SCOTUS TAKES UP JANUARY 6 OBSTRUCTION CHALLENGE — BUT WITH UNKNOWN SCOPE

Today, SCOTUS granted cert to one of the initial challenges to 18 USC 1512(c)(2), that of Joseph Fischer.

Depending on what they do with the appeal, the review could have significant effect on all the January 6 cases charging obstruction — over 300 defendants so far, including Trump.

But no one knows how broadly they will be reviewing this appeal.

On its face, the *only* thing being appealed in Fischer is whether this statute requires document tampering.

> Did the D.C. Circuit err in construing 18 U.S.C. § 1512(c) ("Witness, Victim, or Informant Tampering"), which prohibits obstruction of congressional inquiries and investigations, to include acts unrelated to investigations and evidence?

If SCOTUS upheld the DC Circuit opinion (and all the underlying District opinions), nothing would change. If it overturned the DC Circuit opinion, then hundreds of cases of rioters would be thrown out.

Remember that defendants have *always* likened the January 6 attack with the interruption by protestors of Brett Kavanaugh's confirmation hearing (there are significant differences, starting with the fact that all the protestors who disrupted Kavanaugh's hearing were in the building legally). So I wouldn't even rule out some set of Republicans rejecting this

application on those grounds.

But it's not clear that would affect the charges against Trump. That's because Trump's obstruction *does* involve document tampering: the forged elector certificates.

It's possible, though, that SCOTUS will also review a more contentious issue: the definition of "corrupt purpose" in the statute. Fischer addresses that deeper in the petition.

> While some courts have limited Section 1512(c)(2)'s scope by a particular definition of the critical mens rea element—"corruptly"—they have not defined it uniformly. See Miller, 605 F. Supp. 3d at 70 n.3. And the D.C. Circuit's lead opinion declined to define it all, even while stating that "corrupt intent" limited Section 1512(c)(2)'s reach. Compare Pet. App. 17a-18a with Pet. App. 20a. The lead opinion nonetheless acknowledged three potential definitions:
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> 1. Corruptly means conduct that is "wrongful, immoral, depraved, or evil." Pet. App. at 18a (quoting Arthur Anderson LLP, 544 U.S. at 705, discussing 18 U.S.C. § 1512(b)).
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> 2. Undertaken with a "corrupt purpose or through independently corrupt means, or both." Pet. App. 18a-19a (quoting United States v. Sandlin, 575 F. Supp. 3d 16, 30 (D.D.C. 2021) (citing United States v. North, 910 F.2d 843, 942-43 (D.C. Cir. 1990) (Silberman, J., concurring and dissenting in part)).
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> 3. Conduct that involves "voluntarily and intentionally [acting] to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person." Pet. App. 19a (quoting Aguilar, 515 U.S.

> at 616-17) (Scalia, J., concurring).

Here, SCOTUS could adopt the more restrictive definition of corrupt benefit, option 3.

In that case, it's not clear what would happen with the crime scene defendants: at the DC Circuit, Justin Walker argued that Trump supporters *might* have obtained a corrupt purpose if Trump were unlawfully retained.

But for Trump, there's no question: He was attempting to retain one of the most valuable jobs in the world through unlawful means.

All of which is to say, SCOTUS' decision to review the case is huge — though not entirely unexpected.

But we won't know what to make of the review for some time.

Update: I had been anxiously waiting to see what Steve Vladeck had to say about this. He notes that SCOTUS took Fischer but not Miller and Alam, which had been joined to it.

> All three defendants filed cert. petitions challenging the D.C. Circuit's decision. The Department of Justice filed a single, consolidated brief in opposition—and the Court's website used to reflect that the three cases had been "vided" (meaning that they were being considered alongside each other). Thus, it's really strange that the Court granted *Fischer*, but not *Lang* and *Miller*. (And then quietly removed the notation from *Fischer*'s docket page that the case was tied to *Lang* and *Miller*.) Yes, the Court often holds parallel cases for a lead case, but not after both the court of appeals and the government had already consolidated them.
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> Part of why it's weird is because all three petitions raise the question presented in *Fischer*—the *actus*

> *reus* question. The other two petitions also raise the *mens rea* question (and *Fischer* does not), but if the Court was interested in answering the *actus reus* question in general (and only the *actus reus* question), it could easily have granted all three petitions only on that question.
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> Otherwise, the only difference I can readily discern between Fischer and the other two cases is that Fischer entered the Capitol later on January 6 (after the Joint Session recessed). But it’s hard to believe that the Court is intervening in an interlocutory posture (remember, the cases have not yet gone to trial) because it wants to draw a temporal distinction among which January 6 rioters can and can’t be prosecuted under 1512(c)(2).
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> All of this is to say that, if the Court really was interested in narrowing the scope of 1512(c)(2) to align with Judge Katsas’s dissent in *Fischer*, I don’t get why the Court would sever cases that had hitherto been consolidated.