

# High Court's Jan. 6 Rioter Case May Have Wide Ripple Effects

By **Brook Dooley and Sara Fitzpatrick** (April 8, 2024)

On April 16, the U.S. Supreme Court will hear arguments in *Fischer v. U.S.*,<sup>[1]</sup> a case that will determine whether a law enacted in the wake of the Enron scandal and primarily aimed at white collar crime can be used to prosecute participants in the Jan. 6, 2021, riot at the U.S. Capitol.

At issue is whether prosecutors can charge participants with violation of a federal law that makes it a crime to corruptly obstruct an official proceeding, or whether that law is limited to obstruction that involves evidence tampering.

The court's decision could have a ripple effect on other Jan. 6 prosecutions, as well as the election interference case against former President Donald Trump.

Beyond the events of Jan. 6, though, the court's decision will affect the government's ability to prosecute individuals for protesting a range of official proceedings.

## Background

Joseph Fischer is one of over 1,000 people charged with federal crimes in connection with the Jan. 6, 2021, riot at the U.S. Capitol. Prosecutors contend that Fischer pushed through the crowd of rioters into the Capitol building and charged into a line of police officers before being forcibly removed.

Among the charges against Fischer is a violation of Title 18 of the U.S. Code, Section 1512(c)(2), a provision of the Sarbanes-Oxley Act enacted in the wake of the Enron scandal.

Section 1512(c) is broken into two subsections: Subsection (c)(1), which criminalizes the corrupt destruction of, or tampering with, documents or records with the intent to impair their availability for use in an official proceeding; and Subsection (c)(2), which prohibits "otherwise" corruptly obstructing or influencing official proceedings. Fischer is charged under the latter section, Section 1512(c)(2).

Prosecutors have applied Section 1512(c)(2) to hundreds of other cases involving Jan. 6 rioters on the basis that the attack on the Capitol constituted the corrupt obstruction of the Electoral College vote certification. Former President Trump has also been charged with violating Section 1512(c)(2) for his alleged role in obstructing the certification of the Electoral College vote.

In 2022, the U.S. District Court for the District of Columbia granted Fischer's motion to dismiss the Section 1512(c)(2) charge.<sup>[2]</sup> The court reasoned that Subsection (c)(2) is only intended to cover crimes related to a "document, record, or other object." Under the district court's reading, Section 1512(c)(2) applies only to those who corruptly obstruct an official proceeding by taking "some action with respect to a document, record, or other object."



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On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the dismissal in a 2-1 decision.[3] The majority held that while Subsection (c)(1) concerns evidence tampering, Subsection (c)(2) is more naturally read to apply "to all forms of corrupt obstruction of an official proceeding."

The Supreme Court granted Fischer's petition for certiorari on Dec. 13, 2023, and it will hear oral argument on April 16.

### **Arguments Before the Court**

At the heart of this case is whether the scope of Section 1512(c)(2) is limited to the type of evidence tampering offenses covered by Section 1512(c)(1), or whether Section 1512(c)(2)'s language is meant to be applied more broadly.

Fischer argues that "Section 1512(c)(2) applies only to acts that affect the integrity or availability of evidence." [4] He asserts that this narrow reading is supported by the context and history of the statute, various canons of interpretation, and prior cases in which the Supreme Court rejected "unrestrained" readings of criminal statutes. Fischer further invokes the rule of lenity and the canon of constitutional avoidance as bases for a narrow reading.

The government counters that the statute should be given its "ordinary meaning," that the canons cited by Fischer are inapplicable to this case, and that the context and structure of the statute confirm its plain reading.

The government emphasizes that the word "otherwise" in Section 1512(c)(2) "means 'in a different manner,'" and thus dooms Fischer's interpretation of Section 1512(c)(2) that limits its reach to the types of obstruction covered by Section 1512(c)(1).

The government's reading is well supported by the existing case law interpreting Section 1512(c). For example, of all the federal district courts that have presided over Jan. 6 prosecutions, the court that heard Fischer's case is the only one to dismiss Section 1512(c)(2) charges.

Moreover, the federal appeals courts have taken expansive views of Section 1512(c)(2), applying it not only to tampering with documents, but also to acts such as tipping off the targets of criminal investigations, seeking information about a grand jury investigation in order to evade surveillance, and giving misleading testimony.

On the other hand, recent Supreme Court decisions have reined in expansive readings of the Sarbanes-Oxley Act.

In *Yates v. U.S.*, [5] the court in 2015 considered the prosecution of John Yates, a fisherman who dumped undersized fish overboard to prevent their seizure by an inspector from the Florida Fish and Wildlife Conservation Commission. Prosecutors charged the fisherman under a provision of the Sarbanes-Oxley Act that prohibits tampering with "any record, document, or tangible object" to impede an investigation.

The Supreme Court rejected the government's argument that the statute applied to Yates. While acknowledging that a fish is literally a tangible object, the court concluded that the provision used "tangible object" to mean something narrower, namely an object "used to record or preserve information."

In short, the court in *Yates* looked past the literal language to interpret the statute in light

of its context, structure and purpose.

Although the composition of the court has changed since *Yates*, Fischer will seek to carve out a similar path, arguing that the context, structure and history of Section 1512(c)(2) support a narrow reading of its reach.

### **Potential Impacts of the Decision**

The court's decision could have wide-reaching impacts. Hundreds of Jan. 6 defendants have been charged or convicted under Section 1512(c)(2), many of whom face no other charges.[6] If the court rejects the government's interpretation of Section 1512(c)(2), prosecutors will lose a valuable tool, and the fate of those prosecutions will be up in the air.

The implications for the criminal case against Trump are less clear. Trump has been indicted under Section 1512(c)(2) in part due to his alleged incitement of the Capitol rioters. But he is also alleged to have falsified information in an attempt to change the outcome of the certification.

Thus, the court could interpret the statute in a way that forecloses prosecution of Capitol rioters generally, but that leaves the door open to a prosecution of Trump based on the falsification of information.

Beyond these Jan. 6 cases, Fischer carries implications for other protests of official proceedings. Should the court take an expansive reading of Section 1512(c)(2), the statute could be read to apply broadly to any protest of an official proceeding that "obstructs, influences, or impedes" the proceeding.

Whether a protester violates the statute could then come down to how courts interpret the corrupt mental state required by the statute.

Finally, Fischer is of note because it pits the current court majority's stated commitment to textualism against the court's recent history of reining in aggressive prosecutorial theories.

Read most plainly, the text of Section 1512(c)(2) supports the government's broad reading and application of the statute to the Jan. 6 rioters. But in *Yates* and other cases, the court has recently demonstrated a commitment to curbing what it sees as aggressive prosecution theories.

Last term, for example, in *Percoco v. U.S.*,[7] the court overturned the conviction of a private citizen for honest-services fraud, finding that the theory underlying the jury instructions was overbroad.

Something has to give in Fischer, and practitioners will be watching to see which way the court goes — and what effect it has on Jan. 6 prosecutions and the broader landscape of federal criminal prosecutions.

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[1] Fischer v. United States, No. 22-557.

[2] United States v. Fischer, No. 1:21-CR-00234 (CJN), 2022 WL 782413 (D.D.C. Mar. 15, 2022).

[3] United States v. Fischer, 64 F.4th 329 (D.C. Cir. 2023).

[4] See Pet. Brief at 8.

[5] Yates v. United States, 574 U.S. 528 (2015).

[6] <https://www.lawfaremedia.org/article/one-stiffest-charges-against-jan-6-insurrectionists-hangs-thread-dc-circuit>.

[7] Percoco v. United States, 143 S.Ct. 1130 (2023).