

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 21-CR-177 (CRC)
	:	
DANIEL EGTVEDT,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
COUNT FOUR OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE**

The United States of America respectfully files this opposition to Defendant Daniel Egtvedt’s Motion to Dismiss Count Four of the Indictment for Failure to State an Offense. ECF No. 60. The Defendant moves this Court to dismiss Count Four of the Indictment, charging Egtvedt with obstruction of an official proceeding and aiding and abetting in violation of 18 U.S.C. §§ 1512(c)(2) and 2. Egtvedt asserts that the conduct alleged in Count Four – *i.e.*, his corrupt obstruction, influencing, and impeding of Congress’s certification of the Electoral College vote on January 6, 2021 falls outside the scope of Section 1512(c)(2).

The Defendant’s contentions lack merit. Several courts in this district have rejected many, if not all, of the challenges that the Defendant rehashes in his motion. *See, e.g., United States v. Sandlin*, 21-cr-88 (DLF), 2021 WL 5865006 (D.D.C. Dec. 10, 2021); *United States v. Caldwell*, 21-cr-28 (APM), 2021 WL 6062718 (D.D.C. Dec. 20, 2021); *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891 (D.D.C. Dec. 21, 2021); *United States v. Montgomery*, 21-cr-46 (RDM), 2021 WL 6134591 (D.D.C. Dec. 28, 2021); *United States v. Nordean*, 21-cr-175 (TJK), 2021 WL 6134595 (D.D.C. Dec. 28, 2021); *United States v. Grider*, No. 21-cr-22 (CKK), 2022 WL 392307 (D.D.C. February 9, 2022); *United States v. Bozell*, No. 21-cr-216 (JDB), 2022 WL

474144 (D.D.C. Feb. 16, 2022); *United States v. Andries*, No. 21-cr-93 (RC), 2022 WL 768684 (D.D.C. March 14, 2022); *United States v. Puma*, No.21-cr-454 (PLF), 2022 WL 823079 (D.D.C. March 19, 2022). This Court should adopt the well-reasoned view of the overwhelming majority of district judges to have considered the issues and deny their motions to dismiss.

FACTUAL BACKGROUND

On January 6, 2021, Vice President Pence, under United States Secret Service (USSS) protection, was present at the United States Capitol building. The United States Capitol Police (USCP), with sole authority over security on the Capitol grounds, set up security barriers on the Capitol grounds. On the west side of the Capitol, USCP set up metal bike rack barriers along First Street. Within the West Front of the Capitol building, USCP set up additional temporary metal barriers, green snow fencing, and signage stating, “Area Closed By order of the United States Capitol Police Board.” The Lower West Terrace on the West Front was closed to members of the public. Below is a map of the restricted area:



At 1:00 p.m., on January 6, 2021, a Joint Session of the United States Congress convened

in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol. At approximately 2:00 p.m., certain individuals in the crowd forced their way through, up, and over erected barricades. The crowd, having breached police officer lines, advanced to the exterior façade of the building. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol. At approximately 2:20 p.m., members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to – and did – evacuate the chambers.

Defendant Egtvedt is one of hundreds of individuals charged with crimes relating to the riot at the U.S. Capitol that took place on January 6, 2021. The Defendant attended President Trump’s rally the morning and early afternoon of January 6th, taking both videos of President Trump’s speech and “selfie” photographs of himself with President Trump in the background. The photograph below was captured at 1:08 pm on January 6, 2021, minutes before President Trump concluded his speech:¹

¹ The metadata obtained from the photographs and videos on the Defendant’s phone includes the latitude and longitude coordinates from when the videos and photographs were taken, along with the creation date and time, and the phone make and model (an Apple iPhone 7 Plus).



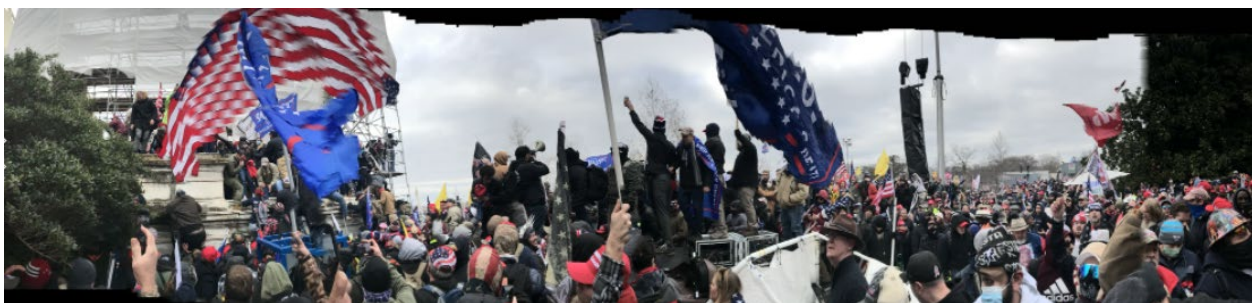
The Defendant's phone then chronicles, through photographs and videos, the march from the rally to the U.S. Capitol. One of those photographs, shown below, was taken at 2:08 pm and shows the crowd on Constitution Avenue NW, with the E. Barrett Prettyman U.S. Courthouse in the background, as they walk towards the U.S. Capitol:



The Defendant's phone also contains a picture that was captured at 2:18 p.m. which shows rioters scaling the walls of the U.S. Capitol:



Another photograph on the Defendant's phone, taken at 2:20 p.m., appears to show rioters on the scaffolding on the north side of the Capitol's lower west terrace:



Egtvedt soon made his way to the Senate wing doorway located on the northern end of the Capitol's upper west terrace. A picture on the Defendant's phone, captured at 2:32 p.m., appears to show the exterior of the Senate wing doorway and shows a rioter scaling the façade of the building above the doorway:



Notably, this doorway was initially breached by rioters at approximately 2:13 p.m., but law enforcement members were able to re-secure it several minutes later. After the door was resecured, USCP fortified the doors with makeshift barricades made out of furniture that was inside the Capitol, and escorted rioters out of the building through a set of nearby windows. By approximately, 2:37 p.m., Egtvedt was standing immediately in front of this doorway, peering through the broken glass at USCP officers:



Egtvedt's phone also contains the image below, captured at 2:37 p.m., showing USCP officers standing behind the makeshift barricade:



As the rioters tried to force their way into the building through the Senate wing doors, one of the USCP officers sprayed Egtvedt and others with chemical spray. The rioters continued to try to force their way in until they were able to breach the building again at approximately 2:48 p.m. Egtvedt followed seconds later:



Once inside the building, Egtvedt proceeded down a hallway, heading south. In the hallway he sat down on a bench for several minutes while dozens of other rioters milled about. The government has recovered a social media, audio-video recording of Egtvedt while he was in this area of the Capitol. On this recording Egtvedt speaks to another rioter, who is apparently live streaming the events, and states:

Tell everybody that's outside, tell them to get in here now! . . . This is our country. We need to reclaim it. We're not going to let the globalists take our country. This is America. Everybody, if you're seeing this, come down here now! We're not backing away. This is our house. Congressmen, grow a spine or f***ing resign!

A few minutes later on the recording Egtvedt starts shouting: "Police are traitors! Police are traitors! Police are traitors!"

After a few more minutes, Egtvedt resumed walking southward in the building, and made his way to a room known as the Crypt. In the Crypt, he verbally berated multiple police officers,

yelling at them that they were “on the wrong f***ing side.”

A few minutes later Egtvedt exited the Crypt and resumed walking south, toward the Hall of Columns. When Egtvedt arrived in the Hall of Columns, at about 3:11 p.m., numerous law enforcement members, all in uniform, were standing along either side. As Egtvedt walked down the middle of the hall, heading in the general direction of an exit doorway, he pointed to several of them and stated, “God bless all of you.” One officer responded, “Keep going, sir.”

As Egtvedt neared the end of the hall, about 20 feet from the exit, another law enforcement member, an FBI agent dressed in tactical gear, motioned for him to continue in that direction. Egtvedt walked a few more feet toward the doorway. However, he then abruptly turned around and began walking back down the Hall of Columns toward the building’s interior. As Egtvedt passed by the same agent, that agent once again motioned for him to proceed to the doorway. Egtvedt ignored the agent and continued walking away from the doorway.

As Egtvedt, who is listed in driver’s license records from 2020 as 6’2” tall and weighing 320 pounds, continued toward the interior of the building, USCP Officer M.M.--a woman about half his size who was in full uniform--stepped in front of him to block his path. When he continued walking toward her, Officer M.M. placed her right hand on his upper left shoulder, to direct him back toward the doorway. When Egtvedt did not comply, two more uniformed USCP officers positioned themselves around Egtvedt.

Egtvedt continued to walk away from the doorway and loudly stated, “You shoot me! Shoot me! You guys are violating the Constitution of the United States of America!” He then swung his left hand around and swatted Officer M.M.’s right hand off his shoulder. Officer M.M. then raised her left hand and placed it on Egtvedt’s upper chest area. Egtvedt then rotated his body and pinned

the officer's left hand in the crook of his right elbow. Officer M.M. swung her right hand against Egtvedt's right arm in order to free her other hand.

As this was happening, the two other USCP officers were attempting to subdue Egtvedt. In addition, D.C. Metropolitan Police Department (MPD) Officer M.D., also in full uniform, positioned himself behind Egtvedt and pulled him by his jacket back toward the doorway. Egtvedt then began to yell, "You work for us! You work for us!" He then twisted around, removing first his left arm and then his right from his jacket, which fell to the floor. He continued in his effort to move forward, away from the doorway.

Two more officers, again in full uniform, surrounded and pushed against Egtvedt, as he continued struggling, still trying to move forward. With the weight of four male officers against him, including Officer M.D., Egtvedt could no longer move forward and fell backwards to the floor. As he hit the floor, the back of his head struck one of the columns. He also landed partly on top of Officer M.D.

For the next two minutes or so, Egtvedt lay on the floor. Although conscious and alert, he refused to comply with officers' demands and stated he would not leave. The officers also asked him whether he wanted medical assistance, which he declined. Finally, two male USCP officers lifted Egtvedt to his feet and half-carried, half pushed him toward and out the doorway. Egtvedt fell to the floor again, immediately outside the doorway. Officers again tried to convince him to stand up and leave. He would not. The officers again offered to get him medical assistance. He again declined.

After about two more minutes the officers helped Egtvedt to his feet. Now standing immediately outside the doorway Egtvedt promptly attempted to re-enter the building. Once again

uniformed officers, including Officer M.M., physically blocked him, and once again Egtvedt swatted at Officer M.M.'s hand as she pushed against his chest.

After a few more moments of confrontation, Egtvedt relented and, at 3:18 p.m., began walking away from the doorway. At this point Egtvedt was on a raised outdoor terrace with several sets of steps leading down to a concrete area on the south side of the building. As he walked toward the steps on the western end of the terrace, an MPD officer called up to him and told him he needed to go the opposite direction, toward the steps on the eastern end. Egtvedt ignored the officer and continued toward and then walked down the steps on the western end.

As he neared the bottom of those steps, the same officer approached him and once again told him he needed to head the opposite direction. He responded, "I don't want to go over there." The officer, a female, repeated her command. He refused and came to the bottom of the steps. The officer, joined by a male MPD officer, then physically turned Egtvedt around and began to push against Egtvedt's back, forcing him to walk toward the east. As he walked, he leaned back against them to resist, and shouted, "This is tyranny!"

When the officers reached an area just outside the southeast corner of the building, other officers opened up a set of metal barriers and Egtvedt was directed to the other side of them. Thereafter, Egtvedt remained on the grounds of the Capitol for several more hours, outside the barriers, attempting at various points to engage verbally with law enforcement members.

The government charged the Defendant by Indictment with violations of 18 U.S.C. 111(a)(1) (Counts One and Two); 18 U.S.C. 231(a)(3) (Count Three); 18 U.S.C. 1512(c)(2) and 2 (Count Four); 18 U.S.C. 1752(a)(1) (Count Five); 18 U.S.C. 1752(a)(2) (Count Six); 18 U.S.C. 1752(a)(4) (Count Seven); 40 U.S.C. 5104(e)(2)(D) (Count Eight); and 40 U.S.C. 5104(e)(2)(F)

(Count Nine). ECF No. 43.

LEGAL STANDARD

A defendant may move to dismiss an indictment or count thereof for failure to state a claim prior to trial. See Fed. R. Crim. P. 12(b)(3)(B)(v). “[A]n indictment must be viewed as a whole, and the allegations must be accepted as true in determining if an offense has been properly alleged.” *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* “An indictment must contain every element of the offense charged, if any part or element is missing, the indictment is defective and must be dismissed.” See *United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017).”

ARGUMENT

Count Four of the Indictment charges the Defendant with corruptly obstructing, influencing, or impeding an “official proceeding,” – i.e., Congress’s certification of the Electoral College vote on January 6, 2021 – in violation of 18 U.S.C. § 1512(c)(2). In 2002, Congress enacted Section 1512(c)’s prohibition on “[t]ampering with a record or otherwise impeding an official proceeding” as part of the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, 807. Section 1512(c)’s prohibition applies to

[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.*

18 U.S.C. § 1512(c) (emphasis added). Section 1515(a)(1), in turn, defines the phrase “official

proceeding” to include “a proceeding before the Congress.” 18 U.S.C. § 1515(a)(1)(B). By the statute’s plain terms, then, a person violates Section 1512(c)(2) when, acting with the requisite mens rea, he engages in conduct that obstructs a specific congressional proceeding, including, as here, Congress’s certification of the Electoral College vote.

The Defendant appears to advance two distinct statutory arguments for the notion that Section 1512(c)(2) does not reach the conduct alleged in the indictment: (1) that Congress’s certification of the Electoral College vote is not an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2); and (2) that Section 1512(c)(2) is limited to obstruction tied to documentary or tangible evidence. Neither claim has merit, as other judges on this Court have concluded with near-perfect uniformity. Every district judge to have reached the issue has concluded that Congress’s certification of the Electoral College is an “official proceeding” within the meaning of 18 U.S.C. 1512(c)(2). In addition, every reported court of appeals decision to have considered the scope of Section 1512(c)(2), and all but one of the district judges of this Court to have considered the issue in cases involving January 6, 2021, have concluded that Section 1512(c)(2) prohibits obstruction regardless of its connection to documentary or tangible evidence. And, in any event, even if a nexus to documentary or tangible evidence were required, the allegations in the Indictment, which track the statutory language, more than adequately informed the Defendant about the charge against them; nothing more was or is required. *See, e.g., United States v. Williamson*, 903 F.3d 124, 130-131 (D.C. Cir. 2018). This Court should adopt the well-reasoned view of the overwhelming majority of district judges to have considered the issues raised by the Defendant and deny his motion to dismiss.

I. Congress’s Joint Session to Certify the Electoral College Vote Is a “Proceeding Before the Congress” under Section 1515(a)(1)(B) And, Therefore, an “Official Proceeding” under Section 1512(c)(2)

The Defendant’s primary statutory argument – that Congress’s Joint Session to certify the Electoral College vote is not a “proceeding before the Congress” under the statute (ECF No. 60, at 4-11) – lacks merit.

a. The plain text of the statute established that the Joint Session is an “official proceeding.”

To determine the meaning of a statute, a court “look[s] first to its language, giving the words used their ordinary meaning.” *Levin v. United States*, 568 U.S. 503, 513 (2013) (internal quotation omitted). Section 1515(a)(1)(B) defines “official proceeding” as a “proceeding before the Congress.” In ordinary parlance, a gathering of the full Congress to certify the Electoral College vote is a congressional proceeding, or “a proceeding before the Congress.” Because Section 1515(a)(1)(B)’s words “are unambiguous, the judicial inquiry is complete.” *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (internal quotation omitted).

Congress’s Joint Session to certify the Electoral College vote constitutes a “proceeding” under any interpretation of that term. In its broadest and most “general sense,” a “proceeding” refers to “[t]he carrying on of an action or series of actions; action, course of action; conduct, behavior.” *United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013) (quoting *Proceeding*, Oxford English Dictionary, available at <http://www.oed.com>). The Defendant does not meaningfully contend that Congress’s Joint Session to certify the Electoral College vote, which involves a detailed “series of actions” outlining how the vote is opened, counted, potentially objected to, and ultimately certified, is not a proceeding – and indeed an official proceeding – under that broad definition.

A narrower definition of the term “proceeding” would look to the “legal – rather than the lay – understanding” of the term. *Ermoian*, 752 F.3d at 1170. This narrower definition includes the “business conducted by a court or other official body; a hearing.” Black’s Law Dictionary, “Proceeding” (11th ed. 2019). Taken with its modifier “official,” the term “proceeding” thus “connotes some type of formal hearing.” *Ermoian*, 752 F.3d at 1170. But even under this narrower definition, Congress’s Joint Session to certify the Electoral College vote – business conducted by an official body, in a formal session – would easily qualify.

The formality involved in the certification of the Electoral College vote places it well within the category of an official proceeding, even under the narrower legal definition of the term “proceeding.” Few events are as solemn and formal as a Joint Session of the Congress. That is particularly true for Congress’s certification of the Electoral College vote, which is expressly mandated under the Constitution and federal statute. Required by law to begin at 1:00 pm on the January 6 following a presidential election, Congress’s meeting to certify the Electoral College vote is both a “hearing” and “business conducted by ... [an] official body.” *See* Black’s Law Dictionary, “Proceeding.” The Vice President, as the President of the Senate, serves as the “presiding officer” over a proceeding that counts votes cast by Electors throughout the country in presidential election. 3 U.S.C. § 15. As in a courtroom, Members may object, which in turn causes the Senate and House of Representatives to “withdraw” to their respective chambers so each House can render “its decision” on the objection. *Id.* And just as the judge and parties occupy specific locations in a courtroom, so too do the Members within the “Hall.” *See* 3 U.S.C. § 16 (President of the Senate is in the Speaker’s chair; the Speaker “immediately upon his left”; the Senators “in the body of the Hall” to the right of the “presiding officer”; the Representatives “in the body of the

Hall not provided for the Senators”; various other individuals “at the Clerk’s desk,” “in front of the Clerk’s desk,” or “upon each side of the Speaker’s platform”). Congress’s certification of the Electoral College vote, moreover, must terminate with a decision: Congress may not recess until “the count of electoral votes” is “completed,” and the “result declared.” *Id.*

Under the plain meaning of Sections 1512(c)(2) and 1515(a)(1)(B), Congress’s Joint Session to certify the Electoral College vote is a “proceeding before the Congress.” That alone disposes of the Defendant’s contentions.

b. The statutory phrase “proceeding before Congress” is not limited to proceedings solely related to the “administration of justice.”

The Defendant nevertheless argues (ECF No. 60, at 6) that the phrase “official proceeding” in Section 1512 applies only to proceedings that involve a hearing affecting the administration of justice. But this narrow reading of the statute finds no textual support when applied to Section 1515(a)(1)(B), which speaks broadly of a proceeding “before the Congress.” Had Congress wanted to impose a definition that more closely resembled a quasi-adjudicative setting (as the Defendant contends), it needed look only a few provisions away to 18 U.S.C. § 1505, which criminalizes, among other things, the obstruction of (i) “the due and proper administration of the law under which any pending proceeding is being had” by a federal department or agency; and (ii) “the due and proper exercise of the power of inquiry under which any inquiry or investigation [that] is being had by” Congress, including by congressional committees and subcommittees. 18 U.S.C. § 1505; *see United States v. Bowser*, 964 F.3d 26, 31 (D.C. Cir. 2020). If Congress wished to similarly limit the obstruction prohibition under § 1512(c)(2) to congressional investigations and the like, it could have enacted language similar to Section 1505. Instead, Congress chose different terms, with different meanings. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from

concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”). Congress enacted broader language (“a proceeding before the Congress”) that covers a broader range of proceedings than only the “inquir[ies] and investigation[s]” envisioned in Section 1505. That broader definition includes the Electoral College vote certification that the Defendant obstructed on January 6, 2021.

None of the Defendant’s arguments have merit. He cites at length (ECF No. 60, at 4-6) the Ninth Circuit’s decision in *Ermoian*, 752 F.3d 1165. But *Ermoian* involved a different statutory definition, 18 U.S.C. § 1515(a)(1)(C), and an entirely different issue: whether an FBI investigation counts as “a proceeding before a Federal Government agency which is authorized by law” under Section 1515(a)(1)(C). In *Ermoian*, the Ninth Circuit reasoned at the outset that the term “proceeding” did not “conclusively resolve whether an FBI investigation qualifies” because narrower definitions of the term “would exclude criminal investigations in the field.” 752 F.3d at 1170. This case, which involves a proceeding before Congress and implicates Section 1515(a)(1)(B) (and not (C)), presents no such question. And, in any event, the Joint Session of Congress to certify the Electoral College vote would satisfy even the narrower formulations of “proceeding” cited in *Ermoian*. The Joint Session plainly constitute “*business conducted* by a court or other official body; a hearing,” or “[a] legal ... process.” *Id.* at 1169 (emphasis added). And there can be no serious dispute that the Joint Session is a “proceeding ... authorized by law” or that it has the “sense of formality” that the Ninth Circuit found absent from mere criminal investigations. *Id.* at 1170 (emphasis added).

The Defendant also notes that other provisions in Chapter 73 “explicitly relate to the administration of justice.” (ECF No. 60, at 8 (citing 18 U.S.C. §§ 1503, 1504, 1513, 1521)). That, too, is unpersuasive. If anything, those neighboring provisions – which criminalize obstruction of other types of investigations and protect judges, jurors, witnesses and the like – underscore how robustly Congress sought to penalize obstructive conduct across a vast range of settings. That Congress wished to penalize efforts to obstruct everything from a federal audit to a bankruptcy case to an examination by an insurance regulatory official only crystallizes that it is more the acts of obstructing, influencing, or impeding – than the particular type of hearing – that lie at “‘the very core of criminality’ under the statute[s].” *Williamson*, 903 F.3d at 131.

The Defendant also claims (ECF N0. 60, at 8-10) that Section 1512(c)’s legislative history weighs in favor of interpreting the obstruction statute narrowly because, in enacting Section 1512(c) in 2002, Congress was principally preoccupied with closing a loophole in connection with potential investigations. Putting aside that the “best evidence of [a statute’s purpose] is the statutory text adopted by both Houses of Congress and submitted to the President,” *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), the obstruction statute’s legislative history confirms that Congress intended “official proceeding” to reach broadly. Although Congress enacted Section 1512(c) as part of the Sarbanes-Oxley Act of 2002, Section 1512(c) adopted – but did not modify – the pre-existing definition of “official proceeding” in Section 1515(a)(1), which had been in place since 1982. *See* Victim and Witness Protection Act of 1982 (“VWPA”), Pub. Law 97-291, § 4(a), 96 Stat. 1252. And, tellingly, in considering the VWPA in 2002, the Senate Judiciary Committee urged the inclusion of a “broad residual clause” – in a provision that was ultimately omitted from the 1982 enactment, but that resembles the current iteration of Section 1512(c)(2) –

precisely because the “purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be protection against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice.” S. Rep. 97-532, at 18 (1982). The upshot is clear: when it enacted the operative definition of “official proceeding,” Congress intended that term to be construed broadly, not narrowly. And this case underscores Congress’s foresight in doing so: the Defendant sought to thwart justice in an unprecedented and inventive manner, by literally driving Congress out of the chamber.²

Finally, the Defendant also contends (ECF No. 60, at 10) that Congress’s certification of the Electoral College vote “may be” “more appropriately” considered the ““official business”” of Congress or a ““federally protected function”” – the statutory phrases used in 40 U.S.C. § 5104(e)(2)(c) and 18 U.S.C. § 231(a)(3), respectively – “rather than an ‘official proceeding before the Congress’” under 18 U.S.C. §§ 1512(c) and 1515. He is, again, incorrect. Sections 213(a)(3), 1512(c)(2), and 5104(e)(2)(C) were enacted at different times and as part of largely unrelated statutory schemes. It is unremarkable that Congress used different – but overlapping – terminology in defining the proceedings, functions, and activities that it intended to protect in those distinct enactments. See *Russello v. United States*, 464 U.S. 16, 25 (1983) (“Language in one statute usually sheds little light upon the meaning of different language in another statute, even

² Even if the Defendant was correct that the obstruction statute’s application to the Electoral College vote certification proceeding was not expressly anticipated by Congress at the time of enactment, that alone “does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command.” *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (internal quotation and alterations omitted). A statute’s application may “reach[] beyond the principal evil legislators may have intended or expected to address.” *Id.* (internal quotation omitted); *cf.*, *Montgomery*, 2021 WL 6134591, at *15-17 (rejecting a narrow understanding of Section 1512(c) based on its legislative history).

when” – unlike there – “the two are enacted at or about the same time.”). Nothing supports the Defendant’s premise that the terms should somehow be read as mutually exclusive.

Since the events of January 6, 2021, at least 10 judges on this Court have considered whether Congress’s certification of the Electoral College vote constitutes an “official proceeding” for purposes of Section 1512(c)(2). All 10 have ruled that it does, largely adopting the government’s rationale and rejecting the arguments that the Defendant presses in this case. *See Sandlin*, 2021 WL 5865006, at *4 (Friedrich, J.); *Caldwell*, 2021 WL 6062718, at *7 (Mehta, J.); *Mostofsky*, 2021 WL 6049891, at *10; *Montgomery*, 2021 WL 6134591, at *4-10 (Moss, J.); *Nordean*, 2021 WL 6134595, at *4-6 (Kelly, J.); *McHugh*, 2022 WL 296304, at *5-9 (Bates, J.); *Grider*, 2022 WL 392307 (Kollar-Kotelly, J.); *Miller*, 2022 WL 823070, at *5; *Andries*, 2022 WL 768684, at *3-7 (Contreras, J.); *Puma*, 2022 WL 823079, at *4-9 (Friedman, J.). Nothing in the Defendant’s briefing warrants departing from that well-reasoned line of decisions.

c. In the alternative, Congress’s certification of the Electoral College vote would qualify as an adjudicatory proceeding.

In any event, even if the statute required the “administration of justice” gloss urged by the Defendant, Congress’s certification of the Electoral College vote as set out in the Electoral Count Act of 1887 would satisfy it. The certification of the Electoral College vote involves the convening of a Joint Session of Congress, a deliberative body over which a government officer, the Vice President as President of the Senate, “presid[es].” 3 U.S.C. § 15. That Joint Session renders judgment on whether to certify the votes cast by Electors in the presidential election. Under the Constitution, the Electors create “lists” of the presidential and vice-presidential candidates, which they “sign” and “certify” before sending to Congress. U.S. Const. amend. XII. Congress then decides whether to count those certified lists, or certificates in conformity with the Electoral Count

Act. 3 U.S.C. § 15. As in an adjudicative setting, parties may lodge objections to the certification, and if any such objection is lodged, each House must consider the objection and make a “decision” whether to overrule or sustain it. 3 U.S.C. § 15. And just as a jury does not (barring a mistrial) recess until it has reached a verdict, the Joint Session cannot “be dissolved” until it has “declared” a “result.” 3 U.S.C. § 16. Even under the Defendant’s theories, Congress’s certification of the Electoral College vote possesses sufficient “tribunal-like” characteristics to qualify as an “official proceeding,” as several judges of this Court have already concluded. *See Caldwell*, 2021 WL 6062718, at *11 (Mehta, J.); *Nordean*, 2021 WL 6134595, at *6; *McHugh*, 2022 WL 296304, at *9.

II. Section 1512(c)(2)’s Prohibition on Obstructive Conduct Does Not Require a Nexus to Documentary or Tangible Evidence.

Citing *Miller*, 2022 WL 823070, the Defendant next contends that Section 1512(c)(2) is limited to obstruction tied to documentary or tangible evidence. (*See, e.g.*, ECF No. 60 at 11-12). He is incorrect, as at least 9 judges of this Court have concluded in rejecting analogous claims by other defendants charged in connection with the events of January 6, 2021. *See Sandlin*, 2021 WL 5865006, at *5-9 (Friedrich, J.); *Caldwell*, 2021 WL 6062718, at *11-21 (Mehta, J.); *Mostofsky*, 2021 WL 6049891, at *11 (Boasberg, J.); *Montgomery*, 2021 WL 6134591, at *10-18 (Moss, J.); *Nordean*, 2021 WL 6134595, at *6-8 (Kelly, J.); *United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.); *Grider*, 2022 WL 392307, at *5-6 (Kollar-Kotelly, J.); *Andries*, 2022 WL 768684, at *9 (Contreras, J.); *Puma*, 2022 WL 823079, at *7-9, 12 & n.4 (Friedman, J.).

a. Section 1512(c)(2)'s text, structure, and history demonstrate that its prohibition on obstructive conduct covers the Defendant's actions on January 6, 2021.

In Section 1512(c)(2), Congress comprehensively prohibited conduct that intentionally and wrongfully obstructs official proceedings. The ordinary meaning of “obstruct[], influence[], or impede[]” encompasses a wide range of conduct designed to frustrate an official proceeding. That conduct can include lying to a grand jury or in civil proceedings, exposing the identity of an undercover agent, and burning a building to conceal the bodies of murder victims. It also includes storming into the Capitol to derail a congressional proceeding. A defendant who, acting with the necessary *mens rea*, obstructs (or attempts to obstruct) Congress's certification of the Electoral College vote, commits a crime under Section 1512(c)(2).

Section 1512(c)(2)'s text and structure demonstrate that it serves as a comprehensive prohibition on corrupt conduct that intentionally obstructs or impedes an official proceeding. When interpreting a statute, courts look first to the statutory language, “giving the words used their ordinary meaning.” *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (internal quotation marks omitted). If the statutory language is plain and unambiguous, this Court's “inquiry begins with the statutory text, and ends there as well.” *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks omitted). Here, the meaning of “obstruct[], influence[], or impede[]” is controlled by the ordinary meaning of those words.

The verbs Congress selected in Section 1512(c)(2) reach broadly. For example, the words “obstruct” and “impede” can “refer to anything that ‘blocks,’ ‘makes difficult,’ or ‘hinders.’” *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (brackets omitted) (citing dictionaries). Similarly, “influence” includes “affect[ing] the condition of” or “hav[ing] an effect on.” *Influence*, Oxford English Dictionary, available at <http://www.oed.com>. By their plain meaning,

therefore, the string of verbs in Section 1512(c)(2) are properly viewed as “expansive” in their coverage. *See United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013).

Section 1512(c)’s structure confirms that straightforward interpretation. Section 1512(c) consists of two provisions, which both require the defendant to act “corruptly.” First, Section 1512(c)(1) criminalizes “alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object . . . with the intent to impair the object’s integrity or availability for use in an official proceeding.” Section 1512(c)(2), by contrast, applies more generally to any acts that “otherwise obstruct[], influence[], or impede[]” an official proceeding. The term “otherwise,” consistent with its ordinary meaning, conveys that Section 1512(c)(2) encompasses misconduct that threatens an official proceeding “beyond [the] simple document destruction” that Section 1512(c)(1) proscribes. *Id.*; *United States v. Petruk*, 781 F.3d 438, 446-47 (8th Cir. 2015) (noting that “otherwise” in Section 1512(c)(2), understood to mean “in another manner” or “differently,” implies that the obstruction prohibition in that statute applies “without regard to whether the action relates to documents or records”) (internal quotation marks omitted); *see also United States v. Ring*, 628 F. Supp. 2d 195, 224 n.17 (D.D.C. 2009) (noting that Section 1512(c)(2) is “plainly separate and independent of” Section 1512(c)(1), and declining to read “otherwise” in Section 1512(c)(2) “as limited by § 1512(c)(1)’s separate and independent prohibition on evidence-tampering”); *Otherwise*, Oxford English Dictionary, available at <http://www.oed.com> (defining otherwise as “in another way” or “in any other way”); *see also Gooch v. United States*, 297 U.S. 124, 127-28 (1936) (characterizing “otherwise” as a “broad term” and holding that a statutory prohibition on kidnapping “for ransom or reward or otherwise” is not limited by the words “ransom” and “reward” to kidnappings for pecuniary benefit); *Collazos v. United States*, 368 F.3d

190, 200 (2d Cir. 2004) (construing “otherwise” in 28 U.S.C. § 2466(1)(C) to reach beyond the “specific examples” listed in prior subsections, thereby covering the “myriad means that human ingenuity might devise to permit a person to avoid the jurisdiction of a court”).

In this way, Section 1512(c)(2) criminalizes the same *result* prohibited by Section 1512(c)(1) – obstruction of an official proceeding – when that result is accomplished by a different *means*, *i.e.*, by conduct other than destruction of a document, record, or other object. *Cf. United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (explaining that 18 U.S.C. § 1503, which criminalizes the result of obstructing the due administration of justice, provides specific means of accomplishing that result and then a separate catch-all clause designed to capture other means). Section 1512(c)(2), in other words, “operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific” obstruction offense involving documents or records under Section 1512(c)(1). *Petruk*, 781 F.3d at 447 (quoting *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014)); *cf. United States v. Aguilar*, 515 U.S. 593, 598 (1995) (describing similar “[o]mnibus” clause in 18 U.S.C. § 1503 as a catchall that is “far more general in scope than the earlier clauses of the statute”).

Consistent with that interpretation, courts have upheld convictions under Section 1512(c)(2) for defendants who attempted to secure a false alibi witness while in jail for having stolen a vehicle, *Petruk*, 781 F.3d at 440, 447; disclosed the identity of an undercover federal agent to thwart a grand jury investigation, *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009); lied in written responses to civil interrogatory questions about past misconduct while a police officer, *Burge*, 711 F.3d at 808-09; testified falsely before a grand jury, *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009); solicited information about a grand jury investigation

from corrupt “local police officers,” *Volpendesto*, 746 F.3d at 286; and burned an apartment to conceal the bodies of two murder victims, *United States v. Cervantes*, No. 16-10508, 2021 WL 2666684, at *6 (9th Cir. June 29, 2021) (unpublished); *see also United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (police officer tipped off suspects before issuance or execution of search warrants), *vacated on other grounds*, 139 S. Ct. 2772 (2019); *United States v. Ahrensfield*, 698 F.3d 1310, 1324-26 (10th Cir. 2012) (law enforcement officer disclosed existence of undercover investigation to target).

Here, Section 1512(c)(2) also applies to the Defendant’s conduct, which involved forcing his way through a barricade and entering into the Senate Wing of the Capitol Building, and engaging in disruptive (and indeed, assaultive) conduct inside of the Capitol Building. In so doing, the Defendant hindered and delayed the certification of the Electoral College vote, an “official proceeding” as that term is defined in the obstruction statute. *See* 18 U.S.C. § 1515(a)(1)(B); *supra* pp.3-4 (listing cases). Because construing Section 1512(c)(2) to reach that conduct would neither “frustrate Congress’s clear intention” nor “yield patent absurdity,” this Court’s “obligation is to apply the statute as Congress wrote it.” *Hubbard v. United States*, 514 U.S. 695, 703 (1995) (internal quotation marks omitted).

In contrast, reading Section 1512(c)(2) as limited only to obstructive acts akin to the document destruction or evidence tampering captured in Section 1512(c)(1) (as the Defendant suggests) suffers at least three flaws. *First*, it would give rise to unnecessarily complex questions about what sort of conduct qualifies as “similar to but different from” the proscribed conduct “described in [Section 1512](c)(1).” *United States v. Singleton*, No. 06-CR-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006) (unpublished); *see id.* (concluding that Section 1512(c)(2)

“require[s] some nexus to tangible evidence, though not necessarily tangible evidence already in existence”); *see also United States v. Hutcherson*, No. 05-CR-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) (unpublished) (concluding that a violation of Section 1512(c)(2) requires proof that “an individual corruptly obstructs an official proceedings [*sic*] through his conduct in relation to a tangible object”). So construed, for example, Section 1512(c)(2) may not encompass false statements made to obstruct a proceeding – though courts have widely upheld convictions for such conduct. *See Petruk*, 781 F.3d at 447 (collecting cases).

Limiting Section 1512(c)(2) in that way would effectively render that provision superfluous considering the comprehensive prohibitions against document and evidence destruction in both Sections 1512(c)(1) and 1519. *See Yates v. United States*, 574 U.S. 528, 541 n.4 (2015) (Section 1512(c)(1) provides a “broad ban on evidence-spoilation”) (internal quotation marks omitted). By contrast, the straightforward interpretation that treats Section 1512(c)(2) as a catch-all for corrupt obstructive conduct not covered by Section 1512(c)(1) would “give effect to every clause and word” of Section 1512(c). *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013); *cf. United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991) (explaining that limiting the catch-all provision in Section 1503’s omnibus clause to obstructive acts “directed against individuals” would render that catch-all superfluous because “earlier, specific[] prohibitions” in Section 1503 “pretty well exhaust such possibilities”) (internal quotation marks omitted); *United States v. Watt*, 911 F. Supp. 538, 546 (D.D.C. 1995) (rejecting interpretation of the Section 1503 omnibus clause that would “serve no other purpose than to prohibit acts already prohibited in the first part of the statute” because that reading would “reduce[] the omnibus clause to mere redundancy”).

Importing into Section 1512(c)(2) a nexus-to-tangible-evidence-or-documents requirement would require inserting an extratextual gloss that would render the verbs in Section 1512(c)(2) nonsensical. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (courts “ordinarily resist reading words or elements into a statute that do not appear on its face”) (internal quotation marks omitted). The *actus reus* that those verbs encompass is obstructing, influencing, and impeding; a defendant cannot “obstruct” a document or “impede” a financial record. *Cf. Yates*, 574 U.S. at 551 (Alito, J., concurring) (rejecting interpretation of “tangible object” in Section 1519 that would include a fish in part because of a mismatch between that potential object and the statutory verbs: “How does one make a false entry in a fish?”); *id.* at 544 (plurality opinion) (“It would be unnatural, for example, to describe a killer’s act of wiping his fingerprints from a gun as ‘falsifying’ the murder weapon.”).

Because “the statutory language provides a clear answer,” the construction of Section 1512(c)(2) “ends there” and it is unnecessary to resort to legislative history. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (same); *see also United States v. De Bruhl-Daniels*, 491 F. Supp. 3d 237, 251-52 (S.D. Tex. 2020) (declining to consider Section 1512’s legislative history). Regardless, the legislative history of Section 1512(c)(2) – particularly when considered alongside the history of Section 1512 more generally – provides no support for a different conclusion, contrary to the Defendant’s assertions (*e.g.*, ECF No. 59, at 8-9; 61, at 8-9). *See, e.g., Montgomery*, 2021 WL 6134591, at *15-17.

When Congress in 1982 originally enacted Section 1512, that legislation did not include what is now Section 1512(c). *See VWPA*, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1249-1250.

Its title then, as now, was “Tampering with a witness, victim, or an informant.” *Id.*; 18 U.S.C. § 1512. As that title suggested, Section 1512 as originally enacted targeted conduct such as using intimidation, threats, or corrupt persuasion to prevent testimony or hinder, delay, or prevent communication of information to law enforcement or the courts as well as intentionally harassing another person to hinder, delay, or prevent that person from taking certain actions. *See* Pub. L. No. 97-291, § 4(a) (now codified as Section 1512(b) and Section 1512(d)).

Twenty years later, following the collapse of the Enron Corporation, Congress passed the Sarbanes-Oxley Act of 2002. Pub. L. No. 107-204, 116 Stat. 745; *see Yates*, 574 U.S. at 535 (plurality opinion). That legislation, which principally aimed to “prevent and punish corporate fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions,” S. Rep. No. 107-146, at 2 (2002), included several different provisions, *id.* at 11 (describing different components of the law); *see also* 148 Cong. Rec. H4683-84 (daily ed. July 16, 2002) (outlining new provisions). Foremost among them were two new criminal statutes, 18 U.S.C. § 1519 and 18 U.S.C. § 1520, which were intended to “clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.” S. Rep. No. 107-146, at 14. The Senate Judiciary Committee Report discussed those two provisions in detail. *See id.* at 14-16.

By contrast, the Sarbanes-Oxley Act’s legislative history provides limited explanation of Congress’s objective in enacting Section 1512(c). The only discussion of Section 1512 in the Senate Judiciary Committee Report, for example, noted that the pre-existing prohibition in Section 1512(b) made it a crime to induce “another person to destroy documents, but not a crime for a person to destroy the same documents personally”—a limitation that “forced” prosecutors to

“proceed under the legal fiction that the defendants [in then-pending *United States v. Arthur Andersen*] are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves.” S. Rep. No. 107-146, at 6-7. Similarly, Senator Hatch observed that the legislation “broaden[ed]” Section 1512 by permitting prosecution of “an individual who acts alone in destroying evidence.” 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch). At a minimum, nothing in these passing references casts doubt on the plain meaning of Section 1512(c)(2), which is reflected in the interpretation described above.

Section 1512(c) also differed from the newly enacted Sections 1519 and 1520 in that Congress added the former to an existing statutory section: Section 1512. *See Yates*, 574 U.S. at 541 (plurality opinion) (noting that, unlike Section 1519, Section 1512(c)(2) was placed among the “broad proscriptions” in the “pre-existing” Section 1512). Moreover, although Section 1512(c) as enacted in the Sarbanes-Oxley Act recognized two distinct prohibitions, *see* Pub. L. No. 107-204, § 1102, 116 Stat. 807 (“Tampering with a record *or* otherwise impeding an official proceeding”) (emphasis added; capitalization altered), Congress did not amend Section 1512’s title. That title, “Tampering with a witness, victim, or an informant,” § 1512, thus encompassed the pre-existing provisions aimed at a defendant’s obstructive conduct directed toward another person,³ but did not reflect the newly enacted prohibitions in Section 1512(c) that criminalized a defendant’s own obstructive act, either through destroying documents (§ 1512(c)(1)) or otherwise impeding a proceeding (§ 1512(c)(2)). *See Yates*, 574 U.S. at 541 n.4 (plurality opinion) (noting

³ *See* § 1512(a) (applies to killing, attempting to kill, or using physical force or the threat of physical force against a person to prevent testimony or induce a witness to withhold information); § 1512(b) (applies to using intimidation, threats, or corrupt persuasion against a person to prevent testimony or hinder, delay, or prevent communication of information to law enforcement or the courts); § 1512(d) (applies to intentionally harassing another person to hinder, delay, or prevent that person from taking certain actions).

that Congress added Section 1512(c)(1), which covered evidence-spoliation, to Section 1512 “even though § 1512’s preexisting title and provisions all related to witness-tampering”).

Section 1512(c)’s legislative and statutory history thus offers two reasons to interpret Section 1512(c)(2) consistently with its plain text and structure. First, Section 1512(c) aimed at closing a “loophole” in Section 1512: the existing prohibitions did not adequately criminalize a defendant’s *personal* obstructive conduct *not* aimed at another person. *See* 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch). Read together in this light, Section 1512(c)(1) criminalizes a defendant’s firsthand destruction of evidence (without having to prove that the defendant induced another person to destroy evidence) in relation to an official proceeding, and Section 1512(c)(2) criminalizes a defendant’s firsthand obstructive conduct that *otherwise* impedes or influences an official proceeding (though not necessarily through another person). *See Burge*, 711 F.3d at 809-10. Second, no substantive inference is reasonably drawn from the fact that the title of Section 1512 does not precisely match the “broad proscription” it in fact contains, given that the Sarbanes-Oxley Act unequivocally and broadly entitled the new provisions now codified in Section 1512(c), “Tampering with a record *or* otherwise impeding an official proceeding.” Pub. L. No. 107-204, § 1102, 116 Stat. 807 (emphasis added; capitalization altered). Section 1512’s title is more limited simply because Congress did not amend the pre-existing title when it added the two prohibitions in Section 1512(c) in 2002. *Cf. Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) (describing “the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text”).

b. This Court should not adopt the outlier construction reflected in *United States v. Miller*

The Defendant largely disregards the authorities discussed above, which are analyzed in the many decisions adopting the government’s reading of the statute. *Supra* pp. 1-2 (citing cases). Instead, they urge this Court to adopt the reasoning of *United States v. Miller*, No. 21-cr-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022) (Nichols, J.), the sole decision in which a judge of this Court has construed Section 1512(c)(2) to require proof that “the defendant ha[s] taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.” *Id.* at *15.⁴ *Miller*’s outlier reasoning is unpersuasive for several reasons.

Focusing on the word “otherwise” in Section 1512(c)(2), *Miller* identified “three possible readings” of Section 1512(c)(2). 2022 WL 823070, at *6. First, Section 1512(c)(2) could serve as a “clean break” from Section 1512(c)(1), *id.* at *6, a reading that “certain courts of appeals have adopted,” *id.* at *7. *Miller*, however, identified multiple “problems” with that interpretation, all rooted in the interpretation of the term “otherwise.” It stated that reading “otherwise” in Section 1512(c)(2) to mean “in a different way or manner” is “inconsistent” with *Begay v. United States*, 553 U.S. 137 (2008), which considered whether driving under the influence qualified as a “violent felony” under the now-defunct residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). 2022 WL 823070, at *7. Second, *Miller* hypothesized that Section 1512(c)(1) could “provide[] examples of conduct that violates” Section 1512(c)(2). 2022 WL 823070, at *8. Third, *Miller* stated that Section 1512(c)(2) could be interpreted as a “residual clause” for Section 1512(c)(1), such that both provisions are linked by the document-destruction and evidence-tampering “conduct pr[o]scribed by” Section 1512(c)(1). 2022 WL 823070, at *9. After

⁴ The government has moved for reconsideration in *Miller*. That motion is pending.

considering Section 1512(c)'s structure, "historical development," and legislative history, *Miller* found "serious ambiguity" as to which of the two "plausible" readings – the second and third readings identified above – Congress intended. *Id.* at *15. Applying what it described as principles of "restraint," *Miller* then interpreted Section 1512(c)(2) to mean that a defendant violates the statute only when he or she "take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence an official proceeding" (the third reading). *Id.*

Miller's reasoning is unpersuasive. See *United States v. McHugh*, No. 21-cr-453, 2022 WL 1302880, at *2-*13 (D.D.C. May 2, 2022) (Bates, J) (rejecting rationale in *Miller*). *Miller* ultimately turned on the court's determination that no "single obvious interpretation of the statute" controlled and that the rule of lenity was applicable and was dispositive. 2022 WL 823070, at *15. The rule of lenity, however, "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted); *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998); *Young v. United States*, 943 F.3d 460, 464 (D.C. Cir. 2019). Some ambiguity is insufficient to trigger the rule of lenity; instead, a court must find "grievous ambiguity" that would otherwise compel guesswork. See *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (internal quotation marks omitted). "Properly applied," then, "the rule of lenity therefore rarely if ever plays a role because, as in other contexts, 'hard interpretive conundrums, even relating to complex rules, can often be solved.'" *Wooden*, 142 S. Ct. at 1074 (Kavanaugh, J., concurring).

The rule of lenity is plainly "inapplicable" here. *Puma*, 2022 WL 823079, at *12 n.4. For the reasons set forth above, Congress made clear in Section 1512(c)(2) that it sought to protect the

integrity of official proceedings – regardless of whether a defendant threatens such a proceeding by trying to interfere with the evidence before that tribunal or threatens the tribunal itself. Any such distinction produces the absurd result that a defendant who attempts to destroy a document being used or considered by a tribunal violates Section 1512(c) but a defendant who threatens to use force against the officers conducting that proceeding escapes criminal liability under the statute. Such an outcome would, ironically, lose sight of a core value that animates the lenity rule: that defendants should be put on notice that their conduct is criminal and not be surprised when prosecuted. *See Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring) (“Lenity works to enforce the fair notice requirement by ensuring that an individual’s liberty always prevails over ambiguous laws.”). It would strain credulity for any defendant who was focused on stopping an official proceeding from taking place to profess surprise that his conduct could fall within a statute that makes it a crime to “obstruct[], influence[], or impede[] [any] official proceeding or attempt[] to do so.” 18 U.S.C. § 1512(c)(2).

None of the grounds identified in *Miller* for finding “serious ambiguity,” 2022 WL 823079, at *15 withstand scrutiny. *Miller* stated that the government’s reading either “ignores” that the word “otherwise” is defined with reference to “something else” (namely Section 1512(c)(1)) or fails to “give meaning” to the term “otherwise.” 2022 WL 823079, at *7. That is incorrect. Far from suggesting that Section 1512(c)(2) is “wholly untethered to” Section 1512(c)(1), *id.*, under the government’s reading, the word “otherwise” in Section 1512(c)(2) indicates that Section 1512(c)(2) targets obstructive conduct in a manner “other” than the evidence tampering or document destruction that is covered in Section 1512(c)(1). That understanding of “otherwise” is both fully consistent with the definitions of the term surveyed in *Miller*, *see* 2022 WL 823079, at

*6 (noting that “otherwise” in Section 1512(c)(2) may be read as “in a different way or manner; differently”; “in different circumstances: under other conditions”; or “in other respects”) (internal quotation marks omitted), and ensures that the term is not rendered “pure surplusage,” *id.* at *7. In other words, “otherwise” makes clear that Section 1512(c)(1)’s scope encompasses document destruction or evidence tampering that corruptly obstructs an official proceeding, while Section 1512(c)(2)’s ambit includes “other” conduct that corruptly obstructs an official proceeding.

Miller also stated (and the Defendant repeats) that, without a nexus to a document, record, or other object, Section 1512(c)(2) “would have the same scope and effect ... [as] if Congress had instead omitted the word ‘otherwise.’” 2022 WL 823079, at *7. But, as already noted, overlap is “not uncommon in criminal statutes,” *Loughrin* 573 U.S. at 358 n.4, and Section 1512(c)(2)’s broader language effectuates its design as a backstop in the same way that a “generally phrased residual clause ... serves as a catchall for matters not specifically contemplated.” *Beatty*, 556 U.S. at 860. And, in any event, interpreting the interplay of Sections 1512(c)(1) and 1512(c)(2) in this way does not foreclose a defendant from arguing that his conduct falls outside Section 1512(c)(2)’s scope because his document destruction or evidence concealment is prohibited and punishable only under Section 1512(c)(1). A defendant prevailing on such a theory may be securing a Pyrrhic victory – where success leads to reindictment under Section 1512(c)(1) – but those practical considerations provide no reason to depart from the plain meaning of Section 1512(c). And, in any event, the “mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either.” *Pasquantino*, 544 U.S. at 358 n.4.

The *Miller* court also posits that the government’s reading is inconsistent with *Begay*. That conclusion is flawed in several respects. First, in considering whether driving under the

influence was a “violent felony” for purposes of the ACCA’s residual clause – which defines a “violent felony” as a felony that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury,” 18 U.S.C. § 924(e)(2)(B)(ii) – the Supreme Court in *Begay* addressed a statutory provision that has an entirely different structure from Section 1512(c)(2). *See, e.g., Sandlin*, 2021 WL 5865006, at *6 (distinguishing *Begay* on the ground that, unlike the ACCA residual clause, the “otherwise” in Section 1512(c)(2) is “set off by both a semicolon and a line break”); *United States v. Ring*, 628 F. Supp. 2d 195, 224 n.17 (D.D.C. 2009). Differently from the ACCA residual clause, the “otherwise” phrase in Section 1512(c)(2) “stands alone, unaccompanied by any limiting examples.” *Ring*, 628 F.Supp.2d at 224 n.17. In other words, the “key feature” in Section 924(e)(2)(B)(ii) at issue in *Begay* – “namely, the four example crimes,” 553 U.S. at 147 – is “absent” in Section 1512(c)(2). *Caldwell*, 2021 WL 6062718, at *14.

Second, *Miller*’s assertion that the meaning of “otherwise” was “[c]rucial” to the Supreme Court’s decision in *Begay* misapprehends *Begay*’s express analysis. The majority in *Begay* noted first that the “listed examples” in Section 924(e)(2)(B)(ii) – burglary, arson, extortion, or crimes involving explosives – indicated that the ACCA residual clause covered only similar crimes. *Begay*, 553 U.S. at 142. The majority next drew support from Section 924(e)(2)(B)(ii)’s history, which showed that Congress both opted for the specific examples in lieu of a “broad proposal” and described Section 924(e)(2)(B)(ii) as intending to encompass crimes “similar” to the examples. *Id.* at 143-144. Only in the final paragraph of that section of the opinion did the majority address the word “otherwise,” noting that the majority “[could] not agree” with the government’s argument that “otherwise” is “sufficient to demonstrate that the examples do not limit the scope of the clause”

because “the word ‘otherwise’ can (we do not say must, cf. post at [150-52] (Scalia, J. concurring in judgment)) refer to a crime that is similar to the listed examples in some respects but different in others.” *Id.* at 144. A tertiary rationale responding to a party’s argument where the majority refrains from adopting a definitive view of “otherwise” cannot plausibly be described as “crucial.” Rather, the majority’s “remarkably agnostic” discussion of “otherwise” in *Begay* explicitly noted that the word may carry a different meaning where (as here) the statutory text and context suggests otherwise. *Montgomery*, 2021 WL 6134591, at *11; *see also Caldwell*, 2021 WL 6062718, at *14 (declining to depart from the “natural reading” of “otherwise” as “‘in a different way or manner’” based on the discussion in *Begay*). In short, the majority in *Begay* actually “placed little or no weight on the word ‘otherwise’ in resolving the case.” *Montgomery*, 2021 WL 6134591, at *11.

Third, whatever the significance of the majority’s interpretation of “otherwise” in *Begay*, *Begay*’s ultimate holding demonstrates why this Court should not embark on imposing an extra-textual requirement within Section 1512(c)(2). The Supreme Court held in *Begay* that Section 924(e)(2)(B)(ii) encompassed only crimes that, similar to the listed examples, involve “purposeful, violent, and aggressive conduct.” 553 U.S. at 144-145. But “*Begay* did not succeed in bringing clarity to the meaning of the [ACCA’s] residual clause.” *Johnson v. United States*, 576 U.S. 591, 600 (2015). Whatever the merits of grafting an atextual (and ultimately unsuccessful) requirement in the context of the ACCA, that approach is unwarranted in the context of Section 1512(c)(2). In the nearly 20 years between Congress’s enactment of Section 1512(c)(2) and *Miller*, no reported cases adopted the document-only requirement urged by the Defendant.

c. Even if it agrees with *Miller*, this Court should not dismiss Count One of the Indictment, which merely tracks Section 1512(c)(2)'s operative statutory text.

In any event, even under the Defendant's theory, Count One sufficiently alleges a violation of Section 1512(c)(2) by tracking the provision's "operative statutory text." *Williamson*, 903 F.3d at 130. It is well-settled that it is "generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The indictment in this case therefore did not need to more specifically allege that the obstruction took the form of taking some action with respect to a document. *Id.*; see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 108-109 (2007). In other words, the indictment's allegations, by charging the operative statutory text, permissibly embrace two theories: (1) that defendants obstructed an official proceeding by taking some action with respect to a document; and (2) that defendants obstructed an official proceeding without taking some action with respect to a document. Even a ruling finding the second theory invalid would leave the first theory intact. For that reason alone, at this stage in the proceedings, dismissal of Count Four would be unwarranted.

WHEREFORE, the Government respectfully requests that the Court deny the Defendant's motion.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

/s/ Colleen D. Kukowski
Colleen D. Kukowski
Assistant United States Attorney
D.C. Bar No. 1012458

Colleen.Kukowski@usdoj.gov
601 D Street, N.W.
Washington, D.C. 20530
(202) 252-2646

CERTIFICATE OF SERVICE

I certify that a copy of the Government's Opposition to the Defendant's Motion to Dismiss Count Four of the Indictment for Failure to State an Offense was served on all counsel of record via the Court's electronic filing service.

/s/ Colleen D. Kukowski
COLLEEN D. KUKOWSKI
Assistant United States Attorney

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