

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	
v.	:	<b>CASE NO. 1:21-CR-00679-JEB</b>
	:	
<b>ROBERT WAYNE DENNIS,</b>	:	
	:	
<b>Defendant.</b>	:	

---

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO  
DISMISS THE INDICTMENT**

---

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully submits this opposition to the Robert Wayne Dennis’ Motion to Dismiss Counts 1, 5, 6, 7, and 8 of the Indictment. Dennis raises multiple arguments in his motion. With respect to Count One, defense first claims that the government is required to prove multiple elements of Section 231(a)(3) in the indictment. ECF No. 28 at 4. Second, he claims Section 231(a)(3) is overbroad and unconstitutionally vague. ECF No. 28 at 8-13. Third, he claims that Section 231(a)(3) impermissibly criminalizes conduct that is protected under the First Amendment. ECF No. 28 at 13. With respect to Counts Five, Six, Seven, and Eight, which allege three violations of 18 U.S.C. § 1752(a) and one violation of 40 U.S.C. § 5104(e), defense claims that the Indictment must be dismissed because it fails to state an offense. ECF No. 28 at 15-25. These arguments are without merit and the motion should be denied.

**PROCEDURAL HISTORY**

On November 17, 2021, the Grand Jury returned an indictment charging the defendant, Robert Wayne Dennis, with various offenses resulting from his conduct at the United States Capitol on January 6, 2021. ECF No. 13. Dennis is charged with the following offenses: civil

disorder, in violation of 18 U.S.C. § 231(a)(3) (Count 1); assaulting, resisting, or impeding certain officers, in violation of 18 U.S.C. § 111(a)(1) (Counts 2, 3, and 4); entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count 5); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count 6); engaging in physical violence in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(4) (Count 7); disorderly conduct in the capitol grounds or buildings, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count 8); and an act of physical violence in the Capitol ground or buildings, in violation of 5104(e)(2)(F) (Count 9). ECF No. 13.

On October 13, 2022, the defendant filed a motion to dismiss Counts One, Five, Six, Seven, and Eight of the indictment, ECF No. 13. For the reasons stated below, the defendant's motion is without merit and should be denied.

### **LEGAL STANDARD**

A defendant may move to dismiss an indictment or count thereof for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). However, the Federal Rules of Criminal Procedure state that an indictment is only required to contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). “An indictment must be viewed as a whole and the allegations must be accepted as true in determining if an offense has been properly alleged.” *United States v. Bowdin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* An indictment must contain every element of the offense charged, if any part or element is missing, the indictment is defective and must be dismissed.” *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017). Because pretrial dismissal of an indictment “directly encroaches upon the fundamental role of the grand

jury, dismissal is granted only in unusual circumstances.” *United States v. Ballestas*, 795 F. 3d 138, 148 (D.C. Cir. 2015) (internal quotation marks omitted). Ultimately, the court must decide “whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed.” *United States v. Bowdoin*, 770 F. Supp 2d 142, 146 (D.D.C. 2011).

## **ARGUMENT**

### **I. Defendant’s Challenges to Count One, Civil Disorder in Violation of 18 U.S.C. 231§ (a)(3), Are Meritless**

Defendant contends that he is improperly charged with violating 18 U.S.C. § 231(a)(3) for multiple reasons including: (a) the indictment did not specifically allege a civil disorder that negatively affected commerce or a federally protected function; (b) the statute is unconstitutionally vague; and (c) the statute violates the First Amendment.

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.

As demonstrated below, defendant’s claims fail to warrant a dismissal of Count One of the indictment.

**A. The Indictment Sufficiently Alleges the Defendant's Violation of 18 U.S.C. § 231(a)(3).**

Defendant contends that he is improperly charged with violating 18 U.S.C. § 231(a)(3) because the indictment does not specifically allege that he resided outside of the District of Columbia, and there are no factual allegations in the indictment that, “might concern a federally protected function.” However, precedent has made clear that 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).

In *United States v. Phomma*, 561 F. Supp. 3d 1059, 2021 U.S. Dist. LEXIS 175489 (D. Or., Sept. 15, 2021), the district court rejected a sufficiency challenge to an indictment that is similar to the indictment here. Like the indictment in this case, the *Phomma* indictment alleged that the offense was committed on or about a specific date (there, August 26, 2020), and that the offense was committed in a specific district (there, the District of Oregon). *Phomma*, 2021 U.S. Dist. LEXIS 175489 at \*18. The court found that although the indictment “[did] not allege the specific facts of the defendant’s conduct,” it “track[ed] the wording of the statute.” *Id.* at \*20. This

was enough for the indictment to survive a sufficiency challenge because that statutory wording “fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.” *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Indeed, as the court noted, “bare-bones” charging instruments, which merely recite the statutory language, are “common” and “entirely permissible” in such circumstances. *Id.* (citing *United States v. Woodruff*, 50 F.3d 673, 676 (9th Cir. 1995)). Applying similar reasoning, Judge Hogan recently reached the same conclusion in a case charging a violation of § 231(a)(3) arising out of the attack on the Capitol. *See United States v. Sargent*, No. 21-cr-258, ECF No. 50 at 4-12 (D.D.C. Apr. 14, 2022).

Although some cases involve a crime “that must be charged with greater specificity,” *Resendiz-Ponce*, 549 U.S. at 190, this is not one of them. The paradigmatic example comes from *Russell v. United States*, 369 U.S. 759 (1962), where the defendant was charged under a statute that makes it a crime for a witness called before a congressional committee to refuse to answer any question “pertinent to the question under inquiry.” 2 U.S.C. § 192. The indictment’s failure in *Russell* to identify the subject of the congressional hearing rendered it insufficient because “guilt” under that statute “depend[ed] so crucially upon such a specific identification of fact.” *Russell*, 369 U.S. at 764. That feature is not present here because guilt under Section 231(a)(3)—or under any of the other charges that the defendant here faces—does not depend on any such “specific identification of fact.” *See Resendiz-Ponce*, 549 U.S. at 110 (not applying *Russell* to the illegal re-entry statute at issue in that case because guilt did not turn upon “a specific identification of fact”); *Williamson*, 903 F.3d at 131 (not applying *Russell* to statute criminalizing threats against federal officers); *see also United States v. Apodaca*, 275 F. Supp. 3d 123, 153 n.17, 154-56 (D.D.C. 2017).



(not applying *Russell* to statute criminalizing use of firearms in connection with drug trafficking crimes).

Count One of this indictment alleges the date of the offense, the location of the offense, the alleged defendant, and the elements of the statute that the defendant violated. ECF No. 13 at 1-2. The burden of proof the defense seeks for the government to show is one that occurs at trial. Section 231(a)(3)'s statutory language alone incorporates considerable factual specificity.

**B. Defendant's Vagueness Challenge to 18 U.S.C. § 231(a)(3) is Unpersuasive.**

Dennis argues that Section 231(a)(3), the civil disorder statute, is unconstitutionally vague and overbroad.<sup>1</sup> Three judges in this district have recently rejected nearly identical challenges to Section 231. *See Mostofsky*, 2021 WL 6049891, at \*8–\*9 (rejecting overbreadth challenges); *Nordean*, 2021 WL 6134595, at \*16–\*17 (rejecting vagueness and overbreadth challenges); *McHugh*, 21-cr-453 (JDB), ECF No. 51, at 28–37.<sup>2</sup> This Court should too.

Section 231(a)(3) criminalizes any “act” (or attempted act) to “obstruct, impede, or 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.” 18 U.S.C. § 231(a)(3). For the statute to apply, the civil disorder must “in any way or degree obstruct[], delay[], or

---

<sup>1</sup> Although Dennis asserts in Section IA of his motion that Section 231(a)(3) is overbroad, he makes no such argument in the Section but rather focuses exclusively on vagueness. His “overbroad” argument is limited to Section IC in which he asserts Section 231(a)(3) infringes upon the First Amendment. Accordingly, the government addresses the “overbroad” argument below.

<sup>2</sup> A number of courts outside this circuit have also recently rejected similar challenges to Section 231. *See United States v. Phomma*, No. 20-465, 2021 WL 4199961, at \*5 (D. Or. Sept. 15, 2021); *United States v. Rupert*, No. 20-cr-104 (NEB/TNL), 2021 WL 1341632, at \*16–\*20 (D. Minn. Jan. 6, 2021) (Report & Recommendation), *adopted*, 2021 WL 942101 (D. Minn. Mar. 12, 2021); *United States v. Pugh*, No. 1:20-cr-73-TFM, slip op. (S.D. Ala. May 13, 2021); *United States v. Wood*, No. 20-cr-56 MN, 2021 WL 3048448 (D. Del. July 20, 2021); and *United States v. Howard*, No. 21-cr-28-pp, 2021 WL 3856290 (E.D. Wis. Aug. 30, 2021).

adversely affect[] commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.” *Id.* The statute defines civil disorder as “any 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). Reading the statute as a whole, it passes muster; Dennis cannot meet the high bar required to invalidate a statute as vague or overbroad. The statute sufficiently provides notice of the conduct it prohibits.

An outgrowth of the Due Process Clause of the Fifth and Fourteenth Amendments, the “void for vagueness” doctrine prevents the enforcement of a criminal statute that is “so vague that it fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, “generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (citation omitted).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *United States v. Williams*, 553 U.S. 285, 306 (2008), or because reasonable jurists might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*, 561 U.S. 358, 403 (2010). A provision is impermissibly vague only if it requires proof of an “incriminating fact” that is so indeterminate as to invite arbitrary and “wholly subjective” application. *Williams*, 553 U.S. at 306; *see Smith v. Goguen*, 415 U.S. 566, 578 (1974). A statutory provision is “not rendered unconstitutionally vague because it ‘do[es] not mean the same thing to all people, all the time, everywhere.’” *Bronstein*, 849 F.3d at 1107 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). A statute is instead vague where

it fails to specify any “standard of conduct . . . at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). A law is not vague because it “call[s] for the application of a qualitative standard . . . to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.’” *Johnson*, 576 U.S. at 603–04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

There is a strong presumption that a statute is not vague. *See United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Other courts in this district have recognized that high bar. *See United States v. Gonzalez*, No. 20-cr-40 (BAH), 2020 WL 6342948, at \*7 (D.D.C. Oct. 29, 2020); *see also United States v. Harmon*, No. 19-cr-395 (BAH), 2021 WL 1518344, at \*4 (D.D.C. Apr. 16, 2021) (finding that the defendant did not meet the “stringent standard” to prevail on a Rule 12 vagueness motion).

Federal legislation enjoys a presumption of constitutionality that may only be overturned “upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). Dennis cannot overcome this presumption.

Section 231(a)(3) is not unconstitutionally vague. *See McHugh*, 21-cr-453, ECF No. 51, at 23; *Nordean*, 2021 WL 6134595, at \*17. It provides sufficient notice of the conduct it prohibits. The terms Dennis attacks, such as “any act to obstruct, impede, or interfere” and “civil disorder,” ECF No. 28 at 9-10, do not carry the potential for misunderstanding or make the statute “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Nordean*, 2021 WL 6134596, at \*16 (observing that “there are specific fact-based ways to determine whether a ‘defendant’s conduct interferes with or impedes others,’ or if a law enforcement officer is performing his official duties ‘incident to and during’ a civil disorder.”). Like the challenge recently rejected by Judge Bates, Dennis’ motion “misunderstand[s]”



vagueness: “There is a crucial difference between reasonable people differing over the meaning of a word and reasonable people differing over its application to a given situation—the latter is perfectly normal, while the former is indicative of constitutional difficulty.” *McHugh*, 21-cr-453, ECF No. 51, at 23.

Section 231(a)(3) does not prohibit mere presence at a civil disorder, but rather, “an act committed during the course of such disorder.” *United States v. Mechanic*, 454 F.2d 849, 853 (8th Cir. 1971). And not just any act: it prohibits only concrete “act[s]” that are performed with the specific purpose to “obstruct, impede, or interfere” with firefighters or law enforcement carrying out their official duties during a civil disorder. It punishes intentional conduct, not “mere inadvertent conduct.” *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972).

Contrary to defendant’s arguments, the statute’s terms are thus quite different from statutory terms that courts have found to be vague, such as statutes that turn on subjective judgments of whether a defendant’s conduct was “annoying” or “indecent,” or those that depend on the victim’s state of mind, as in the cases defendant cites. *See Nordean*, 2021 WL 6134595, at \*16; *see also Williams*, 553 U.S. at 306; Mot. at 8 (citing *Coates*, 402 U.S. at 614, *United States v. Kozminski*, 487 U.S. 931, 949–50 (1988)).<sup>3</sup> “An ordinary person would have an intuitive understanding of what is proscribed by a ban on obstructing, impeding, or interfering with law

---

<sup>3</sup> Dennis also cites *McCoy v. City of Columbia*, 929 F. Supp. 2d 541 (D.S.C. 2013) (ECF 69:7); he states that *McCoy* invalidated the law at issue as overbroad, but *McCoy* in fact found it unconstitutionally vague. *Id.* at 554. In any event, *McCoy* is distinguishable. *See McHugh*, 21-cr-453, ECF No. 51, at 33. *McCoy* invalidated an ordinance making it unlawful “for any person to interfere with or molest a police officer in the lawful discharge of his duties.” *Id.* at 546. As Judge Bates observed, unlike Section 231(a)(3), “the ordinance at issue in *McCoy* did not include a scienter requirement, and its use of only two operative verbs (‘interfere and molest’) prevented interpreters from . . . giving those words ‘more precise content by the neighboring words with which it is associated.’” *McHugh*, at 33 n.24 (citing *McCoy*, 929 F. Supp. 2d at 553) ((quoting *United States v. Stevens*, 559 U.S. 460, 474 (2010))).

enforcement.” *McHugh*, 21-cr-453, ECF No. 51, at 33. In addition, Section 231(a)(3) is not unique; many state and federal statutes likewise criminalize “obstructing” the government’s efforts to enforce the law and maintain public order, and they have been upheld. *See, e.g.*, 26 U.S.C. § 7212(a) (prohibiting obstructing or impeding the administration of the tax laws); 18 U.S.C. § 2237 (making it unlawful to “oppose, prevent, impede, intimidate or interfere with” a maritime investigation); *United States v. Brice*, 926 F.2d 925, 930–31 (9th Cir. 1991) (rejecting overbreadth and vagueness challenges to 41 C.F.R. § 101-20.305, regulation prohibiting impeding or disrupting government duties); *see also* Cal. Penal Code § 148 (prohibiting resisting, delaying, or obstructing any peace officer or emergency medical technician); *State v. Illig-Renn*, 341 Or. 228 (2006) (rejecting constitutional attacks leveled against O.R.S. 162.247(1)(b), which prohibits interference with a police officer); *State v. Steen*, 164 Wash. App. 789, 808 (2011) (rejecting as-applied constitutional challenge to RCW 9A.76.020(1), which criminalizes obstructing police officers).

Dennis also claims that the phrase “incident to and during the commission of a civil disorder” is vague because he cannot tell whether the statute requires an individual to have participated in the civil disorder or if it is sufficient that he be in the general vicinity of the event. ECF No. 28 at 10. This argument, too, is meritless. “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 852; *see also Howard*, 2021 WL 3856290, at \*14 (“[T]he statute does not require the government to prove that the defendant created the civil disorder, or that he was participating in the civil disorder.”). Contrary to Dennis’ argument that any “tumultuous public gathering” could qualify, ECF No. 28 at 11, “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.” *Mechanic*, 454 F.2d at 853; *see* 18 U.S.C. § 232(1); *cf. United States v. Huff*, 630 F. App’x 471, 489 (6th Cir. 2015) (unpublished) (rejecting vagueness challenge to “civil disorder” term in 18 U.S.C. § 231(a)(2) and citing definition in 18 U.S.C. § 231(1)). *See McHugh*, 21-cr-453, ECF No. 51, at 32, 32 n.22.

And even if a broad range of public gatherings could be deemed “civil disorders,” Section 231(a)(3) criminalizes only particular conduct, not mere participation in such a disorder. The “civil disorder” language operates to narrow the situation where the statute may apply—unlike other statutes, which criminalize acts of obstruction, wherever they may take place. *See* 26 U.S.C. § 7212(a) (criminalizing obstruction of tax laws). The requirement that the *actus reus* take place in the context of a civil disorder does not make Section 231 vague; to the contrary, it limits its application.

Dennis’ argument that the statute is vague because it lacks an express scienter requirement or *mens rea* (ECF No. 28 at 10-11) is also incorrect. Dennis ignores the fact that Section 231(a)(3) requires *intent*, which narrows its scope. *See Williams*, 553 U.S. at 294 (focusing on scienter requirement in finding that a statute was not overbroad); *McHugh*, 21-cr-453, ECF No. 51, at 29–31 (finding that Section 231(a)(3) includes an intent requirement). The requirement that a defendant who violates Section 231(a)(3) act with the intent to obstruct, interfere or impede is critical to the First Amendment analysis. *See United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) (intent requirement prevents application of statute to protected speech). The statute requires proof that the “act” was done “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*, 854 F.2d at 854 (construing Section 231(a)(3) to include an intent

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

Dennis’ vagueness claim also fails because his conduct clearly falls within the ambit of Section 231. The Court must consider vagueness “as applied to the particular facts at issue, for a [defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applies to the conduct of others.” *Nordean*, 2021 WL6134595, at \*17 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) (cleaned up)); *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”). The January 6, 2021, attack on the United States Capitol was clearly a “civil disorder,” not just some “tumultuous public gathering” to which the police were called. And there is no question that Dennis participated in the disorder. Tracking the statutory language, the superseding indictment alleges that he “commit[ted] an act to obstruct, impede, and interfere with a law enforcement officer.” ECF No. 13. Dennis crossed into the restricted area and assaulted a police officer. He was not some bystander yelling at police to desist. No one could credibly claim to believe that he could lawfully enter on to restricted Capitol grounds during the riot, and then engage in such action against law enforcement who were attempting to protect and clear the mob from the Capitol. The statute 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.” *Mechanic*, 454 F.2d at 854.

**C. Section 231(a)(3) Does Not Impermissibly Criminalize Speech Under The First Amendment**

Defendant contends that § 231(a)(3) is unconstitutionally broad 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.” Defendant’s Brief at 15. Defendant argues that the First Amendment does not permit an “unqualified prohibition on interference with police duties.” *Id* at 14.

As every other judge in this district who has addressed this precise claim has held, including this Court, *see Mostofsky*, 2021 WL 6049891, at \*8–9, this claim fails. A criminal law is facially overbroad 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, 769–71 (1982)); *see also United States v. Williams*, 553 U.S. 285, 293 (2008); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). A facial 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”).

Judge Berman Jackson is the most recent member of this court to reject an overbreadth challenge to § 231(a)(3). *See United States v. Williams*, 21-cr-0618 (ABJ), 2022 WL 2237301, at \*6–7 (D.D.C. June 22, 2022). She noted that “[i]n the past year, at least four other courts in this district have considered whether section 231(a)(3) is overbroad on its face, and all have concluded

it is not.” *Id.* at \*6.<sup>4</sup> Judge Berman Jackson “agree[d] with the reasoning in those decisions.” *Id.* “First, the statute plainly covers conduct, not speech, as it criminalizes ‘any *act* to obstruct, impede, or interfere with’ a law enforcement officer engaged in the performance of official duties, and the terms ‘obstruct, impede, or interfere with’ are all plainly understood and must be supported by the facts in any particular case.” *Id.* (emphasis added). “Although some ‘acts’ could also serve an expressive function, and one could come up with a hypothetical scenario in which the alleged interference involved particularly obstreperous speech, the law does not require dismissing a charge merely because there is a possibility that the provision could reach some constitutionally protected activity.” *Id.* “Since section 231(a)(3) does not ‘make unlawful a substantial amount of constitutionally protected conduct,’ it is not overbroad on its face.” *Id.* (citing *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)).

Judge Berman Jackson also noted that “a *scienter* requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.” *Id.* at \*7 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982)). She concluded that § 231(a)(3) “only criminalizes acts performed ‘to obstruct, impede, or interfere with’ a law enforcement officer,” “in other words, the statute requires obstructive intent.” *Id.* See also *Nat’l Mobilization Comm. to End War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969) (“It is true that section 231(a)(3) does not specifically refer to intent, but it only applies to a person who ‘commits or attempts to commit any act to obstruct, impede, or

---

<sup>4</sup> Citing *McHugh*, 2022 WL 296304, at \*17; *Mostofsky*, 2021 WL 6049891, at \*8–9; *Nordean*, 2021 WL 6134595, at \*17; and *Gossjankowski*, 2022 WL 782413, at \*3. Judge Berman Jackson also cited three out of district cases that reached the same result. 2022 WL 2237301, at \*6, citing *United States v. Howard*, 21-cr-28 (PP), 2021 WL 3856290, at \*11-12 (E.D. Wis. Aug. 30, 2021); *United States v. Phomma*, 561 F. Supp. 3d 1059, 1067-68 (D. Or. 2021); and *United States v. Wood*, 20-cr-56 (MN), 2021 WL 3048448, at \*7-8 (D. De l. July 20, 2021).

interfere’ with firemen or law enforcement officers.”); *United States v. Mechanic*, 454 F.2d 849, 854 (8th Cir. 1971) (agreeing with *Foran* “that § 231(a)(3) must be construed to require intent”). Other judges of this district are in accord. See *Mostofsky*, 2021 WL 6049891, at \*8 (rejecting overbreadth challenge to § 231(a)(3)); *Nordean*, 2021 WL 6134595, at \*16-18 (§ 231(a)(3) is neither vague nor overbroad); *McHugh*, 2022 WL 296304, at \*13 (same).

Those decisions are correct. In the typical case, a litigant bringing a facial constitutional challenge “must establish that no set of circumstances exists under which the [law] would be valid,” or the litigant must “show that the law lacks a plainly legitimate sweep.” *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (quotation omitted). In the First Amendment context a litigant must demonstrate that “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Id.* (cleaned up). Refusing to enforce a statute because of overbreadth concerns is “strong medicine,” and courts will refuse to enforce the statute on such grounds “only as a last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). “Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech,” *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

The Eighth Circuit’s decision in *Mechanic*, rejecting an overbreadth challenge to § 231(a)(3), is particularly instructive. After noting that the statutory language “applies only to a person who acts to impede, obstruct, or interfere with an official described in the statute,” that court 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 *Foran*, 411 F.2d at 937). 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.* “[I]t 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.*

Apparently seeking to identify “a substantial number” of unconstitutional applications of 231(a)(3), Dennis contends the statute’s prohibitions would apply to someone who “yells at police to desist from an arrest” or “flips off officers to distract or to encourage resistance,” or “records police activity with a cell phone.” Defendant’s Brief at 14. Even assuming these examples both fall within the scope of the statute and improperly trench on First Amendment protections, they do 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. 789, 801 (1984). Dennis identifies no such cases, and no wonder. 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.*

Dennis has given this Court no reason to depart from the unanimous holdings of other judges in this district and elsewhere that 231(a)(3) is not unconstitutionally overbroad.

**II. Defendant’s Challenges to Counts Five, Six and Seven, Charging Violations of 18 U.S.C. § 1752(a)(1), (2), and (4), Respectively, Are Meritless**

Invoking the legislative history of 18 U.S.C. § 1752 at length, MTD 15-22, Defendant contends that statute does not apply to his conduct because the Capitol building and grounds he entered on January 6 where not restricted by the United States Secret Service, and only areas restricted by that agency fall within the purview of the statute. The text of § 1752 contradicts Defendant’s contentions. It states:

(a) Whoever--

(1) knowingly enters or remains in any restricted building or grounds without lawful authority to do so;

(2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions;

(4) knowingly, engages in any act of physical violence against any person or property in any restricted building or grounds;

(5) \* \* \* shall be punished as provided in subsection (b).

**A. Section 1752 Makes No Mention of Which Official Entity Can Restrict Egress Into Areas Covered by the Statute, Much Less Require That Only The Secret Service Can Do So.**

Section 1752(c) (1) provides three alternate definitions for the term “restricted buildings and grounds.”

(c) In this section--

(1) the term “restricted buildings or grounds” means any posted, cordoned off, or otherwise restricted area--

- (A) of the White House or its grounds, or the Vice President's official residence or its grounds;
- (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or
- (C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance; and

(2) the term “other person protected by the Secret Service” means any person whom the United States Secret Service is authorized to protect under section 3056 of this title or by Presidential memorandum, when such person has not declined such protection.

18 U.S.C. § 1752(c).

The definition that applies here is § 1752(c)(1)(B), “any posted, cordoned off, or otherwise restricted area ... of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.” “Person[s] protected by the Secret Service” include the Vice President and the Vice President-elect. § 1752(c)(2). *See* 18 U.S.C. § 3056(a)(1) (“Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the ... the Vice President”). The proscribed conduct within a “restricted building or grounds” includes, as relevant here, “knowingly and unlawfully entering or remaining ... without lawful authority to do so,” § 1752(a)(1) (Count 5), “knowingly and with intent to impede or disrupt government business” engaging] in “disorderly or disruptive conduct” that “in fact, impedes or disrupts” government business,” § 1752(a)(2) (Count 6), and “knowingly engaging in any physical violence against any person or property, § 1752(a)(4) (Count 7).

This Court should again decline Defendant’s request to import an extra-textual requirement that the Secret Service is the only entity that can restrict an area under § 1752. *See United States*

*v. Mostofsky*, 579 F.Supp.3d 9, 39 (D.D.C. December 21, 2021) (reasoning that the text [of § 1752] plainly does not require that the Secret Service be the entity to restrict or cordon off a particular area). As Judge McFadden of this Court held in rejecting that precise argument, advanced by a defendant in another case, “[t]hese extratextual arguments are unavailing.” *United States v. Couy Griffin*, No. 21-CR-00092 (TNM), \_\_ F. Supp. 3d \_\_, 2021 WL 2778557, at \*4 (D.D.C. July 2, 2021); . If § 1752 is “‘directed to’ anyone—a dubious claim—it would seem directed at prosecutors, would-be violators, and courts; it is not a regulatory statute.” *Id.* “More importantly, the Court will not invoke the statute’s supposed purpose or legislative history to create ambiguity where none exists.” *Id.* “If Congress intended a statute designed to safeguard the President and other Secret Service protectees to hinge on who outlined the safety perimeter around the principal, surely it would have said so.” *Id.* at \*6.

Judge McFadden also explained why the legislative history on which Defendant principally relies undercuts his argument:

From its enactment in 1970 until 2006, Section 1752 contained a provision that authorized the Treasury Department (of which, until 2003, the Secret Service was a component) to “designate by regulations the buildings and grounds which constitute the” protected residences or offices of Secret Service protectees and “prescribe regulations governing ingress or egress to ... posted, cordoned off, or otherwise restricted areas where” protectees were present. 18 U.S.C. § 1752(d) (1970)....

By 2006 Congress rewrote the statute, in the process eliminating reference to the Treasury Department and to any “regulations” from any executive branch agency. 18 U.S.C. § 1752 (2006). More, the new statute criminalized merely entering or remaining in a restricted area; the old statute required further action, such as impeding government business, obstructing ingress or egress, or physical violence. *Compare* 18 U.S.C. § 1752(a)(1) (2006) *with* 18 U.S.C. § 1752(a) (1970). But Congress did not stop there. In 2012 it reconfigured the statute, adding the term “restricted buildings or grounds” and then defining it under subsection (c), as it appears today. 18 U.S.C. § 1752(a) (2012). Congress did not take that opportunity to clarify who can or must do the restricting, leaving it open-ended.

*Griffin*, 2021 WL 2778557, at \*4 (footnote omitted).

The statute sets clear limitations on where restricted areas may be established. It criminalizes only entry into a restricted area “of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.” Thus, only agencies that have jurisdiction over such places can set the restrictions.

Defendant relies on *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005), but that case offers him no support. There, the Court of Appeals *affirmed* a § 1752 conviction for entering an airport hangar that was restricted by the Secret Service ahead of a rally involving the President. 416 F.3d at 309. On appeal, *Bursey* challenged the District Court’s finding that he acted willfully. Rejecting that claim, the Fourth Circuit pointed to evidence proving that Bursey must have known he was violating the law by remaining in the restricted area, including evidence that “Bursey understood the area to have been restricted by the Secret Service, and thus a federally restricted zone.” *Id.* As Judge McFadden explained, “the Fourth Circuit [in *Bursey*] had no reason to analyze [whether the Secret Service must impose the restrictions] because all parties agreed that the Secret Service secured the hangar. There is no holding—binding or persuasive—on this question.” *Griffin*, 2021 WL 2778557, at \*5.

**B. The Indictment is Sufficient in Charging the Defendants with Counts in Violation of § 1752**

Defendant, once again, contends issues relating to the indictment and alleges that the indictment does not specifically explain how the “United States Capitol and its grounds” is a restricted building or grounds under § 1752, how Defendant had knowledge that he was entering restricted grounds, or whether the former Vice President was “temporarily visiting” the Capitol on January 6, 2021. But as noted above, the indictment need not identify the particulars of how the offense is committed in order for it to be found sufficient. *See United States v. Resendiz-Ponce*,



549 U.S. 102, 108-09 (2007); *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976); *Hamling v. United States*, 418 U.S. 87, 117-18 (1974).

Count Five, Six, and Seven of this indictment alleges the date of the offenses, the location of the offenses, the alleged defendant, and the elements of the statute that the defendant violated. ECF No. 13. The burden of proof the defense seeks for the government to show is one that occurs at trial.

### **III. Defendant's Challenges to Count Eight, Charging Violations of 40 U.S.C. § 5104(e)(2)(D) Are Meritless**


Defendant contends that he is improperly charged with violating 40 U.S.C. § 5104(e)(2)(D) because the indictment does not allege specific details of the Defendant's conduct and how that conduct violates the statute. As indicated above, precedent has made clear that 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).

Count Eight of this indictment alleges the date of the offense, the location of the offense, the alleged defendant, and the elements of the statute that the defendant violated. ECF No. 13. The burden of proof the defense seeks for the government to show is one that occurs at trial.

**CONCLUSION**

For the foregoing reasons, the government respectfully requests that the defendant's motion be denied.

Respectfully submitted,  
MATTHEW M. GRAVES  
United States Attorney  
D.C. Bar No. 481052

By:   
Nialah S. Ferrer  
New York Bar No. 5748462  
Assistant United States Attorney  
601 D Street, NW  
Washington, D.C. 20530  
(202) 557-1490  
Nialah.Ferrer@usdoj.gov