UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MATTHEW PURSE, Defendant.	CASE NO. 1:21-CR-00512-PLF **Honorable Paul L. Friedman** **United States District Judge** **(Oral Argument Requested)**

MATTHEW PURSE'S REPLY IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

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I. INTRODUCTION

The government's Opposition confirms that the indictment should be dismissed in its entirety. As explained in Mr. Purse's Motion to Dismiss, the government's Criminal Complaint only alleges that Mr. Purse entered the Capitol building thirty-nine minutes after Congress had adjourned, that he spent a total of thirteen minutes in the building, and that while inside, he did nothing other than stand off to the side videotaping the protestors. These facts, even if true, simply cannot give rise to an offense under any of the five counts that Mr. Purse has been charged with.

Rather than argue otherwise, the government contends that the Court cannot look past the indictment in deciding this Motion. The government is wrong—the law is clear that if Mr. Purse stipulates to the government's proffered facts in their Criminal Complaint, which he did for purposes of his Motion, then the Court may dismiss an indictment if these facts do not state an offense against Mr. Purse as a matter of law. To the extent the government claims to have additional facts supporting the indictment, it must provide them through a supplemental briefing or an amended indictment.

Moreover, even if the Court were to overlook the obvious factual deficiencies in the government's case, the Court should still dismiss the indictment based on Mr. Purse's legal arguments that (1) his conduct was not prohibited by section 1512(c)(2) because it did not involve evidence tampering, (2) the term "corruptly" is unconstitutionally vague as applied to Mr. Purse's conduct, and (3) the Capitol grounds were not a "restricted area." As explained below, the government has failed to sufficiently refute any of these arguments.

Accordingly, because both the facts and the law support dismissal, Mr. Purse's Motion to Dismiss should be granted in its entirety.

II. THE COURT MAY DISMISS THE INDICTMENT BASED ON THE FACTS ALLEGED IN THE GOVERNMENT'S CRIMINAL COMPLAINT

As explained in Mr. Purse's moving papers, under *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005) and *United States v. Nitschke*, 843 F. Supp. 2d 4, 16 (D.D.C. 2011), this Court may dismiss an indictment on sufficiency-of-the-evidence grounds where the material facts are undisputed.

The government's contention that considering undisputed material facts outside of the indictment equates to an improper motion for summary judgment is false. In a motion for summary judgment, each party proffers evidence for the Court to evaluate—here Mr. Purse is only requesting that the Court rule on the sufficiency of the indictment assuming the government's allegations made against him in the Criminal Complaint are true. As such, the government's claim that considering the Criminal Complaint would improperly require the government to proffer evidence before trial is also incorrect. *See* ECF no. 35 at p. 5 n. 1. Mr. Purse is not arguing that the government is required at this stage to proffer any evidence whatsoever, only that the government's factual *allegations* must support the charges against him. In essence, Mr. Purse is asking that the Court determine whether there is any reason to have a trial in the first place, because even if the government proves its allegations, the charges still fail as a matter of law. *See e.g. United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988) ("The government's own facts proffered to the defendant and the district court simply did not conform to the allegations in the indictment. The district court found no violation and correctly dismissed the indictment, not because the government could not prove its case, but because there was no case to prove.").

Indeed, virtually every Circuit Court which has considered the issue, including the D.C. Circuit, has rejected the contention that reviewing allegations made by the government outside of

the indictment constitutes an improper motion for summary judgment. In *Yakou*, the D.C. Circuit explained that while "[t]here is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context," "[s]everal circuits have upheld, in the absence of a government objection, the district court's pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds where the material facts are undisputed and only an issue of law is presented" and "[o]ther circuits have recognized that a district court can properly adjudge the sufficiency of the evidence before trial where the government has made a full proffer of evidence or where there is a stipulated record." *Yakou*, 428 F.3d at 246-247. The D.C. Circuit "join[ed] those circuits in upholding the district court's pretrial dismissal of the indictment based on a question of law where the government has not made a timely objection." *Id.* at 247.

Recognizing this clear case law, the government next erroneously claims that the Court may only review documents outside of the indictment where "the government 'has made a *full* proffer of evidence' or the parties have agreed to a 'stipulated record.'" ECF no. 35 at p. 5. This, however, misstates the holding of *Yakou*. In *Yakou,* the Court merely noted that *other* circuits had found that a full proffer of evidence *was sufficient* (not necessary) to allow a Court to rule on sufficiency-of-the-evidence grounds—*Yakou* did not hold that the Court may *only* consider allegations outside of the indictment when the allegations constituted the full evidentiary record. To the contrary, the *Yakou* Court explained that its holding was based on the principle that "the existence of undisputed facts obviated the need for the district court to make factual determinations properly reserved for a jury." *Yakou*, 428 F.3d at 247. Thus, the only relevant question in deciding whether to rule sufficiency-of-the-evidence grounds is whether there are any material facts in dispute. Here, since Mr. Purse is stipulating to the truth of the allegations against him for purpose of the motion, there are no factual disputes and the Court may decide whether these allegations fail to give rise to a criminal offense as a matter of law.

To the extent the government contends that there are additional facts supporting the indictment which are not mentioned in the Criminal Complaint, the government should file a supplemental brief explaining what those facts are.[1] This is the exact approach that was taken by the District Court in *Nitschke* when it dismissed an indictment on sufficiency-of-the-evidence grounds because "the undisputed facts demonstrate[d], as a matter of law, that Defendant did not take a substantial step towards violating [18 U.S.C.] § 2422(b)." *Nitschke*, 843 F. Supp. at 16.

In *Nitschke*, the defendant unilaterally stipulated to all of the facts set forth in the criminal complaint against him and claimed that these allegations, even if true, did not constitute an offense. *Nitschke*, 843 F. Supp. at 7. After the motion was fully briefed, the Court held multiple status hearings and permitted the government to file supplementary briefs explaining whether the government had uncovered any additional facts relevant to the charges against the defendant, or whether they reasonably expected to do so in the future. *Id.* at 7-8. The Court deferred ruling on the motion several times to allow the government to assert these additional facts. *Id.*

Thus, in *Nitschke* the parties did not stipulate to the factual record, nor did the government concede that it made a "full proffer" of evidence. However, the *Nitschke* Court still found that a motion to dismiss was appropriate based on the principles articulated in *Yakou*. Specifically, the Court noted that although the case was "not controlled by *Yakou* because the Government has objected to the Court's consideration of Defendant's Motion before trial" "that distinction… should not be dispositive." *Id.* at 9. Instead, the Court found that it could rule on

[1] Notably, the government's contention that additional investigation may reveal additional conduct by Mr. Purse which supports the charges against him is disingenuous at best. The government claims that "[a]gents recovered the body-worn camera the defendant wore on January 6 throughout the day." ECF no. 35 at p. 39 n. 11. Accordingly the government claims to know exactly what Mr. Purse's conduct was throughout the entire day and no further investigation will reveal any additional information relevant to the charges against Mr. Purse. Regardless, if the government does not currently have facts supporting its charges, it should dismiss the indictment and continue investigating, not proceed to trial on baseless claims with the hope of discovering facts while the case is pending.

sufficiency-of-the-evidence grounds because (1) the defendant stipulated to the facts alleged by the government in the criminal complaint and supplemental briefing, (2) the government was provided opportunities to proffer additional facts, to conduct any subsequent investigation, and to ask the Court for further delay to seek more evidence, and (3) the remaining determination was entirely a legal one. *Id.* The Court explained that waiting until trial to test the sufficiency of the evidence was "unwarranted and would constitute a waste of judicial resources." *Id.*

The government's Opposition does not address *Nitschke*, let alone seek to distinguish it.[2] Instead, the government apparently wishes to waste valuable judicial resources, and force Mr. Purse to expend unnecessary legal fees, in defending claims that the government will be unable to establish as a matter of law, even if their allegations are true. Such a position is impractical—the Court should follow *Yakou* and *Nitschke* and dismiss the indictment because the undisputed facts preferred by the government fail to state an offense against Mr. Purse.

III. ARGUMENT

A. Count One for Felony Obstruction of an Official Proceeding Must Be Dismissed Because the Statute Is Unconstitutionally Vague and Because Mr. Purse Did Not Disrupt an Official Proceeding

1. Section 1512(c)(2) Only Prohibits Evidence Tampering, which Mr. Purse Is Not Alleged to Have Engaged in

As explained in Mr. Purse's Motion, section 1512(c)(2) only prohibits *evidence tampering* and thus Count One must be dismissed because there are no allegations that Mr. Purse took any actions with respect to evidence.

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[2] Confusingly, the government distinguishes two cases, *United States v. Ballestas*, 795 F.3d 138, 149 (D.C. Cir. 2015) and *United States v. Naik*, No. 19-cr-373-TSC, 2020 WL 534539 (D.D.C. Feb. 2, 2020), which did not address whether the Court can rule on sufficiency-of-the-evidence grounds and which Mr. Purse cited for a different legal proposition entirely—that the Court must accept the government's factual allegations as true when ruling on a motion to dismiss.

a. An "Official Proceeding" Must Involve Testimony or Evidence

In their Opposition, the government falsely states that Mr. Purse argues that section 1512 "requires an official proceeding to be adjudicative in nature." ECF no. 35 at p. 10. The government then spends numerous pages arguing that this definition has been rejected by numerous Courts in this District, and in any event, the Certification of an Electoral College vote is adjudicative in nature. *See Id.* at pp. 10-12.

However, Mr. Purse offers a different, broader, definition of the word "proceeding" than a proceeding that is "adjudicative in a nature." As explained in his Motion, the term "proceeding" should be interpreted as "a formal environment in which persons are called to appear or produce documents" and thus a "proceeding before the Congress" should be interpreted as "Congressional hearings which involve witness testimony or the production of documentary evidence." Doc. 34 at pp. 8-9. Thus, under Mr. Purse's definition, whether an event qualifies as a "proceeding" turns not on its purpose, but on whether it involves testimony or documentary evidence. This interpretation of the word "proceeding" is consistent with the holdings of the Fourth, Fifth, and Ninth Circuits. *See United States v. Young*, 916 F.3d 368, 384 (4th Cir. 2019); *United States v. Ramos*, 537 F.3d 439, 464 (5th Cir. 2008); *United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013). Although the government argues that these cases are non-binding, they remain persuasive authority. Notably, while three Circuit Courts have adopted Mr. Purse's definition of "proceeding," the government offers no Circuit Court authority in support of their interpretation, and instead relies solely on non-binding District Court opinions.

Moreover, the government's attempt to distinguish these three Circuit Court cases because they did not involve a proceeding before Congress falls flat. As explained in Mr. Purse's Motion, these Courts interpreted the word "proceeding," based on its dictionary

definition, the statutory context, and legislative intent. The fact that the alleged proceeding involved an investigation before the FBI or administrative agency was irrelevant to these Court's analysis. *Young*, *Ramos*, and *Ermoian*'s interpretation of "proceeding" is equally applicable regardless of whether the proceeding was before a federal government agency under section 1515(a)(1)(C) or a proceeding before Congress under section 1515(a)(1)(B). In all circumstances, "proceeding" should be interpreted as "a formal environment in which persons are called to appear or produce documents."

Although the Certification of the Electoral College vote involves a formal environment whereby Congress resolves objections to the electoral college votes, it does not involve testimony or documentary evidence. *See* 3 U.S.C. § 15. As such, it cannot be considered a "proceeding" under section 1515 and Count One must be dismissed as a matter of law.

b. Section 1512(c)(2) Only Prohibits Obstructing an Official Proceeding Through Actions with Respect to Documents, Records, or Similar Documentary Evidence

As explained in Mr. Purse's Motion, in *United States v. Miller*, 2022 WL 823070, at *15 (D.D.C. Mar. 7, 2022) and *United States v. Fischer*, 2022 WL 782413, at *4 (D.D.C. Mar. 15, 2022) the Courts found that section 1512(c)(2) only prohibited a person from taking some action with respect to documentary evidence, such as documents or records, in order to corruptly obstruct, impede or influence an official proceeding.

In reaching that conclusion the Court found the word "otherwise" in section 1512(c)(2) could be interpreted in three possible ways: (1) it could represent a clean break such that "subsections (c)(1) and (c)(2) are not related at all," (2) "Subsection (c)(1) may contain just examples of the much broader prohibition contained in subsection (c)(2)," or (3) Subsection (c)(2) could be a residual clause for subsection (c)(1) and thus "subsection (c)(2) may be limited

by" the conduct prescribed by subsection (c)(1). *Miller*, 2022 WL 823070 at *6-11. The Court concluded that the first interpretation was not plausible and that while the second and third interpretation were plausible, the third interpretation was "the better one." *Id.* at 15.

In their Opposition, the government claims that they are not relying on this second definition of "otherwise." *See* ECF no. 35 at p. 21 n. 5. Instead, the government argues that "'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)." *Id.* at p. 19. For the reasons explained below, this interpretation creates a litany of problems and is implausible.

(i) The Text of the Statute Suggests that Subsection (c)(2) Is Limited by the Conduct Prohibited in Subsection (c)(1)

The government conclusorily alleges that their definition does not render "otherwise" superfluous. Not so. If the word "otherwise" were omitted from the statute, it would read:

> Whoever corruptly –
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> ... shall be fined ... or imprisoned.

Under this construction, the statute would prohibit document tampering under subsection (c)(1), and obstructing, influencing, or impeding an official proceeding under subsection (c)(2)—which is exactly what the government is contending the statute currently prohibits. Accordingly, under the government's interpretation, the word "otherwise" does not change the meaning of the statute in any way, and thus is superfluous. Interpreting the statute such that the conduct prohibited by

subsection (c)(2) was limited by the conduct prohibited in subsection (c)(1) does not render any portion of the statute superfluous, and this alone makes Mr. Purse's interpretation superior to the government's. *See Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004) (When interpreting a statute, "effect should be given to every word of a statute whenever possible.").

Moreover, the government's interpretation of section 1512(c)(2) is contrary to the Supreme Court's holding in *Begay v. United States*, 553 U.S. 137 (2008). The government argues that *Begay* is distinguishable because ACCA did not include a semicolon and a line break. *See* ECF no. 35 at pp. 20-21. However, the structure of the statute played no role in the Supreme Court's interpretation. Instead, the *Begay* Court reasoned that the four examples in ACCA "indicates that Congress meant for the statute to cover only *similar c*rimes, rather than *every* crime" because "[i]f Congress meant the statute to be all encompassing, it would not have needed to include the examples at all." *Begay v. United States*, 553 U.S. at 142. Thus, the Court held that to give effect to every clause and word, the statute must be read such that the examples "limit[ed] the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 144 (emphasis added).

That same rationale applies with equal force to section 1512(c)(2) regardless of the structure of the statute. If Congress intended for subsection (c)(2) to cover all conduct which results in obstructing, influencing, or impeding an official proceeding, there would be no reason to include subsection (c)(1) at all—document tampering with the intent to impair the evidence's use in an official proceeding clearly falls under subsection (c)(2). Accordingly, consistent with *Begay*, the only way to afford meaning to both (c)(1) and (c)(2) is to interpret the statute such that subsection (c)(2) is limited to prohibiting similar types of conduct to the conduct which is prohibited by subsection (c)(1).

Finally, the government's policy argument for refusing to apply *Begay* is a red herring. *See* ECF no 35 at pp.22-23. It makes no difference whether limiting subsection (c)(2) to similar types of conduct prohibited in (c)(1) will clarify what constitutes a crime under the statute, what matters is that the statute be read in a manner consistent with its plain language, statutory context, and legislative intent.

(ii) The Statutory Context Does Not Support Giving Subsection (c)(2) a Scope Broader Than (c)(1)

Moreover, the government's contention that the broader context of section 1512 supports their interpretation of the scope of subsection (c)(2) lacks statutory support. First, the government's contention that *Miller* contradicted the Supreme Court in *Yates v. United States,* 574 U.S. 528, 540 (2015) when it found that "the other subsections of the [section 1512] criminalize fairly discrete conduct in narrow contexts" is a gross misrepresentation of *Yates*. *See* ECF no. 35 at p. 25. In *Yates*, the Supreme Court merely explained that while sections 1516-1518 prohibited obstructive acts in *specific contexts*, section 1512 applied more broadly to obstructive acts in connection with an official proceeding. *Yates*, 574 U.S. at 540. *Yates* did not hold that the actual conduct prohibited within each subsection of 1512 constituted "broad proscriptions" and indeed, a plain reading of the statute confirms that these subsections criminalize discrete conduct.

Second, the government offers no support for its contention that subsection (c)(2) is broader than the rest of the statute because it was meant to fill in the gaps for all of section 1512. Instead, it is clear that subsection (c) was intended to close the narrow loophole that section 1512(b)(2)(B) made it a crime to "(2) cause or induce any person to—(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding" but did not make it a crime to directly tamper with that evidence.

Indeed, the government's contention that their interpretation does not cause substantial superfluity is confusing at best. The government apparently argues that because some of the provisions of section 1512 are not "entirely subsumed" by subsection (c)(2), there are no substantial superfluity issues with their interpretation of the statute. However, if subsection (c)(2) were meant to fill in all of section 1512's gaps by criminalizing any and all acts of obstructing, influencing, or impeding any official proceeding (or attempting to do so), then every single subsection in section 1512 which involves an official proceeding, including subsection (c)(1), would be completely subsumed by subsection (c)(2). If Congress had intended for subsection (c)(2) to have such breadth, it would have eliminated almost all of these other subsections as part of the amendment, and not buried the broadest provision in subsection (c)(2) .

Moreover, the government's reliance on *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) and *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) for the proposition that "the cannon against superfluity" "is even stronger when it renders superfluous 'other provisions in the same enactment'" is misplaced. *See* ECF no. 35 at p. 26. Under the government's interpretation, subsection (c)(1) is completely subsumed by (c)(2) and thus (c)(1) is superfluous. On the other hand, under Mr. Purse's interpretation (which was endorsed by *Miller*), the word "otherwise" provides that subsection (c)(2) is limited by subsection (c)(1) and thus the inclusion of "otherwise" ensures that both subsections are given meaning. Thus *Marx* and *Freytag* support Mr. Purse's interpretation and weigh against the government's position.

(iii) The Historical Development of Section 1512 Supports a Narrow Interpretation of Subsection (c)(2)

The fact that Congress did not intend for subsection (c)(2) to apply to any and all acts of obstructing, influencing, or impeding any official proceeding is bolstered by the fact that three months after subsection (c) was enacted, subsection (a)(2)(B) was added which prohibits using

physical force, or threats of physical force to cause or induce a person to "alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." The government's attempt to explain away this amendment is nonsensical.

According to the government "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." ECF no. 35 at p. 27. However, this explanation is illogical. The government contends that "'otherwise' as used in section 1512(c)(2) indicates that section 1512(c)(2) targets obstructive conduct in a manner 'other' than the direct evidence tampering or document destruction that is covered in section 1512(c)(1)." ECF no. 35 at p. 19. Thus, according to the government the use of the word "otherwise" in subsection (c)(2) indicates that the subsection criminalizes all other obstructive behavior besides what is prohibited in subsection (c)(1). Under the government's definition of "otherwise" there is no way of reading the subsection as not applying to indirect evidence tampering. As such, under the government's proposed interpretation of "otherwise," indirect evidence tampering would have already been criminalized by section 1512(c)(2) and there would be no reason to add section 1512(a)(2)(B)(ii) just three months later. Accordingly, it is apparent that Congress did not intend for "otherwise" in subsection (c)(2) to result in the subsection criminalizing all obstructive conduct 'other' than the direct evidence tampering prohibited in (c)(1) and this too cuts against the government's definition.

(iv) The Legislative History of Section 1512 Also Supports a Narrow Interpretation of Subsection (c)(2)

The government concedes as it must, that section 1512(c) was enacted as part of the Sarbanes–Oxley Act of 2002 and does not dispute that this Act "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." *Yates v. United States*, 574 U.S. 528, 535–36 (2015). Instead, the government argues that because subsection (c)(2) was added as a floor amendment it may have been broader than the original purpose of the Act. *See* ECF no. 35 at p. 11. However, the government cites to no authority which supports their position that Congress actually did intend for this amendment to achieve a broader goal. Given the text, statutory context, and historical development of the statute, there is simply no basis for concluding that Congress intended for subsection (c) to do anything other than criminalize direct evidence tampering.

(v) Even If Two Interpretations of the Statute Are Plausible, the Rule of Lenity Applies

For all of the foregoing reasons, the government's interpretation of "otherwise" is implausible and it was flatly rejected by *Miller*. However, even if the government's position could be countenanced (and it cannot), the rule of lenity applies.

The government argues that the rule of lenity does not apply because "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." ECF no. 35 at p. 17. According to the government, the statute fairly puts defendant "on notice that their conduct is criminal and not be surprised when prosecuted." *Id.* The government is mistaken.

Subsection (c)(2) does not merely prohibiting "obstructing" an official proceeding, it also prohibits "influencing" it. Based on the government's definition of subsection (c)(2), almost any conduct which either influences Congress, or is intended to influence Congress, would constitute a criminal violation. Thus, according to the government, almost any activist, peaceful protestor, or lobbyist could potentially be liable under subsection (c)(2) merely for trying to influence legislation. Indeed, under the government's definition, an individual could be liable if even the *effect* of their conduct influenced legislation, regardless of their intent. In sum, according to the government's definition, virtually any conduct could be criminalized subsection (c)(2), with the only limitation being that that conduct must be done "corruptly." However, as explained in Section III.A.3 below, the word "corruptly" it itself ambiguous, and thus there is simply no way of reading section (c)(2) and understanding what conduct is actually being criminalized. Accordingly, the rule of lenity applies and the Court should construe the statute in Mr. Purse's favor and dismiss Count One.

2. Mr. Purse Could Not Have Obstructed the Certification of the Electoral College Vote as a Matter of Law Because He Entered the Capitol Building After the Session Was Already Suspended and Only Observed While Inside for a Few Minutes

As explained in Mr. Purse's Motion, "to give rise to liability under section 1512(c)(2), the defendant's obstructive conduct must have "'a relationship in time, causation, or logic with the [official] proceedings.'" *United States v. Aguilar*, 515 U.S. 593, 599 (1995). Thus, contrary to the government's assertion, it is an element of the offense that Mr. Purse's actions had the natural and probable effect of interfering with the Certification of the Electoral College vote. *See United States v. Ring*, 628 F. Supp. 2d 195, 223 (D.D.C. 2009) (to violate section 1512(c)(2), conduct must have [had] the natural and probable effect of interfering with'' the official

proceeding.") (citing *United States v. Reich*, 479 F.3d 179, 185 (2d Cir. 2007)) (emphasis added). Here, Mr. Purse could not have obstructed the Certification of the Electoral College vote because he is not alleged to have entered the Capitol Building until thirty-nine minutes *after* the joint session was suspended, and he left the Capitol Building over five hours *before* it resumed.

a. The Court May Decide Whether The Undisputed Facts Establish That Mr. Purse's Actions Conduct Could Not Have Violated Section 1512(c)(2) As A Matter Of Law

The government's contention that Mr. Purse's argument is premature lacks support. First, in *Puma*, the defendant did not stipulate to the facts alleged in the criminal complaint against him, nor did he request that the Court rule on sufficiency-of-evidence grounds that the undisputed facts established that his actions could not have had the natural and probable effect of interfering with the Certification of the Electoral College vote. Instead, the defendant merely argued that entering the Capitol after Congress evacuated could not satisfy the definition of "corruptly." *See United States v. Puma*, 2022 WL 823079, at *11 (D.D.C. Mar. 19, 2022).

Moreover, in *United States v. Safavian*, 429 F.Supp. 2d 156, 158-59 (D.D.C. 2006), the Court refused to consider a sufficiency-of-the evidence challenge because "numerous material facts remain[ed] in dispute" and because the defendant's motion relied upon "documents that have been produced in discovery, including e-mails, interview notes, and witness statements taken by the FBI."

Here, unlike in *Puma* and *Safavian* there are no disputed facts, and Mr. Purse is only requesting that the Court rule on sufficiency of the evidence grounds, based on the allegations contained in the government's Criminal Complaint. As explained in Section II, *supra*, Mr. Purse does not object to the government filing a supplemental brief with additional facts, to the extent they exist, and this approach is entirely consistent with *United States v. Yakou*, 428 F.3d at 246

and *United States v. Nitschke*, 843 F. Supp. 2d at 16. Any other approach would result in a waste of resources—if the government's obstruction count is based on Mr. Purse entering the Capitol Building thirty-nine minutes after Congress adjourned, there is simply no reason to have a trial on this Count because it fails as a matter of law.

b. The Government Cannot Escape Dismissal By Citing To Unalleged Conduct Outside Of The Capitol

The government's Opposition does not, and cannot, explain how Mr. Purse's conduct of entering the Capitol Building after Congress had adjourned had any effect whatsoever on the Certification of the Electoral College vote. Instead, the government argues that Mr. Purse's conduct *outside* of the Capitol Building *may* have violated subsection (c)(2). *See* ECF no. 35 at p. 29.

Preliminarily the sole case they cite for this proposition, *United States v. Reffitt*, No. 21-cr-32-DLF (D.D.C. Dec. 29, 2021), involved a defendant who was convicted of obstructing an official proceeding because he was among the first group of individuals who attempted to enter the Capitol Building. *See* ECF no. 35-1 at p. 19, 1501:13-19 ("Mr. Reffitt's own taped statements and video footage of his ascent on the west stairs show that he led a throng of people who first breached the Capitol…. As he admitted to another Three Percenter, he knew that Congress was in the joint session, and at a minimum, he knew of and intended the natural consequence of that action that Congress would be unable to continue with the joint session."). *Reffit* is completely inapposite—here Mr. Purse is not alleged to have been one of the first individuals who attempted to breach the Capitol Building while it was in session, he is only alleged to have peacefully walked in and then walked out, after Congress had already adjourned.

Moreover, given that the only conduct asserted against Mr. Purse in the Criminal Complaint involves his actions *inside* the Capitol Building, if the government is relying on

conduct *outside* the Capitol Building to support its obstruction of an official proceeding count, then the indictment must be dismissed as insufficiently vague. "An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute.'" *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976) (citing *United States v. Simmons*, 96 U.S. 360, 362 (1877)). As such, while an "indictment may use the language of the statute" "that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged." *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980).

Here, if the government is not alleging that Mr. Purse's actions inside the Capitol Building obstructed the Certification of the Electoral College vote, then it is entirely unclear what Mr. Purse is actually being charged with—is he being charged with influencing the Certification of the Electoral College vote? Obstructing the Certification of the Electoral College vote? Impeding the Certification of the Electoral College vote? Merely *attempting* to do one of these things? The conclusory recitation of the elements of the offense in the indictment, replete with the disjunctive "or's," does not fairly give Mr. Purse notice of the charges against him and thus the government must supplement the elements of indictment to clarify the exact nature of this Count.

Such specificity is not a mere technicality; it could give rise to additional defenses. For instance, if the government is trying to argue that protest activities on the Capitol Grounds violated subsection (c)(2) because they constitute an attempt to influence a Congressional proceeding, such a contention is clearly barred by the First Amendment.

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44, (1983). In "quintessential public

forums, the government may not prohibit all communicative activity." *Id.* Instead the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

"[C]ourts have long recognized that the Capitol Grounds as a whole meet the definition of a traditional public forum: They have traditionally been open to the public, and their intended use is consistent with public expression." *Lederman v. United States*, 291 F.3d 36, 41–42 (D.C. Cir. 2002) (citing *Jeannette Rankin Brigade v. Chief of Capitol Police,* 342 F.Supp. 575, 583–84 (D.D.C.1972) and *Community for Creative Non–Violence v. Kerrigan*, 865 F.2d 382, 383, 387 (1989)).

In *Lederman*, the defendant challenged the validity of a regulation banning demonstrations on the sidewalk at the foot of the House and Senate Steps. The Court thus found that because the Capitol Grounds were public, the statute was unconstitutional because "certain types of speech (parading, picketing, leafleting, vigils, sit-ins, and speechmaking) are, even under a narrow reading, almost entirely prohibited" and thus was not narrowly tailored to their objectives. *Id.* at 45.

As in *Lederman*, to the extent the government contends that protesting on the Capitol Grounds in an attempt to influence Congress in violation of subsection (c)(2), this would constitute a blanket prohibition on protesting in a public forum and would be barred by the First Amendment.

In sum, to the extent that the government's section 1512(c)(2) claim is based on Mr. Purse's conduct inside the Capitol Building, the count fails because his conduct could not, as a matter of law, have had any effect whatsoever on the Certification of the Electoral College vote. And, to the extent the government's charge us based on unalleged conduct outside of the Capitol

Building, the count fails for lack of specificity and likely violates the First Amendment. In either event, Count One must be dismissed.

3. The Term "Corruptly" Is Unconstitutionally Vague as Applied to Mr. Purse and in Any Event, There Is No Evidence that Mr. Purse Intended to Disrupt the Certification of the Electoral College Vote

Moreover, Count One must also be dismissed because the term "corruptly" is unconstitutionally vague as applied to Mr. Purse. According to the government, "corruptly" is not unconstitutionally vague because it only "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." ECF no. 35 at p. 31.

However, subsection (c)(2) does more than prohibit "obstruction," it also prohibits "influencing." When you apply the government's definition of "corruptly" to "influencing" the problem with the definition becomes readily apparent—the statute would criminalize "a defendant, acting with consciousness of wrongdoing and intent to influence" Congress. Since there is nothing inherently wrong with attempting to influence Congress, and indeed the right to do so is protected by the Petitioning Clause of the First Amendment, liability would hinge entirely on the nebulous notion of "consciousness of wrongdoing." This is precisely the type of interpretation which renders a statute constitutionally vague. *See e.g. United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991). ("Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'") (emphasis added).

Moreover, the government has not adequately distinguished the binding decision in *Poindexter*. As explained in Mr. Purse's moving papers, in *Poindexter*, the Court found that "corruptly" was unconstitutionally vague because it could either be used transitively, i.e. "by

means of corrupting another" or intransitively, i.e. "acting oneself 'in a corrupt… manner.'" *Id.* at 379. The Court found that the statute appeared to use the word transitively and that at the very least it did not fairly give notice that it was intended to be used intransitively. *Id.* at 385-86. Accordingly, because the government was charging the defendant based on the intransitive use of "corruptly," *Poindexter* found the statute unconstitutionally vague as applied to the defendant.

The government erroneously contends that *Morrison* rejected *Poindexter*'s analysis. *See* ECF no. 35 at p. 32. It did not. Instead, in *Morrison* the Court *agreed* with *Poindexter* that section 1512 was "sufficiently similar" to section 1505 "to support a 'transitive' reading of the word 'corruptly'" but found that the defendant acted corruptly in the transitive sense by "try[ing] to 'corrupt' Doris Holmes by exhorting her to violate her legal duty to testify truthfully in court." *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996). Accordingly, far from rejecting *Poindexter*, the *Morrison* court approved of, and adopted *Poindexter*'s analysis.

Here, unlike in *Morrison*, the government is seeking to impose the intransitive use of "corruptly" on Mr. Purse, arguing that he himself acted corruptly, not that he corrupted others. This is precisely the use of the word "corruptly" that *Poindexter* found to be unconstitutionally vague. Moreover, although Congress clarified in section 1515(b), that the word "corruptly" in section 1505 should be construed in both the transitive and the intransitive sense, Congress explicitly limited this definition to 1505. The government provides no explanation for why Congress elected not to extend this definition to section 1512, tacitly conceding that this is a clear indication that Congress intended for *Poindexter*'s limitation of "corruptly" to the transitive use of the word to remain when analyzing section 1512.

Moreover, in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705-06 (2005) the Supreme Court only found that "knowingly… corruptly persuade" limited section 1512(b) to people who were "conscious of their wrongdoing." *Id.* at 706. However, the Court declined to

explore "the outer limits of this element" because "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing" and "the instructions also diluted the meaning of "corruptly" so that it covered innocent conduct." *Id.* Thus *Arthur Andersen*, involved a different subsection, did not address whether the word "corruptly" should be used in a transitive or intransitive sense, and expressly declined to address the limits of the word "corruptly." *Poindexter*, on the other hand, involves almost identical language and is directly applicable to the charges against Mr. Purse. As such, the Court should follow this binding authority and find that it is unconstitutional to apply the intransitive use of the word "corruptly" in section 1512(c)(2).

Finally, even under the government's definition of "corruptly," it is clear that the undisputed facts establish that because Mr. Purse entered the Capitol Building after the Certification of the Electoral College vote had been suspended, he could not have acted corruptly by entering the building. Although the government contends that this argument is premature, the Court may dismiss a charge when the undisputed facts establish as a matter of law that the defendant lacked the necessary intent. *See e.g. United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992) ("The district court's decision granting the defendants' pretrial motion in the instant case constituted a disposition of a legal issue, namely, the ability of the government to prove intent which was an integral element of the 42 U.S.C. § 1395nn(b)(1)(B) offense charged…. As reflected in this majority opinion, a 12(b) motion encourages courts to do precisely what the trial court did in the instant case.") (emphasis added).

Accordingly, the term "corruptly" is unconstitutionally vague, but under any construction of the word, the statute cannot reasonably be interpreted as applying to the act of entering the Capitol Building after the Certification of the Electoral College vote had already been suspended.

B. Counts Two and Three Must Be Dismissed Because the Government Has Not Alleged Any Facts Indicating that Mr. Purse Knowingly Entered a Restricted Building or Grounds

1. The Term "Restricted Area" Is Unconstitutionally Vague as Applied to Mr. Purse and Regardless the Government Has Not Sufficiently Alleged that the Capitol Building Was a Restricted Area

Counts Two and Three of the indictment both fail as a matter of law because the Capitol Building was not a "restricted building[] or grounds" under the statute.

First, as explained in Mr. Purse's moving papers, section 1752(c)(1)'s definition of "restricted buildings or grounds" is unconstitutionally vague because it is written in the passive voice and thus is unclear *who* precisely can make an area restricted by "post[ing], cordon[ing] off, or otherwise restrict[ing]" the area. This statute cannot be interpreted as permitting *anyone* from creating a restricted area merely by posting a sign, and thus it is ambiguous *who* can create a restricted area. Indeed, although the government contends that it is improper to "import an extra-textual requirement" on who can create a restricted area, many of the cases the government cites to do just that. For instance, in *Puma*, the court found that an "authority" must restrict the area. *See United States v. Puma*, 2022 WL 823079, at *14 (D.D.C. Mar. 19, 2022); *see also United States v. Griffin*, 549 F. Supp. 3d 49, 54 (D.D.C. 2021) (noting that "while the Secret Service has primary responsibility for guarding its protectees…, it invariably relies on other law enforcement agencies for support."). Accordingly, because the statute is written in the passive voice, it is simply unclear whether the Capitol Police had the authority to create a restricted area, and thus the statute is unconstitutionally vague as applied to Mr. Purse.

Moreover, contrary to the government's contention, Mr. Purse does not contend that the Secret Service must be the entity which restricts the area under section 1752.[3] Instead, Mr. Purse acknowledges that section 1752 may also allow a federal law enforcement agency acting *in coordination with* the Secret Service, to create a "restricted area" under section 1752. This interpretation of section 1752 is broader than the more limited definition of section 1752 rejected by other Courts in the District, and it is has statutory support. *See e.g.* 18 U.S.C. § 3056(d) (enumerating the powers of the Secret Service and making it a crime to that "knowingly and willfully obstructs, resists, or interferes with a **Federal law enforcement agent** engaged in the performance of the protective functions authorized by … section 1752.") (emphasis added). Because there are no allegations that the Capitol Police secured the Capitol Grounds, in coordination with the Secret Service, the government has not alleged facts indicating that Mr. Purse entered a restricted area.

2. Even if the Capitol Building Were a Restricted Area, the Government Has Not Alleged Sufficient Facts Indicating Mr. Purse Knew That It Was a Restricted Area

According to the government, in order to assert a claim under section 1752(a)(1) they must only establish that Mr. Purse was aware of the fact that that the Capitol Police had cordoned off the Capitol Grounds. ECF No. 35 at p. 39. Not so. The government must establish that Mr. Purse was aware that he was entering a "restricted area." Thus, in order to establish this claim, the government must prove that Mr. Purse (1) knew that the area was cordoned off, (2) knew that it was cordoned off *because* there was a person protected by the Secret Service in the area, and

[3] It appears the government may have confused Mr. Purse's arguments with those raised by other January 6 defendants. Not only does the government mischaracterize Mr. Purse's argument, it also addresses arguments not raised in Mr. Purse's motion and ascribes quotes to Mr. Purse that do not exist *See e.g.* ECF No. 35 at p. 37 (referring to an argument based on the Treasury Department's authority which Mr. Purse did not raise).

(3) knew that the restrictions were put in place by someone with the authority to create a restricted area.

Because the U.S. Capitol Police are responsible for protecting the Capitol Building, Mr. Purse could not have known that on this particular day, the Capitol Police was cordoning off the Capitol grounds because the Vice-President was visiting, as opposed to as an attempt to protect Congress. Indeed, in *Bursey*, the Fourth Circuit did not merely affirm the defendant's conviction because he was aware the area was cordoned off, the Court did so because the defendant "understood the restriction to have been created by the Secret Service **(as opposed to state or local law enforcement**)." *United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005) (emphasis added). Thus, under *Bursey*, it is not enough to show that Mr. Purse was aware that the area had be cordoned off, he had to know *why* it was cordoned off as well.[4]

Finally, the government does not dispute the fact that Mr. Purse could not have known that Vice President Pence had refused to evacuate the Capitol Building and thus he could know have known that the Capitol Building was still restricted at the time he entered.

For all of these reasons, Count Two for violation of section 1752(a)(1) fails as a matter of law and must be dismissed.

C. Counts Three, Four, and Five Must Be Dismissed Because, Based on the Government's Allegations, Mr. Purse Did Not Violate These Statutes as a Matter of Law

The government contends that Mr. Purse's challenges to Counts Three, Four, and Five constitute "premature sufficiency challenge[]s" and that their Criminal Complaint "was never

[4] The government claims that Mr. Purse relied on *Bursey* for the proposition that the Secret Service must create the restricted area. Although other January 6 defendants have cited to *Bursey* for this proposition, Mr. Purse did not. Instead, Mr. Purse cited to *Bursey* for a different element of the offense—the required knowledge required to be criminally liable under section 1752(a)(1).

intended to represent the scope of the government's evidence." ECF no. 35 at p. 40. However, as explained in Section II, *supra*, the Court may dismiss the indictment based on the undisputed allegations in the Criminal Complaint. Here, the government only alleges that Mr. Purse spent a total of thirteen minutes in the Capitol Building, approximately nine minutes of which was him attempting to exit the building, and that while inside he stood "off the side, observing" while holding a video camera. Nothing about this conduct could be considered "disorderly or disruptive," nor could it be described as demonstrating, picketing, or parading. As such, unless the government can proffer additional facts, the Court should dismiss Counts Three to Five.

IV. CONCLUSION

For the foregoing reasons, all pending charges fail as a matter of law and must be dismissed.

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Respectfully submitted,

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