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JOSEPH W. FISCHER, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 23-5572  
 )  
 UNITED STATES, )  
 )  
 Respondent. )

Tuesday, April 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

JEFFREY T. GREEN, ESQUIRE, Bethesda, Maryland; on behalf of the Petitioner.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 23-5572, Fischer  
5 versus United States.

6 Mr. Green.

7 ORAL ARGUMENT OF JEFFREY T. GREEN

8 ON BEHALF OF THE PETITIONER

9 MR. GREEN: Mr. Chief Justice, and may  
10 it please the Court:

11 Congress enacted 1512(c) in 2002 in  
12 the wake of the large-scale destruction of  
13 Enron's financial documents. The statute  
14 therefore prohibits the impairment of the  
15 integrity or availability of -- of information  
16 and evidence to be used in a proceeding. In  
17 2002, Congress hedged a little bit and added  
18 Section (c)(2) to cover other forms of  
19 impairment, the known unknowns, so to speak. It  
20 was, after all, the dawn of the Information Age.

21 Until the January 6th prosecutions,  
22 Section 1512(c)(2), the "otherwise" provision,  
23 had never been used to prosecute anything other  
24 than evidence tampering, and that was for good  
25 reason. This Court has said that "otherwise,"

1     when used in a criminal statute, means to do  
2     similar conduct in a different way.

3             The government would have you ignore  
4     all that or disregard all that and instead  
5     convert (c)(2) from a catchall provision into a  
6     dragnet. One of the things that that dragnet  
7     would cover is Section (c)(1). Our construction  
8     of the statute at least leaves (c)(1) and (c)(2)  
9     to do some independent work.

10            The January 6th prosecutions  
11     demonstrate that there are a host of felony and  
12     misdemeanor crimes that cover the alleged  
13     conduct. A Sarbanes-Oxley-based, Enron-driven  
14     evidence-tampering statute is not one of them.

15            I welcome the Court's questions.

16            JUSTICE THOMAS: Mr. Green, how do we  
17     determine what these two provisions have in  
18     common? Do we look after the "otherwise" or  
19     before and why?

20            MR. GREEN: We -- you look at before,  
21     Justice Thomas, and you look at the kinds of  
22     manner in which documents and records are to be  
23     impaired, and then you look after to see what  
24     the effect is. But I would submit that the  
25     effect is the same, right, in order to cause the

1     impairment of the integrity of the evidence  
2     that's to be used in a proceeding or to prevent  
3     its availability.

4                 So we look back and we look forward.

5                 JUSTICE THOMAS:   Wouldn't it be just  
6     as easy to look at (c) -- at the (c)(2) and then  
7     ask what it has in common with (c)(1) and use  
8     (c)(2)'s provisions as a basis for that  
9     similarity?

10                MR. GREEN:   No, because (c)(2) speaks  
11     to the effect of the actions that the  
12     "otherwise" clause covers.   So, in other words,  
13     we look at (c)(1) and we see that Congress is  
14     concerned about documents and records and other  
15     objects and things that are done to those to  
16     impair the integrity of those, and the effect of  
17     that is to obstruct.   And so (c)(2) omits that  
18     object and verb section.

19                JUSTICE THOMAS:   But you could just as  
20     easily say that Congress is really concerned  
21     about things that obstruct, influence, or impede  
22     official proceedings.   And that's (c)(2).   So  
23     why isn't that the basis for the similarity?

24                MR. GREEN:   Well, because of the --  
25     the presence of the "otherwise" provision.   So

1 "otherwise," as I mentioned -- and "otherwise,"  
2 this Court has said, means to do similar conduct  
3 in a different way. So what we've got here is  
4 -- is the impairment of evidence being done in a  
5 different way.

6 JUSTICE SOTOMAYOR: I'm sorry. I -- I  
7 thought was, yes, doing it in a different way,  
8 so let me give you an example. There is a sign  
9 on the theater, you will be kicked out of the  
10 theater if you photograph or record the actors  
11 or otherwise disrupt the performance.

12 If you start yelling, I think no one  
13 would question that you can be expected to be  
14 kicked out under this policy, even though  
15 yelling has nothing to do with photograph or  
16 recording. The object that the verb is looking  
17 at, the verbs are looking at is the obstruction.  
18 It's not the manner in which you obstruct; it's  
19 the fact that you've obstructed.

20 Isn't that the structure of this  
21 provision?

22 MR. GREEN: It is, Your Honor. It --  
23 it's -- it's in part the structure of the  
24 provision. But what -- what your hypothetical  
25 omits is that there is a specific reticulation,

1 I guess it's called, of all of the different  
2 sorts of things that might be done to evidence  
3 to begin with.

4 JUSTICE SOTOMAYOR: Except that --

5 MR. GREEN: There's a long --

6 JUSTICE SOTOMAYOR: -- what's  
7 fascinating about (1), which is not about (2),  
8 is that (1) doesn't require you to have actually  
9 impeded the proceeding. (1) requires you to  
10 have that intent, but you don't actually have to  
11 accomplish the intent. (2) requires you to  
12 accomplish the intent. And so that's a very  
13 different articulation of what the object of (2)  
14 is. The object of (2) is the actual disruption  
15 of the proceeding.

16 MR. GREEN: Well, I would respectfully  
17 disagree because both --

18 JUSTICE SOTOMAYOR: Well, why? Look  
19 at the language.

20 MR. GREEN: Yeah.

21 JUSTICE SOTOMAYOR: "Alters, destroys,  
22 mutilates, or conceals a record." I do that in  
23 my home, and I do it anticipating that it might  
24 be needed. All I have to do is have the intent  
25 to impair. By that very language, I don't have



1 to have an actual proceeding that I've impaired.

2 On (2), you need an actual proceeding  
3 to impair.

4 MR. GREEN: I guess I'm -- I guess I'm  
5 a little confused, Justice Sotomayor, because,  
6 as I read this, I would think that the  
7 government would say that any attempt at (1) is  
8 also covered by the statute, and I'm not sure  
9 that I would disagree. So I'm not -- I don't  
10 think that there has to be an actual impairment.

11 JUSTICE SOTOMAYOR: No, I do think,  
12 under (1), you don't need an actual impairment.  
13 Under (2), you do.

14 MR. GREEN: Okay. Well, we're --

15 JUSTICE SOTOMAYOR: If you read it --

16 MR. GREEN: But -- but (2) says that  
17 we're attempt --

18 JUSTICE SOTOMAYOR: -- the -- the verb  
19 requires you to actually obstruct the proceeding  
20 in (2). Nowhere in (1) do you actually have to  
21 obstruct.

22 MR. GREEN: Well, in -- in -- in (2),  
23 you -- you only have to attempt to do the things  
24 that -- that are in (2).

25 JUSTICE SOTOMAYOR: No, otherwise

1 obstructs or impedes or attempts to, yes.

2 MR. GREEN: Yes.

3 JUSTICE BARRETT: Counsel, can I ask  
4 you whether -- let's -- let's imagine that we  
5 agree with you. On remand, do you agree that  
6 the government could take a shot at proving that  
7 your client actually did try to interfere with  
8 or, under (c)(1) -- or, actually, no -- sorry --  
9 under (c)(2), obstruct evidence because he was  
10 trying to obstruct the arrival of the  
11 certificates arriving to the vice president's  
12 desk for counting? So there would be an  
13 evidence impairment theory?

14 MR. GREEN: I'm quite sure that my  
15 friend would take a shot, Your Honor, but I  
16 would -- I would -- I would say no, and the  
17 reason why is that this statute prohibits  
18 operation on -- on specific evidence in some  
19 way, shape, or form.

20 Attempting to stop a vote count or  
21 something like that is a very different act than  
22 actually changing a document or altering a  
23 document or creating a fake new document.

24 JUSTICE BARRETT: Well, he's  
25 obstructing evidence in my hypothetical. I

1 mean, he's not actually altering the -- the vote  
2 certificates, which is why I corrected myself  
3 and said under (c)(2). I mean, would that be  
4 different than someone, say, in a trial or a  
5 criminal proceeding trying to prevent evidence  
6 that was going to be introduced in the  
7 proceeding from making it there? So I'm -- I'm  
8 imagining him acting on the certificates, not  
9 the act of counting them.

10 MR. GREEN: Well, again, I think they  
11 can try it, but I -- I don't think that we're  
12 talking about trying to impair just anything  
13 other than the evidence itself. We're trying to  
14 obstruct a proceeding, and there's questions  
15 about what "proceeding" means here, as Your  
16 Honor doubtless knows.

17 But what the government would  
18 essentially be doing, as you noted, is  
19 converting what they've charged in (c)(2) to a  
20 (c)(1) type of crime.

21 JUSTICE BARRETT: Well, no, no, no,  
22 no, no. (c)(2) -- I mean, as I -- maybe I'm  
23 misunderstanding your argument, but I thought  
24 your argument was that (c)(2) picks up other  
25 things, but they just have to be

1 evidence-related.

2           So, in the hypothetical I'm giving  
3 you, it's evidence-related because it's focused  
4 on the certificates, but it's obstruct, obstruct  
5 or impede, say, the certificates arriving to the  
6 vice president's desk insofar as the goal was to  
7 shut down the proceeding and therefore interfere  
8 with the evidence reaching the vice president.

9           MR. GREEN: I -- I still -- that's  
10 closer. It's definitely closer. But, if you  
11 zoom out and look at all of 1512 in order to  
12 understand what kinds of impairment we're  
13 talking about, we are talking about or Congress  
14 is prohibiting the kinds of impairments that  
15 actually change documents that actually affect  
16 their integrity.

17           If it's just impeding or delaying,  
18 we'd submit actually that that is not part of  
19 1512(c). Delays are mentioned in five other  
20 parts of 1512 but not in (c).

21           JUSTICE JACKSON: But -- but, Mr. --  
22 Mr. Green, if -- if -- if Justice Barrett is  
23 wrong, then what work is (c)(2) doing? I mean,  
24 it seems like you've just now re-articulated  
25 only the theory of (c)(1) and you're saying that

1     you have to make it into (c)(1) in order to  
2     be -- you know, to have this statute apply.

3                 So can -- can you help me at least  
4     understand under your theory what additional  
5     thing does (c)(2) offer?

6                 MR. GREEN:  Let's -- let's look at the  
7     verbs of (c)(1), which are alter, destroy,  
8     mutilate, and conceal, and let's think about  
9     their antonyms.  So one instead of destroy would  
10    be actually to create.  So one could use some  
11    sophisticated computer program, we've heard an  
12    awful lot about AI, and we've heard about the  
13    possibility of deepfake photographs.

14                So I -- I think you would violate  
15    (c)(2) if you created a photograph that  
16    established your alibi in -- in some extremely  
17    sophisticated way that would get it admitted  
18    into evidence or make it -- or you submit it for  
19    evidence would probably be where the crime  
20    occurs.

21                JUSTICE JACKSON:  So you're saying  
22    there are other things other than particularly  
23    altering, destroying, mutilating, or concealing,  
24    but it has to be limited to a record?

25                MR. GREEN:  Not necessarily, because,

1 I mean, one other example if I might, Your  
2 Honor, would be not to conceal but to disclose.  
3 So, if I disclosed a witness list in a large  
4 multi-defendant drug trial, my purpose in doing  
5 that, though I haven't altered the document,  
6 would be to intimidate the witnesses or prevent  
7 their attendance. That on our submission would  
8 also violate (c)(2).

9 JUSTICE JACKSON: All right. Can I  
10 just ask you one other question just so that I  
11 can fully understand your theory? You keep  
12 using the term "evidence." And that does not  
13 appear in the statute. The statute (c)(1) says  
14 record, document, or other object.

15 Now I appreciate that, you know,  
16 evidence can be such a thing, but you can  
17 imagine a world in which those two are  
18 different. So where does evidence come in in  
19 your theory and why is it there?

20 MR. GREEN: Well, the -- the -- the  
21 title of the statute refers to tampering with  
22 witnesses, victims, and informants. But along  
23 with wictims -- excuse me, witnesses, victims,  
24 and informants comes evidence that they provide,  
25 whether in the form of testimony or whether in

1 the form of documents.

2 JUSTICE JACKSON: No, I understand.

3 But the statute, the provision we're talking  
4 about here, does not use the term "evidence."

5 And so -- and instead or in addition, it uses  
6 the term "official proceeding," which is  
7 elsewhere defined not in terms of, you know,  
8 court proceedings or investigations. It's just  
9 a proceeding, you know, before Congress.

10 So is it your -- is it your argument  
11 that the only thing that this provision covers  
12 is something that is tantamount to evidence in  
13 an investigation or trial?

14 MR. GREEN: It is, Your Honor. And  
15 we're not limiting it -- our -- our position  
16 does not limit it to documents or records. I  
17 would submit (c)(1), which we say carries into  
18 (c)(2) through the "otherwise" clause, when it  
19 says "other object," is pretty broad.

20 And it need not be -- as -- as -- as  
21 1512(f) provides, it need -- it need not be  
22 admissible to you, (f) -- yeah, (f), it need not  
23 be admissible. So it -- it could cover things  
24 like electronic records. It could cover  
25 communications. It could cover emails. It

1     could cover all kinds of things that we think  
2     get used by fact finders in a formally convened  
3     hearing.

4             JUSTICE KAGAN:  I mean, just to take  
5     you --

6             JUSTICE ALITO:  What about --

7             JUSTICE KAGAN:  -- back to --

8             JUSTICE ALITO:  Just a quick question.  
9     What about the Second Circuit's decision in U.S.  
10    versus Reich, where what was involved was not  
11    evidence, it was a forged court order.  Would  
12    that fall within (c)(2)?

13            MR. GREEN:  Yes, we -- we think that  
14    does fall within (c)(2).  And I think anything  
15    that is falsified in this operative way that is  
16    used to obstruct a proceeding would -- would be  
17    covered by (c)(2).

18            JUSTICE ALITO:  All right.  Thank you.

19            MR. GREEN:  Yes.

20            JUSTICE KAGAN:  And -- and just to  
21    take you back to the -- the question that  
22    Justice Thomas started you with, I mean, there,  
23    it seems to me there are two choices here, and  
24    you could read this as "otherwise obstructs a  
25    proceeding" or "otherwise spoils evidence."



1           And you're using it to say "otherwise  
2   spoils evidence" with, you know, "spoils" being  
3   all those verbs. But it doesn't say that. It  
4   says "otherwise obstructs a proceeding." There  
5   are plenty of ways to write the statute that you  
6   want to write. You could just say otherwise  
7   affects the integrity or availability of  
8   evidence in an official proceeding. You could  
9   combine official proceeding with evidence in  
10   other ways, you know, one with -- you could  
11   replicate the mens rea that (c)(1) has.

12           I mean, there are ways in which  
13   (c)(2), multiple ways in which the drafters of  
14   (c)(2) could have made it clear that they  
15   intended (c)(2) to also operate only in the  
16   sphere of evidence spoliation. But it doesn't  
17   do that. All it says is "otherwise obstructs,  
18   influences, or impedes."

19           MR. GREEN: It -- it -- certainly, the  
20   statute could be written more precisely. Any  
21   statute could be written more precisely.

22           JUSTICE KAGAN: Well, it's not a  
23   question of precisely. The question is what is  
24   this "otherwise" -- this is what Justice Thomas  
25   said at the beginning -- what is this

1 "otherwise" taking from (c)(1)? Of course,  
2 there's commonality that's involved in an  
3 "otherwise." There's both commonality and  
4 difference.

5 But what is the commonality that  
6 (c)(2) is drawing from (c)(1)? It tells you  
7 what the commonality is. The commonality is  
8 that the things that fall into (c)(2) also have  
9 to obstruct, influence, or impede. But what  
10 (c)(2) does not say, really does not say, is  
11 everything in (c)(2) also has to spoil evidence.

12 MR. GREEN: But this Court has said  
13 that "otherwise" in a criminal statute means  
14 similar conduct, so we --

15 JUSTICE KAGAN: Similar conduct,  
16 obstruction of a proceeding, different ways of  
17 carrying out that similar conduct, which is  
18 obstruction of a proceeding.

19 The statute tells you what the similar  
20 conduct is right on its face.

21 MR. GREEN: Well, respectfully,  
22 Justice Kagan, the statute tells you what the  
23 effect is. The conduct that's specified in  
24 (c)(1) is altering, destroying, mutilating, or  
25 concealing a document, record, or other object.

1           And so a drafter of this statute could  
2   easily omit something like that and would omit  
3   something like that for the sake of economy and  
4   also to hedge because we know that what comes  
5   before might not be exactly the same as after,  
6   so we're not going to repeat what we said there,  
7   but we're going to use a connector like  
8   "otherwise" to -- to demonstrate that we're  
9   talking about similar conduct.

10           And I would submit, Your Honor, that  
11   if you look at (c)(2) alone, that is -- please.

12           JUSTICE KAGAN: What's your best case  
13   for this, like, going backward and trying to  
14   find language that does not appear in the  
15   "otherwise" provision and trying to incorporate  
16   it into the "otherwise" provision?

17           MR. GREEN: Well, I think Begay is our  
18   best case for sure.

19           JUSTICE KAGAN: And that's not --

20           MR. GREEN: Antes also.

21           JUSTICE KAGAN: -- a very good  
22   advertisement, I would think. I mean, what  
23   Begay does is exactly that. So you have a very  
24   good case there. And it was a complete failure.  
25   You know, Begay said we look back at this other

1 -- at this thing that Congress, you know, did  
2 not use in the "otherwise" provision and we  
3 derive various things from it and we put it in.  
4 It was purposeful, violent, and aggressive. And  
5 then, a few years later, we said, where did that  
6 come from? We made it up, and we get rid of the  
7 whole thing.

8               So that's not a great advertisement  
9 for rewriting a statute to -- to -- you know, to  
10 take an "otherwise" provision that says what it  
11 says and turn it into an "otherwise" provision  
12 that says something else.

13              MR. GREEN: We would submit that Begay  
14 was abrogated on other grounds, Your Honor. And  
15 the other grounds are the Court -- the members  
16 of the Court could not decide between an  
17 assessment of the types of things that came  
18 before "otherwise" versus the level of risk.

19              And when that began to play out in  
20 complicated cases like Chambers and many others  
21 involving escape from a halfway house, it became  
22 a -- the Court said, an untenable proposition to  
23 figure out what a potential harm to another  
24 person might be looking at what came before.  
25 That doesn't --

1 JUSTICE ALITO: Well --

2 MR. GREEN: That doesn't --

3 JUSTICE ALITO: I'm sorry, Mr. -- Mr.  
4 Green. Go ahead, finish your sentence.

5 MR. GREEN: Yeah, but that doesn't --  
6 that doesn't mean that the Court's holding about  
7 how to construe a statute and its significant  
8 holding about "otherwise" was abrogated in and  
9 of itself as a result of the cases that came  
10 after Begay.

11 JUSTICE ALITO: Well, I -- I'm not a  
12 fan of Begay. Some of us perceived at that time  
13 that there were problems, different problems,  
14 with what the Court did there.

15 But I -- I think there's a point in  
16 the colloquy that you've been having. The  
17 specific types of conduct that are enumerated in  
18 (1), alter, destroy, mutilate, conceal a record,  
19 document, et cetera, et cetera, have two things  
20 in common. One, they all involve documents or  
21 objects, and they also all involve the  
22 impairment of the object's integrity or  
23 availability for use in an official proceeding.

24 So the similarity could be either of  
25 those things. And so I -- I think that you may

1 be biting off more than you can chew by  
2 suggesting, if you are indeed suggesting, that  
3 the "otherwise" clause can only be read the way  
4 you read it. One might say it can certainly be  
5 read the way the government reads it, and that  
6 might even be the more straightforward reading.

7 But it is also possible to read a  
8 clause like this more narrowly, and Judge Katsas  
9 provided an example of that in his opinion. If  
10 you have a statute that says anyone who kills or  
11 injures or assaults someone or otherwise causes  
12 serious injury, commits a crime, you wouldn't  
13 think that that applies to defamation.

14 So it could be read your way. So then  
15 I think you have to go on to some other  
16 arguments and explain why your reading is better  
17 than the government's reading.

18 MR. GREEN: Certainly. And I would  
19 submit, Your Honor, that there are plenty of  
20 other reasons why our reading is the better  
21 reason. And I'm not going to contest or bite  
22 off more than I can chew and say that the  
23 government's reading of (c)(2) is implausible.

24 We think it's unsound, but it's  
25 unsound for the additional reasons that if one

1 zooms out and looks at what the prohibited  
2 conduct is in 1512 generally, we are talking  
3 about interference or operation on forms of  
4 evidence and testimony that -- that obstruct a  
5 proceeding. That's what 12 is all about  
6 generally.

7 And I would submit, Your Honor, too  
8 that as the briefing indicates, ejusdem generis  
9 and -- and noscitur a sociis, those two  
10 venerated Latin canons, also operate in our  
11 favor here, as well as the broader context of  
12 Chapter 73 and -- and -- and Section 15. All of  
13 these things are about doing things that -- that  
14 -- that obstruct a proceeding. And 1512 and  
15 1512(c) zero in on witnesses and evidence.

16 JUSTICE ALITO: Well, you have other  
17 arguments. You have surplusage arguments. You  
18 have arguments about the breadth of the  
19 government's reading of the provision. Do you  
20 want to say anything about those?

21 MR. GREEN: Right. So, with respect  
22 to surplusage, Your Honor, I would refer to  
23 Judge Katsas's opinion, as you did, in  
24 particular in the Joint Appendix at page 88,  
25 which lists out all of the different provisions

1 in Section 1512. Fifteen of the 21 would be  
2 subsumed by the government's reading of (c)(2).

3 The government's reading of (c)(2),  
4 I'd remind the Court, is so broad that it would  
5 cover anyone who does something understanding  
6 that what they are doing is wrong in some way  
7 that in any way influence, impedes or obstructs  
8 an official proceeding of any type.

9 JUSTICE KAGAN: Well, Mr. Green, I  
10 think that this --

11 MR. GREEN: Maybe limited by federal.

12 JUSTICE KAGAN: -- this -- this --  
13 there's a good case that this provision --  
14 everybody knew it was going to be superfluous  
15 because it was a provision that was meant to  
16 function as a backstop. It was a later-enacted  
17 provision. Congress had all these statutes all  
18 over the place. It had just gone through Enron.

19 What Enron convinced them of was that  
20 there were -- there were gaps in these statutes.  
21 And they tried to fill the gaps. They tried to  
22 fill the particular gap that they found out  
23 about in Enron. And then they said, you know,  
24 this is a lesson to us. There are probably  
25 other gaps in this statute.



1                   But they didn't know exactly what  
2     those gaps were. So they said, let's have a  
3     backstop provision. And this is their backstop  
4     provision. And, of course, in that circumstance  
5     -- I mean, superfluity is very often a good  
6     argument when it comes to statutory  
7     interpretation, but it's not a good argument  
8     when Congress is specifically devising a  
9     backstop provision to fill gaps that might  
10    exist -- they don't exactly know how they exist,  
11    but they think that they probably do exist -- in  
12    a preexisting statutory scheme. And that's what  
13    this provision is intended to do.

14                  MR. GREEN: Respectfully, Your Honor,  
15    a close reading of Yates, both the majority  
16    opinion and the dissenting opinion, demonstrates  
17    that this Court thought that 1519 was the  
18    backstop. That was supposed to be the omnibus  
19    provision. And the Court was fighting over what  
20    the meaning of "tangible object" was in 1519.  
21    But that was meant to plug the hole that  
22    Congress --

23                  JUSTICE SOTOMAYOR: Counsel, I -- I  
24    have such a hard time with the superfluity  
25    argument because this entire obstruction section

1 is superfluity. There isn't one provision you  
2 can point to -- you just said it, you can point  
3 to 1512 and you have 1519, which says  
4 destruction of evidence. How are they  
5 different? They're really not. You can point  
6 to any series -- any provision and point to  
7 superfluity in this -- in this -- in this  
8 section, 1512 and otherwise.

9 So we go back to Justice Kagan's  
10 position, which is what you don't have is a  
11 freestanding "otherwise obstructs, influence, or  
12 impedes any official proceeding." I don't see  
13 why that's not the backstop that Congress would  
14 have intended and it's the language it used.

15 MR. GREEN: Well, it's an awfully odd  
16 place to put it, isn't it? I mean, in a  
17 subsection of a subsection in the middle back of  
18 the statute, to -- to include a provision --

19 JUSTICE SOTOMAYOR: Well, I mean, as  
20 you -- as --

21 MR. GREEN: -- that seemingly --

22 JUSTICE SOTOMAYOR: -- but there's  
23 nothing about --

24 MR. GREEN: -- takes over 15 of the 21  
25 other provisions.

1 JUSTICE SOTOMAYOR: The one thing that  
2 Justice Kagan pointed to, which is clear, they  
3 wanted to cover every base, and they didn't do  
4 it in a logical way, but they managed to cover  
5 every base.

6 MR. GREEN: Well, I think you can  
7 reconcile -- I mean, again, that's what the  
8 Court said about 1519 in -- in Yates. And I  
9 don't understand how it is that the government  
10 can come before you today and say we need yet  
11 another catchall, yet another omnibus crime that  
12 will sweep in all kinds of others. We didn't  
13 get what we wanted in Section 15, so now we'll  
14 go to 1512(c)(2) and see if we can expand that  
15 in this way to cover something that it has never  
16 covered before.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 MR. GREEN: And --

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: We've never had a  
25 situation before where there's been a situation

1     like this with people attempting to stop a  
2     proceeding violently. So I'm not sure what a  
3     lack of history proves.

4                 MR. GREEN: Well, I'm -- I'm not sure  
5     that that's true. I'd point to the Hatfield  
6     Courthouse problems in -- in -- in -- in  
7     Portland, Oregon, but let's -- let's also look  
8     at what the Court has said in so many different  
9     cases, in -- in Dubin, in Bond, in Yates, in  
10    Kelly, all of these cases --

11                JUSTICE SOTOMAYOR: But, there, there  
12    was a difference in the use of words. Here,  
13    "otherwise obstructs, influences, or impede,"  
14    you might have a problem with breadth. And the  
15    government can address that. But it's not  
16    unclear what those words mean.

17                MR. GREEN: But the government has no  
18    way to address its problem with breadth because  
19    --

20                JUSTICE SOTOMAYOR: Well, we can let  
21    them answer that.

22                MR. GREEN: Okay.

23                CHIEF JUSTICE ROBERTS: Justice Kagan?  
24                                 Justice Gorsuch?  
25                                 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: If it were just  
2 the language in (c)(2) and so said "whoever  
3 corruptly obstructs, influences or impedes,"  
4 (c)(2), without the word "otherwise," if that  
5 were the whole provision, do you acknowledge  
6 that the language would then be applied properly  
7 to a situation like this?

8 MR. GREEN: Unfortunately, no, and the  
9 reason for that is that, again, applying all the  
10 other canons and -- and applying the whole-text  
11 canon and zooming out and looking at the -- at  
12 1512, we would submit that (c)(2) should still  
13 be read in the way we have suggested that it be  
14 read, as something that is an evidence  
15 impairment statute.

16 I think also, as I mentioned, the  
17 Latin canons, the surplusage problem that (c)(2)  
18 would create, all of those would still obtain if  
19 it sat there by itself without the "otherwise."  
20 The "otherwise" is the icing on the cake.

21 And, finally, Justice Kavanaugh, I  
22 would mention that, as I mentioned to Justice  
23 Barrett, there's an --

24 JUSTICE KAVANAUGH: Well, let me  
25 just -- if you didn't have (c)(1), just had

1 (c)(2), without the "otherwise." I'm not sure I  
2 was clear on that.

3 MR. GREEN: Oh, okay. Well, in that  
4 case, I think it gets even harder. But I would  
5 still say, if we look at what 1512 is about and  
6 if we look at this Court's cases on broad,  
7 implausible -- plausible but broad readings of  
8 criminal statutes not being what the Court  
9 adopts when there's an available narrow reading  
10 because Congress can fix that, we would still  
11 say that (c)(2) doesn't perform the massive  
12 dragnet function that the government submits.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: Yeah, I have a  
17 question about the phrase in (c)(1), the  
18 specific intent. Do you agree it's specific  
19 intent with the intent to impair the object's  
20 integrity? Okay.

21 What is your view about how that  
22 parenthetical applies to (c)(2), if at all?  
23 Like, do you think that that intent requirement  
24 carries over to (c)(2)?

25 MR. GREEN: The corruptly intent

1 requirement?

2 JUSTICE BARRETT: Not -- not  
3 corruptly. The "with the intent to impair the  
4 object's integrity or availability for use in an  
5 official proceeding"?

6 MR. GREEN: Yes, we do, Your Honor.

7 JUSTICE BARRETT: So it carries over.  
8 How --

9 MR. GREEN: And we'd say that's the  
10 object of -- of -- of the overarching mens rea.

11 JUSTICE BARRETT: But how can that be?  
12 I mean, it seems like that, you know, (c)(2)  
13 would read awfully oddly then. It would be  
14 "otherwise obstructs, influences, or impedes any  
15 official proceeding with the intent to impair  
16 the object's integrity or availability for use  
17 in an official proceeding"? That would be your  
18 position of how it would read?

19 MR. GREEN: Well, I think that's  
20 right. I mean, it's -- it's awkward. I mean,  
21 there's no doubt that it's an awkward statute,  
22 but, if you -- if you do the operation that I  
23 talked about earlier, which is we're just going  
24 to use "otherwise" to replace the verbs and the  
25 nouns in (c)(1), then -- then the statute makes

1 perfect sense.

2 With respect to intent, I mean, I  
3 think Your Honor makes an excellent point, which  
4 is that this intent is a specific form of  
5 intent. The "corruptly," which has been  
6 construed to be the mens rea up there, is not  
7 different than -- at least on this reading, is  
8 not -- is not -- or on the accepted reading by  
9 the D.C. Circuit right now is not different  
10 than -- than some form of specific intent.

11 JUSTICE BARRETT: So "corruptly" is  
12 redundant?

13 MR. GREEN: It seems like it's getting  
14 to be, yes.

15 JUSTICE BARRETT: Okay. Thank you.

16 MR. GREEN: That's true. And our  
17 submission is that "corruptly" should mean  
18 something different. So should "proceeding."  
19 That's how you marry 1512 with 1519.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Jackson?

22 JUSTICE JACKSON: So I'm just still  
23 wondering if your theory about this provision  
24 might be too narrow in a sense because you've  
25 got evidence going and spoliation in a sense.



1     What I -- what I'm trying to work out in my mind  
2     is whether you would still have a decent  
3     argument if this 1512 language is read to  
4     prohibit the corrupt tampering with things that  
5     are used to conduct an official proceeding with  
6     the intent of undermining the integrity of the  
7     thing or access to the thing and thereby  
8     obstructing the proceeding.

9             It's not just evidence. It's an  
10    official proceeding. (c)(1) is an example of,  
11    you know, the corrupt tampering with certain  
12    things. And (c)(2) broadens it out a bit. It's  
13    not just documents and records.

14            What do you think about that?

15            MR. GREEN: Well, I think that's --  
16    that's a correct reading, Your Honor. I mean,  
17    we -- as -- as -- as 1512(f) demonstrates, it  
18    doesn't -- you know, 1512(f) we would submit  
19    actually supports our position because it says  
20    the evidence need not be admissible or free of a  
21    privilege claim.

22            Now what would that mean about what  
23    the statute is addressing if it's not evidence?  
24    But (c)(2) has been applied, and -- and  
25    occasionally (c)(1) has been applied.

1 JUSTICE JACKSON: In a non-evidentiary  
2 way?

3 MR. GREEN: Yeah, to -- to -- to  
4 things that could become evidence, to the  
5 efforts to shape someone's grand jury testimony  
6 --

7 JUSTICE JACKSON: All right. Let me  
8 --

9 MR. GREEN: -- to answers to  
10 interrogatories.

11 JUSTICE JACKSON: -- let me ask you  
12 about the question that Justice Barrett asked  
13 before.

14 You know, you -- you suggested that it  
15 has to be to the document, but -- in other  
16 words, the -- the -- the activity has to be  
17 actually to the document, but I don't know why  
18 that's the case under (c)(2).

19 Justice Alito says, well, one of the  
20 commonalities between (c)(1) and (c)(2) could be  
21 the impairment of the object's integrity or  
22 availability.

23 Justice Barrett posits a scenario in  
24 which you have someone who is impairing the  
25 availability by doing something to prevent the

1 object from getting to the proceeding. Why  
2 wouldn't that count under (c)(2)?

3 So this is -- this is, you know,  
4 preventing Congress from counting the electoral  
5 votes, for example. Let's say it's being done.  
6 She says it's in an envelope going to the -- the  
7 vice president's desk and someone does something  
8 to impair or prevent that from happening.

9 Why isn't that what (c)(2) could  
10 cover?

11 MR. GREEN: Well, first, it's not  
12 affecting the integrity of the document, Your  
13 Honor, or -- or the -- or --

14 JUSTICE JACKSON: Availability is also  
15 in the statute.

16 MR. GREEN: Availability it says too,  
17 but, as I mentioned earlier, simply delaying the  
18 arrival of evidence at the courthouse --

19 JUSTICE JACKSON: No, not delay.  
20 Let's say the person steals the envelope and  
21 takes it away.

22 MR. GREEN: Then it gets harder, I  
23 agree. If they steal the envelope, they take it  
24 away, they rip up, all of those things, which is  
25 certainly not what happened here, and it's not

1 in the indictment, the -- the ballots or the --  
2 the vote count is not even in the indictment.

3 JUSTICE JACKSON: Well, we -- we  
4 wouldn't have to decide that.

5 MR. GREEN: Right.

6 JUSTICE JACKSON: We could send it  
7 back if we clarified that that is what the  
8 statute means. I'm trying to understand if you  
9 agree that that's what the statute could mean.

10 MR. GREEN: No, I don't agree that  
11 that's what the statute could mean.

12 JUSTICE JACKSON: Why not?

13 MR. GREEN: The reason is that if you  
14 look at 1512, it is about a direct effect or, in  
15 some senses, an indirect effect but in a limited  
16 way on evidence that's to be used in a  
17 proceeding, right, and -- and "proceeding," as I  
18 mentioned earlier --

19 JUSTICE JACKSON: So as to limit its  
20 availability. So what --

21 MR. GREEN: So as to limit --

22 JUSTICE JACKSON: -- I'm suggesting  
23 is, in (c)(2), if you're doing something to  
24 limit its -- to -- to limit its availability,  
25 why doesn't it count?

1                   MR. GREEN: Because we're limiting the  
2                   availability of its use by a fact finder in a  
3                   proceeding. Again, that's the way to marry  
4                   1519, which covers all kinds of investigations  
5                   and all kinds of other events, with 1512.

6                   1512 is talking about evidence that's  
7                   going to a formal convocation, some kind of  
8                   hearing, before the Congress or before any other  
9                   body --

10                  JUSTICE JACKSON: Thank you.

11                  MR. GREEN: -- as the language says.  
12                  Thank you.

13                  CHIEF JUSTICE ROBERTS: Thank you,  
14                  counsel.

15                  MR. GREEN: Thank you.

16                  CHIEF JUSTICE ROBERTS: General  
17                  Prelogar.

18                  ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

19                               ON BEHALF OF THE RESPONDENT

20                  GENERAL PRELOGAR: Mr. Chief Justice,  
21                  and may it please the Court:

22                       On January 6th, 2021, a violent mob  
23                       stormed the United States Capitol and disrupted  
24                       the peaceful transition of power. Many crimes  
25                       occurred that day, but in plain English, the

1     fundamental wrong committed by many of the  
2     rioters, including Petitioner, was a deliberate  
3     attempt to stop the joint session of Congress  
4     from certifying the results of the election.  
5     That is, they obstructed Congress's work in that  
6     official proceeding.

7             The government accordingly charged  
8     Petitioner with violating Section 1512(c)(2), an  
9     obstruction offense that directly reads onto his  
10    conduct.

11            The case as it comes to this Court  
12    presents a straightforward question of statutory  
13    interpretation: Did Petitioner obstruct,  
14    influence, or impede the joint session of  
15    Congress?

16            The answer is equally straightforward.  
17    Yes, he obstructed that official proceeding.  
18    The terms of the statute unambiguously encompass  
19    his conduct. Petitioner doesn't really argue  
20    that his actions fall outside the plain meaning  
21    of what it is to obstruct. Instead, he asks  
22    this Court to impose an atextual limit on the  
23    actus reus.

24            In his view, because Section  
25    1512(c)(1) covers tampering with documents and

1 other physical evidence, the separate  
2 prohibition in Section 1512(c)(2) should be  
3 limited to acts of evidence impairment.

4 But that limit has no basis in the  
5 text or tools of construction. His reading  
6 hinges on the word "otherwise," but that word  
7 means in a different manner, not in the same  
8 manner. And the two prohibitions in Section  
9 1512(c)(2) aren't unified items on a list where  
10 you could apply associated words canons.  
11 They're separate provisions. They have their  
12 own sets of verbs and their own nouns. They  
13 each independently prohibit attempts, which  
14 would be duplication that makes no sense on  
15 Petitioner's reading. And Congress included a  
16 distinct mental state requirement in (c)(1) that  
17 it chose not to repeat in (c)(2).

18 Section 1512(c)(2) by its terms is not  
19 limited to evidence impairment. Instead, it's a  
20 classic catchall. (c)(1) covers specified acts  
21 that obstruct an official proceeding, and (c)(2)  
22 covers all other acts that obstruct an official  
23 proceeding in a different manner. The Court  
24 should say so and allow this case to proceed to  
25 trial.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: General, there have  
3 been many violent protests that have interfered  
4 with proceedings. Has the government applied  
5 this provision to other protests in the past,  
6 and has this been the government's position  
7 throughout the lifespan of this statute?

8 GENERAL PRELOGAR: It has certainly  
9 been the government's position since the  
10 enactment of 1512(c)(2) that it covers the  
11 myriad forms of obstructing an official  
12 proceeding and that it's not limited to some  
13 kind of evidence impairment gloss.

14 JUSTICE THOMAS: Have you -- so have  
15 you -- have you enforced it in that manner?

16 GENERAL PRELOGAR: We have enforced it  
17 in a variety of prosecutions that don't focus on  
18 evidence tampering.

19 Now I can't give you an example of  
20 enforcing it in a situation where people have  
21 violently stormed a building in order to prevent  
22 an official proceeding, a specified one, from  
23 occurring with all of the elements like intent  
24 to obstruct, knowledge of the proceeding, having  
25 the corruptly mens rea, but that's just because



1 I'm not aware of that circumstance ever  
2 happening prior to January 6th.

3 But just to give you flavor you a  
4 flavor of some of the other circumstances where  
5 we have prosecuted under this provision, for  
6 example, there are situations where we've  
7 brought (c)(2) charges because someone tipped  
8 off the subject of an investigation to the grand  
9 jury's hearings.

10 There was another case where someone  
11 tipped off about the identity of an undercover  
12 law enforcement officer. And in those  
13 situations, there's no specific evidence, no,  
14 you know, concrete testimony or physical  
15 evidence that the conduct is interfering with.  
16 Instead, it's more general obstruction of the  
17 proceeding.

18 JUSTICE THOMAS: So --

19 GENERAL PRELOGAR: Justice Alito  
20 mentioned the Reich case as well, and that's  
21 another one where it was a forged court order  
22 that prompted the litigant to dismiss a mandamus  
23 petition, but that didn't have anything to do  
24 with the evidence that was going to be  
25 considered in that proceeding.

1 JUSTICE THOMAS: So what role does  
2 (c)(1) play in your analysis?

3 GENERAL PRELOGAR: So we understand  
4 1512(c) to split up the world of obstructive  
5 conduct of an official proceeding into the  
6 (c)(1) offense and into (c)(2). (c)(1) covers  
7 everything it enumerates. It's the acts of  
8 altering, concealing, destroying records,  
9 documents, or other objects. And then (c)(2)  
10 would only pick up conduct that obstructs an  
11 official proceeding in a different way.

12 So there's no duplication or  
13 superfluity on our reading. Instead, Congress  
14 was taking this universe and dividing it up into  
15 the two separate offenses.

16 And I think that's actually a virtue  
17 of our reading as compared to Petitioner's  
18 because I have not heard him articulate anything  
19 that would fall within (c)(1) that wouldn't also  
20 come within (c)(2). So, on his reading, (c)(2)  
21 really does just swallow (c)(1) whole.

22 JUSTICE THOMAS: Well, I mean, in the  
23 way you're reading it, (c)(1) -- (c)(2) almost  
24 exists in isolation, certainly not affected by  
25 (c)(1).

1                   GENERAL PRELOGAR: We don't deny at  
2 all that there is a relationship between the two  
3 provisions, Justice Thomas, but it's --

4                   JUSTICE THOMAS: What is that  
5 relationship?

6                   GENERAL PRELOGAR: And the  
7 relationship is the one Congress specified in  
8 the text. It's what follows the word  
9 "otherwise." That is the relevant degree of  
10 similarity. What both (c)(1) and (c)(2) have in  
11 common is that they -- they aim at conduct that  
12 obstructs an official proceeding. (c)(1) does  
13 so in one way, tampering with records and  
14 documents; (c)(2) does so with respect to all  
15 other conduct that in a different manner does  
16 that.

17                   And I think that this has to be the  
18 road the Court goes down to look at what  
19 Congress actually prescribed with respect to  
20 similarity because, in contrast, if you take up  
21 Petitioner's invitation to come up with some  
22 atextual gloss from (c)(1) to port over into  
23 (c)(2), I don't understand what the Court could  
24 look at to guide its determination of exactly  
25 what the relevant similarity would be.

1 CHIEF JUSTICE ROBERTS: General, I'm  
2 sure you've had a chance to read our opinion  
3 released Friday in the Bissonnette case. It was  
4 unanimous. It was very short.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: But it  
7 explained how to apply the doctrine of ejusdem  
8 generis, and it -- what it said is you had  
9 specific terms, a more general catchall, if you  
10 will, term at the end, and it said that the  
11 general phrase is controlled and defined by  
12 reference to the terms that precede it.

13 The "otherwise" phrase is more  
14 general, and the terms that precede it are  
15 "alters, destroys, mutilates, or conceals a  
16 record and document."

17 And applying the doctrine as was set  
18 forth in that opinion, the specific terms  
19 "alters, destroy, and mutilate" carry forward  
20 into (2), and the terms "record, document, or  
21 other object" carry -- carry forward into (2) as  
22 well. And it seems to me that they, as I said,  
23 sort of control and define the -- the more  
24 general term.

25 GENERAL PRELOGAR: So, Mr. Chief

1 Justice, I think that the statute --

2 CHIEF JUSTICE ROBERTS: And I'm sorry.

3 Just to interrupt --

4 GENERAL PRELOGAR: Oh, yes.

5 CHIEF JUSTICE ROBERTS: -- so I could  
6 put out exactly what -- and -- and the  
7 "otherwise" means in other ways. It alters,  
8 destroys, and mutilates record, document, or  
9 other objects that impede the investigation and  
10 otherwise, in other ways, accomplishes the same  
11 result.

12 GENERAL PRELOGAR: So I think the  
13 problem with that approach with respect to 1512  
14 is that it doesn't look like the typical kind of  
15 statutory phrase that consists of a parallel  
16 list of nouns or a parallel list of verbs where  
17 the Court has applied ejusdem generis or the  
18 noscitur canon.

19 You know, these are separate  
20 prohibitions that have their own complex,  
21 non-parallel internal structure. And I think,  
22 actually, the best evidence that it's hard to  
23 figure out how you would divine a degree of  
24 similarity between them just based on the word  
25 "otherwise" is that there are multiple competing

1     interpretations at issue in this case.  You  
2     know, Justice Alito touched on them, and they're  
3     reflected in the competing interpretations  
4     between Judge Katsas on the D.C. Circuit and  
5     Judge Nichols on the district court.

6                 CHIEF JUSTICE ROBERTS:  Competing  
7     interpretations of what, which phrase?

8                 GENERAL PRELOGAR:  So -- and it  
9     relates to exactly the -- the question you asked  
10    me, which is that Judge Nichols thought that  
11    (c)(1) should limit (c)(2), and he looked at it  
12    and said, well, the relevant thing about (c)(1)  
13    is it deals with records, documents, and other  
14    objects, and so that means (c)(2) should be  
15    limited only to other acts that impair physical  
16    evidence.

17                Meanwhile, Judge Katsas looked at the  
18    specific intent requirement in (c)(1), to take  
19    action that impairs the availability or use of  
20    the evidence, and he divined a broader gloss to  
21    put on (c)(2) and said --

22                CHIEF JUSTICE ROBERTS:  Well, but  
23    that's simply saying --

24                GENERAL PRELOGAR:  -- it should be  
25    other impairment of all other evidence.

1 CHIEF JUSTICE ROBERTS: Well, they're  
2 just applying the same doctrine to different  
3 aspects of it. And I think you do that as -- as  
4 well. What are the common elements? Alters,  
5 destroy, and mutilates a record or document.  
6 You have the first few, what you're doing, and  
7 what you're doing it to.

8 And you -- and you apply both of those  
9 in -- as it said in Bissonnette, controlling and  
10 defining the term that follows so that it should  
11 involve something that's capable of alteration,  
12 destruction, and mutilation and with respect to  
13 a record or a document. That -- that's how you  
14 -- that's why --

15 GENERAL PRELOGAR: So I actually don't  
16 even understand --

17 CHIEF JUSTICE ROBERTS: -- when you --  
18 when you apply that doctrine, again, as we did  
19 on Friday, it -- it responds to some of the  
20 concerns that have been raised about how broad  
21 (c)(2) is. You can't just tack it on and say  
22 look at it as if it's standing alone because  
23 it's not.

24 GENERAL PRELOGAR: So let me respond  
25 to that in two ways. I do want to have a chance

1 to address any concerns about breadth. But the  
2 more fundamental point, I think, is that I don't  
3 even understand Petitioner to be suggesting that  
4 you can mix and match the verbs and the nouns  
5 from (c)(1) and (c)(2) in this way.

6 Judge Nichols had a more limited view  
7 that -- that (c)(2) exclusively focuses on  
8 physical objects. It wouldn't apply to things  
9 like testimony because of the limitation that he  
10 gleaned from (c)(1). Judge Katsas, I think,  
11 maybe in line with your question, would  
12 interpret it more broadly.

13 And the -- the basic point as a  
14 textual matter is that there is nothing in the  
15 text of (c)(2) itself to disclose what the  
16 relevant similarity from (c)(1) ought to be.  
17 Instead, we think the relevant similarity is  
18 obstruction of an official proceeding because  
19 that's the language Congress chose.

20 JUSTICE GORSUCH: General --

21 JUSTICE KAVANAUGH: The --

22 JUSTICE GORSUCH: -- if that's -- if  
23 that's -- if that's the case, what work does  
24 "otherwise" do on your theory? Because I think  
25 I -- I might, as I'm hearing you, think that



1 "whoever corruptly obstructs, influences, or  
2 impedes any official proceeding or attempts to  
3 do so" stands alone. And the "otherwise" -- I'm  
4 not hearing what work it does. Can you explain  
5 to me what work it does on your view?

6 GENERAL PRELOGAR: Yes. So the work  
7 that "otherwise" does is to set up the  
8 relationship between (c)(1) and (c)(2) and make  
9 clear that (c)(2) does not cover the conduct  
10 that's encompassed by (c)(1).

11 Now I acknowledge that there would  
12 have been --

13 JUSTICE GORSUCH: Beyond that --  
14 beyond that, beyond saying, okay, (c)(1) does  
15 some things and the whole rest of the universe  
16 of obstructing, impeding, or -- or influencing  
17 is conducted by (c)(2). Is that a fair summary  
18 of your view?

19 GENERAL PRELOGAR: Yes, but there was  
20 a good reason for Congress to do it this way.

21 JUSTICE GORSUCH: No, I understand. I  
22 just --

23 GENERAL PRELOGAR: It traces to the  
24 statutory history.

25 JUSTICE GORSUCH: Yeah, I understand

1       that.  I -- I -- I --

2                   GENERAL PRELOGAR:  And I would just  
3       say that --

4                   JUSTICE GORSUCH:  If I might, so -- so  
5       what -- what does that mean for the breadth of  
6       this statute?  Would a sit-in that disrupts a  
7       trial or access to a federal courthouse qualify?  
8       Would a heckler in today's audience qualify, or  
9       at the state of the union address?  Would  
10      pulling a fire alarm before a vote qualify for  
11      20 years in federal prison?

12                  GENERAL PRELOGAR:  There are multiple  
13      elements of the statute that I think might not  
14      be satisfied by those hypotheticals, and it  
15      relates to the point I was going to make to the  
16      Chief Justice about the breadth of this statute.

17                  The -- the kind of built-in  
18      limitations or the things that I think would  
19      potentially suggest that many of those things  
20      wouldn't be something the government could  
21      charge or prove as 1512(c)(2) beyond a  
22      reasonable doubt would include the fact that the  
23      actus reus does require obstruction, which we  
24      understand to be a meaningful interference.  So  
25      that means that if you have some minor

1 disruption or delay or some minimal outburst --

2 JUSTICE GORSUCH: Okay. So -- so --

3 GENERAL PRELOGAR: -- we don't think  
4 it falls within the actus reus to begin with.

5 JUSTICE GORSUCH: -- my -- my  
6 outbursts require the Court to -- to reconvene  
7 after -- after the proceeding has been brought  
8 back into line, or the -- the pulling of the  
9 fire alarm, the vote has to be rescheduled, or  
10 the protest outside of a courthouse makes it  
11 inaccessible for a period of time.

12 Are those all federal felonies subject  
13 to 20 years in prison?

14 GENERAL PRELOGAR: So, with some of  
15 them, it would be necessary to show nexus. So,  
16 with respect to the protest --

17 JUSTICE GORSUCH: Assume -- assume --

18 GENERAL PRELOGAR: -- outside the  
19 courthouse --

20 JUSTICE GORSUCH: -- I can -- I think  
21 -- I think I've shown --

22 GENERAL PRELOGAR: -- we'd have to  
23 show that, yes, they were aiming at the  
24 proceeding.

25 JUSTICE GORSUCH: Yeah, they were

1     trying to stop the proceeding.

2                 GENERAL PRELOGAR:   Yes.   And then we'd  
3     also have to be able to prove that they acted  
4     corruptly, and this sets a stringent mens rea.  
5     It's not even just the mere intent to obstruct.  
6     We have to show that also, but we have to show  
7     that they had corrupt intent in acting in that  
8     way, and particularly --

9                 JUSTICE GORSUCH:   We went around that  
10    tree yesterday.

11                GENERAL PRELOGAR:   I -- I know.   I --  
12    I -- I heard the argument yesterday, but I guess  
13    what I would say is, to the extent that your  
14    hypotheticals are pressing on the idea of a  
15    peaceful protest, even one that's quite  
16    disruptive, it's not clear to me that the  
17    government would be able to show that each --

18                JUSTICE GORSUCH:   So a mostly peaceful  
19    protest --

20                GENERAL PRELOGAR:   -- of those  
21    protestors had corrupt intent.

22                JUSTICE GORSUCH:   -- that actually  
23    obstructs and impedes an -- an official  
24    proceeding for an indefinite period would not be  
25    covered?

1                   GENERAL PRELOGAR: Not necessarily.

2       We would just have to have the evidence of  
3       intent, and that's a high bar we argue.

4                   JUSTICE GORSUCH: Oh, no, they -- I --  
5       I'm --

6                   GENERAL PRELOGAR: Right.

7                   JUSTICE GORSUCH: They intend to do  
8       it, all right.

9                   GENERAL PRELOGAR: Yes. If they  
10       intend to obstruct and we're able to show that  
11       they knew that was wrongful conduct with  
12       consciousness of wrongdoing, then, yes, that's a  
13       1512(c)(2) offense and then we would charge  
14       that.

15                   JUSTICE KAVANAUGH: What does  
16       "corruptly" add in your view?

17                   GENERAL PRELOGAR: So "corruptly" adds  
18       the requirement that the defendant's conduct be  
19       wrongful and committed with consciousness of  
20       wrongdoing. And this traces to the Court's  
21       decision in Arthur Andersen, where the Court  
22       said this is a term with deep historical roots  
23       with a settled meaning and that it connotes not  
24       just knowledge of your actions, which is, you  
25       know, the intent to obstruct in this case, but

1 further requires that it be done corruptly.

2           And just to give you a more concrete  
3 example of how this has played out in the  
4 January 6th prosecutions, I'd point to the jury  
5 instruction in the Robertson case, which we  
6 refer to and quote in part on page 44 of our  
7 brief. There, the jury was instructed that in  
8 order to show the defendant acted corruptly, the  
9 jury had to -- to conclude that he had an  
10 unlawful purpose or used unlawful means or both  
11 and that he had consciousness of wrongdoing.

12           So I think that that is an  
13 encapsulation of what the jury is asked to  
14 decide on top of the mere intent to obstruct.

15           JUSTICE ALITO: General, let me give  
16 you a -- a specific example which picks up but  
17 provides a little bit more detail with respect  
18 to one of the -- the examples that Justice  
19 Gorsuch provided.

20           So we've had a number of protests in  
21 the courtroom. Let's say that today, while  
22 you're arguing or Mr. Green is arguing, five  
23 people get up, one after the other, and they  
24 shout either "Keep the January 6th  
25 insurrectionists in jail" or "Free the January

1 6th patriots." And as a result of this, our  
2 police officers have to remove them forcibly  
3 from the courtroom and let's say we have to  
4 delay -- it delays the proceeding for five  
5 minutes.

6 And I know that experienced advocates  
7 like you and Mr. Green are not going to be  
8 flustered by that, but, you know, in another  
9 case, an advocate might lose his or her train of  
10 thought and not provide the best argument.

11 So would that be a violation of  
12 1512(c)(2)?

13 GENERAL PRELOGAR: I think it would be  
14 difficult for the government to prove that.

15 JUSTICE ALITO: Why?

16 GENERAL PRELOGAR: At the outset, we  
17 don't think that 1512(c)(2) picks up minimal, de  
18 minimis, minor interferences. We think that the  
19 term "obstruct" on its face connotes a  
20 meaningful interference with a proceeding that  
21 actually blocks --

22 JUSTICE ALITO: Well, it doesn't say  
23 -- I'm sorry. (c)(2) does not refer just to  
24 obstruct. It says "obstructs, influences, or  
25 impedes." Impedes is something less than

1 obstructs.

2           GENERAL PRELOGAR: I think that this  
3 is a verb phrase where iteration was obviously  
4 afoot.

5           JUSTICE ALITO: Well, okay. But the  
6 plain meaning --

7           GENERAL PRELOGAR: And "impedes" is  
8 also thought of as --

9           JUSTICE ALITO: You're -- you're  
10 preaching the plain meaning interpretation of  
11 this provision. The -- the plain meaning of  
12 "impede" in Webster's is "to interfere with or  
13 get in the way of the progress of, to hold up."

14           In the OED, it is "to retard in  
15 progress or action by putting obstacles in the  
16 way." So it doesn't require obstruction. It  
17 requires the causing of delay.

18           GENERAL PRELOGAR: And if this Court  
19 --

20           JUSTICE ALITO: So, again, why  
21 wouldn't that fall within -- now you can say,  
22 well, we're not going to prosecute that. And,  
23 indeed, for all the protests that have occurred  
24 in this Court, the Justice Department has not  
25 charged any serious offenses, and I don't think



1 any one of those protestors has been sentenced  
2 to even one day in prison. But why isn't that a  
3 violation of 512 -- of 1512(c)(2)?

4 GENERAL PRELOGAR: We read the actus  
5 reus more narrowly. Now perhaps you could look  
6 at some of the broader dictionary definitions  
7 and adopt a broader understanding of the actus  
8 reus. Still, there would be the backstop of  
9 needing to prove corrupt intent. I think that's  
10 a stringent mens rea, and then the concept of --

11 JUSTICE ALITO: Well, that's not a  
12 corrupt intent? They -- they -- it's wrongful.  
13 Do you think it's not wrongful to --

14 GENERAL PRELOGAR: I could imagine  
15 defendants in that scenario suggesting that they  
16 thought they had some protected free speech  
17 right to protest. They might say that they  
18 weren't conscious of the fact that they weren't  
19 allowed to make that kind of brief protest in  
20 the Court.

21 And I think it's in a fundamentally  
22 different posture than if they had stormed into  
23 this courtroom, overrun the Supreme Court  
24 police, required the Justices and other  
25 participants to plea -- flee for their safety

1 and done so with clear evidence of intent to  
2 obstruct.

3 JUSTICE ALITO: Yes indeed,  
4 absolutely. What happened on January 6th was  
5 very, very serious, and I'm not equating this  
6 with that. But we need to find out what -- what  
7 are the outer reaches of this statute under your  
8 interpretation.

9 Let me give you another example.  
10 Yesterday protestors blocked the Golden Gate  
11 Bridge in San Francisco and disrupted traffic in  
12 San Francisco. What if something similar to  
13 that happened all around the Capitol so that  
14 members -- all the bridges from Virginia were  
15 blocked, and members from Virginia who needed to  
16 appear at a hearing couldn't get there or were  
17 delayed in getting there? Would that be a  
18 violation of this provision?

19 GENERAL PRELOGAR: It sounds to me  
20 like that wouldn't satisfy the proceeding  
21 element, nor the nexus requirement --

22 JUSTICE ALITO: Why would it not --

23 GENERAL PRELOGAR: -- and nexus --

24 JUSTICE ALITO: -- why would it not  
25 satisfy the proceeding? Let's say they want to

1 get to the Capitol to vote.

2 GENERAL PRELOGAR: Well, if we had  
3 clear --

4 JUSTICE ALITO: They want to get to  
5 the Capitol --

6 GENERAL PRELOGAR: -- if we had clear  
7 evidence that the purpose of the protestors who  
8 had set up the blockage somewhere, some distance  
9 away from the Court was because they had a  
10 specific proceeding in mind, maybe you have the  
11 proceeding.

12 But still, the Court has required a  
13 nexus, and that's been the requirement in cases  
14 like Marinello, Aguilar, and Arthur Andersen,  
15 where the Court has said it does real narrowing  
16 work because you have to show that the natural  
17 and probable effect of the action is to  
18 obstruct. There has to be a relationship in  
19 time, causation, and logic.

20 But, Justice Alito, the other thing I  
21 would say to this set of concerns is that there  
22 are other obstruction provisions, including in  
23 1503, 1505, the tax obstruction statute, 7212,  
24 that use this exact same formulation that the  
25 Court has characterized as an omnibus gloss and

1 never suggested could be subject to an evidence  
2 gloss.

3 So I don't think that to the extent  
4 you have concerns about those hypotheticals,  
5 your -- your question about what would happen in  
6 this courtroom could be covered by 1503.

7 JUSTICE JACKSON: But --

8 GENERAL PRELOGAR: And interpreting  
9 this statute ordinarily --

10 JUSTICE ALITO: Well, let --

11 JUSTICE JACKSON: -- what's --

12 GENERAL PRELOGAR: -- isn't going to  
13 cure that issue.

14 JUSTICE ALITO: Let me give you one --

15 CHIEF JUSTICE ROBERTS: Go ahead.

16 JUSTICE ALITO: One more example. An  
17 attorney is sanctioned under Rule 11 of the  
18 Federal Rules of Civil Procedure by filing  
19 pleadings, written motions, or other papers for  
20 the purpose of causing unnecessary delay or  
21 needlessly increasing the cost of litigation.

22 And in a particular case, the judge  
23 imposes article -- Rule 11 sanctions and says,  
24 this caused a lot of trouble. I can tell you  
25 it -- it -- it cost at least five work days with

1 -- for me personally, all of this unnecessary  
2 paper, and it delayed the progress of this  
3 litigation, so I'm imposing Rule 11 sanctions.

4 Why doesn't that fall within your  
5 interpretation of this provision?

6 GENERAL PRELOGAR: Congress created a  
7 specific safe harbor in 1515(c). It's reprinted  
8 at page 17A to the appendix of our brief that  
9 specifies that advocacy or legal representation  
10 that is conducted as part of a proceeding  
11 shouldn't be understood as obstruction.

12 So I think Congress was itself trying  
13 to draw some lines around participation in a  
14 proceeding on the one hand versus external  
15 forces that obstruct the proceeding on the other  
16 hand.

17 JUSTICE ALITO: It falls within -- but  
18 it falls --

19 JUSTICE JACKSON: But Congress --

20 JUSTICE ALITO: -- within the  
21 language, doesn't it?

22 JUSTICE JACKSON: Well, can --

23 JUSTICE KAGAN: What kind of evidence  
24 do you typically present in these January 6th  
25 cases to prove the "corruptly" element?

1                   GENERAL PRELOGAR: So the January 6th  
2     prosecutions require us to show first that the  
3     defendants had knowledge that Congress was  
4     meeting in the joint session on that day. We  
5     have to show that the defendant specifically  
6     intended to disrupt the joint proceeding.

7                   And then, with respect to using  
8     unlawful means with consciousness of wrongdoing,  
9     we have focused on things like the defendant's  
10    threats of violence, willingness to use violence  
11    here. We allege that Petitioner assaulted a  
12    police officer. We have focused on things like  
13    preparation for violence, bringing tactical gear  
14    or paramilitary equipment to the Capitol.

15                  And I want to emphasize, Justice  
16    Kagan, that this is a stringent mens rea  
17    requirement that has very much constrained the  
18    U.S. Attorney's Office. We've charged over  
19    1,350 defendants with crimes committed on  
20    January 6th, but we've only had -- only had the  
21    evidence of intent to bring charges against 350  
22    for a 1512(c)(2) violation.

23                  JUSTICE KAGAN: So how do you make  
24    that decision? How do you decide which  
25    defendants get charged under this statute as

1       opposed to not?

2                   GENERAL PRELOGAR:   The dividing line  
3       has hinged usually on the evidence we have of  
4       intent.   So we're looking for clear evidence  
5       that the defendant knew about the proceedings  
6       that were happening in the joint session in  
7       Congress that day, clear knowledge of the  
8       official proceeding.

9                   We've looked for evidence that the  
10      defendant specifically intended to -- to prevent  
11      Congress from certifying the vote and so used  
12      his actions to obstruct that proceeding.

13                  And then also, as I mentioned, the --  
14      the knowledge of wrongfulness or unlawful  
15      conduct can come about with respect to  
16      particular preparations that the defendants have  
17      made.

18                  And, you know, there are a number of  
19      cases where, even though we thought we had the  
20      evidence beyond a reasonable doubt, there have  
21      been acquittals because there was, you know,  
22      testimony that was credited that the defendant  
23      thought the proceedings were over and wasn't  
24      intending to obstruct, or one person thought and  
25      said he thought that law enforcement was waving

1 him into the building.

2 So even in situations where we think  
3 we have amassed the evidence, we still haven't  
4 always been able to sustain these convictions  
5 and it's because of the stringent mens rea.

6 JUSTICE JACKSON: General, can I ask  
7 you about your obstruction theory because you  
8 said that you see 1512(c) as dividing the world  
9 of obstruction and that the -- the nexus between  
10 (1) and (2) is the official proceeding and the  
11 obstruction of -- of an official proceeding.

12 I guess what I'm concerned about is  
13 how you then account for the rest of 1512 where  
14 "official proceeding" comes up over and over  
15 again and particular acts that one could view as  
16 obstructing the official proceeding, like  
17 killing or threatening or intimidating  
18 witnesses, is covered so that if we read (c)(2)  
19 to be obstructing an official proceeding, I  
20 don't -- I don't understand what happens to the  
21 rest of those provisions.

22 GENERAL PRELOGAR: So, to the extent  
23 you're pressing on the idea that there's  
24 surplusage, I -- I don't think that that's true.  
25 There is certainly overlap or duplication.



1 That's true on both of the readings in this  
2 case.

3 I think, in -- in part, it might even  
4 be more true on Petitioner's reading because he  
5 says that (c)(2) is likewise focused on all of  
6 the evidence impairment ways to obstruct,  
7 interfering with testimony, interfering with  
8 documents and so forth, and so that very same  
9 duplication is going to be present on his  
10 reading.

11 But, with respect to superfluity, our  
12 interpretation doesn't create any technical  
13 superfluity, and that's because each of those  
14 other provisions that you cited and -- and, in  
15 fact, each of the other provisions of the  
16 obstruction laws cover situations that  
17 1512(c)(2) wouldn't cover.

18 There are three principal  
19 distinctions. The first is that some of them  
20 have less than a corruptly mens rea. So, for  
21 many of the provisions, they can be violated in  
22 ways that wouldn't require the government to  
23 prove "corruptly," and it might mean that we  
24 could charge particular applications of those  
25 provisions under them and not under (c)(2).

1           The second thing is that some of the  
2 provisions sweep more broadly than an official  
3 proceeding. They apply in a wider range of  
4 circumstances. So that would enable us to  
5 charge in those situations where we can't  
6 actually prove the official proceeding element.

7           And then, third and finally, some of  
8 the provisions have a higher penalty  
9 specifically because they target more culpable  
10 conduct. And that's like 1512(a), the one you  
11 referenced about killing a witness. There the  
12 government would charge under that provision  
13 because it's subject to higher penalties than  
14 (c)(2).

15           JUSTICE JACKSON: All right, well --

16           CHIEF JUSTICE ROBERTS: General --

17           JUSTICE JACKSON: -- can I ask you,  
18 would the -- would the government necessarily  
19 lose in the sense that they would not be able to  
20 bring charges against some of the people that  
21 you have described with Justice Kagan if we  
22 looked at (c)(2) as being more limited, perhaps  
23 not all the way, to evidence, but related to  
24 conduct that prevents or obstructs an official  
25 proceeding insofar as it is directed to

1 preventing access to information or documents or  
2 records or things that the official proceeding  
3 would use?

4 I -- I explored with Mr. Green, and as  
5 -- as did Justice Barrett, the idea that, to the  
6 extent that there were people who knew that the  
7 votes were being counted that day and that's  
8 done in a, you know, documentary way in our  
9 system, their interfering by storming the  
10 Capitol might qualify under even an evidence or  
11 document interpretation of (c)(2). Does the  
12 government -- what does the government think  
13 about that?

14 GENERAL PRELOGAR: Yes, I think that  
15 if the Court articulated the standard that way,  
16 these would likely be viable charges. And as we  
17 note in the last footnote of our brief, we --  
18 we've preserved an argument that we could  
19 satisfy even an evidence-related understanding  
20 of (c)(2), in part because the very point of the  
21 conduct, when we have the intent evidence, was  
22 to prevent Congress from being able to count the  
23 votes, from being able to actually certify the  
24 results of the election.

25 Now, we'd obviously need to evaluate

1     whether these charges can go forward based on  
2     whatever this Court says. And I would very much  
3     caution the Court away from any holding that  
4     would require specific evidence by the  
5     government of, you know, precise electoral  
6     certificates or that kind of thing.

7                 Here, the -- the point of it would be  
8     that the -- those who came to the Capitol and  
9     engaged in this criminal conduct to displace  
10    Congress violently from -- from where it had to  
11    be to count those votes acted with an intent to  
12    impair Congress's ability to consider that  
13    evidence.

14                JUSTICE SOTOMAYOR: General, the  
15    district court and the dissent below had a  
16    different variation on the statute and how to  
17    read it. You were starting to explain that to  
18    the Chief.

19                Could you do it if we accepted the  
20    district court's view? I -- I presume that you  
21    could do it if we accepted the dissent below,  
22    correct?

23                GENERAL PRELOGAR: Yes. So I think --

24                JUSTICE SOTOMAYOR: But your whole  
25    response to Justice Ketanji -- to Justice

1 Jackson -- sorry -- to Justice Jackson is that  
2 it assumes the dissent's view?

3 GENERAL PRELOGAR: I thought that  
4 Justice Jackson was potentially proposing even a  
5 broader view, including focusing on the  
6 availability part and making clear that when the  
7 whole point is to prevent the proceeding,  
8 including the consideration of evidence in the  
9 proceeding, from happening, that could qualify.

10 JUSTICE SOTOMAYOR: Okay.

11 GENERAL PRELOGAR: I think it becomes  
12 potentially harder on the Judge Katsas view and  
13 especially harder on the Judge Nichols view.  
14 And that's precisely because Judge -- Judge  
15 Nichols seemed to think that to prove  
16 obstruction, it had to be limited to taking  
17 action with respect to the documents themselves.  
18 And that would be a difficult standard for us to  
19 satisfy.

20 JUSTICE SOTOMAYOR: You read our  
21 discussion on "corruptly" yesterday. It's  
22 clear. You've endorsed the Robertson view.

23 Could you tell me what you feel about  
24 the Walker view? Judge Walker being the part of  
25 the majority below. I -- I assume you know

1     that, but --

2                   GENERAL PRELOGAR:   Yes.   So Judge  
3     Walker articulated an idea that "corruptly" has  
4     to turn exclusively on the government being able  
5     to show that the defendant sought to secure an  
6     unlawful advantage for himself or someone else.

7                   We certainly agree that that's one way  
8     for the government to prove corrupt intent.  
9     It's a way that has traditionally been deployed  
10    in the tax context because the very theory of  
11    the case is that the Defendant is violating the  
12    tax laws or taking efforts to secure an unlawful  
13    advantage under the tax laws.

14                  But I think that it would be incorrect  
15    for the Court to suggest that that's the  
16    exclusive mechanism for the government to try to  
17    prove "corruptly."   You know, there are various  
18    other ways where we might have evidence of, as  
19    we think we do here, unlawful means, committed  
20    with consciousness of wrongdoing, and there's no  
21    basis in the common law or in how the term  
22    "corruptly" has long been understood to limit  
23    the government's ability to prove it only with  
24    that one specific way that Judge Walker pointed  
25    to.

1 JUSTICE SOTOMAYOR: The draw in this  
2 case appears to be the fear that reading the  
3 government's view of either yesterday's case or  
4 today on its plain terms would make it so broad  
5 that somehow that presents a problem. I think  
6 the judges below struggled with that by saying  
7 that gets addressed in the word "corruptly" and  
8 in the nexus requirement, which is the point  
9 you've made today.

10 But neither of those two issues were  
11 resolved below because that wasn't the question  
12 below, correct?

13 GENERAL PRELOGAR: That's right. The  
14 only issue that the D.C. Circuit resolved was  
15 the meaning of the actus reus.

16 JUSTICE SOTOMAYOR: And the only issue  
17 between us is whether we read the words -- how  
18 we read these words.

19 GENERAL PRELOGAR: That's right, but I  
20 don't want to lose sight of the fact, as your  
21 question touched on, that there are inherent  
22 constraints built into the other elements of the  
23 statute. The nexus constraint is a really  
24 critical one. It is the -- the paradigmatic  
25 constraint the Court pointed to, to ensure that

1 obstruction statutes don't sweep too broadly and  
2 scoop up every day conduct that might be  
3 happening out in the world.

4           It has to have that tight connection,  
5 the relationship and time causation or logic,  
6 with the official proceeding. And, of course,  
7 "corruptly," we think, sets a very high bar, as  
8 evidenced by the fact -- as I said to Justice  
9 Kagan, it's not like we can even prove it with  
10 respect to everyone who was in the riot at the  
11 Capitol on January 6th.

12           JUSTICE SOTOMAYOR: Thank you.

13           JUSTICE BARRETT: General, are you  
14 putting a violence requirement as an overlay on  
15 "obstruct, influence, impede"? And I'm -- I'm  
16 thinking of some of your answers to Justice  
17 Alito's hypotheticals. It seemed like you kept  
18 emphasizing the aspect of violence that was  
19 present on January 6th. So am -- am I  
20 understanding you to say there has to be some  
21 sort of violence or no?

22           GENERAL PRELOGAR: No, we don't think  
23 that's a requirement under the statute. I think  
24 it will clearly be easier for us to satisfy  
25 things like the "corruptly" mens rea when we can



1 point to action here, like assaulting a police  
2 officer, that is obviously wrongful, unlawful  
3 conduct, and everyone knows that that's a crime  
4 and you can know the do that.

5           What I was trying to say to Justice  
6 Alito is in situations where hypotheticals press  
7 on the idea that people are engaging in conduct  
8 that maybe they think is constitutionally  
9 protected, they might be wrong about that, there  
10 might not be a First Amendment right that they  
11 think they have, but that can demonstrate that  
12 they don't have the requisite consciousness of  
13 wrongdoing. That would mean we couldn't prove  
14 an obstruction charge.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17           I'm not quite sure I understood an  
18 answer you gave earlier about whether or not  
19 you've previously used (c)(2) in -- in this type  
20 of case. Have you done that before or not?

21           GENERAL PRELOGAR: We have charged  
22 (c)(2) in situations that don't involve evidence  
23 impairment, and the litigating position of the  
24 Department has long been that, as its plain  
25 language suggests, it covers myriad ways of

1 obstructing. I'm not aware of any other factual  
2 circumstance or event out in the world where we  
3 could have proved all of the elements of Section  
4 1512(c)(2) beyond the cases where we've brought  
5 those prosecutions. So --

6 CHIEF JUSTICE ROBERTS: Just so I  
7 understand, the prosecutions are limited in what  
8 way?

9 GENERAL PRELOGAR: They're limited to  
10 a requirement that the specific people had in  
11 mind an official proceeding. So that would take  
12 out the category of hypotheticals --

13 CHIEF JUSTICE ROBERTS: I see.

14 GENERAL PRELOGAR: -- where, you know,  
15 maybe you're protesting a branch of government,  
16 you're outside this Court, but you don't have  
17 this specific argument in mind. And then we  
18 would also need to show an intent to obstruct  
19 the proceeding and the nexus to the proceeding.  
20 And that can take care of, you know, situations  
21 where maybe someone's --

22 CHIEF JUSTICE ROBERTS: And you --  
23 you've done that --

24 GENERAL PRELOGAR: -- pulling a fire  
25 alarm in a different building but it's not --

1 CHIEF JUSTICE ROBERTS: Excuse me.

2 GENERAL PRELOGAR: -- where the  
3 proceeding happens.

4 CHIEF JUSTICE ROBERTS: In prior  
5 cases, you have applied (c)(2) in a situation,  
6 what, not involving specific documents?

7 GENERAL PRELOGAR: Correct. So things  
8 like tipping off someone to the existence of a  
9 grand jury investigation or the identity of an  
10 undercover officer or creating a fake court  
11 order that has nothing to do with the evidence  
12 in the case but is just prompting the litigant  
13 to dismiss a pending mandamus petition.

14 CHIEF JUSTICE ROBERTS: And -- and  
15 your friend's point -- your friend points to an  
16 Office of Legal Counsel opinion from 2019 that  
17 -- I haven't looked at it yet, but I will. It  
18 says it is consistent with Judge Katsas's  
19 opinion below.

20 GENERAL PRELOGAR: So that -- that  
21 advice that was offered to the Attorney General  
22 and never adopted as a formal position of the  
23 Department of Justice related to distinct issues  
24 that arose out of the special counsel  
25 investigation and distinct issues that involved

1 the Office of the Presidency.

2 I don't think that it would be right  
3 to suggest that the memo took any firm stand,  
4 although it did suggest that maybe 1512(c)(2)  
5 should be understood more narrowly, but it  
6 didn't -- but certainly didn't represent any  
7 formal adoption of that position, and that would  
8 have been inconsistent with how the government  
9 has always litigated under (c)(2).

10 CHIEF JUSTICE ROBERTS: What  
11 constitutes a formal acceptance of OLC opinions?

12 GENERAL PRELOGAR: I should probably  
13 know the answer to that one as a matter --

14 CHIEF JUSTICE ROBERTS: And I should  
15 too, but --

16 GENERAL PRELOGAR: -- of DOJ policy,  
17 but what I can tell you is the reason I'm saying  
18 that wasn't an official position is because it  
19 specifically said there's no need to go down the  
20 road of even deciding exactly what 1512(c)(2)  
21 covers because, even assuming that it covers the  
22 full range of obstructive conduct, the  
23 allegations, according to the memo, didn't  
24 satisfy the standard there. So it ultimately  
25 just punted on the issue and said it's not

1 necessary to engage with that issue further.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 JUSTICE THOMAS: General, the -- you  
5 said, as I understand it, that you have applied  
6 (c)(2) in previous cases?

7 GENERAL PRELOGAR: That's right.  
8 We've applied it in cases that do not fit the  
9 evidence impairment model that Petitioner is  
10 urging on the Court here. And it's not just  
11 (c)(2), Justice Thomas, but it's the omnibus  
12 clauses of 1503, 1505, 7212. You know, these  
13 are statutes that use the exact same verb  
14 phrases.

15 JUSTICE THOMAS: The -- I don't -- I'm  
16 not clear as to whether or not -- the specific  
17 instances in which you have used (c)(2) because  
18 you seem to think that (c) -- or argue that  
19 (c)(2) is a standalone provision almost.

20 GENERAL PRELOGAR: We think that it  
21 covers the full range of obstructive conduct  
22 that's not covered by (c)(1), of course, limited  
23 by the requirement of an official proceeding.

24 JUSTICE THOMAS: So, if -- if you have  
25 applied (c)(2), have there been previous, other

1     than the D.C. Circuit, previous courts of  
2     appeals that have looked at this?

3             GENERAL PRELOGAR:   Yes.   And the  
4     uniform consensus among the court of appeals has  
5     been that (c)(2) is not limited by this kind of  
6     evidence impairment gloss that Petitioner is  
7     asking the Court to read into the statute.  
8     There has been no court of appeals that's gone  
9     the other way.

10            We cite a string cite of them that  
11     have recognized looking at the plain language of  
12     this provision that it sweeps in the myriad  
13     forms of obstructive conduct.

14            JUSTICE THOMAS:   So much of your  
15     argument seems to hinge on this being fairly  
16     clear, the -- the -- your interpretation of  
17     (c)(2).

18            GENERAL PRELOGAR:   Yes, we certainly  
19     think we have the best of the plain text.

20            JUSTICE THOMAS:   Okay.   If we think --  
21     if -- if -- if I happen to think it's more  
22     ambiguous, what would your argument be?

23            GENERAL PRELOGAR:   So what I would say  
24     is I think that if you look at the terms in the  
25     statute themselves, that the plain language of

1 the statute supports our view, but it doesn't  
2 end there. And I was -- I have mentioned  
3 several times the other provisions in 1503,  
4 1505, but we think that's actually really  
5 relevant because Congress wasn't writing on a  
6 blank slate when it enacted 1512(c)(2).

7 It's not like it just thought of for  
8 the first time this verb phrase "obstructs,  
9 influences, or impedes." That wasn't taken out  
10 of the ether. That was a well-established term,  
11 verb phrase, in obstruction law drawn from those  
12 other statutes.

13 And as this Court has said many times,  
14 when Congress takes a phrase like that, it  
15 brings the old soil with it. And so Congress  
16 would have clearly known that the courts, this  
17 Court and lower courts, had interpreted the  
18 omnibus gloss in those other statutes to  
19 encompass the full range of obstructive conduct.

20 That's also consistent with all  
21 precedent, as I mentioned to you earlier, so I  
22 think, when you put it all together, there's no  
23 real ambiguity here. We -- we clearly have the  
24 best reading.

25 And the only other thing, the icing on

1 the cake if I could --

2 JUSTICE THOMAS: Yeah.

3 GENERAL PRELOGAR: -- is that if.

4 Actually, what Congress wanted to do was write a  
5 statute that focused only on evidence  
6 impairment, there was a really clear and obvious  
7 way to do it. Congress could have just tacked  
8 on a residual clause to (c)(1) that says "or  
9 otherwise impairs evidence."

10 It would not have used this oblique  
11 reference of "otherwise" and then used a term  
12 that had a well-settled meaning in obstruction  
13 law to sweep more broadly to try to convey that  
14 type of limited scope. It would just be  
15 nonsensical for Congress to draft that way  
16 because it would be so readily misunderstood.  
17 And, in fact, every lower court has understood  
18 Congress to have legislated more broadly here.

19 JUSTICE THOMAS: But that's beginning  
20 to sound more like a contextual argument, which  
21 you seem to eschew in this case.

22 GENERAL PRELOGAR: Well, no, I think,  
23 actually, that the statutory context and history  
24 does bear weight here, and we think that the  
25 roots of this language in those other



1 obstruction provisions help fortify or reinforce  
2 how the Court has always understood the plain  
3 language.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: You argue that there's  
6 a -- an exception for conduct that has only a  
7 minimal effect on official proceedings. Where  
8 does that come from in the text?

9 GENERAL PRELOGAR: That comes from the  
10 verb phrase "obstruct, influence, or impede,"  
11 which we think, if you look at dictionary  
12 definitions, conveys the type of action that  
13 blocks, hinders, makes difficult, persistently  
14 interferes with. You know, this is the kind of  
15 -- the verbs themselves, we think, inherently  
16 contain this limitation.

17 JUSTICE ALITO: There can't be a minor  
18 impediment?

19 GENERAL PRELOGAR: I think as a  
20 colloquial matter, yes, maybe, but, you know, we  
21 think that if you look at what Congress was  
22 trying to do as a whole, the lead term here is  
23 "obstruct." These were various ways of trying  
24 to capture the world of obstructive conduct, and  
25 I think that that adequately conveys the idea

1     that some kind of very minimal, de minimis  
2     interference doesn't qualify.

3                 JUSTICE ALITO: Well, it didn't stop  
4     with "obstruct." It added "impede."

5                 But what is the meaning of -- how  
6     would you define a -- a minimal interference? I  
7     suppose a jury would have to be charged on that.  
8     In order to prove that the person violated this  
9     provision, you must find that the person  
10    committed more than, caused, or intended to  
11    cause more than a minimal interference.

12                How do you define it?

13                GENERAL PRELOGAR: So I think, you  
14    know, to the extent that this would come up in  
15    actual prosecutions -- and I'm not aware of  
16    any -- but, if this came up, then I think that  
17    it would be the defense theory, it's possible  
18    that the Court could decide it as a matter of  
19    law if, in fact, it was so minimal it doesn't  
20    fit within the statutory terms themselves.

21                And I recognize that maybe there could  
22    be gray areas about the nature of the  
23    obstruction and whether it really satisfies the  
24    actus reus. I think that is properly a subject  
25    for the jury.

1 JUSTICE ALITO: All right. What about  
2 the example I gave about you the five protestors  
3 in the courtroom? Is that minimal?

4 GENERAL PRELOGAR: I think that sounds  
5 minimal to me. I mean, it sounds to me like, if  
6 it hasn't actually forced any substantial halt  
7 to these proceedings, it seems like that  
8 wouldn't pick up and track. But, you know, the  
9 same issue would arise under 1503, which  
10 likewise refers to "obstruct, influence, or  
11 impede."

12 JUSTICE ALITO: You haven't said  
13 anything about the surplusage arguments. Let me  
14 just ask you a question or two about that.

15 Suppose someone commits conduct that  
16 falls squarely within 1512(d), the person  
17 intentionally harasses another person and  
18 therefore dissuades that person from attending  
19 or testifying in an official proceeding. So  
20 you've got a square -- you know, a clear  
21 violation of 1512(d) punishable by no more than  
22 three years in prison.

23 But, when Congress added 1512(c)(2),  
24 which seems to cover exactly that conduct, it  
25 said: Well, the punishment shouldn't be -- you

1       could punish that person for up to 20 years.

2               GENERAL PRELOGAR:   There's a key  
3       difference between 1512(d) and 1512(c) in that  
4       (d) doesn't require the intent to obstruct.   And  
5       so the effect of the defendant's harassment  
6       action is to prevent the testimony or the  
7       production of the document.

8               But the government has not read that  
9       statute to require an actual intent to obstruct,  
10      which I think means there are certain factual  
11      scenarios where the government might be able to  
12      prove a 1512(d) offense without satisfying  
13      (c)(2).   But I do want to be responsive to the  
14      broader concern that there's something anomalous  
15      about the 20-year penalty here.

16              Let me say at the outset that no  
17      matter which statute the -- the government  
18      charges under, with respect to all of the  
19      relevant obstruction statutes here, they would  
20      be funneled through the same sentencing  
21      guideline.   So the charging decision wouldn't  
22      make a difference with respect to the sentencing  
23      range.

24              And the concern you have with the  
25      hypothetical arises equally on Petitioner's

1 reading because so too everything that would be  
2 covered in 1512(d) falls within his evidence  
3 impairment limitation. So I don't think the  
4 existence of a statutory max when there's no  
5 mandatory minimum should drive intuitions about  
6 how to interpret this provision.

7 JUSTICE ALITO: Well, I'm not sure  
8 that's the correct interpretation of -- of  
9 subsection (d). How about 1512(b), which also  
10 has a 20-year penalty, but it seems to be  
11 completely subsumed by (c)(2).

12 GENERAL PRELOGAR: I think there is a  
13 lot of overlap between (b) and (c). I don't  
14 deny that. Again, that would be true on either  
15 reading because (b) is paradigmatic witness  
16 tampering. So, even on Petitioner's  
17 understanding of the statute, there would be  
18 equal duplication there.

19 What I would say is there's no actual  
20 superfluity because there are ways of violating  
21 (b) that wouldn't fall within our understanding  
22 of (c)(2), including acting in a misleading  
23 manner towards someone, which wouldn't  
24 necessarily satisfy a corrupt intent definition.

25 JUSTICE ALITO: Really? You think you

1     could knowingly threaten or corruptly  
2     persuade -- corruptly mislead someone? I don't  
3     understand that argument.

4                 GENERAL PRELOGAR: So my recollection  
5     is that there are multiple different means of  
6     carrying out that offense. Of course, something  
7     like threatening or corruptly persuading, that's  
8     the kind of duplication I was referring to  
9     earlier.

10                But another way you can violate (b) is  
11     through intentionally misleading someone. That  
12     wouldn't necessarily require corrupt intent.

13                JUSTICE ALITO: Okay. Thank you.

14                CHIEF JUSTICE ROBERTS: Justice  
15     Sotomayor?

16                JUSTICE ALITO: Oh, sorry. One more.

17                CHIEF JUSTICE ROBERTS: Sorry.

18                JUSTICE ALITO: One more question. I  
19     was struck by the -- the contrast between your  
20     argument here that the Court should read in a  
21     minimal exception with the argument that you  
22     made earlier this term in Muldrow versus City of  
23     St. Louis, where the question was whether an  
24     adverse employment action has to be significant  
25     or not.

1                   And you said no, it doesn't have to be  
2     significant because, "The text likewise admits  
3     of no distinction between discrimination that  
4     results in a significant or insignificant  
5     disadvantage."

6                   So, in Muldrow, you told us no, don't  
7     read in an atextual requirement of significance,  
8     but, here, you seem to be arguing yes, you've  
9     got to read in an atextual requirement of  
10    something that's more than minimal.

11                  GENERAL PRELOGAR: No, that is not our  
12    argument here. We are grounding this in the  
13    text. So we're not suggesting that there's a  
14    basic de minimis principle that applies  
15    throughout all the various legal statutes that  
16    are out there, not anything like that.

17                  Instead, we ground this in a  
18    particular understanding of what it means to  
19    obstruct and what that word conveys.

20                  JUSTICE ALITO: Thank you.

21                  CHIEF JUSTICE ROBERTS: Justice  
22    Sotomayor?

23                  JUSTICE SOTOMAYOR: I know the Reich  
24    case because I decided it. However, the tip  
25    cases, are they in your briefs?

1                   GENERAL PRELOGAR: We cite Ahrensfield.  
2     That's the case where a subject of a grand jury  
3     investigation was tipped off about the existence  
4     of the investigation, but there was no, you  
5     know, kind of material impact or -- or clear  
6     evidence of -- of impairment of the evidence or  
7     availability of testimony or physical documents.

8                   And there are a number of cases in  
9     that line, including -- I don't think we  
10    specifically cited -- but it includes the  
11    disclosing of the identity of an undercover  
12    officer.

13                  JUSTICE SOTOMAYOR: Where do I find  
14    those?

15                  GENERAL PRELOGAR: We would be happy  
16    to supply additional citations if you're looking  
17    for them. I believe that the D.C. Circuit  
18    decision as well cited a range of (c)(2) cases  
19    and made clear that they didn't cover evidence  
20    impairment.

21                  JUSTICE SOTOMAYOR: Thank you.

22                  CHIEF JUSTICE ROBERTS: Justice Kagan?

23                  JUSTICE KAGAN: Mr. Green referred a  
24    few times to 1519 and basically said, well,  
25    that's supposed to be the catchall provision,



1 the omnibus provision. You know, why are you  
2 asking 1512 to do the same thing that 1519 is  
3 supposed to do? So that's one question I have  
4 for you.

5 And the other question I have is just  
6 you've referred a number of times to other  
7 omnibus provisions, 1503, 1505 -- what's the tax  
8 one? Seventy?

9 GENERAL PRELOGAR: 7212. 26 U.S.C.  
10 7212.

11 JUSTICE KAGAN: If -- if we go down  
12 Mr. Green's road in terms of importing other  
13 limits from other places in the statute, are any  
14 of those likely to be challenged in the same  
15 kind of way, or are they written sufficiently  
16 differently so that we wouldn't have to worry  
17 about that?

18 GENERAL PRELOGAR: So let me take the  
19 questions in order.

20 With respect to Petitioner's reliance  
21 on 1519 as the catchall here, I understood the  
22 Court's decision in Yates to say precisely the  
23 opposite. In fact, Yates drew a direct  
24 comparison between 1519 on the one hand, which  
25 it said was a more narrow obstruction provision

1 based on some of the contextual clues there, and  
2 1512(c)(1) on the other hand, which has the  
3 phrase "record, document, or other object," and  
4 said, well, that's the broad obstruction  
5 provision. That's the one that's intended to be  
6 codified in this broader prohibition that's  
7 aimed at official proceedings, and that (c)(1)  
8 language is actually quite broader and would  
9 scoop up the entire world of physical objects,  
10 in contrast to the narrowing interpretation the  
11 Court accepted in Yates.

12 So I don't think the idea that 1519  
13 was the broad catchall can in any way be squared  
14 with what that statute says or how this Court  
15 interpreted it in Yates. And, instead, I think  
16 that the -- the example to draw from Yates or  
17 the lesson to learn from it is that this Court  
18 recognized that Congress was plugging the  
19 specific hole in the Enron scandal and it did so  
20 with overlapping provisions, 1512(c)(1) and  
21 1519, but it was 1512 that the Court pointed to  
22 as the place where you would sensibly locate  
23 this broader provision that aims at the full  
24 range of obstructive acts to catch the known  
25 unknowns.

1                   With respect to the question -- I'm  
2       sorry. Now I'm forgetting the second question.  
3       Oh, about the other statutes and whether they  
4       would be endangered. I would be concerned about  
5       that. I'm sure defendants would try to make  
6       arguments. The language, the verb phrase is  
7       exactly the same or in different order  
8       sometimes, but it's "obstructs, influences, or  
9       impedes," and so the relevant verbs in the actus  
10      reus would be similar. There are different  
11      direct objects there. For example, in 1503,  
12      it's the due administration of justice. In  
13      1505, it's the administration of the power of  
14      Congress's inquiry and investigation.

15                  But it's not clear to me whether --  
16      whether defendants might seek to try to now  
17      artificially limit those -- those clauses beyond  
18      their plain terms. Even though these kinds of  
19      provisions have been in the obstruction law, I  
20      think it traces all the way back to 1830, and  
21      they've never been understood to have that kind  
22      of narrow limitation to evidence impairment or  
23      anything else.

24                  JUSTICE KAGAN: Thank you.

25                  CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: I think the key  
4 word in the -- is "otherwise." And trying to  
5 figure out what that means under our established  
6 principles of statutory interpretation, it would  
7 seem to trigger ejusdem generis under the Begay  
8 precedent. And you've used the phrase a few  
9 times "catchall provision," as does your brief.  
10 And the Scalia-Garner book describes ejusdem  
11 generis as how you interpret catchall  
12 provisions. So does ejusdem generis apply here  
13 or not?

14 GENERAL PRELOGAR: No, we don't think  
15 it can sensibly apply here. So the Court has  
16 said many times that "otherwise" is a natural  
17 way for Congress to create a broad catchall  
18 category. And I certainly don't dispute that  
19 there can be situations where you have a  
20 parallel list of nouns or a parallel list of  
21 verbs where the Court might further think that  
22 ejusdem generis principles apply.

23 But that's just not how 1512(c) is  
24 structured. It has, as I mentioned, its own  
25 complex internal structure. You know, you've

1 got the mens rea requirement that's unique to  
2 (c)(1), and Congress did not transplant that  
3 into (c)(2). That triggers the other canon that  
4 when Congress uses disparate language in two  
5 adjacent provisions, usually it means something  
6 by that.

7 So I think that this just isn't the  
8 kind of situation where the Court could sensibly  
9 apply ejusdem generis.

10 And the other thing I would say is  
11 that, you know, if the Court goes down the road  
12 of trying to glean some kind of requirement from  
13 (c)(1), the other reason the canon is  
14 inapplicable here is that it's not evident on  
15 its face what the common attribute would be, and  
16 that --

17 JUSTICE KAVANAUGH: Well, that -- that  
18 -- that's --

19 GENERAL PRELOGAR: -- relates to the  
20 Nichols/Katsas dispute.

21 JUSTICE KAVANAUGH: As you know,  
22 that's true in almost every ejusdem generis  
23 case, and the -- and the treatise explains that  
24 as well, which is it's hard sometimes to figure  
25 out what the common link among the words in the

1 -- in the phrase is. So that's -- I don't think  
2 that distinguishes -- that point I don't think  
3 distinguishes this case from other ejusdem  
4 generis cases. But you can respond to that.

5 GENERAL PRELOGAR: But I do think that  
6 a plain speaker of English would recognize that  
7 usually the common link or the connective tissue  
8 is the language that follows the word  
9 "otherwise." That's the congressionally  
10 approved similarity. That's what (c)(1) and  
11 (c)(2) have in common. They both relate to  
12 obstructing an official proceeding.

13 And, you know, I recognize that  
14 Petitioner has invoked Begay. Your question  
15 touched on it. But the statute in Begay, which  
16 we think is not the model of statutory  
17 interpretation to follow here, the statute  
18 itself was -- was relevantly different. It had  
19 a list of nouns, and so it was the kind of  
20 statute where potentially ejusdem generis could  
21 apply.

22 JUSTICE KAVANAUGH: What about the  
23 contextual points, a couple of them that I think  
24 have come up, but I just want to make sure you  
25 have a chance to respond, that it would be odd

1 to have such a broad provision tucked in and  
2 connected by the word "otherwise."

3 GENERAL PRELOGAR: I don't think that  
4 the placement in the statute is odd at all for a  
5 couple of different reasons. One is the point I  
6 was trying to make to Justice Kagan about this  
7 Court's own recognition that 1512 is one of the  
8 big obstruction statutes. This is the statute  
9 that is aimed generally at official proceedings.  
10 It's not more discrete. And there are other  
11 provisions like 1519 and some of the ones that  
12 come right before it that are more narrowly  
13 confined and are intended to reflect discrete  
14 circumstances. That doesn't describe 1512 at  
15 all. So, when Congress was trying to broadly  
16 prohibit obstruction of official proceedings,  
17 1512 was exactly the right place to go.

18 Then Petitioner says, well, Congress  
19 buried it in the middle of the -- of the  
20 statute. But I -- I think it's actually quite  
21 explicable when you look at how the other  
22 provisions are structured. 1512(d), which I was  
23 discussing with Justice Alito, has a much more  
24 minimal penalty and doesn't require the intent  
25 to obstruct. So it made sense to put 1512(c)

1 before it but also after 1512(a), which is the  
2 most serious obstruction, like killing a  
3 witness, punishable by 30 years or up to life.

4 JUSTICE KAVANAUGH: Last question.  
5 There are six other counts in the indictment  
6 here, which include civil disorder, physical  
7 contact with the victim, assault, entering and  
8 remaining in a restricted building, disorderly  
9 and disruptive conduct, disorderly conduct in  
10 the Capitol building. And why aren't those six  
11 counts good enough just from the Justice  
12 Department's perspective given that they don't  
13 have any of the hurdles?

14 GENERAL PRELOGAR: Because those  
15 counts don't fully reflect the culpability of  
16 Petitioner's conduct on January 6th. Those  
17 counts do not require that Petitioner have acted  
18 corruptly to obstruct an official proceeding.  
19 And, obviously, Petitioner committed other  
20 crimes that we've charged and that we're seeking  
21 to hold him accountable for.

22 But one of the distinct strands of  
23 harm, one of the -- the -- the root problems  
24 with Petitioner's conduct is that he knew about  
25 that proceeding, he had said in advance of



1 January 6th that he was prepared to storm the  
2 Capitol, prepared to use violence, he wanted to  
3 intimidate Congress. He said they can't vote if  
4 they can't breathe. And then he went to the  
5 Capitol on January 6th with that intent in mind  
6 and took action, including assaulting a law  
7 enforcement officer.

8 That did impede the ability of the  
9 officers to regain control of the Capitol and  
10 let Congress finish its work in that session.  
11 And I think it is entirely appropriate for the  
12 government to seek to hold Petitioner  
13 accountable for that conduct with that intent.

14 JUSTICE KAVANAUGH: And are the  
15 sentences -- the sentence available is longer  
16 for this count than for any of the other counts  
17 or all of them together?

18 GENERAL PRELOGAR: The statutory  
19 maximum is higher, but after a recent decision  
20 in the D.C. Circuit which held that a particular  
21 sentencing enhancement doesn't apply, that was  
22 the Brock case, I believe the sentencing range,  
23 the guidelines range, for the assault count  
24 would actually be a higher guidelines range.

25 And just to give you a sense for a

1 typical January 6th defendant, someone who  
2 doesn't have a prior criminal history and who  
3 committed violent conduct at the Capitol,  
4 accepting responsibility, I think the average  
5 guidelines range or the range that would yield  
6 is 10 to 16 months of imprisonment. For someone  
7 who didn't commit violence, it would be six to  
8 12 months of imprisonment.

9 We've looked at the average sentences  
10 here. There are about 50 that have gone to  
11 sentencing -- conviction and sentencing on just  
12 a 1512(c)(2) as the only felony. So I think  
13 that's the best way to gauge it. This was when  
14 the sentencing enhancement did apply, so the  
15 ranges were higher. The average sentence among  
16 the approximately 50 people is 26 months of  
17 imprisonment, and the median has been 24 months.

18 So there's -- there's no reasonable  
19 argument to be made that the statutory maximum  
20 here is driving anything with respect to  
21 sentencing.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25 JUSTICE BARRETT: General, I want to

1 ask a clarifying question about the distinction  
2 in the government's charging decisions between  
3 (c)(1) and (c)(2). Actually, let me make that  
4 stronger. Not charging decisions; like what you  
5 could charge under the statute.

6 So, as you pointed out to Justice  
7 Kavanaugh just now, you know, (c)(1) has this  
8 additional mens rea requirement. But, you know,  
9 there is overlap. If you read "otherwise  
10 obstructs, influences," et cetera, broadly, it  
11 would encompass -- you know, frankly, even on  
12 the other reading, it would encompass things  
13 like "alters, destroys, mutilates," et cetera.

14 But you wouldn't have to prove the  
15 extra mens rea. I thought I heard you say, and  
16 I just want to clarify, to Justice Jackson  
17 earlier in the argument, that the government  
18 could not charge an alteration, mutilation,  
19 concealing a document or physical objects under  
20 (c)(2).

21 Am I --

22 GENERAL PRELOGAR: That's correct. We  
23 usually charge the specific paragraph and so if  
24 the conduct fits within (c)(1), we would charge  
25 it under (c)(1), and that would be the proper

1 place to locate the charge.

2 JUSTICE BARRETT: And is that  
3 charging, is that prosecutorial discretion or do  
4 you think the statute would permit you to charge  
5 it under (c)(2), thereby escaping the specific  
6 intent requirement?

7 GENERAL PRELOGAR: Well, let me say  
8 that there is a specific intent requirement  
9 under (c)(2). So there's no distinction  
10 between --

11 JUSTICE BARRETT: But it's  
12 different than the -- yeah.

13 GENERAL PRELOGAR: But it's the intent  
14 to obstruct the official proceeding. So you're  
15 right that we wouldn't have to prove intent to,  
16 you know, mutilate a document or something, but  
17 we -- we would still have to show the intent to  
18 obstruct a proceeding.

19 You know, this is pressing on honestly  
20 what's a difficult question about means versus  
21 elements. And I think the best -- the best  
22 reading of the statute is that these are  
23 different elements because they have these  
24 different actus reus, they have the different  
25 mens rea requirement, the mens rea requirement

1     that's specific to (c)(1). They each  
2     independently prohibit attempts but it's a --  
3     it's a hard question ultimately.

4             And if we charged under the wrong  
5     paragraph accidentally, I think we could usually  
6     say that that was harmless error or else  
7     recharge under the correct paragraph.

8             JUSTICE BARRETT: Okay. Let me ask  
9     you a question that kind of gets at some of the  
10    same points that Justice Alito's questions were  
11    getting at.

12            So what if on January 6th the Capitol  
13    itself had not been breached, the protest is  
14    going on outside the Capitol, "stop the steal,  
15    stop the steal," police are, you know, in  
16    megaphones saying, "disburse, disburse," they  
17    are too close to the Capitol, their goal is to  
18    impair, impede, stop the proceeding, stop the  
19    counting of votes.

20            Does that violate the statute in your  
21    view under this impede language?

22            GENERAL PRELOGAR: So I think -- I  
23    think that one relevant question would be  
24    whether we could satisfy the nexus requirement  
25    and show that actually the natural and probable

1 effect of that conduct would be to have some  
2 effect on what's going on in the Capitol --

3 JUSTICE BARRETT: Yes, so you can.  
4 You can. You can.

5 GENERAL PRELOGAR: Yes. So if you're  
6 assuming that the same thing happened where  
7 Congress had to go into recess and couldn't hold  
8 the joint session after all --

9 JUSTICE BARRETT: Yes.

10 GENERAL PRELOGAR: -- because there  
11 was a security risk.

12 JUSTICE BARRETT: Yes.

13 GENERAL PRELOGAR: I think that that  
14 probably would be chargeable if we had the  
15 intent evidence. Now as I mentioned before,  
16 even with respect to the riot that happened,  
17 which was a much more serious breach, we don't  
18 have that evidence of intent for everyone.

19 But if we had, for example, organizers  
20 where it was absolutely clear that they were the  
21 ring leaders who had intended to obstruct and  
22 undertook the action with that specific intent  
23 and did so knowing it was wrongful, and  
24 especially if they went, you know, I'm assuming  
25 you're saying they're in the unauthorized area

1 right outside the Capitol.

2 JUSTICE BARRETT: Yes.

3 GENERAL PRELOGAR: That is unlawful  
4 conduct committed with consciousness of  
5 wrongdoing if we have the proof of it.

6 JUSTICE BARRETT: Let's say that I am  
7 having a hard time seeing -- accepting your  
8 limiting construction of the verbs "obstruct,"  
9 "influence," or "impedes," to have this extra  
10 element.

11 Tell me why I shouldn't be concerned  
12 about the breadth of the government's reading  
13 just relying on "corruptly" and the nexus  
14 requirement. Should I be concerned or -- or  
15 could you just embrace it and say yeah, there  
16 might be some as-applied First Amendment  
17 challenges or that sort of thing?

18 I mean, can I -- can I be comfortable  
19 with the breadth if that's what I think?

20 GENERAL PRELOGAR: Yes, you can be.  
21 You certainly don't have to agree with us that a  
22 de minimis hindrance wouldn't qualify. If you  
23 thought this was unqualified and swept broadly  
24 to any kind of hindrance whatsoever, there would  
25 still be really important limits in the statute.

1 Obviously you'd have to have the official  
2 proceeding.

3 I think the nexus requirement could be  
4 somewhat harder to establish in a circumstance  
5 where you might not think that the natural and  
6 probable effect of the conduct is going to be to  
7 obstruct the proceeding.

8 You'd have to show the defendant knew  
9 that the natural and probable effect would do  
10 that. You'd still have to show the corruptly  
11 mens rea. And as you mentioned, even if you  
12 could show all of that, if it were a  
13 circumstance that really did infringe on First  
14 Amendment rights, there would always be the back  
15 stop of an as-applied constitutional challenge.

16 JUSTICE BARRETT: Do you think it's  
17 plausible that Congress would have written a  
18 statute that broadly? I mean, let's say that I  
19 think that Justice Alito's example of the  
20 protestors in the courtroom, you know --

21 GENERAL PRELOGAR: Yeah.

22 JUSTICE BARRETT: -- it's -- it's --  
23 let's say it's corrupt, and it -- and it impedes  
24 the proceeding because we have to go off the  
25 bench and things are stopped.



1           Let's say I think that that's covered  
2     by the word "impedes" and let's -- there's the  
3     nexus, that it's corruptly. Is it plausible to  
4     think Congress wrote a statute that would sweep  
5     that in?

6           GENERAL PRELOGAR: Yes, I think there  
7     are a lot of legitimate ways to -- to try to  
8     voice your dissent if you disagree with what the  
9     Court is doing, but one of the ways you cannot  
10    do it is come into this courtroom, halt the  
11    proceedings, force the Justices to leave the  
12    bench, and do it with the intent and the corrupt  
13    mens rea.

14           I think that Congress could think that  
15    is a severe intrusion on the functioning of our  
16    government and want to protect against that.  
17    And, again, the 20-year statutory max of course  
18    is just a max. There's no mandatory minimum.  
19    So Congress would have recognized that  
20    sentencing courts would use their discretion to  
21    tailor the actual sentence to the facts of the  
22    that specific offense.

23           JUSTICE BARRETT: Thank you.

24           CHIEF JUSTICE ROBERTS: Justice  
25    Jackson?

1 JUSTICE JACKSON: So you've emphasized  
2 several times that Congress wasn't writing on a  
3 blank slate in 1512(c). But do you dispute that  
4 it was writing against the backdrop of a  
5 real-world context?

6 It was in the wake of Enron, there was  
7 document destruction, and, you know, there was  
8 nothing as far as I can tell in the enactment  
9 history as it was recorded that suggests that  
10 Congress was thinking about obstruction more  
11 generally. They had this particular problem and  
12 it was destruction of information that would  
13 have -- could have otherwise been used in an  
14 official proceeding.

15 So can you just give us a little bit  
16 more as to why we shouldn't think of this as  
17 being a narrower set of circumstances to which  
18 this text relates?

19 GENERAL PRELOGAR: Sure. And, you  
20 know, I'd start by saying that we, of course,  
21 acknowledge that the immediate impetus for  
22 adding 1512 to the statute was to close the  
23 Enron loophole. It was a -- a glaring loophole  
24 in the coverage of the obstruction laws that it  
25 wasn't a crime for you personally to destroy the

1 document and the government had to charge people  
2 for instead persuading other people to destroy  
3 documents.

4 So that was front of mind for  
5 Congress, and Congress wanted to address it. It  
6 did address it with (c)(1) and with 1519  
7 separately.

8 But I think the best way to look at  
9 what Congress was doing in light of that context  
10 is to consider the fact that Congress went  
11 further and enacted (c)(2). The broader lesson  
12 Congress took away from Enron is that when you  
13 set out in advance to try to enumerate all the  
14 various ways that official proceedings can be  
15 obstructed, things will slip through the cracks.  
16 You can't always foresee it.

17 JUSTICE JACKSON: Let me just ask you  
18 this. Was (c)(2) enacted at the same time as  
19 (c)(1)?

20 GENERAL PRELOGAR: Yes, it was.

21 JUSTICE JACKSON: So why couldn't the  
22 broadening relate to other ways in which one  
23 might prevent a proceeding from accessing  
24 information?

25 So one is documents, records, and

1 other objects. But the known/unknown, we don't  
2 know, you know, could it be intangible, for  
3 example, that (c)(2) is sort of getting at when  
4 one gets at physical objects?

5 I guess I'm struggling with leaping  
6 from what's happening in (1) in the context in  
7 which it was actually enacted to all of  
8 obstruction in any form.

9 GENERAL PRELOGAR: So I think the  
10 reason why we wouldn't suggest that the context  
11 could bear that narrower reading is because of  
12 the actual language that Congress used. If it  
13 was really just worried about other kinds of  
14 record-based, proceeding-based, evidence-based  
15 ways of obstructing, then there were easy  
16 templates to add that in as a residual clause to  
17 (c)(1). There was no need to have this entirely  
18 separately numbered prohibition. And especially  
19 there was no need to use the well-recognized  
20 verb phrase "obstructs, influences, or impedes,"  
21 which was clearly drawn from these other omnibus  
22 clauses that sweep more broadly.

23 So I think -- you know, we think that  
24 it's perfectly consistent with the statutory  
25 history here to recognize that after Enron, what

1 Congress thought is we don't want novel ways  
2 that we aren't thinking about of obstructing a  
3 proceeding to not be a crime. We do want to  
4 cover the waterfront of obstructive conduct with  
5 the backstop of a corruptly mens rea, the  
6 limitation to an official proceeding, and so  
7 forth. And that's exactly what the words of the  
8 statute say.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Rebuttal, Mr. Green.

13 REBUTTAL ARGUMENT OF JEFFREY T. GREEN  
14 ON BEHALF OF THE PETITIONER

15 MR. GREEN: Justice Sotomayor, a  
16 defendant who tips off a grand jury witness or  
17 tips off the targets of a search warrant is  
18 someone who is certainly attempting to impair  
19 the integrity or the availability of evidence  
20 and would be covered by (c)(2) just as somebody  
21 who creates a document and then that document is  
22 shown to counsel and counsel withdraws a  
23 mandamus petition has, in fact, created  
24 something that has caused an interference with  
25 an official proceeding.

1           I heard my friend say twice in  
2     response to your questions, Justice Gorsuch and  
3     Justice Barrett, that (c)(2) would cover  
4     peaceful protests as long as she could  
5     demonstrate or the government could demonstrate  
6     that there was the adequate mens rea and a  
7     nexus.

8           As the nexus, let's look at what  
9     1512(f) says. "For the purposes of this  
10    section, an official proceeding need not be  
11    pending or about to be instituted at the time of  
12    the offense." There is no nexus. Congress has  
13    written it out of the statute right there.

14           If the J6 defendants came on January  
15    5th and did all the kinds of things that they  
16    did, maybe one would hope, but if it had  
17    happened that way, it would still be a (c)(2)  
18    violation.

19           With respect to the corruptly mens  
20    rea, Justice Kavanaugh, you asked a question  
21    yesterday about -- about the fact that mens rea  
22    as a break only works at trial because the  
23    government's allegations are taken as true at  
24    the motion to dismiss stage. And I -- I think  
25    that's exactly right.

1                   And that's why it's not a break at all  
2                   or if it's any kind of break, it's a break on a  
3                   -- on a -- on a go-kart. It's a wooden stick.  
4                   What it means is that people like Mr. Fischer  
5                   have to sit and go to trial and seek to -- to --  
6                   to win on a Rule 29 motion because the  
7                   government hasn't proved their mens rea.

8                   The same is true of First Amendment  
9                   defenses, if peace -- peaceful protestors are  
10                  charged with (c)(2). My friend referred to 1503  
11                  and 1505, other statutes within, and a number of  
12                  the Justices have pointed out that there are  
13                  much lower penalties for significant crimes.

14                  I would point the Court to 1752, which  
15                  is civil disobedience in a restricted space,  
16                  which is what Mr. Fischer is charged with.  
17                  That's a misdemeanor. If you cause  
18                  substantially bodily injury, that is a 10-year,  
19                  a 10-year maximum penalty. The government wants  
20                  to unleash a 20-year maximum penalty on  
21                  potential peaceful protests.

22                  That in and of itself is a bad idea  
23                  because it's going to chill protected  
24                  activities. People are going to worry about the  
25                  kinds of protests they engage in, even if

1     they're peaceful, because the government has  
2     this weapon.

3             Finally, I think we haven't touched  
4     very much on the breadth of influence because  
5     that's one of the words that's used in (c)(1)  
6     too. And that would all -- not only would it be  
7     peaceful protests, it could be advocacy. It  
8     could be all kinds of lobbying. Those things  
9     would be covered as well, we've -- we've pointed  
10    out in our briefs.

11            Then, finally, I would say to the  
12    Court let's not forget that civil proceedings  
13    are covered here -- we would submit civil  
14    evidentiary proceedings -- but civil  
15    proceedings. So the government is suggesting  
16    that the Court should unleash a 20-year  
17    obstruction -- maximum obstruction statute on  
18    civil litigation in federal courts.

19            I submit that that is, and we would  
20    submit that that is a very serious tool to put  
21    in the hands of prosecutors.

22            We urge that the Court reverse the  
23    D.C. Circuit.

24            CHIEF JUSTICE ROBERTS: Thank you,  
25    counsel. The case is submitted.



1                   (Whereupon, at 11:51 a.m., the case  
2    was submitted.)  
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## Official - Subject to Final Review

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