No. 23-5572

In the Supreme Court of the United States

JOSEPH W. FISCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Did the D.C. Circuit err in construing 18 U.S.C. § 1512(c) ("Witness, Victim, or Informant Tampering"), which prohibits obstruction of congressional inquiries and investigations, to include acts unrelated to investigations and evidence?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life and the freedom to assemble. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Colorado Republican State Central Committee v. Anderson,* U.S. No. 23-696 (2023); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2234 (2022), addressing various constitutional issues. This amicus brief is particularly filed on behalf of ACLJ members who engage in pro-life advocacy and protest.

The present amicus brief addresses the First Amendment implications of the D.C. Circuit's ruling and urges this Court to interpret 18 U.S.C. § 1512 in the light of First Amendment principles. It takes no position on the specific facts alleged in Joseph Fischer's indictment or the application of a correct interpretation of the statute to those alleged facts and is accordingly a brief in support of neither party.

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

SUMMARY OF ARGUMENT

By interpreting a destruction-of-evidence statute as a cudgel against *any* action that may be taken to *influence* official proceedings, the D.C. Circuit has struck a blow at the very core of the First Amendment.

This Court has repeatedly constrained the interpretation of criminal laws in light of the First Amendment, rejecting interpretations that would empower criminal laws to interfere with the people's rights to engage in assembly and advocacy. The interpretation the D.C. Circuit adopted of 18 U.S.C. § 1512, the obstruction-of-evidence statute, reads that statute so broadly that it includes within its scope – and thus prohibits – wide swaths of protected activity, subject to a twenty-year prison sentence. Under the D.C. Circuit's interpretation, any act taken to influence an official proceeding constitutes the requisite act to establish criminal liability under the statute. This would include protesting a congressional proceeding, advocating for a result at an administrative hearing, and seeking to influence this Court's proceedings through advocacy. The statute's *actus reus* is so broad that it encompasses almost every form of political activity.

The only limitation on the breadth of the D.C. Circuit's interpretation is a single word, "corruptly," that serves as the statute's *mens rea* element. But corruptly is inherently a broad term, exacerbated by the fact that the D.C. Circuit has expressly disclaimed any specific limiting definition. In light of its breadth,

the term "corruptly" cannot provide any significant protection to ensure First Amendment rights are not curtailed. Even more to the point, a criminal statute should not be read to apply extensively and frequently to First Amendment conduct, with the only limitation being a vague and undefined *mens rea*. A standard under which every brief filed with any court constitutes the statute's *actus reus*, and the only question is which briefs have the requisite *mens rea*, is simply not a workable standard of criminal law.

Instead, to the extent there is legitimate ambiguity, this Court should apply the tools of interpretation, particularly the *ejusdem generis* canon, to read this obstruction-of-evidence statute in the context in which it was written. It is clear from its text that it was never designed or understood to attack the First Amendment; the statute's text limits the scope of its application to evidence-related offenses and forecloses the breadth advocated for by the Government.

ARGUMENT

The statute at issue here, 18 U.S.C. § 1512(c), includes as its *actus reus* to "otherwise . . . influence[] . . . any official proceeding." That is a veritable definition of First Amendment activity. The only limitations the statute imposes on this vast prohibition, then, must be derived either from the statutory *mens rea* – "corruptly" – or by reading the term "otherwise" to impute clear guardrails on the

scope of the statute (as this Court has interpreted "otherwise" in other contexts, *see Begay v. United States*, 553 U.S. 137 (2008)). In light of the immense constitutional problems that come with reading a federal criminal statute to prohibit First Amendment activity, it is absolutely essential that this Court interpret § 1512(c) in a manner narrow enough to avoid suspending a sword of Damocles over every person who tries to influence official proceedings.

At the very heart of the First Amendment is the people's right to gather freely and to engage in political activity, including the freedom to protest and seek to influence political action through making their voices heard. This protected expressive activity and speech may support or critique the government, but regardless of its perspective, it is protected speech. "Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (internal quotation marks and citations omitted). By its holding, the D.C. Circuit has left that principle behind.

I. The Construction Adopted by the Court Below Impermissibly Extends 18 U.S.C. § 1512 to First Amendment Activity.

Criminal laws are some of the most powerful tools in the government's arsenal, and this Court has

accordingly been highly circumspect when reviewing laws that affect political speech. Untethered from the facts of this specific case, the D.C. Circuit's interpretation of 18 U.S.C. § 1512(c)(2) reads that statute in such a breathtakingly broad fashion that it will inevitably threaten the rights of citizens to engage in protected advocacy. The court's interpretation will sweep many instances of peaceful political activity into the reach of this criminal statute bearing a heavy penalty, delivering a devastating blow to the First Amendment.

A. Criminal Statutes Should Be Interpreted in Conformity with the First Amendment, Not in Tension with It.

This Court has repeatedly emphasized the importance of interpreting laws in light of the First Amendment, refusing to read statutes in such a way as would cause them to reach common and constitutionally protected activity. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). For example, this Court has interpreted antitrust laws not to apply to a "combination" for purposes of a political publicity campaign in favor of the adoption of certain laws because the alternative "would raise important constitutional questions" under the First Amendment. *Id.* "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*; *see also Nat'l*

Org. for Women v. Scheidler, 510 U.S. 249, 265 (1994) (Souter, J., concurring) (noting "that RICO actions could deter protected advocacy and [cautioning] courts applying RICO to bear in mind the First Amendment interests that could be at stake"). This Court has held that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007).[2]

Likewise, this Court has emphasized that laws burdening speech should be interpreted so as to have a robust scienter element, overturning an interpretation of criminal law related to speech for its overbroad impact on the First Amendment. *Smith v. People of the State of Cal.*, 361 U.S. 147, 152-53 (1959) ("[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."). *Smith* is particularly instructive because the actual material the law in that case targeted, obscenity, is in fact not constitutionally protected. But nonetheless,

> if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction

[2] Chief Justice Roberts's opinion emphasized the practical effects on First Amendment activity of the statute being reviewed in *FEC*, highlighting evidentiary materials submitted by this amicus. *FEC*, 551 U.S. at 470 (opinion of Roberts, C.J., joined by Alito, J.).

> upon the distribution of constitutionally protected as well as obscene literature.

Id. at 153. Likewise here, the effects of the court's interpretation below, even if specific conduct at issue in a particular indictment is illegal, will stretch the statute far beyond illegal conduct to chill many forms of constitutionally protected free speech activity. *See New York v. Ferber*, 458 U.S. 747 (1982). In other words, the First Amendment demands heightened standards for laws that may infringe on speech rights:

> Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.

Smith, 361 U.S. at 150-51.

This First Amendment principle reflects the Court's more general interpretative canon that laws must be construed in a way that would avoid constitutional questions. *See Lucas v. Alexander*, 279 U.S. 573, 577 (1929) (emphasizing that a law "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity"). This Court has set this principle in clear and absolute terms: "where a statute is susceptible of two constructions, by one of which grave and doubtful

constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also Knights Templars' & Masons' Life Indem. Co. v. Jarman*, 187 U.S. 197, 205 (1902). The Court's duty is "to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution." *Grenada Cnty. Supervisors v. Brogden*, 112 U.S. 261, 269 (1884).

B. The D.C. Circuit's Interpretation Would Sweep Within its Ambit Much Protected Speech.

Despite the repeated warnings from this Court that criminal law should not be read so as to infringe upon First Amendment rights, the D.C. Circuit nonetheless read 18 U.S.C. § 1512(c)(2) in a broad and novel fashion. In fact, the D.C. Circuit conceded that "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*." *United States v. Fischer*, 64 F.4th 329, 339 (D.C. Cir. 2023) (emphasis added).

The court below held that the statute is broad enough to include *any influence of any official proceeding*, rather than recognizing that "otherwise" refers to conduct similar to destruction of evidence. (The *mens rea* component, "corruptly," will be discussed *infra*).

The relevant statute provides a twenty-year prison sentence for

> [w]hoever 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.

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

The fundamental problem with this case is the "broader legal implications of the Government's boundless interpretation[.]" *McDonnell v. United States*, 579 U.S. 550, 581 (2016). As Judge Katsas explained thoroughly in his dissent,

> In the government's view, subsection (c)(2) reaches any act that obstructs, influences, or impedes an official proceeding—which means anything that affects or hinders the proceeding, *see Marinello*, 138 S. Ct. at 1106. Among other things, that construction would sweep in advocacy, lobbying, and protest—common mechanisms by which citizens attempt to influence official proceedings. Historically,

> 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. And the Corporate Fraud Accountability Act of 2002, which created section 1512(c), seems an unlikely candidate to extend obstruction law into new realms of political speech[.]

Fischer, 64 F.4th at 378 (Katsas, J., dissenting). The construction adopted by the D.C. Circuit will not apply only to the events of January 6, 2021, but will apply any time anyone is charged under this provision of the Corporate Fraud Accountability Act. Under this interpretation, the only *actus reus* the government need prove to reach a conviction, resulting in up to twenty years of imprisonment, is that a defendant in some way *influences* any official proceeding (or merely attempts to do so). There need be no relation to evidence or witnesses.

The definition that the D.C. Circuit has adopted is so broad that it will inevitably stifle wide swaths of First Amendment activity. "Official proceeding" arguably encompasses many activities of the three branches of government and is defined by statute. 18 U.S.C. § 1515(a)(1). And obstruct, influence, and impede are all broad terms. As this court has made clear, "[t]he statutory words 'obstruct or impede' are broad. They can refer to anything that 'block[s],'

'make[s] difficult,' or 'hinder[s].'" *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (internal citations omitted). "Influence," of course, is even broader, by orders of magnitude.

As Judge Katsas highlighted, "A lobbyist who successfully persuades a member of Congress to change a vote has likewise influenced an official proceeding." *Fischer*, 64 F.4th at 378. Judicial proceedings are included in the statute as official proceedings. Accordingly, any protestor in any case who stands outside this building peacefully protesting is at least attempting to influence proceedings of this Court. The same is true of congressional proceedings, which are also classified as official proceedings: "If attempting to influence a congressional committee by itself is a crime, we might as well convert all of Washington's office buildings into prisons." *Id.* at 379 (quoting *United States v. North*, 910 F.2d 843, 942 (D.C. Cir. 1990) (Silberman, J., dissenting in part)).

The proceedings of this Court, the proceedings of Congress, and the actions of the executive branch are all official proceedings. By the reasoning of the court below, any attempt to "influence" any of those proceedings would be potentially subject to criminal liability and a twenty-year criminal sentence. For that matter, briefs filed with this Court (or any other court) seek to "influence" the decision of the Court in an official proceeding—its adjudication of this case. According to the lower court's rationale, even the filing of this amicus brief satisfies the *actus reus*

element of the Corporate Fraud Accountability Act. This is absurd.

Or take protestors, in particular, those who protest in favor of laws protecting the unborn and women from exploitation. Advocacy and protest are constitutionally protected. But under the government's interpretation, blessed by the lower court, pro-life protestors trying to influence a congressional vote through the signs they are holding in their peaceful protest commit the *actus reus* under § 1512(c). And, as is addressed in more depth in section C *infra*, the "corruptly" element provides scant comfort due to its vagueness.

The government's argument here has focused on the specific facts, regarding as the "core question" in this case as whether the Petitioner's conduct "falls within the scope of Section 1512(c)(2)." Res. Br. in Opp. 13; (*see also id.* at 14) ("At bottom, their contention is that Section 1512(c)(2) does not prohibit what they did on January 6."). But while the specific facts here are of course relevant to the disposition of this Petitioner's charge, it is ultimately a distraction from the central question presented to this Court, which is whether the D.C. Circuit correctly interpreted the Corporate Fraud Accountability Act by stretching it to encompass *any* action that influences an official proceeding. That question, with its heavy First Amendment overtones, is *not* dependent on the specific facts of the indictment. Instead, it depends on the breadth of the implications

of the lower court's ruling, a ruling severely curtailing the First Amendment rights of the public.

C. This Overbreadth is Not Cured by the Statute's Mens Rea.

In an attempt to address the First Amendment and overbreadth concerns raised by Judge Katsas in dissent, the opinion below, *Fischer*, 64 F.4th at 339, offered two "limitations" on 18 U.S.C. § 1512(c)(2) purportedly to curtail prosecutorial discretion and cabin the reach of the statute: (1) the statute applies to behavior targeted at an official proceeding, and (2) it only applies to "corrupt" conduct.

First, the official proceeding limitation is no limitation at all. Much constitutionally protected activity targets "official proceedings," as discussed above. Every protest or lobbying effort aimed at Congress is arguably "targeted" at an official proceeding, as is every judicial or executive branch protest or advocacy. Section 1515(a)(1)'s definition of official proceeding includes "a proceeding before the Congress," § 1515(a)(1)(B), any "proceeding before a judge or court of the United States," § 1515(a)(1)(A), and "a proceeding before a Federal Government agency," § 1515(a)(1)(C), or, in other words, seemingly the entire conduct of the federal government. The First Amendment concerns here will in no way be addressed simply by pointing to the "official proceeding" requirement. In many cases, it is precisely an "official proceeding" that will be at the

very center of First Amendment activity; it is in the context of those activities that people will be most eager to express their First Amendment-protected rights.

Then there is the "corruptly" *mens rea* requirement. That element does not save the statute either.[3] First, a *mens rea* requirement does not subtract from the breadth of the *actus reus* of a statute. An interpretation that says, just about everyone is guilty of the criminal *actus reus*, but we will fix it with an appropriately well-tailored *mens rea* requirement, is simply not an adequate means of statutory interpretation. Mental state, such as "corruptly," is a question of fact. *See, e.g.*, *North*, 910 F.2d at 942 (Silberman, J., dissenting in part) ("[I]t seems inescapable that this is a question of fact for the jury to determine whether an endeavor was undertaken corruptly."). "Under such a vague standard, *mens rea* denotes little more than a jury's subjective disapproval of the conduct at issue." *Fischer*, 64 F.4th at 379-80 (Katsas, J., dissenting). If the only meaningful limitation on the government is *mens rea*, the government may go after whomever it may choose and leave it to defendants to address their own mental state at trial. Even where such

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[3] The concurrence below, although disagreeing with Judge Katsas's analysis, rightly recognized that "we must define that mental state to make sense of (c)(2)'s act element. If (c)(2) has a broad act element and an even broader mental state, then its 'breathtaking' scope is a poor fit for its place as a residual clause in a broader obstruction-of-justice statute." *Fischer*, 64 F.4th at 351-52 (Walker, J., concurring).

defendants could prevail on appeal, lives and careers are ruined, and speech is chilled. The financial and reputational costs of a defense would itself be a severe punishment – as the phrase has it, "the process is the punishment." *Bolingbrook v. Citizens Utils. Co.*, 864 F.2d 481, 484 (7th Cir. 1988). The instant statute is thus equivalent to a statute that would, *inter alia*, prohibit "corruptly" protesting outside, lobbying inside, or writing letters to, Congress.

Corruptly, moreover, is a broad term. The D.C. Circuit did not settle on any specific meaning in this case, nor particularly explained how the word cures the breadth of the *actus reus*. As this Court explained, the "natural meaning" of "corruptly" is that the word is "normally associated with wrongful, immoral, depraved, or evil" conduct. *Arthur Andersen LLP v. United* States, 544 U.S. 696, 705 (2005). An interpretation of "corruptly" to encompass "immoral" conduct would be practically the same as a statute that on its face applies to "wrongful, immoral, depraved, or evil" conduct. Under such a vague standard, *mens rea* denotes little more than a jury's subjective disapproval of the conduct, as Judge Katsas put it. A prosecutor and then a jury would be left free to determine for themselves what sufficiently constitutes evidence of a corrupt motive. One juror believes speech advocating the restriction of abortion is wrongful, immoral, depraved, or evil. Another juror might think the same of speech from the opposite viewpoint.

In *Fischer*, the judges were divided on the question of "corruptly." The D.C. Circuit subsequently adopted a "standard" for *mens rea* under 18 U.S.C. § 1512(c)(2) in *United States v. Robertson*, 84 F.4th 1045, 1049 (D.C. Cir. 2023). That standard does not solve the problem.

The district court in *Robertson* had defined "corruptly" by focusing on "acting 'with consciousness of wrongdoing.'" *United States v. Robertson*, 610 F. Supp. 3d 229, 233 (D.D.C. 2022) (citation omitted). The defendant, in response, relied on the definition of corruptly discussed by Justice Scalia in *United States v. Aguilar*, 515 U.S. 593 (1995). There, Justice Scalia argued, as to a parallel statute, that acting "corruptly" requires "an act done with an intent to give some advantage inconsistent with official duty and the rights of others." *Id.* at 616 (Scalia, J., dissenting in part) (citation omitted); *see also id.* at 616-17 ("An act is done corruptly if it's done . . . with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person.") (citing Appendix). There are ample benefits to embracing this definition: Black's Law Dictionary likewise defines the word *corruptly*, as used in criminal statutes, as "a wrongful desire for pecuniary gain or other advantage." *Corruptly*, Black's Law Dictionary (11th ed. 2019). But as Judge Katsas pointed out, "This improper-benefit test may significantly narrow section 1512(c)(2), but only by excluding these defendants." *Fischer*, 64 F.4th at 380. A test based on Justice Scalia's analysis, requiring an action taken for

direct advantage, would remove defendants who acted without such a financial or pecuniary motive from the net of corruptly.

Instead, in *Robertson* the D.C. Circuit held "that the jury could have found, consistent with the district court's instructions" on a Section 1512(c)(2) count, "that Robertson acted 'corruptly' based on evidence that he used felonious 'unlawful means' to obstruct, impede, or influence the Electoral College vote certification." *Robertson*, 84 F.4th at 1054. Of course, the "means" used would go to the *actus reus*, not the *mens rea*, so it is not clear that this holding makes any sense. Worse, the court explicitly disclaimed adopting a universal standard for corruptly, declining to adopt as a categorical rule the "unlawful means" requirement: "there are a range of ways to prove a defendant's 'corrupt' intent or action." *Robertson*, 84 F.4th at 1054. Hence, even "lawful means" could be swept up under the statute.

The court suggested that corruptly "signifies acting with independently unlawful means, unlawful purpose, or both, and with consciousness of wrongdoing." *Id.* at 1053. But it did not provide any explicit definition or constrain its interpretation to this one meaning or even a possible range of meanings. In other words, the only limitation preventing the stifling of First Amendment activity by 18 U.S.C. § 1512(c)(1)(2) is the "corruptly" standard. And *Robertson* holds that there is no explicit definition of "corruptly," refusing to limit the possible

meanings to any specific definition or tailored meaning.

A narrow definition of "corruptly" would at least have a limiting effect on the scope of § 1512(c), albeit only limiting it in the sense that a statute prohibiting "corruptly" protesting can be narrowly limited. But the D.C. Circuit has expressly disclaimed such a narrow definition, or in fact any meaningful definition at all. *Robertson* will only exacerbate the problems in *Fischer* that Judge Katsas foresaw: without any clear and uniform definition of corruptly, § 1512(c)(1)(2) will have a broad enough sweep to encompass many forms of activity protected by the First Amendment.

Even the proposed "unlawful means" standard, which the trial court in *Robertson* focused on, would still inevitably sweep within it advocacy and protest. People often commit minor, misdemeanor code offenses, such as obstructing pedestrian passage, while engaged in advocacy. Judge Katsas gave several examples. One is that "[a] protestor 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)." 64 F.4th at 380 (Katsas, J., dissenting). Under this test, nonetheless, such conduct "would violate section 1512(c)(2) because [the defendant] broke the law while advocating, lobbying, or protesting." *Id.* Thereby, "the Corporate Fraud Accountability Act extended the harsh penalties of obstruction-of-justice law to new realms of advocacy, protest, and lobbying." *Id.*

D. The Text of 18 U.S.C. § 1512(c)(2) Confirms Judge Katsas's Narrower Reading.

This case hinges on the meaning of one word, "otherwise" in 18 U.S.C. § 1512(c)(1)(2). The broad interpretation adopted by the D.C. Circuit, under which "otherwise" refers to any other conduct whatsoever, without any limitation based on the surrounding language, is inconsistent with this Court's precedent and fails to recognize the specific meaning of "otherwise" used here, applying § 1512(c)(2) to conduct similar to the conduct described in § 1512(c)(1).

Interpretation must consider the whole text and context. *United States v. Briggs*, 141 S. Ct. 467, 470 (2020) ("The meaning of a statement often turns on the context in which it is made, and that is no less true of statutory language."). "The entirety of the document thus provides the context for each of its parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). "Statutory construction [] is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Subsection (c)(2) can only be understood in the light of the rest of Section 1512, particularly, subsection (c)(1). The word "otherwise" cannot be understood in a vacuum, as if (c)(2) "does nothing to restrict the

overall scope of section 1512(c)." *Fischer*, 64 F.4th at 365 (Katsas, J., dissenting).

The government argues that the words that precede "otherwise" in the statute simply do not affect its meaning. This is directly contradictory to many interpretative canons of this Court.

First, it violates the canon against surplusage, under which "it is no more the Court's function to revise by subtraction than by addition." Scalia & Garner, *supra* p. 19, at 174. Instead, interpretation must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citing *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)). By the government's reading, subsection (c)(1) is superfluous, as (c)(2) covers that behavior and more. Further the term "otherwise" itself is meaningless – (c)(2) would stand alone – and thus "otherwise" does not in any way limit the scope of subsection (c)(2). Rather than reading this subsection in such a contextual void, the Court should read (c)(2) in light of the rest of the statute. "Otherwise" is a crucial piece of clarification, indicating that what follows should be understood by reference to the earlier provisions of the statute.

But there is an even more crucially relevant interpretative principle: *ejusdem generis* provides that a general statutory term should be understood in light of the specific terms that surround it. *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (holding that a "catchall provision" is "to be read as bringing within a statute categories

similar in type to those specifically enumerated"). "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, *supra* p. 19, at 199. Under this canon, a later residual clause is "controlled and defined by reference to the enumerated categories . . . which are recited just before it." *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001). As Judge Katsas explained, this principle makes practical sense, because anyone who reads such a clause "would understand that what follows a residual 'other' or 'otherwise' clause is likely similar (though not identical) to the examples that precede it." *Fischer*, 64 F.4th at 366 (Katsas, J., dissenting). Because of this principle, the government's broad interpretation is clearly erroneous. The provisions of subsection (c)(2) must be understood with reference to the type of conduct reflected in (c)(1).

This Court's own precedent reflects this principle when addressing an "otherwise" clause in a criminal statute. In *Begay v. United States*, 553 U.S. 137 (2008), the Court considered what constitutes a "violent felony" under the Armed Career Criminal Act. The statute's definition applied to any crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Just as in this case, the government advocated for a broad interpretation of "otherwise," seeking to apply the

statute to a DUI offense. This Court, rejecting this interpretation, held that the statute's context indicated that "otherwise" in the statute had a restrictive meaning: it "covers only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142. (citation omitted). The Court explained that "to give effect to every clause and word of this statute, we should read the examples as limiting the crimes that [the residual clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 143 (cleaned up). For if Congress "meant the statute to be all encompassing, it is hard to see why it would have needed to include the examples at all." *Id.* at 142. As Judge Katsas put it, "an otherwise clause is not unambiguously all-encompassing. It can connote not only difference but also a degree of similarity." *Fischer*, 64 F.4th at 367 (Katsas, J., dissenting).[4]

Accordingly, the term "otherwise" in 18 U.S.C. 1512(c)(2) should not be interpreted in a semantic vacuum, but in light of the rest of the statute, as an

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[4] The opinion below noted some distinctions between the language at issue here and the language at issue in *Begay*. 64 F. 4th at 345. But, as Judge Katas emphasized in his dissent, this distinction is not material to the interpretative principles that this Court articulated. *Id.* at 367 (Katsas, J., dissenting). The need to interpret "otherwise" in light of the proceeding statutory language does not change because of minor punctuation differences. Drafting style does not alter substance.

action that "otherwise" affects evidence.[5] In the face of the unprecedented potential infringement on First Amendment rights greenlighted by the majority opinion below, it is the interpretative approach Judge Katsas adopted which clearly should carry the day. That approach is crucial to protect political speech.

This Court should protect the people's right to engage in assembly and advocacy. The fundamental error of the lower court, the error that merited this Court's review and correction, "is . . . with the broader legal implications of the Government's boundless interpretation[.]" *McDonnell*, 579 U.S. at 580-81. This Court should curtail this threat to First Amendment rights and recognize that 18 U.S.C. § 1512(c)(2) is a criminal statute regarding the destruction of evidence, not a catch-all attack on political advocacy protected by the First Amendment.

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[5] *See also* Sarah O'Rourke Shrup, *Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(c)(1)*, 102 J. Crim. L. & Crim. 25 (2012).

CONCLUSION

This Court should correct the erroneous statutory interpretation of the D.C. Circuit and its threat to First Amendment-protected political speech and apply 18 U.S.C. § 1512(c)(2) in the context it was written, to apply to tampering with evidence.

Respectfully submitted,

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