No. 23-5572

IN THE

Supreme Court of the United States

JOSEPH W. FISCHER,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF OF *AMICI CURIAE* LAW-LINGUISTICS RESEARCH TEAM CLARK D. CUNNINGHAM AND UTE RÖMER-BARRON, IN SUPPORT OF NEITHER PARTY NEITHER AFFIRMANCE NOR REVERSAL IS SUGGESTED

CLARK D. CUNNINGHAM
Counsel of Record
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW*
85 Park Place NE
Atlanta, Georgia 30303
(404) 413-9168
cdcunningham@gsu.edu

Counsel for Amici Curiae

* for identification only

327286

COUNSEL PRESS
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Christy Goldfuss, *Energy Lessons from the Edge of the Earth,* Center for American Progress (2012), https://www.americanprogress.org/article/energy-lessons-from-the-edge-of-the-earth/ 16

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Clark D. Cunningham & Ute Römer-Barron, *Four Reasons the Supreme Court should reconsider its Article III standing doctrine*, Ohio State Law Journal Online Volume 85 (2024), working paper version available at SSRN: https://ssrn.com/abstract=4714153 also available at: https://readingroom.law.gsu.edu/faculty_pub/3536/ 2

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Clark D. Cunningham is Professor of Law and the W. Lee Burge Chair in Law & Ethics at the Georgia State University College of Law.[2] He is the past-chair of the Section on Law and Interpretation of the Association of American Law Schools.[3] Ute Römer-Barron is Professor in the Georgia State University Department of Applied Linguistics and English as a Second Language. She serves on the editorial boards of the *International Journal of Corpus Linguistics*, *Corpora*, and *English Text Construction* and is General Editor of the book series *Studies in Corpus Linguistics*.[4]

Amici also submitted two amicus briefs using linguistic analysis to the U.S. Court of Appeals for the Sixth Circuit, *Wright v. Spaulding,* 939 F.3d 695, 700 n.1 (6th Cir. 2019) ("We asked the parties to file supplemental briefs on the original meaning of Article III's case-or-controversy requirement, specifically whether the corpus of Founding-era American English helped illuminate that meaning. A team of corpus linguistics researchers

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1. *Amici* state that no counsel for any party authored this brief in whole or in part, and that no entity, other than *amici*, made any monetary contribution toward the preparation or submission of this brief.

2. Employment positions are provided for identification only. This brief is not filed on behalf of Georgia State University, the University System of Georgia, or the State of Georgia.

3. Cunningham's CV is available at: http://www.clarkcunningham.org/.

4. Römer-Barron's CV is available at https://uteroemer.weebly.com/.

submitted two amicus briefs as well. We are grateful to both the parties and the *amici* for their hard work.") The research for these briefs was later the basis for a law review article for which *amici* were co-authors, Haoshan Ren, Margaret Wood, Clark D. Cunningham, Noor Abbady, Ute Römer, Heather Kuhn & Jesse Egbert, *Questions Involving National Peace and Harmony" or "Injured Plaintiff Litigation"? The Original Meaning of "Cases" in Article III of the Constitution,* 36 Ga. St. L. Rev. 491 (2020), available at https://readingroom.law.gsu.edu/gsulr/vol36/iss5/8/. *Amici* are also the co-authors of *Applied corpus linguistics and legal interpretation: A rapidly developing field of interdisciplinary scholarship,* Applied Corpus Linguistics (2023) and *Four reasons the Supreme Court should reconsider its Article III standing doctrine,* Forthcoming in the Ohio State Law Journal Online Volume 85 (2024), working paper version available at SSRN: https://ssrn.com/abstract=4714153 also available at: https://readingroom.law.gsu.edu/faculty_pub/3536/.

Together *amici* submit this brief as the Law and Linguistics Research Team ("research team").

It is a fundamental principle in interpreting a federal statute that "words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute," *Wis. Cent. Ltd. v. United States*, 585 U.S. __, 138 S.Ct. 2067, 2074 (2018); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words generally should be interpreted as taking their ordinary, contemporary, common meaning."). In light of this principle, *amici* offer empirical evidence developed by using the methods of corpus linguistics about the way the "or otherwise"

phrase used in 18 U.S.C. § 1512(c) was generally used in American English in 2002, the time that this provision was enacted. Although courts agree that determining the ordinary meaning of a statute is usually the starting point for interpretation, ordinary meaning is not necessarily the end point in deciding how to apply a statute. *Amici* do not address other possible interpretive issues about how 18 U.S.C. § 1512(c) should be applied, such as the place of this provision in a larger statutory scheme, the historical context of its enactment, Congressional purpose, the decisions of other courts of appeal interpreting this provision, or this Court's interpretation of "otherwise" in *Begay v. United States*, 553 U.S. 137 (2008). Accordingly, *amici* take no position as to whether the decision of the court below should be affirmed or reversed, and this brief is submitted in support of neither party.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by petitioner, James W. Fischer, is "whether the D.C. Circuit erred in construing 18 USC § 1512(c) as applying to acts unrelated to investigations and evidence." The decision in the court below, *United States v. Fischer,* 64 F.4th. 329 (D.C. 2023), was a consolidated appeal from three different district court decisions by the same judge: *United States v. Miller*, 589 F.Supp. 60 (D.D.C. 2022) (Nichols, J.); *United States v. Fischer* 2022 WL 782413, (D.D.C. 2022) (Nichols,J); and *United States v. Lang*, No. 1:21-CR-00053 (D.D.C. Minute Order June 7, 2022) (Nichols, J.). All three defendants were indicted for their alleged involvement in the attack on the U.S. Capitol on January 6, 2020. One count in each of these indictments charged violation of the following statute:

> "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. Code § 1512(c).

Each defendant filed a motion to dismiss the count of the indictment charging violation of this statute and the district court granted the motions for all three defendants. The government appealed all three decisions, which were consolidated and jointly reversed by the court below.

Of these three criminal cases, only Fischer's case is before the Court in this matter.

In Fischer's case the district court held that "for a defendant's conduct to fall within the ambit of subsection (c)(2) [i.e. "otherwise obstructs, influences, or impedes any official proceeding"], the defendant must 'have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding,' quoting its own decision issued a few days earlier in *United States v. Miller*, 589 F.Supp. 60, 78 (D.D.C. March 7, 2022). *United States v. Fischer*, 2022 WL 782413 (D.D.C. March 15, 2022).

The district court chose the *Miller* case to write an extended analysis of the statute. It started the section of its opinion on this issue thus: "The Court begins, as it must, with the text." 589 F.Supp. at 67. However, the district court quickly turned to a dictionary to claim that at the time the statute was enacted in 2022 " 'otherwise' had *three* different definitions that are plausible in this context: "in a different way or manner: differently"; "in different circumstances: under other conditions"; and "in other respects." *Otherwise, Webster's Third New Int'l Dictionary of the English Language Unabridged* (2002)." *Id*. at 67-68 (emphasis added).

The district court then proceeded to say application of the first definition from Webster's --- "in a different way or manner" -- would produce a "possible" interpretation that there is *no* relation between the part of the statute that precedes "or otherwise," 18 U.S. Code § 1512(c)(1), and the part that follows "or otherwise," 18 U.S. Code § 1512(c)(2), which is the section of the statute the defendants allegedly violated. Attributing this interpretation to the government's argument against dismissal of the indictment, the district court called this the "clean break" interpretation.

The district court next described what it considered to be a second "plausible" interpretation: "subsection (c)(1) contains specific examples of conduct that is unlawful under subsection (c)(2). On this interpretation, the word "otherwise" in § 1512(c)(2) does tether the two subsections together, with the text preceding the word—subsection (c)(1)—providing examples that fit within (c)(2)'s broader scope." *Id*. at 70.

The third "plausible" interpretation described by the district court is that subsection (c)(2) is "limited by subsection (c)(1)." Saying that, "just looking to the text," this third interpretation "seems to present the fewest interpretive problems," the district court eventually adopted this interpretation, holding that because the verb phrases that precede "or otherwise" (subsection (c)(2)) all describe actions that affect a record, document, or other object that "*or otherwise obstructs*" can *only* be understood as "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. The court then granted Miller's motion to dismiss: "Nothing in Count Three (or the Indictment more generally) alleges, let alone implies, that Miller took some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence Congress's certification of the electoral vote." *Id.*

The district court dismissed the § 1512(c)(2) charges against Fischer and against Lang using the same interpretation of the statute. *Fischer,* 2022 WL 782413; *Lang*, No. 1:21-CR-00053 (D.D.C. Minute Order June 7, 2022). The government appealed all three cases, which were consolidated under the case name, *United States v. Fischer,* 64 F.4th 329 (D.C. Cir. 2023).

The court of appeals in a 2-1 vote reversed the dismissal of the indictment as to all three defendants. *Id*. The court's analysis began: "When interpreting a statute, "we begin by analyzing the statutory language, 'assuming that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)

(cleaned up) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009))." *Id.* at 335. Applying the same "ordinary meaning" standard as the district court, the majority opinion reaches the opposite conclusion: "the meaning of the statute is unambiguous." *Id.* at 336. The "second" of what the district court thought were three possible meanings, and the option it considered more problematic than the third option the district court chose was "the most natural reading of the statute," according to the majority opinion. *Id.* at 336. "§ 1512(c)(2) applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1)." *Id.* Interestingly, the majority opinion supported its interpretation that opposed the district court's decision by relying on the *same* Webster's definition used by the district court:

> "This reading incorporates the commonplace, dictionary meaning of the word "otherwise": "in a different manner." *See Otherwise, Oxford English Dictionary* (3d ed. 2004) (defining "otherwise" as "[i]n another way or ways; in a different manner; by other means; in other words; differently"). … Giving the text "its ordinary or natural meaning," *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), the statute essentially says, "Whoever corruptly (1) tampers with a document, record, or object to interfere with its use in an official proceeding; or (2) in a different manner obstructs, influences, or impedes any official proceeding, shall be fined or imprisoned." *See also Wis. Cent. Ltd. v. United States*, ––– U.S. ––––, 138 S. Ct. 2067, 2074 (2018) ("[I]t's a fundamental canon

> of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." (cleaned up) (quoting *Perrin v. United States*, 444 U.S. 37 (1979))). *Id.*

The majority opinion's analysis of the statutory text ends, as it started, with emphasis on "ordinary meaning."

> "[T]he broad interpretation of the statute — encompassing all forms of obstructive acts — is unambiguous and natural, as confirmed by the 'ordinary, contemporary, common meaning' of the provision's text and structure. *Perrin*, 444 U.S. at 42." *Id.* at 337.

Judge Walker began his concurring opinion as follows:

> "On January 6, 2021, Joseph Fischer, Edward Lang, and Garret Miller allegedly joined in that day's riot at the United States Capitol. They were indicted on multiple counts, including under 18 U.S.C. § 1512(c)(2) for "corruptly ... obstruct[ing], influenc[ing], or imped[ing]" an "official proceeding." The district court dismissed those counts after concluding that the Defendants' alleged conduct is not covered by (c)(2). That was a mistake. If proven at trial, the Defendants' "efforts to stop Congress from certifying the results of the 2020 presidential election" are the kind of "obstructive conduct" proscribed by (c)(2)." *Id.* at 351.

Judge Katsas, dissenting, would have affirmed the dismissal of the indictments for all three defendants, but using a different interpretation of the statute than any of the three "options" proposed by the district court. He also used the same "ordinary meaning" standard for reaching his interpretation as each of other judges in this case: " 'In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning.' *Lawson v. FMR LLC,* 571 U.S. 429, 440 (2014) (cleaned up)." *Id.* at 365. See also id. at 366 ("the goal of textualism is … to assess how 'an ordinary speaker of English' would understand the phrases that Congress has strung together.' *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media,* ––– U.S. ––––, 140 S. Ct. 1009, 1015 (2020).) Referring to the words following "or otherwise" in the statute as "a residual clause," Judge Katsas wrote:

> "in ordinary English usage, *the verbs preceding* a residual otherwise clause usually do help *narrow its meaning.* For example, if a rule punished anyone who "punches, kicks, bites, or otherwise injures" someone else, you would recognize that the examples involve physical injury, and you would understand that the residual term likewise involves a physical injury." *Id.* at 365-366 (emphasis added).

He applied this "ordinary meaning" assumption that the words preceding "or otherwise" *narrow* the meaning of the words that follow "or otherwise" to conclude that "or otherwise obstructs" in the statute only applies to "acts that affect the integrity or availability of evidence." *Id.* at 363.

Petitioner Fischer asks this Court to adopt the "evidence-based" interpretation of the statute proposed by Judge Katsas.

ARGUMENT

When judges, skilled and sophisticated users of the English language, come to opposing conclusions about the "plain" or "ordinary" meaning of a phrase – as has happened in this case -how can such a conflict be resolved in an objective way?[5] Traditionally courts have resorted to citing dictionary definitions, but in recent years an alternative approach has been gaining attention and respect: the use of corpus linguistics. The supreme courts of Michigan, Idaho, Utah, and Vermont have made use of corpus-based research in their decisions as has the U.S. Court of Appeals for the Third Circuit.[6] Both the Sixth Circuit and the Ninth Circuit have requested that parties submit briefs using corpus-based research. *Wright v Spaulding* (6th Cir.), *supra*; *Jones v Bonta*, 34 F.4th 705 (9th Cir. 2022). More than 20 law review articles have been published in the past five years discussing the application of corpus linguistics to legal interpretation, including articles in the Harvard Law Review, Yale Law Journal, University of Chicago Law Review, Michigan Law Review, and University of Pennsylvania Law Review.[7]

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5. See Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 Yale L. J. 1561 (1994).

6. *See* Clark D. Cunningham, *Cases using or discussing corpus-based linguistic analysis*, Resources on Law & Linguistics, http://www.clarkcunningham.org/L2-Cases.html.

7. *See* Clark D. Cunningham, *Law review articles using or discussing corpus-based linguistic analysis*, Resources on Law & Linguistics, http://www.clarkcunningham.org/L2-Articles.html.

Corpus linguistics is a methodology for doing linguistic research by accessing large digitized data collections of actual language use taken from many sources. These data sets are referred to as *corpora* (singular: *corpus).* Such data sets can be very large, often consisting of thousands of texts and millions of words. Because the statutory language at issue was enacted recently (in 2002), the research team retrieved data from the Corpus of Contemporary American English (COCA), which is available for free on the internet.[8]

COCA is a collection of American English language data, consisting of over 1 billion words. COCA covers a time span of thirty years (1990 to 2019) and is diverse in its coverage, spanning eight different genres including spoken, newspaper, academic, and web genres.[9] Offering more than 20 million words of language data for each genre and each of the thirty years covered by this collection, the corpus is considered a representative collection of contemporary American English usage and is widely used in linguistic research.

When properly executed, corpus linguistic research results meet the scientific standards of "generalizability," "replicability," and "validity."

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8. The COCA website is found at: https://www.english-corpora.org/coca/ Although all the basic searches described in this brief can be performed for free on the COCA website, it is necessary for a user to complete a short, free registration form. If a user is not affiliated with a university, the final option, "Other," should be selected.

9. Mark Davies, *The COCA Corpus* (2020). Accessible at https://www.english-corpora.org/coca/ (link "pdf overview").

To meet the standard of generalizability, researchers must use a corpus that is sufficiently large and varied that it represents the entire population being studied, allowing researchers to conclude that patterns observed within the corpus can be assumed to represent general patterns of language use of that population. COCA meets that standard for American language use in 2002.

Replicability is defined as the degree to which a method produces consistent results, allowing a different researcher applying the same method to duplicate the outcome. The research for this study is highly replicable, not only because the data base, COCA, is publicly available but also because the research team discloses the analytic steps and tools used, including specifications of search methods and parameters.[10]

Validity refers to how well a method measures results defined by a well-formed research question and how well those results reflect real world patterns. Although the history of the *Fischer* litigation includes a number of judicial decisions reaching differing conclusions about how "or otherwise" should be interpreted, all the decisions take as a starting point how the statutory language would have been understood by typical Americans at the time of enactment, which is precisely the research question.

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10. A working paper based on the research reported in this brief, Clark D. Cunningham & Ute Römer-Barron, *Did January 6 defendants (including Donald Trump) "otherwise obstruct" an official proceeding"? Linguistic analysis for the Fischer Case before the Supreme Court,* includes a link to an online appendix that reproduces the results of searches. Available at SSRN: https://ssrn.com/abstract=4709559 and at https://readingroom.law.gsu.edu/faculty_pub/3535/

Although none of the prior decisions in the *Fischer* litigation argue that "or otherwise" should instead be interpreted as having a technical legal meaning in the statute, nonetheless the research team expanded research to a second corpus, the Corpus of the Current US Code (COCUSC), to see if "or otherwise" had a different pattern of usage in federal statutes than in ordinary English generally.[11] COCUSC consists of the entirety of the US Code from the Office of Law Revision Counsel based on the version available in July 2019 when the corpus was created, totaling over 50 million words. The COCUSC research fully confirmed conclusions derived from analysis of COCA.

Linguistic analysis, based on corpus research, of how a legal text would have been understood at the time of enactment can produce much more informative guidance than reference to dictionary definitions. Dictionaries focus on words in isolation rather than meaning of more complete phrases, while meaning in actual language use is almost always found in word combinations. Interpreting the statute at issue in *Fischer* requires understanding how "otherwise" functions in that particular context, in which "otherwise" is introduced by a conjunction, "or," and is followed by a verb phrase, "obstructs … any official proceeding." The team's research reveals that the usage pattern is even wider: as is very typical with usage of "or otherwise" in both ordinary American English and federal statutes, "or otherwise" in the statute is preceded by a list of verbs (which appear in section (c)(1)). Interpretation thus should not focus merely on the word "otherwise" but on a phrase that takes the form:

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11. The COCUSC website is found at: https://lcl.byu.edu/projects/corpus-of-the-current-us-code-cocusc/

[*verb(s)*] *or otherwise* [*VERB*]

A first analytic step to determine the function of "otherwise" in the statute was to carry out a search retrieving from all texts included in the corpus all instances of "or" followed by "otherwise" followed by any verb.[12] The search produced 2,655 instances of this combination. 1,200 types of verb forms were found that were preceded by "or otherwise."

The five most frequent combinations were "or otherwise make" (37 instances in 34 different texts), "or otherwise made" (31 in 28 different texts), "or otherwise used" (30 in 30 different texts), "or otherwise use" (25 in 25 different texts), and "or otherwise affect" (23 in 19 different texts). These five different combinations produced a total of 146 examples, each of which the research team examined individually in the context in which the combination appeared.[13]

The research team also obtained three random sets of 100 examples (300 examples total) of "or otherwise" followed by a verb and analyzed each example individually in the context in which the combination appeared.[14]

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12. This search is accomplished on the COCA website by inserting "or otherwise VERB" in the search field provided by COCA's online tools. "VERB" indicates a search for any word that is tagged in the COCA data base as a verb.

13. COCA can display each instance of a given combination, e.g. "or otherwise make," with a Key Word in Context (KWIC) feature that shows the phrase as it appears in the original text. A wider context can be seen by selecting the dropdown option "CLICK FOR MORE CONTEXT."

14. These sets of 300 randomized examples appear in the appendix to the working paper, supra note 10.

Analyses of this COCA data led to the following observations:

1) "Or otherwise VERB" is a frequently occurring phrase in contemporary American English. The construction is typically preceded by one or more verb(s) resulting in the sequence "verb(s) or otherwise VERB."

2) This sequence has the following consistent function: the verb or verbs that precede "or otherwise" express examples of types of actions or events that are understood to be included in a more general category expressed by the verb that immediately follows "otherwise." The more general category may include actions or events that are different from those referenced by the verb or verbs preceding "or otherwise."

3) No examples were found for which the context indicated that the "or otherwise VERB" construction functioned to limit the scope of the verb following "or otherwise" to actions or events that were closely similar to those expressed by verb or verbs preceding "or otherwise" – which is the interpretation adopted by the district court in this case and in the dissent by Judge Katsas in the court below.

The following two text excerpts taken from two of the three random sets of 100 examples obtained from COCA illustrate how the phrase "or otherwise VERB" can naturally be used to describe a very broad range of actions or events that can be very different than what is described in the verb phrases that precede "or otherwise":

1) "The communities program in the PCME [Programa para las Comunidades Mexicanas en el Extranjero] carried out the mandate of fostering closer ties between Mexicans in the United States and their places of origin. To this end, its designers built on the existing practices and objectives of hometown clubs: their efforts to *implement small projects in hometowns, donate equipment, or otherwise help their communities of origin.*" Luin Goldring, *The Mexican State and Transmigrant Organizations,* 37 Latin American Research Review 55 (2002) (emphasis added)

There could obviously be many ways for "hometown clubs" to "help their communities of origin" that would be very different than donating equipment or implementing small projects.

2) "It's clear that the native people of Tunt are not trapped in this remote location but instead choose to live there and adapt their lives to each new challenge with a mix of modern advancements and traditional Eskimo culture. Several members of the village *have attended college, enlisted in the Army, or otherwise left the village,* only to return. It is a culture steeped in time-honored tradition, but one also committed to improving the standard of living for future generations." Christy Goldfuss, *Energy Lessons from the Edge of the Earth,* Center for American Progress (2012), https://www.americanprogress.org/article/energy-lessons-from-the-edge-of-the-earth/ (emphasis added).

There are obviously lots of other ways for the native people of Tunt to leave the village than to attend college or enlist in the army.

The research team also conducted research using an additional large-scale corpus, the Corpus of the Current US Code (COCUSC), searching again for combinations of "or otherwise" followed by a verb.[15] The search resulted in 4,946 instances of this combination -- almost twice as many total occurrences as found in COCA (2,655 occurrences), even though COCA contains more than 20 times the number of words contained in COCUSC. Thus the conclusion that "or otherwise VERB" is a frequently occurring phrase based on COCA research is even more robust when usage in federal statutes is the context. The most frequent words in the VERB slot overlapped with those found in COCA and included "affect," "made," "dispose," "acquire," and "provided."

As with the COCA research the research team obtained a random sample, for this corpus three sets of 100 random examples (300 total examples), each of which the research team manually reviewed in context.[16]

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15. COCUSC has slightly different search tools than COCA. The research team inserted "or otherwise" in the search field and used the "collocates" function to limit the search to instances where the first word to the right is a verb, inserting "*/v" in the collocates field. COCUSC also has a different way of displaying context. To see the full textual context of any example of "or otherwise" produced by this search just "click" on the phrase "or otherwise" which will appear highlighted in blue in the middle of the selected example.

16. These three sets of 100 randomized examples appear in the appendix to the working paper, *supra* note 10.

The research results showed that the standard pattern for using "or otherwise VERB" observed in general contemporary American English is also found in contemporary federal statutes. There seems to be no ambiguity in either ordinary meaning or federal statutory usage to what the phrase means: the verb or verbs that come before "or otherwise" are specific types of the more general action or event described by the verb that immediately follows "or." The research team found no evidence to the contrary.

As with the random examples obtained from COCA, the results of searching the federal statutes data base were rich with examples showing that the scope of the actions or events described by the verb following "or otherwise" could be much broader than what was described by the verb or verbs preceding "or otherwise," contrary to conclusions about how the "or otherwise" phrase is to be understood expressed by the district court and in Judge Katsas's dissent. Here are two such text excerpts:

3) "A person shall be fined under title 18, imprisoned for not more than six months, or both if the person … *pulls down, impairs or otherwise injures any fence,* wall, or other enclosure … belonging to the Government in the District of Columbia." 40 U.S. Code §8103 (b)(3), Pub. L. 107–217, §1, Aug. 21, 2002, 116 Stat. 1062, 1205 (emphasis added).

Surely a person who drives a car through a government fence, blows it up with an explosive device, or burns it to the ground can be prosecuted under this provision even though such actions are very different than "pulling down" or "impairing" a fence.

4) "An employee of a contractor may not be *discharged, demoted, or otherwise discriminated against* as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract," 41 U.S. Code §4705, Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3677, 3796 (emphasis added).

Presumably this provision is intended to cover a wide range of actions taken against an employee in reprisal for whistleblowing, even if the discrimination is different in nature than discharge or demotion – such as a change in compensation or transfer to a different position or job location.

If, as every judge in this case has affirmed, the beginning point for interpreting this statute should be its "ordinary meaning" --- "ordinary, contemporary, common meaning at the time Congress enacted the statute," 64 F.4th at 336 – then the "second option" interpretation rejected by the district court is the interpretation that matches the results of the linguistic research presented in this brief. *Miller*, 589 F. Supp. at 70 ("otherwise … tether[s] the two subsections together, with the text preceding the word—subsection (c)(1)—providing examples that fit within (c)(2)'s broader scope.") The decision of the court of appeals also appears to be consistent with the research results presented in this brief:

> "[§ 1512(c)(2)] is a "catch-all" that "cover[s] otherwise obstructive behavior that might not constitute a more specific offense" involving documents, records, or objects under § 1512(c)

> (1). ..."the use of the introductory word 'otherwise' indicates that the evasion referred to in the [catch-all provision] reaches beyond the[ ] specific examples [in the preceding sections] to myriad means that human ingenuity might devise," 64 F.4th at 336.

As to the contrary assumption about the "ordinary meaning" of "or otherwise" advanced by the dissent, the research team found *no* evidence in its corpus-based research that words preceding "or otherwise" "usually" narrow the meaning of the words that follow. The interpretations advanced by the dissent and the district court indeed are completely contrary to what the research team observed in both the COCA and U.S. statutes corpora about how the phrase "verb(s) or otherwise VERB" is used. Usage of this pattern consistently indicates that VERB describes a general category of actions or events and that the preceding verbs are examples of that general category.

Judge Katsas actually provided a counter-example of his own assumption about ordinary meaning. Place his "injury" example into a complete sentence:

> "A student who punches, kicks, bites or otherwise injures another student will be subject to suspension."

Surely students who stabbed or shot another student would be subject to suspension under this rule, yet apparently under the dissent's interpretation there would be no suspension of such students because the way they inflicted injuries is too dissimilar from the far

more modest types of injuries that are listed before "or otherwise."

The U.S. Code corpus in fact includes examples of "or otherwise injures" that reinforce this point. See Example (3), above, and also this:

> "Whoever *tears, cuts, or otherwise injures any mail bag with intent … to render the same insecure* shall be fined under this title or imprisoned not more than three years , or both" 18 U.S.C. §1706, (June 25, 1948, ch. 645, 62 Stat. 779; Pub. L. 103–322, title XXXIII, §330016(1)(H), Sept. 13, 1994, 108 Stat. 2147.)

Presumably there are any number of ingenious ways to injure a mail bag, yet surely if a method that is very unlike tearing or cutting is used with the intent to render the bag insecure, this provision would still apply.

CONCLUSION

Taking no position on the ultimate resolution of this appeal, *amici* respectfully submit that linguistic analysis, using scientific methodology, of the Corpus of Contemporary American English indicates that the ordinary meaning of "or otherwise" as used in 18 U.S. Code § 1512(c) is consistent with the interpretation adopted by the Court of Appeals in this case. The interpretation adopted by the Court of Appeals also is supported by a very strong pattern of usage observed in the Corpus of the Current US Code.

Respectfully submitted,

Clark D. Cunningham
Counsel of Record
Georgia State University
College of Law*
85 Park Place NE
Atlanta, Georgia 30303
(404) 413-9168
cdcunningham@gsu.edu

Counsel for Amici Curiae

*Provided as postal address only. This brief is not filed on behalf of Georgia State University, the University System of Georgia, or the State of Georgia.