

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 21-CR-129 (ABJ)
	:	
GABRIEL GARCIA,	:	
also known as “Gabriel Agustin Garcia”	:	
	:	
Defendant.	:	

GOVERNMENT OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to Defendant Gabriel A. Garcia’s (the “Defendant”) Motion to Dismiss Count Two of the Superseding Indictment and Memorandum of Law, filed through counsel on April 3, 2022 (ECF No. 67). The referenced count alleges a violation of 18 U.S.C. §§ 1512, 2. Citing *United States v. Miller*, No. 21-cr-119, ECF No. 73, Order (D.D.C. Mar. 7, 2022) and *United States v. Fischer*, No. 21-cr-00234, ECF No. 64, slip op. at 7 (D.D.C. Mar. 15, 2022), the Defendant argues that Count Two fails to state an offense. That argument lacks merit, and this Court should deny the Defendant’s motion.

BACKGROUND AND PROCEDURAL HISTORY

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Defendant Gabriel Garcia traveled to Washington, D.C., from his home in Florida and took part in the unlawful entry of the Capitol building. While inside the Crypt area of the Capitol building, Garcia participated in an aggressive confrontation with U.S. Capitol Police, during which he dropped a flagpole on police officers, yelled that the officers were “fucking traitors” and told other members of the crowd to “storm this shit.” ECF No. 1-1 at 4-5. After the crowd breached the line of officers, Garcia moved to the Rotunda, where he recorded a video of himself calling for “Nancy” to “come out and play.” *Id.* at 6.

On February 17, 2021, a grand jury returned a six count indictment charging the Defendant with the following offenses: 18 U.S.C. §§ 231(a)(3), 2 (civil disorder); 18 U.S.C. §§ 1512(c)(2), 2 (obstruction of an official proceeding); 18 U.S.C. §§ 1752(a)(1) and (2) (entering and remaining in a restricted building or grounds and disorderly and disruptive conduct in a restricted building or grounds,); and 40 U.S.C. §§ 5104(e)(2)(D) and (G) (disorderly conduct in a Capitol building and parading, demonstrating, or picking in a Capitol building). *See* ECF No. 11.

On November 10, 2021, the grand jury returned a superseding indictment that updated the language in Counts One (Section 231), Two (Section 1512), Three (Section 1752) and Four (Section 1752). *See* ECF No. 44.

LEGAL STANDARD

A defendant may move before trial to dismiss an indictment, or a count thereof, for “failure to state an offense.” *See* Fed. R. Crim. P. 12(b)(3)(B)(v). An indictment’s main purpose is to inform the defendant of the nature of the accusation. *United States v. Ballestas*, 795 F.3d 138, 148-49 (D.C. Cir. 2015). Thus, an indictment need “only contain ‘a plain, concise, and definite written statement of the essential facts constituting the offense charged.’” *Id.* at 149 (quoting Fed. R. Crim. P. 7(c)). “When testing the sufficiency of the charges in an indictment, ‘the indictment must be

viewed as a whole and the allegations [therein] must be accepted as true.” *United States v. Hillie*, 227 F. Supp. 3d 57, 71 (D.D.C. 2017) (quoting *United States v. Bowdoin*, 770 F. Supp. 2d 142, 145 (D.D.C. 2011)). The “key question” is whether “the allegations in the indictment, if proven, are sufficient to permit a petit jury to conclude that the defendant committed the criminal offense as charged.” *Id.*

RELEVANT BACKGROUND

Congress enacted Section 1512 as a prohibition on “[t]ampering with a record or otherwise impeding an official proceeding” in Section 1102 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 807, and codified it in Chapter 73 of Title 18 of the United States Code, placing it within the pre-existing Section 1512 as subsection (c). That prohibition applies to

(c) [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). Here, the indictment charges that, “on or about January 6, 2021 ... Garcia attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress’s certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. § 15-18.” *See* ECF No. 44.

ARGUMENT

The Defendant’s attempts to impose atextual limitations on the scope of 18 U.S.C. § 1512(c)(2) lack merit. Nothing in Section 1512(c)(2)’s text, structure, or history, or in the relevant precedent, limits that provision to obstruction tied to documentary or tangible evidence. And, in any event, even if such a limitation existed, the allegations in the indictment, which track the

statutory language, would satisfy it.

I. Section 1512(c)(2)’s prohibition on obstructive conduct does not require a nexus to documentary or tangible evidence.

The Defendant contends that Section 1512(c)(2)’s prohibition is limited to obstruction tied to documentary or tangible evidence. ECF No. 67, at 3-4. He is incorrect, as at least nine judges of this Court have concluded in rejecting analogous claims by other defendants charged in connection with the events of January 6, 2021. *See United States v. Sandlin*, No. 21-cr-88, 2021 WL 5865006, at *5-6 (D.D.C. Dec. 10, 2021) (Friedrich, J.); *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718, at *11 (D.D.C. Dec. 20, 2021) (Mehta, J.); *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891, at *11 (D.D.C. Dec. 21, 2021) (Boasberg, J.); *United States v. Nordean*, No. 21-cr-175, 2021 WL 6134595, at *6-*9 (D.D.C. Dec. 28, 2021) (Kelly, J.); *United States v. Montgomery*, No. 21-cr-46, 2021 WL 6134591, at *10-*18 (D.D.C. Dec. 28, 2021) (Moss, 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.); *United States v. Puma*, No. 21-cr-454, 2022 WL 823079, at *12 & n.14 (D.D.C. Mar. 19, 2022) (Friedman, J.).

A. Section 1512(c)(2)’s text, structure, and history demonstrate that the statute’s prohibition is not limited to obstruction tied to documentary or tangible evidence.

In Section 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 Section 1512(c)(2).

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 Section 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 Section 1512(c)(2) are properly viewed as “expansive” in their coverage. *See United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013).

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, Section 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 Section 1512(c)(2) encompasses misconduct that threatens an official proceeding “beyond [the] simple document destruction” that Section 1512(c)(1)

proscribes. *Burge*, 711 F.3d at 809; *United States v. Petruk*, 781 F.3d 438, 446-447 (8th Cir. 2015) (noting that “otherwise” in Section 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 Section 1512(c)(2) is “plainly separate and independent of” Section 1512(c)(1), and declining to read “otherwise” in Section 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, 127-128 (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, Section 1512(c)(2) criminalizes the same result prohibited by Section 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 catch-all 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 Section 1512(c)(1). *Petruck*, 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 Section 1512(c)(2) for defendants who attempted to secure a false alibi witness while in jail for having stolen a vehicle, *Petruck*, 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 808-809; 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, 1324-1326 (10th Cir. 2012) (law enforcement officer disclosed existence of undercover investigation to target).

Section 1512(c)(2) also applies to defendants, including the Defendant, who trespassed into the restricted Capitol area on January 6, 2021, to prevent a Joint Session of Congress from certifying the results of the 2020 Presidential election. Those defendants 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). Because construing Section 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).

In contrast, limiting Section 1512(c)(2) to obstructive acts akin to the document destruction or evidence tampering captured in Section 1512(c)(1) 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 [Section 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 Section 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 Section 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, Section 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 Section 1512(c)(2) in that way would effectively render that provision superfluous in light of the comprehensive prohibitions against document and evidence destruction in both Sections 1512(c)(1) and 1519. *See Yates v. United States*, 574 U.S. 528, 541 n.4 (2015) (plurality opinion) (Section 1512(c)(1) provides a “broad ban on evidence-spoliation”) (internal quotation marks omitted). By contrast, the straightforward interpretation that treats Section 1512(c)(2) as a catch-all for corrupt obstructive conduct not covered by Section 1512(c)(1) would “give effect to every clause and word” of Section 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 catch-all provision in Section 1503’s omnibus clause to obstructive acts “directed against individuals” would render that catch-all superfluous because “earlier, specific[] prohibitions” in Section 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 Section 1503’s 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”).

Nor does the fact that Congress adopted a more general catch-all in Section 1512(c)(2) render superfluous other obstruction prohibitions found in Chapter 73, the criminal code’s chapter on obstruction of justice. *See, e.g., Montgomery*, 2021 WL 6134591, at *13 (“[T]he Court is also unpersuaded by Defendants’ more general superfluity argument, which posits that, unless Section 1512(c)(2) is narrowly construed, much of Chapter 73 would be rendered superfluous.”). Instead, the catch-all in Section 1512(c)(2) serves to capture “known unknowns.” *Yates*, 574 U.S. at 551 (Alito, J., concurring) (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009)). Indeed, “the whole value of a generally phrased residual clause ... is that it serves as a catchall” to ensure that the full range of conduct Congress sought to regulate comes within the statute, including “matters not specifically contemplated” by more specific provisions. *Beaty*, 556 U.S. at 860. In any event, “[r]edundancies across statutes are not unusual events in drafting,” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992), and the “rule[] of thumb” that statutes should be interpreted to avoid superfluity necessarily yields to the “cardinal canon” that Congress “says in a statute what it means and means in a statute what it says there,” *id.* at 253-54.

Judicial treatment of the nearby omnibus clause in Section 1503, which prohibits “corruptly ... influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede,

the due administration of justice,” 18 U.S.C. § 1503, is instructive. Drafted in “very broad language,” the omnibus clause or “catchall provision,” *see Aguilar*, 515 U.S. at 599, principally operates to criminalize obstructive conduct that falls outside the narrower prohibitions within Section 1503 and neighboring provisions. *See, e.g., United States v. Sussman*, 709 F.3d 155, 168-170 (3d Cir. 2013) (removing gold coins from safe-deposit box); *United States v. Frank*, 354 F.3d 910, 916-919 (8th Cir. 2004) (removing car to avoid seizure); *United States v. Lefkowitz*, 125 F.3d 608, 619-620 (8th Cir. 1997) (instructing employee to remove documents from a house); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (hiding a witness); *United States v. Brown*, 688 F.2d 596, 597-598 (9th Cir. 1982) (warning suspect about impending search warrant to prevent discovery of heroin); *Howard*, 569 F.2d at 1333-1334 (attempting to sell grand jury transcripts). No court has held that the omnibus clause’s broad language should be given an artificially narrow scope to avoid any overlap with Section 1503’s other, more specific provisions. *Cf. Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005) (“The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either.”). The same is true for the catchall provision in Section 1512(c)(2).

Similarly, Section 1512(c)(2)’s partial overlap with other obstruction statutes does not render those other provisions superfluous. For example, the omnibus clause in 1503 and the congressional obstruction provision in 1505 both reach an “endeavor[] to influence, obstruct, or impede” the proceedings – a broader test for inchoate violations than Section 1512(c)(2)’s “attempt” standard. *See United States v. Sampson*, 898 F.3d 287, 301 (2d Cir. 2018) (“[E]fforts to witness tamper that rise to the level of an ‘endeavor’ yet fall short of an ‘attempt’ cannot be prosecuted under § 1512.”); *United States v. Leisure*, 844 F.2d 1347, 1366-1367 (8th Cir. 1988) (collecting cases recognizing the difference between “endeavor” and “attempt” standards).

Section 1519, which covers destruction of documents and records in contemplation of an investigation or agency proceeding, does not require a “nexus” between the obstructive act and the investigation or proceeding – but Section 1512(c)(2) does. Again, the existence of even “substantial” overlap is not “uncommon” in criminal statutes. *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014). But given that Sections 1503, 1505, and 1519 each reach conduct that Section 1512(c)(2) does not, the overlap provides no reason to impose an artificially limited construction on the latter provision. *See, e.g., Sandlin*, 2021 WL 5865006, at *8 (“[T]he fact that there is overlap between § 1512(c)(2) and the rest of § 1512, or other provisions in Chapter 73, is hardly remarkable.”).

Third, importing into Section 1512(c)(2) a nexus-to-tangible-evidence-or-documents requirement would require inserting an extratextual gloss that would render the verbs in Section 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 Section 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.”).

Because “the statutory language provides a clear answer,” the construction of Section 1512(c)(2) “ends there” and resort to legislative history is unnecessary. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *see also Chamber of Commerce of U.S. v. Whiting*, 563 U.S.

582, 599 (2011) (“Congress’s authoritative statement is the statutory text, not the legislative history.”) (internal quotation marks omitted). Regardless, the legislative history of Section 1512(c)(2) – particularly when considered alongside the history of Section 1512 more generally – provides no support for a contrary conclusion. *See, e.g., Montgomery*, 2021 WL 6134591, at *15-17 (thoroughly analyzing Section 1512(c)(2)’s legislative history and concluding that it does not support a narrow interpretation).

When Congress in 1982 originally enacted Section 1512, that legislation did not include what is now Section 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, Section 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 Section 1512(b) and Section 1512(d)). For example, Section 1512 as enacted in 1982 included a prohibition on using intimidation, physical force, or threats, with the intent to “cause or induce any person to ... alter, destroy, mutilate, or conceal an object with intent to impair that object’s integrity or availability for use in an official proceeding.” *Id.* § 4(a) (originally § 1512(a)(2)(B); now codified at § 1512(b)(2)(B)).

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 on the Sarbanes-Oxley Act 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 Section 1512(c). The only discussion of Section 1512 in the Senate Judiciary Committee Report noted that the pre-existing prohibition in Section 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]” Section 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). Nothing in these passing references casts doubt on the plain meaning of Section 1512(c)(2), which is reflected in the interpretation described above.

Section 1512(c) also differed from the newly enacted Sections 1519 and 1520 in that Congress added the former to an existing statutory section: Section 1512. *See Yates*, 574 U.S. at 541 (plurality opinion) (noting that, unlike Section 1519, Section 1512(c)(2) was placed among the “broad proscriptions” in the “pre-existing” Section 1512). Moreover, although Section 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 Section 1512’s title. That title, “Tampering with a witness, victim, or an informant,” 18 U.S.C. § 1512, thus encompassed the pre-existing provisions aimed at a defendant’s obstructive conduct directed toward another person, but did not expressly reflect the newly enacted prohibitions in Section 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 Section 1512(c)(1), which covered evidence-spoliation, to Section 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 Section 1512(c)(2) consistently with its plain text and structure. First, Section 1512(c) aimed at closing a perceived “loophole” in Section 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, Section 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 Section 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 809-810. Second, no substantive inference is reasonably drawn from the fact that the title of Section 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 Section 1512(c), “Tampering with a record or otherwise impeding an official proceeding.” Pub. L. No. 107-204, § 1102, 116 Stat. 807 (emphasis added; capitalization altered). Section 1512’s title is more limited simply because Congress did not amend the pre-existing title when it added the two prohibitions in Section 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. The Court should not adopt the outlier construction reflected in *United States v. Miller*.

The Defendant ignores the authorities discussed above, which are analyzed in the many decisions of this Court’s judges adopting the government’s reading of the statute. *See supra* p. 4 (citing cases). Instead, he urges this Court to adopt the reasoning of *United States v. Miller*, No. 21-cr-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022) (Nichols, J.), the sole decision in which a judge of this Court has construed Section 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 *15.¹ *Miller*’s outlier reasoning is unpersuasive for several reasons.

Focusing on the word “otherwise” in Section 1512(c)(2), Judge Nichols in *Miller* identified “three possible readings” of Section 1512(c)(2). 2022 WL 823070, at *6. First, Section 1512(c)(2) could serve as a “clean break” from Section 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 Section 1512(c)(2) to mean “in a different way or manner” is “inconsistent” with

¹ The government has moved for reconsideration in *Miller*. That motion remains pending.

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). 2022 WL 823070, at *7. Second, *Miller* hypothesized that Section 1512(c)(1) could “provide[] examples of conduct that violates” Section 1512(c)(2). 2022 WL 823070, at *8. Third, *Miller* stated that Section 1512(c)(2) could be interpreted as a “residual clause” for Section 1512(c)(1), such that both provisions are linked by the document-destruction and evidence-tampering “conduct pr[o]scribed by” Section 1512(c)(1). 2022 WL 823070, at *9. After considering Section 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 Section 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. 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).

Under these standards, the rule of lenity is plainly “inapplicable” here. *Puma*, 2022 WL 823079, at *12 n.4. For the reasons set forth above, Congress made clear in Section 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 Section 1512(c) but a defendant who threatens to use force against the officers conducting that proceeding escapes criminal liability under the statute. Not only does the rule of lenity not require such an outcome, but such an application loses 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). Confirming the absence of ambiguity – serious, grievous, or otherwise – is that despite Section 1512(c)(2)’s nearly 20-year existence, no other judge has found ambiguity in Section 1512(c)(2), including, again, numerous judges on this Court considering the same law and materially identical facts. *See supra* p. 4.

None of the grounds identified by Judge Nichols in *Miller* for finding “serious ambiguity,” 2022 WL 823079, at *15, withstands scrutiny. *Miller* stated that the government’s reading either “ignores” that the word “otherwise” is defined with reference to “something else” (namely Section 1512(c)(1)) or fails to “give meaning” to the term “otherwise.” 2022 WL 823079, at *7. That is incorrect. Far from suggesting that Section 1512(c)(2) is “wholly untethered to” Section 1512(c)(1), *id.*, under the government’s reading, the word “otherwise” in Section 1512(c)(2) indicates that Section 1512(c)(2) targets obstructive conduct in a manner “other” than the evidence tampering or document destruction that is covered in Section 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 Section 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 Section 1512(c)(1)’s scope encompasses document destruction or evidence tampering that corruptly obstructs an official proceeding, while Section 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, Section 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 Section 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.” *Beatty*, 556 U.S. at 860. And, in any event, interpreting the interplay of Sections 1512(c)(1) and 1512(c)(2) in this way does not

foreclose a defendant from arguing that his conduct falls outside Section 1512(c)(2)’s scope because his document destruction or evidence concealment is prohibited and punishable only under Section 1512(c)(1). A defendant prevailing on such a theory may be securing a Pyrrhic victory – where success leads to reindictment under Section 1512(c)(1) – but those practical considerations provide no reason to depart from the plain meaning of Section 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 Section 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 Section 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 Section 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 Section 924(e)(2)(B)(ii) at issue in *Begay* – “namely, the four example crimes,” 553 U.S. at 147 – is “absent” in Section 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 Section 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 Section 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 Section 924(e)(2)(B)(ii) as intending to encompass crimes “similar” to the examples. *Id.* at 143-144. 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 Section 1512(c)(2). The Supreme Court held in *Begay* that Section 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 Section 1512(c)(2). In the nearly 20 years between Congress's enactment of Section 1512(c)(2) and *Miller*, no reported cases adopted the document-only requirement urged by Hale, and for good reason. That interpretation would just give rise to unnecessarily complex questions about what sort of conduct qualifies as “taking some action with respect to a document” in order to obstruct an official proceeding. *See supra* p. 8. It would give rise to more ambiguity than it purports to avoid.

Both before and after the ruling in the *Miller* case, judges on this Court have rejected a document-focused interpretation of Section 1512(c)(2). In *United States v. Sandlin*, No. 21-cr-88, 2021 WL 5865006 (D.D.C. Dec. 10, 2021), the Honorable Dabney L. Friedrich found that Section 1512(c)(2)'s terms are “expansive and seemingly encompass all sorts of actions that affect or interfere with official proceedings” and determined that the use of the word “otherwise” in Section 1512(c)(2) “clarifies” that it “prohibits obstruction by means *other than* document destruction.” *Id.* at *5-*6. She did not view the Supreme Court's decision in *Begay* as altering that conclusion, because *Begay* rested on the ACCA's different statutory language and history. *Id.* at *6. Judge Friedrich also rejected the defendant's reliance on *Yates v. United States*, 574 U.S. 528 (2015) (plurality opinion). *Sandlin*, 2021 WL 5865006, at *6-*8. Finally, Judge Friedrich concluded that, although a plain-text construction of Section 1512(c)(2) creates “substantial overlap” with other provisions in Section 1512 and Chapter 73, it does not create “intolerable overlap.” *Id.* at *7-*8 (citing *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)) (emphasis omitted).

Decisions from other judges on this Court before *Miller* followed suit. For example, in

United States v. Caldwell, No. 21-cr-28, 2021 WL 6062718 (D.D.C. Dec. 20, 2021), the Honorable Amit P. Mehta concluded that Section 1512(c)(2) is not “limited” to conduct “affecting the integrity or availability of evidence in a proceeding.” *Id.* at *11 (brackets and internal quotation marks omitted); *see id.* at *11-*19 (addressing Section 1512(c)(2)’s text and structure, *Begay*, and *Yates*). In *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891 (Dec. 21, 2021), the Honorable James E. Boasberg found persuasive the analysis in *Sandlin* and *Caldwell*. *See id.* at *11. In *United States v. Nordean*, 21-cr-175, 2021 WL 6134595 (D.D.C. Dec. 28, 2021), the Honorable Timothy J. Kelly reasoned that an interpretation of Section 1512(c)(2) limiting it to “impairment of evidence” could not “be squared with” Section 1512(c)(2)’s “statutory text or structure.” *Id.* at *6; *see id.* at *6-*9 (addressing *Yates* and superfluity concerns). And in *United States v. Montgomery*, 21-cr-46, 2021 WL 6134591 (D.D.C. Dec. 28, 2021), the Honorable Randolph D. Moss reached the same conclusion following an extended discussion of Section 1512(c)’s text, structure, and legislative history, as well as the *Begay* and *Yates* decisions. *Id.* at *10-*18; *see also United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.) (reaching the same conclusion on the scope of Section 1512(c)(2)); *United States v. Grider*, 21-cr-22, 2022 WL 392307, at *5-*6 (D.D.C. Feb. 9, 2022) (Kollar-Kotelly, J.) (same).

Following Judge Nichols’s decision in *Miller*, two judges on this Court have disagreed with the *Miller* analysis. In denying a defendant’s post-trial motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, Judge Friedrich indicated that she was “not inclined to reconsider” her ruling in *Sandlin* and described her points of disagreement with *Miller*. *United States v. Reffitt*, 21-cr-32, Trial Tr. 1502-05 (Mar. 8, 2022) (attached as Exhibit A). And in *United States v. Puma*, 21-cr-454, 2022 WL 823079 (D.D.C. Mar 19, 2022), the Honorable Paul J. Friedman concluded that the word “otherwise” in Section 1512(c)(2) “clarifies” that a defendant

violates that section “through ‘obstruction by means *other than* document destruction.’” *Id.* at *12 (quoting *Mostofsky*, 2022 WL 6049891, at *11). In reaching that conclusion, Judge Friedman rejected *Miller*’s “premise that any ‘genuine ambiguity persist[s],’” *id.* at *12 n.4 (quoting Mem. Op. at 7), and therefore found the rule of lenity “inapplicable,” *id.* This Court should reach the same conclusion.

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

Even if *Miller*’s interpretation of Section 1512(c)(2)’s scope were correct (though it is not) dismissal of Count Two in full is improper under Rules 7 and 12 of the Federal Rules of Criminal Procedure.

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

Rule 12 permits a party to raise in a pretrial motion “any defense, objection, or request that the court can determine *without a trial on the merits*.” Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 “does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds” unless the government “has made a full proffer of evidence”

or the parties have agreed to a “stipulated record,” *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005)—neither of which has occurred here. Indeed, “[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn’t authorize its disposition before trial.” *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.).

Although the defendant in *Miller* styled his challenge to Section 1512(c)(2)’s scope as an attack on the indictment’s validity, the scope of the conduct covered under Section 1512(c)(2) is distinct from whether Count Three in *Miller* adequately states a violation of Section 1512(c)(2).² In *Miller*, Count Three of the indictment put the defendant in *Miller* on notice as to the charges against which he must defend himself, while also encompassing both the broader theory that a defendant violates Section 1512(c)(2) through any corrupt conduct that “obstructs, impedes, or influences” an official proceeding *and* the narrower theory that a defendant must “have taken some action with respect to a document,” 2022 WL 823070, at *15, in order to violate Section 1512(c)(2). Judge Nichols’s conclusion that only the narrower theory is a viable basis for conviction should not result in dismissal of the count charging a violation of Section 1512(c)(2); instead, Judge Nichols would properly enforce that limitation by permitting conviction on that basis alone. *See United States v. Ali*, 885 F.Supp.2d 17, 33 (D.D.C. 2012) (limiting the government’s aiding and abetting theory under 18 U.S.C. § 1651 to acts of piracy committed while the defendant was on the high seas but not dismissing the count), *reversed in part by* 718 F.3d 929, 941 (D.C. Cir. 2013) (disagreeing with the district court’s limitation on aiding and abetting liability

² Although Miller argued that the indictment must contain “some allegation” that his conduct “undermined an official proceeding’s ‘truth-finding function through actions impairing the integrity and availability of evidence,’” *United States v. Miller*, No. 21-cr-119, ECF 59, at 7, Judge Nichols’s ruling does not appear to announce a new rule that his narrowed interpretation of Section 1512(c)(2)’s scope creates a new offense *element* that must be alleged in an indictment.

under Section 1651). Critically, cases involving successful challenges by defendants concerning whether their *conduct*—and not merely the allegations against them—falls within the scope of the charged statute arise not under Rule 12 but following trials that establish the evidentiary record necessary to determine precisely what the defendant’s conduct entailed. *See, e.g., Marinello v. United States*, 138 S. Ct. 1101, 1105 (2018) (considering scope of 26 U.S.C. § 7212(a) following defendant’s conviction at trial); *Yates*, 574 U.S. at 534-35 (plurality opinion) (considering scope of the phrase “tangible object” in 18 U.S.C. § 1519 following defendant’s conviction at trial); *Aguilar*, 515 U.S. at 597 (considering scope of omnibus clause in 18 U.S.C. § 1503 following the defendant’s conviction at trial).

It is clear why that is so. Even assuming the Judge Nichols’s interpretation of Section 1512(c)(2) were correct, and that the government therefore must prove “Miller took some action with respect to a document, record, or other object in order to corruptly obstruct, impede[,] or influence Congress’s certification of the electoral vote,” 2022 WL 823070, at *15, no court could ascertain whether a defendant’s conduct meets that test until after a trial, at which the government is not limited to the specific allegations in the indictment. And at trial, the government could prove that the Certification proceeding “operates through a deliberate and legally prescribed assessment of ballots, lists, certificates, and, potentially, written objections.” *Miller* Supp. Br. at 41. For example, evidence would show Congress had before it boxes carried into the House chamber at the beginning of the Joint Session that contained “certificates of votes from the electors of all 50 states plus the District of Columbia.” *Reffitt, supra*, Trial Tr. at 1064 (Mar. 4, 2022) (testimony of the general counsel to the Secretary of the United States Senate) (attached as Exhibit B). Evidence would further show that, as rioters began to breach the restricted area around the Capitol building and grounds on January 6, 2021, legislators were evacuated from the House and Senate chambers,

and the staff for the Secretary of the United States Senate “took the ballot boxes and other paraphernalia of the proceeding” out of the chamber “to maintain custody of the ballots and make sure nothing happen[ed] to them.” *Id.* at 1072.

Additional evidence could establish that a defendant’s conduct had the “natural and probable effect,” *Aguilar*, 515 U.S. at 599 (internal quotation marks omitted), of destroying or imperiling the ballots and “other paraphernalia” from the Certification proceeding. Although the government does not anticipate presenting evidence that the Defendant envisioned placing or in fact placed hands on a document or record connected to the Certification proceeding, his entry into the Capitol building, including participating a confrontation with U.S. Capitol Police Officer in the Crypt, as well as his parading through the Rotunda calling for “Nancy” to “Come Out and Play” contributed to the chaos that led to the evacuation of lawmakers, the entrance of a Capitol police officer with a “very long, very large long gun” onto the Senate floor, and the scramble to remove the sealed electoral ballots to safety. *Reffitt, supra*, Trial Tr. at 1071-72. In that respect, the Defendant here “took” many “action[s]” with respect to Congress’s consideration of documents and records central to the Certification proceeding and thereby corruptly obstructed and impeded that Certification proceeding, including blocking lawmakers from considering such documents and records. In acting to thwart the commencement and operation of an official proceeding that involved such documents, the evidence will establish that the defendant in this case violated Section 1512(c)(2) even under an interpretation of Section 1512(c)(2) that requires “some nexus to tangible evidence,” *Singleton*, 2006 WL 1984467, at *3, or some “conduct in relation to a tangible object,” *Hutcherson*, 2006 WL 270019, at *2; or that the defendant “have taken some action with respect to a document, record, or other object” to obstruct an official proceeding, *Miller*, 2022 WL 823070, at *15.

CONCLUSION

For the foregoing reasons, the Court should not dismiss Count Two.

Respectfully submitted,

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