IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Case No. 1:21-cr-00311-CRC-1**
	*	
JEREMY GROSECLOSE,	*	
Defendant	*	
	*	

CORRECTED MOTION TO DISMISS COUNT TWO

Mr. Groseclose, by his undersigned counsel, hereby moves pursuant to FED. R. CRIM. PROC. 12(b) to dismiss Count Two of the Superseding Indictment, which charges him with obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2).

I. Section 1512(c)(2) Does Not Make Criminal the Actions Charged in Count Two

Section 1512(c)(2), which was enacted in 2002 as part of the Sarbanes-Oxley Act to address corporate fraud, makes it illegal for a person to corruptly otherwise obstruct, influence, or impede an official proceeding. The statutory language, legislative history and legal precedents reflect that § 1512(c)(2) criminalizes action taken by a person "with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." *United States v. Miller*, No. 21-cr-119, 2022 WL 823070 at *15 (D. D.C. 2022). But the indictment does not allege that Mr. Groseclose did any such thing. *See also Yates v United States,* 574 U.S. 528 (2015) (holding that 18 U.S.C. § 1519, another Sarbanes-Oxley obstruction provision, applies only to the destruction of objects used to record or preserve information). Under the *Yates* rationale, § 1512(c)(2) does not criminalize participation in a demonstration, no matter how peaceful or disorderly. *Compare* 18 U.S.C. § 1507 (prohibiting demonstrations in or near a federal *court* building or the residence of a *judge, juror or court official*).

A. The Statute – 18 U.S.C. § 1512. Tampering with a witness, victim, or an informant

(c) Whoever corruptly–

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

shall be fined under this title or imprisoned not more than 20 years, or both.

B. The Text, Structure and Development of § 1512(c)(2)

Mr. Groseclose adopts and incorporates by reference the statutory interpretation set out in Section II of the *Miller* opinion. *Miller*, 2022 WL 823070, at *6 -*15:

> Applying the traditional tools of statutory interpretation – text, structure, and the development of the statute over time – the Court concludes that three readings of the statute are possible, and two are plausible. This is therefore a circumstance in which the Court must "exercise restraint in assessing the reach of a federal criminal statute," and "resolve ambiguities in favor of the defendant."
> . . .
> At the very least, the Court is left with a serious ambiguity in a criminal statute. As noted above, courts have "traditionally exercised restraint in assessing the reach of a federal criminal statute, and have "construed penal laws strictly and resolved ambiguities in favor of the defendant." Applying these principles here "gives citizens fair warning of what conduct is illegal, ensuring that an ambiguous statute does not reach beyond its clear scope." And it makes sure that "the power of punishment is vested in the legislative, not the judicial department." The Court therefore concludes that § 1512(c)(2) must be interpreted as limited by subsection (c)(1), and thus requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.

Miller, 2022 WL 823070, at *6, *15 (internal citations omitted)(cleaned up).

The § 1512(c)(2) charge against Mr. Groseclose is identical to the one charged in the *Miller* indictment. *Miller* thus applies with equal force to the instant case. Moreover, *Miller* distinguishes *United States v. Montgomery,* 2021 WL 6134591 (D.D.C. 12/28/21), another January 6 case that reached a different conclusion in denying the motion to dismiss § 1512(c)(2).[1]

C. Rule of Lenity Requires Dismissal

Even were the Court to reject the *Miller* analysis in favor of that applied in *Montgomery*, dismissal of the 1512(c)(2) count in the instant case is warranted under the rule of lenity, which requires that criminal laws be construed "strictly" and that "ambiguities [be resolved] in favor of the defendant." *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 conflicting analyses and results in *Miller*, on one hand, and *Montgomery and* other January 6 cases, on the other hand, at a minimum illustrate the ambiguity that exists in the statute after all canons of statutory construction are applied. That ambiguity requires application of the rule of lenity.

> The "rule of lenity" is a new name for an old idea – the notion that "penal laws should be construed strictly." The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. 1 W. Blackstone, Commentaries on the Laws of England 88 (1765) (Blackstone); 2 M. Hale, The History of the Pleas of the

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[1] *Miller*, 2022 WL 823070, at *9 ("If Congress intended for the common, linking element in both subsections to be the pendency of an "official proceeding," then the use of "otherwise" in § 1512(c)(2) would be superfluous. After all, both subsections include the term "official proceeding," suggesting that the common link should be something other than the pendency of an official proceeding; otherwise there would be no reason to repeat the term in both subsections"). The *Montgomery* decision applied the same analysis as other J6 cases.

Crown 335 (1736). In the hands of judges in this country, however, lenity came to serve distinctively American functions – a means for upholding the Constitution's commitments to due process and the separation of powers. Accordingly, lenity became a widely recognized rule of statutory construction in the Republic's early years.

Consider lenity's relationship to due process. Under the Fifth and Fourteenth Amendments, neither the federal government nor the States may deprive individuals of "life, liberty, or property, without due process of law." U.S. Const., Amdts. 5, 14. Generally, that guarantee requires governments seeking to take a person's freedom or possessions to adhere to "those settled usages and modes of proceeding" found in the common law. And among those "settled usages" is the ancient rule that the law must afford ordinary people fair notice of its demands. Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws. . . .

Of course, most ordinary people today don't spend their leisure time reading statutes – and they probably didn't in Justice Marshall's and Justice Story's time either. But lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law – the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance. As the framers understood, "subjecting ... men to punishment for things which, when they were done, were breaches of no law ... ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny."("Although it is not likely that a criminal will carefully consider the text of the law ... fair warning should be given to the world in language that the common world will understand").

Closely related to its fair notice function is lenity's role in vindicating the separation of powers. Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. Art. I, § 1. Perhaps the most important consequence of this assignment concerns the power to punish. Any new national laws restricting liberty require the assent of the people's representatives and thus input from the country's "many parts, interests and classes." The Federalist No. 51, at 324 (J. Madison). Lenity helps safeguard this design by preventing judges from intentionally or inadvertently exploiting "doubtful" statutory "expressions" to enforce their own sensibilities. It "places the weight of inertia upon the party that can best induce

> Congress to speak more clearly," forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons. In this way, the rule helps keep the power of punishment firmly "in the legislative, not in the judicial department."
>
> Doubtless, lenity carries its costs. If judges cannot enlarge ambiguous penal laws to cover problems Congress failed to anticipate in clear terms, some cases will fall through the gaps and the legislature's cumbersome processes will have to be reengaged. But, as the framers appreciated, any other course risks rendering a self-governing people "slaves to their magistrates," with their liberties dependent on "the private opinions of the judge." 4 Blackstone 371 (1769). From the start, lenity has played an important role in realizing a distinctly American version of the rule of law – one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.

Wooden v. United States, 142 S.Ct. 1063, 1082-83 (2022) (Gorsuch, J,concurring in the judgment, in which Sotomayor, J. joined) (internal citations omitted).

D. Vagueness Doctrine Requires Dismissal

Dismissal of the 1512(c)(2) count under the vagueness doctrine is also required.

> The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process."

Johnson v. United States, 576 U.S. 591, 595 (2015) (internal citations omitted)

If learned jurists cannot agree on the statute's meaning and the conduct it prohibits, it follows that the statute "fails to give ordinary people fair notice of the conduct it punishes." *Id.* Indeed, in

assessing whether a statute is unconstitutionally vague, the Supreme Court has found important "the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out [a] statute in cases brought before them." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-90 (1921). Moreover, this is not an ordinary conflict. Here, the cases arise out of the same incident and are being tried in the same court. There would seem to be no more vivid example that the statute fails to give fair notice to an ordinary person of what it prohibits when judges carefully and thoroughly applying canons of statutory construction come out with diametrically opposed results.

Vague laws "leav[e] people in the dark about what the law demands and allow[] prosecutors and courts to make it up." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018). The perspective is that of a reasonably intelligent person. If the government is charging hundreds of people with Class B misdemeanors for the same conduct that randomly results in a felony charge punishable by 20 years' imprisonment, the issue is whether the crimes are sufficiently demarcated to put a "reasonably intelligent person" on notice of his dramatically increased criminal liability and to preclude the exercise of arbitrary enforcement. In these § 1512(c)(2) prosecutions, the government has provided no notice, much less fair notice, of when or why a defendant moves from a Title 40 offense to a § 1512 charge. This is a gross absence of "standards to govern the actions of police officers, prosecutors, juries and judges" requiring dismissal of the charges. *Dimaya*, 138 S. Ct. at 1212.

E. Other Grounds for Dismissal

As more fully set forth below, as an independent basis, Count Two must be dismissed as the terms "corruptly" and "otherwise" in § 1512(c)(2) as the government seeks to interpret them are void for vagueness in violation of the Due Process clause and therefore cannot support the charge in Count

Two under this Circuit's decision in *United States v. Poindexter,* 951 F.2d 369 (D.C. Cir.1991), *cert. denied,* 506 U.S. 1021 (1992) and other legal precedents.

For these same reasons, Count Two must be dismissed under a novel application theory. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) ("[A]n unforeseen judicial enlargement of a criminal statute, applied retroactively, operates precisely as an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids.")

Mr. Groseclose also challenges that the proceedings in the Congress on January 6 were "official proceedings" as that term is defined in every reported § 1512(c)(2) case on the subject. Those cases have interpreted "official proceeding" to require a judicial or grand jury proceeding, one involving an exercise of Congress's implied power of investigation in aid of legislation, or one involving an agency's adjudicatory function. *See, e.g.*, *United States v. Guertin*, – F.Supp. 3d __, 2022 WL 203467, at *7 (D. D.C. 2022) (dismissing a non-January 6 prosecution brought under § 1512(c)(2) because it did not involve an "official proceeding").[2]

II. INTRODUCTION – POLITICAL DEMONSTRATIONS AND THE FIRST AMENDMENT

When activity that falls within the shadow of the First Amendment is alleged to be criminal, courts are required to apply the strictest standards of judgment in ensuring that only intentional criminal activity is prosecuted and not constitutionally protected actions, beliefs or associations.

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[2] In *Guertin,* Judge McFadden explained that "throughout § 1512, Congress used the phrase "official proceeding" in a manner that connotes a *formal hearing in which persons are called to appear*. *See, e.g.*, 18 U.S.C. § 1512(a)(1)(A) (making it unlawful to kill with intent to "prevent the attendance or testimony of any person in an official proceeding"); *id.* § 1512(a)(2)(B)(iii) (making it unlawful to cause a person to "evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding"); id. § 1512(d)(1) (making it unlawful to "intentionally harass[ ]" a person to dissuade him from "attending or testifying in an official proceeding") (emphasis added). *Guertin*, slip op. at *7.

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918-19 (1982) (boycott activity, which was not itself violent, that resulted in the loss of business profits was constitutionally protected); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (requiring "rigorous standards of proof" in Smith Act prosecutions).[3] There can be no dispute that circumstances surrounding Count Two and the other offenses charged in Counts One through Six in this case involve the role and activities of thousands of Americans, including Mr. Groseclose in political protest. On January 6, 2021, then-President Donald Trump had summoned his supporters to Washington, D.C. for a political rally to be held at the Ellipse near the White House. Once at the podium, President Trump told the persons assembled at the rally to walk to the Capitol and make their voices heard by Congress.[4]

When individuals associate together to advance a shared political objective, this activity is presumptively protected by the First Amendment to the United States Constitution. *See Texas v. Johnson,* 491 U.S. 397, 408-09 (1989) (a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). In

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[3] *Noto* involved a prosecution under the Alien Registration Act (popularly known as the "Smith Act"), that made it illegal to advocate the violent overthrow of the government, and required non-citizens to register with the federal government. In *Noto,* the Supreme Court emphasized that a Smith Act prosecution must be judged *strictissimi juris* to avoid the "danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes." *Noto*, 367 U.S. at 299-300.

[4] Among other things, President Trump told the assembled crowd: "We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated. . . . I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard." Washington Post, 2/10/21, "When did the Jan. 6 rally become a march to the Capitol?" https://www.washingtonpost.com/politics/2021/02/10/when-did-jan-6-rally-become-march-capitol/

reversing a conviction for flag-burning as "expressive conduct" within protection of the First Amendment, the Supreme Court considered that the incident took place during a demonstration "to protest the policies of the Reagan administration" while President Reagan was being renominated at the Republican National Convention held in Dallas in 1984. *Id.* at 399. Notably for purposes of the instant case, the Supreme Court rejected the argument propounded by Texas that the breaches of the peace by demonstrators nullified the flag burner's First Amendment rights. *Id.* at 408.

As set out in the indictment, Mr. Groseclose was present in Washington, D.C. to attend a political rally near the White House. During his time in Washington, D.C., Mr. Groseclose did not destroy any property and did not injure anyone. He did not bring any weapons with him to the District of Columbia. He did not steal or take away any documents or other property belonging to members of Congress. He did not delete any social media posts, other communications or otherwise destroy any evidence. There is no allegation that while in the Capitol he acted corruptly, *i.e.*, he did not act dishonestly; did not accept or pay any bribes; did not lie to authorities; did not take any action to benefit himself illegally; and did not encourage anyone to do any of those things. Under Supreme Court precedent, Mr. Groseclose's activities while in D.C. involved activities protected by First Amendment freedoms – of speech, of association, and of assembly to petition the Government for redress of grievances – and require this Court to impose the strictest standards of review.

The government can cite no precedent prior to the January 6 prosecutions that supports its open-ended and broad interpretation of § 1512(c)(2), which would reach all attempts to influence Congressional proceedings, not based on any standard or limiting principle heretofore identified. This lack of standard can be seen in the fact that the government has charged hundreds of other similarly situated defendants solely with misdemeanor offenses. Until January 6, every single prosecution

under § 1512(c)(2) in the 22 years since its enactment involved allegations that defendants interfered with the integrity or availability of information destined for a proceeding. That singularity is also found in the cases not brought under § 1512(c)(2). Every time a Congressional hearing or other official proceeding has been disrupted by one or more persons, none of those persons has been prosecuted under § 1512(c)(2). *See, e.g., United States v. Bronstein*, 849 F.3d 1101, 1111 (D.C. Cir. 2017) (speeches made by several defendants as each stood up seriatim during a Supreme Court argument, which "tended to disrupt the Court's operations" prosecuted under a misdemeanor statute).[5]

The D.C. Circuit has recognized that obstruction aimed at Congressional proceedings presents a different analytical framework in determining whether the statute is unconstitutionally vague. *United States v. Poindexter,* 951 F.2d 369 (D.C. Cir.1991), *cert. denied*, 506 U.S. 1021 (1992). In contrast to attempts to influence or impede judicial proceedings, attempts to influence Congress, a political body, are commonplace and not of a criminal nature. *Id.* 951 F.2d at 377-78 (The term corruptly "must have some meaning ... because otherwise the statute would criminalize all attempts to "influence" congressional inquiries – an absurd result that the Congress could not have intended in enacting the statute"); *United States v. Russo*, 104 F.3d 431, 436 (D.C. Cir. 1997) (in contrast to *Poindexter's* concern that not all efforts to obstruct Congress can be criminalized, "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap to mind").

Mindful of First Amendment concerns, the Court should construe the statute to avoid the serious constitutional problems that would arise were § 1512(c)(2) to be applied to Mr. Groseclose.

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[5] On remand from the appeal, each defendant was sentenced to 12-months probation by this Court. Case No. 15-cr-00048-CRC.

III. The Government's Use of § 1512(c)(2) to Prosecute Mr. Groseclose Is A Novel Application of the Law Which Violates His Right to Due Process

Section 1512, enacted as part of *The Victim and Witness Protection Act of 1982* "prohibits various forms of witness tampering." *United States v. Poindexter*, 951 F.2d 369, 382 (D.C. Cir. 1991). In 2002, in the aftermath of the Enron and other corporate fraud scandals, Congress added § 1512(c) as part of the Sarbanes-Oxley Act. Section 1512(c) is titled "the Corporate Fraud Accountability Act of 2002."

Section 1512(c) is "a broad ban on evidence-spoliation." *Yates v. United States*, 574 U.S. 528, 541 (2015). In the two decades that § 1512(c)(2) has been on the books, every prosecution brought by the United States under this subsection has involved allegations that the *actus reus* of the crime involved tampering with testimonial or other evidence, namely by lying, falsifying or tampering with a witness or evidence or suborning another person to do the same.

Nothing in the legislative history supports a reading of § 1512(c)(2) that would interpret the term "corruptly . . . otherwise obstructs, influences, or impedes any official proceeding" to include a political demonstration, even if that demonstration involved a large group of people, some of whom were disorderly and violent. There is not a single passage of legislative history that would support the use of § 1512(c)(2) for such conduct.

The fact that the government cannot cite to a single case where a court has applied its interpretation of § 1512(c)(2) - outside the context of adjudicatory proceedings and investigations and to acts unrelated to the integrity or availability of evidence – means that applying that construction retroactively against Mr. Groseclose is a prototypical due process violation under the novel construction principle. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) ("[A]n

unforeseen judicial enlargement of a criminal statute, applied retroactively, operates precisely as an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." If a "legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a [court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction." An "unforeseen judicial enlargement" is one that has no support in precedent before the criminal act); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (*Bouie* still good law).

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope
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> .

United States v. Lanier, 520 U.S. 259, 266 (1997) (internal citations omitted).

The question is not whether the verbs cover obstructive acts generally but obstructive acts unrelated to evidence impairment or availability – like every other part of § 1512. Because no court had ever held so, it is hard to see how a reasonably intelligent person would have notice that (c)(2) "plainly cover[s]," for example, entering the Capitol without permission. Moreover, the government cannot explain how or why a reasonably intelligent person would be on notice that a Chapter 73 obstruction statute would be applied to a "proceeding" not involving an investigation, evidence, or adjudication. Indeed, over a century of obstruction of justice jurisprudence would put a reasonably intelligent person on notice that the joint session of Congress on January 6 was not a Chapter 73

"proceeding" because it did not involve an investigation, evidence, or adjudication.

The evidence of arbitrariness inherent in the government's use of § 1512 in the January 6 cases is significant. In hundreds of cases arising out of the events on January 6, the government has entered into Class B "petty offense" plea agreements with defendants whose conduct is materially identical to that of Mr. Groseclose, who is facing up to 20 years in prison. In its January 6 prosecutions, the government has ventured no explanation whatsoever to distinguish why a person falls into the misdemeanor category versus the serious felony one. No fair and impartial court system can respond to this enormous problem with drastic consequences for people's lives by ignoring it, particularly in the context of the First Amendment political activities that were at the heart of Mr. Groseclose's presence in DC on January 6.

Although no court before the January 6 prosecutions had applied § 1512(c)(2) to proceedings not involving adjudication or investigations and to acts unrelated to evidence, and although multiple courts in the district have acknowledged that the issues are challenging and difficult, a number of judges in this district have upheld these prosecutions. Even if the government's interpretations of § 1512(c)(2) were somehow unambiguously correct and not void-for-vagueness, they still concededly lack any supporting precedent. It is a violation of the due process clause to apply them retroactively to conduct that occurred before any court had adopted those understandings of the statute. *Lanier*, 520 U.S. at 266 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)).

IV. Section 1512(c)(2) Is Unconstitutionally Vague as Applied

Section 1512(c) is "a broad ban on evidence-spoliation." *Yates v. United States*, 574 U.S. 528, 541 (2015). In the two decades that § 1512(c)(2) has been on the books, every prosecution brought by the United States under this subsection has involved allegations that the *actus reus* of the

crime involved tampering with testimonial or other evidence, namely by lying, falsifying or tampering with a witness or evidence or suborning another person to do the same.

Nothing in the legislative history supports a reading of § 1512(c)(2) that would interpret the term "corruptly . . . otherwise obstructs, influences, or impedes any official proceeding" to include a political demonstration, even if that demonstration involved a large group of people, some of whom were disorderly and violent. There is not a single passage of legislative history that would support the use of § 1512(c)(2) for such conduct.

A. As Applied to Mr. Groseclose, the Term "Corruptly" is Unconstitutionally Vague

In *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991), *cert. denied*, 506 U.S. 1021 (1992), the D.C. Circuit held that the term "corruptly" rendered another obstruction statute, 18 U.S.C. § 1505 unconstitutionally vague as applied to the charged conduct. In all material respects, the text of § 1505 and § 1512(c)(2) are identical. Both subsections proscribe the same *actus reus* when done "corruptly." As here, *Poindexter* also alleged obstruction of Congress.

	§ 1505	**§ 1512(c)(2)**
state of mind	*corruptly*	*corruptly*
actus reus	*influences, obstructs, or impedes*	*obstructs, influences, or impedes*
object	*the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House . . . of the Congress*	*any official proceeding* --- (*official proceeding* includes a *proceeding before Congress*). 18 U.S.C. § 1515(a)(1)(B)
penalty	5 years imprisonment	20 years imprisonment

In 1990, John Poindexter, President Reagan's National Security Advisor was convicted on

two counts, among others, of obstruction of justice in violation of 18 U.S.C. § 1505 for making false and misleading statements to congressional committees and for participating in the preparation of a false chronology, deleting information from his computer and arranging a meeting at which Oliver North gave false statements. *Poindexter*, 951 F.2d at 377. The D.C. Circuit reversed the two obstruction convictions, holding that the word "corruptly" as used in § 1505 was unconstitutionally vague as applied to Poindexter's conduct because the term was too vague to provide constitutionally adequate notice that it proscribed lying to Congress. *Id*. at 379. In addition, the Circuit held that applying § 1505 to Poindexter's false and misleading statements to Congress would require an "intransitive" rather than a "transitive" reading of the word "corruptly." In other words, read intransitively, "corruptly" requires that the defendant is or becomes corrupt; read transitively, the defendant could corrupt another by bribing or influencing the other person to act corruptly.[6] Based on § 1505's language and structure, the Circuit found that the statute favored a transitive reading.

B. Mr. Groseclose Is Not Charged with Influencing Another Person to Act Corruptly

In response to the Poindexter decision, Congress defined "corruptly" for purposes of § 1505. As amended, "corruptly" is defined as "acting with an improper purpose, *personally or by influencing another*, including making a false or misleading statement, or withholding, concealing, altering, or

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[6] *Poindexter*, 951 F.2d at 379:

> We pause first only to note that the verb "corrupt" may be used transitively ("A corrupts B," i.e., "A causes B to act corruptly") or intransitively ("A corrupts," i.e., "A becomes corrupt, depraved, impure, etc."). So too, the adverbial form "corruptly" may have either the transitive or the intransitive sense. *See* 3 Oxford English Dictionary 974 (2d ed. 1989) ("corruptly" may mean either "by means of corruption or bribery," *i.e.*, by means of corrupting another, or acting oneself "in a corrupt or depraved manner").

destroying a document or other information." 18 U.S.C. § 1515(b) (emphasis added). With that statutory change, Congress addressed one the two vagueness problems identified by the court in *Poindexter*. Persons charged under § 1505 now have notice that Congress intended the word "corruptly" in § 1505 to apply in both the transitive and the intransitive sense. A defendant who acts corruptly himself as well as one who influences another person to act corruptly can be prosecuted under 18 U.S.C. § 1505. However, by its terms, the amendment enacted by Congress only applies to § 1505 prosecutions so that the transitive/intransitive issue still presents a vagueness problem in the instant case.[7] The government has not alleged that Mr. Groseclose acted to influence another person to act corruptly, in the transitive sense of that term. Accordingly, § 1512(c)(2) does not reach the conduct charged and is unconstitutionally vague when applied to Mr. Groseclose's conduct.

C. The Charge that Mr. Groseclose Obtructed Congress Is Not "Core" Behavior to Which §1502(c)(2) May Constitutionally Be Applied

Poindexter held that "on its face, the word *corruptly* is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application." *Poindexter*, 951 F.2d at 379.

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

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[7] 18 U.S.C. § 1515(b) states:

> (b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

> . . .
> The various dictionary definitions of the adjective "corrupt" quoted in North I do nothing to alleviate the vagueness problem involved in in attempting to apply the term "corruptly" to Poindexter's conduct. "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." Words like "depraved," "evil," "immoral," "wicked," and "improper" are no more specific – indeed they may be less specific – than "corrupt." *See, e.g., Walton v. Arizona*, 497 U.S. 639 (1990) ("no serious argument [that phrase] especially ... depraved" is not too vague on its face to be an aggravating circumstance in capital sentencing); *Ricks*, 414 F.2d at 1106. (A dictionary definition quoted in North I also mentions "bribery" and the like, but no such conduct is at issue on this appeal.) As used in § 1505, therefore, we find that the term "corruptly" is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress.

Poindexter, 951 F.2d at 378-79.

Poindexter was not the first time that the D.C. Circuit found the terms "corrupt" and "corruptly" unconstitutionally vague. *See, e.g., Ricks v. District of Columbia*, 414 F.2d 1097, 1106 (D.C. Cir.1968) (invalidating vagrancy statute as unconstitutionally vague) ("Immoral," and its synonyms "corrupt, indecent, depraved, dissolute," afford "an almost boundless area for individual assessment of the morality of another's behavior.").

No "narrowing gloss" exists with respect to the § 1512(c)(2) charges against Mr. Groseclose. The charges are not "core" offenses that may constitutionally be prosecuted under § 1512(c)(2). Nor does the legislative history or judicial interpretations of § 1512(c)(2) narrow the term "corruptly" sufficiently to avoid unconstitutional vagueness when applied to charged conduct. The legislative history does not provide any "more specific meaning" of the term "corruptly." *Poindexter,* 951 F.2d at 379 ("Notwithstanding the use of the facially vague term, we suppose that if the legislative history of § 1505 clearly indicates a more specific meaning of the term "corruptly," then the statute might

constitutionally be applied to conduct that comes within that meaning."). The legislative history of § 1512(c)(2), enacted as part of the Sarbanes-Oxley Act targeted corporate fraud.[8] It does not provide a "more specific meaning of the term "corruptly," that would allow this Court to find that § 1512(c)(2) "might constitutionally be applied to" a charge that Mr. AlleGroseclose by his alleged presence and conduct within the Capitol *corruptly* obstructed an official proceeding. To the contrary, the legislative history provides support that § 1512(c)(2) should not be read in the manner that the government endeavors to do in this case. *See Yates v. United States,* 574 U.S. 528, 549 (2015) ("we resist reading§1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that 'tangible object' within 1519's compass is one used to record or preserve information").

Significantly, *Poindexter* recognized that obstruction aimed at Congressional proceedings presents a different analytical framework in determining whether the statute was unconstitutionally vague. Unlike attempts to influence or impede judicial proceedings, attempts to influence Congress, a political body, are commonplace and not of a criminal nature. *Poindexter*, 951 F.2d at 377-78. (The term corruptly "must have some meaning ... because otherwise the statute would criminalize all attempts to "influence" congressional inquiries – an absurd result that the Congress could not have intended in enacting the statute"); *United States v. Russo*, 104 F.3d 431, 436 (D.C. Cir. 1997) (in contrast to *Poindexter's* concern that not all efforts to obstruct Congress can be criminalized, "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap to mind"). Thus, all the § 1512(c)(2) cases involving "core" obstruction prosecutions for perjury, destruction

[8] The Sarbanes-Oxley 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)

and falsification of evidence in connection with judicial and grand jury proceedings are inapposite. *See Poindexter*, 951 F.2d at 385 ("interpretation of § 1505 which would "reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty . . . may be useful as a description of the "core" behavior to which the statute may constitutionally be applied).[9]

Under the *Poindexter* analysis, "corruptly" obstructing, influencing or impeding a congressional proceeding does not at all clearly encompass Mr. Groseclose's alleged entry into the United States Capitol to "make [his] voice heard" as President Trump exhorted his supporters to do, no matter how disorderly he and other demonstrators allegedly might have acted. The Superseding Indictment does not allege that Mr. Groseclose entered the Capitol to suborn perjury, testify falsely, or spoil any evidence in a corrupt manner or influence others to do so. There is also no allegation that Mr. Groseclose acted dishonestly, by paying a bribe to anyone or to gain an unfair advantage for himself.[10]

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[9] The "core" obstructive behavior found in all reported 1512(c)(2) prosecutions involves - committing perjury, suborning perjury, destroying or falsifying evidence or influencing another person to do the same. *See, e.g., United States v. Gordon,* 710 F.3d 1124, 1148 (10th Cir. 2013) (defendant asked another person to backdate and create false documents to present in a forfeiture proceeding); *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013) (providing a forged receipt to the government in connection with its prosecution of a conspiracy to transport and sell stolen vehicles); *United States v.* Matthews, 505 F.3d 698, 701 (7th Cir. 2007) (a failed attempt by a local chief of police to thwart a federal firearms offense brought against a friend, which included trying to "lose" the firearm, enlisting others in his dishonest activities, and committing perjury before a grand jury).

[10] Corruptly may be "characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements." A "corrupt" intent may also be defined as "the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others." *Poindexter*, 951 F.2d at 378. "Also instructive is the definition in Black's Law Dictionary at 311 (5th ed. 1979) that the word corruptly "[w]hen used in a statute, ... generally imports a wrongful design to acquire some pecuniary or other advantage." *United States v. North*, 910 F.2d 843, 940 (D.C. Cir. 1990) (Silverman, J. , concurring in part)(decision modified).

Poindexter remains good law in the D.C. Circuit. Any out-of-circuit cases the government may cite does not undermine *Poindexter* as precedent nor weaken the strength of its reasoning. Moreover, every non-January 6 case that the government has prosecuted under § 1512(c)(2) involves "core" behavior to which the obstruction statute may constitutionally be applied and none involve proceedings before Congress or implicate First Amendment activities. *See Poindexter,* 951 F.2d at 385.[11]

Poindexter is not limited to § 1505 prosecutions. In *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), the D.C. Circuit applied *Poindexter* in a § 1512 case. *Morrison* rejected the as-applied challenge to the § 1512 conviction precisely because the defendant had committed "transitive" corruption in the *Poindexter* sense by endeavoring to persuade a witness "to give specific false testimony" in a judicial proceeding and offering the witness a bribe – "some furniture if she signed the affidavit" for doing so. *Morrison*, 98 F.3d at 621-22; *see also United States v. Kanchanalak*, 37 F. Supp. 2d 1, 4 (D.D.C. 1999) (Friedman, J.) (finding that even after Congress

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[11] *Poindexter*, at 385-86 (internal citations omitted):

> The legislative history we have reviewed may not mandate the "subornation" interpretation of § 1505, which would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty. Still, that interpretation may be useful as a description of the "core" behavior to which the statute may constitutionally be applied
> . . .
> The core interpretation of § 1505 would be narrower still if, as some have suggested, "corruptly" means that in acting, the defendant aimed to obtain an "improper advantage for [himself] or someone else inconsistent with official duty and rights of others." Then someone who influences another to violate his legal duty has not acted corruptly if his purpose is, for example, to cause the enactment of legislation that would afford no particular benefit to him or anyone connected with him.

amended § 1515 in the wake of *Poindexter* to define "corruptly" for purposes of § 1505, § 1515's definition of "corruptly" to mean acting with an "improper purpose" is still unconstitutionally vague under *Poindexter*). Thus, *Morrison* extended *Poindexter* to a § 1512(b) case. Significantly, the core behavior prosecuted in *Morrison* fell within a constitutional application of "corruptly" as it involved the offer of a bribe in connection with a criminal trial.

Other circuits have adopted or expressed support for the *Poindexter* analysis in § 1512 prosecutions. For example, the Third Circuit applied *Poindexter* in a § 1512 prosecution. *See United States v. Davis*, 183 F.3d 231, 249 (3rd Cir. 1999) ("We approved of *Poindexter's* reasoning in the § 1512 context in *United States v. Farrell*"); *United States v. Farrell*, 126 F.3d 484 (3d Cir.1997) (there must be something more inherently wrongful about the persuasion (such as bribery or encouraging someone to testify falsely). The Ninth Circuit has also approved of the *Poindexter* analysis. *See United States v. Aguilar*, 21 F.3d 1475 (9th Cir.1994), *aff'd in part and rev'd in part*, 515 U.S. 593 (1995) (finding "most helpful" *Poindexter*'s holding "that the term "corruptly," as used in 18 U.S.C. § 1505, was unconstitutionally vague as applied to Poindexter's false statements to Congress").

United States v. Shotts,145 F.3d 1289 (11th Cir. 1998) provides little support for the proposition that *Poindexter* should not be extended beyond § 1505. First and foremost, *Shotts* involved allegations of tampering with a grand jury witness, *Shotts,* at 1292, which unlike Mr. Groseclose's charges, are the "core" behavior to which the obstruction statute may constitutionally be applied. *See United States v. Russo*, 104 F.3d 431, 436 (D.C. Cir. 1997) (noting difference

between judicial and congressional settings).[12] Moreover, *Shott* relies on faulty circular reasoning. *See United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011) ("construing "corruptly" to mean "for an improper purpose" – especially if that improper purpose is to hinder an investigation or prosecution (which is already required by the statute) – is circular, essentially rendering the term "corruptly" surplusage).

D. "Corruptly" Requires More Than an Intent to Obstruct and Impede Congress

The Supreme Court's decision in *Arthur Andersen* supports Mr. Groseclose vagueness argument. In *Arthur Andersen*, the Supreme Court vacated a conviction under 18 U.S.C. § 1512(b) where the jury instructions "diluted the meaning of corruptly" by omitting the requirement that supports Mr. Groseclose vagueness argument. *Arthur Andersen LLP v. United States,* 544 U.S. 696, 697 (2005). While the Supreme Court did not address whether the term "corruptly" was unconstitutionally vague as applied to Arthur Andersen's conduct, its decision to vacate the conviction supports Mr. Groseclose's vagueness argument.

> The District Court agreed over petitioner's objections, and the jury was told to convict if it found petitioner intended to "subvert, undermine, or impede" governmental factfinding by suggesting to its employees that they enforce the document retention policy.
>
> These changes were significant. No longer was any type of

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[12] "One can imagine any number of non-corrupt ways in which an individual can intend to impede the work of an agency or congressional committee. . . .The problem for the Poindexter court, then, was to discern some special meaning in the word "corruptly," some meaning "sufficiently definite, as applied to the conduct at issue. . . Otherwise "the statute would criminalize all attempts to 'influence' congressional inquiries – an absurd result that the Congress could not have intended in enacting the statute." We have no such problem in this case. Anyone who intentionally lies to a grand jury is on notice that he may be corruptly obstructing the grand jury's investigation." *Russo*, 104 F.3d at 436.

> "dishonest[y]" necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d]" the Government's factfinding ability. . . .By definition, anyone who innocently persuades another to withhold information from the Government "get[s] in the way of the progress of" the Government. With regard to such innocent conduct, the "corruptly" instructions did no limiting work whatsoever.

Arthur Andersen, 544 U.S. at 706-07.

Similarly, the Tenth Circuit has required proof of dishonesty in a § 1512(c)(2) prosecution:

> Acting "corruptly" within the meaning of § 1512(c)(2) means acting "with an improper purpose **and to engage *in conduct knowingly and dishonestly*** *with the specific intent to subvert, impede or obstruct the [forfeiture proceeding]*."
> . . .
> Any rational jury could have determined that the creation of these false documents was for the corrupt purpose of redirecting the government, based upon false pretenses, away from property that it was trying to seize (*i.e.*, Mr. Gordon's home) in an official proceeding and that Mr. Gordon could foresee that the document would have this effect.

Gordon, 710 F.3d 1124, 1151 (10th Cir. 2013) (emphasis added; alteration in original).

The requirement of dishonest conduct comports with the notion that the core behavior of obstruction statutes is conduct that affects the integrity and availability of evidence such as perjury, destruction and falsification of documents or other evidence. But the Superseding Indictment does not allege that Mr. Groseclose acted dishonestly, or attempted to affect the integrity or availability of evidence, or with the intent to seek an unfair advantage for himself.[13]

III. The Court Must Apply A Heightened Standard of Analysis

The First Amendment activities implicated in the case requires "a more stringent vagueness

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[13] Count Two charges that Mr. Groseclose "attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, the Certification of the Electoral College vote, and did aid and abet others known and unknown to do the same" in violation of 18 U.S.C. § 1512(c)(2).

test." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *see also United States v. Reeves*, 752 F2d 995, 1001 (5th Cir. 1985) ("To interpret 'corruptly' [in obstruction statute] as meaning 'with an improper motive or bad or evil purpose' would raise the potential of overbreadth' in this statute because of the chilling effect on protected activities. . . Where 'corruptly' is taken to require an intent to secure an unlawful advantage or benefit, the statute does not infringe on first amendment guarantees and is not 'overbroad.'").

IV. The Government's Interpretation Renders "Otherwise" Surplusage, Results in an Unconstitutional Novel Application of the Law and Is Inconsistent With the Legislative History

As the *Miller* opinion held, if subsection (c)(2) reaches any and all obstructive acts, the words "or otherwise" have no meaning. That is because the subsection would reach just as far if it simply read, "Whoever corruptly . . . obstructs, influences, or impedes any official proceeding . . .shall be fined. . ." Second, and more important, this interpretation does not give meaning to the word "otherwise." *Miller*, *supra,* at *7 ("When possible, of course, the Court must give effect to every word in a statute. *Setser v. United States*, 566 U.S. 231, 239 (2012). But if § 1512(c)(2) is read as wholly untethered to § 1512(c)(1), then "otherwise" would be pure surplusage. In other words, under this reading, subsection (c)(2) would have the same scope and effect as if Congress had instead omitted the word "otherwise.").[14]

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[14] *See also Miller*, *supra,* at *12:

> A different reading would also create substantial superfluity problems. After all, if subsection (c)(2) is not limited by subsection (c)(1), then the majority of § 1512 would be unnecessary. At a minimum, conduct made unlawful by at least eleven subsections – §§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(C),

The government's interpretation of § 1512(c)(2) not only fails to give meaning to the phrase "or otherwise obstructs," it also renders useless swathes of Chapter 73, all of which are covered by the government's § 1512(c)(2) construction but concern more particular conduct that courts must assume Congress did not craft in vain the other provisions in § 1512 surplusage, unlike Mr. Groseclose's construction. *Yates*, 547 U.S. at 542 ("We resist a reading of [an obstruction statute] that would render superfluous an entire provision passed in proximity as part of the same Act."). If § 1512(c)(2) covers any act that obstructs, influences or impedes any official proceeding, it does not merely "overlap" with some other criminal section:

- **§ 1503,** defined above, criminalizes whoever corruptly, or by threats or force, or by any threatening letter or communication, influences, intimidates, or impedes jurors, officers of the court, law enforcement officers, or the administration of justice;

- **§ 1505** criminalizes, among other things, "Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress"

- **§ 1510** criminalizes those who willfully endeavor by means of bribery to obstruct the communication of information relating to a violation of any criminal statute of the United States to a criminal investigator.

- **§ 1513** criminalizes those who retaliate against witnesses, victims or informants in official proceedings.

- **§ 1519** criminalizes "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with

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1512(b)(2)(D), and 1512(d)(1) – would also run afoul of § 1512(c)(2). To be sure, superfluity is not typically, by itself, sufficient to require a particular statutory interpretation. *See Hubbard v. United States*, 514 U.S. 695, 714 n.14 (1995). But here, such substantial overlap within the same section suggests that Congress did not mean § 1512(c)(2) to have so broad a scope.

> the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. . ."

In analyzing the last section above, § 1519, *Yates* illustrates that the rule against surplusage, and the interpretive canons *ejusdem generis* and *noscitur a sociis*, do not countenance a reading of § 1512(c)(2) that covers all obstructive acts regardless of whether they intend to affect the integrity of availability of evidence in a proceeding.

Were the Court to reject *Miller*, the Government application of § 15012(c)(2) to Mr. Groseclose is nonetheless unconstitutional. At a minimum, a construction of subsection (c)(2) that reaches conduct not directed at undermining the proceeding through actions that affect the integrity and availability of evidence would result in a due process violation under *Bouie's* novel construction principle as well as under the vagueness doctrine. In every reported § 1512(c)(2) decision, "otherwise" performs the task of capturing conduct that still "otherwise" constitutes actions impairing the *integrity and availability of information* used in the "official proceeding." No case involves "obstruction" untethered to the integrity and availability of evidence:

- *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014) (soliciting tips from corrupt cops to evade surveillance constituted evidence sufficient for jury to find "efforts were out of a desire *to influence what evidence came before the grand jury*") (emphasis added);

- *United States v. Phillips*, 583 F.3d 1261, 1265 (10th Cir. 2009) (disclosing identity of undercover agent to subject of grand jury drug investigation evidence sufficient to find purpose was to "*thwart evidence from reaching the investigation*") (emphasis added);

- *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (attempting to obtain false statement *to be used in pending federal charges* sufficient to satisfy § 1512(c)(2));

- *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009) (making false statements "*directly to the grand jury itself"* sufficient to satisfy § 1512(c)(2)) (emphasis original);

- *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (false responses to interrogatories *that were filed in the official proceeding* sufficient to satisfy § 1512(c)(2));

- *United States v. Ring*, 628 F. Supp. 2d 195, 223 (D.D.C. 2009) (making false statements to outside counsel "so that counsel *would provide misleading information to the grand jury*") (emphasis added).

As noted above, notwithstanding *Miller* and all the surplusage, even if the Court were to somehow find the government's construction formally correct, it is certainly not "clearly" so. Thus, the Court would turn to § 1512(c)(2)'s legislative history. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 460 (1987) (review of legislative history appropriate to resolve statutory ambiguity). Section 1512(c) was added in the Sarbanes-Oxley Act of 2002 (SOX). That legislation was "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). Senator Trent Lott, the member of Congress who introduced the amendment that would be codified at § 1512(c), specifically explained its purpose. 148 Cong. Rec. S6542 (daily ed. July 10, 2002). Namely:

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

Id. at S6545 (emphasis added).

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

The legislative history is thus clear that § 1512(c)(2) was enacted to reach conduct that affected the integrity and availability of evidence.

V. *Yates* Plainly Bars the Government's Application of §1512(c)(2) to Mr. Groseclose's Alleged Conduct

First, in *Yates* the government contended that § 1519's "tangible object" in the phrase "any record, document, or tangible object" covered all physical objects, such as a dead fish, not just those that contain information. 574 U.S. at 542. The Court rejected this construction – citing first the rule against surplusage. If § 1519's "tangible object" covered all physical objects, it would render as surplusage § 1512(c)(1), which proscribes "alter[ing], destroy[ing], mutilate[ing], or conceal[ing] a record, document, or other object. . ." 574 U.S. at 542. As shown above, the government's surplusage problem is far worse than in *Yates*. If § 1512(c)(2)'s "or otherwise obstructs" covers all acts regardless of whether they intend to affect the integrity or availability of evidence, it renders as surplusage all of § 1512 and many other provisions in Chapter 73.

There is no support in *Yates*, or anywhere else, that § 1512(c)(2), or any other provision in § 1512, covers acts that do not intend to affect the integrity or availability of any kind of evidence, including objects-containing-information (*Yates*), objects-not-containing-information (§ 1512(c)(1)), or even any other non-object information as the government seeks to do in this case.

Second, *Yates* applied *ejusdem generis* and *noscitur a sociis* to limit "tangible object" to an object used to record or preserve information because the phrase followed a list of words separated by commas, each noun of which recorded or preserved information (records, documents). Under *noscitur a sociis*, "a word is known by the company it keeps to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth

to the Acts of Congress." *Yates*, 574 U.S. at 543 (cleaned up). Section 1519 proscribes "'alter[ing], destroy[ing] . . . *falsif[ying] or mak[ing] a false entry in* any record, document, or tangible object.'" 574 U.S. at 543 (citing § 1519) (emphasis original). The italicized verbs "typically take as grammatical objects . . . things used to record or preserve information." Thus *noscitur a sociis* counseled limiting "tangible object" to evidence that is used to record or preserve information.

Under *ejusdem generis*, "where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 574 U.S. at 544 (cleaned up). That doctrine favors interpreting "tangible object" to mean evidence that records or preserves information given that it followed "record[s], document[s]." *Id.* "It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind *in a provision targeting fraud in financial record keeping*." *Id.* (emphasis added).

Here, the exact same analysis requires rejection of the government's interpretation of § 1512(c)(2). Section 1512(c) criminalizes "whoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object . . . or otherwise obstructs, influences, or impedes any official proceeding . . ." Under *noscitur a sociis*, Section 1512(c)(2)'s "or otherwise obstructs" is surrounded by words that *concern evidence impairment.*

U*nder ejusdem generis*, § 1512(c)(2)'s "or otherwise obstructs" follows this enumerated list: "alter[ing], destroy[ing], mutilate[ing], or conceal[ing] a record, document, or other object. . ." Again, even if it were reasonable to find that "or otherwise obstructs" reaches beyond tampering with record evidence to include non-physical evidence, with respect to conduct that has nothing to do with evidence, "[i]t is highly improbable that Congress would have buried a general . . . statute covering

[obstructive acts not concerning evidence] of any and every kind in a provision targeting fraud in financial record keeping." *Yates*, 574 U.S. at 544.

Finally, *Yates* held that if "recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object'. . .we would invoke the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 574 U.S. at 548. Lenity was particularly appropriate because the government "urge[d] a reading of [an obstruction statute] that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense. . ." *Id.* (emphasis original). "[B]efore we choose the harsher alternative, [we] require that Congress . . . [speak] in language that is clear and definite." *Id.* Lenity is even more appropriate here. The government exposes defendants to a 20-year prison sentence for *any* act, which it deems obstructive *whether or not* it concerns evidence integrity or availability, in any "proceeding" *whether or not* it concerns an inquiry or investigation. The government's interpretation of § 1512(c)(2) floats in space, tethered to nothing more than its nonpublic charging decision-making and inconsistent with any prior application of the statute or demonstrations before Congress.

VI. Congress Certification of the Electoral College Vote Is Not an Official Proceeding

While Congress' certification of the Electoral College vote bears an indicia of officiality, Congress' certification lacked the adjudicatory function that all pre-January 6 cases have required. In *United States v. Kelley*, 26 F.3d 1118 (D.C. Cir. 1994), the D.C. Circuit addressed the definition of a proceeding under both § 1505 and § 1512. Two significant points come from *Kelley*. In the first place, the government stipulated there that "proceeding" meant the same thing in § 1505 and § 1512.

36 F.3d at 1128. That prompted the D.C. Circuit to premise part of its decision on that basis. *Id.* Secondly, the court of appeals held that the Office of Inspector General matter at issue qualified as a "proceeding" under § 1505 because it had these quintessential obstruction-of-justice qualities: (1) "adjudicative power" or "the power to enhance [its] investigation through the issuance of subpoenas or warrants"; and (2) the OIG matter was an investigation. *Kelley*, 36 F.3d at 1127.

These laws and judicial decisions preceded codification of § 1512(c)(2). The interpretive question is not what Congress could have said but did not. (Congress could have said by "proceeding" it meant something different from a century of obstruction jurisprudence but did not.) When construing statutes, courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Hence, "official proceeding" in § 1512(c)(2) should not be interpreted to mean something no law or court had meant before Congress legislated. *United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013) (holding that "proceeding" in § 1515(a)(1) must be interpreted in the "legal sense" to mean activities that feature the defining qualifies of "the business done in courts"). Accordingly, "official proceeding" in §1512(c)(2) requires the performance of an adjudicatory function that was not taking place on January 6.

On January 6, Congress was not sitting as a tribunal in which parties are directed or called to appear. Congress was not "adjudicating" evidence. An adjudicatory function goes hand in hand with the "core" conduct of obstruction statutes that criminalize acts intended to obstruct the integrity and availability of evidence.[15] In this case, there was no adjudicatory function and no obstruction of the

[15] Judge Moss' point about what Congress "could have said" in defining § 1512 should be rejected. *See United States v. Montgomery,* 2021 WL 6134591, at *8 (D. D.C. 2021). First, what Congress "could have said" is not a recognized interpretive canon. Second, comparing 1505's

integrity and availability of evidence. Thus, the Indictment fails to state an offense under § 1512(c)(2).

A. Congress' Electoral Certificate Counting Powers Are Ministerial, Not Adjudicative

Any claim that Congress's Electoral College vote certification is an "adjudicatory proceeding" conflicts with the Constitution and the government's own theory of the case. First, the basic premise of the January 6 investigation is that a mob attempted to stop the Electoral College vote certification after being misled by the former President into believing that Congress could reject electoral certificates affected by "massive voter fraud." The former President's claim was inaccurate in at least one key respect. Congress does not possess the "adjudicative" power to reject procedurally valid electoral certificates for reasons other than authentication. Indeed, on January 6, the presiding officer of the electoral count, the Vice President, stated that the former President was wrong, that the duties of the presiding officer were "largely ceremonial," not "adjudicative." Ltr. of Vice President Mike Pence, Jan. 6, 2021, available at: https://bit.ly/2WVy9s0.

Second, the Constitution does not endow Congress with "adjudicative" powers to "look behind" procedurally valid Electoral College certificates. The so-called Elector Clauses merely provide that the Electors of the Electoral College shall send certified lists (certificates) of their presidential votes to the "Seat of Government of the United States," where the President of the Senate

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"inquiries and investigations" to 1512's "official proceeding" misses the point. The comparison is between 1505's "proceeding" and 1512's "[official] proceeding." The correct interpretive canon looks to how Congress and the courts understood the term "proceeding" before passage of Sarbanes Oxley. Here, the pre-Sarbanes Oxley 1505 cases like *United States v. Kelley*, 36 F.3d 1118 (D.C. Cir. 2009) hold that "proceeding" requires adjudication.

> shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes *shall* then be *counted*. The Person having the greatest Number of Votes *shall* be the President, if such Number be a Majority of the whole Number of Electors appointed. . .

U.S. Const. art. II, § 1, cl. 3 (emphasis added).[16]

The Twelfth Amendment keeps the same procedural structure except requires that each Elector cast one electoral vote for president and one for vice president. U.S. Const. amend. XII. The consensus view among leading constitutional scholars is that "counting" is a ministerial, not a judicial act. *See*, *e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1712 (2002); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 Ark. L. Rev. 215, 229 (1995) ("In counting votes, Congress performs in effect a ministerial function, registering the will of the voters in the electoral college."); *Congress Sowed the Seeds of Jan. 6 in 1887: the Electoral Vote Count Act lets Congress think it can choose the President, but it's unconstitutional*, Judge J. Michael Luttig and David B. Rivkin, Jr., Wall Street Journal, Mar. 18, 2021, available at: https://www.wsj.com/articles/congress-sowed-the-seeds-of-jan-6-in-1887-11616086776.

This is shown in several ways:

Philadelphia Convention of 1787. The Framers rejected a proposal by James Madison and Hugh Williamson to insert the phrase "who shall have balloted" after the word "Electors." The purpose of this proposal was "so that the non-voting electors not being counted might not increase the number necessary as a majority of the whole – to decide the choice without the agency of the Senate." Kesavan, 80 N.C. L. Rev. at 1713 (quoting 2 The Records of the Federal Convention of 1787 at 515 (Max Farrand ed., 1911)). John Dickinson successfully moved to insert after "Electors" the word "appointed." Thus, under the Elector Clauses, the requisite number of electoral votes needed for victory is "a Majority of the whole Number of Electors Appointed." U.S. Const. art. II, § 1, cl. 3. This history suggests that the Framers

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[16] *See also* U.S. Const. art. II, § 1, cl. 1-2, 4.

considered the possibility that there might not be a "vote," *but only if an elector shall not have balloted*. They did not consider the possibility that an electoral vote might be unconstitutional because, say, vote tabulation machines did not recognize Sharpie ink. Kesavan, 80 N.C. L. Rev. at 1713.

The Elector Clauses' immediacy principle. The Twelfth Amendment provides that once the President of the Senate has opened all of the Certificates, "the votes shall *then* be counted." U.S. Const. amend. XII (emphasis added). And in the case of electoral deadlock, the House of Representatives is to "immediately" choose the next president from those on the list. *Id.* At the Convention, James Wilson said, "If the election be made as it ought as soon as the votes of the electors are opened & it is known that no one has a majority of the whole, there can be little danger of corruption." Kesavan, 80 N.C. L. Rev. at 1715 (citing 2 Farrand, at 502). The immediacy principle implies that the counting agents may not delay in counting the electoral certificates. This militates against an "adjudicative" interpretation of "counting," as a judicial-like role necessarily entails deliberation not immediacy.

Separation of powers principles. If Congress had a substantive role in selecting the president, it would collapse the separation of powers. As Gouverneur Morris explained at the time, "if the Executive be chosen by the Legislature, he will not be independent [of] it; and if not independent, usurpation and tyranny on the part of the Legislature will be the consequence." 2 Farrand, at 57.[17]

All of this explains why the government falls back on the obscure objection procedures of the Electoral Count Act of 1887 (ECA) to establish its "adjudicative proceeding" argument. Here, the government runs into a constitutional briar patch. As explained above, neither the Elector Clauses nor the Twelfth Amendment give Congress "adjudicative" power to reject authentic Electoral College certificates. Moreover, the Twelfth Amendment gives Congress no power to enact legislation to enforce its provisions, unlike subsequent amendments expanding the franchise. *Cf.* U.S. Const.

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[17] Congress's role in presidential elections can *become* "adjudicative" in the case of electoral deadlock, *i.e.*, where *the properly certified* electoral votes do not yield a majority to a presidential candidate. U.S. Const. amend. XII. But there was no deadlock on January 6 and the government's "adjudicative" argument does not rest on that contingency but rather on Congress's purported power to reject validly certified electoral votes.

amend. XV, § 2. The Necessary and Proper Clause will not work to that end.[18] Yet in the ECA Congress purported to grant itself the power to reject electoral certificates that "have not been so regularly given by electors whose appointment has been so certified." 3 U.S.C. § 15. Because the Constitution does not permit Congress to exercise that power to the extent it reaches beyond procedural authentication of the certificates, the ECA is generally regarded as "merely precatory" to avoid constitutional conflict. Kesavan, 80 N.C. L. Rev. at 1793. Thus, the government's argument that the ECA shows that congressional joint sessions to count electoral votes are necessarily adjudicative conflicts with the Elector Clauses and the Twelfth Amendment.[19]

B. Even If Congress Constitutionally Gave Itself "Adjudicative" Power over Presidential Elections in the ECA, That Act Did Not Bind Congress on January 6 under the Anti-Entrenchment Principle.

Even if the Congress of 1887 enjoyed the constitutional power to create adjudicative electoral vote procedures, it did not have the power to "entrench" the ECA, binding all future Congresses. 3 U.S.C. §§ 5, 15 (purporting to bind future Congresses to ECA procedures).

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[18] Under the Clause, Congress has the power to carry into execution: (1) "the foregoing Powers," (2) "all other Powers vested by the Constitution into the Government of the United States"; and (3) "all other Powers vested by this Constitution . . . in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. Number (1) does not apply because "foregoing powers" refers to the seventeen enumerated powers of Article I, section 8, and the Elector Clauses are in Article II. Number (2) does not apply because the Elector Clauses impose on the joint convention a duty—the electoral certificates "shall" be "counted"—not the discretion implied by the word "Power." Kesavan, 80 N.C. L. Rev. at 1736. Number (3) does not apply because Congress is not a "Department." *Hubbard v. United States*, 514 U.S. 695, 700 (1995).

[19] Scholars allow that Congress's counting role encompasses a threshold determination as to the "authenticity" of the electoral *certificates* (as opposed to the content of electoral *votes*), i.e., confirming that the certificates are "(i) signed, (ii) certified, and (iii) sealed." Kesavan, 80 N.C. L. Rev. at 1795. But the government argues that the "adjudication" creating the "official proceeding" here lies in Congress's purported power to render judgment on whether to certify the *votes* cast by Electors in the presidential election, i.e., the power to challenge the content of electoral votes.

The constitutional anti-entrenchment principle forbids one Congress from "binding" another, *i.e.*, enacting legislation that purportedly cannot be altered under ordinary bicameralism and executive presentment procedure. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996); *INS v. Chadha*, 462 U.S. 919 (1983); Kesavan, 80 N.C. L. Rev. at 1793 (ECA violates anti-entrenchment principle). That is particularly so with respect to the ECA, which purports to bind Congress to specific parliamentary rules. Under the Rulemaking Clause, each Congress enjoys the power to set its own rules. U.S. Const. Art. I, § 5, cl. 2 ("*each* House may determine the Rules of its Proceedings.") (emphasis added). Therefore, even if the ECA's vote counting procedures were constitutionally "adjudicative" in 1887, that did not make the joint session on January 6 necessarily adjudicative. Instead, to avoid constitutional conflict, the ECA is regarded as a precatory House rule in statutory form. Kesavan, 80 N.C. L. Rev. at 1793.

That means that Mr. Grosecloses's criminal liability turns on this Court's interpretation of an ambiguous House rule (whether Congress's electoral vote count is an "official proceeding" turns on whether it is "adjudicative," which then turns on the Court's interpretation of the ECA). Yet the D.C. Circuit has held that such a circumstance creates a nonjusticiable issue under the political question doctrine. *United States v. Rostenkowski*, 59 F.3d 1291, 1304 (D.C. Cir. 1995). There, the Court of Appeals held that the Rulemaking Clause is a "textually demonstrable commitment of the [interpretation of parliamentary rules] to a coordinate political department." *Rostenkowski*, 59 F.3d at 1304 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). And there is a "lack of judicially discoverable and manageable standards for resolving" a question that turns on ambiguous House rules. *Id.*

The notoriously obscure ECA parliamentary rules were manifested on January 6. The joint session, on whose "adjudicative" procedures the government's "official proceeding" argument turns, was suspended at 1:15 p.m. Eastern Time, fully more than an hour before the alleged obstructive acts in this case took place. 167 Cong. Rec. H77 (Jan. 6, 2021). This had nothing to do with the protesters who entered the Capitol but with the President of the Senate's order that "the two Houses . . .withdraw from the joint session" as a result of objections to the Arizona certificate by Members of Congress. *Id.* Even the obscure ECA provisions on which the government relies make clear that there was no possibility of the separated Houses accepting or rejecting electoral certificates before and during the protester intrusion. 3 U.S.C. § 15. Thus, the government asks the Court to find not only that a joint session to count electoral votes is an "official proceeding" under the obstruction laws but that a suspended one is too – pursuant to hypothetical House rules it declines even to cite.

Yet when a crime committed in Congress depends on the existence of a "competent tribunal" (in this case, an "official proceeding"), the legislature's House rules governing the requirements of such a proceeding must be satisfied. *Christoffel v. United States*, 338 U.S. 84, 88 (1949) (reversing perjury conviction concerning false testimony given to House committee because jury was allowed to convict without finding that the committee's quorum rules were satisfied).[20]

These problems of parliamentary procedure would not be remedied even if the government changed its position to allege that the defendants prevented the joint session from *resuming*, *i.e.*, after

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[20] *Christoffel* was decided before the Court formulated the modern political question doctrine in *Baker*. As Justice Jackson noted in dissent in *Christoffel*, it was not the Court's role to put a judicial gloss on parliamentary rules. 338 U.S. at 91. Yet even if Jackson's view on that point had prevailed in 1949, the perjury-in-Congress conviction may still have required reversal, under the future political question doctrine, if the House rules at issue were ambiguous. *Rostenkowski*, 59 F.3d at 1304.

the conclusion of the separated House objections to the Arizona certificate. Even after the joint session "resumed" at 11:35 p.m. that day, objections to State certificates continued for several more hours. 167 Cong. Rec. H94 (Jan. 6, 2021). The government does not allege that Mr. Groseclose remained in the Capitol building, or even in the vicinity, for that long. If these (unconstitutional) certificate objections, which prevented the joint session from "resuming," continued for hours *after* protesters had been cleared from the Capitol, the government has not made, and cannot make, any argument that the defendants were causally responsible for a delayed "resumption" of the joint session, even assuming the question were justiciable.

CONCLUSION

For all the foregoing reasons, Count Two of the Superseding Indictment which charges a violation of 18 U.S.C. § 1512(c)(2) should be dismissed.

REQUEST FOR A HEARING

Mr. Groseclose respectfully requests that the Court grant a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the instant Motion was served this 1st day of April, 2022 via ECF on all counsel of record.

/s/ Carmen D. Hernandez
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