

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 21-cr-24 (EGS)
	:	
ROBERT GIESWEIN,	:	
	:	
Defendant.	:	

**UNITED STATES’ OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS OBSTRUCTION CHARGE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully submits this opposition to the defendant’s Motion to Dismiss Obstruction Charge (Count One). (ECF 60; hereinafter “Mot.”). The defendant seeks to have this Court find that Congress’s certification of the Electoral College—a Joint Session of Congress mandated by the Constitution—does not qualify as an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2). Second, the defendant suggests that there is something Constitutionally infirm about Congress’s use of the term “corruptly” when applied to the defendant’s unlawful efforts to obstruct, influence, and impede Congress’s certification of the vote on January 6, 2021. Both arguments fail, and the defendant’s motion should be denied.

Contrary to the defendant’s arguments, Congress’s certification of the Electoral College vote as set out in the Constitution and federal statute is plainly a “proceeding before the Congress.” 18 U.S.C. § 1515(a)(1)(B). As required by the United States Code, a Joint Session of Congress is to convene and may not be “dissolved” until a “result [is] declared”—the certification of the Presidential election. 3 U.S.C. §§ 15-16. This solemn process, mandated by the Constitution, requires no further formalism to be considered an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2).

Likewise, the statute's use of "corruptly" establishes the required criminal Rubicon, and in his actions on January 6, the defendant stormed past it. That is, under the obstruction statute, the action to "obstruct[], influence[], or impede[]" Congress must be taken with a wrongful, immoral, depraved, or evil purpose. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("[C]orruptly" is "normally associated with wrongful, immoral, depraved, or evil"). Here, the defendant's wrongful—indeed, independently unlawful—actions to impede the Congressional proceeding are self-evident. As reflected in the charges in the indictment at Counts Two - Six, the defendant's unlawful advance onto Capitol grounds past law enforcement, assaultive conduct against law enforcement outside the Capitol building, entry into the United States Capitol building through a broken window, and continued assaults against law enforcement inside the United States Capitol building each violated multiple federal criminal laws. These corrupt and "independently criminal" actions, taken by the defendant with the intent to obstruct, influence, and impede the certification of a Presidential Election, firmly establish the defendant's criminal culpability. *See United States v. Sandlin*, 21-cr-88 (DLF), at 23-25 (Dec. 10, 2021) ("The indictment in this case alleges obstructive acts that fall on the obviously unlawful side of the line"); *United States v. Caldwell*, 21-cr-28 (APM), at 27 (Dec. 20, 2021) (Defendants' actions were "no mere political protest or trespass;" rather, it "crossed the line to criminal conduct: they 'corruptly' conspired to, and did, 'obstruct, influence, and impede an official proceeding.'").

For the reasons set forth herein, the Court should deny the defendant's motion to dismiss the indictment.

LEGAL STANDARD

A defendant may move to dismiss an indictment or count thereof for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). The "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. Bowdin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The operative 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 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).

Federal Rule of Criminal Procedure 7(c)(1) governs the “Nature and Contents” of an indictment. The rule states, in relevant part, that “[t]he indictment ... must be a plain, concise, and definite written statement of the essential facts constituting the offense charged,” and that “[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.”

ARGUMENT

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

The defendant argues (Mot. 3-30) that Congress’s certification of the Electoral College vote on January 6, 2021 does not qualify as an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2). That argument lacks merit.

A. Background

The Constitution and federal statutory law require that both Houses of Congress meet to certify the results of the Electoral College vote. Two separate provisions in the Constitution mandate that the Vice President while acting as the President of Senate “shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” U.S. Const. art. II, § 1, cl. 3; U.S. Const amend. XII. Under the Electoral Act of 1887, a Joint Session of the Senate and the House of Representatives must meet at “the hour of 1 o’clock

in the afternoon” on “the sixth day of January succeeding every meeting of the electors.” 3 U.S.C. § 15. Section 15 details the steps to be followed: the President of the Senate opens the votes, hands them to two tellers from each House, ensures the votes are properly counted, and then opens the floor for written objections, which must be signed “by at least one Senator and one Member of the House of Representatives.” *Id.* The President of the Senate is empowered to “preserve order” during the Joint Session. 3 U.S.C. § 18. Upon a properly made objection, the Senate and House of Representatives withdraw to consider the objection; each Senator and Representative “may speak to such objection . . . five minutes, and not more than once.” 3 U.S.C. § 17. The Electoral Act, which specifies where within the chamber Members of Congress are to sit, requires that the Joint Session “not be dissolved until the count of electoral votes shall be completed and the result declared.” 3 U.S.C. § 16.

Far from a “ministerial act” (Mot. 3), 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. It is the Joint Session of Congress that then decides whether to count those certified lists or certificates in conformity with the Electoral Count Act. 3 U.S.C. § 15; *see* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1659 (2002) (Under the Electoral Count Act, “the President-elect is not elected by ‘We the People’ on election day, or even by the electors on the day they cast their votes, but by the joint convention of the Senate and House of Representatives on the day the electoral votes are formally counted”). 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 reached a verdict, the Joint Session cannot “be dissolved” until it has “declared” a “result.” 3 U.S.C. § 16. This Constitutionally-mandated process determines the official tally of the Electoral College vote and has, in the past, resulted in the rejection of certain votes for President. *See, e.g.,* Kesavan, 80 N.C.L.Rev. at 1687 (explaining that three votes from the State of Georgia were not counted during the electoral count of 1873).

As described in more detail herein, the Joint Session to determine the next President of the United States is an “official proceeding.” Nothing in the history the defendant describes suggests a different conclusion.

B. The plain text of the statute compels the conclusion that the certification of the Electoral College vote is a proceeding before the Congress

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

- (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
- (B) *a proceeding before the Congress*;
- (C) a proceeding before a Federal Government agency which is authorized by law; or
- (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce[.]

18 U.S.C. § 1515(a)(1) (emphasis added).

The certification of the Electoral College vote as set out in the Constitution and federal statute is a “proceeding before the Congress,” 18 U.S.C. § 1515(a)(1)(B), and, therefore, an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2). *See Sandlin, supra*, at 5-9 (concluding that the Certification of the Electoral College vote qualifies as an official proceeding for purposes of Section 1512(c)(2)); *see also United States v. Mostofsky*, 21-cr-138 (JEB), at 21-22 (Dec. 21, 2021) (same). That conclusion flows principally from the obstruction statute’s plain text. *See Caldwell, supra*, at 8-9 (“A straightforward reading of [the] definition [of ‘official proceeding’] easily reaches the Certification of the Electoral College vote.”).

As noted by the Ninth Circuit, understanding what qualifies as an official proceeding “depends heavily on the meaning of the word ‘proceeding’” because “official proceeding” is defined “somewhat circularly” as, among other things, a congressional “proceeding.” *See United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013). The certification of the Electoral College vote constitutes a “proceeding” under any interpretation of that term. In its broadest and most “general sense,” a proceeding refers to “[t]he carrying on of an action or series of actions; action, course of action; conduct, behavior.” *Id.* (quoting “Proceeding,” Oxford English Dictionary, *available at* <http://www.oed.com>). The defendant does not meaningfully contend that the certification of the Electoral College vote, which involves a detailed “series of actions” outlining how the vote is opened, counted, potentially objected to, and ultimately certified, is not a proceeding—and indeed an official proceeding—under that broad definition. And there is good reason to construe “proceeding” as used in 18 U.S.C. § 1515 broadly. Section 1515’s text encompasses not only congressional proceedings, but judicial proceedings, grand jury proceedings, any legally authorized proceedings before federal government agencies, and proceedings “involving the business of insurance.” 18 U.S.C. § 1515(a)(1); *see* S. Rep. No. 97-

532, at 17 (1982) (noting that the “term ‘official proceeding’” in the obstruction statute is “defined broadly”).

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

the Agency for International Development qualified as a “proceeding” for purposes of 18 U.S.C. § 1505) (emphasis added).

The formality involved in the certification of the Electoral College vote places it “comfortably within the category” of an official proceeding. *See Perez*, 575 F.3d at 169; *see also Caldwell, supra*, at 13-14 (“[T]he Certification of the Electoral College vote exudes ‘formality’ and involves a ‘formal convocation’ of Congress”). Few events are as solemn and formal as a Joint Session of the Congress. That is particularly true for the certification of the Electoral College vote, which is expressly mandated under the Constitution and federal statute. Required by law to begin at 1 p.m. on the January 6 following a presidential election, the certification of the Electoral College vote is both a “hearing” and “business conducted by . . . [an] official body.” *See Black’s Law Dictionary, supra*. The Vice President, as the President of the Senate, serves as the “presiding officer” over a proceeding that counts votes cast by Electors throughout the country in presidential election. 3 U.S.C. § 15. As in a courtroom, Members may object, which in turn causes the Senate and House of Representatives to “withdraw” to their respective chambers so each House can render “its decision” on the objection. *Id.* And just as the judge and parties occupy specific locations in a courtroom, so too do the Members within the “Hall.” *See* 3 U.S.C. § 16 (President of the Senate is in the Speaker’s chair; the Speaker “immediately upon his left”; the Senators “in the body of the Hall” to the right of the “presiding officer”; the Representatives “in the body of the Hall not provided for the Senators”; various other individuals “at the Clerk’s desk,” “in front of the Clerk’s desk,” or “upon each side of the Speaker’s platform”). The Electoral College vote certification, moreover, must terminate with a decision: no recess is permitted until the “the count of electoral votes” is “completed,” and the “result declared.” *Id.* In short, the certification of the Electoral College vote is a “proceeding before the Congress.” *See* 18 U.S.C. § 1515(a)(1)(B).

Other textual features do not alter that straightforward reading. The defendant argues (Mot. 10-11) that the adjective “official” and the preposition “before” limits the definitions in Section 1515(a)(1) to some kind of hearing before a “tribunal,” *i.e.*, a “quasi-judicial” proceeding. As an initial matter, it is difficult to imagine a proceeding more “official” than a constitutionally and statutorily prescribed Joint Session of Congress. Whatever the merits of the defendant’s argument for other provisions in Section 1515(a)(1), moreover, it finds no textual support when applied to Section 1515(a)(1)(B), which speaks broadly of a proceeding “before the Congress.” Had Congress wanted to import a definition that more closely resembled a quasi-adjudicative setting, it needed look only a few provisions away to 18 U.S.C. § 1505, which criminalizes obstruction of “the due and proper administration of the law under which any pending proceeding is being had” by a federal department or agency. 18 U.S.C. § 1505; *see Caldwell, supra*, at 10. And to the extent that “before” refers to “some formal convocation of the agency in which parties are directed to appear,” *see United States v. Young*, 916 F.3d 368, 384 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 140 S. Ct. 113 (2019), the certification of the Electoral College vote involves a “formal convocation” of Congress to assess the Electoral College vote and “declare[]” the “result” of the presidential election, 3 U.S.C. § 16. The “attendance” of none other than the Vice President of the United States—as President of the Senate—is required. 3 U.S.C. § 15.

A comparison with Section 1505 points out another flaw in the defendant’s argument. The defendant argues (Mot. 15) that “a proceeding before the Congress” in 18 U.S.C. § 1515(a)(1)(B) should encompass only a formal congressional investigation or inquiry. But Section 1505 expressly limits obstruction in Section 1505 to “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). Thus, Congress had available to it in a

neighboring provision (*i.e.*, Section 1505) language that would limit the obstruction prohibition to congressional investigations, but it did not apply that same language in the text of Section 1515(a)(1)(B). Instead, Congress enacted broader language—“a proceeding before the Congress”—to cover a broader range of proceedings than the “inquir[ies] and investigation[s]” envisioned and identified in Section 1505. That broader definition in Section 1515 includes the Electoral College vote certification.¹

The defendant also contends (Mot. 14) that Section 1512’s title—“Tampering with a witness, victim, or an informant”—implies that the “official proceeding” definition in Section 1515 does not cover the Electoral College vote certification. Even putting aside the defendant’s selective invocation of the statutory title—he urges this Court to adopt the reasoning in cases like *Ermoian* holding that an “official proceeding” does not include a law enforcement investigation even though the title’s reference to “an informant” would clearly suggest otherwise—his 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).² Finally, as discussed below, the specific statutory

¹ Defendant sows confusion when he attempts to apply the canon of *noscitur a sociis* to interpret the term “official proceeding.” (Mot. 12 – 13). The Court in *Yates v. United States* correctly applied *noscitur a sociis* (*i.e.*, a word is known by the company it keeps) when it sought to interpret two specific terms followed by a generic term when applying the obstruction statute at 18 U.S.C. § 1519. 574 U.S. 528 (2015) (analyzing the objects of destruction that could be covered by the phrase “record, document, or tangible object.”) The canon has no application when applied to the definition of “official proceeding” as set out in 18 U.S.C. § 1515, which sets forth four separate and independent definitions. The canon contributes nothing to the interpretation of “a proceeding before the Congress.”

² The defendant’s invocation of the Justice Manual similarly has no bearing on the Court’s analysis. The Justice Manual (which was previously known as the United States Attorneys Manual, or USAM) “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.*

provision under which the defendant 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. *United States v. Petruk*, 781 F.3d 438, 447 (8th Cir. 2015) (quoting *United States v. Volpendesto*, 746 F.3d 273, 286 (7th Cir. 2104)).

Finally, the defendant’s narrowed reading of “proceeding before the Congress” in 18 U.S.C. § 1515(a)(1)(B)—in essence, importing an extra-textual “quasi-judicial” requirement—would undercut the broad statute that Congress enacted. In the defendant’s view, for example, an individual who threatened a Senator and a Representative with injury unless each agreed to object to the Electoral College certification—even though each Member knew that the objections were frivolous—would not amount to obstruction. Nor would it appear to cover an individual who paid one of the tellers—who are appointed by the Senate and House of Representatives to handle the Electoral College votes—to falsify or destroy votes. The defendant does not explain which congressional proceedings—short, perhaps, of impeachment³—would fall within the ambit of those proceedings where Congress is “acting as a tribunal.” (Mot. 16). That cramped 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 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.

Caceras, 440 U.S. 741, 754 (1979) (IRS manual does not confer any substantive rights on taxpayers but is instead only an internal statement of penalty policy and philosophy).

³ The defendant does not grapple with the anomalous result that follows from his argument: an investigation by a committee—not even a full House, let alone both Houses—would qualify as a “proceeding before the Congress,” but a constitutionally required Joint Session to resolve disputes over and ultimately certify the result of a presidential election would not.

The defendant’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.” Far from a “ministerial act” or “ministerial duty of tabulation” (Mot. 3), 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 reached a verdict, the Joint Session cannot “be dissolved” until it has “declared” a “result.” 3 U.S.C. § 16.

C. The plain text of the statute resolves the inquiry, and the legislative history supports this conclusion.

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 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); *see also United States v. De Bruhl-Daniels*, 491 F. Supp. 3d 237, 251-52 (S.D. Tex. 2020) (declining to consider Section 1512’s legislative history in rejecting the claim that the statute was limited to document destruction). 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.

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 *Moskal 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 Section 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).

Ignoring the plain language of the statute, the defendant offers up a tour of legislative history *en route* to asserting (incorrectly) that Congress did not intend to criminalize obstruction of an official proceeding “prior to the institution of such an official proceeding.” Mot. 20-23. The defendant is wrong. For one, as the defendant notes (Mot. 25), Congress considered, but did not ultimately enact, a narrower “official proceeding” definition that would have applied only to “the exercise of a legislative power of inquiry.” Ultimately, however, Congress adopted the broader definition in Section 1515(a)(1)(B) that encompasses any “proceeding before the Congress.” The defendant does not explain why Congress would have rejected a narrower definition, used broader language, yet nonetheless still have intended the term to take on the narrower definition. *Cf. See Russello v. United States*, 464 U.S. 16, 23 (1983) (refraining from concluding that “differing language in the two subsections has the same meaning in each”).

Moreover, since its inception in 1982, Section 1512 has included statutory text to the effect that “an official proceeding need not be pending or about to be instituted at the time of the offense.” *See Pub. Law 97-291*, 1512(d)(1) as currently codified at 18 U.S.C. § 1512(f)(1). Congress explained its rationale in no uncertain terms: “the Committee felt that this increases the scope of the section by expanding the galaxy of witnesses and victims the protections of its language is meant to embrace [...] intimidation offenses are particularly insidious and do violence

to traditional notions of justice because no one can be convicted of a crime which is not reported.” S. Rep. 97-532 at *19. In fact, the obstruction statute’s legislative history explicitly stated that Congress intended “official proceeding” to reach “broadly,” and to encompass “the rare type of conduct that is the product of the inventive criminal mind.” S. Rep. No. 97-532, at 17-18 (“The term ‘official proceeding’ is defined broadly.”).⁴

II. Section 1512(c)(2)’s text, structure, and history confirm that its prohibition on obstructive conduct covers the defendant’s conduct on January 6, 2021.

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). *See Sandlin, supra*, at 9-16 (concluding that Section 1512(c)(2) covers conduct similar to that alleged in this case); *See Caldwell, supra*, at 37 (explaining that Section 1512(c)(2) “expands the obstructive acts that are unlawful beyond the acts of evidence spoliation made unlawful by [S]ection 1512(c)(1)”).

A. Section 1512(c) covers conduct beyond tampering with a document or object.

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

⁴ Whatever the defendant may have divined in interpreting “official proceeding” by comparing the 1971 Commission Report to the Victim and Witness Act of 1982 is rendered moot by the fact that Congress promulgated an entirely new definition of “official proceeding” that includes the broad definition “proceeding before the Congress.”

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, 446-47 (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, 127-28 (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, 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, *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).

Section 1512(c)(2) also applies to the defendant’s alleged conduct, which involved trespassing into the restricted Capitol area, confronting and assaulting law enforcement officers, and penetrating into the U.S. Capitol building to prevent a Joint Session of Congress from certifying the results of the 2020 Presidential election. In so doing, the defendant 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, reading Section 1512(c)(2) as limited only 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”).⁵ 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*, 574 U.S. at 541 n.4 (plurality opinion) (Section 1512(c)(1) provides a “broad ban on evidence-spoliation”) (internal quotation marks omitted). By

⁵ Similarly complex questions would dog the defendant’s proposed limitation of Section 1512(c)(2) to “some conduct that impairs the integrity and availability of some *evidence*” Mot. 33 (emphasis in original), and William Barr’s proposed limitation to “any conduct . . . directed at undermining a proceeding’s truth-finding function through actions impairing the integrity and availability of evidence,” *id.* at 31 (quoting William Barr, *Mueller’s “Obstruction” Theory*, June 8, 2018) (emphasis omitted). Even if either such limitation applied, however, the alleged conduct in this case would satisfy it. *See infra*, Section III.

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 the Section 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”).

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 Caldwell, supra*, at 36 – 39 (discussing Section 1512(c)(2)’s function among other obstruction statutes). Instead, the catch-all in Section 1512(c)(2) serves to capture “known unknowns.” *See 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, 168-70 (3d Cir. 2013) (removing gold coins from safe-deposit box); *United States v. Frank*, 354 F.3d 910, 916-19 (8th Cir. 2004) (removing car to avoid seizure); *United States v. Lefkowitz*, 125 F.3d 608, 619-20 (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, 597-98 (9th Cir. 1982) (warning suspect about impending search warrant to prevent discovery of heroin); *Howard*, 569 F.2d at 1333-34 (attempting to sell grand jury transcripts). No court, however, 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 catch-all 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, 1366-67 (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 of proceeding—but Section 1512(c)(2) does. *See infra* at 18-22 (describing “nexus” requirement in Section 1512(c)(2); 38-39 (citing cases holding that no such nexus requirement applies to Section 1519). 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.]

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.”).

B. Legislative history supports Section 1512(c)(2)’s broad application.

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.*, 525

U.S. at 438; *see Whiting*, 563 U.S. at 599 (“Congress’s authoritative statement is the statutory text, not the legislative history.”) (internal quotation marks omitted); *see also De Bruhl-Daniels*, 491 F. Supp. 3d at 251-52 (declining to consider Section 1512’s legislative history in rejecting the claim that the statute was limited to document destruction). 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.

When Congress in 1982 originally enacted Section 1512, that legislation did not include what is now Section 1512(c). *See* Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, 1249-50. 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, for example, 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). At a minimum, 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,” § 1512, thus encompassed the pre-existing provisions aimed at a defendant’s obstructive conduct directed toward another person,⁶ but did not 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 “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*

⁶ *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).

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 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.

III. Section 1512(c)(2) is not unconstitutionally vague.

A statute is impermissibly vague if it either (1) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or (2) “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)); *see also United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). The statute at issue here is neither.

A. The term “corruptly” in Section 1512(c)(2) applies to actions taken with wrongful, immoral, depraved, or evil intent to obstruct, influence, or impede the proceeding.

Relying on the D.C. Circuit in *Poindexter*, 951 F.2d 369, the defendant argues that the term “corruptly” as used in 18 U.S.C. § 1512(c)(2) is unconstitutionally vague because it fails to provide notice as to what it means to “otherwise obstruct, influence, or impede” a proceeding before Congress “corruptly.” (Mot. 35-36). The defendant goes on to suggest that the *Poindexter* court held that the term “corruptly” is unconstitutional *per se* – “no matter how [it] is used.” (Mot. 38-39). The defendant has it wrong. *See Sandlin, supra*, at 18-26 (rejecting unconstitutional vagueness challenge to Section 1512(c)(2)); *see Caldwell, supra*, at 18-25 (same); *see also Mostofsky, supra*, at 23-24 (same).

First, the court in *Poindexter* did not hold the term was vague *per se*; instead, it concluded the term was vague as applied to Poindexter's conduct of making false statements to Congress. *See* 951 F.2d at 378-80. Second, *Poindexter*'s analysis was confined to 18 U.S.C. § 1505, and other courts have "decline[d] to extend *Poindexter* to another section of the obstruction-of-justice statutes." *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998); *see also United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996) (rejecting vagueness challenge to "corruptly" under 18 U.S.C. § 1512(b) premised on rationale from *Poindexter*). Finally, *Poindexter* predated *Arthur Andersen*, where the Supreme Court "did not imply the term ["corruptly"] was too vague." *Edwards*, 869 F.3d at 502.

Here, the defendant intended to obstruct, influence, or impede the Congressional proceeding, and, in fact, did so. The defendant's actions to obstruct the proceeding were not lawful acts of protest, but rather were "wrongful, immoral, depraved, or evil" acts, *i.e.*, the unlawful invasion of the Capitol and its grounds and multiple assaults on federal law enforcement deployed to protect the Capitol and its occupants on January 6, 2021. *See United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011) (to act "corruptly" is to act "with an improper purpose and to engage in conduct knowingly and dishonestly with specific intent to subvert, impede, or obstruct"); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (same); *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013) (upholding jury instruction defining "corruptly" as acting with "consciousness of wrongdoing"); *United States v. Matthews*, 505 F.3d 698, 706 (7th Cir. 2007) (upholding instruction defining "corruptly" as acting "with the purpose of wrongfully impeding the due administration of justice"); Seventh Circuit Pattern Criminal Jury Instruction for § 1512 ("A person acts 'corruptly' if he or she acts with the purpose of wrongfully impeding the due administration of justice.").

Consistent with its ordinary meaning, to act “wrongfully” means to act in a manner that is immoral, depraved, or evil. It also includes acting unlawfully. An individual who acts unlawfully with intent to obstruct a congressional proceeding violates Section 1512(c)(2).

The terms “wrongful” or “wrongfully,” which are not defined by statute, are “given their common or popular meanings.” *North*, 910 F.2d at 881. Acting wrongfully principally denotes acting “[i]n a manner contrary to the principles of justice,” or “unfairly.” *Wrongfully*, Oxford English Dictionary, available at <http://www.oed.com>; see Black’s Law Dictionary, *Wrongful* (11th ed. 2019) (“[c]haracterized by unfairness or injustice”); *Masters v. United States*, 42 App. D.C. 350, 356 (D.C. 1914) (defining wrongfully as “in a manner contrary to the moral law or to justice”) (internal quotation marks omitted). In the context of the term “corruptly” as used in Section 1512, the term “wrongful” is akin to “immoral, depraved, or evil.” *Andersen*, 544 U.S. at 705. Stated otherwise, acting wrongfully for purposes of Section 1512 means acting with “consciousness of wrongdoing.” *Id.* at 706.

The wrongfulness component of “corruptly” ensures that Section 1512(c)(2) “reaches only” those who have committed felony obstruction. *Id.* Absent evidence establishing that an individual acted with consciousness of wrongdoing, conduct that is “by itself innocuous”—for example, a friend urging another friend to invoke a Fifth Amendment right against self-incrimination or one spouse persuading another not to disclose marital confidences, see *Trammel v. United States*, 445 U.S. 40, 53 (1980)—is not “corrupt” for purposes of Section 1512. See *Andersen*, 544 U.S. at 703-04. The same is true of an attorney who seeks to persuade her client to withhold documents covered by the attorney-client privilege from investigative agents even though the attorney “surely intend[s]” that her client not disclose those documents to investigators. See *id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)). The consciousness-of-wrongdoing

standard excludes from liability under Section 1512(c) conduct that may be obstructive but “not inherently malign.” *Id.*; *cf. Matthews*, 505 F.3d at 706 (noting that jury instructions’ inclusion of “the word ‘wrongfully’ in the definition of ‘corruptly’” and the instructions’ “criminalizing only the act of ‘wrongfully impeding the due administration of justice’ . . . directed the jury to convict only those who have no legal right to impede justice”).

That limitation is particularly important where, as here, the defendant is alleged to have obstructed a congressional proceeding. *See North*, 910 F.2d at 882. For example, it would not amount to wrongful—and thus corrupt—conduct for an individual to peacefully urge the chairperson of a congressional committee convened to investigate some alleged wrongdoing to stop that investigation on the ground that the investigation “is really designed to embarrass the President (or a Senator), not to investigate wrongdoing.” *Id.* Similarly, a political activist might contact his representative and inform the representative that unless she stops spending her time pursuing a certain investigation rather than some other legislative endeavor, the activist’s group will oppose her reelection. The activist is “endeavoring to impede or obstruct the investigation,” but is not doing so wrongfully, and thus not acting “corruptly” for purposes of Section 1512(c)(2). *See id.* For the same reasons, individuals engaged in protest or speech opposing a government action may intend to obstruct a particular congressional proceeding, but they would not violate Section 1512(c)(2) unless they acted in a manner that was “wrongful, immoral, depraved, or evil.” *Andersen*, 544 U.S. at 705.

Acting “wrongfully” includes acting “[c]ontrary to law” or “unlawful[ly].” Black’s Law Dictionary, *Wrongful* (11th ed. 2019); *accord Wrongfully*, Oxford English Dictionary, available at <http://www.oed.com> (“[i]n an illegal or unlawful manner; contrary to the law; unlawfully; illegally”). Within the context of Section 1512(c)(2), acting wrongfully can include conduct that

evinces the specific intent to obstruct an official proceeding while also independently violating the law. But the term “unlawfully” “is not the full equivalent of wrongfully” because conduct may be unlawful “without being contrary to good morals or to natural justice.” *Masters*, 42 App. D.C. at 356 (emphasis and internal quotation marks omitted). Just as obstructive conduct only violates the obstruction statute when it has “a relationship in time, causation, or logic” to the official proceeding, *see United States v. Aguilar*, 515 U.S. 593, 599 (1995), so too must an individual’s unlawful conduct bear a relationship to the proceeding he intends to obstruct. Jaywalking or speeding on the way to the U.S. Capitol violates the law, but such unlawful conduct would be too attenuated to establish wrongfulness or consciousness of wrongdoing simply because the individual in question intends to obstruct a congressional proceeding upon arrival. Moreover, “wrongful” carries a “much broader and stronger meaning” than “unlawful.” *Masters*, 42 App. D.C. at 356 (internal quotation marks omitted). Thus, an individual whose conduct amounts to a “public welfare offense[]”—an offense “not in the nature of positive aggressions or invasions,” but “in the nature of neglect where the law requires care,” that does not cause “direct or immediate injury to person or property,” and for which “penalties commonly are relatively small,” *Morissette v. United States*, 342 U.S. 246, 255-56 (1952)—may act unlawfully without acting wrongfully.

Whatever “[c]lose cases can be imagined” under Section 1512(c)(2), *see United States v. Williams*, 553 U.S. 285, 306 (2008), the defendant’s is not among them. The defendant did not, for example, submit to a security screening and enter a government building only to make brief speeches or sing in a “spectacle” that ““lasted approximately two to four minutes.”” *United States v. Bronstein*, 849 F.3d 1101, 1105 (D.C. Cir. 2017) (defendants prosecuted for “mak[ing] a harangue or oration” in the Supreme Court in violation of 40 U.S.C. § 6134). He instead rushed past law enforcement, trampled barricades, assaulted law enforcement, and entered the restricted

Capitol building where lawmakers, who should have been certifying the results of the presidential election, had been forced to take shelter from the threat posed by the defendant and others. Those actions describe an effort to corruptly obstruct a congressional proceeding.

B. The term “corruptly” in Section 1512(c)(2) does not require alleging and proving that a defendant acted with intent to secure an unlawful advantage for himself or another.

The defendant argues (Mot. 39-41) that “corruptly” as used in Section 1512(c)(2) requires proof that he sought to obtain an improper benefit for himself or someone else. That argument is flawed.

Section 1512(c)(2) provides that “[w]hoever corruptly . . . obstructs, influences, or impedes any official proceeding” has committed a crime. A person violates that statute when, acting with the requisite *mens rea*, he engages in conduct that obstructs a specific congressional proceeding. *See* 18 U.S.C. § 1512(c)(2); § 1515(a)(1)(B). The *mens rea* identified in Section 1512(c)(2), “corruptly,” requires proof beyond a reasonable doubt that the defendant acted (1) with intent to obstruct, impede, or influence; and (2) wrongfully, *i.e.*, with consciousness of wrongdoing. It does not require, however, establishing that a defendant acted with intent to obtain an unlawful benefit or advantage for himself or another. But if that interpretation were applied here, the allegations in the First Superseding Indictment would suffice.

Since Section 1512(c)(2)’s enactment in 2002, courts have consistently interpreted “corruptly” in Section 1512(c)(2) to require intent to obstruct and wrongfulness. *See United States v. Delgado*, 984 F.3d 435, 452 (5th Cir. 2021); *Friske*, 640 F.3d at 1291 (to act “corruptly” is to act “with an improper purpose” and “with the specific intent to subvert, impede or obstruct”) (quoting *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007)); *Gordon*, 710 F.3d at 1151 (same); *Watters*, 717 F.3d at 735 (upholding jury instruction defining “corruptly” as acting with “consciousness of wrongdoing”) (internal quotation marks omitted); *United States v. Mann*,

701 F.3d 274, 307 (8th Cir. 2012) (same). Courts interpreting the neighboring provision, Section 1512(c)(1), have reached similar conclusions. *See United States v. Bedoy*, 827 F.3d 495, 510 (5th Cir. 2016) (a “proper definition” of “corruptly” for purposes of Section 1512(c)(1) is to act “knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice”) (internal quotation marks omitted); *Matthews*, 505 F.3d at 705 (upholding instruction defining “[c]orruptly” in Section 1512(c)(1) as acting “with the purpose of wrongfully impeding the due administration of justice”); *cf.* Seventh Circuit Pattern Criminal Jury Instruction for § 1512(c) (“A person acts ‘corruptly’ if he or she acts with the purpose of wrongfully impeding the due administration of justice.”).

By contrast, no court interpreting Section 1512(c) appears to have understood “corruptly” to require proof that the defendant acted with the intent to secure an unlawful advantage or benefit either for one’s self or for another. Courts instead have adopted that interpretation when interpreting “corruptly” as used in 26 U.S.C. § 7212(a), which prohibits “corruptly . . . imped[ing]” federal tax law. *See United States v. Floyd*, 740 F.3d 22, 31 (1st Cir. 2014) (noting a “consensus among the courts of appeals that ‘corruptly’” in Section 7212(a) “means acting with an intent to procure an unlawful benefit either for the actor or for some other person,” and citing cases); *see also United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998) (adopting that interpretation of “corruptly” in Section 7212(a)); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) (same); *United States v. Reeves*, 752 F.2d 995, 1001 (5th Cir. 1985) (same)). As used in Section 7212(a), the specific intent to obtain an unlawful benefit or advantage requires that the defendant knows both that his obstructive conduct is “directed at efforts to bring about a particular advantage such as impeding the collection of one’s taxes, the taxes of another, or the auditing of one’s or

another's tax records," *Reeves*, 752 F.2d at 998, and that the advantage is contrary to law, *see Floyd*, 740 F.3d at 31 ("unlawful benefit").

The federal courts' uniform adoption of a more specific and rigorous definition of "corruptly" in Section 7212(a) accords with other *mens rea* requirements in the criminal tax context. For example, in *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court held that in context of tax offenses, the term "willfully" requires proof "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201. That enhanced mental requirement reflected the fact that "the complexity of the tax laws" may make it "difficult for the average citizen to know and comprehend the extent of the[ir] duties and obligations" under those laws, and thus *mens rea* requirements in criminal tax statutes should be interpreted more stringently than in other contexts. *Id.* at 199-200. A similar approach informs the interpretation of "corruptly" under Section 7212(a).

The meaning of "corruptly" in Section 7212(a) is more specific and demanding than the meaning of that term as applied in other, more general obstruction statutes—including Section 1512(c)(2). For example, Congress has defined "corruptly" in 18 U.S.C. § 1505 (prohibiting corrupt endeavors to obstruct agency proceedings and congressional inquiries and investigations) to mean "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b). The Supreme Court defined the term "corruptly" in Section 1512(b) (prohibiting the corrupt persuasion of another person to withhold information from an "official proceeding") as "wrongful, immoral, depraved, or evil." *Andersen*, 544 U.S. at 705. In the context of the general obstruction-of-justice statute, 18 U.S.C. § 1503, courts have defined the term "corruptly" to mean "knowingly and dishonestly," *United States v. Richardson*,

676 F.3d 491, 508 (5th Cir. 2012) (internal quotation marks omitted); “with an improper or evil motive,” *Frank*, 354 F.3d at 922 (internal quotation marks omitted); or, simply, “with the purpose of obstructing justice,” *United States v. Cueto*, 151 F.3d 620, 630 (7th Cir. 1998) (internal quotation marks omitted). And as noted above, “corruptly” in Section 1512(c) similarly refers to acting “with the purpose of wrongfully impeding” the proceeding. Seventh Circuit Pattern Criminal Jury Instruction for § 1512(c).⁷

The D.C. Circuit’s decisions in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam), *withdrawn and superseded in part by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam), and *Poindexter*, 951 F.2d 369, which both discussed the term “corruptly” in 18 U.S.C. § 1505, do not alter this analysis. In *North*, the D.C. Circuit rejected the defendant’s claim that the jury instructions improperly limited his ability to advance a defense that he was authorized by superiors to engage in the charged conduct of obstructing Congress. 910 F.2d at 881. In so doing, the court found no error given one instruction that identified the applicable intent— “[s]pecific intent requires that a person not only acted knowingly, voluntarily and deliberately, but that he acted with a bad purpose, having decided in his mind what he would do and that he then

⁷ The term “corruptly” as used in the obstruction-of-justice statutes also differs from the use of that term in bribery statutes such as 18 U.S.C. § 201 and 18 U.S.C. § 666. “Given the equation of bribery with a *quid pro quo*, ‘corruptly’ in the context of the bribery statute would appear to mean that the defendant accepts money with the specific intent of performing an official act in return.” *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) (addressing conspiracy to violate Section 201); *see United States v. Suhl*, 885 F.3d 1106, 1114 n.5 (8th Cir. 2018) (upholding jury instruction in Section 666 case that defined “corruptly” as acting “with the intent that something of value be given or offered to influence an agent of the state in connection with the agent’s official duties” (quoting *United States v. Jennings*, 160 F.3d 1006, 1019 (4th Cir. 1998))). At least some courts have applied the unlawful-benefit interpretation to “corruptly” in bribery cases. *See, e.g., United States v. Dorri*, 15 F.3d 888, 890 (9th Cir. 1994) (upholding jury instruction in Section 201 prosecution that defined “corruptly” as an act that is “done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method with a hope or expectation of either financial gain or other benefit to one’s self or to another”) (internal quotation marks omitted).

did something prohibited”—even though no instruction independently defined “corruptly.” *Id.* at 884 (internal quotation marks omitted). In canvassing different potential definitions of “corruptly,” the court observed that a “‘corrupt’ intent” could “also” include “‘the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others.’” *Id.* at 881-82 (quoting Ballentine’s Law Dictionary 276 (3d ed. 1969)). But the D.C. Circuit ultimately declined to adopt a definition because “corruptly” as used in Section 1505 was “to be understood according to [its] common meaning[], necessitating no specific definitional instructions.” *Id.* at 884.

In *Poindexter*, the D.C. Circuit suggested that “corruptly” as used in Section 1505 was “vague . . . in the absence of some narrowing gloss.” 951 F.2d at 378. After surveying legislative history (including the “[o]rigins” of Sections 1503 and 1505) and case law interpreting Section 1505, the court reversed the defendant’s conviction because Section 1505 failed to provide “constitutionally required notice” that the defendant’s conduct—making false and misleading statements to Congress—fell within Section 1505’s scope. *Id.* at 380, 386. The court declined to adopt as a standard that “‘corruptly’ means that in acting, the defendant aimed to obtain an ‘improper advantage for [himself] or someone else inconsistent with official duty and rights of others.’” *Id.* at 385-86 (quoting *North*, 910 F.2d at 881-82).

Congress’s response to *Poindexter* further confirms that the term “corruptly” when applied to congressional obstruction does not require proof of an intent to secure an improper advantage or benefit. In 1996, Congress enacted the definitional provision in 18 U.S.C. § 1515(b) for the limited purpose of overruling *Poindexter*. See 142 Cong. Rec. 25,468 (1996) (statement of Sen. Bryan); *United States v. Kanchanalak*, 37 F. Supp. 2d 1, 3-4 (D.D.C. 1999). Rather than require proof that a defendant intended to obtain an improper advantage or benefit for himself or someone

else, Congress defined “corruptly” for purposes of Section 1505 as “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” 18 U.S.C. § 1515(b). That definition does not apply to Section 1512(c)(2)—which was enacted six years after Congress added the definitional provision in Section 1515(b). Nevertheless, if Congress declined to define “corruptly” with reference to an “intent to secure an improper advantage or benefit” for purposes of the congressional obstruction provision in Section 1505, there is no reason to presume that Congress intended to apply that interpretation to the term “corruptly” as used in the congressional obstruction prohibition in Section 1512(c)(2). Instead, Congress’s decision to leave “corruptly” undefined in Section 1512(c)(2) suggests they intended for the term to take on its common meaning, and not the narrower definition applied in criminal tax prosecutions.⁸

Even if the term “corruptly” in Section 1512(c)(2) were interpreted to require proving that a defendant acted with intent to secure an improper advantage or benefit for himself or another, the allegations in the First Superseding Indictment would suffice. An indictment is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of the charge against

⁸ Justice Scalia’s concurring opinion in *United States v. Aguilar*, 515 U.S. 593 (1995), also does not suggest a different view. In discussing the interpretation of “corruptly” in Section 1503, Justice Scalia cited *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979), in which the Tenth Circuit surveyed potential definitions of that term, including one that denoted “an act done with an intent to give some advantage [is] inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.” *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring) (quoting *Ogle*, 613 F.2d at 238). But in *Ogle*, the Tenth Circuit concluded that the term “corruptly” “does not superimpose a special and additional element on the offense such as a desire to undermine the moral character of a juror,” but instead that “an endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly.” 613 F.2d at 238-39. The government’s proposed definition of “corruptly” in Section 1512(c)(2), which requires proving the defendant’s consciousness of wrongdoing and specific intent to impede an official proceeding, is more stringent than the interpretation of “corruptly” approved in *Ogle*.

which he must defend.” *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (internal quotation marks omitted); *United States v. Haldeman*, 559 F.2d 31, 123 (D.C. Cir. 1976) (en banc) (per curiam) (“The validity of alleging the elements of an offense in the language of the statute is, of course, well established.”). “While detailed allegations might well have been required under common-law pleading rules, . . . they surely are not contemplated by Rule 7(c)(1), which provides that an indictment ‘shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.’” *Resendiz-Ponce*, 549 U.S. at 110; *see also United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (“[T]he validity of an indictment ‘is not a question of whether it could have been more definite and certain.’”). Tracking the relevant statutory language, the Indictment charges that the defendant attempted to, and did, “corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress[.]” ECF 3 at *1. The Indictment then asserts that the defendant did so “by entering and remaining in the United States Capitol without authority, committing an act of civil disorder, and engaging in disorderly and disruptive conduct.” *Id.*

IV. The rule of lenity does not apply.

The defendant’s rule of lenity argument fails for many of the same reasons. The rule of lenity is a canon of “last resort.” *Guedes v. Bureau of Alcohol, Tobacco and Firearms*, 920 F.3d 1, 27-29 (D.C. Cir. 2019). The rule of lenity “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); *see Shular v. United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). There is no grievous ambiguity here. *See Sandlin, supra*, at 18 (rejecting argument that rule of lenity applied to interpretation of Section 1512(c)(2) under similar facts); *See Caldwell, supra*, at 46-47 (same); *see Mostofsky, supra*, at 24-25 (same).

To be sure, prior to the events at the Capitol on January 6, no court appears to have applied Section 1512(c)(2) to conduct precisely akin to the defendant's alleged actions, namely, assaulting law enforcement officers as he forced his way into the Capitol in an effort to halt or delay a congressional proceeding. Even if Section 1512(c)(2)'s application to this case was "not expressly anticipated by Congress," that alone "does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (internal quotation marks and brackets omitted). That is so even if the statute's application in a particular case "reaches 'beyond the principal evil' legislators may have intended or expected to address." *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). And any policy-based suggestion "that the current scheme should be altered," *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 778 (2020), ought to be addressed to Congress, not this Court, *see, e.g., United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

CONCLUSION

For the foregoing reasons, and any additional reasons as may be cited at a hearing on this motion, the government respectfully requests that the defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of this pleading to be served upon defense counsel via the Electronic Case Filing (ECF) system, on December 24, 2021.

By: */s/ Jason McCullough*

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