UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO. 21-cr-00497 (ABJ)**
v.	:	
	:	
ANTHONY ANTONIO,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS TWO OF THE SUPERSEDING INDICTMENT

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully opposes defendant Anthony Antonio's (hereinafter, "Antonio" and the "defendant") motion to dismiss Count Two of the superseding indictment (hereinafter, the "Motion" or "Mot."). Dkt. 45. Count Two of the superseding indictment charges Antonio with obstruction of an official proceeding and aiding and abetting, in violation of 18 U.S.C. §§ 1512(c)(2) and 2. Dkt 26.

In his Motion and supporting Memorandum ("Memo.," Dkt. 45-1), Antonio asserts that Count Two fails "to state an essential element of the charge" because "as a matter of law, the Electoral College Vote Certification was not an 'official proceeding' within the meaning of the statute." Memo. 1; Mot. 1 ("As a matter of law, the Electoral College certification in the Capitol building on January 6, 2021 was not an 'official proceeding' under 18 U.S.C. § 1512(c)(2) or 18 U.S.C.[] § 1515(a)(1) and thus the charge must be dismissed."). In particular, defendant argues that the term "proceeding" is limited to matters and business in the courts and, as used in § 1512, "requires a quasi-judicial function, which is lacking from the Congressional vote to confirm President Joe Biden." Memo 1-2.

This argument fails, as this Court has previously concluded. Defendant's motion should be denied. *See generally United States v. Rodriguez*, 2022 WL 39010580, *2-*8 (D.D.C. Aug. 31, 2022) (ABJ), and *United States v. Williams*, 21-CR-618, 2022 WL 2237301, *8-*11 (D.D.C. June 22, 2022).

FACTUAL BACKGROUND[1]

On January 6, 2021, a Joint Session of the United States Congress convened at the United States Capitol at approximately 1:00 p.m. to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on November 3, 2020. Temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd that had gathered outside away from the Capitol building and the proceedings underway inside.

While the certification process was proceeding, and shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts. Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

[1] This summary of facts is offered for context. As Antonio acknowledges in his motion, *see* Dkt 45-1 at 3-4, the validity of Count Two is determined by the language of the charge.

On January 6, 2021, Antonio wore a black tactical bulletproof vest adorned with a "Three Percenter" patch, a black and grey camouflage shirt, dark jeans, and greyish colored sneakers with an orange stripe along the side.[2] Surveillance footage from the U.S. Capitol that day captured Antonio standing at a barricade defended by Metropolitan Police Department ("MPD") and U.S. Capitol Police Department ("USCP") officers. At approximately 1:22 p.m., Antonio stood near officers and shouted, "You want war? We got war. 1776 all over again." When law enforcement officers retreated up a set of stairs toward the Lower West Terrace archway, Antonio followed. As rioters made their way into the passage that led to the entrance of the U.S. Capitol, a large law enforcement presence met them in order to stop the mob's entrance into the building.

Defendant stood at the Lower West Terrace of the Capitol, watching the crowd in the archway grow and at one point raising his arms as if to celebrate. Shortly thereafter, the crowd in the tunnel passed around a riot shield that was apparently taken from one of the defending officers. Antonio again appeared to celebrate. The defendant then entered the passage to the entrance himself with what appears to be an identical riot shield. Over a period of approximately 20 minutes, the defendant left the passageway, re-entered, and was then pushed out again.

At approximately 3:21 p.m., the crowd dragged an MPD officer down the stairs. The defendant squirted water and threw his water bottle in the direction of that officer, although several people stood between him and the officer's location. Afterwards, Antonio returned to the mouth of the archway and began speaking with officers there. He subsequently obtained a bullhorn from someone in the crowd and addressed the crowd from the Lower West Terrace. Soon thereafter, the crowd again began pushing and surging towards the Lower West Tunnel entrance, fighting

[2] *See generally* Dkt. 1-1, Statement of Facts (April 14, 2021).

with law enforcement officers defending the building. Antonio, near the front, told others in the crowd multiple times to stop pushing him and the officers.

At approximately 4:00 p.m., defendant remained at the archway wearing a gas mask. Shortly thereafter, however, he pushed his way out of the passageway. When other rioters used objects to break open windows just to the side of the archway entrance, the defendant asked others in the crowd to lift him up to the window, which he then climbed through and entered into an interior room of the U.S. Capitol Building. Antonio subsequently gave an interview in which he described breaking through the window and got into a room in the Capitol Building. He also stated, "Patriots, we took the Capitol and we're not stopping." Later on January 6, Antonio posted to social media a statement that included, "But, even bigger news is, Trump just came out with, Pennsylvania just got decertified. We're bringing it back, we're stopping the steal. . . . So, we're going to be out there in D.C. celebrating P.A. being decertified. Biden is now not the president-elect anymore, technically. So, we're stopping the steal, we're coming back, Trump 2020."

PROCEDURAL HISTORY

Based on his actions on January 6, 2021, the defendant was charged on December 1, 2021, in a superseding indictment with the following charges: (1) Civil Disorder, in violation of 18 U.S.C. § 231(a)(3) [Count One]; (2) Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. §§ 1512(c)(2) and 2 [Count Two]; (3) Destruction of Government Property and Aiding and Abetting, in violation of §§ 1361 and 2 [Count Three]; (4) Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) [Count Four]; (5) Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2) [Count Five]; (6) Engaging in Physical Violence in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(4) [Count Six]; (7)

Entering and Remaining in Certain Rooms in the Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(C) [Count Seven]; (8) Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) [Count Eight]; and (9) Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G) [Count Nine]. Dkt. 26.

On January 23, 2023, Antonio filed his motion to dismiss. *See* Dkt. 44 and 44-1. On January 27, 2023, Antonio filed his amended motion to dismiss. Dkt. 45 and 45-1.

LEGAL STANDARD

An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished, as it is here, by "echo[ing] the operative statutory text while also specifying the time and place of the offense." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). "[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And an indictment need not inform a defendant "as to every means by which the prosecution hopes to prove that the crime was committed." *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

Rule 12 permits a party to raise in a pretrial motion "any defense, objection, or request that the court can determine *without a trial on the merits*." Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 "does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds" unless the government "has made a *full* proffer of evidence" or the parties have agreed to a "stipulated record," *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (emphasis added)—neither of which has occurred here.

Indeed, "[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn't authorize its disposition before trial." *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.). Criminal cases have no mechanism equivalent to the civil rule for summary judgment. *United States v. Bailey*, 444 U.S. 394, 413, n.9 (1980) (motions for summary judgment are creatures of civil, not criminal trials); *Yakou*, 428 F.2d at 246-47 ("There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context"); *United States v. Oseguera Gonzalez*, No. 20-cr-40-BAH at *5, 2020 WL 6342940 (D.D.C. Oct. 29, 2020) (collecting cases explaining that there is no summary judgment procedure in criminal cases or one that permits pretrial determination of the sufficiency of the evidence). Accordingly, dismissal of a charge does not depend on forecasts of what the government can prove. Instead, a criminal defendant may move for dismissal based on a defect in the indictment, such as a failure to state an offense. *United States v. Knowles*, 197 F. Supp. 3d 143, 148 (D.D.C. 2016). Whether an indictment fails to state an offense because an essential element is absent calls for a legal determination.

Thus, when ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and more specifically, the language used to charge the crimes. *United States v. Bingert*, 21-cr-91 (RCL), 2022 WL 1659163 at *3 (D.D.C. May 25, 2022) (a motion to dismiss challenges the adequacy of an indictment on its face and the relevant inquiry is whether its allegations permit a jury to find that the crimes charged were committed).

ARGUMENT

The Defendant's Motion to Dismiss Count Two of the Superseding Indictment Lacks Merit

I. Count Two of the Superseding Indictment sets forth all the elements of 1512(c)(2).

Count Two of the Superseding Indictment charges Antonio with corruptly obstructing, influencing, or impeding an "official proceeding,"—*i.e.*, Congress's certification of the Electoral College vote on January 6, 2021 – in violation of 18 U.S.C. § 1512(c)(2). Count Two states:

> On or about January 6, 2021, within the District of Columbia and elsewhere, **ANTHONY ALEXANDER ANTONIO** attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.
>
> (**Obstruction of an Official Proceeding and Aiding and Abetting**, in violation of Title 18, United States Code, Sections 1512(c)(2) and 2)

Superseding Indictment at 2, Dkt. 26.

In 2002, Congress enacted Section 1512(c)'s prohibition on "[t]ampering with a record or otherwise impeding an official proceeding" as part of the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, 807. Section 1512(c)'s prohibition applies to:

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

18 U.S.C. § 1512(c) (emphasis added). Section 1515(a)(1), in turn, defines the phrase "official proceeding" to include "a proceeding before the Congress." 18 U.S.C. § 1515(a)(1)(B). By the statute's plain terms, then, a person violates Section 1512(c)(2) when, acting with the requisite *mens rea*, he engages in conduct that obstructs a specific congressional proceeding, including, as here, Congress's certification of the Electoral College vote.

Notwithstanding the plain terms of the offense, Antonio insists that the superseding indictment failed to charge an essential element of the offense (namely, an "official proceeding")

based on his claim that the certification of the Electoral Count vote lacked a "quasi-judicial function" and so does not constitute an "official proceeding" under 18 U.S.C. § 1512(c)(2). This claim fails. Numerous judges of this district, including this Court, have considered and rejected Antonio's arguments with respect to 18 U.S.C. § 1512(c)(2) in other cases arising out of the events at the Capitol on January 6, 2021. "These defendants are not the first to challenge whether indictments charging January 6 defendants under section 1512(c)(2) are deficient." *United States v. Rodriguez*, 21-CR-0246, 2022 WL 39010580, *2 (D.D.C. Aug. 31, 2022) (ABJ), citing *United States v. Williams*, 21-CR-618, 2022 WL 2237301 (D.D.C. June 22, 2022), and collecting cases. As noted there, "similar challenges have been rejected by every court in this district to consider them—with one exception." *Id. See also United States v. Sean Michael McHugh*, 583 F.Supp.3d 1, 18 (D.D.C. 2022) ("*McHugh I*") ("In sum, the Court holds that the January 6th Certification was an 'official proceeding' for the purposes of 18 U.S.C. § 1512(c)(2)'s prohibition on 'corruptly . . . obstruct[ing], influencing, and imped[ing] any official proceeding.'").

That one exception noted by this Court was *United States v. Miller*, 21-CR-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022), but even in that case "the court rejected defendant's argument with respect to the 'official proceeding' issued, but it did find section 1512(c)(2) to be an unconstitutionally vague residual clause." *Id.; see McHugh I* at 18-23; *see also Williams*, 2022 WL 2237301 *2 (describing the holding in *Miller* as "agreeing with the government that the congressional certification of Electoral College results is an 'official proceeding' for purposes of the statute, but finding that the defendant's conduct did not violate section 1512(c)(2) because the provision only applies if the defendant took some action with respect to a document, record, or other object."); *see United States v. Sean Michael McHugh*, 2022 WL 1302880, at *3 (D.D.C. May 2, 2022) ("*McHugh II*") ("[T]he Court again holds that 18 U.S.C. § 1512(c)(2) is not limited to

obstructive acts taken with respect to a document or other object and instead applies broadly to all manner of obstructive conduct.").

Miller has not been followed by other judges in this Court, and the case is now pending on appeal before the United States Court of Appeals for the Circuit of the District of Columbia. *United States v. Garret Miller*, 22-3041 (2022). Here, Antonio's motion does not argue that § 1512 constitutes an "unconstitutionally vague residual clause" or that it applies only where the defendant takes some action with respect to a document, record, or other object. Accordingly, the *Miller* decision is inapplicable to Antonio's motion.

II. The January 6th Certification was an "Official Proceeding" under Section 1512(c)(2).

A. The certification of the Electoral College vote is an official proceeding.

Antonio argues that the Electoral College certification before Congress does not constitute an "official proceeding" under 18 U.S.C. 1512(c)(2), insisting that it applies "solely and exclusively to punish and deter those would interfere with quasi-judicial investigatory proceedings." Memo. at 5-6. According to Antonio, "§ 1512 plainly does not apply when Congress is merely engaging in routine, ministerial function, such as certification of a presidential vote." *Id.* at 6. Antonio further contends that an official proceeding "involves some formal convocation in which parties are directed to appear, instead of any informal investigation or nonjudicial conduct by a governmental body conducted by any member of the agency." *Id.*

This Court has previously rejected this argument. In *United States v. Rodriguez,* defendants argued that the joint session convened to certify the vote of the Electoral College did not constitute an "official proceeding" because § 1512(c)(2) exclusively criminalizes obstructive conduct related to the administration of justice and the Electoral Certification served only a "ministerial function with no adjudicative or legal fact-finding involved." *Rodriguez*, 2022 WL

3910580 at *3. This Court found that "nothing in the text of the provision supports the imposition of this limiting construction." *Id.* Indeed, this Court went on to observe that "[g]iven the language of the statute, then, there is nothing to support defendants' suggestion that the formal gathering must be judicial in nature." *Id.* at *4. *See United States v. Bingert*, No. 21-cr-91, 2022 WL 1659163, at *4 (D.D.C. May 25, 2022) (Lamberth, J.) (citing cases); *United States v. Sandlin,* 575 F.Supp.3d 16, 23 (D.D.C. 2021); *United States v. Caldwell*, 581 F.Supp.3d 1, (D.D.C. 2021); *United States v. Mostofsky*, 579 F.Supp.3d 9 (D.D.C. 2021); *United States v. Montgomery,* 578 F.Supp.3d 54 (D.D.C. 2021); *United States v. Nordean,* 579 F. Supp.3d 28 (D.D.C. 2021).

B. The plain text of the statute establishes that the Joint Session is an "official proceeding."

The Constitution and federal statutory law require that both Houses of Congress meet to certify the results of the Electoral College vote. Two separate provisions in the Constitution mandate that the Vice President while acting as the President of Senate "shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted." U.S. Const. art. II, § 1, cl. 3; U.S. Const amend. XII. Under the Electoral Act of 1887, a Joint Session of the Senate and the House of Representatives must meet at "the hour of 1 o'clock in the afternoon" on "the sixth day of January succeeding every meeting of the electors." 3 U.S.C. § 15. Section 15 details the steps to be followed: the President of the Senate opens the votes, hands them to two tellers from each House, ensures the votes are properly counted, and then opens the floor for written objections, which must be signed "by at least one Senator and one Member of the House of Representatives." *Id.* The President of the Senate is empowered to "preserve order" during the Joint Session. 3 U.S.C. § 18. Upon a properly made objection, the Senate and House of Representatives withdraw to consider the objection; each Senator and Representative "may speak to such objection . . . five minutes, and not more than once." 3 U.S.C. § 17. The Electoral

Act, which specifies where within the chamber Members of Congress are to sit, requires that the Joint Session "not be dissolved until the count of electoral votes shall be completed and the result declared." 3 U.S.C. § 16.

The obstruction statute with which Antonio is charged prohibits corruptly obstructing, influencing, or impeding any official proceeding. 18 U.S.C. § 1512(c)(2). An official proceeding for purposes of § 1512(c)(2) is defined as:

> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a 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;
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> (B) *a proceeding before the Congress*;
>
> (C) a proceeding before a Federal Government agency which is authorized by law; or
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> (D) 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[.]

U.S.C. § 1515(a)(1) (emphasis added). As this Court previously observed, "[g]iven the language of the statute, then, there is nothing to support defendants' suggestion that the formal gathering must be judicial in nature. . . . [t]he limitation would be illogical." *Rodriguez*, 2022 WL 3910580 at *4.

C. The certification of the Electoral College vote is a proceeding before the Congress.

The certification of the Electoral College vote as set out in the Constitution and federal statute is a "proceeding before the Congress," 18 U.S.C. § 1515(a)(1)(B), and, therefore, an "official proceeding" for purposes of 18 U.S.C. § 1512(c)(2). That conclusion flows principally from the obstruction statute's plain text. Skipping past the text, Antonio argues that "§ 1512(c)(2) is meant to perform the narrowly focused function of and deterring individuals who seek to

intimidate or eliminate government witnesses who are set to give testimony or perform other roles in judicial or quasi-judicial proceedings. The vote confirmation of President Joe Biden by Congress does not exhibit any quasi-judicial characteristics and instead falls into the category of routine institutional action." Memo. 8-9. That argument fails. As this Court observed, "Congress defined 'official proceeding' in section 1515(a)(1) to be, among other things, a 'proceeding before the Congress.' . . . The joint session to certify the vote of the Electoral College falls squarely within that definition, even if one adheres to the suggestion advanced by other courts in this district that the word 'proceeding' in section 1515(a)(1) should be 'defined narrowly' as the 'business conducted by a court or other official body; a hearing.'" *Rodriguez*, 2022 WL 3910580 at *3 (internal citations omitted).

Understanding what qualifies as an official proceeding "depends heavily on the meaning of the word 'proceeding'" because "official proceeding" is defined "somewhat circularly" as, among other things, a congressional "proceeding." *See United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013). The certification of the Electoral College vote constitutes a "proceeding" under any interpretation of that term. In its broadest and most "general sense," a proceeding refers to "[t]he carrying on of an action or series of actions; action, course of action; conduct, behavior." *Id.* (quoting *Proceeding,* Oxford English Dictionary, *available at* http://www.oed.com). Antonio does not meaningfully describe how the certification of the Electoral College vote, which involves a detailed "series of actions" outlining how the vote is opened, counted, potentially objected to, and ultimately certified, is not a proceeding—and indeed an official proceeding—under that broad definition. And there is good reason to construe "proceeding" as used in 18 U.S.C. § 1515 broadly. Section 1515's text encompasses not only congressional proceedings, but judicial proceedings, grand jury proceedings, any legally authorized proceedings before federal government agencies,

and proceedings "involving the business of insurance." 18 U.S.C. § 1515(a)(1); *see* S. Rep. No. 97-532, at 17 (1982) (noting that the "term 'official proceeding'" in the obstruction statute is "defined broadly").

But even if the "legal—rather than the lay—understanding" of proceeding governs § 1515's interpretation, *see Ermoian*, 752 F.3d at 1170, the Electoral College vote certification qualifies. This narrower definition includes the "business conducted by a court or other official body; a hearing." Black's Law Dictionary, "proceeding" (11th ed. 2019). Taken with its modifier "official," the term proceeding thus "connotes some type of formal hearing." *Ermoian*, 752 F.3d at 1170; *see United States v. Ramos*, 537 F.3d 439, 462 (5th Cir. 2008) (the "more formal sense" of "official proceeding" is "correct in the context of § 1512"). For example, in cases assessing whether a law enforcement investigation amounts to an "official proceeding" as defined in § 1515 courts analyze the degree of formality involved in an investigation. *See, e.g.*, *United States v. Sutherland*, 921 F.3d 421, 426 (4th Cir. 2019) (FBI investigation not an "official proceeding" because that term "implies something more formal than a mere investigation"), *cert. denied*, 140 S. Ct. 1106 (2020); *Ermoian*, 752 F.3d at 1170-72 (same); *United States v. Perez*, 575 F.3d 164, 169 (2d Cir. 2009) (internal investigation conducted by a review panel within the Bureau of Prisons was an "official proceeding" because the review panel's "work [was] sufficiently formal"); *Ramos*, 537 F.3d at 463 (internal investigation conducted by Customs and Border Patrol not an "official proceeding" because that term "contemplates a formal environment"); *United States v. Dunn*, 434 F. Supp. 2d 1203, 1207 (M.D. Ala. 2006) (investigation conducted by Bureau of Alcohol, Tobacco, and Firearms not an "official proceeding" because that term encompasses "events that are best thought of as hearings (or something akin to hearings)"); *see also United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (holding that a "*formal* investigation" conducted by the Officer of the

Inspector General at the Agency for International Development qualified as a "proceeding" for purposes of § 1505) (emphasis added).

The formality involved in the certification of the Electoral College vote places it "comfortably within the category" of an official proceeding. *See Perez*, 575 F.3d at 169. Few events are as solemn and formal as a Joint Session of the Congress. That is particularly true for the certification of the Electoral College vote, which is expressly mandated under the Constitution and federal statute. Required by law to begin at 1 pm on the January 6 following a presidential election, the certification of the Electoral College vote is both a "hearing" and "business conducted by . . . [an] official body." *See* Black's Law Dictionary, *supra*. The Vice President, as the President of the Senate, serves as the "presiding officer" over a proceeding that counts votes cast by Electors throughout the country in presidential election. 3 U.S.C. § 15. As in a courtroom, Members may object, which in turn causes the Senate and House of Representatives to "withdraw" to their respective chambers so each House can render "its decision" on the objection. *Id.* And just as the judge and parties occupy specific locations in a courtroom, so too do the Members within the "Hall." *See* 3 U.S.C. § 16 (President of the Senate is in the Speaker's chair; the Speaker "immediately upon his left"; the Senators "in the body of the Hall" to the right of the "presiding officer"; the Representatives "in the body of the Hall not provided for the Senators"; various other individuals "at the Clerk's desk," "in front of the Clerk's desk," or "upon each side of the Speaker's platform"). The Electoral College vote certification, moreover, must terminate with a decision: no recess is permitted until the "the count of electoral votes" is "completed," and the "result declared."

Id. In short, the certification of the Electoral College vote is a "proceeding before the Congress." *See* 18 U.S.C. § 1515(a)(1)(B).[3]

Moreover, judges of this Court have found that while not all actions occurring before Congress equate to an official proceeding, the certification of the Electoral College is an official proceeding. *Sandlin,* 575 F.Supp.3d at 23 (finding that the certification of the Electoral College is an official proceeding because the "Joint Session [] has the trappings of a formal hearing before an official body[,]… the certificates of electoral results are akin to records or documents produced during judicial proceedings, and any objection to these certificates can be analogized to evidentiary objections."); *Mostofsky*, 579 F.Supp.3d at 26 (concluding that the certification of the Electoral College is an official proceeding within the meaning of 18 U.S.C. §§ 1515, 1512(c)(2)); *Caldwell*, 581 F.Supp.3d at 11 ("The Certification of the Electoral College vote thus meets the definition of an 'official proceeding.'"); *Nordean,* 579 F.Supp.3d at 42 ("the certification is therefore a 'series of actions' that requires 'some formal convocation,' making it a 'proceeding before the Congress,' 18 U.S.C. §1515(a)(1)(B), and thus an 'official proceeding.'")

D. The Text Offers No Basis for Defendant's Insistence that an "Official Proceeding" Be "Quasi-Judicial."

The defendant improperly asks this Court to add a limitation to the definition of "official proceeding" and interpret it to be limited to proceedings "meant to perform the narrowly focused function of and deterring individuals who seek to intimidate or eliminate government witnesses who are set to give testimony or perform other roles in judicial or quasi-judicial proceedings."

[3] In *McHugh I*, this Court determined that the January 6th Certification was not merely a proceeding of Congress, but was a "proceeding before the Congress," *McHugh I* at 14-15, because the Certification "sees Congress formally convene to hear, debate, and decide any disputes arising from the proceedings of a second entity," and was therefore not "a wholly internal proceeding" but rather one involving "a second entity as an integral component: the Electoral College." *Id.*

Memo. at 8. As an initial matter, it is difficult to imagine a proceeding more "official" than a constitutionally and statutorily prescribed Joint Session of Congress. Whatever the merits of the defendant's argument for other provisions in Section 1515(a)(1), moreover, it finds no textual support when applied to Section 1515(a)(1)(B), which speaks broadly of a proceeding "before the Congress." Had Congress wanted to import a definition that more closely resembled a quasi-adjudicative or quasi-judicial setting, it needed look only a few provisions away to 18 U.S.C. § 1505, which criminalizes obstruction of "the due and proper administration of the law under which any pending proceeding is being had" by a federal department or agency. Further, Section 1505 expressly criminalizes obstruction of "any inquiry or investigation [that] is being had by" Congress, including by congressional committees and subcommittees. 18 U.S.C. § 1505; *see United States v. Bowser*, 964 F.3d 26, 31 (D.C. Cir. 2020). If Congress wished to limit the obstruction prohibition under Section 1505 to congressional investigations, it could have done so in the text of Section 1515(a)(1)(B). *See Russello v. United States,* 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") But it did not. Instead, Congress enacted broader language— "a proceeding before the Congress"—to cover a broader range of proceedings than the "inquir[ies] and investigation[s]" envisioned in Section 1505. That broader definition includes the Electoral College vote certification. *See Caldwell*, 581 F.Supp.3d at 12 (rejecting the same argument and holding that "Congress did not intend to limit the congressional proceedings protected under section 1512(c) to only those involving its adjudicatory, investigative, or legislative functions. And the court will not add a requirement to the statute that Congress did not see fit to include."); *Sandlin*, 575 F.Supp.3d at 24 ("[T]he Court will not read an "administration of justice" requirement

into "official proceeding."); *Nordean,* 579 F.Supp.3d at 43 (holding that the certification was an official proceeding, and that "even if an 'official proceeding' had to be quasi-adjudicative or quasi-judicial in some way—a requirement missing from the plain text of the statute—because Congress's certification of the Electoral College vote has *some* of those features, it would pass the test.").

As this Court previously explained:

> In sum, defendants' attempt to narrow the reach of section 1512(c)(2) to obstructing the administration of justice in an adjudicative context is not supported by its legislative history or the structure of the statute as a whole, and it would be entirely inconsistent with the text of the prohibition against obstructing or impeding "any" official proceeding, which was expressly defined to include a "proceeding before the Congress."

Rodriguez, 2022 WL 3910580 at *8. Defendant's argument that the certification of the Electoral College vote was not an official proceeding within the meaning of § 1512(c)(2) is without merit.

III. The Rule of Lenity Does Not Favor a Narrow Interpretation.

In support of his motion, Antonio claims that the "rule of lenity . . . mandates a narrowing of the term 'official proceeding' to only include government actions with a quasi-judicial character." Memo. 10. The argument too is without merit. As Antonio acknowledges in his Memorandum, the rule of lenity applies only when a criminal statute is ambiguous. "[T]he rule of lenity does not apply here. This rule comes into play only when a statute is ambiguous 'after seizing everything from which aid can be derived." *United States v. Reffitt*, 602 F. Supp. 3d 85, 102 (D.D.C. 2022); *United States v. Caldwell*, 581 F. Supp. 3d 1, 33 (D.D.C. 2021), *reconsideration denied*, No. 21-CR-28 (APM), 2022 WL 203456 (D.D.C. Jan. 24, 2022) ("Stated differently, a court may resort to the rule of lenity only if 'after seizing everything from which aid can be derived' there still remains 'grievous ambiguity or uncertainty. . . Lenity has no

place when a statute 'gives defendants fair warning in plain language.") (internal citations omitted).

Here, the statute is not ambiguous and so the rule of lenity is inapplicable. "[I]n the instant case, Defendant has not pointed to language in § 1512(c)(2) that, like 'tangible object' in § 1519, is arguable ambiguous. Nor has defendant demonstrated that such ambiguity exists even after exhausting the traditional tools of statutory construction." *United States v. Grider*, 585 F. Supp.3d 21, 34 (D.D.C. 2022).

IV. Recognizing that the Electoral College Certification by Congress Was an "Official Proceeding" within the Meaning of Section 1512(c)(2) Does Not Render the Statutory Scheme Superfluous.

Finally, Antonio argues that treating the certification of the Electoral College as an "official proceeding" within the meaning of § 1512(c)(2) renders other statutes superfluous. This argument is also without merit. As this Court has previously observed, "it is not unusual for a particular act to violate more than one criminal statute, . . . and in such situations the Government may proceed under any statute that applies." *Williams*, 2022 WL 2237301, *18 (citing and quoting *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part). The fact that more than one statute may apply to defendant's conduct does not render other statutes superfluous, and the selection of one statute rather than another represents the legitimate exercise of the executive's prosecutorial discretion. *Id.* Indeed, "overlap" is "not uncommon in [federal] criminal statutes." *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014); *accord Hubbard v. United States*, 514 U.S. 695, 714 n.14 (1995) (opinion of Stevens, J.) ("Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct."); *see also United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So long as overlapping criminal

provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.").

Antonio concludes by claiming, without argument, that understanding the certification of the Electoral College as an "official proceeding" under § 1512(c)(2) "threatens to encroach on citizens' basic right to petition guaranteed by the First Amendment of our Constitution" and would "threaten[] to chill or burden excessively the right of persons to protest." Memo. 12. This unsupported claim fails. As a threshold matter, this "court need not consider conclusory arguments with no explanation or support." *Avila v. Dailey*, 246 F. Supp. 3d 347, 361 (D.D.C. 2017), *on reconsideration in part*, No. 15-CV-2135 (TSC), 2017 WL 9496067 (D.D.C. Aug. 1, 2017) (citing *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 499 (D.C. Cir. 2015), *cert. denied*, 578 U.S. 965, 136 S.Ct. 1839, 194 L.Ed.2d 839 (2016); *see also Rodriguez*, 2022 WL 3910580 at *14 n.6 ("Defendant Rodriguez makes passing reference to his First Amendment right to petition the government for a redress of grievances, but makes no argument under the First Amendment requiring the Court's consideration.").

In any event, Antonio's claim fails to acknowledge, let alone address, that the requirement that obstruction must occur "corruptly" under the statute forecloses his imagined threats to protected protest activity. "By contrast, a defendant who . . . lawfully lobbies Congress ahead of an official proceeding, or engages in First Amendment-protected protest activity does not act 'corruptly' within the meaning of the statute." *Sandlin*, 575 F.Supp. at 33. Defendant's claim is without merit.

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CONCLUSION

For the foregoing reasons, the government respectfully requests that Antonio's motion to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 13th day of February 2023, a copy of the foregoing was served upon all parties listed on the Electronic Case Filing (ECF) System.

/s/ *Craig Estes*
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