UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO. 1:21-cr-00311-CRC**
v.	:	
	:	
JEREMY DANIEL GROSECLOSE,	:	
	:	
Defendant.	:	

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

The defendant, Jeremy Daniel Groseclose, has moved to dismiss Count One of the Superseding Indictment, which charges him with civil disorder, in violation of 18 U.S.C. 231(a)(3). (ECF No. 36.) In brief, Groseclose claims that (1) the certification of the Electoral College vote is not a "federally protected function," so 18 U.S.C. § 231(a)(3) cannot apply to his conduct; (2) that 18 U.S.C. § 231(a)(3) exceeded Congress's Commerce Clause power; and (3) that 18 U.S.C. § 231(a)(3) is unconstitutionally vague and unconstitutionally overbroad. None of these arguments has merit, and the Court should deny his motion.[1]

Because Congress's plenary authority over the District of Columbia fully authorizes this legislation, the government takes up that argument first. This opposition next addresses the defendant's argument about a federally protected function, and finally addresses his Constitutional challenges.

I. Section 231(a)(3) Was a Valid Exercise of Congress's Plenary Authority Over the District of Columbia And Its Commerce Clause Power

Groseclose contends that § 231(a)(3) violates the Commerce Clause of Article I, Section

[1] Groseclose's arguments about 18 U.S.C. § 231(a)(3) closely mirror those of another January 6 rioter in *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891 (D.D.C. Dec. 21, 2021). Many of the arguments raised by Mostofsky, and repeated by Groseclose here, were rejected by Judge Boasberg.

8, Clause 3. (ECF No. 36 at 6-14.) That claim is both misdirected and meritless because Congress's power under the Commerce Clause is not at issue in this case. In addition to its *limited* power to regulate foreign and interstate commerce under Clause 3, Congress has *plenary* power under Article I, Section 8, Clause 17, to legislate regarding matters affecting the District of Columbia. Congress exercised its Clause 17 power in 18 U.S.C. 231(a)(3), which prohibits, *inter alia*, obstructing police officers performing their official duties during a civil disorder which has "any effect whatsoever" on commerce "within the District of Columbia." *See* 18 U.S.C. § 232(2)(C).

A. Congress's plenary authority over the District of Columbia renders Section 231(a)(3) valid

Groseclose does not address Congress's Clause 17 power, but only its power to regulate interstate commerce under Clause 3. Congress's power under Clause 3, unlike its power under Clause 17, is bounded by the power of every state to regulate wholly intrastate commerce. Congress's Clause 17 power to regulate not only commerce but matters within the government's police powers with respect to the District of Columbia is not constrained by the power of the states. Groseclose Commerce Clause challenge to the § 231(a)(3) charge for conduct he committed wholly inside the District of Columbia is therefore wholly beside the point.

Regardless of whether § 231(a)(3) exceeds Congress's power under the Commerce Clause—and it does not, *see* infra at 15-18—for cases such as Groseclose involving criminal conduct committed wholly within the District of Columbia, that statute fits comfortably within Congress's power under Clause 17. It 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. 389, 397 (1973). *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"). "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." *Palmore*, 411 U.S. at 397. "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) (citing *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); and *O'Donoghue v. United States*, 289 U.S. 516 (1933)). "[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." *Neild*, 110 F.2d at 250-51. "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.'" *Palmore*, 411 U.S. at 397 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)).

When enacting § 231(a)(3), Congress relied on its Clause 17 power. 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. § 232(2) (emphasis added).

> Count One of the Second Superseding Indictment charges that Groseclose
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> committed and attempted to commit an act to obstruct, impede, and interfere with a 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 and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce…*

(ECF 25 at 1-2 (emphasis added).) Regardless of whether Congress had authority under the Commerce Clause to regulate such conduct in jurisdictions other than the District of Columbia, it did not and could not exceed its "plenary authority" to exercise "police power" within the District of Columbia. *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; although defendants' activities 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," "Section 3 … is not dependent upon the Commerce Clause but rests upon the plenary legislative power of Congress within the District of Columbia").

Because § 231(a)(3) was a valid exercise of Congress's 17 power, it is of no moment whether the Commerce Clause also provides Congress with a basis to enact that statute. All of Groseclose's challenges to the commerce element of § 231(a)(3) are beside the point, because all are grounded upon limitations on Congress's power under Clause 3. (*See* ECF No. 36 at 8 ("Section

231(a)(3) does not substantially affect interstate commerce"); *id.* ("Section 231(a)(3) does not regulate economic activity"); *id.* at 10 ("The jurisdictional element of § 231(a)(3) does not limit its reach to activities that substantially affect interstate commerce"); *id.* at 12 ("Congress did not find that § 231(a)(3)'s activities substantially affect interstate commerce"); *id.* at 13 ("The relationship between § 231(a)(3)'s activities and any effect on interstate commerce is too attenuated").)

Even for criminal statues with nationwide 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"). *See id.* ("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.").

This Court should reject Groseclose challenge to the commerce predicate in the § 231(a)(3) count, where Congress expressly targeted civil disorders that affected commerce within the District of Columbia.

B. Count One sufficiently alleges that the Capitol riot adversely affected interstate commerce.

Although this Court need not reach the Groseclose Commerce Clause challenge to

231(a)(3), if it does, it should reject it. Judge Boasberg and district judges in other judicial districts that have addressed similar claims have held that § 231(a)(3) does not exceed Congress's Commerce Clause authority, even when applied to conduct outside the District of Columbia. "[T]he Court concurs with the Government and the other district courts that § 231(a)(3) contains a jurisdictional element that ensures a sufficient connection to interstate commerce in each application." *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891, at *7 (D.D.C. Dec. 21, 2021). "Section 231(a)(3) expressly limits the statute's sweep to instances where there is a civil disorder that affects interstate commerce and a defendant obstructs law-enforcement officials lawfully conducting their duties incident to such disorder." *Id. See also United States v. Phomma*, 2021 WL 4199961, at *2-3 (D. Or. Sept. 15, 2021) (notwithstanding *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), "§ 231(a)(3) is within Congress's Commerce Clause authority because the statute includes an express jurisdictional element, requiring that the defendant's obstruction or interference with a law enforcement officer or firefighter must occur 'during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce.'"); *accord, United States v. Howard*, 2021 WL 3856290, at *11 (E.D. Wis. Aug. 30, 2021); *United States v. Wood*, 2021 WL 3048448, at *4–6 (D. Del. July 20, 2021); *United States v. Pugh*, 1:20-cr-00073-TFM-B, ECF95 at 7-11 (S.D. Ala., May 13, 2021); *see generally United States v. Huff*, 630 F. App'x 471, 484-85 (6th Cir. 2015) (unpublished) (rejecting Commerce Clause challenge to a charge of transporting a firearm in furtherance of a civil disorder, in violation of 18 U.S.C. § 231(a)(2)).

In mounting his Commerce Clause challenge, Groseclose principally relies on *Lopez* and *Morrison*. In both cases, the challenged statutes contained no "jurisdictional element" that required the Government to prove that the offense conduct affected interstate commerce. *Lopez*, 514 U.S.

at 561-62 (Gun Free Schools Zone Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," in contrast to former 18 U.S.C. § 1202(a), "which made it a crime for a felon to 'receiv[e], posses[s], or transpor[t] in commerce or affecting commerce ... any firearm"); *Morrison*, 529 U.S. at 613 (Violence Against Women Act, "[l]ike the Gun-Free School Zones Act at issue in *Lopez*, … contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"; "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime").

Unlike those statutes, § 231(a)(3) has an "explicit jurisdictional element" that requires the Government to prove that the offense conduct interfered with interstate commerce. *Howard*, 2021 WL 3856290, at *11 ("defendant's reliance on *Lopez* and *Morrison* is misplaced. The statutes struck down in those cases did not have jurisdictional requirements. Section 231(a)(1) does."); *Wood*, 2021 WL 3048448, at *4-6 (rejecting defense claim based on *Morrison* and *Lopez* that "§ 231(a)(3) unconstitutionally exceeds Congress's authority and intrudes into the States' primary role in general law enforcement because it broadly applies to purely local conduct and requires only an attenuated connection to interstate commerce"; "courts have held that 'despite *Lopez* and *Morrison*, the Government need only show a minimal effect on interstate commerce when the statute contains an explicit jurisdictional element'") (quoting *Pugh*, 1:20-cr-00073-TFM-B, ECF 95 at *9 and citing *United States v. Kukafka*, 478 F.3d 531 (3d Cir. 2007) (upholding "Deadbeat Parents Act" where the statute contains an explicit jurisdictional element limiting its reach to only interstate activity)).

In *Mostofsky*, Judge Boasberg methodically rejected each of the arguments that Groseclose now advances in support of his Commerce Clause claim:

- "when a person deliberately commits some act to obstruct, impede or interfere with those officers [who are 'attempting to quell an interference with interstate commerce'], that person is impacting interstate commerce" (cleaned up);

- "'the incident to and during' language in § 231(a)(3) does not suggest that the 'act' or 'lawful performance of [an officer's] official duties' is somehow minimally related to the civil disorder. Rather, the most natural reading of the phrase is to indicate that those activities 'arise[ ] out of' or occur during the civil disorder, not that they are some tangential consequence far downstream from the disorder itself";

- rejecting Mostofsky's claim that "the jurisdictional element is insufficient as it 'does not require a substantial effect on interstate commerce, but instead requires a civil disorder that affects commerce 'in any way or degree'";

- rejecting Mostofsky's claim that "§ 231(a)(3) regulates criminal conduct without a sufficiently close connection with a commercial good or activity."

Mostofsky, 2021 WL 6049891, at *5-6.

The other on-point decisions agree. Contrary to Groseclose contention that Congress's power under the Commerce Clause does not allow it to regulate non-commercial criminal activity (ECF No.3 6 at 6-14), "under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction." *United States v. Hill*, 927 F.3d 188, 193 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 272 (2020) (federal Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249(a)(2), "may be constitutionally applied to an unarmed assault of a victim engaged in commercial activity at his place of work"). And contrary to Groseclose's contention that Congress's power under the Commerce Clause applies only to conduct that has a "substantial effect" on interstate commerce (ECF No. 36 at 10-13), "Congress may regulate violent conduct interfering with interstate commerce even when the conduct itself has a 'minimal' effect on such commerce." *Id.* (citing *Taylor v. United States*, 579 U.S. 301, 309 (2016) (upholding Hobbs Act conviction for robbery of a drug dealer; "where the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the

defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect.").

For that reason as well, this Court should reject Groseclose challenge to the commerce predicate in § 231(a)(3), as charged in Count One of the Second Superseding Indictment.

II. The January 6 Rioters Interfered With a Federally Protected Function.

Groseclose contends that Count One, charging a violation of 18 U.S.C. § 231(a)(3), is fatally defective because it charges that he interfered with the Electoral College certification vote, but that vote was not a "federally protected function," as that term is defined by 18 U.S.C. § 232(3). He argues that the relevant provisions of Title 18 distinguish between Congressional entities, on one hand, and "departments" or "agencies" of the United States, which are part of the Executive branch, on the other. (ECF No. 36 at 3-4.) This claim fails.[2]

Section 231(a)(3) makes unlawful

> commit[ing] or attempt[ing] 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.

18 U.S.C. § 231(a)(3).

A "federally protected function" is

> any function, operation, or action carried out, under the laws of the United States, by any department, agency, or instrumentality of the United States or by an officer or employee thereof; and such term shall specifically include, but not be limited to, the collection and distribution of the United States mails.

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[2] Groseclose opening salvo against § 231(a)(3) is that it was intended to suppress civil rights protests by African Americans and was supported by a racist United States Senator. (ECF No. 36 at 2-3.) But such objections to the motives behind the legislation is no basis to find it unconstitutional if it does not target, directly or indirectly, protected minorities. *See United States v. Howard*, 2021 WL 3856290, at *7 (E.D. Wis. Aug. 30, 2021) (rejecting a similar challenge to § 231(a)(3)); *United States v. Wood*, 2021 WL 3048448, at *4 (D. Del. July 20, 2021) (same).

18 U.S.C. § 232(3).

As used in Title 18, a "department" is "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*." 18 U.S.C. § 6 (emphasis added). An 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*.

Id. (emphasis added).

Groseclose asserts that "[n]one of the federal entities involved on January 6 is a 'federally protected function,'" (ECF No. 36 at 3), so section 231(a)(3) does not apply to his conduct. Groseclose argues that the government has only identified one federally protected function, the joint session of Congress, and that legislative activity cannot constitute a federally protected function. *Id.* at 3-6. As explained below, he is wrong: Congressional certification of the Electoral College vote certainly can constitute a federally protected function. But even if it does not, executive branch functions—the Capitol Police's protection of the Capitol, and the Secret Service's protection of the Vice President—were at issue on January 6, 2021.[3] Therefore, Groseclose's claim fails.[4]

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[3] Groseclose claims that the government has limited itself to an interference-with-Congress theory because "[t]he list of cases that include a § 231(a)(3) charge listed on the DOJ's January 6 website states that the 'federally protected function' was this: the joint session of Congress." (ECF No. 36 at 6.) It is unclear what Groseclose means by this. The website he cites contains a chart with information about various January 6 cases; the website also provides links to certain publicly filed documents such as indictments, plea agreements, and statements of offense. It does not make any arguments or commitments about the government's theory of prosecution.

[4] In *Mostofsky*, Judge Boasberg did not reach the issue of a federally protected function because

A. Congressional certification of the Electoral College vote.

Congressional certification of the Electoral College vote is a federally protected function for two reasons. First, the Vice President is an officer or employee of an agency, namely, the Office of the Vice President, who is carrying out the same certification function. Second, Congress qualifies as a "department" for purposes of 18 U.S.C. § 231(a)(3) and § 232(3) and the certification is a "function, operation, or action," § 232(3) that Congress carries out.

The first theory is straight-forward. The Vice President, while serving as the President of the Senate, presides over the certification of the Electoral College vote. *See* 3 U.S.C. § 15. The Vice President is an "officer or employee" of an agency, namely the Office of the Vice President. The Office of the Vice President is an "authority," *see* 18 U.S.C. § 6, and the Vice President wields the power under that authority as prescribed under the Constitution and federal statute. *Cf. United States v. Espy*, 145 F.3d 1369, 1373-74 (D.C. Cir. 1998) (even if the Executive Office of the President was an agency under § 6, it was not an "agency" under § 1001 because the false statement was not made "within the jurisdiction" of that office; the "jurisdictional" restriction in § 1001 does not appear in § 231(a)(3) or § 232(3)).

Under the second theory, § 231(a)(3) broadly criminalizes obstructing an officer during a civil disorder where that civil disorder "in any or degree obstructs, delays, or adversely affects" either interstate commerce or the "conduct or performance of any federally protected function." Congress surely intended to cover the most dangerous civil disorders, such as those targeting some of the most consequential Congressional decisions in the very seat of Congress.

Section 232(3)'s definition of "federally protected function," speaks broadly of "*any* function, operation, or action" performed under federal law, but specifies that such function,

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he resolved the case on Commerce Clause grounds. *Mostofsky*, 2021 WL 6049891 at *3.

operation, or action be carried out by a "department, agency, or instrumentality of the United States or by an officer or employee thereof." "Law enforcement officer" is defined expansively to include "*any* officer or employee of the United States, *any* State, *any* political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia[.]" 18 U.S.C. § 232(7) (emphasis added); *cf.* 18 U.S.C. § 111 and § 1114 (providing a narrower definition of a law enforcement officer).

The definition and use of the term, "federally protected function," also reveals the statute's broad scope. That term appears only three times in the United States Code—exclusively in connection with the civil disorder statute at issue here. *See* 18 U.S.C. §§ 231(a)(1), 231(a)(3), and 232(3). As used in § 231(a)(1) and (3), the term "federally protected function" appears alongside (and as an alternative to) a broad invocation of Congress's expansive power to regulate under the Commerce Clause. In that context, "federally protected function" demonstrates Congress's intent to ensure that its anti-riot statute could reach any unlawful interference with law enforcement officers during a civil disorder that the federal government had authority to regulate. The breadth in the term is also apparent in its definition. "Federally protected function" is defined as "*any* function, operation, or action carried out, under the laws of the United States, 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). The statutory language reflects Congress's broad aim: to criminalize any interference with firemen and law enforcement officials during and incident to a "public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. 232(1) (defining "civil disorder"). The text underscores Congress's intent

to broaden the statute's application.

Groseclose claims *Hubbard v. United States*, 514 U.S. 695 (1995) controls the outcome of this claim. (ECF No. 36 at 4.) Not so. There, the Court held that the judicial branch was not a "department" or "agency" as that term was used under since-amended language in the False Statements Act, 18 U.S.C. § 1001, which applied to statements made "within the jurisdiction of any department or agency." *Id.* at 700-01. *Hubbard* overruled *United States v. Bramblett*, 348 U.S. 503 (1955), where the Court interpreted "department" in § 1001 to encompass the "executive, legislative, and judicial branches of the Government." *Id.* at 509. The following year, Congress amended § 1001 to extend its coverage to "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," effectively overturning *Hubbard*. *See* False Statements Accountability Act of 1996, Pub.L. No. 104–292, § 2, 110 Stat. 3459 (1996).

To the extent *Hubbard* has any continuing vitality beyond § 1001, it is distinguishable. Section 6 of Title 18 contains an exception to the definition of a "department" as an "executive branch entity." The exception applies when the "context" of a particular statute that incorporates the § 6 definition of "department" shows that Congress intended "department" "to describe" all three branches of the federal government. 18 U.S.C. § 6. Section 6 contains a similar exception to the definition of "agency." After concluding that the judicial branch was not a "department" or "agency" under 18 U.S.C. § 6, the *Hubbard* Court held that the foregoing exception in § 6 did not apply to § 1001 because "there is nothing in the text of [§ 1001], or in any related legislation, that even suggests—let alone 'shows'—that the normal definition of 'department' was not intended." 514 U.S. at 701.

That is decidedly not the case with § 231(a)(3). The phrase, "unless the context shows that

such term was intended to describe the executive, legislative, or judicial branches of the government," refers to the text of the statute that incorporates § 6 or of related statutes. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) (interpreting the Dictionary Act, 1 U.S.C. § 1, which states "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise": "'Context' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts").

Here, that context supports an interpretation that, "department," as used in § 231(a)(3), includes Congress. In § 231(a)(3), Congress paired the phrase, "federally protected function," with the phrase, "affects commerce or the movement of any article or commodity in commerce." "[A]ffects commerce or the movement of any article or commodity in commerce" and "federally protected function" are twin "jurisdictional hooks" demonstrating a Congressional intention to regulate in an area that might otherwise be subject to purely state or local power. *See United States v. Galo*, 239 F.3d 572, 575 (3d Cir. 2001) ("the requirement that at least one of the materials used to produce the child pornography travel in interstate commerce provides the jurisdictional hook"). "Affecting commerce" are "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).[5]

Like the Congressional exercise of its commerce power in § 231(a)(3), its protection of "federally protected functions" in the same phrase of the same statute should be interpreted

[5] *Accord Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause."); *Jones v. United States*, 529 U.S. 848, 856 (2000) (noting "the recognized distinction between legislation limited to activities 'in commerce' and legislation invoking Congress's full power over activity substantially 'affecting ... commerce'"); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995) ("[T]he words 'affecting commerce' ... normally mean a full exercise of constitutional power").

broadly. Specifically, yoking "commerce" and "federally protected function" in the context of the statutory text suggests that Congress sought to broadly prohibit unlawful conduct that might otherwise fall within the general police powers of the states. This Court should apply the extension clause of § 6 and find that "department" as used in § 232(3) "was intended to describe the executive, *legislative*, or judicial branches of the government." 18 U.S.C. § 6.[6]

A contrary interpretation, moreover, would yield "patent absurdity." *Hubbard*, 514 U.S. at 703 (citation omitted). Assume a mob gathered in front of the Washington, D.C. office of the Federal Bureau of Investigation (FBI), which falls within the Department of Justice and thus incontestably qualifies as a "department" as that term is used in Section 232. Assume further that the mob surged inside the building, disrupting the investigative activities, and began interfering with law enforcement officers responding to the riot. Under Groseclose's view, Section 231(a)(3) would apply there, but not to civil disorder that erupted in the very seat of the federal legislature. That is not the statute that Congress intended or enacted.

B. The Capitol Police protecting the U.S. Capitol.

The Capitol Police have a statutory obligation to protect the U.S. Capitol. *See* 2 U.S.C. § 1961 (Capitol Police "shall police the United States Capitol Buildings and Grounds," and shall do so "under the direction of the Capitol Police Board"). The "purpose" of the Capitol Police

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[6] Groseclose relies on *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997) and *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995). Neither addressed § 231(a)(3) or is otherwise relevant. In *Oakar*, the D.C. Circuit held that "[i]n the wake of *Hubbard*, this court has been clear that an entity within the Legislative Branch cannot be a 'department' within the meaning of [18 U.S.C.] § 1001 and 18 U.S.C. § 6." 111 F.3d at 153. In *Dean*, the court, again relying on *Hubbard*, vacated the defendant's convictions for violating § 1001 based on her statements before Congress. 55 F.3d at 658-59. As explained above, *Hubbard* does not control here because, for instance, the Secret Service's protection of the Vice President is a federally protected function that was wholly absent in those cases. *See Nordean*, 2021 WL 6134595, at *14 (so holding and rejecting a challenge to § 231(a)(3) based on *Hubbard*.

Board, in turn, is "to oversee and support the Capitol Police in its mission." Pub. L. No. 108-7, div. H, § 1014(a)(1). Because an agency includes any "board," 18 U.S.C. § 6, it includes the Capitol Police Board. And the Capitol Police, as its website describes, is "a federal law enforcement agency." See https://www.uscp.gov/the-department. Interference with the Capitol Police's duty to protect the Capitol, therefore, was interference with a federally protected function.

C. The U.S. Secret Service protecting the Vice President.

During the afternoon of January 6, officials of the United States Secret Service were engaged in the federally protected function of protecting the Vice President and the Vice President-elect. *See* 18 U.S.C. § 3056(a)(1). Because the civil disorder on January 6 required the Secret Service to move the Vice President to a secure location, the disorder in some "way or degree obstruct[ed], delay[ed], or adversely affect[ed]" that protective function. It makes no difference what capacity the Vice President was serving (*i.e.*, as the Vice President or President of the Senate) at the time the civil disorder arose because the Secret Service protects the Vice President at all times. And of course, the Secret Service, an agency of the Department of Homeland Security, is part of an executive department. *See* 5 U.S.C. § 101.

D. Groseclose's challenge to the government's grand jury presentation fails.

Groseclose claims that federally protected functions other than Congress's certification of the Electoral College vote "[were] not properly presented to the grand jury." (ECF No. 36 at 3.) He further argues that, if the government argues that other federally protected functions were at issue (as it does, here), the Court should conduct an *in camera* review of such presentation *Id.* at 6. This argument is of no moment. First, there is no "authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Kaley v. United States*, 571 U.S. 320, 328 (2014), *quoting Costello v. United States*, 350 U.S. 359, 362-63 (1956). "The grand jury gets to say—

without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Id.*

Second, an indictment that charges an offense by tracking the statutory language and identifies all the elements is generally sufficient to call for a trial on the merits. *See United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976) ("The validity of alleging the elements of an offense in the language of the statute is, of course, well established."). The indictment need not identify the particulars of how the offense is committed. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 108-09 (2007) (indictment charging attempted unlawful entry into the United States, in violation of 8 U.S.C. § 1326(a), was not defective because it did not allege whether the substantial step was satisfied by defendant walking into an inspection area, presenting a misleading identification card, or lying to the customs inspector); *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (indictment was sufficient where it alleged that defendant mailed "obscene" material in violation of 18 U.S.C. § 1461 but did not identify the allegedly obscene materials).

Groseclose's claim cannot be reconciled with *United States v. Williamson*, 903 F.3d 124 (D.C. Cir. 2018). There, defendant was convicted of making a threat against a federal law enforcement officer "with intent to retaliate against such ... officer on account of the performance of official duties." 18 U.S.C. § 115(a)(1)(B). He moved to dismiss the indictment because it failed to "identify particular 'official duties' performed by [the victim] that motivated Williamson's threat." *Id.* at 131. But such specificity was not required. "Specifying a particular official duty (or duties) that may occasion a threat against an officer is not at all 'central to every prosecution under the statute.'" *Id.* "The statute speaks in terms of a threat made 'on account of the performance of official duties,' not to draw attention to a particular official duty, but instead to assure that the threat generally relates to the officer's performance of official duties rather than to a personal

dispute having nothing to do with the officer's job functions." *Id.* Likewise here, § 231(a)(3) requires the government to prove that the defendant obstructed a federally protected function, "not to draw attention to a particular" function but to prevent conviction for obstructing activity that is not a concern of federal authorities.

Similarly, in *Haldeman*, *supra*, the defendant was convicted of obstruction of justice in violation of 18 U.S.C. § 1503. On appeal, he claimed the indictment was deficient because the court permitted the jury to convict him based on evidence and instructions that the charged obstruction could be accomplished by the misuse of the CIA, even though the indictment did not identify such misuse as a means of obstruction. The D.C. Circuit disagreed. "[N]either the constitution, the federal rules of criminal procedure, nor any other authority suggests that an indictment must put the defendants on notice as to every means by which the prosecution hopes to prove that the crime was committed." 559 F.2d. at 124.

Here, obstructing a federally protected function is the element, and the particular function that was obstructed is only a means of violating the statute. If the indictment need not specify the particular federally protected function to validly charge a violation of § 231(a)(3), then it cannot be deficient because the government did not present evidence to the grand jury of a specific federally protected function.

III. Groseclose's Vagueness Challenge Fails.

Groseclose claims that § 231(a)(3) is unconstitutionally vague. (ECF 36 at 14-16.) His argument misconstrues the vagueness doctrine. The challenger must overcome the "strong presumptive validity that attaches to an Act of Congress," which has led the Supreme Court "to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language," *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Nor is a statute impermissibly vague

because a reasonable jurist 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). Rather, a statute is vague only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *United States v. Williams*, 553 U.S. 285, 306 (2008) The "touchstone" of the vagueness analysis "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." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

A proper vagueness challenge, then, *must* turn on the precise wording of the challenged statute and explain why the statutory text fails to give a person of reasonable intelligence adequate notice that their charged conduct violated the statute. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (the definition of "loitering" in the challenged ordinance as "to remain in any one place with no apparent purpose" was unconstitutionally vague); *United States v. Chhun*, 744 F.3d 1110, 1117 (9th Cir. 2014) ("Chhun's void for vagueness argument fails because, as discussed above, the statute's text is clear and unambiguous. A reasonable person would have no difficulty recognizing what conduct § 956(a) prohibits.").

But every court to consider vagueness challenges to § 231(a)(3) has rejected them. *E.g., United States v. Mechanic*, 454 F.2d 849, 853-45 (8th Cir. 1971) ("§ 232, read in conjunction with § 231(a) (3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it"); *United States v. Banks*, 368 F. Supp. 1245, 1247 (D.S.D. 1973) (rejecting vagueness challenge to § 231(a)(3), following *Mechanic*), *abrogated on other grounds by United States v. Auginash*, 266 F.3d 781 (8th Cir. 2001); *see generally Wood*, 2021 WL 3048448, at *9 ("Defendant does not have standing to bring a facial vagueness challenge" to § 231(a)(3) because he failed to "demonstrate that [the

statute]is vague as applied to his conduct"); *cf. United States v. Huff*, 630 F. App'x 471, 487-89 (6th Cir. 2015) (unpublished) ("we reject Huff's void-for-vagueness argument [regarding § 231(a)(2) in all respects"). Groseclose does not address any of those cases, much less demonstrate they were wrongly decided. His vagueness challenge fails.

IV. Groseclose's Overbreadth Claim Fails.

Groseclose contends that § 231(a)(3) is unconstitutionally overbroad under the First Amendment because "it extends to a substantial amount of constitutionally protected speech and expressive conduct in excess of the law's legitimate sweep." ECF No. 36 at 17. He argues that "by penalizing 'any act,' § 231(a)(3) reaches to the outer limits of verbal and expressive conduct without drawing any distinction that could exclude acts undertaken merely to convey a message or symbolic content." *Id.* at 18. He also contends that the word, "interfere," as it appears in the statute, which the statute leaves undefined, "reaches a broad range of speech and expressive conduct." *Id.*

This claim fails. Overbreadth can invalidate a criminal law only if "'a substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008), quoting *New York v. Ferber*, 458 U.S. 747, 769-771 (1982); *see also City of Houston v. Hill*, 482 U.S. 451, 458 (1987). "A statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 293; *see also Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). An overbreadth challenge faces a steep climb when the statute focuses mainly on conduct, as § 231(a)(3) assuredly does. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting the "substantial social costs created by the overbreadth doctrine when it blocks application of a law to . . . constitutionally unprotected conduct").

In *Mechanic*, the Eight Circuit rejected a similar overbreadth challenge to § 231(a)(3). "The operative words of the statute are 'whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer." 454 F.2d at 852. "Thus, the section applies only to a person who acts to impede, obstruct, or interfere with an official described in the statute." *Id.*

The Eighth Circuit held that "conduct involved here [the massing of a mob that threw stones at an R.O.T.C. building on a college campus to protest the Vietnam war, followed by rock and bottle throwing at firemen who arrived to quell the disturbance] is not entitled to constitutional protection." 454 F.2d at 852. "The First Amendment has not been extended to protect rioting, inciting to riot, or other forms of physical violence." *Id.* (citing *National Mobilization Com. to End War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969)). Thus, § 231(a)(3) "does not purport to reach speech of any kind. It reaches only acts to impede, obstruct, or interfere with police officers and firemen." *Id.*; *see also United States v. Wood*, 2021 WL 3048448, at *7 (D. Del. July 20, 2021) ("This Court agrees with *Mechanic* that § 231(a)(3) applies to conduct, not speech."); *United States v. Phomma*, 2021 WL 4199961, at *5 (D. Or. Sept. 15, 2021) ("Defendant has failed to make the required showing to strike down § 231(a)(3) as overbroad."). "The crime set forth by the statute is not mere presence at a civil disorder … but an act committed during the course of such a disorder," so "'civil disorder' simply describes the environment in which the act must be committed in order to be subject to prosecution under § 231(a) (3)." *Mechanic*, 454 F.2d at 853.

And because "the statute does not attempt to curtail speech the defendants may not challenge it as vague or overly broad if their own conduct may be constitutionally prohibited, since … one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in

which its application might be unconstitutional." *Id.* (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)). Finally, "it is not just any public disturbance which is the subject of the section, but only public disturbances which (1) involve acts of violence (2) by assemblages of three or more persons, and which (3) cause immediate danger of or result in injury to (4) the property or person of any other individual." *Id.*[7]

Moreover, § 231(a)(3) requires the government to prove the defendant acted "to obstruct, impede, or interfere with" a firefighter or police officer, *i.e.*, the defendant's purpose or intent in performing the "act" must be to obstruct, impede, or interfere. *See Mechanic*, 454 F.2d at 854 ("§ 231(a) (3) must be construed to require intent"). That *scienter* requirement substantially undermines Groseclose's overbreadth claim. *See United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) (intent requirement prevents application of a statute to protected speech); *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972) (§ 231(a)(3) is not unconstitutional on its face because the statute requires intent and "does not cover mere inadvertent conduct"). Even if the statute lacked an express *scienter* requirement, courts "generally interpret [] criminal statutes to include broadly applicable *scienter* requirements, even where the statute by its terms does not contain them." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted); *see also United States v. Cassel*, 408 F.3d 622, 634 (9th Cir. 2005) ("[E]xcept in unusual circumstances,

[7] In this respect, 18 U.S.C. § 231(a)(3) differs from the statute at issue in *McCoy v. City of Columbia*, 929 F. Supp. 2d 541 (D.S.C. 2013), which Groseclose cites in his motion. (ECF No. 36 at 19, 21.) The *McCoy* court confronted a statute which made it a crime to "interfere with or molest a police officer in the lawful discharge of his duties." *McCoy*, 929 F. Supp. 2d at 546. In finding the statute overbroad, the *McCoy* court noted that "the ordinary meaning of the terms 'interfere' and 'molest' are not limited to physical conduct." *Id.* at 550. Neither of those terms is at issue in § 231(a)(3). And § 231(a)(3), which requires proof of an act, the statute in *McCoy* did not. *See id.* at 546.

we construe a criminal statute to include a *mens rea* element even when none appears on the face of the statute.")

Groseclose contends the statute's prohibitions would apply to someone who "flips off officers to distract or to encourage resistance," or "recording police activity with a cell phone." ECF No. 36 at 19. He also contends that "civil disorder" is "extremely far-reaching," although he notes that the term is defined as "any public disturbance *involving acts of violence by assemblages of three or more persons, which causes an immediate danger of … injury to the property*." *Id.* This would apply, he contends, to "three teenagers whose skateboarding damages property." *Id.*

Even assuming Groseclose's parade of horribles could actually be prosecuted under § 231(a)(3), it does not demonstrate that § 231(a)(3) is unconstitutionally overbroad. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *see also Howard*, 2021 WL 3856290, at *11 (rejecting overbreadth claim that "the government perhaps could charge someone who yelled at an officer during a civil disorder and could argue that the yelling was an "act" that "attempted to obstruct" an officer performing her lawful duties"). Rather, a defendant must show a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of City Council of City of Los Angeles*, 466 U.S. at 801. Laws like § 231(a)(3) that are "not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)" are far less likely to present such a danger. *Hicks*, 539 U.S. at 124. Indeed an "overbreadth challenge" to such a law will "[r]arely, if ever … succeed." *Id.*

Groseclose also compares this case to the statute at issue in *Dream Defenders v. Desantis*, 2021 WL 3491751 (N.D. Fla. Aug. 9, 2021), in which the Chief Judge of the Northern District of

Florida enjoined an anti-riot law. (ECF No. 36 at 22.) But the overbreadth holding in *Dream Defenders* turned largely on the significant difference between First Amendment challenges to state statutes and federal statutes. "When a federal law is at issue, this Court has a 'duty to avoid constitutional difficulties by [adopting a limiting construction] if such a construction is fairly possible.'" 2021 WL 4099437, at *18 (citing *Boos v. Barry*, 485 U.S. 312, 331 (1988)). "[O]n the other hand, [when] a state law is at issue, this Court 'cannot adopt a narrowing construction ... unless such a construction is reasonable and readily apparent.'" *Id.* (citing *Boos*, 485 U.S. at 300). "The distinction is an important one" the court noted, "because when a state statute has unconstitutional applications and has not been given a narrowing construction by the state court that saves it from those applications, federal courts must be careful not to encroach upon the domain of a state legislature by rewriting a law to conform it to constitutional requirements." *Id.* (cleaned up).

Because Groseclose is challenging a federal criminal statute as overbroad, this Court must "adopt[] a limiting construction if such a construction is fairly possible." As noted above, all the courts that have addressed overbreadth challenges to § 231(a)(3) using the more forgiving standard have rejected those challenges. *See Mechanic*, 454 F.2d at 852; *Featherston*, 461 F.2d at 1122; *Wood*, 2021 WL 3048448, at *7; *Phomma*, 2021 WL 4199961, at *5. The *Dream Defenders* court held that the state statute "implicates free expression and assembly rights protected by the First Amendment." 2021 WL 3491751 at *15. As noted above, the courts that have addressed overbreadth challenges to § 231(a)(3) have uniformly found that it does not unreasonably impinge on expressive rights.

Finally, the *Dream Defenders* plaintiffs, including several civil rights organizations, presented "unrebutted evidence [that] through no fault of Plaintiffs, violence often occurs at their

protests." *Id.* at *29. That included evidence that "white supremacists have spit on and attacked Plaintiffs' members at protests." *Id.* The court concluded that if it did not "enjoin the statute's enforcement, the lawless actions of a few rogue individuals could effectively criminalize the protected speech of hundreds, if not thousands, of law-abiding Floridians." *Id.* Groseclose, however, does not claim either that he was a peaceful protester on January 6 (the trial evidence will demonstrate the contrary), or that his expressive rights are being unfairly punished because of "lawless actions of a few rogue" rioters.[8]

[8] Finally, Groseclose claims that the statute cannot be saved without violating the separation of powers. (ECF No. 36 at 24.) This point is entirely conclusory and—beyond case law citing a few broad principles—bereft of any relevant authority or analysis. As such, this Court should deny it out-of-hand. *See United States v. Caraballo-Cruz*, 52 F.3d 390, 393 (1st Cir. 1995) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *United States v. Hughson*, 488 F. Supp. 2d 835, 841 n.2 (D. Minn. 2007) (denying motion to dismiss "[s]ince Hughson offers no more than a conclusory argument that dismissal of the perjury Count requires a dismissal of the obstruction of justice Count"); *United States v. Martin*, No. 1:98-CR-329-RCL, 2022 WL 1618869, at *11 (D.D.C. May 23, 2022) (Lamberth, J.) (denying relief under 28 U.S.C. § 2255; "conclusory arguments may be summarily dismissed") (*quoting Mitchell v. United States*, 841 F. Supp. 2d 322, 328 (D.D.C. 2012) and *United States v. Geraldo*, 523 F. Supp. 2d 14, 22 (D.D.C. 2007)).

CONCLUSION

The Court should deny Groseclose's motion to dismiss Count One of the Superseding Indictment.

Respectfully submitted,
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