circuit's divided opinions over Section 1512(c)(2)'s definition of "corruptly" warrant this Court's review.

The government asserts that there is no reason to review the "corruptly" element because the parties did not extensively brief the issue, the *Fischer* panel did not address the element, and now a recent opinion, *Robertson*, has defined it. Br. Opp. 26–27. That the government likes the definition in *Robertson*, also authored by Judge Pan, does not make the question unworthy of the Court's review. The divided opinions in *Fisher* and *Robertson* on the mens rea question adequately demonstrate that the issue is important and recurring, like the scope of the actus reus necessary for a violation. And exactly what the government means by contending (at 26–27) that the issue was not "extensive[ly] brief[ed]" is a mystery, given that the issue was fully preserved by the parties and, as Judge Walker noted, 15 minutes of oral argument time were spent on it. Pet. App. 44a (Walker, J., concurring in part and concurring in the judgment); *see also* Appellant's Brief at 63–69, *United States* v. *Fischer*, Nos. 22-3038, 22-3039 & 22-3041 (D.C. Cir. Aug. 8, 2022) (Doc. 1958170); Appellees' Brief at 44–48, *United States* v. *Fischer*, Nos. 22-3038, 22-3039 & 22-3041 (D.C. Cir. Sept. 14, 2022) (Doc. 1963748);

Appellant's Reply Brief at 24–26, *United States* v. *Fischer*, Nos. 22-3038, 22-3039 & 22-3041 (D.C. Cir. Oct. 5, 2022) (Doc. 1967589).

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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