

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

**UNITED STATES OF AMERICA** :  
 :  
 **v.** : **Case No.: 21-cr-00730 (CKK)**  
 :  
 **DANEAN KIMBERLY MACANDREW,** :  
 :  
 **Defendant.** :

**GOVERNMENT’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION  
TO DISMISS MULTIPLICITOUS COUNTS**

The Court should deny Defendant Danean MacAndrew’s Motion to Dismiss Multiplicitous Counts, ECF No. 31, because each count contains elements not found in the other counts and, thus, the counts are not multiplicitous.

**BACKGROUND**

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

MacAndrew was part of the crowd that forced entry into the Capitol. MacAndrew was present on Capitol grounds on January 6, 2021, from approximately 2:38 pm to approximately 3:17 pm. Further, MacAndrew entered the Capitol at approximately 3:09 pm. through the Senate Wing Door, which had been previously breached by rioters. MacAndrew spent several minutes inside the Capitol before leaving through the same Senate Wing Door.

While MacAndrew was on restricted Capitol grounds and inside the Capitol, MacAndrew took several videos and photographs of the events of January 6, 2021. When interviewed by the FBI, MacAndrew admitted to being on Capitol grounds and inside the Capitol on January 6, 2021.

For her participation in the January 6, 2021 attack on the Capitol, MacAndrew was charged by Information with violating 18 U.S.C. § 1752(a)(1) (Entering and Remaining in a Restricted Building or Grounds) (Count One), 18 U.S.C. § 1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds) (Count Two), 40 U.S.C. 5104(e)(2)(D)(Disorderly Conduct in a Capitol Building) (Count Three), and 40 U.S.C. 5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building) (Count Four). ECF No. 12. The government later filed a Superseding Information containing the same charges. ECF No. 21. On November 14, 2022, MacAndrews filed the instant motion to dismiss all four counts on multiplicity grounds. ECF No. 31.

## **ARGUMENT**

MacAndrews asserts that if she was convicted of all the counts in the Superseding Information, her conviction would violate the Double Jeopardy Clause of the U.S. Constitution and “even if her case proceeds to a bench trial, there is substantial prejudice to her from proceeding on the multiplicitous information.” ECF No. 31 at 5. MacAndrew is wrong.

### **I. Each count in the Superseding Information contains elements that the other counts do not and therefore the counts are not multiplicitous.**

A defendant may be convicted under different statutory provisions for offenses arising out of the same single act or course of conduct without violating the Double Jeopardy Clause, so long as Congress authorized the imposition of such multiple punishments. *See United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998) (“If the legislature intends to impose multiple punishment, imposition of such sentences does not violate Double Jeopardy.”). “To determine

multiplicity *vel non*, courts generally apply the *Blockburger* test: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not,’ i.e., whether either is a lesser included offense of the other.” *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010) (quoting *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If the two offenses each require proof of a fact the other does not, then the charges are not multiplicitous. *Id.* at 890. The *Blockburger* “test focuses on the statutory elements of the offense, not on the proof offered in a given case.” *United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998). Thus, it is irrelevant whether there is significant overlap in the factual proof of each count at trial, or even whether two counts “are based upon the exact same set of facts and circumstances,” as long as each count’s elements require proof of a fact that the others do not. *United States v. Manafort*, 313 F. Supp. 3d 311, 314 (D.D.C. 2018); *see id.* (“[T]he test for multiplicity is not whether two counts are based on the same set of facts; rather, it is whether the statutory elements of the two offenses are the same.”).

Here, MacAndrew’s multiplicity arguments fail because each of the offenses charged in the Superseding Information “requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304.

First, Count One charges a violation of Section 1752(a)(1) and (b)(1)(A) of Title 18, which applies to a defendant who “knowingly enters or remains in any restricted building or grounds without lawful authority to do so.” Thus, the elements of that offense are:

- (1) The defendant entered or remained in a restricted building or grounds as defined in 18 U.S.C. § 1752(c) without lawful authority to do so;
- (2) The defendant did so knowingly.

Count Two charges a violation of Sections 1752(a)(2) and (b)(1)(A), which applies to a defendant who “knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions.” 18 U.S.C. § 1752(a)(2), (b)(1)(A). The elements of that offense are:

- (1) The defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building or grounds as defined in 18 U.S.C. § 1752(c);
- (2) The defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions;
- (3) The defendant’s conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.

Count Three charges a violation of Section 5104(e)(2)(D) of Title 40, which applies to individuals who “willfully and knowingly. . . (D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress.” 40 U.S.C. § 5104(e)(2)(D). The elements of that offense are:

- (1) The defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings;
- (2) The defendant did so with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress;
- (3) The defendant acted willfully and knowingly.

Count Four charges a violation of Section 5104(e)(2)(G) of Title 40, which applies to defendants who “willfully and knowingly. . . (G) parade, demonstrate, or picket in any of the Capitol Buildings.” 40 U.S.C. § 5104(e)(2)(G). The elements of that offense are:

- (1) The defendant paraded, demonstrated, or picketed in any of the United States Capitol Buildings;
- (2) The defendant acted willfully and knowingly.

None of the counts are multiplicitous. Count One requires proof that MacAndrew entered or remained in a restricted building or grounds “without lawful authority.” Counts Two through Four do not require proof of that fact.

Count Two requires proof that MacAndrew “engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building or grounds” (element one of Count Two) (emphasis added). Counts One, Three, and Four do not require proof of that fact.

Count Three, meanwhile, requires proof that MacAndrew engaged in “disorderly or disruptive conduct,” which Counts One and Four do not require. Although Count Two does include the terms “disorderly or disruptive conduct,” Count Two contains the terms “or in proximity to, any restricted building or grounds,” which Count Three does not include. Count Two also requires proof that MacAndrew’s conduct “in fact impede[d] or disrupt[ed] the orderly conduct of government business or official functions” (element four of Count Four), which Counts One, Three and Four do not.

Finally, Count Four requires that MacAndrew “parade[d], demonstrate[d], or picket[ed] in any of the Capitol Buildings” (element one of Count Five). Counts One through Three do not require this fact.

As such, each count contains at least one element that the other counts do not. MacAndrew misunderstands that the *Blockburger* multiplicity analysis refers to the elements of the offenses, not whether a single act could violate multiple statutes. The very premise of *Blockburger* and its progeny is that the “same act or transaction”—here, MacAndrew’s presence and conduct at the Capitol—can form the basis of multiple criminal charges, so long as each count requires proof of

a fact that the others do not. *Mahdi*, 598 F.3d at 888; *Manafort*, 313 F. Supp. 3d at 314 (counts can be “based upon the exact same set of facts and circumstances,” if *Blockburger* is satisfied). That MacAndrew’s conduct on January 6, 2021 has led to multiple related charges is unsurprising and utterly ordinary in a criminal case.

### CONCLUSION

For the foregoing reasons, the Court should deny MacAndrew’s Motion to Dismiss Multiplicitous Counts and further deny MacAndrew’s request to compel the government to elect between multiplicitous counts.

Respectfully submitted,

MATTHEW M. GRAVES  
UNITED STATES ATTORNEY  
D.C. Bar Number 481052

By: /s/ Zachary Phillips  
ZACHARY PHILLIPS  
Assistant United States Attorney  
CO Bar No. 31251  
Capitol Riot Detail  
United States Attorney’s Office, Detailee  
1801 California Street, Suite 1600  
Denver, CO 80202  
Telephone: (303) 454-0118  
Zachary.phillips@usdoj.gov

**CERTIFICATE OF SERVICE**

On this 2<sup>nd</sup> day of December, 2022 a copy of the foregoing was served upon all parties listed on the Electronic Case Filing (ECF) System.

*s/ Zachary Phillips*

Assistant United States Attorney

CO Bar No. 31251

Capitol Riot Detail

United States Attorney's Office, Detailee

1801 California Street, Suite 1600

Denver, CO 80202

Telephone: (729) 281-1611

Zachary.phillips@usdoj.gov