UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO. 21-cr-204 (BAH)**
v.	:	
	:	
MATTHEW BLEDSOE	:	
	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

On March 3, 2022, Defendant Matthew Bledsoe filed a Motion to Dismiss count One of the Indictment—18 U.S.C. § 1512(c)(2). Defendant raises arguments that have been rejected by almost every single judge on this Court—including some arguments rejected by this Court in *United States v. DeCarlo*, No. 21-cr-73. Defendant raises primarily two arguments 1) that the government has failed to state a claim because Defendant's conduct falls outside of the scope of 1512(c)(2) and 2) that the obstruction of Congress's certification of the Electoral College vote on January 6, 2021 was not an "official proceeding" within the meaning of the statute. Defendant is wrong on both fronts. Nothing in Section 1512(c)(2)'s text, structure, or history, or in the relevant precedent, limits that provision to obstruction tied to documentary or tangible evidence. In any event, even if such a limitation existed, the defendant's alleged conduct falls within the scope of the statute.

RELEVANT BACKGROUND

1. Congress enacted a prohibition on "Tampering with a record or otherwise impeding an official proceeding" in Section 1102 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116

Stat. 745, 807, and codified it within the pre-existing Section 1512 as subsection (c). That prohibition applies to

> (c) [w]hoever corruptly--
>
> > (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> >
> > (2) *otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.*

18 U.S.C. § 1512(c) (emphasis added).

2. On January 6, 2021 at 1:00 p.m., a Joint Session of the United States Congress, consisting of the House of Representatives and the Senate, convened in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 U.S. Presidential Election. The defendant, Matthew Bledsoe, joined a mass of others congregated outside the Capitol building. Bledsoe appears in video immediately outside an exterior door of the Capitol. While the alarm is heard blaring in the background, his co-defendant says, "We're going in!," and Bledsoe says, "In the Capitol! This is our house! We pay for this shit! Where's those pieces of shit at?" After entering the Capitol, Bledsoe entered the Crypt where other crowd members attacked a line of officers. Bledsoe recorded the crowd chanting, "Stop the steal! Stop the steal!" Bledsoe then made his way to the Rotunda where he took a selfie-style video saying, "Free Alex Jones! Look at our House! This motherfucker is nice! Holy shit! Our House!" While in the Rotunda, he also climbed the statue of Gerald Ford planting a flag in its arm. Bledsoe then moved through Statuary Hall to the Statuary Hall Connector joining another group of rioters outside the House Chamber and taking a selfie photo with Co-Defendant Reed. Defendant Bledsoe remained in the Capitol for approximately 30 minutes.

On January 6, 2021, Bledsoe posted a compilation of videos. In one video, he is walking to the rally and says, "We're coming. Just the beginning." In another, he posted a picture of

himself on the street with others and added the caption, "We're not gonna take it." In another video, he posted a picture of people climbing the wall at the Capitol with the caption "Nothing can stop whats [sic] coming."

As a result of the actions of Defendant Bledsoe and hundreds of others, Congress was forced to halt its proceedings and evacuate the House and Senate Chambers. After the building was secured later that day, Congress reconvened and completed counting, certifying, and declaring the Electoral College vote result.

3. On March 10, 2021, the grand jury returned an Indictment, charging Bledsoe with five counts, including Count One, obstruction of an official proceeding and aiding and abetting that obstruction, in violation of 18 U.S.C. §§ 1512(c)(2) and 2. ECF 23. Bledsoe moved to dismiss Count 1, ECF 168.

ARGUMENT

SECTION 1512(C)(2) APPLIES TO THE CONDUCT ALLEGED IN THE SUPERSEDING INDICTMENT

Section 1512(c)(2) provides that "[w]hoever corruptly . . . obstructs, influences, or impedes any official proceeding" has committed a crime. A person violates that statute when, acting with the requisite *mens rea*, he engages in conduct that obstructs a specific congressional proceeding. *See* 18 U.S.C. § 1512(c)(2); § 1515(a)(1)(B). Nothing in Section 1512(c)(2)'s text, structure, or history limits it to obstruction tied to documentary or tangible evidence. Nor does the Supreme Court's decision in *Yates v. United States*, 574 U.S. 528 (2015)—which construed a different term in a different statute—support imposing such an atextual limitation in Section 1512(c)(2). But even if such a limitation existed, the statute encompasses the defendant's alleged conduct.

I. The certification of the Electoral College vote is an "official proceeding" and the United States has stated a claim sufficient to proceed to trial.

Bledsoe argues that the certification of the Electoral College vote is not an "official proceeding" for purposes of Section 1512(c)(2). *See* Def. Mot. to Dismiss, ECF 168, at 22-32. Section 1515(a)(1)(B) defines an "official proceeding" as a "proceeding before the Congress," which encompasses the certification proceeding undertaken by the Joint Session on January 6, 2021. Every judge on this Court to have considered this argument has rejected it. *See United Sates v. Sandlin*, No. 21-cr-88, 2021 WL 5865006, at *4 (D.D.C. Dec. 10, 2021) (Friedrich, J.); *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718, at *7 (D.D.C. Dec. 20, 2021) (Mehta, J.); *United States v. Mostofsky*, No. 21-cr138, 2021 WL 6049891, at *10 (D.D.C. Dec. 21, 2021) (Boasberg, J.); *United States v. Montgomery*, No. 21-cr-46, 2021 WL 6134591, at *4-10 (D.D.C. Dec. 28, 2021) (Moss, J.); *United States v. Nordean*, No. 21-cr-175, 2021 WL 6134595, at *4-6 (D.D.C. Dec. 28, 2021) (Kelly, J.); *United States v. McHugh*, No. 21-cr-453, 2022 WL 296304, at *5-9 (D.D.C. Feb. 1, 2022) (Bates, J.); *United States v. Grider*, No. 21-cr-22, 2022 WL 392307 (D.D.C. Feb. 9, 2022) (Kollar-Kotelly, J.); *United States v. Miller*, No. 1:21-cr-119, 2022 WL 823070, at *5 (D.D.C. Mar. 7, 2022) (Nichols, J.); *United States v. Andries*, No. 21-cr-93, 2022 WL 768684, at *3-7 (D.D.C. Mar. 14, 2022) (Contreras, J.); *United States v. Puma*, No. 21-cr-454, 2022 WL 823079, at *4-9 (D.D.C. Mar. 19, 2022) (Friedman, J.). That includes this Court. *See* Tr. Mot. Hrg., *United States v. DeCarlo, et al.*, No. 21-cr-73 (BAH) (attached as Exhibit A), at 25-39 (D.D.C. Jan. 21, 2022) (holding that certification was an official proceeding);

To determine the meaning of a statute, a court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (internal quotation omitted). Section 1515(a)(1)(B), as noted, defines "official proceeding" as a "proceeding before the Congress." In ordinary parlance, a gathering of the full Congress to certify the Electoral

College vote is a congressional proceeding, or "a proceeding before the Congress." Because Section 1515(a)(1)(B)'s words "are unambiguous, the judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (internal quotation omitted).

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

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

The formality involved in the certification of the Electoral College vote places it well within the category of an official proceeding, even under the narrower legal definition of the term "proceeding." Few events are as solemn and formal as a Joint Session of the Congress. That is particularly true for Congress's certification of the Electoral College vote, which is expressly

mandated under the Constitution and federal statute. Required by law to begin at 1:00 pm on the January 6 following a presidential election, Congress's meeting to certify the Electoral College vote is both a "hearing" and "business conducted by … [an] official body." *See* Black's Law Dictionary, "Proceeding." The Vice President, as the President of the Senate, serves as the "presiding officer" over a proceeding that counts votes cast by Electors throughout the country in presidential election. 3 U.S.C. § 15. As in a courtroom, Members may object, which in turn causes the Senate and House of Representatives to "withdraw" to their respective chambers so each House can render "its decision" on the objection. *Id.* And just as the judge and parties occupy specific locations in a courtroom, so too do the Members within the "Hall." *See* 3 U.S.C. § 16 (President of the Senate is in the Speaker's chair; the Speaker "immediately upon his left"; the Senators "in the body of the Hall" to the right of the "presiding officer"; the Representatives "in the body of the Hall not provided for the Senators"; various other individuals "at the Clerk's desk," "in front of the Clerk's desk," or "upon each side of the Speaker's platform"). Congress's certification of the Electoral College vote, moreover, must terminate with a decision: Congress may not recess until "the count of electoral votes" is "completed," and the "result declared." *Id.*

In short, under the plain meaning of Sections 1512(c)(2) and 1515(a)(1)(B), Congress's Joint Session to certify the Electoral College vote is a "proceeding before the Congress."

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

In Section 1512(c)(2), Congress comprehensively prohibited conduct that intentionally and wrongfully obstructs official proceedings. The ordinary meaning of "obstruct[], influence[], or impede[]" encompasses a wide range of conduct designed to frustrate an official proceeding. That conduct can include lying to a grand jury or in civil proceedings, exposing the identity of an undercover agent, and burning a building to conceal the bodies of murder victims. It also includes

storming into the Capitol to derail a congressional proceeding. A defendant who, acting with the necessary *mens rea*, obstructs (or attempts to obstruct) Congress's certification of the Electoral College vote, commits a crime under Section 1512(c)(2).

1. Section 1512(c)(2)'s text and structure demonstrate that it serves as a comprehensive prohibition on corrupt conduct that intentionally obstructs or impedes an official proceeding. When interpreting a statute, courts look first to the statutory language, "giving the words used their ordinary meaning." *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (internal quotation marks omitted). If the statutory language is plain and unambiguous, this Court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks omitted). Here, the meaning of "obstruct[], influence[], or impede[]" is controlled by the ordinary meaning of those words.

The verbs Congress selected in Section 1512(c)(2) reach broadly. For example, the words "obstruct" and "impede" can "refer to anything that 'blocks,' 'makes difficult,' or 'hinders.'" *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (brackets omitted) (citing dictionaries). Similarly, "influence" includes "affect[ing] the condition of" or "hav[ing] an effect on." *Influence*, Oxford English Dictionary, *available at* http://www.oed.com. By their plain meaning, therefore, the string of verbs in Section 1512(c)(2) are properly viewed as "expansive" in their coverage. *See United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013).

Section 1512(c)'s structure confirms that straightforward interpretation. Section 1512(c) consists of two provisions, which both require the defendant to act "corruptly." First, Section 1512(c)(1) criminalizes "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding." Section 1512(c)(2), by contrast, applies more generally to any acts that "otherwise

obstruct[], influence[], or impede[]" an official proceeding. The term "otherwise," consistent with its ordinary meaning, conveys that Section 1512(c)(2) encompasses misconduct that threatens an official proceeding "beyond [the] simple document destruction" that Section 1512(c)(1) proscribes. *Burge*, 711 F.3d at 809; *United States v. Petruk*, 781 F.3d 438, 446-47 (8th Cir. 2015) (noting that "otherwise" in Section 1512(c)(2), understood to mean "in another manner" or "differently," implies that the obstruction prohibition in that statute applies "without regard to whether the action relates to documents or records") (internal quotation marks omitted); *see also United States v. Ring*, 628 F. Supp. 2d 195, 224 n.17 (D.D.C. 2009) (noting that Section 1512(c)(2) is "plainly separate and independent of" Section 1512(c)(1), and declining to read "otherwise" in Section 1512(c)(2) "as limited by § 1512(c)(1)'s separate and independent prohibition on evidence-tampering"); *Otherwise*, Oxford English Dictionary, *available at* http://www.oed.com (defining otherwise as "in another way" or "in any other way"); *see also Gooch v. United States*, 297 U.S. 124, 127-28 (1936) (characterizing "otherwise" as a "broad term" and holding that a statutory prohibition on kidnapping "for ransom or reward or otherwise" is not limited by the words "ransom" and "reward" to kidnappings for pecuniary benefit); *Collazos v. United States*, 368 F.3d 190, 200 (2d Cir. 2004) (construing "otherwise" in 28 U.S.C. § 2466(1)(C) to reach beyond the "specific examples" listed in prior subsections, thereby covering the "myriad means that human ingenuity might devise to permit a person to avoid the jurisdiction of a court").

In this way, Section 1512(c)(2) criminalizes the same *result* prohibited by Section 1512(c)(1)—obstruction of an official proceeding—when that result is accomplished by a different *means, i.e.*, by conduct other than destruction of a document, record, or other object. *Cf. United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (explaining that 18 U.S.C. § 1503, which criminalizes the result of obstructing the due administration of justice, provides specific means of

accomplishing that result and then a separate catch-all clause designed to capture other means). Section 1512(c)(2), in other words, "operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific" obstruction offense involving documents or records under Section 1512(c)(1). *Petruk*, 781 F.3d at 447 (quoting *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014)); *cf. United States v. Aguilar*, 515 U.S. 593, 598 (1995) (describing similar "[o]mnibus" clause in 18 U.S.C. § 1503 as a catchall that is "far more general in scope than the earlier clauses of the statute").

Consistent with that interpretation, courts have upheld convictions under Section 1512(c)(2) for defendants who attempted to secure a false alibi witness while in jail for having stolen a vehicle, *Petruk*, 781 F.3d at 440, 447; disclosed the identity of an undercover federal agent to thwart a grand jury investigation, *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009); lied in written responses to civil interrogatory questions about past misconduct while a police officer, *Burge*, 711 F.3d at 808-09; testified falsely before a grand jury, *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009); solicited information about a grand jury investigation from corrupt "local police officers," *Volpendesto*, 746 F.3d at 286; and burned an apartment to conceal the bodies of two murder victims, *United States v. Cervantes*, No. 16-10508, 2021 WL 2666684, at *6 (9th Cir. June 29, 2021) (unpublished); *see also United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (police officer tipped off suspects before issuance or execution of search warrants), *vacated on other grounds*, 139 S. Ct. 2772 (2019); *United States v. Ahrensfield*, 698 F.3d 1310, 1324-26 (10th Cir. 2012) (law enforcement officer disclosed existence of undercover investigation to target).

Section 1512(c)(2) also applies to the defendant's alleged conduct, which involved trespassing into the restricted Capitol area, saying things like "In the Capitol! This is our house!

We pay for this shit! Where's those pieces of shit at?" and entering the Capitol to prevent a Joint Session of Congress from certifying the results of the 2020 Presidential election. In so doing, the defendant hindered and delayed the certification of the Electoral College vote, an "official proceeding" as that term is defined in the obstruction statute. *See* 18 U.S.C. § 1515(a)(1)(B). Because construing Section 1512(c)(2) to reach that conduct would neither "frustrate Congress's clear intention" nor "yield patent absurdity," this Court's "obligation is to apply the statute as Congress wrote it." *Hubbard v. United States*, 514 U.S. 695, 703 (1995) (internal quotation marks omitted).

In contrast, reading Section 1512(c)(2) as limited only to obstructive acts akin to the document destruction or evidence tampering captured in Section 1512(c)(1) suffers at least three flaws. *First*, it would give rise to unnecessarily complex questions about what sort of conduct qualifies as "similar to but different from" the proscribed conduct "described in [Section 1512](c)(1)." *United States v. Singleton*, No. 06-CR-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006) (unpublished); *see id.* (concluding that Section 1512(c)(2) "require[s] some nexus to tangible evidence, though not necessarily tangible evidence already in existence"); *see also United States v. Hutcherson*, No. 05-CR-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) (unpublished) (concluding that a violation of Section 1512(c)(2) requires proof that "an individual corruptly obstructs an official proceedings [*sic*] through his conduct in relation to a tangible object"). So construed, for example, Section 1512(c)(2) may not encompass false statements made to obstruct a proceeding—though courts have widely upheld convictions for such conduct. *See Petruk*, 781 F.3d at 447 (collecting cases).

Second, limiting Section 1512(c)(2) in that way would effectively render that provision superfluous in light of the comprehensive prohibitions against document and evidence destruction

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

Nor does the fact that Congress adopted a more general catch-all in Section 1512(c)(2) render superfluous other obstruction prohibitions found in Chapter 73, the criminal code's chapter on obstruction of justice. Instead, the catch-all in Section 1512(c)(2) serves to capture "known unknowns." *See Yates*, 574 U.S. at 551 (Alito, J., concurring) (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009)). Indeed, "the whole value of a generally phrased residual clause . . . is that it serves as a catchall" to ensure that the full range of conduct Congress sought to regulate comes within the statute, including "matters not specifically contemplated" by more specific provisions. *Beaty*, 556 U.S. at 860. In any event, "[r]edundancies across statutes are not unusual events in drafting," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), and the "rule[] of thumb" that statutes should be interpreted to avoid superfluity necessarily yields to the "cardinal

canon" that Congress "says in a statute what it means and means in a statute what it says there," *id.* at 253-54.

Judicial treatment of the nearby omnibus clause in Section 1503, which prohibits "corruptly . . . influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice," 18 U.S.C. § 1503, is instructive. Drafted in "very broad language," the omnibus clause or "catchall provision," *see Aguilar*, 515 U.S. at 599, principally operates to criminalize obstructive conduct that falls outside the narrower prohibitions within Section 1503 and neighboring provisions. *See, e.g.*, *United States v. Sussman*, 709 F.3d 155, 168-70 (3d Cir. 2013) (removing gold coins from safe-deposit box); *United States v. Frank*, 354 F.3d 910, 916-19 (8th Cir. 2004) (removing car to avoid seizure); *United States v. Lefkowitz*, 125 F.3d 608, 619-20 (8th Cir. 1997) (instructing employee to remove documents from a house); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (hiding a witness); *United States v. Brown*, 688 F.2d 596, 597-98 (9th Cir. 1982) (warning suspect about impending search warrant to prevent discovery of heroin); *Howard*, 569 F.2d at 1333-34 (attempting to sell grand jury transcripts). No court, however, has held that the omnibus clause's broad language should be given an artificially narrow scope to avoid any overlap with Section 1503's other, more specific provisions. *Cf. Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005) ("The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either."). The same is true for the catch-all provision in Section 1512(c)(2).

Similarly, Section 1512(c)(2)'s partial overlap with other obstruction statutes does not render those other provisions superfluous. For example, the omnibus clause in 1503 and the congressional obstruction provision in 1505 both reach an "*endeavor*[] to influence, obstruct, or impede" the proceedings—a broader test for inchoate violations than Section 1512(c)(2)'s

"attempt" standard. *See United States v. Sampson*, 898 F.3d 287, 301 (2d Cir. 2018) ("[E]fforts to witness tamper that rise to the level of an 'endeavor' yet fall short of an 'attempt' cannot be prosecuted under § 1512."); *United States v. Leisure*, 844 F.2d 1347, 1366-67 (8th Cir. 1988) (collecting cases recognizing the difference between "endeavor" and "attempt" standards). Section 1519, which covers destruction of documents and records in contemplation of an investigation or agency proceeding, does not require a "nexus" between the obstructive act and the investigation of proceeding—but Section 1512(c)(2) does. *See infra* at 18-22 (describing "nexus" requirement in Section 1512(c)(2); 38-39 (citing cases holding that no such nexus requirement applies to Section 1519). The existence of even "substantial" overlap is not "uncommon" in criminal statutes. *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014). But given that Sections 1503, 1505, and 1519 each reach conduct that Section 1512(c)(2) does not, the overlap provides no reason to impose an artificially limited construction on the latter provision.

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

would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as 'falsifying' the murder weapon.").[1]

2. Because "the statutory language provides a clear answer," the construction of Section 1512(c)(2) "ends there" and resort to legislative history is unnecessary. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Congress's authoritative statement is the statutory text, not the legislative history.") (internal quotation marks omitted); *see also United States v. De Bruhl-Daniels*, 491 F. Supp. 3d 237, 251-52 (S.D. Tex. 2020) (declining to consider Section 1512's legislative history in rejecting the claim that the statute was limited to document destruction). Regardless, the legislative history of Section 1512(c)(2)—particularly when considered alongside the history of Section 1512 more generally—provides no support for a contrary conclusion.

When Congress in 1982 originally enacted Section 1512, that legislation did not include what is now Section 1512(c). *See* Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1249-50. Its title then, as now, was "Tampering with a witness, victim, or an informant." *Id.*; 18 U.S.C. § 1512. As that title suggested, Section 1512 as originally enacted targeted conduct such as using intimidation, threats, or corrupt persuasion to prevent testimony or hinder, delay, or prevent communication of information to law enforcement or the courts as well as intentionally harassing another person to hinder, delay, or prevent that person from taking certain actions. *See* Pub. L. No. 97-291, § 4(a) (now codified as Section 1512(b) and Section 1512(d)). For example, Section 1512 as enacted in 1982 included a prohibition on using

[1] In *United States v. Miller*, 21-cr-119 (CJN), ECF 73 (D.D.C. Mar. 7, 2022), Judge Nichols concluded that Section 1512(c)(2) was limited in manner similar to that suggested by Defendant here. That decision is incorrect for the reasons given in the government's motion to reconsider the *Miller* decision, which is attached here as Exhibit B.

intimidation, physical force, or threats, with the intent to "cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair that object's integrity or availability for use in an official proceeding." *Id.* § 4(a) (originally § 1512(a)(2)(B); now codified at § 1512(b)(2)(B)).

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

By contrast, the Sarbanes-Oxley Act's legislative history provides limited explanation of Congress's objective in enacting Section 1512(c). The only discussion of Section 1512 in the Senate Judiciary Committee Report, for example, noted that the pre-existing prohibition in Section 1512(b) made it a crime to induce "another person to destroy documents, but not a crime for a person to destroy the same documents personally"—a limitation that "forced" prosecutors to "proceed under the legal fiction that the defendants [in then-pending *United States v. Arthur Andersen*] are being prosecuted for telling other people to shred documents, not simply for

destroying evidence themselves." S. Rep. No. 107-146, at 6-7. Similarly, Senator Hatch observed that the legislation "broaden[ed]" Section 1512 by permitting prosecution of "an individual who acts alone in destroying evidence." 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch). At a minimum, nothing in these passing references casts doubt on the plain meaning of Section 1512(c)(2), which is reflected in the interpretation described above.

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

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

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

III. Section 1512(c)(2) is not unconstitutionally vague or overbroad.

The defendant suggests (Def.'s Br. 17-22) that Section 1512(c)(2) violates due process and does not provide adequate notice. Both conclusions are wrong.

1. The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person of "life, liberty, or property, without due process of law."

U.S. Const. amends. V, XIV. 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). To ensure fair notice, "'[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). To avoid arbitrary enforcement, the law must not "vest[] virtually complete discretion" in the government "to determine whether the suspect has [violated] the statute." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *United States v. Williams*, 553 U.S. 285, 306 (2008), or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). "'Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'" *Bronstein*, 849 F.3d at 1107 (quoting *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam)). Rather, a provision is impermissibly vague only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306; *see Smith v. Goguen*, 415 U.S. 566, 578 (1974). The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

A statutory provision is therefore "not rendered unconstitutionally vague because it 'do[es] not mean the same thing to all people, all the time, everywhere.'" *Bronstein*, 849 F.3d at 1107 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). A statute is instead vague where it fails to specify any "standard of conduct . . . at all." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). "As a general matter," however, a law is not constitutionally vague where it "call[s] for the application of a qualitative standard . . . to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Johnson*, 576 U.S. at 603-04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

a. The defendant fails to overcome the strong presumption that Section 1512(c)(2) passes constitutional muster. *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."). Section 1512(c)(2) does not tie criminal culpability to "wholly subjective" terms such as "annoying" or "indecent" that are bereft of "narrowing context" or "settled legal meanings," *Williams*, 553 U.S. at 306, nor does it require application of a legal standard to an "idealized ordinary case of the crime," *Johnson*, 576 U.S. at 604. Section 1512(c)(2)'s prohibition on "corruptly . . . obstruct[ing], influenc[ing], or imped[ing]" an "official proceeding" gives rise to "no such indeterminacy." *Williams*, 553 U.S. at 306. The statute requires that a defendant, acting with consciousness of wrongdoing and intent to obstruct, attempts to or does undermine or interfere with a statutorily defined official proceeding. While "it may be difficult in some cases to determine whether these clear requirements have been met," "'courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and

conduct, from which, in ordinary human experience, mental condition may be inferred.'" *Id.* (quoting *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 411 (1950)).

b. The defendant's arguments (Def.'s Br. 19-21) that Section 1512(c)(2) permits arbitrary enforcement are incorrect. Section 1512(c)(2) requires "the actus reus of impeding, interfering, or obstructing" undertaken with "both intent to obstruct as well as wrongfulness,"—while acknowledging that certain fact patterns will present "hard, borderline cases." S*ee Williams*, 553 U.S. at 306 ("Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.").

IV. The Supreme Court's decision in *Yates v. United States* does not counsel a different interpretation.

The Supreme Court's decision in *Yates v. United States*, which considered how to construe the statutory term "tangible object" in Section 1519, 574 U.S. at 532 (plurality opinion), does not undermine the interpretation of Section 1512(c)(2) articulated above. In *Yates*, a plurality of the Court undertook a "contextual reading" to narrow the scope of "tangible object" in Section 1519 to "only objects one can use to record or preserve information, not all objects in the physical world." *Id.* at 536 (plurality opinion). The contextual features that animated that narrow interpretation in Section 1519 are, however, absent in Section 1512(c)(2).

1. The Court in *Yates* considered a prosecution brought under Section 1519, which makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. 18 U.S.C. § 1519. Yates was a commercial fisherman who ordered his crew to throw his catch back into the sea to prevent federal authorities from determining whether he had harvested undersized fish. *Yates*, 574 U.S. at 531 (plurality opinion).

The question presented was whether "tangible object" as used in Section 1519 included a fish. A fractured Supreme Court produced three opinions.

a. A four-Justice plurality concluded that Section 1519's "context" supported a "narrower reading." *Yates*, 574 U.S. at 539. A holding that "tangible object" included "any and all objects," the plurality concluded, would "cut § 1519 loose from its financial-fraud mooring" in the Sarbanes-Oxley Act. *Id.* at 532. The plurality grounded its analysis in several "[f]amiliar interpretive guides." *Id.* at 539. First, neither Section 1519's caption, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," nor the title within the Sarbanes-Oxley Act within which Section 1519 was placed, "Criminal penalties for altering documents," suggested that Congress aimed to "sweep" in "physical objects of every kind." *Id.* at 539-40.

Second, the plurality relied on Section 1519's placement within Title 18's Chapter 73. *Yates*, 574 U.S. at 540. Specifically, its placement at the end of the chapter following several provisions "prohibiting obstructive acts in specific contexts," suggested that Congress did not intend Section 1519 as an "across-the-board" spoliation ban. *Id.* In contrast, the plurality noted, Congress directed codification of the Sarbanes-Oxley Act's "other additions . . . within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials." *Id.* To illustrate one such "broad[]" provision, the plurality specifically referred to the provision at issue in this case, Section 1512(c), which, as noted above, was titled "Tampering with a record or otherwise impeding an official proceeding," and which Congress placed (as Section 1512(c)) within the "broad proscription[]" found in the "pre-existing" Section 1512. *Id.* at 541.

Third, the plurality compared Section 1519 with the "contemporaneous passage" in the Sarbanes-Oxley Act of Section 1512(c)(1). *See* 574 U.S. at 541. Because Section 1512(c)(1)'s

reference to "'other object'" encompassed "any and every physical object," the plurality "resist[ed] a reading of § 1519" that would make Section 1512(c)(1) superfluous. *Id.* at 542-43. Moreover, the plurality reasoned, the fact that Congress's formulation in Section 1519 did not track the language in Section 1512(c)(1) indicated that Congress intended Section 1519 to be construed differently from Section 1512. *Id.* at 545 n.7. More specifically, the plurality concluded that, by adopting those different formulations, Congress intended the phrase "tangible object" in Section 1519 to "have a narrower scope" than the phrase "'other object'" in Section 1512(c)(1). *Id.* at 544-45.

Fourth, the plurality found support for its narrowing construction in the *noscitur a sociis* and *ejusdem generis* interpretive canons. 574 U.S. at 543-46. Because "tangible object" in Section 1519 was the "last in a list of terms that begins 'any record [or] document,'" the *noscitur a sociis* canon counseled interpreting that term "to refer . . . specifically to the subject of tangible objects involving records and documents." *Id.* at 544. That reading, moreover, "accord[ed] with" Section 1519's verbs, which include "'falsif[ying]'" and "'mak[ing] a false entry in'"—terms that commonly "take as grammatical objects records, documents, or things used to record or preserve information." *Id.* (emphasis omitted). Similarly, application of the *ejusdem generis* canon—that "general words" following "specific words" when listed in a statute are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," *id.* at 545 (internal quotation marks omitted)—indicated that Congress "would have had no reason to refer specifically to 'record' or 'document'" if it intended Section 1519 to "capture physical objects as dissimilar as documents and fish." *Id.* at 546.[3]

[3] By way of example, the Supreme Court cited its decision in *Begay v. United States*, 553 U.S. 137 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015), where the Court interpreted the residual clause in the Armed Career Criminal Act (ACCA), which covered

Finally, the plurality stated that, to the extent its "recourse to traditional tools of statutory construction" left "any doubt" about how to interpret "'tangible object'" in Section 1519, the rule of lenity favored a narrow interpretation of that phrase. 574 U.S. at 547-48. Because a broad reading of Section 1519 would criminalize "tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil," the plurality reasoned that before it opted for the "harsher alternative," Congress must speak "in language that is clear and definite." *Id.* at 548 (internal quotation marks omitted).

b. Justice Alito concurred in the judgment on narrower grounds.[4] Observing that the statutory "question is close," Justice Alito reasoned that the combined effect of "the statute's list of nouns, its list of verbs, and its title" favored the plurality's conclusion. *Yates*, 574 U.S. at 549 (Alito, J., concurring). Section 1519's nouns suggested that "'tangible object'" in that provision "should refer to something similar to records or documents." *Id.* at 550. Similarly, Section 1519's list of verbs are "closely associated with filekeeping," and at least one verb phrase—"'makes a false entry in'"—"makes no sense outside of filekeeping." *Id.* at 551. Finally, Section 1519's title—"Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," § 1519—suggested that "no matter how other statutes might be read," Section 1519 "does not cover every noun in the universe with tangible form." *Id.* at 552.

"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." 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA's enumeration of specific crimes suggested that the "otherwise involves" provisions applied only to "*similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142.

[4] Under the rule announced in *Marks v. United States*, 430 U.S. 188 (1977), Justice Alito's concurrence represents the binding holding as the narrowest opinion among those concurring in the judgment. *See id.* at 193.

c. Justice Kagan, joined by three other Justices, dissented. In her view, the term "'tangible object'" in Section 1519 was "broad, but clear"; it encompassed, as it would in "everyday language," "any object capable of being touched." *Yates*, 574 U.S. at 553 (Kagan, J., dissenting). Reviewing Section 1519's text and context demonstrated that "Congress said what it meant and meant what it said." *Id.* at 555. Moreover, Justice Kagan reasoned, when Congress in Section 1519 used a "broad term" such as "tangible object," an interpretation that provided "immunity" to defendants who destroyed non-documentary evidence had "no sensible basis in penal policy." *Id.* at 558.

2. The decision in *Yates* does not unsettle the straightforward interpretation of Section 1512(c)(2) articulated above because the "familiar interpretive guides" on which the plurality (and to some extent Justice Alito) relied to narrow the scope of Section 1519 do not apply to Section 1512(c)(2).

Consider first, as the plurality did, Section 1512's statutory title. *See Yates*, 574 U.S. at 539-40 (plurality opinion); *see also id.* at 552 (Alito, J., concurring) (considering Section 1519's title). Even leaving aside the "the wise rule" that neither "the title of a statute" nor "the heading of a section" can "limit the plain meaning of the text," *Brotherhood of R.R. Trainmen*, 331 U.S. at 528-29, Section 1512's title, "Tampering with a witness, victim, or an informant," provides no reason to narrow the interpretation of Section 1512(c)(2). *See supra*, at 15-17. For one thing, Congress named that title 20 years before it enacted 1512(c) in the Sarbanes-Oxley Act, and then simply opted not to rename Section 1512 to reflect either of the two new obstruction prohibitions added in Section 1512(c). Section 1512's overarching title therefore does not have the same interpretive force as Section 1519's title, which was enacted by the same Congress that enacted the rest of Section 1519. *See Yates*, 574 U.S. 541 n.4 (plurality opinion). Additionally, whereas

Section 1519's title within the Sarbanes-Oxley Act, "Criminal penalties for altering documents," suggested a narrow focus on document destruction, *see id.* at 539-40, Section 1512(c)'s title within the Sarbanes-Oxley Act reflected both the document-destruction prohibition in Section 1512(c)(1) *and* the broader catch-all obstruction provision in Section 1512(c)(2): "Tampering with a record *or otherwise impeding an official proceeding*." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 807 (emphasis added; capitalization altered).

Similarly inapposite here is Section 1512(c)(2)'s placement within Chapter 73. *See Yates*, 574 U.S. at 540-41 (plurality opinion). Whereas Congress enacted Section 1519 as a standalone prohibition and placed it at the end of the chapter "together with specialized provisions expressly aimed at corporate fraud and financial audits," it instead inserted Section 1512(c) within the "pre-existing" Section 1512. *Id.* at 541 (plurality opinion). So situated, Section 1512(c)(2)'s function as a catch-all obstruction prohibition is consistent with Section 1512's role as a "broad proscription" on obstructive acts. *See id.* (plurality opinion).

That reading, moreover, is consistent with how the *Yates* plurality opinion describes Section 1512(c). *See* 574 U.S. at 541-43, 545. Contrasting the term "other object" in the document-destruction provision in Section 1512(c)(1) with "tangible object" in Section 1519, the plurality concluded that Section 1512(c)(1)'s later enactment suggested Congress intended it to reach more broadly than Section 1519. *Id.* at 542-43; *id.* at 545 n.7 ("Congress designed § 1519 to be interpreted apart from § 1512, not in lockstep with it."). And if Congress intended Section 1512(c)(1) to cover more ground than Section 1519, Section 1512(c)'s text and structure make plain that it further intended Section 1512(c)(2) to cover more ground than Section 1512(c)(1).

The plurality, 574 U.S. at 544-45, and Justice Alito, *id.* at 550, also drew support for their narrowing construction of Section 1519 from interpretive canons, but those canons do not help the

defendants here. "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." *United States v. Espy*, 145 F.3d 1369, 1370-71 (D.C. Cir. 1998). Section 1519's structure—a list of specific terms ("record" and "document) followed by a more general term ("tangible object")—in a singular provision is susceptible to that analysis. *Yates*, 574 U.S. at 545-56 (plurality opinion); *id.* at 549-50 (Alito, J., concurring). But Section 1512(c)'s structure differs significantly: it includes one numbered provision that prohibits evidence-tampering, followed by a semi-colon, the disjunctive "or," and then a separate numbered provision containing the separate catch-all obstruction prohibition. "The absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008). Furthermore, in the same way that the *ejusdem generis* canon does not apply to the omnibus clause in Section 1503 that is "one of . . . several distinct and independent prohibitions" rather than "a general or collective term following a list of specific items to which a particular statutory command is applicable," *Aguilar*, 515 U.S. at 615 (Scalia, J., concurring in part and dissenting in part), it has no application to Section 1512(c)(2), which embodies the same structure. *Cf. Loughrin*, 573 U.S. at 359 (distinguishing the mail fraud statute (18 U.S.C. § 1341), which "contains two phrases strung together in a single, unbroken sentence," from the bank fraud statute (18 U.S.C. § 1344), which comprised "two clauses" with "separate numbers, line breaks before, between, and after them, and equivalent indentation—thus placing the clauses on an equal footing and indicating that they have separate meanings").

The Supreme Court's decision in *Begay v. United States*, 553 U.S. 137, on which the *Yates* plurality in part relied (*see supra*, note 12), does not suggest a different conclusion with respect to Section 1512(c)(2). The statutory provision at issue in *Begay* included a list of specified crimes

("any crime . . . that is . . . burglary, arson, or extortion, or involves use of explosives") followed, in the same sentence, by a more general category ("or otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii)); the Supreme Court held that the "otherwise involves" provision covered only crimes "similar" to those in the enumerated list. *See* 553 U.S. at 142-43. In Section 1512(c)(2), by contrast, "the 'otherwise' phrase . . . stands alone, unaccompanied by any limiting examples" in a provision that "is plainly separate and independent of" Section 1512(c)(1). *Ring*, 628 F. Supp. 2d at 224 n.17. "Thus, just as *Begay* did not define the 'otherwise' clause" in Section 924(e)(2)(B)(ii) "in terms of the independent and preceding" Section 924(e)(2)(B)(i), Section 1512(c)(2)'s "use of 'otherwise'" should not be construed "as limited by § 1512(c)(1)'s separate and independent prohibition on evidence-tampering." *Id.*; *see De Bruhl-Daniels*, 491 F. Supp. 3d at 251 ("[Section 1512(c)(2)] does not appear as a broad catch-all term at the end of a list that must be wrangled into conformity with congressional intent using a canon of construction" but instead "exists as a potent, independent, and unequivocal catch-all provision that reaches all manner of obstructive conduct related to an official proceeding.").

The *noscitur a sociis* canon is similarly inapplicable here. That canon is used only to construe terms that are "of obscure or doubtful meaning," not to change the meaning of unambiguous terms that are simply broad. *Russell Motor Car Co.,* 261 U.S. at 520. Moreover, the canon may be invoked only "when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning." *S. D. Warren Co. v. Maine Bd. of Env't Prot.,* 547 U.S. 370, 378 (2006) (internal quotation marks omitted); *see Beecham v. United States,* 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). As noted above, the first and

second clauses of Section 1512(c) are not items in a list of related terms; rather, they are distinct offenses phrased in the disjunctive. 18 U.S.C. § 1512(c). That structure therefore does not lend itself to application of *noscitur a sociis*. *See De Bruhl-Daniels*, 491 F. Supp. 3d at 251 (declining to apply the *noscitur a sociis* canon to Section 1512(c)).

Finally, the *Yates* plurality's reliance on the rule of lenity has no application here.[5] The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted); *see Shular v. United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). There is no grievous ambiguity here. Section 1512(c)(2)'s text, structure, history, and purpose make clear that it functions as a broad catch-all prohibition on obstructive conduct that covers "otherwise obstructive behavior that might not constitute a more specific" obstruction offense. *Petruk*, 781 F.3d at 447 (internal quotation marks omitted).

The plurality also found the rule of lenity "relevant" in part given the absence of limiting principles under a broad construction of Section 1519. *See Yates*, 574 U.S. at 548. But neither of the features that constrain Section 1512(c)(2)'s reach—the government's requirement to establish that the defendant acted "corruptly" and a nexus to a contemplated official proceeding is present in Section 1519. Section 1519 requires that the defendant act "knowingly" and "with the intent to impede, obstruct, or influence," 18 U.S.C. § 1519, but does not impose the more stringent

[5] Justice Alito did not rely on several features that guide the plurality opinion, including the rule of lenity. *See* 574 U.S. at 549 (noting that the case "should be resolved on narrow grounds," namely, "the statute's list of nouns, its list of verbs, and its title," but not discussing the Sarbanes-Oxley Act, Section 1519's placement within Chapter 73, the Supreme Court's decision in *Begay*, or the rule of lenity). It follows that that his controlling opinion, *see supra* note 13, makes even more clear that Section 1512(c)(2) should not be interpreted differently than its text and structure would suggest.

"corruptly" *mens rea*. And courts of appeals have uniformly concluded that Section 1519 does not include a "nexus" requirement. *See United States v. Scott*, 979 F.3d 986, 992 (2d Cir. 2020) (Supreme Court's decisions in *Marinello*, *Arthur Andersen*, and *Aguilar* do not "overrule[]" existing circuit precedent that Section 1519 "does not have a nexus requirement"); *United States v. Moyer*, 674 F.3d 192, 209 (3d Cir. 2012) (declining to extend nexus requirement from Section 1503 and 1512(b)(2) to Section 1519); *United States v. Kernell*, 667 F.3d 746, 753-55 (6th Cir. 2012); *United States v. Yielding*, 657 F.3d 688, 712-14 (8th Cir. 2011); *see also* S. Rep. No. 107-146, at 14-15 ("[Section 1519] is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter.").[6]

To be sure, no court appears to have applied Section 1512(c)(2) to conduct precisely akin to the defendant's alleged actions, namely, confronting and assaulting law enforcement officers as they forced their way into the Capitol—and all the way into the Gallery of the Senate Chamber—in an effort to halt or delay a congressional proceeding. Even if Section 1512(c)(2)'s application to this case was "not expressly anticipated by Congress," that alone "does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (internal quotation marks and brackets omitted). That is so even if the statute's application in a particular case "reaches 'beyond the principal evil' legislators may have intended or expected to address." *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). And any policy-based suggestion "that the current scheme should be altered," *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768,

[6] The defendant's rule-of-lenity argument (Def.'s Br. 21-22), which relies heavily on the *Yates* plurality's analysis, fails for the same reasons.

778 (2020), ought to be addressed to Congress, not this Court, *see, e.g.*, *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

V. Even if Section 1512(c)(2) required that the obstructive act relate to documentary or tangible evidence, the defendant's alleged conduct would be covered.

At a bare minimum, Section 1512(c)(2) covers conduct that prevents the examination of documents, records, and other nontestimonial evidence in connection with an official proceeding. If, for example, the defendants had corruptly blocked the vehicle carrying the election returns to the Capitol for congressional examination at the certification proceeding, that conduct would clearly fit within Section 1512(c)(2). Section 1512(c)(2) would likewise cover blocking a bus carrying the Members of Congress to the Capitol to examine the election returns at the certification proceeding. And it just as readily covers displacing the Members of Congress from the House and Senate Chambers, where they would examine and discuss those returns and other records.

But even were this Court to adopt the limitation that Section 1512(c)(2) "requires some nexus to tangible evidence," *Singleton*, 2006 WL 1984467, at *3, or a "tangible object," *Hutcherson*, 2006 WL 270019, at *2, the defendant's alleged conduct would still fall within the scope of Section 1512(c)(2) because the defendant "otherwise obstruct[ed], influence[d], or impede[d]" Congress's ability to review documents that it was constitutionally and statutorily required to receive and act upon, thereby obstructing the certification of the Electoral College vote.

The certification of the Electoral College vote is rooted in federal constitutional and statutory law that requires the creation and consideration of various documents. Under the Twelfth Amendment, the state Electors must "vote by ballot," marking one set of ballots for the individual

voted for as President and "distinct ballots" for the vice-presidential selection. U.S. Const. amend. XII. The Electors must then create "lists" of the presidential and vice-presidential candidates who received votes, "which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States." *Id.* These certified lists, or "certificates," are then opened by the President of the Senate "in the presence of the Senate and House of Representatives." *Id.* After opening them, the President of the Senate hands the certificates to two appointed "tellers," who in turn create a new "list" that comprises "the votes as they shall appear from the said certificates." 3 U.S.C. § 15. During the reading of the certificates, the President of the Senate must open the floor to objections; any objection "shall be made in writing . . . and shall be signed by at least one Senator and one Member of the House of Representatives." *Id.* Congress's certification of the Electoral College vote, therefore, operates through a deliberate and legally prescribed assessment of ballots, lists, certificates, and, potentially, written objections.

Had the defendants sought to alter or destroy any of those documents, they also would have violated Section 1512(c)(1). Instead, the defendants allegedly sought to stop the Members of Congress from reviewing those constitutionally and statutorily mandated documents at a proceeding to certify the results of the 2020 presidential election. Because the defendant's alleged conduct thus precluded a full and fair examination of physical or documentary evidence at an official proceeding, the indictment's allegations would satisfy any extratextual "requirement" in Section 1512(c)(2) "for some nexus to a document or other tangible evidence." *Singleton*, 2006 WL 1984467, at *5.

CONCLUSION

For the reasons given here and in the government's opposition to the defendant's motion to dismiss (ECF 168), the Court should deny that dismissal motion.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-73-01
vs.	)	No. 21-73-02
	)	
NICHOLAS DECARLO, and	)	January 21, 2022
NICHOLAS R. OCHS,	)	1:02 p.m.
Defendants.	)	Washington, D.C.

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

(Parties appearing via videoconference and/or telephonically.)

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Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

This hearing was held via videoconference and/or telephonically and is, therefore, subject to the limitations associated with the use of technology, static interference, etc.

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURTROOM DEPUTY: Matter before the Court, Criminal Case No. 21-73, United States of America versus Nicholas DeCarlo and Nicholas R. Ochs.

Your Honor, for the record, pretrial agent Christine Schuck is joining us via telephone.

Counsel, please state your names for the record, starting with the government.

MS. LOEB: Good afternoon, Your Honor. Alexis Loeb for the United States; and with me is my colleague, James Pearce.

THE COURT: All right. Good afternoon.

MR. PEARCE: Good afternoon.

MR. FEITEL: Good afternoon, Your Honor. Robert Feitel for Mr. Nicholas DeCarlo. Mr. DeCarlo is present, and he agrees to proceed by videoconferencing today.

THE COURT: Okay. Thank you, Mr. Feitel.

And, Mr. DeCarlo, could you just raise your hand so I can tell who is who.

(Whereupon, the defendant complies.)

THE COURT: Thank you.

All right. And then for Mr. Ochs.

MR. MacMAHON: Yes, Your Honor. Good afternoon. Edward MacMahon on behalf of Mr. Ochs, who is also present

by video and agrees to appear in that fashion for the hearing today.

THE COURT: Okay. And, Mr. Ochs, raise your hand so I can make sure --

(Whereupon, the defendant complies.)

THE COURT: Okay. Good. Thank you.

All right. Thank you, both counsel, for clearing up the fact that they agree to participate via videoconference.

And I will remind everybody listening that, under my standing order, there is no recording of this proceeding that is permitted; and there will be sanctions if that standing order is violated.

All right. So let's just proceed to the motion hearing that's pending. And then after we -- and I plan to issue an oral ruling today. Then, after that, we can talk about how we want to proceed in the case. So don't leave immediately after I finish my ruling because we have not finished our business here today.

Let me start with the defense counsel and find out if there is -- Mr. Feitel, is there anything you want to add to your papers?

MR. FEITEL: In light of Your Honor's comments about having considered this, I think the most prudent way to proceed is that: If Your Honor has any questions, I

would be glad to try to respond to them. I do have one or two points that I do want to make for emphasis. But, other than that, I will try to be brief, Your Honor.

Your Honor, as you know, we have raised two claims.

With respect to the challenge to this being an "official proceeding," I recognize that, since I filed my pleading, a number of courts have ruled against similar claims. I did want to emphasize, though, that I have tried to make what I think is a slightly more nuanced new argument, which is that we have challenged it only -- we believe our clients have been charged with conspiring to stop the electoral vote count; and that there is a second part of the statute that the government creates procedures to implement a constitutional provision about vote counting. And I think, to the extent that our clients are charged with pretty specific language, given that the government has drafted the indictment and given that there have been other indictments that have been more substantive, I think Your Honor should consider that what our clients are being charged with, obstructing only the tabulation or the certification of the vote.

In terms of -- I did try to think of an analogy. It is almost the same as when a jury has returned a verdict; they have done the work, they have done the vote. The Court reconvenes. Generally, the foreperson, in a criminal case,

gives a signed copy of the verdict sheet to Your Honor's deputy, who brings it up. So the part that's left for the Court is solely the announcement of a decision that's already been made.

I think, if you follow that analogy of what happened -- what our clients are charged with -- it really is not an official proceeding as I think that term meant. Other judges have found that not every time Congress convenes is it an official proceeding. I am going leave my argument at that.

THE COURT: So, Mr. Feitel, basically you are saying that the indictment -- and I'm reading precisely from it, is that -- it defines the "official proceeding," to wit, as Congress's certification of the Electoral College vote.

And so you are saying that that is too abbreviated of a definition of what was happening on January 6th, and that the certification of the Electoral College vote is not certification of the fact that President Biden won?

What precisely are you saying?

MR. FEITEL: I believe that the certification or when Congress convened on January 6th -- there are two parts of the process. The first is the tabulation of the votes; and I believe that that is ministerial or ceremonial, and that that is what my client is charged with obstructing because he is not --

THE COURT: Because you are saying that certification of the Electoral College vote is only referencing the tabulation?

MR. FEITEL: Yes, Your Honor.

THE COURT: As opposed to what else?

MR. FEITEL: As opposed to the objections aren't part of the proceeding. My client wasn't charged with obstructing Congress's objections to the Electoral College vote. He was charged with obstructing Congress's certification of the vote, which I -- I understand that it is a fine line between the two; but I do think that there is --

THE COURT: If there is a line at all, Mr. Feitel. The certification process --

MR. FEITEL: Your Honor --

THE COURT: -- is a unified process; you are going to lose on that one, I am telling you right now.

The slicing and dicing of the certification of the electoral vote count, which takes place in a fairly structured way, under the applicable federal statute goes from -- seamlessly from one process to another; and if there is an objection, that vote is not counted until the objection is resolved, and then it moves on. It's all part of the same process.

MR. FEITEL: I understand.

THE COURT: But what's your next argument, Mr. Feitel.

MR. FEITEL: Your Honor, the only point I want to make with respect to notice is that there is -- I have now undertaken a review of literally hundreds of the indictments, and I cannot find any principal way to distinguish how the government has charged people.

There are defendants who have committed much worse acts and are charged with violence and carrying weapons, who are not charged with the obstruction offense. There are others who seem to have done more or less precisely what Mr. DeCarlo did, and are also not; and I don't see a principal dividing line.

This is a case -- a lot of times the defendants raised these claims and seek comparison amongst different cases; there are factual differences that, sort of, make it easy to divide one from another.

We have, in this case, hundreds of similarly-situated defendants; and I know this has been a complaint from the judiciary as well, that there seems to be no principal distinction.

The point that I am trying to make and emphasize is that the prosecutors -- in all of their hindsight, in all of the videotape and testimony, and the like -- can't seem to have some consistent position or some principle they rely

upon, or some dividing line. I don't see how my client can fairly be said to be on notice for due process that what he did would result in a charge of corrupting or obstructing a congressional proceeding. And, on that, I will conclude, unless Your Honor has any additional questions.

THE COURT: Well, I mean, I think that -- you know, there are, I don't know, how many total number of January 6th-related cases there are now. But as I understood your point on comparing cases, and the evidence underlying different charges, and how you can't distinguish one case from another to explain why some charges are brought in some cases and not in others -- I think that was all going to your point of vagueness; is that right?

MR. FEITEL: Yes, Your Honor.

THE COURT: You are not asking me to undertake a task of doing that kind of comparison which, for example, at the time of sentencing, I have an obligation under 3553(a)(6) to avoid unwarranted sentencing disparities among similarly-situated defendants, and that does oblige judges to undertake some kind of comparative -- broadly comparative analysis of sentences imposed on similarly-situated defendants; but you are not asking me to undertake that here?

It's just part of your broader point that the word "corruptly" in Section 1512(c)(2) is vague; am I correct on

understanding your point on this?

MR. FEITEL: As applied to this case, Your Honor.

THE COURT: As applied to the case, correct.

All right. And I am going to give -- that was an argument that you posed in your reply brief; and I will give the government an opportunity to respond to that since it's the government who is in possession of the most facts on the cases that you cited in your brief, Mr. Feitel.

I do want to talk about one related point to that because you do describe in your brief what the defendants are alleged to have done before, during, and after the attack on the Capitol Building on January 6th. And you basically summarize it as: They went into the Capitol; they engaged in a misdemeanor theft of one pair of flex handcuffs, and wrote on the memorial door with a magic marker the words "MURDER THE MEDIA." And based on those factual allegations, you say that -- as applied to those facts, as you have summarized them, application of 18 U.S.C. 1512(c)(2) is vague as to that.

Do I understand your argument --

MR. FEITEL: Yes, Your Honor.

THE COURT: -- on that point?

MR. FEITEL: Yes. I believe I limited the factual recitation to what was alleged in the indictment.

And the other point was that the government -- I

don't know if the word "conceded" is appropriate -- the government acknowledged or advised me that my client was charged with conspiring with one other person to commit this offense, his codefendant.

Your Honor may recall that there was a series of superior court prosecutions after the inauguration of the former President; and in that case all of the defendants were charged under the same rubric. There were, like, hundreds of defendants in the same case that were all alleged to have conspired with each other. The government has not taken that tack in general, I believe, in the January 6th prosecutions; and they have said otherwise specifically in this case.

THE COURT: Okay. And, Mr. Feitel, can I just ask you to turn your volume up or speak more loudly into your microphone. I am having to strain to hear you a bit; and so is my court reporter; and that is a very difficult thing, to have my court reporter straining to hear you.

Let me just say that one of the things that your brief summary of the factual allegation leaves out -- or a few things you leave out are the factual allegations that both the defendants in this case agreed to travel to D.C.; they raised funds via the internet to finance this travel; they publicized their plans to come to D.C.; and then they traveled to D.C. -- and it was all for the purpose of

stopping, delaying, and hindering the certification of the results of the November 20th presidential election.

So those were a lot of different activities that they engaged in even before they got to D.C. and went to the Capitol -- according to the allegations in the indictment -- to interfere with and stop the certification of the Electoral College vote. So isn't that, in some ways -- all of those acts -- how are those to be omitted in consideration of whether or not this charge is vague when applied to this alleged conduct?

MR. FEITEL: I saw those facts as background; and I see some of them as being innocuous and innocent. I did not see them as being what led the government to believe that my client obstructed.

There are lots and lots of people who said lots and lots of things in the vernacular about the election and who came to Washington, D.C.; many of whom went to the Capitol, but not all of them were charged with the obstruction of an official event. So --

THE COURT: Well, I have seen, Mr. Feitel, a number of these defendants now. I only see the cases in front of me. I don't see, perhaps, even as many as you may be handling as counsel.

MR. FEITEL: This is my only one.

THE COURT: But there are some defendants who came

just to watch the former President speak, and then got caught up in a crowd; they never -- didn't come here planning to go to the Capitol and ending up following the mob to the Capitol. They're in a different category, wouldn't you say, with different forms of evidence about their intent to obstruct the Electoral College vote count and the certification of the presidential election?

MR. FEITEL: Yes, I would agree.

THE COURT: Those -- I would basically call them the followers -- you know, the people who came for a rally with the former President and ended up just being followers of a crowd to the Capitol are in quite a different category, in terms of planning, intent, and execution than defendants who were raising money, publicizing their plans -- all to come stop the certification of the vote, wouldn't you say?

MR. FEITEL: I don't -- I understand Your Honor's position.

I think that the activities that my client engaged in prior to coming fall outside of the parameters of conduct. I don't think publicizing it or raising money to come is an indicator of what actually happened.

And I had originally thought about including a section in the brief distinguishing between what lawyers call actus reus and mens rea -- I decided it wasn't necessary. But I do think that those -- there has to be

congruence between mental state and activities.

As I analyzed this, I thought that that conduct -- coming here and organizing to come here, and publicizing it -- did not coincide with the activities of my client inside of the Capitol, which I think are the operative facts that the government was relying on in this case.

THE COURT: Well, I just look at the indictment, and look at all of the things they've charged. And I review all of those facts that they've charged; and what I've detailed was charged -- all as what the government views as the operative facts.

If I -- if I can just take this a point further, Mr. Feitel, is it the defendants' position that if they can be charged with obstruction of Congress's proceeding to certify the electoral vote count then, in the defendants' view, every person who entered the Capitol Building as part of this mob, and all of whom contributed to halting the proceedings because of the evacuation of the members of Congress, the staff, the reporters -- everybody who was there -- is it their position that if they can be charged, everybody who was in the Capitol Building could be charged with this felony violation of obstruction under 1512(c)(2)?

MR. FEITEL: I believe that is the case, Your Honor.

And to try to answer and to, also, somewhat change topics, that is why I asked the government, before I filed

my pleading, who they thought the co-conspirators were. Because I understood, when I drafted the pleading, that it would be a different terrain if the government said that everybody conspired with each other; that's why I asked specifically: Who were the co-conspirators in this case?

But in theory and in practice, the government, I believe, could charge everybody with a 1512(c) violation who was inside of the building; and that is exactly what happened in the January 20th cases in superior court, for better or for worse. I am not advocating for it; but I do think that it opens the door to everybody being charged if that's the theoretical underpinning of the conspiracy in this case.

THE COURT: Yes. Well, I think the government will speak for itself. But I think the government -- and I don't know anything about what happened in the superior court cases; this is a totally different court. This is federal District Court, not superior court; I don't know what was going on over there. And -- so thank you for bringing that up; but I really have no familiarity with that set of cases.

But I think that -- as I have already detailed, there is a different level of evidence between, as I said, people who came to watch the former President -- were followers, like little -- followers in a crowd -- just

followed people to the Capitol, and took advantage of the opportunity, when they were there, to look around, rummage around, break police lines, and create the havoc that they did. But the evidence that the government may have about people who were just the mob followers versus people who, for some period of time -- even before January 6th -- were raising funds on the internet and planning to come to Washington, D.C. on January 6th to stop the certification of the electoral vote count, that's a different -- totally different type of evidence available to the government; wouldn't you admit, Mr. Feitel?

MR. FEITEL: I acknowledge the government has other evidence against my client, yes.

THE COURT: All right. And wouldn't you also agree that the law is pretty well settled -- as all of my colleagues have cited in these cases where this argument has come up, and in their decisions in these January 6th cases -- that we judges don't get to decide what charges are brought; neither do defense attorneys.

You know, this is a discretionary decision left solely to the executive branch, in the hands of the prosecutors, to decide what charges to bring.

You would agree that that's well-settled law, wouldn't you, Mr. Feitel?

MR. FEITEL: In what -- in the defense, I believe

that if I had challenged this -- even if it were on professional grounds or prosecutorial vindictiveness, I didn't challenge that on that basis; I challenged it on due process and vagueness.

THE COURT: All right. Mr. MacMahon, do you want to say anything?

I know you have added -- you have joined in this motion. But you have -- other than filing a notice that that's what you were doing, you haven't submitted any other arguments; but I will give you an opportunity to say whatever you'd like at this point.

MR. MacMAHON: Thank you, Your Honor.

Yes. Mr. Feitel and I coordinated on these filings, so I didn't really want to overwhelm the Court with more paper than what was necessary.

The Court's questions about all of the planning that went into this case, I mean, if -- in terms of the notice issue and the vagueness issue, I take it that the Court is going to get a chance to hear this evidence and see whether if just coming to Washington to go to a rally is different from coming to Washington to interfere with a congressional hearing and whether certification is going to take place.

The issue of -- and I know the Court has had a lot of hearings in these cases. The videos that the government

will show you of Mr. Ochs walking through the Capitol -- by the way, he didn't write on anything; he didn't take anything personally; he didn't engage in any of those acts at all -- are completely distinct from all of the people walking around the building that are being filmed.

And I guess the government can allege in it -- in the indictment that they have preplanning of an intent to obstruct a congressional hearing. But if -- there wouldn't be any way for Mr. Ochs to have notice walking around the Capitol, not touching a police officer, not breaking a window, not stealing anything -- that his conduct at that time was any different from anybody else that was wandering around with him. And we have all seen -- there is so much video evidence in these cases, as the Court is well aware, and trying to manage the amounts of discovery that -- I joined in this motion because I do think that it is a constitutional issue as to whether there would be proper notice.

And if it gets to -- if we get to the point where it's a Rule 29 question as to whether the government has proven that by saying you are going to come to Washington to listen to the President or Stop the Steal is the equivalent of interfering with -- there were thousands and thousands of people that came to Washington supposedly to Stop the Steal.

I mean, that's just where we really are here;

we're trying to figure out how Mr. Ochs and Mr. DeCarlo would have notice that what they were doing was felonious, as opposed to what all of these other folks did.

That's all I have to say, Your Honor.

THE COURT: Yes. Well -- and I appreciate the, sort of, frustration that you have to want to argue the evidence when this is really purely a legal question in front of me; and we'll get to the point at trial when the evidence will speak. But it's premature to do that now because I presume, for purposes of this legal challenge to the indictment -- because it's seeking to dismiss the first two counts of the indictment -- I assume as true, what the facts are as alleged in the indictment; so this is not about the underlying factual evidence which will have its day in court at the time of trial.

All right. Let me turn to the government.

Ms. Loeb, the defendants -- well, Mr. Feitel raises -- well, both defendants, since Mr. Ochs has joined -- they raise in reply this argument that the obstruction charge against them, for violating Section 1512(c)(2), is so vague -- and I am quoting: That even professional prosecutors cannot make sense out of what conduct violates the statute; that is at the reply, docketed at ECF 61, at page 2.

And they go on to say that -- and I quote: It is

impossible to see a principle basis to distinguish why charges were brought against some defendants for felony obstruction of an official proceeding, and not against other seemingly more culpable defendants.

And they say that the government's charging decisions for January 6th defendants have been inconsistent, and say that some defendants who engaged in actual violence inside the building are not charged with obstruction, while others who engaged in what the government claims was civil disorder, and disorderly and disruptive conduct are so charged.

And then the brief goes on to list several cases arising out of the events on January 6th where the defendants were charged with committing apparently violent acts inside the Capitol Building, some of them while armed; but none of them were charged with a violation of Section 1512(c)(2).

So I note this was an argument that was made in reply; the government doesn't get a surreply -- I guess you could have asked for one. But I am going give you the opportunity here to give oral argument to respond to that argument.

So, Ms. Loeb, or, Mr. Pearce, which one of you is going to be arguing, I don't --

MS. LOEB: Thank you, Your Honor.

Mr. Pearce will be arguing.

THE COURT: Okay.

MR. PEARCE: Thank you, Your Honor. And I will just be handling the hearing. And then Ms. Loeb will address any other matters after you issue your ruling.

So I want to make, sort of, a legal and -- as well as a, sort of, factual point. Legally, the characterization that professional prosecutors are unable to draw meaningful distinctions or, sort of, understand the difference is clearly incorrect.

The statute -- and, frankly, what "vagueness" ultimately challenges is whether there are discernible standards in the statute. And I think, as Your Honor has already noted, five of your colleagues that have ruled on this have concluded that there are.

1512(c)(2) requires that a defendant act corruptly to instruct, impede, or influence an official proceeding. And "corruptly," as we have proposed, is essentially -- a defendant needs to evince the intent to obstruct and act with consciousness of wrongdoing and wrongfulness; and that can manifest, either through unlawful means or with a wrongful purpose. That is a discernible standard.

I recognize that that is -- one could, in specific cases, second-guess the government's charging decision and, you know, come up with -- and this is, sort of, a petri dish

of examples, Your Honor. There are over 700 cases that have been charged at this point; close to 300 have been charged with obstruction.

So, you know, one can certainly say, well, based upon the evidence that I, as an outside observer, see, I don't understand why -- in case X or in case Y -- that a given defendant has not committed an obstruction violation of 1512(c)(2). That's not what the vagueness inquiry is all about.

And Your Honor quoted -- made reference to the idea of prosecutorial discretion. Judge Moss referred to it in *Montgomery*, and the D.C. Circuit's decision in *Kincaid versus the District of Columbia*; and basically said the -- and I will quote from that: The presence of enforcement discretion alone does not render a statutory scheme unconstitutionally vague.

And, in *Kincaid*, Judge Kavanaugh was looking to the Supreme Court's unanimous decision in *United States versus Batchelder*, where a defendant was challenging on vagueness grounds, among other things -- but, for our purposes, we'll refer to vagueness grounds, sort of, two statutes; one that had a 2-year maximum, one that had a 5-year maximum, and essentially covered the same conduct basically: A felon in possession of a firearm. And the Supreme Court quite clearly said that: A government's

choice to prosecute someone between those statutes falls within its discretion and gives rise to no vagueness concerns.

So I am not going to go into, sort of, the internal policy as to why, in particular cases, we make a decision to prosecute one or the other that fully implicates prosecutorial discretion; but I think I can speak in general terms.

Hearkening back to what we need to prove, it may well be that the defendants in the January 6th -- or individuals involved in January 6 events acted with violence; but it's difficult to prove what their intent was. Sure, it is possible, in some of these cases, to argue that one can infer that their intent was to stop the certification; but sometimes there might be evidence that we have uncovered in our investigation that makes that problematic; and so there may be reasons why we feel that we could not -- or at least there are litigation concerns in trying to prove that beyond a reasonable doubt.

But, honestly, that's neither here nor there. As Judge Moss stated in *Montgomery,* he declined the defendants there an invitation to go through a sample of representative cases and do the kind of second-guessing or Monday morning quarterbacking that is not the judiciary's or the public's role to undertake.

As to the, sort of, specific allegations here, I think Your Honor quite correctly indicated this is -- I recognize that these are factual challenges, and the defendants are urged to develop a theory that, look, just the fact that we were planning alone, that shouldn't be enough; and the defendants can certainly raise those arguments when they go in front of a jury.

Of course, I think, as Your Honor laid out, the indictment indicates not only the preplanning and coordination to come on January 6th to stop, hinder, and delay the certification vote, but that the defendants were among the first -- are alleged to be among the first to come into the Capitol. The defendants are alleged to have come in and defaced the Capitol while inside, by scribbling "MURDER THE MEDIA" on the door; to have stolen flexicuffs from the Capitol Police. These are all allegations that more than adequately show that they have acted corruptly to impede or obstruct the certification proceeding; and they are not vague in any context or, sort of, in any way. And of course, any arguments that the facts don't bear that out or that one would give some interpretation to the facts as alleged is an argument for a jury, but not at this juncture in the litigation, Your Honor.

THE COURT: All right. Is there anything else that the government would like to add to its papers?

MR. PEARCE: No, Your Honor. Although, I am, of course, happy to answer any questions that the Court --

THE COURT: Mr. Feitel, it's your motion, so do you want to respond?

MR. FEITEL: No. I have nothing further to add, Your Honor. Thank you.

THE COURT: All right. I am going to issue my ruling now.

The briefing in this case is complete.

Five other judges on this court have thoroughly, thoughtfully, and very persuasively addressed, in written opinions, all of the arguments presented in the briefing before the Court in this case.

Judge Friedrich addressed these arguments in *U.S. v Sandlin*, at 21-CR-88; Judge Kelly addressed them in *U.S. v Nordean*, in 21-CR-175; Judge Boasberg addressed the arguments in *U.S. v Mostofsky*, in 21-CR-138; Judge Moss, in *United States v Montgomery*, 21-CR-46; and Judge Mehta, in *U.S. v Caldwell*, in 21-CR-28.

And given the extensive amount that has already been said in these written opinions, I thought it would be more expedient, and certainly no more than necessary, for me to issue my ruling on the pending motion to dismiss orally, rather than adding a sixth written opinion to those already excellent opinions written by my colleagues on the issues

presented in the defendants' motions to dismiss.

The defendants in this case, Nicholas DeCarlo and Nicholas Ochs, are charged in a seven-count indictment with conspiring to stop, delay, and hinder Congress's certification of the Electoral College vote in the 2020 election, and for related acts underlying the conspiracy that culminated in their entry and unlawful occupation of the U.S. Capitol Building on January 6, 2021.

The defendant DeCarlo in a motion to dismiss, docketed at ECF 55, seeks to have the Court dismiss Counts One and Two of the indictment, which charge Defendants with corruptly obstructing, influencing, and impeding an official proceeding; specifically -- and I quote: Congress's certification of the Electoral College vote, and attempting to do so, in violation of 18 U.S.C. Section 1512(c)(2), as well as conspiring to violate Section 1512(c)(2).

The defendant Ochs has adopted Defendant DeCarlo's motion in full. See Ochs's notice of adoption of the motion, docketed at ECF 56.

Counts One and Two, the only felony counts in the seven-count indictment, are the most serious charges against the defendants, and carry penalties of: Up to 5 years' imprisonment on Count One, charging the conspiracy to obstruct Congress's certification of the Electoral College

vote; 20 years' imprisonment on Count Two, charging substantive obstruction of an official congressional proceeding.

Defendants' contend that these two felony charges fail to state an offense for two reasons -- both of which present pure questions of law, which means that they must be resolved by a judge, not a jury.

The defendants' first question of law is whether Congress's certification of the Electoral College vote, on January 6, 2021, qualifies as an official proceeding as this term "official proceeding," is used in 18 U.S.C. Section 1512(c)(2), which is the criminal statute the defendants are charged with conspiring to violate in Count One and with substantively violating in Count Two.

Even though Congress's certification of the Electoral College vote is constitutionally mandated in two provisions of the U.S. Constitution -- in Article II, Section 1, Clause 3, and in constitutional Amendment XII -- plus, this certification is required under a federal statute, the Electoral Act of 1887, codified at 3 U.S.C. Section 15 -- Defendants argue this task is not an "official proceeding" because it lacks any investigative, legislative, or fact-finding purpose.

As to this first question, the government argues that Congress's certification of the Electoral College vote

does constitute an "official proceeding" for purposes of Section 1512(c)(2), which does not require the proceeding to have a fact-finding, testimonial, or investigative purpose.

The defendants' second question of law is whether 18 U.S.C. Section 1512(c)(2) is unconstitutionally vague as applied to their own actions because this criminal statute requires that they acted "corruptly," and that this requirement failed to give them notice that their alleged conduct, in the indictment, was prohibited under the statute.

As to this second question, the government argues that Section 1512(c)(2) is not vague as applied to Defendants because their alleged conduct falls squarely within judicial interpretations of the term "corruptly" as used in this criminal statute.

So let me begin with some basic legal principles.

When a criminal law is written and enacted by Congress, the myriad real-life circumstances that may arise in which the law applies are not always fully anticipated. Laws are generally written to accommodate novel factual circumstances.

The Supreme Court has articulated an important condition that Congress exercise its power to write new federal criminal laws by writing statutes that give ordinary people fair warning about what the law demands of them. See

U.S. v Davis, 139 S. Court, 2319, jump cite 2323, 2019.

And I start with this because never before have Americans attacked the U.S. Capitol on the day Congress was scheduled to certify the Electoral College vote for the new president.

For over 200 years, the peaceful transition of power from one presidential administration to another has been marked with Congress's certification of the Electoral College vote; and this event has been respectfully observed by American citizens, but not on January 6, 2021.

And I start with this historical fact because what happened on January 6th was a chilling new type of criminal conduct to which our criminal laws have never before had to be applied.

As Judge Boasberg cogently stated in his *Mostofsky* decision -- and I quote: In promulgating criminal statutes, past Congresses had understandably not fathomed that people might attempt to invalidate a lawful election by force in the Capitol itself. As a result, the government has had to be somewhat more innovative in determining which charges to prosecute.

Application of criminal laws to conduct never before seen, like what occurred on January 6, 2021, appropriately generates the kind of legal questions the defendants raise here about whether the criminal law fits

the charged criminal conduct and complies with what Justice Gorsuch said in *Davis* was: Does a statute give ordinary people fair warning about what the law demands of them?

For the reasons I will explain, even though the attack on the Capitol on January 6 was never planned for or imagined by the Congress when it enacted the criminal statute at issue in 18 U.S.C. Section 1512(c)(2), this law fits the charged criminal conduct, and Defendants' motion to dismiss will be denied.

The legal standard that I will apply here, and that guides my analysis of the arguments presented by the parties in support of their position is all well settled.

The main purpose of an indictment is to inform the defendant of the nature of the accusation against him. See *United States v Hitt*, 249 F.3d 1010, jump cite 1016, D.C. Circuit case from 2001, quoting *Russell v United States*, 369 U.S. 749, jump cite 767, from 1962.

Thus, the Federal Rules of Criminal Procedure require an indictment to contain only: A plain, concise, and definite written statement of the essential facts constituting the offense charged. See Federal Rule of Criminal Procedure 7(c). See, also, *U.S. v Ballestas*, 795 F.3d 138, jump cite 148 through 49, D.C. Circuit from 2015.

Before trial, a defendant may move to dismiss an entire indictment or a charge in it for failure to state an offense. See Federal Rule of Criminal Procedure 12(b)(3)(B)(v). As the D.C. Circuit has instructed, however: Dismissal is granted only in unusual circumstances, because the Court's power to dismiss an indictment directly encroaches upon the fundamental role of the grand jury. See the D.C. Circuit's case in *Ballestas*, again, 795 F.3d, at jump cite 148.

Accordingly, the Court has a limited and narrow role in considering a motion to dismiss an indictment like the one that's pending before me brought by the defendants DeCarlo and Ochs. The Court is limited to reviewing the face of the indictment and, more specifically, the language used to charge the crimes. And in this review, the Court must assume to be true the indictment's factual allegations. See *Ballestas*, again, 795 F.3d, at 149.

Rather than address the sufficiency of the evidence, which has not yet been presented, the sole question before the Court is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. See *U.S. v Bowdoin*, 770 F.Supp.2d 142, jump cite 146, D.D.C. case from 2011, citing *U.S. v Sampson*, 371 U.S. 75, jump cite 76, from 1962.

The defendants' argument to dismiss Counts One and

Two will be addressed in order, starting with the "official proceeding" meaning in application here, the first legal question.

The defendants are not the first January 6th defendants, as I have mentioned, to argue that the joint session of Congress convened to certify the Electoral College's votes for the 2020 presidential election does not qualify as an "official proceeding" under Section 1512(c)(2).

Five judges on this court have reviewed the exact same arguments the defendants now raise; and each judge has found such arguments to be without merit, and held that Congress's joint session to certify the electoral results on January 6th constituted an "official proceeding" under Section 1512(c)(2). Judge Friedrich so held in *Sandlin*; Judge Mehta, in his case; Judge Boasberg in *Mostofsky*; Judge Kelly, in *Nordean*; and Judge Moss in *Montgomery*; and the Court agrees with their reasoning.

Section 1512(c) penalizes anyone who corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so.

And an "official proceeding," for purposes of Section 1512, is defined to include, among other things -- and I quote: A proceeding before Congress. See 18 U.S.C. Section 1515(a)(1)(B).

Although helpful, the statutory definition of an "official proceeding" does not, by itself, resolve the question of what constitutes a proceeding before the Congress, as used in 1512(c)(2).

It may seem obvious and just common sense that when the Constitution, in two different parts, requires the Congress to perform a task, and the federal statute details how this task is to be done by Congress, that the proceeding in which this task is actually performed is very official. This obvious and common-sense answer is also the correct legal answer here.

The term "proceeding," in Section 1512(c)(2), should be given its legal definition.

As Judge Friedrich explained in *Sandlin* -- quoting from a well-respected legal dictionary, *Black's Law Dictionary* -- this term "proceeding," is defined as the business conducted by an official body -- here, Congress -- in a hearing.

Judge Mehta cited the same definition in *Caldwell;* and that the proceeding must occur "before the Congress" suggests that a "proceeding" must involve some formal convocation of the legislative branch -- as Judge Kelly said in *Nordean*.

And as Judge Moss explained in *Montgomery,* quote: Not every event occurring within the walls of Congress

constitutes an official proceeding, but the proceeding must involve a formal assembly or meeting of Congress for purposes of conducting official business.

Congress's certification of the Electoral College vote easily falls within the definition of a "proceeding before Congress."

The Constitution requires Congress to convene in a joint session of the Senate and House of Representatives for the opening, counting, and certification of the Electoral College vote. See U.S. Constitution, Article II, Section I, Clause 3, Amendment XII.

In tandem, the Electoral Count Act of 1887, 3 U.S.C., Sections 15 through 18, sets out how the constitutionally mandated business of the certification by Congress must proceed:

Pursuant to Section 15, a joint session of the Senate and House of Representatives must meet at 1 p.m. on the sixth day of January after the Electoral College has met.

The president of the Senate, who is the Vice President of the country, serves as the presiding officer and opens the certificates of the electoral votes, handing them to tellers appointed by the House and the Senate, who are tasked with making a list of the votes.

Each time the Vice President, as the presiding

officer, opens and announces a certificate, the officer must ask if there are any objections. Objections must be made in writing, and signed by a member of the Senate and a member of the House. Both chambers then withdraw to consider any objections to a particular certificate and resolve them separately. And the presiding officer cannot open and announce another certificate until the objections for the previous certificate have been resolved.

Finally, the joint session: Shall not be dissolved until the count of the electoral votes has been completed and the results declared by the presiding officer.

In sum, the joint session has all the markers of an official body conducting its business in a format similar to a hearing. As Judge Friedrich aptly summarized, quote: There is a presiding officer, a process by which objections can be heard, debated, and ruled upon, and a decision -- the certification of the results -- that must be reached before the session can be adjourned. See *Sandlin*.

Defendants made two arguments challenging this obvious conclusion, and both are nonstarters.

Defendants first insist that Congress's certification of the vote is not an official proceeding, and this constitutionally and statutorily mandated proceeding is merely a ministerial or ceremonial appearance because it does not involve any testimonial, fact-finding,

investigative purpose or Congress carrying out any of its enumerated powers.

Defendants ignore the importance of the relevant statutory language.

Every judge on this court to consider this argument has explained that the definition of an "official proceeding" as "a proceeding before the Congress" contains no language injecting the limitation Defendants suggest, that only certain types of congressional proceedings involving testimony, fact-finding, or investigations are protected from obstruction under Section 1512(c)(2). See *Sandlin*, 2021 WL 5865006, at *4; *Caldwell*, 2021 WL 6062718, at *5; *Nordean*, 2021 WL 6134595, at *5; *Montgomery*, 2021 WL 6134591, at *6.

If Congress intended to limit the congressional proceedings protected under Section 1512(c) to proceedings convened only for investigative, fact-finding, legislative, or other enumerated purposes, it easily could have done so.

For example, Congress did so in 18 U.S.C. Section 1505, a provision in the same section that prohibits obstructive acts directed at only those congressional proceedings that involve the power of inquiry.

Congress's omission of any language suggesting that only congressional proceedings of a certain type or purpose are covered by Section 1512(c) means that Congress

did not intend to limit the coverage of Section 1512(c) to proceedings involving only an investigative, legislative, or some other specific purpose. See *Department of Homeland Security versus MacLean*, 574 U.S. 383, jump cite 391, 2015. And I quote from the Supreme Court: Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. See, also, *Sandlin*, at *4; *Caldwell*, at *5; *Nordean*, at *5; and *Montgomery*, at *6.

Thus, the Court will not add, at Defendants' behest, requirements to the statute that Congress itself did not find necessary to include.

As the Supreme Court stated in *Bates v United States*, 552 U.S. 23, jump cite 29, 1997: We ordinarily resist reading words or elements into a statute that do not appear on its face.

Next, Defendants double down on this argument and say that the five recent decisions by my colleagues on this court should not be considered persuasive because they, and the government, treat the joint session as a monolithic whole, when, by statute, it comprises -- and I am quoting the defendants here: Two separate and distinct components; one, the counting of the previously awarded state electoral votes; and possibly, two, a challenge to the certification. See the defendants' reply at 1-2, and Defendants' motion at

pages 3 through 4.

Defendants claim that the indictment in this case charges Defendants with attempting to obstruct the first phase of the process, not the latter.

Defendants' attempt to slice and dice the certification process into two parts ignores both the plain language of the indictment and the Electoral Count Act.

The plain language of the indictment charges Defendants with conspiring to obstruct Congress's certification of the Electoral College vote. Defendants do not and cannot point to any language in the indictment parsing out the certification into separate and distinct components or charging Defendants with attempting to stop only the reading out and counting of the votes.

The statutory language confirming how this proceeding is to go on reinforces why the defendants are unable to do so.

As the Court explained earlier, the Electoral Count Act requires the joint session convened on January 6 to open and count a certificate; resolve any objections to a certificate as it is announced; and adjourn only after fully certifying each vote and declaring the results of the election.

The counting of the votes and the objection process are not two distinct phases, as Defendants would

have it. Before a vote can be counted, the presiding officer must call for any objections to the certificate, and the presiding officer cannot open and count another vote until the objections to the prior certificate have been resolved.

Put another way, the joint session does not convene, count all of the votes, adjourn or declare a result, and then reconvene to resolve any objections to the vote count. It is one integrated, monolithic -- to quote the defendants -- process.

The government and the courts correctly treat the proceeding as a monolithic whole because it is one.

Thus, both the plain language of the indictment and the statutory language defining the proceeding support the conclusion that Congress's certification of the Electoral College vote, as a whole, was the official proceeding that Defendants allegedly conspired to obstruct.

Accordingly, the proceeding alleged in the indictment -- Congress's certification of the Electoral College vote -- constitutes "an official proceeding" under 18 U.S.C. Section 1512(c)(2).

Defendants also seek to dismiss Counts One and Two on the grounds that this section, Section 1512(c)(2), is unconstitutionally vague as applied to Defendants because the statute's use of the word "corruptly" does not provide

adequate notice that Defendants' conduct was prohibited under the statute.

Again, the five judges on this court to consider this argument have consistently held that: The use of the word "corruptly" does not render Section 1512(c)(2) unconstitutionally vague as applied to January 6 defendants, whose alleged conduct involves acting with the intent to obstruct, influence, or impede Congress's certification of the Electoral College vote and using unlawful means to do so. See *Nordean*, at *12; *Sandlin*, at *14; *Caldwell*, at *11; *Mostofsky*, at *11; *Montgomery*, at *21 through 22.

The Court agrees with these holdings, and finds their reasoning highly persuasive.

The law is well-settled that a law is vague when it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement. See *U.S. v Bronstein*, 849 F.3d 1101, jump cite 1106, D.C. Circuit from 2017, quoting *Johnson v United States*, 576 U.S. 591, jump cite 595, from 2015.

The Court's primary inquiry is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendants' conduct was criminal. See *U.S. v Lanier*, 520 U.S. 259, jump cite 267, 1997.

To prevail in a vagueness challenge, like the one

brought here, Defendants face a heavy burden to overcome.

The Supreme Court and the D.C. Circuit have instructed that courts should hold a statute as unconstitutionally vague only if, after applying the rules of statutory interpretation, the statute specifies no standard of conduct at all. See *Bronstein*, 849 F.3d, at 1107 -- again, the D.C. Circuit case from 2017, quoting *Coates v City of Cincinnati*, 402 U.S. 611, jump cite 614, from 1971.

Furthermore, when a statute clearly applies to a defendant's conduct, such defendant cannot successfully challenge it for vagueness. See *Parker v Levy*, 417 U.S. 733, jump cite 756, from 1974.

Defendants rely primarily on *U.S. v Poindexter*, 951 F.2d 369, a D.C. Circuit case from 1991, to argue that: The use of the term "corruptly" in criminal statutes has consistently been held to raise notice, vagueness problems -- see the defendants' motion, at 10, that I'm quoting; this is an incorrect statement.

In *Poindexter*, the D.C. Circuit held that the term "corruptly," as used in a different statute, 18 U.S.C. Section 1505, was unconstitutionally vague as applied to that defendant when based on his conduct in that case of lying to Congress. See *Poindexter*, 951 F.2d -- at 379, at 385.

As Judges Friedrich, Mehta, and Kelly explain in great detail -- in *Sandlin*, *Caldwell*, and *Nordean* -- reliance on *Poindexter* alone cannot show that use of the term "corruptly," in 1512(c), is unconstitutionally vague as applied to defendants. Three of the many reasons bear noting:

First, even the court in *Poindexter* did not conclude that the term was unconstitutionally vague as applied to all conduct. See *Poindexter*, 951 F.2d, at 385.

Second, courts, including the D.C. Circuit, have since cabined *Poindexter's* holding to its facts and have not read it as a broad indictment of the use of the word "corruptly" in the various obstruction-of-justice statutes. See Judge Friedrich's decision in *Sandlin*, at *11, quoting *U.S. v Shotts*, 145 F.3d 1289, jump cite 1300, from the Eleventh Circuit in 1998.

Third, at the time of *Poindexter*, the court found that the term "corruptly" in Section 1505 was used in the transitive sense, meaning that a person must act to corrupt another person in order for their conduct to be prohibited under the statute; instead of being used in the intransitive sense, meaning that the person personally acted corruptly, with no requirement that the person's action must corruptly influence another. See *Caldwell*, at *9 through 10.

To put it more simply, the law at the time of

Poindexter would not prohibit a person making false statements to obstruct a proceeding but would prohibit influencing another person to make false statements to obstruct a proceeding.

Section 1512(c) was purposefully enacted to ensure that persons acting corruptly, without influencing or persuading others, could also be prosecuted for obstruction.

Previously, the statute, similar to Section 1505, only prohibited individuals from persuading others to engage in obstructive conduct.

Congress wanted to address this gap in the law and drafted Section 1512(c) so that "corruptly" took on the intransitive sense, allowing the statute to prohibit acts of obstruction committed by a defendant acting alone. See *Montgomery*, at *15.

Consequently, this textual difference with Section 1512(c)(2) taking on the intransitive sense, the concern about the transitive reading of "corruptly" that undergirded the court's decision in *Poindexter*, has no bearing on a prosecution brought under 1512(c)(2).

Contrary to Defendants' assertion that courts have consistently found the term "corruptly" to raise vagueness problems, several circuits have held that this term, particularly in the context of 1512(c), is not unconstitutionally vague, and provides a discernible

standard when legally construed. See *Montgomery*, at *20.

As the government helpfully points out, courts have typically construed the term "corruptly" as having two components: Intent to obstruct, impede, or influence; and two, wrongfulness. See the government's motion at 20, collecting cases.

Courts have also limited the reach of the term by construing it to have a nexus requirement; meaning that a defendant engaging in obstructive conduct must have contemplated a particular, foreseeable proceeding. See *U.S. v Young*, 916 F.3d 368, jump cite 386, Fourth Circuit 2019, and interference with the proceeding must be the natural and probable effect of the defendant's conduct. See *U.S. v Phillips*, 583 F.3d 1261, jump cite 1264, Tenth Circuit, from 2009.

This Court agrees with Judge Friedrich that construing the term "corruptly" in this manner provides a clear standard to which a defendant can conform his behavior. See *Sandlin*, at *12.

First, the Supreme Court previously has upheld the intent element, as laid out in the nexus requirement, in *U.S. v Aguilar,* 515 U.S. 593, jump cite 599 through 600, in 1995, when it construed a similar obstruction statute at Section 1503. The Supreme Court explained that the requirement served as a constraint that established a fair

warning of what constitutes a violation under the statute.

Since then, every circuit to consider the question has held that the nexus requirement applies to Section 1512(c). See *Young*, Fourth Circuit case, at 916 F.3d, jump cite 386; also, see *Montgomery*, at *20.

Second, the Supreme Court, in construing related obstruction statutes, also has held that the term "corruptly" means wrongful behavior; *Arthur Anderson v United States*, 544 U.S. 696, jump cite 705, from 2005. Subsequent decisions have put sufficient judicial gloss on what constitutes wrongful behavior or wrongdoing for purposes of Section 1512(c), so as to provide a clear distinction between lawful and unlawful conduct. See *Caldwell*, at *11.

At this stage, the Court need not craft a redefined definition of "corruptly" because, as Judge Friedrich explained, the ordinary meaning of wrongful, along with the judicial opinions construing it, identify a core set of conduct against which Section 1512(c)(2) may be constitutionally applied. See *Sandlin*, *13.

Specifically, this term covers independently criminal conduct, that is inherently malign, and committed with the intent to obstruct an official proceeding.

As Judge Friedrich succinctly explained, defining "corruptly" in this way shields those who engage in lawful,

innocent conduct, even when done with the intent to obstruct, impede, or influence the official proceeding from falling within the ambit of Section 1512(c)(2).

The indictment in this case alleges such conduct; and Defendants' claim that the government is attempting to hold the defendants criminally liable as a result of their mere presence in the building -- see the defendants' motion at 12 -- grossly downplays the actual allegations in the indictment.

Specifically, the indictment alleges that Defendants: Purposely conspired to obstruct, influence, and impede Congress's certification of the Electoral College vote, and to attempt to do so through a variety of means, including by:

One, agreeing to participate in and planning an operation to stop, delay, and hinder Congress's certification of the Electoral College vote. See the indictment, at paragraph 18;

Two, forcibly storming past exterior barricades, Capitol Police, and other law enforcement officers to enter the U.S. Capitol on January 6, without authorization. See paragraphs -- of the indictment -- 18 and 24; conduct that also would constitute a violation of 18 U.S.C. Section 1752(a)(1). See paragraphs 35 and 36 of the indictment;

Three, traveling through the Capitol Building and

occupying the premises after the Capitol had been breached by the first wave of unauthorized persons entering the building. See the indictment, at paragraphs 24 to 25;

Four, defacing the memorial door of the Capitol by inscribing the words "MURDER THE MEDIA" on the door. See paragraph 27, conduct that also would constitute a violation of 18 U.S.C. Section 1361. See paragraphs 31 and 32;

Five, stealing a pair of flex handcuffs belonging to the U.S. Capitol Police. See paragraph 28, conduct that also would constitute a violation of 18 U.S.C. Section 641. See paragraphs 33 and 34;

And six, knowingly and with intent to impede and disrupt the orderly conduct of government business and official functions; engaging in disorderly and disruptive conduct in restricted areas of the U.S. Capitol Building and its grounds, conduct that also would constitute a violation of 18 U.S.C. Section 1752(a)(2). See paragraphs 37 through 38.

As the government correctly notes, Section 1512(c)'s "corruptly" element provided fair notice to Defendants that this conduct was criminal, since the indictment sufficiently alleges that Defendants acted intentionally, and also did so with consciousness of wrongdoing by engaging in illegal acts including trespass, depredation, and theft. See the government's motion at 25.

Because the indictment alleges that the defendants used obvious criminal means with the intent to obstruct an official proceeding, their conduct falls squarely within the core coverage of "corruptly" as used in Section 1512(c)(2). See *Sandlin*, at *13.

Accordingly, as the statute clearly applies to the facts alleged in the indictment, Defendants may not successfully challenge it for vagueness. See *Parker*, 417 U.S., jump cite 756.

Finally, Defendants also argue that the charging decisions of the U.S. Attorney's Office regarding Section 1512(c)(2) suggest such "unfettered prosecutorial discretion" that the statute must be standardless due to its arbitrary enforcement and must, therefore, be vague.

Defendants' argument is easily dispatched, as all the judges on this court to address the issue have already found. See *Nordean*, at *12; *Sandlin*, at *9; *Montgomery*, at *22; *Caldwell*, at *8.

Defendants' focus on the U.S. Attorney's Office decision to charge or not to charge similarly-situated January 6 defendants under Section 1512(c)(2) is misplaced.

The government's exercise of discretion over charging determinations alone does not render a statutory scheme unconstitutionally vague. See *Kincaid v Government of District of Columbia*, 854 F.3d 721, jump cite 729, D.C.

Circuit from 2017.

That is because few subjects are less adapted to judicial review than the exercise by the executive of his discretion in deciding when and whether to institute criminal proceedings or what precise charge shall be made. See *U.S. v Fokker Services, B.V.*, 818 F.3d 733, jump cite 741, D.C. Circuit case from 2016, quoting *Newmann v U.S.*, 382 F.2d 479, jump cite 480, D.C. Circuit case from 1967.

As Judge Moss explained, I think quite well: The relevant question is not whether prosecutors have pursued every case in which a defendant may be charged under a given statute. All that is required is that the statute in question constrains a specific, objectively defined and observable behavior. See *Montgomery*, at *22, quoting *Agnew versus Government of District of Columbia*, a D.C. Circuit case from 2019.

I agree with Judge Moss and, therefore, this Court, as said in *Montgomery*, declines the defendant's invitation to compare the charges that the government has brought in each of the January 6 cases or to second-guess the government's decisions to offer plea agreements to lesser charges in some cases. The evidence in those cases is not before the Court; and, in any event, separation of powers accords the executive branch substantial deference in deciding which cases to prosecute under which statutes, and

in deciding when and whether to extend a plea offer. See *Montgomery*, at *23.

Judge Mehta made the same point in *Caldwell*, at *8, that: Discretionary prosecutorial decisions cannot render vague as applied a statute that by its plain terms provides fair notice.

So, as just discussed, the Court finds that Section 1512(c)(2) supplies adequate constraints by providing the requisite notice of the conduct it prohibits.

Accordingly, the defendants' vagueness challenge to Section 1512(c)(2) based on arbitrary enforcement also fails.

In sum, because the indictment alleges that Defendants acted corruptly and with intent to obstruct an official proceeding, in violation of Section 1512(c)(2), Defendants had fair warning that their conduct violated the statute, and the indictment does not fail to state an offense. So, therefore, the motion to dismiss Counts One and Two is denied.

All right. So now let's turn to how the parties would like to proceed. Have the parties conferred about trial dates in this case and motion schedule?

MS. LOEB: Your Honor, no. We have not yet had a chance to confer about how to move forward. We were waiting for the outcome of Your Honor's ruling.

THE COURT: Okay. And so do we need to set another status conference date or do you want me to just pull some trial dates out of my hat, or what? Which would you prefer?

MS. LOEB: Your Honor, I think -- Your Honor, I think it would be appropriate to set another status date; and that would also give the parties a chance to confer and discuss whether Your Honor's ruling changes anything, in terms of a potential resolution. In addition, the government has recently produced some discovery which would give the defendants an opportunity to review that discovery.

THE COURT: All right. Do I take it that a plea offer has been extended and rejected in the case today, or not? Is that an incorrect assumption?

MS. LOEB: Your Honor, we have not extended a formal plea offer. It appeared that the parties were too far apart, and that plea discussions would not be --

THE COURT: All right. So then why don't we -- because what I have been doing in other cases because, you know, January 6th is now over a year past, I am ready to move these cases along and get them to trial to the extent that I can, depending on the speed with which counsel can be ready.

So what I have been doing is I have been setting a status conference and suggesting that the parties -- a few

days before the status conference -- give me some -- three proposed dates for trial, and a motion schedule. So we can set this -- and at the status conference I will tell you what I have decided -- based on conferring the master trial calendar for the Court and my own schedule -- about what the trial date will be.

Does that sound like it would be good?

How long do you want for the next status conference? 30 days, a shorter period? What's your suggestion?

MS. LOEB: Your Honor, that works well. And I think 30 days -- 30 days makes sense.

MR. MacMAHON: Your Honor, if I may.

THE COURT: Yes.

MR. MacMAHON: I think 30 days is fine.

I think we will be needing a trial date in this case. But if the government wants to wait 30 days to set it, I would, in the interim -- I don't know what kind of dates the Court has to know what we're looking at for us to meet and confer about trial dates. Do you have any kind of a range for us?

I know these defendants are not incarcerated and that all of the incarcerated defendants are going first in a lot of these other cases, and I understand why --

THE COURT: Well, it depends. I mean, although we

are giving preferences to incarcerated defendants for a variety of different reasons, not all of the incarcerated defendants are anxious to go to trial right now.

So, quite frankly, I might have time in February; but I don't -- as I said, I usually -- I can take control of everybody's lives; I guess I do have that power. But I do prefer to let litigators control their lives as much as possible -- and confer and figure out what is best for them and for their clients -- and for when they will be best prepared.

So, Mr. MacMahon, am I hearing that you would like me to set the trial date today?

MR. MacMAHON: No. I don't think so, Your Honor --

THE COURT: Okay. Well, I just wanted to be clear on that. I just wanted to be clear on that because I will be happy to do so. But --

MR. MacMAHON: I was saying --

THE COURT: -- I will also be happy to give you-all 30 days to take stock, confer with each other about when you want to try the case, and then we can proceed from there.

Why don't I set this down for a status conference on February 25 at 10:00 a.m. And I would ask that by February 22 the parties submit a joint status report to the

Court advising whether you are ready to set the trial date then or whether you are still discussing a potential disposition short of trial and need more time to complete those discussions, or give me three proposed dates for a trial and a motion schedule.

All right. And I will exclude time under the Speedy Trial Act between today and February 25; I find that it is in the interest of justice to do so, and that those interests outweigh the interest of the defendants and the public in a speedier trial in order to give the parties time to complete discovery, review discovery, discuss with their clients, and for counsel to discuss among themselves whether they are interested in a disposition short of trial, and to also confer about the most convenient trial dates for all of the parties involved.

So, Ms. Loeb, is that sufficient for the Speedy Trial Act findings?

MS. LOEB: Yes, Your Honor.

I do have just one request because I am located in California. If it's possible to do the hearing later on the 25th, I would appreciate it. If not, I will, of course, make myself available at 10.

THE COURT: We can do it at 11.

MS. LOEB: Thank you, Your Honor.

THE COURT: Is that convenient for everybody else?

Mr. Feitel?

MR. FEITEL: Yes, Your Honor.

THE COURT: Mr. MacMahon?

MR. MacMAHON: Yes. Thank you, Your Honor.

THE COURT: Okay.

MS. LOEB: And Your Honor --

THE COURT: Is there anything further? I'm sorry.

MS. LOEB: I apologize, Your Honor.

I assume we will plan on a video hearing for that date as well?

THE COURT: Yes. I am continuing remote hearings through February.

Is there anything -- any other further questions? Anything further from the government?

Anything further from you, Mr. Feitel?

MS. LOEB: Nothing further from the government.

MR. FEITEL: No, Your Honor.

THE COURT: And from you, Mr. MacMahon?

MR. MacMAHON: No, Your Honor.

THE COURT: All right. You are all excused.

MR. PEARCE: Thank you, Your Honor. Have a good weekend.

THE COURT: You too.

MR. MacMAHON: Thank you, Your Honor.

MS. LOEB: Thank you, Your Honor.

(Whereupon, the proceeding concludes, 2:19 p.m.)

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

PLEASE NOTE: This hearing was held via videoconference and/or telephonically in compliance with the COVID-19 pandemic stay-safer-at-home recommendations and is therefore subject to the limitations associated with the use of technology, including but not limited to telephone signal interference, static, signal interruptions, and other restrictions and limitations associated with remote court reporting via telephone, speakerphone, and/or videoconferencing capabilities.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 27th day of January, 2022.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**No. 21-CR-119 (CJN)**
	:	
GARRET MILLER,	:	
Defendant.	:	

GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING DISMISSING COUNT THREE OF THE INDICTMENT

On March 7, 2022, the Court granted Defendant Garret Miller's motion to dismiss a count charging him with a violation of 18 U.S.C. § 1512(c)(2) (Count Three), which prohibits corruptly obstructing, influencing, or impeding an official proceeding. ECF 73. In the Court's view, a defendant violates Section 1512(c)(2) only when that individual "take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." Memorandum Opinion (Mem. Op.), ECF 72, at 28. Because, according to the Court, the indictment did not allege or imply that Miller took any such action, the Court dismissed Count Three. *Id.* at 29.

Reconsideration is appropriate where, as here, it furnishes a district court "the opportunity to correct [its] own alleged errors" and thereby "prevents unnecessary burdens" on the court of appeals. *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam). The government moves the Court to reconsider its ruling dismissing Count Three on two independent grounds. First, the Court erred by applying the rule of lenity. Rejecting an interpretation of Section 1512(c)(2)'s scope that every other member of this Court to have considered the issue and every reported case to have considered the issue (to the government's knowledge) has adopted, the Court found "serious ambiguity" in the statute. Mem. Op. at 28. The rule of lenity applies "'only if, after seizing

everything from which aid can be derived,'" the statute contains "a '*grievous* ambiguity or uncertainty,'" and the Court "'can make no more than a guess as to what Congress intended.'" *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998)) (emphasis added); *see also* Mem. Op. at 9 (citing "'grievous' ambiguity" standard). Interpreting Section 1512(c)(2) consistently with its plain language to reach any conduct that "obstructs, influences, or impedes" a qualifying proceeding does not give rise to "serious" or "grievous" ambiguity.

Second, even if the Court's document-focused interpretation of Section 1512(c)(2) were correct, such that the government must prove that Miller "took some action with respect to a document," Mem. Op. at 29, the Court erred in dismissing Count Three in full based on the purported insufficiency of the indictment. Count Three sufficiently alleged a violation of Section 1512(c)(2) by tracking the provision's "operative statutory text." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). The indictment did not need to more specifically allege that the obstruction took the form of taking some action with respect to a document. In other words, the indictment's allegations, by charging the operative statutory text, permissibly embrace two theories: (1) that Miller obstructed an official proceeding by "tak[ing] some action with respect to a document," Mem. Op. at 28; and (2) that Miller obstructed an official proceeding without taking some action with respect to a document. The Court's ruling finding the second theory invalid left the first theory intact. Moreover, Rule 12 of the Federal Rules of Criminal Procedure does not permit dismissal where, as here, additional facts would assist in resolving the pretrial motion. In particular, evidence at trial could establish the documents and records used in the Certification proceeding and prove that Miller's conduct had the natural and probable effect of destroying or imperiling those documents and records. Because the indictment's allegations sufficiently charge

the first theory that Miller obstructed the proceeding by taking action with respect to a document, the Court should not have dismissed Count Three.

I. Relevant Background

The grand jury returned a multi-count indictment that charged Miller with, among other things, one count of congressional obstruction, in violation of 18 U.S.C. § 1512(c)(2). Congress enacted Section 1512 as a prohibition on "[t]ampering with a record or otherwise impeding an official proceeding" in Section 1102 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 807, and codified it in Chapter 73 of Title 18 of the United States Code, placing it within the pre-existing Section 1512 as subsection (c). That prohibition applies to

> (c) [w]hoever corruptly--
>
> > (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> >
> > (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.

18 U.S.C. § 1512(c). Count Three charges that on January 6, 2021, Miller "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." ECF 61, at 2-3.

Miller moved to dismiss that count on three grounds. *See* ECF 34. He argued that (1) the Certification of the Electoral College vote was not an "official proceeding"; (2) Section 1512(c)(2) did not apply to his alleged conduct because it is limited to conduct impairing the availability and integrity of evidence; and (3) Section 1512(c)(2) is unconstitutionally vague as applied to him. *Id.* The Court rejected the first argument, *see* Mem. Op. at 9-10, but agreed that Miller's alleged conduct did not fall within Section 1512(c)(2)'s scope, *id.* at 10-29. The Court did not address

Miller's third argument.

Focusing on the word "otherwise" in Section 1512(c)(2), the Court identified "three possible readings" of Section 1512(c)(2)'s scope. Mem. Op. at 11. First, Section 1512(c)(2) could serve as a "clean break" from Section 1512(c)(1), *id.* at 11-12, a reading that "certain courts of appeals have adopted," *id.* at 14. The Court, however, identified multiple "problems" with that interpretation, all focused on the interpretation of the term "otherwise." The Court reasoned that reading "otherwise" in Section 1512(c)(2) to mean "in a different way or manner" is "inconsistent" with the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), which considered whether driving under the influence qualified as a "violent felony" under the now-defunct residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). Mem. Op. at 12-14. The Court accordingly rejected the first interpretation. *Id.* at 19-20. Second, in the Court's view, Section 1512(c)(1) could "provide[] examples of conduct that violates" Section 1512(c)(2). *Id.* at 15-16. Third, Section 1512(c)(2) could be interpreted as a "residual clause" for Section 1512(c)(1), such that both provisions are linked by the document-destruction and evidence-tampering "conduct pr[o]scribed by" Section 1512(c)(1). *Id.* at 17. After considering Section 1512(c)'s structure, "historical development," and legislative history, the Court found "serious ambiguity" as to which of the two "plausible" readings—the second and third readings identified above—Congress intended. Applying what the Court described as principles of "restraint," the Court then interpreted Section 1512(c)(2) to mean that a defendant violates the statute only when he or she "take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence an official proceeding" (the third reading). *Id.* at 28. Because, in the Court's view, the indictment did not encompass an allegation that Miller took any such action, the Court dismissed Count Three. *Id.* at 29.

Both before and after the ruling in this case, judges on this Court have rejected a document-focused interpretation of Section 1512(c)(2). In *United States v. Sandlin*, No. 21-cr-88, 2021 WL 5865006 (D.D.C. Dec. 10, 2021), the Honorable Dabney L. Friedrich found that Section 1512(c)(2)'s terms are "expansive and seemingly encompass all sorts of actions that affect or interfere with official proceedings" and determined that the use of the word "otherwise" in Section 1512(c)(2) "clarifies" that it "prohibits obstruction by means *other than* document destruction." *Id.* at *5-*6. She did not view the Supreme Court's decision in *Begay* as altering that conclusion, because *Begay* rested on the ACCA's different statutory language and history. *Id.* at *6. Judge Friedrich also rejected the defendant's reliance on *Yates v. United States*, 574 U.S. 528 (2015) (plurality opinion). *Sandlin*, 2021 WL 5865006, at *6-*8. Finally, Judge Friedrich concluded that, although a plain-text construction of Section 1512(c)(2) creates "substantial overlap" with other provisions in Section 1512 and Chapter 73, it does not create "intolerable overlap." *Id.* at *7-*8 (citing *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)) (emphasis omitted).

Decisions from other judges on this Court before *Miller* followed suit. For example, in *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718 (D.D.C. Dec. 20, 2021), the Honorable Amit P. Mehta concluded that Section 1512(c)(2) is not "limited" to conduct "affecting the integrity or availability of evidence in a proceeding." *Id.* at *11 (brackets and internal quotation marks omitted); *see id.* at *11-*19 (addressing Section 1512(c)(2)'s text and structure, *Begay*, and *Yates*). In *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891 (Dec. 21, 2021), the Honorable James E. Boasberg found persuasive the analysis in *Sandlin* and *Caldwell*. *See id.* at *11. In *United States v. Nordean*, 21-cr-175, 2021 WL 6134595 (D.D.C. Dec. 28, 2021), the Honorable Timothy J. Kelly reasoned that an interpretation of Section 1512(c)(2) limiting it to

"impairment of evidence" could not "be squared with" Section 1512(c)(2)'s "statutory text or structure." *Id.* at *6; *see id.* at *6-*9 (addressing *Yates* and superfluity concerns). And in *United States v. Montgomery*, 21-cr-46, 2021 WL 6134591 (D.D.C. Dec. 28, 2021), the Honorable Randolph D. Moss reached the same conclusion following an extended discussion of Section 1512(c)'s text, structure, and legislative history, as well as the *Begay* and *Yates* decisions. *Id.* at *10-*18; *see also United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.) (reaching the same conclusion on the scope of Section 1512(c)(2)); *United States v. Grider*, 21-cr-22, 2022 WL 392307, at *5-*6 (D.D.C. Feb. 9, 2022) (Kollar-Kotelly, J.) (same).

Following this Court's decision in *Miller*, two judges on this Court have disagreed with the *Miller* analysis. In denying a defendant's post-trial motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, Judge Friedrich indicated that she was "not inclined to reconsider" her ruling in *Sandlin* and described her points of disagreement with *Miller*. *United States v. Reffitt*, 21-cr-32, Trial Tr. 1502-05 (Mar. 8, 2022) (attached as Exhibit A). And in *United States v. Puma*, 21-cr-454, 2022 WL 823079 (D.D.C. Mar 19, 2022), the Honorable Paul J. Friedman concluded that the word "otherwise" in Section 1512(c)(2) "clarifies" that a defendant violates that section "through 'obstruction by means *other than* document destruction.'" *Id.* at *12 (quoting *Mostofsky*, 2022 WL 6049891, at *11). In reaching that conclusion, Judge Friedman rejected *Miller*'s "premise that any 'genuine ambiguity persist[s],'" *id.* at *12 n.4 (quoting Mem. Op. at 7), and therefore found the rule of lenity "inapplicable," *id.*

II. Argument

Reconsideration of the Court's ruling is appropriate for two reasons. First, the Court erred by applying the rule of lenity to Section 1512(c)(2) because, as many other judges have concluded after examining the statute's text, structure, and history, there is no genuine—let alone "grievous"

or "serious"—ambiguity. Second, even if the Court's narrow interpretation of Section 1512(c)(2)'s scope were correct, the Court erred by dismissing Count Three in full because the indictment's allegations, by charging defendant using the statutory text, validly encompassed that narrower theory, particularly if this Court were to consider proffered evidence that the government would adduce at trial. *See, e.g.*, *United States Firtash*, 392 F.Supp.3d 872, 887 (N.D. Ill. 2019) (upholding money laundering charge in indictment based in part on government's proffer of evidence regarding the nature of the financial transaction).

A. Legal standard

A reconsideration motion gives district courts "the opportunity to correct their own alleged errors," which in turn "prevents unnecessary burdens being placed on the courts of appeals." *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam). Although not provided for under the Federal Rules of Criminal Procedure, a motion to reconsider is available "as justice requires," *United States v. Hassanshahi*, 145 F.Supp.3d 75, 80 (D.D.C. 2015) (internal quotation marks omitted), and when "necessary under the relevant circumstances," *United States v. Caldwell*, 21-cr-28, 2022 WL 203456, at *1 (D.D.C. Jan. 24, 2022) (quoting *Cobell v. Norton*, 355 F.Supp.2d 531, 539 (D.D.C. 2005)). Reconsideration may be appropriate where a court "patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court." *Caldwell*, 2022 WL 203456, at *1 (internal quotation marks omitted). A reconsideration motion can address issues not discussed or briefed by the parties, but it is "not simply an opportunity to reargue facts and theories upon which a court has already ruled." *Hassanshahi*, 145 F.Supp.3d at 80-81 (internal quotation marks omitted); *see Arias v. DynCorp*, 856 F.Supp.2d 46, 52 (D.D.C.

2012) (noting that litigants who "have once battled for the court's decision . . . should not be permitted to battle for it again") (brackets and internal quotation marks omitted). Reconsideration is warranted here to address two issues not presented to the Court: "the degree of ambiguity required to trigger the rule of lenity," *Wooden v. United States*, 142 S. Ct. 1063, 1084 (2022) (Gorsuch, J., concurring), and whether a court is limited only to the indictment's allegations when considering a pretrial challenge to the scope of conduct that a statute encompasses.

B. The Court's ruling erroneously applied the rule of lenity.

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955). That principle underlies the "venerable" rule of lenity, Mem. Op. at 8 (quoting *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (Bibas, J., concurring)), which ensures that "legislatures and not courts" define criminal activity given the "seriousness of criminal penalties" and the fact that "criminal punishment usually represents the moral condemnation of the community." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

The rule of lenity, however, does not come into play when a law merely contains some degree of ambiguity or is difficult to decipher. The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted); *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998); *Young v. United States*, 943 F.3d 460, 464 (D.C. Cir. 2019).

In short, some ambiguity is insufficient to trigger the rule of lenity; instead, a court must find "grievous ambiguity" that would otherwise compel guesswork. *See Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (internal quotation marks omitted). "Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, 'hard interpretive conundrums, even relating to complex rules, can often be solved.'" *Wooden*, 142 S. Ct. at 1074 (Kavanaugh, J., concurring) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)).

The Court erroneously applied the rule of lenity in this case. The Court referred to the "'grievous' ambiguity" standard when initially discussing the rule, *see* Mem. Op. at 9, and found "a serious ambiguity" regarding the conduct that Section 1512(c)(2) reaches, *id.* at 28; *see also id.* at 22 ("[T]he Court does not believe that there is a single obvious interpretation of the statute."). But the Court's interpretation of Section 1512(c)(2)'s scope places undue emphasis on a single word ("otherwise") and a single Supreme Court decision (*Begay*) that interpreted that word as used in an entirely different statute and statutory context. A proper reading of Section 1512(c)(2)'s text, structure, and history demonstrates that Section 1512(c)(2) prohibits any corrupt conduct that intentionally obstructs or impedes an official proceeding, not merely where a "defendant ha[s] taken some action with respect to a document, record, or other object," *id.* at 28, to corruptly obstruct an official proceeding.

Simply put, the rule of lenity is "inapplicable" here. *Puma*, WL 823079, at *12 n.4. Congress made clear in Section 1512(c)(2) that it sought to protect the integrity of official proceedings—regardless of whether a defendant threatens such a proceeding by trying to interfere with the evidence before that tribunal or threatens the tribunal itself. Any such distinction between these forms of obstruction produces the absurd result that a defendant who attempts to destroy a document being used or considered by a tribunal violates Section 1512(c) but a defendant who

threatens to use force against the officers conducting that proceeding escapes criminal liability under the statute. Not only does the rule of lenity not require such an outcome, but such an application loses sight of a core value that animates the lenity rule: that defendants should be put on notice that their conduct is criminal and not be surprised when prosecuted. *See Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring) ("Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws."). It would strain credulity for any defendant who was focused on stopping an official proceeding from taking place to profess surprise that his conduct could fall within a statute that makes it a crime to "obstruct[], influence[], or impede[] [any] official proceeding or attempt[] to do so." 18 U.S.C. § 1512(c)(2). Confirming the absence of ambiguity—serious, grievous, or otherwise—is that despite Section 1512(c)(2)'s nearly 20-year existence, no other judge has found ambiguity in Section 1512(c)(2), including eight judges on this Court considering the same law and materially identical facts. *See supra* at 5-6.

1. Section 1512(c)(2)'s text and structure make clear that it covers obstructive conduct "other" than the document destruction covered in Section 1512(c)(1).

While Section 1512(c)(1) prohibits the corrupt destruction or alteration of documents, records, and other objects in connection with an official proceeding, Section 1512(c)(2) prohibits corrupt conduct that "otherwise" obstructs, influences, or impedes an official proceeding. Before this Court's decision to the contrary, every reported case to have considered the scope of Section 1512(c)(2), *see* Gov't Supp. Br., ECF 74, at 7-9,[1] and every judge on this Court to have considered

[1] *See, e.g.*, *United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (police officer tipped off suspects about issuance of arrest warrants before "outstanding warrants could be executed, thereby potentially interfering with an ongoing grand jury proceeding"), *vacated on other grounds*, 139 S. Ct. 2772 (2019); *United States v. Petruk*, 781 F.3d 438, 446-47 (8th Cir. 2015) (defendant attempted to secure a false alibi witness while in jail for having stolen a vehicle); *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014) (defendant solicited information about a grand

the issue in cases arising out of the events at the Capitol on January 6, 2021, *see supra* at 5-6, concluded that Section 1512(c)(2) "prohibits obstruction by means *other than* document destruction." *Sandlin*, 2021 WL 5865006, at *5. That conclusion follows inescapably from the text of Section 1512(c)'s two subsections read together: Section 1512(c)(1) "describes how a defendant can violate the statute by 'alter[ing], destroy[ing], mutilat[ing], or conceal[ing]' documents for use in an official proceeding," *Puma*, 2022 WL 823079, at *12, while "otherwise" in Section 1512(c)(2) "signals a shift in emphasis . . . from actions directed at evidence to actions directed at the official proceeding itself," *Montgomery*, 2021 WL 6134591, at *12 (internal quotation marks omitted).

This Court was thus mistaken in concluding that this interpretation either "ignores" that "otherwise" is defined with reference to "something else," namely Section 1512(c)(1), or fails to "give meaning" to the term "otherwise." Mem. Op. at 12. Far from suggesting that Section 1512(c)(2) is "wholly untethered to" Section 1512(c)(1), *id.*, "otherwise" as used in Section 1512(c)(2) indicates that Section 1512(c)(2) targets obstructive conduct in a manner "other" than the evidence tampering or document destruction that is covered in Section 1512(c)(1). *See* ECF 74, at 8. That understanding of "otherwise" is both fully consistent with each definition the Court surveys, *see* Mem. Op. at 11 (noting that "otherwise" in Section 1512(c)(2) may plausibly be read as "in a different way or manner; differently"; "in different circumstances: under other conditions";

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jury investigation from corrupt "local police officers'); *United States v. Ahrensfield*, 698 F.3d 1310, 1324-26 (10th Cir. 2012) (law enforcement officer disclosed existence of undercover investigation to target); *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009) (defendant disclosed identity of an undercover officer, thus preventing him from making controlled purchases from methamphetamine dealers); *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009) (false testimony before a grand jury); *United States v. Reich*, 479 F.3d 179, 185-87 (2d Cir. 2007) (Sotomayor, J.) (defendant an opposing part a forged court order that purported to recall and vacate a legitimate order, causing the opposing party to withdraw an application for a writ of mandamus).

or "in other respects") (internal quotation marks omitted), and ensures that the term is not rendered "pure surplusage," *id.* at 12. In sum, "otherwise" makes clear that Section 1512(c)(1)'s scope encompasses document destruction or evidence tampering that corruptly obstructs an official proceeding, while Section 1512(c)(2)'s ambit includes "other" conduct that corruptly obstructs an official proceeding.

The fact that some cases "could be brought under either or both prongs of Section 1512(c)," *Montgomery*, 2021 WL 6134591, at *12, does not imply that Section 1512(c)(2) "would have the same scope and effect . . . if Congress had instead omitted the word 'otherwise,'" Mem. Op. at 12. For one thing—and as noted in the government's supplemental brief, *see* ECF 74, at 11-13—overlap is "not uncommon in criminal statutes," *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014), and Section 1512(c)(2)'s broader language effectuates its design as a backstop in the same way that a "generally phrased residual clause . . . serves as a catchall for matters not specifically contemplated." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009). Moreover, interpreting the interplay of Sections 1512(c)(1) and 1512(c)(2) in this way does not foreclose a defendant from arguing that his conduct falls outside Section 1512(c)(2)'s scope because his document destruction or evidence concealment is prohibited and punishable only under Section 1512(c)(1). To be sure, practical considerations may militate against seeking such a potentially Pyrrhic victory—where success leads to reindictment under Section 1512(c)(1)—but those practical considerations provide no reason to reject the straightforward interpretation of Section 1512(c) as divided between a provision that targets evidence destruction (Section 1512(c)(1)) and a provision that applies to "otherwise" obstructive conduct (Section 1512(c)(2)). And, in any event, the "mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005).

The Court further concluded that interpreting "otherwise" in the manner described above is "inconsistent" with *Begay*, where, in the Court's view, analysis of what "'otherwise' meant" was "[c]rucial" to the Supreme Court's analysis. Mem. Op. at 12. That conclusion is flawed in several respects. First, in considering whether driving under the influence was a "violent felony" for purposes of the ACCA's residual clause, which defines a "violent felony" as a felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury," 18 U.S.C. § 924(e)(2)(B)(ii), the Supreme Court in *Begay* addressed a statutory provision that has an entirely different structure than Section 1512(c)(2). *See Sandlin*, 2021 WL 5865006, at *6 (distinguishing *Begay* on the ground that, unlike the ACCA residual clause, the "otherwise" in Section 1512(c)(2) is "set off by both a semicolon and a line break"); *United States v. Ring*, 628 F.Supp.2d 195, 224 n.17 (D.D.C. 2009). Unlike in the ACCA residual clause, the "otherwise" phrase in Section 1512(c)(2) "stands alone, unaccompanied by any limiting examples."[2] *Ring*, 628 F.Supp.2d at 224 n.17. In other words, the "key feature" in Section 924(e)(2)(B)(ii) at issue in *Begay*, "namely, the four example crimes," 553 U.S. at 147, is "absent" in Section 1512(c)(2). *Caldwell*, 2021 WL 6062718, at *14. Although this Court recognized the structural difference between the ACCA residual clause and Section 1512(c)(2), *see* Mem. Op. at 18-19, it offered no reason to import *Begay*'s interpretation of "otherwise" to Section 1512(c)(2)'s differently structured provision.

Second, describing the Supreme Court's interpretation of "what 'otherwise' meant" as

[2] The Court suggested (Mem. Op. at 15-16) that "[t]he government also presents an alternative reading" that Section 1512(c)(1) "provides examples of conduct that violates" Section 1512(c)(2). *Id.* at 15. That is incorrect. Neither the government nor Miller nor (to the government's knowledge) any court has proposed or adopted that construction of Section 1512(c)(2). Considering an interpretation that no party advocates and no court has adopted injects the kind of "front-end ambiguity" that "lead[s] to significant inconsistency, unpredictability, and unfairness in application." *Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring).

"[c]rucial" to that Court's decision in *Begay* is an inaccurate description of *Begay*'s analysis. The majority in *Begay* noted first that the "listed examples" in Section 924(e)(2)(B)(ii)—burglary, arson, extortion, or crimes involving explosives—indicated that the ACCA residual clause covered only similar crimes. *Begay*, 553 U.S. at 142. Those examples, the majority reasoned, demonstrated that Section 924(e)(2)(B)(ii) was not designed "to be all encompassing," but instead to cover only "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 142-43. The majority next drew support for its conclusion from Section 924(e)(2)(B)(ii)'s history, which showed that Congress both opted for the specific examples in lieu of a "broad proposal" that would have covered offenses involving the substantial use of physical force and described Section 924(e)(2)(B)(ii) as intending to encompass crimes "similar" to the examples. *Id.* at 143-44. In the final paragraph of that section of the opinion, the majority addressed "otherwise," noting that the majority "[could]not agree" with the government's argument that "otherwise" is "*sufficient* to demonstrate that the examples do not limit the scope of the clause" because "the word 'otherwise' *can* (we do not say *must*, cf. *post* at [150-52] (Scalia, J. concurring in judgment)) refer to a crime that is similar to the listed examples in some respects but different in others." *Id.* at 144.

A tertiary rationale responding to a party's argument where the majority refrains from adopting a definitive view of "otherwise" cannot be described as "crucial." The majority's "remarkably agnostic" discussion of "otherwise" in *Begay* explicitly noted that the word may carry a different meaning where (as here) the statutory text and context suggests otherwise. *Montgomery*, 2021 WL 6134591, at *11; *see Caldwell*, 2021 WL 6062718, at *14 (declining to depart from the "natural reading" of "otherwise" as "'in a different way or manner'" based on the discussion in *Begay*). In short, the majority in *Begay* "placed little or no weight on the word

'otherwise' in resolving the case." *Montgomery*, 2021 WL 6134591, at *11.

Third, whatever the significance of the majority's interpretation of "otherwise" in *Begay*, *Begay*'s ultimate holding demonstrates why this Court should not embark on imposing an extra-textual requirement within Section 1512(c)(2). The Supreme Court held in *Begay* that Section 924(e)(2)(B)(ii) encompasses only crimes that, similar to the listed examples, involve "purposeful, violent, and aggressive conduct." 553 U.S. at 144-45. But "*Begay* did not succeed in bringing clarity to the meaning of the residual clause." *Johnson v. United States*, 576 U.S. 591, 600 (2015). Just as the *Begay* majority "engraft[ed]" the "purposeful, violent, and aggressive conduct" requirement onto the ACCA's residual clause, 553 U.S. at 150 (Scalia, J., concurring in judgment) (internal quotation marks omitted), so too this Court engrafts onto Section 1512(c)(2) the requirement that a defendant "have taken some action with respect to a document, record, or other object" to obstruct an official proceeding, Mem. Op. at 28. In the nearly 20 years since Congress enacted Section 1512(c)(2), no reported cases have adopted the Court's interpretation, and for good reason. That interpretation would give rise to unnecessarily complex questions about what sort of conduct qualifies as "taking some action with respect to a document" in order to obstruct an official proceeding. *Cf. United States v. Singleton*, No. 06-cr-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006) (unpublished) (concluding that Section 1512(c)(2) "require[s] some nexus to tangible evidence, though not necessarily tangible evidence already in existence"); *see also United States v. Hutcherson*, No. 05-cr-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) (unpublished) (concluding that a violation of Section 1512(c)(2) requires proof that "an individual corruptly obstructs an official proceedings [*sic*] through his conduct in relation to a tangible object").[3] In brief, the Court's interpretation is likely to give rise to the very ambiguity it purports

[3] The Court's interpretation of Section 1512(c)(2) resembles the reading given in *Singleton* and *Hutcherson*, both of which are unpublished and neither of which the Court cites. As noted in the

to avoid.

The Court's observation that only "certain courts of appeals," Mem. Op. at 14, have interpreted Section 1512(c)(2) to reach conduct that obstructs an official proceeding other than document destruction significantly understates the case law. Every reported case—both in the courts of appeals and in district courts—has interpreted Section 1512(c)(2) in that manner. *See* ECF 74, at 7-9 (discussing cases). Moreover, the Court's effort to distinguish one of those cases, *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015), misses the mark. That *Petruk* did not cite or discuss *Begay*, Mem. Op. at 14, says nothing about the logic of its analysis, particularly given how "remarkably agnostic" *Begay*'s discussion of "otherwise" is. *See Montgomery*, 2021 WL 6134591, at *11. The Court likewise faulted *Petruk* for misreading the Supreme Court's decision in *United States v. Aguilar*, 515 U.S. 593 (1995), where the Supreme Court interpreted the omnibus clause in 18 U.S.C. § 1503 to require a "relationship in time, causation, or logic," *id.* at 599, between the obstructive conduct and the proceeding—a grand jury investigation—at issue in the defendant's case. But the restraint the Supreme Court exercised by interpreting Section 1503 to require that "nexus" is paralleled by interpreting the same nexus requirement to apply to Section 1512(c)(2)—as other judges on this Court have done, *see* ECF 74, at 20-22 (explaining that the nexus requirement applies to Section 1512(c)(2)); *Montgomery*, 2021 WL 6134591, at *20-*21—and not by imposing an additional, atextual requirement that a defendant must "have

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main text, no other court, at least in a reported opinion, appears to have adopted the nexus-to-tangible-evidence-or-a-tangible-object standard articulated in *Singleton* and *Hutcherson*. *See United States v. De Bruhl-Daniels*, 491 F.Supp.3d 237, 250-51 (S.D. Tex. 2020) (identifying *Singleton* and *Hutcherson* as outliers from the "most popular—and increasingly prevalent—interpretation of § 1512(c)(2) [as] an unlimited prohibition on obstructive behavior that extends beyond merely tampering with tangible items"); *Ring*, 628 F.Supp.2d at 225 n.18 (disagreeing with *Singleton* and *Hutcherson* but finding that the alleged conduct at issue in that case involved "some nexus to documents"). No court of appeals has cited either case.

taken some action with respect to a document" for his conduct to fall within the scope of Section 1512(c)(2).[4]

2. Other tools of statutory interpretation do not undermine that straightforward reading.

Because Section 1512(c)(2)'s text and context make clear that it reaches conduct that obstructs, influences, or impedes an official proceeding in a manner other than document destruction or evidence tampering, resorting to other tools of statutory interpretation is not necessary. In any event, those tools reinforce that straightforward interpretation of Section 1512(c)(2)'s scope. *See* ECF 74, at 9-17. In reaching a contrary conclusion, the Court erred in several respects.

First, the Court suggested that reading Section 1512(c)(2) consistently with its plain language and structure as described above would "introduce something of an internal inconsistency" because Section 1512(c)(2) would have greater breadth than neighboring provisions in Section 1512. Mem. Op. at 21; *see id.* (describing Section 1512(c)(2) as an "elephant[] in [a] mousehole[]"). That reasoning is inconsistent with *Yates*, where a plurality of the Supreme Court recognized that Section 1512 consisted of "broad proscriptions," not "specialized provisions expressly aimed at corporate fraud and financial audits." 574 U.S. at 541 (plurality opinion). Moreover, the narrowing construction the Court imposes on Section 1512(c)(2) fails to consider that Section 1512(c)(2) reaches more broadly precisely because other

[4] The Court's similar criticism of *United States v. Burge*, 711 F.3d 803 (7th Cir. 2013), Mem. Op. at 15 n.7, fails for the same reason. And the Court's related criticism that *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014), which relied in part on *Burge*, "did not even involve a prosecution under § 1503, let alone § 1512(c)(2)," Mem. Op. at 15 n.7, falls short. The defendants in *Volpendesto* were prosecuted for, among other things, conspiracy to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(k), and the jury was instructed on the elements of 18 U.S.C. § 1512(c)(2). *See United States v. Volpendesto*, 08-cr-115, Dkt. No. 518, at 88-95 (N.D. Ill. Dec. 22, 2010).

provisions within Section 1512 leave gaps that Section 1512(c)(2) fills. *Cf. Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949) ("The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.").

Second, the Court worried that a reading of Section 1512(c)(2) that encompasses obstructive conduct unrelated to documents or records would give rise to "substantial superfluity problems." Mem. Op. at 21. But even a "broad interpretation of § 1512(c)(2) does not entirely subsume numerous provisions within the chapter," and any overlap with other provisions in Section 1512 is "hardly remarkable." *Sandlin*, 2021 WL 5865006, at *8; *accord Nordean*, 2021 WL 6134595, at *8. More troubling, by interpreting Section 1512(c)(2) to require "some action with respect to a document," Mem. Op. at 28, the Court risks rendering Section 1512(c)(2) itself superfluous in light of the "broad ban on evidence-spoliation" in Section 1512(c)(1), *Yates*, 574 U.S. at 541 n.4 (plurality opinion) (internal quotation marks omitted). Moreover, because Section 1512(c)(1) includes both completed and *attempted* evidence tampering, *see* 18 U.S.C. § 1512(c)(1) (reaching "[w]hoever corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, *or attempts to do so*) (emphasis added), it is unlikely that a defendant who "take[s] some action with respect to a document, record, or other object," Mem. Op. at 28, has not also taken a "substantial step" toward altering, destroying, mutilating, or concealing that document sufficient to fall within the scope of Section 1512(c)(1). *See United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014) (explaining that the "general meaning of 'attempt' in federal criminal law" is "an action constituting a 'substantial step' towards commission of a crime and performed with the requisite criminal intent").

The canon against superfluity, which is "strongest when an interpretation would render superfluous another part of the same statutory scheme," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013), is even stronger when it renders superfluous "other provisions in the *same enactment*." *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) (emphasis added; internal quotation marks omitted); *cf. Yates*, 574 U.S. at 543 (plurality opinion) ("We resist a reading of § 1519 that would render superfluous an entire provision passed . . . as part of the same Act."). That principle comes into play here because Sections 1512(c)(1) and 1512(c)(2) were enacted together as part of the Sarbanes-Oxley Act. *See* ECF 74, at 15-16.

Third, the Court's discussion of statutory and legislative history, Mem. Op. at 23-28, provides no sound reason to deviate from the straightforward interpretation of Section 1512(c)(2) described above. For example, the Court suggested that Congress would have had no reason to add Section 1512(a)(2)(B) three months after enacting Section 1512(c)(2) if the latter provision were construed broadly. Mem. Op. at 25. Section 1512(a)(2)(B) prohibits the use or threatened use of physical force against "any person" with the intent to "cause or induce any person" to take one of four actions, including "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] an object with intent to impair the integrity or availability of the object for use in an official proceeding." 18 U.S.C. § 1512(a)(2)(B)(ii). But as the Court noted, Mem. Op. at 21 & 23, unlike Section 1512(a)(2)(B), Section 1512(c) aimed generally to impose "direct" liability for obstructive conduct that was not directed at intimidating or influencing another person, *see* ECF 74, at 16.[5] Understood

[5] The Court suggested (Mem. Op. at 22 n.10) that Section 1512(c)(2) could be read as "creating 'direct' liability for the other types of conduct covered by § 1512—that is, that it makes criminal an individual doing directly those things for which the rest of § 1512 requires action directed at another person." Although the government's supplemental brief described Section 1512(c)(2) in those terms, *see* ECF 74, at 16 ("Section 1512(c) aimed at closing a 'loophole' in Section 1512: the existing prohibitions did not adequately criminalize a defendant's *personal* obstructive conduct

in that light, Section 1512(a)(2)(B) operates harmoniously with both subsections in Section 1512(c): Section 1512(a)(2)(B)(ii) reaches a defendant's use of force or threatened use of force at *another person* in order to cause that person to destroy documents in connection with an official proceeding; Section 1512(c)(1) reaches a defendant's direct destruction of documents in connection with an official proceeding; and Section 1512(c)(2) reaches a defendant's non-document-related conduct that obstructs or impedes an official proceeding. And while the legislators who enacted Section 1512(c) in the Sarbanes-Oxley Act undoubtedly had document shredding foremost in mind, *see* Mem. Op. at 26-28; *accord* ECF 74, at 15 (noting floor statements addressing concern about document shredding in the *Arthur Andersen* prosecution), "it is unlikely that Congress was concerned with only the type of document destruction at issue in the *Arthur Andersen* case." *Montgomery*, 2021 WL 6134591, at *16. In other words, "there is no reason to believe that Congress intended to fix that problem only with respect to 'the availability or integrity of evidence.'" *Id.*

Finally, an interpretation of Section 1512(c)(2) that imposes criminal liability only when an individual takes direct action "with respect to a document, record, or other object" to obstruct a qualifying proceeding leads to absurd results. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (rejecting interpretation of a criminal statute that would "produce results that were not merely odd, but positively absurd"). That interpretation would appear, for example, not to encompass an individual who seeks to "obstruct[], influence[], or impede[]" a congressional proceeding by explicitly stating that he intends to stop the legislators from performing their constitutional and statutory duties to certify Electoral College vote results by "drag[ging]

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not aimed at another person."), the Court decided (Mem. Op. at 22 n.10) "not [to] address" the interpretation "further" because "[n]either party presses this argument (or anything like it)."

lawmakers out of the Capitol by their heels with their heads hitting every step," *United States v. Reffitt*, 21-cr-32 (DLF), Trial Tr. 1502, carrying a gun onto Capitol grounds, *id.* at 1499, and then leading a "mob and encourag[ing] it to charge toward federal officers, pushing them aside to break into the Capitol," *id.* at 1501-02, unless he also picked up a "document or record" related to the proceeding during that violent assault. The statutory text does not require such a counterintuitive result.

C. Even if the Court's interpretation of Section 1512(c)(2)'s scope were correct, pretrial dismissal based on the indictment's allegations is premature.

Reconsideration is additionally appropriate even if the Court adheres to its interpretation of Section 1512(c)(2)'s scope because dismissal of Count Three in full is improper under Rules 7 and 12 of the Federal Rules of Criminal Procedure.

An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure 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), which 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). "[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And 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).

Rule 12 permits a party to raise in a pretrial motion "any defense, objection, or request that the court can determine *without a trial on the merits*." Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 "does not explicitly authorize the pretrial dismissal of an indictment on

sufficiency-of-the-evidence grounds" unless the government "has made a full proffer of evidence" or the parties have agreed to a "stipulated record," *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005)—neither of which has occurred here. Indeed, "[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn't authorize its disposition before trial." *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.).

Although Miller has styled his challenge to Section 1512(c)(2)'s scope as an attack on the indictment's validity, the scope of the conduct covered under Section 1512(c)(2) is distinct from whether Count Three adequately states a violation of Section 1512(c)(2).[6] Here, Count Three of the indictment puts Miller on notice as to the charges against which he must defend himself, while also encompassing both the broader theory that a defendant violates Section 1512(c)(2) through any corrupt conduct that "obstructs, impedes, or influences" an official proceeding *and* the narrower theory that a defendant must "have taken some action with respect to a document," Mem. Op. at 28, in order to violate Section 1512(c)(2). The Court's conclusion that only the narrower theory is a viable basis for conviction should not result in dismissal of Count Three in full; instead, the Court would properly enforce that limitation by permitting conviction on that basis alone. *See United States v. Ali*, 885 F.Supp.2d 17, 33 (D.D.C. 2012) (limiting the government's aiding and abetting theory under 18 U.S.C. § 1651 to acts of piracy committed while the defendant was on the high seas but not dismissing the count), *reversed in part by* 718 F.3d 929, 941 (D.C. Cir. 2013) (disagreeing with the district court's limitation on aiding and abetting liability under Section 1651).

[6] Although Miller argues that the indictment must contain "some allegation" that his conduct "undermined an official proceeding's 'truth-finding function through actions impairing the integrity and availability of evidence," ECF 59, at 7, this Court's ruling does not appear to announce a new rule that its narrowed interpretation of Section 1512(c)(2)'s scope creates a new offense *element* that must be alleged in an indictment.

Critically, cases involving successful challenges by defendants concerning whether their *conduct*—and not merely the allegations against them—falls within the scope of the charged statute arise not under Rule 12 but following trials that establish the evidentiary record necessary to determine precisely what the defendant's conduct entailed. *See, e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1105 (2018) (considering scope of 26 U.S.C. § 7212(a) following defendant's conviction at trial); *Yates*, 574 U.S. at 534-35 (plurality opinion) (considering scope of the phrase "tangible object" in 18 U.S.C. § 1519 following defendant's conviction at trial); *Aguilar*, 515 U.S. at 597 (considering scope of omnibus clause in 18 U.S.C. § 1503 following the defendant's conviction at trial).

It is clear why that is so. Even assuming the Court's interpretation of Section 1512(c)(2) were correct, and that the government therefore must prove "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," Mem. Op. at 29, the Court cannot determine whether Miller's conduct meets that test until after a trial, at which the government is not limited to the specific allegations in the indictment.[7] And at trial, the government could prove that the Certification proceeding "operates through a deliberate and legally prescribed assessment of ballots, lists, certificates, and, potentially, written objections." ECF 74, at 41. For example, evidence would show Congress had before it boxes carried into the House chamber at the beginning of the Joint Session that contained "certificates of votes from the electors of all 50 states plus the District of Columbia." *Reffitt*, *supra*, Trial Tr. at 1064 (Mar. 4, 2022) (testimony of the general counsel to the Secretary of the United States Senate) (attached as Exhibit B). Evidence

[7] The government made this argument during the hearing on Miller's dismissal motion. *See United States v. Miller*, 21-cr-119, Transcript of Video Oral Argument, at 27-28 (Nov. 22, 2021) (attached as Exhibit C).

would further show that, as rioters began to breach the restricted area around the Capitol building and grounds on January 6, 2021, legislators were evacuated from the House and Senate chambers, and the staff for the Secretary of the United States Senate "took the ballot boxes and other paraphernalia of the proceeding" out of the chamber "to maintain custody of the ballots and make sure nothing happen[ed] to them." *Id.* at 1072.

Additional evidence could establish that Miller's conduct had the "natural and probable effect," *Aguilar*, 515 U.S. at 599 (internal quotation marks omitted), of destroying or imperiling the ballots and "other paraphernalia" from the Certification proceeding. Although the government does not anticipate presenting evidence that Miller envisioned placing or in fact placed hands on a document or record connected to the Certification proceeding, his forcible entry into the Capitol building and interference with law enforcement officers contributed to the chaos that led to the evacuation of lawmakers, the entrance of a Capitol police officer with a "very long, very large long gun" onto the Senate floor, and the scramble to remove the sealed electoral ballots to safety. *Reffitt*, *supra*, Trial Tr. at 1071-72. In that respect, Miller "took" many "action[s]" with respect to Congress's consideration of documents and records central to the Certification proceeding and thereby corruptly obstructed and impeded that Certification proceeding, including blocking lawmakers from considering such documents and records. In acting to thwart the commencement and operation of an official proceeding that involved such documents, the evidence will establish that Miller violated Section 1512(c)(2) even under an interpretation of Section 1512(c)(2) that requires "some nexus to tangible evidence," *Singleton*, 2006 WL 1984467, at *3, or some "conduct in relation to a tangible object," *Hutcherson*, 2006 WL 270019, at *2; or that the defendant "have taken some action with respect to a document, record, or other object" to obstruct an official proceeding, Mem. Op. at 28.

III. Conclusion

For the foregoing reasons, the Court should reconsider its ruling and reinstate Count Three.

Respectfully submitted,

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