IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NUMBER 21-553-TFH-1**
	:	
THOMAS BALLARD	:	

ORDER

AND NOW, this day of , 2022, upon consideration of the Defendant's Motion to Dismiss Count Three of the Second Superseding Indictment, and the government's response thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

_____
HONORABLE THOMAS F. HOGAN
United States District Court Judge

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	:	
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DEFENDANT'S MOTION TO DISMISS
COUNT THREE OF THE SECOND SUPERSEDING INDICTMENT

Defendant Thomas Ballard respectfully submits this Motion to Dismiss Count Three of the Second Superseding Indictment, pursuant to 12(b)(3)(B) of the Federal Rules of Criminal Procedure. Count Three alleges that on or about January 6, 2021, Mr. Ballard "attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18," in violation of 18 U.S.C. § 1512(c) and 2 (Obstruction of an Official Proceeding and Aiding and Abetting). Count Three must be dismissed due to several defects. First, Congress's certification of the 2020 presidential election was not an "official proceeding" under § 1512(c). Second, § 1512(c)(2) functions as a limited catchall to § 1512(c)(1), an encompassing conduct that undermines an official proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Third, as charged, § 1512(c)(2) does not provide fair notice that "official proceedings" includes proceedings unrelated to the administration of justice, and the statute's mens rea requirement—that the criminal act be committed "corruptly"—lacks a limiting principle. As such, it is unconstitutionally vague as applied to Mr. Ballard. All of the facts and case law supporting this Motion are set forth in the accompanying Memorandum of Law, which is incorporated here by reference.

WHEREFORE, for all the reasons set forth above and in the accompanying Memorandum of Law, as well as any other reasons which may become apparent at a hearing or the Court deems just, Defendant Ballard respectfully submits that the Court dismiss Count Three of the Second Superseding Indictment.

Respectfully submitted,

/s/ Andrew C. Moon
ANDREW C. MOON
Assistant Federal Defender

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT THREE OF THE SECOND SUPERSEDING INDICTMENT

Mr. Ballard is charged by indictment for acts allegedly committed at the United States Capitol on January 6, 2021. In Count Three, the Second Superseding Indictment alleges that Mr. Ballard obstructed an official proceeding before Congress—"specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitutions of the United States and 3 U.S.C. §§ 15-18"—in violation of 18 U.S.C. § 1512(c)(2) and 2. Mr. Ballard respectfully requests that the Court dismiss Count Three because it is fatally flawed for several reasons.

First, the statutory language, legislative history, and legal precedent indicate that § 1512(c)(2) only prohibits the corrupt obstruction of tribunal-like proceedings before Congress related to the administration of justice. Because § 1512(c)(2) does not prohibit the obstruction of a proceeding before Congress such as the certification of the electoral college vote, Count Three fails to state an offense. Second, the conduct Mr. Ballard has been accused of committing cannot qualify as conduct that "otherwise obstructs, influences, or impedes" an official proceeding, as § 1512(c)(2) is married to and limited by § 1512(c)(1). As such, subsection (c)(2) prohibits only conduct that undermines an official proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Third, as charged, § 1512(c)(2) does not provide fair notice that "official proceedings" includes proceedings unrelated to the administration of justice,

and the statute's mens rea requirement—that the criminal act be committed "corruptly"—lacks a limiting principle. As such, it is unconstitutionally vague as applied to Mr. Ballard.

For these reasons, and in light of the fact that courts must exercise restraint when assessing the reach of criminal statutes and apply the rule of lenity in a defendant's favor, Mr. Ballard respectfully requests that the Court dismiss Count Three.

I. Background

Mr. Ballard is from Fort Worth, Texas. When Mr. Ballard heard President Donald Trump's call for people to come to the Capitol, he decided to drive from Texas to Washington D.C. to attend the political rally. Mr. Ballard walked to the Capitol and engaged in the protesting outside. Mr. Ballard never entered inside the building. He is not a member of a violent or extremist group. Rather, he is a lone individual who was persuaded by the rhetoric of President Trump and the Republican party and was led to believe that the 2020 election was stolen.

As a result of his alleged actions on January 6, 2021, Mr. Ballard stands charged in a Second Superseding Indictment with two counts of Civil Disorder, in violation of 18 U.S.C. § 231(a)(3) (Counts One and Two); Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. §1512(c)(2) and 2 (Count Three); Assaulting, Resisting, or Impeding Certain Officers, in violation of 18 U.S.C. 111(a)(1) (Count Four); Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon, in violation of 18 U.S.C. § 111(a)(1) and (b)(Count Five); Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A) (Count Six); Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(2) and (b)(1)(A) (Count Seven); Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C.

§ 1752(a)(4) and (b)(1)(A) (Count Eight); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Nine); and Act of Physical Violence in the Capitol Grounds or Buildings, in violation of 40 U.S.C. § 5104(e)(2)(F) (Count Ten). In Count Three, the government alleged that Mr. Ballard "attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote. Count Three is defective and must be dismissed.

On March 7, 2022, the Honorable Carl J. Nichols issued an order dismissing an identical charge against Garret Miller. *See United States v. Miller*, No. 21-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022). In an accompanying memorandum, Judge Nichols concluded "that § 1512(c)(2) must be interpreted as limited by subsection (c)(1), and thus 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." *Id.* at *15. Because nothing in the indictment against Miller "allege[d], let alone implie[d], that Miller took some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence Congress's certification of the electoral vote," the indictment failed to allege a violation of 18 U.S.C. § 1512(c)(2). *Id.*[1]

[1] As this Court certainly is aware, other courts within the District of Columbia have disagreed and denied motions to dismiss § 1512(c)(2) charges filed by similarly situated defendants. *See United States v. Grider*, No. 21-22, 2022 WL 392307 (D.D.C. Feb. 9, 2022); *United States v. Caldwell, et al.*, No. 21-28, 2021 WL 6062718 (D.D.C. Dec. 20, 2021); *United States v. Reffitt*, No. 21-cr-32, Order, Dkt. 81 (D.C.C. Dec. 29, 2021); *United States v. Montgomery and Knowlton*, No. 21-46, 2021 WL 6134591 (D.D.C. Dec. 28, 2021); *United States v. Sandlin,* No. 21-cr-88, 2021 WL 5865006 (D.D.C. Dec. 10, 2021); *United States v. Mostofsky*, No. 21-138, 2021 WL 6049891 (D.D.C. Dec. 21, 2021); *United States v. Nordean et al.*, No. 21-cr-2021 WL 6134595 (D.D.C. Dec. 28, 2021); *United States v. McHugh*, 21-cr-453, 2022 WL 296304 (D.D.C. Feb. 1, 2022).

II. Legal Standards

A. Motion to Dismiss Standard of Review

Rule 12 provides that a defendant may move to dismiss the pleadings on the basis of a "defect in the indictment or information." Fed. R. Crim. P. 12(b)(3)(B). In considering a Rule 12 motion to dismiss, "the Court is bound to accept the facts stated in the indictment as true." *United States v. Syring*, 522 F. Supp. 2d. 125, 128 (D.D.C. 2007); *United States v. Sampson*, 371 U.S. 75, 78 (1962). Accordingly, "the Court cannot consider facts beyond the four corners of the indictment." *United States v. Ring*, 628 F. Supp. 2d 195, 204 (D.D.C. 2009) (internal quotations omitted). Rather, the Court must limit its analysis to "the face of the indictment, and, more specifically, the language used to charge the crimes." *United States v. Akinyoyenu*, 199 F. Supp. 3d 106, 110 (D.D.C. 2016).

B. Exercise of Restraint in Interpreting Criminal Statutes

Any ambiguities in the scope of the federal criminal statute at issue and its application to Mr. Ballard's alleged conduct should be resolved with the aid of two interpretive rules: the exercise of restraint in assessing the reach of a federal criminal statute and the rule of lenity. *See Miller*, 2022 WL 823070, at *4-5. The exercise of restraint is necessary "both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (internal quotation marks omitted); *see also United States v. Arthur Anderson, LLP*, 544 U.S. 696, 703 (2005) (instructing courts to "exercise[] restraint in assessing the reach of [a statute]" and strictly construing § 1512(b)(2)'s broadly worded language). Thus, "due process bars courts from applying a novel construction of

a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 268 (1997).

Relatedly, under the rule of lenity, "where text, structure, and history fail to establish that the government's position is unambiguously correct," courts must "resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also Yates v. United States*, 574 U.S. 528, 547-48 (2015).

III. Discussion

Mr. Ballard is charged in Count Three of the Second Superseding Indictment with obstructing an official proceeding before Congress, in violation of 18 U.S.C. § 1512(c)(2). Count Three provides:

> On or about January 6, 2021, within the District of Columbia and elsewhere, Thomas Ballard, attempt to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. § 15-18.

Second Superseding Indictment, ECF No. 34. at 2. No other facts are provided in support of Count Three.

Mr. Ballard respectfully requests that the Court dismiss Count Three because it is fatally flawed for several reasons. First, the statutory language, legislative history, and legal precedent reflect that § 1512(c)(2) only prohibits the corrupt obstruction of tribunal-like proceedings before Congress related to the administration of justice. Because § 1512(c)(2) does not prohibit the obstruction of a proceeding before Congress like the certification of the electoral college vote, Count Three fails to state an offense. Second, the conduct Mr. Ballard has been accused of committing cannot qualify as conduct that "otherwise obstructs, influences, or impedes" an official proceeding, within the meaning of Section 1512(c)(2). Third, as charged, § 1512(c)(2) does not

provide fair notice that "official proceedings" includes proceedings unrelated to the administration of justice, and the statute's mens rea requirement—that the criminal act be committed "corruptly"—lacks a limiting principle. As such, it is unconstitutionally vague as applied to Mr. Ballard.

A. The proceedings before Congress on January 6, 2021 do not involve the "due administration of justice" and do not qualify as "official proceedings"

While the Electoral College certification process on January 6, 2021 was a solemn occasion, it was not an "official proceeding" as that term is used in the obstruction of justice statute. Under the Twelfth Amendment, the certification process on January 6th was nothing more than a ministerial function of Congress that involved counting votes. Congress was not engaged in a formal, fact-finding investigation or inquiry hearing wherein outside witnesses would be compelled to attend, documents subpoenaed, and sworn testimony was to be taken, or involved in any other hallmarks of a judicial-like proceeding or congressional inquiry. While the Electoral College certification was surely "Government business" and an "official function[ ]" of Congress, *see* 18 U.S.C. § 1752(a)(2) (Count Three), it was not an evidence-gathering, formal, judicial or quasi-judicial event that is at the heart and soul § 1512. Because Count Three alleges that Mr. Ballard obstructed the Electoral College certification, which does not constitute an "official proceeding," Count Three must be dismissed.

1. Neither the Constitution nor the Electoral Count Act contemplate any tribunal-like role for Congress in its certification of the electoral vote

The procedures in Congress for certifying the Electoral College vote are primarily a ministerial act. *See* Vasan Desavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. REV. 1653, 1659 (2002) (hereinafter "Desavan") ("The counting function appears to be a ministerial duty of tabulation imposed by the Constitution because each of the electoral colleges meet in their

respective states instead of at some central location."). The Constitution's directive is clear: "[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. Const. amend. XII; *see also* U.S. Const. art. II, § 1. In the case of electoral deadlock, the House of Representatives is to "immediately" choose the next President. U.S. Const. amend. XII. Nothing in the Constitution or the Electoral Count Act (ECA), 3 U.S.C. §§ 5–6, 15–18—the legislation that sets out the procedures for the certification of the electoral college vote—requires the Joint Session of Congress call witnesses to bring forth testimony or other evidence to carry out this "counting function."[2] Indeed, the Constitution's principles of immediacy "militates against the deliberative aspects of counting and the judging of the electoral votes." Desavan at 1719.

Historical practice since the dawn of the Republic confirms this. Prior to and after the passage of the ECA, there has never been an instance where Congress engaged in a full-blown investigation with the calling of witnesses to give testimony, requests for records, or consideration of other evidence in order to decide the electoral vote count. *See id.* at 1678–94 (providing a survey of all historical incidents where a problem arose with the electoral count). This held true during the Joint Session of Congress on January 6, 2021, when numerous objections concerning the electoral votes were overruled without consideration of any evidence or testimony. *See* 167 CONG. REC. H79, 105-06, 108, 111 (2021) and 167 CONG. REC. S16, 25, 32 (2021) (legislators requested, but did not receive, authority to open investigation regarding electoral certificates), S17

[2] Contrast this with the Grand Committee Bill of 1800, a piece of proposed legislation that would have created a committee to "sit with closed doors" and have the "power to send for persons, papers, and records to compel the attendance of witnesses" for determining the results of the electoral college vote. *See* Desavan at 1671 (quoting House Special Committee, Counting Electoral College Votes, H.R. Msc. Doc. 44-13, at 17 (1877)). Ultimately, the bill failed to pass and no efforts were ever made to grant Congress the same levels of power proposed therein. *See id.* at 1673.

(senators proposing pausing the count and creating a 15-member commission to investigate certain states' election counts).

In stark contrast, Congress *does* operate in an adjudicatory function through its power under the House Judging Clause found in Article I, Section 5 of the Constitution: "Each House shall be the Judge of the elections, returns and qualifications of its own members." This has been held to confer upon Congress certain powers that are "judicial in character." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929). But no such clause exists in any of the provisions related to the electoral count. This, at the very least, supports the notion that the Joint Session of Congress "does not have the authority to judge the elections, returns, and qualifications of the electors" and that it "is not a judicial tribunal with the power to investigate" the same. Desavan at 1752; *see also* 2 Joseph Story, Commentaries on the Constitution of the United States § 1464, at 317 (1833) (discussing the electoral college clause of the Constitution and how "no provision is made for the discussion or decision of any questions, which may arise") and 3 Joseph Story, Commentaries on the Constitution of the United States § 831, at 294–95 (1833) (explaining how, on the other hand, the House Judging Clause was viewed as necessary to safeguard the liberties of the people).

That the election certification proceedings have no relation to the administration of justice is clear from the language of the Constitution and historical practice. Accordingly, such proceedings do not fit into the realm of proceedings covered in 18 U.S.C. § 1512(c)(2).

2. Section 1512(c)(2) prohibits obstructing only "official proceedings," which are tribunal-like proceedings relating to the administration of justice

Section 1512(c) provides: "Whoever 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 . . . shall be fined . . . or imprisoned. . .

18 U.S.C. § 1512(c). Section 1515 provides that, "[a]s used in section[ ] 1512 . . . (1) the term "official proceeding" means:

> (A) a proceeding before a judge or court of the United States . . .;
> (B) a proceeding before the Congress;
> (C) a proceeding before a Federal Government agency which is authorized by law; or
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency . . .

Turning no further than to the statutory text, the term "official proceeding," when read in context within § 1512(c) and with the neighboring and related Chapter 73 statutes, connotes tribunal-like proceedings relating to adjudication, deliberation, and the administration of justice—all qualities absent from proceedings relating to the certification of the electoral vote. Yet even if the statutory text were ambiguous, the statute's legislative history further demonstrates that "official proceeding," as used in § 1512(c), does not include Congress's counting of the electoral vote.

i. The statutory text

To determine legislative intent, courts "always begin with the text of the statute." *United States v. Barnes*, 295 F.3d 1354, 1359 (D.C. Cir. 2002). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (internal quotes omitted)). The structure and plain language of § 1512, particularly in light of the Supreme Court's long-standing guidance on strictly construing penal statutes, support an interpretation of "official proceeding" as limited to proceedings in which evidence is taken,

whether before a court, Congress, or government agency. Under such a definition, the proceedings before Congress on January 6, 2021, would not qualify as official proceedings under the statute.

Few courts have grappled with the meaning of "official proceeding" and its surrounding terms. *See, e.g.*, *United States v. Ermoian*, 752 F.3d 1165, 1168, 1169 (9th Cir. 2013) ("Our circuit has never before addressed the meaning of the term 'official proceeding' as used in the obstruction of justice statute at 18 U.S.C. § 1512."). But every time the government has attempted to give any Chapter 73 "proceeding" a meaning other than the business of a legal tribunal, it has failed. In *Ermoian*, for example, the government argued that an FBI investigation qualified as an "official proceeding" under § 1512(c) and § 1515(a)(1)(C). But the Ninth Circuit rejected the government's argument, first analyzing the legal meaning of the term "proceeding" in the text of the statute and its use in the grammatical context of the "official proceeding" definition in Section 1515, and then turning to the broader statutory context.

In considering the definition of "official proceeding," the Ninth Circuit concluded the term, as used in § 1512, carries its "legal"—rather than lay—definition: ""[a] legal action or process; any act done by authority of a court of law; a step taken by either party in a legal case." *Id.* (quoting *Proceeding*, Oxford English Dictionary, *available at* http://www.oed.com). Turning to the grammatical structure, the appellate court found it "clear that the term connotes some type of formal hearing," as the "use of the preposition 'before' [a Federal Government agency] suggests an appearance in front of the agency sitting as a tribunal." *Id.* at 1170-71; *see id.* at 1171 (noting the Fifth Circuit similarly found the use of the word "before" implies that an "'official proceeding' involves some formal convocation of the agency in which parties are directed to appear" (quoting *United States v. Ramos*, 537 F.3d 439, 462–63 (5th Cir. 2008))).

The broader statutory context also "implie[d] that some formal hearing before a tribunal is contemplated." *Id.* The *Ermoian* court noted that § 1512 refers to "prevent[ing] the attendance or testimony of any person in an official proceeding"; "prevent [ing] the production of a record, document, or other object, in an official proceeding"; and "be[ing] absent from an official proceeding to which that person has been summoned by legal process." *Id*. at 1171–72 (quoting 18 U.S.C. §§ 1512(a)(1)(A)-(B), (a)(2)(B)(iv)). The statutory language—including the terms "attendance," "testimony," "production," and "summon[ ]"—further bolstered the Ninth Circuit's conclusion that "a criminal investigation is not an 'official proceeding' under the obstruction of justice statute." *Id.* at 1172.

Applying the analytical approaches in *Ermoian*, the text and context of § 1512 strongly suggest that a "proceeding before Congress" (1) does not include every action, series of actions, courses of conduct, or behavior of Congress, but some narrower universe of "proceedings," and (2) that the narrower universe is limited by the technical legal understanding of that word as connoting "business done in courts" and "an act done by the authority or direction of the court, express or implied." *See Ermoian*, 752 F.3d at 1172; *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (2012) ("Sometimes context indicates that a technical meaning applies. . . . And when law is the subject, ordinary legal meaning is to be *expected*," even though it "often differs from common meaning." (emphasis added)). Indeed, "proceeding before Congress" connotes "an appearance in front of the agency *sitting as a tribunal*," *Ermoian*, 752 F.3d at 1172 (emphasis added), and a proceeding in which "parties are directed to appear," *Ramos*, 537 F.3d at 462–63. And the frequent appearance of "terms 'attendance', 'testimony', 'production', and 'summon[]' when describing an official proceeding"

throughout § 1512 also "strongly implies that some formal hearing before a tribunal is contemplated." *Ermoian*, 752 F.3d at 1172.

But certification proceedings hardly rise to the level of "business done in courts" in that there is no formal investigation or consideration of facts and little to no discretion on the part of the Joint Session of Congress and its Presiding Officer. No person is directed to appear and give testimony during the certification proceedings. In fact, the interested party—the winner of the electoral college vote—does not appear to observe the proceedings.

Stepping back, both the title of the statute and the scheme of Chapter 73 as a whole demonstrate that "proceeding before Congress" specifically relates to tribunals and the administration of justice. *See I.N.S. v. Nat'l Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's test"); *NASDAQ Stock Mkt., LLC v. Sec. & Exch. Comm'n*, 961 F.3d 421, 426 (D.C. Cir. 2020) ("A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme[,] because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The title of the statute is explicit; the clear reach of § 1512 is to offenses involving the "Tampering with a witness, victim, or an informant." And almost every one of the statutes contained in Chapter 73 are related to the obstruction of the administration of justice and serve to protect participants in the administration of justice.

Specifically, §§ 1501 through 1504 address conduct toward process servers, extradition agents, and officers of the court or jurors. Section 1505 criminalizes the obstruction of congressional proceedings, specifically proceedings conducted pursuant to Congress's "power of inquiry," i.e., "inquir[ies] or investigation[s]." Section 1506 criminalizes theft or alteration of a record or process in any court, or acknowledgement of false bail. Section 1507 makes it illegal to

picket or parade near a federal courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Sections 1513, 1514, and 1514a address retaliatory conduct toward witnesses for attending or testifying in official proceedings or investigations preceding them. Other Chapter 73 statutes address investigations that precede such tribunal-like proceedings: § 1510 deals with obstruction of criminal investigations; §§ 1516 through 1518 criminalize obstruction of specific types of other investigations; and §§ 1519 and 1520 prohibit the destruction, alteration, or falsification of records during a federal investigation, or that relate to corporate audits. Section 1521 relates to retaliation against judges and investigators.

Congress therefore certainly knows how to criminalize in explicit terms demonstrations, threats, force, or violent conduct that interfere with certain types of proceedings. All of these laws in Chapter 73 are related to the obstruction of tribunal-like proceedings in the administration of justice (or explicitly relate to investigations that precede such proceedings) and serve to protect participants therein. It follows that in order to prove a violation of § 1512(c), there must be proof that the "official proceeding" the defendant allegedly obstructed was a proceeding related to the administration of justice in a similar setting. As such, the Court should conclude that the "official proceeding" — and more specifically, the "proceeding before Congress" — that was allegedly obstructed by Mr. Ballard must relate to a proceeding in which Congress is acting as a tribunal and which related to the administration of justice.

ii. Legislative intent

Because the text and context of §§ 1512(c)(2) and 1515 make clear that the counting of electoral votes does not qualify as an "official proceeding," the Court need not turn to legislative history to find that Count Three must be dismissed. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to

the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). But that history does support the same conclusion.

Section 1512(c) was passed as part of the Sarbanes- Oxley Act of 2002 ["SOX"], "[a]n Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. As the previous U.S. Attorney General described it, SOX "was prompted by Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen, had systematically destroyed potentially incriminating documents." Mem. of William P. Barr, dated June 8, 2018 ("Barr Mem"), p. 5, available at https://bit.ly/2RYVZ47; *see Yates*, 574 U.S. at 535–36. Upon a review of the statute's legislative history, the former Attorney General concluded that the plain purpose of §1512(c)(2) was a "loophole closer meant to address the fact that the existing section 1512(b) covers document destruction only where a defendant has induced another person to do it and does not address document destruction carried out by a defendant directly." *Id.*; *see Arthur Andersen LLP*, 544 U.S. at 707-07 (same).

Indeed, the legislative history supports the former Attorney General's interpretation of § 1512(c)(2)'s purpose. The Senate Judiciary Committee report described the Act's purpose as "provid[ing] for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain Federal investigations." S. REP. NO. 107-146, at 2 (2002). The Committee Report noted that much of Arthur Andersen's document destruction was "undertaken in anticipation of a SEC subpoena to Andersen for its auditing and consulting work related to Enron." *Id.* at 4. Congress was adamant that "[w]hen a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the

jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment." *Id.* at 6-7.

Section 1512(c) did not exist as part of the original proposal. S. 2010, 107th Cong. (2002). Rather, Senator Trent Lott introduced it as an amendment in July 2002. 148 Cong. Rec. S6542 (daily ed. July 10, 200). The Senator explained the purpose of adding § 1512(c):

> [This section] would enact stronger laws against *document shredding*. Current law prohibits obstruction of justice by a defendant acting alone, but only if a proceeding is pending and a subpoena has been issued for the evidence that has been destroyed or altered . . . [T]his section would allow the government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury subpoena. I think this is something we need to make clear so we do not have a repeat of what we saw with the Enron matter earlier this year.

Id. at S6545 (emphasis added). Senator Orin Hatch similarly explained that § 1512(c) would "close [] [the] loophole" created by the available obstruction statutes and hold criminally liable a person who, acting alone, destroys documents. *Id.*

In short, the Act's preamble and the legislative history show that § 1512(c) was aimed particularly at preventing corporations and their employees from destroying records relevant to federal securities investigations and was not intended to apply in all circumstances where a government function may have been impeded.

iii. The Department of Justice's Criminal Resource Manual supports this interpretation

The defense position on the meaning of "official proceeding" is also consistent with the Department of Justice's own interpretation, as reflected in their Criminal Resource Manual discussing the application of Section 1512:

> Section 1512 of Title 18 constitutes a broad prohibition against tampering with a witness, victim or informant. *It proscribes conduct intended to illegitimately affect the presentation of evidence in Federal proceedings or the communication of information to Federal law enforcement officers*.

CRIMINAL RESOURCE MANUAL, CRM 1729, Department of Justice (available at https://www.justice.gov/archives/jm/criminal-resource-manual-1729-protection-government-processes-tampering-victims-witnesses-or) (emphasis added). Indeed, as recently as three years ago, the government argued in federal court that the meaning of "official proceeding" in § 1512(c) is "limited to quasi-adjudicative investigations or inquiries that involve the making of findings of fact and the issuance of rulings or recommendations for government action." *United States v. O'Connell*, No. 17-cr-50, 2017 WL 9360868 at *5 (E.D. Wis. Sept. 5, 2017) (summarizing DOJ's interpretation of § 1512(c)).

iv. Summary

Obstruction of the certification of the Electoral College vote is not a crime under 18 U.S.C. § 1512(c). Indeed, no court has ever interpreted an "official proceeding" as that term is used in § 1512(c) to apply to a ceremonial function such as the certification of the Electoral College vote. The government is asking this Court to go well beyond the plain meaning of the term "proceeding," its use in the grammatical context of the "official proceeding" definition, the broader statutory context, and the legislative history to allow this prosecution to go forward. Mr. Ballard respectfully requests that the Court decline the invitation and dismiss Count Three.

B. Count Three fails to allege conduct that "otherwise obstructs, influences, or impedes any official proceeding"

Count Three must be dismissed because it fails to allege an *actus reus* that falls within 18 U.S.C. § 1512(c)(2). Section 1512(c)(2) prohibits only conduct that "otherwise obstructs, influences, or impedes any official proceeding." Congress's use of the word "otherwise" necessarily ties (c)(1) and (c)(2) together. *See Setser v. United States*, 566 U.S. 231, 239 (2012) (court must "give effect ... to every clause and word" of a statute). Indeed, the word "otherwise" implies a relationship between two things. *See Merriam-Webster.com/dictionary/otherwise* ("1: in

a different way or manner; 2: in different circumstances; 3: in other respects 4: if not"). And, in consideration of the plain meaning of "otherwise" in light of § 1512(c) as a whole, pursuant to the doctrine of *ejusdem generis*, as well as of the larger statutory context and the statute's legislative history, § 1512(c)(2) clearly is limited to conduct that undermines an official proceeding's truth-finding function through actions impairing the integrity and availability of evidence. The government therefore has failed to allege criminal conduct in Count Three.

1. *Ejusdem generis* demands that § 1512(c)(2) expands the reach of proscribed conduct in subsection (c)(1) but only to obstructive conduct regarding the integrity and production of documents and objects

The doctrine *ejusdem generis* demonstrates Congress's intention to create a clear interrelationship between § 1512(c)(1) and (c)(2), specifically to make the clause "obstructs, influences, or impedes," modify—likely enlarge—the language in the opening clause. "*[E]jusdem generis*[ ] counsels: Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words." *Yates*, 574 U.S. at 545; *see also United States v. Espy*, 145 F.3d 1369, 1370–71 (D.C. Cir. 1998) ("Where a general term follows a list of specific terms, the rule of ejusdem generis limits the general term as referring only to items of the same category."). In *Yates*, the Supreme Court held that fish jettisoned from a boat by a fisherman who wished to avoid detection of his having kept undersized fish did not qualify as "tangible objects" within the meaning of 18 U.S.C. § 1519. Section 1519 states that one who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of" certain matters is guilty of a crime. Like § 1512(c), § 1519 was enacted as

part of the Sarbanes-Oxley Act of 2002. *Id.* at 532. To apply § 1519 to sea creatures, the Court held,

> would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with an obstructive intent. *Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover ups, we conclude that a matching construction of § 1519 is in order*: A tangible object captured by § 1519, we hold, *must be one used to record or preserve information.*

Id. (emphasis added). Thus, § 1519 could not be properly read outside the context of SOX's financial and audit reforms. *See id.*at 541. And, within the statute itself, "tangible object" must be interpreted "by the company it keeps." *Id.* at 543. The Supreme Court noted that "the words immediately surrounding 'tangible object' in § 1519—'falsifies, or makes a false entry in any record [or] document]'—. . . cabin the contextual meaning of that term." *Id.* at 542. Because the last two verbs "falsify" and "make a false entry in" "typically take as grammatical objects records, documents, or things used to record or preserve information," "tangible object" should be read to refer "specifically to the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information." *Id.*

Under the related *ejusdem generis* canon, "tangible object," which "is the last in a list of terms that begins 'any record [or] document,'" could not be read "to capture physical objects as dissimilar as documents and fish." *Id.* at 543, 546. In reaching that interpretation of § 1519, *Yates* relied on *Begay v. United States*, 553 U.S. 137, 142-43 (2008). In *Begay*, the Court used *ejusdem generis* to determine what crimes were covered by the statutory phrase "any crime . . . that . . . is burglary, arson, or extortion, involves use of explosives, or *otherwise involves* conduct that presents a serious potential risk of physical injury to another." 553 U.S. at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added). *Begay* held that the "otherwise involves" provision covered "only similar crimes, rather than every crime that 'presents a serious potential risk of physical

injury to another.'" *Id*. Had Congress intended the latter "all encompassing meaning," "it is hard to see why it would have needed to include the [preceding statutory] examples at all." *Id*. [3]

Yates and *Begay* mean that § 1512(c)(2)'s reference to acts that "*otherwise* obstruct[], influence[], or impede[] any official proceeding," covers "only similar crimes" to those enumerated in § 1512(c)(1), i.e., "alter[ing], destroy[ing], mutilate[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." Thus, a fair reading of the statute is: "Whoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object with the intent to impair the object's integrity or availability for use in an official proceeding, or who engages in similar, but unenumerated, obstructive conduct involving the integrity and production of documentary evidence for an official proceeding," is guilty under § 1512(c). Such a reading of § 1512(c) takes into account that the term "otherwise" does two things: it creates a connection between (c)(1) and (c)(2), while it expands the reach of the verbs of proscription in subsection (c)(1).[4] Congress's

[3] Although Yates was a plurality opinion, Justice Alito's concurring opinion supports Mr. Ballard's position. According to Justice Alito, the statute's list of nouns, its list of verbs, and its title all stood out as showing that the statute in question did not reach the conduct of the defendant in that case. *Yates*, 574 U.S. at 549 (Alito, J., concurring). Regarding the nouns, Justice Alito considered the application of both *noscitur a sociis* and *ejusdem generis* to find that the term "tangible object" should refer to "something similar to records or documents." *Id*. at 549–50. In this case, § 1512(c)(1) refers to "a record, document, or other object." There is no allegation that Mr. Ballard interfered with any such item, much less any evidence. Justice Alito then looked at the verbs and noticed some glaring problems trying to apply those verbs to any tangible object. *Id*. at 551 ("How does one make a false entry in a fish?"). Here, because there was no evidence interfered with by Mr. Ballard, the verbs in § 1512(c) have no object to reference. Finally, Justice Alito pointed to the title of the statute: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," and noted, "This too points toward filekeeping, not fish." *Id*. at 552. As Mr. Ballard has already addressed above, the title of § 1512 clearly supports a finding that it was not intended to apply to all forms of obstructive conduct.

[4] Relying on *Begay* and *Yates*, former Attorney General Barr similarly explained:

intent was to proscribe obstructive conduct regarding the integrity and production of documents and objects that might otherwise slip through the cracks without a broad residual clause,[5] not to hand prosecutors a sweeping, over-lapping obstruction of justice statute equipped with a 20-year maximum penalty sledgehammer. Had Congress intended the "or otherwise obstructs. . ." language to create an unlimited obstruction catch-call crime, "it is hard to see why it would have needed to include the examples [in § 1512(c)(1)] at all." *Yates*, 553 U.S. at 142. Indeed, or why it would have any need for the rest of the obstruction crimes in Chapter 73.

2. The statutory context demonstrates § 1512(c)(2) is limited by subsection (c)(1)

> [W]hen Congress enumerates various specific acts constituting a crime and then following that enumeration with a residual clause, introduced with the words 'or otherwise,' then the more general action referred to immediately after the word 'otherwise' is most naturally understood to cover acts that cause a *similar kind* of result as the preceding listed examples, but cause those results in a *different manner*. In other words, the specific examples enumerated prior to the residual clause are typically read as refining or limiting in some way the broader catch-all term used in the residual clause.

Barr Mem. at 4.

[5] Some examples include: 1) A person feigns a COVID infection and quarantines himself to avoid producing documents under a time-sensitive subpoena by a grand jury. 2) A corporate executive, knowing that he could be indicted for fraud, hands over to the Government, in response to a subpoena, three tractor-trailers full of nongermane documents, knowing that the smoking-gun document is buried at the bottom, ensuring that prosecutors miss the statute of limitations. 3) A person under grand jury investigation with the IRS, knowing that a windstorm is about to hit his residence, sets all of his incriminating paperwork on a front porch table, where they proceed to be blown away, making them unavailable for an official proceeding. 4) A lawyer files multiple frivolous challenges to a court order or subpoena to avoid document production, admitting that she filed the litigation for no other reason but to delay handing over documents for use in an official proceeding. 5) A person, knowing that their iPhone contains incriminating texts messages, deletes selected, non-incriminating texts, which changes the context of other texts messages, deliberately making them look less incriminating to the grand jury. 6) Knowing that a plaintiff, because of a mandatory deadline, has one hour left to hand-file a make-or-break pleading at the courthouse, a person slashes the plaintiff's tires, preventing him from making the filing, which causes the plaintiff's case to be dismissed. 7) A corporate fraud suspect changes the company password to computer files, which have been subpoenaed, preventing access by investigators and others.

A thorough review of the entire statutory context proves that the word "otherwise" was intended by Congress to marry §§ 1512(c)(1) and 1512(c)(2) together. The most obvious contextual evidence of this is § 1512's repeated use of the disjunctive "or" throughout the statute as a way of demarcating plainly separate and independent conduct. In fact, the word "or" is used nine times in 18 U.S.C. § 1512 to create twenty separate and independent methods of obstructing justice. For example, "or" is used in § 1512(a)(1) to demarcate three separate methods of obstructing justice by murder or attempted murder.[6] Similarly, "or" twice appears in § 1512(a)(2), effectively demarcating seven distinct methods of obstruction through threats or physical force.[7]

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[6] (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).
18 U.S.C. § 1512(a)(1)(A)-(C).

[7] (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).
18 U.S.C. § 1512(a)(2)(A)-(C).

In stark contrast, Congress, unlike in twenty surrounding places, inserted "otherwise" between subsections (c)(1) and (c)(2) of § 1512(c).

As the Court can see, when Congress set out to create plainly separate and independent acts of obstruction of justice, it did so twenty times by carefully inserting the word "or" (without the word "otherwise") between sections. And after using "or" to unambiguously demarcate twenty plainly separate and independent methods of obstructing justice, Congress instead inserted the word "otherwise" between subsections (c)(1) and (c)(2), thus intending the term to have a statutory constructive purpose different than underscoring disjunction between the subsections. Indeed, without the word "otherwise," (c)(1) and (c)(2) describe plainly separate and independent conduct. Use of "otherwise" could not have been included in the statute for the purpose of underscoring disjunction.

The statutory context further suggests that subsection (c)(2) has a narrow scope, as found by the *Miller* court. The other subsections within § 1512 criminalize "discrete conduct in narrow contexts," including subsection (c)(1), which prohibits an individual from taking certain specific actions—"a narrow, focused range of conduct." *Miller*, 2022 WL 823070, at *11. It follows that subsection (c)(2)—"nestled in the middle of the statute"—has a narrow focus as well. *Id.* at *12. Such a narrow reading avoids "substantial superfluity problems," where "at least eleven subsections—§§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(C), 1512(b)(2)(D), and 1512(d)(1)—" would run afoul of a broad subsection (c)(2). *Id.*

Former Attorney General William Barr noted this superfluity problem with an all-encompassing catch-all interpretation of § 1512(c)(2):

> [I]t is clear that use of the word 'otherwise' in the residual clause [of Section 1512(c)(2)] expressly links the clause to the forms of obstruction specifically

> defined elsewhere in the provision. Unless it serves that purpose, the word 'otherwise' does no work at all and is mere surplusage. [An] interpretation of the residual clause as covering any and all acts that influence a proceeding reads the word 'otherwise' out of the statute altogether. But any proper interpretation of the clause must give effect to the word 'otherwise'; it must do some work.

Barr Mem. at 4. Not only would a broad reading of (c)(2) "render all the specific terms in clause (c)(1) surplusage[,] . . . it would swallow up all the specific prohibitions in the remainder of § 1512 — subsections (a), (b), and (d)." *Id.* And, as Mr. Barr continued, "[m]ore than that, it would subsume virtually all other obstruction provisions in Title 18. . . . It is not too much of an exaggeration to say that, if § 1512(c)(2) can be read as broadly as being proposed, then virtually all Federal obstruction law could be reduced to this single clause." *Id.*; *see also Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

3. The historical development of § 1512(c)(2)

The *Miller* court found further support for its conclusion that Congress intended subsection (c)(2) to be narrow in the historical development of § 1512. *See* 2022 WL 823070, at *12-13. Prior to 2002, when § 1512(c) was enacted, § 1512 made criminal only actions directed at causing or influencing "another person" to take improper action. *Id.* at *12 (citing 18 U.S.C. § 1512). Section 1512(c) filled a gap in the statutory scheme by making it unlawful for a person to take certain action directly. *See id.* In so doing, subsection (c) "took much of its language from § 1512(b)." *Id.* at *13 (comparing the two subsections). Thus, "by drawing heavily from a single provision out of four already included in subsection (b), Congress intended subsection (c) to have a narrow, limited focus—just like subsection (b)(2)(B)." *Id.*

In addition, just three months after enacting subsection (c), Congress added § 1512(a)(2)(B), which is nearly identical to § 1512(b)(2), but with an added element of physical

force or the threat of physical force. If subsection (c) is construed as broad, subsection (a)(2)(B) would be superfluous. Yet Congress deemed it necessary to add subsection (a)(2)(B) shortly after enacting subsection (c). *See id.*

4. The legislative history of § 1512(c)(2)

As detailed above, § 1512(c)'s legislative history resolves any ambiguity surrounding the meaning of the subsection. *See infra* III(A)(2)(ii) at 17. Because, in the wake of the Enron scandal, "then-existing criminal statutes made it illegal to cause or induce *another* person to destroy documents, but did not make it illegal to do so by oneself," *Miller*, 2022 WL 823070, at *14, Congress passed § 1512(c) to prevent corporations and their employees from destroying records relevant to federal securities investigations. *See infra* p. 17 (quoting former Attorney General Barr). Indeed, as former Attorney General Barr stated, "The legislative history . . . confirms that § 1512(c) was not intended as a sweeping provision supplanting wide swathes of obstruction law, but rather as a targeted gap-filler designed to strengthen prohibitions on the impairment of evidence." Barr Memo at 6.

Thus, not only does the legislative history demonstrate that § 1512(c) targets actions affecting proceedings with characteristics of a tribunal, at which evidence is taken and matters are adjudicated or deliberated, but also that Congress intended subsection (c)(2)—along with the rest of § 1512—to have a narrow focus, targeting only actions similar to those listed in (c)(1).

In sum, the canons of construction employed by the Court in *Begay* and *Yates*, and the text, structure, and legislative history of § 1512(c)(2), all support a holding that the "otherwise" clause in § 1512(c)(2) must be construed in a similar vein to the terms that are in (c)(1). *See Miller*, 2022

WL 823070, at *6 ("The text, structure, and development of the statute over time suggest that [§ 1512(c)(1) limits the scope of § 1512(c)(2)]."). [8] Former Attorney General Barr summed it up well:

> [U]nder the statute's plain language and structure, the most natural and plausible reading of 1512(c)(2) is that it covers acts that have the same kind of obstructive impact as the listed forms of obstruction — i.e., impairing the availability or integrity of evidence — but cause this impairment in a different way than the enumerated actions do. Under this construction, then, the "catch all" language in clause (c)(2) encompasses any conduct, even if not specifically described in 1512, that is directed at undermining a proceeding's truth-finding function through actions impairing the integrity and availability of evidence.

Barr Mem. at 4-5. Thus, in order for Count Three to sufficiently allege a violation, it must allege in some way that Mr. Ballard's conduct undermined a proceeding's "truthfinding function through actions impairing the integrity and availability of evidence." Because no such allegation exists in the Second Superseding Indictment, this Court should dismiss Count Three of the Second Superseding Indictment alleging a violation of § 1512(c)(2).

C. Section 1512(c)(2) is unconstitutionally vague as applied to Mr. Ballard

Count Three of the Second Superseding Indictment must also be dismissed because, as charged, § 1512(c)(2) does not provide fair notice that "official proceedings" include proceedings unrelated to the administration of justice, and the statute's mens rea requirement—that the criminal act be committed "corruptly"—lacks a limiting principle. As such, the statute is unconstitutionally vague as applied to Mr. Ballard.

The vagueness doctrine, a derivative of due process, protects against the ills of laws whose "prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In

[8] The *Miller* court further concluded that, "[a]t the very least," the statute was "seriously ambigu[ous]," and the court therefore must exercise restraint and resolve the ambiguity in favor of the defendant." 2022 WL 823070, at *15. "Applying these principles here," the court reasoned, "'gives citizens fair warning of what conduct is illegal, ensuring that [an] ambiguous statute[] do[es] not reach beyond [its] clear scope." *Id.* (quoting *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (Bibas, J., concurring)).

prohibiting overly vague laws, the doctrine seeks to ensure that persons of ordinary intelligence have "fair warning" of what a law prohibits, prevent "arbitrary and discriminatory enforcement" of laws by requiring that they "provide explicit standards for those who apply them," and, in cases where the "statute abut(s) upon sensitive areas of basic First Amendment freedoms," avoid chilling the exercise of First Amendment rights. *Id.* at 108–09; *see also United States v. Bronstein*, 849 F.3d 1101, 1106 (D.C. Cir. 2017). In view of this last interest, the Constitution requires a " 'greater degree of specificity' " in cases involving First Amendment rights. *Smith v. Goguen,* 415 U.S. 566, 573 (1974)); *see Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. 489, 500 (1982) (if the law at issue "interferes with the right of free speech or of association, a more stringent vagueness test [] appl[ies]"). "The inquiry is undertaken on a case-by-case basis, and a reviewing court must determine whether the statute is vague as-applied to the affected party." *United States v. Fullmer*, 584 F.3d 132, 152 (3d Cir. 2009). If the government's novel interpretation of § 1512(c)(2) is applied here, it is unconstitutionally vague for the following reasons.

1. Section 1512(c)(2) does not provide fair notice that "official proceeding" includes proceedings unrelated to the administration of justice

As indicated above, § 1512(c)(2) has never been used to prosecute a defendant for the obstruction of an "official proceeding" unrelated to the administration of justice, i.e., a proceeding not charged with hearing evidence and making factual findings. Moreover, there is no notice, much less fair notice, in § 1512(c)(2) or in any statute in Chapter 73 that a person may be held federally liable for obstructing a proceeding in a way that does not interfere with the availability or integrity of evidence. Accordingly, the government's interpretation of § 1512(c)(2) here is void-for-vagueness as applied to Mr. Ballard.

In this case, the void-for-vagueness doctrine's function of guarding against arbitrary or discriminatory law enforcement is worth elaborating. As Justice Gorsuch memorably put it:

> Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of 'pretended' crimes . . .as one of their reasons for revolution. . . Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

Sessions v. Dimaya, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring).

The concern about vagueness-enabled arbitrary enforcement is manifested here. It takes two forms, which might be called specific and general arbitrariness. At a general level, the government's enforcement of § 1512(c)(2) against Mr. Ballard is arbitrary because, prior to January 6, the government had never charged "obstruction of a congressional proceeding," under any statute, where the "proceeding" was not an investigation or inquiry. Accordingly, the government's election to put a new interpretation on the statute for a select group of related cases raises questions about discriminatory law enforcement. Those questions are only underlined by the patently political nature of the circumstances of the offense, as well as the criminalization of Mr. Ballard's First Amendment rights to political speech, assembly, and to petition the government for a redress of grievances. U.S. Const. amend I; *Hoffman Estates*, 455 U.S. at 500.

Perhaps more serious is the specific arbitrariness enabled by the government's vague interpretation. Hundreds of January 6 defendants entered the Capitol Building, many of whom made statements about their intent to demonstrate against Congress inside the building. Yet some are charged with traditional misdemeanor "parading" offenses under Title 40 carrying six-month maximum sentences, while others are charged with felony obstruction carrying a 20-year maximum. Consider *United States v. Kevin Cordon*, 21-cr-277 (D.D.C. 2021). Cordon was charged with obstruction of an official proceeding under Section 1512(c)(2). His criminal complaint shows that he entered the Capitol Building and, after January 6, made a statement to the

press giving direct insight into his intent. Among other things, he stated, in writing, that he entered the Capitol to "take back our democratic republic. . .We're not going to take this lying down. . . We're taking our country back. This is just the beginning." 21-cr-277, ECF No. 1-1. Yet, the government dropped its obstruction charge against Cordon.

Or consider James Little. According to the government's sentencing memorandum, Mr. Little:

> (1) "unlawfully entered the [Capitol] although he admitted seeing law enforcement officers deploy tear gas and supposedly fire rubber bullets to disperse rioters"; (2) "penetrated the Capitol all the way to the Senate Gallery where he took photographs of himself and sent the photographs to trusted friends," (3) "fist bumped other rioters in celebration of their breach of the Capitol"; (4) while in the Capitol, sent text messages "in which he boasted, 'We just took the Capitol,'" and "'We are stopping treason! Stealing elections is treason! We're not going to take it anymore!'"; and (5) in November 2020, "uploaded a video titled, 'We Won't Beat Them Next Time! There Won't Be A Next Time! It's Now Or Never!' to a YouTube channel he maintains in which he threatened civil war and gun violence against political opponents of the former President if the Supreme Court did not intervene in the election on the former President's behalf and once more referenced civil war between during a January 13, 2021 interview."

United States v. James Little, No. 21-cr-315, ECF No. 31. Mr. Little pled guilty to a single count of parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G).

Or consider Anthony Mariotto. According to the government's sentencing memorandum, Mr. Mariotto:

> (1) " entered the Capitol building through an obviously damaged Senate Wing Door approximately five minutes after it was breached"; (2) " entered and remained in . . . the Senate Gallery, took a selfie-style photograph . . . and posted it to Facebook with the caption "I'm in [sic] And there are just a few [sic] This is our house," and deleted his Facebook account soon thereafter"; (3) "was present for and recorded assaults against the police inside the Capitol building"; (4) while walking through several hallways, . . . chanted "Where Are the Traitors" and attempted to open multiple closed doors"; and (5) "provided a post-arrest interview to a local news station minimizing his conduct on January 6, 2021.

United States v. Anthony Mariotto, No. 21-94, ECF No. 35. Mr. Mariotto also pled guilty to a single count of parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G).

Or consider Glenn Wes Lee Croy, who also pled guilty to a single count of parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G). During Mr. Croy's sentencing, Chief Judge Beryl A. Howell reviewed the facts of the case, noting that Croy "traveled all the way from Colorado," taunted and yelled at officers, and "intentionally . . . followed [the crowd] into the Capitol knowing it was unlawful to be inside the Capitol Building" and knowing the "door he entered . . . had been . . . kicked down [by rioters]." *United States v. Glenn Wes Lee Croy*, No. 21-cr-162, Dkt. 63 at 82 (D.D.C. 2021). Judge Howell continued:

> He took advantage of this opportunity to enter the Capitol even while he knew officers were trying to keep them out because there were very important proceedings going on inside the Capitol that day. And then, once entering the Capitol Building for the first time, he joined this crowd in letting them know that they did not hav49e control over the building, chanting, "Whose house?" "Our house" -- as he was in the building and walking through the halls. . . .

Id. at 83. Even after Croy left the Capitol building, he soon reentered a second time. *See id.* at 85. And while he did not physically attack any police officer, he "engaged in a verbal altercation outside of the Capitol Building with officers," "[took] advantage of the damage that other rioters effected to get into the Capitol Building," "engage[d] in chants that were going on while he was inside the building," "force[d] police to retreat two to three times as part of the crowd inside the Capitol Building," and "brag[ged] about his actions" in private messages to friends. *Id.* at 85-86.

In assessing Croy's actions, Judge Howell suggested that little separated a misdemeanor "parading in the Capitol" offense and felony "obstruction" of Congress where "[i]t strains credulity . . . for the defendant to claim he aimlessly followed the crowd to the Capitol that day; and that the

evidence shows his lack of intent to do something in the Capitol that day, his lack of understanding where he was in the Capitol, and his herd mentality, rather than a desire to execute a plan to stop the vote that was taking place in the Senate. This . . . was a defendant who . . . followed this crowd into the Capitol hearing all around them what was going on." *Id.* at 84. Indeed, if Croy did not intend to impede or influence Congress, what was the purpose of the "parading, demonstrating, or picketing" inside the Capitol Building? In effect, § 1512(c)(2)—as charged by the government—is merely a misdemeanor masquerading as a felony. Insofar as it alleges that Mr. Ballard obstructed a type of "official proceeding" nowhere identified in §§ 1512(c)(2) and 1515 and alleges a crime conceptually indistinguishable from a misdemeanor parading offense, Count Three must be dismissed under the Due Process Clause of the Fifth Amendment.

2. As charged in the Second Superseding Indictment, § 1512(c)(2)'s use of "corruptly" is void for vagueness

As charged, the term "corruptly" in Section 1512(c)(2) fails to clearly define prohibited conduct. Indeed, the allegation of "corruptly" is all that takes the charge against Mr. Ballard from an offense punishable up to six months imprisonment to an offense punishable by up to twenty years imprisonment. *Cf.* Second Superseding Indictment, Count Nine (charging Mr. Ballard with *willfully and knowingly* engaging in disorderly and disruptive conduct in a Capitol building with the intent to impede, disrupt, and disturb the orderly conduct of a session of Congress, a violation of 40 U.S.C. § 5104(e)(2)) and Count Three (charging Mr. Ballard with *corruptly* obstructing, influencing, and impeding an official proceeding before Congress, in violation of 18 U.S.C. § 1512(c)(2)). Accordingly, the D.C. Circuit's decision in *United States v. Poindexter* demands that Count Three be dismissed for vagueness.

In *Poindexter*, a former U.S. national security advisor was prosecuted for his role in the Iran-Contra Affair, and was found guilty of lying to or misleading Congress, in violation of 18

U.S.C. § 1505, which provides: "Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House . . ." shall be fined or imprisoned. The defendant appealed, arguing "use of the term 'corruptly' renders the statute unconstitutionally vague as applied to his conduct." *Poindexter*, 951 F.2d 369, 377 (D.C. Cir. 1991).

The D.C. Circuit agreed, holding the term "corruptly" as used in § 1505 "is too vague to provide constitutionally adequate notice that it prohibits lying to Congress." *Id*. at 379. In so ruling, the court relied on the definitions of "corrupt" and "corruptly" applied in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990):

> '[C]orruptly' is the adverbial form of the adjective 'corrupt,' which means 'depraved, evil: perverted into a state of moral weakness or wickedness ... of debased political morality; characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements. A 'corrupt' intent may also be defined as 'the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others.

Poindexter, 951 F.2d at 378 (quoting *North*, 910 F.2d at 881–82). The court noted several problems with the use of the term "corruptly." For one, "on its face, the word 'corruptly' is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id*. In that case, "'corruptly influencing' a congressional inquiry d[id] not at all clearly encompass lying to the Congress," whereas such conduct was a clear violation of § 1001, the False Statements statute.'" *Id.* The dictionary definition, themselves vague, offer no help: "[w]ords like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific – indeed they may be less specific – than 'corrupt.'" *Id*. at 378-79.

Searching for a way out of the mess, the court observed that the verb "corrupt" "may be used transitively ('A corrupts B,' i.e., 'A causes B to act corruptly') or intransitively ('A corrupts,'

i.e., 'A becomes corrupt, depraved, impure, etc.')." *Id.* at 379. It similarly determined that § 1505's adverb "corruptly" could take on either a transitive or intransitive meaning. Accordingly, to avoid the unconstitutional vagueness in a value-laden interpretation (e.g., "immoral"), the court decided that § 1505 "favor[ed] the transitive reading." *Id.* Thus, the *Poindexter* court construed § 1505 "to include only 'corrupting' another person by influencing him to violate his legal duty." *Id.* But even that definition of "corruptly" may suffer from unconstitutional vagueness where the defendant's purpose is not "to obtain an improper advantage for himself or someone else":

> [S]omeone who influences another to violate his legal duty [but] to cause the enactment of legislation that would afford no particular benefit to him or anyone connected to him. Or, as the Chief Judge instanced at the oral argument of this case, there "would be some purposes that would be corrupt and some that wouldn't be . . . Suppose the [defendant acted] to protect the historical reputation of some historical figure that has been dead for 20 years and he decides that he doesn't want to mar that person's reputation."

Poindexter, 951 F.2d at 386. Thus, the appellate court held, by failing to "provide constitutionally adequate notice that it prohibits lying to the Congress," § 1505 was unconstitutionally vague as applied to the defendant's conduct.

Following *Poindexter*, Congress amended § 1515 to clarify that, "[a]s used *in Section 1505*, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering or destroying a document or other information." § 1515(b) (emphasis added). However, Congress did not amend § 1515 to define "corruptly" as used in § 1512. In addition, the phrase "improper purpose" was held unconstitutionally vague in *Poindexter*. 951 F.2d at 379 ("Words like

'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'").[9]

As in § 1505, "in the absence of some narrowing gloss," the term "corruptly" in § 1512(c)(2) leaves a layperson "guess[ing] at its meaning." More broadly, the most widely accepted definition of "corrupt" intent, as understood in the obstruction statutes, is acting with the intent to obtain an improper advantage for oneself or an associate. *United States v. North*, 910 F.2d 843, 882, 285 U.S. App. D.C. 343 (D.C. Cir. 1990), *opinion withdrawn and superseded in other part on reh'g*, 920 F.2d 940, 287 U.S. App. D.C. 146 (D.C. Cir. 1990) (holding that a "corrupt" intent means "the intent to obtain an improper advantage for oneself or someone else. . ."); *United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998) ("[A] well-accepted definition of corruptly" is "to act with the intent to secure an unlawful advantage or benefit either for one's self or for another"); *United States v. Dorri*, 15 F.3d 888, 895 (9th Cir. 1994) (holding that "corruptly" element was satisfied by evidence that defendant acted "with a hope or expectation of [a] benefit to one's self"); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) ("Corruptly" means "done with the intent to secure an unlawful benefit either for oneself or another"); *United States v. Reeves*, 752 F2d 995, 1001 (5th Cir. 1985) ("To interpret 'corruptly' [in obstruction statute] as meaning 'with an improper motive or bad or evil purpose' would raise the potential of overbreadth' in this statute because of the chilling effect on protected activities. . . Where 'corruptly' is taken to require an

[9] *Poindexter* is still good law in this Circuit. *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996) (affirming § 1512 conviction because the defendant had committed "transitive" corruption in the *Poindexter* sense by persuading a witness to violate their legal duty to testify truthfully in court); *see also United States v. Kanchanalak*, 37 F. Supp. 2d 1, 4 (D.D.C. 1999) (Friedman, J.) (finding that even after Congress amended § 1515 in the wake of *Poindexter* to define "corruptly" for purposes of § 1505, § 1515's definition of "corruptly" to mean acting with an "improper purpose" is still unconstitutionally vague under *Poindexter*).

intent to secure an unlawful advantage or benefit, the statute does not infringe on first amendment guarantees and is not 'overbroad.'").

But the Second Superseding Indictment does not allege that Mr. Ballard "obstructed" the joint session by 'corrupting' another person by influencing him to violate his legal duty," *Poindexter*, 951 F.2d at 385, or that he somehow acted to gain a material advantage for himself or an associate. Rather, it appears that, to the government, "corruptly" means nothing more than "wrongfully" or "with the intent to impede or influence." Such use of the term is unconstitutionally vague under *Poindexter*. As argued, this interpretation contributes to the collapse of any distinction between a misdemeanor parading-in-Congress offense and felony obstruction of an official proceeding. Indeed, it is not at all clear that § 1512(c)(2) encompasses the conduct with which Mr. Ballard has been charged. The term "corruptly" simply lacks definition and remains too vague to have provided Mr. Ballard with notice that his conduct was indeed corrupt.

Compounding the failure to notify laymen of its proscribed conduct, the statute, as it has been utilized by the government post-January 6th, will have a chilling effect on protected speech due to the ambiguity of the statute's reach. The government's decisions to selectively prosecute Mr. Ballard and other January 6th protestors—as opposed to protestors engaged in comparable conduct at prior politic events—demonstrate the discretion based on content permitted by the statute's vagueness. *See Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries

to pursue their personal predilections." (internal quotation marks and citation omitted) (alteration in original)).

The Supreme Court has held that scienter requirements in criminal statutes may "'alleviate vagueness concerns,' because a mens rea element makes it less likely that a defendant will be convicted for an action that he or she committed by mistake.'" *Fullmer*, 584 F.3d at 152. The vagueness of the mens rea element itself in the statute at issue here makes the unconstitutionality of § 1512(c)(2) all the more compelling. Allowing the government to proceed on Count Three would criminalize all attempts to "influence" congressional proceedings — "an absurd result that the Congress could not have intended in enacting the statute." *Pointdexter*, 951 F.2d at 377–78. This echoes what the Supreme Court alluded to in *Yates*, noting, "It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping." *Yates*, 574 U.S. at 546.

Not surprisingly then, there has never been a case where someone has been charged with the "corrupt" obstructing, influencing, or impeding of an official proceeding based on disruptive behavior. To successfully maintain this charge, without more statutory guidance, a certain amount of imaginary line drawing is necessary to designate conduct as "corrupt." But the need for such creativity demonstrates the excessive discretion left with the government in its charging, and the ultimate vagueness of the statute as applied to these unique circumstances.

D. The rule of lenity dictates that the allegations in Count Three fall outside the scope of § 1512(c)(2)

Here, even if the Court decides that the government's interpretation of § 1512(c)(2) is correct—i.e., that "official proceedings" of Congress include those which are not held pursuant to its investigatory power, that § 1512(c)(2) applies outside the context of the impairment of evidence, and that "corruptly" includes a disinterested but mistaken purpose—it is plainly not

unambiguously so. That is shown by the lack of any case law supporting the government's interpretations, by the legislative history which tells against those interpretations, and by the text and structure not just of § 1512(c) but of all sections of Chapter 73.

To be clear: before January 6, the government never charged "obstruction of a congressional proceeding," under any statute, where the "proceeding" was not an investigation or inquiry. The ECA procedures do not concern the "back and forth between citizens and government" within which zone the obstruction statutes aim to prevent the former's impairment of information bearing on the latter's decision-making. *United States v. Sutherland*, 921 F.3d 421, 426 (4th Cir. 2019) (Wilkinson, J.). They do not perform a truth-seeking function carrying the threat of a penalty, i.e., they do not concern the administration of justice. *See Arthur Andersen LLP*, 544 U.S. at 703 ("Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice.").

As in *Yates*, the rule of lenity "is relevant here, where the Government urges a reading of [§ 1512(c)(2)] that exposes individuals to 20–year prison sentences" for obstructing any proceeding before Congress in any manner that it deems "corrupt." 574 U.S. at 547. In determining the meaning of "corruptly obstructing, influencing, or impeding a proceeding before Congress," as those terms are used in § 1512, it would be "appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* (citation omitted). Because it failed to do so and the government has accused Mr. Ballard such that it is not "clear and definite" that his conduct violates § 1512(c)(2), this Court should resolve any ambiguities in Mr. Ballard's favor by dismissing Count Three.

IV. Conclusion

There is no question that there are other more appropriate and definitive statutes available to charge Mr. Ballard for his alleged obstructive conduct (and he has, in fact, been charged with violating those other statutes). The government's attempts to overcharge him using a statute that, by any interpretation, does not apply to his conduct does no justice. It goes against precedent, legislative history, its own Manual, its former Attorney General, and violates multiple constitutional protections.

For all the above noted reasons, and any that may be presented at a hearing on this matter and that are fair and just, this Honorable Court should dismiss Court Three of the Second Superseding Indictment for failure to state an offense. In addition, Count Three should be dismissed because 18 U.S.C. § 1512(c)(2) is so vague that it failed to give fair notice to Mr. Ballard of the criminal nature of his conduct, in violation of the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

/s/ Andrew C. Moon
ANDREW C. MOON
Assistant Federal Defender

CERTIFICATE OF SERVICE

I, Andrew Moon, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have served a copy of Defendant's Motion to Dismiss Count Three of the Second Superseding Indictment, by electronic case filing and/or hand delivery, upon Barry K. Disney, Assistant United States Attorney, United States Attorney's Office, 1331 F Street NW, Washington, DC 20005, via his email address Barry.Disney@usdoj.gov.

/s/ Andrew C. Moon
ANDREW C. MOON
Assistant Federal Defender

DATE: May 31, 2022