SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

JOSEPH W. FISCHER,)

Petitioner,)

v.) No. 23-5572

UNITED STATES,)

Respondent.)

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 112

Place: Washington, D.C.

Date: April 16, 2024

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

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

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

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.

C O N T E N T S

P R O C E E D I N G S

(10:10 a.m.)

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

Mr. Green.

ORAL ARGUMENT OF JEFFREY T. GREEN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

So we look back and we look forward.

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

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

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

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

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

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

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

Isn't that the structure of this provision?

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

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

JUSTICE SOTOMAYOR: Except that --

MR. GREEN: There's a long --

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

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

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

MR. GREEN: Yeah.

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

to have an actual proceeding that I've impaired.

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

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

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

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

JUSTICE SOTOMAYOR: If you read it --

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

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

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

JUSTICE SOTOMAYOR: No, otherwise

obstructs or impedes or attempts to, yes.

MR. GREEN: Yes.

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

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

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

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

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

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

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

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

evidence-related.

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

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

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

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

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

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

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

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

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

MR. GREEN: Not necessarily, because,

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

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

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

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

the form of documents.

JUSTICE JACKSON: No, I understand. But the statute, the provision we're talking about here, does not use the term "evidence." And so -- and instead or in addition, it uses the term "official proceeding," which is elsewhere defined not in terms of, you know, court proceedings or investigations. It's just a proceeding, you know, before Congress.

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

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

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

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

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

JUSTICE ALITO: What about --

JUSTICE KAGAN: -- back to --

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

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

JUSTICE ALITO: All right. Thank you.

MR. GREEN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: And that's not --

MR. GREEN: Antes also.

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

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

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

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

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

JUSTICE ALITO: Well --

MR. GREEN: That doesn't --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GREEN: Maybe limited by federal.

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

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

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

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

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

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

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

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

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

MR. GREEN: -- that seemingly --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you.

MR. GREEN: And --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

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

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

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

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

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

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

MR. GREEN: Okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

MR. GREEN: The corruptly intent

requirement?

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

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

JUSTICE BARRETT: So it carries over. How --

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

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

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

perfect sense.

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

JUSTICE BARRETT: So "corruptly" is redundant?

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

JUSTICE BARRETT: Okay. Thank you.

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

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

What do you think about that?

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

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

JUSTICE JACKSON: In a non-evidentiary way?

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

JUSTICE JACKSON: All right. Let me --

MR. GREEN: -- to answers to interrogatories.

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

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

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

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

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

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

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

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

JUSTICE JACKSON: Availability is also in the statute.

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

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

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

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

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

MR. GREEN: Right.

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

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

JUSTICE JACKSON: Why not?

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

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

MR. GREEN: So as to limit --

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

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

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

JUSTICE JACKSON: Thank you.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GREEN: Thank you.

CHIEF JUSTICE ROBERTS: General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

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

JUSTICE THOMAS: So --

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

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

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

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

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

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

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

JUSTICE THOMAS: What is that relationship?

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

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

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

(Laughter.)

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

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

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

GENERAL PRELOGAR: So, Mr. Chief

Justice, I think that the statute --

CHIEF JUSTICE ROBERTS: And I'm sorry. Just to interrupt --

GENERAL PRELOGAR: Oh, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: General --

JUSTICE KAVANAUGH: The --

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

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

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

Now I acknowledge that there would have been --

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

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

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

GENERAL PRELOGAR: It traces to the statutory history.

JUSTICE GORSUCH: Yeah, I understand

that. I -- I -- I --

GENERAL PRELOGAR: And I would just say that --

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

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

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

disruption or delay or some minimal outburst --

JUSTICE GORSUCH: Okay. So -- so --

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

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

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

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

JUSTICE GORSUCH: Assume -- assume --

GENERAL PRELOGAR: -- outside the courthouse --

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

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

JUSTICE GORSUCH: Yeah, they were

trying to stop the proceeding.

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

JUSTICE GORSUCH: We went around that tree yesterday.

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

JUSTICE GORSUCH: So a mostly peaceful protest --

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

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

GENERAL PRELOGAR: Not necessarily. We would just have to have the evidence of intent, and that's a high bar we argue.

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

GENERAL PRELOGAR: Right.

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

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

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

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

further requires that it be done corruptly.

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

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

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

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

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

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

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

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

JUSTICE ALITO: Why?

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

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

obstructs.

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

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

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

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

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

GENERAL PRELOGAR: And if this Court --

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

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

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

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

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

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

and done so with clear evidence of intent to obstruct.

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

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

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

JUSTICE ALITO: Why would it not --

GENERAL PRELOGAR: -- and nexus --

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

get to the Capitol to vote.

GENERAL PRELOGAR: Well, if we had clear --

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

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

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

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

never suggested could be subject to an evidence gloss.

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

JUSTICE JACKSON: But --

GENERAL PRELOGAR: And interpreting this statute ordinarily --

JUSTICE ALITO: Well, let --

JUSTICE JACKSON: -- what's --

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

JUSTICE ALITO: Let me give you one --

CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

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

JUSTICE JACKSON: But Congress --

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

JUSTICE JACKSON: Well, can --

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

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

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

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

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

opposed to not?

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

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

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

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

him into the building.

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: All right, well --

CHIEF JUSTICE ROBERTS: General --

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

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

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

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

Now, we'd obviously need to evaluate

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

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

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

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

GENERAL PRELOGAR: Yes. So I think --

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

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

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

JUSTICE SOTOMAYOR: Okay.

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

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

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

that, but --

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: I see.

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

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

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

CHIEF JUSTICE ROBERTS: Excuse me.

GENERAL PRELOGAR: -- where the proceeding happens.

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

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

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

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

the Office of the Presidency.

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

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

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

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

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

necessary to engage with that issue further.

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And the only other thing, the icing on

the cake if I could --

JUSTICE THOMAS: Yeah.

GENERAL PRELOGAR: -- is that if. Actually, what Congress wanted to do was write a statute that focused only on evidence impairment, there was a really clear and obvious way to do it. Congress could have just tacked on a residual clause to (c)(1) that says "or otherwise impairs evidence."

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

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

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

How do you define it?

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

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

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

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

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

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

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

could punish that person for up to 20 years.

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

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

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

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

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

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

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

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

JUSTICE ALITO: Really? You think you

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

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

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

JUSTICE ALITO: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE ALITO: Oh, sorry. One more.

CHIEF JUSTICE ROBERTS: Sorry.

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

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

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

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

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

JUSTICE SOTOMAYOR: Where do I find those?

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And just to give you a sense for a

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: General, I want to

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

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

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

Am I --

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

place to locate the charge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BARRETT: Yes.

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

JUSTICE BARRETT: Yes.

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

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

right outside the Capitol.

JUSTICE BARRETT: Yes.

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

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

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

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

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

Obviously you'd have to have the official proceeding.

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

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

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

GENERAL PRELOGAR: Yeah.

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

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

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

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

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

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

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

GENERAL PRELOGAR: Yes, it was.

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

So one is documents, records, and

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

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

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Green.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Whereupon, at 11:51 a.m., the case was submitted.)

U

V

W

Y

Z