

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>Case No. 21-CR-276 (CKK)</b>
<b>v.</b>	:	
	:	
<b>CLIFFORD MACKRELL</b>	:	
<b>also known as “Cliff Mackrell,”</b>	:	
	:	
<b>Defendant.</b>	:	

**GOVERNMENT’S OPPOSITION TO THE DEFENDANT’S MOTION TO DISMISS  
COUNT ONE OF THE SUPERSEDING INDICTMENT**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, opposes the Defendant’s Motion to Dismiss Count One of the Superseding Indictment. ECF 54.<sup>1</sup> Count One of the Superseding Indictment charges the defendant with Civil Disorder, in violation of 18 U.S.C § 231(a)(3). Mackrell raises three arguments in his motion. First, he contends that Section 231(a)(3) is overbroad and unconstitutionally vague. ECF 54 at 2. Second, he claims that Section 231(a)(3) impermissibly criminalizes conduct that is protected under the First Amendment. ECF 54 at 6. Finally, the defendant claims that the Indictment must be dismissed because it does not provide sufficient notice and fails to state an offense. ECF 54 at 8. These arguments are without merit and the motion should be denied.<sup>2</sup>

**PROCEDURAL HISTORY**

On March 16, 2021, a criminal complaint was filed charging the defendant with six felony and misdemeanor offenses arising from his conduct on January 6, 2021: Civil Disorder, in violation of § 231(a)(3); Assaulting, Resisting, or Impeding Certain Officers, in violation of 18 U.S.C. §§

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<sup>1</sup> A second superseding indictment was filed on March 29, 2023, under ECF No. 65. Count One of the second superseding indictment has not changed significantly enough to impact the content of the government’s response concerning the previous version of the indictment.

<sup>2</sup> References to “the defendant” or to “Mackrell” refer to Clifford Mackrell.

111(a)(1); Entering and Remaining in a Restricted Building or Grounds while Using or Carrying a Dangerous Weapon, in violation of 18 U.S.C. §§ 1752(a)(1) and (4); and Violent Entry and Disorderly Conduct in the Capitol Grounds, in violation of 40 U.S.C. § 5104(e)(2)(F). On April 2, 2021, the grand jury returned a six-count indictment charging the defendant with the same violations listed above. ECF 10. On November 10, 2021, the grand jury returned a superseding indictment revising the language of the original indictment. ECF 31. On March 21, 2023, the defendant filed a Motion to Dismiss Count One of the superseding indictment. ECF 54.

On March 29, 2023, the grand jury returned a second superseding indictment. ECF 65. The second superseding indictment added a new defendant, Michael Mackrell. The six charges against Clifford Mackrell remained the same, although the wording of certain counts was revised and Michael Mackrell is now included with Clifford Mackrell in Count One.

Count One of the superseding indictment charges the defendant with Civil Disorder, in violation of 18 U.S.C. § 231(a)(3). Pursuant to § 231(a)(3):

Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—

Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 231(a)(3). “Civil disorder” for purposes of this statute is defined as “any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.”

18 U.S.C. § 232(1).

Count One of the First Superseding Indictment alleges the following:

On or about January 6, 2021, within the District of Columbia and elsewhere, CLIFFORD MACKRELL, also known as “Cliff,” committed and attempted to commit an act to obstruct, impede, and interfere with a law enforcement officer, that

is, an officer from the United States Capitol Police Department, lawfully engaged in the lawful performance of his/her official duties incident to and during the commission of a civil disorder, which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function..

Superseding Indictment at 1–2, ECF No. 31. <sup>3</sup>

### STANDARD OF REVIEW

Federal Rule of Criminal Procedure 7(c)(1) states, in relevant part, that “[t]he indictment ... must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). An indictment is sufficient under the Constitution and Rule 7 if it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,” *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished, as it is here, by “echo[ing] the operative statutory text while also specifying the time and place of the offense,” *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). “[T]he validity of an indictment ‘is not a question of whether it could have been more definite and certain.’” *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And an indictment need not inform a defendant “as to every means by which the prosecution hopes to prove that the crime was committed.” *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

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<sup>3</sup> The current version of Count One alleges:

On or about January 6, 2021, within the District of Columbia, CLIFFORD MACKRELL, also known as “Cliff Mackrell,” and MICHAEL MACKRELL committed and attempted to commit an act to obstruct, impede, and interfere with a law enforcement officer that is lawfully engaged in the lawful performance of his official duties, incident to and during the commission of a civil disorder which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function.

Rule 12 permits a party to raise in a pretrial motion “any defense, objection, or request that the court can determine *without a trial on the merits.*” Fed. R. Crim. P. 12(b)(1) (emphasis added). It follows that Rule 12 “does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds” unless the government “has made a *full* proffer of evidence” or the parties have agreed to a “stipulated record,” *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (emphasis added). Neither of these things occurred here.

A criminal defendant may move for dismissal based on a defect in the indictment, such as a failure to state an offense. *United States v. Knowles*, 197 F. Supp. 3d 143, 148 (D.D.C. 2016). Whether an indictment fails to state an offense because an essential element is absent calls for a legal determination. But criminal cases have no mechanism equivalent to the civil rule for summary judgment. *United States v. Bailey*, 444 U.S. 394, 413, n.9 (1980) (motions for summary judgment are creatures of civil, not criminal trials); *Yakou*, 428 F.2d at 246-47 (“There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context”); *United States v. Oseguera Gonzalez*, No. 20-cr-40-BAH at \*5, 2020 WL 6342940 (D.D.C. Oct. 29, 2020) (collecting cases explaining that there is no summary judgment procedure in criminal cases or one that permits pretrial determination of the sufficiency of the evidence). Accordingly, dismissal of a charge does not depend on forecasts of what the government can prove. Indeed, “[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion [to dismiss], Rule 12 doesn’t authorize its disposition before trial.” *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.).

Thus, when ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and more specifically, the language used to charge the crimes. *United States v. Bingert*, 605 F.Supp.3d 111, 118 (D.D.C. 2022) (a motion to dismiss challenges the adequacy of an indictment on its face and the relevant inquiry is whether its allegations

permit a jury to find that the crimes charged were committed); *United States v. McHugh*, 583 F. Supp. 3d 1, 10 (D.D.C. 2022) (a motion to dismiss involves the Court’s determination of the legal sufficiency of the indictment, not the sufficiency of the evidence); *United States v. Puma*, 596 F.Supp.3d 90, 96 (D.D.C. 2022) (quoting *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009)).

## ARGUMENT

The defendant’s motion lacks merit. The Superseding Indictment provides sufficient notice to the defendant as to the charge against him, so it is not unconstitutionally vague. Furthermore, § 231(a)(3) is not unconstitutionally overbroad on its face; violent conduct by the defendant *himself* is not required to violate it, and the statutory definition of “civil disorder” is not overbroad either. Accordingly, the Court should deny the defendant’s motion.

### I. Section 231(a)(3) Is Neither Unconstitutionally Vague nor Overbroad

By isolating various statutory terms, *see, e.g.*, ECF 54 at 2-3, (“civil disorder,” and “assembling with three or more persons to cause immediate danger”), (“civil disorder” and “acts of violence”), and (“any act to obstruct, impede, or interfere”), the defendant attempts to argue that § 231(a)(3), the civil disorder statute, is either unconstitutionally vague or overbroad. ECF 54 at 2–7, 10–11. At least four judges in this district—Chief Judge Boasberg, Judge Kelly, Judge Bates, and Judge Nichols—have recently rejected nearly identical challenges to § 231. *See United States v. Mostofsky*, 579 F.Supp.3d 9, 22-24 (D.D.C. 2021) (rejecting overbreadth challenges); *United States v. Nordean*, 579 F.Supp.3d 28, 58 (D.D.C. 2021) (rejecting vagueness and overbreadth challenges); *McHugh*, 583 F. Supp. 3d at 23–29 (rejecting vagueness and overbreadth challenges); *United States v. Fischer*, No. 21-cr-234 (CJN), 2022 WL 782413, at \*2–4 (D.D.C. Mar. 15, 2022) (rejecting vagueness and overbreadth challenges); *United States v. Williams*, No. 21-cr-618 (ABJ), 2022 WL

2237301 at \*6 (D.D.C. Jun. 22, 2022) (rejecting vagueness and overbreadth challenges)<sup>4</sup>. This Court should too because, reading the statute as a whole, it passes muster. Vagueness and overbreadth are not judged according to whether a litigant might identify a hypothetical case on the edge where application of a law might be questionable, yet the defendant erroneously urges the Court to do so. Instead, the defendant must demonstrate either that the statute fails to provide sufficient notice of what conduct constitutes a violation or that the statute could be unconstitutionally applied in a significant segment of cases.<sup>5</sup> See *Fischer*, 2022 WL 782413, at \* 3–4. The defendant fails to meet both of these high bars.

*a. The Vagueness and Overbreadth Doctrines*

An outgrowth of the Due Process Clause of the Fifth and Fourteenth Amendments, the “void for vagueness” doctrine prevents the enforcement of a criminal statute that is “so vague that it fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, “generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry

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<sup>4</sup> A number of courts outside this circuit have also recently rejected similar challenges to § 231. See *United States v. Phomma*, No. 20-465, 2021 WL 4199961, at \*5 (D. Or. Sept. 15, 2021); *United States v. Rupert*, No. 20-cr-104 (NEB/TNL), 2021 WL 1341632, at \*16–\*20 (D. Minn. Jan. 6, 2021) (Report & Recommendation), *adopted*, 2021 WL 942101 (D. Minn. Mar. 12, 2021); *United States v. Pugh*, No. 1:20-cr-73-TFM, slip op. (S.D. Ala. May 13, 2021); *United States v. Wood*, No. 20-cr-56 MN, 2021 WL 3048448 (D. Del. July 20, 2021); and *United States v. Howard*, No. 21-cr-28-pp, 2021 WL 3856290 (E.D. Wis. Aug. 30, 2021).

<sup>5</sup> A more stringent standard applies to non-First Amendment cases because the defendant must show that no set of circumstances exists under which the [law] would be valid,” or the litigant must “show that the law lacks a plainly legitimate sweep.” *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (quotation omitted). Several of the defendant’s arguments that do not implicate the First Amendment are in fact subject to the more stringent standard. But because the defendant’s arguments fail under both standards, the government applies the more permissive standard throughout its Response.

a reasonable opportunity to familiarize itself with its terms and to comply.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (citation omitted).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *United States v. Williams*, 553 U.S. 285, 306 (2008), or because reasonable jurists might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). A provision is impermissibly vague only if it requires proof of an “incriminating fact” that is so indeterminate as to invite arbitrary and “wholly subjective” application. *Williams*, 553 U.S. at 306; *see Smith v. Goguen*, 415 U.S. 566, 578 (1974). A statutory provision is “not rendered unconstitutionally vague because it ‘do[es] not mean the same thing to all people, all the time, everywhere.’” *Bronstein*, 849 F.3d at 1107 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). A statute is instead vague where it fails to specify any “standard of conduct . . . at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). A law is not vague because it “call[s] for the application of a qualitative standard . . . to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.’” *Johnson*, 576 U.S. at 603–04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

There is a strong presumption that a statute is not vague. *See United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Other courts in this district have recognized that high bar. *See, e.g., United States v. Gonzalez*, No. 20-cr-40 (BAH), 2020 WL 6342948, at \*7 (D.D.C. Oct. 29, 2020); *see also United States v. Harmon*, No. 19-cr-395 (BAH), 2021 WL 1518344, at \*4 (D.D.C. Apr. 16, 2021) (finding that the defendant did not meet the “stringent standard” to prevail on a Rule 12 vagueness motion).

Facial overbreadth challenges—in which a defendant asserts that a statute, constitutionally applied to him, is nevertheless invalid because it would be unconstitutional in a “substantial number” of other cases, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)-

-are even more exceptional. Overbreadth can invalidate a criminal law only if “‘a substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep,’” and no limiting construction is available. *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 769–771 (1982)); *see also City of Houston v. Hill*, 482 U.S. 451, 458 (1987). The Supreme Court has “‘vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *Williams*, 553 U.S. at 292.

“[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, a defendant must show a “realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . .” *Id.* at 801. “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).” *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

Invalidating a statute for overbreadth is “strong medicine” to be applied “sparingly and only as a last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). If the statute is “readily susceptible” to a narrowing construction that would make it constitutional, it must be upheld. *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 397 (1988); *accord Broadrick*, 413 U.S. at 613; *United States v. Rundo*, 990 F.3d 709, 714 (9th Cir. 2021) (“we construe [the riot statute, 18 U.S.C. §§ 2101–2102] as constitutional if we can reasonably do so”).

*b. Section 231(a)(3) is not void for vagueness.*

The defendant argues that to an ordinary person reading the statute, the phrase ‘any act to obstruct, impede, or interfere’ is vague because, on its face, the statute’s plain meaning can fairly include pure speech or expressive nonphysical conduct protected by the First Amendment. ECF 54

at 4. But federal legislation enjoys a presumption of constitutionality that may only be overturned “upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). Ultimately, the defendant cannot overcome this presumption because § 231(a)(3) is not constitutionally vague. *See McHugh*, 583 F. Supp. 3d at 24; *Nordean*, 579 F.Supp.3d 28, at 58. It provides sufficient notice of the conduct it prohibits.

The terms the defendant attacks, such as “any act to obstruct, impede, or interfere,” ECF 54 at 4, do not carry the potential for misunderstanding or make the statute “so standardless that it invites arbitrary enforcement[.]” *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Nordean*, 579 F.Supp.3d 28, at 57 (observing that “there are specific fact-based ways to determine whether a ‘defendant’s conduct interferes with or impedes others,’ or if a law enforcement officer is performing his official duties ‘incident to and during’ a civil disorder[.]”). Like a similar challenge rejected by Judge Bates, the defendant’s motion “misunderstand[s]” vagueness: “There is a crucial difference between reasonable people differing over the *meaning* of a word and reasonable people differing over its *application* to a given situation—the latter is perfectly normal, while the former is indicative of constitutional difficulty.” *McHugh*, 583 F. Supp. 3d at 27 (emphasis in original). Indeed, § 231(a)(3) does not prohibit mere presence at a civil disorder but rather, “acts performed with the intent to obstruct, impede, or interfere with a law enforcement officer” in the course of that disorder. *See Id.* at 25. It punishes intentional conduct, not “mere inadvertent conduct.” *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972).

Contrary to defendant’s arguments, the statute’s terms are thus quite different from statutory terms that courts have found to be vague, like statutes that turn on subjective judgments of whether a defendant’s conduct was “annoying” or “indecent,” or those that depend on the victim’s state of mind. *See Nordean*, 579 F.Supp.3d 28, at 57; *see also Williams*, 553 U.S. at 306. “An ordinary person would have an intuitive understanding of what is proscribed by a ban on obstructing,

impeding, or interfering with law enforcement.” *McHugh*, 583 F. Supp. 3d at 27. In addition, § 231(a)(3) is not unique; many state and federal statutes likewise criminalize “obstructing,” “impeding,” or “interfering with” the government’s efforts to enforce the law and maintain public order, and they have been upheld. *See, e.g.*, 26 U.S.C. § 7212(a) (prohibiting obstructing or impeding the administration of the tax laws); 18 U.S.C. § 2237 (making it unlawful to “oppose, prevent, impede, intimidate or interfere with” a maritime investigation); *United States v. Brice*, 926 F.2d 925, 930–31 (9th Cir. 1991) (rejecting overbreadth and vagueness challenges to 41 C.F.R. § 101-20.305, regulation prohibiting impeding or disrupting government duties); *see also* Cal. Penal Code § 148 (prohibiting resisting, delaying, or obstructing any peace officer or emergency medical technician); *State v. Illig-Renn*, 341 Or. 228 (2006) (rejecting constitutional attacks leveled against O.R.S. 162.247(1)(b), which prohibits interference with a police officer); *State v. Steen*, 164 Wash. App. 789, 808 (2011) (rejecting as-applied constitutional challenge to RCW 9A.76.020(1), which criminalizes obstructing police officers).

The defendant’s vagueness assertions also ignore the fact that § 231(a)(3) requires *criminal intent*, which narrows its scope. *See McHugh*, 583 F. Supp. 3d at 25. Indeed, the requirement that a defendant who violates § 231(a)(3) act with the intent to obstruct, interfere or impede squarely addresses the defendant’s overbreadth concerns. *See United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) (intent requirement prevents application of statute to protected speech). Taking a step back from the defendant’s mischaracterizations, the statute plainly requires proof that the “act” was done with the specific criminal intent “to obstruct, impede, or interfere” with a firefighter or police officer. *See McHugh*, 583 F. Supp. 3d at 25 (“[Section] 231(a)(3) is a specific intent statute[.]”)

The defendant’s vagueness argument also fails because his conduct falls plainly within the ambit of § 231(a)(3). The Court must consider vagueness “as applied to the particular facts at issue, for a [defendant] who engages in some conduct that is clearly proscribed cannot complain of the

vagueness of the law as applies to the conduct of others.” *Nordean*, 579 F.Supp.3d 28 at 57 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010)); *see generally* *Wood*, 2021 WL 3048448, at \*9 (“Defendant does not have standing to bring a facial vagueness challenge” to § 231(a)(3) because he failed to “demonstrate that [the statute] is vague as applied to his conduct”). The conduct at issue here squarely satisfies § 231(a)(3). The January 6, 2021 attack on the United States Capitol by a mob of thousands, some of whom assaulted law enforcement officers, was clearly a “civil disorder.” The only real question for trial on Count One is whether the defendant’s conduct “obstruct[ed], impede[d], or interfere[d] with” law enforcement officers who were engaged in their official duties in response to that civil disorder. ECF 31 at 1-2. The government’s evidence will show that the defendant was not some bystander yelling at police to desist. The government anticipates that officers will testify that one of their objectives, broadly, was to safely clear the Capitol building of rioters, and the government’s evidence will show that the defendant acted with specific intent to hinder this and other objectives. To this end, the statute sufficiently “provide[s] people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Despite the defendant’s complaints, “the terms [he] attacks do not carry the potential for misunderstanding[.]” *United States v. Fischer*, Case No. 21-CR-234 (CJN), 2022 WL 782413, at \*3 (D.D.C. Mar. 15, 2022).

*c. Section 231(a)(3) is not unconstitutionally overbroad.*

Many of the defendant’s arguments and, most explicitly, his argument concerning the term “civil disorder,” ECF 54 at 5-6 are appropriately understood as an overbreadth argument—he contends that the statute criminalizes too wide an array of activity, including protected activity. *See* ECF 54 at 5-6. “[T]his exact argument has been heard and rejected by at least five different federal judges all within the last year.” *McHugh*, 583 F. Supp. 3d at 28 (citing *Mostofsky*, 579 F.Supp.3d 9,

22-24; *Nordean*, 579 F.Supp.3d 28 at 57; *Howard*, 2021 WL 3856290, at \*11–12; *Phomma*, 2021 WL 4199961, at \*4–5; *Wood*, 2021 WL 3048448, at \*7–8, and adding, “[t]his Court joins them.”).

Section 231(a)(3) is not overbroad because “the statute’s potentially unconstitutional applications are few compared to its legitimate ones.” *Mostofsky*, 579 F.Supp.3d, at 22. The plain text supports this reading. *See Nordean*, 579 F.Supp.3d 28, at 57. An overbreadth challenge faces a steep uphill climb when the statute focuses mainly on conduct, as § 231(a)(3) does. *See Hicks*, 539 U.S. at 119, 124 (noting the “substantial social costs created by the overbreadth doctrine when it blocks application of a law to . . . constitutionally unprotected conduct” and observing that laws “not specifically addressed to speech or to conduct necessarily associated with speech” are far less likely to be overbroad).

The defendant contends that “civil disorder,” as defined at § 232(1), without any specificity as to how that term would be overbroadly read, “authorizes a felony conviction for a bystander who yells at police to desist from an arrest, one who flips off officers to distract or encourage resistance, or one who records police activity with a cell phone.” ECF 54 at 7. The text of the statute contradicts this contention because it “shows that § 231(a)(3) covers primarily, if not exclusively, conduct or unprotected speech, such as threats.” *Fischer*, 2022 WL 782413, at \*4 (internal quotation marks omitted). Indeed, “civil disorder’s ‘fulsome statutory definition’ makes plain that to constitute a ‘civil disorder,’ the “gathering’ must ‘involve acts of violence’ and either cause or ‘immediate[ly]’ ‘threaten bodily injury or property damage[,]” and “[t]he definition, in other words, ‘limits the application of civil disorder to a small (obviously unlawful) subset of public gatherings.’” *Id.* at \*3 (alterations in original) (quoting *McHugh*, 583 F. Supp. 3d at 27 n. 22).

## **II. COUNT ONE PROVIDES SUFFICIENT NOTICE**

In his final argument, Mackrell argues the charges in Count One lack any specifics and contain only conclusory allegations and therefore provides him with inadequate notice, violates

his right to presentment to a grand jury, and fails to state an offense. ECF 54:8.

Mackrell misunderstands the purpose of an indictment and the “low bar” an indictment must clear to satisfy the federal rules and Constitution. *United States v. Sargent*, 1:21- cr-00258-TFH 2022 WL 1124817 at \*1 (D.D.C. Apr. 14, 2022). Federal Rule of Criminal Procedure 7(c)(1) states, in relevant part, “[t]he indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged,” and that “[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.” As the D.C. Circuit explained in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), “[a]lthough an indictment must – in order to fulfill constitutional requirements – apprise the defendants of the essential elements of the offense with which they are charged, neither the Constitution, the Federal Rules of Criminal Procedure, nor any other authority suggests that an indictment must put the defendants on notice as to every means by which the prosecution hopes to prove that the crime was committed.” *Id.* at 124. Indeed, “the validity of an indictment ‘is not a question of whether it could have been more definite and certain.’” *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)).

“While detailed allegations might well have been required under common-law pleading rules, . . . they surely are not contemplated by Rule 7(c)(1), which provides that an indictment ‘shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.’” *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007). As a mere notice pleading, an indictment is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend.” *Id.* at 108; *Haldeman*, 559 F.2d at 123 (“The validity of alleging the elements of an offense in the language of the statute is, of course, well established.”). 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.” *Resendiz-Ponce*, 549 U.S. at 108 (cleaned up) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The indictment “should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied.” *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007). Only in the rare case where “guilt depends so crucially upon . . . a specific identification of fact” not included in the statutory language will an indictment that restates the statute’s language be insufficient. *Haldeman*, 559 F.2d at 125 (quoting *Russell v. United States*, 369 U.S. 749, 764 (1962)).

Applying these principles, courts in this District have upheld the sufficiency of indictments far less specific than Mackrell’s. For example, in *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017), the defendants were charged with offenses under 18 U.S.C. § 924(c). The indictment provided only “general detail as to the places where the offenses were committed: namely, Mexico and the United States.” *Id.* at 154. Regarding the time of the offense, the indictments alleged that the offenses had occurred over a two- and nine-year period. *Id.* Finally, the indictments “d[id] not specify a particular weapon that was possessed,” or “specify whether the firearms were ‘used, carried or brandished’” under the statute. *Id.* Nonetheless, the indictments in *Apodaca* were sufficient. *Id.* at 153-54.

Count One of the First Superseding Indictment alleges the following:

On or about January 6, 2021, within the District of Columbia and elsewhere, CLIFFORD MACKRELL, also known as “Cliff,” committed and attempted to commit an act to obstruct, impede, and interfere with a law enforcement officer, that is, an officer from the United States Capitol Police Department, lawfully engaged in the lawful performance of his/her official duties incident to and during the commission of a civil disorder, which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function..

Superseding Indictment at 1–2, ECF No. 31.

Count One of Mackrell’s Superseding Indictment is more specific than that in *Apodaca*. Here, Count One alleges the offenses took place specifically in this District. Here, Count One notifies Mackrell of the exact day on which the alleged crime occurred: January 6, 2021. *Id.* Mackrell demands specificity not required under the Constitution, the Federal Rules, or precedent in this District.

Mackrell’s “complaint seems to result . . . from a general misunderstanding of the purpose of the indictment and, especially, from an inflated notion of what must be included therein.” *Haldeman*, 559 F.2d at 124. As the D.C. Circuit concisely explained in rejecting a similar argument in *Verrusio*:

Verrusio contends that Count Two of the indictment failed to allege an official act because it failed to say “how Mr. Verrusio was going to use his position” to help United Rentals . . . . The indictment certainly need not allege precisely how Verrusio contemplated [committing the crime]. Would he do it by himself or ask someone else to do it? Would that someone else be Colonel Mustard or Professor Plum? With a candlestick or a rope, in the library or the study? Answering those questions is not required at the indictment stage.

762 F.3d at 14–15; *see also United States v. Williamson*, 903 F.3d 124, 131 (D.C. Cir. 2018) (affirming denial of a motion to dismiss a count charging the defendant with making a threat against a federal law enforcement officer “with intent to retaliate against such . . . officer on account of the performance of official duties,” 18 U.S.C. § 115(a)(1)(B), because the “statute speaks in terms of a threat made ‘on account of the performance of official duties,’ not to draw attention to a particular official duty, but instead to assure that the threat generally relates to the officer’s performance of official duties rather than to a personal dispute having nothing to do with the officer’s job functions”). Mackrell’s specificity argument fails.

Similarly, Mackrell’s contention that his right to presentation to the grand jury is also without merit. The Fifth Amendment right to presentation to the grand jury simply means that “a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.” *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270, 273 (1960). *See also United States*

*v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988). The defendant relies upon *United States v. Du Bo* to support his claim that the right to presentation to the grand jury has been violated. In *Du Bo* the indictment lacked the necessary allegation of criminal intent. *See United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979). But Mackrell makes no claim that the indictment is missing an essential element. And, as set forth above, his claim that the indictment fails to state an offense or provide adequate notice is without merit.

**CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Court deny the defendant's motion to dismiss Count One of the Superseding Indictment.

Respectfully submitted,

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