

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

**UNITED STATES OF AMERICA**

**v.**

**PATRICK STEDMAN,**

**Defendant.**

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**CR. NO. 21-cr-383 (BAH)**

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

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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 Stedman’s motions, ECF No. 46, seeking dismissal of Counts One, Two, and Three of the Indictment. Count One charges the Defendant with obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2) and 18 U.S.C. § 2. Count Two charges the Defendant with entering and remaining in a restricted building and grounds, in violation of 18 U.S.C. § 1752(a)(1). Count Three charges the Defendant with disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2).

In his motion, Defendant Stedman argues that Count One fails to state an offense and asserts that the Congressional certification proceeding was not an official proceeding, that the Defendant did not take “some action with respect to a document, record, or other object,” and that should Count One be construed to apply to the Congressional Session on January 6<sup>th</sup>, it would be unconstitutional as applied to the Defendant. ECF 46-1 13-33. The Defendant also argues that

Counts Two and Three fail to state an offense. ECF 46-1 at 33-38. Defendant Stedman's contentions lack merit. These arguments have routinely been rejected by the courts in this district, as well as recently by the Circuit court in *United States v. Fischer*, No. 22-3038, \_\_\_ F.4th \_\_\_, 2023 WL 2817988 (D.C. Cir. Apr. 7, 2023), and should 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 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. *United States v. Bingert*, 21-cr-91, ---F.Supp.3d ---, 2022 WL 1659163, at \*3 (D.D.C. May 25, 2022) (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); *United States v. McHugh (McHugh II)*, No. 21-cr-453, 2022 WL 1302880, at \*2 (D.D.C. May 2, 2022) (Bates, J.) (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. § 1512(c)(2))**

In his motion to dismiss Count One, the Defendant incorrectly argues that: 1) section 1512 fails to state an offense; 2) the proceeding addressed in Count One does not satisfy the statutory requirement for an “official proceeding,” - did not take action with respect to a document – lack of notice – arbitrary – void for vagueness - and 3) Section 1512(c)(2) is unconstitutionally vague. None of these arguments support relief for the Defendant. His conduct falls within the plain language of Section 1512 and occurred at the time of an official proceeding.

Most judges in this District have rejected the challenges the Defendant’s raises in his motions.<sup>1</sup> *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 (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

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<sup>1</sup> 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) (Friedrich, J.).

In addition, the D.C. Circuit’s recent decision in *Fischer* confirms the sufficiency of the indictment in this case. In *Fischer*<sup>2</sup>, the D.C. Circuit addressed a pretrial ruling that Section 1512(c)(2) “requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.” 2023 WL 2817988, at \*3 (quoting *United States v. Miller*, 589 F. Supp. 3d 60, 78 (D.D.C. 2022)). Because the indictments in the cases on appeal did not allege that the defendants “violated § 1512(c)(2) by committing obstructive acts related to ‘a document, record, or other object,’ the district court dismissed the § 1512(c)(2) counts.” *Id.* The government appealed and the D.C. Circuit reversed, holding Section 1512(c)(2) “encompasses all forms of obstructive conduct, including . . . efforts to stop Congress from certifying the results of the 2020 presidential election.” *Id.* at \*3. The court concluded that, “[u]nder the most natural reading of the statute, § 1512(c)(2) applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1).” *Id.* at \*4. The D.C. Circuit’s opinion in *Fischer* thus confirms that the indictment in this case is sufficient notwithstanding the fact that it does not allege obstructive acts related to a document, record, or other object.

**A. Even Prior to *Fischer*, 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)—

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<sup>2</sup> The *Fisher* case was a consolidated appeal which included the case of *United States v. Miller*, No. 21-cr-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022), which is cited in the Defendant’s brief which was filed prior to *Fisher* reversing *Miller*.

particularly when considered alongside the history of Section 1512 more generally—does not support the Defendant’s 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 Defendant’s 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 Defendant’s 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 contends 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 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.

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).

C. 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). The D.C. Circuit, in *Fischer*, concurred with the district courts that have decided this issue. As noted by the Circuit, “[t]he statutory definition of “official proceeding” under § 1512(c)(2) includes a “proceeding before the Congress.”” 2023 WL 2817988, at \*9. **Section 1512(c)(2) Applies to the Conduct Alleged in the Indictment**



The Defendant contends, based on Judge Nichols’ decision in *United States v. Miller*, 589 F.Supp.3d 60 (D.D.C. 2022), that the Defendant’s conduct, like that of *Miller*, fails to fit within the scope of conduct prohibited by § 1512(c)(2). ECF 46-1 at 17-18. Specifically, the Defendant argues that pursuant to *Miller*, § 1512 is limited in scope to a defendant taking some action with respect to a document, record or other object. *Id.* However, this is an incorrect interpretation of § 1512(c)(2), and in *Fischer*, the D.C. Circuit reversed *Miller*, holding Section 1512(c)(2) “encompasses all forms of obstructive conduct, including . . . efforts to stop Congress from certifying the results of the 2020 presidential election.” *United States v. Fischer*, 2023 WL 2817988 at \*3. The court concluded that, “[u]nder the most natural reading of the statute, § 1512(c)(2) applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1).” *Id.* at \*4.

#### **D. Section 1512(c)(2) Is Not Unconstitutionally Vague**

Next, the Defendant contends that Section 1512(c)(2) is unconstitutionally vague. Every judge in this District has denied this argument, and this Court should do the same.

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).

The 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 impeded[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)).

With respect to the contours of “corruptly”, the Defendant’s claim that the word “corruptly” itself in Section 1512(c)(2) is unconstitutionally vague is simply 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 the 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 Defendant’s 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. While the D.C. Circuit is set to take up the appeal of the scope of the *mens rea* requirement within the statute on May 11, 2023, in *United States v. Robertson*, No. 22-3062 – *see also Fischer*, 2023 WL 2817988, at \*8 – the Defendant’s conduct falls squarely within the confines of 1512(c)(2).

### **E. The Rules of Lenity and Constitutional Avoidance Do Not Apply**

As every other court to address this issue has concluded, the “temporarily visiting” language of Section 1752(a) is unambiguous. Therefore, the Court need not resort to the rules of lenity and constitutional avoidance. As Judge McFadden explained last year when rejecting nearly identical arguments that the rules of lenity and constitutional avoidance should apply as a result of Section 1752’s purported ambiguity,

[Defendant] invokes the doctrine of lenity and the “novel construction principle.” Neither applies. Lenity is “a sort of junior version of the vagueness doctrine.” It comes into frame only when a court has exhausted all canons of statutory construction and is left with only a coin flip to resolve “grievous ambiguity.”

As the Court has explained, Section 1752 is capacious, not ambiguous. [Defendant’s] “ability to articulat[e] a narrower construction” of the statute does not trigger lenity. Nor has there been an “unforeseen judicial enlargement” of a longstanding criminal statute so that it operates like an *ex post facto* law. [Defendant] has allegedly violated a rarely charged statute, but that does not mean the construction of the statute unfairly blindsided him. There was no prevailing practice of courts forgoing or rejecting the interpretation that the Government now advances.

*Griffin*, 549 F. Supp. 3d at 57-58 (citations omitted).

The judges of this District have rejected attempts to cast Section 1752 as “ambiguous.” “Section 1752 ‘is clear[,] gives fair notice of the conduct it punishes, and [does not] invite arbitrary enforcement.’” *United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at \*9 (D.D.C. Feb. 16, 2022) (citing *United States v. Nordean*, No. 21-cr-175 (TJK), 2021 WL 6134595, at \*19 (D.D.C. Dec. 28, 2021)); *Griffin*, 549 F. Supp. 3d at 57 (“This law is no trap awaiting the unwary.”)).

“Likewise, prosecuting [Stedman] under § 1752 does not unexpectedly broaden the statute.” *Id.* “The government alleges that Capitol Police and barricades were present and visible outside the Capitol Building, yet [Stedman] forced his way in regardless. Those charges, if proven,

would clearly constitute violations of § 1752 under the statute’s plain text. Hence, the § 1752 charges . . . may proceed to trial.” *See id.* (citations omitted).

#### **F. Section 1512(c)(2) Does Not Violate the Ex Post Facto Clause**

The Defendant contends that charging him under § 1512(c)(2) violates the *Ex Post Facto* clause of the Fifth Amendment of the U.S. Constitution, because the prosecution would, in his view, involve a “novel construction” of the statute. ECF 46-1 at 28-29. This argument proceeds from his claim that the statute does not prohibit the interference with official proceedings that “do not hear evidence or find facts.” *Id.* at 3. This argument fails.

The prior judicial decisions to address this issue uniformly rejected the view that the Defendant urges here. *See, e.g., Mostofsky*, 2021 WL 6049891, at \*11 (“The Court has already rejected the notion that this is such a novel interpretation, and it cannot say that applying it to his conduct is so ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue’” (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964))); *Nordean*, 2021 WL 6134595, at \*12 (“Section 1512(c)(2)’s application to the allegations in the First Superseding Indictment is ‘fairly disclosed’ by the text (citation omitted). Thus, the Due Process Clause does not require dismissal.”)

Those decisions properly applied the relevant law. “The *ex post facto* prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’” *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (citing cases). “Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Id.* at 28-29 (citing cases). “The ban

also restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Id.* at 29 (citing cases).

So construed, the “*Ex Post Facto Clause* is a limitation upon the powers of the Legislature and does not of its own force apply to the Judicial Branch of government.” *Marks v. United States*, 430 U.S. 188, 191 (1977) (citation omitted). Nevertheless, “due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *Lanier*, 520 at 266. *See United States v. Bailey*, 259 F.3d 1216, 1219 (10th Cir. 2001) (“because he challenges judicial interpretations of a statute rather than the statute itself, Bailey raises a due process argument rather than one based directly on the *Ex Post Facto Clause*”).

But a judicial interpretation of a criminal statute violates due process only if it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *see also Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998) (“The test for determining whether the retroactive application of a judicial decision violates due process is essentially one of foreseeability.”). A ruling would violate due process, for instance, if it both disadvantaged the defendant and conflicted with prior judicial announcements on the same subject. *See Williams v. Filson*, 908 F.3d 546, 577 (9th Cir. 2018) (no *ex post facto* violation where “Williams has identified no pre-*Cavanaugh* authority from Nevada courts that is inconsistent with the rule *Cavanaugh* adopted, and we have found none”; “[w]e cannot say that the Nevada Supreme Court’s interpretation of § 200.033(5) constitutes an “unexpected and indefensible” break with prior Nevada law”); *Washington v. Boughton*, 884 F.3d 692, 701 (7th Cir. 2018) (no *ex post facto* violation where the “state court’s extension of [its prior decisions] to the materially similar facts here was not an ‘unexpected and

indefensible’ departure from established Wisconsin law, but rather within the permissible scope of ‘incremental and reasoned development of precedent that is the foundation of the common law system’); *Bailey*, 259 F.3d at 1219 (“we reject [the due process] argument both because [defendant] cites no authority from this or any other court interpreting § 3583 in the manner he seeks and because interpreting § 3583(e)(3) and Rule 32.1(a)(2) to allow post-term revocation hearings is clearly foreseeable”).

The Defendant cites not a single case holding that §§ 1512(c)(2) prohibit the obstruction of only those proceedings before Congress that are adjudicatory. He cannot demonstrate that there would be a due process violation under these circumstances. Therefore, his motion should be denied.

## **II. Counts Two and Three (18 U.S.C. § 1752)**

Defendant Stedman moves to miss Counts Two and Three, 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 46-1 at 34.

These are now well-trodden arguments in this district, having been raised and rejected consistently in similar cases arising from the January 6<sup>th</sup> 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 the 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, the Defendant asserts that Counts Two and Three, 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 46-1 at 26-28. Nothing in the express language of Section 1752 requires this, and the 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;

(b) 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, the Defendant argues that “only” the Secret Service can designate a restricted building or grounds. ECF 46-1 at 26. However, because the plain language of the statute is clear and unambiguous, reading the implied requirement provided by the Defendant is unwarranted. Even if one were to look beyond this plain language, the legislative history of Section 1752 also weighs against the 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 the Defendant does 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 the Defendant’s 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 the Defendant resists. As the 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 the Defendant’s 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].”).

This Court, in *United States v. Oliveras*, 2023 WL 196746, at \*1-2, addressed this issue directly. “The central problem with [the Defendant’s] statutory interpretation argument is that the statutory language on which the argument is predicated was removed from the statute in 2006.” *Id.*, at \*1. Indeed, “[t]he plain meaning of the current text . . . contains no requirement that anyone, including the USSS, formally designated the area restricted.” *Id.* at \*2. (internal punctuation omitted).

### **B. Several Secret Service Protectees Were Temporarily Visiting the Capitol Grounds on January 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 the Defendant’s relevant conduct on Capitol grounds on January 6, 2021, three Secret Service protectees—Vice President Pence and two immediate family members—were present. The Defendant’s conduct accordingly falls within the Section 1752’s plain sweep when he entered the restricted area of the Capitol and travelled throughout the Capitol building including through the Speaker of the House’s office spaces, immediately in front of the House chamber, and to the Rotunda, while the Vice President and his family were “temporarily visiting.”

The Defendant contends that the Section 1752 charges against him 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 46-1 at 34-35. In particular, the Defendant argues that because former Vice President Mike Pence 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, the Defendant makes 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 find the Defendant’s argument as meritless, as all others have,<sup>3</sup> as it defies Section 1752’s plain terms, purpose, and structure.

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<sup>3</sup> *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.”).

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.”<sup>4</sup> 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. § 175(1)(B).

Again, this Court in *Oliveras* tackled this issue, noting that the Defendant’s interpretation would yield “absurd results.” 2023 WL 196746, at \*2. The Defendant’s interpretation, calling into question whether a Vice President could “visit” his office in the Capitol, “would inexplicably pop that bubble” for an ill-defined list of destinations where the President or Vice President’s presence is sufficient “frequent” or the reason for their presence sufficiently “official.” The Court declines to introduce such needless ambiguity into a simple statutory phrase.” *Id.*

### **C. Section 1752 (a)(2) is not Unconstitutionally Vague**

The Defendant asserts, erroneously, that Section 1752(a)(2) is unconstitutionally vague. The Defendant fails to acknowledge his position is contrary to the holdings of Judges Friedman,

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

Bates, Kelly, McFadden, and Cooper, who all rejected vagueness challenges to 18 U.S.C. 1752(a)(1) and (a)(2). *See Grider*, 2022 WL 3016775, at \*7; *Puma*, 2022 WL 823079, at \*3 (“This Court concludes that ... 18 U.S.C. § 1752 [is] not unconstitutionally vague.”) (Friedman, J.); *Bozell*, 2022 WL 474144, at \*9 (“§ 1752 “is clear[,] gives fair notice of the conduct it punishes, and [does not] invite arbitrary enforcement.”); *United States v. Nordean*, 579 F. Supp. 3d 28, 60 (D.D.C. 2021) (§ 1752(a)(1) and (a)(2) are “not unconstitutionally vague”); *Griffin*, 549 F. Supp. 3d at 57 (“This law is no trap awaiting the unwary.”); *United States v. Caputo*, 201 F. Supp. 3d 65, 72 (D.D.C. 2016) (“18 U.S.C. § 1752(a)(1) is ... not void for vagueness.”) (Cooper, J.)

A statute is vague where it (1) fails to give ordinary people fair notice of the conduct it punishes or (2) is so standardless that it invites arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591, 595 (2015). Neither applies to Section 1752. As set out above, Section 1752 prohibits a defendant from knowingly engaging in certain conduct in “any posted, cordoned off, or otherwise restricted area, of ... grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.” 18 U.S.C. § 1752(a), (c)(1)(B). As explained above, the statute is not vague: rather, it clearly does not require that the Secret Service restrict the area. The Defendant’s apparent mistake of law about an interpretation of the statute contrary to its plain text does not make the statute vague. *See United States v. Neely*, No. CR 21-642 (JDB), 2023 WL 1778198, at \*4 (D.D.C. Feb. 6, 2023) (rejecting identical argument and observing, “there is no reasonable divergence of opinion”). As Judge McFadden held in *United States v. Griffin*, “[1752] does not invite arbitrary enforcement by criminalizing common activities or giving law enforcement undue discretion.” 549 F. Supp. 3d 49, 57 (D.D.C. 2021). Therefore, Section 1752 is not unconstitutionally vague as to the identity of the restricting party.

The Defendant challenges the charge brought under Section 1752(a)(2) (Count 3), alleging that “[t]he phrase ‘within such proximity to’ is vague and ambiguous, and therefore as applied violates [Defendant’s] Due Process Clause rights.” ECF 46-1 at 35-36. But the Defendant ignores the explicit language of the Indictment, which alleges that engaged in disorderly and disruptive conduct “*in and within such proximity to*” restricted grounds (Count Three). ECF 14 (emphasis added). Thus, the Indictment alleges that the Defendant was not just “within such proximity” to a restricted area but was in fact *within* a restricted area. “So whatever ‘fuzzy boundary standard[]’ that phrase may introduce is irrelevant here.” *Nordean*, 579 F. Supp.3d at 60, n.16.<sup>5</sup> *See also*, *United States v. Griffith*, No. 21-CR-244, 2023 WL 1778192, at \*3 (D.D.C. Feb. 6, 2023); *United States v. Egtvedt*, 21-CR-177, Dkt. Entry 93 at 13, n.2.

Judge Bates’ decision rejecting the same vagueness challenge in *Neely* is instructive. As in *Griffith* and *Egtvedt*, Judge Bates first pointed out that the indictment alleged that the defendant was “in” the restricted area, not merely in proximity to it. *Neely*, 2023 WL 1778198, at \*4. Moreover, Judge Bates found, the boundary-based vagueness argument failed because it did not “grapple with the *mens rea* element of the statute, which requires him to have acted “knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions.” *Id.* at \*5 (citing *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) (“[A] scienter requirement may mitigate a law’s vagueness ...”). Like *Neely*, the

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<sup>5</sup> While the Court should reject the vagueness claim based solely on the statute and the indictment, the government expects that the facts at trial will show that the Defendant was within the restricted area, and so would clearly be on notice that his conduct violated the statute, regardless of his quibble with the “proximity” provision. “A [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applies to the conduct of others.” *Nordean*, 579 F. Supp. 3d 28, at 57 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) (cleaned up).



Defendant “does not argue that description of the conduct regulated—disorderly conduct that disrupts government business—is vague.” For this additional reason, his motion fails.

**CONCLUSION**

For the foregoing reasons, the Defendant’s motion to dismiss should be denied.

Respectfully submitted,

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>v.</b>	:	<b>Case No. 21-cr-383 (BAH)</b>
	:	
<b>PATRICK STEDMAN,</b>	:	
	:	
<b>Defendant.</b>	:	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this pleading was served on  
opposing counsel via ECF.

/s/ Joseph S. Smith, Jr.  
JOSEPH S. SMITH, JR