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

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| **UNITED STATES OF AMERICA** | ) | |
| **V.** | ) | CASE NO: 1:21-CR-496 |
| **MARK IBRAHIM,** | ) | Hearing: 11/30/2022 |
| DEFENDANT. | ) | |

**REPLY TO GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS COUNT THREE OF THE INDICTMENT ON GROUNDS OF EXEMPTION**

The parties' disagreement comes down to a comma.

I. **Grammatical Review of the Exemption Sentence**

> "Except as specified below, the provisions of section 6(a)(1)(A) of the Act, as amended relating to the carriage of firearms shall not apply to officers or employees of the United States authorized by law to carry firearms, duly appointed federal, state or local law enforcement officers authorized to carry firearms, and members of the Armed Forces, while engaged in the performance of their duties, or any person holding a valid permit under the laws of the District of Columbia to carry firearms in the course of his employment."

Capitol Police Board Regulations, Section 2, in relevant part.

The Capitol Police Board Regulations state that "officers or employees of the United States authorized by law to carry firearms" and "duly appointed federal, State of local law enforcement officers authorized to carry firearms" are exempt from the law restricting firearm carriage on Capitol Grounds. This same sentence then provides that "and members of the Armed Forces, while engaged in the performance of their duties," are also exempt.

This is a compound sentence of independent clauses joined by the term "and" in order to combine the independent clauses into a single sentence. The "while engaged in the performance

of their duties" is an apposition that describes the particular members of the Armed Forces who qualify for the exemption. As written, the apposition for the portion of the sentence describing "members of the Armed Forces" does not extend to other independent clauses in the sentence. This is consistent with the preceding two groups that are exempted by this sentence —the "officers or employees of the United States" and the "law enforcement officers" — each of which has appositive qualifiers that follow the subject: the first group's qualifier is "authorized by law to carry firearms" and second group's qualifier is "authorized to carry firearms."

Thus, this sentence, or at the least the portion of the sentence that is at issue, has a total of three independent clauses, each qualified:

- 1) "officers or employees of the United States" — qualified by "authorized by law to carry firearms"
- 2) "duly appointed federal, state or local law enforcement officers" — qualified by "authorized to carry firearms"
- 3) "members of the Armed Forces" — qualified by "while engaged in the performance of their duties"

The reading proposed by the defense is straightforward, grammatically sound, and logically congruous.

## II. **The Government's Interpretation is Incorrect, Nonsensical and Illogical**

The government's interpretation of this sentence is that the qualifier for the "members of the Armed Forces" extends to all preceding independent clauses, a reading that implies two logical incongruences: (a) that officers of the United States and law enforcement officers have two qualifiers while members of the armed forces have one, and, that (b) officers of the United

States and law enforcement officers can be engaged in the performance of their duties with firearms while unauthorized to carry those firearm.

The government's reading indicates that this sentence is saying that "officers or employees of the United States" and "federal, state or local law enforcement officers" must be both — "authorized by law," for the former, and just "authorized," for the latter — and, additionally, be "engaged in the performance of their duties," while "members of the Armed Forces" need only to be "engaged in the performance of their duties." The implication is that there are two conditions for law enforcement and for officers of the United States, yet only one for members of the Armed Forces. This is incongruous— but even more striking when considered together with the second issue that this interpretation raises: that officers or employees of the United States and duly appointed federal, state or local law enforcement officers can be engaged in the performance of their duties with firearms while not authorized to carry those firearms. This, of course, is a dead end for the government's proposed interpretation. This simply doesn't make sense.

Moreover, this interpretation conflicts with another paragraph of the regulations prescribed by the Capitol Police Board — section 3. "The provisions of section 6(a)(1)(B) of the Act, as amended, relating to the use of firearms and dangerous weapons shall not apply to any duly appointed law enforcement officer engaged in the performance of his official duties." When discussing the *use of firearms*, as opposed to the *carry*, the Capitol Police Board regulations impose the requirement that law enforcement officers can only *use* their firearms if engaged in the performance of their official duties. Here, the exemption for the *use* of firearms, a more serious and strict exemption, is limited to law enforcement officers only, does not extend to the

other three categories of exemptees outlined in Section 2, and does not have that allegedly additional requirement of also being "authorized" to carry those firearms that they are using. Section 3 proves the government's interpretation of Section 2 as implausible — the use of firearms cannot logically have fewer conditions than the carry of firearms.

The government's interpretation is implausible and plainly wrong.

III. **Mr. Ibrahim is Exempted by the Capitol Police Board Regulations**

As the government has conceded in ECF No 62, p.4, that Mr. Ibrahim "was an officer of the United States" at all times material. Mr. Ibrahim was a federal law enforcement officer, as well as an employee of the United States. He was both authorized by his department to carry firearms, see DEA Agents Manual § 6122.11(B), and authorized by law to carry firearms — namely, 21 U.S.C. § 878, which states that DEA federal law enforcement officers are authorized to carry firearms, and D.C. Code § 22–4505, which permits federal police officers who are otherwise authorized to carry firearms to do so in the District of Columbia. Mr. Ibrahim is exempt from the enforcement of the law charged in Count Three of the Indictment.

IV. **The Government's Discussion About Duty Assignments is Irrelevant**

The government dedicates the majority of their argument to discussion of policy regarding DEA officers on duty. This is irrelevant to the issue raised by the defense, which is that Mr. Ibrahim was exempt because he was authorized to carry firearms. Since he is not claiming exemption under the Armed Forces clause (which he technically could claim as well, but has not

done due to the qualifier of having to be on duty), there is no need to discuss the issue of duty and assignments.

V. **The Government's Reliance on Affidavits is Outside the Scope of a Motion to Dismiss and Irrelevant**

In order to create criminal liability where there should be none, the government sought out the help of bureaucrats and attached their affidavits as proof of legal interpretation. Luckily for all of us, bureaucrats don't write laws, elected Congressmen do. Irrespective of the stunning chutzpah, this is also outside the scope of this court's purview when faced with a Motion to Dismiss. See, e.g., *United States v. Akinyoyenu*, 199 F. Supp. 3d 106 (D.D.C. 2016). The government's position has been consistent — that their indictment is sufficient. Accordingly, this court must proceed with the limitations set out by the indictment — a limitation crafted and imposed by the government itself.

VI. **The Rule of Lenity Favors Defendant's Interpretation**

When there is ambiguity in a law, the courts invoke the rule of lenity, not the affidavits of bureaucrats.

At the end of the day, the only reason we are looking at administrative regulations in Mr. Ibrahim's Motion to Dismiss is because 40 U.S.C. § 5104(e)(1) directly references and incorporates administrative regulation, thereby requiring the same analysis of this regulation as we would of a law.

The rule of lenity directs courts to resolve ambiguities in criminal laws in favor of the defendant, not the government. *Liparota v. United States*, 471 U.S. 419, 427 (1985). "'[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Bouie v. City of Columbia*, 378 U. S. 347, 351 (1964) (quoting *United States v. Harriss*, 347 U. S. 612, 617 (1954)); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (refusing to expand a criminal statute's reach without "a fair warning ... given to the world in language the common world will understand"). Withal, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (describing lenity "as a sort of junior version of the vagueness doctrine" that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered" (citation and quotation marks omitted)). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267. See also *Wooden v. United States*, 142 S. Ct. 1062, 1082 (2022) (Gorsuch, J., concurring) ("Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws.").

In a regular statute, the exemptions are listed within the statute. In 40 U.S.C. § 5104(e)(1)(A)(i), the code references an outside source, "regulations prescribed by the Capitol Police Board." The regulations prescribed by the Capitol Police Board must, therefore, be read and interpreted as the law. In this case, the rule of lenity must apply to the regulations prescribed by the Capitol Police Board in the same way as they would for us reading the statute that references the "regulations prescribed by the Capitol Police Board."

The government argues "absurd results" because it turns out that counsel for the government dislikes certain individuals who the government has permitted to possess firearms. That's an issue they can take up with the departments who issued such permissions, and if the language of the regulation bothers the prosecution, then with the Capitol Police Board, or with the elected officials in Congress. The fact that there exist individuals who the government is upset about having exemption under this law is not a legal basis of any sort that this Court to consider.

Mr. Ibrahim's interpretation of Section 2 is clear, consistent with other provisions of the regulations prescribed by the Capitol Police Board, and logical. The government's interpretation is everything but logical and consistent. The government's interpretation should be rejected.

## VII. **The Government Makes False Representations About Mr. Ibrahim and Other January 6 Defendants**

While only peripheral, the government made false and inflammatory statements in their Response, in an unsightly attempt to persuade this Court, and these remarks require a brief response.

As has previously been demonstrated in this case, see Defendant's Motion to Dismiss Count Four of the Indictment, ECF No. 49 (Sustained), the government feels no shame in putting false accusations on the record. In its most recent filing, ECF No. 62, the government has implied that enumerated January 6 defendants (one of whom is represented by undersigned counsel, Mr. Christopher Warnagiris), were on Capitol Grounds or inside of the Capitol Building

on January 6, 2021 with firearms. This is untrue. None of these individuals are charged with any firearms offenses.

Moreover, in footnote 5, the government alleged that Mr. Ibrahim violated department regulations by being in a federal facility with a firearm on January 6 — this is also absolutely false (and of course not supported by the corresponding criminal charge under 18 USC § 930 — a felony charge we all know the government would indict giddily if they could). Counsel for the government agreed on the record at one of the last hearings that Mr. Ibrahim had not entered a government building with a firearm.

On top of that, the government alleged that Mr. Ibrahim participated in a riot. Yet this is contrary to the evidence the government has referenced to support Count Two of the Indictment, the defendant's self-recorded video lamenting the breakdown of the protest into a riot; and, the evidence the government referenced to support Count Four of the Indictment (Dismissed), Mr. Ibrahim's statement that he put away his flags after he observed the breakdown of the protest into something he did not wish to be a part of and wanted to disassociate himself from the protestors. So, no, the defendant never participated in a riot, and the government knows it. The allegations in the Response are entirely false.

Since none of these issues relate directly to the Motion to Dismiss, the defense will not spend additional time arguing these issues. But these purposefully misleading and inflammatory remarks by the government are highly irregular and deserve further scrutiny at an appropriate juncture.

VIII. **Mr. Ibrahim's Motion to Dismiss should be granted**.

For all the reasons stated herein, the Defendant's motion should be granted and Count Three should be dismissed.

Respectfully submitted,
By Counsel:

/s/
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**CERTIFICATE OF SERVICE FOR CM/ECF**

I hereby certify that on November 22, 2022, I will electronically file the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/
Marina Medvin, Esq.