UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 1:21-cr-00038 (CRC)**
	)	
RICHARD BARNETT	)	
	)	
Defendant.	)	

DEFENDANT'S OPPOSED MOTION TO DISMISS COUNT TWO OF THE SUPERSEDING INDICTMENT FOR FAILURE TO STATE AN OFFENSE

Comes now the Defendant, RICHARD BARNETT, by and through undersigned counsel, and respectfully moves this court to dismiss Count Two of the indictment, along with the accompanying aiding and abetting charge because the Government has failed to state an essential element of the offense. Mr. Barnett supports his request as follows:

I. INTRODUCTION

The government entered a superseding indictment on December 22, 2022 with a substantially changed Count Two that reads as follows:

> On or about January 6, 2021, within the District of Columbia and elsewhere, RICHARD BARNETT, also known as "Bigo Barnett" attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically,
>
> **((Obstruction of an Official Proceeding and Aiding and Abetting,** in violation of Title 18, United States Code, Sections 1512(c)(2) and 2))

1:21-cr-00038-CRC ECF No. 96

The superseding indictment deleted the ECF No. 19 indictment language: "by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct," while specifying the official proceeding as "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."

At the Pretrial Conference conducted on January 4, 2023, the Court allowed that this motion to dismiss should be submitted by January 5, 2023.

In this case, Mr. Barnett was additionally indicted for alleged violations of 18 U.S.C. § 1752(a)(2) Disorderly and Disruptive Conduct in a Restricted Building; 40 U.S.C. § 5104(e)(2)(C) Entering and Remaining in Certain Rooms in the Capitol Building; 40 U.S.C. § 5104(e)(2)(D) Disorderly Conduct in a Capitol Building; 40 U.S.C. § 5104(e)(2)(G) Parading, Demonstrating, or Picketing in a Capitol Building, 18 U.S.C. § 641 Theft of Government Property (an empty envelop he bled on and left $.25 for) and now the added charge of 18 U.S.C. Section 231(a)(3) Civil Disorder.

II. STATUTORY BACKGROUND AND HISTORY

A. Section 1512(c)(2)'s Structure and Legislative History

1. § 1512(c) provides: "Whoever 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 . . . shall be fined . . . or imprisoned. . .

§1512(c)(2)

2. § 1515 defines the term "official proceeding" as used in Section 1512(c).

"[T]he term 'official proceeding' means

> (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 . . . .

§ 1515(a)(1)

3. Congress subsequently amended § 1515 to provide:

> As used in section 1505, the term '**corruptly**' means 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.

§ 1515(b)

B. Section 1512 Falls Under Chapter 73, Obstruction of Justice.

Section 1512 is titled "Witness Tampering." Section 1512(c) was a change after the Enron scandal that was specifically designed to close a loophole related to acts preventing use of documents as evidence.

C. Congress Created Section 1512(c) to Fill a Loophole That Existed at the Time of the Enron Case.

1. The Senate Report for the Sarbanes-Oxley Act identified the statutory loophole as the requirement that the person damaging documents had to have been directed by defendants.

> Indeed, even in the current Andersen case, prosecutors have been forced to use the "witness tampering" statute, 18 U.S.C. § 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves. Although prosecutors have been able to bring charges thus far in the case, in a case with a single person doing the shredding, this legal hurdle might present an insurmountable bar to a successful prosecution.

S. Rep. No. 107–146, p. 7 (2002).

2. Senator Lott introduced § 1512(c) on July 10, 2002. He said the amendment's "purpose" was "[t]o deter fraud and abuse by corporate executives" as happened in the Enron case. 148 Cong. Rec. S6542 (daily ed. July 10, 2002). Then-Senator Joseph Biden referred to the new subsection (c) as "making it a crime for document shredding." *Id*. at S6546. Senator Hatch made similar statements regarding the focus of the proposed new subsection on documents and document shredding, as well as its ties to the then-recent Enron scandal. Senator Hatch said, "the amendment strengthens an existing federal offense that is often used to prosecute document shredding and

other forms of obstruction of justice," noting that current law "does not prohibit an act of destruction committed by a defendant acting alone." *Id*. at S6550.

D. President Bush Defined *Corruptly* for the Executive Branch in Scienter Terms Upon Signing H.R. 3763[1] and Indicated the Law was to Stop Business Fraud and Corruption

> To ensure that **no infringement on the constitutional right to petition the Government for redress of grievances occurs in the enforcement of section 1512(c)** of title 18 of the U.S. Code, enacted by [§] 1102 of the Act, which among other things prohibits corruptly influencing any official proceeding, the executive branch shall construe the term "corruptly" in section 1512(c)(2) *as requiring proof of a criminal state of mind on the part of the defendant.*
>
> GEORGE W. BUSH
> THE WHITE HOUSE,
> July 30, 2002. (Emphasis added)

1. The President stated that the Sarbanes-Oxley Act and sections were to protect investors and improve corporate disclosures related to financial matters. "The Act adopts tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders." *Id*.[2]

2. The Congressional debate about the need for passage of the Act with Section 1512(c) to hold corporations accountable and to close loopholes regarding evidence alteration or destruction,[3] combined with President Bush's statements about Section 1512(c) were heavily covered in media because of the Enron case. In addition to legacy news coverage, the topic was

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[1] Statement issued by the White House Press Secretary on July 30, 2002 and found at https://georgewbush-whitehouse.archives.gov/news/releases/2002/07/20020730-10.html (last visited September 20, 2022).

[2] Refers to the Sarbanes-Oxley Act of 2002 (*Public Company Accounting Reform and Investor Protection Act*), Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 15 U.S.C. and 18 U.S.C. including Section 1512(c) changes).

[3] Statements in support of the Sarbanes-Oxley Act of 2002 included "we must crack down on the corporate criminals and rebuild America's confidence in our markets .... [T]he best way to do that is to punish the corporate wrongdoers and to punish them harshly." 148 CONG. REC. H5464 (daily ed. July 25, 2002) (statement of Representative Sensenbrenner).

covered in opinion pieces and even advertising, "A television commercial for Heineken beer, broadcast during the 2002 holiday season, vilified Enron's document destruction as being anathema to having been 'good this year.'"[4] Heineken showed what looked to be snow falling outside an apartment building, and then panned inside a top-level apartment, where men in white shirts were shredding documents and tossing confetti shreds outside. *Id*.[5]

3. There is no apparent evidence of any intent by the Congress or President Bush in respectively passing and signing § 1512(c) that it would ever serve as a catch-all for interrupting a Congressional hearing, the passage of legislation, or committee work sessions.

MEMORANDUM OF LAW

III. LEGAL STANDARD

Federal Rule of Criminal Procedure 12 provides that a "party may raise by 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). Before trial, a criminal defendant may move to dismiss a count of the indictment based on a "defect in the indictment." Fed. R. Crim. P. 12(b)(3)(B). Defects can include "lack of specificity" and "failure to state an offense." *Id*. A "failure to state an offense" argument includes constitutional challenges to the statute creating the charged offenses. See *United States v. Stone*, 394 F.Supp.3d 1, 7 (D.D.C. 2019); *United States v. Seuss*, 474 F.2d 385, 387 n.2 (1st Cir. 1973).

When considering a motion to dismiss an indictment, a court must assume the truth of the

[4] Daniel A. Shtob, "Corruption of a Term: The Problematic Nature of 18 U.S.C. §1512(c), the New Federal Obstruction of Justice Provision," 57 Vanderbilt Law Review 1429, 1432 (2019). Available at: https://scholarship.law.vanderbilt.edu/vlr/vol57/iss4/6

[5] The old 2002 commercial 'Let It Snow" can be found on YouTube: https://www.youtube.com/watch?v=UZ9n1x9YjjY (last visited September 21, 2022).

factual allegations in the indictment. *United States v. Ballestas*, 795 F.3d 138, 149 (D.C. Cir. Where an indictment is defective for failing to state an offense, a pretrial motion to dismiss the defective indictment is warranted, and the **Court must dismiss an indictment which fails to state all essential elements of the crime charged**. Fed. R. Crim. P. 12 (b)(3)(B)(v). (Emphasis added). The indictment must be plain, concise, and clear as to the facts of the offense charged. Fed. R. Crim. P. 7(c)(1). The indictment must provide the defendant sufficient detail to allow him to prepare a defense, to defend against a subsequent prosecution of the same offense, and to ensure that he is prosecuted upon facts presented to the Grand Jury." *United States v. Apodaca*, 275 F. Supp. 3d 123, 153 (D.D.C. 2017) ((citing *Russell v. United States*, 369 U.S. 749 (1962); *Stirone v. United States*, 361 U.S. 212 (1960)). In addition, to be sufficient, an indictment must "fairly inform[] [the] defendant of the charge against which he must defend, and [] enable[] [him] to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974).

When considering a challenge to the indictment, "a district court is limited to reviewing the face of the indictment;" *United States v. Sunia*, 643 F.Supp.2d 51, 60 (D.D.C. 2009) "The operative question is whether [those] allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed." *United States v. Sanford, Ltd.*, 859 F.Supp.2d 102, 107 (D.D.C. 2012).

"Due process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 268 (1997).

A criminal statute is unconstitutionally vague if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *United*

States v. Bronstein, 849 F.3d 1101, 1106 (D.C. Cir. 2017) ((quoting *Johnson v. United States*, 135 S.Ct 2551, 2556 (2015)). "The void-for-vagueness doctrine . . . guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes. And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Notice requires the person to be able to know what acts are criminal. "It is an elementary principal of criminal pleading, that where the defendant of an offence . . .includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)

The Department of Justice itself recently summarized and stated that § 1512 constitutes "a broad prohibition against tampering with a witness, victim or informant. It proscribes conduct intended to illegitimately affect the presentation of evidence in Federal proceedings or the communication of information to Federal law enforcement officers."[6]

Significantly, the Supreme Court held in *United States v. Aguilar*, 515 U.S. 593, 599 (1995), "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." In *Aguilar*, the Court held that a violation of "§ 1503 require[s] ... a 'nexus' between the obstructive act and the proceeding." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-708 (2005). While *Aguilar* analyzed § 1503, the Second Circuit held that "§ 1512(c)(2) incorporates a 'nexus requirement' as articulated in Aguilar." *United States*

[6] Dep't of Justice, United States Attorneys' Manual, Title 9, Criminal Resource Manual 1729 (2020).

v. Reich, 479 F.3d 179, 186 (2d Cir. 2007). See also *United States v. Gray*, 642 F.3d 371, 376 (2d Cir. 2011) where "§ 1512(c)(2), which proscribes corruptly obstructing a judicial proceeding or attempting to do so, requires proof of a nexus between the defendant's conduct and the proceeding."

IV. ARGUMENT

Section 1512(c) falls under Chapter 73 of Title 18 titled "Obstruction of Justice." See generally 18 U.S.C. §§ 1501–1521. As the Ninth Circuit has carefully considered and recognized, based on the plain language of the statute, an offense under § 1512(c) does not prohibit the obstruction of every governmental function; it only prohibits the obstruction of proceedings such as a hearing that takes place before a tribunal. See *United States v. Ermoian*, 752 F.3d 1165, 1171 (9th Cir. 2013). As noted above, Count Two of the Indictment charges that Mr. Barnett obstructed an "official proceeding," with that proceeding now being identified in the indictment rather than only verbal comment. As set forth below, Mr. Barnett argues that the Department of Justice (DOJ) has taken § 1512(c)(2) out of the context of the parent chapter that is titled *Witness Tampering*, where § 1512(c)(2) was designed specifically for document tampering. Based on legislative intent, § 1512(c) was designed for one purpose—to prevent a party from altering, tampering, destroying, or otherwise making evidence unavailable. All judges to date in this District assert that the joint session of Congress held on January 6 as directed by the U.S. Constitution is a "proceeding." With the exception of one judge, all others in this District allow any act that allegedly obstructs, delays, or interferes with a Congressional proceeding to be criminally prosecuted under § 1512(c)(2).

As cited above, the law is supposed to be clear enough about what is a crime to laypersons. The Congressional Research Service prepared a report in 2014 for Congress about several

Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities. [7] The report addresses some distinctions in Section 1512's subsections, but makes clear all fall under the umbrella of Witness Tampering. The CRS report describes Section 1512 by stating that it applies to the obstruction of federal proceedings—judicial, congressional, or executive.

> It consists of four somewhat overlapping crimes: use of force or the threat of the use of force to prevent the production of evidence (18 U.S.C. 1512(a)); use of deception or corruption or intimidation to prevent the production of evidence (18 U.S.C. 1512(b)); destruction or concealment of evidence or attempts to do so (18 U.S.C. 1512(c)); and witness harassment to prevent the production of evidence (18 U.S.C. 1512(d)). The offenses have similar, but not identical, objectives and distinctive elements of knowledge and intent. Section 1512 also contains freestanding provisions that apply to one or more of the offenses within the section. These deal with affirmative defenses (18 U.S.C. 1512(e)); jurisdictional issues (18 U.S.C. 1512(f),(g),(h)); venue (18 U.S.C. 1512(i)); sentencing (18 U.S.C. 1512(j)); and conspiracy (18 U.S.C. 1512(k)).

CRS Report "Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities" at 1.

Nowhere does the CRS report, developed by experts to address the statutes in the report, indicate that Section 1512(c)(2) can be applied to any acts besides those involving the destruction or concealment of evidence.

A. Count Two of the Indictment Fails to State an Offense Because it Charges Mr. Barnett With a Non-Existent Offense as one of the Elements.

The superseding indictment specified the proceeding title for what was supposedly obstructed as an element of the crime. Two cases in this District for Section 1512(c)(2) are on appeal in the D.C. Circuit because a judge dismissed the charges, but the issues are not about the proceeding aspect and involve whether the statute requires document tampering. The Eleventh Circuit held:

> An indictment charging a defendant with a violation of 18 U.S.C. § 1512(c),

[7] CRS, "Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities," RL34303 · VERSION 9, updated April 2014.

> obstruction of justice, **must identify the official proceeding that was the object of the obstruction**. Even if the indictment mirrors the elements of the offense in the statute, the indictment must specifically identify the particular proceeding that the government will prove was the object of the obstruction.

United States v. Schmitz, 634 F.3d 1247 (11th Cir. 2011) (Emphasis added).

The superseding indictment added a name for the alleged proceeding, calling it "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. **There can be no crime because there is no such proceeding.** Congress was not certifying anything under the Twelfth Amendment or the Electoral Count Act on January 6, 2021. The only places where certification occurs is at the states. The Twelfth Amendment and 3 U.S.C. §§ 15-18 make clear that certificates arrive from states, with each state's elections certified in December by the legislature, governor, or secretary of state depending on state legislation for the responsible entity. There is counting, there is tallying, and there is a declaration of the winner for President and Vice President.

Because Mr. Barnett is being accused of a crime he could not have physically aided or committed given the lack of a specified, actual proceeding that could be obstructed as a required element of the crime, Count Two must be dismissed.

The indictment still lacks specificity for how Mr. Barnett obstructed the proceeding if the named proceeding existed. He never saw Congress or was in its vicinity when he was pushed into the Capitol. Congress had left the building by the time Mr. Barnett was pushed in. Mr. Barnett cannot have interred with the resumption of any proceeding because he left the Capitol not long after entry. He cannot have obstructed an unidentified proceeding by sitting at a staff aide's chair unless the unidentified proceeding was to take place in that office and occupation of a chair now violates Section 1512(c)(2).

American jurisprudence does not allow prosecution for non-existent crimes. Words have meaning and alleging a non-crime requires the defendant be acquitted or pardoned as applicable. In an example, "Plaintiff in error was convicted of the alleged crime of forgery in the second degree, as a second offense. There is no such crime known to the penal law of the State of New York." *Carlesi v. New York*, 233 U.S. 51, 52 (1914). The convicted felon received a Presidential pardon. *Carlesi* held that upon the pardon the Plaintiff in error could not have a statute written after the fact and then used against him when the pardon made him innocent. In yet another case example: "[T]he arrest here was rested on a charge of 'suspicion of housebreaking.' There is no such crime. Hence the arrest is illegal. And it is illegal even if we read the charge as one for the crime of house-breaking." *Bell v. United States*, 254 F.2d 82, 88 (D.C. Cir. 1958). Words in charging documents have meaning.

> [T]he defendant was indicted for perjury on a preliminary examination before a judge of the District Court of the United States, and it was held by Mr. Justice Story that the indictment could not be maintained, saying: 'The statute does not punish every perjury, but only a perjury done in *a court of the United States*. Plainly, therefore, it is of the very essence of the offence that it should be charged as committed in such court
>
> .

Todd v. United States, 158 U.S. 278, 284 (1895)

The Court and prosecution cannot invent intent of the Grand Jury that charged a crime that nobody could have committed. The jurisprudence on this is rooted in our founding and history.

> It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute.'" *United States* v. *Lacher*, 134 U.S. 624; Endlich on the Interpretation of Statutes, sec. 329, 2d ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280.

Todd v. United States, 158 U.S. 278, 279 (1895)

Hess provides a clear summary of specifics required in the indictment and defect:

> The general, and, with few exceptions, of which the present is not one, the universal rule, on this subject, is, that all the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective. **No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication**, and the charge must be made directly and not inferentially, or by way of recital.

United States v. Hess, 124 U.S. 483, 486 (1888).

Despite request, we have thus far been denied the instructions and testimony at the Grand Jury. Regardless, it is apparent there was misinformation afoot on December 21, 2022. A reading of the face of the indictment shows Count Two lacks specifics and is wholly defective. The Count is written as a legal conclusion without any facts related to the elements of the crime charged, the specific name of the proceeding is a non-existent one under the law referenced.

Other cases that show the requirements for accuracy and specificity to allow for a defense make clear that in addition to missing an element of the crime, an indictment is defective in failing to describe the circumstances of the offense.[8] While no act is specified, there is no act that can obstruct a non-existent proceeding. Mr. Barnett cannot defend against an alleged unknown act against a non-existent proceeding. When it comes to preparing a defense, the indictment only says that Mr. Barnett at some time and at some unknown place, with no intent, did something where he attempted to and did obstruct, impede, or influence a non-existent proceeding. He cannot have committed any crime under Count Two.

Finally, this Circuit requires specificity in counts. In this case, the lack of specificity cannot be cured by a bill of particulars, or by the government verbally telling this Court, as it did on January 4th, the facts it intends as the specifics that are not in the indictment. The government can

[8] *United States* v. *Carll*, 105 U.S. 611; *Evans* v. *United States*, 153 U.S. 584; *United States* v. *Hess*, 124 U.S. 483; *Keck* v. *United States*, 172 U.S. 434; *Moore* v. *United States*, 160 U.S. 268; *Bartell* v. *United States*, 227 U.S. 427; *Martin* v. *United States*, 168 F. 198.

then change its mind and add different facts at trial. The binding set of facts that the government will prove in a charge must be in the indictment. The Circuit said a bill of particulars is insufficient to cure a defective indictment that lacks fact - as is the case here. And the Court said a bill of particulars cannot be used when an omitted fact is a material element of the offense. *United States v. Thomas*, 444 F.2d 919, 923 (D.C. Cir. 1971).

Where Mr. Barnett obstructed, how he obstructed, whom he aided, and what proceeding was obstructed are multiple missing material facts in Count 2.

> In such circumstances, to permit the omission to be cured by a bill of particulars would be to allow the grand jury to indict with one crime in mind and to allow the U.S. Attorney to prosecute by producing evidence of a different crime. Such imprecision in a grand jury indictment cannot be permitted. To do so would make it possible for the U.S. Attorney to usurp the function of the grand jury by supplying an essential element of the crime and, in many cases, would violate due process by failing to give the accused fair notice of the charge he must meet.

United States v. Thomas, 444 F.2d 919, 923 (D.C. Cir. 1971)

B. Count Two of the Indictment Fails to State an Offense Because it Charges Mr. Barnett With Conduct Outside the Reach of § 1512(c)(2), and Unconstitutionally Applies the Law.

1. <u>18 U.S.C. § 1512(c) Requires Evidence in the Form of a Document.</u>

18 U.S.C. § 1512(c), of which § 1512(c)(2) is a part, was enacted by the Sarbanes-Oxley Act as an amendment to 18 U.S.C. § 1512. Sarbanes-Oxley Act, Pub. L. No. 107-204, § 1102, 116. Stat. 807 (2002). As outlined *supra* in Section II, C-D, neither Congress nor the President enacted § 1512(c) to be used for anything other than document tampering as related to evidence. The Department of Justice's own interpretation of § 1512 is reflected in its Criminal Resource Manual. *See* Criminal Resource Manual, CRM 1729, Department of Justice that states § 1512 "proscribes conduct intended to illegitimately affect the presentation of evidence in Federal proceedings. . . ." The President, DOJ and Congress never distinguished before January 6, 2021 that any part of 1512(c) was not tied to interfering with the presentation of evidence by witnesses

or by tangible items like documents. A review of other parts of § 1512 shows it involves actions against people, whereas § 1512(c) was added for actions taken by people against documents and tangible evidence. Section 1512(c)(2) may have been ahead of its time in compensating for electronic drives and cloud files. Section 1512 requires action against a witness or evidentiary document. § 1512(c) was enacted to prevent document tampering that would impact evidence required for a proceeding.

Mr. Barnett cannot have violated § 1512 (c)(2) because he was not inside the Capitol Building at 2:20 and obstructed nothing to cause Congress to evacuate its chambers. He is not charged with any action that did or would have impacted a witness's testimony or a document required for evidence by Congress on January 6, 2021 or any future date. § 1512 is not titled "Disrupting Congress." There are misdemeanor crimes for disrupting Congress. 18 U.S.C. § 1752(a)(2) Disorderly and Disruptive Conduct in a Restricted Building and 40 U.S.C. § 5104(e)(2)(D) Disorderly Conduct in a Capitol Building are existing statutes. In Mr. Barnett's case, the DOJ has arbitrarily made those crimes lesser crimes within Section 1512.

Count Two is arbitrary in application - beyond prosecutorial discretion because in 2017 when protestors gathered outside a Senate meeting on replacing the Affordable Care Act, there was no attempted use of § 1512(c). The large group of protestors shouted, blocked hallways, and refused to leave. Over 150 people were arrested and while the majority received minor fines if anything, fifteen protestors were charged with the misdemeanor of disrupting Congress.[9] News reported that proceedings had to stop for over fifteen minutes. Thus, in 2017 the conduct of causing a delay in

[9] https://www.nbcwashington.com/news/local/181-arrested-at-capitol-hearing-during-protests-about-gop-health-care-bill/28737/ (last visited September 21, 2022).

Congressional proceedings that did not involve witness or evidence tampering did not give rise to charges and prosecution under Section 1512(c)(2).

After being pushed and swept inside open doors with crowd flow, Mr. Barnett is recorded on video in the building at 2:47 p.m., well after Congress had evacuated. ECF No. 1-1 at 2; ECF 3-1 at 4. He did not force his way inside and made no threats. Neither is he accused of doing anything to tamper with a witness or evidentiary documents that would be used by Congress on January 6, 2021, or later. A key element of the crime is not charged in that there was no evidence related to documents or files that were tampered with. Section 1512 was never intended to be a catch-all for temporary schedule disruptions in Congress. And corrupt intent is required under Section 1512. President Bush was clear that airing grievances, which in the English language include First Amendment speech, cannot be grounds for use of Section 1512(c).

Because Mr. Barnett did not "tamper" with evidence or documents and he was not accused of such; and had no intent to and the Government cannot show he had any *mens rea* to obstruct any proceeding by tampering with a witness or evidence; and with no specific conduct listed as a material fact in the indictment, the charging is an unconstitutional expansion beyond the reach of § 1512(c)(2). Count Two should be dismissed.

2. <u>The Statute is Unconstitutional in Arbitrary Application</u>.

Count Two provides not a scintilla of information about whom Mr. Barnett aided and abetted, how, and for what. No person can know what will make their actions a crime under Section 1512(c)(2) as applied given that January 6, 2021 cases bootstrap four standard misdemeanors (18 U.S.S. Section 1752 and 40 U.S.C. Section 40) as included lesser offenses or acts that are then alleged as being equal to *mens rea*. The statute is not vague as written - but its interpretation and

application against Mr. Barnett and January 6 defendants appear novel and capricious, and therefore, unconstitutional.

The DOJ, as well as the D.C. U.S. District Court's judges, view and apply Sections 1512(c)(1) and (c)(2) as disjointed, because of the word "otherwise," even though in the English language "otherwise" as used in Section 1512(c)(2) is a conjunctive adverb. Despite Senators stating at the time of enactment circa 2002 that Section 1512(c) closed a loophole for document destruction or tampering, for January 6th cases the legislative intent is ignored. Section 1512(c)(2) is used without any relation to a witness or evidence. Despite every other part of Section 1512 having a purpose to deter a threat to a witness or tangible document or file related to evidence, the Government and District Court judges have decided that Congress buried 1512(c)(2) as a crime for anything that interrupts "the proceeding," where no interference with a witness or evidence is required. There was not a single "witness" on January 6. The Electoral Count Act never once mentions the word "witness.' The Act never once mentions the word 'evidence' as a requirement to ceremoniously count certificates. Because of the above, the statute is being applied unconstitutionally and outside of its design, where anything that interrupts "a proceeding" can be charged as a twenty-year felony.

A judge, U.S. Attorney, or FBI agent can decide and change daily what obstructs a proceeding involving no witness or evidence. A proceeding is now anything involving Congress,

The DOJ did not use Section 1512(c)(2) in 2017 when groups in intervals showed up in the Senate gallery and yelled during the Justice Kavanaugh confirmation hearings, where said hearings were actually "obstructed" and had to stop while members of Code Pink were removed. The DOJ did not use Section 1512(c)(2) when people verbally surrounded and accosted Republican Senators in hallways and by elevators during breaks from the confirmation hearings -

where the locations were off-limits to the public. The DOJ did not use Section 1512(c)(2) when Congresswoman Kyrsten Sinema was accosted by activists while using the restroom. The DOJ did not use Section 1512(c)(2) after gun control activist David Hogg was escorted out of a House Judiciary Committee hearing on June 20, 2022, following an outburst that received over one million views on Twitter within hours of the incident. On January 5 -6, 2021, Ray Epps told people to go inside the capitol, and was at multiple bicycle rack breaches, but he has not been charged.

This is beyond prosecutorial discretion. In application, nobody can tell what acts will be criminal under Section 1512(c)(2), where the DOJ and the D.D.C. say that 1512(c)(2) can be anything that disrupts what they call a "proceeding." According to the DOJ's and D.D.C's interpretation, and current application of Section 1512(c)(2), it is a felony punishable by twenty years in prison to block a Senator's parking space that subsequently causes the Senator to be late for a conference.

This novel and unprecedented application relies on the false idea that Congress buried a catch-all clause to all of Section 1512 in Section 1512(c)(2) where no person can know what conduct violates what part of the law, if any. This makes the law unconstitutional as applied. As a catch-all phrase, Section 1512(c)(2) joins to Section 1512(c)(1) in the English language and as Congress and the President intended in 2002. But as applied, instead of the focus being on witness and evidence tampering (the reasons for the overall statute's existence), the DOJ arbitrary interpretation combined with D.D.C. court-made law as applies to January 6 defendants, has turned Section 1512(c)(2) on its head. Now anything that might interrupt any "proceeding" that is deemed "official" where there is no evidence or witnesses can result in a 20-year felony if DOJ decides to prosecute. The potential reach of this statue is limitless and has no bounds.

In Mr. Barnett's case, the indictment shows that the Government turned trespass and being amidst a loud First Amendment protest into new, unwritten elements for the Section 1512(c) crime that is supposed to be about document tampering. Because the statute is unconstitutional as applied since nobody can know what constitutes criminal activity, and where others similarly situated are not charged equally, Mr. Barnett's Count Two should be dismissed.

3. Under DOJ and The Court's Mistaken Grammatical Interpretation, There Are No Set Elements That Make Up A 1512(C)(2) Crime in Count Two.

A thorough review of the entire statutory context proves that the word "otherwise" was intended by Congress to unite sections 1512(c)(1) and 1512(c)(2). The obvious contextual evidence that counters the Court's usual "plain meaning" determination is § 1512's repeated use of the disjunctive "or" throughout the statute as a way of demarcating plainly separate and independent conduct. In fact, the word "or" is used nine times in 18 U.S.C. § 1512 to create twenty separate and independent methods of obstructing justice. "Or" is used in § 1512(a)(1) to demarcate three separate methods of obstructing justice by murder or attempted murder. Similarly, "or" appears twice in § 1512(a)(2), effectively demarcating seven distinct methods of obstruction through threats or physical force. Congress, unlike in twenty surrounding places in the Witness Tampering statutes, inserted "otherwise" only between subsections (c)(1) and (c)(2) of § 1512(c). Why would Congress, after using "or" to unambiguously demarcate twenty plainly separate and independent methods of obstructing justice, insert the word "otherwise" between subsections (c)(1) and (c)(2) for the exact same purpose? In other words, Congress could have "underscored" that (c)(1) and (c)(2) involve different obstructive conduct by omitting "otherwise" from the statute altogether. Therefore, logically "otherwise" must have been intended by Congress to have a statutory constructive purpose different than, as the Court found, underscoring disjunction between the subsections.

The Section 1512(c)(2) and Section 2 Indictment against Mr. Barnett, if left standing, allow a claim of disorderly conduct and aid to unidentified persons - without any sub-elements and without standards - to be decided based upon the subjective imagination of a jury. The indictment's Count Two eliminates the *mens rea* (i.e., to corruptly intend to obstruct a proceeding) required by Section 1512 . As charged, Count Two allows allegations and interpretation that conduct was disorderly (*actus rea* alone) to result in a guilty conviction for a felony that was enacted to deter the destruction of evidence for a Congressional investigation or court proceeding. Without any showing that the alleged disorderly conduct was intended to obstruct anything, a finding that conduct was disorderly makes Section 1512(c)(2) a strict liability crime. The Government knows that Mr. Barnett did not do anything to stop the debates over Arizona electoral votes. He did not aid anyone in causing Congress to stop its business. Mr. Barnett did not by his short presence around 2:50 p.m. cause Congress to stop its business because Congress had already evacuated. Mr. Barnett did not cause any delay to the restart of the debates over the electoral count because he left the building well before the USCP cleared out the last protestors.

There is no indication as to why Section 1512(c)(2) is being used for January 6 defendants and why it was not used for the more than 150 protestors who shut down a Senate proceeding in 2017 as discussed *supra*. The time in 2017 was about 17 minutes of shutdown versus five and a half hours on January 6, 2021. The amount of shutdown time that can be claimed as disruptive versus obstructive is totally arbitrary in application. Further, the US Capitol Police (USCP) with the House Speaker, Senate leader, and Sergeants-at-Arms determined when Congress members (at their predetermined reduced number due to Covid-19 seating restrictions) would return to recommence the ceremonial business of watching certificates from states be opened and counted. The USCP set the time for security clearing of the expansive building given the exit of the last

protestors and many stray journalists and photographers by around 4:00 p.m.. The USCP's clearing timeline after protestors were all outside is not transparent or discernible, where the USCP with the House and Senate leaders for unknown reasons declared 8:00 p.m. as the time to restart. Allowances for Congress members' and USCP's dinner time and member travel cannot be attributed to alleged conduct by Mr. Barnett since he left the building well before the last protestors were out. Mr. Barnett did not prevent any USCP from executing their security duties. His pushed through the open doors around 2:47 p.m. where he went looking for a rest room did not enable anyone else to stop a meeting that had already been stopped.

Disorderly conduct, that is covered under misdemeanor statutes, now can be used as stand-alone *actus rea* to prove felony Section 1512(c)(2) guilt. Without even showing the required *mens rea* for knowingly being in a restricted area under Section 1752, just a claim of being disorderly without intent to do anything besides protest can be turned into strict liability under Section 1512(c)(2). If Congress wanted to create a law that made it a felony to interrupt a meeting that was not a hearing with witnesses and evidence, it could have written laws different than the misdemeanors already on the books. Because of the above, Mr. Barnett's indictment makes it impossible to defend against Section 1512(c)(2) and Count Two of the Indictment should be dismissed.

4. <u>Misuse of Grammar Allows Misapplication of the Law from What was Intended</u>.

Taking Sections 1512(c)(1) and (c)(2) as not connected would require Section 1512(c)(2) to be a complete, stand-alone sentence with the lead-in "whoever corruptly." It is not. "Otherwise" is used as a conjunctive adverb in thoughtful reading of the entire statute. In Section 1512(c)(2) Congress left open the ability to address other means of interfering with the availability of documents as evidence in a proceeding. In the Enron case, the lack of a "Section 1512(c)" meant

that the document possessor could destroy, shred, tamper, or otherwise make documents disappear. Again, why would Congress delineate--twenty times--separate types of obstructive conduct by using "or," but then insert the word "otherwise" in § 1512(c) for the same purpose? In the rest of the statute, Congress listed very specific acts (murder, kidnapping, etc.) whereas for documents it left open other ways someone trying to obstruct a proceeding could impact them. Nothing indicates Congress intended Section 1512(c)(2) as a placeholder for DOJ and courts to come along and implement their own version of this law.

There are six types of adverbs in the English language: adverbs of time, manner, place, degree, frequency, and conjunction.[10] The first five types are similar in nature, and are used to modify (typically) verbs within their clauses or sentences.[11] The sixth type of adverb is the "conjunctive adverb," which "is an adverb that acts like a conjunction."[12] In § 1512(c)(1), "otherwise" operates as a conjunctive adverb. That "otherwise" in § 1512(c)(1) is a conjunctive adverb is clear. According to a well-respected dictionary: "When used to connect two related clauses, otherwise is usually classified as a conjunctive adverb, which by grammatical tradition should be preceded either by a semicolon or by a period."[13]

A "conjunctive adverb" conjoins and modifies two separate clauses. The difference between "otherwise" the "adverb" and "otherwise" the "conjunctive adverb" is significant. An "adverb" modifies an adjacent word, e.g., "she believed otherwise," "quickly ran," "knocked on the door loudly," "briefly spoke," etc. Conjunctive adverbs, by contrast, do not modify adjacent words; instead, these grammatical renegades relate the entire adverbial clause back to the

[10] https://www.thesaurus.com/e/grammar/types-of-adverbs/ (online thesaurus).
[11] *Id*.
[12] *Id*. A "conjunctive adverb" is sometimes called an "adverbial conjunction."
[13] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th Ed. 2020), https://www.ahdictionary.com/word/search.html?q=otherwise, (Usage note) (emphasis original).

preceding clause, thus modifying, in some respect, the first clause. A conjunctive adverb connects independent clauses and acts as a modifier by using one clause to modify another.[14]

A "conjunctive adverb" is "a word that modifies a whole previous statement." Frederick Crews, The Random House Handbook 403 (6th ed. 1992). Unlike the Government's interpretation, "otherwise" was not used for disjunction where an unregulated catch-all could be applied to Section 1512 in its entirety. Under the Government's interpretation the entirety of Section 1512 could be eliminated and replaced with just Section 1512(c)(2).

Congress's intent in Section 1512(c)(2) was to criminalize obstructive conduct related to documentary-type evidence technically not captured or anticipated under Section 1512 (c)(1); and not to hand prosecutors and courts a sweeping, over-lapping obstruction of justice statute equipped with a 20-year maximum penalty sledgehammer. As the Supreme Court has emphasized "over and over," when "expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank v. Independent Ins. Agents of Amer.*, 508 U.S. 439, 455 (1993) (internal citations omitted).

The current version of § 1512(c) was enacted as part of Sarbanes-Oxley and was intended by Congress to improve the accuracy of corporate disclosures by penalizing those who obstruct justice "by impairing the integrity or availability of records, documents, and other tangible objects." *United States v. Hutcherson*, No. 6:05CR00039, 2006 U.S. Dist. LEXIS 6652, at *6-7 (W.D. Va. Feb. 3, 2006). Accordingly, "the amended § 1512(c) created a specific subsection dealing with tampering with tangible evidence, in what was otherwise a statute that previously dealt only with tampering of persons." *Id*. Section 1512 was not intended to create two separate

[14] Dictionary.com (online dictionary and thesaurus), https://www.thesaurus.com/e/grammar/conjunctive-adverbs/ (emphasis added).

crimes, but instead, was "meant to criminalize difficult to enumerate conduct that would otherwise slip past Section 1512(c)(1)'s specific prescription. *Id*. *Accord United States v. Pugh*, No. 15-CR-116 (NGG), 2015 U.S. Dist. LEXIS 170271, at *54-55 (E.D.N.Y. Dec. 21, 2015) ("Accordingly, this structure suggests that subsections (1) and (2) of Section 1512(c) outlining two separate ways that a person can corruptly violate the statute."). Importantly, the understanding by President Bush and the DOJ upon enactment in 2002 was that the DOJ had to show the defendant's *mens rea* to obstruct justice. Grievance speech, under First Amendment protest, including expressive conduct a defendant believes is legal, cannot equal obstruction of Congress for *mens rea* or within the law's intent by the legislature and the President.

5. The Government's Interpretation Violates the Canons of Noscitur A Sociis and Ejusdem Generis.

That Congress only intended for § 1512(c)(2) to apply to conduct that resembles the specific acts listed in § 1512(c)(1) in some way (other than misapplied to make any conduct that disrupts a proceeding a felony) is required by the application of the interpretative canons of noscitur a sociis and ejusdem generis as illustrated by *Yates v. United States*, 135 S.Ct. 1074 (2015) and *Begay v. United States*, 553 U.S. 137 (2008).

In *Yates*, fishermen threw grouper overboard when they were about to be caught with under-sized fish. They were charged with Section 1519 - a felony carrying up to a twenty-year sentence. *Yates* at 1520. 18 U.S.C. § 1519 made it a crime to "alter[],destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] false entry in any record, document, or tangible object" in relation to certain types of investigations, matters, and cases. 18 U.S.C. § 1519. In reversing the Eleventh Circuit's judgment, a four-Justice plurality of the Supreme Court noted that 18 U.S.C. § 1519 was created through the Sarbanes-Oxley Act ((the same act that created 18 U.S.C. §1512(c), the act where Mr. Barnett is charged, without any involvement with documents)).

The plurality noted that the Sarbanes-Oxley Act "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen, LLP, had systematically destroyed potentially incriminating documents." *Yates*, 135 S.Ct. 1081. With this backdrop, the plurality determined that the term "tangible object" in § 1519 is only meant to refer to tangible objects that are of a type with a "record" or "document" and not just to "all objects in the physical world." *Id*. at 1081. The four-Justice plurality indicated that this conclusion was compelled by use of the interpretive canons of *noscitur a sociis* (it is known by its company) and *ejusdem generis* (of the same kind). *Id*. at 1085-86. In this, they were joined by a fifth Justice. *Id*. at 1089-90. To show how reading Sections (c)(1) and (c)(2) as disjointed creates an absurdity, upon review of the rest of the statute that harmonizes like "things" in each section where what the section is intended to address is clear, *Miller* aptly observed that the government's construction of § 1512(c)(2) presumes Congress would "hide [an] elephant in [a] mousehole." 2022 U.S. Dist. LEXIS 45696, at *29.

As the plurality in *Yates* explained, under the noscitur a sociis canon, a term should not be ascribed "a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id*. at 1085 (quoting *Gustafson v. Alloyd Co*., 513 U.S. 561, 575 (1995)). Under the *ejusdem generis* canon, "[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 1086 (quoting *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2008)) ("[usually]" added in *Yates*). By applying the *noscitur a sociis* canon and the *ejusdem generis* cannon to "any record, document, or tangible object" in § 1519, the four-Justice plurality and the concurring Justice determined that "tangible object" should not be

understood to be something of a type different than "record" or "document." *Yates*, 135 S.Ct. 1087, 1089.

Begay concerned the interpretation of an "otherwise" clause in 18 U.S.C. § 924(e)(2)(B). In *Begay*, the issue was whether DUI for example fell under the "otherwise" section after specific violent crimes were listed. *Begay* held that the proximity of the listed crimes "burglary, arson, extortion, or crimes involving the use of explosives" to a general crime "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another" was sufficient to "indicate[] that [the 'otherwise' clause] covers only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142. Specifically, even though DUI posed a serious risk of injury, the Court found "that DUI falls outside the scope of clause (ii). It is too unlike the provision's listed examples [burglary, arson, extortion, or crimes involving explosives] for us to believe that Congress intended the provision to cover it." *Id*. at 142.

Congress does not write criminal laws where people must read caselaw over twenty years to know what the newest interpretation will be and what violates the law from year to year. Because of the Canons of *Noscitur A Sociis* and *Ejusdem Generis*, the meaning of Section 1512(c)(1)-(2) clearly operate together and cannot now be interpreted to infer Congress meant something that it never wrote. Congress did not mean to hide an elephant in a mousehole. It makes no sense, given the overall construction of Section 1512, that if Congress meant to allow anything otherwise to violate Section 1512 - unrelated to documents and evidence - it would have added an additional subsection. Thus, Count Two should be dismissed.

6. <u>The Government's Construction of § 1512(c)(2) Creates Surplusage</u>

Accepting the Government's construction for § 1512(c)(2) creates surplusage for almost

the entirety of § 1512. The canon against surplusage holds that "all words in a statute are to be assigned meaning, and that nothing therein is to be construed as 'surplusage.'" *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (quoting *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)). "[T]he canon . . . is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. General Rev. Corp.*, 568 U.S. 371, 386 (2013) (emphasis added). If § 1512(c)(2) covers every and any act that obstructs, influences, or impedes an official proceeding, which can involve no witnesses or documents, then seven of the provisions are rendered superfluous and run afoul of § 1512(c)2). :§§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(C), 1512(b)(2)(D), and 1512(d)(1).

Because the Government's interpretation of Section 1512(c) creates surplusage - where the above sections are duplicative in effort, the majority of Section 1512 is unconstitutional. This is absurdly outside the legislative intent but this far the D.D.C. by the majority has ignored the absurdity. Count Two of the Indictment should be dismissed.

7. <u>Review of all of § 1512 Shows the Government Interpretation of § 1512(c) is Wrong</u>.

A review of § 1512(a), (b), and (d) shows that each provision proscribes only conduct that is intended to cause the suppression or corruption of testimony, evidence, and information that could be relevant at an official proceeding: § 1512(a) proscribes murder or attempted murder, and the use of force, threats of force, or attempts to use force or threats of force that has such intent; § 1512(b) proscribes intimidation, threats, and corrupt persuasion that has such intent, and § 1512(d) proscribes harassment that has such intent.

Given that Congress inserted the current § 1512(c) into the scheme that included the above three provisions shows that it intended for § 1512(c) as whole to only address conduct that might

affect the evidence an official proceeding would review—not all conduct that affects or can affect an official proceeding as a general matter. Because of arbitrary decisions, the Government makes for construing actions as meeting the elements of Section 1512(c)(2), its incorrect construction of the language, and failure to look at the legislative history, the government failed to correctly apply the statute. And because of the incorrect and arbitrary application, Mr. Barnett cannot have known at the time if he violated the law, and what he is supposed to defend against.

Section 1512(c)(2) requires an act against documents. Mr. Barnett is not charged with such offense, and instead, the Government makes entering the capitol and alleged disorderly conduct lesser crimes under Section 1512(c)(2), that once charged, are strict liability violations of the Section 1512(c) law that was all about documents.

Count Two for 1512(c)(2) and Section 2 should be dismissed because Mr. Barnett cannot have known what acts would violate the law; the statute is being applied unconstitutionally, and the Government and D.D.C. are using a faulty construction of the language where they can make anything a crime in violation of Section 1512(c), while Mr. Barnett's alleged and admitted conduct is beyond the reach of what was the intended construction of the law. Mr. Barnett is not charged with committing the acts, or having the *mens rea*, required for 1512(c)(2). Because of this, Count Two should be dismissed.

C. The Electoral Count is not a Proceeding as Contemplated When Section 1512(c) Was Passed Because it was a Ministerial Function Through January 2021, and the Electoral Count Reform Act Goes so Far as to Declare it Such.

Assuming the counting on January 6 is what the indictment failed to list as the proceeding (that is a required element), all the District judges who have held on Section 1512(c)(2) non-concur with stating that the ceremonial counting of the Electoral College votes by the Vice President is not a proceeding, no matter how ministerial. The actual meeting to count the Electoral College

votes is conducted pursuant to the Twelfth Amendment and 3 U.S.C. § 15. At such a meeting of both houses of Congress, the states' "certificates of electoral votes" are "presented" to the Vice President by "tellers" on a state-by-state basis and "read… in the hearing of the two Houses." After such reading of the certificates of electoral votes from each state, the votes are then "counted… and delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States." *Id*. This procedure allows for no exercise of discretion or judgment on the parts of the tellers and the President of the Senate, *id.*, and their roles must therefore be regarded as purely ceremonial and ministerial.

"Ministerial describes an act or a function that conforms to an instruction or a prescribed procedure. It connotes obedience. A ministerial act or duty is a function performed without the use of judgment by the person performing the act or duty."[15] "MINISTERIAL. . . . as opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court. When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment."[16]

There is significant case history prior to January 6, 2021, articulating what a "proceeding" is under 1512(c)(2), with no mention of any ministerial electoral count. The necessary requirements for the sufficiency of an official proceeding are (1) a witness and (2) evidence through testimony or documents under Section 1512. There is not a single mention of a witness in the Electoral Count Act, nor is there any mention of evidence. There is instead, a scripted

[15] West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.
[16] https://legal-dictionary.thefreedictionary.com/Ministerial

procedure that the Vice President reads. While there was an objection to the votes from Arizona on January 6th prior to evacuation, the thing cut short was a debate in each house and a vote as to whether to accept the certificates. No witnesses were scheduled. The Secretaries of State who certified the electors' certificates were not present. Debate was going to include words, but no document evidence was going to be provided.

A "proceeding" cannot simultaneously be both a proceeding where decisions and judgments are made and a ceremony where there is no discretion, decision, or judgment. In his letter dated January 6, 2021, VP Pence wrote that his role was largely ceremonial. The Congress recently engaged in revision work for the Electoral Count Act, where the word "ministerial" is included to solidify that there is no decision-making. The use of "proceeding" to describe a function where no decisions were to be made by a master of ceremonies or the electoral vote talliers, and where everything was scripted for a ceremony, with not a single witness, does not meet the historical usage that required hearings and evidence for a proceeding. The operative terms prior to Section 1512(c) as rewritten to incorporate Section 1519 and Section 1505 were "hearing" and "evidence." January 6, 2021, was not a hearing and there was no evidence to be presented by a witness or document. The debate for any objections did not involve any witnesses or documents.

V. CONCLUSION

Because Count Two of the Indictment omits an actual identifiable proceeding and inserted a non-existent proceeding, there cannot have been any obstruction. Count Two lacks an element of the crime and thus fails to state an offense. Hence, the indictment is defective. Because no specific fact in the superseding indictment identifies where Mr. Barnett's actions fall within the ambit of conduct necessary for the triggering of statute 1512(c), Count Two is defective. The Count must be dismissed because of "the settled rule in the federal courts that an indictment may not be

amended except by resubmission to the grand jury, unless the change is merely a matter of form." *Russell v. United States*, 369 U.S. 749, 770 (1962) (quoting *Ex parte Bain*, 121 U.S. 1; *United States* v. *Norris*, 281 U.S. 619; *Stirone* v. *United States*, 361 U.S. 212).

Because only what is in the indictment may be considered, no interpretation that adds what "the Grand Jury" must have meant can justify prosecuting the unidentified acts that obstructed a non-existent proceeding without being repugnant to the law. The facts in Mr. Barnett's case show that application of the statute is capricious and arbitrary where the required element of a proceeding that was obstructed is missing, and Mr. Barnett's motion to dismiss should be granted.

WHEREFORE, Defendant, Richard Barnett moves this Honorable Court to dismiss Count Two of the Indictment as irretrievably defective for failure to state an offense for 18 U.S.C. Section 1512 (c)(2) and 18 U.S.C Section 2; and for misapplication of the statute; and for good reasons as the Court sees fit to issue the proposed order attached with this motion.

Dated January 5, 20223

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 5th day of January, 2023, a copy of the foregoing was served upon all parties as forwarded through the Electronic Case Filing (ECF) System.

/s/Carolyn Stewart, Esq.
Carolyn Stewart, Esq.