UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 21-CR-127 (ABJ)**
	:	
JOSHUA BLACK,	:	
	:	
Defendant.	:	

UNITED STATES' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully opposes defendant Joshua Black's Motion to Dismiss Count One of the Indictment (ECF No. 49 ("Motion")). Count One charges him with obstruction of an official proceeding and aiding and abetting in violation of 18 U.S.C. §§ 1512(c)(2), 2, related to the attack on the U.S. Capitol on January 6, 2021.

Black appears to make three primary arguments regarding Count One, largely rehashing the defense arguments in *United States v. Miller,* 21-cr-119 (CJN) (D.D.C. Mar. 7, 2022), an outlier ruling that granted a motion to dismiss a § 1512(c)(2) count in another Capitol-attack case. First, he claims § 1512(c)(2) "cannot be viewed as [an] independent crime but, rather, is a residual clause tethered to, and a catchall for, § 1512(c)(1)," which prohibits conduct related to records, documents, and other tangible objects relevant to the obstruction of an official proceeding. Accordingly, a jury could not conclude Black's alleged conduct fell within that proscription. (Mot. at 3-4, 7-9.) Second, Black contends the Joint Session of Congress convened for the Electoral College vote certification on January 6, 2021, was not an "official proceeding" under § 1512(c)(2).

(*Id.* at 3.) Third, he maintains one aspect of § 1512—the *mens rea* requirement that a defendant act "corruptly" to obstruct an official proceeding—is unconstitutionally vague. (*Id.* at 4.)[1]

Black's contentions lack merit. Several courts in this district have rejected many, if not all, of the challenges he recycles in the Motion. *See, e.g.*, *United States v. Sandlin,* 21-cr-88 (DLF), 2021 WL 5865006 (D.D.C. Dec. 10, 2021); *United States v. Caldwell*, 21-cr-28 (APM), 2021 WL 6062718 (D.D.C. Dec. 20, 2021); *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891 (D.D.C. Dec. 21, 2021); *United States v. Montgomery,* 21-cr-46 (RDM), 2021 WL 6134591 (D.D.C. Dec. 28, 2021); *United States v. Nordean,* 21-cr-175 (TJK), 2021 WL 6134595 (D.D.C. Dec. 28, 2021); *United States v. DeCarlo,* 21-cr-73 (BAH) (oral ruling) (D.D.C. Jan. 21, 2022); *United States v. McHugh I,* 21-cr-453 (JDB), ECF No. 51 (D.D.C. Feb. 1, 2022); *United States v. Grider,* 21-cr-22 (CKK), 2022 WL 392307 (D.D.C. Feb. 9, 2022); *United States v. Andries*, 21-cr-93 (RC), 2022 WL 768684 (D.D.C. Mar. 14, 2022); *United States v. Puma,* 21-cr-454 (PJF), 2022 WL 823079 (D.D.C. Mar 19, 2022); *United States v. McHugh II,* 21-cr-453 (JDB), ECF No. 64 (D.D.C. May 2, 2022); *United States v. Hale-Cusanelli,* 21-cr-37 (TNM) (oral ruling)

[1] Black's Motion generally requests to adopt the defense submissions in *Miller,* 21-cr-119 (CJN), and "to conform his (Mr. Black's) case and particular circumstances to the arguments made, and points and authorities in support thereof, by Mr. Miller." (Mot. at 3.) The primary arguments outlined here are what he characterizes as the "essence" of the defense claims in *Miller*. (*Id.*) To the extent there are additional arguments on which Black intends to rely that are not specifically articulated in his Motion, the United States similarly incorporates and requests that the Court consider the government's pleadings and arguments in *Miller,* ECF Nos. 35 (government's memorandum in opposition to motion to dismiss), 63 (motion for leave to supplemental brief in response to defendant's second supplement to motion to dismiss (with attached brief in *United States v, Montgomery,* 21-cr-46 (RDM)), 75 (motion for reconsideration), and 84 (reply in support of reconsideration), all of which are attached to this Opposition.

(D.D.C. May 6, 2022). This Court should adopt the well-reasoned view of the overwhelming majority of district judges who considered the issues and deny his Motion.

FACTUAL BACKGROUND

The affidavit supporting the complaint against Black details at length the commencement of the Joint Session of Congress to certify the Electoral College vote in the 2020 Presidential Election on January 6, 2021, at around 1:00 p.m. in the Capitol; the breach of and unlawful entry of large crowds into the Capitol; the suspension of the Joint Session while law enforcement worked to restore order and clear the Capitol of the unlawful occupants; and the resumption of the Joint Session around 8:00 p.m., approximately six hours after the crowd breached the Capitol. (ECF No. 1.)

The affidavit and government pleadings filed before a detention hearing in this matter (ECF Nos. 1, 20, 21) detail Black's conduct leading up to, during, and after January 6, 2021. Black traveled from Leeds, Alabama, to attend the "Stop the Steal" rally President Donald Trump held in Washington, D.C, on January 6. Black made his way to the Capitol and initially positioned himself at the front of the large crowd that had gathered at the West Front of the Capitol grounds. Police officers deployed less-than-lethal munitions to control the growing and increasingly violent mob, and Black was struck in the left cheek by a munition, causing a gaping wound.

Sometime after getting shot, Black proceeded to the East Front of the Capitol and participated in the breach of the East Rotunda Doors. For several minutes, Black was among a larger group of rioters that screamed at, pushed, grabbed, sprayed chemical irritants at, and wrested a riot shield from a thin line of U.S. Capitol Police ("USCP") officers defending that entryway. At one point, Black participated with several rioters in a heave-ho maneuver designed to breach the Doors. Rioters finally breached that entrance, and Black crossed the threshold of the Capitol

at approximately 2:40 p.m. After moving between two police officers who could not control the rioters cascading into that entryway, Black walked through corridors leading to the Senate Chamber, eventually entering and remaining on the Senate Floor for over 20 minutes.

While on the Senate Floor, Black and other rioters rifled through at least one Senator's papers, and he took a cellphone photo of a Congressman and a Senator's objection to the certification of the Electoral College count vote for the State of Arizona. Black also posed for photos, participated in a prayer at the Senate Floor dais led by another rioter, Jacob Chansley (also known as the "QAnon Shaman"), and sat on the floor talking on his cellphone. A USCP officer asked him and other rioters to leave the Senate Chamber at least twice, but Black did not leave until a column of several police officers entered the Chamber and forced rioters out at approximately 3:09 p.m. Black exited the Capitol at the Senate Carriage Door at approximately 3:10 p.m.

Following January 6, Black admitted participating in the riot in a video testimonial he posted to YouTube and in two voluntary interviews with the Federal Bureau of Investigation ("FBI"). Among other statements about his conduct, he professed his belief that the Presidential election of 2020 and his country had been "stolen"; claimed he wanted to get inside the Capitol to "pray the blood of Jesus over it"; and admitted he was carrying a knife when he entered the building. During a search of his residence in Alabama on January 14, 2021, the FBI recovered the clothing and knife Black admitted he wore inside the Capitol. The FBI arrested him later that day.

PROCEDURAL HISTORY

On January 13, 2021, Black was charged by complaint for his actions on January 6, 2021. (ECF No. 1.) Black was arrested on January 14, 2021. On February 17, 2021, the Grand Jury returned an indictment charging Black with obstruction of an official proceeding and aiding and

abetting, in violation of 18 U.S.C. §§ 1512(c)(2), 2 (Count One), along with seven other offenses. (ECF No. 9.)[2] Count One reads:

> On or about January 6, 2021, within the District of Columbia and elsewhere, JOSHUA BLACK, attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct.
>
> (Obstruction of an Official Proceeding and Aiding and Abetting, in violation of Title 18, United States Code, Sections 1512(c)(2) and 2)

(*Id.* at 2.)

On April 28, 2022, Black filed his Motion. The Court has not set a further hearing date.

LEGAL STANDARD

A defendant may move to dismiss an indictment or count thereof for failure to state a claim before trial. Fed. R. Crim. P. 12(b)(3)(B)(v). "[A]n indictment must be viewed as a whole, and the allegations must be accepted as true in determining if an offense has been properly alleged." *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* "An indictment must contain every element of the offense charged, if any part or

[2] The remaining counts in the Indictment are: Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A) (Count Two); Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly of Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(2) and (b)(1)(A) (Count Three); Impeding Ingress and Egress in a Restricted Building or Grounds with a Deadly or Dangerous Weapon and Aiding and Abetting, in violation of 18 U.S.C. §§ 1752(a)(3) and (b)(1)(A), and 2 (Count Four); Unlawful Possession of a Dangerous Weapon on Capitol Grounds or Buildings, in violation of 40 U.S.C. § 5104(e)(1)(A) (Count Five); Entering and Remaining on the Floor of Congress, in violation of 40 U.S.C. § 5104(e)(2)(A) (Count Six); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Seven); and Impeding Passage through the Capitol Grounds or Buildings and Aiding and Abetting, in violation of 40 U.S.C. §§ 5104(e)(2)(E), 2 (Count Eight).

element is missing, the indictment is defective and must be dismissed." *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017).

ARGUMENT

BLACK'S MOTION TO DISMISS COUNT ONE, ALLEGING A VIOLATION OF 18 U.S.C. § 1512(c)(2), LACKS MERIT.

Count One of the Indictment charges Black with corruptly obstructing, influencing, or impeding an "official proceeding"—*i.e.,* Congress's certification of the Electoral College vote on January 6, 2021—and aiding and abetting in violation of 18 U.S.C. §§ 1512(c)(2), 2. In 2002, Congress enacted § 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 § 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.

Black's statutory and constitutional arguments lack merit. At least 11 district judges of this Court have considered, in other cases arising out of the events at the Capitol on January 6, 2021, one or more of the arguments he raises. *See supra,* pp. 2-3 (citing cases). Every reported court of appeals decision to have considered the scope of § 1512(c)(2) and all but one of the district

judges of this Court to have considered the issue in cases involving January 6, 2021, have concluded that § 1512(c)(2) prohibits obstruction regardless of its connection to documentary or tangible evidence. And in any event, even if a nexus to documentary or tangible evidence were required, the allegations in the Indictment, which track the statutory language, adequately informed Black about the charge against him; nothing more was or is required. In addition, every district judge to have reached the issue has concluded that Congress's certification of the Electoral College is an "official proceeding" within the meaning of 18 U.S.C. § 1512(c)(2) and that § 1512(c)(2) is not unconstitutionally vague. *See, e.g.*, *United States v. Williamson*, 903 F.3d 124, 130-31 (D.C. Cir. 2018). Black's claim that the "corruptly" *mens rea* requirement of § 1512(c)(2) is unconstitutionally vague is also meritless. This Court should adopt the well-reasoned view of the overwhelming majority of district judges to have considered the issues raised by Black and deny his Motion.[3]

I. Section 1512(c)(2) Applies to the Conduct Alleged in the Indictment, and its Prohibition on Obstructive Conduct Does Not Require Nexus to Documentary or Tangible Evidence.

Black appears to advance two distinct statutory arguments for the notion that § 1512(c)(2) does not reach the conduct alleged in the Indictment: (1) that § 1512(c)(2) is limited to obstruction tied to documentary or tangible evidence; and (2) that Congress's certification of the Electoral College vote is not an "official proceeding" for purposes of 18 U.S.C. § 1512(c)(2). Neither claim

[3] Although Black's Motion presents vagueness as one of his primary claims (Mot. at 4), it is well-settled that, when both statutory and constitutional questions are presented, courts should consider the statutory questions first. *See, e.g.*, *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[O]ur established practice is to resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue."). The government accordingly addresses Black's statutory claims first.

has merit, as other judges on this Court have concluded with near-perfect uniformity. The former would fail even on its own terms.

Referencing the Honorable Judge Carl J. Nichols's opinion in *Miller*, 2022 WL 823070, Black contends that § 1512(c)(2) is "tethered to, and operates as a catchall for, § 1512(c)(1)," and is thus limited to obstruction "in relation to records, documents and other tangible things." (Mot. at 3, 7-9.) He is incorrect, as at least 10 judges of this Court have concluded in rejecting analogous claims by other defendants charged in connection with the events of January 6, 2021. *See, e.g., Sandlin*, 2021 WL 5865006, at *5-9 (Friedrich, J.); *Caldwell*, 2021 WL 6062718, at *11-21 (Mehta, J.); *Mostofsky*, 2021 WL 6049891, at *11 (Boasberg, J.); *Montgomery*, 2021 WL 6134591, at *10-18 (Moss, J.); *Nordean*, 2021 WL 6134595, at *6-8 (Kelly, J.); *United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.); *Grider*, 2022 WL 392307, at *5-6 (Kollar-Kotelly, J.); *Andries*, 2022 WL 768684, at *9 (Contreras, J.); *Puma*, 2022 WL 823079, at *7-9, 12 & n.4 (Friedman, J.).

A. Section 1512(c)(2)'s text, structure, and history demonstrate that its prohibition on obstructive conduct covers Black's actions on January 6, 2021.

In § 1512(c)(2), Congress comprehensively prohibited conduct that intentionally and wrongfully obstructs official proceedings. The ordinary meaning of "obstruct[], influence[], or impede[]" encompasses a wide range of conduct designed to frustrate an official proceeding. That conduct can include lying to a grand jury or in civil proceedings, exposing the identity of an undercover agent, and burning a building to conceal the bodies of murder victims. It also includes storming into the Capitol to derail a congressional proceeding. A defendant who, acting with the necessary *mens rea*, obstructs (or attempts to obstruct) Congress's certification of the Electoral College vote, commits a crime under § 1512(c)(2).

1. *By its plain terms, § 1512(c)(2) is a comprehensive prohibition on obstructive conduct.* Section 1512(c)(2)'s text and structure demonstrate that it serves as a comprehensive prohibition on corrupt conduct that intentionally obstructs or impedes an official proceeding. When interpreting a statute, courts look first to the statutory language, "giving the words used their ordinary meaning." *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (internal quotation marks omitted). If the statutory language is plain and unambiguous, this Court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks omitted). Here, the meaning of "obstruct[], influence[], or impede[]" is controlled by the ordinary meaning of those words.

The verbs Congress selected in § 1512(c)(2) reach broadly. For example, the words "obstruct" and "impede" can "refer to anything that 'blocks,' 'makes difficult,' or 'hinders.'" *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (brackets omitted) (citing dictionaries). Similarly, "influence" includes "affect[ing] the condition of" or "hav[ing] an effect on." *Influence*, Oxford English Dictionary, *available at* http://www.oed.com. By their plain meaning, therefore, the string of verbs in § 1512(c)(2) are properly viewed as expansive in their coverage. *See United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) ("The expansive language in [§ 1512(c)(2)] operates as a catchall to cover 'otherwise' obstructive behavior that might not fall within the definition of document destruction [in § 1512(c)(1)].").

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

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

In this way, § 1512(c)(2) criminalizes the same *result* prohibited by § 1512(c)(1)—obstruction of an official proceeding—when that result is accomplished by a different *means, i.e.*, by conduct other than destruction of a document, record, or other object. *Cf. United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (explaining that 18 U.S.C. § 1503, which criminalizes the result of obstructing the due administration of justice, provides specific means of accomplishing that result and then a separate catchall clause designed to capture other means). Section 1512(c)(2), in other words, "operates as a catch-all to cover otherwise obstructive behavior

that might not constitute a more specific" obstruction offense involving documents or records under § 1512(c)(1). *Petruk*, 781 F.3d at 447 (quoting *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2014)); *cf. United States v. Aguilar*, 515 U.S. 593, 598 (1995) (describing similar "[o]mnibus" clause in 18 U.S.C. § 1503 as a catchall that is "far more general in scope than the earlier clauses of the statute").

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

Here, § 1512(c)(2) also applies to Black's conduct, which involved actively participating in the breach of the East Rotunda Doors, where numerous rioters violently attacked besieged police officers; entering and remaining in the Senate Chamber for over 20 minutes; participating with others in rifling through the papers of at least one Senator; taking a photo of a document related to Congressmembers' objection of the Electoral Count certification; and making several admissions about how the election and his country were "stolen." In so doing, he hindered and delayed the

certification of the Electoral College vote, an "official proceeding" as that term is defined in the obstruction statute. *See* 18 U.S.C. § 1515(a)(1)(B); *infra,* p. 31 (listing cases). Because construing § 1512(c)(2) to reach that conduct would neither "frustrate Congress's clear intention" nor "yield patent absurdity," this Court's "obligation is to apply the statute as Congress wrote it." *Hubbard v. United States*, 514 U.S. 695, 703 (1995) (internal quotation marks omitted).

2. *The claim that § 1512(c)(2) is tethered to the acts enumerated in subsection (c)(1) is flawed.* In contrast, reading § 1512(c)(2) as limited only to obstructive acts akin to the document destruction or evidence tampering captured in § 1512(c)(1) (as Black suggests) suffers at least three flaws.

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

Second, limiting § 1512(c)(2) in that way would effectively render that provision superfluous considering the comprehensive prohibitions against document and evidence destruction in both § 1512(c)(1) and § 1519. *See Yates v. United States*, 574 U.S. 528, 541 n.4 (2015) (§ 1512(c)(1) provides a "broad ban on evidence-spoliation") (internal quotation marks

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

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

3. *Neither the legislative history of § 1512(c)(2) nor its surrounding statutory text support Black's claim that it is a residual clause of subsection (c)(1).* Because "the statutory language provides a clear answer," the construction of § 1512(c)(2) "ends there" and it is

unnecessary to resort to legislative history. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (same); *see also United States v. De Bruhl-Daniels*, 491 F. Supp. 3d 237, 251-52 (S.D. Tex. 2020) (declining to consider § 1512's legislative history). Regardless, the legislative history of § 1512(c)(2)—particularly when considered alongside the history of § 1512 more generally—provides no support for a different conclusion, contrary to Black's assertions (Mot. at 8). *See, e.g.*, *Montgomery*, 2021 WL 6134591, at *15-17.

When Congress in 1982 originally enacted § 1512, that legislation did not include what is now § 1512(c). *See* VWPA, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1249-1250. Its title then, as now, was "Tampering with a witness, victim, or an informant." *Id.*; 18 U.S.C. § 1512. As that title suggested, § 1512 as originally enacted targeted conduct such as using intimidation, threats, or corrupt persuasion to prevent testimony or hinder, delay, or prevent communication of information to law enforcement or the courts as well as intentionally harassing another person to hinder, delay, or prevent that person from taking certain actions. *See* Pub. L. No. 97-291, § 4(a) (now codified as § 1512(b) and § 1512(d)).

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

and the preservation of financial and audit records." S. Rep. No. 107-146, at 14. The Senate Judiciary Committee Report discussed those two provisions in detail. *See id.* at 14-16.

By contrast, the Sarbanes-Oxley Act's legislative history provides limited explanation of Congress's objective in enacting § 1512(c). The only discussion of § 1512 in the Senate Judiciary Committee Report, for example, noted that the preexisting prohibition in § 1512(b) made it a crime to induce "another person to destroy documents, but not a crime for a person to destroy the same documents personally"—a limitation that "forced" prosecutors to "proceed under the legal fiction that the defendants [in then-pending *United States v. Arthur Andersen*] are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." S. Rep. No. 107-146, at 6-7. Similarly, Senator Hatch observed that the legislation "broaden[ed]" § 1512 by permitting prosecution of "an individual who acts alone in destroying evidence." 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch). At a minimum, nothing in these passing references casts doubt on the plain meaning of § 1512(c)(2), which is reflected in the interpretation described above.

Section 1512(c) also differed from the newly enacted § 1519 and § 1520 in that Congress added the former to an existing statutory section: § 1512. *See Yates*, 574 U.S. at 541 (plurality opinion) (noting that, unlike § 1519, § 1512(c)(2) was placed among the "broad proscriptions" in the "pre-existing" § 1512). Moreover, although § 1512(c) as enacted in the Sarbanes-Oxley Act recognized two distinct prohibitions, *see* Pub. L. No. 107-204, § 1102, 116 Stat. 807 ("Tampering with a record *or* otherwise impeding an official proceeding") (emphasis added; capitalization altered), Congress did not amend § 1512's title. That title, "Tampering with a witness, victim, or an informant," § 1512, thus encompassed the preexisting provisions aimed at a defendant's

obstructive conduct directed toward another person,[4] but did not reflect the newly enacted prohibitions in § 1512(c) that criminalized a defendant's own obstructive act, either through destroying documents (§ 1512(c)(1)) or otherwise impeding a proceeding (§ 1512(c)(2)). *See Yates*, 574 U.S. at 541 n.4 (plurality opinion) (noting that Congress added § 1512(c)(1), which covered evidence-spoliation, to § 1512 "even though § 1512's preexisting title and provisions all related to witness-tampering").

Section 1512(c)'s legislative and statutory history thus offers two reasons to interpret § 1512(c)(2) consistently with its plain text and structure.

First, § 1512(c) aimed to close a "loophole" in § 1512: the existing prohibitions did not adequately criminalize a defendant's *personal* obstructive conduct *not* aimed at another person. *See* 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch). Read together in this light, § 1512(c)(1) criminalizes a defendant's firsthand destruction of evidence (without having to prove that the defendant induced another person to destroy evidence) in relation to an official proceeding, and § 1512(c)(2) criminalizes a defendant's firsthand obstructive conduct that *otherwise* impedes or influences an official proceeding (though not necessarily through another person). *See Burge*, 711 F.3d at 809-10.

Second, no substantive inference is reasonably drawn from the fact that the title of § 1512 does not precisely match the "broad proscription" it in fact contains, given that the Sarbanes-Oxley Act unequivocally and broadly entitled the new provisions now codified in § 1512(c), "Tampering with a record *or* otherwise impeding an official proceeding." Pub. L. No. 107-204, § 1102, 116

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

Stat. 807 (emphasis added; capitalization altered). § 1512's title is more limited simply because Congress did not amend the preexisting title when it added the two prohibitions in § 1512(c) in 2002. *Cf. Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) (describing "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text").

B. This Court should not adopt the outlier construction reflected in *United States v. Miller,* including its erroneous application of the rule of lenity.

Black largely disregards the authorities discussed above, which are analyzed in the many decisions adopting the government's reading of the statute. *Supra,* p. 2 (citing cases). Instead, he urges this Court to adopt the reasoning of Judge Nichols in *Miller*, the sole decision in which a judge of this Court has construed § 1512(c)(2) to require proof that "the defendant ha[s] taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." *Id.* at *15.[5] *Miller*'s outlier reasoning is unpersuasive for several reasons.

Focusing on the word "otherwise" in § 1512(c)(2), *Miller* identified "three possible readings" of § 1512(c)(2). 2022 WL 823070, at *6. First, § 1512(c)(2) could serve as a "clean break" from § 1512(c)(1), *id.* at *6, a reading that "certain courts of appeals have adopted," *id.* at *7. *Miller*, however, identified multiple "problems" with that interpretation, all rooted in the interpretation of the term "otherwise." It stated that reading "otherwise" in § 1512(c)(2) to mean "in a different way or manner" is "inconsistent" with *Begay v. United States*, 553 U.S. 137 (2008), which considered whether driving under the influence qualified as a "violent felony" under the now-defunct residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1).

[5] The government has moved for reconsideration in *Miller*. *See Miller,* 21-cr-119 (ECF No. 75 filed April 1, 2022).) That motion is pending.

2022 WL 823070, at *7. Second, *Miller* hypothesized that § 1512(c)(1) could "provide[] examples of conduct that violates" § 1512(c)(2). 2022 WL 823070, at *8. Third, *Miller* stated that § 1512(c)(2) could be interpreted as a "residual clause" for § 1512(c)(1), such that both provisions are linked by the document-destruction and evidence-tampering "conduct pr[o]scribed by" § 1512(c)(1). 2022 WL 823070, at *9. After considering § 1512(c)'s structure, "historical development," and legislative history, *Miller* found "serious ambiguity" as to which of the two "plausible" readings—the second and third readings identified above—Congress intended. *Id.* at *15. Applying what it described as principles of "restraint," *Miller* then interpreted § 1512(c)(2) to mean that a defendant violates the statute only when he or she "take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence an official proceeding" (the third reading). *Id.*

Miller's reasoning is unpersuasive. *Miller* ultimately turned on the court's determination that no "single obvious interpretation of the statute" controlled and that the rule of lenity was applicable and was dispositive. 2022 WL 823070, at *15. Black also presses this Court to apply lenity because "genuine ambiguity exists as to the application of" § 1512(c)(2). (Mot. at 4.) The rule of lenity, however, "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted); *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998); *Young v. United States*, 943 F.3d 460, 464 (D.C. Cir. 2019). Some ambiguity is insufficient to trigger the rule of lenity; instead, a court must find "grievous ambiguity" that would otherwise compel guesswork. *See Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (internal quotation marks omitted). "Properly applied," then, "the rule of lenity therefore rarely if ever plays a role

because, as in other contexts, 'hard interpretive conundrums, even relating to complex rules, can often be solved.'" *Wooden*, 142 S. Ct. at 1074 (Kavanaugh, J., concurring).

The rule of lenity is plainly "inapplicable" here. *Puma*, 2022 WL 823079, at *12 n.4; *see also McHugh II*, ECF No. 64 at 25-26 (memorandum opinion) (because court arrived at a "superior interpretation of § 1512(c)(2) using traditional tools of statutory interpretation, the rule of lenity may not be applied"). For the reasons set forth above, Congress made clear in § 1512(c)(2) that it sought to protect the integrity of official proceedings – regardless of whether a defendant threatens such a proceeding by trying to interfere with the evidence before that tribunal or threatens the tribunal itself. Any such distinction produces the absurd result that a defendant who attempts to destroy a document being used or considered by a tribunal violates § 1512(c) but a defendant who threatens to use force against the officers conducting that proceeding escapes criminal liability under the statute. Such an outcome would, ironically, lose sight of a core value that animates the lenity rule: that defendants should be put on notice that their conduct is criminal and not be surprised when prosecuted. *See Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring) ("Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws."). It would strain credulity for any defendant who was focused on stopping an official proceeding from taking place to profess surprise that his conduct could fall within a statute that makes it a crime to "obstruct[], influence[], or impede[] [any] official proceeding or attempt[] to do so." 18 U.S.C. § 1512(c)(2).

None of the grounds identified in *Miller* for finding "serious ambiguity," 2022 WL 823079, at *15—grounds which Black adopts in his Motion—withstand scrutiny. *Miller* stated—and Black repeats—that the government's reading either "ignores" that the word "otherwise" is defined with reference to "something else" (namely § 1512(c)(1)) or fails to "give meaning" to the term "otherwise." 2022 WL 823079, at *7. That is incorrect. Far from suggesting that § 1512(c)(2) is

"wholly untethered to" § 1512(c)(1), *id.*, under the government's reading, the word "otherwise" in § 1512(c)(2) indicates that § 1512(c)(2) targets obstructive conduct in a manner "other" than the evidence tampering or document destruction covered in § 1512(c)(1). That understanding of "otherwise" is both fully consistent with the definitions of the term surveyed in *Miller*, *see* 2022 WL 823079, at *6 (noting that "otherwise" in § 1512(c)(2) may be read as "in a different way or manner; differently"; "in different circumstances: under other conditions"; or "in other respects") (internal quotation marks omitted), and ensures that the term is not rendered "pure surplusage," *id.* at *7. In other words, "otherwise" makes clear that § 1512(c)(1)'s scope encompasses document destruction or evidence tampering that corruptly obstructs an official proceeding, while § 1512(c)(2)'s ambit includes "other" conduct that corruptly obstructs an official proceeding.

Miller also stated that, without a nexus to a document, record, or other object, § 1512(c)(2) "would have the same scope and effect … [as] if Congress had instead omitted the word 'otherwise.'" 2022 WL 823079, at *7. But, as already noted, overlap is "not uncommon in criminal statutes," *Loughrin* 573 U.S. at 358 n.4, and § 1512(c)(2)'s broader language effectuates its design as a backstop in the same way that a "generally phrased residual clause . . . serves as a catchall for matters not specifically contemplated." *Beaty*, 556 U.S. at 860. And, in any event, interpreting the interplay of § 1512(c)(1) and § 1512(c)(2) in this way does not foreclose a defendant from arguing that his conduct falls outside § 1512(c)(2)'s scope because his document destruction or evidence concealment is prohibited and punishable only under § 1512(c)(1). A defendant prevailing on such a theory may be securing a Pyrrhic victory—where success leads to reindictment under § 1512(c)(1)—but those practical considerations provide no reason to depart from the plain meaning of § 1512(c). And, in any event, the "mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino*, 544 U.S. at 358 n.4.

The *Miller* court also posits that the government's reading is inconsistent with *Begay*. That conclusion is flawed in several respects. First, in considering whether driving under the influence was a "violent felony" for purposes of the ACCA's residual clause—which defines a "violent felony" as a felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury," 18 U.S.C. § 924(e)(2)(B)(ii) —the Supreme Court in *Begay* addressed a statutory provision that has an entirely different structure from § 1512(c)(2). *See, e.g.*, *Sandlin*, 2021 WL 5865006, at *6 (distinguishing *Begay* on the ground that, unlike the ACCA residual clause, the "otherwise" in § 1512(c)(2) is "set off by both a semicolon and a line break"); *United States v. Ring*, 628 F. Supp. 2d 195, 224 n.17 (D.D.C. 2009). Differently from the ACCA residual clause, the "otherwise" phrase in § 1512(c)(2) "stands alone, unaccompanied by any limiting examples." *Ring*, 628 F.Supp.2d at 224 n.17. In other words, the "key feature" in § 924(e)(2)(B)(ii) at issue in *Begay*—"namely, the four example crimes," 553 U.S. at 147—is "absent" in § 1512(c)(2). *Caldwell*, 2021 WL 6062718, at *14.

Second, *Miller*'s assertion that the meaning of "otherwise" was "[c]rucial" to the Supreme Court's decision in *Begay* misapprehends *Begay*'s express analysis. The majority in *Begay* noted first that the "listed examples" in § 924(e)(2)(B)(ii)—burglary, arson, extortion, or crimes involving explosives—indicated that the ACCA residual clause covered only similar crimes. *Begay*, 553 U.S. at 142. The majority next drew support from § 924(e)(2)(B)(ii)'s history, which showed that Congress both opted for the specific examples in lieu of a "broad proposal" and described § 924(e)(2)(B)(ii) as intending to encompass crimes "similar" to the examples. *Id.* at 143-44. Only in the final paragraph of that section of the opinion did the majority address the word "otherwise," noting that the majority "[could]not agree" with the government's argument that "otherwise" is "sufficient to demonstrate that the examples do not limit the scope of the clause" because "the word 'otherwise' *can* (we do not say *must*, cf. *post* at [150-52] (Scalia, J. concurring

in judgment)) refer to a crime that is similar to the listed examples in some respects but different in others." *Id.* at 144. A tertiary rationale responding to a party's argument where the majority refrains from adopting a definitive view of "otherwise" cannot plausibly be described as "crucial." Rather, the majority's "remarkably agnostic" discussion of "otherwise" in *Begay* explicitly noted that the word may carry a different meaning where (as here) the statutory text and context suggests otherwise. *Montgomery*, 2021 WL 6134591, at *11; *see also Caldwell*, 2021 WL 6062718, at *14 (declining to depart from the "natural reading" of "otherwise" as "'in a different way or manner'" based on the discussion in *Begay*). In short, the majority in *Begay* actually "placed little or no weight on the word 'otherwise' in resolving the case." *Montgomery*, 2021 WL 6134591, at *11.

Third, whatever the significance of the majority's interpretation of "otherwise" in *Begay*, *Begay*'s ultimate holding demonstrates why this Court should not embark on imposing an extra-textual requirement within § 1512(c)(2). The Supreme Court held in *Begay* that § 924(e)(2)(B)(ii) encompassed only crimes that, similar to the listed examples, involve "purposeful, violent, and aggressive conduct." 553 U.S. at 144-145. But "*Begay* did not succeed in bringing clarity to the meaning of the [ACCA's] residual clause." *Johnson v. United States*, 576 U.S. 591, 600 (2015). Whatever the merits of grafting an atextual (and ultimately unsuccessful) requirement in the context of the ACCA, that approach is unwarranted in the context of § 1512(c)(2). In the nearly 20 years between Congress's enactment of § 1512(c)(2) and *Miller*, no reported cases adopted the document-only requirement urged by Black.

C. Even if it agrees with *Miller*, this Court should not dismiss Count One of the Indictment, which merely tracks § 1512(c)(2)'s operative statutory text.

In any event, even under Black's theory, Count One (ECF No. 7 at 2) sufficiently alleges a violation of § 1512(c)(2) by tracking the provision's "operative statutory text." *Williamson*, 903 F.3d at 130. It is well-settled that it is "'generally sufficient that an indictment set forth the offense

in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The Indictment in this case therefore did not need to more specifically allege that the obstruction took the form of taking some action with respect to a document. *Id.*; *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108-109 (2007). In other words, the Indictment's allegations, by charging the operative statutory text, permissibly embrace two theories: (1) that Black obstructed an official proceeding by taking some action with respect to a document; and (2) that Black obstructed an official proceeding without taking some action with respect to a document. Even a ruling finding the second theory invalid would leave the first theory intact. For that reason alone, at this stage in the proceedings, dismissal of Count One would be unwarranted.

Moreover, Rule 12 of the Federal Rules of Criminal Procedure does not permit dismissal where, as here, additional facts would assist in resolving the pretrial motion. In particular, contrary to his claims (Mot. at 8-9), evidence at trial could establish the documents and records used in the Certification proceeding and prove that Black's conduct, directly and indirectly, had the natural and probable effect of destroying or imperiling those documents and records. Because the Indictment's allegations sufficiently charge the first theory that Black obstructed the proceeding by taking action with respect to a document, this Court should not dismiss Count One.

II. Congress's Joint Session to Certify the Electoral College Vote Is a "Proceeding Before the Congress" under § 1515(a)(1)(B) and, Therefore, an "Official Proceeding" under § 1512(c)(2).

Black's alternative statutory argument styled as his lead claim—that Congress's Joint Session to certify the Electoral College vote is not a "proceeding before the Congress" under §

1515(a)(1)(B), and therefore, not an "official proceeding" under § 1512(c)(2) (Mot. at 3, 5-6)—also lacks merit.

A. The plain text of the statute established that the Joint Session is an "official proceeding."

To determine the meaning of a statute, a court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (internal quotation omitted). Section 1515(a)(1)(B), as noted, defines "official proceeding" as a "proceeding before the Congress." In ordinary parlance, a gathering of the full Congress to certify the Electoral College vote is a congressional proceeding, or "a proceeding before the Congress." Because § 1515(a)(1)(B)'s words "are unambiguous, the judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (internal quotation omitted).

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

A narrower definition of the term "proceeding" would look to the "legal—rather than the lay—understanding" of the term. *Ermoian*, 752 F.3d at 1170. This narrower definition includes the "business conducted by a court or other official body; a hearing." Black's Law Dictionary, "Proceeding" (11th ed. 2019). Taken with its modifier "official," the term "proceeding" thus

"connotes some type of formal hearing." *Ermoian*, 752 F.3d at 1170. But even under this narrower definition, Congress's Joint Session to certify the Electoral College vote—business conducted by an official body, in a formal session—would easily qualify.

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

Under the plain meaning of § 1512(c)(2) and § 1515(a)(1)(B), Congress's Joint Session to certify the Electoral College vote is a "proceeding before the Congress." That alone disposes of Black's contention.

B. The statutory phrase "proceeding before Congress" is not limited to proceedings solely related to the "administration of justice."

Black nevertheless suggests that the phrase "official proceeding" in § 1512 applies only to "impeachment hearings" or "other investigative hearings which are designed to elicit evidence relevant to a governmental function." (Mot. at 5-6.) But this narrow reading of the statute finds no textual support when applied to § 1515(a)(1)(B), which speaks broadly of a proceeding "before the Congress."

Had Congress wanted to impose a definition that more closely resembled a quasi-adjudicative setting (as Black contends), it needed look only a few provisions away to 18 U.S.C. § 1505, which criminalizes, among other things, the obstruction of (i) "the due and proper administration of the law under which any pending proceeding is being had" by a federal department or agency; and (ii) "the due and proper exercise of the power of inquiry under which 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 similarly limit the obstruction prohibition under § 1512(c)(2) to congressional investigations and the like, it could have enacted language similar to § 1505.

Instead, Congress chose different terms, with different meanings. 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."). Congress enacted broader language ("a

proceeding before the Congress") that covers a broader range of proceedings than only the "inquir[ies] and investigation[s]" envisioned in § 1505. That broader definition includes the Electoral College vote certification that defendants obstructed on January 6, 2021.

None of Black's contrary arguments have merit. He cross-references the defense arguments in *Miller,* which cite at length the Ninth Circuit's decision in *Ermoian*, 752 F.3d 1165. (Mot. at 5 (citing *Miller,* ECF No. 34 at 8-11; ECF No. 38 (generally); ECF No. 47 at 8-9).) But *Ermoian* involved a different statutory definition, 18 U.S.C. § 1515(a)(1)*(C)*, and an entirely different issue: whether an FBI investigation counts as "a proceeding before a Federal Government agency which is authorized by law" under § 1515(a)(1)(C).

In *Ermoian*, the Ninth Circuit reasoned at the outset that the term "proceeding" did not "conclusively resolve whether an FBI investigation qualifies" because narrower definitions of the term "would exclude criminal investigations in the field." 752 F.3d at 1170. Black's case, which involves a proceeding before Congress and implicates § 1515(a)(1)*(B)* (and not *(C)*), presents no such question. In any event, the Joint Session of Congress to certify the Electoral College vote would satisfy even the narrower formulations of "proceeding" cited in *Ermoian*. The Joint Session plainly constituted "*business conducted* by a court *or other official body*; a *hearing*," or "[a] legal . . . process." *Id.* at 1169 (emphasis added). And there can be no serious dispute that the Joint Session is a "proceeding … authorized *by law*" or that it has the "sense of formality" that the Ninth Circuit found absent from mere criminal investigations. *Id.* at 1170 (emphasis added).

Rather than engage with § 1515's text, Black relies on surrounding statutory language and the "holdings of other courts considering the reach of § 1512," and cross-references defense arguments in *Miller* based on legislative history, to argue for its narrow application. (Mot. at 5.) That approach fails in four respects.

First, it is methodologically flawed. To determine the meaning of a statute, the Court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (quoting *Mescal v. United States*, 498 U.S. 103, 108 (1990)). In ordinary parlance, a gathering of the full Congress to certify the Electoral College vote is a congressional proceeding, a proceeding before the Congress. Because § 1515(a)(1)(B)'s words "are unambiguous, the judicial inquiry is complete." *See Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (internal quotation marks omitted). Black offers no rationale for breezing past the statute's plain text to reach for other interpretive tools.

Second, the other statutory tools on which he purports to rely do not aid his argument. He argues the title of § 1512 ("Tampering with a witness, victim, or an informant"), though "not completely dispositive," may imply that the "official proceeding" definition in § 1515 does not cover the Electoral College vote certification. (Mot. at 5.) But this contention runs headlong into "the wise rule" that neither "the title of a statute" nor "the heading of a section" can "limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947). At any rate, the specific statutory provision under which Black is charged, 18 U.S.C. § 1512(c)(2), explicitly reaches more broadly than tampering: it "operates as a catch-all to cover otherwise obstructive behavior that might not constitute a more specific" obstruction offense. *Petruk*, 781 F.3d at 447 (quoting *Volpendesto*, 746 F.3d at 286); *see also McHugh II,* ECF No. 64 at 12 (interpreting the text of "paragraph (c)(2) [of § 1512 as] a catch-all provision that prohibits a set of actions inclusive of, but broader than, the acts proscribed by paragraph (c)(1)").

Other provisions outside § 1512, such as those elsewhere in Chapter 73, have even less bearing on the plain meaning of § 1512(c)(2). (Mot. at 5 (cross-referencing defense argument in *Miller,* ECF No. 38 at 4).) If anything, those neighboring provisions—which criminalize

obstruction of other types of investigations and protect judges, jurors, witnesses and the like—merely underscore how robustly Congress sought to penalize obstructive conduct across a vast range of settings. That Congress wished to penalize efforts to obstruct everything from a federal audit to a bankruptcy case to an examination by an insurance regulatory official only crystallizes that it is more the acts of obstructing, influencing, or impeding—than the particular type of hearing—that lie at "'the very core of criminality' under the statute[s]." *Williamson*, 903 F.3d at 131.

Third, to the extent Black claims that § 1512(c)'s legislative history weighs in favor of interpreting the obstruction statute narrowly because, in enacting § 1512(c) in 2002, Congress was principally preoccupied with closing a loophole in connection with potential investigations, the legislative record also belies this argument. Putting aside that the "best evidence of [a statute's purpose] is the statutory text adopted by both Houses of Congress and submitted to the President," *West Va. Univ. Hosp's., Inc. v. Casey*, 499 U.S. 83, 98 (1991), the obstruction statute's legislative history confirms that Congress intended "official proceeding" to reach broadly. Although Congress enacted § 1512(c) as part of the Sarbanes-Oxley Act of 2002, § 1512(c) adopted—but did not modify—the preexisting definition of "official proceeding" in § 1515(a)(1), which had been in place since 1982. *See* Victim and Witness Protection Act of 1982 ("VWPA"), Pub. Law 97-291, § 4(a), 96 Stat. 1252. And, tellingly, in considering the VWPA in 2002, the Senate Judiciary Committee urged the inclusion of a "broad residual clause"—in a provision that was ultimately omitted from the 1982 enactment, but that resembles the current iteration of § 1512(c)(2)—precisely because the "purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be protection against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice." S. Rep. 97-532, at 18 (1982).

The upshot is clear: when it enacted the operative definition of "official proceeding," Congress intended that term to be construed broadly, not narrowly. And this case underscores Congress's foresight in doing so: Black and his fellow rioters sought to thwart justice in an unprecedented and inventive manner, by literally driving Congress out of the chamber.[6]

Finally, Black's narrowed reading of "proceeding before the Congress" in 18 U.S.C. § 1515(a)(1)(B)—importing an extra-textual "administration of justice" requirement (Mot. at 5, 6)—would undercut the broad statute that Congress enacted. Other than a reference to impeachment hearings and "investigative hearings . . . designed to elicit evidence relevant to a government function," (*id.* at 5-6), he does not explain what other congressional proceedings would fall within the ambit of his narrowed definition. That crabbed approach fails to recognize that the certification of the Electoral College vote is an official proceeding that is "crucial to the conduct of government" and therefore "entitled to go forward free of corrupting influences that not only delay [it] but increase the chances of false and unjust outcomes." *Sutherland*, 921 F.3d

[6] Black cross-references another claim raised by the defense in *Miller,* based on an unenacted obstruction bill from 1979, that suffers a similar flaw. (Mot. at 5 (citing *Miller,* ECF No. 47 at 8-9).) Congress considered, but ultimately did not enact, a narrower prohibition on obstructing the "exercise of a legislative power of inquiry," see S. 1722, 96th Cong. § 1323(a)(2)(C) (1979), opting instead for the broader provision covering obstruction of any "proceeding before the Congress" currently found in § 1515(a)(1)(B). *See Poindexter*, 951 F.2d at 382 (discussing the unenacted Senate version of § 1512). In addition, to the extent Black argues or intends to argue, as others have, that that the obstruction statute's application to the Electoral College vote certification proceeding was not expressly anticipated by Congress at the time of enactment, that alone "does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock v. Clayton Canty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (internal quotation and alterations omitted). A statute's application may "reach[] beyond the principal evil legislators may have intended or expected to address." *Id.* (internal quotation omitted); *cf. Montgomery*, 2021 WL 6134591, at *15-17 (rejecting a narrow understanding of § 1512(c) based on its legislative history). In any event, *Miller* ultimately rejected the claim the Certification proceeding was not an "official proceeding" for purposes of § 1512 and § 1515. *Miller,* ECF No. 72 at 9-10.

at 426. Whatever the outer limits of a "proceeding before the Congress" for purposes of the obstruction statute, the Electoral College vote certification falls well within them.[7]

Since the events of January 6, 2021, at least 10 judges on this Court have considered whether Congress's certification of the Electoral College vote constitutes an "official proceeding" for purposes of § 1512(c)(2). All 10 have ruled that it does, largely adopting the government's rationale and rejecting the arguments that Black presses in this case. *See Sandlin*, 2021 WL 5865006, at *4 (Friedrich, J.); *Caldwell*, 2021 WL 6062718, at *7 (Mehta, J.); *Mostofsky*, 2021 WL 6049891, at *10 (Boasberg, J.); *Montgomery*, 2021 WL 6134591, at *4-10 (Moss, J.); *Nordean*, 2021 WL 6134595, at *4-6 (Kelly, J.); *McHugh I*, 2022 WL 296304, at *5-9 (Bates, J.); *Grider*, 2022 WL 392307, at *3-4 (Kollar-Kotelly, J.); *Miller*, 2022 WL 823070, at *5-6 (Nichols, J.); *Andries*, 2022 WL 768684, at *3-7 (Contreras, J.); *Puma*, 2022 WL 823079, at *4-9 (Friedman, J.). Nothing in Black's briefing warrants departing from that well-reasoned line of decisions.[8]

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[7] Black's challenge fails even if he were correct—and he is not—that for a proceeding to constitute an "official proceeding" under the obstruction statute, that proceeding must be "quasi-judicial" or "quasi-adjudicative." (Mot. at 5 (cross-referencing defense arguments in *Miller,* ECF No. 34 at 8-11).) The certification of the Electoral College vote comprises features that resemble an adjudicative proceeding. It involves the convening of a Joint Session of Congress, a deliberative body over which a government officer, the Vice President as President of the Senate, "presid[es]." 3 U.S.C. § 15. That body convenes to render judgment on whether to certify the votes cast by Electors in the presidential election. As in an adjudicative setting, parties may lodge objections to the certification, and if any such objection is lodged, each House must consider the objection and make a "decision" whether to overrule or sustain it. *Id.* And just as a jury does not (barring a mistrial) recess until it has a reached a verdict, the Joint Session cannot "be dissolved" until it has "declared" a "result." 3 U.S.C. § 16.

[8] To the extent Black relies on the defense argument in *Miller* that the Department of Justice's own interpretation of § 1512 supports the notion that the certification of the Electoral College vote was not an "official proceeding," (*Miller,* ECF No. 38 at 4), his invocation of the Justice Manual similarly has no bearing on the Court's analysis. The U.S. Attorney's Manual ("USAM") (the previous name of the Justice Manual) "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995) (quoting USAM §1-1.100). *Cf. United States v. Caceras*, 440 U.S. 741, 754 (1979) (IRS manual does not confer any

C. In the alternative, Congress's certification of the Electoral College vote would qualify as an adjudicatory proceeding.

In any event, even if the statute required the "administration of justice" gloss that Black urges, Congress's certification of the Electoral College vote as set out in the Electoral Count Act of 1887 would satisfy it. The certification of the Electoral College vote involves the convening of a Joint Session of Congress, a deliberative body over which a government officer, the Vice President as President of the Senate, "presid[es]." 3 U.S.C. § 15. That Joint Session renders judgment on whether to certify the votes cast by Electors in the presidential election. Under the Constitution, the Electors create "lists" of the presidential and vice-presidential candidates, which they "sign" and "certify" before sending to Congress. U.S. Const. amend. XII. Congress then decides whether to count those certified lists, or certificates in conformity with the Electoral Count Act. 3 U.S.C. § 15. As in an adjudicative setting, parties may lodge objections to the certification, and if any such objection is lodged, each House must consider the objection and make a "decision" whether to overrule or sustain it. 3 U.S.C. § 15. And just as a jury does not (barring a mistrial) recess until it has a reached a verdict, the Joint Session cannot "be dissolved" until it has "declared" a "result." 3 U.S.C. § 16. Even under Blacks theories, Congress's certification of the Electoral College vote possesses sufficient "tribunal-like" characteristics to qualify as an "official proceeding," as several judges of this Court have already concluded. *See Caldwell*, 2021 WL 6062718, at *11 (Mehta, J.); *Nordean*, 2021 WL 6134595, at *6 (Kelly, J.); *McHugh*, 2022 WL 296304, at *9 (Bates, J.).

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substantive rights on taxpayers but is instead only an internal statement of penalty policy and philosophy).

III. Section 1512(c)'s "Corruptly" *Mens Rea* Requirement Is Not Unconstitutionally Vague.

Black contends that the *mens rea* requirement for a violation of § 1512(c)—which requires a defendant to have acted "corruptly" to obstruct an official proceeding—is unconstitutionally vague. (Mot. at 4, 6-7). He is incorrect, as every judge on this Court to have considered the issue has concluded.[9]

A. *Legal standard.* The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV. An outgrowth of the Due Process Clause, the "void for vagueness" doctrine prevents the enforcement of a criminal statute that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, "'[g]enerally, a legislature need do nothing more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). To avoid arbitrary enforcement, the law must not "vest[] virtually complete discretion" in the government "to determine whether the suspect has [violated] the statute." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *United States v. Williams*, 553 U.S. 285, 306 (2008), or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). "'Even trained lawyers may

[9] Black correctly recognizes that Judge Nichols's opinion in *Miller* "did not address the vagueness issue" that Miller raised in his pleadings. (Mot. at 7, n.8.)

find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'" *Bronstein*, 849 F.3d at 1107 (quoting *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam)). A provision is impermissibly vague only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306; *see Smith v. Goguen*, 415 U.S. 566, 578 (1974). The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

B. *Section 1512(c), as a whole, is not unconstitutionally vague.* Black fails to overcome the "strong presumpti[on]" that § 1512(c)(2), as a whole, is constitutional. *See United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Section 1512(c)(2) does not tie criminal culpability to "wholly subjective" terms such as "annoying" or "indecent" that are bereft of "narrowing context" or "settled legal meanings," *Williams*, 553 U.S. at 306, nor does it require application of a legal standard to an "idealized ordinary case of the crime," *Johnson*, 576 U.S. at 604. Section 1512(c)(2)'s prohibition on "corruptly . . . obstruct[ing], influenc[ing], or imped[ing]" an "official proceeding" gives rise to "no such indeterminacy." *Williams*, 553 U.S. at 306. The statute requires that a defendant, acting with consciousness of wrongdoing and intent to obstruct, attempts to or does undermine or interfere with a statutorily defined official proceeding. While "it may be difficult in some cases to determine whether these clear requirements have been met," "'courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.'" *Id.* (quoting *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 411 (1950)).

C. *The term "corruptly" § 1512(c)(2) clearly identifies the conduct it punishes.* Black's specific claim that the word "corruptly" in § 1512(c)(2) is unconstitutionally vague is mistaken. As Judge Friedman recently observed, "[j]udges in this district have construed 'corruptly' to require 'a showing of "dishonesty" or an 'improper purpose'[;], 'consciousness of wrongdoing'[;] or conduct that is 'independently criminal,' 'inherently malign, and committed with the intent to obstruct an official proceeding.'" *Puma*, 2022 WL 823079, at *10 (quoting *Montgomery*, 2021 WL 6134591, at *19; *Bozell*, 2022 WL 474144, at *6; *Caldwell*, 2021 WL 6062718, at *11; and *Sandlin*, 2021 WL 5865006, at *13) (alterations omitted). Under any of these common-sense constructions, the term "corruptly" "not only clearly identifies the conduct it punishes; it also 'acts to shield those who engage in lawful, innocent conduct – even when done with the intent to obstruct, impede, or influence the official proceeding.'" *Id.* (quoting *Sandlin*, 2021 WL 5865006, at *13). It presents no vagueness concern, and it provides fair notice to Black as to his punishable conduct.

Nor does Black's reliance on *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), (Mot. at 6-7), support his attacks on the word "corruptly," for at least three reasons.

First, the D.C. Circuit narrowly confined *Poindexter*'s analysis to § 1505's use of "corruptly," and expressly declined to hold "that term unconstitutionally vague as applied to all conduct." 951 F.2d at 385. Five years later, in *United States v. Morrison*, 98 F.3d 619 (D.C. Cir. 1996), the D.C. Circuit rejected a *Poindexter*-based vagueness challenge to 18 U.S.C. § 1512(b) and affirmed the conviction of a defendant for "corruptly" influencing the testimony of a potential witness at trial. *Id.* at 629-30. Other courts have similarly recognized "the narrow reasoning used in *Poindexter*" and "cabined that vagueness holding to its unusual circumstances." *United States v. Edwards*, 869 F.3d 490, 502 (7th Cir. 2017); *see also, e.g.*, *United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998) (rejecting vagueness challenge to "corruptly" in 26 U.S.C. § 7212(a)); *United*

States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (same for 18 U.S.C. § 1512(b)); *United States v. Brenson*, 104 F.3d 1267, 1280 (11th Cir. 1997) (same for 18 U.S.C. § 1503). Black's invocation of *Poindexter* accordingly fails to establish that § 1512(c) suffers the same constitutional indeterminacy.

Second, *Poindexter* predated the Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). There, the Court explained the terms "'[c]orrupt" and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." *Id.* at 705 (citation omitted). In doing so, the Court "did not imply that the term was too vague." *Edwards*, 869 F.3d at 502.

Third, and as noted above, courts have encountered little difficulty when addressing "corruptly" in § 1512(c)(2) following *Arthur Andersen*. *See supra*, pp. 35, 36. Such efforts demonstrate that the statute's "corruptly" element does not invite arbitrary or wholly subjective application by either courts or juries.

CONCLUSION

WHEREFORE, the United States respectfully requests that Black's Motion to Dismiss Count One of the Indictment be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 2022, I served a copy of this pleading on all parties to this matter as indicated in the Court's electronic case files system.

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