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

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 E. Chicago Avenue
Chicago, IL 60611
jeff@greenlawchartered.com

HEIDI R. FREESE
RONALD A. KRAUSS
FREDERICK W. ULRICH*
AMANDA R. GAYNOR
RYAN F. SHELLEY
FEDERAL PUBLIC DEFENDER'S OFFICE
100 Chestnut St., 3rd Fl.
Harrisburg, PA 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Joseph W. Fischer

* Counsel of Record

March 28, 2024

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INTRODUCTION

The government urges a broad reading of Section 1512(c)(2) on the view that Congress could have limited the subsection's reach by simply adding limiting language. Resp. Br. at 15, 20, 23, 48. But what Congress might have done is a flawed premise: what Congress did do was close the narrow loophole identified after the Enron and Arthur Anderson accounting scandal. The government suggests that the Court should twist Congress's effort into the creation of an omnibus obstruction offense for prosecutors to use in future cases. That is a convenient rationale because until the January 6 prosecutions, no one had extended subsection (c)(2) beyond instances involving evidence impairment. See JA 20–21, 37–38; Resp. Br. at 40. If there ever were a textual case in which judicial restraint is called for because Congress can broaden a statute to fit the government's desired scope, this is that case.

The government's arguments also would distort traditional statutory analysis by throwing open the interpretive gates with respect to "residual" or "otherwise" statutory clauses, potentially making all such clauses "omnibus" provisions that radically expand the scope of application. Traditionally, this Court has read omnibus or catchall clauses with restraint out of deference to the prerogatives of Congress in defining federal crimes and concern for fair warning. See, *e.g.*, *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995).1 The

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[1] Although ancillary to the statutory-construction argument, the government's factual recitation, which it frames as what it "expects to prove" at trial, is contradicted by the video evidence. When the crowd breached the Capitol, Mr. Fischer was in Maryland, not Washington, D.C. He returned after Congress had recessed. His earlier Facebook posts about violence, when read in

government asks the Court to upend that tradition here and do so because, well, if Congress had meant otherwise it would have done a better job at drafting. But it is the government's flawed application of statutory-interpretation principles, not any shortcoming of Congress, that leads the government to urge a boundless reading of Section 1512(c)(2).

ARGUMENT

I. The text, statutory context, and statutory history of Section 1512(c)(2) do not support the government's broad reading of the subsection as an omnibus obstruction offense disconnected from evidence impairment.

The government contends that Mr. Fischer "does not meaningfully dispute that his alleged conduct 'obstruct[ed]' and 'impede[d]' an official proceeding." Resp. Br. at 16, 20. That is both inaccurate and question-begging. It is inaccurate because Congress had recessed well before Mr. Fischer's four-minute entry and departure from the Capitol. And it is also question-begging because its assumes the answer to the question presented here—namely, whether obstruction under Section 1512(c)(2) extends beyond some form of evidence impairment. Pet. Br. at 8.

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context, refer to his belief that Antifa planned to disrupt the rally. And his boast that he had been sent by CNN and MSNBC, followed by shouting "charge," was in obvious jest. The video shows that he did not "run" toward the police line or crash into it; he was knocked to the ground (as was an officer) by the crowd surge. Finally, he was not "forcibly removed"; he walked out on his own.

A. Section 1512(c)'s text focuses on varying forms of evidence impairment.

The government begins its textual analysis by quoting the entirety of Section 1512(c), but it then proceeds to analyze only Section 1512(c)(2) and the verbs within it, without reference to Section 1512(c)(1). See Resp. Br. at 19–22. That is not how this Court does statutory interpretation. Section 1512(c) is *one sentence*, and the all-important "or otherwise" clause is the link that connects its two parts—subsections (c)(1) and (c)(2).[2] Section 1512(c)(2) thus is a continuation of the sentence at the end of § 1512(c)(1) and—as this Court's precedents make clear—cannot be analyzed as if it stands alone. When analyzed not in isolation, but in conjunction with the remainder of the plain text and the statutory context, the government's reading of subsection (c)(2) as a separate "omnibus offense" falls flat. Resp. Br. at 17, 19.

1. A textual focus contradicts the government's broad reading.

The choice between two readings of a statutory provision "can sensibly be made only by … reviewing text in context." *Pulsifer* v. *United States*, No. 22-340, 601 U.S. ___, ___ S. Ct. ___, slip op. at 7 (U.S. Mar. 15, 2024). In other words, a statute's meaning does not "'turn solely' on the broadest imaginable 'definitions of

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[2] In its entirety, the sentence reads: Whoever corruptly 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 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.

its component words'"—"linguistic and statutory context also matter." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018) (quoting *Yates* v. *United States*, 574 U.S. 528, 537 (2015) (plurality)). As Judge Easterbrook memorably put it: "Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster." *Hermann* v. *Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992).

That is precisely what the government does here. The government's principal textual argument slices Section 1512(c) not just into phrases, but into its component words, plucking them from their linguistic and statutory context. The government then takes those words—"obstruct," "influence," "impedes," and "otherwise"—and offers up a handful of dictionary definitions for each. Resp. Br. at 17–19. Its analysis then proceeds by "[p]utting the statutory terms together" in order to—*et voila*—arrive at its preferred rule: that "Section 1512(c)(2)'s text makes it unlawful to corruptly obstruct or impede an official proceeding through means not already covered by Section 1512(c)(1)." Resp. Br. at 20. This is not how courts analyze statutory text.

To be sure, "dictionaries are a good place to start." *Wheaton* v. *McCarthy*, 800 F.3d 282, 287 (6th Cir. 2015) (Kethledge, J.). But "textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries," *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 704–05 (2020) (Alito, J., dissenting), because "words are given meaning by their context," Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012); see *Davis* v. *Mich. Dep't of Treasury*, 489 U.S.

803, 809 (1989); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 71, 74 (1994) (explaining that dictionaries are "like 'word zoos'": "One can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings."). In other words, the meaning of a statutory text is not the sum total of the individual definitions of its words —it is "what [the words] convey, in their context." Scalia & Garner, *supra*, 56; see *Epic Sys. Corp.*, 584 U.S. at 523; JA 76 (Katsas, J., dissenting) (statutory interpretation seeks to "understand the phrases that Congress has strung together," not "explore the definitional possibilities of isolated words") (quoting *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020)); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2457 (2003).

This analytical error is most acute in the government's discussion of the word "otherwise." The government says that the "commonplace, dictionary meaning of the word" is "in a different manner." Resp. Br. at 19. And no doubt, that is *one* meaning of the word. But it is not the *only* meaning. As a glance at any dictionary shows, "otherwise" can also be used to connote similarity. *Webster's New International Dictionary of the English Language* 1729 (2d ed. 1935) ("[i]n other respects"); *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1019 (1996) ("under other circumstances"); *Webster's Third New International Dictionary of the English Language Unabridged* 1598 (1993) ("in other respects"). This is especially true when, as here, "otherwise" is preceded by "or," thus forming the phrase "or otherwise" that connects verbs on either side. See *Villarreal* v. *R.J. Reynolds*

Tobacco Co., 839 F.3d 958, 963–64 (11th Cir. 2016) (en banc) (Pryor, J.) ("Words can acquire different meanings when combined in a phrase, and the phrase 'or otherwise' is different from the sum of its parts.").

Indeed, this Court rejected not long ago the government's rigid view of "otherwise" as meaning "in a different manner" no matter the preceding statutory context. See *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (explaining that "the word 'otherwise' *can* (we do not say *must*) refer to a crime that is similar to the listed examples in some respects but different in others") (citation omitted), *abrogated on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015); *Pulsifer*, slip op. at 25 (rejecting this always-disjunctive understanding of "or" and recognizing that "or" and other "conjunctions are versatile words, which can work differently depending on context"). An "otherwise" clause thus is not unambiguously all-encompassing—it can, as Judge Katsas recognized, "connote not only difference but also a degree of similarity," depending on the "statutory context." JA 79 (Katsas, J., dissenting).

Judge Pryor recognized the same in *Villarreal*, where the Eleventh Circuit analyzed Section 4(a)(2) of the Age Discrimination in Employment Act, which makes it "unlawful for an employer … to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise* adversely affect his status as an employee, because of such individual's age." 829 F.3d at 963 (emphasis added). Writing for the en banc majority, Judge Pryor rejected the argument that the government makes here—that the use of "or" in "or otherwise" introduces a "distinct

prohibition phrased in the disjunctive." Resp. Br. at 26; cf. JA 15 (Pan, J.) ("[Section] 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)"). The court explained that the "use of 'or otherwise' to connect verbs is a familiar construction" that operates not as an omnibus clause, but a residual "catchall" that links what "comes after the 'or otherwise'" to the "specific terms that precede it." *Villarreal*, 839 F.3d at 964; see *id.* ("reject[ing] the reasoning" that "Congress's use of 'otherwise' confirms that 'make available' means something different than, or unlike, disclosure'").

Given all this, one might expect the government to show its work—that is, to examine "otherwise" in its linguistic and statutory context and show why, in this instance, "or otherwise" should be read as meaning "in a [very] different manner." But it does not. Instead, it simply points to cases involving different statutory language where this Court read an "otherwise" phrase as introducing a "catchall phrase[ ]." Resp. Br. at 19; see *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534–35 (2015) (interpreting the phrase "otherwise make unavailable" in the Fair Housing Act); *Gooch* v. *United States*, 297 U.S. 124, 126–28 (1936) (interpreting the phrase "and held for ransom or reward or otherwise" in the Federal Kidnapping Act); cf. *Villarreal*, 839 F.3d at 968 (explaining that "[t]he use of the word 'catchall' by the Supreme Court [in *Inclusive Cmtys.*] is agnostic about the present matter"). That is not the stuff of rigorous

textual analysis or case law analysis either. See *infra* at 10–11.

Here, as Judge Katsas recognized, to determine the meaning of subsection (c)(2), that provision must be read together with subsection (c)(1). From this vantage point, the term "otherwise" links the *actus rei* verbs in subsection (c)(1) and the obstruction covered in subsection (c)(2). And "in ordinary English usage, the verbs preceding a residual *otherwise* clause usually *do* help narrow its meaning." JA 75 (Katsas, J.). At bottom, the placement of "otherwise" in Section 1512(c)—following subsection (c)(1)'s list of evidence impairment examples—fits that of a residual clause, not an all-encompassing separate offense that renders subsection (c)(1), among other provisions, irrelevant.

Even if the Court were to conclude that "otherwise," as used here, means "in a different way or manner," Mr. Fischer's construction of Section 1512(c)(2)—as applying only to conduct intended to affect the availability or integrity of evidence—is still the better reading. Subsection (c)(1)'s focus is on a specific form of evidence impairment—"alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object," for the purpose of preventing its "use in an official proceeding." 18 U.S.C. § 1512(c)(1). What Subsection (c)(2) then covers are different ways of manipulating evidence other than those mentioned in (c)(1)—for example, by passing notes to an attorney advising a grand jury witness in order to shape the record of that person's testimony; by staging photographic evidence; or by deleting, wiping, or corrupting digitized evidence. In other words: subsection (c)(2) covers conduct that impairs evidence in a "different way or manner"—"otherwise"—than "alter[ing], destroy[ing]

mutilate[ing] or conceal[ing]."[3] This is the classic function of a residual clause. *E.g.*, *Residual*, Black's Law Dictionary (9th ed. 2009) (constituting the remaining or leftover).

Decisions addressing subsection (c)(2) bear this out. *E.g.*, *United States* v. *Beach*, 80 F.4th 1245, 1257 (11th Cir. 2023) (recognizing that subsection (c)(2) "prohibits obstructing an official proceeding by tampering with evidence"). For example, "otherwise" obstructing might include falsehoods, like making false claims about firearm ownership to alleviate the defendant's guilt as a felon in possession. See *United States* v. *Lucas*, 499 F.3d 769, 780-81 (8th Cir. 2007) (en banc). Or it might involve offering false testimony during a preliminary-injunction hearing. *United States* v. *Jefferson*, 751 F.3d 314, 321 (5th Cir. 2014). Or it could cover "draft[ing] a phony services contract to hide the

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[3] Amici characterize Mr. Fischer's textual argument as coming from the world of Alice in Wonderland. *See* Br. of John Danforth *et al.*, as *Amici Curiae* supporting Resp. at 2, *Fischer* v. *United States* (No. 23-5572). But in making their argument, amici artfully ignore that the document impairment in Section 1512(c)(1) does not encompass evidence impairment generally. One can impair evidence "differently" than by altering, destroying, or concealing a document or thing. *E.g.*, *United States* v. *Mintmire*, 507 F.3d 1273, 1290 (11th Cir. 2007) (attempting to orchestrate a grand jury witness' testimony by sending notes to an attorney who then coached the witness). And those residual forms of evidence impairment are what (c)(2) covers. The Through the Looking Glass moment here would be for those who authored the Sarbanes-Oxley Act upon learning that they had created a new and breathtaking obstruction offense by endeavoring to close the narrow Enron-Arthur Anderson loophole. *Cf.* Br. for the Hon. Michael Oxley, as *Amicus Curiae* supporting Petitioner, *Yates* v. *United States*, 574 U.S. 528 (2015) (No. 13-7451), 2014 WL 3101371, at *2–4 (describing the conduct motivating the Act).

true nature of illegal kickback payments" from a federal agency. *United States* v. *Guardiola Ramirez*, 2006 WL 573917, at *2 (D.P.R. Mar. 8, 2006). Or creating and producing false grand-jury documents. See *United States* v. *Hutcherson*, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006).

2. The precedent cited by the government does not counsel a broad reading of Section 1512(c)(2), regardless of its characterization.

The government repeatedly characterizes subsection (c)(2) as a "classic" or "traditional catchall clause" that, pursuant to the Court's precedent, warrants a broad scope. Resp. Br. at 16–19. But this Court's precedent does not clearly define the scope of a catchall clause, and it certainly does not license broadly expanding the scope of conduct that a statute covers. See, *e.g.*, *Aguilar*, 515 U.S. at 600 (emphasizing the need for restraint in assessing the reach of a criminal statute); see also *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 564 (Alito, J. dissenting, joined by Roberts, C.J., & Scalia and Thomas, JJ.) ("Catchalls must be read 'restrictively' to be 'like' the listed terms"). Nor has the Court's use of the adjective "catchall" been uniform: "Catchall" clauses are also characterized as "omnibus" clauses. See, *e.g.*, *Aguilar*, 515 U.S. at 598; see also *id.* at 615 (Scalia, J. concurring in part and dissenting in part). Instead, what differentiates the reach of these clauses is the accompanying language and the relevant context. See *Villarreal*, 839 F.3d at 968.

For example, the government relies on *Texas Department of Housing & Community Affairs*, 576 U.S. at

519, for its general rule as to the term "otherwise" and catchall clauses. See Resp. Br. at 22. There, the Court considered whether the language "otherwise makes unavailable" in the Fair Housing Act encompassed disparate-impact claims. 576 U.S. at 530, 534. Unlike with Section 1512(c)(2), the Court had interpreted similar language before in Section 703(a) of the Civil Rights Act of 1964 and Section 4(a) of Age Discrimination and Employment Act of 1967 to include disparate-impact claims. See *id*. at 530–33. And when Congress later amended the Fair Housing Act it was presumed to be aware of this Court's rulings, and the federal circuits had unanimously interpreted the Fair Housing Act as including disparate-impact claims. See *id*. at 535–36. This interpretation also dovetailed with the central purpose of the Act. See *id*. at 539. Here, by contrast, the text and structure of the "otherwise" clause differs. And, as important, the statutory context and history undermine the view that Congress intended to insert an expansive obstruction offense in a subparagraph of a subsection. JA 91, 98 (Katsas, J., dissenting).[4]

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[4] The government's reliance on *Gooch* v. *United States*, 297 U.S. 124 (1936) for the proposition that "otherwise" typically introduces a "broad" catchall clause is also misplaced. *See* Resp. Br. at 19. In *Gooch*, the Court construed the Federal Kidnapping Act, which included the language "kidnaped . . . and held for ransom or reward or otherwise." 297 U.S. at 126. The appellant argued that the term "otherwise" was limited to pecuniary consideration. But the Court relied on a Senate Judiciary Committee report stating that Congress added "otherwise" to extend jurisdiction over those held "not only for reward, but for any other reason." *Id*. at 128. Again, legislative context matters. Here, as outlined in Mr. Fischer's principal brief, *see* Pet. Br. at 22–24, the legislative context conflicts with the broad reading advanced by the government.

Along similar lines, the government's assertion that this Court had rejected an argument over superfluity like Mr. Fischer's in *Helsinn Healthcare S.A.* v. *Teva Pharmaceuticals USA, Inc.*, 139 S. Ct. 628 (2019), misreads that opinion and misconstrues the surplusage argument here. In *Helsinn Healthcare*, the issue concerned language in the America Invents Act that foreclosed receiving a patent if the invention was "in public use, on sale, or otherwise available to the public." *Id.* at 630. There, the invention had been sold under a contract that required the buyer to keep it confidential. See *id.* Helsinn thus argued that the invention was not "otherwise available to the public." But this Court had previously held that the "on sale" language was enough to foreclose a patent. See *id.* (citing *Pfaff* v. *Wells Elecs., Inc.*, 525 U.S. 55 (1998). *Helsinn* thus only stands for the proposition that one of the enumerated criteria in the statute had been satistied. See *Id.* at 634.

This argument differs significantly from the wholesale surplusage attending the government's construction of Section 1512(c)(2). Cf. JA at 88–90 (Katsas, J.) (noting that the government's interpretation of subsection (c)(2) collapses much of Section 1512 and Chapter 73 into it). Even more, the Court's discussion of the "otherwise" clause in *Helsinn Healthcare* in fact supports Mr. Fischer's construction of Section 1512(c)(2)—that is, that it "captures material that does not fit neatly into the statute's enumerated categories but is nevertheless meant to be covered." 139 S. Ct. at 634. Here, construing (c)(2) as capturing other forms of evidence impairment beyond those enumerated in (c)(1) is consistent with the statutory aim.

Finally, the government's effort to distinguish the residual clause in *Begay* v. *United States*, 553 U.S. 137 (2008) from the one in Section 1512(c)(2) is unconvincing. To start, the government stresses that the statutory structure of Section 1512(c) "differs significantly" from the Armed Career Criminal Act provision addressed in *Begay*. Resp. Br. at 24. But subsection (c)(1) and (c)(2) are, like Section 924(e)(2)(B)(ii), part of one sentence. Moreover, the visual appearance of Section 1512(c) on the page is obviously nothing more than a Congressional attempt at uniform formatting throughout that Section.

Next, the government suggests that *Begay* illustrates the pitfalls of inserting language into a statute because the Court later held that the ACCA's residual clause was unconstitutionally vague. Resp. Br. at 24. But the ruling in *Begay* did not add language. See 553 U.S. at 143 (giving effect to every clause and word). It simply limited the statute's reach. That *Begay's* limiting interpretation could not cure the vagueness concerns there does not counsel for a broad reading here; if anything, it counsels strongly against reading an "otherwise" clause in an unbounded way.

B. Section 1512(c)'s text and structure do not foreclose applying canons of construction.

1. *Noscitur a sociis* and *ejusdem generis*

The government does not dispute that Section 1512(c)(1) includes a listing of specific forms of evidence impairment. Nor could the government challenge Congress' purpose in addressing this area of

evidence impairment—the document shredding at the heart of the Enron and Arthur Anderson scandal. See *Yates* v. *United States*, 574 U.S. at 535-56 (2015) (plurality).

The government contends, however, that *noscitur a sociis* has no application to Section 1512(c)(2) because this provision does not contain a connected list of items that share an attribute. Resp. Br. at 26. But (c)(2) is part of one sentence and thus connected to (c)(1), which includes an item list. The shared attribute involves differing ways of impairing evidence for use in an official proceeding. Even more, this argument makes a classic logical error—it concludes that because a canon applies in one set of circumstances, it does not apply in another. That is incorrect. As the Court has made clear, "[t]his canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Dubin* v. *United States*, 599 U.S. 110, 124–25 (2023).

The government's effort to discount the *ejusdem generis* canon is just as flawed. While the government is correct that the two paragraphs employ different verbs, it is wrong to suggest that the first part of the sentence is limited to specific forms of evidence impairment with no similar focus in the second part. Indeed, this view sharply conflicts with *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), where the Court explained that, applying *ejusdem generis*, a residual clause "should itself be controlled and defined by reference to the enumerated categories … which are recited just before it." *Id.* at 115. On this point, the government points to what it characterizes as (c)(1)'s "additional *mens rea* requirement"—an intent to impair the object's integrity or availability for use in an

official proceeding. Resp. Br. at 25. But this argument ignores the sentence's grammatical structure. For example, if the document impairing in subsection (c)(1) is not intentionally linked to an official proceeding, then there would be no obstruction offense. In (c)(2), by contrast, that link requires no clarification because obstructing an official proceeding is the direct object.[5]

The government attempts to bolster its challenge to the above canons by asserting that this Court "specifically declined to extend [*Yates'* reasoning on *noscitur a sociis* and *ejusdem generis*] to Section 1512(c)(1)'s comparable language." Resp. Br. at 27. But as one might suspect from the government's failure to quote any language from *Yates*, this Court did no such thing.

In analyzing Section 1519, the *Yates* plurality found Section 1512(c)(1) "instructive." Specifically, the Court explained that, if the government were correct that "tangible object" in Section 1519 included "all physical objects," then Congress "had no reason to enact § 1512(c)(1)"—"[v]irtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well." *Yates*, 574 U.S. at 542. Thus, far from "specifically declin[ing] to extend" its reasoning to Section 1512(c)(1), the Court in *Yates* referenced the language in Section 1512(c)(1) covering "other object" to show why the government's expansive reading of Section

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[5] The government also cannot rely upon *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008). *Ali* addressed an immunity provision for "any officer of customs or excise *or any other law enforcement officer*." 28 U.S.C. § 2680(c) (emphasis added). Ali argued that the "other law enforcement officer" meant customs or excise officers. But the statutory context did not suggest that focus. *See Ali*, 552 U.S. at 225–26. Here, conversely, every crime within Section 1512 concerns evidence impairment.

1519 created unnecessary surplusage. See *Yates*, 574 U.S. at 542–43.

2. The canon against surplusage

The government concedes that its construction of Section 1512(c)(2) "overlaps" with the other subsections in Section 1512 and "other portions of the obstruction code." Resp. Br. at 33. It argues that such surplusage is tolerable because some provisions allow conviction on a lesser *mens rea* and some do not require an "official proceeding." Resp. Br. at 43. Here, again, the government's argument misses the relevant context. On the *mens rea* point, the government's citations involve killing a witness, or preventing witness testimony with force, threats, and intimidation. *E.g.*, 18 U.S.C. § 1512(a)(1)(A)–(B) to (a)(2)(A)–(B). Those specific intent crimes easily satisfy the government's proposed definition of corruptly: "us[e] of unlawful means[] or act[ing] with an unlawful purpose." Resp. Br. at 44 (quoting *United States* v. *Robertson*, 86 F.4th 355, 362 (D.C. Cir. 2023)).

The government also asserts that some provisions in Section 1512 "do not require an official proceeding." Resp. Br. at 34 (citing 18 U.S.C. §§ 1512(d)(4), 1519). This argument is meritless. First, Section 1512(d)(4) concerns intentionally harassing, hindering, preventing, or dissuading a person from causing a criminal prosecution, probation, or parole revocation proceeding. But a criminal prosecution or probation revocation involves a proceeding before a judge, thus satisfying the definition at issue. See 18 U.S.C. § 1515(a)(1)(A). While a parole revocation under Section 1512(d)(4) would likely be characterized as a

quasi-judicial proceeding, *e.g.*, *Swift* v. *California*, 384 F.3d 1184, 1189 (9th Cir. 2004), it still squares with Mr. Fischer's argument that Section 1512's focus is on investigations, evidence, and witnesses. This is also true for Section 1519, which addresses investigations and the administration of matters within the jurisdiction of a United States department or agency.

C. The statutory history of Section 1512(c) undermines the government's broad reading of subsection (c)(2).

While conceding that Congress transplanted Section 1512 from earlier statutory enactments, the government maintains that the transplanted language included "prior omnibus provisions." Resp Br. at 33. But there is no historical support for this proposition. To the contrary, Congress created Section 1512 with The Victim and Witness Protection Act of 1982 ("VWPA"), "which prohibits various forms of witness tampering, including many activities that were formerly prohibited by [Sections] 1503 and 1505." *United States* v. *Poindexter*, 951 F.2d 369, 382 (D.C. Cir. 1991). In the VWPA, Congress "transfer[red]" the first type of obstruction offense under Section 1505—tampering with witnesses—to Section 1512. See *id.* The omnibus clause—covering obstruction of the "due administration" of a proceeding—remained unaltered in Section 1505. *Id.* Congress, notably, considered adding an omnibus clause to Section 1512 but declined doing so. See *id.* at 383 (citing 128 Cong. Rec. 26,350 (1982)).[6]

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[6] On the Senate floor, Senator Heinz, a VWPA sponsor, said that an omnibus clause was "'beyond the legitimate scope of this *witness protection* measure. It is also probably duplicative of

Along similar lines, the government mistakenly views the authority under 18 U.S.C. §§ 1503, 1504 as supporting a broad reading of Section 1512(c)(2). See Resp. Br. at 32–33. It's just the opposite. Those opinions, *e.g.*, *United States* v. *Sussman*, 709 F.3d 155 (3d Cir. 2013) (removal of frozen assets), have a nexus to proceedings that consider evidence. *E.g.*, *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (selling confidential grand jury transcript). And removing an asset, concealing it, or improperly disclosing grand jury testimony affects the integrity and availability of evidence.

The government's statutory history also supports Mr. Fischer's argument that an "official proceeding" contemplated investigations, inquiries, evidence, and witnesses. See Pet. Br. at 21–22 (tracing the statutory history of Section 1512). The government responds that there are several kinds of "official proceedings" that do not involve evidence, such as a status conference, an oral pronouncement of an opinion, or a legislative committee vote. See Resp. Br. at 28–29. And, the government queries, what if the obstructive conduct involved bribing a judge or a juror? See *id*. at 29–30.

As for the former examples, other statutes address criminal conduct affecting non-evidentiary proceedings. See, *e.g.*, 18 U.S.C. §§ 1503 (influencing or injuring an officer of any court), 1505 (obstructing proceedings before agencies or committees), 1507 (picketing or parading with the intent to interfere or obstruct the

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[o]bstruction of justice statutes already on the books.'" *Id*. (quoting 128 Cong. Rec. 26,810 (1982)) (emphasis added).

administration of justice), 1509 (obstruction of court orders). And as for the latter, Congress has addressed bribery of a judge or a juror. See*, e.g.*, 18 U.S.C. §§ 201, 1503. So the government's hypothetical "uncovered" crimes provide no basis to construe Section 1512(c)(2) as an omnibus obstruction offense.

The government's resort to legislative history is also unavailing. Although acknowledging that Congress enacted Section 1512(c) to address accounting fraud, see Resp. Br. at 38,[7] the government then points to the remarks of Senator Hatch to suggest that subsection (c)(2) was included to reach other forms of obstruction. See Resp. Br. at 39. But even assuming those singular remarks are authoritative, the government fails to disclose the context of Senator Hatch's statement. His comments reference Section 1512 generally before discussing the "new document destruction provision contained in S. 2010 . . . permit[ting] the government to prosecute an individual who acts alone in destroying evidence." 148 Cong. Rec. S6524, S6550 (daily ed. July 10, 2002).

II. The government's proposed *mens rea* definition and nexus requirement do not provide meaningful checks on Section 1512(c)(2)'s breadth.

A. *Mens rea* – corruptly.

The government contends that proof of a "corrupt intent imposes significant limits on Section 1512(c)(2)

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[7] *Accord* Pub. L. No. 107-204, 116 Stat. 745, 807 § 1101 (The Corporate Fraud Accountability Act of 2002).

[and thus] address[es] concerns about over-prosecution." Resp. Br. at 46. Yet the government's definition of acting corruptly provides little in the way of a guardrail. For example, the jury instruction used in the January 6 prosecutions provides:

> To act corruptly, the defendant must use unlawful means or have a wrongful or an unlawful purpose, or both.

Robertson, 86 F.4th at 372 (cleaned up). As the *Robertson* dissent recognized, this definition sweeps broadly because acting with unlawful purpose *or* through unlawful means "makes the commission of any crime 'corrupt.'" *Id*. at 381 (Henderson, J. dissenting); see also JA 126 n.3 (Nichols, J.) (noting the capaciousness of corruptly). Here, for instance, the crime could be parading on the grounds outside the Capitol without a license.[8] In fact, the government has indicted individuals under Section 1512(c)(2) who never entered the Capitol. *E.g.*, *United States* v. *Hazelton*, No. 1:21-CR-30-JDB at Doc. 1-1 (D.D.C. Jan. 21, 2021) (statement of offense attached to criminal complaint); *United States* v. *Celentano*, No. 1:22-cr-186-TJK at Doc. 1-1 (D.D.C. Mar. 1, 2022) (same).

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[8] Indeed, the government's construction of Section 1512(c)(2) leaves no conceptual difference between an obstruction-of-an-official-proceeding felony and a parading Class B misdemeanor under 40 U.S.C. § 5104(e)(2)(G).

B. The nexus requirement under Section 1512(c)(2) provides no relevant limitation to the *actus rei*.

The government asserts that the requirement under Section 1512(c)(2) that the conduct have an adequate relationship in time, causation, or logic with a "proceeding" acts as a reassuring limit on its breadth. See Resp. Br. at 42. But that existing requirement has nothing to do with the scope of Section 1512(c)(2)'s *actus rei*. Instead, it addresses whether there was a pending or foreseeable official proceeding. See, *e.g.*, *United States* v. *Young*, 916 F.3d 368, 386 (4th Cir. 2019) (collecting cases). Moreover, that requirement can do no work here because the government never addresses Mr. Fischer's argument regarding what sort of "proceedings" would be the object of the supposed nexus test. See Pet. Br. 25-26 (the legal definition of "proceeding" is limited to "assemblies involving witnesses or evidence"); see also *United States* v. *Ramos*, 537 F.3d 439, 463 (5th Cir. 2008) (concluding that "in all the instances in which the term 'official proceeding' is actually used in § 1512, its sense is that of a hearing rather than simply any investigatory step taken by an agency"). If, instead, any governmental "proceeding" counts, then the government's nexus test would always be satisfied and thus no check at all. That is also true of the government's additional check, exempting a "minor" or "minimal effect" on the "proceeding" from the scope of Section 1512(c)(2) (Resp. Br. 42), which is unworkably subjective on its face. And, as Mr. Fischer's case reflects, the government checks are demonstrably ineffective in practice because the government considers that it can charge a Section 1512(c)(2) offense even when a defendant arrived at the Capitol well after Congress had recessed and was in the building less than 4 minutes.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 E. Chicago Avenue
Chicago, IL 60611
jeff@greenlawchartered.com

HEIDI R. FREESE
RONALD A. KRAUSS
FREDERICK W. ULRICH*
AMANDA R. GAYNOR
RYAN F. SHELLEY
FEDERAL PUBLIC DEFENDER'S OFFICE
100 Chestnut St., 3rd Fl.
Harrisburg, PA 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Joseph W. Fischer

* Counsel of Record

March 28, 2024