No. 23-5572

In the Supreme Court of the United States

JOSEPH W. FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 1512(c)(2), which prohibits corruptly obstructing an official proceeding, is limited to acts that impair the integrity or availability of evidence for use in that proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 6-110) is reported at 64 F.4th 329. The opinion of the district court (J.A. 132-144) is not published in the Federal Supplement but is available at 2022 WL 782413.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2023. A petition for rehearing was denied on May 23, 2023 (J.A. 3). On August 15, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 5, 2023. The petition was filed on September 11, 2023, and was granted on December 13, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1512(c) of Title 18 of the United States Code provides:

> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 1512(c).

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

This criminal prosecution arises from petitioner's alleged involvement in the violent riot that forced a suspension of the constitutionally and statutorily required congressional counting of presidential electors' ballots on January 6, 2021. A federal grand jury in the United States District Court for the District of Columbia returned an indictment charging petitioner with forcibly assaulting a federal officer, in violation of 18 U.S.C. 111(a)(1) and 2; entering or remaining in a restricted area, in violation of 18 U.S.C. 1752(a)(1); parading, demonstrating, or picketing in the Capitol, in violation of 40 U.S.C. 5104(e)(2)(G); disorderly conduct in a

restricted area, in violation of 18 U.S.C. 1752(a)(2); disorderly conduct in the Capitol building, in violation of 40 U.S.C. 5104(e)(2)(D); obstructing or interfering with a law-enforcement officer during a civil disorder, in violation of 18 U.S.C. 231(a)(3); and corruptly obstructing an official proceeding, in violation of 18 U.S.C. 1512(c)(2) and 2. J.A. 181-185. The district court granted petitioner's pretrial motion to dismiss the Section 1512(c)(2) count. J.A. 132-144. The court of appeals reversed and remanded for further proceedings. J.A. 6-110.

A. The January 6 Riot

1. This case arises from the violent disruption of a joint session of Congress convened to count the certified votes of the Electoral College in the 2020 presidential election. Individual citizens' votes for a presidential candidate "actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns." *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2319 (2020). The Constitution directs that electors "shall meet in their respective states, and vote by ballot for President and Vice-President," and shall "make distinct lists of all persons voted for as President" (and Vice President) "and of the number of votes for each." U.S. Const. Amend. XII. The electors must then "sign and certify" those lists and transmit them "to the seat of the government of the United States, directed to the President of the Senate." *Ibid.* The President of the Senate, after receiving the certificates, "shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Ibid.*

Under the applicable version of the Electoral Count Act, ch. 90, 24 Stat. 373, the joint session of Congress at which the certified results are opened and counted must

convene "on the sixth day of January" after a presidential election, "in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon." 3 U.S.C. 15 (2018). At the joint session, the President of the Senate "open[s] * * * all the certificates," has them "read" aloud to the joint Congress, and "call[s] for [written] objections." *Ibid.* If an objection is made, the Senate "shall * * * withdraw," and each chamber shall consider the objection separately. *Ibid.* Following any such consideration, the two chambers "shall immediately again meet" to resume the vote-counting process, which culminates in the President of the Senate announcing the election results. *Ibid.*

2. On January 6, 2021, both Houses of Congress met in a joint session to count the certified votes in the 2020 presidential election. J.A. 145, 188. As Congress began undertaking its constitutional and statutory obligations, "thousands of supporters of the losing candidate, Donald J. Trump, converged on the United States Capitol to disrupt the proceedings." J.A. 6-7.

Then-Vice President Michael Pence, who presided in his capacity as President of the Senate, "gaveled in" the joint session and proceeded to open the certified votes of each State's electors to be read aloud. Staff of Senate Comm. on Homeland Sec. & Gov't Affairs et al., *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, at 23-24 (2021) (Security Report). When he reached Arizona, at 1:46 p.m., an objection was lodged. See *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*, H.R. Rep. No. 663, 117th Cong., 2d Sess. 464 (2022) (Final Report). The Senate withdrew to its own chamber across the Capitol,

and the House and Senate began to consider the objection. *Ibid.*

Meanwhile, the crowd that had gathered outside the Capitol "turned violent," as "[r]ioters broke through the protective lines of the Capitol Police, assaulted officers, and shattered windows." J.A. 148. At around 2:15 p.m., while the Senate and House were separately debating the Arizona objection, the rioters breached the Capitol building itself—entering first on the Senate side after smashing a window with a stolen riot shield, climbing in, and opening doors from the inside. Final Report 653.

When the rioters breached the building, Members of Congress were instructed to evacuate and the Vice President and the Speaker of the House "were ushered off the Senate and House floors," forcing both chambers to halt the vote-counting process and go into recess. Final Report 653; see Security Report 25; J.A. 7. In the House chamber where the joint session had originally convened, police officers "barricaded the door with furniture and drew their weapons to hold off rioters" while Members of Congress and their staffs were evacuated. Security Report 26.

For the next several hours, law-enforcement officers worked to reestablish control of the Capitol building. See Final Report 666-669. Congress was unable to resume the vote-counting proceeding until the Capitol building was "cleared and checked for threats like lurkers or explosives." *United States* v. *Alford*, 89 F.4th 943, 953 (D.C. Cir. 2024). Each unauthorized person "increased the chaos within the building, the police's difficulty in restoring order[,] and the likelihood of interference with the Congress's work." *Ibid.*

Eventually, at 8 p.m., officers determined that the Capitol grounds were secure, and the Senate resumed

its work. Security Report 26. The House reconvened an hour later, and the joint session ultimately concluded at around 4 a.m. the following morning. *Ibid.* Approximately 140 police officers were assaulted during the violence, and the riot resulted in millions of dollars of damage to the Capitol and related losses.[1]

3. Following the unprecedented events of January 6, the Department of Justice launched a comprehensive effort to identify and charge individuals who engaged in criminal conduct at the Capitol.

As a result of law-enforcement efforts, more than 1265 defendants have been arrested across virtually every State. Those individuals have been charged with a variety of offenses based on the nature and severity of their conduct. For example, approximately 450 defendants have been charged with assaulting, resisting, or impeding officers or employees, including roughly 125 individuals charged with using a deadly or dangerous weapon or causing serious bodily injury to an officer. *Three Years*. As relevant here, the government has also identified defendants whose conduct and mental state rise to the level of establishing proof beyond a reasonable doubt that they corruptly obstructed Congress's certification of the election results in the joint session. To that end, approximately 330 defendants have been charged with violating 18 U.S.C. 1512(c)(2). Section 1512(c) provides:

> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so,

---

[1] U.S. Atty's Office for D.C., *Three Years Since the Jan. 6 Attack on the Capitol* (Jan. 5, 2024) (*Three Years*), perma.cc/KP2N-SF5D.

> with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

The statute defines an "'official proceeding'" to include "a proceeding before the Congress." 18 U.S.C. 1515(a)(1)(B).

Federal prosecution of the January 6 rioters has yielded substantial accountability for the criminal conduct that occurred. Approximately 720 defendants have pleaded guilty to various charges, and another approximately 140 defendants have been found guilty at contested trials. *Three Years*.

B. District Court Proceedings

1. In November 2021, a federal grand jury in the District of Columbia returned a seven-count superseding indictment charging petitioner with violent involvement in the events of January 6. J.A. 181-185. The charges included one count of corruptly obstructing, influencing, or impeding an official proceeding, or aiding and abetting that crime, in violation of 18 U.S.C. 1512(c)(2) and 2. J.A. 183.

2. The Section 1512(c)(2) charge in petitioner's indictment alleges that "[o]n or about January 6, 2021, within the District of Columbia and elsewhere, [petitioner] attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment * * * and 3 U.S.C. §§ 15-18." J.A.

183. The government expects to prove the following facts at trial.

Before January 6, 2021, petitioner, who was then a police officer, wrote a series of text messages about his plans for that day. He told his police chief that the chief "might need * * * to post [petitioner's] bail," that "[i]t might get violent," and that "they should storm the capital and drag all the democrates [sic] into the street and have a mob trial." D. Ct. Doc. 49, at 2 (Nov. 5, 2021). In a separate series of messages he asked another person, "Are you going to D.C on January 6th.....!!!!! Its going to be historic !!!!!" *Ibid.* He later wrote to the same person, "Take democratic congress to the gallows," and "Can't vote if they can't breathe..lol." *Ibid.*

On January 6 itself, petitioner recorded a cellphone video that begins at approximately 3:24 p.m., while he was standing outside the Capitol's East Rotunda doors. D. Ct. Doc. 49, at 2. Petitioner can be heard on the video yelling "Charge!" before pushing through the crowd and entering the building. *Ibid.* Once inside, petitioner ran toward a line of police officers with another rioter while yelling, "Motherfuckers!" *Ibid.* Petitioner crashed into the police line and fell to the ground. See J.A. 192-193. Petitioner's intrusion into the Capitol was also captured on a camera worn by a law-enforcement officer. See J.A. 196-199. That footage shows at least one police officer on the ground after petitioner's assault. J.A. 197. Petitioner remained inside the Capitol until he was forcibly removed about four minutes after entering. D. Ct. Doc. 49, at 3.

On January 7, petitioner posted the video he had taken of himself at the Capitol on Facebook, with the text, "Made it inside … received pepper balls and pepper sprayed. Police line was 4 deep.. I made it to level

two…" J.A. 191. In a comment on another user's post that same day, petitioner wrote, "we pushed police back about 25 feet. Got pepper balled and OC sprayed * * * but entry into the Capital was needed to send a message that we the people hold the real power." J.A. 193-194. He also exchanged messages with another Facebook user in which he stated that he "may need a [new] job" due to his actions, but that he had already told his police chief, "I have no regrets and give zero shits." J.A. 194-195.

The FBI identified petitioner from the Facebook video, see J.A. 189-190, and arrested him on February 19, 2021, D. Ct. Doc. 49, at 4. During the arrest, he again insisted that he had no regrets, and he shouted profanities at both the arresting agents and his police chief, who had accompanied them. *Ibid.* When the agents asked petitioner for his phone, he gave them one that had not been used since well before January 6, 2021. *Ibid.* Agents ultimately found the phone that petitioner had used to record himself at the Capitol hidden under a bed in his house. *Ibid.*

3. The district court granted petitioner's pretrial motion to dismiss the Section 1512(c)(2) count. J.A. 132-144. The court concluded that petitioner's alleged conduct does not "fall within the ambit of subsection (c)(2)" under the reasoning the court had set forth in an opinion in a different case, *United States* v. *Miller*, No. 21-cr-119 (D.D.C.). J.A. 140; see J.A. 145-180 (opinion in *Miller*).

In *Miller*, the district court had construed Section 1512(c)(2) to be implicitly limited by Section 1512(c)(1), which makes it a crime to corruptly "alter[ ], destroy[ ], mutilate[ ], or conceal[ ] a record, document, or other object * * * with the intent to impair the object's integrity

or availability for use in an official proceeding." 18 U.S.C. 1512(c)(1). Specifically, the court had held that Section 1512(c)(2) applies only if a defendant takes "some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." J.A. 179. Applying that reasoning here, the court dismissed the Section 1512(c)(2) count in petitioner's indictment because it does not allege that petitioner took some action with respect to a document in order to obstruct "Congress's certification of the electoral vote." J.A. 141.

C. Court Of Appeals Decision

The government appealed in this case, in *Miller*, and in a third case in which the district court had dismissed a Section 1512(c)(2) count based on the same reasoning. The court of appeals consolidated the government's interlocutory appeals, reversed the district court, and remanded for further proceedings. J.A. 6-110.

1. The court of appeals explained that 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)." J.A. 15. The court found "the text of § 1512(c)" to be "unambiguous," as it connects paragraphs (c)(1) and (c)(2) with the word "'otherwise,'" whose "commonplace, dictionary meaning" is "'in a different manner.'" J.A. 14-15 (citations omitted). The court observed that the word "'otherwise'" is a "natural" way to introduce a catchall provision because the term conveys that the conduct prohibited by the provision "'reaches beyond the specific examples in the preceding sections.'" J.A. 17 (brackets and citation omitted).

The court of appeals also observed that "the vast majority of courts interpreting the statute have adopted

the natural, broad reading * * * , applying the statute to all forms of obstructive conduct that are not covered by subsection (c)(1)." J.A. 17-18. And it noted that "no fewer than fourteen" district judges in the District of Columbia had rejected analogous pretrial challenges to Section 1512(c)(2) charges in "prosecution[s] of defendants who allegedly participated in the Capitol riot." J.A. 19; see J.A. 19 n.3 (collecting cases).

The court of appeals found support for its understanding of Section 1512(c)(2)'s text in surrounding provisions demonstrating Congress's "capacity to clearly target document-related misconduct when it wishes to do so." J.A. 31. And the court observed that a "cramped, document-focused" interpretation of Section 1512(c)(2) would be "dubious" for the additional reason that Section 1512(c)(1) already "comprehensive[ly]" targets document-related obstruction, making it "difficult to envision why a catch-all aimed at even more document-related acts would be necessary as a backstop." J.A. 32.

The court of appeals also explained that the defendants' reliance on *Begay* v. *United States*, 553 U.S. 137 (2008), in which this Court had interpreted a statutory definition with "a very different structure," was misplaced. J.A. 33. The court additionally observed that "the *ejusdem generis* and *noscitur a sociis* canons" are an unsound basis for "reject[ing] the natural reading of § 1512(c)(2)." J.A. 34; see J.A. 34-35. And the court noted that it had reviewed the statute's history and found "nothing * * * inconsistent with" its interpretation. J.A. 36; see J.A. 36-39.

The court of appeals further observed that the "natural reading of § 1512(c)(2)" did not run afoul of the canon against surplusage. J.A. 39-43. Among other things, the court emphasized that some superfluity exists on any

reading because even if the court "accept[ed] the interpretations of the district court and [petitioner]" and substantially constricted Section 1512(c)(2)'s scope contrary to its plain language, the provision would still overlap with "numerous other subsections." J.A. 40.

2. The panel members also each wrote individual opinions. In a portion of the lead opinion that Judge Walker declined to join, Judge Pan emphasized that the mens rea element—"corruptly"—imposes an "important limitation[ ]" on the statute's scope. J.A. 21; see J.A. 21-27. She found it unnecessary, however, to settle on any "particular definition" in this case because all of the potential interpretations are satisfied where the defendant obstructed an official proceeding using "'independently corrupt means'" such as "assaulting [a] law enforcement officer[ ]." J.A. 22-23 (citation omitted).

Judge Walker wrote separately to note that his agreement with the court of appeals' interpretation of Section 1512(c)(2)'s actus reus was premised on a specific construction of the "corruptly" element—rejected by both of the other panel members—as requiring proof that the defendant acted "with an intent to procure an unlawful benefit either for himself or for some other person." J.A. 46 (Walker, J., concurring in part and concurring in the judgment) (citation omitted); see J.A. 46-69; cf. J.A. 24-25 (opinion of Pan, J.); J.A. 106-108 (Katsas, J., dissenting).

Judge Katsas dissented, taking the view that Section 1512(c)(2) applies "only to acts that affect the integrity or availability of evidence" at an official proceeding. J.A. 71; see J.A. 70-110.

SUMMARY OF ARGUMENT

The text, context, and history of 18 U.S.C. 1512(c)(2) establish that it functions as a catchall offense designed

to ensure complete coverage of all forms of corrupt obstruction of an official proceeding. Petitioner errs in asking the Court to depart from the ordinary meaning of the statute by limiting it to acts that impair the integrity or availability of evidence. That interpretation finds no sound foothold in the text and would undermine Congress's effort to prohibit unanticipated methods of corruptly obstructing an official proceeding—such as petitioner's alleged conduct in joining a violent riot to disrupt the joint session of Congress certifying the presidential election results.

A. Section 1512(c) broadly prohibits a defendant from corruptly engaging in conduct to obstruct court, agency, and congressional proceedings. Paragraph (c)(1) prohibits defendants from "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, * * * with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. 1512(c)(1). And paragraph (c)(2), in turn, prohibits "otherwise obstruct[ing], influenc[ing], or imped[ing] any official proceeding." 18 U.SC. 1512(c)(2).

The ordinary meaning of the text demonstrates that Section 1512(c)(2) functions as a catchall designed to capture all forms of obstructive conduct *beyond* Section 1512(c)(1)'s focus on evidence impairment. The verb phrase "obstructs, influences, or impedes" encompasses myriad ways of hindering a proceeding. And the word "otherwise" means "in a different manner." J.A. 15 (citation omitted). Putting the text together, Section 1512(c)(2) reaches methods of obstructing a proceeding that are different from—not simply the same as—the evidence tampering that Section 1512(c)(1) covers.

Petitioner urges the Court to instead confine Section 1512(c)(2) to obstructive acts that affect the integrity or

availability of evidence. But the text of the provision says no such thing. And the word "otherwise" cannot do the limiting work petitioner urges. That term does not require an amorphous "degree of similarity" between paragraphs (c)(1) and (c)(2), Pet. Br. 10 (citation omitted), but instead is a typical way of introducing a catchall clause that sweeps beyond what came before. By interpreting "otherwise" to instead narrow paragraph (c)(2)'s reach to evidence-focused obstruction, petitioner would wholly duplicate paragraph (c)(1), depriving it of meaningful effect.

Petitioner errs in relying on *Begay* v. *United States*, 553 U.S. 137 (2008). The residual clause at issue there differs significantly from Section 1512(c)(2), and the atextual gloss *Begay* adopted ultimately contributed to the Court's later conclusion that the residual clause was unconstitutionally vague. Petitioner's invocation of *ejusdem generis* and *noscitur a sociis* is likewise misplaced, as those canons do not apply across the two different paragraphs in (c)(1) and (c)(2), which have distinct verbs and objects. And petitioner is wrong to assert that the official proceedings covered by Section 1512(c)(2) are limited to those that involve a formalized process for finding the truth. That contention overlooks the statutory definition of "official proceeding," 18 U.S.C. 1515(a)(1), and would not in any event justify interpreting the terms "obstructs, influences, or impedes," 18 U.S.C. 1512(c)(2), contrary to their ordinary meaning to reach only acts impairing evidence.

B. Context and structure confirm that Section 1512(c)(2) functions as a catchall reaching forms of obstruction not already captured under Section 1512(c)(1). Congress has included similar language in surrounding obstruction provisions—including Sections 1503 and

1505—and that language has never been limited to acts involving the spoliation of evidence.

To support a contrary structural argument, petitioner contends that giving Section 1512(c)(2) its ordinary meaning would render other obstruction provisions superfluous. That is incorrect. By virtue of its function as a catchall, Section 1512(c)(2) necessarily overlaps with other provisions—but it does not subsume them. And petitioner's evidence-focused interpretation itself creates extensive superfluity and overlap.

C. Section 1512(c)(2)'s history further supports interpreting the provision as a catchall. Congress enacted the statute after the Enron scandal exposed a loophole in the obstruction statutes, which did not have any prohibition on personally destroying documents. Congress enacted 18 U.S.C. 1512(c)(1) and 18 U.S.C. 1519 to close that specific loophole. And Congress further enacted 18 U.S.C. 1512(c)(2) to address the larger problem the Enron scandal brought to light—namely, the risk that corrupt obstruction could occur in unanticipated ways not prohibited by statutes targeted at specific forms of obstruction.

D. Policy concerns about the possibility of excessive prosecution provide no basis to override Section 1512(c)(2)'s text and insert requirements in the statute that Congress did not include. Those arguments also fail to account for Section 1512(c)(2)'s limits. To begin, the provision's actus reus only covers acts that *hinder* a proceeding—not acts, like lobbying or peaceful protest, that are not readily characterized as rising to the level of obstruction or that independently enjoy protection under the First Amendment. In addition, Section 1512(c)(2) requires that a defendant's conduct have a nexus to a specific proceeding, thereby excluding more

attenuated conduct. Finally—and critically—a defendant does not violate Section 1512(c)(2) unless he acts corruptly. Congress has frequently relied on a stringent mens rea to narrow the application of a broad actus reus, and requiring a corrupt mental state serves that function in Section 1512(c)(2).

E. Principles of constitutional avoidance and lenity provide no support for petitioner's interpretation. Because his alleged conduct satisfies all the elements of Section 1512(c)(2), the Court should affirm the court of appeals' judgment reinstating that charge.

ARGUMENT

THE CORRUPT OBSTRUCTION PROHIBITED BY 18 U.S.C. 1512(c)(2) IS NOT LIMITED TO ACTS AFFECTING THE AVAILABILITY OR INTEGRITY OF EVIDENCE

The proof in this case would show that on January 6, 2021, petitioner and other rioters corruptly sought to prevent Congress from counting the certified votes of the Electoral College in the joint session. Petitioner does not meaningfully dispute that his alleged conduct "obstruct[ed]" and "impede[d]" an official proceeding under the ordinary meaning of those terms. 18 U.S.C. 1512(c)(2). Instead, he asks this Court to read additional words into Section 1512(c)(2) by limiting it to obstructive acts "that affect the integrity or availability of evidence." Pet. Br. 8. The Court should reject that profoundly atextual interpretation.

Section 1512(c)(2)'s text is not limited to conduct that affects the integrity or availability of evidence. Instead, Congress adopted a traditional catchall clause, reaching all forms of corrupt obstruction of an official proceeding. In petitioner's view, Section 1512(c)(2) effectively borrows language not found in its text from Section 1512(c)(1)'s mens rea requirement, which refers to

"impair[ing] [an] object's integrity or availability for use in an official proceeding"; the mechanism for this insertion, according to petitioner, is the use of the word "otherwise" in Section 1512(c)(2) to introduce the covered obstructive acts. 18 U.S.C. 1512(c)(1) and (2). That interpretation is fundamentally incorrect.

"Otherwise" means a *different* manner—not the *same* manner—of "obstruct[ing], influenc[ing], or imped[ing] any official proceeding." 18 U.S.C. 1512(c)(2). Section 1512(c)(2) is thus a classic catchall provision. It supplements, but does not override, other more specific obstruction statutes. And it ensures that unanticipated methods of corruptly obstructing an official proceeding —like occupying the Capitol building and forcing the suspension of Congress's joint session certifying the election results—are prohibited, while giving a judge discretion to tailor the punishment to the crime. Petitioner's efforts to read his alleged conduct out of the statute lack support in its text, context, or history.

A. The Plain Meaning Of Section 1512(c)(2)'s Text Is Not Limited To Acts Affecting Evidence

Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, the text makes clear that Congress enacted Section 1512(c)(2) as a catchall for methods of corruptly obstructing an official proceeding that other obstruction statutes do not capture.

1. Section 1512(c)(2)'s terms are not limited to evidence-centered obstruction

Section 1512(c) prohibits a defendant from "corruptly" engaging in conduct that:

> (1) alters, destroys, mutilates, or conceals a record, document, or other object, * * * with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding.

18 U.S.C. 1512(c). In interpreting a statute, "words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd.* v. *United States*, 585 U.S. 274, 284 (2018) (citation omitted). And the ordinary meaning of the verb phrase "otherwise obstructs, influences, or impedes," 18 U.S.C. 1512(c)(2), encompasses myriad forms of conduct that hinder a particular activity.

As this Court has observed, the verbs "'obstruct'" and "'impede' are broad" as a matter of plain language and "can refer to anything that 'blocks,' 'makes difficult,' or 'hinders.'" *Marinello* v. *United States*, 138 S. Ct. 1101, 1106 (2018) (brackets and citation omitted). Dictionaries confirm that understanding. See, *e.g.*, *The American Heritage Dictionary of the English Language* 1214 (4th ed. 2000) (*American Heritage*) (defining "obstruct" as "To impede, retard, or interfere with; hinder: obstructed my progress. See synonyms at hinder") (emphasis omitted); *id.* at 879 (defining "impede" as "To retard or obstruct the progress of. See synonyms at hinder") (emphasis omitted). Read in the context of a statute creating a federal felony, the terms "obstruct" and "impede" refer to acts that create a meaningful interference—but they do not limit the various ways the proceeding can be obstructed. See *Webster's Third New International Dictionary of the English Language* 1132 (2002) (*Webster's*) (defining "impede" as

to "hold up : BLOCK"); see also *Random House Webster's Unabridged Dictionary* 1338 (2d ed. 1999) (defining "obstruct" as "to block or close up with an obstacle; make difficult to pass"); 10 *The Oxford English Dictionary* 668 (2d ed. 1989) (*OED*) (defining "obstruct" as "To stand in the way of, or persistently oppose the progress or course of (proceedings, or a person or thing in a purpose or action)").

The scope of the statute's third verb, "influence," varies depending on context. It can apply to any act that "affect[s] the nature, development, or condition of" something, *American Heritage* 899, or can more particularly refer "to mov[ing] by improper or undue influence," 7 *OED* 940. Here, where the word appears between "obstruct[ ]" and "impede[ ]," in a statute that requires "corrupt[ ]" action, 18 U.S.C. 1512(c)(2), it takes on the narrower meaning. See J.A. 87-88 (Katsas, J., dissenting) (noting that this "string[ ] of near synonyms" indicates "that 'iteration is obviously afoot'") (quoting *Moskal* v. *United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting)).

The "commonplace, dictionary meaning of the word 'otherwise,'" in turn, is "'in a different manner.'" J.A. 15 (quoting *The Oxford English Dictionary* (3d ed. 2004)); see, *e.g.*, *American Heritage* 1246 ("In another way; differently"; "In other respects"); *Webster's* 1598 ("in a different way or manner"). As this Court has previously recognized, the word "'[o]therwise'" is a natural way to "introduce" a "catchall phrase[ ]." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535 (2015); see, *e.g.*, *Gooch* v. *United States*, 297 U.S. 124, 126-128 (1936) (holding that "otherwise" in phrase "'for ransom or reward *or otherwise*'" is "broad" and not limited by "'ransom or reward'" to

kidnappings for "pecuniary value") (citation omitted). And here, "otherwise" signals that paragraph (c)(2) "operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific offense like document destruction." *United States* v. *Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (citation omitted).

Putting the statutory terms together, 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). And petitioner's alleged conduct falls squarely within that prohibition because he allegedly joined a violent riot with the purpose of disrupting a joint session of Congress convened to certify the election results.

2. Petitioner provides no sound textual basis for departing from Section 1512(c)(2)'s plain language

Petitioner does not seriously dispute that his alleged conduct falls within the ordinary meaning of "obstructs" and "impedes." Instead, he asks this Court to limit Section 1512(c)(2)'s coverage to a narrow subset of corrupt obstructive acts—those that "affect the integrity or availability of evidence." Pet. Br. 8. "Had Congress intended to limit [the statute's] reach as petitioner contends, it easily could have written" such a law. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008). It might have included, for example, only conduct that "'otherwise impairs the integrity or availability of evidence for use in an official proceeding.'" J.A. 31. But Congress did not include that limit or anything like it—and this Court has repeatedly declined to "read[ ] words or elements into a statute that do not appear on its face." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (quoting *Bates* v. *United States*, 522 U.S. 23, 29 (1997)).

Petitioner provides no sound textual basis for departing from that cardinal principle here.

a. Petitioner's principal textual argument is that "[t]he term 'otherwise' links the *actus rei* verbs in subsection (c)(1) and the obstruction covered in subsection (c)(2)," thereby "connot[ing] * * * a degree of similarity." Pet. Br. 10 (citations omitted). Petitioner further asserts that this "degree of similarity" requirement, *ibid.*, limits Section 1512(c)(2) to acts that "affect the integrity or availability of evidence," *id.* at 8. That argument is flawed on many levels.

First, as discussed above, "otherwise" means in a *different* manner, not in the *same* manner. See pp. 19-20, *supra*. Accordingly, although phrases that include the term "otherwise" can be used to signify some similarity, it is only the "*particular* similarity specified after the 'otherwise.'" *Begay* v. *United States*, 553 U.S. 137, 150-151 (2008) (Scalia, J., concurring in the judgment). The word "'otherwise'" "draws a substantive connection between two sets only on one specific dimension—*i.e.*, whatever follows 'otherwise.'" *Ibid.*; accord *id.* at 158-159 (Alito, J., dissenting). Here, therefore, the relevant similarity between the conduct proscribed by paragraphs (c)(1) and (c)(2) is the one specified by Congress: Both provisions target conduct that "obstructs, influences, or impedes any official proceeding." 18 U.S.C. 1512(c)(2). Petitioner goes astray by instead treating Congress's use of "otherwise" as an invitation to read into the statute a demand for some additional, amorphous "degree of similarity," Pet. Br. 10 (citation omitted), not specified in the text.

Second, petitioner errs in asserting (Br. 13-14) that affording the word "otherwise" its ordinary meaning would render both it and paragraph (c)(1) superfluous.

Paragraph (c)(1) identifies the particular types of obstructive conduct that prompted Congress to enact Section 1512(c). See pp. 38-39, *infra* (discussing Congress's response to document destruction during the Enron scandal). And paragraph (c)(2) then makes clear that Congress sought to prohibit obstruction more broadly, beyond the specific types of obstruction that were front of mind at the time. See, *e.g.*, *Paroline* v. *United States*, 572 U.S. 434, 448 (2014) (rejecting superfluity argument; reasoning that "[t]he first five categories provide guidance to district courts as to the specific types of losses" covered); *Ali*, 552 U.S. at 226 (similar).

Congress often uses the "or otherwise" formulation in this way, to signal a transition to something different in a broader catchall clause. See, *e.g.*, *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 535 (interpreting "'or otherwise'" in multiple similarly worded statutes as introducing "catchall phrases" with a different focus from the language that precedes them).[2] And this Court has previously rejected a similar superfluity argument in interpreting another phrase introduced by "'otherwise'" as a "catchall clause." *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 634 (2019).

Put differently, the point of using "otherwise" to emphasize a transition to a catchall clause is to eliminate any doubt about the breadth and direction of statutory

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[2] See also, *e.g.*, 18 U.S.C. 514(a)(1) (prohibition on "draw[ing], print[ing], process[ing], produc[ing], publish[ing], or otherwise mak[ing]" false financial instruments); 18 U.S.C. 757 (prohibition on "aid[ing], reliev[ing], transport[ing], harbor[ing], conceal[ing], shelter[ing], protect[ing], hold[ing] correspondence with, giv[ing] intelligence to, or otherwise assist[ing]" an escaped prisoner of war); 18 U.S.C. 2232(a) (prohibition on "destroy[ing], damag[ing], wast[ing], dispos[ing] of, transfer[ring], or otherwise tak[ing] any action" to impair seizure of property).

language. Petitioner's reading, in contrast, would interpret "'otherwise'" to "narrow the statute's reach," Pet. Br. 14—precisely the opposite of what the word commonly does.

In any event, petitioner's interpretation itself fails to avoid "swallow[ing] [paragraph] (c)(1) whole." Pet. Br. 14. Petitioner acknowledges (*ibid.*) that his "reading of (c)(2) overlaps with (c)(1)," but he identifies no actual conduct that would fall within paragraph (c)(1) but not paragraph (c)(2). It would make no sense for Congress to have defined an entirely separate actus reus in paragraph (c)(1) simply for the purpose of implying—obliquely—that paragraph (c)(2) should be narrower than its plain text suggests. Had Congress meant to add extra verbs to paragraph (c)(1), see J.A. 84 (Katsas, J., dissenting), it would have simply added them; had it meant to clarify that the preexisting verbs apply to intangible evidence, see J.A. 85, it would have simply said so; and had it intended to give paragraph (c)(2) an "evidence impairment" focus, see Pet. Br. 3, it would have simply adopted one. See, *e.g.*, 18 U.S.C. 1519.

Third, petitioner errs (Br. 18) in relying on *Begay* v. *United States*. In *Begay*, the Court addressed a definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA) that covered any felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 553 U.S. at 140 (quoting 18 U.S.C. 924(e)(2)(B)(ii) (2000)). The Court reasoned that "the provision's listed examples" indicated that its residual clause (the clause beginning with "'otherwise'") "covers only *similar* crimes," namely those that are "purposeful, 'violent,' and 'aggressive,'" "rather than *every* crime that 'presents a serious

potential risk of physical injury to another.'" *Id.* at 142, 144-145 (citations omitted). In doing so, the Court accepted that "otherwise" means "in a different way or manner," *id.* at 144 (citation omitted), but disagreed with the government that the word was "*sufficient* to demonstrate that the examples d[id] not limit the scope of" that particular clause, *ibid.*

As this Court later recognized, *Begay*'s "phrase 'purposeful, violent, and aggressive' ha[d] no precise textual link to the residual clause." *Sykes* v. *United States*, 564 U.S. 1, 13 (2011). Instead, it represented a wholecloth "addition to the statutory text," *ibid.*—and one that contributed to vagueness rather than resolving it, see *Johnson* v. *United States*, 576 U.S. 591, 600 (2015). As the *Johnson* Court explained, *Begay*'s atextual gloss on a clause introduced by "otherwise" ultimately "did not succeed in bringing clarity to the meaning of the residual clause," and wound up as one step on the road to the clause's invalidation for unconstitutional vagueness. *Ibid.* *Begay*'s approach provides no model to follow here. Rather, *Begay* illustrates the pitfalls of inserting into a statute language that Congress did not write, especially when petitioner's preferred insertion ("acts that affect the integrity or availability of evidence," Pet. Br. 8) is drawn from the intent element of Section 1512(c)(1) ("intent to impair the object's integrity or availability for use"), but Congress conspicuously omitted any such limitation in Section 1512(c)(2).

Begay also sheds no light on the proper interpretation of Section 1512(c)(2) for an additional reason: The statutory structure of the ACCA differs significantly from the structure of Section 1512(c). The definition of "violent felony" at issue in *Begay* consisted of a list of terms followed immediately by a residual clause, a

structure that lent itself to relying on the listed items to construe the residual clause. See pp. 25-27, *infra*. Section 1512(c), however, has a different structure, with two separate, non-parallel paragraphs. As this Court has previously recognized, Congress's decision to break prohibitions into two separate paragraphs significantly supports giving the second provision independent scope. See *Loughrin* v. *United States*, 573 U.S. 351, 359 (2014) (distinguishing the mail-fraud statute, which "contains two phrases strung together in a single, unbroken sentence," from the bank-fraud statute, which comprises "two clauses" with "separate numbers, line breaks before, between, and after them, and equivalent indentation").

b. Petitioner also attempts to limit Section 1512(c)(2) by invoking (Br. 16-17) the *ejusdem generis* and *noscitur a sociis* canons. But Section 1512(c)(2)'s text and structure provide no basis for applying either interpretive principle.

Ejusdem generis "limits general terms [that] follow specific ones to matters similar to those specified." *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 294 (2011) (citation omitted; brackets in original). The hypotheticals suggested by the dissent below have that structure. See J.A. 76 (analyzing examples with "the form '*A*, *B*, *C*, or otherwise *D*'"). Section 1512(c) is quite different. The two paragraphs employ different verbs ("alters, destroys, mutilates, or conceals" versus "obstructs, influences, or impedes") with different objects ("a record, document, or other object" versus "any official proceeding"). 18 U.S.C. 1512(c)(1) and (2). And paragraph (c)(1) includes an additional mens rea requirement ("with the intent to impair the object's integrity or availability for use in an official proceeding")

that has no counterpart in paragraph (c)(2). *Ibid.* Section 1512(c) thus looks nothing like the lists of terms that call for the application of *ejusdem generis*.

Consistent with that understanding, this Court has held that the far simpler phrase "'any officer of customs or excise or any other law enforcement officer' does not lend itself to application of the canon" because it is "disjunctive, with one specific and one general category" rather than "a list of specific items separated by commas and followed by a general or collective term." *Ali*, 552 U.S. at 225. As the Court explained, "[t]he absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase." *Ibid.* The same logic applies with even greater force here.

Noscitur a sociis is similarly inapplicable. That canon supplies a rule of thumb that when "several items in a list share an attribute," that "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994); see *S. D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (canon applies "when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning'") (citation omitted). As discussed, however, Section 1512(c)(2) is not an item in a list—much less an individual statutory "term[ ]," *S. D. Warren*, 547 U.S. at 378—but instead a distinct prohibition phrased in the disjunctive.

Petitioner errs in invoking (Br. 17-18) *Yates* v. *United States*, 574 U.S. 528 (2015). The statute at issue there, 18 U.S.C. 1519, penalized "knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up,

falsif[ying], or mak[ing] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency." Applying *ejusdem generis*, the plurality reasoned that the term "'tangible object'" should be interpreted in light of the preceding terms "'record'" and "'document'" as limited to "objects used to record or preserve information." *Yates*, 574 U.S. at 544-546; see *id.* at 550 (Alito, J., concurring in the judgment).

Section 1519 illustrates the structure of a provision to which the *noscitur a sociis* or *ejusdem generis* canons could potentially apply: a "list of specific items separated by commas and followed by a general or collective term." *Ali*, 552 U.S. at 225; see 18 U.S.C. 1519 ("record, document, or tangible object"). Section 1512(c), divided into two separate paragraphs, is structured in an entirely different way. And given that *Yates* specifically declined to extend its reasoning to Section 1512(c)(1)'s comparable language, *Yates*, 574 U.S. at 542 (plurality opinion), it would be odd to nonetheless extend that reasoning to the even more distinct Section 1512(c)(2).

Nor is this a case, such as *Yates*, see Pet. Br. 16-17, where rejecting a narrowing construction would require "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." 574 U.S. at 543 (plurality opinion) (citation omitted). The *Yates* plurality reasoned that it would make no sense to prohibit "'falsifying'" or "'mak[ing] a false entry in'" an object, like a fish, that is not used to "record or preserve information." *Id.* at 544. But there is no similar textual incongruity in adhering to the ordinary meaning of the

words in Section 1512(c)(2): It is perfectly sensible to speak of a person who "obstructs, influences, or impedes" an "official proceeding."

c. Finally, petitioner attempts to narrow Section 1512(c)(2)'s text by focusing on the *object* of the prohibited obstructive acts: an official proceeding. Pet. Br. 12 n.4, 22, 24-26. In petitioner's view, an official proceeding must involve "a formalized process for finding the truth." *Id.* at 24 n.10 (citation omitted). And it therefore follows, he asserts, that the scope of the section is limited to protecting "the integrity of evidence." *Id.* at 12 n.4. Both the premise and the conclusion are unsound.

Section 1512(c)(2) prohibits the corrupt obstruction of "any official proceeding." 18 U.S.C. 1512(c)(2). The term "'official proceeding,'" in turn, is defined to include court proceedings, lawfully authorized proceedings before federal agencies, certain insurance-regulatory matters, and "a proceeding before the Congress." 18 U.S.C. 1515(a)(1). The ordinary meaning of a "proceeding" is "[a] course of action; a procedure," *American Heritage* 1398; the legal meaning includes "[t]he business conducted by a court or other official body; a hearing," *Black's Law Dictionary* 1241 (8th ed. 2004). And this Court has repeatedly observed that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali*, 552 U.S. at 219 (citation omitted) (brackets in original).

Nothing in the statute limits the covered proceedings to those involving formal factfinding or evidence-taking procedures. Nor does that limit have any basis in ordinary or legal usage. A court hearing a legal argument, for example, is not taking evidence or examining documents. The same is true when a court convenes

the parties for a status conference or to announce an opinion. Likewise, a congressional committee that has convened for a vote, to explain the opening of an investigation, or to issue a report is not necessarily considering evidence. Yet each of those functions would naturally be described as a "proceeding."

Had Congress intended to limit the term "official proceeding" to those proceedings "involving investigations and evidence," Pet. Br. 24 (emphasis omitted), it could easily have done so—as it did in nearby Section 1505. See 18 U.S.C. 1505 (prohibiting obstruction of Congress's "exercise of the power of inquiry under which any inquiry or investigation is being had"). This Court "must give effect to, not nullify, Congress' choice to include limiting language in some provisions but not others." *Gallardo* v. *Marstiller*, 596 U.S. 420, 431 (2022).[3]

In any event, even if Section 1512(c)(2) were somehow limited to proceedings that could be described as "a formalized process for finding the truth," Pet. Br. 24 n.10 (citation omitted), that would not justify petitioner's leap to the conclusion that the terms "obstructs, influences, or impedes," 18 U.S.C. 1512(c)(2), should be limited to actions that impair the integrity or availability of evidence. It is possible to obstruct a proceeding for finding the truth in other ways—by, for example,

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[3] In arguing otherwise, petitioner misinterprets (Br. 24) the Department of Justice's Criminal Resource Manual, which stated only that Section 1515(a)(1)'s definition of "official proceeding" is "in large part" a restatement of the interpretation of the term in 18 U.S.C. 1503 and 1505. "Protection of Government Processes—'Official Proceeding' Requirement—18 U.S.C. 1512," U.S. Dep't of Justice, *Criminal Resource Manual* § 1730, perma.cc/S5NU-F56Z. Regardless, the Manual is no longer in use. See *United States* v. *Fitzsimons*, 605 F. Supp. 3d 132, 140 (D.D.C. 2022).

bribing or threatening a juror or judge. And nothing in the language Congress used supports petitioner's assertion (Br. 8) that Congress intended to limit the obstruction covered by Section 1512(c)(2) to acts affecting the "integrity or availability" of evidence in an official proceeding. To the contrary, Congress included such language in Section 1512(c)(1)'s mens rea requirement, but notably declined to include anything like it in Section 1512(c)(2). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (brackets and citation omitted).[4]

B. Context And Structure Confirm The Natural Meaning Of Section 1512(c)(2)'s Text

The words of a statute must, of course, "be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the statutory

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[4] Petitioner raises his contention about the meaning of "proceeding" only in service of his argument about the meaning of "otherwise obstructs, influences, or impedes." He does not advance an independent argument that his alleged conduct does not satisfy Section 1512(c)(2)'s proceeding element, and such an argument would not be within the question presented in any event. Moreover, as every judge below and every court to have considered the question has agreed, the phrase "any official proceeding," 18 U.S.C. 1512(c)(2), readily encompasses the joint session of Congress on January 6, 2021. See *United States* v. *Gray*, 652 F. Supp. 3d 112, 118-119, 121 (D.D.C. 2023) (collecting cases); J.A. 28 (majority), 73 (Katsas, J., dissenting), 155 (district court). The Constitution and the Electoral Count Act together established specific rules and procedures for that proceeding. U.S. Const. Amend. XII; 3 U.S.C. 15 (2018); see pp. 3-4, *supra*.

context and structure underscore the plain meaning of Section 1512(c)(2)'s text.

1. The inclusion of a catchall clause in an obstruction provision was not an innovation. Congress has long had one in 18 U.S.C. 1503, which prohibits coercive behavior toward a juror or court official, "or corruptly or by threats of force, or by any threatening letter or communication, influenc[ing], obstruct[ing], or imped[ing] * * * the due administration of justice." 18 U.S.C. 1503(a). Well before the enactment of Section 1512(c)(2), this Court recognized that the quoted language "serves as a catchall" and dubbed it "the 'Omnibus Clause.'" *United States* v. *Aguilar*, 515 U.S. 593, 598 (1995).

Section 1512(c)(2) uses the same verbs ("obstruct," "influence," and "impede") as Section 1503, and has a distinct direct object (substituting "any official proceeding" for "the due administration of justice"). 18 U.S.C. 1503, 1512(c)(2). And Congress placed Section 1512(c)(2) within the "broad proscription[ ]" of "the pre-existing § 1512." *Yates*, 574 U.S. at 541 (plurality opinion). Those similarities indicate that Section 1512(c)(2), like Section 1503's omnibus clause, is "more general in scope than the earlier clauses of the statute," *Aguilar*, 515 U.S. at 598, and is not limited by the specifically described conduct that precedes it, see *id.* at 614-615 (Scalia, J., concurring in part and dissenting in part); see also *United States* v. *Banks*, 942 F.2d 1576, 1578 (11th Cir. 1991); *United States* v. *Lester*, 749 F.2d 1288, 1293 n.3 (9th Cir. 1984); *United States* v. *Schaffner*, 715 F.2d 1099, 1103 (6th Cir. 1983); *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978); *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972). And Congress further emphasized Section 1512(c)(2)'s

independent operation by breaking the catchall language out into its own separate paragraph.

The verbal phrasing of Section 1512(c)(2) parallels not only the wording of the preexisting Section 1503, but also the wording of the preexisting 18 U.S.C. 1505, which prohibits "corruptly, or by threats or force, or by any threatening letter or communication influenc[ing], obstruct[ing], or imped[ing] or endeavor[ing] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress." Like Section 1503's prohibition on corruptly obstructing "the due administration of justice," 18 U.S.C. 1503(a), Section 1505's actus reus is limited by the target of the corrupt activity—namely, the proceeding or inquiry—not by its form. Predecessor provisions to Sections 1503 and 1505 worked in a similar way.[5]

Neither Sections 1503 and 1505 nor their antecedents have been limited to acts of obstruction involving the spoliation of evidence. See, *e.g.*, *United States* v.

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[5] Both Sections 1503 and 1505 originate from an 1831 law in which Congress first prohibited corruptly obstructing judicial proceedings. See Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 488 (prohibiting "corruptly, or by threats or force, obstruct[ing] or imped[ing] * * * the due administration of justice"). Congress used similar language in later statutes focused on protecting jurors, see Act of June 10, 1872, ch. 420, 17 Stat. 378, and in forbidding obstruction of congressional or administrative proceedings, see Act of Jan. 13, 1940, ch. 1, 54 Stat. 13. Those provisions were ultimately combined and reorganized into Sections 1503 and 1505. See Act of June 25, 1948, ch. 645, 62 Stat. 769-770.

Sussman, 709 F.3d 155, 168-170 (3d Cir. 2013) (removal of frozen assets from safe deposit box); *United States* v. *Frank*, 354 F.3d 910, 918-919 (8th Cir. 2004) (concealing asset subject to seizure); *Howard*, 569 F.2d at 1333 (selling confidential transcript of grand jury testimony); Jeffrey R. Kallstrom & Suzanne E. Roe, *Obstruction of Justice*, 38 Am. Crim. L. Rev. 1081, 1085 (2001) (observing that circuit courts have construed Section 1503's catchall clause to "proscribe[ ] an expansive category of conduct that interferes with the judicial process"); *id.* at 1103 (describing Section 1505 as a "companion statute to § 1503" covering "much of the same behavior" in other contexts).

When Congress transplanted into Section 1512(c)(2) the language already used in prior omnibus provisions, it presumably meant for that language to have similar breadth—to carry the "'old soil'" forward as "part of the package," *United States* v. *Hansen*, 599 U.S. 762, 778-779 (2023) (citation omitted). If Congress meant something else, it could easily have said so. It did not.

2. Petitioner's primary structural argument (Br. 14-15) is that interpreting Section 1512(c)(2) in accordance with its natural meaning leaves other obstruction statutes with no work to do and violates the canon against surplusage. That is wrong. By virtue of its catchall function, Section 1512(c)(2) necessarily overlaps to some degree with prohibitions in other subsections of Section 1512 and other portions of the obstruction code. But it does not subsume them. And petitioner's own interpretation itself creates the very superfluity he criticizes.

a. As a general matter, "overlap"—including "substantial" overlap—is "not uncommon in criminal statutes." *Loughrin*, 573 U.S. at 358 n.4. And here, overlap

is inevitable. The "whole value of" a provision like Section 1512(c)(2) "is that it serves as a catchall for matters not specifically contemplated—known unknowns." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 860 (2009). By its nature, that function requires broad language that overlaps with more specific prohibitions. See, *e.g.*, *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (discussing Section 1503's omnibus clause).

Here, moreover, Congress added Section 1512(c)(2) after it had already enacted other subsections of Section 1512 as well as various nearby provisions like Sections 1503 and 1505. "Congress could have eliminated the overlap between" Section 1512(c)(2) and those other provisions "only if it completely rewrote" the latter, something it "reasonably declined to do." J.A. 41.

b. Although Section 1512(c)(2) overlaps to some degree with existing provisions, petitioner is wrong to assert that his atextual limitation is necessary to avoid "collaps[ing] 15 of the 21 offenses in Section 1512," and "absorb[ing] obstruction offenses outside Section 1512 in Chapter 73" into paragraph (c)(2). Pet. Br. 14-15; see J.A. 89 n.4 (Katsas, J., dissenting) (listing provisions). In fact, each provision has a broader compass than Section 1512(c)(2) in certain respects.

To begin, many would allow conviction, at least in some circumstances, on a lesser mens rea than "corruptly." See 18 U.S.C. 1512(a)(1)(A) and (B); 18 U.S.C. 1512(a)(2)(A) and (B); 18 U.S.C. 1512(b)(1) and (2); 18 U.S.C. 1512(d)(1) and (4); 18 U.S.C. 1503; 18 U.S.C. 1505; see also 18 U.S.C. 1519. Others do not require an official proceeding. See 18 U.S.C. 1512(d)(4); 18 U.S.C. 1505; see also 18 U.S.C. 1519. And some carry a higher potential penalty than Section 1512(c)(2). See 18 U.S.C.

1512(a)(1)(A) and (B); 18 U.S.C. 1512(a)(2)(A) and (B); 18 U.S.C. 1503.

Petitioner's arguments also fail on a provision-by-provision analysis:

- *Killing.* Petitioner argues (Br. 14) that the government's interpretation would displace 18 U.S.C. 1512(a)(1)(A), which prohibits killing another person with the intent to prevent him from attending an official proceeding. But that provision—which targets a particularly culpable form of obstruction—understandably carries a higher potential penalty than Section 1512(c). Compare 18 U.S.C. 1512(a)(3), with 18 U.S.C. 1512(c).
- *Witness tampering.* The dissent below pointed (J.A. 89) to Section 1512(b)(1), which prohibits various actions undertaken "to * * * influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1). But that provision, unlike subsection (c), can be violated in ways that do not require that the defendant acted "corruptly"—namely, knowing use of intimidation or threats, or misleading conduct. *Ibid.*; see *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 705 (2005) (contrasting "knowingly" and "corruptly") (citation omitted).
- *Harassment.* The dissent below also focused (J.A. 89) on Section 1512(d), which prohibits "intentionally harass[ing] another person and thereby hinder[ing], delay[ing], prevent[ing], or dissuad[ing] any person from" undertaking various acts, such as testifying at an official proceeding. 18 U.S.C. 1512(d). Section 1512(d), however, does not require an intent to obstruct.

The dissent below contrasted Section 1512(d)'s maximum penalty (three years) with Section 1512(c)(2)'s (20 years). J.A. 89-90. But as Congress likely expected, a sentence for either offense would generally be imposed by reference to the same Sentencing Guideline—the Guideline that applies to the category of "obstruction of justice" offenses. See Sentencing Guidelines § 2J1.2 (2001) (capitalization and emphasis omitted). More generally, the range of sentences available under Section 1512(c)(2), which has no minimum sentence, simply reflects the provision's catchall function, which anticipates that the district judge will tailor each sentence to fit the facts of each new crime. And in doing so, the judge would be required to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"—irrespective of the statute under which the conduct was charged. 18 U.S.C. 3553(a)(6).

c. In any event, "the canon against surplusage merely favors that interpretation which *avoids* surplusage—and petitioner['s] interpretation no more achieves that end" than the plain textual one does, *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (citation omitted). Petitioner's view (Br. 8) that Section 1512(c)(2) applies to "acts that affect the integrity or availability of evidence" would, according to his own logic, create extensive superfluity and overlap.

Most glaringly, as noted above, see p. 23, *supra*, petitioner's interpretation of paragraph (c)(2) would "swallow[ ] [paragraph] (c)(1) whole," Pet. Br. 14. And the superfluity extends further still. Many of the provisions on which petitioner focuses are themselves provisions addressing conduct that would "impair the availability of victims, witnesses, informants, and evidence for

use in a proceeding"—the range of conduct that petitioner suggests Section 1512(c)(2) covers. Pet. Br. 12. For example, the prohibition on killing someone to prevent the victim's attendance or testimony at a proceeding, 18 U.S.C. 1512(a)(1)(A), clearly fits that description. That petitioner's interpretation would produce the very overlap he criticizes further demonstrates that the surplusage canon does not apply.

3. Finally, petitioner briefly invokes (Br. 21) Section 1512's title, which is "Tampering with a witness, victim, or an informant." But as petitioner acknowledges (*ibid.*), that title long predates the addition of Section 1512(c)(2). And although it is true that Congress did not amend the overall title of Section 1512 to account for the indisputably broader scope of both Sections 1512(c)(1) and (c)(2), the provision enacting Section 1512(c) was captioned "Tampering with a record *or otherwise impeding an official proceeding*." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (capitalization and emphasis altered).

That broader caption for Section 1512(c) focusing on the separate domains of paragraphs (c)(1) and (c)(2) is part of the "words Congress chose" and the President signed into law. *Dubin* v. *United States*, 599 U.S. 110, 120 (2023) (giving weight to a statutory title). And it contrasts with other, narrower headings in the same Act that were document-focused, such as the caption and title for the new 18 U.S.C. 1519. See Sarbanes-Oxley Act § 802(a), 116 Stat. 800 ("Criminal penalties for altering documents"; "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") (capitalization altered; emphasis omitted); see also *Yates*, 574 U.S. at 539-540 (plurality opinion) (relying on headings in construing Section 1519).

Section 1512(c)'s broader caption thus reinforces paragraph (c)(2)'s extension beyond evidence impairment.

C. Section 1512(c)(2)'s History Confirms Its Catchall Role

The history of Section 1512(c)(2) further underscores that it was specifically designed as the catchall that its text reflects.

1. Section 1512(c) was enacted in the Sarbanes-Oxley Act of 2002, which responded to the "exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." J.A. 36 (quoting *Yates*, 574 U.S. at 535-536 (plurality opinion)). Prior federal law prohibited "persuading another person to destroy records in connection with an investigation or other proceeding," but did not directly prohibit a person from destroying the same records himself. *Ibid.*

Congress addressed the gap by enacting new substantive prohibitions. The new Sections 1519 and 1512(c)(1) closed the specific evidence-related loophole at issue in the Enron scandal itself. And the new Section 1512(c)(2) sought to solve the larger problem that the Enron scandal brought to light—namely, corrupt obstruction that occurred in ways unanticipated by statutes targeted at specific forms of obstruction.

Specifically, the new Section 1519 prohibited "knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case." Sarbanes-Oxley

Act § 802(a), 116 Stat. 800. And the new Section 1512(c)(1) prohibited "corruptly * * * alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, or attempt[ing] to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." § 1102(2), 116 Stat. 807.

Had Congress simply wanted to close the specific Enron loophole, it would have stopped there. But Congress went further. As multiple lawmakers recognized, the new Section 1512(c)—which included both paragraphs (c)(1) and (c)(2)—was designed to prohibit both "document shredding and other forms of obstruction of justice." 148 Cong. Rec. 12,517 (2002) (statement of Sen. Hatch); accord *id.* at 14,489, 14,501, and 14,503 (similar statements of Reps. Sensenbrenner, Bereuter, and Tiahrt). Those statements map directly onto the unambiguous meaning of the enacted language. In paragraph (c)(1), Congress addressed document-focused obstruction, and in paragraph (c)(2), Congress addressed other forms of obstruction.

By taking steps to address both personal document destruction and other conduct designed to obstruct an official proceeding, Congress followed a well-worn path. Here, as in other contexts, a "generally phrased residual clause" "serves as a catchall for matters not specifically contemplated." *Republic of Iraq*, 556 U.S. at 860. "[S]tatutory prohibitions often go beyond the principal evil" that motivated their enactment "to cover reasonably comparable evils." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). As this Court has recently reiterated, "the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative

command." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 674 (2020) (brackets, citation, and internal quotation marks omitted).

2. Petitioner's insertion of an evidence-impairment limit in Section 1512(c)(2) is not supported by statutory history. Petitioner contends (Br. 21-22) that when Section 1512 was first enacted in 1982, it focused on witness tampering. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1249-1253. But even assuming that were true, it would be irrelevant to interpreting the statute as it exists today. The Sarbanes-Oxley Act placed within Section 1512 a new prohibition that does not focus exclusively or even primarily on witness tampering.

Nor do judicial applications of Section 1512(c)(2) provide a basis to depart from its text. Petitioner suggests (Br. 19) that the facts of prosecutions under Section 1512(c)(2) support his evidence-impairment gloss. But "contrary to [petitioner's] claim, case law does not uniformly apply the statute to circumstances involving evidence impairment." J.A. 19; see, *e.g.*, *United States* v. *Reich*, 479 F.3d 179, 185-187 (2d Cir.) (Sotomayor, J.) (affirming conviction under Section 1512(c)(2) where defendant forged court order to deceive litigant), cert. denied, 552 U.S. 819 (2007); *United States* v. *Ahrensfield*, 698 F.3d 1310, 1323-1326 (10th Cir. 2012) (same where defendant tipped off target of ongoing criminal investigation). And even in cases that "happen[ed] to address behavior that impaired evidence," J.A. 19, many courts have recognized the "capacious" language that Congress used in Section 1512(c)(2), see *ibid.* (citing examples). In any event, any novelty of applying Section 1512(c)(2) to varied forms of obstruction that do not involve evidence impairment is not a reason to

disregard its text—particularly when that text is specifically designed as a catchall to cover methods of corrupt obstruction that it would have been difficult or impossible to foresee.[6]

D. Petitioner's Concerns About Over-Prosecution Provide No Basis To Depart From Section 1512(c)(2)'s Text

Petitioner (Br. 32) and his amici (see, *e.g.*, American Ctr. for Law & Justice Amicus Br. 8-18) contend that affirming the decision below will lead to over-prosecution. That policy-focused speculation provides no basis for departing from Section 1512(c)(2)'s unambiguous text. Moreover, it fails to account for Section 1512(c)(2)'s significant limits.

1. Section 1512(c)(2)'s actus reus requires meaningful interference with a specific proceeding

Section 1512(c)(2)'s actus reus itself would exclude many of the benign hypotheticals that petitioner and his amici posit.

a. As a threshold matter, Section 1512(c)(2) is limited to conduct that *hinders* a proceeding. Bona fide advocacy that forms a legitimate part of that proceeding, like lobbying or presenting oral argument to a court, does not qualify.

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[6] Contrary to petitioner's assertion (Br. 11), the government has not previously endorsed his evidence-impairment interpretation. The memorandum he cites (*ibid.*) addressed the distinct issue of whether the sitting President could be charged with a violation of Section 1512(c)(2) based on "otherwise lawful" exercises of supervisory authority if those acts were undertaken "with a corrupt intent." Memorandum from Steven A. Engel, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., *Review of the Special Counsel's Report* 5 (Mar. 24, 2019). That memorandum declined to offer any firm views on the proper scope of the statute. See *ibid.*

Even as to hindrances, it is doubtful that Section 1512(c)(2) reaches conduct designed to have only a minimal effect on an official proceeding. See pp. 18-19, *supra*. As the Court long ago explained in connection with contempt of court, "[t]here may be misbehavior in the presence of a court amounting to contempt, that would not, ordinarily, be said to obstruct the administration of justice." *Ex parte Savin*, 131 U.S. 267, 276 (1889). Congressional hearings, for example, often inspire protests, which may impose minor burdens. But the long tradition of peaceful protest—which includes robust exercise of First Amendment rights—would exclude such minor burdens from Section 1512(c)(2)'s actus reus. And petitioner provides no actual examples of courts applying the statute's verbs to benign behavior, let alone examples that would survive an as-applied First Amendment challenge. Any court confronted with such a prosecution could address it as appropriate. This, however, is not such a case; the conduct of participating in a violent riot inside the Capitol to disrupt the joint session of Congress certifying the election results cannot be described as a minor interference or protected First Amendment activity.

b. Second, a defendant cannot obstruct an official proceeding in violation of Section 1512(c)(2) unless his conduct has a sufficient "relationship in time, causation, or logic" with the proceeding, such that interfering with the proceeding is the "'natural and probable effect'" of the defendant's conduct. *Aguilar*, 515 U.S. at 599 (citation omitted). This Court has repeatedly construed obstruction statutes similar to Section 1512(c) to contain such a "nexus" requirement. *Id.* at 600.

In *Aguilar*, for example, the Court rejected a prosecution under the omnibus clause of Section 1503 where

a defendant lied to an FBI agent without knowing whether the agent "might or might not testify before [the] grand jury." 515 U.S. at 600. The Court found that the record lacked the requisite evidence of a "nexus" between the defendant's lies and the grand jury investigation itself. *Ibid.* In *Arthur Andersen,* the Court later recognized a similar nexus requirement under Section 1512(b)(2). Although Congress has specified that a proceeding "need not be pending or about to be instituted at the time of the offense" for purposes of that provision, 18 U.S.C. 1512(f)(1), this Court held that the defendant must at least act "in contemplation" of a "particular official proceeding," *Arthur Andersen*, 544 U.S. at 708 (quoting *Aguilar*, 515 U.S. at 599). And in *Marinello*, 138 S. Ct. at 1109, the Court applied a similar nexus requirement to the "Omnibus Clause" of a tax-obstruction statute, 26 U.S.C. 7212(a).

The reasoning of those decisions applies equally to Section 1512(c)(2). A defendant cannot "obstruct[ ], influence[ ], or impede[ ] an[ ] official proceeding"—let alone do so "corruptly"—unless his conduct is sufficiently connected with a current or future proceeding. 18 U.S.C. 1512(c)(2). Courts of appeals, recognizing as much, have accordingly vacated Section 1512(c)(2) convictions where the evidence failed to establish a sufficient nexus between the obstructive act and an official proceeding. See, *e.g.*, *United States* v. *Young*, 916 F.3d 368, 387-389 (4th Cir.), cert. denied, 140 S. Ct. 113 (2019); *United States* v. *Friske*, 640 F.3d 1288, 1292-1293 (11th Cir. 2011).

2. Section 1512(c)(2)'s mens rea requires proof that a defendant acted "corruptly"

Critically, moreover, a defendant does not violate Section 1512(c)(2) unless he acts "corruptly." 18 U.S.C.

1512(c). In the only case to date where the D.C. Circuit has directly addressed Section 1512(c)(2)'s mens rea, it upheld the conviction where the jury was instructed to find that the defendant "use[d] unlawful means, or act[ed] with an unlawful purpose, or both," and also had "consciousness of wrongdoing," meaning "an understanding or awareness that what [he] [wa]s doing [wa]s wrong." *United States* v. *Robertson*, 86 F.4th 355, 362 (D.C. Cir. 2023) (quoting jury instructions).

a. Congress did not define "corruptly" for purposes of Section 1512, but this Court has explained that the "natural meaning" of that term is "normally associated with wrongful, immoral, depraved, or evil" conduct. *Arthur Andersen*, 544 U.S. at 705 (citing dictionaries); see, *e.g.*, *Black's Law Dictionary* 348 (7th ed. 1999) (defining "corruptly" to mean "[i]n a corrupt or depraved manner") (emphasis omitted); *Merriam Webster's Dictionary of Law* 109 (1996) (defining "corrupt" to mean "having an unlawful or evil motive") (emphasis omitted). Accordingly, proof that a defendant intentionally or knowingly hindered a congressional proceeding is not enough to show that he did so "corruptly." See *Robertson*, 86 F.4th at 366; *United States* v. *North*, 910 F.2d 843, 940-941 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part), amended on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

"'[C]ongressional committees are part and parcel of a political branch of government' that is engaged in making legislative and policy choices." *Robertson*, 86 F.4th at 366 (citation omitted). Many deliberate efforts to influence the legislative process, such as lobbying, are not inherently wrongful. Thus, even setting aside the actus reus limitations discussed above, the mens rea element of Section 1512(c)(2) helps to ensure that

lobbying and similar accepted efforts to influence the legislature would fall outside the scope of Section 1512(c)(2). See *id.* at 366-367.

b. Petitioner appears to suggest (Br. 27-29) that this Court should adopt a definitive interpretation of "corruptly" in Section 1512(c). But the decision below did not resolve that question; it is not fairly encompassed within the question presented, see Pet. i; and the Court should await full briefing on the issue given that any interpretation would apply not only to paragraphs (c)(1) and (c)(2) but also to a variety of other statutes that specify a "corruptly" mens rea, including those that apply to judicial proceedings, see p. 46, *infra* (listing statutes). In any event, the authorities on which petitioner relies do not support the additional strictures that he would impose, and those strictures are unnecessary to ensure that Section 1512(c)(2) has appropriate limits.

Petitioner contends that the term "'corruptly' has a long-standing common-law definition" that refers to "acting 'with an intent to procure an unlawful benefit either for [oneself] or for some other person.'" Pet. Br. 29 (citation omitted). But he fails to show that to be the term's exclusive definition. See *Robertson*, 86 F.4th at 372-373 (explaining that the "'expectation-of-benefit requirement'" is not a longstanding feature of obstruction law and instead "has been almost exclusively confined to bribery and tax law"); cf. J.A. 106-107 (Katsas, J., dissenting) (explaining that Judge Walker's contrary view below was based on "three dissents," two of which "reject [his] proposed standard"). And it would make no sense for Congress to allow its own and judicial proceedings to be obstructed when a defendant does not intend a particular benefit but nevertheless wrongly seeks to prevent justice from being done.

Petitioner also suggests (Br. 28) that the "corruptly" mens rea is "vague" and will not provide practical limits. But this Court has construed the term in other contexts without suggesting that it is too vague to be applied commonsensically by a jury. See, *e.g.*, *Arthur Andersen*, 544 U.S. at 705. And petitioner fails to demonstrate that any jury instructions in this case—where the relevant count was dismissed before trial—or in a significant number of other cases charging "corrupt" conduct under Section 1512(c)(2) or other obstruction provisions have been or will be problematic.

c. Under any of the available interpretations of "corruptly," the requirement that the government prove beyond a reasonable doubt that the defendant acted with corrupt intent imposes significant limits on Section 1512(c)(2) that address concerns about over-prosecution. In particular, it is difficult to see how common activities like legitimate "lobbying, advocacy, and protest" (Pet. Br. 32) could reasonably be viewed as "wrongful, immoral, depraved, or evil," *Arthur Andersen*, 544 U.S. at 705. Petitioner presumably includes such examples in his brief precisely because they will strike a reasonable person as noncriminal. For that very same reason, a jury likely would not find such actions to be corrupt.

Congress has frequently viewed imposing a mens rea of "corruptly" as one appropriate way to narrow the application of a potentially broad actus reus. See, *e.g.*, 18 U.S.C. 1503 (obstructing "due administration of justice"); 18 U.S.C. 1505 (obstructing agency proceeding or congressional inquiry); 26 U.S.C. 7212(a) (obstructing "due administration" of tax code). That stringent mens rea serves the same function in Section 1512(c)(2).

E. Petitioner's Invocation Of The Constitutional-Avoidance And Lenity Canons Is Unsound

Petitioner further errs in invoking (Br. 31-32) the constitutional-avoidance and lenity canons. As to the former, petitioner refers in passing (Br. 32) to the First Amendment, but the First Amendment does not confer on petitioner any right to assault police officers inside the Capitol as part of an effort to impede an official proceeding. And under this Court's overbreadth doctrine, a defendant whose own conduct was not protected by the First Amendment may challenge a statute as facially unconstitutional only on the theory that "the 'statute prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *Hansen*, 599 U.S. at 770 (citation omitted). Petitioner does not attempt to satisfy the demanding standard for an overbreadth claim, and any speculative First Amendment concerns would not be enough to justify the "strong medicine" of facial invalidation. *Id.* at 784 (citation omitted). Instead, any constitutional issues that might conceivably arise in a particular case can be addressed through an as-applied challenge. See *id.* at 770 (explaining that "case-by-case" challenges are the "usual[ ]" and preferred method for adjudicating First Amendment claims).

Petitioner's brief invocation (Br. 31) of "ex post facto principles" is equally unavailing. This Court has stated that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). But neither the text nor any prior appellate decision limits Section 1512(c)(2) to acts of evidence impairment, and due process does not

require that some prior case with "fundamentally similar" facts have occurred before petitioner can be held liable for his violation. *Id.* at 270. If that were so, then catchall provisions like Section 1512(c)(2) could never fulfill their function.

The clarity of Section 1512(c)(2)'s traditional terms also defeats any vagueness concerns (Pet. Br. 32 n.17), as well as petitioner's reliance on the rule of lenity (*id.* at 30-31). Lenity comes into play "only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'" *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (citation omitted). As the court of appeals recognized, Section 1512(c)(2) is not ambiguous, let alone grievously so. J.A. 43-44. And this Court has rejected the suggestion (Pet. Br. 31) that the mere existence of disagreement among judges demonstrates ambiguity. See *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995); see also, *e.g.*, *United States* v. *Hayes*, 555 U.S. 415, 429-430 (2009).

* * * * *

The government is prepared to prove at trial that petitioner corruptly joined the violent riot on January 6 to obstruct Congress's certification of the results of the presidential election. That charge satisfies all of the elements of Section 1512(c)(2). The text of the provision resolves this case, and there is no basis to insert language into the statute that Congress did not write. The Court should make that clear and affirm the court of

appeals' judgment reinstating petitioner's Section 1512(c)(2) charge.[7]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[7] In the lower courts, the government argued that petitioner's alleged conduct would violate Section 1512(c)(2) even if the provision were construed to apply only to acts involving "evidence impairment." Pet. Br. 20; see Gov't C.A. Br. 59-61; D. Ct. Doc. 72, at 22-25 (Apr. 8, 2022); see also, *e.g.*, Gov't C.A. App. 205 (trial testimony in another case) (discussing documentary evidence in electoral count proceedings and the effects of the rioters' actions on that evidence). The court of appeals had no need to address that alternative argument. Accordingly, if this Court rejects the government's interpretation of Section 1512(c)(2), it should make clear that the government remains free on remand to seek to establish that the charge in this case can satisfy whatever construction of the statute the Court adopts.

APPENDIX

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APPENDIX

1. U.S. Const. Art. II, § 1, Cls. 1-4 provide:

[1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said

House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

2. U.S. Const. Amend. XII provides:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for Pres-

ident, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

3. 3 U.S.C. 15 (2018) provides:

Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Sen-

ate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like

manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless

the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

4. 3 U.S.C. 16 (2018) provides:

Same; seats for officers and Members of two Houses in joint meeting

At such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be

competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

5. 3 U.S.C. 17 (2018) provides:

Same; limit of debate in each House

When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

6. 3 U.S.C. 18 (2018) provides:

Same; parliamentary procedure at joint meeting

While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

7. 18 U.S.C. 1503 provides:

Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

8. 18 U.S.C. 1505 provides:

Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

9. 18 U.S.C. 1512 provides:

Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

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[1] So in original.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence,

that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in

which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

10. 18 U.S.C. 1515 provides:

Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate com-

merce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

11. 18 U.S.C. 1519 provides:

Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

12. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 807, provides:

SEC. 1102 TAMPERING WITH A RECORD OR OTHERWISE IMPEDING AN OFFICIAL PROCEEDING.

Section 1512 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and

(2) by inserting after subsection (b) the following new subsection:

"(c) Whoever corruptly—

"(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

"(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.".