

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 21-cr-00116
	)	
WILLIAM MCCALL CALHOUN, JR	)	
<i>Defendant.</i>	)	

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**DEFENDANT’S RENEWED MOTION TO DISMISS COUNT ONE OF THE SUPERSEDING INDICTMENT, MOTION TO DISMISS COUNTS TWO, THREE, FOUR AND FIVE OF THE SUPERSEDING INDICTMENT, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

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COMES NOW, Defendant, William McCall Calhoun, Jr., by and through counsel, Jessica N. Sherman-Stoltz, Esq., and respectfully files a renewed motion to dismiss Count One, and motion to dismiss Counts Two, Three, Four and Five, and moves this Court to dismiss all Counts of the Superseding Indictment. In support of his Motion, he sets forth the following facts and argument:

**I. BACKGROUND**

Defendant’s charges before this Court arise out of the events that took place at the United States Capital on January 6, 2021. On January 15, 2021 a complaint, affidavit in support, arrest warrant and motion for detention were filed against Mr. Calhoun in the U.S. District Court for the Middle District of Georgia (Macon). The complaint charged Mr. Calhoun with one count of entry to Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a), one count of Violent Entry or Disorderly Conduct in violation of 40 U.S.C. §

5104(e)(2), and one count of Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2). Mr. Calhoun was arrested that same day, and he made his first appearance before the U.S. District Court for the Middle District of Georgia (Macon).

The Defendant was subsequently charged by Indictment in the District of Columbia in the instant matter on February 12, 2021, and arraigned before this Court on Monday, March 1, 2021.

On January 12, 2022, the Government filed a superseding Indictment in the District of Columbia, charging Mr. Calhoun with one count of obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), one count of entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1), one count of disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2), one count of disorderly conduct in a Capital Building, in violation of 40 U.S.C. § 5104(e)(2)(D), and parading demonstrating, or picketing in a Capital Building, in violation of 40 U.S.C. § 5104(e)(2)(G).

## **II. LEGAL STANDARDS OF REVIEW**

### **A. Motion to Dismiss**

A Defendant may raise by pretrial motion any defenses and objections which “the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(1). These include “a defect in the indictment,” including a “failure to state an offense” and “lack of specificity.” Fed. R. Crim. P. 12(b)(3)(B)(iii) & (v). Additionally, a Defendant may move

to dismiss an indictment on the grounds that, inter alia, it fails to state an offense or contains multiplicitous counts. Fed. R. Crim. P. 12(b)(3)(B).

In considering a Rule 12 motion to dismiss, “the Court is bound to accept the facts stated in the indictment as true.” *United States v. Syring*, 522 F. Supp. 2d 125, 128 (D.D.C. 2007); *United States v. Sampson*, 371 U.S. 75, 78 (1962). An “indictment must be viewed as a whole” and the “allegations must be accepted as true” in determining if an offense has been properly alleged. *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* Additionally, “the Court cannot consider facts beyond the four corners of the indictment.” *United States v. Ring*, 628 F. Supp. 2d 195, 204 (D.D.C. 2009) (*internal quotations omitted*).

An indictment must be a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). An 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 be 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), and *Stirone v. United States*, 361 U.S. 212 (1960)).

Before trial, a defendant in a criminal case may move to dismiss the charging document for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). *See United States v.*

*Akinyoyenu*, 199 F. Supp. 3d 106, 109 (D.D.C. 2016) (Citations omitted). The operative question is whether the allegations in the 7th S.I., if proven, permit a jury to conclude that the defendant committed the criminal offense as charged. *Id.* at 9-10. See *United States v. Sanford, Ltd.*, 859 F. Supp. 2d 102, 107 (D.D.C. 2012); *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). Moreover, in analyzing this, “a district court is limited to reviewing the face of the charging document and, more specifically, the language used to charge the crimes.” *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) (emphasis original).

## **B. Vagueness**

A valid charging document must set out “the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet.” *United States v. Pickett*, 353 F.3d 62, 67 (D.C. Cir. 2004). The Government must state the essential elements of the crime and allegations of “overt acts [constituting the offense] with sufficient specificity.” *United States v. Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995).

A criminal complaint is also meant to satisfy at least two constitutional provisions. First, it gives Sixth Amendment notice of the nature and circumstances of the alleged crime so the accused may meet the charge and defend himself. *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001); *Hamling v. United States*, 418 U.S. 87, 117 (1974). Second, a valid indictment fulfills the Fifth Amendment’s edicts that citizens are not placed in jeopardy twice for the same offense. *Stirone v. United States*, 361 U.S. 212, 218 (1960);

*United States v. Martinez*, 764 F.Supp.2d 166, 170 (D.D.C.2011) (quotations and citations omitted). That is, the allegations must be sufficiently clear, complete, thorough enough, non-generic, and specific to the particular Defendant to identify if the Defendant were later charged with the same offense that double jeopardy applies to bar a second prosecution of the same offense.

A criminal complaint fulfills these fundamental constitutional provisions when it sets out both the elements of the crime and the factual circumstances that would satisfy those elements when assumed true. *Hamling*, 418 U.S. at 118-19. A criminal complaint may be dismissed as constitutionally insufficient when it does not join the elements with factual allegations. *See Russell v. United States*, 369 U.S. 749, 763-771 (1962); *United States v. Hillie*, 227 F. Supp. 3d 57 (D.D.C. Jan. 5, 2017); (Jackson, D.J.).

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*, 576 U.S. 591, 595 (2015)). “The touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United States v. Lanier*, 520 U.S. 259 (1997). The void-for-vagueness doctrine protects against arbitrary or discriminatory law enforcement. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

### III. ARGUMENT

#### **A. Count One**

Count One of the superseding indictment charges Mr. Calhoun with a violation of 18 U.S.C. § 1512(c)(2) and 2, as follows:

“On or about January 6, 2021, within the District of Columbia and elsewhere, WILLIAM McCALL CALHOUN, attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress’s certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.” ECF Document Number 83, p. 1.

Section 1512(c) falls under Chapter 73 of Title 18, which deals with “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. *United States v. Ermoian*, 752 F.3d 1165, 1179 (9th Cir. 2013). Stated differently, Section 1512(c), by its plain language, does not criminalize the obstruction of legislative action by Congress. Any alleged obstruction of the certification of the Electoral College vote is simply outside the scope of §1512(c). Alternatively, on its face §1512 is constitutionally infirm because of its inherent vagueness and arbitrary enforcement in the panoply of January 6th cases.

#### 1. Insufficiency of the Evidence and Failure to State an Offense

Count One of the Indictment charges that Mr. Calhoun corruptly “obstructed,” “influenced,” and “impeded” an official proceeding,” in violation of 18 U.S.C. § 1512(c)(2), and it identifies that “proceeding” as “Congress’s certification of the Electoral College vote.”

“Obstruct,” “influence,” and “impede” are broad terms, of which the government has not provided any evidence to support Mr. Calhoun having knowingly engaged in corrupt conduct, taken a step, an action, something that constituted a substantial step toward the commission of the crime of obstructing, influencing, and impeding the official proceeding. *See United States v. Friske*, 640 F.3d 1288 (2011). Additionally, the government hasn’t shown any evidence that Mr. Calhoun knew his actions were likely to affect an official proceeding, or that he was even in the Capitol when an official proceeding was taking place.<sup>1</sup> “[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.” *Id.* at 1293. The government has only shown that Mr. Calhoun walked around in the generally public areas of the Capitol for approximately 30 minutes.

## 2. Section 1512(c)(2) is Unconstitutionally Vague

How is the ordinary citizen supposed to know whether his conduct runs afoul of § 1512 (c)(2) and punishment for a felony or falls under the category of a misdemeanor

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<sup>1</sup> The January 6, 2021 timeline of events indicate that both the House and the Senate had already recessed and had either already been evacuated, or were being evacuated by the time Mr. Calhoun entered the Capitol Building at 2:19 PM.

offense of disorderly conduct under 40 U.S.C. § 5104 which limits the punishment to six months in prison? Under the same principles of *United States v. Johnson*, 576 U.S. 591 (2015) and its progeny, 18 U.S.C. § 1512(c)(2) violates due process because it is vague and does not provide fair notice to Mr. Calhoun as to the conduct it punishes. Section 1512(c)(2) provides that:

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 . . .

18 U.S.C. §§ 1512(c)(1) and (2).

First, § 1512(c) uses words throughout both subsections that require courts to speculate as to their meaning in the context of the defendant's particular actions. To wit, courts must speculate as to the meaning of the word "corruptly" and the phrase "official proceeding." Perhaps more problematic is the residual clause of subsection (c)(2), one that is so ambiguous, requiring courts to line-draw when determining if a defendant has "otherwise" obstructed, impeded, or influenced an official proceeding before Congress.

In *Johnson*, the Supreme Court considered the constitutionality of residual clause of the Armed Career Criminal Act, which enhanced a defendant's sentence if the defendant

had a conviction for a prior felony that “otherwise involved conduct that presented a serious potential risk of physical injury to another.” *Johnson*, 576 U.S. at 591. In finding a due process violation, the Supreme Court explained that the residual clause required a “wide-ranging inquiry” in each case as to what could potentially cause injury in each set of circumstances. *Johnson*, 576 U.S. at 597. Observing that the ambiguity of the residual clause resulted in disparate interpretations, the Supreme Court acknowledged that the “failure of persistent efforts to establish a standard can provide evidence of vagueness.” *Id.* at 598.

Similarly, in the case at hand, the residual clause of § 1512(c) is constitutionally vague, requiring courts to speculate and line-draw when distinguishing “official proceedings” from mere ancillary proceedings or investigations. As discussed above, courts have generally interpreted “official proceeding” to mean something more formal than an investigation.

The vagueness of the statute is not limited to the confusion that surrounds what constitutes an “official proceeding.” The D.C. Circuit has acknowledged that the word “corruptly” is vague on its face as used in a similar statute, 18 U.S.C. § 1505, that prohibits obstruction of a proceeding before departments, agencies, or congressional investigations. The court held that “in the absence of some narrowing gloss, people must guess at its meaning and application.” *United States v. Poindexter*, 951 F.2d 369, 398 (D.C. Cir. 1991). Previously, in *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), the court had

held that a statute that criminalized “leading an immoral or profligate life” vague because it found “immoral” to be synonymous with “corrupt, depraved, indecent, dissolute, all of which would result in ‘an almost boundless area for the individual assessment of another’s behavior.’” *Poindexter*, 951 F.2d at 399 (quoting *Ricks*, 414 F.2d at 1097). The court explained that various dictionary definitions of the word “corrupt” did not reduce the confusion as to its meaning for purposes of the statute. *Id.* After similar assessment of the legislative history and judicial interpretation, as has been done here, the court concluded that neither of those inquiries provided defendants with the constitutionally required notice that the statute requires, and found the term vague as applied to the defendant making false statements. *Id.* at 406.

Following *Poindexter*, Congress amended § 1515 to define “corruptly” for purposes of § 1505 only 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.” § 1515(b). However, this amendment did not resolve the vagueness that still exists in § 1512 as Congress did not amend § 1515 as it applies to § 1512.

Even though the D.C. Circuit later held that the word “corruptly” was not vague as applied, it was because in that case the defendant influenced a witness, which fits squarely within the non-vague category that *Poindexter* established. *See United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996). In *Morrison*, the defendant tried to influence a

witness's testimony and "exhorted her to violate her legal duty to testify truthfully in court." *Id.* The *Poindexter* Court explained that influencing another to "violate their legal duty" was not vague because "it would both take account of the context in which the term 'corruptly' appears and avoid the vagueness inherent in words like 'immorally.'" *Poindexter*, 951 F.2d at 379. However, *Morrison* was not faced with the question of what "corruptly" means in the context of § 1512(c) and does not resolve the ambiguity that the word presents in conjunction with the rest of the statute. Even taking "corruptly influences" together is still vague because "influence" alone is another vague word and means something different than "influencing another to violate their legal duty" as described in § 1515.

Analyzing the government's approach to charging defendants with a violation of § 1512(c)(2) arising out of events on January 6, 2021, illustrates how vague and arbitrary the enforcement of this statute can be. Initially, it seemed that the government was only charging those individuals who had entered the Senate chamber<sup>2</sup> with a § 1512(c)(2) violation, however, a brief look of some of defendants that have been charged with a violation of § 1512(c)(2) clearly shows the government's charging inconsistencies.

1. *United States v. Isaac Sturgeon*, 21-cr-91, Mr. Sturgeon is alleged to have assisted in pushing a barricade outside the Capitol building but never entered the Senate chamber, never went inside the Capitol building, and never made any

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<sup>2</sup> The ceremonial Electoral College certification took place in the Senate Chamber.

threats to law enforcement or on social media suggesting he wished to disrupt the vote. Mr. Sturgeon is not alleged to be part of the Oath Keepers or the Proud Boys.

2. *United States v. Kenneth Grayson*, 21-cr-224, Mr. Grayson is alleged to have entered the Capitol building, but not alleged to have entered the Senate chamber. Prior to January 6, 2021, he allegedly wrote in a private message, "I am there for the greatest celebration of all time after Pence leads the Senate flip! OR IM THERE IF TRUMP TELLS US TO STORM THE FUKIN CAPITOL IME DO THAT THEN!"
3. *United States v. Benjamin Larocca*, 21-cr-317, Mr. Larocca allegedly entered the Capitol building while screaming "Our House!" He was with an individual who was allegedly yelling, "You fucking oath breakers!" Mr. Larocca is not alleged to have entered the Senate floor and is not a member of the Proud Boys or Oath Keepers.
4. *United States v. Sean Michael McHugh*, 21-cr-436, Mr. McHugh allegedly employed bear spray in direction of officers and yelled insults at officers. He also allegedly used a megaphone and engaged the crowd with chant, such as "our house!" There is no evidence he entered the Capitol building or the Senate floor.

5. *United States v. Dale Jeremiah Shalvey*, 21-cr-334, Mr. Shalvey allegedly entered the Senate chamber and is captured on video rummaging through Senator Cruz's notes. However, he is not alleged to be a part of the Oath Keepers or the Proud Boys.

As illustrated by these cases, the facts and circumstances of each vary drastically from one another, and clearly show that the government's charging decisions are inconsistent. Some cases allege entry into the Capitol building while others do not. The government does not specify what "influence" these defendants had or how exactly they "impeded." With respect to Mr. Calhoun, he was originally charged via criminal complaint and indicted in February of 2021. Mr. Calhoun is alleged to have entered the Capitol building, but not the Senate chamber, and made statements on social media similar to many of the other political statements that have been uttered by several defendants. The inconsistent charging decisions along with the inherently vague words of the statute, as well as the "residual clause" that is the basis for charging Mr. Calhoun all show that 18 U.S.C. § 1512(c)(2) is unconstitutionally vague and does not provide fair notice to Mr. Calhoun.

#### **B. Counts Two and Three**

Count Two of the superseding indictment charges Mr. Calhoun with a violation of 18 U.S.C. § 1752(a)(1), as follows:

"On or about January 6, 2021, within the District of Columbia, WILLIAM McCALL CALHOUN, did knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United

States Capitol and its grounds, where the Vice President was temporarily visiting, without lawful authority to do so.

Count Three of the superseding indictment charges Mr. Calhoun with a violation of 18

U.S.C. § 1752(a)(2), as follows:

“On or about January 6, 2021, within the District of Columbia, WILLIAM McCALL CALHOUN, did knowingly, and with intent to impede and disrupt the orderly conduct of Government business and official functions, engage in disorderly and disruptive conduct in and within such proximity to, a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting, when and so that such conduct did in fact impede and disrupt the orderly conduct of Government business and official functions. ECF Document Number 83, p. 2.

1. Multiplicity

The conduct alleged in Counts Two and Three of the Superseding Indictment all arise out of the same criminal conduct without any indication that Congress intended that conduct to be punishable under multiple subsections of 18 U.S.C. § 1752. If Mr. Calhoun violated 18 U.S.C. § 1752(a)(2) (Count Three) by knowingly engaging in disorderly or disruptive conduct in the Capitol which impeded or disrupted the orderly conduct of government business or official functions, it follows that he was knowingly remaining in the Capitol without authority, given that nobody has authority to remain in the Capitol and impede or disrupt the orderly conduct of government business or official functions and, therefore, he also violated 18 U.S.C. § 1752(a)(1) (Count Two). Count Two is a lesser included offense of Count Three.

An indictment is multiplicitous if it charges a single offense in separate counts. *See*, e.g. *United States v. Wilkinson*, 124 F.3d 971, 975 (8th Cir. 1997). “There are at least two species of multiplicity challenges....The first type arises when a defendant is charged with violating two different statutes, one of which is arguably the lesser included offense of the other. This is the species of multiplicity challenge addressed in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and its progeny. Unless each offense requires proof of an element that the other does not, a defendant may not be charged with both. The second type of multiplicity challenge arises when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct. In that circumstance, the court inquires “whether separate and distinct prohibited acts, made punishable by law, have been committed.” *United States v. Woerner*, 709 F.3d 527, 539 (2016).

Based on the foregoing, Counts Two and Three of the Superseding Indictment should be dismissed as multiplicitous under the *Blockburger* test. Count Two also fails the second species of multiplicity in that, applying the Rule of Lenity, there is no indication that Congress intended multiple punishments for each violation of 18 U.S.C. § 1752 arising out of the same criminal conduct.

## 2. Insufficiency of the Evidence and Failure to State a Claim

The charging instruments do not allege any specific “posted, cordoned off, or otherwise restricted area,” 18 U.S.C. § 1752(c), established by the Secret Service. They do

not allege that Mr. Calhoun “entered or remained in” such an “area.” § 1752(a)(1). Mr. Calhoun is alleged to have been inside the Capitol on January 6th for approximately 30-40 minutes. Ex A, Transcripts, at p. 17:18-19.

The Indictment is silent as to what Mr. Calhoun’s “disorderly<sup>3</sup> and disruptive conduct” consisted of except to say that he did “engage in disorderly and disruptive conduct in and within such proximity to a restricted building and grounds, where the Vice President was temporarily visiting when and so that such conduct did in fact impeded and disrupt the orderly conduct of Government business and official functions.” ECF Document Number 83, p. 2. It is not alleged how Mr. Calhoun’s actions “in fact impede[d] and disrupt[ed] the orderly conduct of Government business and official functions.” § 1752(a)(2).

The evidence against Mr. Calhoun as related to Counts Two and Three is insufficient to support a conviction.

### 3. Restricted Buildings or Grounds

Both of these charges concern certain conduct related to statutorily “restricted building or grounds.” 18 U.S.C. § 1752(c) provides the following definition:

- (1) the term “restricted building or grounds” means any posted, cordoned off, or otherwise restricted area –

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<sup>3</sup> “ ‘[D]isorderly’ conduct is that which ‘tends to disturb the public peace, offend public morals, or undermine public safety.’ ‘Disorderly,’ Black’s Law Dictionary (9th ed. 2009; see also ‘Disorderly,’ Oxford English Dictionary (2nd ed. 1989) (‘Not according to order or rule; in a lawless or unruly way; tumultuously, riotously.’). Conduct is ‘disruptive’ if it ‘tend[s] to disrupt some process, activity, condition, etc.’ ‘Disruptive,’ Merriam-Webster.com Dictionary (June 16, 2022).” Rivera, 2022 WL 2187851 at \*5.

- (A) of the White House or its grounds, or the Vice President's official residence or grounds;
- (B) of a building or grounds where the President or other person protected by the Secret Service is or will temporarily be visiting; or
- (C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.

18 U.S.C. § 1782(c)(1)(A)-(C) (emphasis added).

The United State Capitol and its grounds are not specifically included in the definition set forth above. Rather, the government alleges that the Capitol was a "restricted building and grounds" on January 6th because it was a "building or grounds where the President or other person protected by the Secret Service is or will temporarily be visiting." 18 U.S.C. § 1752(c)(1)(B). The "other person," as set forth in the Indictment, was then-Vice President Michael Pence. Accordingly, Mr. Calhoun did not violate §1752 unless then-Vice President Pence was 1) "visiting" or "temporarily visiting" the specific area that Mr. Fischer traversed; and 2) the Secret Service designated that area as a restricted zone. The government cannot establish either element for the reasons that follow.

a. Vice President Pence was not "Temporarily Visiting" the Capitol

Then-Vice President Pence was not "temporarily visiting" the Capitol on January 6, 2021. The Capitol is a federal government building in the District of Columbia. Vice President Pence lived and worked in D.C. at his official residence, and actually worked at the Capitol Building and grounds – it was his place of employment. Vice President Pence had a permanent office "within the United States Capitol and its grounds," in his capacity

as President of the Senate. On January 6th, Vice President Pence was working -- he was presiding in the Senate chamber to count the electoral votes. *See* U.S.C. § 15 (“Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and *the President of the Senate shall be their presiding officer.*”) (emphasis added).

b. The Secret Service did not “Restrict” the Capitol or its Grounds on  
January 6th

The legislative history of 18 U.S.C. § 1752 and the statutory authorization of 18 U.S.C. § 30569 make it clear that only the United States Secret Service (“Secret Service”) can restrict areas for temporary visits by the President or Vice President. A particular place does not become restricted just because the Vice President enters it; rather, the Secret Service, the agency in charge of protecting the Vice President, must create the temporary restricted zone to facilitate its duty to protect. Indeed, the Government has specifically argued that it is the “Secret Service” that “exercise[s] its discretion to determine the scope of the restricted area necessary to protect” a designated person. *United States v. Jabr*, Cr. No. 18-105 (PLF), ECF #26 at page 9. The Government does not allege that any of the barriers that Mr. Calhoun allegedly crossed<sup>4</sup> were specifically erected for the Vice-

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<sup>4</sup> It is important to note that Mr. Calhoun did not reach the Capitol complex until well after the initial breach. By the time he entered, all of the physical barriers to entry had been removed. Further, video footage obtained in discovery shows that when Mr. Calhoun entered the doors to the Capitol, any police

President's visit at the direction of the Secret Service. On January 6, 2021, the restrictions placed on the Capitol were created by the Capitol Police, not the Secret Service.<sup>5</sup> As such, a necessary factual predicate to a 18 U.S.C. § 1752 offense is lacking, and Counts Two and Three must be dismissed for failure to state a claim.

#### 4. Unconstitutionally Vague

If the Court concludes that the Indictment properly charges Mr. Calhoun with violating § 1752 by crossing a boundary set by an agency other than the USSS, the statute is unconstitutionally vague as applied to Mr. Calhoun.

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*, 576 U.S. 591, 595 (2015)); see also *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.2d 1, 23 (D.C. Cir. 2009) (noting that criminal statute must “provide adequate notice to

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officer stationed at the door did not make any attempt to block or stop his entry into the building.

<sup>5</sup> Additional legislative history and language also confirm that the “posted, cordoned off, or otherwise restrict area[s]” must be created by the Secret Service to trigger the statute. As originally passed in 1970, the statute, 84 Stat. 1891, authorized the Treasury Department, which included the Secret Service at that time, to prescribe regulations for restricting grounds where the President and other protected leaders would visit. See 18 U.S.C. § 1752(d)(2); 84 Stat. 1891. Accordingly, the Treasury Department implemented numerous regulations, including requirements that the Secret Service designate certain “temporary residences” and “temporary offices” of their protectees and provide “notice to prospective visitors.” 31 C.F.R. § 408.2(c). In 2006, Congress, likely because the Secret Service was reassigned to the Department of Homeland Security, repealed subsection (d) of §1752, which authorized the Treasury Department to promulgate regulations. See Pub. L. 109-177, Title VI, Sec. 602, 120 Stat. 252 (March 9, 2006). Nonetheless, the clear legislative intent behind §1752 from the date of its enactment was to provide the Secret Service with authorization to create temporary protected zones to facilitate its role in protecting the President and other protectees.

a person of ordinary intelligence that his contemplated conduct is illegal”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)). “[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United States v. Lanier*, 520 U.S. 259, 67 (1997). “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)).

In addition, if the law at issue “interferes with the right of free speech or of association, a more stringent vagueness test [] appl[ies].” *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 500 (1982) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)). Vagueness challenges are either facial or as-applied. “[T]he distinction between facial and as applied challenges goes to the breadth of the remedy employed by the Court, not what must be pleaded by the complaint.” *Edwards v. District of Columbia*, 755 F.3d 886, 1001 (D.C. Cir. 2014) (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)).

Under the government’s interpretation of § 1752, there is no notice, much less “fair notice,” of the conduct proscribed in this case. As shown above, the text, legislative history, and common sense all point to the ordinary person’s reasonable conclusion that

the government agency that may restrict a person from entering an area in which there is a Secret Service protectee is—the Secret Service. But if the text, legislative history and common sense inform an “ordinary person” that he violates § 1752 by entering an area the Secret Service has restricted there is no similar notice in the statute that being on the wrong side of a police barricade is, independent of the Secret Service, in violation of that statute. The complaint and Indictment do not allege postings on January 6th warning Mr. Calhoun that the Secret Service designated the area he entered as restricted. They do not allege any law enforcement officers notified Mr. Calhoun of that fact. Nothing in § 1752 so much as hints at the possibility that disobeying local law enforcement per se may result in liability under that statute, provided some USSS protectee lurks somewhere within the restricted area.

The concern about vagueness-enabled arbitrary enforcement is manifested here. It takes two forms, specific and general arbitrariness. At a general level, the government’s enforcement of § 1752 against Mr. Calhoun is arbitrary because, prior to January 6th, it had never prosecuted a violation of that statute with the allegation that the accused entered an area restricted by some government agency other than the USSS. The government’s election to put a new interpretation on the statute for a select group of related cases raises questions about discriminatory law enforcement. Those questions are only underlined by the patently political nature of the circumstances of the offense, as well as the criminalization of Mr. Calhoun’s First Amendment rights to political speech,

assembly, and to petition the government for a redress of grievances. U.S. Const. amend I; *Hoffman Estates*, 455 U.S. at 500 (stricter scrutiny of vague statutes in the context of activities protected by the First Amendment).

The government has offered pictures showing Mr. Calhoun walking down hallways in the Capitol and in the Rotunda. Places where many other protestors moved about freely and exited at will without a word from any of the USCP officers lining the hallway. We are to presume by the government's charges that this is a "restricted area." Those pictures also show dozens of other individuals "remaining" in the same area. Yet it is undisputed that most of those people have not been charged under § 1752 like Mr. Calhoun. The explanation for why the government chose to prosecute Mr. Calhoun under § 1752, and not others, is perhaps rooted in his pre-January 6th social media posts. Of course, even if the facts are as the government as alleged, his social media posts have nothing to do with § 1752, or the Secret Service. But the government's naked reliance such facts plainly shows the danger of arbitrariness inherent in the vague and elastic interpretation of § 1752 it offers for this specific defendant.

Insofar as they both allege that Mr. Calhoun entered and remained in a "restricted area" set by an agency nowhere identified in the statute, Counts Two and Three are unconstitutionally vague.

##### 5. Rule of Lenity

Even if this Court finds that § 1752 is not unconstitutionally vague as applied to Mr. Calhoun, or that the evidence is sufficient to support Counts Two and Three against Mr. Calhoun, or that Counts Two and Three are not multiplicitous, any ambiguities in the statute should be resolved in his favor under the rule of lenity. Under that principle, “where text, structure, and history fail to establish that the government’s position is unambiguously correct,” courts must “apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.” *United States v. Granderson*, 511 U.S. 39, 54 (1994). “When interpreting a criminal statute, we do not play the part of a mind reader.” *United States v. Santos*, 553 U.S. 507, 515 (2008) (Scalia, J.). “In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. ‘Probability is not a guide which a court, in construing a penal statute, can safely take.’” *Id.* (quoting *United States v. Wiltberger*, 18 U.S. 76 (1820)).

Because the government’s interpretations are not unambiguously correct, the Court is required to resolve any ambiguities in Mr. Calhoun’s favor by dismissing the Indictment. *Granderson*, 511 U.S. at 54; *Santos*, 553 U.S. at 515.

### **C. Count Four**

Count Four of the superseding indictment charges Mr. Calhoun with a violation of 18 U.S.C. § 5104(e)(2)(D), as follows:

“On or about January 6, 2021, within the District of Columbia, WILLIAM McCALL CALHOUN, willfully and knowingly engaged in disorderly and disruptive conduct within the United States Capitol Grounds and in any of the Capitol Buildings with the intent to impede, disrupt, and disturb the orderly conduct of a

session of Congress and either House of Congress. ECF Document Number 83, p. 2.

1. Insufficiency of the Evidence and Failure to State a Claim

The Indictment is silent as to what Mr. Calhoun's "disorderly and disruptive conduct" consisted of, except to say that he did willfully and knowingly "engage in disorderly and disruptive conduct within the United States Capitol Grounds and in any of the Capitol Buildings with the intent to impede, disrupt, and disturb the orderly conduct of a session of Congress and either House of Congress." ECF Document Number 83, p. 2.

Additionally, it is not alleged how Mr. Calhoun's actions "in fact impede[d], disrupt[ed], and disturb[ed] the orderly conduct of Government business and official functions." § 5104(e)(2)(D).

The evidence against Mr. Calhoun as related to Count Four is insufficient to support a conviction.

**D. Count Five**

Count Five of the superseding indictment charges Mr. Calhoun with a violation of 18 U.S.C. § 5104(e)(2)(G), as follows:

"On or about January 6, 2021, within the District of Columbia, WILLIAM McCALL CALHOUN, willfully and knowingly paraded, demonstrated, and picketed in any United States Capitol Building. ECF Document Number 83, p. 3.

Count Five severely conflicts with the U.S. Constitutional rights of free speech and to petition the government for the redress of grievances.

The Government has provided no factual allegations of Mr. Calhoun (1) parading, (2) demonstrating, or (3) picketing in the U.S. Capitol building, or in any other Capitol Building. Additionally, the Affidavit in Support of a Criminal Complaint and Arrest Warrant (ECF Doc. 1-2 – Magistrate Case No. 5:21-mj-00008-CHW), does not claim that Mr. Calhoun violated 18 U.S.C. 5104(e)(2)(G).

As the Government has already conceded, Mr. Calhoun's "actions that day involved going into the Capitol with Mr. Nalley, spending 30 to 40 minutes inside the Capitol and then as I understand it, leaving the Capitol." (See Exhibit A - July 11, 2022, transcript of proceedings, p. 17:17-19.)

1. Insufficiency of the Evidence and Failure to State an Offense

As previously stated, neither the Superseding Indictment nor the Affidavit in Support of a Criminal Complaint contains no factual allegations as to Mr. Calhoun's conduct of parading, demonstrating, or picketing inside of the U.S. Capitol Building.

In *Hunter v. District of Columbia*, 47 App. D.C. 406 (D.C. Cir. 1918), for example, the Circuit Court examined an indictment that alleged that the defendants had "congregate[d] and assemble[d] on Pennsylvania avenue, N.W., [and] did then and there crowd, obstruct, and incommode the free use of the sidewalk thereof on said avenue" in violation of the unlawful assembly statute. *Id.* at 408. Beyond the general terms of acts prohibited by the statute, there was no averment of fact "to inform defendants of the nature of the acts which [were] relied upon by the prosecution as constituting alleged

obstruction of the sidewalk, or that would enable defendants to make an intelligent defense, much less to advise the court of the sufficiency of the charge in law to support a conviction." *Id.* at 410. And the fact that the charging document "fail[ed] to set out the acts committed by the defendants which constituted the crowding obstructing of the free use of the walk by them[,]" *Id.* at 409.

As stated by the *Hunter* Court:

[i]t is elementary that an information or indictment must set out the facts constituting the offense, with sufficient clearness to apprise the defendant of the charge he is expected to meet, and to inform the court of their sufficiency to sustain the conviction. ... In other words, when the accused is led to the bar of justice, the information or indictment must contain the elements of the offense with which he is charged, with sufficient clearness to fully advise him of the exact crime which he is alleged to have committed.

*Id.* at 409, 410 (*emphasis added*) (internal quotation marks and citation omitted).

The *Hunter* Court also observed that the defendants in that case could have engaged in a number of acts that fell outside the scope of the statute, and thus, by failing to specify the defendants' particular conduct, the indictment was "too vague, general, and uncertain to meet the requirements of the established rules of criminal pleading," which in turn rendered it "insufficient in law." *Id.* at 410.

## 2. First Amendment Protected Conduct

40 U.S.C. §5104(e)(2)(G) prohibits three specific modes of First Amendment activity—parading, demonstrating, and picketing. Other First Amendment activity that is not within the ambit of parading, demonstrating, or picketing are not prohibited. By its own

terms 40 U.S.C. §5104(e)(2)(G) addresses parading, demonstrating and picketing.

Somewhat similar to §5104(e)(2)(G), 40 U.S.C. §5104(f) states:

(f) Parades, Assemblages, and Display of Flags — Except as provided in section

5106 of this title, a person may not—

- (1) parade, stand, or move in processions or assemblages in the Grounds; or
- (2) display in the Grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

As a comparison, 40 U.S.C. §5104(e)(2)(G) states: “An individual or group of individuals may not willfully and knowingly—parade, demonstrate or picket in any of the Capitol Buildings.”

The First Amendment literally says “Congress shall make no law” restricting speech, advocacy, or petitioning. By consultation with any English dictionary, this freedom must apply to “picketing” and “parading” and “demonstrating.” Thus, Congress is subject to the control and correction of the public according to the plain text of the Constitution. *See, e.g., Lederman v. United States*, 291 F.3d 36 (DC Cir. 2002) (striking down a regulation banning leafleting and other “demonstration activities” on the sidewalk at the foot of the House and Senate steps on the East Front of the Capitol). The *Lederman* Court found that sidewalks around the Capitol are a public forum, and that a regulation banning leafleting and other “demonstration activities” at the foot of the House and Senate steps on the east side of the Capitol is unconstitutional.

Mr. Calhoun's charge is aimed at dispelling his, and millions of others' right to petition and speak against perceived government abuses at the Capitol. The government seeks to insulate congressional representatives, staff, officials, and attendees from receiving the messages of Mr. Calhoun and other protestors and petitioners. These efforts by the government are unconstitutional. *See, e.g., Gresham v. Peterson*, 225 F.3d 899 (7<sup>th</sup> Cir. 2000).

The late Judge Larry McKinney of the U.S. Southern District of Indiana dealt with a similar case involving a protestor who picketed a speech by Vice President Dick Cheney in 2002. *Blair v. City of Evansville*, 361 F. Supp. 2d 846 (S.D.In. 2005). Blair was arrested for "disorderly conduct" while merely holding a sign that stated "Cheney 19th Century Energy Man" at an event in Evansville, Indiana. Blair later sued arresting officers, and the court held that "the restriction of protesters to an area 500 feet away from the only entrance used by attendees, and on the opposite end of the building from where Vice President Cheney would enter the facility and from where the majority of people attending the event would park, burdened speech substantially more than was necessary to further the [government's] goals of safety."

Even more than in *Blair*, the expansive speech and picketing restrictions here (effectively the entire 1.5 million square foot Capitol complex) are massively overexpansive and not narrowly tailored to serve a significant government interest. *See United States v. Albertini*, 472 U.S. 675, 689 (1985)). While the vice president and Congress

can and should be properly protected from danger, the 1st amendment requires that the vice president and Congress cannot be entirely insulated from picketing and advocacy.

Judge McKinney found that the restriction of protesters to an area 500 feet away from the only entrance used by attendees, and on the opposite end of the building from where Vice President Cheney would enter the facility and from where the majority of people attending the event would park, burdened speech substantially more than was necessary to further the goals of safety.

Furthermore, other cases that have looked at restrictions on access to public buildings similar to the Centre have found a violation of the First Amendment on more narrow restrictions. *See, e.g., Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 861-62 (9th Cir. 2004) (200 and 265 feet security zones found over broad); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (seventy-five yard security zone found over broad because it prevented demonstration from reaching intended audience); but *see Madsen*, 512 U.S. at 771 (holding that a thirty-six-foot buffer zone on public property was narrow enough).

*Blair*, 361 F. Supp. 2d at 858.

Similarly to the 1,000-foot ban in *Weinberg v. City of Chicago*, 310 F.3d 1029, 1040 (7th Cir. 2002), Judge McKinney found that the location of the protest zone in *Blair*

“eliminated any meaningful avenue for the communication of ideas by the protestors to at least one intended audience, the attendees.”

The Court in *Bynum v. United States Capitol Police Board*, 93 F. Supp. 2d 50 (D.D.C. 2000) found regulations purporting to implement 40 U.S.C. §5104(e)(2)(G) to violate the

First Amendment and Due Process. With respect to the First Amendment the *Bynum*

Court states:

The Court, however, cannot conclude that the regulation is reasonable in light of the purposes it could legitimately serve. While the regulation is justified by the need expressed in the statute to prevent disruptive conduct in the Capitol, it sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive, such as “speechmaking... or other expressive conduct...” Traffic Regulations for the Capitol Grounds §158. Because the regulations proscriptions are not limited to the legitimate purposes set forth in the statute, it is an unreasonable and therefore an unconstitutional restriction on speech...

*Id.* at 57 (*Citations omitted*).

In *Bynum*, Judge Friedman also found that a “picketing and parading” ban violated due process because it was vague: “While there certainly are types of expressive acts that rise to the level of a demonstration, any regulation that allows a police officer the unfettered discretion to restrict behavior merely because it ‘conveys a message’ or because it has a ‘propensity to attract a crowd of onlookers’ cannot survive a due process challenge.” *Id.*

With respect to Due Process and unconstitutional vagueness, the *Bynum* Court states:

In fact, the definition of “demonstration” in the regulation encompassing all expressive conduct, whether disruptive or not appears to expand the restrictive powers given by the statute to the Capitol Police rather than limit or guide them. This definitional “guidepost” thus has the potential to squelch nearly any type of expressive conduct, whether or not it is actually a demonstration, and may sweep within its scope expression that is protected by the First Amendment. The regulation therefore is both unconstitutionally overbroad and unconstitutionally vague.

*Id.* at 58.

The main holding in *Bynum* was that broad regulations purporting to implement 40 U.S.C. §5104(e)(2)(G) violated the First Amendment and Due Process. As part of its analysis, the *Bynum* Court stated:

Indeed, the regulation goes beyond what Congress intended and permits the Capitol Police to block activity not proscribed or intended to be proscribed by the statute Congress enacted. The statute prohibits loud, threatening or abusive language; any disorderly or disruptive conduct engaged in with the intent to impede, disrupt or disturb the orderly conduct of any session of Congress or a congressional hearing or committee meeting; any behavior that obstructs or impedes passage through or within the Capitol or any of its buildings or grounds; physical violence; and parades and picketing. 40 U.S.C. § 193f(b) (4)-(7).[5] When viewed in the context of these other various forms of statutorily prohibited behavior, Congress' statutory prohibition against "demonstrat[ing]" appears aimed at controlling only such conduct that would disrupt the orderly business of Congress not activities such as quiet praying, accompanied by bowed heads and folded hands. The police could properly use the statutory standards of Section 193f(b) itself to control, for example, groups of people praying in a way that impeded or obstructed passageways, hearings or meetings, involved loud, threatening or abusive language or physical violence, or was otherwise disorderly or disruptive. Plaintiff's activity was none of these.

*Id.* at 57-58.

In *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972)

(*emphases added*), the court states:

**The Capitol Grounds** (excluding such places as the Senate and House floors, committee rooms, etc.) **have traditionally been open to the public**; indeed, thousands of people visit them each year. Thus, we cannot agree with the defendants that the Capitol Grounds have ever been characterized by the serenity and quiet of a hospital or library.

While the *Jeannette Rankin Brigade* Court was reviewing an issue concerning the Capitol Grounds, the stated exclusions of the Senate and House floors and committee

rooms is more consistent with the public availability issues. In any event, the *Jeannette Rankin Brigade* Court did not specifically opine on areas of Capitol Buildings that were not the Senate and House floors or committee rooms.

In *Jeannette Rankin Brigade*, 342 F. Supp.at 583-84, the Court held a blanket statutory prohibition on parades, assemblages or processions on Capitol Grounds is unconstitutional. See also *Gregory v. Chicago*, 394 U.S. 111, 89 S. Ct. 946 (1969) (where the Supreme Court reviewed a protest march aimed at the Chicago city government and held that as long as marches are “peaceful and orderly” they are protected by the First Amendment.); *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963); *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286 (1972); and *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940).

40 U.S.C. § 5104(e)(2)(G), which forbids “willfully and knowingly parad[ing], demonstrate[ing], or picket[ing] in any of the Capitol Buildings” is unconstitutional both on its face and as applied to the alleged conduct of Mr.Calhoun. As conceded by the Government, Mr. Calhoun is accused of nothing more than walking into the Capitol during normal business hours as part of a demonstration of expression regarding the fairness of the 2020 presidential election. Mr. Calhoun has a 1st amendment right to express his opinions in such a manner.

#### IV. CONCLUSION

For all of the above-stated reasons and arguments, Defendant, William McCall

Calhoun, prays for the entry of an Order dismissing all Counts of the Superseding Indictment.

Dated: December 23, 2022.

Respectfully Submitted,

WILLIAM MCCALL CALHOUN, JR.

/s/ Jessica N. Sherman-Stoltz

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### **CERTIFICATE OF SERVICE**

I hereby CERTIFY that on this the 23rd day of December 2022, a true and correct copy of the foregoing *Defendant's Renewed Motion to Dismiss Count One of the Superseding Indictment, Motion to Dismiss Counts Two, Three, Four, and Five, and Memorandum in Support Thereof* with the Clerk of Court via the CM/ECF system, which will automatically send an email notification of such filing to all counsel of record.

/s/ Jessica N. Sherman-Stoltz

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