No. 23-5572

IN THE

Supreme Court of the United States

JOSEPH W. FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

AMICUS CURIAE BRIEF OF LIBERTY COUNSEL ACTION, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Amicus curiae, Liberty Counsel Action ("LCA"),[1] is a public policy education, training, and advocacy organization with offices in Florida and Washington D.C. Founded in 1986, LCA's focus is the advancement of religious freedom, the sanctity of human life, the family, responsible government, national security, and support for Israel at the federal, state, and local levels.

Amicus provides education and policy positions and papers for federal, state, and local lawmakers and government bodies. *Amicus* supports the right of people to peacefully assemble to exercise their rights under the First Amendment. *Amicus* is concerned about the unprecedented and unconstitutional interpretation, application, and enforcement of 18 U.S.C. §1512(c) to constitutionally protected expression. As a zealous advocate for the First Amendment, *Amicus* appeals to this Court to limit the unconstitutionally overbroad application of federal criminal statutes to prevent the chill of constitutionally protected expression of those who wish to assemble, speak, and petition to have their voices heard and who otherwise attempt to influence legislation and policy.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amicus Curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION

As Charles Dickens famously penned,

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

Charles Dickens, *A Tale of Two Cities* 1 (Oxford Univ. Press, 1953 ed. (1859)).

"Well taught English students know that the lines quoted above refer, literally, to Paris and London in 1775." *US Trust v. U.S. Trust Co. of N.Y.*, 210 F. Supp. 2d 9, 12 (D. Mass. 2002). "Figuratively, they serve to set the tone for the ensuing tale" of a federal statute enacted to prevent the fraudulent destruction of corporate financial records being deployed—nearly a quarter century later—to indict and imprison individuals for peacefully exercising their First

Amendment rights to speak, assemble, and petition the government. *Id.*[2]

Enron Corporation, an energy conglomerate, began experiencing financial trouble in 2000, which became much worse by 2001. On August 14, 2001, Enron's Chief Executive Officer unexpectedly resigned, and a "senior accountant at Enron warned Kenneth Lay, Enron's newly appointed CEO, that Enron could implode in a wave of accounting scandals" very soon. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 699 (2005) (cleaned up). That foretold implosion is precisely what followed. With Securities and Exchange Commission investigations announced and commenced, Enron began a process "of substantial destruction of paper and electronic documents." *Id.* at 701. Despite being warned by accountants that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff," one of the lead executives at Enron "picked up a document with the words 'smoking gun' written on it and began to destroy it, adding 'we don't need this.'" *Id.* at 702 n.6. And, worse still, Enron was not alone in its cover-up of securities fraud. Its "outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." *Yates v. United States*, 574 U.S. 528, 536 (2015); *see also Lawson v.*

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[2] *Amicus* does not intend to suggest that all individuals present at the United States Capitol on January 6 were peaceful, or that there were not individuals who otherwise committed crimes. But that is beside the point of the instant matter. As discussed *infra*, the Circuit Court's application of Section 1512(c) is so untethered to the text that it can be, and has been, applied to peaceful assembly and expression, which creates the constitutional infirmity in need of this Court's redress.

FMR LLC, 571 U.S. 429, 434 (2002) ("contractors and subcontractors, including the accounting firm, Arthur Andersen, participated in Enron's fraud and its coverup"). Many investors were defrauded as a result of Enron's scandal.

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002." *Lawson*, 571 U.S. at 432. "The Sarbanes-Oxley Act, all agree, was prompted by exposure of Enron's massive accounting fraud," *Yates*, 574 U.S. at 536, and had the overarching aim to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Lawson*, 571 U.S. at 435 (quoting S.Rep. No. 107-146 at 2 (2002)). In essence, Section 1512 of the Sarbanes-Oxley Act—when coupled with its corresponding provision in Section 1519—"was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing." *Yates*, 574 U.S. at 536.

In 2002, it was the best of times when President Bush "hailed" the Sarbanes-Oxley Act as "one of the most-far reaching reforms of American business practices since the time of Franklin Delano Roosevelt." Elisabeth Bumiller, *Corporate Conduct: The President; Bush signs Bill Aimed at Fraud in Corporations*, N.Y. Times (July 31, 2002), *available at* http://www.nytimes.com/2002/07/31/business/corpora

te-conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html.

Fast forward two decades, and it is the worst of times where—if the Circuit Court's interpretation and application of Section 1512(c) is to be followed—"we might as well convert all of Washington's office buildings into prisons." *United States v. Fischer*, 64 F.4th 329, 379 (D.C. Cir. 2023) (Katsas, J., dissenting) (quoting *United States v. North*, 910 F.2d 843, 941-42 (D.C. Cir. 1990) (Silberman, J., concurring)).

One might justifiably wonder how this provision aimed at "corporate document-shredding," *Yates*, 574 U.S. at 536, implicates the First Amendment to the United States Constitution. The answer: January 6th. "Section 1512(c)(2) has been on the books for two decades and charged in thousands of cases—*yet until the prosecutions arising from [January 6th], it was uniformly treated as an evidence-impairment crime*." *Fischer*, 64 F.4th at 377 (Katsas, J., dissenting) (emphasis added).

What Congress intended to prevent fraudulent document shredding has instead turned into a Constitution-shredding provision being wielded in novel, unintended, and grossly disproportionate prosecutions of individuals who merely exercised their First Amendment rights to assemble, speak, and petition. "[U]ntil the January 6 prosecutions, courts had no occasion to consider whether it sweeps more broadly" than its intended purpose of preventing evidence destruction. *Id.* The January 6 prosecutions and the government's unconstitutional overreach in

supercharging expressive activities into felonies subject to 20-year prison sentences demand this Court's intervention.

There are certainly those who view January 6 as "one of the greatest tragedies in American history." *United States v. Garcia*, No. 21-0129 (ABJ), 2022 WL 2904352, *13 (D.D.C. July 22, 2022). Others disagree.[3] But, even assuming *arguendo* that January 6 was the tragedy some claim, that is all the more reason for this Court to ensure that the fateful events of that day do not become a stain on the Constitution itself. While it may be "tempting to hold that First Amendment rights should acquiesce to national security in this instance," *Tobey v. Jones*, 706 F.3d 379, 393 (4th Cir. 2013), the survival of the Republic depends on this Court not succumbing to that temptation.

When tensions arise in the National conversation, such as in the case of January 6, often "the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights." *American Communist Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 453 (1950) (Black, J., dissenting). But, where the fog of public excitement is at its apex, "the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly." *De Jonge v.*

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[3] Others, more truthfully, note that while the vandalism that occurred on January 6 was unlawful and should be punished, it was not a national tragedy or an insurrection. *See, e.g.*, Tucker Carlson, *The truth of what happened on Jan. 6 is still unknown*, Fox News (June 9, 2022), https://www.foxnews.com/opinion/tucker-truth-happened-jan-6-unknown (last visited Feb. 1, 2024.").

Oregon, 299 U.S. 353, 365 (1937). Indeed, "[t]imes of crisis take the truest measure of our commitment to constitutional values. Constitutional values are only as strong as our willingness to reaffirm them when they seem most costly to bear." *Hartness v. Bush*, 919 F.2d 170, 181 (D.C. Cir. 1990) (Edwards, J., dissenting). "History reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. *But the ultimate strength of our constitutional guarantees lies in the unhesitating application in times of crisis and tranquility alike*." *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring) (emphasis added).

Regardless of one's views of the events surrounding January 6, the First Amendment demands more protection for constitutionally protected expressive activities than the Circuit Court's application of Section 1512(c) provides. For, "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be discarded." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting). This Court should relegate the unconstitutional expansion of Section 1512(c) to the dustbin of constitutional history.

SUMMARY OF ARGUMENT

The Circuit Court below, along with numerous district courts before it, have permitted federal law enforcement officials to use the document-shredding prohibition in 18 U.S.C. §1512(c) to indict, convict,

and imprison defendants who merely sought to exercise their constitutionally protected right to expression. The application of this corporate financial records law has run roughshod over the First Amendment. Transgressors can be punished by applicable law, but the Sarbanes-Oxley Act is neither applicable nor appropriate here.

The provision at issue in the instant matter is entitled, "Tampering with a witness, victim, or an informant." *See* 15 U.S.C. § 1512. It states:

> 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).

Statutes that touch and concern cherished First Amendment liberties must be carefully scrutinized to ensure that the right to speak is not chilled by the unintended consequences of laws not designed to impact speech. The Circuit Court's application of

Section 1512(c) criminalizes vast amounts of constitutionally protected expression, casts a net far too wide to survive constitutional scrutiny, would make this Court's past precedents a dead letter, and fails to provide adequate notice to the citizenry that it can be trotted out to punish unpopular defendants far beyond what the law would otherwise allow. This Court should resoundingly reject the use of Section 1512(c) to activities involving speech, assembly, and petition; and put it back in its proper role as a document-shredding prohibition. Anything less tramples the First Amendment freedoms that lay "at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

ARGUMENT

I. THE CIRCUIT COURT'S APPLICATION OF SECTION 1512(c) TO EXPRESSIVE ACTIVITIES RUNS ROUGHSHOD OVER THE FIRST AMENDMENT.

A. Criminal Statutes Touching Core First Amendment Activities Must Be Scrutinized With Particular Care.

The operative language of the Sarbanes-Oxley Act is straightforward:

> 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)

The plain language of Section 1512(c) applies to documents and records, *not expressive activity*. And even if one disagrees that what happened on January 6 was expressive activity, at least it should be clear that the Sarbanes-Oxley Act has no application to the events of January 6.

"Criminal statutes must be scrutinized with particular care [and] those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (internal citations omitted). Since time immemorial, this Court has recognized that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to courts to step inside and say who could be rightfully detained and who should be set at large." *Id.* at 466 (quoting *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1876)).

The reason for this is simple: "the First Amendment protects against the Government; it does not leave us at the mercy of the *noblesse oblige*. We would not uphold an unconstitutional statute because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). This is especially true in cases involving criminal statutes because "we cannot construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Stevens*, 559 U.S. at 480).

"[W]hen assessing the reach of a federal criminal statute, we must pay close heed to the language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985). Put simply, in an area touching upon critical First Amendment liberties, statutes must be read narrowly to avoid their unconstitutional application to protected speech. "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). As Justice Frankfurter colorfully put it,

> [i]n order to curb a mischief Congress cannot be so indefinite in its requirements that effort to meet them raises hazards unfair to those who seek obedience or involves surrender of freedoms which exceeds what may fairly be exacted. These restrictions on the broad scope

> of legislative direction are merely the law's application of the homely saws that one should not throw out the baby with the bath or burn the house to roast the pig.

Am. Communist Ass'n CIO v. Douds, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring). The Circuit Court's application of Section 1512(c) to protected expression presents this Court with "legislation not reasonably restricted to the evil with which it is said to deal," *Butler v. Michigan*, 352 U.S. 380, 383 (1957), and impermissibly turns Section 1512(c) into a meat cleaver and then burns the house to roast the pig. This Court should reject that novel, untethered, and expansive reading of Section 1512(c)

B. Section 1512(c), As Construed By The Circuit Court, Does Not Provide Sufficient Notice That Its Scope Extends To First Amendment Activities.

"[A]s we have recently reaffirmed, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (cleaned up). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we chose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bass*, 404

U.S. at 347 (cleaned up). *See also Dowling*, 473 U.S. at 213 (same). "The fair notice requirement "exists in part to protect the Due Process Clause's promise." *Bittner v. United States*, 598 U.S. 85, 102 (2023).

Here, the Circuit Court's acceptance of the Government's position that Section 1512(c) reaches constitutionally protected expression fails to give fair warning to anyone, much less Petitioner and the other defendants subjected to the Government's unconstitutional application of Section 1512(c). As this Court has acknowledged, "'the law is settled that *penal statutes* are to be construed strictly' and an individual 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Bittner*, 598 U.S. at 102 (quoting *Commissioner v. Acker*, 361 U.S. 87, 91 (1959)) (emphasis original). The Circuit Court's interpretation and application of Section 1512(c) ignores settled law by imposing the document-shredding prohibition's penalties to First Amendment activities.

As Judge Henderson noted in her dissent in a separate January 6 case, it is "doubt[ful] whether, in enacting section 1512(c), that Congress intended to supercharge a range of minor advocacy, lobbying, and protest offenses into 20-year felonies." *United States v. Robinson*, 86 F.4th 355, 396 (D.C. Cir. 2023) (Henderson, J., dissenting). Judge Katsas's dissent below further demonstrates the constitutional flaw in applying Section 1512(c) to such a broad swath of constitutionally protected expression.

> Consider a few more examples. A protester who demonstrates outside a courthouse, hoping to affect jury deliberations, has influenced an official proceeding (or attempted to do so, which carries the same penalty). So has an EPA employee who convinces a member of Congress to change his vote on pending environmental legislation. And so has the peaceful protestor in the Senate gallery. Under an unlawful-means test, all three would violate section 1512(c) because each of them broke the law while advocating, lobbying, or protesting. *See* 18 U.S.C. §1507 (prohibiting picketing outside a courthouse with the intent to influence a judge, juror, or witness); *id.* §1913 (prohibiting lobbying by agency employees); 40 U.S.C. §5104(e)(2)(G) (prohibiting demonstrating inside the Capitol Building). And each would face up to 20 years' imprisonment—rather than maximum penalties of one year, a criminal fine, and six months, respectively.

Fischer, 64 F.4th at 380 (Katsas, J., dissenting).

Can Congress really have intended for the penalties it already established for specific offenses to be enhanced by twenty years at the whim of a prosecutor in a case that does not involve evidence destruction, and to allow that enhancement on the basis of a document-shredding provision in Sarbanes-Oxley? Surely not.

Take, for example, one of the federal trespassing statutes. *See* 18 U.S.C. §1752. Congress enacted that statute to prohibit, *inter alia*, (1) "knowingly enter[ing] or remain[ing] in any restricted building or grounds without lawful authority to do so," (2) "knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions . . . imped[ing] or disrupt[ing] the orderly conduct of Government business or official functions," (3) obstructing or impeding ingress or egress to restricted buildings," and (4) engaging in violence against any person in a government building. 18 U.S.C. § 1752(a)(1)-(4). The penalty for such criminal trespass is "imprisonment for not more than one year" and a monetary fine if no deadly weapon or firearm is used and the trespass does not result in significant bodily injury. 18 U.S.C. §1752(b)(1)-(2). And, even if a deadly weapon or firearm is used or an individual suffers significant bodily injury as a result of the trespass, the maximum penalty under the statute is 10 years' imprisonment. 18 U.S.C. §1752(b)(1).

Under this particular federal trespass statute, individuals can see on the face of the provision that it applies to specific activity—entering and remaining in a restricted federal building for the purpose of impeding official business—and can see the consequences of engaging in the prohibited conduct. The trespass statute is plainly applicable to the United States Capitol. *See* 18 U.S.C. §1752(c). It thus provides fair notice to everyone what it prohibits, where it applies, and what its consequences are. In other words, it gives "a fair warning . . . to the world

in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

The juxtaposition of this plainly applicable statute with the plainly inapplicable document-shredding prohibitions of Section 1512(c) compels a finding that the Circuit Court's unprecedented interpretation and application of Section 1512(c) to expressive activities fails to provide adequate notice to those who might suffer its consequences. No one believed in 2002 when Sarbanes-Oxley was passed that Section 1512(c)'s document-shredding prohibition would later be applied to advocacy, lobbying, and petition activities. Yet, the Circuit Court's interpretation and application of it below accepts that it applies in such circumstances. "By glossing over section 1512(c)(2)'s ambiguity and adopting an all-encompassing interpretation," the Circuit Court diverged from well-settled precedent that it should not "assign federal criminal statutes a breathtaking scope." *Fischer*, 64 F.4th at 383 (Katsas, J., dissenting) (quoting *United States v. Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting)). The First Amendment requires more.

C. The Circuit Court's Application Of Section 1512(c) To First Amendment Activities Would Criminalize Assembly, Petition, And Free Speech.

The Circuit Court noted that its novel application of a document-shredding provision to First

Amendment activities was, unsurprisingly, without precedent. "To be sure, *outside of the January 6 cases brought in this jurisdiction*, *there is not precedent for using §1512(c)(2) to prosecute the type of conduct at issue in this case*." *Fischer*, 64 F.4th at 339 (emphasis added). The reason for this is simple: use of Section 1512(c) in the manner below criminalizes large swaths of constitutionally protected expression. The only reason for Section 1512(c)'s unprecedented application here is that the speech, assembly, and expression was unpopular, detested by the very prosecutors running amok with the section's prohibitions, and invited opprobrium from the people—elected representatives—who it was aimed at influencing. A crime of this nature is no crime—*it is the premise of our Constitution*.

"The vitality of civil and political institutions in our society depends on free discussion." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Indeed,

> [t]he greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937).

"The right to speak freely and to promote a diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4.

> It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion *cannot be made a crime*. The holding of meetings for peaceable political action *cannot be proscribed*. Those who assist in the conduct of such meetings *cannot be branded as criminals on that score* [and] mere participation in a peaceable assembly and a lawful public discussion *[cannot be] the basis for a criminal charge*.

De Jonge, 299 U.S. at 365 (emphasis added). For in these principles "lies the security of the Republic, the very foundation of constitutional government." *Id.*

That such speech, assembly, or expression invites dispute or touches upon sensitive and unpopular matters is of no moment. "[A] function of free speech under our system of government is to invite dispute," *Terminiello*, 337 U.S. at 4, and "[i]t 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." *Id.* Indeed, "[s]peech is often provocative and challenging," *id.*, and it "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). "If there is a bedrock

principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

The Circuit Court's application of Section 1512(c) permits the criminalization of expressive activities. As Judge Katsas noted below,

> An activist who successfully rails against bringing a bill to a vote on the Senate floor has obstructed or influenced an official proceeding. . . . A lobbyist who successfully persuades a member of Congress to change a vote has likewise influenced an official proceeding. So has a peaceful protestor who, attempting to sway votes, holds up a sign in the Senate gallery before being escorted away. . . . the construction of section 1512(c) adopted by my colleagues will sweep in all of the above.

Fischer, 64 F.4th at 380 (Katsas, J., dissenting). And, because—for purposes of Section 1512(c)—the proceeding need not even be ongoing, *see* 18 U.S.C. §1512(f)(1), all such activities would be subject to criminal prosecution and 20 years' imprisonment *regardless of when such activities took place or whether a proceeding was actually obstructed*. *See id.* "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, 64 F.4th at 380 (Katsas, J., dissenting) (quoting *United States v. North*, 910 F.2d 843, 882 (D.C. Cir. 1990)).

D. This Court's First Amendment Precedent Would Be Unrecognizable In A World Where Section 1512(c) Operates As The Circuit Court Allowed In This Case.

This Court's First Amendment precedent would be vastly different had Section 1512(c) been applied in the manner the Circuit Court permitted below. Take, for instance, *Cox v. Louisiana*, where some 1,500 to 2,000 protestors demonstrated from the Louisiana State Capitol to the courthouse. 379 U.S. 536, 538 (1965). One of the protestors, Reverend Elton Cox, led a civil rights demonstration and was the organizer of the large protest that led to numerous arrests. *Id.* at 538-39. During the demonstration, several police officers "spoke to Cox at the northeast corner of the capital grounds. Cox identified himself as the group's leader [and] explained that the students were demonstrating to protest the illegal arrest of some of their people who were being held in jail [and] to protest the evil of discrimination." *Id.* at 539-40. Dissatisfied with what was a peaceful protest, the police instructed Cox that his group had become "inflammatory" and a disturbance of the peace. *Id.* He was arrested and convicted of three offenses: disturbing the peace, obstructing public passages, and picketing before a courthouse. *Id.* at 538. He was sentenced to almost two years in jail and $5,700 fine. *Id.*

Much like here, the trial court found that it "must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district . . . and congregate across the street from the courthouse." *Id.* at 550. This Court reversed and set aside Cox's conviction because the government's application of its ordinances violated the First Amendment. *Id.* at 545. "It is clear to us that on the facts of this case . . . Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute." *Id.* This Court noted that the evidence for conviction "showed no more than that the opinions which the students were peaceably expressing were sufficiently opposed to the views of the majority of the community" and that using this as the basis for a criminal conviction cannot be countenanced under the First Amendment. *Id.* at 551. "[T]he compelling answer is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.* (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

Under the Circuit Court's decision below, there is little doubt Reverend Cox could have been charged and convicted with a violation of Section 1512(c) for "obstruct[ing], influenc[ing], or imped[ing] any official proceeding" that may have been happening at the courthouse that day, 18 U.S.C. §1512(c)(2), and therefore sentenced to twenty years in prison. Reverend Cox's protest of the young men's arrests and detainment in jail could have been held, under the Circuit Court's analysis below, as obstructing the future proceeding wherein the young men would be

tried, as attempting to influence the judge or jury who would preside over that proceeding, or as impeding access to a proceeding to be held on the day of the protest because 1,500-2,000 people had taken up most of the passageway to the courthouse. *See* 379 U.S. at 538-39.

The document-shredding prohibition under Section 1512(c) was never intended to reach Reverence Cox's expressive conduct, nor for that matter the events of January 6. But the logical inference of the Circuit Court's decision below is that it would have reached Reverend Cox's expression. After all, the Circuit Court held that the fact Congress might not have intended it is irrelevant, since that is the "whole value of a generally phrased . . . catchall for matters not specifically contemplated." *Fischer*, 64 F.4th at 339 (cleaned up).

This Court's decision in *Edwards v. South Carolina* would likewise be vastly different had the Circuit Court's application of Section 1512(c) applied in 1963. 372 U.S. 229 (1963). There, 187 petitioners challenged their arrest and conviction for engaging in a protest aimed at demonstrating their "dissatisfaction with the present condition of discriminatory actions" to the "Legislative Bodies of South Carolina." 372 U.S. at 230. The protestors specifically went to the South Carolina State House grounds to target their dissatisfaction at officials who would be meeting in the legislative body that day. *Id.* Indeed, the protestors in *Edwards* targeted the State House because it was the building containing the Executive Branch of the South Carolina government,

the Legislative Branch, and the Judicial Branch." *Id.* at 235 n.10. Despite the fact that the only disturbance the protestors caused was to "slow down" vehicular traffic on the capitol grounds, *id.* at 231. The protestors were charged and convicted of breach of the peace. *Id.* at 234. Each of the protestors was sentenced to between five and 30 days in jail. *Id.* at 234. This Court held that such convictions could not withstand First Amendment scrutiny. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Id.* at 237.

Using the Circuit Court's understanding of Section 1512(c), petitioners in *Edwards* would no doubt have been obstructing an official proceeding, or—by their own admission—attempting to do so, because "during the period covered in the warrant in this matter . . . the Legislature of South Carolina was in session." *Id.* at 235 n.10. Thus, there would have been an ongoing "official proceeding," *Fischer*, 64 F.4th at 342-43, and petitioners in *Edwards* would have been "corruptly" attempting to "influence" that proceeding by taking "obstructive action [that was] independently unlawful" under South Carolina law. *Id.* Thus, rather than the 30-day jail penalty, the *Edwards* petitioners would have "face[d] up to 20 years' imprisonment" under the Circuit Court's decision to "supercharge a range of minor advocacy, lobbying, and protests." *Id.* at 380 (Katsas, J., dissenting).

Similarly, would Paul Robert Cohen have been subject to a supercharged felony punishable by 20 years' imprisonment for impeding or attempting to

impede the work of the Los Angeles Municipal Court on April 26, 1968? *See Cohen v. California*, 403 U.S. 15 (1971). There, Mr. Cohen was present for business in the "corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'F*** the Draft." *Id.* at 16. He was convicted and sentenced to 30 days' imprisonment for disturbing the peace. *Id.* This Court set aside his conviction because the First Amendment prohibits the state from criminalizing speech that might otherwise be deemed offensive to some. *Id.* at 26. There were, no doubt, official court proceedings taking place in the Los Angeles Municipal Court that morning, and Mr. Cohen doubtlessly caused some impediment to those proceedings by requiring officers to arrest him in the "corridor outside division 20." *Id.* at 16. And, Mr. Cohen testified that "he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feeling against the Vietnam War and the draft." *Id.* Thus, Mr. Cohen intentionally wore a jacket that would cause a disturbance (*i.e.*, obstruction or impediment) inside the courthouse during official proceedings. Under the Circuit Court's rationale below, Mr. Cohen thus "corruptly" impeded an official proceeding, and could have been sentenced to 20 years' imprisonment under Section 1512(c).

Had the Circuit Court's understanding of Section 1512(c) been applicable at the time of these cases and had it been adopted by this Court, as the United States requests here, the First Amendment would look nothing like the shining beacon of protection this Court's precedents have otherwise made it.

II. THE CIRCUIT COURT'S INTERPRETATION AND APPLICATION OF SECTION 1512(c) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The Circuit Court's interpretation and application of Section 1512(c) to permit prosecution for expressive activities without any limiting principle makes Section 1512(c) unconstitutionally vague and overbroad, and permits the government to selectively enforce it.

A. The Circuit Court's Extension Of Section 1512(c) To First Amendment Activities Leaves People Of Ordinary Intelligence Guessing At Its Meaning And Differing As To Its Application.

A law is unconstitutionally vague and overbroad if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Government restrictions "must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to take." *Id.* at 393. "Precision of regulation" is the touchstone of the First Amendment. *NAACP v. Button*, 371 U.S. 415, 435 (1963). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). While all regulations must be reasonably

clear, "laws which threaten to inhibit the exercise of constitutionally protected" expression must satisfy "a more stringent vagueness test." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Thus, a law must give "adequate warning of what activities it proscribes" and must "set out explicit standards for those who apply it." *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citing *Grayned*, 408 U.S. at 108).

As Chief Justice Hughes wrote in *Stromberg v. California*,

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

283 U.S. 359, 369 (1931); *see also*, *Edwards*, 372 U.S. at 238 (same).

As Judge Katsas pointed out below, the First Amendment infirmities arising from the Circuit Court's application of Section 1512(c) would otherwise be problematic in themselves, but "[t]his problem is

particularly serious given the breadth of Section 1512(c)." *Fischer*, 64 F.4th at 379 (Katsas, J., dissenting). Section 1512(c)'s prohibitions—if not appropriately cabined to prohibit application to constitutionally protected activity—leaves men guessing whether their otherwise lawful activities automatically become serious felonies at the whim of a rogue prosecutor. Indeed, Section 1512(c), without appropriate restrictions, "would sweep in *any conduct that influences or affects an official proceeding*." *Id.* (emphasis added).

> Imagine a tobacco or firearms lobbyist who persuades Congress to stop investigating how many individuals are killed by the product. Would the lobbyist violate section 1512(c) because his conduct was 'wrongful' or 'immoral' in some abstract sense? Or what if the lobbyist believed that his work was wrongful or immoral, but did it anyway to earn a living? The lead opinion dismisses such hypotheticals . . . but without explaining why liability would not attach under a mere requirement of acting wrongfully.

Id.

The Constitution does not permit the government to leave people guessing as to whether their speech and expressive activities might be subject to prosecution under a statute having nothing to do with speech. "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the

full exercise of First Amendment freedoms." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). "When the statutes also have an overbroad sweep," as the Circuit Court's application of Section 1512(c) does below, "the hazard of loss or substantial impairment of those precious rights may be critical." *Id.* Under the Circuit Court's application of Section 1512(c) below, even individuals who peacefully engaged in lawful protest may find themselves on the receiving end of a felony prosecution by the United States Department of Justice because the Circuit Court's application of Section 1512(c) "lends [itself] too readily to denial of [First Amendment] rights." *Id.* "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Id.* The reason for this is amply demonstrated by even the concurrence below, which noted that "[a]n innovatively broad definition of 'corruptly' could raise serious concerns that §1512(c)(2) is a vague provision with a *breathtaking scope*." *Fischer*, 64 F.4th at 360 (Walker, J., concurring) (emphasis added).

Under the Circuit Court's interpretation, Section 1512(c) "would sweep in advocacy, lobbying, and protest—common mechanisms by which citizens attempt to influence official proceedings." *Id.* at 378 (Katsas, J., dissenting). But, "[h]istorically, these activities did not constitute obstruction unless they directly impinged on a proceeding's truth-seeking function through acts such as bribing a decisionmaker or falsifying evidence presented to it." *Id.* Section 1512(c) "*seems an unlikely candidate to extend obstruction law into new realms of political speech*."

Id. (emphasis added). But, as unlikely a candidate as the face of the statute might suggest, the Circuit Court below and numerous district courts before it turned it into precisely that vehicle and ran roughshod over the First Amendment in the process. And, regardless of the unlikeliness of Section 1512(c)'s candidacy for obstruction prosecutions before, that is irrelevant for purposes of the First Amendment. "[W]e have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski*, 380 U.S. at 487. Simply put, this Court does not tolerate "in the area of First Amendment freedoms, the existence of a penal statute susceptible to sweeping and improper application." *Button*, 371 U.S. at 433.

The Circuit Court below questioned the hypotheticals that Judge Katsas raised by suggesting that an appropriate narrowing of the word "corruptly" solves all constitutional problems. *Fischer*, 64 F.4th at 339-40. But, as this Court has held, "[i]t is no answer to say that the statute would not be applied in such a case," *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 599 (1967), because the mere possibility of such enforcement "intimidates parties into censoring their own speech, even if the discretion and power are never abused." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Under the Circuit Court's interpretation and application of Section 1512(c), "[t]he range of activities which are or might be deemed inconsistent

with the required promise is very wide indeed," *Baggett v. Bullitt*, 377 U.S. 360, 371 (1964), and the "boundaries of the forbidden areas [not] clearly marked." *Id.* at 372. Under the Circuit Court's application of Section 1512(c), one is left to wonder: "Where does fanciful possibility end and intended coverage begin." *Id.* at 373. That is a question the First Amendment prohibits the government from imposing on the citizenry. The Circuit Court below puts them to that unenviable inquiry. "*Free speech may not be so inhibited*." *Id.* (emphasis added).

B. The Government's Selective Application Of Section 1512(c) Proves It Is Vague And Runs Afoul Of Vital Constitutional Guarantees.

The United States' selective application of Section 1512(c) also demonstrates that, under the Circuit Court's interpretation and application, it is an unwieldy and unprincipled provision capable of discriminatory application at the whim of roving prosecutors. A few examples demonstrate the problems of such an untethered interpretation of Section 1512(c). As the Circuit Court recognized, "outside of 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." *Fischer*, 64 F.4th at 339. Yet, the United States dusted off this document-shredding prohibition to supercharge the minor offenses of some and the constitutionally protected expression of others into felonies subject to 20 years' imprisonment. In no other instance, including a host of recent

examples of similar expressive activities disrupting official proceedings, has the United States wielded the sword of Section 1512(c) to impose such drastic penalties.

Take for instance, the violent assaults at the Hatfield Federal Courthouse in Portland, Oregon in July 2020. *See Portland Riots Read Out: July 21,* U.S. Department of Homeland Security (Jul. 21, 2020), https://www.dhs.gov/news/ 2020/07/21/portland-riots-read-out-july-21 (last visited February 1, 2024). There, the United States Department of Homeland Security noted "violent attacks on federal officers with weapons as well as efforts to start fires at the Hatfield Federal Courthouse *with law enforcement officers inside the building*." *Id.* (emphasis added). As reported, "over 1,000 people surrounded the Hatfield Federal Courthouse and began removing plywood coverings from the windows meant to protect the building and the federal officers inside, and then attempted to throw objects – some of them incendiary – through the windows at the offices." *Id.* These individuals – though plainly committing violent crimes (*i.e.*, acting "corruptly") – were no doubt obstructing official proceedings at the federal courthouse in Portland.

Did Section 1512(c) make an appearance in those felony prosecutions of the terrorists and anarchists in Oregon who plainly assaulted a federal building and impeded official proceedings? *No*.

Or, take Defendant Tighe Barry, who unlawfully and intentionally obstructed the Judiciary Committee

of the United States Senate during its hearings on the appointment of Justice Brett Kavanaugh. *See United States v. Barry*, No. 18-cv-00111 (RMM), 2019 WL 2396266 (D.D.C. June 5, 2019). On September 6, 2018, Defendant Barry "attended the Senate confirmation hearing for then-nominee Justice Brett Kavanaugh in the Hart Senate Office Building." 2019 WL 2396266, at *1. "The officers observed Mr. Barry allegedly placing a pink tiara hat on his head with the writing 'KAVA-NOPE CODE PINK' and allegedly advised him that demonstrating was prohibited and to remove the hat." *Id.* Defendant Barry "then pulled out a large sign and stood on top of his chair and allegedly began shouting in the direction of the hearing committee members." *Id.* "When approached by the officers, Mr. Barry allegedly leapt from his row of chairs to the row in front of him, causing a chair to dislodge towards other attendees behind him and allegedly injuring another hearing attendee." *Id.* "The officers then removed Mr. Barry from the hearing room, while he allegedly continued to shout, carrying him out by his arms and legs." *Id.*

Did the United States dust off Section 1512(c) to prosecute Mr. Barry for corruptly obstructing, impeding, or attempting to influence the Senate confirmation hearings for Justice Kavanaugh? *No*.

Notably, Defendant Barry was charged with disorderly conduct at the United States Capitol. *Id.* (citing 40 U.S.C. §5104(e)(2)(D)). Judge Katsas pointed out that a "protestor in the Senate gallery" could be charged with exactly what Defendant Barry was charged with and face only six months'

imprisonment, *Fischer*, 64 F.4th at 380 (Katsas, J., dissenting), while a January 6 defendant subject to Section 1512(c)'s newfound use would suffer the supercharged felony worth 20 years' imprisonment. Contrary to Petitioner below, Defendant Barry suffered no such fate.

Or, take the recent anti-Israel protestors storming the rotunda of the Cannon House Office Building. *See* Jillian Smith, *Hundreds arrested after Pro-Palestinian demonstrators flood Cannon Rotunda, Capital Complex*, FOX 5 DC (Oct. 18 2023), https://www.fox5dc.com/news/pro-palestinianprotest-underway-at-capitol-rotunda-uscp-detains-some demonstrators-israel-hamas-war-capitol-hill-jewish-voices-for-peace (last visited February 1, 2024). There, "demonstrators flood[ed] into the Cannon House Office Building and large crowds gather[ed] with flags and signs around the Capitol complex." *Id.* It took Capitol Police "hours to clear the crowd that had grown inside," and several individuals had assaulted officers. *Id.* The Capitol Police charged them with illegally protesting inside a House Office Building. *Id.*

Again, did the United States trot out Section 1512(c) to prosecute these violent protestors that "stormed the Capital" in the same manner as the numerous January 6 defendants are alleged to have done? *No.*

The above examples are not the only recent protestors who "stormed" the Capitol and disrupted the work of Congress. In November, members of the

Code Pink organization staged a protest in the United States Senate building. *See* Emily Jacobs, *Israel war: Code Pink occupies Senate Democrat offices demanding Gaza ceasefire* (November 3, 2023), https://www.washingtonexaminer.com/news/2433753/israel-war-code-pink-occupies-senate-democrat-offices-demanding-gaza-ceasefire/ (last visited February 1, 2024). The Code Pink protestors "covered themselves in fake blood" and "took over the offices" of 10 United States Senators. *Id.*

In December, another group of protestors occupied the Hart Senate Office Building, sprawling themselves on the floor to obstruct passage, throwing "blood money" all over the atrium floor, and climbing on statues to protest the United States position on Israel. *See* Rachel Schilke, *Capitol Police arrest more than 40 pro-ceasefire protestors inside Senate office building*, Washington Examiner (December 11, 2023), https://www.washingtonexaminer.com/news/senate/2449305/capitol-police-arrest-more-than-40-pro-ceasefire-protesters-inside-senate-office-building/ (last visited February 1, 2024).

Did Section 1512(c) make an appearance in any of these matters? *No*, all protestors were charged with violation of a D.C. ordinance prohibiting protesting in a government building.

The disparate application of laws runs afoul of the basic premise of our constitutional system. "[A]ll should be governed by the same legal standards to the end that they receive equal treatment under law." *Kinsella v. Krueger*, 351 U.S. 470, 477 (1956). And,

"[i]mpartiality in this sense assures equal application of the law" and "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to every other party." *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002). The Circuit Court's interpretation and application of Section 1512(c) in this case, and in many others concerning the January 6 defendants, blatantly ignores this fundamental principle of the Constitution. "The effect of a double standard might well create sufficient unrest and confusion to result in the destruction of effective law enforcement." *Kinsella*, 351 U.S. at 477. The prosecution of Petitioner Fischer below and many of the January 6 defendants prosecuted by the United States under Section 1512(c) runs this unacceptable risk. The conviction should be reversed, and Section 1512(c) returned to its rightful place as a document-shredding prohibition. Any other outcome leaves it as a Constitution-shredding criminal prohibition with unimaginable consequences for the First Amendment and the Republic.

CONCLUSION

The Circuit Court's interpretation and application of Section 1512(c) cannot be reconciled with the First Amendment. This Court should reverse and hold that Section 1512(c) does not apply beyond its intended document-shredding purpose.

Respectfully submitted,

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