UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Case No. 1:21-cr-392-RCL
FELIPE ANTONIO MARTINEZ, et al.,	)	
Defendants.	)	

DEFENDANT MARTINEZ'S REPLY TO THE GOVERNMENT'S OPPOSITION TO HIS MOTION FOR LESSER-INCLUDED OFFENSE INSTRUCTION

In opposing Defendant Martinez's request for a lesser included offense instruction, the government argues that 18 U.S.C. § 1512(d)(1) does not comprise a "subset" of the elements required in § 1512(c)(2) for this reason alone: "Section 1512(c)(2) focuses on 'how a defendant acts, not how he causes another person to act.'" Gov't Opp., ECF 339, p. 3 (quoting *United States v. Nordean, et al.*, 579 F. Supp. 3d 28, 49 (D.D.C. 2021)). "In that respect, Section 1512(c)(2) criminalizes 'actions directed at the official proceeding itself.'" *Id.* (quoting *United States v. Montgomery*, 578 F. Supp. 3d 54, 72 (D.D.C. 2021)).

The government's position is inconsistent with its allegations in the Second Superseding Indictment (SSI) and in hundreds of similar January 6-related indictments; inconsistent with its arguments in motion-to-dismiss briefing across those cases; and inconsistent with dozens of decisions by this Court denying motions to dismiss § 1512(c)(2) charges. The SSI charges that Martinez did "obstruct, influence, and impede" an official proceeding precisely because of how "he cause[d] another person to act," namely, "Congress's certification of the Electoral College vote" was delayed, according to the SSI. SSI, ECF 210, ¶ 74. The SSI does not allege any act "obstruct[ing], influenc[ing], and imped[ing]" the joint session in any manner other than

"caus[ing] another person to act" in a given way (causing members of Congress not to count electoral votes or to count votes in a different manner).

Contrary to the government's response, Martinez's argument does not turn on an "evidentiary approach" to lesser included offenses rather than an "elements test." ECF 339, p. 4. As Martinez noted, the statutory definition of "official proceeding" is predicated on a particular set of actions by a defined set of people. Here, the term means, "a proceeding before the Congress." 18 U.S.C. § 1515(a)(1)(B). As a matter of law, House rules, and common sense, there is no "proceeding before the Congress" unless certain conditions concerning the actions of particular people are satisfied; at the most basic level, that means the presence of members of Congress necessary to satisfy the quorum rules dictated by the Electoral Count Act, cited in the SSI itself. SSI, ECF 210, ¶ 74 (citing 3 U.S.C. §§ 15-18).

Nor does the government contest Martinez's definition of "harass," the actus reus of § 1512(d)(1): "to vex, trouble, or annoy continually or chronically." *Harass*, Webster's Third New International Dictionary of the English Language Unabridged (1966). The government does not explain how a defendant might "obstruct" or "impede" a congressional proceeding under § 1512(c)(2) *without* "trouble[ing], or annoy[ing]" (under § 1512(d)(1)) any individual on whose presence the "official proceeding" is statutorily conditioned. That is because one cannot logically do so. Thus, the conclusion that the offense in § 1512(d)(1) is necessarily a subset of the offense in § 1512(c)(2) (as the government defines the crime) is rooted in the elements test, not the "evidentiary approach."

Critically, the government's indictments and arguments belie its distinction here that "Section 1512(c)(2) criminalizes 'actions directed at the official proceeding itself,'" ECF 339, p. 3, while § 1512(d)(1) in contrast focuses on how defendants' actions cause people associated with that proceeding to act. As the lead opinion *United States v. Fischer* emphasized, in all three cases

under review there the government argued that the defendants' § 1512(c)(2) offense lay in "assaulting law enforcement officers in an effort to prevent Congress from certifying election results." 64 F.4th 329, 342 (D.C. Cir. 2023). Of course, defendants' assaults on law enforcement officers are not actions "directed at the official proceeding itself" as a contrast to actions directed at parties associated with the proceeding.

Recently, this Court found a defendant guilty of § 1512(c)(2) by virtue of his assaults on law enforcement officers outside the Capitol Building, not because of his actions "directed at the official proceeding itself." *United States v. Worrell*, 21-cr-292-RCL, 5/12/2023 Minute Order. If the government's position here were correct, the *Worrell* verdict on the § 1512(c)(2) charge would be erroneous.

In sum, if a defendant obstructs or impedes "a proceeding before the Congress" he is, by definition, "trouble[ing], or annoy[ing]" the people whose presence calls that proceeding into existence (and vice versa)—though he may not necessarily be doing so "corruptly." Thus, Section 1512(d)(1) is a "subset" of the elements of § 1512(c)(2)—as defined by the government in the January 6 cases—and the jury should be instructed accordingly.

Dated: October 6, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 6th day of October, 2023, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s): Counsel of record.

And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

/s/ Nicholas D. Smith