UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **MATTHEW THOMAS PURSE,** **Defendant.**	**Case No. 1:21-cr-00512-PLF**

UNITED STATES' SUPPLEMENTAL OPPOSITION
TO DEFENDANT PURSE'S SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

The United States of America, through undersigned counsel, respectfully submits its Supplemental Opposition to defendant Purse's most recent attempt to persuade this Court to dismiss Count One of the indictment, which charges obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2). Relying on the D.C. Circuit's recent decision in *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023), Purse maintains in a supplemental brief, ECF 45, that *Fischer*'s reversal of the single judge who dismissed Section 1512(c)(2) counts against Capitol riot defendants paradoxically requires dismissal here. It is hard to see how *Fischer*—a case in which the government successfully challenged the dismissal of Section 1512(c)(2) charges at the pleading stage—in any way suggests that dismissal of Court One is warranted now. For the reasons discussed below, this Court should reject Purse's strained interpretation of *Fischer* and deny his motion to dismiss.

RELEVANT PROCEDURAL HISTORY[1]

[1] This supplement, like the United States' response to the motion to dismiss, above does not summarize Purse's conduct on January 6, 2021 or other relevant conduct, since the prosecution's evidence is not relevant to the sufficiency of the language for the charge in Count One. *See, e.g.*, *United States v. Puma*, 596 F.Supp.3d 90, 96 (D.D.C. 2022). Although not necessary, if this Court

Purse confronts charges arising from his role in the attack on the United States Capitol. On August 6, 2021, a grand jury returned a five-count indictment charging in Count One that Purse attempted to and did obstruct, influence and impede an official proceeding in violation of 18 U.S.C. § 1512(c)(2); in Count Two that Purse knowingly entered and remained in a restricted building and grounds, in violation of 18 U.S.C. § 1751(a)(1); in Count Three that, with the intent to impede or disrupt the orderly conduct of government business or official functions, he engaged in disorderly and disruptive conduct in and within such proximity to a restricted building and grounds, in violation of 18 U.S.C. § 1752(a)(2); in Count Four that he willfully and knowingly engaged in disorderly and disruptive conduct within the United States Capitol Grounds and any of the Capitol Buildings, in violation of 40 U.S.C. § 5104(e)(2)(D), and in Count Five that he willfully and knowingly paraded, demonstrated, and picketed in any Capitol Building. ECF 9.

As relevant here, Count One of the indictment charged:

> On or about January 6, 2021, within the District of Columbia and elsewhere, **MATTHEW THOMAS PURSE,** attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.
>
> (**Obstruction of an Official Proceeding**, in violation of Title 18, United States Code, Sections 1512(c)(2))

Id. at 1.

Purse subsequently moved to dismiss all counts in the indictment. ECF 34. With respect to Count One, Purse argued that Section 1512(c)(2) only prohibited obstruction through "some

prefers to have some context for the charges against Purse, a partial summary government's evidence has been summarized in response to an unrelated motion and is available at ECF 38 at 4-7.

action with respect to documentary evidence," ECF 34:16-22,[2] citing the Honorable Carl J. Nichols' decisions in *United States v. Miller*, 589 F.Supp.3d 60 (D.D.C. 2022) and *United States v. Fischer*, No. 21-cr-234 (CJN), 2022 WL 782413 (D.D.C. 2022). He also argued that the Joint Session of Congress to certify the results of the 2020 presidential election was not an "official proceeding" under the definition provided in 18 U.S.C. § 1515(a)(1)(B). ECF 34 at 13-16. Reaching beyond the language of the indictment, Purse argued for dismissal of Count One because of his assumption that the United States lacked sufficient evidence to prove the offense. *See* ECF 34 at 8 and 10 (incorrectly suggesting the existence of undisputed facts) and (23-24) (arguing Purse's version of the government's evidence. Finally, his motion claimed that Section 1512's requirement that the defendant act "corruptly" was unconstitutionally vague, ECF 34 at 25-27, and that the "rule of lenity" applied to his analysis, ECF 34 at 22. The United States filed a response opposing each of Purse's arguments, ECF 35, and Purse submitted a reply. ECF 36.

While Purse's motion to dismiss the indictment was pending, the United States pursued interlocutory appeals of the rulings in *Miller* and *Fischer* and a third case, *United States v. Lang*, 21-cr-53 (CJN), where Judge Nichols dismissed Section 1512 counts in other cases arising from the attack on the United States Capitol. All three appeals were consolidated under *Fischer*, which overturned the district court's dismissals. The *per curiam* judgment in *Fischer* stated that the district court's orders are "reversed and the cases [are] remanded for further proceedings, in accordance with *the opinion of the court*[.]" Judgment (Apr. 7, 2023) (emphasis added) (attached). A notation at the bottom of the judgment further clarified that Judge Pan filed the "[o]pinion for the court" and that Judge Walker joined that opinion "except as to Section I.C.1 and footnote 8."

[2] Page numbers are those assigned by CM/ECF.

Id. Nevertheless, Purse now argues that *Fischer* supports his pending motion to dismiss the Section 1512 count in this case.

ARGUMENT

Purse's motion to dismiss Count One should be denied because the indictment in this case sufficiently alleges a violation of Section 1512(c)(2), as the D.C. Circuit's recent opinion in *Fischer* confirms.

An indictment's "main purpose is 'to inform the defendant of the nature of the accusation against him.'" *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001) (quoting *Russell v. United States*, 369 U.S. 749, 767 (1962)). Thus, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). Given these limited requirements, it is "generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)).

The grand jury charged Purse in Count One with violating Section 1512(c)(2), which makes it a crime to "corruptly . . . obstruct[ ], influence[ ], or impede[ ] any official proceeding, or attempt[ ] to do so[.]" The term "official proceeding" means, among other things, "a proceeding before the Congress[.]" 18 U.S.C. § 1515(a)(1)(B). Tracking this statutory language, the indictment alleged:

> On or about January 6, 2021, within the District of Columbia and elsewhere, **MATTHEW THOMAS PURSE,** attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress's certification of the Electoral College vote as set out in the

> Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.

ECF 9 at 1.

This charge properly (1) contained the elements of the offense, (2) fairly informed Purse of the charge against which he was required to defend, and (3) provided sufficient information to protect him from future prosecutions for the same offense. Nothing more was required. *See, e.g., United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) ("[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.' . . . Rather, to be sufficient, an indictment need only inform the defendant of the precise offense of which he is accused so that he may prepare his defense and plead double jeopardy in any further prosecution for the same offense.") (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)).

Rather than helping Purse, the D.C. Circuit's recent decision in *Fischer* confirms the sufficiency of the indictment in his case. In *Fischer*, the D.C. Circuit addressed pretrial rulings 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.'" 64 F.4th at 334 (quoting *United States v. Miller*, 589 F. Supp. 3d 60, 78 (D.D.C. 2022)). Because the indictments in the consolidated 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 335. 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 § 112(c)(1)." *Id.* at 336. Additionally, a majority of the panel agreed with

every decision, including those of Judge Nichols, finding that the term "official proceeding" included "congressional certification of the Electoral College count." *Id*. at 342. The D.C. Circuit's opinion in *Fischer* thus confirms that Count One of 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.

Despite that confirmation, Purse continues his attempt to challenge Count One's sufficiency through an interpretation of *Fischer* that does not withstand scrutiny, beginning with the inaccurate claim that the panel in *Fischer* "reached no consensus over the scope of Section 1512(c)(2)" and therefore this Court is not bound by any of its reasoning. ECF 45 at 3, 8. Next, he urges this Court to adopt the approach of the dissenting opinion in *Fischer*. Inconsistently, he also asserts that the majority in *Fischer* did reach agreement that "assaulting a police officer was sufficient to establish a 'corrupt' act under Section 1512(c)(2)." ECF 45 at 8. According to Purse, however, since he is not charged with assaulting a police officer, in the absence of an assault charge, Section 1512's requirement for corrupt intent is unconstitutionally vague and overbroad. Not one of these arguments has merit.

I. In *Fischer*, the D.C. Circuit conclusively rejected rulings limiting Section 1512(c)(2)'s application to obstructive acts related to a document, record, or other object.

Contrary to Purse's claim that the decision in *Fischer* provided "no consensus over the scope of Section 1512(c)(2)," ECF 45 at 8, a majority of that panel adopted a single rationale deciding the question presented to the court of appeals: whether that provision required extratextual proof of obstruction related to a document, record, or other object. *Fischer* held in Section I.A that Section 1512(c)(2) was "unambiguous" and it "applies to all forms of corrupt obstruction of an official proceeding" other than the document destruction and evidence tampering

already covered in Section 1512(c)(1). *Fischer*, 64 F.4th at 336. Similarly, in Section I.C.2 a majority of the panel agreed that congressional certification of the Electoral College vote qualifies as an "official proceeding for purposes of Sections 1512(c)(2) and 1515(a)(1)(B), *id*. at 342. Accordingly, a majority of the Court did agree on a rationale explaining the result: Section 1512(c)(2)'s unambiguous statutory text describing the *actus reus* of the offense.

II. The dissent in *Fischer* does not govern resolution of Purse's motion to dismiss Count One.

The per curiam judgment in *Fischer* correctly reflects the panel majority's agreement that Section 1512(c)(2) encompasses the conduct alleged against the consolidated appellees and that the district court erred in concluding otherwise. This Court should reject Purse's implication that the panel members did not understand the ways in which they agreed and disagreed and that they mistakenly issued the judgment.

To the contrary, the *per curiam* judgment correctly identified the lead opinion as the "[o]pinion of the court." Unlike in cases decided by a "fragmented" court that fails to articulate a holding that finds majority support, here a "single rationale explain[s] the result." *United States v. Marks*, 430 U.S. 188, 193 (1977). Specifically, a two-judge majority agreed on the "interpretation of [1512](c)(2)'s act element," *Fischer*, 64 F.4th at 351 (Walker, J., concurring), and adopted all but Section I.C.1 (declining to interpret "corruptly") and footnote 8 of the lead opinion. That opinion held in Section I.A that Section 1512(c)(2) was "unambiguous" in that it "applies to all forms of corrupt obstruction of an official proceeding" other than the document destruction and evidence tampering covered in Section 1512(c)(1), and reversed the district court's contrary ruling. *Fischer*, 64 F.4th at 336.

Purse mischaracterizes the relationship between the three opinions. For example, he inaccurately claims, ECF 45 at 8, that Judge Walker's concurrence was conditional and applied

"only if his narrow definition of corruptly was accepted." To be sure, the concurrence would have determined that "corruptly" means "a criminal intent to procure an unlawful benefit," *Fischer*, 64 F.4th at 357 (Walker, J., concurring). But the resolution of that *mens rea* issue was not necessary to the Court's holding concerning the offense's *actus reus*—which Judge Walker joined by concurring in all but a section and a footnote in the lead opinion and concurring in the judgment reversing the district court's dismissals of the Section 1512(c)(2) count. The lead opinion recognized the concurrence's "corruptly" interpretation as one potential "candidate[]," *id.* at 339-40 (opinion of Pan, J.), but adopted no definitive interpretation because "the task of defining 'corruptly'" was not before the Court, *id.* at 340; the concurrence's author joined the lead opinion's *actus reus* analysis and separately confirmed that the defendants' '"efforts to stop Congress from certifying the results of the 2020 presidential election' are the kind of 'obstructive conduct' proscribed by [Section 1512](c)(2)." *Fischer*, 64 F.4th at 351 (Walker, J., concurring) (quoting the lead opinion).

Additionally, there was no agreement between the concurrence and the dissent that the interpretation of "corruptly" was before the Court. By contrast, as both the lead and dissenting opinions recognized, the definition of "corruptly" in Section 1512(c)(2) was not squarely presented and therefore not resolved. *See id.* at 339 (opinion of Pan, J.) ("expressing [no] preference for any particular definition of 'corruptly'" because "the allegations against appellees appear to be sufficient to meet any proposed definition of 'corrupt' intent"); *id.* at 341 (noting that the dissent also "declines to settle on a precise meaning of 'corruptly' at this time" and thus "share[s] much common ground" with the lead opinion "on the issue of *mens rea*"); *id.* at 379-81 (Katsas, J., dissenting) (surveying possible definitions of "corruptly" but declining to adopt one). While the dissent also reviewed different formulations of "corruptly," the dissenting opinion criticized the

concurrence's definition of "corruptly" because it "required transplanting" into Section 1512(c)(2) an interpretation of "corruptly" "that appears to have been used so far only in tax law," *Fischer*, 64 F.4th at 381 (Katsas, J. dissenting).

Purse's suggestion that this Court is free to ignore the judgment in *Fischer* and apply the reasoning of its dissent lacks merit. Although such an option may exist when judges "are equally divided on the proper disposition of [a] case," *Elliott By & Through Elliott v. United States*, 37 F.3d 617, 618 (11th Cir. 1994) (en banc); *see LeDure v. Union Pac. R.R. Co.*, 142 S. Ct. 1582 (2022) (affirming by an equally divided Court where one Justice did not participate), Purse provides no authority supporting application of this approach to a three-judge panel. Indeed, Judge Nichols' dismissal of the Section 1512(c)(2) counts was either correct, and should be affirmed, or incorrect, and should be reversed; two judges must necessarily agree on one of those binary choices. But even if an equally divided three-way split were possible, it would not be present where, as here, two members of a three-judge panel agree on the case's disposition.

In this respect, the *Fischer* lead opinion resembles those that have commanded a five-Justice majority in the Supreme Court, with one Justice writing a concurring opinion explaining his or her disagreement with aspects of the majority opinion but joining it anyway. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352-53 (2011) (Thomas, J., concurring); *Arizona v. Gant*, 556 U.S. 332, 354 (2009) (Scalia, J., concurring); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 408 (2002) (O'Connor, J, concurring). In such a case, the majority opinion controls. In *Fischer*, Judge Walker joined the portion of the lead opinion holding that Section 1512(c)(2) encompasses all forms of obstructive conduct and reasoning that congressional certification of the Electoral College count was an official proceeding. That is *Fischer*'s clear holding. The fact that Judge Walker's understanding of the statute's *mens rea* requirement informed his decision to join

the majority opinion does not make that understanding a holding of the court. *Cf. King v. Palmer*, 950 F.2d 771, 784 (D.C. Cir. 1991) (en banc) (observing that "the result is binding even when the Court fails to agree on reasoning") (citing *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting)). Insofar as this Court "needs *some* rule to decide the holding" of *Fischer*, 64 F.4th at 362 n.10 (Walker, J., concurring), that rule is apparent: it should follow the parts of the opinion agreed upon by a majority of the panel, namely, that Section 1512(c)(2)'s plain text encompasses all forms of obstructive conduct.

III. Because the decision in *Fischer* does not authoritatively construe "corruptly" in 18 U.S.C. § 1512(c)(2), its discussion of that term does not dictate any resolution of Purse's motion to dismiss.

As explained above, the panel in *Fischer* produced a majority opinion ruling that Section 1512(c)(2)'s *actus reus* encompassed all forms of obstructive conduct. The decision did not, however, authoritatively construe the term "corruptly," constituting the statute's *mens rea* requirement. Purse's attempts to use selected portions of *Fischer* to challenge either Section 1512(c)(2)'s use of the term "corruptly" or the use of that term in Count One are unpersuasive.

Notably, the district court in *Fischer* did not pronounce an authoritative holding on the meaning of "corruptly" in Section 1512(c)(2). The district court's dismissal of the Section 1512 counts in *Fischer*, *Miller*, and *Lang* (consolidated on appeal) was based on its view that the *actus reus* of the offense requires a nexus to documents, not any concern about the statute's *mens rea* element; accordingly, the definition of "corruptly" was not extensively briefed by the parties or squarely presented to the D.C. Circuit on appeal, and the court of appeals therefore had no cause to resolve the issue. Furthermore, the sole concurring opinion in *Fischer* that sought to define "corruptly" did not command sufficient support to render that definition a holding of the Court.

A. *Fischer* did not decide how to interpret "corruptly" in Section 1512(c)(2).

The panel in *Fischer* produced three opinions. In the portions of the lead opinion (Pan, J.) joined in full by the concurring judge (Walker, J.), *Fischer* relied on Section 1512(c)(2)'s text and structure as well as case law interpreting the statute, *see id.* at 335-39, to conclude that 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 335. In a section of the lead opinion that Judge Walker did not join, Judge Pan reasoned that "[t]he requirement of 'corrupt' intent prevents [Section] 1512(c)(2) from sweeping up a great deal of conduct that has nothing to do with obstruction," but refrained from defining "the exact contours of 'corrupt' intent" because "the task of defining 'corruptly'" was not before the Court. *Id.* at 340 (opinion of Pan, J.). Judge Walker, believing that defining "corruptly" was necessary to "make sense" of [Section 1512](c)(2)'s act element," wrote a concurring opinion in which he proposed defining the term to mean to "act with an intent to procure an unlawful benefit either for oneself or for some other person." *Id.* at 352 (Walker, J., concurring) (citation omitted). The dissenting opinion (Katsas, J.) criticized the concurrence's definition of "corruptly" because it "required transplanting" into Section 1512(c)(2) an interpretation "that appears to have been used so far only in tax law," but did not endorse any other definition of the term. *Id.* at 381 (Katsas, J., dissenting). *See* ECF 45 at 8 (acknowledging that the dissent "declined to reach the *mens rea* requirement").

As explained in both the lead and dissenting opinions in *Fischer*, the definition of "corruptly" was not squarely presented in that case and therefore was not resolved. *See id.* at 340-41 (opinion of Pan, J.) ("expressing [no] preference for any particular definition of 'corruptly'" because "the allegations against appellees appear to be sufficient to meet any proposed definition of 'corrupt' intent"); *id.* at 341 (noting that the dissent also "declines to settle on a precise meaning of 'corruptly' at this time" and thus "share[s] much common ground" with the lead opinion "on

the issue of *mens rea*"); *id.* at 379-81 (Katsas, J., dissenting) (surveying possible definitions of "corruptly" but declining to adopt any particular one). Although the concurrence would have determined that "corruptly" means "a criminal intent to procure an unlawful benefit," *id.* at 352 (Walker, J., concurring), the resolution of that *mens rea* issue was not necessary to the court's holding concerning the *actus reus* of the offense—which Judge Walker joined by concurring in all but a section and a footnote in the lead opinion and concurring in the judgment—and his views on the meaning of "corruptly" were not adopted by the other judges on the panel.

Reading *Fischer* to have left unresolved the definition of "corruptly" in Section 1512(c)(2) is consistent with how the case was litigated. Although defendant Miller argued before the district court that Section 1512(c)(2)'s *mens rea* requirement was unconstitutionally vague, *see United States v. Miller*, 589 F. Supp. 3d 60, 65 (D.D.C. 2022), the district court did not address that argument and specifically declined to interpret "corruptly" when adjudicating the government's reconsideration motion, *see United States v. Miller*, 605 F. Supp. 3d 63, 70 n.3 (D.D.C. 2022).[3] The question presented in *Fischer* concerned Section 1512(c)(2)'s *actus reus* requirement, *see* Brief for the United States, *United States v. Fischer*, No. 22-3038, at 2-3 (whether Section 1512(c)(2) covers the defendants' "alleged conduct"), and the government's opening 68-page brief devoted only three pages to addressing "corruptly" when discussing limitations on the statute's reach. *See Fischer*, 64 F.4th at 340 (opinion of Pan, J.) (noting that the parties addressed "corruptly" "only peripherally" in the briefs). With respect to defining "corruptly" in Section

[3] Lang's motion to dismiss the Section 1512 count in his indictment never addressed the statute's *mens rea* requirement or argued that the term "corruptly" was vague. *United States v. Lang*, 21-cr-53 (CJN) (ECF 54, 57). In *Fischer*, the district court granted Fischer's motion to dismiss the Section 1512(c)(2) charge alleged in that indictment, referencing the earlier decision in *Miller* without mentioning or analyzing "corruptly" in its Memorandum Order. *Fischer*, 21-cr-234 (CJN) (ECF 64).

1512(c)(2), the Court in *Fischer* did not have the "benefits of the normal litigation process," *id.*, which in turn risks an "improvident or ill-advised" ruling on an issue not squarely presented, *United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004).

Relatedly, treating the concurrence's "corruptly" definition in *Fischer* as a binding holding is in tension with the party-presentation principle, under which courts "rely on the parties to frame issues for decision and assign courts the role of neutral arbiter of matters the parties present." *Sineneng-Smith v. United States*, 140 S. Ct. 1575, 1579 (2020) (citing *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). The concurrence's suggestion, *Fischer*, 64 F.4th at 352 n.1 (Walker, J. concurring), that the parties adequately presented the interpretation of "corruptly" is mistaken. The concurrence observed that the defendants had "raised the issue below," *id.*, without acknowledging that the district court never adjudicated the vagueness challenge or defined "corruptly." And although the concurrence relied on "lengthy discussions by several district judges in similar cases," *id.*, those judges also declined to offer definitive interpretations of "corruptly" in those rulings. *See, e.g.*, *United States v. Montgomery*, 578 F. Supp. 3d 54, 84 n.5 (D.D.C. 2021) ("[B]ecause the Court has yet to hear from the parties on the proper jury instructions, the Court will leave for another day the question whether this formulation [of corruptly]—or a slightly different formulation—will best guide the jury.").[4] In short, the concurrence's interpretation of "corruptly" did not result from the "crucible of litigation," *Fischer*, 64 F.4th at 340 (opinion of Pan, J.), and thus should not be treated as authoritative. At most, this Court should conclude that its interpretation of "corruptly" is sufficient, but not necessary, to prove that a defendant acted corruptly for purposes of Section 1512.

[4] Additionally, no district court judge appears to have instructed a jury using the concurrence's "corruptly" interpretation.

B. Section 1512(c)(2) does not require assaultive conduct.

Purse appears to argue that since, according to him, the only reason the panel in *Fischer* "reversed the District Court's decision is because Judges Pan and Walker both concluded that *assaulting* a police officer is conduct that is sufficient to violate Section 1512(c)(2)" and because the indictment here does not charge Purse with assault, *Fischer* supports dismissal. ECF 45 at 3. This argument is incorrect.

Contrary to Purse's argument, *Fischer*'s holding is not limited to cases involving assaultive conduct. Although the defendants in *Fischer* were alleged to have engaged in assaults on law enforcement officers, the D.C. Circuit held that Section 1512(c)(2) applies more broadly to "*all* forms of obstructive conduct[.]" 64 F.4th at 335 (emphasis added). The court explained that "the meaning of the statute is unambiguous. . . . Under 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 336 (emphasis added). The court concluded that "[this] broad interpretation of the statute — encompassing all forms of obstructive acts — is unambiguous and natural, as confirmed by the 'ordinary, contemporary, common meaning' of the provision's text and structure." *Id.* at 337 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). It is impossible to read the D.C. Circuit's repeated references to Section 1512(c)(2)'s prohibition on "all forms" of obstructive acts as somehow limiting the statute's scope to obstructive acts involving assault. Purse's argument, ECF 45 at 8, that the only majority opinion in *Fischer* was one that rejected the government's definition of corruptly and agreed that "assaulting a police officer was sufficient to establish a 'corrupt' act under Section 1512(c)(2)" is meritless. Agreement that assaults sufficiently establish corrupt intent is not the same as a determination that assaults are

necessary. Arguments in his supplemental brief seeking dismissal of Count One because the indictment does not allege an assaultive act should thus be denied.[5]

IV. Purse's remaining arguments are meritless.

Purse urges this Court to adopt *Fischer*'s dissenting opinion with arguments that other interpretations of "corruptly" would render Section 1512 would otherwise be void for vagueness. Any such void for vagueness claim, however, was not presented to the court of appeals. Judge Nichols did not rule on any void for vagueness claim in any of the cases consolidated under the *Fischer* appeal. Neither the concurring opinion nor the dissenting opinion, which Purse would have this Court adopt, addressed a vagueness or an overbreadth challenge. Moreover, a vagueness challenge targeting "corruptly" would require analysis of Section 1512(c)(2)'s application to Purse's conduct, *see United States v. Poindexter*, 951 F.2d 369, 385-86 (D.C. Cir. 1991) (concluding, following a conviction at trial, that the congressional obstruction provision in 18 U.S.C. § 1505 was "unconstitutionally vague as applied to [the defendant's] conduct"), not of the sufficiency of the indictment's allegations. Since *Fischer* does not dictate the resolution of Purse's vagueness challenge, this Court should reject it for the reasons provided in the government's response, ECF 35 at 29-33.

This Court should also reject Purse's renewed attempt to invoke the rule of lenity. Here, *Fischer* does apply. In Section II.C, the majority determined that "As we have explained, the

[5] Notably, instead of challenging the language of Count One, Purse's supplemental brief persists in attacking what he understands to be the government's proof at trial. As previously explained, however, ECF 35 at 6-7, challenges to the validity of a charge do not depend on forecasts of what the prosecution can prove, and a court is limited to reviewing the face of the indictment and the language used to charge its crimes. *See also United States v. Puma*, 596 F.Supp.3d 90, 96 (D.D.C. 2022).

language of § 1512(c)(2) is clear and unambiguous. Restraint and lenity therefore have no place in our analysis." 64 F.4th at 350.

V. CONCLUSION

In *Fischer*, the D.C. Circuit reversed dismissals of counts charging violation of Section 1512. In doing so, a majority rejected the same arguments Purse raised in his pending motion to dismiss, including arguments that Section 1512(c)(2) required obstruction relating to a document, records, or tangible object; that certification of the Electoral College count was not an official proceeding; and that the rule of lenity applied to interpretation of the that statute. Purse's claim that the panel in *Fischer* failed to reach a binding majority is wrong and contradicted by the *per curiam* judgment. The majority's assessment that assault charges in the cases before it were sufficient to meet the statute's *mens rea* requirement did not extend to requiring assault charges for other indictments such as Purse's to be sufficient. Accordingly, this Court should reject the reasoning in Purse's supplemental brief and deny his motion to dismiss.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
D.C. Bar No. 481052

/s/ Karen Rochlin
KAREN ROCHLIN
DC Bar No. 394447
Assistant U. S. Attorney Detailee
U.S. Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132
(786) 972-9045
Karen.Rochlin@usdoj.gov