

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

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	CR. NO. 21-cr-305 (JEB)
	:	
SARA CARPENTER,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO
DISMISS COUNT ONE, TWO, THREE, FOUR, AND SEVEN OF THE INDICTMENT**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits that this Court should deny Defendant Carpenter’s motion, ECF No. 57, seeking dismissal of Count One, Two, Three, Four, and Seven of the Indictment. Count One charges Defendant with civil disorder, in violation of 18 U.S.C. § 231(a)(3), and 2. Count Two charges Defendant with obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), and 2. Count Three charges Defendant with entering and remaining in a restricted building and grounds, in violation of 18 U.S.C. § 1752(a)(1). Count Four charges Defendant with disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2). Count Seven charges Defendant with parading, demonstrating, or picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G).

In her motion, Defendant Carpenter asserts that Counts Two, Three, and Four fail to state an offense while Counts One, Two, and Seven are unconstitutionally vague. Lastly, Defendant claims Count Seven is unconstitutionally overbroad. Defendant Carpenter’s contentions lack merit. These

motions rest on arguments that courts in this district¹ have routinely rejected and should likewise be denied for the reasons explained herein.

LEGAL STANDARD

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

Rule 12 permits a party to raise in a pretrial motion “any defense, objection, or request that the court can determine *without a trial on the merits*.” Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 “does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds” unless the government “has made a *full* proffer of evidence” or the parties have agreed to a “stipulated record,” *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (emphasis added)—neither of which has occurred here.

Indeed, “[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn’t authorize its disposition before trial.” *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.). Criminal cases have

¹ This Court rejected arguments of failure to state an offense and vagueness in *US v. Dennis*, 2022 WL 17475401.

no mechanism equivalent to the civil rule for summary judgment. *United States v. Bailey*, 444 U.S. 394, 413, n.9 (1980) (motions for summary judgment are creatures of civil, not criminal trials); *Yakou*, 428 F.2d at 246-47 (“There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context”); *United States v. Oseguera Gonzalez*, No. 20-cr-40-BAH at *5, 2020 WL 6342940 (D.D.C. Oct. 29, 2020) (collecting cases explaining that there is no summary judgment procedure in criminal cases or one that permits pretrial determination of the sufficiency of the evidence). Accordingly, dismissal of a charge does not depend on forecasts of what the government can prove. Instead, a criminal defendant may move for dismissal based on a defect in the indictment, such as a failure to state an offense. *United States v. Knowles*, 197 F. Supp. 3d 143, 148 (D.D.C. 2016). Whether an indictment fails to state an offense because an essential element is absent calls for a legal determination.

Thus, when ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and more specifically, the language used to charge the crimes. *Bingert*, 2022 WL 1659163 at *3 (a motion to dismiss challenges the adequacy of an indictment on its face and the relevant inquiry is whether its allegations permit a jury to find that the crimes charged were committed); *McHugh*, 2022 WL 1302880 at *2 (a motion to dismiss involves the Court’s determination of the legal sufficiency of the indictment, not the sufficiency of the evidence); *United States v. Puma*, 2020 WL 823079 at *4 (D.D.C. Mar. 19, 2022) (quoting *United States v. Sunia*, 643 F.Supp. 2d 51, 60 (D.D.C. 2009)).

ARGUMENT

I. Count One (18 U.S.C. § 231)

Defendant Carpenter’s motion to dismiss Count One, charging Defendant with 18 U.S.C. § 231(a)(3), on the basis that the indictment does not contain facts essential to the offense charged, and

that Section 231 is unconstitutionally vague, should be denied. The indictment sufficiently puts Defendant on notice of the date, place, and general conduct of the crimes alleged and, therefore, does not require allegations beyond the elements of the offenses. Section 231 is not unconstitutionally vague because it plainly criminalizes conduct that intentionally interferes with named personnel performing their duties and does not criminalizes any protected activity.

A. The Superseding Indictment provides sufficient notice

Carpenter contends that Count One in the Superseding Indictment should be dismissed because it does not provide adequate specificity and information as to the charge against her. Carpenter premises this challenge on the Sixth Amendment’s right “to be informed of the nature and the cause of the accusation” and Federal Rule of Criminal Procedure 7(c)’s requirement that an indictment must contain a “plain, concise, and definite written statement of the essential facts constituting the offense charged.”

Carpenter misunderstands the purpose of an indictment and the low bar it must clear to satisfy the Federal Rules of Criminal Procedure and the Constitution. As the D.C. Circuit explained in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), “[a]lthough an indictment must in order to fulfill constitutional requirements apprise the defendants of the essential elements of the offense with which they are charged, neither the Constitution, the Federal Rules of Criminal Procedure, nor any other authority suggests that an indictment must put the defendants on notice as to every means by which the prosecution hopes to prove that the crime was committed.” *Id.* at 124. Indeed, “the validity of an indictment ‘is not a question of whether it could have been more definite and certain.’” *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). “While detailed allegations might well have been required under common-law pleading rules . . . they surely are not contemplated by Rule 7(c)(1), which provides that an indictment ‘shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.’”

Id. at 110. As a mere notice pleading, an indictment is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend.” *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *Haldeman*, 559 F.2d at 123 (“The validity of alleging the elements of an offense in the language of the statute is, of course, well established.”). Only in the rare case where “guilt depends so crucially upon . . . a specific identification of fact” not included in the statutory language will an indictment that restates the statute’s language be insufficient. *Haldeman*, 559 F.2d at 125 (quoting *Russell v. United States*, 369 U.S. 749, 764 (1962)).

Applying these principles, judges in this District have upheld the sufficiency of indictments far less specific than Carpenter’s. For example, in *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017), the defendants were charged with offenses under 18 U.S.C. § 924(c). The indictments provided only “general detail as to the places where the offenses were committed: namely, Mexico and the United States.” *Id.* at 154. As to the “when” of the offenses, the indictments alleged that the offenses had occurred over a two- and nine-year period. *Id.* Finally, the indictments “d[id] not specify a particular weapon that was possessed,” or “specify whether the firearms were ‘used, carried or brandished’” under the statute. *Id.* Nonetheless, the indictments were sufficient.

Judges in this District have also upheld against specificity challenges to indictments that arose out of the January 6, 2021, riot at the U.S. Capitol and are identical to the operative indictment in this case. For example, in *United States v. Sargent*, Judge Hogan rejected a similar specificity challenge to an indictment charging Section 231 and other charges also faced by Defendants in this case. No. 21-CR-258, 2022 WL 1124817, at *3 (D.D.C. Apr. 14, 2022). In a careful and deliberate opinion, Judge Hogan concluded that every one of the charged counts was properly alleged because each stated the elements of the offense and, though the charging language closely mirrored the statute, no further factual allegations were required to provide notice or protect against double jeopardy concerns. *Id.* at *2–*10.

In *United States v. Williams*, Judge Berman Jackson similarly found that the language of an indictment charging a violation of 18 U.S.C. § 231(a)(3) that largely tracked the statute was sufficiently specific. No. 21-CR-618, 2022 WL 2237301, at *8 (D.D.C. June 22, 2022). She observed: “the first paragraph of the indictment comprising Count I sets forth all of the elements of section 231(a)(3) . . . It thereby enables Williams to prepare a defense and plead that an acquittal or conviction is a bar to future prosecutions.” *Id.*

The Section 231(a)(3) charging language that passed muster in *Williams*, see No. 21-CR-618, ECF 27 at 1-2 (Count One), is identical to Count One of the indictment here, see ECF 35 at 1-2 (Count One). As in *Sargent* and *Williams*, the indictment provides sufficient information to fairly inform Defendant of those offenses. Defendant knows the day on which the alleged crimes occurred: January 6, 2021, which is alleged in all counts. See ECF 35. She knows that all charged conduct occurred in this District, from the indictment’s allegation. *Id.* Multiple counts specifically refer to conduct on U.S. Capitol grounds, further narrowing the “where” of the charged crimes, and at a time when the Vice President was and would be temporarily visiting. Count One relates specifically to an existing civil disorder and to a law enforcement officer. ECF 35. The statutes charged are not so unusually vague that they require allegations beyond the elements of the offenses.

B. 18 U.S.C. § 231 is not Unconstitutionally Vague

Carpenter also brings a facial challenge to Section 231, arguing that it is unconstitutional on its face for several reasons: (1) Section 231 criminalizes “any act to obstruct, impede, or interfere” which fails to indicate whether the defendant is required to have participated in the civil disorder, or if it is sufficient that he or she be in the general vicinity of the event.” ECF 57 at 18-19; (2) Section 231 lacks predictability and precision, *Id.* at 21-22; and (3) Section 231 is subject to challenge because it lacks a scienter requirement, *Id.* at 22. None of these arguments has merit, and they were appropriately rejected by another judge in this District. See *United States v. Mostofsky*, 579 F. Supp.

3d 9, 14 (D.D.C. 2021).

Constitutional statutory analysis begins with the statute’s plain language. *United States v. Shill*, 740 F.3d 1347, 1351 (9th Cir. 2014). Federal legislation enjoys a presumption of constitutionality that may only be overturned “upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). Section 231(a)(3) criminalizes any act or attempted act to “obstruct, impede, or interfere” with a law enforcement officer “lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.” The statute defines civil disorder as “any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.” 18 U.S.C. § 232(1).

Carpenter’s motion is most appropriately cast as an overbreadth argument—that is, she contends that Section 231 criminalizes too wide an array of activity including protected speech. Overbreadth can invalidate a criminal law only if “‘a substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep.’” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008), quoting *New York v. Ferber*, 458 U.S. 747, 769-771 (1982); see also *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). “A statute is facially invalid if it prohibits a substantial amount of protected speech.” *Williams*, 553 U.S. at 293; see also *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). An overbreadth challenge faces a steep climb when the statute focuses mainly on conduct, as Section 231(a)(3) assuredly does. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting the “substantial social costs created by the overbreadth doctrine when it blocks application of a law to . . . constitutionally

unprotected conduct”).

In *United States v. Mechanic*, 454 F.2d 849 (8th Cir. 1971), the Eighth Circuit rejected a similar overbreadth challenge to Section 231(a)(3). “The operative words of the statute are ‘whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer.’” *Id.* 852. “Thus, the section applies only to a person who acts to impede, obstruct, or interfere with an official described in the statute.” *Id.* The Eighth Circuit held that “conduct involved here [the massing of a mob that threw stones at an R.O.T.C. building on a college campus to protest the Viet Nam war, followed by rock and bottle throwing at fireman who arrived to quell the disturbance] is not entitled to constitutional protection,” as “[t]he First Amendment has not been extended to protect rioting, inciting to riot, or other forms of physical violence.” *Id.* (citing *National Mobilization Com. to End War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969)). Thus, the Eighth Circuit concluded, Section 231(a)(3) “does not purport to reach speech of any kind. It reaches only acts to impede, obstruct, or interfere with police officers and firemen.” *Id.*; *see also United States v. Wood*, 2021 WL 3048448, at *7 (D. Del. July 20, 2021) (“This Court agrees with *Mechanic* that § 231(a)(3) applies to conduct, not speech.”).

Because “the statute does not attempt to curtail speech the defendants may not challenge it as vague or overly broad if their own conduct may be constitutionally prohibited, since . . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.” *Mechanic*, 454 F.2d at 853, citing *United States v. Raines*, 362 U.S. 17, 21 (1960). Accordingly, as this Court in *Mostofsky* found, Section 231’s “plain text, . . . indicates that it is ‘targeted primarily if not exclusively at conduct rather than speech,’” rendering defendant’s overbreadth challenge without merit. *Mostofsky*, 2021 WL 6049891 at * 8.

Carpenter next claims that Section 231 is subject to challenge because, according to

Carpenter, she cannot tell whether the statute requires an individual to have participated in the civil disorder or if it is sufficient that he be in the general vicinity of the event. This argument, too, is meritless. “The crime set forth by the statute is not mere presence at a civil disorder . . . but an act committed during the course of such a disorder, so ‘civil disorder’ simply describes the environment in which the act must be committed in order to be subject to prosecution under § 231(a) (3).” *Mechanic*, 454 F.2d at 852; *see also United States v. Howard*, 2021 WL 3856290, at *14 (E.D. Wis. Aug. 30, 2021) (“[T]he statute does not require the government to prove that the defendant created the civil disorder, or that he was participating in the civil disorder.”). Moreover, “it is not just any public disturbance which is the subject of the section, but only public disturbances which (1) involve acts of violence (2) by assemblages of three or more persons, and which (3) cause immediate danger of or result in injury to (4) the property or person of any other individual.” *Mechanic*, 454 F.2d at 853; *see* 18 U.S.C. § 232(1).

Third, Carpenter claims that Section 231 lacks a scienter element, which she asserts weighs further in favor of the statute’s overbreadth or vagueness. ECF 57 at 22. But the scienter requirement clearly implied by the language neutralizes this concern. The statute requires proof that the underlying act was done “to obstruct, impede, or interfere” with a firefighter or law enforcement officer, *i.e.* the defendant’s purpose or intent in performing the act must be to obstruct, impede, or interfere. *See Mechanic*, 854 F.2d at 854 (“§ 231(a) (3) must be construed to require intent”); *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972) (§ 231(a)(3) is not unconstitutional on its face because the statute requires intent and “does not cover mere inadvertent conduct”); *Williams*, 553 U.S. at 294 (focusing on scienter requirement in finding that a statute was not overbroad). Even if the statute lacked an express scienter requirement, courts “generally interpret . . . criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.” *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted); *see also*

United States v. Cassel, 408 F.3d 622, 634 (9th Cir. 2005) (“[E]xcept in unusual circumstances, we construe a criminal statute to include a mens rea element even when none appears on the face of the statute.”).

More generally, Carpenter states that the “imprecise language” of Section 231 creates the risk that the statute’s scope could entirely depend on “a law enforcement official’s unbounded speculation about subjective factors.” ECF 57 at 18. This appears to argue that Section 231 is void for vagueness but fails to make the requisite showing for such a claim. A statute is impermissibly vague if it either (1) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or (2) “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. at 732 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)); see also *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). But Section 231 is not vague; it punishes intentional conduct directed against firefighters and law enforcement officers carrying out their official duties during a civil disorder. The statute prohibits only concrete “act[s]” that are performed with the specific purpose to “obstruct, impede, or interfere” with firefighters or law enforcement. And it prohibits not the mere presence at a civil disorder, but rather, “an act committed during the course of such disorder.” *Mechanic*, 454 F.2d at 853.

The statute’s intent is plain and provides ample notice, as every court that has considered this issue has found. *Mechanic*, at 853–54 (“§ 232, read in conjunction with § 231(a) (3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it”); *United States v. Huff*, 630 F. App’x 471, 487-89 (6th Cir. 2015) (unpublished) (“[W]e reject Huff’s void-for-vagueness argument [regarding § 231(a)(3)] in all respects”); *United States v. Banks*, 368 F. Supp. 1245, 1247 (D.S.D. 1973) (rejecting vagueness challenge to § 231(a)(3), following *Mechanic*), *abrogated on other grounds by United States v. Auginash*, 266 F.3d 781 (8th Cir. 2001); see generally *Wood*, 2021 WL 3048448, at *9

(“Defendant does not have standing to bring a facial vagueness challenge” to § 231(a)(3) because he failed to “demonstrate that [the statute] is vague as applied to his conduct”).

Section 231(a)(3) is “sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden.” *Mechanic*, 454 F.2d at 854. Carpenter’s facial attack on Section 231 should be rejected.

II. Count Two (18 U.S.C. § 1512(c)(2))

In her motion to dismiss Count Two, Defendant incorrectly argues that: 1) section 1512 fails to state an offense; 2) the proceeding addressed in Count Two does not satisfy the statutory requirement for an “official proceeding;” and 3) Section 1512(c)(2) is unconstitutionally vague. None of these arguments support relief for any of the defendants who raise them. Defendant Carpenter’s conduct falls within the plain language of Section 1512 and occurred at the time of an official proceeding.

Accordingly, as Defendant acknowledges, most judges in this District have rejected the challenges the defendants raise in their motions.² See, e.g., *United States v. Fitzsimons*, 21-cr-158, ---F.Supp.3d---, 2022 WL 1698063, at *6-*12 (D.D.C. May 26, 2022) (Contreras, J.); *United States v. Bingert*, 21-cr-91, ---F.Supp.3d ---, 2022 WL 1659163, at *7-*11 (D.D.C. May 25, 2022) (Lamberth, J.); *United States v. Hale-Cusanelli*, No. 21-cr-37 (D.D.C. May 6, 2022) (McFadden, J.) (motion to dismiss hearing at pp. 4-8); *United States v. McHugh (McHugh II)*, No. 21-cr-453, 2022 WL 1302880, at *2-*13 (D.D.C. May 2, 2022) (Bates, J.); *United States v. Puma*, 21-cr-454, ---F.Supp.3d---, 2022 WL 823079, at *12 n.4 (D.D.C. Mar. 19, 2022) (Friedman, J.); *United States v. Bozell*, 21-cr-216, 2022 WL 474144, at *5 (D.D.C. Feb. 16, 2022) (Bates, J.); *United States v. Grider*, 585 F.Supp.3d 21 (D.D.C. 2022) (Kollar-Kotelly, J.); *United States v. Nordean*, 579 F.Supp.3d 28

² Challenges based on the definition of an official proceeding and the alleged vagueness of Section 1512(c)(2) have been rejected unanimously.

(D.D.C. 2021) (D.D.C. 2021) (Kelly, J.); *United States v. Montgomery*, 578 F.Supp.3d 54, (D.D.C. 2021) (Moss, J.); *United States v. Mostofsky*, 579 F.Supp.3d 9 (D.D.C. 2021) (Boasberg, J.); *United States v. Caldwell*, 581 F.Supp.3d 1 (D.D.C. 2021) (Mehta, J.); *United States v. Sandlin*, 575 F.Supp.3d 16 (D.D.C. 2021) (Friedrich, J.).

A. Legislative history does not support a narrowed interpretation of 1512(c)(2)

Because “the statutory language provides a clear answer,” the construction of Section 1512(c)(2) “ends there,” and resort to legislative history is unnecessary. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Regardless, the legislative history of Section 1512(c)(2)—particularly when considered alongside the history of Section 1512 more generally—does not support the defendants’ interpretation of Section 1512(c)(2) for two reasons.

First, Section 1512(c) aimed at closing a “loophole” in Section 1512: the existing prohibitions did not adequately cover a defendant’s *personal* obstructive conduct *not* aimed at another person. *See* 148 Cong. Rec. S6550 (statement of Sen. Hatch). To close that loophole, Section 1512(c)(1) criminalizes a defendant’s firsthand destruction of evidence (without having to prove that the defendant induced another person to destroy evidence) in relation to an official proceeding, and Section 1512(c)(2) criminalizes a defendant’s firsthand obstructive conduct that *otherwise* impedes or influences an official proceeding (though not necessarily through another person). *See Burge*, 711 F.3d at 809-10. The defendants’ limiting construction undermines Congress’s efforts at loophole closing.

Second, no substantive inference is reasonably drawn from the fact that the title of Section 1512 does not precisely match the “broad proscription” it in fact contains, given that the Sarbanes-Oxley Act unequivocally and broadly entitled the new provisions now codified in Section 1512(c), “Tampering with a record *or* otherwise impeding an official proceeding.” Pub. L. No. 107-204, § 1102, 116 Stat. 807 (emphasis added; capitalization altered). Section 1512’s title is more limited

simply because Congress did not amend the pre-existing title when it added the two prohibitions in Section 1512(c) in 2002. *Cf. Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) (describing “the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text”).

And while the legislators who enacted Section 1512(c) in the Sarbanes-Oxley Act undoubtedly had document shredding foremost in mind, “it is unlikely that Congress was concerned with only the type of document destruction at issue in the *Arthur Andersen* case.” *Montgomery*, 578 F.Supp.3d at 77. In other words, “there is no reason to believe that Congress intended to fix that problem only with respect to ‘the availability or integrity of evidence.’” *Id.* In addition, if the defendants’ narrow interpretation were correct, then certain floor statements, such as Senator Hatch’s description of Section 1512(c)’s purpose to strengthen an obstruction offense “often used to prosecute document shredding *and other forms of obstruction of justice*,” 148 Cong. Rec. S6550 (emphasis added), “would be quite strange.” *McHugh*, 2022 WL 1302880, at *12.

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

The Defendant contend that the Electoral College certification before Congress does not constitute an “official proceeding” under 18 U.S.C. 1512(c)(2). This argument lacks merit and this judges in this district have consistently rejected it, including in *Miller*, 589 F.Supp.3d at 66-67; *see also United States v. Rodriguez*, No. 21-cr-0246 (ABJ), 2022 WL 3910580 at *3-4 (D.D.C. Aug. 31, 2022); *Puma*, 2022 WL 823079, at *10; *Bingert*, 2022 WL 1659163 at *4; *United States v. Robertson*, 588 F.Supp.3d 114, 120-22 (D.D.C. 2022) The same result is warranted here.

i. The plain text of the statute establishes that the Joint Session is an Official Proceeding

a. Background

The Constitution and federal statutory law require that both Houses of Congress meet to

certify the results of the Electoral College vote. Two separate provisions in the Constitution mandate that the Vice President while acting as the President of Senate “shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” U.S. Const. art. II, § 1, cl. 3; U.S. Const amend. XII. Under the Electoral Act of 1887, a Joint Session of the Senate and the House of Representatives must meet at “the hour of 1 o’clock in the afternoon” on “the sixth day of January succeeding every meeting of the electors.” 3 U.S.C. § 15. Section 15 details the steps to be followed: the President of the Senate opens the votes, hands them to two tellers from each House, ensures the votes are properly counted, and then opens the floor for written objections, which must be signed “by at least one Senator and one Member of the House of Representatives.” *Id.* The President of the Senate is empowered to “preserve order” during the Joint Session. 3 U.S.C. § 18. Upon a properly made objection, the Senate and House of Representatives withdraw to consider the objection; each Senator and Representative “may speak to such objection . . . five minutes, and not more than once.” 3 U.S.C. § 17. The Electoral Act, which specifies where within the chamber Members of Congress are to sit, requires that the Joint Session “not be dissolved until the count of electoral votes shall be completed and the result declared.” 3 U.S.C. § 16.

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

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

or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce[.]

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

b. Certification of the Electoral College vote is a proceeding before the Congress

The certification of the Electoral College vote as set out in the Constitution and federal statute is a “proceeding before the Congress,” 18 U.S.C. § 1515(a)(1)(B), and, therefore, an “official proceeding” for purposes of 18 U.S.C. § 1512(c)(2). That conclusion flows principally from the obstruction statute’s plain text. Skipping past the text, the defendants argue that Congress’ certification of the Electoral college is a “ceremonial meeting” that decides “nothing.” ECF 202:13 (Johnson); *see also* ECF 210:7-8 (Blythe) (certification is a ceremonial and administrative event). As this Court noted in *Puma*, the logic behind this argument is “flawed”. *Puma*, 2022 WL 823079, at *11.

Understanding what qualifies as an official proceeding “depends heavily on the meaning of the word ‘proceeding’” because “official proceeding” is defined “somewhat circularly” as, among other things, a congressional “proceeding.” *See United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013). The certification of the Electoral College vote constitutes a “proceeding” under any interpretation of that term. In its broadest and most “general sense,” a proceeding refers to “[t]he carrying on of an action or series of actions; action, course of action; conduct, behavior.” *Id.* (quoting *Proceeding*, Oxford English Dictionary, available at <http://www.oed.com>). The defendants do not meaningfully contend that the certification of the Electoral College vote, which involves a detailed “series of actions” outlining how the vote is opened, counted, potentially objected to, and ultimately certified, is not a proceeding—and indeed an official proceeding—under that broad definition. And there is good reason to construe “proceeding” as used in 18 U.S.C. § 1515 broadly. Section 1515’s text encompasses not only congressional proceedings, but judicial proceedings, grand jury

proceedings, any legally authorized proceedings before federal government agencies, and proceedings “involving the business of insurance.” 18 U.S.C. § 1515(a)(1); *see* S. Rep. No. 97-532, at 17 (1982) (noting that the “term ‘official proceeding’” in the obstruction statute is “defined broadly”).

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

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

The formality involved in the certification of the Electoral College vote places it “comfortably within the category” of an official proceeding. *See Perez*, 575 F.3d at 169. Few events are as solemn and formal as a Joint Session of the Congress. That is particularly true for the certification of the Electoral College vote, which is expressly mandated under the Constitution and federal statute. Required by law to begin at 1 pm on the January 6 following a presidential election, the certification of the Electoral College vote is both a “hearing” and “business conducted by . . . [an] official body.” *See Black’s Law Dictionary, supra*. The Vice President, as the President of the Senate, serves as the “presiding officer” over a proceeding that counts votes cast by Electors throughout the country in presidential election. 3 U.S.C. § 15.

As in a courtroom, Members may object, which in turn causes the Senate and House of Representatives to “withdraw” to their respective chambers so each House can render “its decision” on the objection. *Id.* And just as the judge and parties occupy specific locations in a courtroom, so too do the Members within the “Hall.” *See* 3 U.S.C. § 16 (President of the Senate is in the Speaker’s chair; the Speaker “immediately upon his left”; the Senators “in the body of the Hall” to the right of the “presiding officer”; the Representatives “in the body of the Hall not provided for the Senators”; various other individuals “at the Clerk’s desk,” “in front of the Clerk’s desk,” or “upon each side of the Speaker’s platform”). The Electoral College vote certification, moreover, must terminate with a decision: no recess is permitted until the “the count of electoral votes” is “completed,” and the “result declared.” *Id.* In short, the certification of the Electoral College vote is a “proceeding before the Congress.” *See* 18 U.S.C. § 1515(a)(1)(B).

C. Section 1512(c)(2) Is Not Unconstitutionally Vague.

Next, Defendant contends that Section 1512(c)(2) is unconstitutionally vague. As pointed out

by Defendant, every judge in this District has denied this argument.

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person of “life, liberty, or property, without due process of law.” U.S. Const. amends. V, XIV. An outgrowth of the Due Process Clause, the “void for vagueness” doctrine prevents the enforcement of a criminal statute that is “so vague that it fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, “[g]enerally, a legislature need do nothing more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). To avoid arbitrary enforcement, the law must not “vest[] virtually complete discretion” in the government “to determine whether the suspect has [violated] the statute.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *United States v. Williams*, 553 U.S. 285, 306 (2008), or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). “Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.” *Bronstein*, 849 F.3d at 1107 (quoting *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam)). A provision is impermissibly vague only if it requires proof of an “incriminating fact” that is so indeterminate as to invite arbitrary and “wholly subjective” application. *Williams*, 553 U.S. at 306; see *Smith v. Goguen*, 415 U.S. 566, 578 (1974). The “touchstone” of vagueness analysis “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, 267 (1997).

Defendant has not overcome the “strong presumpti[on]” that Section 1512(c)(2) is constitutional. *See United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Section 1512(c)(2) does not tie criminal culpability to “wholly subjective” terms such as “annoying” or “indecent” that are bereft of “narrowing context” or “settled legal meanings,” *Williams*, 553 U.S. at 306, nor does it require application of a legal standard to an “idealized ordinary case of the crime,” *Johnson*, 576 U.S. at 604. Section 1512(c)(2)’s prohibition on “corruptly ... obstruct[ing], influenc[ing], or imped[ing]” an “official proceeding” gives rise to “no such indeterminacy.” *Williams*, 553 U.S. at 306. The statute requires that a defendant, acting with consciousness of wrongdoing and intent to obstruct, attempts to or does undermine or interfere with a statutorily defined official proceeding. While “it may be difficult in some cases to determine whether these clear requirements have been met,” “courts and juries everyday pass upon knowledge, belief and intent – the state of men’s minds – having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.” *Id.* (quoting *American Communications Ass’n, CIO v. Douds*, 339 U.S. 382, 411 (1950)).

The Defendant’s claim that the word “corruptly” in Section 1512(c)(2) is unconstitutionally vague is incorrect. As Judge Friedman recently observed, “[j]udges in this district have construed ‘corruptly’ to require ‘a showing of “dishonesty” or an ‘improper purpose’[;], ‘consciousness of wrongdoing’[;] or conduct that is ‘independently criminal,’ ‘inherently malign, and committed with the intent to obstruct an official proceeding.’” *Puma*, 2022 WL 823079, at *10 (quoting *Montgomery*, 578 F.Supp.3d at 81); *Bozell*, 2022 WL 474144, at *6; *Caldwell*, 581 F.Supp.3d at *19; and *Sandlin*, 575 F.Supp.3d at 33 (alterations omitted). Under any of these common-sense constructions, the term “corruptly” “not only clearly identifies the conduct it punishes; it also ‘acts to shield those who engage in lawful, innocent conduct – even when done with the intent to obstruct, impede, or influence the official proceeding.’” *Id.* (quoting *Sandlin*, 575 F.Supp.3d at 33). It presents no vagueness

concern.

Nor does *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), support Defendant's attacks on the word "corruptly," for at least two reasons. First, the D.C. Circuit narrowly confined *Poindexter*'s analysis to Section 1505's use of "corruptly," and expressly declined to hold "that term unconstitutionally vague as applied to all conduct." 951 F.2d at 385. Five years later, in *United States v. Morrison*, 98 F.3d 619 (D.C. Cir. 1996), the D.C. Circuit rejected a *Poindexter*-based vagueness challenge to 18 U.S.C. § 1512(b) and affirmed the conviction of a defendant for "corruptly" influencing the testimony of a potential witness at trial. *Id.* at 629-30. Other courts have similarly recognized "the narrow reasoning used in *Poindexter*" and "cabined that vagueness holding to its unusual circumstances." *United States v. Edwards*, 869 F.3d 490, 502 (7th Cir. 2017); *see also, e.g., United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998) (rejecting vagueness challenge to "corruptly" in 26 U.S.C. § 7212(a)); *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998) (same for 18 U.S.C. § 1512(b)); *United States v. Brenson*, 104 F.3d 1267, 1280 (11th Cir. 1997) (same for 18 U.S.C. § 1503). The defendants' invocation of *Poindexter* accordingly fails to establish that Section 1512(c) suffers the same constitutional indeterminacy.

Second, *Poindexter* predated the Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). There, the Court explained the terms "[c]orrupt" and "corruptly" are normally associated with wrongful, immoral, depraved, or evil." *Id.* at 705 (citation omitted). In doing so, the Court "did not imply that the term was too vague." *Edwards*, 869 F.3d at 502. Third, and as noted above, courts have encountered little difficulty when addressing "corruptly" in Section 1512(c)(2) following *Arthur Andersen*. *See Puma*, 2022 WL 823079, at *10 (quoting *Montgomery*, at 81); *Bozell*, 2022 WL 474144, at *6; *Caldwell*, 581 F.Supp.3d at 19; and *Sandlin*, 575 F.Supp.3d at 32-33 (alterations omitted). Such efforts demonstrate that the statute's "corruptly" element does not invite arbitrary or wholly subjective application by either courts or juries.

Defendant's conduct falls squarely within the confines of 1512(c)(2). Carpenter attended a rally called "Stop the Steal." ECF 54 at 14. Defendant entered the Capitol (after bypassing numerous manned and unmanned barricades) at a time the building was closed so that an official proceeding could take place. *Id.* Carpenter made her way to the Senate Wing doors where she screamed in officers' faces. *Id.* at 18-19. When Defendant Carpenter finally exited the building, she stood on the Capitol steps and proclaimed, "The breach was made, and it needs to calm down now. Congress needs to come out, and they need to certify Trump as President. This is our house... We did it, we breached the door." *Id.* at 22.

III. Counts Three and Four (18 U.S.C. § 1752)

Defendant Carpenter moves to miss Counts Three and Four, charging 18 U.S.C. § 1752, on the following grounds: (1) only the Secret Service, not the Capitol Police, can delegate "restrictive areas", and the Secret Service did not establish the "restricted area" on January 6, 2021, and (2) one of the Secret Service's protectees that day, former Vice President Mike Pence, was not "temporarily visiting" the Capitol. ECF 57 at 23-28.

These are now well-trodden arguments in this district, having been raised and rejected consistently in similar cases arising from the January 6th Capitol attack. The area was restricted due to a visiting protectee and therefore the Secret Service did not have to expressly establish the restricted area. For the following detailed reasons, the Court should deny Defendant's motion here as well.

A. Section 1752 does not require the government to prove that the restricted area was restricted at the Secret Service's direction.

First, Defendant asserts that Counts Three and Four, charging 18 U.S.C. §§ 1752(a)(1)–(2) and (b)(1)(A), should be dismissed for failure to state an offense because the U.S. Capitol Police, and not the Secret Service, designated the "restricted area" around the U.S. Capitol on Jan. 6, 2021. ECF 57 at 23-26. Nothing in the express language of Section 1752 requires this, and Defendant's attempts

to read such a requirement as implied in the statutory language flies against the commonsense reading of the text and its legislative history.

Section 1752 provides in relevant part:

(a) Whoever—

(1) knowingly enters or remains in any restricted building or grounds without lawful authority to do so; [or]

(2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions;

(c) In this section—

(1) [T]he term “restricted buildings or grounds” means any posted, cordoned off, or otherwise restricted area—

(B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting;

18 U.S.C. § 1752. Section 1752 also defines “restricted building or grounds” to include any posted, cordoned off, or otherwise restricted area “of the White House or its grounds, or the Vice President’s official residence or its grounds” or “of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.” 18 U.S.C. §§ 1752(c)(1)(A), (C).

The language of Section 1752 contains no express requirement that the “restricted buildings or grounds” must be restricted by USSS for there to be a violation of Section 1752. Nonetheless, Defendant argues the requirement is the “exclusive” role of the Secret Service. ECF 57 at 24. However, because the plain language of the statute is clear and unambiguous, reading the implied

requirement provided by Defendant is unwarranted. Even if one were to look beyond this plain language, the legislative history of Section 1752 also weighs against Defendant's interpretation.

First, there is no ambiguity in the text of Section 1752 as to the meaning of "restricted building or grounds." Namely, Section 1752 proscribes certain conduct in and around "any restricted building or grounds," *see* 18 U.S.C. § 1752(a), and it provides three definitions for the term "restricted buildings and grounds," *see* § 1752(c)(1), including "any posted, cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting," § 1752(c)(1)(B). Through a cross-reference, Section 1752 makes clear—and Defendants do not appear to dispute—that "person[s] protected by the Secret Service" include the Vice President. § 1752(c)(2); *see* § 3056(a)(1). The proscribed conduct within a "restricted building or grounds" includes, as relevant here, knowingly and unlawfully entering or remaining, § 1752(a)(1), and knowingly and with intent to impede or disrupt government business, engaging in "disorderly or disruptive conduct" that "in fact, impedes or disrupts" "government business," § 1752(a)(2).

In short, Section 1752 "prohibits persons from knowingly entering without lawful authority to do so in any posted, cordoned off, or otherwise restricted area of a building or grounds where a person protected by the Secret Service is or will be temporarily visiting." *Wilson v. DNC Servs. Corp.*, 417 F. Supp. 3d 86, 98 (D.D.C. 2019), *aff'd*, 831 F. App'x 513 (D.C. Cir. 2020). Where, as here, the words of the statute are unambiguous, "the judicial inquiry is complete." *See Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (internal quotation marks omitted). However, under Defendants' interpretation of Section 1752, there is an additional, implied requirement unstated in the statutory language above that any restricted area must be designated by USSS. There is no such requirement, nor is there any credible rationale why one should be inferred.

And while looking beyond the plain language is unwarranted here, *See United States v.*

American Trucking Associations, 310 U.S. 534, 543 (1940) (stating that looking beyond clear statutory text is appropriate where the results would be absurd or demonstrably at odds with clearly expressed Congressional intent), the legislative history of Section 1752 in fact affirms the plain reading of the text that Defendants resist. As Defendant acknowledges, when Section 1752 was first enacted in 1970, USSS was part of the Treasury Department, and this original version of the statute explicitly incorporated regulations promulgated by the Treasury Department governing restricted areas. See *United States v. Bursey*, 416 F.3d 301, 306-07 (4th Cir. 2005) (noting that definition of restricted area required interpreting Treasury regulations). Specifically, subsection (d) of Section 1752 gave authority to Treasury, which oversaw USSS, to “prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President is or will be temporarily visiting.” Pub. L. 91-644, Title V, Sec. 18, 84 Stat. 1891-92 (Jan. 2, 1971).

However, when Congress revised Section 1752 in 2006, it struck subsection (d) from the statute, eliminating the requirement that “restricted building or grounds” be necessarily defined or designated by USSS or any other particular law enforcement agency. Pub. L. 109-177, Title VI, Sec. 602, 120 Stat. 192 (Mar. 9, 2006). In 2012, Congress further reinforced this interpretation by adding the definitional subsection (c) cited above, which provides the current definition of “restricted building or grounds.” Pub. L. 112-98, Title I, Sec. 2, 126 Stat 263 (March 8, 2012). Contrary to Defendants’ reading, the legislative history shows that Congress deliberately excised any requirement that a restricted area depend on any definition or determination by USSS.

Both the plain language and legislative history of Section 1752 show that there is no requirement, express or implied, that an area be restricted by a particular law enforcement agency, as courts in this district have unanimously held. *United States v. Grider*, --- F.Supp.3d ---, 2022 WL 3016775, at *7 (D.D.C. July 29, 2022) (collecting cases) (internal quotations omitted) (“[N]othing in

the statutory text requires the Secret Service to be the entity to restrict or cordon off a particular area, nor does Grider point to any provision in the statute in support of such a proposition.”); *United States v. Bingert*, --- F.Supp.3d ---, 2022 WL 1659163, at *14 (D.D.C. May 25, 2022) (“[D]efendants fashion a bizarre requirement, seemingly out of thin air: that only the Secret Service can designate an area as restricted [for the purposes of 18 U.S.C. § 1752].”). Defendants’ contention that Counts Five, Six, and Seven are defective for this reason should be likewise rejected.

B. Several Secret Service protectees were temporarily visiting the Capitol grounds on Jan. 6, 2021

Section 1752 prohibits the unlawful entry into a restricted or otherwise cordoned off “building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.” 18 U.S.C. § 1752(c)(1)(B). As the government intends to prove at trial, at the time of Defendants’ relevant conduct on Capitol grounds on January 6, 2021, three Secret Service protectees—Vice President Pence and two immediate family members—were present. Defendants’ conduct accordingly falls within the Section 1752’s plain sweep when they entered the restricted area of the Capitol and assaulted law enforcement officers with a metal barricade while the Vice President and his family were “temporarily visiting.”

Defendant contends that the Section 1752 charges against them must be dismissed because the U.S. Capitol grounds on Jan. 6, 2021, were not a building or grounds “where the President or other person protected by the Secret Service is or will be temporarily visiting.” ECF 57 at 26. In particular, Defendant argues that because former Vice President Mike Pence lived and worked in the District of Columbia, and because he had an office inside the Capitol building, he could therefore not be “temporarily visiting” the building or grounds for the purposes of Section 1752.

First, Defendants make no mention of Vice President Pence’s two immediate family members—both USSS protectees—who were also with him that day. This makes any argument as to

whether Vice President Pence was “temporarily visiting” a moot point. Regardless, the Court should reject Defendants’ argument as meritless, as all others have,³ as it defies Section 1752’s plain terms, purpose, and structure.

As noted above, to determine the meaning of a statute, a court “look[s] first to its language, giving the words used their ordinary meaning.” *Levin*, 568 U.S. at 513 (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). The verb “visit” means, *inter alia*, “to go to see or stay at (a place) for a particular purpose (such as business or sightseeing)” or “to go or come officially to inspect or oversee.”⁴ Either definition describes the Secret Service protectees’ activities on January 6. Vice President Pence was physically present at the U.S. Capitol for a particular purpose: he presided over Congress’s certification of the 2020 Presidential Election, first in the joint session, and then in the Senate chamber. Similarly, the Vice President’s family members came to the U.S. Capitol for a particular purpose: to observe these proceedings. Finally, as President of the Senate, Vice President Pence oversaw the vote certification. Given the presence of the Vice President and his family members, the U.S. Capitol qualified as a building where “[a] person protected by the Secret Service [was] . . . temporarily visiting.” 18 U.S.C. § 1752(c)(1)(B).

Defendants emphasize Section 1752’s use of the term “temporarily,” citing cases where the President or Vice President were “traveling outside of D.C., where they live and work, ‘visiting’ that area for a ‘temporary’ purpose.” ECF 210 at 20. First, Section 1752 does not impose a requirement

³ *E.g. United States v. Puma*, 2022 WL 823079, at *17 (D.D.C. Mar. 19, 2022) (rejecting same argument as “not supported by the statutory text and . . . out of step with the statutory context); *United States v. McHugh*, 583 F. Supp. 3d 1, 35 (D.D.C. 2022) (“None of McHugh’s arguments about the meaning of ‘temporarily visiting’ sway the Court from the commonsense conclusion, founded on ordinary usage, dictionary definitions, and judicial interpretations, that Vice President Pence was ‘temporarily visiting’ the Capitol on January 6, 2021.”); *United States v. Rodriguez*, No. CR 2 (ABJ), 2022 WL 3910580, at *16 (D.D.C. Aug. 31, 2022) (“This strained interpretation is inconsistent with both the text and the structure of the statute.”).

⁴ <https://www.merriam-webster.com/dictionary/visit>.

that the location being temporarily visited be outside of the District of Columbia. Second, Section 1752 does not require that the purpose of the visit be temporary, but that the nature of the visit itself be temporary. Vice President Pence and his family had traveled to the U.S. Capitol to oversee and attend the Joint Session of Congress—a proceeding of limited duration. At the close of the proceeding, they left—confirming the “temporary” nature of their visit.

IV. Count Seven (40 U.S.C. § 5104(e)(2)(G))

Carpenter’s motion to dismiss the Section 5104(e)(2)(G) count is without merit and should be denied. Defendant advances two arguments: (1) Section 5104(e)(2)(G) is “substantially overbroad,” ECF 57 at 28; and (2) Section 5104(e)(2)(G) is “unconstitutionally vague on its face.” *Id.* at 32. However, courts have routinely held that the language of 5104(e)(2)(G) is clear as it plainly prohibits only conduct that would disrupt the orderly business of Congress.

A. Section 5104 is not Unconstitutionally Overbroad

The statute is not overbroad. *See Seitz*, 21-cr-279 (DLF), ECF No. 51 at 12-14. In the First Amendment context, as in others, “[f]acial challenges are disfavored.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Facial overbreadth challenges—in which a defendant asserts that a statute, constitutionally applied to her, is nevertheless invalid because it would be unconstitutional in a “substantial number” of *other* cases, *id.* at 449 n.6 (internal quotation marks omitted)—are even more exceptional. “‘Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment,’” overbreadth is “‘strong medicine’ to be employed ‘only as a last resort.’” *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)); *cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting the “substantial social costs created by the overbreadth doctrine when it blocks application of a law to . . . constitutionally unprotected conduct”) (emphasis omitted).

The Supreme Court has therefore “vigorously enforced the requirement that a statute’s overbreadth be *substantial* . . . relative to the statute’s plainly legitimate sweep.” *Williams*, 553 U.S. at 292. “[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *Id.* at 801. And laws that are “not specifically addressed to speech” are far less likely to present such a danger. *Hicks*, 539 U.S. at 124; *see id.* (observing that “an overbreadth challenge” to such a law will “[r]arely, if ever, . . . succeed”).

Defendant’s challenge fails that demanding standard. Because “it is impossible to determine whether a statute reaches too far without first knowing what the statute covers,” the “first step in overbreadth analysis is to construe the challenged statute.” *Williams*, 553 U.S. at 293. The prohibition in Section 5104(e)(2)(G) presents “no ambiguity”; it “tells the citizen that it is unlawful” for her to parade, demonstrate, or picket inside the Capitol Building. *Jeanette Rankin Brigade*, 342 F. Supp. at 583. The operative verbs—parade, demonstrate, and picket—principally target conduct rather than speech, and those verbs are paired with the “willfully and knowingly” scienter requirements, *see Williams*, 553 U.S. at 294 (focusing on scienter requirement in determining that statute was not overbroad). And the subsequent six words, “in any of the Capitol Buildings,” makes clear that the statute prohibits conduct within a nonpublic forum, which cabins the overbreadth of which Mitchell complains. *Nassif*, 2022 WL 4130841, at *4. At the very least, Mitchell cannot show that Section 1512(c)(2) is “substantial[ly]” overbroad relative to its “plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 n.6 (internal quotation marks omitted).

Defendant’s own prosecution—which involves physically trespassing into the restricted

Capitol where she screamed at numerous police lines protecting areas of the building where an official proceeding had been taking place before it was disrupted—is illustrative of the numerous constitutionally legitimate applications of the statute to conduct and unprotected speech. And far from showing a “realistic danger” of constitutionally problematic applications in other cases, *Taxpayers for Vincent*, 466 U.S. at 801, Defendant fails to identify a single actual example of a prosecution based on protected speech. The limitations inherent in the crime of conviction, moreover, render the possibility of any such prosecutions marginal at best, and any such case could be the subject of an as-applied challenge. Nothing at all calls for the “strong medicine,” *Los Angeles Police Dep’t*, 528 U.S. at 39 (internal quotation marks omitted) of overbreadth invalidation.

Defendant’s citations to case law show the weaknesses of her overbreadth claim. She relies on *Bynum v. U.S. Capitol Police Bd.*, where Judge Friedman ruled that a Capitol Police regulation interpreting Section 5104(e)(2)(G)⁵ that defined “demonstration activity” to include “holding vigils” and “sit-ins” swept too broadly because it “invited the Capitol Police to restrict behavior that is no way disruptive.” 93 F. Supp. 2d at 53, 57. As an initial matter, *Bynum*’s invalidation of a Capitol Police regulation—which was applied to an individual who was denied permission to pray inside the Capitol building—does not inform the statutory challenge that Carpenter presses here. Moreover, Judge Friedman in *Bynum* (and Judge Bates in *Nassif*) concluded that the inside of the Capitol building is a nonpublic forum, where the government may restrict First Amendment activity if “the restrictions are ‘viewpoint neutral’ and ‘reasonable in light of the purpose served by the forum.’” *Id.* at 56 (citing *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985)); *see also Nassif*, 2022 WL 4130841, at *4. He reasoned that, although the

⁵ At the time, the provision was Section 193(f)(b)(7).

regulation went too far, Section 5104(e)(2)(G) itself set forth “legitimate purposes,” *Bynum*, 93 F. Supp. 2d at 57, that were “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,” *id.* at 58.⁶ In short, Judge Friedman concluded that, unlike the regulation at issue in *Bynum*, the statute itself was not “substantial[ly]” overbroad relative to its “plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 n.6 (internal quotation marks omitted); *see also Nassif*, 2022 WL 4130841, at *4.

Additionally, Defendant’s reliance on *Lederman v. United States*, 89 F. Supp. 2d 29 (D.D.C. 2000), is likewise unavailing. Like *Bynum*, *Lederman* involved a challenge to a Capitol Police regulation, and is of marginal, if any, relevance for that reason. Furthermore, the regulation at issue there limited the areas within the Capitol *Grounds* in which individuals could engage in “demonstration activity,” which in *Lederman* involved the distribution of leaflets in support of the arts. *Id.* at 32. Relying in part on *Jeanette Rankin Brigade*, *supra*, Judge Roberts in *Lederman* concluded that the entire Capitol Grounds constitute a traditional public forum, *id.* at 37, and that although the regulation left open alternative channels for expression, its imposition of a total ban burdened more speech than necessary. *Id.* at 38-39. The hypothetical “group of congressional staffers” whose conduct would violate the regulation (and who Mitchell cites, ECF No. 51 at 6-7) “stood outside the Capitol,” and thus “within a traditional public forum.” *Id.* at 41. But Section 5104(e)(2)(G)’s prohibition applies only within the nonpublic forum inside the Capitol buildings,

⁶ Defendant argues that the legislative debate over what became Section 5104(e)(2)(G) undercuts Judge Friedman’s interpretation that the statute was designed to prevent conduct that disrupted congressional business. *See* ECF No. 51 at 6. Even putting aside the irrelevance of legislative history when interpreting unambiguous statutes, Defendant confuses congressional debate about whether to add an additional intent requirement to the existing “willfully and knowingly” scienter in the statute with the actus-reus question—what type of conduct does “demonstrate” in Section 5104(e)(2)(G) encompass—at issue in *Bynum*.

rendering the hypothetical inapt. As Judge Friedrich held, the statute does not cover a substantial amount of protected expressive activity. *Seitz*, 21-cr-279 (DLF), ECF No. 51 at 14.

Defendant digresses at various points—where precedent and the language of the statute do not support her argument—to statements during the House debate on the statute. But legislative history “is an uneven tool that cannot be used to contravene plain text.” *Bingert*, 2022 WL 1659163, at *11 (citing *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011)); see also *Nassif*, 2022 WL 4130841, at *7 (defendant’s “reliance on legislative history is misplaced where the plain text of the statute leaves no need to resort to alternative methods of interpretation.”). The floor statements on which Defendant relies are “particularly ‘unreliable.’” *United States v. Powell*, No. 21-cr-179, ECF No. 73, at 6 (D.D.C. July 8, 2022) (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921)). For example, in at least one instance, Defendant’s citation to the legislative history is misleading. She accurately quotes Representative O’Neal’s statement that O’Neal is “a little bit disturbed” about the language of the predecessor to Section 5104(e)(2)(G), see ECF No. 51 at 3, but omits the later discussion in which O’Neal makes clear that the basis for his concern was that the prohibition does not also include the Capitol Grounds. See 113 Con. Rec. H29,390 (daily ed. Oct. 19, 1967) (statement of Rep. O’Neal) (asking if “anyone would have an objection to adding the word ‘grounds’ to the new language”).⁷

A. Section 5104(e)(2)(G) is not unconstitutionally vague.

Defendant also is incorrect when she asserts that Section 5104(e)(2)(G) is “unconstitutionally vague on its face.” ECF No. 51 at 7-11.⁸ Her flawed argument should be rejected, as it was when

⁷ Other representatives clarified that the law enacted in 1946 already included a similar prohibition that applied to the Capitol Grounds. See 113 Con. Rec. H29,390 (daily ed. Oct. 19, 1967) (statement of Rep. Colmer) (noting that such an addition “would be surplusage”).

⁸ As a general matter, one making such a facial vagueness challenge must demonstrate that the law is “impermissibly vague in all its applications”; one whose conduct is “clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Vill. of Hoffman Ests.*, 455 U.S. 489, 494-95 (1982). Defendant cannot surmount that demanding standard. Where the facial challenge relies on a First Amendment theory, a facial challenge may be available

raised by other January 6 rioters in *Nassif*, 2022 WL 4130841, at *7, and *Seitz*, No. 21-cr-279 (DLF), ECF No. at 51 at 7-8.

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person of “life, liberty, or property, without due process of law.” U.S. Const. amends. V, XIV. An outgrowth of the Due Process Clause, the “void for vagueness” doctrine prevents the enforcement of a criminal statute that is “so vague that it fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, “[g]enerally, a legislature need do nothing more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). To avoid arbitrary enforcement, the law must not “vest[] virtually complete discretion” in the government “to determine whether the suspect has [violated] the statute.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). “Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.” *Bronstein*, 849 F.3d at 1107 (quoting *Rose v. Locke*, 423 U.S. 48,

where the challenger shows that the law in question “reaches a substantial amount of constitutionally protected conduct.” See *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (citing *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983)). Even assuming that is viable theory under governing law, see *Quigley v. Giblin*, 569 F.3d 449, 457-58 (D.C. Cir. 2009) (questioning the breadth of “First Amendment vagueness doctrine”), Defendant’s facial vagueness claim fails for the same reasons that her overbreadth challenge falls short.

50 (1975) (per curiam)). Rather, a provision is impermissibly vague only if it requires proof of an “incriminating fact” that is so indeterminate as to invite arbitrary and “wholly subjective” application. *Williams*, 553 U.S. at 306; see *Smith v. Goguen*, 415 U.S. 566, 578 (1974). The “touchstone” of vagueness analysis “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, 267 (1997).

A statutory provision is therefore “not rendered unconstitutionally vague because it ‘do[es] not mean the same thing to all people, all the time, everywhere.’” *Bronstein*, 849 F.3d at 1107 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). A statute is instead vague where it fails to specify any “standard of conduct . . . at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). “As a general matter,” however, a law is not constitutionally vague where it “call[s] for the application of a qualitative standard . . . to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.’” *Johnson*, 576 U.S. at 603-04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

Defendant fails to overcome the strong presumption that Section 5104(e)(2)(G) passes constitutional muster. See *United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 32 (1963) (“The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.”).

Section 5104(e)(2)(G) does not tie criminal culpability to “wholly subjective” terms such as “annoying” or “indecent” that are bereft of “narrowing context” or “settled legal meanings,” *Williams*, 553 U.S. at 306, nor does it require application of a legal standard to an “idealized ordinary case of the crime,” *Johnson*, 576 U.S. at 604. That the statute makes it unlawful to “willfully and knowingly . . . parade, demonstrate, or picket in any of the Capitol Buildings,” gives

rise to “no such indeterminacy.” *Williams*, 553 U.S. at 306; *see also Nassif*, 2022 WL 4130841, at *7. That is, the plain language clearly prohibits an individual from engaging in disruptive conduct inside the Capitol building. *See Bynum*, 93 F. Supp. 2d at 57-58 (explaining that Capitol Police regulation at issue in that case was unnecessary because Congress had provided “more than sufficient guidance” in Section 5104(e)(2)(G)’s statutory text). While “it may be difficult in some cases to determine whether these clear requirements have been met,” ““courts and juries every day pass upon knowledge, belief and intent—the state of men’s minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.”” *Id.* (quoting *American Communications Ass’n, CIO v. Douds*, 339 U.S. 382, 411 (1950)).⁹

As Judge Bates explained as he rejected an identical argument that Section 5104(e)(2)(G) “does not define the offense so as to put ordinary people on notice of what is prohibited,” ECF No. 51 at 7; *Nassif*, 2022 WL 4130841, at *6,

The definition of demonstrate—“to make a public demonstration; esp. to protest against or agitate for something,” Oxford English Dictionary (3d ed. 2005), or “to make a public display of sentiment for or against a person or cause,” as by “students demonstrating for the ouster of the dictator,” Webster’s New International Dictionary (3d ed. 1993)—is not so vague as [defendant] contends. When read “in light of its neighbors,” *McHugh I*, 2022 WL 296304, at *12, “parade” and “picket,” it is clear that § 5104(e)(2)(G) prohibits taking part in an organized demonstration or parade that advocates a particular viewpoint—such as, for example, the view that the 2020 U.S. Presidential Election was in some way flawed.

Accordingly, Judge Bates held, as this Court should, that “§ 5104(e)(2)(G) is not unconstitutionally vague on its face.” *Id.* at *7.

⁹ For the reasons given above, Defendant’s reliance on scattered comments during the floor debate in the House does not require a different outcome.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss should be denied.

Respectfully submitted,

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