IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. **WILMAR MONTANO-ALVARADO** Defendant	**USDC Case: 21-0154(RJL)**

MOTION TO DISMISS

TO THE HONORABLE RICHARD J. LEON,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF COLUMBIA:

COMES NOW the appearing defendant, Wilmar Montano-Alvarado, through the undersigned counsel who, very respectfully, **STATES** and **PRAYS** as follows**:**

INTRODUCTION

Count Two in this case—and identical charges in other cases arising from the January 6 incident at the U.S. Capitol—amount to dramatic and unprecedented overcharging by the U.S. Government under 18 U.S.C. § 1512(c)(2). Section 1512(c)(2), buried in the middle of a witness tampering statute and carrying a twenty-year maximum, is not the catch-all obstruction provision the government wants it to be. Section 1512(c)(2) is targeted at actions impairing the integrity of evidence to be used in tribunal-type settings. What Mr. Montano-Alvarado is charged with doing—disrupting Congress's electoral count—involves neither of those things. Until the January 6 indictments, section 1512(c)(2) had never been applied in the fashion the government seeks to today, and the law does not support starting now. Furthermore section 1512(c)(2), as interpreted

and applied by the government, is unconstitutional and void for vagueness. Count Two must be dismissed.

To be clear, the January 6 incident is a stain on the United States' democratic history. If the government proves its case, Mr. Montano-Alvarado and men and women like him, in the absence of dangerous weapons or violence, may have violated other laws that carry lesser penalties. *See, e.g.*, 18 U.S.C. § 1752; 40 U.S.C. §§ 5104, 5109. That is why Mr. Montano-Alvarado is not moving to dismiss the other charges in his case. He just has not violated section 1512(c)(2).

BACKGROUND

1. Factual Background

Wilmar Montano-Alvarado was indicted on several counts related to the January 6, 2020 incident at the United States Capitol. Count 2 of the indictment—and of the two superseding indictments that followed—charged Mr. Montano-Alvarado with:

> attempt[ing] to, and did, corruptly obstruct, influence, and impede an official proceeding; that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College Vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18. . . in violation of Title 18, United States Code, Sections 1512(c)(2) and (2).

Dkt. 30.

Mr. Montano-Alvarado moved to stay the instant proceeding in light of the pending appeal in *U.S. v. Miller*, which will resolve the applicability of 18 U.S.C. § 1512(c)(2) to a substantively identical charge arising from the same January 6 incident. *See* Dkt. 41.

The Court denied his motion to stay noting, among other things, that Mr. Montano-Alvarado had not moved to dismiss Count 2. *See* Minute Entry on 8/12/2022. He now does so.

2. Legal Background

Section 1512 is a witness tampering statute. *See* 8 U.S.C. § 1512 (titled: "[t]ampering with a witness, victim, or an informant"). It criminalizes discrete conduct in specific contexts. Subsection (a) criminalizes, for example, killing another person to prevent their attendance at an official proceeding, 18 U.S.C. § 1512(a)(1)(A), or using physical force (or a threat of it) against a person with the intent to cause a witness to withhold testimony, *id.* § 1512(a)(2)(B)(i). Subsection (b), in turn, focuses on verbal conduct, such as using threats with intent to influence a witness's testimony. *Id.* § 1512(b)(1). And subsection (d) criminalizes intentionally harassing a witness in order to dissuade that witness from testifying. *Id.* § 1512(d)(1).

Subsection (c), the provision at issue here, is a more recent addition to § 1512. It provides that:

> (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.

18 U.S.C. § 1512(c).

An "official proceeding," referenced across section 1512, is defined as—

> (1) A proceeding before a judge or court of the United States, a United states magistrate judge, bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
>
> (2) A proceeding before the Congress;
>
> (3) A proceeding before a Federal Government agency which is authorized by law; or
>
> (4) A proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

Id. § 1515(a)(1).

Section 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002, which targets "corporate malfeasance." Pub. L. No. 107-204, 116 Stat. 745. "The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelation 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) (plurality opinion). While section 1512(b) "made it an offense to 'intimidat[e], threate[n], or corruptly presuad[e] another person' to shred documents," the statute had a loophole. *Id.* at 536. It did not prohibit individuals from shredding documents themselves. *Id.*

The Senate Report for the Sarbanes-Oxley Act homed in on this problem:

> [I]n the current Andersen case, prosecutors have been forced to use the "witness tampering" statute, 18 U.S.C. § 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the shredding, this legal hurdle might present an insurmountable bar to a successful prosecution.

S. Rep. No. 107–146, p. 7 (2002).

Senator Lott introduced section 1512(c) to plug this loophole. He stated that the new subsection would "would enact stronger laws against document shredding." 148 Cong. Rec. S6545 (daily ed. July 10, 2002). "Current law," Senator Lott noted, "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.*

Section 1512(c) was, in fact, a bit of an afterthought. Earlier versions of the Sarbanes-Oxley Act already included Section 1519, which was likewise targeted at preventing the alteration or destruction of record evidence. *See Miller*, 2022 WL 823070, at *14. At the time, then-Senator Biden noted that 1512(c) was duplicative of provisions already in the legislation. *Id.*

ARGUMENT

1. Count Two Fails to Charge Conduct that is a Crime Under § 1512(c)(2)

Count Two fails to allege an *actus reus* that falls within 18 U.S.C. § 1512(c)(2). This is a separate ground for dismissing the indictment.

In *Begay v. United States*, 553 U.S. 137 (2008)[1], the Supreme Court considered whether drunk driving was a "violent felony" under the Armed Career Criminal Act (ACCA)'s residual clause. ACCA defines a "violent felony" as a crime that "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a risk of physical injury to another*." *Begay*, 553 U.S. at 139-40 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2000)) (emphasis added). ACCA's use of the word "otherwise," according to the majority opinion, tied the clause preceding it to the clause following it (known as the residual clause). The clause preceding "otherwise" "limit[ed] the scope of the [residual] clause to crimes that are similar to the examples themselves." *Begay*, 553 U.S. at 143 (emphasis added). The residual clause thus covered crimes that were "similar in respect to the degree of risk" produced by the enumerated offenses, but, in accordance with the definition of the word "otherwise," were "different in respect to the 'way or manner' in which [they] produce[] that risk." *Id.* at 144 (quoting the definition of 'otherwise' from Webster's Third New International Dictionary 1598 (1961)). Ultimately, the Supreme Court held that "driving under the influence" fell outside of ACCA's "violent felony" definition because it was

[1] *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

not like burglary, arson, or extortion, which typically involve purposeful, violent, and aggressive conduct. *Id.* at 142.

So too here. Section 1512(c)'s structure closely parallels ACCA. It also uses the word "otherwise" followed by a residual or catch-all clause: "obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. § 1512(c)(2). Thus, under the statute's plain language, section 1512(c)(2) covers conduct that has the same sort of obstructive impact as the enumerated types of obstruction in (c)(1), but that causes obstruction in a different way. Section 1512(c)(2) encompasses conduct not specifically enumerated in (c)(1), but likewise designed to undermine a proceeding's truth-finding mission through actions impairing the integrity of evidence or limiting its availability for use in an official proceeding.

This interpretation is reinforced by the structure of 1512, the case law interpreting 1512(c), and 1512(c)'s legislative history.

As discussed earlier, section 1512 is focused on witness tampering, and its provisions are targeted toward specific, particularized actions. Subsection (c)(1) likewise "continues the statute's focus on specific and particularized actions, albeit in a slightly different manner." *United States v. Miller*, No. 1:21-CR-00119 (CJN), 2022 WL 823070, at *11 (D.D.C. Mar. 7, 2022). "Instead of making unlawful an individual's action with respect to another person to achieve some illicit end—as subsections (a), (b), and (d) do—subsection (c)(1) prohibits an individual from taking certain actions directly." *Id.* In particular, it prohibits "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, or attempt[ing] to do so, with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1).

The government's anticipated reading of 1512(c)(2)—untethered from the limiting context of (c)(1) or any other provision—would mean it is the only provision in the entire section without

a narrow focus. Indeed, the government will presumably claim that 1512(c)(2) applies to any act influencing, hampering, or interrupting a pending or contemplated official proceeding so long as it is done with an improper motive. But that interpretation renders superfluous huge swaths of § 1512—and many other obstruction of justice statutes for that matter. Not only would 1512(c)(2) swallow all of 1512(c)(1), but also "conduct made unlawful by at least eleven subsections [of 1512 too]—§§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(C), 1512(b)(2)(D), and 1512(d)(1)." *Miller*, 2022 WL 823070, at *12. Same with huge swaths of the rest of 18 U.S.C. Chapter 73, which focuses on obstruction of justice and which would be rendered superfluous in substantial part by the government's reading. *See, e.g.*, 18 U.S.C. § 1503(a) (influencing or injuring officer or juror); *id.* § 1504 (influencing juror by writing); *id.* § 1505 (obstruction of proceedings before departments, agencies, and committees); *id.* § 1507 (picking or parading with the intent of interfering with the administration of justice); and *id.* § 1509 (obstruction of court orders). It is implausible that Congress intended to render so much of its own law unnecessary in a subsection to a subsection buried in the middle of a long witness tampering statute and that it enacted as an afterthought. Congress, as we know, "does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

The case law applying 1512(c)(2), likewise, reflects a targeted application of the provision to attempts to interfere with and render false evidence. *See, e.g.*, *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009) (involving false testimony to a grand jury); *United States v. Jefferson*, 751 F.3d 314, 321 (5th Cir. 2014) (involving intentional false statements to court during a preliminary injunction hearing); *United States v. Lucas*, 499 F.3d 769, 780-81 (8th Cir. 2007) (involving a defendant having others falsely claim ownership of a firearm); *United States v.*

Mintmire, 507 F.3d 1273, 1290 (11th Cir. 2007) (involving defendant's "attempt[s] to orchestrate" grand jury witness's testimony by sending notes to an attorney who in turn "coached" the witness); *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (involving false statements in a court proceeding); *United States v. Pugh*, 945 F.3d 9, 28 (2d Cir. 2019) (involving destruction of several USB drives and deletion of data); *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (involving providing false answers to interrogatories in a civil law suit filed by a person seeking damages for mistreatment while in police custody, explaining that § 1512(c)(1) "covers obstructive conduct in the form of physical destruction of documents and records" whereas § 1512(c)(2) covers "otherwise" obstructive behavior, including giving false statements in interrogatories relating to a civil law suit). Even the most obscure uses of 1512(c)(2) at least involve attempts to prevent the flow of evidence to a proceeding. *See United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014) (soliciting tips from corrupt cops to evade surveillance); *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009) (disclosing identity of undercover agent to subject of grand jury drug investigation). They do not, as is the case here, merely involve the delay of a proceeding.

Legislative history confirms this result too. As already mentioned, section 1512(c)(2) was designed to close a loophole in criminal law that made it a crime to encourage a witness to tamper with evidence without making it a crime to tamper with that evidence directly. *See supra* Legal Background.

At least one court in this district has adopted an interpretation similar to the one advanced here, and dismissed January 6 indictments because they did not allege that the defendant had taken some action with respect to "a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." *See Miller*, 2022 WL 823070, at *15; *U.S. v. Lang*, 1:21-cr-0053; *U.S. v. Fischer*, 1:21-cr-0234. Many other judges in this district have disagreed.

But their opinions, with all due respect, suffer from several flaws in their reasoning, a few of which are discussed below.

First, their reasoning focuses on the definitions of the words "obstruct," "influence" and "impede" found 1512(c), without adequately appreciating the context in which those words, and the provision more generally, are used. *See, e.g.*, *United States v. Sandlin*, 575 F. Supp. 3d 16, 24 (D.D.C. 2021); *United States v. Montgomery*, 578 F. Supp. 3d 54, 70 (D.D.C. 2021); *United States v. Fitzsimons*, No. CR 21-158 (RC), 2022 WL 1698063, at *7 (D.D.C. May 26, 2022). This is error. A court "should not confine itself to examining a particular statutory provision in isolation." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* A court's duty, after all, is "to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015). Courts regularly reject readings of statutory provisions that make some sense in isolation, in favor of ones that better accord with a coherent, sensible understanding of a statute as a whole. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 315 (2009) (rejecting reading of a statute that would render a subsection of the same provision superfluous and concluding that the better answer is that "[t]hat Congress meant to do just what Members explicitly said in the legislative record."). The same result should apply here.

Second, other courts in this district erroneously rejected the reasoning advanced above on the theory that it requires invoking the statutory canons of *ejusdem generis* or *noscitor a socciis*. In their estimation, these canons require the residual or "catch all" part of the statute to follow a list. *See, e.g.*, *United States v. Montgomery*, 578 F. Supp. 3d 54, 75 (D.D.C. 2021); *United States v. Caldwell*, 581 F. Supp. 3d 1, 29 (D.D.C. 2021); *United States v. Sandlin*, 575 F. Supp. 3d 16,

26 (D.D.C. 2021). First and foremost, "[a] listing is not a prerequisite" to *noscitor a socciis.* Scalia & Garner, *Reading Law* 197 (2012). Plus, there is such a list in 1512(c)(1): "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so." Some courts have suggested that the intervening intent requirement in (c)(1) ("with the intent to impair the object's integrity or availability for use in an official proceeding") somehow cuts off the application of *ejusdem generis* and *noscitor a socciis*. *See, e.g.*, *United States v. Fitzsimons*, No. CR 21-158 (RC), 2022 WL 1698063, at *12 (D.D.C. May 26, 2022). But just as the inclusion of the intervening phrase "involves use of explosives" did not prevent the Supreme Court from concluding that ACCA's residual clause was narrowed by the words that proceeded it in *Begay*, so too should this court reject the argument that "with the intent to impair the object's integrity or availability for use in an official proceeding" prevents it from holding that 1512(c)(1) narrows 1512(c)(2)'s focus.

Third, other courts place far too much weight on the punctuation in section 1512(c) and the fact that 1512(c)(1) and (2) are contained in separate provisions. *See, e.g.*, *Fitzsimons*, 2022 WL 1698063, at *12. The use of separate statutory provisions does not mean the meaning of one can never inform the other. Likewise, "punctuation alone," like "isolated words and sentences," is not "a reliable guide for discovery of a statute's meaning." *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). "Statutory construction is a holistic endeavor." *Id.* (internal quotation marks omitted).

Fourth, courts have called 1512(c)(2)'s legislative history into question by pointing to floor statements by individual's other than 1512(c)(2)'s sponsor. *See, e.g.*, *United States v. McHugh*, No. CR 21-453 (JDB), 2022 WL 1302880, at *12 (D.D.C. May 2, 2022). Putting aside the dubiousness of relying on that particular brand of legislative history, the statements courts point to

do not contradict the interpretation offered here. In *United States v. McHugh*, for example, the presiding District Judge pointed to Senator Hatch's floor statement that section 1512(c) "strengthened an existing federal offense that is often used to prosecute document shredding *and other forms of obstruction of justice*" to reject the idea that 1512(c)(2) only covers document destruction. 2022 WL 1302880, at *12 (quoting 148 Cong. Rec. S6550 (daily ed. July 10, 2002)) (emphasis in original). Defense counsel, however, agrees that section 1512(c)(2) covers "other forms of obstruction of justice" beyond document shredding. Section 1512(c)(2) covers all obstruction directed at undermining an official proceeding's truth-finding function through actions impairing the integrity and availability of evidence.

Finally, if—after reading the relevant cases—this Court still finds itself conflicted about the right outcome, there is a very simple way out: lenity. Lenity enforces some of the justice system's noblest aims. It works to enforce "the ancient rule that the law must afford ordinary people fair notice of its demands . . . by ensuring that an individual's liberty always prevails over ambiguous laws." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring). It also plays a "role in the separation of powers" by "preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Id.* at 1083. It may be among the more disfavored canons of construction in recent years, but it is far from dead. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 547 (2015) (citing rule of lenity to support interpretation) (per Justice Ginsburg, with three Justices concurring and one Justice concurring in the judgment); *United States v. Cano-Flores*, 796 F.3d 83, 93 (D.C. Cir. 2015) (same); *United States v. Guertin*, No. 1:21-CR-262 (TNM), 2022 WL 203467, at *3 (D.D.C. Jan. 24, 2022) (same); *Sandvig v. Barr*, 451 F. Supp. 3d 73, 88 (D.D.C. 2020) (same). Lenity exists precisely to resolve situations where, after considering all the tools in the interpretive tool

belt, the court is still conflicted about the proper construction of the statute. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1247 (D.C. Cir. 2008) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct, we apply the rule of lenity and resolve the ambiguity in the defendant's favor.") (cleaned up). If the Court here feels conflicted between the construction of section 1512(c)(2) offered by the defense and the government, the proper course is to interpret the statute in favor of the defense.

In sum, section 1512(c)(2) does not apply to attempts to stop or delay an official proceeding. It applies to efforts to impair the integrity or availability of evidence for use in an official proceeding.

2. The Certification of the Electoral Vote Was Not An "Official Proceeding."

Prior to the January 6 incident, courts had not had occasion to consider what qualified as "a proceeding before the Congress," the definition of "official proceeding" at issue here. But they had considered what qualified as "a proceeding before a Federal Government agency which is authorized by law." Indeed, a court in this district has recently held that the word "before" "suggests an 'official proceeding' would typically entail convening a formal tribunal or adjudicative body before which parties are compelled to appear." *United States v. Guertin*, 581 F. Supp. 3d 90, 97-98 (D.D.C. 2022). The Fifth Circuit has likewise held that the use of the preposition "before" "implies that an 'official proceeding' involves some formal convocation of the agency in which parties are directed to appear" *United States v. Ramos*, 537 F.3d 439, 462–63 (5th Cir. 2008). Courts have also examined how "official proceeding" is used throughout section 1512 and concluded it is used "in a manner that contemplates a formal environment in which persons are called to appear or produce documents." *See id.* at 463. Thus, these courts have held that "a covered 'proceeding before a Federal government agency' must resemble a formal

tribunal." *Guertin*, 581 F. Supp. 3d at 98; *see also United States v. Ermoian*, 752 F.3d 1165, 1172 (9th Cir. 2013) (analyzing the text in and surrounding Sections 1515 and 1512 and concluding that it "strongly implies that some formal hearing before a tribunal is contemplated").

There is no textual reason to distinguish proceedings before agencies from proceedings before Congress. Both statutory definitions use the term "before," and both are employed identically across § 1512. Therefore, the question is whether the Congress's role in counting electoral votes resembles a "formal tribunal." It does not. No one is "before" Congress during the electoral vote counting. The states' selection of electors is conclusive, and "shall govern in the counting of the electoral votes" by Congress. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rhenquist, J. concurring). By the time Congress begins its role in counting the electoral votes under the Twelfth Amendment and the Electoral Count Act (codified at 3 U.S.C. §§ 5-6, 15-18), the states have already heard disputes and certified the vote. The Joint Session does not have the power under the Constitution to reject the votes of any State. *See* Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N.C. L. REV. 1653, 1709 (2002) [hereinafter Kesavan].[2]

---

[2] Indeed, Congress thought about enacting legislation in 1800 that would have created a committee for determining the results of the electoral college vote with the "power to send for persons, papers, and records to compel the attendance of witnesses." *See* Kesavan at 1671 (quoting House Special Committee, Counting Electoral College Votes, H.R. Msc. Doc. 44-13, at 17 (1877)). This bill did not pass, and for good reason. As one of the Constitution's original framers, Senator Charles Pickney, explained during debate on the bill, it was contrary to the framers' intended roll for Congress in counting electoral votes:

> It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given. . . . To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity, as the [F]ramers of the Constitution never could have been guilty of. How could they expect, that in deciding on the election of a President, particularly where such election was strongly contested, that party spirit would not prevail, and govern

Unsurprisingly, the certification proceedings are therefore nothing like tribunal proceedings—where persons are called to appear, evidence is introduced, and facts are adjudicated. *See, e.g.*, 3 U.S.C. § 15 (noting that members of Congress may make an objection, in writing, and without argument); *id.* § 17 (setting out a procedure for legislators to debate objections amongst themselves by saying their piece for a maximum of five minutes each; not to call witnesses). No outside parties were summoned to attend the January 6 proceedings; no witnesses were called; and no evidence was subpoenaed or produced. Arguments to the contrary—that Congress's electoral counting is a tribunal-like proceeding where the outcome is anything less than predestined—risk countenancing the very type of undemocratic power grab that legal experts and the general public rejected in the run up to January 6 and thereafter.

Indeed, the question of Congress's role during the electoral count (and whether it can function as tribunal) goes to the heart of democratic, separation of powers and federalism concerns. History, therefore, is an important guide into how this process works.

Objections to the electoral college vote peaked a long time ago, in the 1800s, because of confusion about the entry of new states to the union and when their votes should start to count. These objections were repeatedly rejected because the members of Congress concluded they did not have the authority to overrule the votes of the states. *See generally* Kesavan, *supra* at 1678-94. More recent examples confirm this result. Take the case of the "faithless elector" from 1969. There, a North Carolina elector refused to give his electoral vote to Richard Nixon, despite Nixon winning North Carolina's popular vote. Members of Congress objected, but that objection was

---

every decision?

Id. at 1672 (quoting 10 Annals of Cong. 130).

ultimately rejected because of a prevailing view among members of Congress that Congress's role was limited, as summed up most aptly by Representative Rarick:

> [We] are not election supervisors nor given the discretion to recompute the vote received from a sovereign state. The Constitution clearly proscribes our duty as to 'count the electoral votes,' the ministerial function of a central collecting agency and a tabulating point.

See Kesavan, *supra* at 1694 (emphasis added) (quoting floor statement of Representative Rarick).

Even during the Joint Session of Congress on January 6, 2021—despite numerous objections being raised to the electoral votes from different states—the objections were overruled without consideration of any evidence or testimony. *See* 167 Cong. Rec. H79, 105-06, 108, 111 (2021) and 167 Cong. Rec. S16, 25, 32 (2021) (legislators requested, but did not receive authority to open investigation regarding electoral certificates).

Indeed, there has never been an instance where Congress engaged in an investigation into electoral votes that required the calling of witnesses, requests for records, or consideration of evidence to decide the count. *See* Kesavan, *supra*, at 1678–94 (surveying electoral counts since the founding). The only instance that came at all close was during the presidential election of 1876 between Samuel Tilden and Rutherford B. Hayes. There several states sent multiple slates of electors to Congress. *Id.* at 1689. Congress then created an electoral commission to sort through the mess. *Id.* The Commission does not appear to have called witnesses or considered other evidence before the deciding the electoral vote. Instead, the members of the commission voted along party lines to elect President Hayes and avert a political crisis. *Id.* This incident confirms the argument here—and, to the extent it does not, it should carry little to no weight since Commission is widely understood to have been unconstitutional. *See id.* at 1689, n. 160.

Thus, "official proceedings," as defined by section 1515 and used in section 1512, do not cover Congress's electoral count. Attempts to disrupt the electoral count, while likely a violation

of other statutes, do not run afoul of section 1512(c)(2).

3. Section 1512(c)(2) Is Unconstitutionally Vague

The Court should dismiss the Indictment for the third and final reason that it is unconstitutionally vague as applied. Section 1512(c)(2), as applied to Congressional proceedings, fails to provide constitutionally required notice of what the statute prohibits, because the meaning of "corruptly" is vague. "[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, violates the first essential of due process of law" and cannot be applied." *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). "In particular, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it prohibits." *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991).

In *United States v. Poindexter*, the D.C. Circuit held that the word "corruptly" created vagueness in 18 U.S.C. § 1505—another obstruction of justice statute closely related to section 1512(c)(2).

Section 1505 said:

> *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 administration of the law under which any pending proceeding is being had before any department or agency of the United States, or *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* [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

951 F.2d at 377 (emphasis altered).

The Circuit found that "corruptly influencing" a congressional inquiry did not clearly encompass lying to Congress, which is, by way of contrast, clearly a violation of § 1001. The word "corruptly," as the Circuit explained, "is vague; that is, in the absence of some narrowing

gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378. Dictionary definitions, the court noted, did not help clarify its meaning. "'[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.'" *Id.* (citation omitted). "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.'" *Id.* (citation omitted). However, "[v]ague terms," the Circuit noted, "do not suddenly become clear when they are defined by reference to other vague terms." *Id.* "Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'" *Id.* at 379. As used in § 1505, therefore, the Circuit found that the word "corruptly" was too vague to provide the constitutionally required notice that lying to Congress violated it. *Id.* The legislative history, which did not adequately provide notice either, and the absence of a consistent judicial narrowing of the term reinforced this view. *See id.* at 379-86.

Poindexter's reasoning dictates the same result here. The text of section 1512(c)(2) is very similar to the text of 1505. Unlike another statute—40 U.S.C. § 5104—which clearly criminalizes the conduct at issue here, section 1512(c)(2) does not.[3] The word "corruptly" is vague as employed in the statute and the legislative history does nothing to clarify its application. Indeed, as discussed above the legislative history suggests that the conduct at issue here—entering the U.S. Capitol during the electoral counting and stopping it—is not what Congress had in mind at the time it passed the law. Instead, it was focused on evidence tampering and destruction. Furthermore, other

[3] Counts Six and Seven of the Superseding Indictment charge Mr. Montano-Alvarado with violating 40 U.S.C. § 5104. *See* Dkt. 30.

courts have suggested that section 1512(c)(2)'s text might have been derived from similar text in section 1505. *See, e.g.*, *McHugh*, 2022 WL 1302880, at *10. That further reinforces the conclusion that just as section 1505's use of corruptly was unconstitutional as applied, so too is 1512(c)(2)'s.

Judicial interpretations do not serve to save section 1512(c)(2) either. Though a number of courts in this district have held that section 1512(c)(2) can pass due process muster, their interpretations differ materially. *See, e.g.*, *United States v. Sandlin*, 575 F. Supp. 3d 16, 33 (D.D.C. 2021) (suggesting acting corruptly must include conduct that is both "independently criminal" and "inherently malign"); *United States v. Nordean*, 579 F. Supp. 3d 28, 50 (D.D.C. 2021) (suggesting unlawful purposes may be sufficient to act corruptly even in the absence of unlawful means (i.e., actions that otherwise break the law)); *United States v. Caldwell*, 581 F. Supp. 3d 1, 22 (D.D.C. 2021) (suggesting that acting corruptly includes an element of conscious wrongdoing that may need to exceed mere trespass); *United States v. Montgomery*, 578 F. Supp. 3d 54, 84 (D.D.C. 2021) (suggesting that acting corruptly includes an element of conscious wrongdoing and possibly the further requirement that the defendant acted "with the hope or expectation of a benefit to oneself or a benefit to another person."). The fact that courts cannot agree on a singular definition of corruptly underscores its vagueness.

In conclusion, section 1512(c)(2) is unconstitutional and void for vagueness as applied to Mr. Montano-Alvarado's charged conduct. It cannot be enforced against him.

* * *

WHEREFORE, and for the reasons expressed herein, the appearing defendant respectfully requests that this Honorable Court to dismiss Count Two of the Second Superseding Indictment with Prejudice.

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas No. 3233
Texas State Bar No. 14003750

By /s/ Alex Omar Rosa-Ambert
ALEX OMAR ROSA-AMBERT
Assistant Federal Public Defender
Attorney-in-Charge
Puerto Rico State Bar ID No. 15048
Southern District of Texas No. 3644073

COURTNEY L. MILLIAN
Assistant Federal Public Defender
District of Columbia Bar No. 1659911
Attorneys for Defendant
440 Louisiana, Suite 1350
Houston, Texas 77002-1056
Telephone: 713.718.4600
Fax: 713.718.4610
alex_rosa-ambert@fd.org
courtney_millian@fd.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed an exact copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record, or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

RESPECTFULLY SUBMITTED.

In Houston, Texas, this 14th day of October, 2022.

/s/ Alex Omar Rosa-Ambert
ALEX OMAR ROSA-AMBERT