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New York Law Journal

WHITE-COLLAR CRIME

Testing SCOTUS's 'Unmistakable Trend' in Shadow of Trump Prosecution

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April 10, 2024

Fischer v. United States, No. 23-5572 (2023), an appeal scheduled to be argued this Tuesday by a defendant charged for physically obstructing Congress' joint session to certify the result of the 2020 Presidential Election, is the latest test of the Supreme Court's pattern of rejecting broad interpretations of federal criminal statutes. *See* R. Anello & R. Albert, "SCOTUS Confirms "Unmistakable Trend" in Narrowing Identity Theft Statute", N.Y.L.J. (Aug. 10, 2023).

This time, however, the question arises with the outsized specter of the prosecution of former-President Donald Trump looming, barely in the background. In *Fischer*, the court will determine whether 18 U.S.C. §1512(c)(2), which in broad terms criminalizes the corrupt obstruction of an official proceeding, applies to defendants who forcibly entered the Capitol building on Jan. 6, 2021. To those who have been following the court's criminal docket, a ruling narrowing the statute's reach would not be surprising.

Because Trump faces charges under the same statute for his conduct following the 2020 election, *Fischer*'s political context is inescapable, but Congress and the courts have long struggled to properly define the elusive concept of obstruction. Indeed, the case hearkens back to another SCOTUS decision addressing an ostensibly broad post-Enron

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obstruction statute in an unusual context: the "fish" case, *Yates v. United States*, 574 U.S. 528, 532 (2015), a decision authored by Justice Ruth Bader Ginsburg, which narrowed the statute's reach.

Because Trump is charged with a broad array of conduct going well beyond the conduct in *Fischer*, the narrowed reading Fischer urges might well be of limited help in Trump's case. Both for its potential implications for the Trump prosecution and, more broadly, for the range of obstruction and other white-collar statutes that prohibit "corrupt" conduct, the *Fischer* case is worthy of attention.

The Statute and Proceedings Below

Fischer, who is among more than 330 defendants to have been charged over the events at the Capitol on Jan. 6, 2021, is claimed to have encouraged rioters to "charge" and "hold the line," and to have crashed into the police line, resulting in a "physical encounter"

with at least one law enforcement officer. *United States v. Fischer*, 64 F.4th 329, 332 (D.C. Cir. 2023). A grand jury charged Fischer with felony assault, misdemeanor disorderly conduct charges, and one count of Obstruction of an Official Proceeding under 18 U.S.C. §1512(c)(2).

Section 1512(c) criminalizes "[w]hoever corruptly… (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences or impedes any official proceeding, or attempts to do so" (emphasis added). Congress enacted Section 1512(c) as part of the Sarbanes-Oxley Act of 2002 (SOX), in the wake of Enron's massive accounting scandal and the destruction of potentially incriminating documents by the company's outside auditor, Arthur Andersen. Legislative history suggests that Congress intended the amendment to close the "Arthur Andersen loophole" left by 18 U.S.C. §1512(b)(2), which prohibits inducing others to destroy records, documents, or objects but does not prohibit an individual herself from such conduct.

Fischer moved to dismiss the Section 1512(c)(2) charge. He prevailed at first, with Judge Carl Nichols of the U.S. District Court for the District of Columbia diverging from the vast majority of rulings and concluding that a 1512(c)(2) charge requires allegations that the defendant "took some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence" an official proceeding. *United States v. Fischer*, 2022 WL 782413, at *4 (D.D.C. March 15, 2022).

On April 7, 2023, in a consolidated appeal, the D.C. Circuit reversed Nichols in a split decision. In Judge Florence Pan's lead decision, she concluded that Section 1512(c)(2)'s language unambiguously applies to all forms of obstructive conduct because "otherwise" means "in a different manner." Judge Justin Walker concurred in the judgment on the condition that "corrupt" be defined as "an intent to procure an unlawful benefit either for himself or some other person" in order to appropriately cabin the scope of the statute.

Judge Gregory Katsas dissented, asserting that "otherwise" in subsection (c)(2) means "in a manner similar to." In his view, subsection (c)(2) covers only those acts that impair the integrity or availability of evidence, a construction that complies with the Supreme Court's "repeated[] [] reject[ion]…of criminal statutes that would reach significant areas or innocent or unregulated conduct" (citing *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *McDonnell v. United States*, 579 U.S. 550 (2016); *Bond v. United States*, 572 U.S. 844 (2014)).

Defendants petitioned for a writ of certiorari in September 2023, requesting that SCOTUS resolve whether Section 1512(c)(2) includes acts unrelated to investigations and evidence. The court granted the petition on Dec. 13, 2023.

The Text and Context Debate

As is often the case, both parties argue in their merits briefs that the plain text of the statute supports their position. Fischer contends that subsection (c)(2) extends only to acts affecting evidence spoilation. Because the term "otherwise" follows subsection (c)(1)'s list of evidence impairment examples, subsection (c)(2) must function as a narrow residual clause rather than a broad catch-all clause. The government, for its part, stresses the commonly understood meaning of the term "otherwise" which is defined in the Oxford English as "in a different manner." According to the government, subsection (c)(2) must cover conduct broader and different from evidence tampering so as not to render (c)(2) superfluous and duplicative of subsection (c)(1).

To further underscore their positions, the parties also rely on the context of subsection (c)'s passage as part of SOX and its apparent intention to close the loophole of §1512(b)(2) applying to only indirect

rather than direct conduct. According to Fischer, his alleged breach of the Capitol is not only at odds with the "financial-fraud mooring" of SOX but also the evidence impairment conduct that led to Section 1512(c)'s enactment.

The government argues that the statute's historical background weighs in favor of interpreting subsection (c)(2) as a catch-all provision to prevent the possibility of another gap akin to the "Arthur Andersen loophole." The government points out that in adding (c)(2), Congress did not limit its language to terms covering only evidence impairment, as it has used in other obstruction laws.

'Fischer' and the Fish Case

Fischer also invokes the Court's prior decision in *Yates v. United States*, 574 U.S. 528 (2015). *Yates* interpreted 18 U.S.C. §1519, another provision of SOX that addresses obstruction of justice. Section 1519 penalizes "knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence" a federal investigation.

The *Yates* court answered whether a fish counted as a "tangible object" after officials cited a fisherman for catching undersized red grouper, who then threw them overboard and replaced them with complying fish to try to escape liability.

Ginsburg, writing for the plurality, acknowledged that a "fish is no doubt an object that is tangible," but "it would cut §1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." The plurality relied on SOX's purpose, as well as the statutory canon ejusdem generis, to conclude that "tangible object" must be interpreted in light of the preceding terms "record" and "document."

Fischer raises *Yates* to argue that the court should reject the government's reading of Section 1512(c)(2) to encompass physical obstruction because, as in *Yates*, such an "unrestrained reading" would ignore the statute's "textual moorings" and structure.

The government argues that the reasoning of *Yates* does not apply because *ejusdem generis* applies to a sentence listing a series of specific items, but Section 1512(c) is structured as two separate paragraphs. The government additionally points out that the plurality in *Yates* expressly "declined to extend its reasoning to Section 1512(c)(1)'s comparable language." The government further argues that reading Section 1519 to encompass a fish results in a "textual incongruity" (because it makes no sense to falsify a fish), not present in applying Section 1512(c)(2) to Fischer.

Yates appears to present the closest analogue for predicting the Supreme Court's forthcoming interpretation of Section 1512(c)(2), and "[i]n the specific context of obstruction of justice, the Supreme Court repeatedly has emphasized the need for caution." *Fischer*, 64 F.4th at 382 (Kastas, J., dissenting). More broadly, since *Yates*, a narrowing construction invariably has been the result when SCOTUS has granted review to address a criminal statute that, as Justice Kagan conceded as to §1519, is "a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." *Yates*, 574 U.S. at 570 (Kagan, J., dissenting).

'Fischer' and the Trump 2020 Election Criminal Case

If the court narrowly construes Section 1512(c) as urged in *Fischer*, the ruling does not necessarily foretell a win for Trump in his criminal case pending before Judge Tanya Chutkan of the U.S. District Court for the District of Columbia for violating the statute.

The government alleges far broader conduct against Trump than just the physical breach of the Capitol and assault on officers. The charges against Trump for violating and conspiring to violate §1512(c)(2) include allegedly attempting to marshal individuals

to serve as fraudulent electors and send those false certifications to Congress and the Vice President, seeking to deceive state officials into undertaking efforts to derail the proceeding, making false statements and seeking to fraudulently induce members of Congress and the vice president into taking and declining to take actions in the election certification proceeding. *See United States v. Trump*, No. 23-cr-257, Dkt. No. 1 (Aug. 1, 2023).

If the court were to adopt Katsas' position and interpret Section 1512(c)(2) as limited to only those acts that impair the integrity or availability of evidence, Trump's alleged conduct still would appear to suffice. The Jan. 6, 2021, election certification, by statute, relies on specific records—certificates of votes from each state—and as the government argues, Trumps actions allegedly sought to tamper with the integrity of those records.

Of course, the precise language the court might adopt in limiting the reach of Section 1512(c)(2) could be pivotal to the statute's application to Trump's alleged conduct.

Potential Implications for White-Collar Defendants

Another issue looming in *Fischer* is whether the court must define the "corrupt" intent element in order to interpret the scope of Section 1512(c), and if so how. Any such definition could have broader implications for white-collar criminal defendants. Apart from obstruction statutes, "corruptly" appears frequently in white-collar statutes, such as in the Foreign Corrupt Practices Act, 15 U.S.C. §§78dd-1 & dd-2, and numerous bribery statutes. *See, e.g.,* 18 U.S.C. §§201(b) and (c), § 215, and § 666. In fact, "there are around 50 [ ] references to 'corruptly' in Title 18 of the U.S. Code." *Fischer*, 64 F.4th at 341.

The decisions below reflect that defining the term may not be strictly necessary to resolve the sufficiency of the indictments. In her lead opinion, Pan declined to define "corruptly" because she found the allegations against Fischer "sufficient to meet any proposed definition of 'corrupt' intent" and "the meaning of 'corruptly' was discussed only peripherally in the parties' briefs and in the district court's opinion."

Similarly, Kastas in dissent declined to define "corruptly," but because he found that no definition of "corruptly" could limit a broad construction of Section 1512(c)(2) from sweeping up legitimate conduct.

In his briefing, Fischer adopts the same position as Kastas, and the government argues that any of the available interpretations sufficiently cabin the statute. Any narrowed definition of the term SCOTUS adopts in *Fischer*, such as Walker's definition which requires proof that a defendant acted "with an intent to procure an unlawful benefit," would likely have an impact on obstruction statutes and other criminal laws beyond Section 1512(c). (Walker, J., concurring).

Conclusion

Fischer presents an interesting test of whether SCOTUS will continue its "unmistakable" message that courts should not assign federal criminal statutes a potentially wide-ranging scope "when a narrower reading is reasonable." *United States v. Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J. dissenting). To court watchers, the odds appear to be against affirmance. The case's potential impact on the Trump prosecution makes it all the more intriguing.

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