No. 23-5572

IN THE
Supreme Court of the United States

JOSEPH W. FISCHER,
Petitioner,
v.
UNITED STATES,
Respondent.

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

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Fdn., Gun Owners of Cal., Citizens United, Citizens United Foundation, The Presidential Coalition, Tennessee Firearms Assn., U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Ed. Fund in Support of Petitioner

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February 5, 2024

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Citizens United, Citizens United Foundation, Tennessee Firearms Association, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Presidential Coalition, LLC is a political committee. Some of these *amici* filed the only *amicus* brief at the petition stage in this case.

STATEMENT OF THE CASE

On January 6, 2021, a crowd protesting the manner by which the 2020 presidential election was conducted assembled at the U.S. Capitol building where Congress was gathered to certify the electoral votes cast by each state. For reasons not yet proven, persons inside the Capitol opened the impenetrable metal doors of the Capitol to allow protesters inside.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Petitioner Joseph Fischer was charged criminally for his participation in the protest. Fischer attended a rally at the Ellipse earlier on January 6 and then headed home. After hearing about the events occurring at the Capitol, he returned to the city and entered the Capitol and grounds for four minutes. During those few minutes he returned handcuffs dropped by one officer, spoke with another officer, patted a third on the shoulder, was pushed into a police line by other protestors, was pepper sprayed by officers, and left. *See* Petition for Certiorari at 4-5.

Fischer, along with co-defendants Garret Lang and Edward Miller, was charged with violation of 18 U.S.C. § 1512(c) (a provision in the Sarbanes-Oxley Act of 2002 amending the statute entitled "Tampering with a witness, victim, or an informant").

The district court dismissed the charges against all three defendants for violating 18 U.S.C. § 1512(c)(2), since there was no allegation that the defendants had tampered with documents. *United States v. Fischer*, 2022 U.S. Dist. LEXIS 45877, *10 (D.D.C. 2022). A panel of the D.C. Circuit Court reinstated the indictments, over a strong dissent. *See United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023).

Fischer's petition for certiorari was supported by one *amicus* brief, which was filed by some of these *amici*,[2] and granted on December 13, 2023.

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[2] *See* Brief *Amicus Curiae* of America's Future, *et al.*, U.S. Supreme Court, No. 23-5572 (Oct. 13, 2021).

STATEMENT

What did Petitioner Joseph Fischer do to justify being charged with violating 18 U.S.C. § 1512(c)(2)?

On the morning of January 6, Fischer attended a rally at the Ellipse and then headed home. After hearing about the events occurring at the Capitol, he returned to the city and entered the Capitol and grounds for four minutes. During those few minutes he returned handcuffs dropped by one officer, spoke with another officer, patted a third on the shoulder, was pushed into a police line by other protestors, was pepper sprayed by officers, and left. *See* Pet. Br. at 4-5. The panel opinion adds little to these facts, only repeating from the criminal complaint that Fischer "had a 'physical encounter' with at least one law enforcement officer, and participated in pushing the police." *Fischer* at 332. Even if true, based on this conduct, the government brings a charge that could lead to Fischer's incarceration for 20 years.

Why was Petitioner Joseph Fischer charged with violating 18 U.S.C. § 1512(c)(2)?

President Biden repeatedly describes the events of January 6 as an insurrection, causing Attorney General Garland to have led one of the largest and most complex and resource-intensive investigations in our history. Yet the Justice Department has charged not one person with the crime of "insurrection" under 18 U.S.C. § 2383. Most agree that it would be exceedingly difficult to meet the elements of that section. By comparison, it is rather easy to show that

the business of Congress in counting electoral college votes was "impeded" for three hours. Additionally, insurrection carries a 10-year maximum sentence, while impeding a proceeding carries a much harsher 20-year maximum sentence. For these reasons, the ability of prosecutors to rely on § 1512(c)(2) has been central to the Biden Justice Department's ability to charge more than 1,265 Trump supporters, generating 718 guilty pleas, and the incarceration of nearly 500 persons, with more to come. The Biden Justice Department's new interpretation of § 1512(c)(2) allows prosecutors to threaten Trump-supporting defendants with 20-year imprisonment after a trial in the District of Columbia, where Donald Trump received 5.4 percent of the vote in 2020, compared to Joe Biden's 92.15 percent.

The Department of Justice's novel interpretation of § 1512(c)(2) is particularly unpersuasive because it was developed and is being used to punish severely the political opponents of the President. The Biden Justice Department did not use § 1512(c)(2) against the Antifa rioters who set fire to the Mark Hatfield Federal Courthouse in Portland, Oregon in March 2021. Democrat Congressman Jamaal Bowman (D-NY) was not charged with having "corruptly ... obstruct[ed] ... or impede[d] [an] official proceeding, or attempt[ed] to do so" when he pulled a congressional fire alarm in order to delay House proceedings on September 30, 2023; rather, he was allowed to plead guilty to a misdemeanor, pay a $1,000 fine and, and write a letter of apology.

SUMMARY OF ARGUMENT

In 2002, 18 U.S.C. § 1512(c) was enacted to plug a loophole that was discovered during the prosecution of Arthur Andersen for destroying evidence relating to its client Enron. Before § 1512(c) was added, corporate document shredding to hide evidence of financial wrongdoing was unlawful if one person directed another, but not if he acted alone. As amended, this section has been relied on by prosecutors to accomplish this clear purpose for two decades — and then came January 6, 2021.

The Biden Administration has repeatedly characterized the January 6 election protest at the Capitol not just a riot, but as "an insurrection." The Justice Department began what is certainly one of its broadest and intensive investigations in U.S. history. Surprisingly, the Biden Justice Department chose not to charge any of the so-called insurrectionists with the federal crime of insurrection under 18 U.S.C. § 2383. It had a better idea.

The Biden Justice Department would reinterpret 18 U.S.C. § 1512(c)(2) to use against not only Petitioner Fischer, but hundreds of other January 6 protestors and President Trump as well. With this new tool, it not only would avoid the need to demonstrate the elements of the crime of "insurrection," but also would have access to § 1512's maximum sentence of 20 years — a far more useful tool to facilitate plea bargains than the 10-year sentence for insurrection. By isolating subsection (c)(2) from subsection (c)(1), and seeking a new

meaning of "official proceeding," Justice Department prosecutors were able to re-purpose that statute to accomplish something Congress never envisioned.

The "insurrection" narrative was being pushed by the Biden Administration and their allies in the mainstream media as an existential threat to democracy. In response, district court judges in the District of Columbia readily accepted the task of suppressing the insurrection. The Justice Department's new interpretation of § 1512(c)(2) was readily adopted — until Petitioner Fischer's challenge. As Justice Gorsuch warned, "[f]ear and the desire for safety ... can lead to a clamor for ... almost any action ... to address a perceived threat." *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1315 (2023) (statement of Justice Gorsuch, concurring). When lower courts succumbed to this instinct, it resulted in what Justice Gorsuch feared — "the loss of many cherished civil liberties." *Id*.

Lastly, the government's re-interpretation of § 1512(c)(2) sweeps so broadly that it could be used to criminalize efforts by Americans to exercise their First Amendment rights to speak, assemble, and petition the government. The Justice Department's investigation has already involved abusive surveillance of innocent Americans, having the chilling effect that could be expected. The January 6 prosecutions of even the elderly provide the backdrop for the Biden Administration's recent creation of a new category of extremists identified as President Donald Trump and his MAGA followers. As additional information is revealed about the actual events on

January 6, those who have accepted the insurrection narrative are finding that they have been led astray.

ARGUMENT

I. THE CIRCUIT COURT'S REASONS FOR APPROVING THE JUSTICE DEPARTMENT'S NEW INTERPRETATION OF 18 U.S.C. § 1512(c)(2) TO APPLY TO JANUARY 6 PROTESTORS ARE UNPERSUASIVE.

Fischer, along with co-defendants Garret Lang and Edward Miller, was charged with violation of 18 U.S.C. § 1512(c)(2) (subsection (c) added to that section by the Sarbanes-Oxley Act of 2002):

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

The panel below began by reviewing precedents which it contended support a "broad reading of § 1512, applying the statute to all forms of obstructive conduct that are not covered by subsection (c)(1)." *Fischer* at 337. The panel then admitted that Appellants are

correct in noting that all these "cases involve 'evidence impairment,'" but argues the precedents still support its position: "[w]hile the cited cases happen to address behavior that impaired evidence, none of them suggests that subsection (c)(2) is limited." *Id*. at 338. This argument from silence advanced the panel's new interpretation not one inch.

The panel's interpretation isolated § 1512(c)(2) from its companion subsection, (c)(1). Only if the term "otherwise" is viewed in isolation can the government prevail. However, this is not how any nonfiction texts are interpreted.[3] It most certainly is not how statutes are analyzed. As Justice Kavanaugh explained:

> [T]his Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again....[4]

The panel found that the conduct proscribed by the term "otherwise" in (c)(2) unambiguously included "**all forms** of corrupt obstruction." *Id*. at 336 (Katsas, J., dissenting) (emphasis added). As Judge Katsas analyzed the panel opinion, "the catchall *otherwise* clause alone determines the scope of the provision"

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[3] *See* E.D. Hirsch, Validity in Interpretation at viii, 1, 5, 212-13 (Yale Univ. Press: 1967).

[4] *Bostock v. Clayton County*, 140 S. Ct. 1827 (2020) (Kavanaugh, J., dissenting).

disregarding all indications to the contrary, and thus reduces (c)(1) and (c)(2) "to a single provision criminalizing any act that corruptly obstructs an official proceeding." *Id*. Under the panel's interpretation, indictments could still be brought under subsection (c)(1), but it is surplusage, as any destruction of evidence previously criminalized under (c)(1) is now subsumed under (c)(2).

The panel also isolated § 1512(c)(2) from the statute that enacted it. The panel admitted, but then disregarded, the fact that Congress' purpose in Sarbanes-Oxley was to respond to "revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating **documents**." *Id*. (emphasis added). Arthur Andersen operated a "shred room," using a commercial-grade shredder from Enron's headquarters, shredding an "abnormal volume" of Enron papers sent to Andersen.[5] The panel recognized that Congress sought to plug a loophole in Title 18, as "section 1512(b) made it a crime to persuade another person to destroy documents but not a crime for a person to destroy the same documents personally." *Id*. at 347. If Congress had a broader purpose than addressing the problem of Arthur Andersen document shredding, surely it would

[5] "In Depositions, Arthur Andersen Staffers Detail 'Shred Room'," *AP* (March 15, 2002). *See* unsourced report that the shredding included several tons of paper and 30,000 computer files and emails, P. Coleman, ENRON: Crooks in Suits (2017).

have made that clear somewhere — not just by employing the word "otherwise."[6]

In a case evaluating the "corruptly persuade" requirement in § 1512, this Court unanimously found the government's reading of the statute criminalized innocent behavior, explaining principles that apply here:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress ... and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." [*Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (citations omitted).]

Judge Katsas exposed the incongruity of the government's position:

> The government posits that Congress plugged the loophole with a grossly incommensurate patch. On its view, instead of simply adding a prohibition on direct evidence impairment to preexisting prohibitions on indirect evidence impairment, Congress added a prohibition on

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[6] "Congress ... does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

> obstruction or influencing *per se*. [*Id*. at 376 (Katsas, J., dissenting).]

Also, the panel's discussion of the proposed change to the title of § 1512 was particularly unpersuasive. The section's title both before and after Sarbanes-Oxley is "Tampering with a witness, victim, or an informant." Congress declined to adopt a change to the title of § 1512 to add the words "or Otherwise impeding an Official Proceeding." The panel's way to avoid the obvious implications of Congress' decision not to change the title was by simply asserting that the proposed amendment to the title — which was not adopted — was a better indication of what Congress intended, than what Congress actually did. *See id*. *See also*, A. Scalia & B. Garner, Reading Law (West: 2012) at 221 ("The title and headings are permissible indicators of meaning.").

Revealingly, the panel appeared to admire the Arthur Andersen prosecutors who it said obtained their convictions "under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying documents." If the panel had no problem with the Arthur Andersen prosecution being based on a "legal fiction," why not approve the prosecution of January 6 protestors on another legal fiction — that Congress enacted subsection (c)(2) to apply to protests at the Capitol?

Lastly, the panel had no problem with the Justice Department breaking new legal ground to reimagine and reinterpret a long-standing statute to aid the

prosecutors of the January 6 "riot." As Judge Katsas explained:

> Section 1512(c)(2) has been on the books for two decades and charged in thousands of cases — yet until the prosecutions arising from the January 6 riot, it was uniformly treated as an evidence-impairment crime. This settled understanding is a "powerful indication" against the government's novel position. [*Id*. at 377 (Katsas, J., dissenting).]

Additionally, this new interpretation of § 1512 by the Justice Department is inconsistent with the Department's prior view of this section. A memorandum from the Office of Legal Counsel ("OLC") considered whether obstruction of justice charges should be brought under § 1512(c)(2) based on the facts alleged in the March 19, 2019 Report of Special Counsel Mueller.[7] The OLC Opinion described the statute as applying to "efforts to impair or intentionally alter evidence (documentary or testimonial) that would negatively impact the ... ability to obtain and develop evidence." *Id*. at 3. The OLC Opinion reviewed the Special Counsel's "expansive reading" of the statute in taking the position that "there is no requirement that the act be inherently malign or impair the availability of witnesses or evidence," and concluded, "we do not

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[7] *See, e.g.,* Memorandum from Ass't Att'y Gen. Office of Legal Counsel Steven Engel & Principal Assoc. Deputy Att'y Gen. Edward C. O'Callaghan to Att'y Gen. William P. Barr at 3-5 (Mar. 24, 2019).

subscribe to such a reading of the obstruction-of-justice statutes." *Id*. at 5. The panel's opinion made no mention of this OLC Opinion.

II. THE CIRCUIT COURT'S EMBRACE OF A FABRICATED JANUARY 6 NARRATIVE APPARENTLY INSPIRED IT TO SANCTION A REINTERPRETATION OF SARBANES-OXLEY.

A. The Court Below Presumed the Truth of the Government's "Insurrection" Narrative about January 6.

The panel opinion below provided anything but a dispassionate version of the facts and the law for this Court's review:

> [T]housands of supporters of **the losing candidate**, Donald J. **Trump**, **converged** on the United States Capitol **to disrupt** the proceedings. The **Trump** supporters **swarmed** the building, **overwhelming** law enforcement officers.... The **chaos** wrought by **the mob** forced members of Congress to stop the certification and **flee** for safety. [*Fischer* at 332 (emphasis added).]

The Court referred to a "riot" or "rioters" six times and "mob" four times to refer to the protestors, and Fischer was treated as just another member of that "mob." Rather than examining Fischer's actions individually, the panel seems to treat Fischer as being culpable for the actions of everyone in the "mob." This

prejudgment appears to have led to a series of arbitrary rulings. For example, the court found irrelevant the fact that Fischer arrived at the Capitol after Congress recessed, and therefore that he could not have caused the suspension of the vote certification process. *See id.* at 333, n.1.

The panel's language suggests that it has assumed that the protestors were part of an "insurrection." However, most Trump supporters were there because they believed the election had been compromised. They went to the Capitol to protest (not disrupt), and they assembled at (not converged at and swarmed) the Capitol. Trump and his supporters were blamed even though the riot began while Trump was still speaking at the Ellipse.[8] Never did the court use the words "protest" or "rally" to describe the events. The court admitted that "outside the January 6 cases brought in this jurisdiction, there is **no precedent** for using § 1512(c)(2) to prosecute the type of conduct at issue in this case," but adopted that view nevertheless. *Id.* at 339 (emphasis added).

The panel was not alone. District court judges in the District of Columbia hearing January 6 cases almost uniformly have viewed defendants under the Democrats' insurrection narrative. Judge Reggie Walton, sentencing defendant Lori Vinson, stated that "[d]emocracies die, and we've seen it in the past, when the citizens rise up against their government and engage in the type of conduct that happened on

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[8] *See* "The Capitol Riot: A Chronology," *National Security Archive*.

January 6."[9] Judge Amy Berman Jackson told defendant Karl Dresch that he was an "enthusiastic participant" in an attempt "to subvert democracy, to stop the will of the people and replace it with the will of the mob."[10] Judge Randolph Moss stated that the protest "threatened not only the security of the Capitol, but democracy itself." *Id*. Judge Tanya Chutkan, described as "the toughest punisher" of January 6 protestors, accused protestors of "trying to violently overthrow the government."[11] "Chutkan has often has [sic] handed down prison sentences in Jan. 6, 2021, riot cases that are harsher than Justice Department prosecutors recommended."[12]

If the insurrection narrative inclined the panel to rule for the government, it would not be the first time that a court's judgment was clouded by exigent circumstances, causing it to reverse 20 years of prosecutorial and judicial understanding of the meaning of § 1512(c)(2). The panel appears to have adopted the narrative advanced by Vice President Kamala Harris when she equated January 6 with

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[9] M. Cohen and H. Lybrand, "'We're getting all kinds of threats': Judge says defiant US Capitol rioters are fueling threats from Trump supporters," *CNN* (Oct. 22, 2021).

[10] T. Sneed, "US Capitol riot judges step up as the conscience of democracy while lawmakers squabble," *CNN* (Aug. 13, 2021).

[11] M. Kunzelman and A. Richer, "In Jan. 6 cases, 1 judge stands out as toughest punisher," *Associated Press* (June 12, 2022).

[12] M. Kunzelman, "Judge assigned to Trump's Jan. 6 case is a tough punisher of Capitol rioters," *Associated Press* (Aug. 2, 2023).

Pearl Harbor and the attacks on 9-11.[13] In times of crisis, federal courts have been all too willing to yield to Justice Department demands for new powers.[14]

B. Much Is Not Known about the Violence on January 6.

Even if this Court felt it necessary to bend the law to somehow "save democracy,"[15] it would need information to supplement what the panel knew when the case was decided on April 7, 2023. Much of what has been learned since then does not support the government's insurrection narrative. Consider just one of the January 6 narratives which has proven to be false — the claim that no federal agents were embedded in the January 6 crowd. The House Select Committee on January 6 ("J6 Committee") appointed

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[13] "Certain dates echo throughout history.... when our democracy came under assault.... December 7, 1941. September 11, 2011, and January 6, 2021." "Fact Check: Did Kamala Harris Compare 9/11 to January 6?" *Newsweek* (Sept. 12, 2023).

[14] Some of those Justice Department demands were later admitted to have been fraudulent. *See, e.g.,* "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases," *U.S. Department of Justice* (May 20, 2011) ("the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment ... [b]ut the Solicitor General did not inform the Court of the report.... Nor did he inform the Court that a key set of allegations ... had been discredited ... and relied on gross generalizations about Japanese Americans.").

[15] J. Cassidy, "Joe Biden Makes Saving Democracy the Center of His Campaign," *The New Yorker* (Jan. 4, 2024).

by Speaker Pelosi advanced falsehoods and hyperbole in its report which were politically pre-ordained.[16] The J6 Committee summarily "dismissed" claims of FBI involvement in the January 6 crowd, calling them "unsupported."[17]

Later, an FBI whistleblower revealed that the bureau's Washington Field Office refused the Boston Field Office's request for footage of the events at the Capitol, because "there may be undercover officers or confidential human sources on those videos whose identity we need to protect."[18] The former director of the Washington office subsequently admitted that "[t]he FBI had so many paid informants at the Capitol on Jan. 6, 2021, that it lost track of the number and

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[16] *See, e.g.,* P. Sperry, "Lies, Damned Lies, and the Jan. 6 Committee," *Epoch Times* (Aug. 8, 2022) (J6 Committee chairman Rep. Bennie Thompson accused protestors of "'savagely beating and killing law enforcement officers'"); S. Arnold, "Jan. 6 Committee Caught 'Lying and Altering Evidence,'" *TownHall.com* (June 12, 2022) (J6 Committee investigation falsified text messages between Rep. Jim Jordan (R-OH) and Trump chief of staff Mark Meadows); Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol at 77, 586 (calling the Capitol protest a "violent uprising" and a "coup").

[17] M. Alfaro, "House Jan. 6 committee dismisses 'unsupported' claim of FBI involvement in riot," *Washington Post* (Jan. 11, 2022).

[18] E. Lawrence, "Whistleblower: FBI had informants, undercover officers in Capitol on Jan 6, they may be on video," *American Military News* (May 18, 2023).

had to perform a later audit to determine exactly how many ... were present."[19]

The politicized strategy of Pelosi and the J6 Committee to release only selective excerpts of the 80,000 hours of video taken that day also gave a slanted view. As more video has been released by Speakers Kevin McCarthy and Mike Johnson, the American People have come to realize that they were lied to. *See* Tucker Carlson, "This video tells a different story of Jan 6," *Fox News*.

Now that Republican House members have reviewed the videotape and other evidence of the day's events, Rep. Clay Higgins (R-LA) has stated that over 200 persons working for or with federal law enforcement were embedded among the protestors that day. "Hard, objective, and conservative estimates would put the number of FBI assets in the crowd outside and working inside at well over 200," Higgins said.[20] Higgins stated that some FBI "assets" served as "guides" once protestors came inside the Capitol, to assist them in reaching sensitive areas where trespassing would be more easily proven to be criminal and serious. *Id.* at 3:30-4:35.

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[19] M. Devine, "FBI lost count of how many paid informants were at Capitol on Jan. 6, and later performed audit to figure out exact number: ex-official," *New York Post* (Sept. 19, 2022).

[20] Interview with Rep. Clay Higgins, "D.C. Shorts" at 5:08, *Daily Caller* (Jan. 8, 2024).

C. Not Allowing "Fear and the Desire for Safety" to Drive a Decision.

Before a decision is reached based on the insurrection narrative, there is the need to reconsider assumptions made by the panel below. The January 6 events are now three years in the past. Although the courts below are still caught up in the "insurrection" hysteria, the nation cannot afford for this Court to succumb to the same temptation. As Justice Gorsuch has wisely warned:

> Fear and the desire for safety are powerful forces. They can lead to a clamor for action — almost any action — as long as someone does something to address a perceived threat.... We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties. [*Arizona v. Mayorkas*, 143 S. Ct. 1312, 1315 (2023) (statement of Justice Gorsuch, concurring).]

"In some cases, like this one," Justice Gorsuch cautioned, "courts even allowed themselves to be used to perpetuate ... decrees for collateral purposes, itself a form of emergency-lawmaking-by-litigation." The circuit court's creation of novel criminal applications of Sarbnes-Oxley is just the sort of "emergency-lawmaking-by-litigation" of which Justice Gorsuch warned.

In another case, where the government had violated civil rights in the midst of the COVID-19 panic, Justice Gorsuch warned that "[g]overnment is not free to disregard the First Amendment in times of crisis." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Likewise here, courts are not free to create new criminal laws or novel applications of criminal laws to address what increasingly appears to have been largely a fabricated crisis. As it did in *Roman Catholic Diocese*, this Court should resist the rushed impulses that have affected lower courts, and simply interpret the text and history of the Sarbanes-Oxley amendment to the criminal code according to what Professor E.D. Hirsh calls a search for "authorial intent."[21]

III. AS NEWLY INTERPRETED BY THE BIDEN ADMINISTRATION, SECTION 1512(c)(2) CRIMINALIZES ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

Petitioner's opening brief presents many compelling reasons as to why § 1512(c)(2) should not be read expansively to cover Petitioner's conduct. In its last section, it invokes the canon of constitutional avoidance. Petitioner asserts that, "without a limitation on its reach, [that statute] is both

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[21] University of Virginia Professor Emeritus of education and humanities, E.D. Hirsch, Jr., has observed that "[i]n law ... a so-called pragmatism prevails which holds that the meaning of a law is what present judges say the meaning is." This view constitutes "an assault on the sensible belief that a text means what the author meant." E.D. Hirsch at viii, 1.

breathtaking in its scope and unconstitutional in many applications." Pet. Br. at 31. There is no question that, if the government's expansive interpretation of § 1512(c)(2) were adopted, it would apply not only to Petitioner and several hundred of the over 1,000 and counting January 6 defendants who have been arrested, including President Trump.[22] It could also potentially apply to millions of American citizens who, at least until the Department of Justice devised its novel interpretation of Sarbanes-Oxley, had thought that they had the right to question the integrity of elections, and to assemble at the seat of the national government to petition Congress for redress of grievances.

Judge Katsas' dissent identified the constitutional problem created by the government's aggressive interpretation of § 1512:

> advocacy, lobbying, and protest before the political branches is political speech that the **First Amendment** squarely protects.... Thus, "to assert that all endeavors to influence, obstruct, or impede the proceedings of congressional committees are, as a matter of law, corrupt would undoubtedly criminalize some innocent behavior." [*Fischer* at 378 (Katsas, J., dissenting) (emphasis added).]

The Justice Department appears wholly unconcerned that its position operates to insulate

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[22] *See* "Capitol Breach Cases," U.S. Department of Justice.

Congress from public input. It protects the People's House from hearing the voice of the People. The fact that persons such as Fischer are being prosecuted, despite the fact that he did nothing violent on January 6, sends a message — a message that the Biden Administration may want to send — that the government is not to be resisted. There have even been reports from the mainstream media that "[t]he federal government believes that the threat of violence and major civil disturbances around the 2024 U.S. presidential election is so great that it has quietly created a new category of extremists that it seeks to track and counter: Donald Trump's army of MAGA followers."[23] This message quite obviously adds to the chill on the exercise of First Amendment rights.

A. Freedom of Speech.

The panel's approval of the Biden Justice Department's new interpretation of § 1512(c)(2) has allowed federal prosecutors to target those who came to the District of Columbia simply to protest the integrity of the 2020 election — even without engaging in violence or entering the Capitol. The panel below quoted several of Fischer's **private text messages** sent before January 6, as if he was being indicted, at least in part, for his intemperate texts.[24] *Fischer* at

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[23] W. Arkin, "Donald Trump Followers Targeted by FBI as 2024 Election Nears," *Newsweek* (Oct. 4, 2023).

[24] "Biden said 'American democracy is under attack' because Trump will not accept the results of the 2020 election." J. Mason, "Biden warns election deniers pose threat, blames Trump,"

332. By contrast, there were 12,000 **public Tweets** sent during the Trump presidency using the phrase "assassinate Trump," but the Justice Department did not appear to have seriously focused on many of those.[25]

Harsh criticism of government is protected speech. As Justice Douglas put it, "Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. **We can seek to challenge and annoy**...." *Colten v. Ky.*, 407 U.S. 104, 122 (1972) (Douglas, J., dissenting) (emphasis added). Contentious speech is not a problem, this Court has explained:

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it **induces a condition of unrest**, creates dissatisfaction

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Reuters (Nov. 3, 2022). If election deniers are a threat to democracy, should the First Amendment be violated to stop the threat? At least prosecutors in the Wilson Administration had clear congressional authority when they invoked the Sedition Act of 1917, to end anti-war speech. The Sedition Act authorized the same 20-year sentences as section 1512. *See* D. Root, "When the Government Declared War on the First Amendment," *Reason* (Oct. 2017).

[25] *See* S. Lekach, "Over 12,000 tweets are calling for Trump's assassination," *mashable.com* (Feb. 2, 2017).

> with conditions as they are, or even stirs people to anger.... There is no room under our Constitution for a more restrictive view. [*Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added).]

One need not speculate as to whether the Justice Department's new interpretation of § 1512(c)(2) could be used to chill the speech of its political opponents, for this is exactly how it is being used in pending cases. Two of the charges in the indictment brought against President Trump relate to § 1512(c)(2) — one for its violation, and one for conspiracy to violate it. *See United States v. Trump*, Indictment at 43-44 (Aug. 1, 2023) (D.C. Dist. Ct. No. 23-cv-257). The indictment claims the crimes occurred "on or about November 14, 2020, through on or about January 7, 2021...." *Id*. What conduct could such an indictment be based upon? There is no allegation that President Trump himself was present at the Capitol on January 6 or that he undertook to physically prevent Congress from going forward with its proceedings on that day. The Special Counsel's indictment relies on President Trump's phone calls, speeches, and tweets to demonstrate wrongdoing. Indeed, **President Trump has been charged with committing and inspiring political speech** — seeking to support the presentation of evidence concerning election irregularities before the joint session of Congress.[26]

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[26] Had the Department of Justice's new interpretation of § 1512 been in effect during the certification of the 2016 election, the proverbial shoe would have been on the other foot. Would the Department of Justice have charged those in the Clinton

B. Freedoms of Assembly and Petition.

If there is one place in the country where Americans have a constitutional right to assemble to petition their government for the redress of grievances, it should be the United States Capitol. These constitutional liberties have a rich tradition, and efforts to restrict either activity have been viewed as unAmerican, at best.

One member of the House of Representatives' first Congress, James Madison, introduced a bill of rights which included a provision that read: "The people shall not be restrained from peaceably assembling and consulting for their common good." *See* Sources of Our Liberties at 422 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978). After a series of amendments and votes, the provision was modified to its present form, reading "the right of the people peaceably to assemble," without tying the right to any particular purpose.

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campaign who refused to concede defeat, promoting the totally discredited "conspiracy theory" that Russia had influenced our election, arguments which were used to interrupt the January 6, 2017 vote certification? How would the Justice Department have viewed protestors — or even members of the House of Representatives who improperly raised objections that were not also endorsed by a Senator, or that were based on false allegations of Russian interference with the 2016 elections? Could they have been deemed criminal acts to impede a "official proceeding"? *See* B. Williams, "11 times VP Biden was interrupted during Trump's electoral vote certification," *CNN* (Jan. 6, 2017).

The government has announced that its investigation is not limited to those who committed acts of violence. As part of its investigation, the Justice Department surreptitiously obtained the names of persons who flew into the District of Columbia around January 6, or stayed at a hotel, or used their credit cards in the metro area.[27] Even apart from threatened prosecutions, the very notion that federal prosecutors are compiling such lists is chilling in and of itself. Federal prosecutors have announced that their search for more defendants continues, and is not limited to persons who went into the Capitol on January 6.[28] The search, however, does appear to be limited to Trump supporters.

This Court has rightly recognized that "[t]he right of peaceable assembly is a right **cognate** to those of free speech and free press and is **equally fundamental** ... [and] cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (emphasis added). And, in 1876, this Court recognized:

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[27] *See* B. Singman, "'Alarming' surveillance: Feds asked banks to search private transactions for terms like 'MAGA,' 'Trump,'" *Fox News* (Jan. 17, 2024).

[28] *See* S. Arnold, "U.S. Attorney Suggests DOJ Will Target Americans Who Stood Outside the Capitol on Jan 6," *Townhall* (Jan. 7, 2024).

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances ... is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. [*United States v. Cruikshank*, 92 U.S. 542, 552 (1876).]

At the heart of the right to assemble is the right of the people to self-government. The role of the government is to keep the physical peace, not to conduct or "curtail" assemblies, support or discourage appeals, or other communicative activities among the citizenry. Again, the *DeJonge* Court got it right: the government's constitutionally required role is to foster, not to proscribe, "peaceable political action." *DeJonge* at 365. To be sure, the government has authority to "deal[] with the abuse" of the "free speech, free press, and free assembly" rights, but it must preserve them "inviolate":

> in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [*Id*. at 365.]

Quoting from *Cruikshank* decided sixty-two years before, the *DeJonge* Court affirmed that "'[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for

consultation in respect to public affairs and to petition for redress of grievances.'" *Id.*

Having acknowledged this foundation, the *DeJonge* Court held that "peaceable assembly for lawful discussion cannot be made a crime." *Id.* Further, the Court ruled that "[t]hose who **assist** in the conduct of such meetings cannot be branded as criminals on that score." *Id.* (emphasis added). Finally, the Court concluded that:

> The question, if the rights of free speech and peaceable assembly are to be preserved, is **not as to the auspices** under which the meeting is held **but as to its purpose**; **not** as to the **relations** of the speakers, **but whether their utterances transcend the bounds of freedom of speech** which the Constitution protects. [*Id.* (emphasis added).]

To be sure, some of the persons in the January 6 crowd were not peaceable, and acts of violence are prosecutable. But that does not justify the dragnet investigative sweep of all those attending the protest, nor basing indictments on new and novel interpretations of laws. Moreover, it is becoming clearer and clearer that Trump supporters may have had help in causing the disturbance. Video demonstrates that persons inside the Capitol opened the heavy and impenetrable doors to that building. It shows that some uniformed law enforcement opened interior doors and escorted and guided protestors through the Capitol. Congressman Clay Higgins estimates that there were more than 200 law

enforcement personnel embedded into the crowd. *See* Tucker Carlson Interview of Cong. Clay Higgins (Jan. 8, 2024). When the details of an event are hidden or unknown, it is legitimate to ask: *Cui bono*?

Judge Katsas' view that the government's position "that all endeavors to **influence, obstruct, or impede** the proceedings of congressional committees are, as a matter of law, corrupt would undoubtedly criminalize some innocent behavior." Indeed, it would criminalize constitutionally protected behavior. The Biden Administration's misuse of a criminal statute to indict election protestors constitutes a clear effort to chill the speech, assembly, and petition rights of his political opponents, and should be brought to an end.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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