NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

ROYLEE RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that the federal witness tampering statute, 18 U.S.C. § 1512, requires proof that the defendant "contemplate[d] a[] particular official proceeding in which th[e testimony] might be material." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

The question presented is whether it is sufficient that the defendant *subjectively* contemplated a federal official proceeding, or whether § 1512(b) also requires proof that it was reasonably (*objectively*) foreseeable that a federal official proceeding might occur.

PARTIES TO THE PROCEEDINGS

The caption lists all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

United States v. Richardson, No. 3:21-cr-123-RGE-SBJ (S.D. Iowa) (criminal proceedings), judgment entered January 24, 2023.

United States v. Richardson, No. 23-1179 (8th Cir.) (direct criminal appeal), judgment and opinion entered February 7, 2024, petition for rehearing *en banc* and by the panel denied on March 12, 2024.

There are no other proceedings in state or federal trial or appellate courts or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roylee Richardson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Eighth Circuit's published opinion in Mr. Richardson's case is available at 92 F.4th 728 and appears in the appendix to this petition at page 1.

JURISDICTION

The Eighth Circuit entered judgment in Mr. Richardson's case on February 7, 2024. The Eighth Circuit denied Mr. Richardson's petition for rehearing *en banc* and by the panel on March 12, 2024.

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1512(b)(1) provides:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding
>
> . . . .
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(f) provides:

> (f) For the purposes of this section—
>
> (1) an official proceeding need not be pending or about to be instituted at the time of the offense[.]

18 U.S.C. § 1515(a)(1)(A) provides:

> (a) As used in sections 1512 and 1513 of this title and in this section—
>
> (1) the term "official proceeding" means—
>
> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury[.]

STATEMENT OF THE CASE

Roylee Richardson was found guilty by a jury of possession of a firearm by a felon, 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 1), and two counts of tampering with a witness, 18 U.S.C. §§ 1512(b)(1) and (2) (Counts 2 and 3). This petition seeks review of the Eighth Circuit's conclusion that sufficient evidence supported his federal conviction for tampering with a witness, as charged in Count 2, stemming from jail phone calls made several months before any federal proceeding. (*See* App. A, pp. 3-5.)

Count 2 alleged that Mr. Richardson "did knowingly attempt to corruptly persuade or engage in misleading conduct toward a witness, A.D., by attempting to influence or prevent the testimony of A.D. at an official proceeding," in violation of 18 U.S.C. § 1512(b). At the time of the tampering, A.D. was Mr. Richardson's girlfriend. Mr. Richardson was jailed on state charges relating to assaulting A.D. and shooting at a vehicle. (App. A, p. 2.)

The Eighth Circuit's opinion summarized the most relevant calls as follows:

Consider the following conversation from [February 10, 2021,] three days after his arrest [on state charges]:

ROYLEE RICHARDSON: . . . All they got to do is drop that [state] intimidation [with a dangerous weapon charge], because I ain't shooting at nobody.

UNKNOWN MALE: Hell, no, you don't want that. You don't want *the feds* picking that s*** up, brother.

ROYLEE RICHARDSON: I take the other charge. You feel me? The other charges I'll take.

UNKNOWN MALE: *The felon in possession*?

ROYLEE RICHARDSON: Yeah, I'll take that.

UNKNOWN MALE: You gonna go *federal* though, man. Do you know how much you gonna be facing after your background *with the feds*, brother?

ROYLEE RICHARDSON: Yeah.

UNKNOWN MALE: You facing like 10, 15 years if *the feds* pick everything up right now, all those cases. . . . Just like that, brother, *you're going federal*.

ROYLEE RICHARDSON: Yeah.

UNKNOWN MALE: You're trippin. Hell no, *you won't take no felon in possession*. . . .

ROYLEE RICHARDSON: Man.

The call logs show that Richardson called the victim next, less than 20 minutes later. He began by professing his love for her and then insisted that she "say nothing" because he was "fighting the case." After asking whether the police had found the gun, he went on to explain that if she refused to appear in court or "g[o]t on the stand and sa[id] . . . that she [had] lied," he "would be cool." What he really feared, after all, was "spend[ing] his life in prison."

> He asked again about the gun a few days later. When she said officers had found it, he told her that she had "bl[own]" it. He also explained that it "might" mean he "go[es] *fed*" . . . . A few minutes later, he instructed her to change her story.

(App. A, pp. 3-4 (italicizations in panel's opinion).) The calls summarized above occurred in February 2021. Mr. Richardson was not charged with any offense in federal court until December 7, 2021.

Nevertheless, based on the conversations, the Eighth Circuit concluded that sufficient evidence supported Mr. Richardson's conviction for witness tampering under federal law, as charged in Count 2. The court reasoned:

> From these conversations, the jury drew the reasonable inference that Richardson's attempts at "corruptly persuad[ing]" [A.D.] to lie or refuse to testify had a nexus to the lengthy sentence he would face from a federal felon-in-possession charge. 18 U.S.C. § 1512(b). A "particular" federal prosecution was "foreseeable," [*United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015)], even if it was not yet "pending or about to be instituted," 18 U.S.C. § 1512(f)(1). . . . And he thought that "influenc[ing]" her "testimony" or "prevent[ing]" it altogether would stave off a lengthy federal sentence. 18 U.S.C. § 1512(b)(1). The jury did not need to hear anything else to find him guilty.

(App. A, pp. 4-5.) Thereafter, Mr. Richardson's petition for rehearing by the court *en banc* and by the panel was denied. (App. C, p. 18.)

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION WAS INCORRECT BECAUSE OBJECTIVE FORESEEABILITY OF A FEDERAL "OFFICIAL PROCEEDING" IS A NECESSARY ELEMENT TO THE FEDERAL CRIME OF WITNESS TAMPERING UNDER 18 U.S.C. § 1512(b).

The issue presented is whether Mr. Richardson's attempts to persuade A.D. to change her story were directed at an "official proceeding"—that is, "a proceeding before a judge or court of the United States, a United States magistrate judge, . . . or a Federal grand jury." 18 U.S.C. § 1515(a)(1)(A). An "official proceeding" must be federal, not state. *United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015). Although "[a]n official proceeding need not be pending or about to be instituted at the time of the offense," 18 U.S.C. § 1512(f)(1), this Court has held that witness tampering does not violate § 1512 unless the defendant contemplated a "particular official proceeding in which th[e testimony] might be material." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

The Eighth Circuit's decision is incorrect because it focused entirely on *subjective* foreseeability and not at all on *objective* foreseeability. The decision seized on Mr. Richardson's subjective fears about a federal firearm prosecution, but did not discuss at all whether any such fear was objectively reasonable when he made the phone calls, 10 months before his federal indictment. Although § 1512(b) does not require proof that a federal proceeding was pending or about to be instituted when the obstructive act occurred, *Arthur Andersen* establishes that there still needs to be a "particular official proceeding" where testimony "might be material." Without proof

that a "particular official proceeding" was objectively foreseeable (which the government did not offer in Mr. Richardson's case), the government cannot prove a § 1512(b) charge.

Why does objective foreseeability matter in this context? Without a requirement of objective foreseeability, § 1512(b) would stretch into areas traditionally reserved to state and local authorities. Take, for example, a defendant charged with an entirely intrastate crime over which the federal government has no jurisdiction. Imagine that defendant has a subjective fear that he might face prosecution in federal court, even though, in reality, the federal government lacks jurisdiction. Under the Eighth Circuit's formulation of § 1512(b), that defendant could be prosecuted federally if he said to a potential witness, "Do not speak with the FBI about me." That federal prosecution could proceed, if the Eighth Circuit's decision stands, even though the FBI would never have approached that potential witness, and even though the federal government could not prosecute the underlying crime that led to the obstructive conduct.

As Judge Katsas explained in his dissent in *United States v. Fischer*, 64 F.4th 329 (D.C. Cir.), *cert. granted*, 144 S. Ct. 537 (2023), this Court should "reject[] 'improbably broad' interpretations of criminal statutes that would reach significant areas of innocent or previously unregulated conduct." *Id.* at 378 (Katsas, J., dissenting) (rejecting conclusion that 18 U.S.C. § 1512(c)(2) covers conduct relating to the January 6, 2021, riot). "Likewise, th[is] Court routinely disfavors

interpretations that would make a statute unconstitutional—or even raise serious constitutional questions." *Id.* Granting this petition gives the Court an opportunity to limit application of § 1512(b) to prevent federal overreach into the province of the states. *See* U.S. Const. amend. X.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT ON WHETHER OBJECTIVE FORESEEABILITY IS A NECESSARY ELEMENT UNDER 18 U.S.C. § 1512(b).

The Eighth Circuit's decision conflicts with decisions from other circuits.

The Tenth Circuit's decision in *United States v. Sutton*, 30 F.4th 981 (10th Cir. 2022), is an example. In *Sutton*, the Tenth Circuit reversed two defendants' § 1512(b) convictions in a case that arose "from a jail fight that started when an inmate learned that another inmate had 'snitched.'" *Id.* at 982. The court held that § 1512 requires proof that, as of the time of the tampering, a "reasonable likelihood existed that the proceeding would be federal." *Id.* at 989. In other words, the Tenth Circuit concluded that § 1512 requires proof both that the defendant "contemplated a federal proceeding," *and* "it was reasonably likely that the contemplated proceeding would have been federal." *Id.* at 990; *see also id.* at 987 ("In § 1512(b), Congress didn't clearly express its intent to federalize state witness tampering that incidentally interfered with federal proceedings.").

The Eighth Circuit's decision also runs contrary to the Third Circuit's decision in *United States v. Shavers*, 693 F.3d 363 (3d Cir. 2012).[1] *Shavers* reversed § 1512(b)

[1] The Third Circuit's decision was vacated on other grounds by *Shavers v. United States*, 570 U.S. 913 (2013).

convictions for two defendants prosecuted for tampering that occurred during the pendency of state proceedings. 693 F.3d at 379-81. The defendants "were aware that they were subject to a federal investigation" when the tampering occurred. *Id.* at 380. Notwithstanding that subjective awareness, the court reversed the convictions because the state proceedings were the target of the tampering. *Id.* ("Here, Shavers and White were clearly contemplating their upcoming hearings in Pennsylvania state court, and not any federal proceeding, when they sought to tamper with potential witnesses.").

In sum, Mr. Richardson's conviction would not stand under *Sutton* or *Shavers*, and the Eighth Circuit's contrary opinion conflicts with these precedents. This Court should grant the petition for writ of certiorari to correct the decision below and harmonize circuit precedent on this important issue.

CONCLUSION

For these reasons, Mr. Richardson respectfully requests that the Court grant his petition for writ of certiorari.

RESPECTFULLY SUBMITTED,

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