IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF THE MOTION TO DISMISS COUNT TWO

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

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

Section 1512(c)(2) criminalizes actions impairing the integrity or availability of evidence to be used in tribunal-like settings. However wrongful Mr. Montano-Alvarado's actions on January 6, 2020 as alleged in the indictment might have been, they do not run afoul of Section 1512(c)(2).

The government, for its part, interprets Section 1512(c)(2) as covering all obstructive conduct taken with a corrupt motive and related to any sort of formalistic Congressional event. This interpretation is far too broad and is not supported by the text and structure of the law. The law has never been applied so widely before, and, indeed, this interpretation would mean that Congress buried its arguably broadest and most powerful obstruction law in the middle of a witness tampering statute. This defies logic. For good measure, the government's interpretation is also void for vagueness as applied.

Ultimately, the government's position fails for the reasons set out below. In particular, the government's opposition does not engage with the defendant's interpretation of Section 1512(c)(2) as covering conduct that impairs the integrity or availability of evidence. Instead, it focuses on a different legal test advanced by another judge of this court in *United States v. Miller*, 589 F. Supp. 3d 60, 78 (D.D.C. 2022), and related cases. For this reason, Mr. Montano-Alvarado now believes oral argument would be helpful to the court to ensure the issues presented here are fully addressed by the parties.

ARGUMENT

1. Count Two Does Not Charge A Crime Under § 1512(c)(2)

The government's brief is understandably focused on disputing the legal test set out in *United States v. Miller* and other similarly reasoned district court decisions. *See* Gov. Opp. 17-20, 25-38. Those cases hold that, to violate Section 1512(c)(2), the defendant must have taken some action with respect to a document, record, or other tangible object. *See United States v. Miller*, 589 F. Supp. 3d 60, 78 (D.D.C. 2022); *United States v. Singleton*, No. 06-CR-80, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006); *United States v. Hutcherson*, No. 05-CR-39, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006). This interpretation of Section 1512(c)(2) would require dismissal of Count Two since Mr. Montano-Alvarado undisputedly did not take an action with respect to a document, record, or other tangible object. Defense counsel would be very happy for the Court to adopt this test.

But, notably, Mr. Montano-Alvarado offered a different (and in our estimation more nuanced) interpretation of what Section 1512(c)(2) forbids: "Section 1512(c)(2) encompasses conduct not specifically enumerated in (c)(1), but likewise designed to undermine a proceeding's truth-finding mission through actions impairing the integrity of evidence or limiting its availability

for use in an official proceeding." Motion at 6. This test would also require dismissal in this case. *See* Motion 5-12. Unfortunately, the government never addresses this argument. And, as a result, most of its arguments in its opposition brief are inapposite or fail on their face. *See* Gov. Opp. 16-20, 25-38.

For example, the government argues that the defense's interpretation of Section 1512(c)(2) effectively renders that provision superfluous considering the prohibitions against evidence destruction in both Sections 1512(c)(1) and 1519. But Mr. Montano-Alvarado's interpretation of Section 1512(c)(2) covers all kinds of obstructive acts—like lying to a grand jury or soliciting tips to avoid surveillance—that go beyond traditional evidence destruction. *See* Motion at 7-8. It is the government's argument, instead, that renders large swaths of obstruction law superfluous. *See* Motion at 6-7.

Take another example. The government claims that its interpretation of Section 1512(c)(2) (as covering all obstructive conduct taken with a corrupt motive) is consistent with courts' decision to uphold convictions under Section 1512(c)(2) for conduct ranging from lying in written responses to civil interrogatory questions,[1] to burning an apartment to conceal the bodies of two murder victims,[2] to tipping off suspects before execution of search warrants,[3] among others. Gov. Opp. at 16-17. However, as explained in the Motion to Dismiss, cases like these are, in fact, consistent with Mr. Montano-Alvarado's interpretation of the Section 1512(c)(2) as covering actions impairing the integrity of evidence or limiting its availability. *See* Motion at 7-8. In fact, they demonstrate a significantly more targeted application of Section 1512(c)(2) than what the government is advocating for. *See id.* They do not advance the government's position at all.

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[1] *United States v. Burge*, 711 F.3d 803 (7th Cir. 2013).
[2] *United States v. Cervantes*, No. 16-10508, 2021 WL 2666684 (9th Cir. June 29, 2021).
[3] *United States v. Martinez*, 862 F.3d 223, 238 (2d Cir. 2014).

At the end of the day, the government is left with three core arguments in favor of its interpretation of section 1512(c)(2). First, it focuses myopically on the definitions of "obstruct," "impede," and "influence," and claims these words cover Mr. Montano-Alvarado's conduct. Gov. Opp. at 14-15. Defense counsel does not disagree with the idea that, in isolation, those words have broad meanings. But, of course, statutory sub-sub-sections aren't interpreted in isolation. Instead, they must be considered in context.

As explained in the Motion to Dismiss, Section 1521(c)(2) operates as a residual clause to Section 1512(c)(1), and accordingly its interpretation is informed by Section 1512(c)(1)'s scope. This parallels the way the Supreme Court interpreted ACCA in *United States v. Begay*.[4] Section 1512(c)(2) covers conduct that has the same sort of obstructive impact as the enumerated types of obstruction in (c)(1), but, in accord with the definition of the word "otherwise" found in (c)(2), that causes that obstruction in a different way or manner.[5]

This interpretation is confirmed by other structural considerations and even legislative history. Every other subsection and sub-sub-section in Section 1512 has a targeted focus. Under the defendant's interpretation Section 1512(c)(2) would too, but under the government's

[4] The government describes the Supreme Court's reasoning in Begay as follows: (1) ACCA had a list of examples (burglary, arson, etc.) that indicated that its residual clause covered only similar crimes, (2) ACCA's history to reinforces its conclusion, and (3) only as the third aspect of it's the word "otherwise" did not demonstrate that that the examples did not limit the scope of the residual clause. Gov. Opp. at 31. As explained in the Motion to Dismiss, 1512(c) has a similar structure, also uses the word "otherwise" in the same manner, and 1512(c)'s history confirms that it is limited to conduct directed at limiting the integrity and availability of evidence.

[5] Notably, one of the cases the government cites for the proposition that the word "otherwise" is broad and is not limited by examples that precede it actually reaches the opposite result. In that case, the Supreme Court was tasked with interpreting a statutory prohibition on kidnapping "for ransom or reward or otherwise." Gooch v. United States, 297 U.S. 124, 127-28 (1936). The Court did not interpret the word "otherwise" to mean the statute prohibited kidnapping for any reason ever. Instead, it held that "Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might *secure some benefit to himself*." *Id.* at 128 (emphasis added). Kidnapping for ransom or for reward are clearly done "to secure some benefit" to the transgressor. The Court may, on its face, have rejected the application of "ejusdem generis" to the statute. But like in *Begay* and like here, the Court clearly interpreted the residual feature of the statute to cover conduct that was consistent with features of the language that preceded it.

interpretation it would not. Indeed, the government's interpretation would effectively render superfluous most of the rest of Section 1512 and a significant number of other obstruction laws. *See* Motion 6-7. Congress did not hide this elephant—a comprehensive federal obstruction provision that swallows much of the rest of obstruction law—in a mousehole—a sub-sub-provision to section overwhelmingly targeted at criminalizing witness tampering.

The defendant's interpretation of Section 1512(c)(2) is likewise consistent with its legislative history, which makes plain that the provision was an afterthought designed to close a loophole that made it a crime to encourage a witness to tamper with evidence without making it a crime to tamper with that evidence directly. *See* Motion at 4-5, 8.

The government disagrees. This is its second core argument: that the legislative history does not support Mr. Montano Alvarado's position. Gov. Opp. at 20-25. The government first complains that the Court cannot resort to legislative history where the text of the statute is clear, which it claims it is. However, this Circuit has said the opposite: "[l]egislative history . . . may be consulted to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Sierra Club v. E.P.A.*, 353 F.3d 976, 988 (D.C. Cir. 2004). In any event, the defense's argument is that this legislative history *reinforces* its clear interpretation of 1512(c)'s text and structure. This is undoubtedly an appropriate use of legislative history. *See, e.g.*, *Budowich v. Pelosi*, No. CV 21-3366 (JEB), 2022 WL 2274359, at *12 (D.D.C. June 23, 2022) (explaining that legislative history "buttresses the Court's text-based statutory construction").

Next, the government complains about the absence relevant legislative history for Section 1512(c). But in doing so it overlooks the most illuminating piece of that history that we have: the floor statements of the Senator who introduced Section 1512(c), explaining what it was going to

do. According to Senator Lott, Section 1512(c) "would enact stronger laws against document shredding." 148 Cong. Rec. S6545 (daily ed. July 10, 2002). "Current law prohibits obstruction of justice by a defendant acting alone, but only if a proceeding is pending and a subpoena has been issued for the evidence that has been destroyed or altered." Section 1512(c) would "allow the Government to charge obstruction against individuals who acted alone, even if the [evidence] tampering took place prior to the issuance of a grand jury subpoena." *Id.* This language clearly reinforces the defense's interpretation of Section 1512(c)(2) and contradicts the government's.

The government also emphasizes the fact Congress did not amend Section 1512's header—"tampering with a witness, victim, or an informant"— following its enactment of Section 1512(c). It notes that the header in the Sarbanes Oxley Act associated with Section 1512(c), though never added to the U.S. Code, reflected the fact that its contents were not limited to witness tampering. That may be true, but it does not matter. The defense has never argued that Section 1512(c)(2) is strictly limited to matters of witness tampering. Instead, our argument is that part of the reason the government's interpretation must fail is because it is premised on the idea that Congress enacted its arguably most wide-ranging obstruction statute for federal proceedings by burying it the middle of a statute focused overwhelmingly on other conduct. The government does not seriously dispute that this is the consequence of its interpretation.

Third, and finally, the government argues that this Court should follow the opinions of other district court judges in this jurisdiction that have come out in favor of the government's position. Gov. Br. at 13, 26-32. But district court decisions are only persuasive authority. *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."). And as Mr. Montano-Alvarado explained in his motion,

these decisions suffer from numerous flaws in reasoning. *See* Motion at 9-10. The government fails to address the defense's arguments about these flaws. The Court should not follow persuasive authority that, with all due respect to those courts, is not persuasive.

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

Count Two must be dismissed for the separate reason that the certification of the electoral vote is not an official proceeding as it is defined in Section 1515 and used in Section 1512. Numerous courts have held that an "official proceeding" as used in those sections requires a tribunal-type proceeding. *See, e.g.*, *United States v. Guertin*, 581 F. Supp. 3d 90, 97-98 (D.D.C. 2022); *United States v. Ramos*, 537 F.3d 439, 462-63 (5th Cir. 2008); *United States v. Ermoian*, 752 F.3d 1165, 1172 (9th Cir. 2013). A tribunal-type proceeding is a formal convocation at which parties are directed to appear and produce documents.[6] It contains within it some ability to adjudicate facts and, depending on how facts are adjudicated, reach different outcomes. *See United States v. Perez*, 575 F.3d 164, 169 (2d Cir. 2009) (concluding that BOP fact-finding inquiry following the use of force was official proceeding because it was adjudicative in nature).

The government points out that the cases that reach these conclusions discuss proceedings before agencies rather than proceedings before Congress. *See* Gov. Br. at 10-11. But it offers no reason to draw a distinction between the two. And there is no good reason. Indeed, their textual definitions are virtually identical, except one refers to Congress and the other refers to the agency authorized by law. *Compare* 18 U.S.C. § 1515(a)(1)(B) ("(1) the term 'official proceeding' means . . . (B) a proceeding before the Congress") *with id.* § 1515(a)(1)(C) ("(1) the term 'official

[6] *See, e.g.*, *Guertin*, 581 F. Supp. 3d at 97-98 (describing official proceeding as one that generally entails convening an adjudicative body "before which parties are compelled to appear); *Ramos*, 537 F.3d at 462-63 (official proceeding contemplates formal convocation at which persons are called to appear and directed to produce documents); *Ermoian*, 752 F.3d at 1171 (same). *Cf. United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (explaining that agency investigations may qualify as "proceedings" under 18 U.S.C. § 1505 if those investigations involve "some adjudicative power" such as the power to issue subpoenas, and compel sworn testimony in conjunction with an investigation).

proceeding' means . . . (B) a proceeding before a Federal Government agency which is authorized by law").

As a backup, the government argues that the certification qualifies as a tribunal-type proceeding because it is "formal." That is part of what is required in a tribunal-type proceeding, and a number of courts have dismissed charges where this formality is lacking.

But that is not all tribunal-type proceeding requires. Courts have explained, as discussed, that tribunal-type proceedings include the calling of parties to appear "before" them, the opportunity to direct the production of documents or appearance of witnesses, and to adjudicate facts and reach different outcomes. See supra n.6. The government does not seriously dispute that these features are absent from certification. Parties are not called to appear before Congress during the certification of the electoral vote. Congress does not have the power to subpoena evidence or call witnesses, much make a substantive decision that changes the outcome of an election. It, accordingly, is not a tribunal-type proceeding, and thus is not an "official proceeding."

3. Section 1512(c)(2) is Void for Vagueness

Lastly, Mr. Montano-Alvarado respectfully requests that the Court dismiss the indictment for the independent reason that it is unconstitutionally vague as applied. The D.C. Circuit in *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), held that the word "corruptly" in 18 U.S.C. § 1505 was vague as applied. Section 1512(c)'s use of the word "corruptly" creates the same problems.

After *Poindexter,* Congress enacted a definition of "corruptly" for purposes of Section 1505. *See* False Statements Accountability Act of 1996, Pub. L. 104–292, § 3, 110 Stat 3459. However, this amendment did not resolve the vagueness that still exists in Section 1512, as Congress did not supply a definition for corruptly as it applies to Section 1512.

The government contends Mr. Montano-Alvarado's arguments fail for a couple of reasons. First, it claims that the D.C. Circuit narrowed *Poindexter*'s applicability in a case called *United States v. Morrison*, 98 F.3d 619 (D.C. Cir. 1996). The court in *Poindexter* explained that influencing another to "violate their legal duty" was not vague because "it would both take account of the context in which the term 'corruptly' appears and avoid the vagueness inherent in words like 'immorally,'" found in the general definition of the word "corruptly." *Poindexter*, 951 F.2d at 379. However, because the defendant's conduct in that case did not involve corruptly influencing another to violate a legal duty, it did not save the statute from vagueness as applied. *Id.* In *Morrison*, the defendant was charged with violating Section 1512(b) because he tried to influence a witness's testimony and "exhorted her to violate her legal duty to testify truthfully in court." 98 F.3d at 630. The Court held that Section 1512(b) was not vague as applied because the defendant's conduct fell squarely within the interpretation of the word "corruptly" that *Poindexter* held was not vague as applied. *Id.* *Poindexter* and *Morrison* are entirely consistent. And they stand for the basic proposition that when interpreting obstruction statutes, the way to read the word "corruptly" to avoid vagueness problems is to conclude that it applies to instances like when the defendant corrupts another to violate their legal duty.[7] That would not apply to the conduct here.

The government further questions *Poindexter* by citing to *Arthur Andersen v. United State*s, 544 U.S. 696 (2005). But *Arthur Anderson* was not about the vagueness of a statute but rather about a jury instruction that failed to "convey the requisite consciousness of wrongdoing" required for a violation of 1512(b). *Id.* at 698. The Court took issue with the district court's decision to modify the Fifth Circuit pattern jury instruction to remove the requirement that, among

[7] The government cites to several out-of-circuit decisions discussing how to interpret the word "corruptly" to avoid vagueness concerns. These opinions, unlike *Poindexter* and *Morrison*, are not binding on this court.

other things, proof that someone acted "dishonestly." *Id.* at 697. This holding is not inconsistent with *Poindexter*. *Poindexter* remains good law. It identifies the vagueness problems that the word "corruptly" creates in the obstruction statute. It is unconstitutionally vague because it does not provide a clear standard for what conduct is prohibited, thereby permitting arbitrary and unprincipled enforcement. For this reason, too, Count Two of the Indictment should be dismissed.

Finally, as explained in the Motion to Dismiss, district courts in this district have struggled with how to define the word "corruptly" in their January 6 cases, and reached different conclusions. *See* Motion at 18. This underscores how vague the word corruptly is. The government has no response to this point.

CONCLUSION

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

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CERTIFICATE OF SERVICE

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

RESPECTFULLY SUBMITTED.

In Houston, Texas, this 10th day of November 2022.

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