IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-626 (PLF)**
	:	
DEREK COOPER GUNBY,	:	
	:	
Defendant.	:	
	:	

UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Defendant Derek Gunby ("Defendant") has filed a Motion ("Motion," ECF No. 78) to Dismiss Count One of the Indictment (ECF No. 69), a charge of obstruction of an official proceeding, in violation of 18 U.S.C. §1512(c)(2). The Defendant's Motion argues that (1) the text of Section 1512(c)(2) is not applicable to Gunby's conduct because Section 1512(c)(2) prohibits only those obstructive acts which relate to "a document, record, or other object" and because the certification of the electoral vote is not an "official proceeding," and (2) Section 1512(c)(2) is unconstitutionally vague because the term "corruptly" is unconstitutionally vague and the rule of lenity should be applied. Defendant's Motion fails to mention relevant and binding D.C. Circuit case law on these very issues, as well as the opinions of this Court and other district courts who have consistently rejected similar arguments. Accordingly, the Defendant's Motion should be denied.

PROCEDURAL BACKGROUND

On October 12, 2021, the United States charged Gunby by information with entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2);

disorderly conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and parading, demonstrating or picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G). *See* Information (ECF No. 14). Subsequently, on September 4, 2023, a grand jury charged Gunby in an indictment with the same four charges and the additional charge of obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2). *See* Indictment (ECF No. 69). On September 20, 2023, this Court gave Gunby leave to file any motions, including motions to dismiss and motions *in limine*, concerning the added Section 1512(c)(2) charge in Count One. *See* Fourth Amended Scheduling Order (ECF No. 77). On October 2, 2023, Gunby filed the Motion to Dismiss Count One of the Indictment (ECF No. 78).

FACTUAL BACKGROUND

The January 6, 2021 Attack on the Capitol

To avoid unnecessary exposition, the government refers to the general summary of the attack on the U.S. Capitol. *See* Statement of Offense (ECF No. 1-1), at 1.

Defendant Gunby's Role in the January 6, 2021 Attack on the Capitol

In summary, Defendant Gunby entered restricted Capitol grounds through the West side of the Capitol, which hosted some of the most chaotic and violent scenes that took place on January 6th. Although Gunby does not appear to have engaged in violence himself, videos recorded on his phone show that as Gunby went further into the restricted areas – up the Northwest stairs and pass the adjacent scaffolding, into the Northwest Courtyard, and into the Capitol Building itself – he noted the chaos ("people are climbing the scaffolding") and made clear his intent to help take over the Capitol and stop the certification ("we are trying to storm the Capitol Building… taking the country back" and "we're depending on Mike Pence to do the

right thing in certifying this vote? No."). Gunby also engaged with the mob, for instance, yelling, "Push forward!" to a crowd of rioters entering the Capitol Building and "Police stand down!" as he remained on restricted Capitol grounds and watched some of the most heinous attacks on officers that occurred on January 6th.

ARGUMENT

I. LEGAL STANDARD

An indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). This may be accomplished, as it is here, by "echo[ing] the operative statutory text while also specifying the time and place of the offense." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). An indictment need not inform a defendant "as to every means by which the prosecution hopes to prove that the crime was committed." *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

A pretrial motion may challenge "a defect in the indictment or information" if "the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B). A court's supervisory powers provide the authority to dismiss an indictment; however, "dismissal is granted only in unusual circumstances." *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015). An "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 operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.*

II. THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS COUNT ONE (OBSTRUCTION OF AN OFFICIAL PROCEEDING)

A. Defendant's argument that Section 1512(c)(2) prohibits only those obstructive acts which relate to "a document, record, or other object" is based almost entirely on a district court case the Defendant's Motion fails to mention was reversed and remanded by the D.C. Circuit over six months ago.

The Defendant's Motion asserts that Section 1512(c)(2) is not applicable to Gunby's conduct because Section 1512(c)(2) prohibits only those obstructive acts which relate to "a document, record, or other object." Motion at 2-8. To support this reading of the statute, Defendant repeatedly cites to *United States v. Miller*, 589 F. Supp. 3d 60, 63 (D.D.C. 2022) ("*Miller*"), *reconsideration denied,* 605 F. Supp. 3d 63 (D.D.C. 2022), and *rev'd and remanded sub nom. United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023) ("*Fischer*").[1] However, the Motion fails to mention that (1) *Miller* was reversed and remanded by the D.C. Circuit Court in April 2023 in the *Fischer* case, and (2) Defendant's argument that obstructive acts under Section 1512(c)(2) must to relate to "a document, record, or other object" was specifically addressed by the D.C. Circuit Court in *Fischer* and explicitly rejected.

In *Fischer*, the D.C. Circuit addressed a pretrial ruling that Section 1512(c)(2) "'requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.'" 64 F.4th at 334. Because the indictments in the cases on appeal, including the indictment in *Miller*, did not allege that the defendants "violated § 1512(c)(2) by committing obstructive acts related to 'a document, record,

[1] *Miller* is cited to in the Defendant's Motion as "*United States v. Miller*, No. 1:21-cr-119 (CJN), 2022 U.S. Dist. LEXIS 45696, at *40 (D.D.C. Mar. 7, 2022) [hereinafter "*Miller* Mem. Op."], *on appeal*, No. 22-3041 (D.C. Cir. 2022)."

or other object,' the district court dismissed the § 1512(c)(2) counts." *Id.* The government appealed and the D.C. Circuit reversed, holding Section 1512(c)(2) "encompasses all forms of obstructive conduct, including . . . efforts to stop Congress from certifying the results of the 2020 presidential election." *Id.* at 335. The court concluded that, "[u]nder the most natural reading of the statute, § 1512(c)(2) applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1)." *Id.* at 336 (concluding that this "broad interpretation of the statute—encompassing all forms of obstructive acts—is unambiguous and natural, as confirmed by the 'ordinary, contemporary, common meaning' of the provision's text and structure") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). This portion of the opinion was authored by Judge Pan and joined by Judge Walker, and thus constitutes *Fischer*'s binding holding. *Fischer* thus confirms that the indictment in this case need not have alleged obstructive acts related to a document, record, or other object. *See Fischer*, 64 F.4th at 332.

Additionally, this Court has repeatedly rejected Defendant's argument that the obstructive acts must relate to a document, record, or other object, and recently recognized that it was foreclosed by *Fischer*. *See* U*nited States v. Connell*, No. CR 21-0084 (PLF), 2023 WL 4314903, at *4 (D.D.C. July 3, 2023) ("In light of the D.C. Circuit's conclusion that Section 1512(c)(2) 'applies to all forms of corrupt obstruction of an official proceeding' other than conduct covered under Section 1512(c)(1), *United States v. Fischer*, 64 F.4th at 336, the Court rejects [Defendants'] arguments to the contrary"; *United States v. Puma*, 596 F. Supp. 3d 90, 106-08 (D.D.C. 2022) ("In sum, Section 1512(c)(2) gives defendants fair warning in plain language that a crime will occur in a different ('otherwise') manner compared to § 1512(c)(1) if the defendant 'obstructs, influences, or impedes any official proceeding' without regard to whether the action relates to documents or

records.") (citing *United States v. Caldwell*, 581 F. Supp. 3d 1, 21 (D.D.C. 2021)); *and United States v. Gossjankowski*, No. CR 21-0123 (PLF), 2023 WL 130817, at *8 (D.D.C. Jan. 9, 2023) ("in contrast to [Defendant]'s assertions, an individual can violate Section 1512(c)(2) without taking 'some action with respect to a document, record, or other object.'"). Accordingly, Count One should not be dismissed based on this thoroughly repudiated argument.

B. Defendant's argument that the Certification of the Electoral Vote is not an "official proceeding" was similarly rejected by the D.C. Circuit and this Court.

The Defendant's Motion also asserts that Congress's counting of the Electoral College votes, a constitutionally mandated process that includes certifying the next President and Vice President of the United States, does not constitute an "official proceeding" because it does not resemble a formal tribunal before which parties are compelled to appear and it is a "ceremonial" event. Motion at 8-13. However, the D.C. Circuit has read no such requirements or limitations into the definition of "official proceeding":

> The statutory definition of 'official proceeding' under § 1512(c)(2) includes a 'proceeding before the Congress.' 18 U.S.C. § 1515(a)(1)(B). Although appellees strain to argue that the Electoral College vote certification is not a 'proceeding before the Congress' because it does not involve 'investigations and evidence,' …we see no such limit in the ordinary meaning of the word 'proceeding.' …Appellees rely on a narrower, alternative definition of 'proceeding' to support their position — '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment; any procedural means for seeking redress from a tribunal or agency; and the business conducted by a court or other official body; a hearing.' …But that definition is inapt when interpreting the meaning of a 'proceeding before the Congress.' 18 U.S.C. § 1515(a)(1)(B). Notably, Congress follows statutory directives to complete the certification of the Electoral College vote…[which] reflect Congress's own intent that the vote certification shall be a 'proceeding before the Congress.'" 18 U.S.C. § 1515(a)(1)(B).

Fischer, 64 F.4th at 342–43; *see also Connell*, 2023 WL 4314903, at *4 ("contrary to [defendant's] assertion, there is no requirement that an 'official proceeding' must be a 'tribunal-like proceeding[]

relating to adjudication, deliberation, and the administration of justice.'"; *Puma*, 596 F. Supp. 3d at 97-102 ("The Court concludes that Congress' activities on January 6, 2021, clearly constitute a formal assembly akin to a hearing and thus fall within this definition of an 'official proceeding' before 'the Congress.'").

C. Section 1512(c)(2)'s use of the word "corruptly" is not unconstitutionally vague.

Defendant's Motion also assertion that Section 1512(c)(2)'s use of the word "corruptly" is unconstitutionally vague. *See* Motion at 13-20. The term "corruptly" is not unconstitutionally vague. The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from "depriv[ing] any person of life, liberty, or property, without due process of law." An outgrowth of the Due Process Clause, the "void for vagueness" doctrine prevents the enforcement of a criminal statute that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). Notably, the void for vagueness doctrine is narrow. The challenger must overcome a strong presumption that duly enacted statutes are constitutional. *See United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963) ("The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.").

Accordingly, the void for vagueness doctrine "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke*, 423 U.S. 48, 49 (1975) (per curiam). Rather, a statute is unconstitutionally vague only if it "proscribe[s] no comprehensible course of conduct at all." *United States v. Powell*, 423 U.S. 87, 92 (1975). "What

renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Indeed, district courts here have recognized a high bar for rendering a statute unconstitutionally vague and has advised:

> [N]o void for vagueness challenge is successful merely because a statute requires a person to conform his conduct to an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask. Instead, unconstitutional vagueness arises only if the statute specifies no standard of conduct at all.

United States v. Gonzalez, No. 20-cr-40-BAH, 2020 WL 6342948, at *7 (D.D.C. Oct. 29, 2020) (internal citation and quotation omitted); *see also United States v. Harmon*, No. 19-cr-395-BAH, 2021 WL 1518344, at *4 (D.D.C. Apr. 16, 2021) (finding that the defendant did not meet the "stringent standard" to prevail on a Rule 12 void-for-vagueness motion). As this Court has held, "[a] statutory term is not rendered unconstitutionally vague because it does not mean the same thing to all people, all the time, everywhere. . . . Rather, a statute is unconstitutionally vague if, applying the rules for interpreting legal texts, its meaning specifies no standard of conduct . . . at all." *Puma*, 576 F. Supp. 3d at 103 (quoting *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017)).

Although the D.C. Circuit did not resolve the meaning of the term "corruptly" in *Fischer*, both judges who joined the lead opinion determined that term is not unconstitutionally vague as used in Section 1512(c). *See Fischer*, 64 F.4th at 339-42 (Pan, J.) (explaining that, under any formulation, "'corrupt' intent exists at least when an obstructive action is independently unlawful," and that "appellees err in arguing that the term 'corruptly' 'takes on unconstitutional vagueness'

in circumstances outside the context of a judicial proceeding"); *id.* at 352 (Walker, J.) (explaining that his interpretation of "corruptly" "avoids vagueness").

This Court has agreed with those determinations by the D.C. Circuit. "The text of Section 1512(c), and the inclusion of the term 'corruptly,'" this Court concluded, "'gives fair notice of the conduct it punishes' and does not invite 'arbitrary enforcement.'" *Puma*, 576 F. Supp. 3d at 103 (quoting *Johnson*, 576 U.S. at 596). Further, as this Court recently observed, "[j]udges in this district have construed 'corruptly' to require 'a showing of dishonesty' or an 'improper purpose'[;] 'consciousness of wrongdoing'[;] or conduct that is 'independently criminal,' 'inherently malign, and committed with the intent to obstruct an official proceeding.'" *Id.* (quoting *Montgomery*, 578 F. Supp. 3d at 81; *Bozell*, 2022 WL 474144, at *6; *Caldwell*, 581 F. Supp. 3d at 19-20; and *Sandlin*, 575 F. Supp. 3d at 33) (alterations omitted).[2] "These constructions," this Court has concluded, "support a consensus that Section 1512(c) clearly punishes those who endeavor to obstruct an official proceeding by acting with a corrupt purpose, or by independently corrupt means, or both." *Id.* (cleaned up). Under any of these common-sense constructions, the term "corruptly" "not only clearly identifies the conduct it punishes; it also 'acts to shield those who engage in lawful, innocent conduct—even when done with the intent to obstruct, impede, or influence the official proceeding.'" *Id.* (quoting *Sandlin*, 575 F. Supp. 3d at 33). It presents no vagueness concern.

[2] Upon information and belief, every court in the January 6 context, aside from Judge Nichols, has promulgated jury instructions that has adopted some form of this language, often adding that the defendant must use unlawful means or act with an unlawful purpose. *See, e.g.*, *United States v. Sara Carpenter*, 21-cr-305-JEB (ECF 95); *United States v. Thomas Robertson*, 21-cr-34-CRC (ECF 86); *United States v. Dustin Thompson*, 21-cr-161-RBW (ECF 83); *United States v. Anthony Williams*, 21-cr-377-BAH (ECF 112); *United States v. Alexander Sheppard*, 21-cr-203-JDB (final instructions not available on ECF); *United States v. Elmer Rhodes, et al*, 22-cr-15-APM (ECF 396); *United States v. Doug Jensen*, 21-cr-6-TJK (ECF 97).

Additionally, as Judge Berman Jackson explained in a recent order denying multiple motions to dismiss,

> To the extent defendant point[s] to the presence of the term 'corruptly' in section 1512(c)(2) as the basis for her assertion that the statute is unconstitutionally vague, that argument has been foreclosed by the D.C. Circuit's decision in *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023). *Although the lead and concurring opinions in Fischer could not agree upon the meaning of 'corruptly,' both agreed that the indictment – similar to the one in this case – sufficiently alleged that defendant 'corruptly' obstructed, influenced, and impeded an official proceeding.*

United States v. Lee, 21-0303-2 (ABJ) (Aug. 14, 2023), Dkt. 107 (Order Denying Motions to Dismiss) at 18-19 (denying a motion to dismiss a Section 1512(c)(2) charge for vagueness in a case where indictment had similar language to the indictment here and the defendant was also charged with obstruction of an official proceeding and the same four misdemeanors charged in the instant case).[3] Recognizing that the court had not agreed upon a definition of "corruptly," Judge Walker explained that the indictments in that case nonetheless "should be upheld" because "[e]ach contains 'the essential facts constituting the offense charged.' That's because they allege that the Defendants 'corruptly obstruct[ed], influence[d], and impede[d] an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote." *Fischer*, 64 F.4th at 361 (Walker, J., concurring) (quoting Fed. R. Crim. P. 7(c)(1)). The same is true in the instant case – the indictment sufficiently alleges that the Defendant acted corruptly, and the Court should leave the exact definition of that term for another day, when the issue is properly

[3] Notably, the Motions to Dismiss denied in the *Lee* case were submitted by Defense Counsel in the instant case. *See* Dkt. 97, 98, and 100. Hence, Defense Counsel should have had notice of the *Fischer* decision and referenced it somewhere in Defendant's Motion to the Court.

before the Court.[4] *See United States v. Munchel*, No. 1:21-CR-118-RCL, 2023 WL 2992689, at *5 (D.D.C. Apr. 18, 2023) ("First, the 'corruptly' language in the statute is not undefined, vague, or limited to situations where a defendant personally benefited. While the lead opinion and concurring opinion in *Fischer* were at odds regarding the precise bounds of the corrupt mens rea, both agreed that . . . an indictment alleging a corrupt mens rea in the same manner as the one in this case survives a motion to dismiss.") (citing *Fischer*, 64 F. 4th 329).

D. The D.C. Circuit clearly rejected Defendant's argument that the rule of lenity should be applied.

Finally, the D.C. Circuit rejected the Defendant's rule of lenity argument. *See* Motion at 20-21. The Defendant submit that it is unfair to prosecute him for obstruction of an official proceeding because he was not on "fair warning" concerning the illegal nature of his conduct, due to alleged ambiguity of Section 1512(c)(2). The rule of lenity, however, applies "only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'" *Fischer*, 64 F.4th at 350 (quoting *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (1994)). In addressing the same argument from another January 6 defendant, the Circuit

[4] There is a pending appeal of the decision in *United States v. Robertson*, 610 F. Supp. 3d 229, 232 (D.D.C. 2022), which will directly address the parameters of the "corruptly" language in Section 1512(c)(2). *Robertson* was argued before a D.C. Circuit Court, three-judge panel on May 11, 2023, which included Judge Pan, Judge Cornelia Pillard, and Judge Karen L. Henderson. *See United States v. Robertson*, No. 22-3062 (D.C. Cir. May 11, 2023).

concluded, "the language of § 1512(c)(2) is clear and unambiguous. Restraint and lenity therefore have no place in our analysis." *Id.*[5]

[5] The various arguments in the Defendant's Motion have also been rejected by the majority of judges in this District. *See, e.g., United States v. Fitzsimons*, 21-cr-158, 605 F. Supp. 3d 132 (D.D.C. 2022) (Contreras, J.); *United States v. Bingert*, 21-cr-91, 605 F. Supp. 3d 111 (D.D.C. 2022) (Lamberth, J.); *United States v. Hale-Cusanelli*, 21-cr-37, ECF 82 (D.D.C. May 6, 2022) (McFadden, J.) (motion to dismiss hearing at pp. 4-8); *United States v. McHugh* (*McHugh II*), 21-cr-453, 2022 WL 1302880 (D.D.C. May 2, 2022) (Bates, J.); *United States v. Andries*, 21-cr-93, 2022 WL 768684 (D.D.C. Mar. 14, 2022) (Contreras, J.); *United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.); *United States v. Grider*, 21-cr-22, 585 F. Supp. 3d 21 (D.D.C. 2022) (Kollar-Kotelly, J.); *United States v. Nordean*, 21-cr-175, 579 F. Supp. 3d 28 (D.D.C. 2021) (Kelly, J.); *United States v. Montgomery*, 21-cr-46, 578 F. Supp. 3d 54 (D.D.C. 2021) (Moss, J.); *United States v. Mostofsky*, 21-cr-138, 579 F. Supp. 3d 9 (D.D.C. 2021) (Boasberg, J.); *United States v. Caldwell*, 21-cr-28, 581 F. Supp. 3d 1 (D.D.C. 2021) (Mehta, J.); *United States v. Sandlin*, 21-cr-88, 575 F. Supp. 3d 16 (D.D.C. 2021) (Friedrich, J.).

CONCLUSION

The Government respectfully requests that the Court deny Defendant's Motion to Dismiss Count One of the Indictment.

Respectfully submitted,

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