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

BRIEF OF *AMICI CURIAE* CHRISTOPHER WARNAGIRIS, CHRISTOPHER CARNELL, AND ROBERT NORWOOD IN SUPPORT OF PETITIONER

MARINA MEDVIN
MEDVIN LAW PLC
916 Prince Street
Alexandria, VA 22314
(888) 886-4127
contact@medvinlaw.com

THEODORE M. COOPERSTEIN
Counsel of Record
CLOUTHIER COOPERSTEIN PLLC
1020 Highland Colony Parkway
Suite 803
Ridgeland, MS 39157
(601) 397-2471
ted@msappellatelawyers.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*[1]

Amici Christopher Warnagiris, Christopher Carnell, and William Robert Norwood, III are defendants in three criminal prosecutions pending in the United States District Court for the District of Columbia. Each *amicus's* indictment charges the defendant with violation of Title 18, United States Code, § 1512(c)(2), the statutory provision at issue in the present case. Each *amicus* attended the election protest on January 6, 2021, and entered the United States Capitol Building. The Petitioner challenges a D.C. Circuit ruling that affects these *amici's* pending criminal cases. The Court's ruling will control the proceedings and affect outcomes in the trials of *amici curiae* Warnagiris, Carnell and Norwood.

Christopher Warnagiris is the defendant in Case No. 1:21-CR-382-PLF (D.D.C.). The Second Superseding Indictment in that case charges Warnagiris with nine counts, including violations of 18 U.S.C. § 1512(c)(2) and 18 U.S.C. § 111(a). Warnagiris has moved to dismiss the § 1512(c)(2) charge, and that motion was denied in the district court. The District Court has set the Warnagiris trial for April 1, 2024.

Christopher Carnell is the defendant in Case No. 1:23-CR-139-BAH (D.D.C.). The Indictment charges Carnell with six counts, including violation of 18 U.S.C. § 1512(c)(2). Carnell's indictment does not charge

---

[1] Rule 37 Statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

felony assault under 18 U.S.C. § 111(a). Carnell has moved to dismiss the charge under § 1512(c), and that motion was denied in the district court. The District Court has set the Carnell trial for February 12, 2024.

Robert Norwood is the defendant in Case No. 1:21-CR-233-CJN (D.D.C.). The Superseding Indictment charges Norwood with seven counts, including violation of 18 U.S.C. § 1512(c)(2). Norwood's indictment does not charge felony assault under 18 U.S.C. § 111(a). Norwood has moved to dismiss the § 1512(c)(2) charge, and the district court has deferred ruling on that motion pending the Court's ruling in this case. The district court has set trial of Robert Norwood for August 26, 2024.

Amici Carnell and Norwood have not been charged with assault. Both have argued to the district court that, based on the lack of a clear majority opinion in *United States v. Fischer*, a narrow reading of the panel opinions requires the Government to charge both § 111 and § 1512(c)(2) in the same indictment, when there is no allegation of witness tampering, or evidence impairment, in order to sustain the § 1512(c)(2) charge.

STATUTORY PROVISION INVOLVED

Subsection (c) of § 1512, Title 18, United States Code, provides:

§ 1512. Tampering with a Witness, Victim, or Informant

. . . .

(c) Whoever corruptly –

(1) Alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with 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).

SUMMARY OF THE ARGUMENT

With its ruling below, the D.C. Circuit expands the statute at 18 U.S.C. § 1512(c)(2) beyond the text and intended limits that Congress wrote. Conflicting panel opinions do not reconcile, leaving Joseph Fischer again indicted under § 1512(c)(2), and the three present *amici* with no clear guidance to their own fates. Other defendants, not only those presently indicted in the District of Columbia, but those charged in the future and across all the United States District Courts, face

equally dark uncertainty as they confront and defend unclear criminal charges.

Left uncorrected, the lower court ruling threatens prosecution of supposed judicial administration crimes across the United States, for ostensibly any reason or conduct extending beyond the courtroom and judicial process, yet somehow near any official event. Stretching the statute beyond its previously known contours, the Government indictments can aim at all manner of conduct to criminalize acts that unsuspecting defendants without fair notice believed to be not criminal, and to amplify misdemeanors into felonies, all with *ex post facto* effect.

The Government's policy and the D.C. Circuit's adoption of that interpretation of the law violate principles of due process. Both the Executive and the Judiciary branches in so doing are rewriting the law at 18 U.S.C. § 1512(c)(2), in violation of the constitutional separation of powers.

The Court should reverse the judgment of the D.C. Circuit.

ARGUMENT

I. The Government's interpretation of the statute violates Due Process and the Rule of Lenity.

A. The Rule of Lenity furthers dual Constitutional values.

"Since the founding, lenity has sought to ensure that the government may not inflict punishment on individuals without fair notice and the assent of the people's representatives." *Wooden v. United States*, 595 U.S. at 392 (Gorsuch, J., concurring). It "is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Yates v. United States*, 574 U.S. 528, 548 (2015); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

1. Due Process and fair notice

Due Process principles in the Fifth and Fourteenth Amendments to the Constitution call for clear and fair notice to all persons of what actions or behaviors will constitute crimes. U.S. CONST. amend. V; *id*. amend. XIV, § 1. Individuals "can suffer penalties only for violating standing rules announced in advance." *Wooden*, 595 U.S. at 390-91 (Gorsuch, J., concurring); *see* THE FEDERALIST No. 84 (Alexander Hamilton); *see also Bittner v. United States*, 598 U.S. 85, 102 (2023); *Dubin v. United States*, 599 U.S. 110, 135-36 (2023) ("due process means that criminal statutes must

provide rules 'knowable in advance.'") (citing *Percoco v. United States*, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring)); *Johnson v. United States*, 576 U.S. 591, 595 (2015) ("the constitutional minimum of due process . . . provide[s] ordinary people with fair notice of the conduct [the laws] punish") (cleaned up).

When a law does not clearly identify what it prohibits, the defendant always merits the benefit of the doubt and Lenity excuses the conduct. *Bouie v. City of Columbia*, 378 U.S. 347, 349 (1964) (reversing trespass convictions for failure "to afford fair warning that the conduct for which they have now been convicted had been made a crime"); *see McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("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."); *United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute"); *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."). *See also Huddleston v. United States*, 415 U.S. 814, 834 n.* (1974) (Douglas, J., dissenting) (failure to apply the rule of lenity "is only another device as lacking in due process as Caligula's practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning."); *United States v. Cardiff*, 344

U.S. 174, 176 (1952) ("The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.").

The Rule of Lenity applies equally to sentencing as to substantive provisions. *United States v. Batchelder*, 442 U.S. 114, 121 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978). When the D.C. Circuit enlarged the application of § 1512(c)(2) to make a felon of a trespass misdemeanant, it "foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old" interpretation of the law. *Miller v. Florida*, 482 U.S. 423, 433 (1987) (retrospective increase in sentencing violates the prohibition of *ex post facto* laws); *see also Lankford v. Idaho*, 500 U.S. 110, 121 (1991) (noting "the importance we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure").

Appendix A to the Guidelines Manual of the United States Sentencing Commission directs sentence calculation for the offense of conviction under 18 U.S.C. § 1512(c)(2) to Guideline 2J1.2 in Chapter 2 of the Guidelines. United States Sentencing Commission, GUIDELINES MANUAL ("U.S.S.G."), app. A, at p. 566 (Nov. 2021). That Guidelines section focuses exclusively on crimes and conduct directed toward judicial proceedings, witnesses and evidence. *See*, *e.g.*, U.S.S.G. § 2J1.1 (Contempt of Court); *id*. § 2J.12 (Obstruction of Justice); *id*. § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness); *id*. § 2J.1.4 (Impersonation); *id*. § 2J1.5 (Failure to Appear by Material Witness); *id*.

§ 2J1.6 (Failure to Appear by Defendant); *id*. § 2J1.9 (Payment to Witness). This constrained focus corroborates the longtime presumption born of precedent and experience, that § 1512(c)(2) is properly applied to crimes of judicial administration. Pet. App. 17; 64 F.4th at 339 ("there is no precedent for using § 1512(c)(2) to prosecute the type of conduct at issue in this case.") (Pan, Cir. J.).

Redirecting those portions of the Guidelines to encompass the breadth of conduct the Government now seeks to charge, is no less a denial of fair warning or an *ex post facto* change in the established penalties. *See Peugh v. United States*, 369 U.S. 530 (2013) (application of higher Guidelines at sentencing than existed at the time of crime's commission violates the *ex post facto* clause); *Carmell v. Texas*, 529 U.S. 513, 533 (2000) ("There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.").

Without proper notice to the defendant that specified conduct is prohibited, an ambiguous law violates Due Process. The "first essential of due process of law is that statutes must give people of common intelligence fair notice of what the law demands of them." *United States v. Davis*, 588 U.S. ___, ___, 139 S. Ct. 2319, 2325 (2019) (cleaned up); *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926). The plain ambiguity of § 1512(c)(2) denies any defendant notice

of prohibited conduct, and of the severe punishment that follows.

2. Separation of Powers

The Rule of Lenity upholds separation of powers principles in the Constitution. All legislative power lies with the Congress, and the Rule safeguards the law-making monopoly granted to Congress in Article I by not permitting the courts or executive agencies to enact criminal law or rules with criminal sanctions. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); THE FEDERALIST No. 51, at 321 (James Madison) (new national laws restricting liberty require assent of the nation's "many parts, interests and classes"); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1870) (Marshall, C.J.) (the Rule of Lenity keeps the power of punishment fairly "in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *United States v. Wilson*, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830) (No. 16,730) (noting "the plain and universal principle that the power of punishment is vested in the legislature and not in the judicial department").

Only the legislative body explicitly granted power as the elected representatives of the people may make laws. U.S. CONST. art. I, § 1; *United States v. Bass*, 404 U.S. 336, 348 (1971) ("because of the seriousness of criminal penalties, and because criminal punishment

usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"); *cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community.").

"The role of this Court is to apply the statute as written – even if we think some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (cleaned up); *see also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (federal courts have no criminal jurisdiction, except what is given by statute).

"[I]t is Congress's responsibility to unambiguously define the scope of criminal conduct." *Cargill v. Garland*, 57 F.4th 447, 472 n.13 (5th Cir. 2023) (per curiam) ("Congress having failed to do so, we deploy lenity to retain the proper allocation of legislative power, not unsettle it."), *cert. granted*, ___ U.S. ___, 144 S. Ct. 374 (Nov. 3, 2023). No person should be held at risk in liberty or property unless such a law clearly and specifically sets out the elements of the crime. *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring) (the Rule of Lenity "seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions."); *Bass*, 404 U.S. at 347 ("it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 (to "determine that

a case is within the intentions of a statute, its language must authorize us to say so.").

In like manner, the clear distinction between legislative and judicial conduct prevents blurring of the boundaries between the Congress and the courts and permits the judiciary to retain its singular focus on interpreting the laws as they are written. The "Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute's meaning by rounding up to the most punitive interpretation its text and context can tolerate." *Dubin*, 599 U.S. at 134 (Gorsuch, J., concurring); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result"); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted"); *Huddleston*, 415 U.S. at 831 ("The rule is also the product of an awareness that legislators and not the courts should define criminal activity"); *United States v. Open Boat*, 27 F. Cas. 364, 357 (C.C.D. Me. 1829) (No. 15, 968) (Story, J.) ("Even where cases lie within the same mischief, if they are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority to meet them."). *See also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 297 *180 (1840) ("No remark is better founded in human experience than that of Montesquieu, that 'there is no liberty,

if the judiciary be not separated from the legislative and executive powers.' ").

A further argument against judicial overreach to fill a legislative gap with the Court's own supposition, is that such drafting error can easily be corrected by Congress, while Congress cannot correct a case-specific court ruling. "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." THE FEDERALIST No. 81, *supra*, at 483 (Alexander Hamilton).

B. The Government's expanded definition of § 1512(c)(2) exceeds Constitutional limits.

1. No fair warning preceded the broad expansion of the scope of this law.

"[H]ere it is impossible that the party could foresee that an action, innocent when it was done, should afterwards be connected to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust." 1 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *46 (1765).

"Deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. The lead opinion admits forthrightly that "there is no precedent for using § 1512(c)(2) to

prosecute the type of conduct at issue in this case." Pet. App. 17; 64 F.4th at 339 (Pan, Cir. J.).

> The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1954). No protestor on January 6, 2021, had warning that a political protest that ran out of control equated to a 20-year felony for destruction of evidence or threatening witnesses.

"If the defendant lacks knowledge that his actions are likely to affect the . . . proceeding, he lacks the requisite intent to obstruct." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (citing *United States v. Aguilar*, 55 U.S. 593, 599 (1995)). "A broad interpretation would also risk the lack of fair warning and related kinds of unfairness." *Marinello v. United States*, 584 U.S. ___, 138 S. Ct. 1101, 1108 (2018).

2. The prosecution's stretch of § 1512(c)(2) to engulf all manner of conduct transgresses the separation of powers.

The Court has made it clear, it "cannot construe a criminal statute on the assumption that the

Government will use it responsibly." *Dubin*, 599 U.S. at 131 (cleaned up); *Marinello*, 584 U.S. at ___, 138 S. Ct. at 1109; *McDonnell v. United States*, 579 U.S. 550, 576 (2016); *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

"This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint." *Stevens*, 559 U.S. at 480. By expanding § 1512(c)(2) through mere implication of unlawful activity, of any kind, the prosecutor fails to "take Care that the Laws are faithfully executed." U.S. CONST. art. II, § 3. Instead, by so doing, the prosecutor takes upon himself the full license to rewrite the laws and wield them on the unsuspecting and unintending citizen whom the prosecutor disfavors for any reason. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (rejecting argument of "[t]he United States [that] violators, by their very conduct, exhibit a purpose to do wrong, which suffices" as *mens rea*.).

"Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly prescribe." *United States v. Davis*, 588 U.S. ___, ___, 139 S. Ct. 2319, 2333 (2019); *Stevens*, 599 U.S. at 481 (rewriting the law through interpretation "would constitute a serious invasion of the legislative domain.") (cleaned up).

II. The Court should reverse the D.C. Circuit judgment.

A. The D.C. Circuit's ruling invites profligate abuse of the statute.

Left undisturbed, the D.C. Circuit judgment reverses the district court and restores the indictment against Fischer. But all other present and future defendants facing § 1512(c)(2) charges suffer greater uncertainty than before the decision.

Amici Carnell and Norwood, for instance, have not been charged with assault. The disharmony of the three panel opinions would require the Government to charge in the same indictment an assault under 18 U.S.C. § 111 as a predicate for § 1512(c)(2), when there is no allegation of witness tampering or evidence impairment.

The question remains whether the Government may prosecute *amici* via § 1512(c)(2) for attendance at the protest, or other conduct not directed to evidence impairment; nor can these *amici* yet know what level of *mens rea* the Government must prove beyond a reasonable doubt to convict *amici*. "Criminal offenses requiring no *mens rea* have a generally disfavored status." *Liporata v. United States*, 471 U.S. 419, 426 (1985) (cleaned up); *see Ratzlaf*, 510 U.S. at 148 ("were we to find [a *mens rea*] requirement ambiguous, as applied . . . we would resolve any doubt in favor of the defendant."). And whatever the standard now may be, *amici* could not have known it on or before January 6, 2021.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morisette v. United States*, 342 U.S. 246, 250 (1952); *see also Liporata*, 471 U.S. at 425.

This indeterminacy has already taken effect in the district court as trial judges in the District of Columbia consider proposed jury instructions for § 1512(c)(2). *See* Brief for Christopher Warnagiris et al. as *Amici Curiae* Supporting Petitioners at App. 1, *Lang v. United States* (No. 23-32) and *Miller v. United States* (No. 23-94) (U.S. Aug. 30, 2023). The instruction does not define "obstruct" or "Obstruction." *Cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (reversing conviction under 18 U.S.C. § 1512 where "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. . . . The instructions also diluted the meaning of 'corruptly' so that it covered innocent conduct.").

Problems grow exponentially with the volume of January 6 related prosecutions by the Government in the District of Columbia. A search of the clerk of court's online docket for indictments charging § 1512(c)(2) since January 7, 2021, revealed 255 cases.[2]

---

[2] The online portal for the U.S. District Court for the District of Columbia Clerk's Office Case Management/Electronic Case Filing system (CM/ECF) permits query of the dockets for all filed cases. A search was made on Jan. 30, 2024, for all charged felony

See also Press Release, United States Attorney's Office for the District of Columbia, Three Years Since the Jan. 6 Attack on the Capitol (Jan. 6, 2024) ("More than 332 [January 6] defendants have been charged with corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so."), https://www.justice.gov/usao-dc/36-months-jan-6-attack-cpitol-0.

The Court should consider that continued prosecution under the expanded § 1512(c)(2) will have far-reaching impact in the traditional administration of justice crimes of witness tampering and intimidation, evidence impairment, and other yet unknown new conceptions of obstruction, arising in routine federal judicial proceedings.

The Court should reverse the D.C. Circuit to forestall inconsistent outcomes and unintended consequences in both traditional and innovative prosecutions under the witness tampering and obstruction of justice statutes.

B. The three divergent opinions below do not reconcile, and they provide no clear guidance for application of 18 U.S.C. § 1512(c)(2).

Basic principles of criminal law establish two elements to any crime: culpable conduct (*actus reus*); and

---

counts of 18 U.S.C. § 1512(c)(2), in both disposed and pending cases, which identified 255 cases.

the necessary state of mind (*mens rea*). *See*, *e.g.*, 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.5, at 381 (2003) ("For several centuries (at least since 1600) the different common law crimes have been so defined as to require for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or – more rarely – negligence."); *see also* 4 BLACKSTONE, *supra*, *21 ("Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. . . . So that, to constitute a crime against human laws, there must be, first a vitious will; and, secondly, an unlawful act consequent upon such vitious will."). *See Elonis v. United States*, 575 U.S. 723, 734 (2015) ("wrongdoing must be conscious to be criminal. . . . [T]he general rule is that a guilty mind is a necessary element in the indictment and proof of every crime.") (cleaned up); *Western Fuels – Utah, Inc. v. Federal Mine Safety & Health Rev. Comm'n*, 870 F.2d 711, 713 (D.C. Cir. 1989) ("The general rule of both civil and criminal responsibility is that a person is not liable for a harm done unless he caused it by his action (*actus reus*), and did so with a certain intent (*mens rea*)."); *see generally Powell v. Texas*, 392 U.S. 514, 535-36 (1968) ("We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds."). The lower court opinions present contradictory approaches to this offense's elements.

The district court, in a detailed and thorough analysis, examined 18 U.S.C. § 1512(c)(2), then applied its analysis to the Petitioners' indictments. Judge Nichols discerned limiting factors that placed the crime within a subset category of conduct, and, on those criteria, rejected the application of § 1512(c)(2) to Fischer and similarly charged defendants, without considering *mens rea*. Pet. App. 110, 116. *United States v. Miller*, 589 F. Supp. 3d 60 (D.D.C. 2022), *rev'd sub nom. United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023).

On review by the Court of Appeals, the panel issued three opinions. Pet. App. 1; *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023). Close reading of the opinions finds no consensus or majority as to either the conduct prohibited, nor the minimal level of intent to commit the crime, in the statute.

1. The D.C. Circuit opinions make everything and nothing culpable conduct.

No two of the three opinions agree on enough to instruct a prosecutor or defense attorney, what conduct can be charged or how to defend the charge.

The dissent alone narrowly limits the relevant conduct to witness tampering, forgery, evidence spoliation and the like. The other two opinions both accept any independently unlawful conduct as *actus reus* – thereby importing anything and everything as conduct that violates any other law. Nothing unique or distinctive qualifies the resultant § 1512(c)(2); that language

now calls for nothing distinctive or additional to criminalize conduct. Yet the 20-year maximum penalty will apply to anything **otherwise** unlawful.

The present three *amici* highlight this problem with their cases. In each instance, the stretching of § 1512(c)(2) results in a defendant who commits a misdemeanor trespass, with a maximum six-month penalty, transformed into a judicial administration felon, facing a twenty-year prison sentence. Such was not the intent of Congress, nor could any defendant have foreseen it.

The district court interpreted § 1512 to conform subsections 1512(c)(1) and (c)(2) to each other. Pet. App. 116; 589 F. Supp. 3d at 67. With subsection (1) proscribing acts to "alter, destroy, mutilate or conceal a record, document or other object," both parties agreed with the district court that the crux was the meaning of "otherwise" in subsection (2) to determine what additional conduct (2) covers. *Id*. Judge Nichols concluded "that § 1512(c)(2) must be interpreted as limited by subsection (c)(1), and thus requires that the defendant have taken some action with respect to a document, record or other object in order to corruptly obstruct, impede or influence an official proceeding." *Id*. at 78.

In rejecting the Government's broader view, Judge Nichols noted the danger that subsection (c)(2), if read too broadly, essentially swallows up subsection (c)(1) – and thereby challenges why Congress would have

bothered to specify the subset of conduct in (c)(1) at all. Reading (c)(2) to include (c)(1)

> would also create substantial superfluity problems. After all, if subsection (c)(2) is not limited by subsection (c)(1), then the majority of § 1512 would be unnecessary. . . . But here, such substantial overlap **within the same section** suggests that Congress did not mean § 1512(c)(2) to have so broad a scope.

589 F. Supp. 3d at 73-74 (emphasis added).

No two of the three circuit judges agreed what conduct violates the statute. Judge Pan read § 1512(c)(2) directly contrary to the district court's reading, to prohibit "all forms of obstructive conduct that are not covered by subsection (c)(1)." Pet. App. 14; 64 F.4th at 336-37. This broad scope includes the assaultive conduct charged against Fischer (and *amicus* Warnagiris). In this view, the statute "plainly extends to a wide range of conduct." Pet. App. 17; 64 F.4th at 339. The limits to any acts prosecuted would lie only in the statute's requirements that the defendant act "corruptly" (see below) and "the behavior must target an official proceeding." Pet. App. 17; 64 F.4th at 339.

The "concurring" opinion also viewed the culpable conduct as broad. Judge Walker agreed, without considering other conduct, that Fischer's alleged assaults "are the kind of obstructive conduct proscribed by (c)(2)." Pet. App. 42; 64 F.4th at 351. So long as the charged act "meets the test of independently unlawful conduct," Pet. App. 19; 64 F.4th at 340, the next and

decisive criterion would be whether the act was done "corruptly." Pet. App. 42; 64 F.4th at 351-52 ("(c)(2) has a broad act element"). By accepting the charged assaults as presumptively sufficient to § 1512(c)(2), but going no further, this opinion sustained the indictment of Fischer, but it leaves other defendants bereft of guidance – especially those who did not commit assault.

The dissenting opinion read § 1512(c) as constrained to an evidence-focused interpretation, "applying section 1512(c) only to acts that affect the integrity or availability of evidence." Pet. App. 65-66; 64 F.4th at 363. Agreeing with the district court's analysis, the dissent identified conduct impairing relevant evidence or testimony, without concern to define or explore the necessary *mens rea*. Pet. App. 102; 64 F.4th at 382 ("Rather than try to extract meaningful limits out of that broad and vague adverb ['corruptly'], we should have acknowledged that Congress limited the *actus reus* to conduct that impairs the integrity or availability of evidence.").

2. *Mens Rea* eludes definition in the panel opinions.

As with the problem of defining culpable conduct, so too, the three opinions do not define the mental state providing criminal *mens rea*.

Judge Pan interpreted § 1512(c)(2) to have a *mens rea* level as capacious or flexible as the corresponding *actus reus* criteria – importing the mental state of the already otherwise unlawful act. Pet. App. 18; 64 F.4th

at 340 (corrupt intent exists "when an obstructive action is independently unlawful"). This follows from the opinion's allowance for any unlawful act to double as act of obstruction under the statute: Section 1512(c)(2) thereby adopts the *mens rea* of that imported crime. The mental state for § 1512(c)(2) would therefore be as high or as low a bar as would match the criminal conduct any prosecutor chose to indict, and otherwise unpredictable, or unforeseeable by any potential defendant.

The lead opinion did not define a more precise criminal intent, satisfied merely to find Fischer culpable. Pet. App. 18-19; 64 F.4th at 340 ("The sufficiency of the indictments in this case does not turn on the precise definition of 'corruptly.' Because the task of defining 'corruptly' is not before us and I am satisfied that the government has alleged conduct by appellees sufficient to meet that element, I leave the exact contours of 'corrupt' intent for another day.").

Judge Walker found a limiting principle in the word "corruptly." Pet. App. 42; 64 F.4th at 351 ("I believe we *must* define that mental state to make sense of (c)(2)'s act element.") (emphasis original). Whatever the offending act, it must be done "with an intent to procure an unlawful benefit either for himself or for some other person." Pet. App. 42; 64 F.4th at 352. "The defendant must not only know he was obtaining an unlawful benefit, it must also be his objective or purpose." Pet. App. 42; 64 F.4th at 352 (cleaned up).

The dissent rejected that definition of "corruptly," considering specific criminal intent applicable only in tax prosecutions. Pet. App. 100; 64 F.4th at 381 ("The concurrence's approach thus requires transplanting into § 1512(c)(2) an interpretation of *corruptly* that appears to have been used so far only in tax law."). Instead, the dissent took the route of the district court to narrow the subject conduct, limiting the scope and reach of the statute. Pet. App. 102; 64 F.4th at 382 ("Rather than try to extract meaningful limits out of that broad and vague adverb, we should have acknowledged that Congress limited the *actus reus* to conduct that impairs the integrity or availability of evidence.").

The net effect of these three opinions is to leave § 1512(c)(2) bereft of any clear *mens rea* element. At one end of the spectrum, Judge Pan dismisses concern over *mens rea*, so long as the conduct is obstructive, otherwise unlawful, and directed toward an official proceeding. At the other end, Judge Walker requires a specific intent to seek an improper benefit for oneself or another. The dissent requires only a knowing mental state, but strictly limits chargeable acts to conduct that impedes a witness or otherwise impairs evidence.

3. Section 1512(c) has become unmoored and ill-defined.

The supposed majority opinions both read the statute broadly, but they agree only to reverse the district court judgment. Pet. App. 40; 64 F.4th at 351

("Appellees' alleged conduct falls comfortably within the plain meaning of" § 1512(c)); Pet. App. 61; 64 F.4th at 361 ("Even under the proper, narrow reading of 'corruptly,' the indictments should be upheld."). Outside the narrow context of Fischer's case, the two opinions do not converge. *Compare* Pet. App. 21; 64 F.4th at 340-41 ("It is more prudent to delay addressing the meaning of corrupt intent" to a later case) *with* Pet. App. 63 n.10; 64 F.4th at 363 & n.10 ("my reading of 'corruptly' is necessary to my vote to join the lead opinion's proposed holding.").

Beyond those specific assaults charged, the opinions implacably disagree: Judge Walker's concurrence expressly conditions a holding upon the definition of "corruptly" to qualify charged conduct. Pet. App. 63 n.10; 64 F.4th at 362 & n.10 ("If I did not read 'corruptly' narrowly, I would join the dissenting opinion."). But Judge Pan explicitly rejects such a condition. Pet. App. 22 & n.5; 64 F.4th at 341 & n.5 ("a majority of the panel has expressly declined to endorse the concurrence's definition of 'corruptly'."). There are three disparate views of *mens rea*. *Cf. Wooden v. United States*, 595 U.S. 360, 378 (2022) (Kavanaugh, J., concurring) ("The deeply rooted presumption of *mens rea* generally requires the government to prove the defendant's *mens rea* with respect to each element of a federal offense.").

With every unlawful act now chargeable under § 1512(c)(2), so long as there is nexus to an official proceeding, no specific standard informs the statute. Pet. App. 96; 64 F.4th at 379 ("the *actus reus* posited here

would sweep in any conduct that influences or affects an official proceeding.") (Katsas, Cir. J., dissenting).

Without distinct, characteristic elements, the § 1512(c)(2) offense when charged becomes multiplicitous. *See Whalen v. United States*, 445 U.S. 684, 691-92 (1980) ("multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not. . . . The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.") (cleaned up); *Blockburger v. United States*, 284 U.S. 299 (1932) (unless each offense requires proof of different facts, charges are multiplicitous). *See also Multiplicity*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("The improper charging of the same offense in more than one count of a single indictment or information.").

In other words, § 1512(c)(2) now adds no distinct and separate offense to an indictment; rather, it doubles another charged offense in a second, repetitive count, in any indictment that would charge § 1512(c)(2) together with the "independently unlawful act" comprising the predicate offense conduct – while it also enlarges the penalty.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

THEODORE M. COOPERSTEIN
Counsel of Record
CLOUTHIER COOPERSTEIN PLLC
1020 Highland Colony Parkway
Suite 803
Ridgeland, MS 39157
(601) 397-2471
ted@msappellatelawyers.com

MARINA MEDVIN
MEDVIN LAW PLC
916 Prince Street
Alexandria, VA 22314
(888) 886-4127
contact@medvinlaw.com