No. 23-5572

IN THE
Supreme Court of the United States

JOSEPH W. FISCHER
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* FORMER GOVERNMENT OFFICIALS AND CONSTITUTIONAL LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are former prosecutors, elected officials, other government officials, and constitutional lawyers who have collectively spent decades defending the Constitution, the interests of the American people, and the rule of law. As such, amici have an interest in the faithful enforcement of criminal laws enacted by Congress. Amici respectfully submit this brief to explain why Section 1512(c)(2) is properly understood to cover all forms of corrupt obstruction of an official proceeding.

SUMMARY OF ARGUMENT

Section 1512(c)(2) makes it a crime to "obstruct, influence, or impede any official proceeding." 18 U.S.C. § 1512(c)(2) (cleaned up). The statutory text thus makes clear that it covers all conduct that corruptly obstructs, influences, or impedes an official proceeding.

In contrast to this straightforward reading of Section 1512(c)(2), petitioner proposes an invented reinterpretation of the text according to which only a small subset of corrupt obstruction of an official proceeding qualifies: conduct that achieves its corrupt purpose by affecting the availability or integrity of evidence for use in that official proceeding. *See* Pet. Br. at 7. That manufactured construction of the statute is unwarranted. Petitioner suggests Section 1512(c)(1), which lists specific ways in which a criminal might obstruct, influence, or impede an official proceeding, limits

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Section 1512(c)(2), which covers conduct that "otherwise" corruptly obstructs, influences, or impedes an official proceeding. But petitioner's logic is backward. Section 1512(c)(1) does not contract the scope of Section 1512(c)(2); Section 1512(c)(2) expands the scope of the statute beyond Section 1512(c)(1).

Even if petitioner were correct that Section 1512(c)(2) covers less than its text commands, the narrowing construction he suggests is incorrect. His proposed evidence impairment interpretation of Section 1512(c)(2) improperly excludes corrupt obstructive conduct that indisputably falls within the statute's scope. Under this Court's cases, any limiting principle on the scope of Section 1512(c)'s broad, general terms must be defined by a similarity dictated by the context in which those general words appear. Section 1512(c)'s text and context establish that the only similarity connecting the scope of the two provisions is that Section 1512(c)(1) lists specific examples of the broader category in Section 1512(c)(2), the scope of which is defined by the words of Section 1512(c)(2) itself. The statutory text, the history of its application, and this Court's cases demonstrate that—at a bare minimum—Section 1512(c)(2) encompasses all conduct that corruptly interferes with official proceedings to thwart their proper functioning, regardless of the particular means the defendant corruptly employs to achieve that interference.

For these reasons, the Court should reject petitioner's unwarranted interpretation to hold that Section 1512(c)(2) applies to all conduct that corruptly interferes with official proceedings.

ARGUMENT

I. Section 1512(c)(2) Applies to All Forms of Corrupt Obstruction of an Official Proceeding.

The court of appeals correctly held 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 statute's text, structure, and history compel that conclusion.

1. The text of the statute makes clear that Section 1512(c)(2) is a broad prohibition meant to capture a wide range of corrupt obstruction of an official proceeding. Section 1512(c) provides:

> 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).

The Court "begin[s] with the Act's language." *United States v. Tinklenberg*, 563 U.S. 647, 653 (2011). "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *Connecticut Nat'l*

Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Section 1512(c)'s text unambiguously encompasses all conduct that "corruptly . . . obstructs, influences, or impedes any official proceeding." 18 U.S.C. § 1512(c)(2). "[W]ords generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (cleaned up). Each of these verbs carries an expansive meaning. To "obstruct" is "to block up; stop up or close up; place an obstacle in or fill with obstacles or impediments to passing" or "to be or come in the way of; hinder from passing, action, or operation; impede, retard." Webster's Third New International Dictionary 1559 (1986). To "impede" is "[t]o interfere with or get in the way of the process of; hold up; block; detract from." *Id.* at 1132. And to "influence" is "to affect or alter the conduct, thought or character of by indirect or intangible means: sway." *Id.* at 1160. As relevant here, to "influence" takes a more specific meaning from the noun form: "corrupt interference with or manipulation of authority for personal gain." *Id.* None of these definitions specify or narrow the mechanism by which the hindrance or interference is accomplished.

Contrary to petitioner's contention, nothing in the statute's text purports to limit the provision's expansive scope. Section 1512(c)(2) contains no further words of limitation on the types of obstruction, influence, or impeding it covers beyond the requirements that the conduct was committed "corruptly" and that it was directed at "any official proceeding." In contrast

to those two express limitations, Section 1512(c)(2) does not indicate that it refers only to a subset of corrupt conduct that obstructs, influences, or impedes any official proceeding. Section 1512(c)(2)'s "structure [thus] shows that Congress knew how to draft the kind of statutory language that petitioner seeks to read into [it]." *State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 580 U.S. 26, 36 (2016). *See also Pugin v. Garland*, 599 U.S. 600, 608 (2023) ("[I]f Congress wanted to define offenses 'relating to obstruction of justice' to have the same coverage as § 1503(a), Congress knew how to do so."). For example, Congress could have drafted Section 1512(c)(2) to apply to conduct that "corruptly obstructs, influences, or impedes any official proceeding by affecting the availability or integrity of evidence for use in that official proceeding." *See* Pet. Br. at 7. But Congress did not draft that statute. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008) ("Had Congress intended to limit [the statute's] reach as petitioner contends, it easily could have written" that statute); *Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court "resist[s] reading words or elements into a statute that do not appear on its face").

2. The statute's structure confirms that broad scope. By using the word "otherwise" to introduce Section 1512(c)(2), Congress deliberately distinguished the broad category of conduct covered by that catchall provision from the narrower scope of Section 1512(c)(1). As the court of appeals explained, the connective adverb "otherwise" bears a "commonplace, dictionary meaning" of "'in a different manner.'" J.A. 15 (quoting The Oxford English Dictionary (3d ed. 2004)). The relationship between the two provisions in Section 1512(c) reflects that meaning of "otherwise." Section 1512(c) gives a specific list of verbs connected by

"otherwise" to a broader set of verbs. The list of verbs in Section 1512(c)(1) is narrow: "alters, destroys, mutilates, or conceals." 18 U.S.C. § 1512(c)(1). And those verbs are further narrowed by a list of direct objects: "a record, document, or other object." *Id.* By contrast, the verbs "'obstruct'" and "'impede' are broad" and "can refer to anything that 'blocks,' 'makes difficult,' or 'hinders.'" *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (cleaned up). "'[O]therwise[]'" thus "captures [conduct] that does not fit neatly into the statute's enumerated categories but is nevertheless meant to be covered." *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 634 (2019). *See also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535 (2015).

Consider the following sentence: "Anyone who throws, dribbles, or catches a ball, or otherwise plays a sport, shall receive a varsity letter." The catchall phrase "or otherwise plays a sport" encompasses all sports, including baseball and football, even though dribbling a ball is not a way to play either sport. Indeed, the catchall phrase "or otherwise plays a sport" includes hockey or swimming even though neither sport involves a ball at all. The reason is that the scope of the catchall phrase is defined by its own terms rather than by the specific but expressly non-exhaustive examples of ways to play a sport. And by its own terms, the phrase "or otherwise plays a sport" includes playing all sports without limitation. In precisely the same manner, the phrase "otherwise obstructs, influences, or impedes any official proceeding" in Section 1512(c)(2) is limited neither to the particular ways of corrupt obstructing listed in Section 1512(c)(1) nor to ways of corrupt obstructing that are directed towards a "record, document, or other object."

Accordingly, the natural meaning of a sentence with Section 1512(c)'s structure is that the catchall clause encompasses all forms of corruptly obstructing, influencing, or impeding an official proceeding.

3. Section 1512(c)'s history corroborates that grammatical conclusion. Section 1512(c) became law as part of the Sarbanes-Oxley Act of 2002, which Congress enacted after "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." *Yates v. United States*, 574 U.S. 528, 535–36 (2015). On petitioner's view, the narrow factual circumstances of the scandal that prompted Congress to act imposes strict limits on the scope of the statute it enacted. That is incorrect.

Congress sought to solve both the immediate problem posed by the Enron scandal and the deeper issue it revealed. In Sections 1512(c)(1) and 1519, Congress addressed the immediate problem by closing the loophole in federal law that permitted those who shred documents to evade criminal liability even while those who persuaded others to do so did not. *Yates*, 574 U.S. at 536 (quoting S.Rep. No. 107–146, p. 14 (2002)). In Section 1512(c)(2), Congress addressed the deeper issue—that federal law was unable to keep pace with the myriad and evolving ways in which criminals seek to thwart the administration of justice.

Reflecting that dual purpose, the legislative history is replete with references both to evidence destruction and other forms of obstruction more broadly. For example, Senator Hatch explained that the Act targeted "document shredding *and other forms of obstruction of justice*." 148 Cong. Rec. 12,517 (2002) (statement of Sen. Hatch) (emphasis added). Similarly,

Representative Sensenbrenner explained that the Act would "strengthen[] laws that criminalize document shredding *and other forms of obstruction of justice*." *Id.* at 14,489 (statement of Rep. Sensenbrenner) (emphasis added). Neither Senator Hatch nor Representative Sensenbrenner nor anyone else suggested that they meant for the law they drafted to be narrowed by the atextual limitation that petitioner seeks to graft onto it. Congress hardly perceived the problem as technical and narrow, calling for a response that went no further than the precise actions that had previously evaded punishment.

To achieve that remedial purpose, the "whole value" of 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). The grammatical structure of Section 1512(c) again reflects that broad remedial purpose. Consider again the hypothetical sentence: "Anyone who throws, dribbles, or catches a ball, or otherwise plays a sport, shall receive a varsity letter." Even if the School Board adopted this rule in response to its prior failure to award varsity letters to those who played basketball, it sensibly would have included the catchall clause "or otherwise plays a sport" to ensure that the same failure did not repeat itself in a slightly different context. For that reason, a hockey player who was denied a varsity letter under this broad, inclusive rule would be rightfully aggrieved. So too does Section 1512(c)(2)'s scope extend beyond the narrow factual circumstances that prompted Congress to enact it.

Section 1512(c)(2)'s broad remedial scope becomes particularly clear by comparison to Section 1507. That provision makes it a crime to "picket[] or parade[] in or near a building housing a court of the United

States" "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." 18 U.S.C. § 1507. *See* J.A. 60 (Walker, J., concurring). Section 1507 thus recognizes that sufficiently disruptive protests in or outside a courthouse can improperly interfere with the administration of justice therein. That is precisely the sort of conduct that petitioner allegedly undertook with thousands of others who stormed the Capitol on January 6. But Section 1507 does not apply to petitioner's alleged conduct, because the Capitol is not a courthouse and members of Congress are not judges, jurors, or court officers. Absent the catchall clause in Section 1512(c)(2), petitioner's alleged conduct would thus not violate any of the obstruction of justice statutes in federal law.[2] That limitation in Section 1507's scope is exactly the sort of technical loophole that Congress intended to close by enacting Section 1512(c)(2).

* * *

[2] In addition to Section 1512(c)(2), petitioner was also charged with parading, demonstrating, or picketing in the Capitol, in violation of 40 U.S.C. § 5104(e)(2)(G), disorderly conduct in the Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(D), and other crimes not specific to the Capitol. J.A. 186-87. In contrast to Section 1512(c)(2), neither crime under Section 5104 requires an intent to interfere with an official proceeding—they are simple disorderly conduct crimes. And in contrast to the 20-year maximum sentence for a violation of Section 1512(c)(2), violations of Section 5104 carry a maximum sentence of 6 months. *United States v. Alford*, 89 F.4th 943, 949 (D.C. Cir. 2024) (citing 40 U.S.C. § 5109(b)). That stark disparity is precisely why Congress intended Section 1512(c)(2) to cover conduct of the sort petitioner is alleged to have committed.

The text, structure, and history of Section 1512(c)(2) thus demonstrate beyond any doubt that it encompasses all conduct that corruptly obstructs, influences, or impedes any official proceeding.

II. Petitioner's Proposed Evidence Impairment Interpretation Improperly Excludes Corrupt Obstruction That Falls Within Section 1512(c)(2)'s Scope.

Petitioner's proposed evidence impairment interpretation finds no basis in Section 1512(c)(2)'s text and improperly excludes from its coverage corrupt obstruction that without question falls within its scope. The sole purported basis petitioner offers for his manufactured interpretation is the hypothesis that "Section 1512(c)(2)'s meaning is properly circumscribed by the enumeration of specific obstructive acts in Section 1512(c)(1)." Pet. Br. at 9. He suggests that an "'otherwise' clause thus 'can connote not only difference but also a degree of similarity.'" *Id.* at 10 (quoting JA 79 (Katsas, J., dissenting)). *See also id.* at 18 (citing *Begay v. United States*, 553 U.S. 137 (2008)). For that reason, he argues, Section 1512(c)(2)'s expansive language must be interpreted to apply only to that subset of conduct that corruptly obstructs, influences, or impedes an official proceeding that achieves that obstructive end by impairing evidence.

Petitioner's argument is flawed in two respects. First, as the court of appeals held and as demonstrated above, Section 1512(c)(1) does not limit the scope of Section 1512(c)(2). Section 1512(c)'s text establishes that the only "similarity" connecting the scope of the two provisions is that Section 1512(c)(1) lists specific examples of the broader category in

Section 1512(c)(2), the scope of which is defined by the words of Section 1512(c)(2) itself. Thus "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object" are particular ways of "obstruct[ing], influenc[ing], or imped[ing] any official proceeding," and those examples do not limit the broad scope of the capacious general terms that follow.

Second, even accepting petitioner's flawed premise that Section 1512(c)(1) works to limit Section 1512(c)(2), he offers no argument at all to support his excessively narrow interpretation. Contrary to petitioner's contention, Section 1512(c)(2) is not limited to corruptly obstructing an official proceeding by impairing evidence. Petitioner struggles to point to a single possible case that would be covered by his evidence impairment interpretation of Section 1512(c)(2) that is not already covered by the specific evidence impairment crimes listed in Section 1512(c)(1). In addition to that dire surplusage, petitioner's proposed interpretation suffers from an even more serious flaw: it fails to cover cases that are indisputably within Section 1512(c)(2)'s proper scope. The statutory text, the history of its application, and this Court's cases demonstrate that—at a bare minimum—Section 1512(c)(2) encompasses all conduct that corruptly interferes with official proceedings to thwart their proper functioning, regardless of the particular means the defendant corruptly employs to achieve that interference.

1. The appearance of the verbs "obstruct," "influence," and "impede" in neighboring provisions establishes that Section 1512(c)(2)'s broad scope is not limited to evidence impairment. "[T]he normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v.*

Alvarez, 546 U.S. 21, 34 (2005). *See also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (applying canon to "exposition of Title VI" and "[j]ust next door, [to] Title VII"). Neighboring provisions using the same words explicitly do not limit their scope to evidence impairment. Section 1503 makes it a crime to "corruptly, or by threats or force, or by any threatening letter or communication, endeavor[] to influence, intimidate, or impede any grand or petit juror." 18 U.S.C. § 1503. Similarly, Section 1504 makes it a crime to "influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror . . . by writing or sending to him any written communication." *Id.* § 1504. These prohibitions on extrajudicial communication with jurors seek to prevent the manipulation of those proceedings through means that are, by definition, not evidentiary.

Similarly, as noted above, Section 1507 makes it a crime to "picket[] or parade[] in or near a building housing a court of the United States" "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." 18 U.S.C. § 1507. Such picketing or parading aims to improperly impact a judicial proceeding through means that similarly do not, by definition, involve any evidence that might be submitted to the court.

And Section 1509 makes it a crime to "obstruct[], impede[], or interfere[] with . . . the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States" "by threats of force." 18 U.S.C. § 1509. This provision

pertains to the execution of a court order, not any evidence that might be presented to the court through the legal procedures leading to that order.

None of these provisions can sensibly be understood to address conduct that "affect[s] the availability or integrity of evidence for use in an official proceeding." Pet. Br. at 7. Petitioner's narrow construction would thus require the Court to graft an atextual limitation on the words of Section 1512(c)(2) that would be nonsensical if applied to the exact same words in adjoining provisions of the statue. As a result, petitioner's proposed interpretation would require the words "obstruct," "influence," and "impede" to carry a specialized, narrow meaning in Section 1512(c)(2) while those words would still carry their ordinary, broad meaning in numerous adjoining provisions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709 (2014) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.") (internal quotations omitted; alteration in original). The Court should reject petitioner's attempt to define the words "obstruct," "influence," and "impede" in Section 1512(c)(2) in ways contrary to the meanings those terms must logically bear in adjoining provisions of the statute.

2. The history of Section 1512(c)(2)'s application confirms that petitioner's proposed evidence impairment interpretation is incorrect. Beginning soon after its enactment and for nearly 20 years since, the courts of appeals have upheld convictions under Section 1512(c)(2) that defy petitioner's evidence impairment interpretation. In *United States v. Reich*, 479 F.3d 179 (2d Cir. 2007) (Sotomayor, J.), the Second Circuit upheld a conviction under Section 1512(c) in which the defendant Reich, a lawyer who represented himself in

a suit against a brokerage firm through which he had invested, faxed a fraudulent court order to opposing counsel in the underlying suit. When the magistrate judge assigned to that underlying suit failed to rule on the brokerage firm's pending motion for summary judgment, its counsel applied for a writ of mandamus with the Second Circuit to compel the magistrate judge to issue a decision on summary judgment. Before the Second Circuit could act on the application, Reich faxed to the brokerage firm's counsel what purported to be an order from the magistrate judge ruling in favor of the brokerage firm on various matters and then recusing herself from the case. Relying on the fabricated court order, the brokerage firm's counsel withdrew the application for a writ of mandamus.

In upholding Reich's conviction under Section 1512(c)(2), the Second Circuit explained that he "directly injected a false order into ongoing litigation to which he was a party" and thus he "at the very least 'influence[d]' the proceedings, in that it caused a litigant to withdraw a filing and contact a judge, and caused Magistrate Judge Mann to issue an order explaining the falsity of the forged Order and to convene a status conference to discuss it." *Id.* at 186-187 (alteration in original). Neither the fabricated court order nor anything else at issue in Reich's conviction was evidence in the underlying civil case that he corruptly obstructed and influenced. *See United States v. Delgado*, 984 F.3d 435, 452-53 (5th Cir. 2021) (affirming conviction under Section 1512(c)(2) of state court judge who was target of a federal bribery investigation and attempted to return cash bribe); *United States v. Newton*, 452 Fed. Appx. 288, 291 (4th Cir. 2011) (affirming conviction under Section 1512(c)(2) of defendant who informed sister of impending police raid

because "as a consequence of the information relayed by Newton, the arrests of several of the suspects . . . was delayed" and evidence was destroyed). *See also United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (Section 1512(c)(2) "operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific offense like document destruction, which is listed in (c)(1).") (quoting *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir.2014)); *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (similar).

Petitioner incorrectly states (at 7-8) that "before the January 6 cases, no court had applied Section 1512(c)(2) to conduct not intended to affect the availability or integrity of evidence." He then compounds that error by inaccurately alleging (at 6) that Judge Pan "conceded that—'outside of the January 6 cases'—there is no precedent for applying Section 1512(c) to conduct unrelated to evidence impairment, and that such application was beyond Congress' expressed purpose in amending that section." (quoting JA 20-21, 37-38). Judge Pan conceded no such thing because, as *Reich* and similar cases demonstrate, it is false. Contrary to petitioner's misrepresentation, Judge Pan acknowledged that "outside of the January 6 cases brought in this jurisdiction, there is no precedent for using § 1512(c)(2) to prosecute *the type of conduct at issue in this case*." J.A. 20 (emphasis added). That unremarkable comment simply recognized that prior to the January 6 cases, no one has been charged under Section 1512(c)(2)—or under any other statute—for violently assaulting the Capitol to interfere with the electoral count because no one had ever perpetrated

such an assault until the day petitioner allegedly committed his crimes.[3]

3. Petitioner's reliance on *Begay v. United States*, 553 U.S. 137 (2008), and *Yates v. United States*, 574 U.S. 528 (2015), is misplaced. This Court held in *Begay* that the statutory term "violent felony" as it appears in the Armed Career Criminal Act excludes drunk driving. To reach that conclusion, the Court interpreted the residual clause in the term's statutory definition, which covers a crime 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." 18 U.S.C. § 924(e)(2)(B)(ii). The Court determined that although "[d]runk driving is an extremely dangerous crime," it nonetheless "falls outside the scope of clause (ii)." *Begay*, 553 U.S. at 141-42. The basis of the Court's decision was that "the word 'otherwise' can (we do not say must) refer to a crime that is similar to the listed examples in some respects but different in others—similar, say, in respect to the degree of risk it produces, but different in respect to the 'way or manner' in which it produces that risk." *Id.* at 144 (cleaned up). The Court therefore "read the examples as limiting

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[3] Petitioner also misrepresents (at 11) the position of the Office of Legal Counsel, inaccurately claiming that "until the January 6 prosecutions, the government interpreted Section 1512(c)'s text consistent with the understanding of Judge Katsas and the district court." The OLC memo makes clear that it was not "necessary [for it] to address this [interpretive] disagreement [on the scope of Section 1512(c)(2)], because in [its] view, Volume II of the [Mueller] Report does not establish offenses that would warrant prosecution, even under such a broad legal framework." 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* at 5 (March 24, 2019).

the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 143.

The Court's analysis thus turned entirely on the type of similarity it required between the listed crimes and the conduct claimed to fall within the residual clause. The Court identified the requisite similarity in that "[t]he listed crimes all typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 144-45 (citation and quotation marks omitted). It then explained that, "viewed in terms of the Act's basic purposes, this distinction matters considerably" because the Act "focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Id.* at 146. Because "[c]rimes committed in such a purposeful, violent, and aggressive manner are potentially more dangerous when firearms are involved," the residual clause covers "conduct [that] makes [it] more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.* at 145 (citation and quotation marks omitted). Drunk driving fails to manifest that special danger because "in this respect—namely, a prior crime's relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary and arson) are different from DUI, a strict-liability crime." *Id.*

This Court's decision in *Yates* similarly held that a fish is not a "tangible object" under Section 1519. 574 U.S. at 532. That provision makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper

administration" of various proceedings. 18 U.S.C. § 1519. Like the Court in *Begay*, its interpretation narrowed the statutory phrase "tangible object" based on the context in which it appears. Relying on same canons of *noscitur a sociis* and *ejusdem generis* that petitioner invokes (at 16-17), the Court concluded that, as it is used in Section 1519, the phrase refers "specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information." 574 U.S. at 544.

The Court again determined the type of similarity it demanded between the contested phrase "tangible object" and its surrounding words entirely by looking to the statute's logic. Section 1519, unlike Section 1512(c), is a list of verbs designating prohibited conduct followed by a list of nouns designating the objects at which those prohibited actions might be directed. The Court reasoned that interpreting "tangible object" to include any physical thing yields grammatical incoherence: "The last two verbs, 'falsif[y]' and 'mak[e] a false entry in,' typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives." *Yates*, 574 U.S. at 544. *See also id.* at 551-52 (Alito, J., concurring in the judgment). But one cannot falsify a fish. The Court therefore concluded that the scope of the grammatical objects of those verbs must be limited to those referents to which those verbs could coherently apply. *See also id.* at 564 (Kagan, J., dissenting) (identifying "things that provide information, and thus potentially serve as evidence relevant to matters under review" as the "common trait that links all the words in a statutory phrase").

Petitioner's argument fundamentally falters at this step. Even if Section 1512(c)(2)'s scope is narrowed

from its plain text by a requirement of "similarity" with the specific conduct listed in Section 1512(c)(1), petitioner cannot explain why evidence impairment is that requisite similarity. Petitioner implicitly concedes the problem by abandoning the district court's interpretation, which identified the even narrower category of document destruction as the requisite similarity. *See* J.A. 179 (Nichols, J.) (Section 1512(c)(2) "requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding."). And following *Begay* and *Yates*, the proper basis for a narrowing construction is the logic of the statute and the evils Congress aimed to address by enacting Section 1512(c). Those evils were not limited to documents or to evidence.

The "basic purpose" of Section 1512(c) is to prevent the interference with official proceedings in order to thwart their proper functioning, regardless of the particular means the defendant corruptly employs to achieve that interference. *See Begay*, 553 U.S. at 146; *Yates*, 574 U.S. at 544. That interference can be executed through evidence impairment, through manipulation of legal procedures, or through violent disruption like the assault on the Capitol on January 6. Accordingly, even if the Court relies on *Begay* and *Yates* to narrow the scope of Section 1512(c)(2) to conduct that bears some degree of "similarity" with the crimes listed in Section 1512(c)(1), it should reject petitioner's excessively constricted evidence impairment interpretation to ensure that the statute captures all forms of corrupt interference with an official proceeding aimed at thwarting its proper functioning.

* * *

Petitioner's proposed evidence impairment interpretation of Section 1512(c)(2) thus improperly excludes corrupt obstructive conduct that indisputably falls within the statute's scope. The Court should reject that unwarranted interpretation to hold that Section 1512(c)(2) applies to all conduct that corruptly interferes with official proceedings.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX – LIST OF *AMICI CURIAE*

Institutional affiliations are included for identification purposes only.

Marc Agnifilo – Marc Agnifilo served as an Assistant U.S. Attorney and as an Assistant District Attorney in the Manhattan District Attorney's Office. He is currently a partner at a private practice law firm where he focuses on complex criminal cases.

Ty Cobb – Ty Cobb served as Special Counsel to the President in the Trump Administration (2017-2018); Senior Trial Counsel to Independent Counsel Judge Arlin Adams (1995); and Assistant U.S. Attorney for the District of Maryland (1980-1986).

George Conway – George T. Conway III serves as Board President, Society for the Rule of Law; and he principally authored the brief for respondent opposing immunity in Clinton v. Jones, 520 U.S. 681 (1997).

John Farmer – John J. Farmer Jr. served as New Jersey Attorney General, appointed by Governor Christine Todd Whitman (1999-2002); Chief Counsel to Governor Whitman (1997-1999); Deputy Chief Counsel to Governor Whitman (1996-1997); Assistant U.S. Attorney for the District of New Jersey in the George H.W. Bush.

Phil Lacovara – Philip Allen Lacovara served as Deputy Solicitor General in the Nixon Administration (1972-1973); Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office (1973-1974); and drafted the brief for the United States and presented argument in United States v. Nixon, 418 U.S. 683 (1974).

John McKay – John McKay served as U.S. Attorney for the Western District of Washington in the George W. Bush Administration (2001-2007).

Richard Painter – Richard Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School and was formerly the Associate Counsel to the President where he served as the chief White House ethics lawyer.

Fern Smith – Fern M. Smith served as Judge of the U.S. District Court for the Northern District of California, appointed by President Reagan (1988-2005); and as Director of the Federal Judicial Center (1999-2003).

Laurence H. Tribe – Laurence H. Tribe is the Carl M. Loeb University Professor of Constitutional Law Emeritus at Harvard University and the former Director of the Office of Access to Justice in the U.S. Justice Department.

William F. Weld – William F. Weld served as Governor of Massachusetts (1991-1997); U.S. Assistant Attorney General for the Criminal Division in the Reagan Administration (1986-1988); and U.S. Attorney for the District of Massachusetts in the Reagan Administration (1981-1986).

Shan Wu – Shan Wu served as Counsel to Attorney General Janet Reno from 1998 until 2000 and as an Assistant United States Attorney in Washington, D.C. from 1990 until 2001.