UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)
v.	) Case No. 1:21-CR-708 (RCL)
LEO CHRISTOPHER KELLY,	)
Defendant.	)

Defendant's motion for reconsideration of denial of motion to dismiss §1512 count

COMES NOW Defendant, Leo Christopher Kelly, by and through undersigned counsel, and hereby respectfully moves this Court to reconsider the denial of the motion to dismiss the charges brought pursuant to 18 U.S.C. § 1512. This motion re-urges dismissal on the basis of the decision in *United States v. Fischer*, F. 4th , No. 22-3038, 2023 WL 2817988 (D.C. Cir. Apr. 7, 2023). This Court denied the motion to dismiss in the pretrial hearing on April 25, 2023.

1. **The *Fischer* Decision Requires Dismissal of the Obstruction Counts**

On April 7, 2023, the United States Court of Appeals issued a decision with three separate opinions. A careful reading of *Fischer* requires dismissal of the obstruction charges brought under § 1512(c)(2).

The Court of Appeals decision has no majority opinion. The "lead" opinion was written by Judge Pan. Judge Walker's concurring opinion joins Judge Pan's opinion only conditionally but if the condition is not met, he would join the dissent. Judge Walker also posits that his opinion should control. Because of the unmet condition that Judge Walker places on his concurrence, Judge Katsas' dissenting opinion is the only opinion that in effect *sub silentio* receives two votes.

A. Section 1512(c)(2) Covers Only Conduct that Impairs the Integrity or Availability of Evidence

The dissent by Judge Katsas is clear, section 1512(c)(2) covers only conduct "that impairs the integrity or availability of evidence."

> In sum, there 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," ante at ——. 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*.
> . . .
> The conduct alleged here violates many criminal statutes, but section 1512(c) is not among them. Because my colleagues conclude otherwise, I respectfully dissent.
> *Fischer*, 2023 WL 2817988, at *44–45 (emphasis added).

In reaching his decision, Judge Katsas rightly took into account the First Amendment interests implicated in the application of § 1512(c)(2) to the protests – peaceful and violent – that took place on January 6:

> [M]y colleagues' approach creates vagueness problems as well as First Amendment ones. Consider 18 U.S.C. § 1505, which imposes criminal penalties on anyone who "corruptly ... influences, obstructs, or impedes" a congressional inquiry. In *Poindexter*, we held this provision unconstitutionally vague as applied to acts of lying to Congress. 951 F.2d at 379. In rejecting the government's argument that the mens rea requirement sufficiently narrowed the statute, we explained that "on its face, the word 'corruptly' is vague," *id*. at 378, as were the string of adjectival synonyms. *See id.* at 379 ("Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.' "). To cure the vagueness, we limited the act component of section 1505. Specifically, we held that it applies only to acts causing a third party to violate some legal duty, thus excluding acts by which the defendant directly attempts to influence the proceeding. But this saving construction is not available here. As explained earlier, one thing section 1512(c) clearly did is break down the distinction between direct and indirect obstruction. So, if subsection (c)(2) covers all obstructive acts, direct and indirect, it has the same breadth that caused the Poindexter court to find unconstitutional vagueness. And as with the First Amendment objection, it is no answer to say that section 1512(c) may be constitutionally applied to the extreme conduct alleged here. That is true, but the government's construction still creates improbable breadth and a host of unconstitutional applications in other cases, even with the requirement of acting "corruptly." *Id.* at *44.

Judge Walker's opinion conditionally joins only part of the lead opinion. *Id.* at 17. However, the condition that Judge Walker requires- a narrow reading of "corruptly"– is not met by Judge Pan's lead opinion. In those circumstances, Walker joins the dissent. *Id.* at *27 (N.10).

Under the reading of section 1512(c)(2) set out in Jude Katsas's opinion that 1512©(2) covers only conduct that impairs the integrity or availability of evidence, the obstruction count in the indictment against Mr. Kelly must be dismissed because the indictment does not allege that the integrity or availability of any evidence was impaired by Mr. Kelly or anyone else.

B. Judge Walker's Concurring Opinion Only Conditionally Joins the Lead Opinion

In his concurrence, Judge Walker only conditionally joins Judge Pan's opinion. *Id.* at *17. The condition is a narrow definition of the "corruptly" mental state set out in § 1512(c)(2). However, Judge Pan's lead opinion declines to define "corruptly" narrowly. *Id.* at 7.

If proven at trial, the Defendants' "efforts to stop Congress from certifying the results of the 2020 presidential election" are the kind of "obstructive conduct" proscribed by (c)(2). Lead Op. 8. I thus concur in the Court's judgment and join the lead opinion's interpretation of (c)(2)'s act element.

I do not join Section I.C.1 of the lead opinion — which declines to decide the scope of (c)(2)'s "corrupt[ ]" mental state — because I believe that we must define that mental state to make sense of (c)(2)'s act element. If (c)(2) has a broad act element and an even broader mental state, then its "breathtaking" scope is a poor fit for its place as a_ residual clause in a broader obstruction of justice statute. *See Van Buren v. United States*, ____U.S ___, 141 S.Ct. 1648,1661, 210 L.Ed. 2nd 26 (2021).

…

Instead, I would give "corruptly" its long-standing meaning. It requires a defendant to act "with an intent to procure an unlawful benefit either for himself or for some other person." The defendant must "not only kn[ow] he was obtaining an 'unlawful benefit,' " it must also be "his 'objective' or 'purpose.' " Read that way, "corruptly" makes sense of (c)(2)'s place in the statutory scheme and avoids rendering it a vague and far-reaching criminal provision.

When used as a criminal mental state, "corruptly" is a term of art that requires a defendant to act with "an intent to procure an unlawful benefit either for himself or for some other person." That meaning has been recognized in similar contexts by Justice Thomas, Justice Scalia, and Judge Silberman. And in this context, for § 1512(c), the statutory text and structure confirm that "corruptly" has its long-established meaning. Reading it that way reconciles (c)(2) with the statutory scheme, avoids vagueness, and heeds the Supreme Court's warning to beware of interpretations that impose onto criminal statutes a "breathtaking" scope. *Van Buren v. United States*, —— U.S. ——, 141 S. Ct. 1648, 1661, 210 L.Ed.2d 26 (2021).
Because I read "corruptly" as courts have read it for hundreds of years
— **and only because I read it that way** — I concur in the Court's judgment.

Id. at *17, 26–27 (D.C. Cir. Apr. 7, 2023) (Walker, J. concurring in part) (emphasis added; internal citations omitted).

Judge Walker's narrow reading of "corruptly" was a "necessary" condition to his vote "to join the lead opinion's proposed holding on *obstructs, influences, or impedes* an *official proceeding*. *Id.* As that condition was not met, Judge Walker was clear that he would "join the dissenting opinion." *Id.* In effect, the only opinion that garnered two votes is the dissent by Judge Katsas. Thus, the obstruction count should be dismissed because the dissenting opinion reads §1512(c)(2) to reach only conduct that impairs the integrity or availability of evidence.

C. **What does corruptly mean?**

With respect to the term "corruptly," Judge Pan explained that "corrupt intent exists at least when an obstructive action is independently unlawful – *i.e.*, an independently unlawful act is necessarily "wrongful" and encompasses a perpetrator's use of "independently corrupt means" or "an unlawful method." *Id.* at *8.

Judge Pan noted that the "concurring opinion embraces the definition of "corruptly" that requires proof that the defendant acted "with an intent to procure an unlawful benefit either for himself or for some other person." *Id.* However, she maintained that because "the meaning of "corruptly" was discussed only peripherally in the parties' briefs and in the district court's opinion, and no party requested the standard that the concurrence adopts" she would leave the exact contours of the term to another day. *Id.*

D. We are left with Judge Katsas' holding that Congress limited the "actus reus" of §1512 to conduct that impairs the integrity or availability of evidence

The fractured decision leaves Judge Katsas' reading of § 1512(c)(2) that "Congress limited the actus reus to conduct that impairs the integrity or availability of evidence" as the only ruling that garnered two votes. *Id.* at *44. Judge Pan's broad reading of the *actus reus* is rejected by both Judge Walker (unless the mens rea is narrowed, which the Pan opinion does not) and Judge Katsas.

Judge Walker concurs with Judge Pan's broad act element only if the "corrupt" mental state is narrowly defined. "If (c)(2) has a broad act element and an even broader mental state, then its "breathtaking" scope is a poor fit for its place as a residual clause in a broader obstruction-of-justice statute." *Id.* at *17 (Walker concurrence). Without that narrow reading of corruptly, Judge Walker "join[s] the dissent." *Id.* at *27 (N.8).

In sum, the obstruction count against Mr. Kelly does not allege that he impaired the integrity or availability of evidence. Accordingly, the count must be dismissed.

While Mr. Kelly recognizes that the argument that the dissenting opinion is the controlling opinion is an extraordinary argument, there is no other logical way to reconcile the separate opinions. Indeed, Judge Walker creates this extraordinary result by explicitly conditioning his concurrence on a condition that Judge Pan does not agree to and at the same time arguing that his opinion controls:

> Because I read "corruptly" as courts have read it for hundreds of years — and ***only*** because I read it that way — I concur in the Court's judgment. I also join all but Section I.C.1 and footnote 8 of the lead opinion. *Fischer* at *27-28 (emphasis original).

With all due respect to the Circuit Judges, it is extraordinary that Judge Pan and Judge Walker each assert that their opinion controls while disagreeing on the essential issues in the case. The result is an extraordinarily confusing decision that creates more vagueness than it resolves. Undersigned counsel is asking this Court for an extraordinary remedy, but one that seems to fit the charges in the case.

Wherefore, the defendant respectfully asks this Court to dismiss the 1512 count in the indictment.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the forgoing was filed electronically for all parties of record on this 27th day of April, 2023.

s/
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