SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH W. FISCHER,)

Petitioner,)

v.) No. 23-5572

UNITED STATES,)

Respondent.)

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9

10 Washington, D.C.

11 Tuesday, April 16, 2024

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13 The above-entitled matter came on for

14 oral argument before the Supreme Court of the

15 United States at 10:10 a.m.

16

17 APPEARANCES:

18 JEFFREY T. GREEN, ESQUIRE, Bethesda, Maryland; on

19 behalf of the Petitioner.

20 GEN. ELIZABETH B. PRELOGAR, Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf

22 of the Respondent.

23

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

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument this morning in Case 23-5572, Fischer

5 versus United States.

6 Mr. Green.

7 ORAL ARGUMENT OF JEFFREY T. GREEN

8 ON BEHALF OF THE PETITIONER

9 MR. GREEN: Mr. Chief Justice, and may

10 it please the Court:

11 Congress enacted 1512(c) in 2002 in

12 the wake of the large-scale destruction of

13 Enron's financial documents. The statute

14 therefore prohibits the impairment of the

15 integrity or availability of -- of information

16 and evidence to be used in a proceeding. In

17 2002, Congress hedged a little bit and added

18 Section (c)(2) to cover other forms of

19 impairment, the known unknowns, so to speak. It

20 was, after all, the dawn of the Information Age.

21 Until the January 6th prosecutions,

22 Section 1512(c)(2), the "otherwise" provision,

23 had never been used to prosecute anything other

24 than evidence tampering, and that was for good

25 reason. This Court has said that "otherwise,"

1 when used in a criminal statute, means to do
2 similar conduct in a different way.
3 The government would have you ignore
4 all that or disregard all that and instead
5 convert (c)(2) from a catchall provision into a
6 dragnet. One of the things that that dragnet
7 would cover is Section (c)(1). Our construction
8 of the statute at least leaves (c)(1) and (c)(2)
9 to do some independent work.
10 The January 6th prosecutions
11 demonstrate that there are a host of felony and
12 misdemeanor crimes that cover the alleged
13 conduct. A Sarbanes-Oxley-based, Enron-driven
14 evidence-tampering statute is not one of them.
15 I welcome the Court's questions.
16 JUSTICE THOMAS: Mr. Green, how do we
17 determine what these two provisions have in
18 common? Do we look after the "otherwise" or
19 before and why?
20 MR. GREEN: We -- you look at before,
21 Justice Thomas, and you look at the kinds of
22 manner in which documents and records are to be
23 impaired, and then you look after to see what
24 the effect is. But I would submit that the
25 effect is the same, right, in order to cause the

1 impairment of the integrity of the evidence
2 that's to be used in a proceeding or to prevent
3 its availability.
4 So we look back and we look forward.
5 JUSTICE THOMAS: Wouldn't it be just
6 as easy to look at (c) -- at the (c)(2) and then
7 ask what it has in common with (c)(1) and use
8 (c)(2)'s provisions as the basis for that
9 similarity?
10 MR. GREEN: No, because in -- in --
11 (c)(2) speaks to the effect of the actions that
12 the "otherwise" clause covers. So, in other
13 words, we look at (c)(1) and we see that
14 Congress is concerned about documents and
15 records and other objects and things that are
16 done to those to impair the integrity of those,
17 and the effect of that is to obstruct. And so
18 (c)(2) omits that object and verb section.
19 JUSTICE THOMAS: But you could just as
20 easily say that Congress is really concerned
21 about things that obstruct, influence, or impede
22 official proceedings, and that's (c)(2). So why
23 isn't that the basis for the similarity?
24 MR. GREEN: Well, because of the -- of
25 the -- the presence of the "otherwise"

1 provision. So "otherwise," as I mentioned
2 -- and -- and "otherwise," this Court has said,
3 means to do similar conduct in a different way.
4 So what we've got here is -- is the impairment
5 of evidence being done in a different way.
6 JUSTICE SOTOMAYOR: I'm sorry. I -- I
7 thought was, yes, doing it in a different way,
8 so let me give you an example. There is a sign
9 on the theater: You will be kicked out of the
10 theater if you photograph or record the actors
11 or otherwise disrupt the performance.
12 If you start yelling, I think no one
13 would question that you can be expected to be
14 kicked out under this policy, even though
15 yelling has nothing to do with photograph or
16 recording. The object that the verb is looking
17 at, the verbs are looking at, is the
18 obstruction. It's not the manner in which you
19 obstruct; it's the fact that you've obstructed.
20 Isn't that the structure of this
21 provision?
22 MR. GREEN: It is, Your Honor. It --
23 it's -- it's in part the structure of the
24 provision. But what -- what your hypothetical
25 omits is that there is a specific retriculation,

1 I guess it's called, of all of the different
2 sorts of things that might be done to evidence
3 to begin with.
4 JUSTICE SOTOMAYOR: Except that --
5 MR. GREEN: There's a long --
6 JUSTICE SOTOMAYOR: -- what's
7 fascinating about (1), which is not about (2),
8 is that (1) doesn't require you to have actually
9 impeded the proceeding. (1) requires you to
10 have that intent, but you don't actually have to
11 accomplish the intent. (2) requires you to
12 accomplish the intent. And so that's a very
13 different articulation of what the object of (2)
14 is. The object of (2) is the actual disruption
15 of the proceeding.
16 MR. GREEN: Well, I would respectfully
17 disagree because, I mean, both --
18 JUSTICE SOTOMAYOR: Well, why? Look
19 at the language.
20 MR. GREEN: Yeah.
21 JUSTICE SOTOMAYOR: "Alters, destroys,
22 mutilates, or conceals a record." I do that in
23 my home, and I do it anticipating that it might
24 be needed. All I have to do is have the intent
25 to impair. By that very language, I don't have

1 to have an actual proceeding that I've impaired.
2 On (2), you need an actual proceeding
3 to impair.
4 MR. GREEN: I guess I'm -- I -- I
5 guess I'm a little confused, Justice Sotomayor,
6 because, as I read this, I would think that the
7 government would say that any attempt at (1) is
8 also covered by the statute, and I'm not sure
9 that I would disagree. So I'm not -- I -- I
10 don't think that there has to be an actual
11 impairment.
12 JUSTICE SOTOMAYOR: No, I do think,
13 under (1), you don't need an actual impairment.
14 Under (2), you do.
15 MR. GREEN: Okay. Well, or --
16 JUSTICE SOTOMAYOR: If you read it --
17 MR. GREEN: But -- but (2) says or
18 attempts --
19 JUSTICE SOTOMAYOR: -- the -- the verb
20 requires you to actually obstruct the proceeding
21 in (2). Nowhere in (1) do you actually have to
22 obstruct.
23 MR. GREEN: Well, in -- in -- in (2),
24 you -- you only have to attempt to do the things
25 that -- that are in (2).

1 JUSTICE SOTOMAYOR: No, otherwise
2 obstructs or impedes or attempts to, yes.
3 MR. GREEN: Yes.
4 JUSTICE BARRETT: Counsel, can I ask
5 you whether -- let's -- let's imagine that we
6 agree with you. On remand, do you agree that
7 the government could take a shot at proving that
8 your client actually did try to interfere with
9 or, under (c)(1) -- or, actually, no -- sorry --
10 under (c)(2), obstruct evidence because he was
11 trying to obstruct the arrival of the
12 certificates arriving to the vice president's
13 desk for counting? So there would be an
14 evidence impairment theory?
15 MR. GREEN: I'm quite sure that my
16 friend would take a shot, Your Honor, but I
17 would -- I would -- I would say no, and the
18 reason why is that this statute prohibits
19 operation on -- on specific evidence in some
20 way, shape, or form.
21 Attempting to stop a vote count or
22 something like that is a very different act than
23 actually changing a document or altering a
24 document or creating a fake new document.
25 JUSTICE BARRETT: Well, he's

1 obstructing evidence in my hypothetical. I
2 mean, he's not actually altering the -- the vote
3 certificates, which is why I corrected myself
4 and said under (c)(2). I mean, would that be
5 different than someone, say, in a trial or a
6 criminal proceeding trying to prevent evidence
7 that was going to be introduced in the
8 proceeding from making it there? So I'm -- I'm
9 imagining him acting on the certificates, not
10 the act of counting them.
11 MR. GREEN: Well, again, I think they
12 could try it, but I -- I don't think that we're
13 talking about trying to impair just anything
14 other than the evidence itself. We're trying to
15 obstruct a proceeding, and there's questions
16 about what "proceeding" means here, as Your
17 Honor doubtless knows.
18 But what the government would
19 essentially be doing, as you noted, is
20 converting what they've charged in (c)(2) to a
21 (c)(1) type of crime.
22 JUSTICE BARRETT: Well, no, no, no,
23 no. (c)(2) -- I mean, as I -- maybe I'm
24 misunderstanding your argument, but I thought
25 your argument was that (c)(2) picks up other

1 things, but they just have to be
2 evidence-related.
3 So, in the hypothetical I'm giving
4 you, it's evidence-related because it's focused
5 on the certificates, but it's obstruct, obstruct
6 or impede, say, the certificates arriving to the
7 vice president's desk insofar as the goal was to
8 shut down the proceeding and therefore interfere
9 with the evidence reaching the vice president.
10 MR. GREEN: I -- I still -- that's
11 closer. It's definitely closer. But, if you
12 zoom out and look at all of 1512 in order to
13 understand what kinds of impairment we're
14 talking about, we are talking about or Congress
15 is prohibiting the kinds of impairments that
16 actually change documents that actually affect
17 their integrity.
18 If it's just impeding or delaying,
19 we'd submit actually that that is not part of
20 1512(c). Delays are mentioned in five other
21 parts of 1512 but not in (c).
22 JUSTICE JACKSON: But -- but, Mr. --
23 Mr. Green, if -- if -- if Justice Barrett is
24 wrong, then what work is (c)(2) doing? I mean,
25 it seems like you've just now re-articulated

1 only the theory of (c)(1) and you're saying that
2 you have to make it into (c)(1) in order to
3 be -- you know, to have this statute apply.
4 So can -- can you help me at least
5 understand under your theory what additional
6 thing does (c)(2) offer?
7 MR. GREEN: Let's -- let's look at the
8 verbs of (c)(1), which are "alter," "destroy,"
9 "mutilate," and "conceal," and let's think about
10 their antonyms. So one instead of "destroy"
11 would be actually to create. So one could use
12 some sophisticated computer program, we've heard
13 an awful lot about AI, and we've heard about the
14 possibility of deepfake photographs.
15 So I -- I think you would violate
16 (c)(2) if you created a photograph that
17 established your alibi in -- in some extremely
18 sophisticated way that would get it admitted
19 into evidence or make it -- or you submit it for
20 evidence would probably be where the crime
21 occurs.
22 JUSTICE JACKSON: So you're saying
23 there are other things other than particularly
24 altering, destroying, mutilating, or concealing,
25 but it has to be limited to a record?

1 MR. GREEN: Not necessarily, because,
2 I mean, one other example if I might, Your
3 Honor, would be not to conceal but to disclose.
4 So, if I disclosed a witness list in a large
5 multi-defendant drug trial, my purpose in doing
6 that, though I haven't altered the document,
7 would be to intimidate the witnesses or prevent
8 their attendance. That, on our submission,
9 would also violate (c)(2).
10 JUSTICE JACKSON: All right. Can I
11 just ask you one other question just so that I
12 can fully understand your theory? You keep
13 using the term "evidence," and that does not
14 appear in the statute. The statute, (c)(1) says
15 "record, document, or other object."
16 Now I appreciate that, you know,
17 evidence can be such a thing, but you can
18 imagine a world in which those two are
19 different. So where does evidence come in in
20 your theory and why is it there?
21 MR. GREEN: Well, the -- the -- the
22 title of the statute refers to tampering with
23 witnesses, victims, and informants. But along
24 with wictims -- excuse me, witnesses, victims,
25 and informants comes evidence that they provide,

1 whether in the form of testimony or whether in
2 the form of documents.
3 JUSTICE JACKSON: No, I understand.
4 But the statute, the provision we're talking
5 about here, does not use the term "evidence."
6 And so -- and instead or in addition, it uses
7 the term "official proceeding," which is
8 elsewhere defined not in terms of, you know,
9 court proceedings or investigations. It's just
10 a proceeding, you know, before Congress.
11 So is it your -- is it your argument
12 that the only thing that this provision covers
13 is something that is tantamount to evidence in
14 an investigation or trial?
15 MR. GREEN: It -- it is, Your Honor.
16 And we're not limiting it -- our -- our position
17 does not limit it to documents or records. I
18 would submit (c)(1), which we say carries into
19 (c)(2) through the "otherwise" clause, when it
20 says "other object," is pretty broad.
21 And it need not be -- as -- as -- as
22 1512(f) provides, it need -- it need not be
23 admissible to you, (f) -- yeah, (f), it need not
24 be admissible. So it -- it could cover things
25 like electronic records. It could cover

1 communications. It could cover emails. It
2 could cover all kinds of things that we think
3 get used by fact finders in a formally convened
4 hearing.
5 JUSTICE KAGAN: I mean, just to take
6 you --
7 JUSTICE ALITO: What about --
8 JUSTICE KAGAN: -- back to --
9 JUSTICE ALITO: Just a quick question.
10 What about the Second Circuit's decision in U.S.
11 versus Reich, where what was involved was not
12 evidence, it was a forged court order. Would
13 that fall within (c)(2)?
14 MR. GREEN: Yes, we -- we think that
15 does fall within (c)(2). And I -- I think
16 anything that is falsified in this operative way
17 that is used to obstruct a proceeding would --
18 would be covered by (c)(2).
19 JUSTICE ALITO: All right. Thank you.
20 MR. GREEN: Yes.
21 JUSTICE KAGAN: Just to take you back
22 to the -- the question that Justice Thomas
23 started you with, I mean, there, it seems to me
24 there are two choices here, and you could read
25 this as "otherwise obstructs a proceeding" or

1 "otherwise spoils evidence."
2 And you're using it to say "otherwise
3 spoils evidence" with, you know, "spoils" being
4 all those verbs. But it doesn't say that. It
5 says "otherwise obstructs a proceeding." There
6 are plenty of ways to write the statute that you
7 want to write. You could just say otherwise
8 affects the integrity or availability of
9 evidence in an official proceeding. You could
10 combine official proceeding with evidence in
11 other ways, you know, one with -- you could
12 replicate the mens rea that (c)(1) has.
13 I mean, there are ways in which (c)(2)
14 -- multiple ways in which the drafters of (c)(2)
15 could have made it clear that they intended
16 (c)(2) to also operate only in the sphere of
17 evidence spoliation. But it doesn't do that.
18 All it says is "otherwise obstructs, influences,
19 or impedes."
20 MR. GREEN: It -- it -- certainly, the
21 statute could be written more precisely. Any
22 statute could be written more precisely.
23 JUSTICE KAGAN: Well, it's not a
24 question of precisely. The question is what is
25 this "otherwise" -- this is what Justice Thomas

1 said at the beginning -- what is this
2 "otherwise" taking from (c)(1)? Of course,
3 there's commonality that's involved in an
4 "otherwise." There's both commonality and
5 difference.
6 But what is the commonality that
7 (c)(2) is drawing from (c)(1)? It tells you
8 what the commonality is. The commonality is
9 that the things that fall into (c)(2) also have
10 to obstruct, influence, or impede. But what
11 (c)(2) does not say, really does not say, is
12 everything in (c)(2) also has to spoil evidence.
13 MR. GREEN: But this Court has said
14 that "otherwise" in a criminal statute means
15 similar conduct, so we --
16 JUSTICE KAGAN: Similar conduct,
17 obstruction of a proceeding, different ways of
18 carrying out that similar conduct, which is
19 obstruction of a proceeding.
20 The statute tells you what the similar
21 conduct is right on its face.
22 MR. GREEN: Well, respectfully,
23 Justice Kagan, the statute tells you what the
24 effect is. The conduct that's specified in
25 (c)(1) is altering, destroying, mutilating, or

1 concealing a document, record, or other object.
2 And so a drafter of this statute could
3 easily omit something like that and would omit
4 something like that for the sake of economy and
5 also to hedge because we know that what comes
6 before might not be exactly the same as after,
7 so we're not going to repeat what we said there,
8 but we're going to use a connector like
9 "otherwise" to -- to demonstrate that we're
10 talking about similar conduct.
11 And I would submit, Your Honor, that
12 if you look at (c)(2) alone, that is -- please.
13 JUSTICE KAGAN: What's your best case
14 for this, like, going backward and trying to
15 find language that does not appear in the
16 "otherwise" provision and trying to incorporate
17 it into the "otherwise" provision?
18 MR. GREEN: Well, I think Begay is our
19 best case for sure.
20 JUSTICE KAGAN: And that's not --
21 MR. GREEN: Yates is also a good case.
22 JUSTICE KAGAN: -- a very good
23 advertisement, I would think. I mean, what
24 Begay does is exactly that. So you have a very
25 good case there. And it was a complete failure.

1 You know, Begay said we look back at this other
2 -- at this thing that Congress did, you know,
3 did not use in the "otherwise" provision and we
4 derive various things from it and we put it in.
5 It was "purposeful, violent, and aggressive."
6 And then, a few years later, we said, where did
7 that come from? We made it up, and we get rid
8 of the whole thing.
9 So that's not a great advertisement
10 for rewriting a statute to -- to -- you know, to
11 take an "otherwise" provision that says what it
12 says and turn it into an "otherwise" provision
13 that says something else.
14 MR. GREEN: We would submit that Begay
15 was abrogated on other grounds, Your Honor, and
16 the other grounds are the Court -- the members
17 of the Court could not decide between an
18 assessment of the types of things that came
19 before "otherwise" versus the level of risk.
20 And when that began to play out in
21 complicated cases like Chambers and many others
22 involving escape from a halfway house, it became
23 a -- an -- the Court said, an untenable
24 proposition to figure out what a potential harm
25 to another person might be looking at what came

1 before. That doesn't --
2 JUSTICE ALITO: Well --
3 MR. GREEN: That doesn't --
4 JUSTICE ALITO: I'm sorry, Mr. -- Mr.
5 Green. Go ahead, finish your sentence.
6 MR. GREEN: Yeah, but that doesn't --
7 that doesn't mean that the Court's holding about
8 how to construe a statute and its significant
9 holding about "otherwise" was abrogated in and
10 of itself as a result of the cases that came
11 after Begay.
12 JUSTICE ALITO: Well, I -- I'm not a
13 fan of Begay. Some of us perceived at that time
14 that there were problems, different problems,
15 with what the Court did there.
16 But I -- I think there -- there's a
17 point in the colloquy that you've been having.
18 The specific types of conduct that are
19 enumerated in (1), alter, destroy, mutilate,
20 conceal a record, document, et cetera, et
21 cetera, have two things in common. One, they
22 all involve documents or objects, and they also
23 all involve the impairment of the object's
24 integrity or availability for use in an official
25 proceeding.

1 So the similarity could be either of
2 those things. And so I -- I think that you may
3 be biting off more than you can chew by
4 suggesting, if -- if you are indeed suggesting,
5 that the "otherwise" clause can only be read the
6 way you read it. One might say it can certainly
7 be read the way the government reads it, and
8 that might even be the more straightforward
9 reading.
10 But it is also possible to read a
11 clause like this more narrowly, and Judge Katsas
12 provided an example of that in his opinion. If
13 you have a statute that says anyone who kills or
14 injures or assaults someone or otherwise causes
15 serious injury, commits a crime, you wouldn't
16 think that that applies to defamation.
17 So it could be read your way. So then
18 I think you have to go on to some other
19 arguments and explain why your reading is better
20 than the government's reading.
21 MR. GREEN: Certainly. And I -- I
22 would submit, Your Honor, that there are plenty
23 of other reasons why our reading is the better
24 reason. And I'm not going to contest or bite
25 off more than I can chew and say that the

1 government's reading of (c)(2) is implausible.
2 We think it's unsound, but it's
3 unsound for the additional reasons that if one
4 zooms out and looks at what the prohibited
5 conduct is in 1512 generally, we are talking
6 about interference or operation on forms of
7 evidence and testimony that -- that obstruct a
8 proceeding. That's what 12 is all about
9 generally.
10 And I would submit, Your Honor, too
11 that as the briefing indicates, ejusdem generis
12 and -- and noscitur a sociis, those two
13 venerated Latin canons, also operate in our
14 favor here, as well as the broader context of
15 Chapter 73 and -- and -- and Section 15. All of
16 these things are about doing things that -- that
17 -- that obstruct a proceeding. And 1512 and
18 1512(c) zero in on witnesses and evidence.
19 JUSTICE ALITO: Well, you have other
20 arguments. You have surplusage arguments. You
21 have arguments about the breadth of the
22 government's reading of the provision. Do you
23 want to say anything about those?
24 MR. GREEN: Right. So, with respect
25 to surplusage, Your Honor, I would refer to

1 Judge Katsas's opinion, as you did, in
2 particular in the Joint Appendix at page 88,
3 which lists out all of the different provisions
4 in Section 1512. Fifteen of the 21 would be
5 subsumed by the government's reading of (c)(2).
6 The government's reading of (c)(2), I
7 remind the Court, is so broad that it would
8 cover anyone who does something understanding
9 that what they are doing is wrong in some way
10 that in any way influence, impedes, or obstructs
11 an official proceeding of any type.
12 JUSTICE KAGAN: Well, Mr. Green, I
13 think that this --
14 MR. GREEN: Maybe limited by federal.
15 JUSTICE KAGAN: -- this -- this --
16 there's a good case that this provision --
17 everybody knew it was going to be superfluous
18 because it was a provision that was meant to
19 function as a backstop. It was a later-enacted
20 provision. Congress had all these statutes all
21 over the place. It had just gone through Enron.
22 What Enron convinced them of was that
23 there were -- there were gaps in these statutes.
24 And they tried to fill the gaps. They tried to
25 fill the particular gap that they found out

1 about in Enron. And then they said, you know,
2 this is a lesson to us. There are probably
3 other gaps in this statute.
4 But they didn't know exactly what
5 those gaps were. So they said, let's have a
6 backstop provision. And this is their backstop
7 provision. And, of course, in that circumstance
8 -- I mean, superfluity is very often a good
9 argument when it comes to statutory
10 interpretation, but it's not a good argument
11 when Congress is specifically devising a
12 backstop provision to fill gaps that might
13 exist -- they don't exactly know how they exist,
14 but they think that they probably do exist -- in
15 a preexisting statutory scheme. And that's what
16 this provision is intended to do.
17 MR. GREEN: Respectfully, Your Honor,
18 a close reading of Yates, both the majority
19 opinion and the dissenting opinion, demonstrates
20 that this Court thought that 1519 was the
21 backstop. That was supposed to be the omnibus
22 provision. And the Court was fighting over what
23 the meaning of "tangible object" was in 1519.
24 But that was meant to plug the hole that
25 Congress --

1 JUSTICE SOTOMAYOR: Counsel, I -- I
2 have such a hard time with the superfluidity
3 argument because this entire obstruction section
4 is superfluidity. There isn't one provision you
5 can point to -- you just said it, you can point
6 to 1512 and you have 1519, which says
7 destruction of evidence. How are they
8 different? They're really not. You can point
9 to any series -- any provision and point to
10 superfluidity in this -- in this -- in this
11 section, 1512 and otherwise.
12 So we go back to Justice Kagan's
13 position, which is what you don't have is a
14 freestanding "otherwise obstructs, influence, or
15 impedes any official proceeding." I don't see
16 why that's not the backstop that Congress would
17 have intended and it's the language it used.
18 MR. GREEN: Well, it's an awfully odd
19 place to put it, isn't it, I mean, in a
20 subsection of a subsection in the middle back of
21 the statute, to -- to include a provision --
22 JUSTICE SOTOMAYOR: Well, I mean, as
23 you -- as --
24 MR. GREEN: -- that seemingly --
25 JUSTICE SOTOMAYOR: -- but there's

1 nothing about --

2 MR. GREEN: -- takes over 15 of the 21

3 other provisions.

4 JUSTICE SOTOMAYOR: The one thing that

5 Justice Kagan pointed to, which is clear, they

6 wanted to cover every base, and they didn't do

7 it in a logical way, but they managed to cover

8 every base.

9 MR. GREEN: Well, I think you can

10 reconcile -- I mean, again, that's what the

11 Court said about 1519 in -- in Yates. And I

12 don't understand how it is that the government

13 can come before you today and say we need yet

14 another catchall, yet another omnibus crime that

15 will sweep in all kinds of others. We didn't

16 get what we wanted in Section 15, so now we'll

17 go to 1512(c)(2) and see if we can expand that

18 in this way to cover something that it has never

19 covered before.

20 CHIEF JUSTICE ROBERTS: Thank you.

21 MR. GREEN: And --

22 CHIEF JUSTICE ROBERTS: Thank you,

23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 Justice Sotomayor?
2 JUSTICE SOTOMAYOR: We've never had a
3 situation before where there's been a situation
4 like this with people attempting to stop a
5 proceeding violently. So I'm not sure what a
6 lack of history proves.
7 MR. GREEN: Well, I'm -- I'm not sure
8 that that's true. I'd point to the Hatfield
9 Courthouse problems in -- in -- in -- in -- in
10 Portland, Oregon. But let's -- let's also look
11 at what the Court has said in so many different
12 cases, in -- in Dubin, in Bond, in Yates, in
13 Kelly. All of these cases --
14 JUSTICE SOTOMAYOR: But, there, there
15 was a difference in the use of words. Here,
16 "otherwise obstructs, influences, or impede,"
17 you might have a problem with breadth. And the
18 government can address that. But it's not
19 unclear what those words mean.
20 MR. GREEN: But the government has no
21 way to address its problem with breadth because
22 --
23 JUSTICE SOTOMAYOR: Well, we can let
24 them answer that.
25 MR. GREEN: Okay.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?
4 JUSTICE KAVANAUGH: If it were just
5 the language in (c)(2) and so said "whoever
6 corruptly obstructs, influences, or impedes,"
7 (c)(2), without the word "otherwise," if that
8 were the whole provision, do you acknowledge
9 that the language would then be applied properly
10 to a situation like this?
11 MR. GREEN: Unfortunately, no, and the
12 reason for that is that, again, applying all the
13 other canons and -- and applying the whole-text
14 canon and zooming out and looking at the -- at
15 1512, we would submit that (c)(2) should still
16 be read in the way we have suggested that it be
17 read, as something that is an evidence
18 impairment statute.
19 I think also, as I mentioned, the
20 Latin canons, the surplusage problem that (c)(2)
21 would create, all of those would still obtain if
22 it sat there by itself without the "otherwise."
23 The "otherwise" is the icing on the cake.
24 And, finally, Justice Kavanaugh, I
25 would mention that, as I mentioned to Justice

1 Barrett, there's an issue --
2 JUSTICE KAVANAUGH: Well, let me
3 just -- if you didn't have (c)(1), you just had
4 (c)(2) without the "otherwise." I'm not sure I
5 was clear on that.
6 MR. GREEN: Oh, okay. Well, in -- in
7 that case, I think it gets even harder. But I
8 would still say, if we look at what 1512 is
9 about it -- and -- and if we look at this
10 Court's cases on broad, implausible -- plausible
11 but broad readings of criminal statutes not
12 being what the Court adopts when there's an
13 available narrow reading because Congress can
14 fix that, we would still say that (c)(2) doesn't
15 perform the massive dragnet function that the
16 government submits.
17 JUSTICE KAVANAUGH: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?
20 JUSTICE BARRETT: Yeah, I have a
21 question about the phrase in (c)(1), the
22 specific intent. Do you agree it's specific
23 intent with the intent to impair the object's
24 integrity? Okay.
25 What is your view about how that

1 parenthetical applies to (c)(2), if at all?
2 Like, do you think that that intent requirement
3 carries over to (c)(2)?
4 MR. GREEN: The corruptly intent
5 requirement?
6 JUSTICE BARRETT: Not -- not
7 corruptly. The "with the intent to impair the
8 object's integrity or availability for use in an
9 official proceeding."
10 MR. GREEN: Yes, we do, Your Honor.
11 JUSTICE BARRETT: So it carries over.
12 How --
13 MR. GREEN: And we'd say that's the
14 object of -- of -- of the overarching mens rea.
15 JUSTICE BARRETT: But how can that be?
16 I mean, it seems like that, you know, (c)(2)
17 would read awfully oddly then. It would be
18 "otherwise obstructs, influences, or impedes any
19 official proceeding" -- "with the intent to
20 impair the object's integrity or availability
21 for use in an official proceeding"? That would
22 be your position of how it would read?
23 MR. GREEN: Well, I think that's
24 right. I mean, it's -- it's awkward. I mean,
25 there's no doubt that it's an awkward statute,

1 but, if you -- if you do the operation that I
2 talked about earlier, which is we're just going
3 to use "otherwise" to replace the verbs and the
4 nouns in (c)(1), then -- then the statute makes
5 perfect sense.
6 With respect to intent, I mean, I
7 think Your Honor makes an excellent point, which
8 is that this intent is a specific form of
9 intent. The "corruptly," which has been
10 construed to be the mens rea up there, is not
11 different than -- at least on this reading, is
12 not -- is not -- or on the accepted reading by
13 the D.C. Circuit right now is not different
14 than -- than some form of specific intent.
15 JUSTICE BARRETT: So "corruptly" is
16 redundant?
17 MR. GREEN: I -- it seems like it's
18 getting to be, yes.
19 JUSTICE BARRETT: Okay. Thank you.
20 MR. GREEN: That's true. And I -- our
21 submission is that "corruptly" should mean
22 something different. So should "proceeding."
23 That's how you marry 1512 with 1519.
24 JUSTICE BARRETT: Thank you.
25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I'm just still

3 wondering if your theory about this provision

4 might be too narrow in a sense because you've

5 got evidence going and spoliation in a sense.

6 What I -- what I'm trying to work out

7 in my mind is whether you would still have a

8 decent argument if this 1512 language is read to

9 prohibit the corrupt tampering with things that

10 are used to conduct a -- an official proceeding

11 with the intent of undermining the integrity of

12 the thing or access to the thing and thereby

13 obstructing the proceeding.

14 It's not just evidence. It's an

15 official proceeding. (c)(1) is an example of,

16 you know, the corrupt tampering with certain

17 things. And (c)(2) broadens it out a bit. It's

18 not just documents and records.

19 What do you think about that?

20 MR. GREEN: Well, I think -- I think

21 that's -- that's a correct reading, Your Honor.

22 I mean, we're -- is -- as -- as 1512(f)

23 demonstrates, it doesn't -- you know, 1512(f) we

24 would submit actually supports our position

25 because it says the evidence need not be

1 admissible or free of a privilege claim.
2 Now what would that mean about what
3 the statute is addressing if it's not evidence?
4 But (c)(2) has been applied, and -- and
5 occasionally (c)(1) has been applied.
6 JUSTICE JACKSON: In a non-evidentiary
7 way?
8 MR. GREEN: Yeah, to -- to -- to
9 things that could become evidence, to the
10 efforts to shape someone's grand jury testimony
11 --
12 JUSTICE JACKSON: All right. Let me
13 --
14 MR. GREEN: -- to answers to
15 interrogatories.
16 JUSTICE JACKSON: -- let me ask you
17 about the question that Justice Barrett asked
18 before.
19 You know, you -- you suggested that it
20 has to be to the document, but -- in other
21 words, the -- the -- the activity has to be
22 actually to the document. But I don't know why
23 that's the case under (c)(2).
24 Justice Alito says, well, one of the
25 commonalities between (c)(1) and (c)(2) could be

1 the impairment of the object's integrity or
2 availability.
3 Justice Barrett posits a scenario in
4 which you have someone who is impairing the
5 availability by doing something to prevent the
6 object from getting to the proceeding. Why
7 wouldn't that count under (c)(2)?
8 So this is -- this is, you know,
9 preventing Congress from counting the electoral
10 votes, for example. Let's say it's being done.
11 She says it's in an envelope going to the -- the
12 vice president's desk and someone does something
13 to impair or prevent that from happening. Why
14 isn't that what (c)(2) could cover?
15 MR. GREEN: Well, it -- first, it's
16 not affecting the integrity of the document,
17 Your Honor, or -- or the -- or --
18 JUSTICE JACKSON: Availability is also
19 in the statute.
20 MR. GREEN: Availability it says too,
21 but, as I mentioned earlier, simply delaying the
22 arrival of evidence at the courthouse --
23 JUSTICE JACKSON: No, not delay.
24 Let's say the person steals the envelope and
25 takes it away.

1 MR. GREEN: Then it gets harder, I
2 agree. If they steal the envelope, they take it
3 away, they rip up, all of those things, which is
4 certainly not what happened here, and it's not
5 in the indictment, the -- the ballots or the --
6 the vote count is not even in the indictment.
7 JUSTICE JACKSON: Well, we -- we
8 wouldn't have to decide that.
9 MR. GREEN: Right.
10 JUSTICE JACKSON: We could send it
11 back if we clarified that that is what the
12 statute means. I'm trying to understand if you
13 agree that that's what the statute could mean.
14 MR. GREEN: No, I don't agree that
15 that's what the statute could mean.
16 JUSTICE JACKSON: Why not?
17 MR. GREEN: The -- the reason is that
18 if you look at 1512, it is about a direct effect
19 or, in some senses, an indirect effect but in a
20 limited way on evidence that's to be used in a
21 proceeding, right, and -- and "proceeding," as I
22 mentioned earlier --
23 JUSTICE JACKSON: So as to limit its
24 availability. So what --
25 MR. GREEN: So as to limit its

1 availability.
2 JUSTICE JACKSON: -- I'm suggesting
3 is, in (c)(2), if you're doing something to
4 limit its -- to -- to limit its availability,
5 why doesn't it count?
6 MR. GREEN: Because we're limiting the
7 availability of its use by a fact finder in a
8 proceeding. Again, that's the way to marry
9 1519, which covers all kinds of investigations
10 and all kinds of other events, with 1512.
11 1512 is talking about evidence that's
12 going to a formal convocation, some kind of a
13 hearing, before the Congress or before any other
14 body --
15 JUSTICE JACKSON: Thank you.
16 MR. GREEN: -- as the language says.
17 Thank you.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 MR. GREEN: Thank you.
21 CHIEF JUSTICE ROBERTS: General
22 Prelogar.
23
24
25

1 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
2 ON BEHALF OF THE RESPONDENT
3 GENERAL PRELOGAR: Mr. Chief Justice,
4 and may it please the Court:
5 On January 6th, 2021, a violent mob
6 stormed the United States Capitol and disrupted
7 the peaceful transition of power. Many crimes
8 occurred that day, but in plain English, the
9 fundamental wrong committed by many of the
10 rioters, including Petitioner, was a deliberate
11 attempt to stop the joint session of Congress
12 from certifying the results of the election.
13 That is, they obstructed Congress's work in that
14 official proceeding.
15 The government accordingly charged
16 Petitioner with violating Section 1512(c)(2), an
17 obstruction offense that directly reads onto his
18 conduct.
19 The case as it comes to this Court
20 presents a straightforward question of statutory
21 interpretation: Did Petitioner obstruct,
22 influence, or impede the joint session of
23 Congress?
24 The answer is equally straightforward.
25 Yes, he obstructed that official proceeding.

1 The terms of the statute unambiguously encompass
2 his conduct. Petitioner doesn't really argue
3 that his actions fall outside the plain meaning
4 of what it is to obstruct. Instead, he asks
5 this Court to impose an -- atextual limit on the
6 actus reus. In his view, because Section
7 1512(c)(1) covers tampering with documents and
8 other physical evidence, the separate
9 prohibition in Section 1512(c)(2) should be
10 limited to acts of evidence impairment.
11 But that limit has no basis in the
12 text or tools of construction. His reading
13 hinges on the word "otherwise," but that word
14 means in a different manner, not in the same
15 manner. And the two prohibitions in Section
16 1512(c)(2) aren't unified items on a list where
17 you could apply associated words canons.
18 They're separate provisions. They have their
19 own sets of verbs and their own nouns. They
20 each independently prohibit attempts, which
21 would be duplication that makes no sense on
22 Petitioner's reading. And Congress included a
23 distinct mental state requirement in (c)(1) that
24 it chose not to repeat in (c)(2).
25 Section 1512(c)(2) by its terms is not

1 limited to evidence impairment. Instead, it's a
2 classic catchall. (c)(1) covers specified acts
3 that obstruct an official proceeding, and (c)(2)
4 covers all other acts that obstruct an official
5 proceeding in a different manner. The Court
6 should say so and allow this case to proceed to
7 trial.
8 I welcome the Court's questions.
9 JUSTICE THOMAS: General, there have
10 been many violent protests that have interfered
11 with proceedings. Has the government applied
12 this provision to other protests in the past,
13 and has this been the government's position
14 throughout the lifespan of this statute?
15 GENERAL PRELOGAR: It has certainly
16 been the -- the government's position since the
17 enactment of 1512(c)(2) that it covers the
18 myriad forms of obstructing an official
19 proceeding and that it's not limited to some
20 kind of evidence impairment gloss. With --
21 JUSTICE THOMAS: Have you -- so have
22 you -- have you enforced it in that manner?
23 GENERAL PRELOGAR: We have enforced it
24 in a variety of prosecutions that don't focus on
25 evidence tampering.

1 Now I can't give you an example of
2 enforcing it in a situation where people have
3 violently stormed a building in order to prevent
4 an official proceeding, a specified one, from
5 occurring with all of the elements like intent
6 to obstruct, knowledge of the proceeding, having
7 the corruptly mens rea, but -- but that's just
8 because I'm not aware of that circumstance ever
9 happening prior to January 6th.
10 But just to give you a flavor of some
11 of the other circumstances where we have
12 prosecuted under this provision, for example,
13 there are situations where we've brought (c)(2)
14 charges because someone tipped off the subject
15 of an investigation to the grand jury's
16 hearings. There was another case where someone
17 tipped off about the identity of an undercover
18 law enforcement officer.
19 And in those situations, there's no
20 specific evidence, no, you know, concrete
21 testimony or physical evidence that the conduct
22 is interfering with. Instead, it's more general
23 obstruction of the proceeding.
24 JUSTICE THOMAS: So --
25 GENERAL PRELOGAR: Justice Alito

1 mentioned the Reich case as well, and that's
2 another one where it was a forged court order
3 that prompted the litigant to dismiss a mandamus
4 petition. But that didn't have anything to do
5 with the evidence that was going to be
6 considered in that proceeding.
7 JUSTICE THOMAS: So what role does
8 (c)(1) play in your analysis?
9 GENERAL PRELOGAR: So we understand
10 1512(c) to split up the world of obstructive
11 conduct of an official proceeding into the
12 (c)(1) offense and into (c)(2). (c)(1) covers
13 everything it enumerates. It's the acts of
14 altering, concealing, destroying records,
15 documents, or other objects. And then (c)(2)
16 would only pick up conduct that obstructs an
17 official proceeding in a different way.
18 So there's no duplication or
19 superfluity on our reading. Instead, Congress
20 was taking this universe and dividing it up into
21 the two separate offenses.
22 And I think that's actually a virtue
23 of our reading as compared to Petitioner's
24 because I have not heard him articulate anything
25 that would fall within (c)(1) that wouldn't also

1 come within (c)(2). So, on his reading, (c)(2)
2 really does just swallow (c)(1) whole.
3 JUSTICE THOMAS: Well, I mean, in the
4 way you're reading it, (c)(1) -- (c)(2) almost
5 exists in isolation, certainly not affected by
6 (c)(1).
7 GENERAL PRELOGAR: We don't deny at
8 all that there is a relationship between the two
9 provisions, Justice Thomas, but it's --
10 JUSTICE THOMAS: What is that
11 relationship?
12 GENERAL PRELOGAR: And the
13 relationship is the one Congress specified in
14 the text. It's what follows the word
15 "otherwise." That is the relevant degree of
16 similarity. What both (c)(1) and (c)(2) have in
17 common is that they -- they aim at conduct that
18 obstructs an official proceeding. (c)(1) does
19 so in one way, tampering with records and
20 documents; (c)(2) does so with respect to all
21 other conduct that in a different manner does
22 that.
23 And I think that this has to be the
24 road the Court goes down to look at what
25 Congress actually prescribed with respect to

1 similarity because, in contrast, if you take up
2 Petitioner's invitation to come up with some
3 atextual gloss from (c)(1) to port over into
4 (c)(2), I don't understand what the Court could
5 look at to guide its determination of exactly
6 what the relevant similarity would be.
7 CHIEF JUSTICE ROBERTS: Well, yeah --
8 General, I'm sure you've had a chance to read
9 our opinion released Friday in the Bissonnette
10 case. It was unanimous. It was very short.
11 (Laughter.)
12 CHIEF JUSTICE ROBERTS: But it
13 explained how to apply the doctrine of ejusdem
14 generis, and -- and it -- what it said is that
15 specific terms, a more general catchall, if you
16 will, term at the end, and it said that the
17 general phrase is controlled and defined by
18 reference to the terms that precede it.
19 The "otherwise" phrase is more
20 general, and the terms that precede it are
21 "alters, destroys, mutilates, or conceals a
22 record [and] document."
23 And applying the doctrine as was set
24 forth in that opinion, the specific terms
25 "alters, destroy, and mutilate" carry forward

1 into (2), and the terms "record, document, or
2 other object" carry -- carry forward into (2) as
3 well, and it seems to me that they, as I said,
4 sort of control and defined the -- the more
5 general term.
6 GENERAL PRELOGAR: So, Mr. Chief
7 Justice, I think that the statute --
8 CHIEF JUSTICE ROBERTS: And I'm sorry.
9 Just to interrupt --
10 GENERAL PRELOGAR: Oh, yes.
11 CHIEF JUSTICE ROBERTS: -- so I could
12 put out exactly what -- and -- and the
13 "otherwise" means in other ways. It alters,
14 destroys, and mutilates record, document, or
15 other objects that impede the investigation and
16 otherwise, in other ways, accomplishes the same
17 result.
18 GENERAL PRELOGAR: So I think the
19 problem with that approach with respect to 1512
20 is that it doesn't look like the typical kind of
21 statutory phrase that consists of a parallel
22 list of nouns or a parallel -- list of verbs
23 where the Court has applied ejusdem generis or
24 the noscitur canon.
25 You know, these are separate

1 prohibitions that have their own complex,
2 non-parallel internal structure. And I think,
3 actually, the best evidence that it's hard to
4 figure out how you would divine a degree of
5 similarity between them just based on the word
6 "otherwise" is that there -- there are multiple
7 competing interpretations at issue in this case.
8 You know, Justice Alito touched on them, and
9 they're reflected in the competing
10 interpretations between Judge Katsas on the D.C.
11 Circuit and Judge Nichols on the district court.
12 CHIEF JUSTICE ROBERTS: Competing
13 interpretations of what, which phrase?
14 GENERAL PRELOGAR: So -- and it
15 relates to exactly the -- the question you asked
16 me, which is that Judge Nichols thought that
17 (c)(1) should limit (c)(2), and he looked at it
18 and said, well, the relevant thing about (c)(1)
19 is it deals with records, documents, and other
20 objects, and so that means (c)(2) should be
21 limited only to other acts that impair physical
22 evidence.
23 Meanwhile, Judge Katsas looked at the
24 specific intent requirement in (c)(1), to take
25 action that impairs the availability or use of

1 the evidence, and he divined a broader gloss to
2 put on (c)(2) and said --
3 CHIEF JUSTICE ROBERTS: Well, but
4 that's simply saying --
5 GENERAL PRELOGAR: -- it should be
6 other impairment of all other evidence.
7 CHIEF JUSTICE ROBERTS: Well, they're
8 just applying the same doctrine to different
9 aspects of it. And I think you do that as -- as
10 well. What are the common elements? Alters,
11 destroy, and mutilates a record or document.
12 You have the first few, what you're doing, and
13 what you're doing it to.
14 And you -- and you apply both of those
15 in -- as it said in Bissonnette, controlling and
16 defining the term that follows so that it should
17 involve something that's capable of alteration,
18 destruction, and mutilation and -- and with
19 respect to a record or a document. That --
20 that's how you -- that's why --
21 GENERAL PRELOGAR: So I actually don't
22 even understand --
23 CHIEF JUSTICE ROBERTS: -- when you --
24 when you apply that doctrine, again, as we did
25 on Friday, it -- it responds to some of the

1 concerns that have been raised about how broad
2 (c)(2) is. You can't just tack it on and say
3 look at it as if it's standing alone because
4 it's not.
5 GENERAL PRELOGAR: So let me respond
6 to that in two ways. I do want to have a chance
7 to address any concerns about breadth. But the
8 -- the more fundamental point, I think, is that
9 I don't even understand Petitioner to be
10 suggesting that you can mix and match the verbs
11 and the nouns from (c)(1) and (c)(2) in this
12 way.
13 Judge Nichols had a more limited view
14 that it -- that (c)(2) exclusively focuses on
15 physical objects. It wouldn't apply to things
16 like testimony because of the limitation that he
17 gleaned from (c)(1). Judge Katsas, I think,
18 maybe in line with your question, would
19 interpret it more broadly.
20 And the -- the basic point as a
21 textual matter is that there is nothing in the
22 text of (c)(2) itself to disclose what the
23 relevant similarity from (c)(1) ought to be.
24 Instead, we think the relevant similarity is
25 obstruction of an official proceeding because

1 that's the language Congress chose.
2 JUSTICE GORSUCH: General --
3 JUSTICE KAVANAUGH: The --
4 JUSTICE GORSUCH: -- if that's -- if
5 that's -- if that's the case, what work does
6 "otherwise" do on your theory? Because I think
7 I -- I might, as I'm hearing you, think that
8 "whoever [...] corruptly obstructs, influences,
9 or impedes any official proceeding, or attempts
10 to do so" stands alone. And the "otherwise" --
11 I'm not hearing what work it does. Can you
12 explain to me what work it does on your view?
13 GENERAL PRELOGAR: Yes. So the work
14 that "otherwise" does is to set up the
15 relationship between (c)(1) and (c)(2) and make
16 clear that (c)(2) does not cover the conduct
17 that's encompassed by (c)(1).
18 Now I acknowledge that there would
19 have been --
20 JUSTICE GORSUCH: Beyond that --
21 beyond that, beyond saying, okay, (c)(1) does
22 some things and the whole rest of the universe
23 of obstructing, impeding, or -- or influencing
24 is conducted by (c)(2). Is that a fair summary
25 of your view?

1 GENERAL PRELOGAR: Yes, but there was
2 a good reason for Congress to do it this way.
3 JUSTICE GORSUCH: No, I -- I
4 understand. I just --
5 GENERAL PRELOGAR: It traces to the
6 statutory history.
7 JUSTICE GORSUCH: Yeah, I -- I
8 understand that. I -- I -- I --
9 GENERAL PRELOGAR: And I would just
10 say that --
11 JUSTICE GORSUCH: If I might, so -- so
12 what -- what does that mean for the breadth of
13 this statute? Would a sit-in that disrupts a
14 trial or access to a federal courthouse qualify?
15 Would a heckler in today's audience qualify, or
16 at the State of the Union address? Would
17 pulling a fire alarm before a vote qualify for
18 20 years in federal prison?
19 GENERAL PRELOGAR: There are multiple
20 elements of the statute that I think might not
21 be satisfied by those hypotheticals, and it
22 relates to the point I was going to make to the
23 Chief Justice about the breadth of this statute.
24 The -- the kind of built-in
25 limitations or the things that I think would

1 potentially suggest that many of those things
2 wouldn't be something the government could
3 charge or prove as 1512(c)(2) beyond a
4 reasonable doubt would include the fact that the
5 actus reus does require obstruction, which we
6 understand to be a meaningful interference. So
7 that means that if you have some minor
8 disruption or delay or some minimal outburst --
9 JUSTICE GORSUCH: Okay. So -- so --
10 GENERAL PRELOGAR: -- we don't think
11 it falls within the actus reus to begin with.
12 JUSTICE GORSUCH: -- my -- my
13 outbursts require the Court to -- to -- to -- to
14 reconvene after -- after the -- the proceeding
15 has been brought back into line, or the -- the
16 pulling of the fire alarm, the vote has to be
17 rescheduled, or the -- the -- the protest
18 outside of a courthouse makes it inaccessible
19 for a period of time.
20 Are those all federal felonies subject
21 to 20 years in prison?
22 GENERAL PRELOGAR: So, with some of
23 them, it would be necessary to show nexus. So,
24 with respect to the protest --
25 JUSTICE GORSUCH: Assume -- assume --

1 GENERAL PRELOGAR: -- outside the
2 courthouse --
3 JUSTICE GORSUCH: -- I can -- I think
4 -- I think I've shown --
5 GENERAL PRELOGAR: -- we'd have to
6 show that, yes, they were aiming at a
7 proceeding.
8 JUSTICE GORSUCH: Yeah, they were
9 trying to stop the proceeding.
10 GENERAL PRELOGAR: Yes. And then we'd
11 also have to be able to prove that they acted
12 corruptly, and this sets a stringent mens rea.
13 It's not even just the mere intent to obstruct.
14 We have to show that also, but we have to show
15 that they had corrupt intent in acting in that
16 way, and particularly --
17 JUSTICE GORSUCH: We went around that
18 tree yesterday.
19 GENERAL PRELOGAR: I -- I know. I --
20 I -- I heard the argument yesterday, but I guess
21 what I would say is, to the extent that your
22 hypotheticals are pressing on the idea of a
23 peaceful protest, even one that's quite
24 disruptive, it's not clear to me that the
25 government would be able to show that each --

1 JUSTICE GORSUCH: So a mostly peaceful
2 protest --
3 GENERAL PRELOGAR: -- of those
4 protestors had corrupt intent.
5 JUSTICE GORSUCH: -- that actually
6 obstructs and impedes an -- an official
7 proceeding for an indefinite period would not be
8 covered?
9 GENERAL PRELOGAR: Not necessarily.
10 We would just have to have the evidence of
11 intent, and that's a high bar we argue.
12 JUSTICE GORSUCH: Oh, no, they -- I --
13 I -- I -- I'm --
14 GENERAL PRELOGAR: Right.
15 JUSTICE GORSUCH: They -- they intend
16 to do it, all right.
17 GENERAL PRELOGAR: Yes. If they
18 intend to obstruct and we're able to show that
19 they knew that was wrongful conduct with
20 consciousness of wrongdoing, then, yes, that's a
21 1512(c)(2) offense and then we would charge
22 that.
23 JUSTICE KAVANAUGH: What does
24 "corruptly" add in your view?
25 GENERAL PRELOGAR: So "corruptly" adds

1 the requirement that the defendant's conduct be
2 wrongful and committed with consciousness of
3 wrongdoing. And this traces to the Court's
4 decision in Arthur Andersen, where the Court
5 said this is a term with deep historical roots,
6 with a settled meaning, and that it connotes not
7 just knowledge of your actions, which is, you
8 know, the intent to obstruct in this case, but
9 further requires that it be done corruptly.
10 And just to give you a more concrete
11 example of how this has played out in the
12 January 6th prosecutions, I'd point to the jury
13 instruction in the Robertson case, which we
14 refer to and quote in part on page 44 of our
15 brief. There, the jury was instructed that in
16 order to show the defendant acted corruptly, the
17 jury had to -- to conclude that he had an
18 unlawful purpose or used unlawful means or both
19 and that he had consciousness of wrongdoing.
20 So I think that that is an
21 encapsulation of what the jury is asked to
22 decide on top of the mere intent to obstruct.
23 JUSTICE ALITO: General, let me give
24 you a -- an -- a specific example which is --
25 picks up but provides a little bit more detail

1 with respect to one of the -- the examples that
2 Justice Gorsuch provided.
3 So we've had a number of protests in
4 the courtroom. Let's say that today, while
5 you're arguing or Mr. Green is arguing, five
6 people get up, one after the other, and they
7 shout either "Keep the January 6th
8 insurrectionists in jail" or "Free the January
9 6th patriots." And as a result of this, our
10 police officers have to remove them forcibly
11 from the courtroom and let's say we have to --
12 it delays the proceeding for five minutes.
13 And I know that experienced advocates
14 like you and Mr. Green are not going to be
15 flustered by that, but, you know, in another
16 case, an advocate might lose his or her train of
17 thought and not provide the best argument.
18 So would that be a violation of
19 1512(c)(2)?
20 GENERAL PRELOGAR: I think it would be
21 difficult for the government to prove that.
22 JUSTICE ALITO: Why?
23 GENERAL PRELOGAR: At the outset, we
24 don't think that 1512(c)(2) picks up minimal, de
25 minimis, minor interferences. We think that the

1 term "obstruct" on its face connotes a
2 meaningful interference with a proceeding that
3 actually blocks --
4 JUSTICE ALITO: Well, it doesn't say I
5 -- I'm sorry. It -- (c)(2) does not refer just
6 to obstruct. It says "obstructs, influences, or
7 impedes." Impedes is something less than
8 obstructs.
9 GENERAL PRELOGAR: I think that this
10 is a verb phrase where iteration was obviously
11 afoot.
12 JUSTICE ALITO: Well, okay. But the
13 -- the plain meaning --
14 GENERAL PRELOGAR: And "impedes" is
15 also thought of as --
16 JUSTICE ALITO: You're -- you're
17 preaching the plain meaning interpretation of
18 this provision. The -- the plain meaning of
19 "impede" in Webster's is "to interfere with" or
20 get in the way of the progress of, to hold up.
21 In the OED, it is "to retard in progress or
22 action by putting obstacles in the way."
23 So it doesn't require obstruction. It
24 requires the causing of delay.
25 GENERAL PRELOGAR: And if this Court

1 --

2 JUSTICE ALITO: So, again, why

3 wouldn't that fall within -- now you -- you can

4 say, well, we're not going to prosecute that.

5 And, indeed, for all the protests that have

6 occurred in this Court, the Justice Department

7 has not charged any serious offenses, and I

8 don't think any one of those protestors has been

9 sentenced to even one day in prison. But why

10 isn't that a violation of 512 -- of 1512(c)(2)?

11 GENERAL PRELOGAR: We read the actus

12 reus more narrowly. Now perhaps you could look

13 at some of the broader dictionary definitions

14 and adopt a broader understanding of the actus

15 reus. Still, there would be the backstop of

16 needing to prove corrupt intent. I think that's

17 a stringent mens rea, and in the concept of --

18 JUSTICE ALITO: Well, that's not a

19 corrupt intent? They -- they -- it's wrongful.

20 Do you think it's not wrongful to --

21 GENERAL PRELOGAR: I could imagine

22 defendants in that scenario suggesting that they

23 thought they had some protected free speech

24 right to protest. They might say that they

25 weren't conscious of the fact that they weren't

1 allowed to make that kind of brief protest in
2 the Court.
3 And I think it's in a fundamentally
4 different posture than if they had stormed into
5 this courtroom, overrun the Supreme Court
6 police, required the Justices and other
7 participants to plea -- flee for their safety,
8 and done so with clear evidence of intent to
9 obstruct.
10 JUSTICE ALITO: Well -- yes indeed,
11 absolutely. What happened on January 6th was
12 very, very serious, and I'm not equating this
13 with that. But we need to find out what -- what
14 are the outer reaches of this statute under your
15 interpretation.
16 Let me give you another example.
17 Yesterday protestors blocked the Golden Gate
18 Bridge in San Francisco and disrupted traffic in
19 San Francisco. What if something similar to
20 that happened all around the Capitol so that
21 members -- all the bridges from Virginia were
22 blocked, and members from Virginia who needed to
23 appear at a hearing couldn't get there or were
24 delayed in getting there? Would that be a
25 violation of this provision?

1 GENERAL PRELOGAR: It sounds to me
2 like that wouldn't satisfy the proceeding
3 element, nor the nexus requirement --
4 JUSTICE ALITO: Why would it not --
5 GENERAL PRELOGAR: -- and nexus --
6 JUSTICE ALITO: -- why would it not
7 satisfy the proceeding? Let's say they want to
8 get to the Capitol to vote.
9 GENERAL PRELOGAR: Well, if we had
10 clear --
11 JUSTICE ALITO: They want to get to
12 the Capitol --
13 GENERAL PRELOGAR: -- if we had clear
14 evidence that the purpose of the protestors who
15 had set up the blockage somewhere, some distance
16 away from the Court was because they had a
17 specific proceeding in mind, maybe you have the
18 proceeding.
19 But still, the Court has required a
20 nexus, and that's been the requirement in cases
21 like Marinello, Aguilar, and -- and Arthur
22 Andersen, where the Court has said it does real
23 narrowing work because you have to show that the
24 natural and probable effect of the action is to
25 obstruct. There has to be a relationship in

1 time, causation, and logic.
2 But, Justice Alito, the other thing I
3 would say to this set of concerns is that there
4 are other obstruction provisions, including in
5 1503, 1505, the tax obstruction statute, 7212,
6 that use this exact same formulation that the
7 Court has characterized as an omnibus clause and
8 never suggested could be subject to an evidence
9 gloss.
10 So I don't think that to the extent
11 you have concerns about those hypotheticals,
12 your -- your question about what would happen in
13 this courtroom could be covered by 1503.
14 JUSTICE JACKSON: But --
15 GENERAL PRELOGAR: And interpreting
16 this statute ordinarily --
17 JUSTICE ALITO: Well, let --
18 JUSTICE KAGAN: Well on what --
19 GENERAL PRELOGAR: -- isn't going to
20 cure that issue.
21 JUSTICE ALITO: Let me give you one --
22 CHIEF JUSTICE ROBERTS: Go ahead.
23 JUSTICE ALITO: One more example. An
24 attorney is sanctioned under Rule 11 of the
25 Federal Rules of Civil Procedure by filing

1 pleadings, written motions, or other papers for
2 the purpose of causing unnecessary delay or
3 needlessly increasing the cost of litigation.
4 And in a particular case, the judge
5 imposes Article -- Rule 11 sanctions and says,
6 this caused a lot of trouble. I can tell you
7 it -- it -- it caused at least five work days
8 with -- for me personally, all of this
9 unnecessary paper, and it delayed the progress
10 of this litigation, so I'm imposing Rule 11
11 sanctions.
12 Why doesn't that fall within your
13 interpretation of this provision?
14 GENERAL PRELOGAR: Congress created a
15 specific safe harbor in 1515(c). It's reprinted
16 at page 17A to the appendix of our brief that
17 specifies that advocacy or legal representation
18 that is conducted as part of a proceeding
19 shouldn't be understood as obstruction.
20 So I think Congress was itself trying
21 to draw some lines around participation in a
22 proceeding on the one hand versus external
23 forces that obstruct the proceeding on the other
24 hand.
25 JUSTICE ALITO: It falls within -- but

1 it falls --

2 JUSTICE JACKSON: But --

3 JUSTICE ALITO: -- within the

4 language, doesn't it?

5 JUSTICE JACKSON: But --

6 JUSTICE KAGAN: What -- what kind of

7 evidence do you typically present in these

8 January 6th cases to prove the "corruptly"

9 element?

10 GENERAL PRELOGAR: So the January 6th

11 prosecutions require us to show first that the

12 defendants had knowledge that Congress was

13 meeting in the joint session on that day. We

14 have to show that the defendant specifically

15 intended to disrupt the joint proceeding.

16 And then, with respect to using

17 unlawful means with consciousness of wrongdoing,

18 we have focused on things like the defendant's

19 threats of violence, willingness to use violence

20 here. We allege that Petitioner assaulted a

21 police officer. We have focused on things like

22 preparation for violence, bringing tactical gear

23 or paramilitary equipment to the Capitol.

24 And I want to emphasize, Justice

25 Kagan, that this is a stringent mens rea

1 requirement that has very much constrained the
2 U.S. Attorney's Office. We've charged over
3 1,350 defendants with crimes committed on
4 January 6th, but we've only had the -- only had
5 the evidence of intent to bring charges against
6 350 for a 1512(c)(2) violation.
7 JUSTICE KAGAN: So how do you make
8 that decision? How do you decide which
9 defendants get charged under this statute as
10 opposed to not?
11 GENERAL PRELOGAR: The dividing line
12 has hinged usually on the evidence we have of
13 intent. So we're looking for clear evidence the
14 -- defendant knew about the proceedings that
15 were happening in the joint session in Congress
16 that day, clear knowledge of the official
17 proceeding.
18 We've looked for evidence that the
19 defendant specifically intended to -- to prevent
20 Congress from certifying the vote and so used
21 his actions to obstruct that proceeding.
22 And then also, as I had mentioned, the
23 -- the knowledge of wrongfulness or unlawful
24 conduct can come about with respect to
25 particular preparations that the defendants have

1 made.

2 And, you know, there are a number of

3 cases where, even though we thought we had the

4 evidence beyond a reasonable doubt, there have

5 been acquittals because there was, you know,

6 testimony that was credited that the defendant

7 thought the proceedings were over and wasn't

8 intending to obstruct, or one person thought and

9 said he thought that law enforcement was waving

10 him into the building.

11 So even in situations where we think

12 we have amassed the evidence, we still haven't

13 always been able to sustain these convictions,

14 and it's because of the stringent mens rea.

15 JUSTICE JACKSON: General, can I ask

16 you about your obstruction theory because you

17 said that you see 1512(c) as dividing the world

18 of obstruction and that the -- the nexus between

19 (1) and (2) is the official proceeding and the

20 obstruction of -- of -- of an official

21 proceeding.

22 I guess what I'm concerned about is

23 how you then account for the rest of 1512, where

24 "official proceeding" comes up over and over

25 again, and particular acts that one could view

1 as obstructing the official proceeding, like
2 killing or threatening or intimidating
3 witnesses, is covered so that if we read (c)(2)
4 to be obstructing a -- an official proceeding, I
5 don't -- I don't understand what happens to the
6 rest of those provisions.
7 GENERAL PRELOGAR: So, to the extent
8 you're pressing on the idea that there's
9 surplusage, I -- I don't think that that's true.
10 There is certainly overlap or duplication.
11 That's true on both of the readings in this
12 case.
13 I think, in -- in part, it might even
14 be more true on Petitioner's reading because he
15 says that (c)(2) is likewise focused on all of
16 the evidence impairment ways to obstruct,
17 interfering with testimony, interfering with
18 documents and so forth, and so that very same
19 duplication is going to be present on his
20 reading.
21 But, with respect to superfluity, our
22 interpretation doesn't create any technical
23 superfluity, and that's because each of those
24 other provisions that you cited and -- and, in
25 fact, each of the other provisions of the

1 obstruction laws cover situations that
2 1512(c)(2) wouldn't cover.
3 There are three principal
4 distinctions. The first is that some of them
5 have less than a corruptly mens rea. So, for
6 many of the provisions, they can be violated in
7 ways that wouldn't require the government to
8 prove "corruptly," and it might mean that we
9 could charge particular applications of those
10 provisions under them and not under (c)(2).
11 The second thing is that some of the
12 provisions sweep more broadly than an official
13 proceeding. They apply in a wider range of
14 circumstances. So that would enable us to
15 charge in those situations where we can't
16 actually prove the official proceeding element.
17 And then, third and finally, some of
18 the provisions have a -- a higher penalty
19 specifically because they target more culpable
20 conduct. And that's like 1512(a), the one you
21 referenced about killing a witness. There, the
22 government would charge under that provision
23 because it's subject to higher penalties than
24 (c)(2).
25 JUSTICE JACKSON: All right. Well,

1 let me --

2 CHIEF JUSTICE ROBERTS: General --

3 GENERAL PRELOGAR: So there's no

4 actual superfluity.

5 JUSTICE JACKSON: -- can I ask you,

6 would the -- would the government necessarily

7 lose in the sense that they would not be able to

8 bring charges against some of the people that

9 you have described with Justice Kagan if we

10 looked at (c)(2) as being more limited, perhaps

11 not all the way to evidence, but related to

12 conduct that prevents or obstructs an official

13 proceeding insofar as it is directed to

14 preventing access to information or documents or

15 records or things that the official proceeding

16 would use?

17 I -- I explored with Mr. Green, and --

18 and as did Justice Barrett, the idea that to the

19 extent that there were people who knew that the

20 votes were being counted that day and that's

21 done in a, you know, documentary way in our

22 system, their interfering by storming the

23 Capitol might qualify under even an evidence or

24 document interpretation of (c)(2).

25 Does the -- what does the government

1 think about that?
2 GENERAL PRELOGAR: Yes, I think that
3 if the Court articulated the standard that way,
4 these would likely be viable charges. And as we
5 note in the last footnote of our brief, we --
6 we've preserved an argument that we could
7 satisfy even an evidence-related understanding
8 of (c)(2), in part because the very point of the
9 conduct, when we have the intent evidence, was
10 to prevent Congress from being able to count the
11 votes, from being able to actually certify the
12 results of the election.
13 Now we'd obviously need to evaluate
14 whether these charges can go forward based on
15 whatever this Court says, and I would very much
16 caution the Court away from any holding that
17 would require specific evidence by the
18 government of, you know, precise electoral
19 certificates or that kind of thing.
20 Here, the -- the point of it would be
21 that the -- those who came to the Capitol and
22 engaged in this criminal conduct to displace
23 Congress violently from -- from where it had to
24 be to count those votes acted with an intent to
25 impair Congress's ability to consider that

1 evidence.

2 JUSTICE SOTOMAYOR: General, the

3 district court and the dissent below had a

4 different variation on the statute and how to

5 read it. You were starting to explain that to

6 the Chief.

7 Could you do it if we accepted the

8 district court's view? I -- I presume that you

9 could do it if we accepted the dissent below,

10 correct?

11 GENERAL PRELOGAR: Yes. So I think --

12 JUSTICE SOTOMAYOR: Yeah. But your

13 whole response to Justice Ketanji -- to Justice

14 Jackson -- sorry -- to Justice Jackson is that

15 it -- it assumes the dissent's view?

16 GENERAL PRELOGAR: I thought that

17 Justice Jackson was potentially proposing even a

18 broader view, including focusing on the

19 availability part and making clear that when the

20 whole point is to prevent the proceeding,

21 including the consideration of evidence in the

22 proceeding, from happening, that could qualify.

23 JUSTICE SOTOMAYOR: Okay.

24 GENERAL PRELOGAR: I think it becomes

25 potentially harder on the -- the Judge Katsas

1 view and especially harder on the Judge Nichols
2 view, and that's precisely because Judge --
3 Judge Nichols seemed to think that to prove
4 obstruction, it had to be limited to taking
5 action with respect to the documents themselves.
6 And that would be a difficult standard for us to
7 satisfy.
8 JUSTICE SOTOMAYOR: You read our
9 discussion on "corruptly" yesterday. It's
10 clear. You've endorsed the Robertson view.
11 Could you tell me what you feel about
12 the Walker view? Judge Walker being part of the
13 majority below. I -- I assume you know that,
14 but --
15 GENERAL PRELOGAR: Yes. So Judge
16 Walker articulated an idea that "corruptly" has
17 to turn exclusively on the government being able
18 to show that the defendant sought to secure an
19 unlawful advantage for himself or someone else.
20 We certainly agree that that's one way
21 for the government to prove corrupt intent.
22 It's a way that has traditionally been deployed
23 in the tax context because the very theory of
24 the case is that the defendant is violating the
25 tax laws or taking efforts to secure an unlawful

1 advantage under the tax laws.

2 But I think that it would be incorrect

3 for the Court to suggest that that's the

4 exclusive mechanism for the government to try to

5 prove "corruptly." You know, there are various

6 other ways where we might have evidence of, as

7 we think we do here, unlawful means, committed

8 with consciousness of wrongdoing, and there's no

9 basis in the common law or in how the term

10 "corruptly" has long been understood to limit

11 the government's ability to prove it only with

12 that one specific way that Judge Walker pointed

13 to.

14 JUSTICE SOTOMAYOR: The draw in this

15 case appears to be the fear that reading the

16 government's view of either yesterday's case or

17 today on its plain terms would make it so broad

18 that somehow that presents a problem. I think

19 the judges below struggled with that by saying

20 that gets addressed in the word "corruptly" and

21 in the nexus requirement, which is the point

22 you've made today.

23 But neither of those two issues were

24 resolved below because that wasn't the question

25 below, correct?

1 GENERAL PRELOGAR: That's right. The
2 only issue that the D.C. Circuit resolved was
3 the meaning of the actus reus.
4 JUSTICE SOTOMAYOR: And the only issue
5 between us is whether we read the words -- how
6 we read these words?
7 GENERAL PRELOGAR: That's right, but I
8 don't want to lose sight of the fact, as your
9 question touched on, that there are inherent
10 constraints built into the other elements of the
11 statute. The nexus constraint is a really
12 critical one. It is the -- the paradigmatic
13 constraint the Court has pointed to to ensure
14 that obstruction statutes don't sweep too
15 broadly and scoop up everyday conduct that might
16 be happening out in the world.
17 It has to have that tight connection,
18 the relationship in time, causation, or logic,
19 with the official proceeding. And, of course,
20 "corruptly," we think, sets a very high bar, as
21 evidenced by the fact as, as I said to Justice
22 Kagan, it's not like we can even prove it with
23 respect to everyone who was in the riot at the
24 Capitol on January 6th.
25 JUSTICE SOTOMAYOR: Thank you.

1 JUSTICE BARRETT: General, are you
2 putting a violence requirement as an overlay on
3 "obstruct, influence, impede"? And I'm -- I'm
4 thinking of some of your answers to Justice
5 Alito's hypotheticals. It seemed like you kept
6 emphasizing the aspect of violence that was
7 present on January 6th. So am -- am I
8 understanding you to say there has to be some
9 sort of violence or no?
10 GENERAL PRELOGAR: No, we don't think
11 that's a requirement under the statute. I think
12 it will clearly be easier for us to satisfy
13 things like the corruptly mens rea when we can
14 point to action here, like assaulting a police
15 officer, that is obviously wrongful, unlawful
16 conduct, and everyone knows that that's a crime
17 and you cannot do that.
18 What I was trying to say to Justice
19 Alito is, in situations where hypotheticals
20 press on the idea that people are engaging in
21 conduct that maybe they think is
22 constitutionally protected, they might be wrong
23 about that, there might not be a First Amendment
24 right that they think they have, but that can
25 demonstrate that they don't have the requisite

1 consciousness of wrongdoing. That would mean we
2 couldn't prove an obstruction charge.
3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.
5 I'm not quite sure I understood an
6 answer you gave earlier about whether or not
7 you've previously used (c)(2) in -- in this type
8 of case. Have -- have you done that before or
9 not?
10 GENERAL PRELOGAR: We have charged
11 (c)(2) in situations that don't involve evidence
12 impairment, and the litigating position of the
13 Department has long been that, as its plain
14 language suggests, it covers myriad ways of
15 obstructing. I'm not aware of any other factual
16 circumstance or event out in the world where we
17 could have proved all of the elements of Section
18 1512(c)(2) beyond the cases where we've brought
19 those prosecutions. So --
20 CHIEF JUSTICE ROBERTS: You -- and
21 just so I understand, the prosecutions are
22 limited in what way?
23 GENERAL PRELOGAR: They're limited to
24 a requirement that the specific people had in
25 mind an official proceeding. So that would take

1 out the category of hypotheticals --
2 CHIEF JUSTICE ROBERTS: I see. Right.
3 GENERAL PRELOGAR: -- where, you know,
4 maybe you're protesting a branch of government,
5 you're outside this Court, but you don't have
6 this specific argument in mind.
7 And then we would also need to show an
8 intent to obstruct the proceeding and the nexus
9 to the proceeding, and that can take care of,
10 you know, situations where maybe someone's --
11 CHIEF JUSTICE ROBERTS: And you've --
12 you've done that --
13 GENERAL PRELOGAR: -- pulling a fire
14 alarm in a different building, but it's not --
15 CHIEF JUSTICE ROBERTS: Yeah, yeah.
16 Excuse me.
17 GENERAL PRELOGAR: -- even where the
18 proceeding happens.
19 CHIEF JUSTICE ROBERTS: In prior
20 cases, you have applied (c)(2) in a situation,
21 what, not involving specific documents?
22 GENERAL PRELOGAR: Correct. So things
23 like tipping off someone to the existence of a
24 grand jury investigation or the identity of an
25 undercover officer or creating a fake court

1 order that has nothing to do with the evidence
2 in the case but is just prompting the litigant
3 to dismiss a pending mandamus petition.
4 CHIEF JUSTICE ROBERTS: And -- and
5 your friend's point -- your friend points to an
6 Office of Legal Counsel opinion from 2019 that
7 -- I haven't looked at it yet, but I will --
8 that says it is consistent with Judge Katsas's
9 opinion below. You --
10 GENERAL PRELOGAR: So that -- that
11 advice that was offered to the Attorney General
12 and never adopted as a formal position of the
13 Department of Justice related to distinct issues
14 that arose out of the special counsel
15 investigation and distinct issues that involved
16 the Office of the Presidency.
17 I don't think that it would be right
18 to suggest that the memo took any firm stand,
19 although it did suggest that maybe 1512(c)(2)
20 should be understood more narrowly, but it
21 didn't -- it certainly didn't represent any
22 formal adoption of that position, and that would
23 have been inconsistent with how the government
24 has always litigated under (c)(2).
25 CHIEF JUSTICE ROBERTS: What

1 constitutes a formal acceptance of OLC opinions?

2 GENERAL PRELOGAR: I should probably

3 know the answer to that one as a matter of --

4 CHIEF JUSTICE ROBERTS: Yeah, I should

5 too, but --

6 GENERAL PRELOGAR: -- of DOJ policy,

7 but what -- what I can tell you is the reason

8 I'm saying that wasn't an official position is

9 because it specifically said there's no need to

10 go down the road of even deciding exactly what

11 1512(c)(2) covers because, even assuming that it

12 covers the full range of obstructive conduct,

13 the allegations, according to the memo, didn't

14 satisfy the standard there. So it ultimately

15 just punted on the issue and said it's not

16 necessary to engage with that issue further.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Justice Thomas?

19 JUSTICE THOMAS: General, the -- you

20 said, as I understand it, that you have applied

21 (c)(2) in previous cases?

22 GENERAL PRELOGAR: That's right.

23 We've applied it in cases that do not fit the

24 evidence impairment model that Petitioner is

25 urging on the Court here. And it's not just

1 (c)(2), Justice Thomas, but it's the omnibus
2 clauses of 1503, 1505, 7212. You know, these
3 are statutes that use the exact same verb
4 phrase, and we've --
5 JUSTICE THOMAS: I'm -- those are
6 fine. I -- but I'm -- (c)(2).
7 GENERAL PRELOGAR: Yes.
8 JUSTICE THOMAS: The -- I don't -- I'm
9 not clear as to whether or not -- the specific
10 instances in which you have used (c)(2) because
11 you seem to think that (c) -- or argue that
12 (c)(2) is a standalone provision almost.
13 GENERAL PRELOGAR: We think that it
14 covers the full range of obstructive conduct
15 that's not covered by (c)(1), of course, limited
16 by the requirement of an official proceeding.
17 JUSTICE THOMAS: So, if -- if you have
18 applied (c)(2), have there been previous, other
19 than the D.C. Circuit, previous courts of
20 appeals that have looked at this?
21 GENERAL PRELOGAR: Yes. And the
22 uniform consensus among the court of appeals has
23 been that (c)(2) is not limited by this kind of
24 evidence impairment gloss that Petitioner is
25 asking the Court to read into the statute.

1 There has been no court of appeals that's gone
2 the other way. We cite a string cite of them
3 that have recognized looking at the plain
4 language of this provision that it sweeps in the
5 myriad forms of obstructive conduct.
6 JUSTICE THOMAS: So much of your
7 argument seems to hinge on this being fairly
8 clear, the -- the -- your interpretation of
9 (c)(2).
10 GENERAL PRELOGAR: Yes, we certainly
11 think we have the best of the plain text.
12 JUSTICE THOMAS: Okay. If we think --
13 if -- if -- if -- if I happen to think it's more
14 ambiguous, what would your argument be?
15 GENERAL PRELOGAR: So what I would say
16 is I think that if you look at the terms in the
17 statute themselves, that the plain language of
18 the statute supports our view, but it doesn't
19 end there. And I was -- I have mentioned
20 several times the other provisions in 1503,
21 1505, but we think that's actually really
22 relevant because Congress wasn't writing on a
23 blank slate when it enacted 1512(c)(2).
24 It's not like it just thought of for
25 the first time this verb phrase "obstructs,

1 influences, or impedes." That wasn't taken out
2 of the ether. That was a well-established term,
3 verb phrase, in obstruction law drawn from those
4 other statutes.
5 And as this Court has said many times,
6 when Congress takes a phrase like that, it
7 brings the old soil with it. And so Congress
8 would have clearly known that the courts, this
9 Court and lower courts, had interpreted the
10 omnibus clause in those other statutes to
11 encompass the full range of obstructive conduct.
12 That's also consistent with all
13 precedent, as I mentioned to you earlier, so I
14 think, when you put it all together, there's no
15 real ambiguity here. We -- we clearly have the
16 best reading.
17 And the only other thing, the icing on
18 the cake if I could --
19 JUSTICE THOMAS: Yeah.
20 GENERAL PRELOGAR: -- is that if,
21 actually, what Congress wanted to do was write a
22 statute that focused only on evidence
23 impairment, there was a really clear and obvious
24 way to do it. Congress could have just tacked
25 on a residual clause to (c)(1) that says "or

1 otherwise impairs evidence."

2 It would not have used this oblique

3 reference of "otherwise" and then used a term

4 that had a well-settled meaning in obstruction

5 law to sweep more broadly to try to convey that

6 type of limited scope. It would just be

7 nonsensical for Congress to draft that way

8 because it would be so readily misunderstood.

9 And, in fact, every lower court has understood

10 Congress to have legislated more broadly here.

11 JUSTICE THOMAS: But that's beginning

12 to sound more like a contextual argument, which

13 you seem to eschew in this case.

14 GENERAL PRELOGAR: Well, no, I -- I

15 think, actually, that the statutory context and

16 history does bear weight here, and we think that

17 the roots of this language in those other

18 obstruction provisions help fortify or reinforce

19 how the Court has always understood the plain

20 language.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: You argue that there's

23 a -- an exception for conduct that has only a

24 minimal effect on official proceedings. Where

25 does that come from in the text?

1 GENERAL PRELOGAR: That comes from the
2 verb phrase "obstruct, influence, or impede,"
3 which we think, if you look at dictionary
4 definitions, conveys the type of action that
5 blocks, hinders, makes difficult, persistently
6 interferes with. You know, this is the kind of
7 -- the verbs themselves, we think, inherently
8 contain this limitation.
9 JUSTICE ALITO: There can't be a minor
10 impediment?
11 GENERAL PRELOGAR: I think as a
12 colloquial matter, yes, maybe, but, you know, I
13 -- we think that if you look at what Congress
14 was trying to do as a whole, the lead term here
15 is "obstruct." These were various ways of
16 trying to capture the world of obstructive
17 conduct, and I think that that adequately
18 conveys the idea that some kind of very minimal,
19 de minimis interference doesn't qualify.
20 JUSTICE ALITO: Well, it didn't stop
21 with "obstruct." It -- it added "impede."
22 But what is the meaning of -- how
23 would you define a -- a minimal interference? I
24 suppose a jury would have to be charged on that.
25 In order to prove that the person violated this

1 provision, you must find that the person
2 committed more than, caused, or intended to
3 cause more than a minimal interference.
4 How do you define it?
5 GENERAL PRELOGAR: So I think, you
6 know, to the extent that this would come up in
7 actual prosecutions -- and I'm not aware of
8 any -- but, if this came up, then I think that
9 it would be the defense theory, it's possible
10 that the Court could decide it as a matter of
11 law if, in fact, it was so minimal it doesn't
12 fit within the statutory terms themselves.
13 And I recognize that maybe there could
14 be gray areas about the nature of the
15 obstruction and whether it really satisfies the
16 actus reus. I think that is properly a subject
17 for the jury.
18 JUSTICE ALITO: All right. What about
19 the example I gave you about the five protestors
20 in the courtroom? Is that minimal?
21 GENERAL PRELOGAR: I think that sounds
22 minimal to me. I mean, it sounds to me like, if
23 it hasn't actually forced any substantial halt
24 to these proceedings, it seems like that
25 wouldn't pick up and track. But, you know, this

1 -- the same issue would arise under 1503, which
2 likewise refers to "obstruct, influence, or
3 impede."
4 JUSTICE ALITO: You haven't said
5 anything about the surplusage arguments. Let me
6 just ask you a question or two about that.
7 Suppose someone commits conduct that
8 falls squarely within 1512(d), the person
9 intentionally harasses another person and
10 therefore dissuades that person from attending
11 or testifying in an official proceeding. So
12 you've got a square -- you know, a clear
13 violation of 1512(d) punishable by no more than
14 three years in prison.
15 But, when Congress added 1512(c)(2),
16 which seems to cover exactly that conduct, it
17 said: Well, the punishment shouldn't be -- you
18 could punish that person for up to 20 years.
19 GENERAL PRELOGAR: There's a key
20 difference between 1512(d) and 1512(c) in that
21 (d) doesn't require the intent to obstruct. And
22 so the effect of the defendant's harassment
23 action is to prevent the testimony or the
24 production of the document.
25 But the government has not read that

1 statute to require an actual intent to obstruct,
2 which I think means there are certain factual
3 scenarios where the government might be able to
4 prove a 1512(d) offense without satisfying
5 (c)(2). But I do want to be responsive to the
6 broader concern that there's something anomalous
7 about the 20-year penalty here.
8 Let me say at the outset that no
9 matter which statute the -- the government
10 charges under, with respect to all of the
11 relevant obstruction statutes here, they would
12 be funneled through the same sentencing
13 guideline. So the charging decision wouldn't
14 make a difference with respect to the sentencing
15 range.
16 And the concern you have with the
17 hypothetical arises equally on Petitioner's
18 reading because so too everything that would be
19 covered in 1512(d) falls within his evidence
20 impairment limitation. So I don't think the
21 existence of a statutory max when there's no
22 mandatory minimum should drive intuitions about
23 how to interpret this provision.
24 JUSTICE ALITO: Well, I'm not sure
25 that's the correct interpretation of -- of

1 subsection (d).

2 How about 1512(b), which also has a

3 20-year penalty, but it seems to be completely

4 subsumed by (c)(2).

5 GENERAL PRELOGAR: I think there is a

6 lot of overlap between (b) and (c). I -- I

7 don't deny that. Again, that would be true on

8 either reading because (b) is paradigmatic

9 witness tampering. And so, even on Petitioner's

10 understanding of the statute, there would be

11 equal duplication there.

12 What I would say is there's no actual

13 superfluity because there are ways of violating

14 (b) that wouldn't fall within our understanding

15 of (c)(2), including acting in a misleading

16 manner towards someone, which wouldn't

17 necessarily satisfy a corrupt intent definition.

18 JUSTICE ALITO: Really? You think you

19 could knowingly threaten or corruptly

20 persuade -- corruptly mislead someone? I -- I

21 don't understand that argument.

22 GENERAL PRELOGAR: So my recollection

23 is that there are multiple different means of

24 carrying out that offense. Of course, something

25 like threatening or corruptly persuading, that's

1 the kind of duplication I was referring to
2 earlier.
3 But another way you can violate (b) is
4 through intentionally misleading someone. That
5 wouldn't necessarily require corrupt intent.
6 JUSTICE ALITO: Okay. Thank you.
7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?
9 JUSTICE ALITO: Oh, sorry. One more.
10 CHIEF JUSTICE ROBERTS: Sorry.
11 JUSTICE ALITO: One more question. I
12 was struck by the -- the contrast between your
13 argument here that the Court should read in a
14 minimal exception with the argument that you
15 made earlier this term in Muldrow versus the
16 City of St. Louis, where the question was
17 whether an adverse employment action has to be
18 significant or not.
19 And you said no, it doesn't have to be
20 significant because, "The text likewise admits
21 of no distinction between discrimination that
22 results in a significant or insignificant
23 disadvantage."
24 So, in Muldrow, you told us no, don't
25 read in an atextual requirement of significance,

1 but, here, you seem to be arguing yes, you've
2 got to read in an atextual requirement of
3 something that's more than minimal.
4 GENERAL PRELOGAR: No, that is not our
5 argument here. We are grounding this in the
6 text. So we're not suggesting that there's a
7 basic de minimis principle that applies
8 throughout all the various legal statutes that
9 are out there, not anything like that.
10 Instead, we ground this in a
11 particular understanding of what it means to
12 obstruct and what that word conveys.
13 JUSTICE ALITO: Thank you.
14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?
16 JUSTICE SOTOMAYOR: I know the Reich
17 case because I decided it. However, the tip
18 cases, are they in your briefs?
19 GENERAL PRELOGAR: We cite
20 Ahrensfield. That's the case where a subject of
21 a grand jury investigation was tipped off about
22 the existence of the investigation, but there
23 was no, you know, kind of material impact or --
24 or clear evidence of -- of impairment of the
25 evidence or availability of testimony or

1 physical documents.
2 And there are a number of cases in
3 that line, including -- I don't think we
4 specifically cited -- but it includes the
5 disclosing of the identity of an undercover
6 officer.
7 JUSTICE SOTOMAYOR: Where do I find
8 those?
9 GENERAL PRELOGAR: We would be happy
10 to supply additional citations if you're looking
11 for them. I believe that the D.C. Circuit
12 decision as well cited a range of (c)(2) cases
13 and made clear that they didn't cover evidence
14 impairment.
15 JUSTICE SOTOMAYOR: Thank you.
16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 JUSTICE KAGAN: Mr. Green referred a
18 few times to 1519 and basically said, well,
19 that's supposed to be the catchall provision,
20 the omnibus provision. You know, why are you
21 asking 1512 to do the same thing that 1519 is
22 supposed to do? So that's one question I have
23 for you.
24 And the other question I have is just
25 you've referred a number of times to other

1 omnibus provisions, 1503, 1505 -- what's the tax
2 one? Seventy?
3 GENERAL PRELOGAR: 7212. 26 U.S.C.
4 7212.
5 JUSTICE KAGAN: If -- if we go down
6 Mr. Green's road in terms of importing other
7 limits from other places in the statute, are any
8 of those likely to be challenged in the same
9 kind of way, or are they written sufficiently
10 differently so that we wouldn't have to worry
11 about that?
12 GENERAL PRELOGAR: So let me take the
13 questions in order.
14 With respect to Petitioner's reliance
15 on 1519 as the catchall here, I understood the
16 Court's decision in Yates to say precisely the
17 opposite. In fact, Yates drew a direct
18 comparison between 1519 on the one hand, which
19 it said was a more narrow obstruction provision
20 based on some of the contextual clues there, and
21 1512(c)(1) on the other hand, which has the
22 phrase "record, document, or other object," and
23 said, well, that's the broad obstruction
24 provision. That's the one that's intended to be
25 codified in this broader prohibition that's

1 aimed at official proceedings, and that (c)(1)
2 language is actually quite broader and would
3 scoop up the entire world of physical objects,
4 in contrast to the narrowing interpretation the
5 Court accepted in Yates.
6 So I don't think the idea that 1519
7 was the broad catchall can in any way be squared
8 with what that statute says or how this Court
9 interpreted it in Yates. And, instead, I think
10 that the -- the example to draw from Yates or
11 the lesson to learn from it is that this Court
12 recognized that Congress was plugging the
13 specific hole in the Enron scandal and it did so
14 with overlapping provisions, 1512(c)(1) and
15 1519, but it was 1512 that the Court pointed to
16 as the place where you would sensibly locate
17 this broader provision that aims at the full
18 range of obstructive acts to catch the known
19 unknowns.
20 With respect to the question -- I'm
21 sorry. Now I'm forgetting the second question.
22 Oh, about the other statutes and whether they
23 would be endangered. I would be concerned about
24 that. I'm sure defendants would try to make
25 arguments. The language, the verb phrase is

1 exactly the same or in different order
2 sometimes, but it's "obstructs, influences, or
3 impedes," and so the relevant verbs in the actus
4 reus would be similar. There are different
5 direct objects there. For example, in 1503,
6 it's the due administration of justice. In
7 1505, it's the administration of the power of
8 Congress's inquiry and investigation.
9 But it's not clear to me whether --
10 whether defendants might seek to try to now
11 artificially limit those -- those clauses beyond
12 their plain terms, even though these kinds of
13 provisions have been in the obstruction law, I
14 think it traces all the way back to 1830, and
15 they've never been understood to have that kind
16 of narrow limitation to evidence impairment or
17 anything else.
18 JUSTICE KAGAN: Thank you.
19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?
21 Justice Kavanaugh?
22 JUSTICE KAVANAUGH: I think the key
23 word in the -- is "otherwise." And trying to
24 figure out what that means under our established
25 principles of statutory interpretation, it would

1 seem to trigger ejusdem generis under the Begay
2 precedent. And you've used the phrase a few
3 times, "catchall provision," as does your brief.
4 And the Scalia-Garner book describes ejusdem
5 generis as how you interpret catchall
6 provisions. So does ejusdem generis apply here
7 or not?
8 GENERAL PRELOGAR: No, we don't think
9 it can sensibly apply here. So the Court has
10 said many times that "otherwise" is a natural
11 way for Congress to create a broad catchall
12 category. And I certainly don't dispute that
13 there can be situations where you have a
14 parallel list of nouns or a parallel list of
15 verbs where the Court might further think that
16 ejusdem generis principles apply.
17 But that's just not how 1512(c) is
18 structured. It has, as I've mentioned, its own
19 complex internal structure. You know, you've
20 got the mens rea requirement that's unique to
21 (c)(1), and Congress did not transplant that
22 into (c)(2). That triggers the other canon that
23 when Congress uses disparate language in two
24 adjacent provisions, usually it means something
25 by that.

1 So I think that this just isn't the
2 kind of situation where the Court could sensibly
3 apply ejusdem generis.
4 And the other thing I would say is
5 that, you know, if the Court goes down the road
6 of trying to glean some kind of requirement from
7 (c)(1), the other reason the canon is
8 inapplicable here is that it's not evident on
9 its face what the common attribute would be, and
10 -- and that --
11 JUSTICE KAVANAUGH: Well, that -- that
12 -- that's --
13 GENERAL PRELOGAR: -- just relates to
14 the Nichols/Katsas dispute.
15 JUSTICE KAVANAUGH: As you know,
16 that's true in almost every ejusdem generis
17 case, and the -- and the treatise explains that
18 as well, which is it's hard sometimes to figure
19 out what the common link among the words in the
20 -- in the phrase is. So that's -- I don't think
21 that distinguish -- that point I don't think
22 distinguishes this case from other ejusdem
23 generis cases. But you can respond to that.
24 GENERAL PRELOGAR: But I do think that
25 a plain speaker of English would recognize that

1 usually the common link or the connective tissue
2 is the language that follows the word
3 "otherwise." That's the congressionally
4 approved similarity. That's what (c)(1) and
5 (c)(2) have in common. They both relate to
6 obstructing an official proceeding.
7 And, you know, I -- I recognize that
8 Petitioner has invoked Begay. Your question
9 touched on it. But the statute in Begay, which
10 we think is not the model of -- of statutory
11 interpretation to follow here, the statute
12 itself was -- was relevantly different. It had
13 a list of nouns, and so it was the kind of
14 statute where potentially ejusdem generis could
15 apply.
16 JUSTICE KAVANAUGH: What about the
17 contextual points, a couple of them that I think
18 have come up, but I just want to make sure you
19 have a chance to respond, that it would be odd
20 to have such a broad provision tucked in and
21 connected by the word "otherwise."
22 GENERAL PRELOGAR: I don't think that
23 the placement in the statute is odd at all for a
24 couple of different reasons. One is the point I
25 was trying to make to Justice Kagan about this

1 Court's own recognition that 1512 is one of the
2 big obstruction statutes. This is the statute
3 that is aimed generally at official proceedings.
4 It's not more discrete. And there are other
5 provisions like 1519 and some of the ones that
6 come right before it that are more narrowly
7 confined and are in -- intended to reflect
8 discrete circumstances. That doesn't describe
9 1512 at all. So, when Congress was trying to
10 broadly prohibit obstruction of official
11 proceedings, 1512 was exactly the right place to
12 go.
13 Then Petitioner says, well, Congress
14 buried it in the middle of the -- of the
15 statute. But I -- I think it's actually quite
16 explicable when you look at how the other
17 provisions are structured. 1512(d), which I was
18 discussing with Justice Alito, has a much more
19 minimal penalty and doesn't require the intent
20 to obstruct. So it made sense to put 1512(c)
21 before it but also after 1512(a), which is the
22 most serious obstruction, like killing a
23 witness, punishable by 30 years or up to life.
24 JUSTICE KAVANAUGH: Last question.
25 There are six other counts in the indictment

1 here, which include civil disorder, physical
2 contact with the -- the victim, assault,
3 entering and remaining in a restricted building,
4 disorderly and disruptive conduct, disorderly
5 conduct in the Capitol building. And why aren't
6 those six counts good enough just from the
7 Justice Department's perspective given that they
8 don't have any of the hurdles?
9 GENERAL PRELOGAR: Because those
10 counts don't fully reflect the culpability of
11 Petitioner's conduct on January 6th. Those
12 counts do not require that Petitioner have acted
13 corruptly to obstruct an official proceeding.
14 And, obviously, Petitioner committed other
15 crimes that we've charged and that we're seeking
16 to hold him accountable for.
17 But one of the distinct strands of
18 harm, one of the -- the -- the root problems
19 with Petitioner's conduct is that he knew about
20 that proceeding, he had said in advance of
21 January 6th that he was prepared to storm the
22 Capitol, prepared to use violence, he wanted to
23 intimidate Congress. He said they can't vote if
24 they can't breathe. And then he went to the
25 Capitol on January 6th with that intent in mind

1 and took action, including assaulting a law
2 enforcement officer.
3 That did impede the ability of the
4 officers to regain control of the Capitol and
5 let Congress finish its work in that session.
6 And I think it is entirely appropriate for the
7 government to seek to hold Petitioner
8 accountable for that conduct with that intent.
9 JUSTICE KAVANAUGH: And are the
10 sentences -- the sentence available is longer
11 for this count than for any of the other counts
12 or all of them together?
13 GENERAL PRELOGAR: The statutory
14 maximum is higher, but, after a recent decision
15 in the D.C. Circuit which held that a particular
16 sentencing enhancement doesn't apply, that was
17 the Brock case, I believe the sentencing range,
18 the guidelines range, for the assault count
19 would actually be a higher guidelines range.
20 And just to give you a sense for a
21 typical January 6th defendant, someone who
22 doesn't have a prior criminal history and who
23 committed violent conduct at the Capitol,
24 accepting responsibility, I think the average
25 guidelines range or -- or the range that would

1 yield is 10 to 16 months of imprisonment. For
2 someone who didn't commit violence, it would be
3 six to 12 months of imprisonment.
4 We've looked at the average sentences
5 here. There are about 50 that have gone to
6 sentencing -- conviction and sentencing on just
7 a 1512(c)(2) as the only felony. So I think
8 that's the best way to gauge it. This was when
9 the sentencing enhancement did apply, so the
10 ranges were higher. The average sentence among
11 the approximately 50 people is 26 months of
12 imprisonment, and the median has been 24 months.
13 So there's -- there's no reasonable
14 argument to be made that the statutory maximum
15 here is driving anything with respect to
16 sentencing.
17 JUSTICE KAVANAUGH: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?
20 JUSTICE BARRETT: General, I want to
21 ask a clarifying question about the distinction
22 in the government's charging decisions between
23 (c)(1) and (c)(2). Actually, let me make that
24 stronger. Not charging decisions; like what you
25 could charge under the statute.

1 So, as you pointed out to Justice
2 Kavanaugh just now, you know, (c)(1) has this
3 additional mens rea requirement. But, you know,
4 there is overlap. If you read "otherwise
5 obstructs, influences," et cetera, broadly, it
6 would encompass -- you know, frankly, even on
7 the other reading, it would encompass things
8 like "alters, destroys, mutilates," et cetera.
9 But you wouldn't have to prove the
10 extra mens rea. I thought I heard you say, and
11 I just want to clarify, to Justice Jackson
12 earlier in the argument that the government
13 could not charge an alteration, mutilation,
14 concealing a document or physical object under
15 (c)(2). Am I --
16 GENERAL PRELOGAR: That's correct. We
17 usually charge the specific paragraph and so, if
18 the conduct fits within (c)(1), we would charge
19 it under (c)(1), and that would be the proper
20 place to locate the charge.
21 JUSTICE BARRETT: And is that
22 charging, is that prosecutorial discretion, or
23 do you think the statute would permit you to
24 charge it under (c)(2), thereby escaping the
25 specific intent requirement?

1 GENERAL PRELOGAR: Well, let me say
2 that there is a specific intent requirement
3 under (c)(2). So there's no distinction between
4 them in that regard.
5 JUSTICE BARRETT: But it's
6 different than the -- yeah.
7 GENERAL PRELOGAR: It's the intent to
8 obstruct the official proceeding. So you're
9 right that we wouldn't have to prove intent to,
10 you know, mutilate a document or something, but
11 we -- we would still have to show the intent to
12 obstruct the proceeding.
13 You know, this is pressing on honestly
14 what's a difficult question about means versus
15 elements, and I think the best look at -- the
16 best reading of the statute is that these are
17 different elements because they have these
18 different actus reus, they have the different
19 mens rea require -- the mens rea requirement
20 that's specific to (c)(1). They each
21 independently prohibit attempts. But it's a --
22 it's a hard question ultimately.
23 And if we charged under the wrong
24 paragraph accidentally, I think we could usually
25 say that that was harmless error or else

1 recharge under the correct paragraph.
2 JUSTICE BARRETT: Okay. Let me ask
3 you a question that kind of gets at some of the
4 same points that Justice Alito's questions were
5 getting at.
6 So what if on January 6th the Capitol
7 itself had not been breached, the protest is
8 going on outside the Capitol, "Stop the Steal,
9 Stop the Steal," police are, you know, in
10 megaphones saying, "Disperse, disperse," they're
11 too close to the Capitol, their goal is to
12 impair, impede, stop the proceeding, stop the
13 counting of votes.
14 Does that violate the statute in your
15 view under this "impede" language?
16 GENERAL PRELOGAR: So I think -- I
17 think that one relevant question would be
18 whether we could satisfy the nexus requirement
19 and show that actually the natural and probable
20 effect of that conduct would be to have some
21 effect on what's going on in the Capitol, and in
22 the mine run --
23 JUSTICE BARRETT: Yes. Say you can.
24 You can. Just say you can.
25 GENERAL PRELOGAR: Yes. So if you're

1 assuming that the same thing happened where
2 Congress had to go into recess and couldn't hold
3 the joint session after all --
4 JUSTICE BARRETT: Yes.
5 GENERAL PRELOGAR: -- because there
6 was such a security risk? I think that that
7 probably would be chargeable if we had the
8 intent evidence.
9 Now, as I mentioned before, even with
10 respect to the riot that happened, which was a
11 much more serious breach, we don't have that
12 evidence of intent for everyone.
13 But, if we had, for example,
14 organizers where it was absolutely clear that
15 they were the ring leaders who had intended to
16 obstruct and undertook the action with that
17 specific intent and did so knowing it was
18 wrongful, and especially if they went -- you
19 know, I'm assuming you're saying they're in the
20 unauthorized area right outside the Capitol.
21 JUSTICE BARRETT: Yes.
22 GENERAL PRELOGAR: That is unlawful
23 conduct committed with consciousness of
24 wrongdoing if we have the proof of it.
25 JUSTICE BARRETT: Let's say that I am

1 having a hard time seeing -- accepting your
2 limiting construction of the verbs "obstruct,"
3 "influence," or "impedes," to have this extra
4 element.
5 Tell me why I shouldn't be concerned
6 about the breadth of the government's reading
7 just relying on "corruptly" and the nexus
8 requirement. Should I be concerned or -- or
9 could you just embrace it and say, yeah, there
10 might be some as-applied First Amendment
11 challenges or that sort of thing?
12 I mean, can I -- can I be comfortable
13 with the breadth if that's what I think?
14 GENERAL PRELOGAR: Yes, you can be.
15 You certainly don't have to agree with us that a
16 de minimis hindrance wouldn't qualify. If you
17 thought that this was unqualified and swept
18 broadly to any kind of hindrance whatsoever,
19 there would still be really important limits in
20 the statute. Obviously, you'd have to have the
21 official proceeding.
22 I think the nexus requirement could be
23 somewhat harder to establish in a circumstance
24 where you might not think that the natural and
25 probable effect of the conduct is going to be to

1 obstruct the proceeding.
2 You'd have to show that the defendant
3 knew that the natural and probable effect would
4 do that. You'd still have to show the corruptly
5 mens rea. And as you mentioned, even if you
6 could show all of that, if it were a
7 circumstance that really did infringe on First
8 Amendment rights, there would always be the
9 backstop of an as-applied constitutional
10 challenge.
11 JUSTICE BARRETT: Do you think it's
12 plausible that Congress would have written a
13 statute that broadly? I mean, let's say that I
14 think that Justice Alito's example of the
15 protestors in the courtroom, you know --
16 GENERAL PRELOGAR: Yeah.
17 JUSTICE BARRETT: -- it's -- it's --
18 let's say it's corrupt, and it -- and it impedes
19 the proceeding because we have to go off the
20 bench and things are stopped.
21 Let's say I think that that's covered
22 by the word "impedes" and let's -- there's the
23 nexus, then it's corruptly. Is it plausible to
24 think Congress wrote a statute that would sweep
25 that in?

1 GENERAL PRELOGAR: Yes. I think that
2 there are a lot of legitimate ways to -- to try
3 to voice your dissent if you disagree with what
4 the Court is doing, but one of the ways you
5 cannot do it is come into this courtroom, halt
6 the proceedings, force the Justices to leave the
7 bench, and do it with the intent and the corrupt
8 mens rea. I think that Congress could think
9 that is a severe intrusion on the functioning of
10 our government and want to protect against that.
11 And, again, the 20-year statutory max,
12 of course, is just a max. There's no mandatory
13 minimum. So Congress would have recognized that
14 sentencing courts would use their discretion to
15 tailor the actual sentence to the facts of the
16 that specific offense.
17 JUSTICE BARRETT: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?
20 JUSTICE JACKSON: So you've emphasized
21 several times that Congress wasn't writing on a
22 blank slate in 1512(c). But do you dispute that
23 it was writing against the backdrop of a
24 real-world context?
25 It was in the wake of Enron, there was

1 document destruction, and, you know, there was
2 nothing as far as I can tell in the enactment
3 history as it was recorded that suggests that
4 Congress was thinking about obstruction more
5 generally. They had this particular problem and
6 it was destruction of information that would
7 have -- could have otherwise been used in an
8 official proceeding.
9 So can you just give us a little bit
10 more as to why we shouldn't think of this as
11 being a narrower set of circumstances to which
12 this text relates?
13 GENERAL PRELOGAR: Sure. And, you
14 know, I'd start by saying that we, of course,
15 acknowledge that the immediate impetus for
16 adding 1512 to the statute was to close the
17 Enron loophole. It was a -- a glaring loophole
18 in the coverage of the obstruction laws that it
19 wasn't a crime for you personally to destroy the
20 document and the government had to charge people
21 for instead persuading other people to destroy
22 documents.
23 So that was front of mind for
24 Congress, and Congress wanted to address it. It
25 did address it with (c)(1) and with 1519

1 separately.
2 But I think the best way to look at
3 what Congress was doing in light of that context
4 is to consider the fact that Congress went
5 further and enacted (c)(2). The broader lesson
6 Congress took away from Enron is that when you
7 set out in advance to try to enumerate all the
8 various ways that official proceedings can be
9 obstructed, things will slip through the cracks.
10 You can't always foresee it.
11 JUSTICE JACKSON: Let me just ask you
12 this. Was (c)(2) enacted at the same time as
13 (c)(1)?
14 GENERAL PRELOGAR: Yes, it was.
15 JUSTICE JACKSON: And so why couldn't
16 the broadening relate to other ways in which one
17 might prevent a proceeding from accessing
18 information?
19 So one is documents, records, and
20 other objects. But the known/unknown, we don't
21 know, you know, could it be intangible, for
22 example, that (c)(2) is sort of getting at when
23 one gets at physical objects?
24 I guess I'm struggling with leaping
25 from what's happening in (1) in the context in

1 which it was actually enacted to all of
2 obstruction in any form.
3 GENERAL PRELOGAR: So I -- I think the
4 reason why we wouldn't suggest that the context
5 could bear that narrower reading is because of
6 the actual language that Congress used. If it
7 was really just worried about other kinds of
8 record-based, proceeding-based, evidence-based
9 ways of obstructing, then there were easy
10 templates to add that in as a residual clause to
11 (c)(1). There was no need to have this entirely
12 separately numbered prohibition. And especially
13 there was no need to use the well-recognized
14 verb phrase "obstructs, influences, or impedes,"
15 which was clearly drawn from these other --
16 omnibus clauses that sweep more broadly.
17 So I think -- it -- it -- you know, we
18 think that it's perfectly consistent with the
19 statutory history here to recognize that after
20 Enron, what Congress thought is we don't want
21 novel ways that we aren't thinking about of
22 obstructing a proceeding to not be a crime. We
23 do want to cover the waterfront of obstructive
24 conduct with the backstop of a corruptly mens
25 rea, the limitation to an official proceeding,

1 and so forth. And that's exactly what the words
2 of the statute say.
3 JUSTICE JACKSON: Thank you.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.
6 Rebuttal, Mr. Green.
7 REBUTTAL ARGUMENT OF JEFFREY T. GREEN
8 ON BEHALF OF THE PETITIONER
9 MR. GREEN: Justice Sotomayor, a
10 defendant who tips off a grand jury witness or
11 tips off the targets of a search warrant is
12 someone who is certainly attempting to impair
13 the integrity or the availability of evidence
14 and would be covered by (c)(2) just as somebody
15 who creates a document and then that document is
16 shown to counsel and counsel withdraws a
17 mandamus petition has, in fact, created
18 something that has caused an interference with
19 an official proceeding.
20 I heard my friend say twice in
21 response to your questions, Justice Gorsuch and
22 Justice Barrett, that (c)(2) would cover
23 peaceful protests as long as she could
24 demonstrate or the government could demonstrate
25 that there was the adequate mens rea and a

1 nexus.

2 As the nexus, let's look at what

3 1512(f) says. "For the purposes of this

4 section, an official proceeding need not be

5 pending or about to be instituted at the time of

6 the offense." There is no nexus. Congress has

7 written it out of the statute right there.

8 If the J6 defendants came on January

9 5th and did all the kinds of things that they

10 did, maybe one would hope, but if it had

11 happened that way, it would still be a (c)(2)

12 violation.

13 With respect to the corruptly mens

14 rea, Justice Kavanaugh, you asked a question

15 yesterday about -- about the fact that mens rea

16 as a break only works at trial because the

17 government's allegations are taken as true at

18 the motion to dismiss stage. And I -- I think

19 that's exactly right.

20 And that's why it's not a break at all

21 or, if it's any kind of break, it's a break on a

22 -- on -- on a go-kart. It's a wooden stick.

23 What it means is that people like Mr. Fischer

24 have to sit and go to trial and seek to -- to --

25 to win on a Rule 29 motion because the

1 government hasn't proved their mens rea.
2 The same is true of First -- First
3 Amendment defenses if peace -- peaceful
4 protestors are charged with (c)(2). My friend
5 referred to 1503 and 1505, other statutes
6 within, and a number of the Justices have
7 pointed out that there are much lower penalties
8 for significant crimes.
9 I would point the Court to 1752, which
10 is civil disobedience in a restricted space,
11 which is what Mr. Fischer is charged with.
12 That's a misdemeanor. If you cause substantial
13 bodily injury, that is a 10-year -- a 10-year
14 maximum penalty. The government wants to
15 unleash a 20-year maximum penalty on potential
16 peaceful protests.
17 That in and of itself is a bad idea
18 because it's going to chill protected
19 activities. People are going to worry about the
20 kinds of protests they engage in, even if
21 they're peaceful, because the government has
22 this weapon.
23 Finally, I think we haven't touched
24 very much on the breadth of influence because
25 that's one of the words that's used in (c)(1)

1 too, and that would all -- not only would it be
2 peaceful protests, it could be advocacy. It --
3 it could be all kinds of lobbying. Those things
4 would be covered as well, we've -- we've pointed
5 out in our briefs.
6 Then, finally, I would say to the
7 Court let's not forget that civil proceedings
8 are covered here -- we -- we would submit civil
9 evidentiary proceedings -- but civil
10 proceedings. So the government is suggesting
11 that the Court should unleash a 20-year
12 obstruction -- maximum obstruction statute on
13 civil litigation in federal courts.
14 I submit that that is, and we would
15 submit that that is, a very serious tool to put
16 in the hands of prosecutors.
17 We urge that the Court reverse the
18 D.C. Circuit.
19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.
21 The case is submitted.
22 (Whereupon, at 11:51 a.m., the case
23 was submitted.)
24
25

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