UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO.: 1:21-CR-599 (RBW)**
v.	:	
	:	
DONNIE DUANE WREN, and	:	
THOMAS HARLEN SMITH	:	
	:	
Defendants.	:	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS COUNTS ONE AND TWO OF THE SUPERSEDING INDICTMENT

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits that this Court should deny defendants Wren and Smith's Motions to Dismiss, ECF No. 56 and 60, Counts One and Two of the Superseding Indictment ("Indictment"), ECF No. 51.[1]

Counts One and Two charge Smith with civil disorder, in violation of 18 U.S.C. § 231(a)(3). Smith argues that Counts One and Two of the Indictment are unconstitutionally vague, unconstitutional under the First Amendment, and do not contain facts essential to the offense charged. ECF No. 60.

Count Two charges Smith and Wren with civil disorder, in violation of 18 U.S.C. § 231(a)(3). Wren urges that this count should be dismissed because the statute (1) exceeds Congress's commerce clause authority, (2) is unconstitutional under the first amendment, and (3) is unconstitutionally vague. Wren also argues that the Indictment is factually insufficient.

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[1] Since the filing of the defendants' motions, a grand jury has returned a Second Superseding Indictment. ECF No. 71. The substance of the civil disorder charges has not changed, and the defendant's motion should be construed to apply to this charging instrument as well.

The Defendants' contentions misapply and misinterpret the law and should be denied.

FACTUAL 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 underway, a large crowd gathered outside the United States Capitol building, entered the restricted grounds, and forcibly breached the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress were halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Defendants Thomas Smith and Donnie Wren, cousins, traveled together to Washington, D.C. to attend former President Trump's rally on January 6, 2021. After the rally, Smith and Wren walked from the rally to the United States Capitol. They entered Capitol grounds and joined in the riot.

Smith and Wren were in the Lower West Terrace Tunnel area at around 3:00 p.m. They made their way to the Tunnel entrance. Wren remained at the mouth of the Tunnel while Smith, carrying a flag attached to a flagpole, entered the Tunnel and approached the police line standing guard at the doors leading into the Capitol building. Moments later, Smith jammed the flagpole like a spear trying to stab at one of the glass windowpanes within the first set of Tunnel doors.

Less than an hour later, at approximately 3:50 p.m., Smith and Wren made their way to the Upper West Terrace, where they stood directly in front of the police line, walking back and forth and waving flags for approximately 10 minutes. A physical conflict began between the police and the crowd of rioters at approximately 4:21 p.m. Smith and Wren participated in this conflict,

pushing back against the officers' riot shields for approximately 25 seconds. Smith turned his back to the officers then used his body weight to push into a police riot shield.

Following the physical confrontation with the police line, Smith charged into a crowd of rioters to kick an officer's backside, then darted out of the crowd. Moments later, Smith threw a metal stick or pole at the police line. The metal stick or pole hit an officer in the head, causing the officer to stagger backwards. Smith then retreated into the crowd of rioters.

Smith and Wren left the Upper West Terrace area at approximately 4:30 p.m. and began their departure from the Capitol grounds.

ARGUMENT

I. 18 U.S.C. § 231(a)(3) has continually been upheld under Commerce Clause challenges and the District of Columbia falls under the Plenary Clause regardless.

Wren argues at length, (ECF No. 56 at 14-25), that Section 231(a)(3) exceeds Congress's Commerce authority, under the Commerce Clause of the United States Constitution because it "criminalizes intrastate activity that lacks a substantial nexus to interstate commerce." ECF No. 56 at 14; see U.S. CONST. art. I, § 8, cl. 3. Wren relies principally on *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), which held, respectively, that Congress exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), and the Violence Against Woman Act of 1994, § 40302, 108 Stat. 1941-42, 42 U.S.C. § 13981(b). *Lopez*, 514 U.S. at 568; *Morrison*, 529 U.S. at 617. ECF No. 56 at 14-25. Wren's claim fails for two reasons: (1) courts have upheld § 231(a)(3) under the Commerce Clause and (2) regardless of whether § 231(a)(3) exceeds Congress's power under the Commerce clause, and it does not, Wren's conduct committed wholly within the District of Columbia also falls within Congress's power under Article I, Section 8, Clause 17, the Plenary Power.

a. Courts, including a District of Columbia judge in the January 6 context, have upheld Section 231(a)(3) under the Commerce Clause.

Several courts, including the District of Columbia, have upheld Section 231(a)(3) against objections under the Commerce Clause. Here, *United States v. Mostofsky*, 579 F.Supp.3d 9 (D.D.C. 2021), is most instructive. Here, Wren copies the Commerce Clause arguments made by another January 6 defendant, Aaron Mostofsky, in moving to dismiss his criminal charges under § 231(a)(3) for his actions on January 6, 2021. *See United States v. Mostofsky*, No. 1:21-cr-000138-JEB, ECF No. 45 at 64-72 (filed August 30, 2021). Each of these arguments was rejected, as they should be here.

Wren argues that Section 231 violates the Commerce Clause because: (1) it does not regulate economic activity (ECF No. 56 at 17-19); (2) it includes a faulty jurisdictional element because it does not limit the reach to activities that 'substantially affect' interstate commerce (ECF No. 56 at 19-21) and because any effect on interstate commerce is too attenuated (ECF No. 56 at 23-24); and (3) Congress made no findings to establish that activity regulated by § 231(a)(3) substantially affects interstate commerce (ECF No. 56 at 21-23). Each of these arguments are were rejected in *Mostofsky*. *See United States v. Mostofsky*, No. 1:21-cr-000138-JEB, ECF No. 45 at 64-72 (filed August 30, 2021); *United States v. Mostofsky*, 579 F.Supp.3d 9, 16-21 (D.D.C. 2021).

Specifically, in *Mostofsky*, the court rejected the argument that Section 231 regulates noneconomic conduct because "the act of interfering with the duties of a law enforcement officer or state firefighter incident to a civil disorder is not economic in nature" and "therefore fails the first *Morrison* factor." *Mostofksy*, 579 F. Supp.3d at 17-18. Instead, the court found that "[d]espite the actus reus being noneconomic. . . [§ 231(a)(3)] may be upheld because [it] 'proscribe[s] conduct interfering with or affecting interstate commerce' in the form of either hurting a victim at

work or disrupting efforts to contain a civil disorder that affects interstate commerce." *Id.* at 17-18. "Indeed, it is often the case that the circumstances around an act are what must affect interstate commerce even though the act itself is not commercial." *Id.* at 19-21 (citing *Harrington*, 108 F.3d at 1469–70 ("We do not rest our holding on the understanding that the defendant was 'engaged in interstate commerce' when he participated in the robbery of the restaurant[;] . . . rather, we rely on the undisputed fact that the restaurant was engaged in interstate commerce.")).

Similarly, in *Mostofsky*, the court similarly rejected Wren's argument that while § 231(a)(3) has a "commercial nexus element" for jurisdictional purposes, the element "is faulty because it does not limit the reach of the statute to activities that 'substantially affect' interstate commerce." *Id.* at 17-18. The court instead found that "[t]he connection to interstate commerce in § 231(a)(3) is slightly less direct than those in the jurisdictional elements of the Hobbs Act or RICO, but that does not make the jurisdictional element deficient." *Id.* at 18. "In sum, the Court concurs with the Government and the other district courts that § 231(a)(3) contains a jurisdictional element that ensure a sufficient connection to interstate commerce in each application." *Id.* at 20.

As to Wren's argument that "Congress made no findings to establish that the activity regulated by § 231(a)(3) substantially affects interstate commerce beyond any impact 'visible to the naked eye'," it is not necessary to look beyond the jurisdictional element because the jurisdictional element is satisfied. *Id* at 19-20. Indeed, "all recent district-court opinions to have considered whether § 231(a)(3) is valid under the Commerce Clause have done so solely based on that [jurisdictional] factor." *See*, *e.g.*, *Howard*, 2021 WL 3856290, at *9–11; *Wood*, 2021 WL 3048448, at *6; *Phomma*, 561 F.Supp.3d at 1064–66; see also *Terry v. Reno*, 101 F.3d 1412, 1418 (D.C. Cir. 1996) ("Lopez's fundamental proposition is that Congress must ensure that its Commerce Clause power to regulate noncommercial activities extends to only those activities that

substantially affect interstate commerce. Congress may do so either through its own legislative findings or by including a jurisdictional element in the statute; it need not do both.")).

Prior to *Mostofsky*, another District of Columbia court had previously "found that § 231(a)(3) was not an 'unconstitutional exercise[] of the commerce power' nor a violation of the First Amendment. . . ." *Mostofksy*, 579 F. Supp.3d at 17 (citing *United States v. Hoffman*, 334 F. Supp. 502 (D.D.C. 1971)). 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).

For the reasons that other courts have upheld Section 231(a)(3) as a valid exercise of Congress's Commerce Clause power, as well as those reasons articulated in *Mostofksy* in the context of January 6, 2021, Wren's Commerce Clause objections to § 231(a)(3) fall flat and should be rejected.

b. Section 231(a)(3) can independently be upheld under Congress's Plenary Power over the District of Columbia.

Regardless of whether § 231(a)(3) exceeds Congress's power under the Commerce Clause—and it does not, *see supra* at 4-6—for cases such as Wren's involving criminal conduct committed wholly within the District of Columbia, that statute fits comfortably within Congress's power under Article I, Section 8, Clause 17, which states:

> The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States,

> and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

U.S. CONST. art. I, § 8, cl. 17.

Congress's power under Clause 17 "is plenary." *Palmore v. United States*, 411 U.S. 397 (1973). "Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Id.* "Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State … so long as it does not contravene any provision of the constitution of the United States.'" *Id.* (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)). "Congress may legislate within the District for every proper purpose of government," and "[w]ithin the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments." *Neild v. D.C.*, 110 F.2d 246, 249 (D.C. Cir. 1940). "[W]hen it legislates for the District, Congress. . . exercise[es] complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. *Id.* at 250-51; *see also Hyde v. S. Ry. Co.*, 31 App. D.C. 466, 469 (D.C. Cir. 1908) ("The legislative power of Congress over the District of Columbia and the Territories [is] plenary, and [is] not depending upon the interstate-commerce clause").

By enacting § 231(a)(3), Congress relied on its Clause 17 power with respect to the District of Columbia. That statute prohibits "any act" that "obstruct[s], impede[s], or interfere[s] with any. . . law enforcement officer. . . engaged in [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." 18 U.S.C. § 231(a)(3) (emphasis

added). "Commerce," as used in § 231(a)(3), "means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) *wholly within the District of Columbia*." 18 U.S.C. 18 U.S.C.A. § 232(2) (emphasis added).

In *Lopez* and *Morrison*, the Court stressed how Congress's Commerce Clause power was cabined by the retained authority of the states to regulate commerce wholly within their borders. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-28 (citing *Lopez*, 514 U.S., at 568); *Lopez*, 514 U.S. at U.S. at 559 ("the proper test [for the scope of Congress's power under the Commerce Clause] requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"); *id.* at 564 ("if we were to accept the Government's arguments [that the Gun Free Schools Zone Act did not exceed Congress's powers under the Commerce Clause], we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Although it is without power to regulate purely intrastate commercial matters, Congress has plenary authority to regulate wholly local matters within the District of Columbia.

Additionally, Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617. "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 616. By contrast "the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8." *Palmore*, 411 U.S. at 397-98.

Indeed, even for criminal statues with national application that do not single out commerce within the District for special protection, as § 232(2)(C) does with respect to § 231(a)(3), Commerce Clause challenges to prosecutions for crimes occurring wholly within the District must fail. *See United States v. Mahdi*, 598 F.3d 883, 896 (D.C. Cir. 2010) (rejecting claim that VICAR, 18 U.S.C. § 1959, "is facially unconstitutional as it violates the Commerce Clause"; "[I]t is impossible to see how a statute regulating conduct within the District of Columbia could exceed congressional authority under the Commerce Clause. . . . Even if there were some doubt about § 1959's constitutionality outside the District of Columbia, 'we need not find the language of [§ 1959] constitutional in all its possible applications in order to uphold its facial constitutionality.'") (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971)); *accord United States v. Carson*, 455 F.3d 336, 368 (D.C. Cir. 2006) ("Within the District, Congress did not need to rely on its Commerce Clause authority.").

Here, Counts One and Two of the Second Superseding Indictment charge that Wren and Smith "obstructed and attempted to obstruct a law enforcement officer. . . incident to a civil disorder" that "adversely affected" "in any way or degree" "commerce," meaning, *inter alia*, commerce "wholly within the District of Columbia." Regardless of whether Congress had authority under the Commerce Clause to regulate such conduct in jurisdictions other than the District of Columbia, its exercise of its police power here was plenary and—absent the violation of some other provision of the Constitution—wholly legitimate. *See generally Darnell v. Markwood*, 220 F.2d 374, 375–77 (D.C. Cir. 1954) (reversing dismissal of complaint under the Sherman Act, 15 U.S.C. §§ 1, 2, and 3, alleging that defendants "restrain[ed] interstate trade and commerce, and trade and commerce in the District [of Columbia]"; and finding that although defendants' activities occurring wholly within the District of Columbia "do not come within the

control of the Commerce Clause, or, therefore, within either Sections 1 or 2 of the Sherman Act" nevertheless "Section 3 … is not dependent upon the Commerce Clause but rests upon the plenary legislative power of Congress within the District of Columbia"). Wren fails to identify any Constitutional provision that § 231(a)(3)'s enactment violates.

Because Clause 17, rather than Clause 3, provided Congress with plenary authority to prohibit conduct that had any effect whatsoever on commerce within the District of Columbia, all of Wren's challenges to the commerce element of § 231(a)(3) miss the mark, because all are grounded upon limitations on Congress's power under Clause 3. *See* ECF No. 56 at 18 (arguing that "the activity regulated by § 231(a)(3) is noneconomic for purposes of the first Morrison factor. . . [and] is not part of any larger body of economic regulation. . . ."); *id.* at 17 ("§ 231(a)(3) does not regulate activity that substantially affects interstate commerce"); *id.* at 19 (arguing that the jurisdictional "commercial nexus element [of § 231(a)(3)]. . . is faulty because it does not limit the reach of the statute to activities that 'substantially affect' interstate commerce"); *id.* at 22 ("Congress made no findings to establish that the activity regulated by § 231(a)(3) substantially affects interstate commerce beyond any impact 'visible to the naked eye.'"); *id.* at 23 ("The noneconomic conduct penalized by § 231 by definition is too attenuated to satisfy the 'substantially affects' test for commercial impact"). While the court in *Mostofsky*, did not reach this question, as it had "already found that § 231(a)(3) satisfies the Interstate Commerce Clause," it acknowledged that the Plenary power "may provide the Government another leg to stand its § 231(a)(3) count on." *Mostofksy*, 579 F. Supp.3d at 21.

Because this § 231(a)(3) is a valid exercise of Congress's plenary authority over the District of Columbia, this Court should reject Wren's challenge to Counts One and Two.

II. 18 U.S.C. § 231(a)(3) is Constitutional under the First Amendment because it is not Overbroad and is not Content based.

Under the First Amendment, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). But "the 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 of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984), and "[r]arely, 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," *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). A defendant must show "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801. Wren and Smith fail to make that showing, here.

a. Section 231(a)(3) is not Overbroad because it Criminalizes Non-Expressive Conduct, not Speech.

Wren and Smith argue that Section 231(a)(3)'s criminalizing of "any act to obstruct, impede, or interfere with … law enforcement … incident to or during the commission of a civil disorder" "extends to a substantial amount of constitutionally protected speech and expressive conduct." ECF No. 60 at 8. Their imagined examples include "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." *Id.*

This argument fails because Section 231(a)(3) criminalizes non-expressive conduct, not speech. As Judge Kelly ruled in another January 6 case, the statute "does not even mention speech, and it simply does not prohibit peaceful expression or association." *United States v. Nordean*, No. CR 21-175, 579 F.Supp.3d 28, 58 (D.D.C. Dec. 28, 2021). Despite the Defendants' speculative examples, "the statute's potentially unconstitutional applications are few compared to its legitimate ones." *Mostofsky*, 579 F.Supp.3d at 22.

Section 231(a)(3) is easily distinguished from the overbroad laws addressed in the cases on which Wren relies. Unlike the Section 231(a)(3), these overbroad laws did not explicitly criminalize an "act." The ordinance in *McCoy v. City of Columbia* stated: "It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties." 929 F.Supp.2d 541, 546 (D.S.C. 2013). The infinitives "interfere with" and "molest" encompass far more speech and expressive conduct than Section 231(a)(3)'s criminalized behavior—"any act." The ordinance in *City of Houston, Tex. v. Hill* read: "It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." 482 U.S. 451, 455 (1987). Here, the phrase "in any manner oppose, molest, abuse or interrupt" explicitly includes speech and expressive conduct.

Compared to these ordinances, Section 231(a)(3) makes very clear that it criminalizes acts, not speech. Overbreadth challenges to such statutes "[r]arely, if ever, … succeed." *Hicks*, 539 U.S. at 124. Smith and Wren's challenge should not.

b. If Section 231(a)(3) Criminalizes any expressive conduct, it is facially content-neutral and does not have a Content-based or Viewpoint-based Purpose.

The statute is facially content-neutral because, if it criminalizes any speech or expressive conduct, the illegality of the act is based on its obstructing, impeding, or interfering effect on law enforcement "incident to and during" a civil disorder. 18 U.S.C. § 231(a)(3). For example, someone can legally burn an American flag or a Confederate flag during a civil disorder so long as they do not "obstruct, impede, or interfere" with any law enforcement. They can legally lead chants with a bullhorn (in support or against any cause), but they cannot hold the bullhorn up to an officer's ear during the civil disorder and scream their message as loud as they could—incapacitating the officer. This Court should follow Judge Kollar-Kotelly's reasoning in *Grider* and conclude that any facial challenge to Section 231(a)(3) must fail. *See United States v. Grider*, 21-cr-00022, 2022 WL 3016775, at *5-6 (D.D.C. 2022).

Wren argues that 18 U.S.C. § 231(a)(3) has an improper content-based and viewpoint-based purpose, citing legislative history showing one Senator's anti-Civil Rights Movement animus in 1968. ECF No. 56 at 4-11. The Court need not descend into decades of legislative history to determine whether this man's comments taint the statute with a content-based purpose. While some legislators at the time certainly held racist views, they were also concerned with curtailing civil disorder and the damage to life, property, and society that it causes. Congressmen and women in the decades since have maintained 18 U.S.C. § 231, including amending it in 1994. It would be nonsensical for this Court to allow the views of one Senator fifty-five years ago to taint a modern statute, which is still meant to protect officers working to contain civil disorder—no matter what political movement motivates it.

Ultimately, the Court should deny the motion because Section 231(a)(3) criminalizes non-expressive conduct, not speech.

III. 18 U.S.C. § 231(a)(3) is not Unconstitutionally Vague.

18 U.S.C. § 231(a)(3) reads:

> 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.

(Emphasis added.)

The Defendants argue that the phrases "any act," "to obstruct, impede, or interfere," "incident to and during the commission of a civil disorder," and "in any way or degree obstructs, delays, or adversely affects commerce" are unconstitutionally vague. ECF No. 56 at 40 and ECF No. 60 at 4-5. Smith further argues that the statute lacks a scienter requirement and thus should be scrutinized with extra care. ECF No. 60 at 5.

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 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). 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).

Several other courts in this district have denied vagueness challenges to Section 231(a)(2) in January 6 cases. *See, e.g., United States v. McHugh*, No. 21-cr-453, 583 F. Supp. 3d 1, 24-30 (D.D.C. 2022) (Bates, J.); *United States v. Fischer*, 2022 WL 782413, at *2–4 (D.D.C. Mar. 15, 2022) (Nichols, J.); *Nordean*, 597 F.Supp.3d at 46-51 (Kelly, J.).

The phrases highlighted by the Defendants are not unconstitutionally vague because "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." *Nordean*, 2021 WL 6134595, at *57. Unlike terms like "annoying," "indecent," or "unreasonable," the statutory language does not "condition criminal liability on individualized, subjective judgments." *McHugh*, 583 F. Supp. 3d at 27. "Civil disorder" has a "fulsome statutory definition" clarifying that "the 'gathering' must 'involve acts of violence' and either cause or 'immediate[ly]' 'threaten bodily injury or property damage.' The definition, in other words, 'limits the application of "civil disorder" to a small (obviously unlawful) subset of "public gatherings."'" *Fischer*, 2022 WL 782413, at *3 (quoting *Nordean*, 2021 WL 6134595 at *16; 18 U.S.C. § 232(1)). Finally, the Court should disregard the Defendants' argument that the statute lacks scienter because Section "231(a)(3) is a specific intent statute." *McHugh*, 583 F. Supp. 3d at 25; *see alse Fischer*, 2022 WL 782413, at *3.

Importantly, 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.'" *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19, (2010)). Here, Smith and Wren—joining a large civil disturbance—forcefully confronted and impeded law enforcement officers as they attempted to clear the Upper West Terrace.

Smith and Wren have not overcome the presumption that 18 U.S.C. § 231(a)(3) is not vague and have not given the Court reason to diverge from the other opinions from the district.

IV. Count One and Two are Legally Sufficient to State an Offense.

Smith and Wren also object under Rule 7(c) of the Federal Rules of Criminal Procedure. In particular, they contend that proper notice under the Sixth Amendment has not been made adequately. ECF No. 56 at 45-47. This is incorrect.

Count Two states:

> On or about January 6, 2021, at approximately 4:20 p.m., within the District of Columbia, DONNIE DUANE WREN and THOMAS HARLEN SMITH committed and attempted to commit an act to obstruct, impede, and interfere with law enforcement officers, that is, officers from the United States Capitol Police, Metropolitan Police Department, and other law enforcement agencies, lawfully engaged in the lawful performance of their 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.[2]
>
> (Civil Disorder, in violation of Title 18, United States Code, Sections 231(a)(3))

(ECF No. 71 at 2.) 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." An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure 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

[2] Count One is identical except for the time (approximately 3:03 p.m.), and it only charges Smith.

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)). 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).

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 prosecution "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) (declining to hold but citing this holding in Circuits 3, 8, and 11)—neither of which 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. Criminal cases have no mechanism equivalent to the civil rule for summary judgment. *See United States v. Bailey*, 444 U.S. 394, 413, n.9 (1980); *Yakou*, 428 F.2d at 246-47; *United States v. Oseguera Gonzalez*, No. 20-cr-40-BAH at *5, 2020 WL 6342940 (D.D.C. Oct. 29, 2020) (there is no procedure in criminal cases that permits pretrial determination of the sufficiency of the evidence). Indeed, "[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, 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, the court is limited to reviewing the face of the indictment and more specifically, the language used to charge the crimes. *Bingert*, 21-cr-93 (RCL) (ECF 67:5); *United States v. Puma*, No. 21-cr-454 (PLF), 2020 WL 823079 at *4 (D.D.C. Mar. 19, 2022) (quoting *United States v. Sunia*, 643 F.Supp. 2d 51, 60 (D.D.C. 2009)).

In another January 6 case, Judge Hogan rejected an argument like the defendants', concluding that the indictment need not allege the specific facts detailing precisely how the prosecution believes the defendant violated the statute on January 6th. *See United States v. Sargent*, 2022 WL 1124817 at *3, *4, *7, and *10, (D.D.C. 2022). Instead, as noted above, an allegation of fact beyond the statute's elements is required only if "guilt depends so crucially upon such a specific identification of fact." *Id.* at *10 (*quoting Russell*, 369 U.S. at 764). The exact nature of the "federally protected function" obstructed by the Capitol riot or the precise physical technique used to "obstruct, impede, and interfere with law enforcement" will not decide Smith or Wren's guilt. *See Id.* at *3 (finding "any act" to be sufficient because it implies conduct, not speech).

Smith argues that Counts One and Two fail to include legally sufficient facts regarding the "federally protected function." Here, evidence at trial could establish the "federally protected function" through the USSS's protection of the Vice President and his family, *see Nordean*, 579 F. Supp. 3d at 55-56, or the United States Capitol Police's obligation to protect the Capitol, *see* 2 U.S.C. § 1961. Under Rule 7, Counts One and Two are legally sufficient because they "echo[s] the operative statutory text while also specifying the time and place of the offense." *Williamson*, 903 F.3d at 130. The Indictment need not inform the Defendants "as to every means by which the

prosecution hopes to prove . . . the crime." *Haldeman*, 559 F.2d at 124. The time and place of the offense, Smith's own assaultive conduct, and the significance of the civil disorder at the Capitol on January 6, 2021 provide Smith with notice that the United States may prove that the civil disorder "obstructed, delayed, and adversely affected . . . the conduct and performance of" the duties of either the USSS or Capitol Police. If the Court orders a bill of particulars under Rule 7(f), it will outline these two "federally protected functions." This Court should adopt the reasoning in *Nordean* and *Sargent* and find that the Indictment properly states a claim. 579 F. Supp. 3d at 60-61; 2022 WL 1124817 at *3-6.

Even if the Court determined that the Indictment was legally insufficient to state an offense, it should not dismiss the charges until the United States "has made a full proffer of evidence" or the parties have agreed to a "stipulated record." *See Yakou*, 428 F.3d at 246-47; *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000); *United States v. Nabors*, 45 F.3d 238, 240 (8th Cir. 1995).

CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' Motions to Dismiss Counts One and Two of the Superseding Indictment.

Respectfully submitted,

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