UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case. No. 21-CR-508 (BAH)**
	)	
LANDON BRYCE MITCHELL	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL

Release pending appeal is warranted in Mr. Mitchell's case. Mr. Mitchell, contrary to the government's suggestion, is not a flight risk. He remained on pretrial release throughout the pendency of the case against him, was permitted to voluntarily surrender, and did so without incident. The government assumes Mr. Mitchell's appeal raises a substantial question but then disputes whether his § 1512(c)(2) conviction is likely to be reversed even in light of a favorable decision in *Fischer v. United States*, No. 23-5572 (December 13, 2023). But it fails to explain what makes Mr. Mitchell's case any different from Mr. Fischer's. Finally, the government also disputes whether, if *Fischer* is resolved in Mr. Mitchell's favor, Mr. Mitchell is likely to receive a reduced sentence of imprisonment that would expire before his appeal concludes. In disputing this latter point, the government is wrong about what Mr. Mitchell's guidelines range would be on remand, overlooks this Court's prior practice when sentencing misdemeanor-only January 6 defendants, and

ignores the similarities between Mr. Mitchell's case and the other January 6 defendants who have been granted bond pending appeal.

A. Mr. Mitchell poses no flight or safety risk.

The government contests whether Mr. Mitchell is a flight and safety risk. This Court, however, allowed Mr. Mitchell to self-surrender. Implicit in that decision was the conclusion that he did not present a flight risk. And, indeed, the Court was right to think so. Mr. Mitchell self-surrendered on the appointed date without issue. In fact, he did more than that. After his sentencing, Mr. Mitchell went directly to Virginia to resolve a case there, served a sentence, immediately contacted counsel and pretrial services upon his release, and followed every direction pretrial and probation to get a new self-surrender date, prior to ultimately surrendering to the BOP.

The government highlights Mr. Mitchell's lack of compliance with his conditions of release prior to sentencing, but accurately notes that this court did not revoke his pretrial release and that his compliance improved dramatically when he moved in with his brother and sister-in-law. Mr. Mitchell plans to live with them if released, where they will continue to be a positive influence on him.

B. Mr. Mitchell's appeal raises a substantial question.

In light of the Supreme Court's grant of certiorari in *Fischer*, whether § 1512(c)(2) applies to Mr. Mitchell's conduct undoubtedly is a substantial question of law.

A "substantial question" within the meaning of § 3143(b) is "'one that very well could be decided the other way.'" *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (quoting *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985)). It does not require showing likelihood of success on the merits. *Bayko*, 774 F.2d at 521 (explaining that release pending appeal law "could not be read to mean that bail would not be granted unless the district court made a finding that it was likely to be reversed"). Instead, the defendant must merely show that the question is "close." *Perholtz*, 836 F.2d at 555.

The government claims to not be contesting that the issue in *Fischer* is a substantial question. But then it repeatedly argues that Mr. Mitchell has not shown that a favorable decision in *Fischer* is "likely" to result in the reversal of his conviction based on the record from his stipulated bench trial. This comes dangerously close to an attempt to resurrect the likelihood of success on the merits standard, which this circuit has already declined to adopt. *See Perholtz*, 836 F.2d at 555 (adopting "close" question standard); *see also United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985) (explaining that the language "likely to result in reversal" prohibits the court from releasing defendants where the error would be "considered harmless" or where reversal was not the proper remedy).

Fischer arises from a motion to dismiss his indictment—which, as to the section § 1512(c)(2) charge, looks identical to Mr. Mitchell's—not a judgment of acquittal following trial. Judge Nichols concluded that, under his interpretation of §

1512(c)(2), that indictment had to be dismissed. *See United States v. Fischer*, No. 1:21-CR-00234 (CJN), 2022 WL 782413, at *4 (D.D.C. Mar. 15, 2022). Judge Katsas, in dissent, agreed. *United States v. Fischer*, 64 F.4th 329, 364, 383 (D.C. Cir. 2023) (Katsas, J., dissenting). The government offers no reason to think Mr. Mitchell's case would be treated differently.

Plus, it is important to be clear what the substantial question presented in *Fischer* is: whether 18 U.S.C. § 1512(c)(2) covers acts unrelated to investigations and evidence. There is no suggestion—in the facts from the stipulated trial or otherwise—that Mr. Mitchell did anything to impair the integrity or availability of evidence related to the certification of the electoral college vote.

The government relies on Judge Millett's concurring opinion in *United States v. Brock*, No. 23-3045, 2023 WL 3671002, at *3 (D.C. Cir. May 25, 2023), to argue that Mr. Mitchell's very participation in the events of January 6 make him guilty of obstruction even under the evidenced-based construction advanced by Judge Katsas in *Fischer*. Quoting Judge Millett's concurring opinion, the government asserts that Mr. Mitchell's appearance on the Senator floor "necessarily obstructed the handling, submission, processing, and congressional consideration of the evidence of each State's electoral votes. It did so just as much as if [Mitchell] had grabbed a pile of state certificates and run away with them." Gov. Opp. at 6. With respect, this is not correct. Temporarily stopping the certification of the vote is not the same as absconding or tampering with the votes themselves. Indeed, that is the very point of

both Judge Nichol's and Judge Katsas's opinions; otherwise, they would not have concluded that the indictment needed to be dismissed. The Supreme Court may yet adopt Judge Millett's interpretation over Judge Nichol's and Judge Katsas's. But that does not mean that, if the Supreme Court adopts the Katsas/Nichols approach, Mr. Mitchell's § 1512(c)(2) conviction will remain intact. Instead, it is virtually certain that it will not. *See, e.g., United States v. Sheppard*, 2024 WL 127016, at *3 (D.D.C. Jan. 11, 2024) ("If the Supreme Court decides as Judge Nichols did in the *Fischer* trial court decision, or as Judge Katsas opined in his dissent in *Fischer*, [Mr. Mitchell's] conduct would likely not come within the scope of the statute, and the § 1512(c)(2) conviction would be reversed."); *see also United States v. Adams*, No. 21-CR-354 (APM), 2024 WL 111802, at *2 (D.D.C. Jan. 10, 2024) (noting that, if the defense prevails in *Fischer*, the defendant's § 1512(c)(2) conviction will be vacated).

C. Resolution of the *Fischer* question in Mr. Mitchell's favor would likely result in a reduced imprisonment sentence that would expire before his appeal concludes.

Without his § 1512(c)(2) conviction, Mr. Mitchell will stand convicted of only misdemeanors. The government seems to agree that, without the § 1512(c)(2) conviction, Mr. Mitchell's offense level will be 8.[1] Gov. Br. 7.[2] As explained in Mr.

[1] Mr. Mitchell is accepting, for the purposes of this motion, that the higher § 2A2.4 guideline applies to at least one of his 18 U.S.C. § 1752 convictions. For avoidance of doubt, however, he is not waiving his right to argue at some later point that § 2B2.3 applies. *See* Order, *United States v. Brodnax*, No. 1:21-cr-350 (DLF), ECF 61 (Aug. 18. 2022); *see also United States v. Nassif*, No. 23-3069.

[2] The government claims that, depending on the ruling in *Fischer*, Mr. Mitchell may still be eligible for a cross reference to the obstruction guideline because by preponderance he intended to commit another felony (presumably still § 1512(c)(2) obstruction). If *Fischer* goes the Nichols/Katsas way, the question will be whether Mr. Mitchell intended to commit obstructive acts related to

Mitchell's motion for a reduction in sentence, at sentencing his criminal history category was IV. But, in light of a retroactive amendment to the guidelines that became effective on February 1, 2024, he will no longer receive the two status points that originally raised his criminal history category from III to IV. *See* U.S.S.G. § 4A1.1(e); U.S.S.G. § 1B1.10(d) (listing Amendment 821 among the covered amendments). Instead, his criminal history score will be III.

Plus, in misdemeanor only cases, this Court consistently imposes sentences below Mr. Mitchell's guidelines. *See, e.g., United States v. Brian McCreary*, No. 21-cr-125 (BAH) (18 U.S.C. § 1752(a)(1); 42 days' intermittent confinement, 60 days' home detention); *United States v. Robert Schornack*, No. 21-cr-278 (BAH) (18 U.S.C. § 1752(a)(1); 28 days' intermittent confinement, two months' home detention); *United States v. Daniel Heredeen*, No. 21-cr-278 (BAH) (18 U.S.C. § 1752(a)(1); 14 days' incarceration, 60 days home detention); *United States v. Reed Blake*, No. 21-cr-204 (BAH) (18 U.S.C. § 1752(a)(1); 42 days' intermittent confinement, 3 months home detention); *United States v. Lindsey Terry*, No. 21-cr-162 (BAH) (18 U.S.C. § 1752(a)(1), 40 U.S.C. §§ 5104(e)(2)(D), (e)(2)(G); 5 months' incarceration); *United States v. James Allen Mels*, No. 21-cr-184 (BAH) (18 U.S.C. § 1752(a)(1), 3 months home detention); *United States v. Jolene Eicher*, No. 22-cr-38 (BAH) (18 U.S.C. §§ 1752(a)(1), (a)(2); 40 U.S.C. §§ 5104(e)(2)(D), (e)(2)(G); 2 months' incarceration);

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documents and evidence. For the same reason the § 1512(c)(2) conviction fails, so would the attempt to use the cross reference.

United States v. Heather Kepley, No. 23-CR-162 (BAH) (18 U.S.C. § 1752(a)(1); 28 days' intermittent confinement; 60 days' home detention*); United States v. Ronald Andrulonis*, No. 23-cr-85-BAH (18 U.S.C. § 1752(a)(1); 14 days' intermittent confinement, 60 days' home detention). *But see United States v. Glen Mitchell*, No. 21-CR-00346 (BAH) (18 U.S.C. § 1752(a)(2); 8 months' incarceration in case involving violent physical contact with law enforcement).

But perhaps the best analogy is to another release pending appeal decision: *United States v. Adams*, No. 21-CR-354 (APM), 2024 WL 111802 (D.D.C. Jan. 10, 2024). In that case, another judge of this Court granted a motion for release pending appeal for a defendant in a remarkably similar position to Mr. Mitchell. Mr. Adams, like Mr. Mitchell, "entered the Senate chamber on January 6." *Id.* at *3. *See also* Adams Stip. Facts 8-9 (noting that Mr. Adams entered the Senate Chamber and walked among the Senator's desks). He, like Mr. Mitchell, had issues complying with his pretrial release conditions and, in particular, the conditions related to drug use. *See Adams*, 2024 WL 111802, at *1 (noting the defendant's history of substance use, "including while this case was pending"). And Mr. Adams, like Mr. Mitchell, faced trauma in his life. *See* Adams Sentencing Tr. 64; Mitchell PSR ¶¶ 96, 97.[3] In fact, in some ways Mr. Mitchell is in a better position than Mr. Adams, who made statements after his stipulated trial that the court "deemed inconsistent with his factual admissions." *Adams*, 2024 WL 111802, at *2 n.1. Nevertheless, the district court

[3] Mr. Adams even had the same two status points Mr. Mitchell did.

concluded that Mr. Adams should be released pending appeal after he had served approximately five months incarceration.

Mr. Mitchell self-surrendered on November 1, 2023. He has served approximately 3.5 months incarceration already. Mr. Mitchell has thus, today, served more time than this court ordinarily gives in misdemeanor-only cases and nearly as much time as Mr. Adams had at the time he was released.

Furthermore, by the time *Fischer* is likely to be issued, Mr. Mitchell will have served nearly 8 months. His appeal is also not likely to end there as he did not waive his other appellate issues. Accordingly, Mr. Mitchell has easily shown that a favorable result in *Fischer* is likely to result in a sentence of imprisonment that is less than the total time he has already served plus the expected duration of the appeal process. Release, accordingly, is appropriate. *See also Munchel v. United States*, No. 21-cr-118-RCL (D.D.C. Jan. 25, 2024) (granting release pending appeal to defendant who had served three months and would have seven misdemeanors if her § 1512(c)(2) convictions were vacated); *United States v. Sheppard*, No. CR 21-203 (JDB), 2024 WL 127016, at *5 (D.D.C. Jan. 11, 2024) (granting release pending appeal to defendant who had verbally assaulted an officer upon completion of six months incarceration).

Conclusion

For these reasons, Mr. Mitchell respectfully moves for release pending appeal.

Respectfully Submitted,

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