No. _____

In The
Supreme Court of the United States

EDWARD LANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in concluding that application of 18 U.S.C. Section 1512(c)(2), a statute crafted to prevent tampering with evidence in "official proceedings," can be used to prosecute acts of violence against police officers in the context of a public demonstration that turned into a riot, resulting in so "breathtaking" an application of the statute as to run afoul of *Van Buren v. United States*, 141 S. Ct. 1648 (2021).

PARTIES TO THE PROCEEDING

Petitioner Edward Lang is an adult resident of the State of New York. He is currently incarcerated as a pre-trial detainee.

Respondent is the United States of America, acting through the United States Attorney's Office for the District of Columbia.

RELATED CASES

- *United States of America v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023), *rehearing denied*, 2023 LEXIS 12753 (D.C. Cir., May 23, 2023), Docket No. 22-3038, 1:21-cr-000234-CJN-1.
- *United States v. Lang*, 64 F.4th 329 (D.C. Cir. 2023), *rehearing denied*, 2023 LEXIS 12753 (D.C. Cir., May 23, 2023), Docket No. 22-2039, 1-21-cr-00053-CJN-1.
- *United States v. Miller*, 64 F.4th 329 (D.C. Cir. 2023), *rehearing denied*, 2023 LEXIS 12753 (D.C. Cir., May 23, 2023), Docket No. 22-2041, 12-cr-00119-CJN-1.

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PETITION FOR A WRIT OF CERTIORARI

Edward Lang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, reported at 64 F.4th 329 (2018), is reprinted in the Appendix (App.) at 1-118. The appellate court's ruling denying the petitioner's request for a rehearing is reprinted at App. 124.[1]

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its decision on April 7, 2023, and denied a motion for rehearing on May 23, 2023. App. 1, 124. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

[1] The underlying appeal consolidated three defendant's claims: the petitioner's, Joseph Fischer's and Garrett Miller's, and hence is denominated *United States v. Fischer*. Mr. Lang breaks ranks with the other appellants by filing this petition. He does not know whether they intend to seek certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . " U.S. Const. amend. V.

Title 18 U.S.C. Section 1512(c)(1) and (2) provides in pertinent part:

> (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 the 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.

STATEMENT OF THE CASE

A short walk from the building in which this Court sits, a revolution is underway, with ambitious federal prosecutors reworking the penal code to make it do work never intended to be done, work that threatens to chill, and does chill, ordinary Americans in their

First Amendment rights to assemble, to petition for the redress of grievances and to speak out on matters of public concern. In the name of saving democracy, prosecutors are undermining the core principles on which this republic stands. In this, likely the first writ of certiorari filed incident to a criminal prosecution arising from the events of January 6, 2021, the petitioner requests relief to check the blind ambition of federal prosecutors. Without action from this Court, hundreds, if not thousands, of Americans will face substantial prison sentences for doing no more than speaking out at a protest that evolved into a dynamic conflict. It is no overstatement to say the future of the First Amendment hangs in the balance. A statute intended to combat financial fraud has been transformed into a blatant political instrument to crush dissent.

On January 6, 2021, thousands of Americans gathered in Washington, D.C., to protest a stolen election, as direct a threat to our democratic traditions as a foreign invasion. They were inspired to attend and to protest by the President of the United States, Donald J. Trump, who, in the aftermath of the November 2020 election, contended the election was stolen to the benefit of then president-elect Joseph Biden. Mr. Trump urged people to come to Washington, D.C., on January 6, 2021, to "stop the steal." It was the day Congress was statutorily obliged to certify the results of the votes of the Electoral College. When it became apparent that Vice President Mike Pence, the presiding officer of the joint session of Congress responsible for certifying the results, would not act to stop certification, Mr. Trump urged the thousands milling about on Washington's

Mall and at the Ellipse, where the president was speaking, to head to the Capitol and to patriotically and peacefully protest and to "fight like hell" lest they "no longer have a country." The president told people the republic was under attack and that ordinary people needed to save it.

The petitioner, Mr. Lang, heeded the president's call to action. He went to the Capitol to protest, was swept up in the violence of a crowd and the ensuing struggle with police officers, where he acted to defend himself and others from police violence. He is among the more than 1,000 persons to be arrested in the wake of the riot at the Capitol that day. He acted in self-defense, in defense of others, and in defense of democracy itself. Among the charges he faces is a violation of 18 U.S.C. Section 1512(c)(2), acting with a "corrupt" purpose to impede an official proceeding. The Justice Department promises as many as 1,000 more prosecutions. This statute has been used repeatedly in the prosecutions of those accused of breaking the law on January 6, 2021.

Use of a statute intended to combat alteration of records, intimidation of witnesses and conduct aimed at disrupting investigative and adjudicatory proceedings is an example of prosecutorial overcharging, using a statute designed for one purpose in a manner at odds and inconsistent with Congressional intent and the plain meaning of the statute. This use necessarily chills anyone considering attending a public protest, or appearing outside a building at which an official proceeding is set to commence. Will they, too, be charged with a felony if the event turns violent?

Mr. Lang filed a motion to dismiss the Section 1512 count prior to trial. The District Court granted his motion. On a consolidated interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit joined by two similarly situated co-defendants, the Court, in a split decision, reversed the District Court. A motion for rehearing was denied. Headed to this Court are dozens of convictions for violation of Section 1512(c)(2) arising from January 6, 2021 prosecutions.

Mr. Lang asks this Court to grant certification on a question which will arise in hundreds of cases as the Justice Department continues to charge folks who participated in a protest turned violent on January 6, 2021. Resolution of the question is imperative to prevent the use of this statute to prosecute folks who protested in a good faith belief that their actions were necessary to prevent an election from being stolen, an event tantamount to an internal coup d'etat. Refusal to resolve this question will chill others inclined to petition and assemble for the redress of grievances, for fear that those opposed to their views might prosecute them for possessing a "corrupt" intent.

SUMMARY OF THE ARGUMENT

Prior to trial, the District Court granted Mr. Lang's motion to dismiss the count arising under 18 U.S.C. Section 1512(c)(2). The Government took a timely interlocutory appeal, and the Appellate Court

agreed with the Government in a split decision. A motion for rehearing was denied, and stay of the mandate granted as to the 18 U.S.C. Section 1512(c)(2) count only. App. 125. Mr. Lang is scheduled to go to trial in the fall on related counts.

The sole issue before the Court in this petition is whether the indictment's reliance on 18 U.S.C. Section 1512(c)(2) pleads an offense, or, whether, as Mr. Lang argues, the Government's use of this statute in this case violates the prohibition against "breathtaking" application of a statute. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).

Mr. Lang raises two related questions in the petition:

First, whether the application of 18 U.S.C. Section 1512(c)(2) is subject to an "evidence based" interpretation rendering it inapplicable to a case alleging assault on a police officer. Mr. Lang contends that this is the proper reading of the statute.

Second, whether the "corrupt" purpose element of 18 U.S.C. Section 1512(c)(2) can be satisfied in the absence of any claim that a defendant sought to gain anything from his or her alleged misconduct. Mr. Lang contends that the corrupt purpose cannot be so satisfied.

The Court of Appeals offered vastly different opinions on these issues, resulting in a cacophonous decision destined to leave judges, practitioners, and most

importantly, potential defendants, confused about the statute's scope and meaning.

Writing for the Court, Judge Pan read the Section 1512(c)(2), a statute passed to enhance the government's ability to prosecute individuals interfering with the evidentiary integrity of official proceedings, as permitting prosecution for any unlawful conduct. The term "otherwise," with which Section 2 begins, was held as a portal to a range of activity limited only by the imagination of the government. Thus Section 2 is untethered to the activities on which Section 1 focuses: the alteration, destruction, or concealment of a record, document, or other object, with the intent to impair the object's use in an official proceeding. Judge Pan also concluded that a "corrupt" *mens rea* encompassed *any* unlawful purpose. Judge Pan's reading of 18 U.S.C. Section 1512(c)(2) renders the statute a club of seemingly infinite uses by federal prosecutors.

Writing in concurrence, Judge Walker construed corrupt purpose more narrowly, to wit: to act "with the intent to procure an unlawful benefit to either for himself or some other person" App. 47. In this case the beneficiary, Judge Walker, concluded, by reasons of highly attenuated reasoning, was President Trump. Because use of force against a police officer in the performance of his or her duties is always unlawful and Mr. Lang acted with an intent that his actions might benefit Mr. Trump, the statute fits the alleged crime, according to Judge Walker. Significantly, Judge Walker thought it necessary to do what Judge Pan thought unnecessary – define what "corruptly" meant.

Writing in dissent, Judge Katsas wrote in favor of an "evidence-based" limitation on the applicability of 18 U.S.C. Section 1512(c)(2). Because assault on an officer does not pertain to evidence used in an official proceeding, the statute was misapplied in this case, in a manner suggesting the sort of "breathtaking" application this Court warns against.

On an issue of vital importance to scores, if not hundreds, of defendants in prosecutions related to the riot at the Capitol on January 6, 2021, District Courts are left without guidance from a fractured Court in these historic cases. Writing for the Court, Judge Pan adopts a broad definition of "corruptly" as any unlawful purpose, and rejects an evidence-based limitation on prosecutions. Judge Walker implicitly rejected the evidence-based limitation, but adopts a narrower definition of "corruptly," one entailing an intent to receive an unlawful benefit for oneself or a third party, joining with Judge Pan only because it is always unlawful to assault an officer. Judge Katsas, in the meanwhile, adopts the evidence-based limitation, while largely skirting the issue of "corruptly's" meaning. It is a cacophonous result that leaves unsettled significant issues.

The result will be a discordant series of appeals and petitions in years to come, and, arguably, prosecutions conducted armed with "breathtaking" applications of a statute passed in the wake of a financial crisis, Sarbanes-Oxley, to a protest sounding in core First Amendment activities involving the right to peaceable assembly, to petition for redress of grievances, and to speak out. The timing of this filing is

significant: As the nation's attention turns to the 2024 election, there is good reason to fear that the Justice Department's current use of Section 1512(c)(2) will serve to chill political speech and expression on the eve of one of the most consequential events in American life – the election of the next President of the United States.

REASONS FOR GRANTING THE PETITION

I. The Application Of Section 1512(c)(2) In The Context Of A Public Protest Turned Violent Is An Unprecedented Overcriminalization Of Otherwise Criminal Conduct With Chilling Consequences

The prosecution at issue arose in a unique context and at a fraught moment in American history. A sitting president claimed an election had been stolen – short of an invasion by a foreign power, the most shocking threat conceivable to the American republic. The president called upon Americans to come to Washington, D.C., in an effort to "stop the steal." On January 6, 2021, the day electoral votes were to be certified by Congress, the president called on people to march on the Capitol. Thousands did so. Once they arrived at the Capitol, a riot broke out. Hundreds, perhaps, when all the charges than can be filed have been filed, thousands of Americans face criminal prosecution. All attended an event to petition for redress of grievances, all assembled, all intended by their presence to speak out. A wide variety of criminal charges, both

misdemeanor and felony, cover the panoply of offenses committed that day. Yet for reasons unknown, the Department of Justice has seen fit to apply a statute applicable to crimes involved in the presentation of evidence in official proceedings done for venal and corrupt purposes in a manner that has never been done before.

It falls to this Court to rein in the Department of Justice. The deterrent effect of criminal prosecutions must not give way to vindictiveness. Use of 18 U.S.C. Section 1512(c)(2) in this manner and in this context will serve only to chill people in the exercise of rights fundamental to our way of life.

The *Fischer* court's rendering of 18 U.S.C. Section 1512(c)(2) transforms a nuanced statutory scheme requiring use of a scalpel to distinguish various forms of culpable conduct into an invitation to use a sledgehammer to wallop anyone convicted of obstruction with a 20-year sentence. Broad application of this statute to allegations unrelated to "evidence-impairment" is almost unheard of, despite the fact that the statute is two-decades old.

The statute reads as follows:

> (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

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

18 U.S.C. Section 1512(c)(2).

As Judge Katsas noted in dissent in *Fischer*:

> [T]he government's interpretation of section 1512(c) injects a significant structural anomaly into Chapter 73 because of its 20-year maximum penalty. . . . For example, picketing, parading or using a sound truck to influence a proceeding carries a one-year maximum penalty. 18 U.S.C. Section 1507. Using threats or force generally carries a maximum penalty of either 5 or 10 years, depending on whether the proceeding is before a Court, an agency, or Congress. *Id.*, Sections 1503(b), 1505. And destroying, manipulating, or falsifying evidence carries a maximum penalty of 20 years. *Id.*, Sections 1512(c), 1519. This scheme ties the penalty to the sophistication of the obstruction and the kind of proceeding targeted. Rudimentary forms of obstruction, such as picketing, receive the lowest penalty. . . . The government's interpretation would collapse all of this, making any form of obstructing an official proceeding a 20-year felony.

Katsas dissent, App. 102.

That the government has made a policy decision to broaden the application of this statute in an effort to over-penalize those who participated in the riots on January 6, 2021 is beyond doubt. "[U]ntil the prosecutions arising from the January 6 riot, it was uniformly treated as an evidence-impairment crime. . . . [U]until the January 6 prosecutions, courts had no occasion to consider whether it sweeps more broadly, because all of the caselaw had involved conduct plainly intended to hinder the flow of truthful evidence to a proceeding." Katsas dissent, App. 105.

The one counterexample relied upon by the *Fischer* majority involves falsification of a court document and its use to persuade another party to withdraw a court filing. *United States v. Reich*, 479 F.3d 179 (2d Cir. 2007). In *United States v. Burge*, 711 F.3d 803 (7th Cir. 2013), the Court reasoned that the term "otherwise" linked sections 1 and 2 reflecting a Congressional intention that "the same type of . . . misconduct that might 'otherwise' obstruct a proceeding beyond simple document destruction." *Id.* at 808. This narrowing interpretation was also followed in *United States v. Petruk*, 781 F.3d 438, 445 n.2 (8th Cir. 2015) (approving a jury instruction that directed that a defendant must "contemplate" some official proceeding in which "testimony, record[s], document[s], or other object[s] might be material"); *United States v. Volpendesto*, 746 F.3d 273, 287 (7th Cir. 2014) (evidence sufficient to convict when shown defendant intended to "influence what evidence came before a grand jury"); and, *United States*

v. Desposito, 704 F.3d 221, 231 (2d Cir. 2013) (defendant planned to "create fraudulent evidence").

The use of a statute fashioned to respond to manipulation of official proceedings by means of influencing the integrity of the evidence in the context of the January 6 riot prosecutions is the sort of "improbably broad" interpretation of a criminal statute this Court disapproved of in *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (use of computer fraud statute "would attach criminal penalties to a breathtaking amount of commonplace computer activity). See also, *McDonnell v. United States*, 579 U.S. 550, 574-76 (2016) (rejecting "expansive interpretation" of bribery statute); and, *Bond v. United States*, 572 U.S. 844, 863 (2014) (rejecting transformation of chemical weapons statute in an "anti-poisoning regime that reaches simple assaults"). As Judge Katsas noted in dissent in *Fischer*, "[T]he government's interpretation would make section 1512(c)(2) both improbably broad and unconstitutional in many of its applications." App. 107. Mr. Lang insists this is a blatant political act by one party weaponizing the penal code to punish its adversaries.

In the instant case, protestors turned out en masse to engage in protected activity: they petitioned for the redress of grievance, they assembled, and some engaged in vitriolic, hyperbolic speech, both on the day of the protests and in the days and weeks preceding it. When the demonstration turned to a riot, some of the protestors turned to violence; Mr. Lang will contend at trial his use of force was in defense of himself and others from police violence. There was no need to create a new and novel application of a statute to capture the

violence that took place that day; existing statutes were sufficient to assign criminal liability. Did Mr. Lang assault a police officer? If so, there is a statute for that. Did he breach the peace? If so, there is a statute for that, too. Did he trespass? The answer is by now obvious.

Unsatisfied with the penalties the violation of these statutes might impose, and desiring to broadcast a louder and more compelling general deterrent message, the government transformed Section 1512(c)(2) into something well beyond what Congress had in mind when it passed a law intended to punish interference with the integrity of evidentiary proceedings. This statute not only carries with it a significant penalty – up to 20 years in prison – it sends a chilling message to anyone contemplating attendance at a political rally: Stay home. If things go wrong, you could face charges of corruptly obstructing an official proceeding. Closing Arthur Anderson's "loophole" was never intended to result in a hangman's noose of general application.

II. Permitting The Element Of Corrupt Purpose To Bear Such A Broad Scope And Meaning Transforms Almost Any Act Into A Corrupt Act, And Thus 1512(c)(2) Into A Statute So Vague As To Provide No Notice Of What Is And Is Not Prohibited

A defendant must act "corruptly" to be guilty of a violation of Section 1512(c)(2). This is more than mere intent, or even specific intent. If the term is more than mere surplusage, and given its location in the statute,

it is most assuredly not surplus, it defines an element of the offense. The D.C. Circuit's decision below skirted this issue in its highly unusual, and fractured opinion, resulting in a jurisprudence more likely to confound judges and practitioners alike than it is to assure the just resolution of cases charging the statute.

Writing for the Court, Judge Pan skirted the issue of just what a corrupt purpose was. Judge Pan rejected the defendants' contention that Section 1512(c)(2) was limited to evidence-based obstruction, and declined even to consider the meaning of corrupt purpose, concluding that the issue had not been adequately briefed by the parties. In Judge Pan's view, there were no limitations on what could be prosecuted under this obstruction of justice statute; Section 2's use of the term "otherwise" opened the door to a vast new world of prosecutorial discretion, a world welcoming Alice into Wonderland to the Justice Department.

That's all the Court decided in *Fischer*.

The fair notice requirement of criminal law requires that a person of ordinary intelligence be placed on notice of what the law proscribes. As Justice Oliver Wendell Holmes, Jr. wrote in *McBoyle v. United States*, 283 U.S. 25 (1931) fair notice requires that the line distinguishing what is prohibited and what is permitted be clear "in language that the common world will understand." Otherwise, the criminal code becomes a tool of oppressive government misconduct, with prosecutors, and courts, free to import esoteric meanings into statutes, prosecuting the unwitting and unaware for crimes they could not imagine having committed. This

makes a mockery of the law's role in creating settled expectations between and among strangers, and setting limits on what the government can do in the name of the law. In this case, a law intended to criminalize tampering with evidence related to official proceedings is being used to cudgel unwary defendants. It is unnecessary surplusage in a case in which the alleged misconduct is already covered by a number of other statutes. And it sets a dangerous precedent, tempting prosecutors and judges alike use an overbroad definition of "corruptly" to criminalize conduct that may very well be protected by the First Amendment.

As set forth in the Indictment and reported in the Court of Appeals decision, Mr. Lang was

> a member of the mob that forced Congress to stop its certification procedure, [he] allegedly fought against police officers in the Capitol for more than two hours, repeatedly striking officers with a bat and brandishing a stolen police shield. His 13-count indictment alleged that he assaulted six Metropolitan Police Officers, caused bodily injury to one of them, and engaged in disorderly conduct and physical violence with a bat and shield in a restricted area of the Capitol.

Fischer, App. 4. He was charged with a variety of crimes, including, Assaulting, Resisting, or Impeding Certain Officers, in violation of 18 U.S.C. Section 111(a)(1), a felony, and misdemeanor charges of Disorderly Conduct in a Capitol Building, in violation of 18 U.S.C. Section 5104(e)(2)(D), and Disorderly and Disruptive Conduct in a Restricted Building or Grounds,

in violation of 18 U.S.C. Sections 1752(a)(2) and (b)(1)(a). *Id*. The felony assault count alleges Mr. Lang "did forcibly assault, resist, oppose, impede, intimidate, and interfere with[] and officer and employee of the United States . . . " *Id.* The misdemeanor counts allege that Mr. Lang acted "with intent to impede and disrupt the conduct of a session of Congress." *Id.*, 5. Mr. Lang did not challenge the indictment as to these counts.

Mr. Lang did move to dismiss the Indictment as to the count arising under 18 U.S.C. Section 1512(c)(2), specifically contending that the statute was applied in a breathtakingly overbroad manner. Specifically, he contended that a statute designed and intended to prohibit tampering with evidence could not plausibly be stretched to cover an alleged violent physical assault of a police officer. The District Court agreed, but a fractured Appellate Court appears to have disagreed but for reasons that are at best discordant and confusing. Two of the three-judge panel's opinions provide differing rationale for overturning the District Court, and one judge, in the view of the petitioner, dissenting for all the right reasons.

The Appellate Court's decision will influence scores, if not hundreds, of prosecutions arising from the riot at the Capitol on January 6, 2021. This Court should grant certiorari to rein in prosecutors now free to use a statute with a seemingly narrow reach in a broad, and potentially dangerous manner. Individuals appearing at protests to petition for the redress of grievances may likely now feel chilled to exercise core First Amendment rights. If the protest turns violent,

will they, too, be swept in events and charged with acting in a corrupt manner?

Judge Walker concurred with Judge Pan that Section 1512(c)(2) applies to assaultive conduct, but disagreed with Judge Pan about corrupt purpose. In Judge Walker's view, the issue was adequately briefed and argued before the Circuit Court. *Fischer*, App. 48, fn.1. Deciding whether an assault of a peace officer in the context of the January 6, 2021 riot was a corrupt act was necessary, Judge Walker reasoned. He concluded that a corrupt purpose had "its long-standing meaning, . . . 'an intent to procure an unlawful benefit either for himself of some other person.' *Marinello v. United States*, 138 S. Ct. 1101, 114 (2018)." *Fischer*, App. 47. The third-party beneficiary, in Judge Walker's view, was Mr. Trump, who would have retained office if the riot stopped the electoral vote count – although how a mere pause in the proceedings would accomplish that result was left unstated, and since assaulting a police officer is always wrong, the element of unlawful purpose was satisfied.

Judge Katsas, in dissent, noted that the consequence of the lead opinion's refusal to address the meaning of "corruptly" yields a statute without "significant guardrails" capable of application in contexts that encroach on core freedoms, including the freedom to assemble. "Decades ago, we observed that a statute reaching conduct that is not 'decent, upright, good, or right' 'affords an almost boundless area for individual assessment of the morality of another's behavior.' *Ricks v. District of Columbia*, 414 F.2d 1097, 1006 (D.C.

Cir. 1968). . . . Under such a vague standard, mens rea would denote little more than a jury's subjective disapproval of the conduct at issue." *Fischer*, App. 110. The result of *Fischer*, Judge Katsas correctly observes, is that "it posits that the Corporate Fraud Accountability Act extended the harsh penalties of obstruction-of-justice law to new realms of advocacy, protest, and lobbying." *Fischer*, App. 112.

Judge Katsas, preferring a definition of "corruptly" more in keeping with that of Judge Walker, sought to sidestep the issue by opining that 18 U.S.C. Section 1512(c)(2) was applicable only in evidence-based contexts and was not therefore properly used in a case involving assaultive conduct. In effect, the residual clause of Section 2, prohibiting a person from "otherwise" obstructing an official proceeding was inapplicable to an assault on a police officer.

As a result, the Circuit judges exchanged opinions about what definition of "corruptly" is the law of the Circuit, with Judge Walker suggesting that under *Marks v. United States*, 430 U.S. 188 (1997) his opinion about the term's meaning might bind future panels in the D.C. Circuit. *Fischer*, App. 70 n.10. Judge Pan disagreed in a lengthy footnote. *Fischer*, App. 24 n.5. The liberty interest of scores, if not hundreds, of defendants are now strained through arcane positions asserted in the footnotes of contrasting opinions. This is a pressing federal question that requires an authoritative decision now. The opinion leaves fundamental questions unaddressed and judges and practitioners grappling to find settled ground in a body of law set to

explode given the expected volume of prosecutions contemplated by the Justice Department as to the riot on January 6, 2021.

Judge Walker's opinion illustrates what's at stake without an authoritative decision about the meaning of the term "corruptly." "An innovatively broad definition of 'corruptly' could raise serious concerns that Section 1512(c)(2) is a vague provision with a breathtaking scope. For example, if 'corruptly' requires proof only that a defendant acted with a 'wrongful purpose,' then (c)(2) might criminalize many lawful attempts to 'influence[ ]' congressional proceedings – ." *Fischer*, App. 67. Judge Walker urged the Circuit court to give the term a narrow reading so as to avoid the Supreme Court's having to "repeat itself" about the dangers of courts "assign[ing] federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *Fischer*, App. 68, citing *United States v. Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting) (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)).

Judge Katsas raised another significant concern. The *Fischer* decision countenances application of 18 U.S.C. Section 1512(c)(2) in a manner that easily affects protected political speech. "[A]dvocacy, lobbying, and protest before the political branches is political speech that the First Amendment squarely protects." *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235-236 (1963). 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. *United States v. North*, 910 F.2d 842, 882 (D.C. Cir. 1990)." *Fischer*, App. 108.

On the indictment as challenged here, Mr. Lang was a protestor turned violent. His crimes of violence are to be prosecuted under 18 U.S.C. Section 111(a)(1), a felony penalizing the assault of certain officers. His entry into Capitol Grounds is to be prosecuted under misdemeanor statutes, Disorderly Conduct in a Capitol Building, in violation of 18 U.S.C. Section 5104(e)(2)(D) and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. Sections 1752(a)(2) and (b)(1)(a). *Fischer*, App. 5. These charges carry a significantly lesser penalty that the 18 U.S.C. Section 1512(c)(2) charge.

In sum, the government's decision to charge Mr. Lang with Section 1512(c)(2) is an example of prosecutorial over-reaching. The federal statutes were not silent on the claims the government wanted to pursue at trial – the government contends he assaulted police officers and disrupted Congress. Mr. Lang contends otherwise, but understands that his right to present a defense must wait until the time of trial. For the present, he can only ask this Court to reverse the D.C. Circuit and rule that 18 U.S.C. Section 1512(c)(2) is limited in scope, and is applicable to crimes charging interference with integrity of evidence presented at official proceedings, and that the "corrupt" intent required to prove a violation of the statute is more than acting up at the scene of a political riot. In the District of Columbia prosecutors are now enabled to prosecute

anyone who attends at a public demonstration gone awry; the result will be to create fear in those who would otherwise feel free to petition for redress of grievances, assemble in public places, and speak out about public affairs. It is that regime, and not a few hours' disturbance at the Capitol on January 6, 2021, that is the more grave threat to democracy in America.

III. A Writ of Certiorari is Warranted Under Rule 10(c)

Rule 10 of this Court's Rules, cautions that a writ of certiorari is a matter of judicial discretion and will be granted for only the most compelling reasons. Rule 10(c) reads, in pertinent part, that the Court shall consider whether "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, . . . " The petitioner submits that the Justice Department's overbroad application of the federal penal code to prosecute participants in the January 6, 2021 riot at the Capitol is the act of a behemoth unrecognized, unwarranted and unwelcome in American life. Our political life for centuries has been fractious, with violence all too frequent. Seeking to punish and silence dissent in the name of democracy is the twisted dream of a slumbering tyrant. This Court can and must act in this very simple case. Using 18 U.S.C. Section 1512(c)(2) in the manner approved by the Court of Appeals is a terrifying misapplication of the law. This is nothing less than the weaponization of the penal code to stifle dissent; it

sets a terrifying precedent unworthy of this nation's history.

CONCLUSION

The petition for certification should be granted.

Respectfully submitted,

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