UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MATTHEW PURSE, Defendant.	CASE NO. 1:21-CR-00512-PLF **Honorable Paul L. Friedman** **United States District Judge** **(Oral Argument Requested)**

MATTHEW PURSE'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

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I. INTRODUCTION

The government's Supplemental Opposition misinterprets *United States v. Fischer*, 64 F. 4th 329 (D.C. Cir. 2023) and mischaracterizes (or ignores) Mr. Purse's arguments in an effort to obscure the fact that their interpretation of section 1512(c)(2) is dangerously overbroad and raises serious constitutional issues. Indeed, the government does not dispute the fact that *its* interpretation of the *actus reus* prohibited by 1512(c)(2) applies to any and all attempts at influencing an official proceeding and thus extends to virtually all forms of federal legislative and judicial advocacy. In fact, the government takes the position that this extraordinarily broad interpretation is mandated by *Fischer* because a majority of the panel found that section 1512(c)(2) goes beyond evidence tampering.

The government's attempt to separate the *actus reus* and *mens rea* elements of section 1512(c)(2), however, must be rejected as contrary to both the holding in *Fischer* and clear Supreme Court precedent. These two elements are necessarily tied together—the scope of one element has a direct influence the scope of the other element. Specifically, *Fischer* acknowledged that the more broadly one of the two elements is defined, the more narrow the other element must be construed in order to prevent the statute from criminalizing activities which are protected by the United States Constitution (such as political speech). For example, Judge Walker found that section 1512(c)(2) could only contain a very broad *actus reus* element if the *mens rea* element was very narrow, and Judge Katsas found that because the *mens rea* element could not be sufficiently narrowed, the *actus reus* element must be substantially limited.

Despite agreement that the two elements were tied together, the *Fischer* court could not reach a definitional consensus on *both* the scope of the *actus reus* and *mens rea* elements. Instead, the court reversed the dismissals because Judge Pan and Judge Walker both found that assaulting a police officer in an effort to overturn the presidential election is conduct that is

sufficient to violate their own unique interpretations of section 1512(c)(2)'s *actus reus* and *mens rea* elements. Because there was no consensus among the panel on the scope of both the *actus reus* and *mens rea* elements, however, *Fischer* cannot be considered binding precedent on the interpretation of the individual *actus reus* element of the statute in isolation. Indeed, as the government concedes, because *Fischer* did not reach a consensus on the *mens rea* element, this Court is free to apply its own interpretation of "corruptly" under section 1512(c)(2). If the Court adopts Judge Walker's narrow definition of "corruptly," then *Fischer* arguably provides precedent for expanding the *actus reus* element beyond evidence tampering. However, Judge Walker explicitly stated that if his interpretation of the *mens rea* requirement was not adopted then he would agree with Judge Katsas that section 1512(c)(2) is limited to evidence tampering. As such, if this Court declines to adopt Judge Walker's definition of "corruptly," *Fischer* requires that this Court limit the statute's *actus reus* to evidence tampering because that would be the interpretation of the majority of the panel.

Here, the Court should heed the concerns over the breadth of section 1512(c)(2) and find that the statute is limited to evidence tampering because this interpretation poses the least amount of constitutional issues and is the only way to meaningfully limit the scope of the statute. However, even if the Court were to find that the statute extends beyond evidence tampering, *Fischer* still supports dismissing the section 1512(c)(2) charge because it confirms that the *mens rea* element is unconstitutionally vague (either facially or as applied to Mr. Purse) or that, at the very least, the rules of lenity and restraint apply.

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II. ARGUMENT

A. There Was No Consensus In *Fischer* Over The Scope Of Section 1512(c)(2) And Thus The Court Should Adopt Judge Katsas's Interpretation

The government erroneously contends that "a two-judge majority [in *Fischer*] agreed on the 'interpretation of [1512](c)(2)'s act element'" and found that the statute's *actus reus* is not limited to "document destruction and evidence tampering." Doc. 46 at 7. According to the government, Mr. Purse "inaccurately claims … that that Judge Walker's concurrence was conditional and applied 'only if his narrow definition of corruptly was accepted'" and that "the resolution of that *mens rea* issue was not necessary to the Court's holding concerning the offense's *actus reus*.'" *Id.* at 7-8. The government is wrong. Mr. Purse did not mischaracterize Judge Walker's concurrence, he cited to it verbatim:

> [M]y reading of "corruptly" *is necessary to my vote* to join the lead opinion's proposed holding on "obstructs, influences, or impedes" an "official proceeding." 18 U.S.C. § 1512(c)(2). *If I did not read "corruptly" narrowly, I would join the dissenting opinion*. That's because giving "corruptly" its narrow, long-established meaning resolves otherwise compelling structural arguments for affirming the district court, as well as the Defendants' vagueness concerns. *See supra* Sections III & IV. *Fischer*, 64 F. 4th at 362 n. 10 (emphasis added).

Thus, notwithstanding the government's contention to the contrary, Judge Walker was explicit that his interpretation of the *actus reus* element was conditioned on his interpretation of the *mens rea* element, and that if the *mens rea* element were construed as broader than his interpretation, he would agree that the *actus reus* element in subsection (c)(2) was limited to evidence tampering. Indeed, Judge Walker repeatedly emphasized that the scope of the statute's *actus reus* element could not be divorced from the scope of the statute's *mens rea* element. *See e.g. id.* ("[G]iving 'corruptly' its narrow, long-established meaning resolves otherwise compelling structural arguments for affirming the district court, as well as the Defendants' vagueness concerns.'); *id.* at 351 ("I believe that we *must* define that mental state to make sense

of (c)(2)'s act element"); *id.* at 360-62 ("[A]n innovatively broad definition of 'corruptly' could raise serious concerns that § 1512(c)(2) is a vague provision with a breathtaking scope" but that "[r]eading 'corruptly' to require more than a 'wrongful purpose' avoids that problem.").

Similarly, Judge Katsas also found that the statute's *actus reus* and *mens rea* elements must be interpreted together. *See id.* at 365 (rejecting the government's position that subsection (c)(2) should be analyzed without looking to the text of section 1512 as a whole because "it is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'") (citing *Reno v. Koray*, 515 U.S. 50, 56 (1995)). In fact, it was the inability to sufficiently narrow section 1512(c)(2)'s scope through the *mens rea* element which caused him to conclude that that the *actus reus* must be limited to evidence tampering. *See id.* at 382 ("[T]here is no plausible account of how section 1512(c)(2) could sweep in these defendants yet provide 'significant guardrails' through its requirement of acting 'corruptly,' …. Rather than try to extract meaningful limits out of that broad and vague adverb, we should have acknowledged that Congress limited the actus reus to conduct that impairs the integrity or availability of evidence.").

Finally, even Judge Pan indicated that the scope of the *actus reus* and *mens rea* elements were connected. *See id.* at 339 ("Although the text of § 1512(c)(2) plainly extends to a wide range of conduct," the requirement of corrupt intent provided a "significant guardrail[] for prosecutions brought under the statute."); *id.* ("The requirement of 'corrupt' intent prevents subsection (c)(2) from sweeping up a great deal of conduct that has nothing to do with obstruction."). Judge Pan's determination that it was not necessary to define the precise scope of the *mens rea* element was not because she found it to be irrelevant to her interpretation of the *actus reus* element, but rather because she determined that assaulting a police officer fell within

any conceivable interpretation of the word "corruptly." *See id.* at 340 ("Each appellee in this consolidated appeal is charged with assaulting law enforcement officers while participating in the Capitol riot… I am satisfied that the government has alleged conduct by appellees sufficient to meet that element, I leave the exact contours of "corrupt" intent for another day.").

Thus, a majority of the panel in *Fischer* (and likely all three judges) found that the Court could not interpret the scope of the *actus reus* requirement of subsection (c)(2) without also interpreting the scope of the *mens rea* requirement. As such, the fact that Judge Pan and Judge Walker both found that the *actus reus* in subsection (c)(2) extended beyond evidence tampering under the particular set of facts presented in *Fischer* does not bind this Court in the instant case because Judges Pan and Walker did not otherwise come to an agreement on the scope of the statute's *mens rea* element.

As such, the government's contention that there must have been a consensus on the scope of the statute because two judges agreed on reversing the dismissal is nonsensical. The fact that Judges Pan and Walker both found that assaulting law enforcement officers in an effort to prevent Congress from certifying election results fell within their own unique definition section 1512(c)(2)'s *actus reus* and *mens rea* elements does not mean they reached a consensus with precedential value as to the *actus reus* element in a vacuum.[1] To the contrary, Judge Walker's agreement with Judge Pan on the scope of the statute's *actus reus* element was dependent on the scope of the statute's *mens rea*—if his narrow definition of "corruptly" were adopted then he agreed with Judge Pan that the *actus reus* extended beyond evidence tampering to include assaultive behavior. But if his definition of "corruptly" was not adopted, then Judge Walker

[1] The government devotes an entire section to a straw-man argument that *Fischer* stands for the proposition that only individuals who assault law enforcement officers can fall within section 1512(c)(2). *See* Doc. 46 at 14-15. Mr. Purse did not argue, or even imply, that assaulting a police officer is necessary for a violation of section 1512(c)(2).

agreed with Judge Katsas that the *actus reus* was limited to evidence tampering. Here, the government concedes that the panel did not reach an agreement on the scope of the *mens rea* requirement and thus the Court is free to adopts its own interpretation of "corruptly." *See* Doc. 46 at 11-13. If this Court agrees with Judge Walker, then *Fischer* arguably provides precedent for expanding the *actus reus* element beyond evidence tampering. However, if this Court disagrees with Judge Walker's definition of "corruptly," then *Fischer* requires the Court to limit the *actus reus* to evidence tampering since that is how both Judge Walker and Judge Katsas would interpret the statute.

As explained in Mr. Purse's Supplemental Brief, this Court should adopt Judge Katsas' interpretation of section 1512(c)(2) and find that the statute's *actus reus* element is limited to evidence tampering because that interpretation causes the least amount of constitutional problems. Indeed, the government does not contest the fact that their interpretation of section 1512(c)(2) applies to any act of attempting to influence legislation or a federal court hearing and thus encompasses every single federal litigant and attorney representing them, filer of an amicus brief, activist, peaceful protestor, and lobbyist. Such an interpretation results in serious constitutional issues—it would infringe on First Amendment rights and would violate Due Process for being insufficiently vague and overbroad since the only limitation on the breadth of the statute is the vague requirement that the person act "corruptly." The government does not even attempt to distinguish the two Supreme Court cases cited by Mr. Purse in his Supplemental Brief, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, (1988) and *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.* 365 U.S. 127, 136 (1961), which held that interpretations such as the one proffered by the government here are disfavored. Accordingly, because Judge Katsas' interpretation of section 1512(c)(2) causes the

least amount of constitutional issues and is the only way to sufficiently narrow the scope of the statute, this Court should adopt it and find that the statute is limited to evidence tampering.

B. The Word "Corruptly" In Section 1512(c)(2) Is Insufficiently Vague And Thus The Indictment Does Not Sufficiently Inform Mr. Purse Of The Charges Against Him And The Rules Of Lenity And Restraint Apply

In Mr. Purse's Supplemental Brief, he explained that relying on "corruptly" to limit the scope of section 1512(c)(2) would render the statute unconstitutionally vague because it was not clear what is meant by the term. In support of that argument, Mr. Purse noted that "Judge Pan set forth three additional possible definitions, and Judge Walker proposed his own definition" of "corruptly." *See* Doc. 45 at 9. Rather than dispute that the panel in *Fischer* could not agree on the scope of the word "corruptly," the government's Supplemental Opposition devotes numerous pages *agreeing* with Mr. Purse on this point. *See* Doc. 46 at 11-13. Nor does the government dispute Mr. Purse's argument that "none of the proposed definitions [in *Fischer*] clearly apply to the allegations against Mr. Purse." Doc. 45 at 9. Instead, the government claims that it is inappropriate to determine whether the term "corruptly" is unconstitutionally vague when ruling on a Motion to Dismiss the Indictment. *See* Doc. 46 at 15 ("[A] vagueness challenge targeting 'corruptly' would require analysis of Section 1512(c)(2)'s application to Purse's conduct… not of the sufficiency of the indictment's allegations."). The government is incorrect for several reasons:

First, Mr. Purse is not *solely* arguing that the word "corruptly" is vague as applied to him, he is also arguing that the term is facially deficient when used to narrow a statute with an extraordinary broad *actus reus*. *See e.g. United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991) ("Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'").

Second, as explained at length in Mr. Purses Motion to Dismiss and Reply, this Court is permitted to look at the allegations against Mr. Purse in the Criminal Complaint when ruling on his Motion because it may dismiss an indictment on sufficiency-of-the-evidence grounds where the material facts are undisputed. *See* Doc. 34 at 4 and Doc. 36 at 2-5.

Third, the uncertainty over the meaning of the word "corruptly" also renders the Indictment itself deficient. The government concedes that the Indictment is only sufficient if it "fairly informed [Mr.] Purse of the charge against which he was required to defend." Doc. 46 at 5. As such, given the numerous definitions, the Indictment stating that Mr. Purse acted "corruptly" does not sufficiently inform him of the mental state that he is accused of acting with. Indeed, the government's Supplemental Opposition does not dispute the fact its own interpretation of the word "corruptly" (that a person act "with consciousness of wrongdoing") was rejected by all three judges in *Fischer*. Thus, to the extent that this is what was meant by the government in the Indictment, *Fischer* would support a dismissal of the charge.[2]

Finally, because a reasonable person would not know that Mr. Purse's conduct was "corrupt" under section 1512(c)(2), the rules of lenity and restraint apply. The government's contention that *Fischer* precludes application of these doctrines is false. In *Fischer*, the panel only held that the rules of lenity and restraint and did not apply because a reasonable person would know that assaulting a police officer was acting in a corrupt manner. *See e.g. Fischer*, 64 F.4th at 342 ("[I]t is beyond debate that appellees and other members of the public had fair notice that assaulting law enforcement officers in an effort to prevent Congress from certifying election results was "wrongful" and "corrupt" under the law."). Here, the government alleges

[2] Notably, *Fischer* does not affect Mr. Purse's previous argument that the Indictment is also deficient regarding the *actus reus* element because it is unclear from the Indictment whether Mr. Purse is being charged with influencing the Certification of the Electoral College vote, whether he is being charged with obstructing it, whether he is being charged with impeding it, or whether he is being charged with attempting to do one of those things. *See* Doc. 36 at 17.

that Mr. Purse entered the Capitol building thirty-nine minutes after Congress had adjourned, that he spent a total of thirteen minutes in the building, and that while inside, he did nothing other than stand off to the side videotaping the protestors. Unlike a person who assaulted a police officer, a reasonable person would not understand that Mr. Purse's actions in the Capitol Building satisfied any of the proposed definitions of "corruptly" and thus *Fischer* does not preclude a finding that the rules of lenity and restraint apply to Mr. Purse. To the contrary, the disparate definitions of the word "corruptly" in *Fischer*, none of which applies to Mr. Purse's alleged conduct, supports the application of the rules of lenity and restraint.

III. CONCLUSION

For the foregoing reasons, *Fischer* confirms that the section 1512(c)(2) charge against Mr. Purse fails as a matter of law and must be dismissed.

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Respectfully submitted,

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