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 U.S. SENATOR TOM COTTON, REPRESENTATIVE JIM JORDAN, AND 21 OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSEPH W. FISCHER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are United States Senator Tom Cotton, Representative Jim Jordan, and 21 other members of Congress. The full list of *amici* is below.

As members of Congress, *amici* have a strong interest in securing a proper interpretation of Section 1512(c)(2), which Congress created when it enacted the Corporate Fraud Accountability Act of 2002. *See* 18 U.S.C. § 1512(c)(2). Several *amici* sit on Committees that oversee matters related to the Act, including the Senate Committee on the Judiciary; the Senate Committee on Banking, Housing, and Urban Affairs; the House Committee on the Judiciary; and the House Committee on Financial Services.

Amici also have a strong interest in ensuring that courts properly apply canons of construction that Congress relies on for certainty regarding the effect of legislation in its drafting and enacting of public laws. However, the D.C. Circuit's decision below failed to apply those canons properly, thereby expanding Section 1512(c) beyond its permissible meaning.

If allowed to stand, the lower court's decision will only reward and incentivize politically motivated uses of ill-fitting criminal statutes with harsh penalties.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The following is the full list of *amici*:

United States Senate

Tom Cotton (AR)
Kevin Cramer (ND)
Mike Lee (UT)

United States House of Representatives

Jim Jordan (OH-04)
Cliff Bentz (OR-02)
Lauren Boebert (CO-03)
Jerry Carl (AL-01)
Michael Cloud (TX-27)
Matt Gaetz (FL-01)
Lance Gooden (TX-05)
Marjorie Taylor Greene (GA-14)
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Diana Harshbarger (TN-01)
Lisa McClain (MI-09)
Mary Miller (IL-15)
Alex Mooney (WV-02)
Barry Moore (AL-02)
Andy Ogles (TN-05)
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Guy Reschenthaler (PA-14)
Matt Rosendale (MT-02)
Tom Tiffany (WI-07)
Michael Waltz (FL-06)

SUMMARY OF THE ARGUMENT

The D.C. Circuit held by a 2-1 vote that Section 1512(c)'s criminalization of destroying records, documents, or other objects, or otherwise obstructing, influencing, or impeding an official proceeding unambiguously encompasses "all forms of obstructive acts," including entering the Capitol building on January 6, 2021. That expansive interpretation—which coincides with the Department of Justice's interpretation—was wrong, and it has predictably led to arbitrary and politicized prosecutions.

The statutory context of Section 1512(c)(2), in particular, which Congress created in the aftermath of the Enron scandal, limits its coverage to the impairment of evidence like records and documents. It is a subsection within a section titled "Tampering with a witness, victim, or an informant." The majority below instead read Section 1512(c)(2) in isolation, found that it unambiguously encompassed any form of obstruction of an official proceeding, and concluded all contrary contextual evidence was irrelevant. *See* Part I, *infra*.

The majority opinion's expansive interpretation of Section 1512(c)(2) has serious constitutional implications. It criminalizes political conduct and grants the Department of Justice nearly unfettered discretion to prosecute Americans based on the perceived morality of their political beliefs. The government has gone after hundreds of perceived violations of Section 1512(c)(2)—ranging from January 6 defendants to former President Trump himself—*except* when it involves someone whose

political views align with the current administration's.

Selective prosecutions are entirely predictable when courts interpret a harsh criminal statute far too broadly, especially when that expanded scope covers the political process.

This Court should reverse the decision below.

ARGUMENT

I. The Majority Opinion Below Disregarded and Misapplied Numerous Rules of Statutory Construction.

"[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno v. Koray*, 515 U.S. 50, 56 (1995) (cleaned up).

The majority opinion violated this "fundamental" rule of statutory construction by insisting that Section 1512(c)(2) be interpreted "consider[ing] nothing outside the four corners of subsection (c)(2)." Pet.App.69a (Katsas, J., dissenting). That led the majority to conclude prematurely (and mistakenly) that Section 1512(c)(2) is "unambiguous" and, thus, that any resort to statutory context was unnecessary and irrelevant. Pet.App.26a.

But the court below was required to consider statutory context *as part of* deciding whether Section 1512(c)(2) is ambiguous, not afterwards. If it had properly undertaken the process of statutory analysis, the majority would have reached the same conclusion

as Judge Katsas: Section 1512(c)(2) "covers only acts that impair the integrity or availability of evidence." Pet.App.91a (Katsas, J., dissenting).

A. The Majority Opinion Creates Nearly "Complete" Surplusage of Section 1512.

The majority and Judge Katsas agreed that "no construction of section 1512(c)(2) will eliminate all surplusage." Pet.App.86a–87a (Katsas, J., dissenting); Pet.App.36a (majority op.). But the majority concluded that because both views result in surplusage, the canon against surplusage was of no aid whatsoever, as the court would simply be "'substituting one instance of superfluous language for another.'" Pet.App.36a. That mistaken view led the majority to ignore overwhelming contextual evidence that its interpretation of Section 1512(c)(2) was wrong.

When it comes to statutory interpretation, surplusage is disfavored, and more surplusage is more disfavored. *See* Pet.App.87a (Katsas, J., dissenting) ("[A] construction that creates substantially less of it is better than a construction that creates substantially more."). Petitioner's interpretation would create minor overlap between provisions, but the "government's interpretation yields complete surplusage." Pet.App.85a (Katsas, J., dissenting).

Judge Katsas explained that Section 1512 includes twenty other provisions, each of which is narrowly focused, and "at least 15" of them would be rendered superfluous by the government's and majority opinion's broad view of Section 1512(c)(2).

Pet.App.82a (Katsas, J., dissenting). After all, if Section 1512(c)(2) outlaws any and all obstructing, influencing, or impeding of any official proceeding, there would have been no point in listing separate provisions covering, for example, killing a person to prevent his attendance at an official proceeding (covered by Section 1512(a)(1)(A)), or to prevent the production of a record, document, or other object in an official proceeding (covered by Section 1512(a)(1)(B))—or any of another dozen narrowly defined actions already covered elsewhere in Section 1512. Pet.App.83a (Katsas, J., dissenting).

That superfluity is even more inexplicable when one considers that the numerous provisions rendered superfluous have significant disparities in maximum penalties, from three years up to thirty years. *Id*. The "government's interpretation"—adopted by the majority below—"collapse[s] all of this, making any form of obstructing an official proceeding a 20-year felony" under Section 1512(c)(2). Pet.App.90a (Katsas, J., dissenting).

Under the government's and majority's view, Congress provided a reticulated scheme covering narrowly defined acts involving evidence and records, as well as their resulting penalties—and then obliterated that scheme with one omnibus provision buried "in a subsection of a subsection nestled in the middle of the statute." *United States v. Miller*, 589 F. Supp. 3d 60, 73 (D.D.C. 2022) (Nichols, J.). Congress does not write statutes that way.

The majority opinion responded that this extraordinarily level of superfluity "is easily explained

by the fact that Congress drafted and enacted that subsection after the rest of § 1512." Pet.App.36a. That is unpersuasive for numerous reasons.

First, the majority provided no authority for the notion that the canon against superfluity no longer applies once Congress amends a statute. This Court has long held the opposite, requiring that courts construe subsequent amendments in light of the *entire* statute and its history. *United States v. Wong Kim Ark*, 169 U.S. 649, 653–54 (1898). The majority failed to follow that rule and effectively adopted a conflicting rule that statutes no longer must be read as a whole after there has been an amendment.

Second, it's telling that the majority suddenly felt compelled to turn to statutory history[2] in an attempt to salvage its unconvincing interpretation, because just a few pages earlier, the majority opinion said that resorting to statutory history was inappropriate given its conclusion that Section 1512(c)(2) was unambiguous. *Compare* Pet.App.36a, *with* Pet.App.31a. This internal inconsistency should have led the majority at least to recognize that it was mistaken in having previously concluded that Section 1512(c)(2) was "unambiguous." Pet.App.11a. Instead, the majority insisted that its previously-determined interpretation of Section 1512(c)(2) was completely

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[2] The majority also seems to have conflated "legislative history," Pet.App.31a, with "statutory history." *See, e.g., BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (contrasting "unenacted legislative history" with "the record of *enacted* changes Congress made to the relevant statutory text over time").

unaffected by the immense superfluity it would create.

Third, Congress's amendment to include 1512(c)(2) supports Petitioner because Congress aimed to close a loophole, not blow open the entire statute, as explained below. *See* Part I.B, *infra*.

The majority also argued that "[i]f Congress's goal were to criminalize a subset of obstructive behavior, it easily could have used words that precisely define that subset," and "[i]n fact, Congress enacted exactly that kind of precise directive in § 1505 and in § 1519, the latter at the same time as § 1512(c)." Pet.App.27a. The majority criticizes the relatively minor overlap caused by Petitioner's interpretation while ignoring that its own interpretation eliminates 75% of the entire statute. The majority's reliance on Section 1519 is especially unpersuasive because, as several members of this Court have argued, Congress's enactment of both Sections 1512(c) and 1519 was likely nothing more than "belt-and-suspenders caution." *Yates v. United States*, 574 U.S. 528, 562–63 (2015) (Kagan, J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting).

It is undisputed that either side's interpretation will result in some surplusage. But at every turn, the majority resisted the obvious point that less surplusage is preferred over "complete surplusage." Pet.App.85a (Katsas, J., dissenting). If the majority below had addressed this statutory context as part of its statutory interpretation, rather than as an afterthought, it would have reached the same conclusion as Judge Katsas.

B. The Majority Opinion Disregarded the Historical Context of Section 1512(c)(2).

When interpreting a statute, a court must consider "the context from which the statute arose," *Bond v. United States*, 572 U.S. 844, 860 (2014), which here demonstrates that Section 1512(c)(2) is limited to evidentiary impairment.

Congress enacted Section 1512(c) as the first provision of the Corporate Fraud Accountability Act of 2002, which was part of the larger Sarbanes-Oxley Act of 2002. Pub. L. No. 107-204, tit. XI, § 1102, 116 Stat. 745, 807. Like many other provisions in Sarbanes-Oxley, Section 1512(c) was included to address financial crime. Congress enacted Sarbanes-Oxley in part because of a major accounting fraud scandal involving Enron Corporation that resulted in the company's collapse in 2001. *See* S. Rep. No. 107-146 (2002). Leading up to its collapse, Enron and the accounting firm Arthur Andersen falsified company financial statements that would have revealed immense financial losses. *Id*. at 3. When the SEC began investigating, Arthur Andersen partners allegedly directed the firm's employees to shred documents that evidenced the fraud. *Id*. at 4.

The Corporate Fraud Accountability Act aimed to patch a loophole in how federal obstruction of justice statutes applied to the frauds revealed in the Enron scandal. *See id*. at 6. Prior to Sarbanes-Oxley, Section 1512 made it a crime "to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally." *Id*.; *see* 18

U.S.C. § 1512(b)(2) (prohibiting efforts to "persuade[] another person" to "alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding"). That is because Section 1512 was primarily a "'witness tampering' statute." S. Rep. No. 107-146 at 7. In its origin, Section 1512 aimed to "protect[] victims and witnesses from intimidation," such as by intimidating witnesses into destroying evidence, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1248, 1249 (1982); S. Rep. No. 97-532, 1982 WL 25068, at *16 (1982), rather than criminalize the personal destruction of evidence *per se*. For that, other obstruction-of-justice statutes applied. *See United States v. Poindexter*, 951 F.2d 369, 382 (D.C. Cir. 1991).

Other statutes covered personal destruction of evidence, but Congress perceived that they were limited to contexts that did not apply to the Enron scandal. Section 1503 criminalizes the obstruction of justice, but the acts must have sufficient "nexus" in time, causation, and logic to a pending judicial proceeding. *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *see also* 18 U.S.C. § 1505 (criminalizing obstruction of agency and congressional investigations). Section 152(8) applies to destroying financial books and records, but only after a bankruptcy case has been filed. 18 U.S.C. § 152(8). Still others apply in different contexts. *See* 18 U.S.C. § 1517 (criminalizing obstruction of financial institution examinations); *id.* § 1518 (criminalizing obstruction of communicating records relating to federal health care offenses).

This loophole became apparent when the Department of Justice began prosecuting Arthur Andersen. Prosecutors were "forced to use [§ 1512] under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." S. Rep. No. 107-146 at 7.

Congress "close[d] this loophole" by creating Section 1512(c) as part of the Corporate Fraud Accountability Act of 2002. 148 Cong. Rec. 12517 (2002) (remarks of Sen. Orrin Hatch). Unlike the existing Section 1512, which applied to evidentiary impairment caused by "another person," the new Section 1512(c) applied to "whoever" did it. As the bill's sponsors explained, this change cut out the middleman to "permit the government to prosecute an individual who acts alone in destroying evidence." *Id.*; *see also id.* at 12512 (remarks of Sen. Trent Lott).[3]

Section 1512(c) thus broadened *who* could be charged for tampering with evidence. But it did not broaden the scope of prohibited conduct beyond evidentiary impairment. That focus remains in the current Section 1512, which mentions "record," "document," or other "object" a total of 26 times. *See* 18 U.S.C. §§ 1512(a)(1)(B); 1512(a)(2)(B)(i); 1512(a)(2)(B)(ii); 1512(a)(2)(B)(iii); 1512(b)(2)(A); 1512(b)(2)(B); 1512(b)(2)(C); 1512(c)(1); 1512(f).

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[3] Several senators described the provision as a law against "document shredding." *See* 148 Cong. Rec. at 12512 (remarks of Sen. Trent Lott); *id.* at 12513 (remarks of Sen. Joseph Biden); *id.* at 12517 (remarks of Sen. Orrin Hatch).

The majority opinion below acknowledged some of this statutory history and context but just as quickly dismissed it by stating that "any discrepancy between Congress's primary purpose in amending the law and the broad language that Congress chose to include in § 1512(c)(2) must be resolved in favor of the plain meaning of the text." Pet.App.32a. But that just begs the question. Determining whether Section 1512(c)(2) is "plain" and ambiguous turns in part on statutory context, such as Section 1512's overwhelming focus on documents and evidence, but the majority simply refused to consider that context by pointing to its prior conclusion that the text was plain.

Just as with its analysis on surplusage, *see* Part I.A, *supra*, the majority prematurely concluded the statute was unambiguous and then rejected all contrary statutory context as inconsistent with that purported unambiguity. That is not how statutory interpretation works.

C. The Majority Erroneously Disregarded the Textual Link Between Sections 1512(c)(1) and 1512(c)(2).

The majority also erred by concluding that the "otherwise" clause in Section 1512(c)(2) connotes no narrowing based on the preceding list of prohibited actions (i.e., "alters, destroys, mutilates, or conceals a record, document, or other object … with the intent to impair," 18 U.S.C. § 1512(c)(1)).

Noscitur a sociis provides that "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553

U.S. 285, 294 (2008). This Court has already applied this canon to Sarbanes-Oxley to constrain the meaning of the seemingly broad phrase "tangible object" by noting that the preceding list included terms like "record[s]" and "document[s]." *Yates*, 574 U.S. at 544 (cleaned up). Like the statute in *Yates*, the residual clause here "is the last in a list of terms that begins 'any record or document'" and "is therefore appropriately read to refer, not to any [form of obstruction], but specifically to the subset of [obstruction] involving records and documents, *i.e.*, [obstruction of] record[s] or preserv[ing] information." *Id*. (cleaned up); *see also Begay v. United States*, 553 U.S. 137, 143 (2008).

The canon *ejusdem generis* similarly "limits general terms that follow specific ones to matters similar to those specified." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 294 (2011) (cleaned up). That includes a "catchall phrase" like the "otherwise" clause in Section 1512(c)(2). Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

Accordingly, the use of "otherwise" in Section 1512(c)(2) "connote[s] … similarity" to the aforementioned terms. Pet.App.73a (Katsas, J., dissenting). To be sure, one could debate precisely how much similarity is connoted. As Judge Katsas explained, Section 1512(c)(2) most likely covers matters regarding evidence, not just *physical* evidence as the district court had concluded, but that difference does not matter here because Petitioner has not been charged with "*any* action affecting physical *or other*

evidence." Pet.App.78a–79a (Katsas, J., dissenting) (emphases added).

Given this, it's no surprise that "there is no precedent for using § 1512(c)(2) to prosecute the type of conduct at issue in this case." Pet.App.17a. The majority and government could not identify a single case ever brought under Section 1512(c)(2) that did not involve evidentiary matters. Pet.App.15a. Typically, when the government claims to have "discover[ed] in a long-extant statute an unheralded power"—*e.g.*, charging trespassers with a twenty-year felony—a court should "greet [the government's] announcement" of this new authority "with a measure of skepticism." *UARG v. EPA*, 573 U.S. 302, 324 (2014).

Instead, the majority opinion below persisted in its view, concluding that "otherwise" in Section 1512(c)(2) is in no way narrowed by the preceding list in Section 1512(c)(1). The majority rested primarily on the fact that "the 'otherwise' clause in § 1512(c)(2) sits within a separately numbered subparagraph, after a semicolon and line break, all of which put distance between it and the lists of verbs and objects included in subsection (c)(1)." Pet.App.29a.

As Judge Katsas explained, the majority's view is inconsistent with how Congress drafts statutes. Pet.App.74a (Katsas, J., dissenting). Drafting guidelines recommend that text be "broken into subsections and subparagraphs 'to the maximum extent practicable.'" *Id.* (cleaned up) (quoting House Off. Legis. Couns., House Legislative Counsel's Manual on Drafting Style, HLC No. 104.1, § 312, at 24

(1995); citing Senate Off. Legis. Couns., Legislative Drafting Manual § 112, at 9–11 (1997)).

Further, any listing of items followed by "otherwise" can be converted into a listing of separate subsections without changing the meaning at all (and *vice versa*). Pet.App.74a (Katsas, J., dissenting). The line spacing doesn't matter; what matters is that the use of "otherwise" necessarily invokes "the connotation of similarity." *Id.*

That connotation is especially strong when the preceding list includes numerous similarly related and narrow examples. Pet.App.75a (Katsas, J., dissenting). "The long, reticulated list of examples in subsection (c)(1) makes it even more implausible that subsection (c)(2) would render them meaningless." *Id.* That is why Judge Pan (who was not joined by any other judge on this point) had it exactly backwards when she claimed that the admittedly complex nature of the interaction between provisions subsection (c)(1) and subsection (c)(2) somehow supports giving a maximalist interpretation to the latter. Pet.App.40–41a n.8 (Pan, J.).

* * *

The government and majority opinion below could reach their interpretation of Section 1512(c)(2) only by reading that provision in isolation, declaring it unambiguous, and then subsequently rejecting all contrary contextual evidence as irrelevant to that allegedly unambiguous text. That has it backwards. The statutory context must be considered as part of a court's statutory construction, not viewed as an

irrelevant formality to be rejected after the fact. *See Koray*, 515 U.S. at 56.

II. The Government's Broad View of Section 1512(c)(2) Turns It into a Weapon for Political Prosecution.

The government's "'breathtaking'" interpretation of Section 1512(c)(2), Pet.App.42a (Walker, J., concurring in part and concurring in the judgment), turns it into an extraordinarily serious weapon for selective prosecution against disfavored political conduct.

Indeed, the unstated but universally recognized reason the government has insisted on using Section 1512(c)(2) for January 6 defendants is because it carries such lengthy prison sentences. The government has begun using Section 1512(c)(2) as its all-purpose weapon against perceived political opponents, even now charging President Trump and seeking his imprisonment for up to twenty years. In short, the government's view of Section 1512(c)(2) presents an intolerable risk of politicized prosecutions. Only a clear rebuke from this Court will stop the madness.

A. The Government's Interpretation Would Criminalize Political Conduct.

The government's sweeping interpretation of Section 1512(c)(2) would cover protected political activities. Under the government's view, Section 1512(c)(2) can apply to any act that "obstructs, influences, or impedes" an official proceeding. As this Court has explained, "obstruct" or "impede[]" involves

anything that affects or hinders the proceeding. *See Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018). In other words, the government would have Section 1512(c)(2) apply to acts that merely intend *to affect* any official proceeding.

"[T]hat construction would sweep in advocacy, lobbying, and protest—common mechanisms by which citizens attempt to influence official proceedings." Pet.App.94a (Katsas, J., dissenting). Advocacy, lobbying, and protest are common exercises of political expression. Acting to "influence" government proceedings toward some favored goal is practically a definition of political activity.

The government's interpretation would encompass not only lobbying[4] but all kinds of public-interest advocacy. Activist groups frequently organize issue campaigns to flood congressional offices' phone lines and websites. *See, e.g.*, Stephanie Condon, *Congressional Phones Jammed After Obama Appeal to Contact Lawmakers*, CBS News (July 26, 2011), http://tinyurl.com/4smma35d. Advocacy groups throughout history have organized trips to Washington timed to congressional or executive consideration of favored items. Most famously, the 1963 civil rights "March on Washington" "was designed to force President Kennedy to support the Civil Rights Act" then pending in Congress. Ethan Zuckerman, *The Capitol Rioters Are Giving*

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[4] *See* 2 U.S.C. §§ 1602(8), 1602(8)(B)(v) (defining "lobbying contact" to include "an attempt to influence" executive branch and legislative branch officials with regard to government proceedings).

Insurrection a Bad Name, The Atlantic (Jan. 19, 2021), http://tinyurl.com/f6wm7pab.

Moreover, Section 1512(c)(2) applies to executive and congressional proceedings, so it is not limited just to some narrow segment or type of proceedings. And as Judge Katsas explained below, unlike Title 18's other obstruction-of-justice statutes, the government's view of Section 1512(c)(2) also isn't limited to "directly imping[ing] on a proceeding's truth-seeking function through acts such as bribing a decisionmaker or falsifying evidence presented to it." Pet.App.94a (Katsas, J., dissenting). In the government's eyes, any potential "influence" could apparently harm the integrity of the proceeding.

Accordingly, the government's construction would allow any enterprising federal prosecutor to charge Section 1512(c)(2)—with a maximum penalty of twenty years in prison—for anything deemed to have sufficiently affected almost any aspect of the federal legislative or executive functions. Informal lobbying and grassroots activities against some legislative or executive goal of the President would be subject to a serious felony charge.

Even outside the context of statutes that sweep in constitutionally protected activity, this Court has repeatedly rejected "improbably broad" interpretations of criminal statutes that would reach large swaths of previously non-criminal conduct. *Bond*, 572 U.S. at 860; *see, e.g., Dubin v. United* States, 599 U.S. 110, 130 (2023) (rejecting interpretation of identity theft statute that "would sweep in the hour-inflating lawyer, the steak-

switching waiter, the building contractor who tacks an extra $10 onto the price of the paint he purchased"); *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (rejecting interpretation of computer fraud statute that "would attach criminal penalties to a breathtaking amount of commonplace computer activity"); *McDonnell v. United States*, 579 U.S. 550, 574–76 (2016) (rejecting "expansive interpretation" of bribery statute that would reach "normal political interaction between public officials and their constituents"); *Bond*, 572 U.S. at 863 (rejecting interpretation that would turn chemical weapons statute "into a massive federal anti-poisoning regime that reaches the simplest of assaults").

The case against such an improbably broad interpretation is even stronger when it would set up a "constitutional collision," as the "prospect of unconstitutional applications" should instead "urge a narrower construction" of the statute. *United States v. Hansen*, 599 U.S. 762, 781 (2023) (cleaned up); *see, e.g.*, *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) ("When a serious doubt is raised about the constitutionality of an Act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (cleaned up). Advocacy, lobbying, and protest before the political branches are protected political expression under the First Amendment. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235–36 (1963).

Constitutional avoidance, therefore, provides yet another basis for reversing the decision below and

interpreting Section 1512(c)(2) as covering only actions related to evidentiary matters. Pet.App.94a–95a (Katsas, J., dissenting).

Rather than tempering her view in light of its resulting First Amendment problems, Judge Pan (not joined by any other judge) leaned on the statute's *mens rea* requirement ("corruptly") to "prevent[] subsection (c)(2) from sweeping up a great deal of conduct that has nothing to do with obstruction." Pet.App.18a (Pan, J.).

Judge Pan declined in this case to adopt any particular definition of "corruptly," instead deciding that whatever it means, the allegations against Petitioner were sufficient. Pet.App.18a (Pan, J.). Ironically, just a few months later, Judge Pan herself wrote the majority opinion in a separate case holding, over a strong dissent by Judge Henderson, that "corruptly" in Section 1512(c)(2) is satisfied whenever the defendant "used felonious 'unlawful means' to obstruct, impede, or influence the Electoral College vote certification." *United States v. Robertson*, 86 F.4th 355, 364 (D.C. Cir. 2023). That is circular. Accordingly, whenever a defendant violates the other elements of Section 1512(c), he also corruptly violates it, proving that Judge Pan was wrong when she insisted here that "corruptly" would meaningfully cabin Section 1512(c)(2)'s reach.

Indeed, Judge Pan never grappled with how any of her definitions of "corruptly" "would cure the improbable breadth created by an all-encompassing view" of Section 1512(c)(2). Pet.App.95a (Katsas, J., dissenting). In fact, her two competing views of

"corruptly" actually worsen the First Amendment concerns.

One such proffered definition requires the defendant to have acted "'with a hope or expectation of either financial gain or other benefit to oneself or a benefit of third person.'" Pet.App.19a (Pan, J.). In Judge Pan's view, however, the "benefit" that Petitioner and other January 6 defendants sought was to "overturn the election results." *Id*. That is inherently circular in the context of political advocacy, which by definition seeks to obtain the change for which the person has advocated. As Judge Katsas explained, a "firearms lobbyist would be covered if he sought a 'benefit' of less stringent gun regulations." Pet.App.99a (Katsas, J., dissenting).

Judge Pan's other potential definition of "corruptly" fails just as badly at limiting the scope of abuse for Section 1512(c)(2). This second definition looks to whether the defendant's conduct was "'wrongful, immoral, depraved, or evil.'" Pet.App.18a (Pan, J.). This subjective definition invites prosecutorial scrutiny of the supposed moral content of defendants' political beliefs and motivations. Judge Katsas's hypothetical illustrates the problem:

> Imagine a tobacco or firearms lobbyist who persuades Congress to stop investigating how many individuals are killed by the product. Would the lobbyist violate section 1512(c)(2) because his conduct was 'wrongful' or 'immoral' in some abstract sense?

Pet.App.96a (Katsas, J., dissenting).

In today's polarized age, many view those with different political beliefs as being immoral or evil. *See* Kim Hart, *Exclusive Poll: Most Democrats See Republicans As Racist, Sexist*, Axios (Nov. 12, 2018), http://tinyurl.com/2dm8e4ez; Pew Res. Ctr., *As Partisan Hostility Grows, Signs of Frustration With the Two-Party System* 47 (Aug. 9, 2022), http://tinyurl.com/yxtayyjr ("Today, majorities in both parties . . . view members of the opposing party as more immoral."). And it is undeniable that some reserve special moral opprobrium for supporters of President Trump. For almost a decade, political leaders and media commentators have constantly denigrated President Trump's supporters as racists, sexists, bigots, "deplorables," and many other terms connoting immorality. *See, e.g.,* Jamelle Bouie, *There's No Such Thing as a Good Trump Voter*, Slate (Nov. 15, 2016), http://tinyurl.com/sjybw4bk; Adam Serwer, *The Cruelty Is the Point*, The Atlantic (Oct. 3, 2018), http://tinyurl.com/5ar7y6cp; Colby Itkowitz & John Wagner, *Biden Says Trump Is America's First 'Racist' President*, Wash. Post (July 22, 2020), http://tinyurl.com/79js5u85; Harold Hutchison, *'We Are at War with These People': MSNBC Guest Claims Trump Supporters Are 'Evil'*, Daily Caller News Found. (Sept. 4, 2022), http://tinyurl.com/56whjxhu.

Thus, under the government's view, any attempt to affect any legislative or executive proceedings in a way that benefits President Trump could inherently qualify as a felony subject to a maximum twenty-year imprisonment.

This already-fraught inquiry is compounded by the fact that *mens rea* is a question of fact decided by the

jury. "Under such a vague standard, *mens rea* would denote little more than a jury's subjective disapproval of the conduct at issue." Pet.App.93a (Katsas, J., dissenting). For January 6 defendants, that means whether their acts were "wrongful" or "immoral" would be determined by jurors selected from the most electorally partisan jurisdiction in the country. *See, e.g.*, Rowan Scarborough, *'Tribal' D.C. Juries Align with Biden and Democrats*, Wash. Times (May 25, 2022), http://tinyurl.com/4s88aavm. And because the seat of the federal government is in Washington, this asymmetric dynamic will chill protected petitioning and speech by those who visit the nation's capital.

Given such festering potential for abuse, it is unsurprising that questionable applications of corrupt intent to political expression have already afflicted several January 6 cases.

For one Section 1512(c) defendant—a mother who worked as a school occupational therapist and had no prior criminal history—the government pointed to evidence that she "carr[ied] a large sign reading, 'WE THE PEOPLE TAKE BACK OUR COUNTRY' on one side and 'THE CHILDREN CRY OUT FOR JUSTICE' on the other side" as evidence of her "corrupt" intent. Statement of Offense at 3, *United States v. Priola*, No. 1:22-cr-00242 (D.D.C. July 26, 2022), ECF No. 65. Such slogans are commonplace in politics, but under Section 1512(c), they become fodder for juries to find that defendants acted immorally.

In another case, the government pointed to a Facebook post by a nonviolent defendant that, amidst expressing other concerns about the 2020 presidential

election, exhorted followers to attend the protest and "call and email your US Senators & Congressman/woman." Statement of Facts at 11, *United States v. Gray*, No. 1:22-mj-00128-ZMF-3 (D.D.C. June 6, 2022), ECF No. 1. Again, conduct protected by the First Amendment's right to petition the government was turned into evidence of a "corrupt" intent.

The Department of Justice and D.C. juries have readily attributed immorality to the genuine belief of many January 6 defendants that there was fraud during the 2020 presidential election. Under the government's view, not only political advocacy, but political belief itself becomes an element of a Section 1512(c) violation.

If Section 1512(c)(2) applies to political activities, then the "corrupt" *mens rea* requirement poses no barrier and invites prosecutors and jurors to target political opponents they view as immoral. These concerns counsel against the government's sweeping interpretation.

B. The Government Is Already Using Section 1512(c)(2) to Prosecute Political Opponents.

This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation and internal quotation omitted). There is no need to speculate about the abuses that will result if this Court adopts the government's expansive interpretation of Section 1512(c). The government has

already begun using that statute selectively as a cudgel against its political opponents.

Many January 6 defendants were nonviolent and would be subject to prosecution under (at most) provisions covering "parad[ing], demonstrat[ing], or picket[ing] in any of the Capitol Buildings," which imposes a six-month maximum[5]; "disorderly … conduct … in any of the Capitol Buildings," which likewise carries a six-month maximum[6]; or "enter[ing] and remain[ing] in any restricted building or grounds," which carries a one-year maximum.[7]

The administration was dissatisfied with these low prison sentences for non-violent offenders. So, as it has repeatedly done in other contexts,[8] the administration tried to get around this "problem" by searching the statute books and seizing on what seemed like a broad provision providing the kind of relief the administration wanted—i.e., lengthy prison time. Section 1512(c) authorizes sentences up to 20 years. Of all the nonviolent crimes available to the government for charging January 6 defendants, Section 1512(c) offers by far the stiffest penalty. In

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[5] 40 U.S.C. §§ 5104(e)(2)(G), 5109.

[6] *Id*. §§ 5104(e)(2)(D), 5109.

[7] 18 U.S.C. § 1752(a)(1).

[8] *See Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *NFIB v. OSHA,* 595 U.S. 109 (2022); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

fact, its penalty is noticeably longer even than the relevant *violent* criminal statutes.[9]

The government has not hesitated to use Section 1512(c)(2). More than 332 January 6 defendants have been charged by the government with violations of Section 1512(c)(2). *See* U.S. Att'y's Off., D.C., Three Years Since the Jan. 6 Attack on the Capitol (Jan. 5, 2024), http://tinyurl.com/y749ysn5. For cases in which sentencing has already occurred, roughly half of the defendants charged with a Section 1512(c)(2) offense were either charged with it alone, or only with a nonviolent crime attendant to being present in a Capitol building. *See* Dep't of Just., Sentences Imposed in Cases Arising Out of the Events of January 6, 2021 (Jan. 5, 2024), http://tinyurl.com/yc6nv7w6.

Nor is the government's extraordinary reliance on Section 1512(c)(2) limited to "small-time" defendants whom the government thinks it can push into plea bargains. The government has even charged President Trump with a violation of Section 1512(c)(2), hoping to imprison—for up to twenty

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[9] *Compare* 18 U.S.C. § 1512(c)(2) (20-year maximum), *with id.* § 231(a)(3) (obstructing, impeding, or interfering with certain officers incident to civil disorder; 5-year maximum); *id.* § 111(a)(1), (2) (forcibly assaulting, resisting, opposing, intimidating, or interfering with certain officers without deadly or dangerous weapon; 8-year maximum); *id.* § 1752(a)(1), (b) (entering and remaining in a restricted building or grounds with dangerous weapon or causing significant bodily injury; 10-year maximum); *id.* § 1752(a)(2), (b) (disorderly and disruptive conduct in a restricted building or grounds with dangerous weapon or causing significant bodily harm; 10-year maximum).

years—the leading candidate to oust President Biden from the White House.

The government first began trying to charge President Trump with a violation of Section 1512(c) during the Department of Justice's investigation into potential Russian interference in the 2016 presidential election. The Mueller report dedicated an entire section to rebutting defenses to Section 1512(c)(2). *See* 2 Robert S. Mueller, III, U.S. Dep't of Just., Report on the Investigation Into Russian Interference in the 2016 Presidential Election 159–178 (Mar. 2019). The government's theory then was that President Trump "obstructed" the "proceeding" of some executive officials investigating claims of Russian interference in the election by exercising his Article II powers to direct officials and make personnel decisions, such as by firing former FBI director James Comey.

But as former Attorney General Bill Barr then explained to the Department, the Mueller report relied on a "new unbounded interpretation" of Section 1512(c)(2) that would prohibit even "facially-lawful acts taken by public officials exercising [] their discretionary powers if those acts influence a proceeding." Memorandum of Bill Barr to Deputy Att'y Gen. Rod Rosenstein & Assistant Att'y Gen. Steve Engel (June 8, 2018), http://tinyurl.com/mrx7xaau. Trump was "not being accused of engaging in any wrongful act of evidence impairment." *Id.*

This history, combined with the government's treatment of January 6 defendants and President Trump, confirms that the government's abuse of

Section 1512(c)(2) is no aberration. The government will use it as an all-purpose cudgel against its political opponents, be they low profile or the highest profile. This Court should issue a clear rebuke of the government's interpretation. The peril of improper political motivations in pursuing these convictions is otherwise simply too great.

C. The Government Has Consistently Declined to Apply Its Own Interpretation of Section 1512(c)(2) to Political Sympathizers.

By viewing Section 1512(c)(2) as "so shapeless a provision," the government inherently invites "arbitrary and discriminatory enforcement." *McDonnell*, 579 U.S. at 576 (cleaned up). And this Court has been clear that courts "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Id.* (cleaned up).

As explained above, the government has not been shy about using Section 1512(c)(2) against its perceived political opponents. The flip side is that the government has been curiously hesitant to charge Section 1512(c)(2) against those who align with the current administration even when their conduct undoubtedly falls well within the government's expansive view of Section 1512(c)(2).

As *McDonnell* explained, *see* 579 U.S. at 576, this disparate treatment is entirely predictable when the statute is construed so broadly and aims directly at political conduct, as explained above, *see* Part II.A, *supra*.

For example, U.S. Representative Jamaal Bowman has conceded that he willfully or knowingly set off a false fire alarm in a Capitol building, causing an evacuation that delayed a House of Representative vote on last-minute government funding legislation. *See* Mychael Schnell, *House Sends Senate Bill to Avert Government Shutdown*, The Hill (Sept. 30, 2023), http://tinyurl.com/54fv2xxu. Rather than be hit with Section 1512(c)(2) and face twenty years in prison, Bowman instead got a slap on the wrist from the D.C. attorney general, who charged only a misdemeanor and then even dropped that charge in exchange for an apology, a fine, and three months' probation. Andrew Solender & Cuneyt Dil, *Bowman Pleads Guilty to Pulling Capitol Hill Fire Alarm*, Axios (Oct. 25, 2023), http://tinyurl.com/328a32cf. And there has been not a peep from the U.S. Department of Justice about Bowman's conduct. *See* Jason Willick, *Why the Jamaal Bowman Fire Alarm Scandal Will Keep Burning*, Wash. Post. (Nov. 1, 2023), https://tinyurl.com/mvcswb69.

Also curiously escaping the administration's reliance on Section 1512(c)(2) are scores of pro-Hamas protestors who occupied Capitol buildings to advocate for Congress to back a ceasefire in Gaza. Sara Dorn, *Dozens Arrested in Latest Capitol Protest Calling for Israel-Hamas Cease-Fire*, Forbes (Dec. 11, 2023), http://tinyurl.com/bdzbpfvj. Again, this easily fits within the government's scope of Section 1512(c)(2). And again, because those protestors are not conservatives, they face no possibility of prosecution under Section 1512(c)(2).

Or consider the protestors who interrupted Representative Jim Jordan's House Judiciary Committee field hearing in New York City, where Representative Jordan was examining violent crime. Matthew Impelli, *Protesters Rush Hallway Outside of Jim Jordan's Hearing Against Alvin Bragg*, Newsweek (Apr. 17, 2023), http://tinyurl.com/2p8ee6ce. Again, there has been no Section 1512(c)(2) prosecution, because those protestors were Democrats interrupting Republicans.

Finally, for a case study in the difference between the current administration and President Trump's administration, consider the scores of protestors arrested for interfering with Senate Judiciary Committee hearings for President Trump's judicial nominees like then-Judge Brett Kavanaugh and Steven Menashi. *See* Jason Breslow, *The Resistance at the Kavanaugh Hearings: More Than 200 Arrests*, Nat'l Pub. Radio (Sept. 8, 2018), https://perma.cc/G76W-3W9M; Jennifer Bendery, *Progressives Storm Senators' Offices to Confront Them on Votes for Trump's Judges*, Huffington Post (Sept. 11, 2019), https://perma.cc/A4BV-QEJN. Those actions by protestors were highly improper and certainly were criminal. But President Trump's Department of Justice did not adopt the strained view that those protestors should be charged with Section 1512(c)(2) and sentenced to up to twenty years in prison. Other statutes covered their behavior, and many were charged under those statutes. Unfortunately, such principled adherence to the rule of law has not been a hallmark of the current administration.

Such abuses erode the foundations of societal trust in institutions—institutions that must exist for our constitutional republic to flourish. And those abuses and erosion of trust will continue unless this Court lays down a clear marker by construing Section 1512(c)(2) in accordance with standard principles of interpretation, which will narrow its scope and thereby avoid the risk of highly-politicized and high-stakes criminal prosecutions of perceived political opponents—a risk that has already materialized.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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