No. 23-94

IN THE
Supreme Court of the United States

GARRET MILLER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT SUMMARY

The government has charged hundreds of citizens from across the country with a novel obstruction-of-justice offense carrying a 20-year maximum prison sentence for any act that corruptly obstructs, impedes, or influences any congressional proceeding. Many are not accused of violence. Consequently, the United States District Court for the District of Columbia, and juries impaneled there, are spending hundreds of hours in hearings and trials adjudicating this shapeless offense. Of the five D.C. Circuit judges who have now considered the question, three have resolved that the government's construction of Section 1512(c)(2) in the January 6 cases is overbroad.

Against that confused backdrop, the government's opposition does not focus on the merits. It principally argues that while the Court may ultimately decide to resolve the statutory questions presented by Miller, its review should be deferred until after entry of a final judgment because "[a]ny review of the question presented here" would be premature absent "additional legal and factual development. . ." Opp. 15.

Left unexplained is why the government believed that the court of appeals could manage the task when the government itself sought interlocutory review of the "premature" question. The government's view appears to be that, where it is the respondent anyway, the utility of interlocutory review is capped along a vertical axis at the point where this Court's jurisdiction begins. In any case, no disagreement exists about the determinative facts. The question is whether Section 1512(c)(2) reaches conduct unrelated to evidence impairment, not whether

Petitioner Miller committed an assault, a charge that he has already resolved and is thus not subject to factual development. And even the panel's lead opinion did not rest on the unsupportable ground that a factfinder may equate electoral certificates with "evidence." Cf. Opp. 25-26.

If anything, the three months since the Petition's filing have occasioned fresh reasons for present review. The D.C. Circuit decided another Section 1512(c)(2) case related to the events of January 6—and, again, the court splintered. *United States v. Robertson*, 2023 U.S. App. LEXIS 27878 (D.C. Cir. Oct. 20, 2023). Three of the Circuit's judges have now concluded that the government's construction of the Section 1512(c)(2) offense in the January 6 cases is overbroad. Two of their colleagues have disagreed. Thus hundreds of protesters are still being charged, tried, and sentenced under a statutory interpretation adopted by a minority of the Circuit judges who have considered the question. That anomalous situation is another compelling reason not to delay review. And resolution now of the pure legal question at issue would obviate countless hours that factfinders will otherwise expend on these matters, to say nothing of erroneously imposed prison time.

The last three months have also seen highly publicized episodes of Capitol protest that may constitute violations of the government's novel Section 1512(c) interpretation. As political demonstrations like these multiply without obstruction-of-justice charges filed, the public's impression that one-off interpretations of a criminal law have been applied to a select group will undermine the appearance of justice. On the other hand, pressure to correct the double standard will likely lead to future criminalization of protest, lobbying, and advocacy at the Capitol.

ARGUMENT

I. Many reasons argue against delaying review of the important questions Miller raises

The government does not dispute that Miller raises important questions of federal law. Instead, it argues that "[a]ny review of the question presented here should [] await further proceedings, which will provide additional legal and factual development. . ." Opp. 15. That is wrong.

1. The government's position is self-contradicting. When it sought interlocutory review of the district court's dismissal of its novel § 1512(c)(2) charge, the government did not take the position that the question of statutory interpretation at issue could not be resolved without "additional legal and factual development." Opp. 15. To the contrary, it asked the D.C. Circuit to construe the statute in its favor. Nor does the government take the position here that the panel's lead opinion is deficient in that respect. The government fails to explain why the law and facts were ripe for the D.C. Circuit's review but are not for the appellate jurisdiction of this Court.

2. The parties do not "disagree about the conduct *at issue*." Opp. 13 (emphasis added). The government observes that it will prove at trial that Petitioner Lang assaulted officers, *id.* at 14, and that Petitioners Miller and Fischer "took part" in a "violent occupation of the Capitol . . ." *Id.* But the pure legal question at issue is whether the Section 1512(c)(2) offense reaches conduct unrelated to evidence impairment, not whether Miler committed an assault. EL App. 9-45. Thus, the parties need not agree on whether Miller committed an assault if there is no

dispute that the charged conduct did not impair evidence and was not intended to. Here, the lead opinion's reversal of the district court's dismissal order was not predicated, even secondarily, on the ground that the government had somehow charged Miller with evidence impairment. Instead, its decision rested on the determination that Section 1512(c)(2) reaches conduct beyond evidence impairment, potentially including protest, advocacy and lobbying. *Id.*

Unlike with Lang and Fischer, it is inaccurate for the government to argue that any "violent acts" by Miller on January 6 await "additional . . . factual development." Opp. 15. Miller has pled guilty to, and has been sentenced on, every crime with which he was charged except for the invalid Section 1512(c)(2) offense, processes that required the district court to make findings as to the relevant facts. Dist. Ct. Dkt. 141.

3. The government's contention that the "interlocutory posture of a case" alone warrants denial of a petition (Opp. 13) is wrong. *E.g.*, *United States v. Bates*, 522 U.S. 23 (1997) (resolving criminal appeal in identical interlocutory posture). Anyway, the balance of interests involved in the mine-run criminal case that reaches this Court in an interlocutory posture diverges from the balance here.

In the Capitol riot prosecutions, the same pure legal question arises across hundreds of cases that are being litigated simultaneously—*i.e.*, whether a congressional proceeding involving neither an investigation nor an inquiry somehow entails "evidence" with which a defendant may interfere. Thus, while the efficiencies of interlocutory resolution may be outweighed in a typical

criminal appeal by individualized factual permutations that may emerge up until entry of a final judgment, delayed review here would not "provide additional legal and factual development" on any relevant issue, Opp. 15, but would instead cause factfinders to waste hundreds of additional hours adjudicating an offense that three D.C. Circuit judges have determined is breathtakingly overbroad with respect to any defendant.

II. Judge Pan's lead opinion is not more persuasive than the opinions of three other Circuit judges

1. In its 10-page defense of the panel's lead opinion (Opp. 15-25), the government omits a salient fact: not just two but three Circuit judges have determined that the government's evidence-free interpretation of Section 1512(c)(2) is implausibly overbroad.

Judge Walker explicitly conditioned his concurrence in the decision here on a narrowed definition of Section 1512(c)(2)'s "corruptly" element developed in his opinion: acting with the intent to secure an unlawful benefit with the knowledge the benefit is unlawful. EL App. 48 n. 1. ("[M]y vote to uphold the indictments depends on it."). Absent the Court's agreement on that point, the judge would have found the government's construction of the statute in the Capitol riot cases to be "breathtaking" in scope, subjecting it to vagueness and overbreadth concerns. *Id.* Yet the lead opinion did not adopt Judge Walker's "corruptly" definition. And Judge Katsas determined that even with Judge Walker's "torqued-up *mens rea*," the statute would have "improbable breadth" when decoupled from evidence impairment. EL App. 114-15.

Although the government cites the D.C. Circuit's later Section 1512(c)(2) decision in *Robertson*, it omits that a judge dissented there. Opp. 27. Like the lead opinion here, the opinion of the *Robertson* court was authored by Judge Pan. *Robertson* also considered the meaning of "corruptly" in Section 1512(c)(2) and declined to apply Judge Walker's definition, despite the judge's conditional vote here. *Robertson* held instead that it is sufficient for the government to prove that a Section 1512(c)(2) defendant acted through "independently unlawful means," notwithstanding Judge Walker's and Judge Katsas's concerns that such a definition would transform "comparatively minor advocacy, lobbying, and protest offenses into 20-year felonies." EL App. 114-15.

The government's description of *Robertson* also omits that, in light of the *Robertson* court's decision not to follow Judge Walker's concurring opinion in this case, Judge Henderson dissented, intimating that she would have accordingly joined Judge Katsas's dissent in the decision below. *Robertson*, 2023 U.S. App. LEXIS 27878, at *90-91 (Henderson, J., dissenting).

In sum, the government would have the Court ignore a highly unusual situation. One judge authored the lead opinions in both this appeal and *Robertson*, upholding the government's novel construction of Section 1512(c)(2) in the Capitol riot cases. Three judges determined that the interpretation is implausibly overbroad. Yet it is the first judge's opinion—a minority view in the court of appeals—which currently binds the Circuit.

2. On the merits, the government's arguments (Opp. 15-25) were refuted by Judges Katsas, Walker, and Henderson.

a. The government misstates the terms of the dispute. The "statutory text, structure, context and history," it argues, "all refute petitioners' 'cramped, document-focused interpretation' of Section 1512(c)(2)." Opp. 15 (quoting Lang Pet. App. 31). But Miller's interpretation is not "document-focused." Instead, as Judge Katsas observed, "Congress limited the [Section 1512(c)(2)] *actus reus* to conduct that impairs the integrity or availability of evidence"—of any kind, including testimonial evidence. EL App. 116.

b. The government does not deny the "'cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute.'" EL App. 91 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). Nor does it deny that its evidence-free interpretation of subsection (c)(2) would make surplusage of "other parts of Section 1512" and "numerous provisions in the obstruction statutes." Opp. 22. But those considerations have "little weight," it contends, because "reading Section 1512(c)(2) as limited to *document-related* obstruction would similarly render Section 1512(c)(1) largely nugatory." *Id.* (emphasis added).

Again, Miller does not contend that subsection (c)(2) is limited to "document-related" obstruction. As Judge Katsas demonstrated, when the subsection is limited to conduct that impairs the integrity or availability of *evidence* (document-related or otherwise), it functions as a residual clause for acts of evidence impairment not "otherwise" captured by the spoliation crimes listed in subsection (c)(1). EL App. 91-93. Thus, while the government's interpretation decoupling the clause from any evidence impairment spawns a great deal of statutory surplusage, Judge Katsas's generates none.

The government labors to distinguish *Begay v. United States*, 553 U.S. 137 (2008). Opp. 25. The result fails to persuade. Just as it does here, the Court in *Begay* considered the scope of a residual "otherwise clause" that followed a list of specific offenses: "a violent felony" was defined as "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). The Court held that the residual clause, located in the Armed Career Criminal Act of 1984 (ACCA), did not reach a DUI offense because "it covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" 553 U.S. at 142. The Court explained that "to give effect to every clause and word of th[e] 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 [preceding the 'otherwise clause'] at all." *Id.* at 142. As Judge Katsas showed, applying the *Begay* principle to the residual clause in Section 1512(c)(2) would mean limiting it to "crimes that are roughly similar, in kind as well as in degree of [obstruction] posed, to the examples" in subsection (c)(1). EL App. 81-82. Acts that "otherwise" obstruct an official proceeding through evidence impairment are similar "in kind as well as in degree of [obstruction] posed" to the listed spoliation crimes in subsection (c)(1). By contrast, acts of political protest at a congressional proceeding that is neither an inquiry nor investigation are not "similar in kind" to spoliation of evidence. And if Congress intended subsection (c)(2) to cover any act that obstructs, influences or impedes, "it is hard to see why it would have needed to

include the [other crimes in Section 1512 and Chapter 73] at all." *Begay*, 553 U.S. at 142.

The government observes that, in contrast with *Begay*, the "otherwise clause" here is separated from the list of specific offenses in subsection (c)(1) by a line break and a semicolon. Opp. 24. That argument fails on its own terms. *Begay* interpreted the residual clause in Section 924(e)(2)(B)(ii) in light of subsection (B)(i)—clauses separated by a semicolon and line break. *Begay*, 553 U.S. at 142. Second, as Judge Katsas observed, a text's plain meaning is derived from diction, grammar, and syntax, not line breaks (a verse term) or punctuation. EL App. 81.

The government adds that any "potential relevance" of *Begay* is "called into question" by the Court's subsequent holding that the ACCA's residual clause was unconstitutionally vague. Opp. 24 (citing *Johnson v. United States*, 576 U.S. 591, 598, 606 (2015)). Unsurprisingly, even the lead opinion here did not distinguish *Begay* on that basis. If the *Begay* Court's clarifying construction was not enough to save the ACCA's residual clause from vagueness, that logic does not redound to the advantage of the government's unbounded construction of Section 1512(c)(2) here.

c. The government contends that "no other court of appeals has ever endorsed the construction that petitioners advocate." Opp. 20. As Judge Katsas observed, if the government's representation is accurate, it is only because, in the 20 years since codification of Section 1512(c), the offense has been "uniformly treated as an evidence-impairment crime." EL. App. 105. Judge Katsas showed that the "one counterexample" held up by the lead opinion was not a counterexample at all: "the defendant

there falsified an official court document and used it to persuade a party to withdraw a filing." *Id.* (citing *United States v. Reich*, 479 F.3d 179, 182 (2d Cir. 2007)).

As to Section 1512(c)'s statutory history, nothing there supports the incongruous contention that Congress intended to fix the "Arthur Andersen loophole," which concerned the auditor's "systematic[] dest[ruction] [of] potentially incriminating documents," Opp. 17, by creating an offense having nothing to do with evidence impairment. From this history the government derives the observation that Section 1512(c)(2) was intended to cover more than just "document-related" obstruction. Opp. 18. The government's continuous mischaracterization of the dispute's terms tells against its position.

d. The government argues that Miller's "conduct would satisfy even the [] evidence-focused definition" followed in every § 1512(c)(2) prosecution in the 20 years up until January 6, 2021. It contends that "certificates of votes from each State" are a "specific type of evidence." Opp. 25. Although the government made this argument below—Gov't C.A. Br. 61-67—it was not even accepted by the panel's lead opinion. EL App. 9-45. For evidence is "something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Evidence*, Black's Law Dictionary (11th ed. 2019). A ballot is not created or employed to "prove or disprove" an "alleged fact." It is "[a]n instrument, such as a paper or ball, used for casting a vote." *Ballot*, Black's Law Dictionary (11th ed. 2019).

e. The government contends that the Court should not interpret § 1512(c)(2)'s "corruptly" element as it was

not "squarely addressed" by the court of appeals and "the issue would not be outcome determinative at this stage." Opp. 27. Not so. As Judge Walker observed, the issue was fully brief and argued. EL App. 49 n. 1. It is outcome determinative because, as two Circuit judges have already determined, the question whether the government's interpretation of § 1512(c)(2) is overbroad may turn on the definition of "corruptly," an element found in the clause under review here. The suggestion that every word in a statutory clause demands a distinct appeal is nonsensical.

III. Recent political protest at the Capitol underscores the importance of review

Recent weeks have witnessed myriad episodes of Capitol protest that underline the urgent need for this Court's review of the questions presented.

During a recent congressional vote on a last-minute spending bill, a member of Congress pulled a fire alarm, causing an evacuation of the Cannon House Office Building. While such a prank might ordinarily be charged as a local misdemeanor, it would constitute a 20-year felony under the government's § 1512(c)(2) interpretation here if done to obstruct, influence, or impede the congressional proceeding.[1]

Similarly, hundreds of protesters have swarmed the Capitol Rotunda and disrupted congressional proceedings

1. Jason Willick, *The Jamaal Bowman Scandal Should Set Off Supreme Court Alarms*, Wash. Post (Oct. 5, 2023), available at https://www.washingtonpost.com/opinions/2023/10/05/jamaal-bowman-capitol-riot-supreme-court/

with loud chanting calling for a ceasefire in the Israel-Hamas conflict.[2] Perhaps unsurprisingly, calls were heard for the congressman's and protesters' prosecution for obstruction of an official proceeding.

CONCLUSION

To date, only January 6 defendants have been charged under the government's novel § 1512(c)(2) interpretation. But under that interpretation, all the aforementioned acts may be chargeable. In the status quo, then, it is entirely unclear where the line of legality is being drawn in the context of protest in the Nation's Capital. In an age of extreme partisanship, there exists a grave danger that the government's vaguely defined offense will be used to stymie congressional protest and advocacy based on political viewpoints.

Respectfully submitted,

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2. Mike Bedigan, *Hundreds of Protesters Swarm Capitol Rotunda to Demand Israel-Hamas Ceasefire*, Yahoo News (Oct. 18, 2023), available at https://ca.finance.yahoo.com/news/dozens-protesters-swarm-capitol-rotunda-191037351.html