No. 10-5443

In the Supreme Court of the United States

CHARLES ANDREW FOWLER, AKA MAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 1512(a)(1)(C), which makes it a crime to kill someone with the intent to prevent the communication of information relating to the commission or possible commission of a federal offense to a federal law enforcement officer or federal judge, requires proof that the victim would in fact have communicated such information to federal officers.

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OPINION BELOW

The opinion of the court of appeals (J.A. 76-86) is reported at 603 F.3d 883.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2010. The petition for a writ of certiorari was filed on July 13, 2010, and granted on November 15, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of killing another person with the intent to prevent communication by any person to a law enforcement officer relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(a)(1)(C) and (3)(A), 1111(a), and 2 (Count 1); and premeditated murder with a firearm, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), 1111(a), and 2 (Count 2). J.A. 15-20, 80. He was sentenced to life imprisonment on Count 1 and a consecutive sentence of ten years of imprisonment on Count 2. The court of appeals affirmed. J.A. 76-86.

1. Congress enacted 18 U.S.C. 1512 as part of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1249-1253, in order to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." § 2(b)(1), 96 Stat. 1249. The statute now authorizes punishment for:

> Whoever kills or attempts to kill another person, with intent to—
>
> * * * * *
>
> > prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

18 U.S.C. 1512(a)(1)(C). Section 1515(a)(4) clarifies that the term "law enforcement officer" means federal law enforcement officer by defining the term to mean "an

officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." 18 U.S.C. 1515(a)(4). But Section 1512 also provides that: "In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).

2. In the early morning hours of March 3, 1998, petitioner and Robert Winston were recruited by Christopher Gamble, Andre Paige, and Jeffrey Bouyie, to assist in robbing a NationsBank branch later that day. J.A. 22, 77. At the time the five men joined forces, petitioner and Winston had recently committed a robbery and had stolen a car, and the other three men had recently robbed a Holiday Inn. J.A. 22-23, 77. Together, the group of men used the stolen car to surveil the bank; retrieved guns, masks, and gloves to use in robbing the bank; and drove to Oakland Cemetery to prepare for the robbery. J.A. 77.

At the cemetery, the five men prepared to rob the bank by discussing their plans, listening to music, drinking alcohol, and using illegal drugs. J.A. 22-26, 77. Shortly before dawn, petitioner walked away from the other four men so that he could use cocaine without having to share the cocaine with his companions. J.A. 23-26, 77. While petitioner was away from the other men, Haines City Police Officer Christopher Todd Horner drove up behind the stolen car and shined a spotlight on the car and its occupants. J.A. 26-27, 77-78. Officer Horner was patrolling the cemetery because it was known to be a high-crime area, particularly for using drugs and disposing of stolen cars. J.A. 77-78. Before

approaching the group of men, Officer Horner informed the Haines City police dispatcher that he was going to investigate a suspicious vehicle. J.A. 78.

When Officer Horner approached the men in the stolen car, he pulled out his gun, shined his flashlight on the men, and asked them what they were doing. J.A. 27-29. Gamble testified at petitioner's trial that he and the other three men in the car were nervous when Officer Horner arrived because they "had guns, drugs." J.A. 27. He testified that he told the three other men in the car with him to "stay cool," but that he knew they were "basically caught in the act." J.A. 27-28. Gamble noted that it was "evident" to Officer Horner that the men were preparing to commit a robbery because they were wearing black clothing and gloves, and because Officer Horner knew that Gamble had previously been involved in robberies. J.A. 30-31, 34, 78. Gamble and Winston got out of the stolen car and Gamble attempted to make excuses for their presence in the cemetery. J.A. 35. Officer Horner told the group to give him their names so that he could check to see whether there were any outstanding warrants for the men. J.A. 28, 35-37, 78. As he did so, Officer Horner backed up to his own car, keeping his gun pointed at the men in and around the stolen car. J.A. 36-37. Gamble testified that Officer Horner seemed nervous, was reaching for something, and was presumably returning to his car to "call for backup." J.A. 36-37, 43-44.

As Officer Horner was returning to his car, petitioner came up behind him and reached for the officer's gun. J.A. 37, 78. Petitioner, with assistance from Gamble, Winston, and Paige, subdued Officer Horner and got control of his gun. J.A. 37-39, 78. When petitioner ordered Officer Horner to get on his knees, Horner com-

plied. J.A. 39, 79. Petitioner pointed the gun at the back of Officer Horner's head and told him not to move. J.A. 40. Gamble tried to reassure Officer Horner that nothing would happen to him; in response, Officer Horner said to Gamble, "Chris, why are you doing this?" J.A. 38-40, 78. At that point, Gamble testified, "everything got out of control" because the other men knew that Officer Horner had identified Gamble. J.A. 38. Gamble testified that petitioner said: "Oh, man, you know him? You know him? Oh, man, why? Now we can't walk away from this thing." J.A. 38, 40, 78. Gamble asked petitioner to give him Officer Horner's gun; instead, Bouyie screamed to petitioner that he should "kill that cracker," and petitioner killed Officer Horner by shooting him in the back of the head. J.A. 42-43, 79.

Officer Horner's death remained unsolved until March 2002 when Gamble, who was in state custody for a robbery that he committed after the murder, began cooperating with state officials. J.A. 79. Gamble confessed to a string of unsolved robberies, including the robbery of the Holiday Inn on March 3, 1998, and eventually disclosed the details of Officer Horner's murder to Detective Louis Giampavolo of the Polk County Sheriff's office. 6/12/2008 Tr. 167, 172-183. Detective Giampavolo presented the information from Gamble's debriefings to federal authorities after Giampavolo learned that the Holiday Inn robbery was outside the four-year state statute of limitations period. *Id.* at 185-187.

After testifying before a federal grand jury in the Middle District of Florida in January and February 2003, Gamble was indicted on 14 federal counts, including for robbery, conspiracy to commit robbery, various firearms offenses, and the murder of Officer Horner. 6/12/2008 Tr. 186. Gamble pleaded guilty to all 14

counts of the indictment and received a sentence of life imprisonment. 6/11/2008 Tr. 168-170, 176, 181-182, 185-189; 6/12/2008 Tr. 172-176, 180-181, 184-188; J.A. 79.

3. On September 19, 2007, a federal grand jury in the Middle District of Florida returned a two-count indictment charging petitioner with Officer Horner's murder. J.A. 15-20. Count One charged petitioner with murdering Officer Horner with the intent to prevent him from communicating to a law enforcement officer information relating to the commission or possible commission of federal offenses, in violation of 18 U.S.C. 1512(a)(1)(C) and (3)(A), 1111, and 2. J.A. 15-17. The indictment identified the relevant federal offenses as the armed robbery of the Holiday Inn, in violation of 18 U.S.C. 1951; conspiracy to rob a bank, in violation of 18 U.S.C. 2113 and 371; possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and possession of cocaine and marijuana, in violation of 21 U.S.C. 844(a). J.A. 15-17. Count Two charged petitioner with murdering Officer Horner in the course of using and carrying a firearm during and in relation to crimes of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), 1111(a), and 2. J.A. 17-18.

At his jury trial, petitioner moved for a judgment of acquittal at the close of the government's case-in-chief, pursuant to Federal Rule of Criminal Procedure 29(a), solely on the ground that Gamble's testimony was not credible. J.A. 46. The district court denied the motion. *Ibid.* Following the court's charge to the jury, petitioner's counsel renewed his motion for a judgment of acquittal, stating simply that "I need to renew a motion that I made at the conclusion of the Government's case." J.A. 50. The court again denied the motion. *Ibid.*

The district court adopted the government's proposed jury instructions on the elements of the Section 1512(a)(1)(C) offense and instructed the jury as follows:

> [Petitioner] can be found guilty of [Count One] only if all of the following facts are proved beyond a reasonable doubt: First, that [petitioner] killed Christopher Todd Horner as charged and, second, that [petitioner] killed Christopher Todd Horner knowingly and willfully with the intent to prevent him from communicating information relating to the commission or possible commission of a federal offense to a law-enforcement officer or a judge of the United States.
>
> * * * * *
>
> Specifically, the Government[] alleges that the killing was done to prevent the communication by Christopher Todd Horner of information relating to one or more of the following federal offenses: One, the robbery of a Holiday Inn in violation of Title 18 U.S.C. Section 1951; two, a conspiracy to rob a bank in violation of Title 18 United States Code, Sections 1951, 2113, and 371; three, the possession of a firearm by a convicted felon in violation of Title 18 United States Code, Section 922(g); and/or four, possession of a controlled substance in violation of Title 18 [sic] United States Code, Section 844(a).

J.A. 59-60. The court then instructed the jury on the elements of each of those offenses. J.A. 60-66. Petitioner did not object to the government's proposed charge or request an alternative instruction to elaborate on any need for proof that information about the underlying federal crimes would have been transferred to federal law enforcement officers. J.A. 48; 6/13/2008 Tr.

111-117. The jury found petitioner guilty on both counts. J.A. 80. Petitioner was sentenced to life imprisonment on Count 1 and to a consecutive sentence of ten years of imprisonment on Count 2. *Ibid.*

4. The court of appeals affirmed. J.A. 76-86. Raising a specific sufficiency-of-the-evidence argument for the first time on appeal, petitioner challenged the sufficiency of the evidence to support his conviction under Section 1512(a)(1)(C). Petitioner did not dispute the evidence that he murdered Officer Horner. Rather, he argued that the government had failed to present evidence that the information Officer Horner might have obtained likely would have been transferred to *federal* law enforcement officers or that a *federal* investigation of the federal crimes involving petitioner and his associates was likely. The court rejected that contention, concluding that the statute did not require proof that a federal investigation was "ongoing, imminent, or likely," or that the victim "would have likely communicated information relating to the possible commission of a federal offense to federal authorities." J.A. 81. Citing its precedent and cases from other federal circuits, the court of appeals held that "the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)." J.A. 85. Applying that standard, the court found that "the federal nexus requirement was clearly satisfied" by the evidence that petitioner and the others in the group were in the process of committing, or had committed, numerous federal crimes—*i.e.*, they "were going to (or had already) engaged in armed robbery" and "had in [their] collective possession firearms, a stolen car, marijuana, and cocaine"—that "could have led to a federal investigation and prosecution." J.A. 85-86.

SUMMARY OF ARGUMENT

Petitioner was convicted of violating 18 U.S.C. 1512(a)(1)(C) by murdering Officer Christopher Todd Horner with the intent to prevent Officer Horner or others from communicating to federal law enforcement officials information about the commission or possible commission of various federal crimes. Petitioner contends that his conviction cannot stand because the government failed to prove that it was "likely" or "plausible" that information about the underlying federal offenses would have been communicated to federal, as opposed to state or local, law enforcement officials. He is incorrect both as to what the law requires and as to what the government proved in this case. Section 1512(a)(1)(C) is satisfied by proof of a reasonable possibility that one of the communications that a defendant prevented or intended to prevent by killing his victim would have been with a federal law enforcement official, and the government's evidence met that standard.

A. Congress enacted Section 1512(a)(1)(C) in order to protect the federal criminal justice system against the loss of evidence when potential witnesses and informants are murdered to silence them. The statute itself does not specify how likely it must have been that a communication prevented or intended to be prevented by the killing would have been with a *federal* officer. Petitioner offers various formulations of how certain that communication must be ("likely," "certain," "plausible") and relies primarily on cases linking that element (or other federal nexus elements) to either the defendant's or the victim's state of mind. But none of petitioner's formulations finds support in the structure or purpose of the statute.

First, any suggestion that the federal-officer element requires proof that the defendant intended to obstruct a communication with a federal officer specifically, or that he knew that his conduct would have such an obstructive effect, is refuted by the plain text of the statute. Subsection (g)(2) of Section 1512 specifies that, for all offenses punished by Section 1512, the government need not prove that the defendant had any particular state of mind with respect to the federal nature of the officer. Second, it would make little sense for Congress to link the federal-officer element to the state of mind or past conduct of the victim. The statute's express protection of relevant communications by "any person"—not just by the victim—precludes such a requirement. In addition, requiring that a victim already have communicated with federal officials would exclude protection of first-time communications, a result that would undermine the statute's focus on a defendant's intent to "prevent" a covered communication.

In determining whether a defendant has violated Section 1512(a)(1)(C), a jury must make a predictive judgment—*i.e.*, whether the defendant's obstructive killing might have prevented a communication with a federal law enforcement official. In most instances, the statute protects communications that never occur. In determining whether a particular obstructive murder falls within the prohibition in Section 1512(a)(1)(C), a jury must determine whether it was reasonably possible that at least one of the communications that the murder prevented or was intended to prevent would have been with a federal law enforcement official. That possibility may be established with different types of evidence in different cases. Such a possibility must be realistic, as opposed to remote—*i.e.*, must be reasonable in light of

the evidence and common sense. But the government need not prove that such a communication would definitely have occurred, or would more likely than not have occurred, absent the defendant's obstructive conduct. Such a high burden would frustrate Section 1512(a)(1)(C)'s purpose to protect the integrity of the federal criminal justice system, including *potential* future investigations and prosecutions.

B. Petitioner contends that principles of constitutional avoidance require the Court to adopt his restrictive reading of the federal-officer element. That is incorrect. Congress has broad authority under the Necessary and Proper Clause to enact legislation that rationally furthers an enumerated power. By criminalizing murders that interfere with the potential investigation and prosecution of federal crimes, Congress acted well within its constitutional authority. Congress can deter and punish threats to the integrity of the federal criminal justice system without requiring proof that such a threat was realized in every case. In enacting Section 1512(a)(1)(C), Congress did not criminalize all murders or otherwise upset the federal-state balance. Rather, Congress properly punished murders that are committed with the intent to obstruct the flow of information about federal crimes to law enforcement officials.

C. Petitioner's conviction should be affirmed because the government produced more than sufficient evidence to prove that one of the communications petitioner prevented by killing Officer Horner might have been with a federal law enforcement official. When petitioner killed Officer Horner, Horner was in the process of initiating communication with other local law enforcement officers about the federal crimes he was uncovering. Although Officer Horner was not able to complete that

communication, the government presented evidence that, when local law enforcement officials later received information about those crimes from one of petitioner's co-conspirators, those officials transmitted the information to federal law enforcement officers, who investigated and prosecuted some of the crimes. The fact that local law enforcement officials communicated information about at least some of the crimes that were the subject of petitioner's obstruction to federal law enforcement officials is sufficient to establish a reasonable possibility that at least one of the communications petitioner prevented or intended to prevent would have been with a federal officer. Indeed, it is also sufficient to establish that such a communication was plausible or realistically likely; thus, petitioner is not entitled to a reversal of his conviction even under his view of the law.

ARGUMENT

PETITIONER WAS PROPERLY CONVICTED OF VIOLATING 18 U.S.C. 1512(a)(1)(C) BY KILLING ANOTHER PERSON WITH THE INTENT TO PREVENT THE COMMUNICATION OF INFORMATION ABOUT POSSIBLE OR ACTUAL FEDERAL CRIMES TO FEDERAL OFFICIALS

Section 1512(a)(1)(C) of Title 18 makes it illegal for anyone to "kill[] or attempt[] to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." Petitioner does not contest that the evidence introduced at trial was sufficient to prove that he killed Officer Horner with the intent to prevent the communication of information relating to the commission or possible commission of various federal offenses to law enforcement officers. Peti-

tioner contends instead that the government failed to prove with sufficient certainty that his murder of Officer Horner had the effect (or was intended to have the effect) of preventing the communication of such information to *federal* law enforcement officials. But the government established a reasonable possibility that petitioner's murder of Officer Horner prevented the communication of information related to federal crimes to a federal law enforcement official, and that is sufficient to establish that petitioner violated Section 1512(a)(1)(C).

Section 1512 does not specify how likely it must have been that at least one of the communications that was obstructed or intended to be obstructed would have been with a federal officer. The disagreement in this case boils down to whether the government must establish that such a communication *would* have happened or whether it is sufficient to establish that it *might* have happened. Given the structure and purpose of Section 1512 and related provisions, the government need only prove that such a communication might have happened—*i.e.*, that a reasonable possibility existed that one of the communications that the defendant intended to prevent would have been with a federal law enforcement official. A theoretical or remote possibility will not suffice; but the government need not prove that it was more likely than not that such a communication would have occurred.

A. The Federal-Officer Element In Section 1512(a)(1)(C) Requires Proof Of A Reasonable Possibility That The Victim Or Some Other Person Would Have Communicated With A Federal Law Enforcement Official

While petitioner generally asserts that the government must prove that information relating to a federal

crime "would have been transferred" to a federal law enforcement official (Br. 2, 11), he offers a variety of formulations of how certain it must be that the communication would have occurred. Petitioner variously argues that such a communication must already have occurred (Br. 16, 20, 29 (arguing that an "actual communication" is required)), that it must be "likely" to occur (Br. 17, 20, 24, 26, 29, 33, 41), and that it must be "certain" to occur (Br. 16, 32).[1] He also relies (Br. 29-35) on cases holding that the government must prove a particular mens rea with respect to federal nexus elements in other statutes. But none of petitioner's formulations finds support in the statutory text, none comports with the purpose of the statute, and none makes sense in light of the predictive determination a jury is required to make in finding a defendant guilty of violating Section 1512(a)(1)(C). Rather, in determining what communications might have occurred had a defendant not killed his victim, a jury need only find that it was reasonably possible that one such communication would be with a federal law enforcement official.

1. The text of Section 1512(a)(1)(C) makes clear that a jury need not find that a defendant had any particular state of mind with respect to whether the communication he intended to prevent would involve a federal law enforcement officer

a. In order to obtain a conviction under Section 1512(a)(1)(C), the government must prove that a defendant killed someone with the intent to "prevent the communication by any person to a law enforcement officer * * * of the United States"—defined to mean a federal

[1] Petitioner does not challenge the district court's instructions to the jury in any respect, nor did he do so below. See J.A. 48.

officer—"of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(a)(1)(C), 1515(a)(4). The statutory language of course covers a defendant who kills someone with the *intent* to prevent a communication about a federal crime to a federal officer specifically (as opposed to a state or local officer). If the government introduces evidence of such an intent, that will be sufficient to sustain a conviction. But Congress made clear that the government need not prove either that a defendant had such an intent or that he knew that one result of his obstructive killing would be to prevent a communication with a federal officer: Section 1512(g) specifies that, for purposes of Section 1512 prosecutions generally, "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).[2]

Congress's decision not to require that a defendant have had any particular state of mind about the federal nature of the relevant officer is consistent with the general rule that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *United States* v. *Feola*, 420 U.S. 671, 677 n.9 (1975) (holding that a defendant need not know that the individual he is assaulting is a federal officer in order to violate 18 U.S.C. 111's prohibition on assaulting federal officers). Because the "primary purpose" of such

[2] Because no evidence was introduced at petitioner's trial that he specifically intended to obstruct a communication with a *federal* law enforcement officer, this case presents the question of how the government may prove a violation of the statute in the absence of such an intent.

a jurisdictional element "is to identify the factor that makes" the criminalized conduct "an appropriate subject for federal concern," "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense." *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). Jurisdictional elements do not have the effect of "criminaliz[ing] otherwise innocent conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Feola*, 420 U.S. at 685 ("The situation is not one where legitimate conduct becomes unlawful solely because of the [federal] identity of the individual or agency affected."); cf. *Liparota* v. *United States*, 471 U.S. 419, 426 (1985) (construing statute to include mens rea element in part because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."). Murdering an individual in order to prevent the communication to law enforcement of information about criminal conduct—indeed, murdering an individual for any reason—is not innocent conduct that becomes subject to criminal prohibition simply because one of the communications prevented by the killing might have been to federal officials. As this Court explained in *X-Citement Video*: "Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." 513 U.S. at 73 n.3.

b. The plain import of the statutory text is confirmed by its legislative history. Congress enacted Section 1512 in 1982 as part of the Victim and Witness Protection Act, with the broad purpose of protecting the integrity of the criminal justice system, including the investigation and prosecution of federal crimes. Pub. L.

No. 97-291, § 4(a), 96 Stat. 1249-1253; see *id.* § 2(b)(1), 96 Stat. 1248-1249 (purpose of Act is to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process"); see S. Rep. No. 532, 97th Cong., 2d Sess. 15 (1982) (*Senate Report*) (noting that intimidation of victims and witnesses "inherently thwarts the administration of criminal justice"). As originally enacted, Section 1512 prohibited, *inter alia*, "knowingly us[ing] intimidation or physical force, or threaten[ing] another person, or attempt[ing] to do so * * * with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." § 4(a), 96 Stat. 1249 (Section 1512(a)). That provision was amended in 1986 (and codified as Section 1512(a)(1)(C)) to prohibit "kill[ing] or attempt[ing] to kill" a person with the requisite obstructive intent. Criminal Law and Procedure Technical Amendments Act, Pub. L. No. 99-646, § 61, 100 Stat. 3614; see 132 Cong. Rec. 11,291 (1986). Since the original enactment of Section 1512, Congress has specified that the relevant law enforcement official must be a federal law enforcement official. § 4(a), 96 Stat. 1252 (18 U.S.C. 1515). But Section 1512 has also always included the language now codified at 18 U.S.C. 1512(g), stating that the government need not prove any particular state of mind with respect to the federal identity of the relevant law enforcement entity. § 4(a), 96 Stat. 1250 (18 U.S.C. 1512(e)).

The statutory subsection now codified at Section 1512(g) originated in a House bill in 1982. H.R. 7191, 97th Cong., 2d Sess. (128 Cong. Rec. 26,357 (1982)) ("In a prosecution for an offense under this section, no state

of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government."). Representative Rodino, one of the sponsors of the House bill, explained the purpose of including that provision:

> This provision is necessary because of the convention that the state of mind applicable to the conduct required for the offense also applies to any circumstances or results that are required. Because the term[] * * * "law enforcement officer" [is] defined in section 1515 to mean * * * a Federal officer * * * it would be necessary for the prosecution, absent this provision, to prove that the defendant knew the * * * law enforcement officer was * * * a Federal officer * * * . Since the * * * Federal status of the officer * * * [is a] matter[] that go[es] to the power of the Federal government to assert jurisdiction over conduct, rather than to the criminal nature of the conduct, it is neither necessary nor appropriate to require proof that the defendant knew the * * * officer * * * was a Federal * * * officer.

128 Cong. Rec. at 26,351. That explanation confirms the plain meaning of the text that, consistent with traditional rules governing jurisdictional elements in federal criminal statutes, a defendant need not have intended to prevent a communication with a federal officer in particular and need not have known that his act of killing would have that effect.

2. Section 1512(a)(1)(C) does not require proof that a victim had already communicated with federal officials or that he had a subjective intent to do so in the future

Petitioner argues (Br. 14-35) that, in order to prove that a defendant violated Section 1512(a)(1)(C), the government must establish that the killing prevented an "actual communication" or a "likely communication." Although petitioner does not specify what quantum or variety of evidence would meet that standard, his reliance on the Fifth Circuit's decision in *United States* v. *Causey*, 185 F.3d 407 (1999), cert. denied, 530 U.S. 1277 (2000), and the Second Circuit's decision in *United States* v. *Lopez*, 372 F.3d 86 (2004), cert. denied, 546 U.S. 827 (2005), indicates that he would require either that the victim already had established a connection with federal officials or that the victim subjectively intended to communicate with federal officials. Neither construction finds support in the statute and both would undermine the statute's purpose.

In *Causey*, the Fifth Circuit vacated the convictions of two police officers who had arranged the murder of a witness who had filed a police brutality complaint with the New Orleans Police Department against one of the defendants. 185 F.3d at 411. The court concluded that the evidence was insufficient to support the defendants' convictions under Section 1512(a)(1)(C) because there was no evidence that, before her death, the victim had either already communicated with federal law enforcement officials or intended to do so. *Id.* at 422-423. The Second Circuit reached a similar result in *Lopez*, overturning a Section 1512(a)(1)(C) conviction when the victim had contacted local law enforcement authorities about the defendant's criminal behavior but had not

"turned to" federal officials or shown a subjective intent to do so. 372 F.3d at 92. To the extent petitioner reads *Causey* and *Lopez* to hold that the federal-officer element may be satisfied only through evidence of a victim's previous contact with federal authorities or a victim's subjective intent to initiate such contact, his construction in reliance on those cases places too narrow a gloss on Section 1512(a)(1)(C).[3]

Initially, petitioner's contention (Br. 26) that the government was required to prove a "nexus between [petitioner's] obstructive conduct and the transfer of information from Officer Horner to a Federal official" is incorrect. The statute does not require that the communication that the defendant intended to prevent would have come from the victim himself. The text of the statute prohibits killing someone with the intent to prevent "the communication by *any* person" of the relevant information to a law enforcement official. 18 U.S.C. 1512(a)(1)(C) (emphasis added). That prohibition protects all covered communications, regardless of whether they directly involve the victim. For example, the stat-

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[3] Although petitioner characterizes the Second Circuit's holding in *Lopez* as adopting such a limited reading of the statute, the court in fact acknowledged that a broader swath of conduct could satisfy the federal-officer nexus in Section 1512(a)(1)(C). See 372 F.3d at 91 (noting that the federal-officer nexus could be satisfied by "proof that the defendant had 'actual knowledge of the federal nature of the offense'" at issue); see *id.* at 90 ("The victim need not have agreed to cooperate with any federal authority or even to have evinced an intention or desire to so cooperate. There need not be an ongoing investigation or even any intent to investigate. Rather, the killing of an individual with the intent to frustrate the individual's *possible* cooperation with federal authorities is implicated by the statute.") (emphasis added) (quoting *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996)).

ute would punish the killing of a person with the intent to send a message to a third person that she should not share information about a federal crime with law enforcement officials.

Moreover, the text of the statute is not limited to the killing (or attempted killing) of a victim who has already communicated with federal officials about the federal crimes or possible federal crimes at issue. The statute punishes killings that are intended to *prevent* such communications, and it thereby refutes any suggestion that Congress excluded protection of first-time communications. See *Websters's Third New International Dictionary* 1798 (1986) (*Webster's*) (definition of "prevent" includes "to keep from happening or existing esp. by precautionary measures"); *Black's Law Dictionary* 1307 (9th ed. 2009) (*Black's*) ("prevent" means "[t]o hinder or impede"). Indeed, the facts of this case indicate the absurdity that would result from such a reading of the statute. Petitioner shot Officer Horner in the back of the head in order to prevent him from conveying to law enforcement officers information that Officer Horner was acquiring about the federal crimes of petitioner and his companions. If Congress intended to protect only victims who had already initiated contact with federal officials, efficient violators of Section 1512(a)(1)(C) such as petitioner would go unpunished.

Such a reading of the statute would also thwart its purpose of protecting the integrity of future and potential investigations of federal crimes. See *Senate Report* 14 ("Section 1512 applies to offenses against witnesses, victims, or informants which occur before the witness testifies or the informant communicates with law enforcement officers."). Thus, courts of appeals have uniformly held that a federal investigation need not be on-

going or imminent at the time of the killing to find a violation of the statute. See, *e.g.*, *United States* v. *Stansfield*, 101 F.3d 909, 918 n.4 (3d Cir. 1996); *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996); see also *United States* v. *Serrata*, 425 F.3d 886, 897 (10th Cir. 2005); *United States* v. *Veal*, 153 F.3d 1233, 1249 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999). That rule is consistent with the broader statute's prohibition of various types of conduct intended to obstruct an "official proceeding." See 18 U.S.C. 1512(a)(1)(A), (B), (2)(A), (B), (b)(1), (2), (c)(1), (2), and (d)(1). The statute specifically provides that such a proceeding "need not be pending or about to be instituted at the time of the offense," 18 U.S.C. 1512(f)(1), again confirming Congress's intent to protect the integrity of potential future federal investigations and proceedings.

No greater justification exists to condition federal jurisdiction on a victim's subjective intent to communicate with federal law enforcement officials. The only intent Congress required the government to prove in order to establish a violation of Section 1512(a)(1)(C) is the defendant's intent that killing his victim will prevent the communication of information about federal crimes to law enforcement officials. Given that the defendant need not have had communication to *federal* officials in mind, it would make no sense to require that a victim have had a subjective intent to communicate with federal officials at the time of his murder. Courts of appeals have consistently refused to read such a requirement into the statute. See, *e.g.*, *Romero*, 54 F.3d at 62; *United States* v. *Harris*, 498 F.3d 278, 286 (4th Cir. 2007), cert. denied, 552 U.S. 1281 (2008). Doing so would also be inconsistent with the provision's protection of a

covered communication from "any person" to a law enforcement officer. If conviction turns on the victim's subjective intent to communicate with a federal official, a broad swath of killings plainly covered by the text of the statute—*e.g.*, killing a person's child in order to prevent the parent from sharing information with law enforcement officers—would be excluded.

Certainly, it will be easier for the government to prove a violation of Section 1512(a)(1)(C) when a victim has already cooperated with federal investigators or has expressed his subjective intent to do so. Indeed, petitioner identifies three cases in which courts of appeals held that the statutory elements were satisfied in part because there was on ongoing federal investigation at the time of the murder. See Br. 26-28 (citing *United States* v. *Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004), cert. denied, 544 U.S. 912 (2005); *United States* v. *Bell*, 113 F.3d 1345 (3d Cir.), cert. denied, 522 U.S. 984 (1997); and *United States* v. *Emery*, 186 F.3d 921 (8th Cir. 1999), cert. denied, 528 U.S. 1130 (2000)). But Congress did not require the government to produce such evidence in every case and none of the cases petitioner cites holds otherwise. It is sufficient to satisfy the jurisdictional element that one of the communications actually prevented or intended to be prevented by the murder might have been with a federal official.

3. In order to prove a violation of Section 1512(a)(1)(C), the government need only prove a reasonable possibility that information relating to a federal crime was prevented from reaching a federal law enforcement official

a. Because Section 1512(a)(1)(C) does not require the government to prove any particular state of mind (of the defendant or the victim) as to the federal-officer element, that element describes a possible outcome from the obstructive killing, rather than its purpose. The central question in this case is how likely it must be that the killing in question had the effect of preventing the communication of information about a federal crime to a federal law enforcement official. The statute itself does not define the degree of likelihood required. But the statute does require that the intent of the unlawful killing was to *prevent* the communication at issue. Except in cases in which the defendant's goal was thwarted, therefore, the relevant communication will not occur. In determining whether the government satisfied the federal-officer element in a particular case, a jury must make a hypothetical prediction about what might have occurred in the absence of the murder. Given the uncertainty inherent in making such a prediction, it is sufficient that a jury conclude that it was reasonably possible that one consequence of the killing in question was the prevention of a communication with a federal law enforcement officer about the commission or possible commission of a federal offense. In other words, the government must prove that such a federal communication

might have occurred, but need not prove that it is more likely than not that it would have.[4]

Petitioner rightly points out (Br. 16) that "Congress did not use the word 'possible' at the beginning of subsection (C) before the word 'communication.'" But Congress did not use the words "likely," "certain," "realistically plausible," or "actual" either. Because the statute punishes murderous means of "keep[ing]" the relevant communications "from happening," see *Webster's* 1798 (defining "prevent"), it protects communications that never occur. The Court must therefore read some qualifier into the communication requirement. If the statute protected only actual communications, it would punish only unsuccessful attempts to obstruct the transmission of information about federal crimes to law enforcement

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[4] Courts of appeals have routinely held that the federal-officer element in Section 1512(a)(1)(C) is satisfied when the evidence establishes a "possibility" that the information would have been communicated to a federal official. *E.g.*, J.A. 85 (holding that "*possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)"); *Harris*, 498 F.3d at 283-286 (upholding jury instruction stating that jury must find that there was a "possibility or likelihood" that information would have been communicated to federal official); *Romero*, 54 F.3d at 62 (Section 1512(a)(1)(C) implicates "the killing of an individual with the intent to frustrate the individual's possible cooperation with federal authorities"). Courts have applied the same standard in interpreting the similarly worded federal-officer requirement in 18 U.S.C. 1512(b)(3), which prohibits knowingly intimidating, threatening, or corruptly persuading another person with the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." *E.g.*, *United States* v. *Carson*, 560 F.3d 566, 580-581 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010); *Serrata*, 425 F.3d at 897; *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001); *Veal*, 153 F.3d at 1251.

officers and retaliation for past communications (which is covered under 18 U.S.C. 1513). Reading such a limit into the statute is clearly at odds with Congress's intent.

Petitioner criticizes the court of appeals' use of a "possible or potential communication" standard (J.A. 85 (emphases removed)), arguing (Br. 12, 17, 24, 26, 41) that it amounts to nothing more than a "theoretical possibility" standard. But such an argument ignores the general requirement in criminal trials that a jury's inference reasonably follow from the evidence presented. It is not enough, therefore, that a victim simply knew about the commission or possible commission of a federal crime without more; Section 1512 does not federalize the murder of all people who happen to have information about a federal crime. The statute requires that the defendant have had an obstructive intent in killing the victim. And the jury must have some evidentiary basis for concluding that the information the defendant intended to prevent from being communicated to law enforcement officials might have been communicated to a federal law enforcement official. A standard that looks to whether a reasonably possible consequence of the killing was to prevent communication about a federal offense to a federal law enforcement officer strikes the proper balance.

Criminal juries are often required to draw inferences or to make predictive judgments. See, *e.g.*, *James* v. *United States*, 550 U.S. 192, 207-208 (2007); *County Court* v. *Allen*, 442 U.S. 140, 156-157 (1979). In doing so, jurors are permitted to rely on "common sense and experience" in drawing reasonable conclusions. *Barnes* v. *United States*, 412 U.S. 837, 845 (1973); see *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523, 526 (1956) ("The very essence of [the jury's] function is to select from among

conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.") (internal quotation marks and footnotes omitted). When establishing a violation of Section 1512(a)(1)(C), the government presents sufficient evidence to satisfy the federal-officer element if a reasonable jury could conclude that a defendant's killing of a person might have prevented the communication of information about a federal crime to a federal law enforcement official. See *United States* v. *Diaz*, 176 F.3d 52, 91 (2d Cir.), cert. denied, 528 U.S. 875, and 528 U.S. 957 (1999).

Congress's intent that Section 1512(a)(1)(C) broadly protect the integrity of federal investigations and prosecutions is also confirmed by the broad reach of the provision's "federal crime" jurisdictional element. By protecting information about the commission of federal offenses and the *possible* commission of federal offenses, Congress opted not to require proof of certainty that a particular murder actually obstructed the investigation or prosecution of a federal crime. Rather, the statute applies to the communication of information about crimes that may never take place. See *Black's* 1284 (defining "possibility" as "[a]n event that may or may not happen"). No greater certainty—or likelihood—should be required when interpreting the federal-officer element.

b. As with any challenge to the sufficiency of evidence presented in a criminal trial, a determination of

whether a statutory standard has been satisfied in a particular case will depend on the evidence presented in that case. *Bell*, 113 F.3d at 1350 n.4 (noting that the court "espress[ed] no opinion as to what types and what quantum of evidence satisfies" the federal-officer element because such an inquiry "by its nature will require careful, case-by-case analysis"). That unremarkable proposition is borne out in the courts of appeals' review of convictions under Section 1512(a)(1)(C). For example, courts have consistently held that the statute's federal-officer element is satisfied when the federal nature of the crimes at issue has been established and a federal investigation into such crimes was already underway at the time of the killing, regardless whether the defendant knew of the existence of the investigation or knew whether the victim had had any contact with such an investigation. *E.g.*, *Rodriguez-Marrero*, 390 F.3d at 13; *Emery*, 186 F.3d at 925; *Bell*, 113 F.3d at 1350; *United States* v. *Gonzalez*, 922 F.2d 1044, 1053-1054 (2d Cir.), cert. denied, 502 U.S. 1041 (1991).

But those cases involve a relatively easy application of Section 1512(a)(1)(C)'s federal-officer element, and courts of appeals have made clear that a federal investigation need not be underway or even contemplated at the time of the killing in order for the government to satisfy that nexus. See J.A. 81; *Stansfield*, 101 F.3d at 918; *Romero*, 54 F.3d at 62; accord *Serrata*, 425 F.3d at 897; *Veal*, 153 F.3d at 1249. In some cases, it will be sufficient that a defendant knew of the federal nature of his crime when he killed someone with the intent to prevent the communication to law enforcement officers of information about that crime. *E.g.*, *Stansfield*, 101 F.3d at 918; accord *United States* v. *Carson*, 560 F.3d 566, 581 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010).

In other cases, the government may prove that the defendant intended to prevent a specific communication with a law enforcement body and that communication with such body might have resulted in communication to a federal officer of information the defendant intended to cover up. See *Bell*, 113 F.3d at 1349.

In some cases, when the other elements have been satisfied—*i.e.*, a defendant killed someone with the intent to prevent communication to a law enforcement officer about the commission of a federal crime—a jury may find that one such communication might be with a federal officer based on the distinctly federal nature of the underlying crime. See *Bell*, 113 F.3d at 1349 ("If an offense constitutes a federal crime, it is more likely that an officer investigating it would *be* a federal officer."); see also *Harris*, 498 F.3d at 286 n.5 ("[T]he federal nature of the offense at issue at least created the possibility that [the victim] might have decided in the future to contact federal authorities. * * * [A]lthough the local police had not referred to federal authorities information that [the victim] had provided in the past, the federal nature of the offenses created the possibility that they would decide to refer future information."). If, for example, the underlying crime involves the hijacking of a plane or a conspiracy to assassinate the President, the jury could reasonably conclude that federal law enforcement officials would be (or would have been) involved in the investigation and prosecution of the crime. Or, as petitioner notes (Br. 33), the government may introduce evidence that federal and state or local law enforcement officers have a regular practice of cooperating or sharing information either generally or with respect to a particular class of crimes. Cf. *Bartkus* v. *Illinois*, 359 U.S. 121, 133 n.22 (1959) (noting that, when Congress

long ago made most bank robberies a federal crime, would-be bank robbers were put on notice that: "'flight,' their most valuable weapon, has, under the operation of the National Bank Robbery statute, proved quite impotent. The bank robbery rate has been cut in half, and there has been a fine relation between state and federal agencies in the apprehension and trial of bank robbers.") (quoting Interstate Commission on Crime, *Handbook on Interstate Crime Control* 114 (1938)).

4. Petitioner's reliance on this Court's decisions construing intent requirements in other statutes prohibiting other types of obstruction is misplaced

Although petitioner stops short of explicitly arguing that Section 1512(a)(1)(C) requires the government to prove that a defendant had a particular state of mind with respect to the federal-officer element, he relies on this Court's decisions in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), and *United States* v. *Aguilar*, 515 U.S. 593 (1995), to argue (Br. 29-35) that Section 1512(a)(1)(C)'s "nexus requirement" was not satisfied in this case. But the holdings of *Arthur Andersen* and *Aguilar* are not applicable to Section 1512(a)(1)(C), which expressly disavows the type of mens rea found applicable to the distinct statutory nexus elements at issue in those cases.

In *Arthur Andersen*, the Court construed the meaning of the phrase "knowingly * * * corruptly persuades" as used in 18 U.S.C. 1512(b)(2)(A) and (B) (2000), which prohibit, *inter alia*, "knowingly * * * corruptly persuad[ing] another person * * * with intent to * * * cause" such person to "withhold" documents from or alter documents for use in an "official proceeding." The Court first concluded that the mens rea

implicit in the word "knowingly" applied to the act of "corruptly persuad[ing]" such that "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'" 544 U.S. at 705-706. Turning to the type of proof needed to satisfy the "official proceeding" element, the Court held that, in order to prove that a defendant had knowingly corruptly persuaded someone to withhold documents from an official proceeding, the government was required to prove that the defendant had in mind a "particular official proceeding in which [the] documents [at issue] might be material." *Id.* at 707-708. In so holding, the Court in *Arthur Andersen* relied on its previous decision in *Aguilar*, in which the defendant was charged with violating 18 U.S.C. 1503 by "corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation." *Arthur Andersen*, 544 U.S. at 708 (quoting *Aguilar*, 515 U.S. at 599). The Court in *Aguilar* had similarly held that a defendant "lacks the requisite intent" to violate the statute if he "lacks knowledge that his actions are likely to affect" a particular judicial proceeding. 515 U.S. at 599; see *Arthur Andersen*, 544 U.S. at 708.

Petitioner would have this Court import the reasoning of *Arthur Andersen* and *Aguilar* into the distinct context of Section 1512(a)(1)(C), which does not require proof either that a defendant "corruptly" did anything or that the obstructive conduct at issue implicated an official proceeding. More to the point, the holdings of those cases require the government to prove that a defendant had a particular state of mind with respect to the particular federal proceeding that was the object of the defendant's obstructive conduct. Such a requirement cannot be read into Section 1512(a)(1)(C)'s federal-officer element because, as explained, Section 1512(g)

expressly states that "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." Although petitioner claims (Br. 35) that "the nexus requirements established by this Court in *Arthur Andersen* and *Aguilar* contradict the Eleventh Circuit opinion in the present case," it is not clear how that could be so when those cases held that a particular "state of mind need be proved with respect to" the "nexus requirements" at issue—a requirement Congress has specifically rejected with respect to the conduct of which petitioner was convicted.[5]

B. The Principle of Constitutional Avoidance Does Not Require This Court To Adopt Petitioner's Restrictive Reading Of Section 1512(a)(1)(C)'s Federal-Officer Element

Although not altogether clear, petitioner seems to invoke the clear statement principles of *Cleveland* v. *United States*, 531 U.S. 12 (2000); *Jones* v. *United States*, 529 U.S. 848 (2000); and *United States* v. *Bass*, 404 U.S. 336 (1971), to justify (Br. 35-41) his limited reading of Section 1512(a)(1)(C). Petitioner concedes (Br. 40) that Congress acted within its constitutional authority when it enacted Section 1512(a)(1)(C). Petitioner instead claims (Br. 37-41) that the Court should apply a form of constitutional avoidance by construing the statute to require proof of an "actual" or "likely"

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[5] Moreover, the Court in *Arthur Andersen* was motivated in part by a desire to avoid criminalizing otherwise innocent conduct through a federal nexus requirement. See 544 U.S. at 703-704. As discussed at p. 16, *supra*, such a concern is not relevant in this case, in which petitioner's obstructive conduct—*i.e.*, murder—was neither innocent nor innocuous.

communication with a federal officer in order to avoid "upset[ting] the federal-state balance." Petitioner did not raise that argument in the court of appeals and is incorrect in any event.

As this Court has noted, when Congress criminalizes acts such as perjury and witness tampering, it does so "in furtherance of the power to constitute federal tribunals." *United States* v. *Comstock*, 130 S. Ct. 1949, 1958 (2010); *Jinks* v. *Richland County*, 538 U.S. 456, 462 n.2 (2003); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819)). Congress can similarly protect the integrity of the Executive Branch's investigation and prosecution of federal crimes. In doing so, Congress may seek to ensure that the transfer of information to federal law enforcement officers and judges about possible federal crimes is wholly unimpeded by those with obstructive intent. Cf. *Feola*, 420 U.S. at 676 n.9 ("[W]here Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement.").

Although petitioner is correct (Br. 39) that murder is generally a state law crime, Congress's prohibition of murders that have the potential to disrupt the integrity of federal investigations and prosecutions of federal crimes hardly "upset[s] the delicate balance between State and Federal powers" (Br. 36). Section 1512(a)(1)(C) does not rest on putative federal authority to prosecute all murders, or even all murders of individuals who possess information about the commission or possible commission of criminal activity. The statute is tailored to protect the integrity of the federal criminal justice system in three respects. First, it requires that the underlying crimes or possible crimes are federal offenses. Second, it requires that a defendant commit

murder with the intent to prevent the communication of information about such federal crimes. Third, it requires some nexus with a federal law enforcement officer or judge.

The Necessary and Proper Clause of the Constitution, Art. I, § 8, Cl. 18, "grants Congress broad authority to enact federal legislation," including "laws that are 'convenient, or useful' or 'conducive' to the * * * 'beneficial exercise'" of an enumerated power. *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418). Pursuant to that broad authority, "Congress routinely * * * enact[s] criminal laws in furtherance of, for example, its enumerated power[] to * * * establish federal courts." *Id.* at 1957. Similarly, it routinely protects the integrity of investigations into federal criminal activity. See *United States* v. *Rodgers*, 466 U.S. 475, 481-482 (1984) (false statements to the Federal Bureau of Investigation or Secret Service are prosecutable under 18 U.S.C. 1001; Congress has a "valid legislative interest in protecting the integrity of [such] official inquiries, * * * an interest clearly embraced in, and furthered by, the broad language of § 1001") (internal quotation marks omitted). Congress did exactly that in criminalizing the conduct described in Section 1512(a)(1)(C), and that provision is "plainly adapted" to the end of protecting federal criminal investigations and prosecutions. See *McCulloch*, 17 U.S. (4 Wheat.) at 421.

In exercising its authority under the Necessary and Proper Clause, Congress is not limited to prohibiting murders that the government can prove actually prevented an identifiable communication with a specific federal law enforcement official. The Constitution does not demand a perfect fit between the federal interest and every possible application of a statute enacted to

serve that interest. In *Sabri* v. *United States*, 541 U.S. 600 (2004), for example, this Court upheld a statute criminalizing the bribery of officials of government entities that receive at least $10,000 in federal funds. The court found the statute to be a valid exercise of Congress's authority under the Necessary and Proper Clause to effectuate its enumerated power under the Spending Clause, Art. I, § 8, Cl. 1, to appropriate money for the general welfare. *Sabri*, 541 U.S. at 604-608. Noting that Congress may use "rational means[] to safeguard the integrity of" federal spending, the Court rejected the defendant's argument that Congress should have required a direct connection between the proscribed bribe and the federal dollars that triggered federal jurisdiction. *Id.* at 605-606. As the Court explained in *Comstock*, "in aid of [Congress's] implied power to criminalize graft of 'taxpayer dollars,' Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been 'traceably skimmed from specific federal payments.'" 130 S. Ct. at 1964 (quoting *Sabri*, 541 U.S. at 605-606).

Just as no "traceabl[e]" connection was required between the criminal conduct at issue in *Sabri* and the federal funds that Congress desired to protect, Congress was not limited in enacting Section 1512(a)(1)(C) to punishing intentionally obstructive murders that had the effect of preventing "actual" identifiable communications with federal officers. Rather, it is eminently rational to proscribe such murders when there is a reasonable possibility that they prevented a communication with a federal law enforcement official about a federal crime. *Sabri*, 541 U.S. at 605; *McCulloch*, 17 U.S. (4 Wheat.) at 354, 413, 421.

Thus, there is no merit to petitioner's contention (Br. 35) that construing Section 1512(a)(1)(C) as Congress intended—to prevent the obstruction of communications that might have been with federal law enforcement officers—would allow Congress to "exercise[] a general police power." It is true that this Court has expressed reluctance to interpret a statute to "'significantly change[] the federal-state balance' in the prosecution of crimes" unless Congress clearly expresses its intent to do so. *Jones*, 529 U.S. at 858 ((quoting *Bass*, 404 U.S. at 349); see *Cleveland*, 531 U.S. at 24. But that legitimate concern is not implicated by Section 1512(a)(1)(C) because it is appropriately targeted to prohibit conduct that poses a potential threat to federal law enforcement, and because it does not reach murders that lack that federal link.

C. Under Any Understanding Of Section 1512(a)(1)(C)'s Federal-Officer Element, Petitioner's Conviction Is Valid

The government was not required to prove that petitioner's murder of Officer Horner prevented an actual or likely communication with a federal official about the commission of a federal offense. The government was required to prove that petitioner killed Officer Horner with the intent to prevent any person's communication to a law enforcement official of information relating to the commission or possible commission of a federal crime, and that it was reasonably possible that such a communication would have been with a federal law enforcement official. The government clearly met that burden.[6]

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[6] Although petitioner asks this Court to reverse his conviction for violating 18 U.S.C. 1512(a)(1)(C) based on purported insufficiency of

Petitioner does not contest the jury's finding that he killed Officer Horner with the intent to prevent the communication to other law enforcement officers of information about the commission or possible commission of federal crimes. Petitioner and his companions had recently committed federal crimes, were in the process of committing other federal crimes, and were planning to commit still others in the near future when Officer Horner came upon them in the cemetery. Christopher Gamble testified that, when petitioner snuck up on and overpowered Officer Horner, the officer was in the process of contacting other law enforcement officers in order to discover additional information about the men gathered in the cemetery and to request assistance. J.A. 28, 35-37, 43-44, 78. Although the communication Officer Horner was on the verge of initiating when petitioner subdued and then killed him was with local (rather than federal) law enforcement officers, it was reasonable for the jury to conclude that information about the federal offenses at issue ultimately might have been communi-

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evidence, he does not dispute that he failed to present such a claim in the district court. Indeed, petitioner failed to present any claim in the district court about the proper interpretation of any element of Section 1512(a)(1)(C). This Court must therefore review his sufficiency claim under the plain-error standard. Fed. R. Crim. P. 52(b); see *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905); see also, *e.g.*, *United States* v. *Goode*, 483 F.3d 676, 681 (10th Cir. 2007) ("When a defendant challenges in district court the sufficiency of the evidence on specific grounds, all grounds not specified in the motion are waived.") (internal quotation marks and citation omitted). Petitioner cannot overcome the plain-error hurdle because he cannot identify any error, let alone one that was plain. In addition, because the government presented sufficient evidence to satisfy the federal-officer element whatever that element is construed to require, petitioner cannot demonstrate prejudice and is therefore not entitled to relief.

cated to federal officers and that petitioner prevented or intended to prevent such communication.

Because Section 1512(a)(1)(C) does not require that the victim himself be the one who might have communicated with a federal officer, the relevant inquiry is whether information relating to the underlying federal crimes might have been communicated by any person to federal officers. That standard was easily satisfied in this case. Petitioner is incorrect in asserting (Br. 13; see Br. 25-26) that "the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of" the Holiday Inn robbery. In 2002, petitioner's co-conspirator Christopher Gamble provided information to local law enforcement officers about various offenses, including the Holiday Inn robbery he had committed hours before meeting up with petitioner and traveling to Oakland Cemetery on March 3, 1998. 6/12/2008 Tr. 172-184. Local law enforcement officers subsequently transmitted information about that robbery—a federal offense under 18 U.S.C. 1951—to federal officials, who opened an investigation. 6/12/2008 Tr. 184-189. Gamble also provided information to local, and then to federal, law enforcement officers about the group's plan to rob a NationsBank and about the events in Oakland Cemetery on the morning of March 3, 1998, including the murder of Officer Horner. *Id.* at 172-184. Gamble ultimately testified about his crimes before a federal grand jury, which returned a 14-count indictment against him including for crimes related to the Holiday Inn robbery. 6/11/2008 Tr. 181-188; 6/12/2008 Tr. 184-189.

When petitioner killed Officer Horner, Horner was in the process of initiating communication with a local law enforcement agency about the underlying federal

crimes. Petitioner prevented that communication. But when local law enforcement officers later received that information from Gamble, they passed it on to federal law enforcement officials. That is sufficient to prove that it was reasonably possible that at least one communication that petitioner intended to obstruct when he killed Officer Horner would have been with federal officials. The government need not prove that it was more likely than not that such a communication would have happened, or would have happened sooner, absent the murder. It was reasonable for the jury to conclude that such a communication between local and federal officers might have happened based on the fact that it did happen when the local officers later obtained the information petitioner sought to suppress through other channels.

In addition, the local law enforcement officer to whom Gamble eventually confessed testified that he collected all of the police reports about Gamble's armed robberies in the course of providing information to federal officers. 6/12/2008 Tr. 185-186, 193-194. Had Officer Horner not been killed by petitioner, any report he would have prepared concerning the activities of petitioner and his companions might have been transmitted to federal authorities. In that sense, too, petitioner's murder of Officer Horner prevented a possible communication with federal officers.

Even if petitioner were correct that the government was required to prove that a communication with a federal officer was "plausib[le]" or "realistic[ally] likel[y]" (Br. 41), the government satisfied that standard as well. No one can know with absolute certainty whether Officer Horner or his colleagues would have informed federal officials about the federal crimes Officer Horner

uncovered if he had not been murdered. But the jury knew that local officials did pass such information to federal officials when they received it. The jury was entitled to conclude on that basis that it was plausible or realistically likely that, when petitioner killed Officer Horner in order to prevent him from communicating with law enforcement about the federal crimes at issue, one of the communications he prevented or intended to prevent would have been with a federal officer. Accord *United States* v. *Ronda*, 455 F.3d 1273, 1285 (11th Cir. 2006) (with respect to offense under Section 1512(b)(3), "the evidence at trial showed that [defendant's] misleading information was not only 'likely' to be transferred to federal investigators, it in fact was transferred to federal investigators"), cert. denied, 549 U.S. 1212 (2007) .

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 1503 provides:

Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

2. 18 U.S.C. 1512 provides:

Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts

to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

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[1] So in original.

(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,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[2] supervised release,,[2] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defen-

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[2] So in original.

dant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be insti-

tuted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

3. 18 U.S.C. 1515 provides in pertinent part:

Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

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(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

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