UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **BRUNO JOSEPH CUA**	**Criminal Action No. 21-00107 (RDM)** **Honorable Randolph D. Moss** **Trial: February 13, 2023**

BRUNO CUA'S MOTION TO DISMISS COUNT ONE OF THE SECOND SUPERSEDING INDICTMENT

Jonathan Jeffress (D.C. Bar No. 479074)
William E. Zapf (D.C. Bar No. 987213)
KaiserDillon PLLC
1099 14th Street NW
8th Floor West
Washington, DC 20005
T: (202) 640-2850
F: (202) 280-1034
jjeffress@kaiserdillon.com
wzapf@kaiserdillon.com

Attorneys for Bruno Joseph Cua

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Defendant Bruno Cua, through his counsel, files this motion to dismiss Count One of the Second Superseding Indictment ("SSI"), pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.

INTRODUCTION

The SSI charges Mr. Cua in Count One with violating section 231(a)(3) of Title 18. Count One should be dismissed because section 231 is constitutionally infirm. Police powers belong to the States. The Commerce Clause did not give Congress the power to direct them. The government's attempt to avoid the issue in this case by claiming the January 6 "civil disorder" adversely affected a "federally protected function" fails as well. Congressional entities, such as the U.S. Capitol Police (USCP), are not "departments" or "agencies" "of the United States." § 232(3). On these grounds, the Court should dismiss Count One.

STATUTORY HISTORY AND FACTUAL BACKGROUND

I. The Structure and History of Section 231(a)(3)

Section 231 provides criminal penalties for:

> 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[.]

§ 231(a)(3).

Section 231(a)(3) was enacted as part of the Civil Obedience Act of 1968 (COA). Pub. L. 90-284, Apr. 11, 1968, Title X. Senator Russell Long of Louisiana sponsored the COA during the Senate's debates over the Civil Rights Act of 1968. 114 Cong. Rec. 1294-96 (Jan. 29, 1968). It was proposed as a rejoinder to the civil rights bill and to the civil rights movement. First, the COA was to blunt the legal protections proposed under the "hate crime" title of the Civil Rights

Act of 1968. Codified at 18 U.S.C. § 245, the hate crime title criminalized interfering with another person because of the person's race or because he engaged in federally protected activity. Senator Long was clear that the COA was designed to diminish the hate crime law. 114 Cong. Rec. 1287-94 (Jan. 29, 1968). His "greatest immediate concern" about the hate crime law was "the unwitting stumbling block it could place before State and local officials in their honest attempts to detain and prosecute incendiary rabble rousers." *Id.* at 1289.

Second, it was the COA's purpose to jail civil rights leaders. For example, Senator Long said the COA was needed due to "a so-called civil rights march led by Dr. Martin Luther King in the streets of Birmingham in March of 1963." 114 Cong. Rec. 1294 (Jan. 29, 1968). During that march, Long complained, Dr. King had "addressed a tense crowd with inflammatory words," while in jail, King "wrote an inflammatory letter which gained wide recognition in its pleas for Negroes to disobey those laws they felt unjust." *Id.* Long offered similar explanations for the COA by reference to other civil rights leaders. 114 Cong. Rec. 5536 (Mar. 6, 1968). As for the constitutional power Congresses needed to pass the COA—the Commerce Clause—Long explained the COA would apply to intrastate conduct so that it would "not leave available to Rap Brown or Stokely Carmichael the technical defense that they did not cross the State boundary with the intent to create a riot." 114 Cong. Rec. 5533.

Third, Senator Long said the COA would "strike at" the "doctrine . . . that one should not obey the laws that stand in the way of alleged 'civil rights.'" 114 Cong. Rec. 1295 (Jan. 29, 1968). As to the COA section that would become § 231(a)(3), Senator Long explained that this section "would make it a Federal offense for people to snipe at firemen or shoot at policemen while they are trying to do their duty protecting lives and property." 114 Cong. Rec. 5542.

II. Count One of the Second Superseding Indictment

The SSI charges Cua with the felony offense of committing, and attempting to commit, "an act" to obstruct, impede, and interfere with "a law enforcement officer, that is, Officer, G.L., 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 a federally protected function," in violation of 18 U.S.C. § 231(a)(3).

In a bill-of-particulars response in another January 6 case, government added detail to its section 231(a)(3) charge that the government can confirm applies to Mr. Cua:

> The government intends to argue that the defendant's actions or attempted actions that were intended to obstruct, impede, or interfere with any law enforcement officer defending and protecting the U.S. Capitol and its occupants on January 6th include: defendant's *act of pushing, individually or with others, against law enforcement officers [in the] U.S. Capitol[.]*

See United States v. Mostofsky, Crim. No. 21-cr-138-JEB (D.D.C.), ECF No. 38, at 2 (emphasis added), attached at Exhibit 1. The government also specified which alleged "federally protected functions" were "adversely affected" by the "civil disorder" on January 6. *Id.* at 3-4.

<u>ARGUMENT</u>

I. Standard for a Rule 12(b) motion to dismiss an indictment

Rule 7 of the Federal Rules of Criminal Procedure provides that "the indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . ." Fed. R. Crim. P. 7(c)(1). This rule performs several constitutionally required functions, including protecting against prosecution for crimes based on evidence not presented to the grand jury, as required by the Fifth Amendment. *See, e.g.*, *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). Rule 12 provides that a defendant may move to

dismiss the pleadings on the basis of a "defect in the indictment or information," including a "lack of specificity" and a "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(iii),(v). It also permits such a motion on the basis of a "defect in instituting the prosecution," including "an error in the grand-jury proceeding." Fed. R. Crim. P. 12(b)(3)(A)(v). *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (an indictment must "fairly inform[] a defendant of the charge against which he must defend" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged").

II. Count One for violation of section 231(a)(3) count should be dismissed.

A. Count One should be dismissed for lack of specificity because it does not sufficiently inform Mr. Cua of how his actions adversely affected either commerce or a federally protected function.

"An indictment's primary purpose is 'to inform the defendant of the nature of the accusation against him.'" *United States v. Harmon*, 474 F. Supp. 3d 76, 86 (D.D.C. 2020) (quoting *Russell v. United States*, 369 U.S. 749, 767 (1962)). The indictment must "fairly inform[] a defendant of the charge against which he must defend" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling*, 418 U.S. at 117-18. These requirements exist to ensure that defendants' constitutional rights are protected. "The notice requirement is established in the Sixth Amendment, which provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]'" *United States v. Saffarinia*, 424 F. Supp. 3d 46, 57 (D.D.C. 2020) (internal quotation and citation omitted). "A valid indictment also preserves the Fifth Amendment's protections against abusive criminal charging practices; specifically, its guarantees that a criminal defendant can only be prosecuted for offenses that a grand jury has actually

passed up on, and that a defendant who is convicted of a crime so charged cannot be prosecuted again for that same offense." *Id.*

An indictment must "first, contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117. "The test for sufficiency is whether it is fair to require the accused to defend himself on the basis of the charge as stated in the indictment." *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980). "An indictment not framed to appraise the defendant with reasonable certainty, of the nature of the accusation against him … is defective." *Russell*, 369 U.S. at 675.

Here, it would be wholly unfair to require Mr. Cua to defend himself against Count One when the government has not notified him of the either how commerce or a federally protected function was adversely affected. Although the "generally applicable rule is that the indictment may use the language of the statute … that language must be supplemented with enough detail to apprise the accused of the particular offense with which is charged." *Conlon*, 628 F.2d at 155.

B. Even if the indictment is sufficiently specific, any "federally protected function" the government has pled (or could plead) does not qualify under the statute.

To establish Mr. Cua is guilty of violating section 231(a)(3), the government must allege and prove beyond a reasonable doubt that the "civil disorder" on January 6 had an adverse effect on commerce or a "federally protected function," § 231(a)(3). SSI, Count One. The commerce prong of section 231(a)(3) is unconstitutional and the government's allegation as to the federally protected function fails as a matter of law.

Given the SSI's allegation that Mr. Cua obstructed, impeded, and interfered with Officer G.L. of the Capitol Police, Mr. Cua understands that the government intends to rely upon a theory at trial that the function of the Capitol Police, and specifically of Officer G.L. was the

federally protected function, the conduct and performance of which was allegedly obstructed, delayed, and adversely affected.[1] The Capitol Police, however, do not fall within the meaning of a federally protected function, as that term should be interpreted. A list of the federally protected functions proffered by the government in a different January 6 case, *United States v. Mostofsky*, Crim. No. 21-cr-138-JEB (D.D.C.), *see* Exhibit 1, does not list any entities that fit within the meaning of "federally protected functions."

"Federally protected function" is defined as any "function, operation or action carried out. . . by any *department, agency, or instrumentality of the United States* or by an officer or employee thereof." 18 U.S.C. § 232(3) (emphasis added). Section 6 of Title 18 defines "department" and "agency" for the title:

> The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6.

The Supreme Court has held that section 6's definition of "department" as "one of the *executive* departments enumerated in section 1 of Title 5" presumptively controls any Title 18 statute's use of that term unless the government makes a "fairly powerful" "showing" that Congress intended, in the statute at issue, that "department" should refer to the "legislative, or judicial branches of government," which the Court held was the "unusual sense" of the term.

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[1] To the extent the government intends to proceed on a different theory with respect to the federally protected function, the Indictment fails to sufficiently plead Count 1. To the extent the government attempts to prove a different theory at trial, it would constitute a material and prejudicial variance from the indictment and/or a constructive amendment from the indictment that the Grand Jury considered. *See United States v. Lorenzana-Cordon*, 949 F.3d 1, 4 (D.C. Cir. 2020) (explaining the two terms). Mr. Cua reserves the right to move to dismiss the Indictment if the government proffers a federally protected function by an entity different from the Capitol Police.

Hubbard v. United States, 514 U.S. 695, 700 (1995). In *Hubbard*, a man was convicted under a now-superseded version of § 1001 that punished "'[w]hoever, in any matter within the jurisdiction of *any department or agency of the United States* knowingly and willfully . . . makes any false, fictitious or fraudulent statements. . .'" 514 U.S. at 698 (quoting § 1001) (emphasis added). The man had filed false records in a bankruptcy court. The lower courts upheld his conviction on the ground that such a court was a "department . . .of the United States," in the sense that the executive, legislative and judicial branches of government were sometimes referred to as "departments" in the 18th century. *Id.* Not only did the Supreme Court reverse his conviction on the ground that this interpretation of "department" was inconsistent with § 6, it overruled its own prior contrary precedent notwithstanding *stare decisis.* 514 U.S. at 701.

Applying the *Hubbard* rule, the D.C. Circuit has held that congressional entities do not satisfy section 6's "department" and "agency" "of the United States" because they are not *executive* departments and agencies. See *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997) (after Supreme Court's decision in *Hubbard*, "an *entity within the Legislative Branch* cannot be a 'department' within the meaning of § 1001 and 18 U.S.C. § 6," nor is Congress an "agency" under § 6) (emphasis added); *United States v. Dean*, 55 F.3d 640, 659 (D.C. Cir. 1995) (reversing convictions under § 1001 for false statements to Congress, as *Hubbard* "narrowed the reach of ["department" and "agency"] *to matters within the executive branch*") (emphasis added). *See also Trump v. Deutsche Bank AG*, 943 F.3d 627, 645 (2d Cir. 2019) (applying *Hubbard* and § 6 and holding that the Right to Financial Privacy Act's reference to a "department or agency" does not apply to Congress) *rev'd and remanded on other grounds sub. nom. Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020); *United States v. Perraud*, 672 F. Supp. 2d 1328, 1344 n. 4 (S.D. Fla. 2009) (Congress neither a "department" nor an "agency").

Beyond those decisions, Title 18 distinguishes between congressional entities, on the one hand, and "departments" or "agencies" "of the United States," on the other. Consistent with *Hubbard-Oakar-Dean*, the latter always lie "within the executive branch." *See, e.g.*, 18 U.S.C.§ 1505 (distinguishing between obstruction of congressional proceedings and "proceeding[s] . . . before any department or agency of the United States. . .").

Against that backdrop, the government's bulleted list of "federally protected functions" in the *Mostofsky* bill of particulars response, Ex. 1, fails as a matter of law for the following reasons:

- **U.S. Capitol Police**. The USCP is not a "federally protected function" for several reasons. First, USCP is not an executive department or agency. It is operated by the Capitol Police Board, which is composed solely of congressional not executive entities, *see* Capitol Police Board, U.S. Capitol Police, https://www.uscp.gov/the-department/oversight/capitol-police-board. One of the federal statutes cited in the government's particulars response explicitly states that USCP is not an executive department or agency. 2 U.S.C. § 1970. Second, the USCP are among the "law enforcement officers" the government alleged Mr. Cua "interfered" with under § 231(a)(3) during the "civil disorder." If the USCP are also the "federally protected function"— i.e., the police are both the protecting function and the function that is protected—the term "federally protected function" adds nothing to the meaning of § 231(a)(3). Statutes must be construed to avoid surplusage. *See*, *e.g.*, *Indep. Ins. Agents of Am.*, *Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000); *United States v. Rupert*, 2021 U.S. Dist. LEXIS 53152, *43 (D. Minn. Jan. 6, 2021) (Had the government not been relying alternatively on interstate commerce in that case, the court would have dismissed the section 231(a)(3) charges because the government merely pointed to law enforcement officers, not a "federally protected function").

- **"Executive departments and agencies."** The government cites 2 U.S.C. § 1970, which states that executive departments and agencies "may assist the United States Capitol Police in the performance of its duties by providing services . . ." § 1970(a)(1). But it does not identify the "function, operation, or action carried out" by any "executive department or agency" on January 6 that was adversely affected by the civil disorder. § 232(3). And, again, if the executive department or agency at issue is a "law enforcement agency," the government's interpretation of section 231(a)(3) is tautological.

- **Archivist of the United States**. The government states, "pursuant to 3 U.S.C. § 6, the Archivist of the United States has the responsibility to safeguard the electoral certificates submitted by the states." ECF No. 38, p. 3. However, section 6 does not actually say that. Rather, it states that the Archivist has the duty to transmit to Congress "copies in full" of the certificates, which need not entail "safeguarding" them, whatever the government may mean by that. (Same-day mail and email now exist, unlike in 1887.) § 6. In any case, the Archivist is the administrator for the National Archives and Records Administration which is neither an executive "department" nor an "agency" under 18 U.S.C. § 6, and the government does not

explain how the certificates were adversely affected by the civil disorder; it merely states a legal conclusion.

- **The President of the Senate.** The government notes the Vice President's role as President of the Senate under the ECA. It is not clear what argument the government intends to make, as the Senate is not a "department, agency or instrumentality of the United States" under 18 U.S.C. § 6, even assuming the President of the Senate could be characterized as an "officer" or "employee" thereof. § 232(3). *Dean*, 55 F.3d at 659.

- **Commencement of term of office statute.** The government cites the statute stating that the term of office for President "shall, in all cases, commence on the 20th day of January next succeeding the day on which the votes of the electors have been given." 3 U.S.C. § 101. The "function" described in § 101 is that the President and Vice President's term shall begin on January 20. But the government does not argue that the "civil disorder" adversely affected that function. Rather, it alleges that the disorder "affected the counting of the votes of the electors" on January 6, which is not the "function" in § 101; the joint session resumed on January 6. SSI, Count Two.

- **The Secret Service.** Officers of the U.S. Secret Service, like those of the U.S. Capitol Police, are "law enforcement officers" under § 232(7). See 18 U.S.C. § 3056(b)(3), (d) (describing USSS as a "law enforcement agency"). The government alleges the USSS were "engaged in the enforcement . . . of criminal laws of the United States," § 232(7), on January 6 because the government alleges that protesters breached a "restricted area" under § 1752, which it is the duty of the USSS to enforce. § 3056(d). As explained above, if the USSS are also the "federally protected function," the term "federally protected function" adds nothing to the meaning of § 231(a)(3). *Hawke*, 211 F.3d at 644 (statutes must be construed to avoid surplusage); *Rupert*, 2021 U.S. Dist. LEXIS 53152, *43.

- **Department of Homeland Security (DHS)**. The government represents that DHS had the responsibility to protect the Capitol and its grounds on January 6, pursuant to 40 U.S.C. § 1315 and that was a "federally protected function." First, that is not accurate. The USCP are designated with the statutory duty to protect the Capitol and its grounds, not DHS. 2 U.S.C. § 1961(a). Second, the government does not specify what DHS agency it is referring to, or how it was adversely affected, but if it is a "law enforcement agency," that would not identify a "federally protected function" because that reading of section 231(a)(3) is tautological. *Rupert*, 2021 U.S. Dist. LEXIS 53152, *43.

Besides not satisfying the definitions of "department" and "agency" in § 6, the above list suffers from another flaw. As indicated above, the "civil disorder's" "adverse effect" on a "federally protected function" is an element of the SSI's § 231(a)(3) charge. That means the government was required to establish probable cause of a "federally protected function" to the grand jury to satisfy the Fifth Amendment's presentment requirement. U.S. Const. amend. V;

Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (holding that under the Fifth Amendment, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

Here, the only entity in the above list that the government even arguably presented to the grand jury as a "federally protected function" was the USCP. As explained above, the USCP is not an executive "department" or "agency" "of the United States." But it is almost certainly the case that the government did not even present the USCP as the "federally protected function." The government has repeatedly stated in criminal complaints charging a § 231(a)(3) offense on the DOJ's January 6 website, including Mr. Cua's complaint, *see* ECF No. 1-1 at 12, states that the "federally protected function" was "the Joint Session of Congress." Capitol Breach Cases, DOJ, available at: https://www.justice.gov/usao-dc/capitol-breach-cases. *Hubbard-Oakar-Dean* show that Congress is not a "department" or "agency" "of the United States."

To the extent the government claims that any other entity was presented to the grand jury as a "federally protected function," it should produce that evidence or provide it to the Court for review *in camera*. Because Congress/USCP are not an executive department or agency, the government has not alleged, and did not present to the grand jury, a "federally protected function" that was "adversely affected" by the "civil disorder." Accordingly, the section 231(a)(3) offense must be dismissed at least in part for failure to state an offense and for a grand jury error.

C. Even if the indictment is sufficiently specific, section 231(a)(3) exceeds Congress's Commerce Clause authority.

The government also attempts to rely upon section 231(a)(3)'s option of showing that the civil disorder "adversely affected commerce and the movement of any article and commodity in commerce." Congress lacked the constitutional power to legislate such a provision. The Commerce Clause prohibits the criminalization of noneconomic intrastate activity unless "the

regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Under that test, the Supreme Court has invalidated federal criminal laws prohibiting gun possession in a school zone and domestic violence in the Violence Against Women Act. *Lopez*, 514 U.S. at 552-64; *United States v. Morrison*, 529 U.S. 598, 607-19 (2000). Following *Lopez* and *Morrison*, § 231(a)(3) constitutes an unconstitutional exercise of Congress's power.

1. The police power and the Commerce Clause's prohibition on Congress's regulation of intrastate activity that does not "substantially affect" interstate commerce.

"Under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 n. 3 (internal quotation marks omitted). Accordingly, the Supreme Court in *Lopez* concluded that, in the criminal context, Congress's "power . . . [t]o regulate Commerce with foreign Nations, and among the several States[,]" under Article I, § 8, cl.3, is inherently limited by the Tenth Amendment's reservation of police power to the States. The limited federal commerce power permits Congress to regulate only three categories of activity: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "those activities that *substantially* affect interstate commerce." *Id.* (emphasis added).

The Supreme Court developed the third *Lopez* category in order to define "the outer limits" on Congress's authority to enact legislation "regulating intrastate economic activity" that "substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 559; *see also United States v. Robertson*, 514 U.S. 669 (1995) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects") (emphasis in original). The regulated activity must "substantially affect" interstate commerce because "[t]he 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." *Morrison*, 529 U.S. at 618.

In *Morrison*, the Supreme Court established a "controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *United States v. Adams*, 343 F.3d 1024, 1028 (9th Cir. 2003) (quoting *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003)). Those factors are:

> (1) whether the regulated activity is commercial/economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.

Adams, 343 F.3d at 1028 (citing *Morrison*, 529 U.S. at 610-612). "The 'most important' factors for a court to consider are the first and the fourth." *Id.*

2. Section 231(a)(3) does not substantially affect interstate commerce

Section 231(a)(3) criminalizes "any act" that obstructs, impedes, or interferes with a local police officer performing lawful duties "incident to and during the commission of a civil disorder which *in any way or degree* obstructs, delays, or adversely affects commerce of the movement of any article or commodity in commerce. . ." (emphasis added). Since § 231(a)(3) is not directed at the channels or instrumentalities of commerce, only the third *Lopez* factor is at issue. However, under the four controlling factors described in *Adams* and *Morrison*, § 231(a)(3) does not regulate activity that substantially affects interstate commerce. Accordingly, the statute is unconstitutional.

a) Section 231(a)(3) does not regulate economic activity

As in *Lopez* and *Morrison*, the act of interfering with the duties of a law enforcement officer in a civil disorder is not economic in nature. It therefore fails the first *Morrison* factor.

In *Lopez*, the Court found the activity of gun possession under the Gun-Free School

Zones Act has "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 567. Further, the Gun-Free School Zones Act was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Similarly, in *Morrison*, the Supreme Court concluded that the civil remedy for gender-motivated violence under Violence Against Women Act (VAWA) was a regulation of noneconomic activity that exceeded Congress's commerce authority. 529 U.S. at 617. Even though the VAWA was enacted with the support of significant congressional findings regarding the "nationwide, aggregated impact" of gender-motivated violence on interstate commerce, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The "noneconomic, criminal nature of the conduct at issue was central" to the *Lopez* and *Morrison* rulings. *Morrison*, 529 U.S. at 610.

In contrast to *Lopez* and *Morrison*, in *Gonzales v. Raich*, the Supreme Court upheld a federal law prohibiting the intrastate cultivation of marijuana for personal use because the law formed an "essential part" of the Controlled Substances Act (CSA), which encompassed "a larger regulation of economic activity." 545 U.S. 1, 24-25 (2005) (quoting *Lopez*, 514 U.S. at 561). The majority observed that the "primary purpose" of the CSA is "to control the supply and demand of controlled substances in both lawful and unlawful drug markets." *Raich*, 545 U.S. at 19. Understood within that larger framework, the challenged provision was a regulation on "economic activity" because "failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22.

As with the statutes under consideration in *Lopez* and *Morrison*, the activity regulated by § 231(a)(3) is noneconomic for purposes of the first *Morrison* factor. The gravamen of §

231(a)(3) criminalizes obstruction, interference, and impeding state officers, with no direct connection to commerce or economic activity. And, unlike in *Raich*, § 231(a)(3) is not part of any larger body of economic regulation; it involves "a brief, single-subject statute[,]" which "by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Raich*, 545 U.S. at 23-24 (distinguishing *Lopez*, 514 U.S. at 561) (internal quotation marks omitted); *accord Morrison*, 529 U.S. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity").

b) The jurisdictional element of § 231(a)(3) does not limit its reach to activities that substantially affect interstate commerce.

Although § 231(a)(3) contains a commercial nexus element, the element is faulty because it does not limit the reach of the statute to activities that "substantially affect" interstate commerce. There are several problems under the second *Morrison* factor on limitations to the statute's reach.

First, the commercial nexus element is not connected to the "any act" element. Section 231(a)(3) makes it a crime 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.*

(Emphasis added). The commercial nexus clause unambiguously modifies the term "civil disorder," not "any act." Thus, a charge under § 231(a)(3) need not be supported by evidence that a defendant's *act* impacted interstate commerce. Instead, it requires evidence only that the act interfered with an officer engaged in the performance of duties "incident to and during the commission of a civil disorder," and that the civil disorder, not the individual's act, minimally affected commerce.

The statutory "incident to and during" connector further diminishes any required link to interstate commerce. Although the statute does not make clear whether the connector applies to the act itself or to the lawful performance of official duties, either construction places the interstate commerce element another step removed from the regulated activity. The term "incident" as an adjective connotes a degree of separation, in that one occurrence of lesser importance is "[d]ependent on, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance)." INCIDENT, BLACK'S LAW DICTIONARY (11th ed. 2019). Activity with only an incidental connection to an event that affects commerce is not a permissible subject of federal criminal law.

Finally, the commercial nexus element of § 231(a)(3) does not require a *substantial* effect on interstate commerce, but instead requires a civil disorder that affects commerce "in any way or degree." The terms are virtual opposites. Substantial means "[c]onsiderable in extent, amount, or value," whereas the word "any" is expansive and unqualified. *Compare* SUBSTANTIAL, BLACK'S LAW DICTIONARY (11th ed. 2019) *with* ANY, BLACK'S LAW DICTIONARY (11th ed. 2019); *see St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978) (statutory language that covered "'any' act" was "broad and unqualified"). An "any way or degree" impact on commerce is not a "substantial" impact. The second *Morrison* factor is not satisfied.

c) Congress did not find that § 231(a)(3)'s activities substantially affect interstate commerce.

Formal congressional findings are neither required nor sufficient to establish a valid exercise of federal commerce authority. *Lopez*, 514 U.S. at 562-63; *Morrison*, 529 U.S. at 614. Congressional findings may demonstrate that an activity "substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Lopez*, 514 U.S. at 563. But "the existence of congressional findings is not sufficient" when Congress merely

offers a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615.

Here, 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." The only potentially relevant findings relate to the impact of "riots" on interstate commerce. 114 Cong. Rec. 1294-95 (Jan. 29, 1968). Upon first proposing the Civil Obedience Act, Senator Long stated certain facts, without citation, concerning what he called the "wholesale Negro violence," which he said "was an almost nightly affair in the streets of our cities" between 1965 and 1967. 114 Cong. Rec. 1295. For example, he said:

> In [1967], nearly 100 people were killed. Nearly 2,000 were injured. Police reported 4,289 cases of arson alone. Over 16,000 rioters were arrested. The estimated property loss was in the neighborhood of $160 million. The estimated economic loss to riot-torn businesses was $504 million.

Id. Senator Long asserted that these "riots" impeded interstate commerce:

> Any riot, as we know and experience them today, generally does impede the flow of goods in interstate commerce. It stops the movement of people in interstate commerce. It interferes with the goods that were intended to move in interstate commerce.

114 Cong. Rec. 5535-36 (Mar. 6, 1968).

But the statutory definition of "civil disorder" involving "acts of violence by assemblages of three or more persons" (18 U.S.C. § 232(1)) has no connection to riots on the scale described by Senator Long. Moreover, § 231(a)(3) does not target the destructive behavior attendant to a riot; the criminalized conduct is interference with an official's duties "incident to and during" a civil disorder. The congressional record contains no findings that individual interference with police and firefighters as defined under § 231(a)(3) substantially affects interstate commerce. The third *Morrison* factor is not satisfied.

d) The relationship between § 231(a)(3)'s activities and any effect on interstate commerce is too attenuated.

Any causal chain that could link the activity proscribed under § 231(a)(3) to any substantial impact on interstate commerce is too far attenuated to place the activity within reach of Congress's commerce authority. The offense conduct of § 231(a)(3) need not affect commerce directly. It suffices to establish that a person's acts interfered with an official's duties performed "incident to and during" any "civil disorder" that, in turn, affects commerce. Such language requires *no effect* on commerce by the defendant's action; it need only be incident to and co-occurring with something (civil disorder) that has an effect on commerce. Even if the statute could be read to link the actions to an effect, such an "incidental effect on interstate commerce . . . does not warrant federal intervention." *Musick v. Burke*, 913 F.2d 1390, 1397 (9th Cir. 1990). The noneconomic conduct penalized by § 231 by definition is too attenuated to satisfy the "substantially affects" test for commercial impact.

Even if interference with police could affect commerce in the aggregate, when considered on a nationwide scale, that would be insufficient to place those acts within the federal commerce authority. In *Morrison*, the Supreme Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617. Here, the paucity of cases prosecuted under § 231(a)(3) further negates any claim of an aggregate effect. In sum, the four *Morrison* factors demonstrate that section 231(a)(3) regulates purely local, noneconomic activities that do not "substantially affect" interstate commerce. As a result, § 231(a)(3) falls outside of Congress's power to regulate under the Commerce Clause.

CONCLUSION

For all the foregoing reasons, Mr. Cua respectfully requests that the Court dismiss Count One of the Second Superseding Indictment.

Respectfully submitted,

DATED: December 5, 2022

/s/ *William E. Zapf*
Jonathan Jeffress (D.C. Bar No. 479074)
William E. Zapf (D.C. Bar No. 987213)
KaiserDillon PLLC
1099 14th Street NW
8th Floor West
Washington, DC 20005
T: (202) 640-2850
F: (202) 280-1034
jjeffress@kaiserdillon.com
wzapf@kaiserdillon.com

Attorneys for Bruno Joseph Cua

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2022, I filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system and served a copy of it by electronic mail on counsel for the United States, Assistant United States Attorneys Kaitlin Klamann, Carolina Nevin, and Kimberly Paschall.

Dated: December 5, 2022

/s/ William E. Zapf
William E. Zapf