IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	**CRIMINAL NUMBER 21-691**
	:	
	:	
CHRISTIAN MATTHEW MANLEY	:	

DEFENDANT'S MOTION TO DISMISS COUNT ONE

Defendant Christian Matthew Manley respectfully requests that this Court dismiss Count One of the Indictment, pursuant to Federal Rule of Criminal Procedure 12(b)(3). Count One alleges that, on or about January 6, 2021, Mr. Manley:

> 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/her duties incident to and during the commission of a civil disorder which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function

in violation of 18 U.S.C. § 231(a)(3).

Count One must be dismissed because § 231(a)(3) suffers from numerous constitutional defects: (1) facial insufficiency, in violation of the Sixth Amendment; (2) exceeding Congress's Commerce Clause authority by reaching purely intrastate interactions between individuals and local law enforcement officers that have always been the province of the States; (3) violating the First Amendment as a substantially overbroad regulation of protected expression, and a content-based restriction on expression that fails strict scrutiny; and (4) using overly vague terms, violating the Fifth Amendment's Due Process Clause.

WHEREFORE, for all the reasons set forth above and in the accompanying Memorandum of Law, as well as any other reasons which may become apparent at a hearing or

the Court deems just, Defendant Manley respectfully submits that the Court dismiss Count One of the Indictment.

Respectfully submitted,

/s/ Natasha Taylor-Smith
NATASHA TAYLOR-SMITH
Assistant Federal Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	**CRIMINAL NUMBER 21-691**
	:	
	:	
CHRISTIAN MATTHEW MANLEY	:	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Mr. Manley is charged by indictment for acts allegedly committed at the United States Capitol on January 6, 2021. In Count One, the Indictment charges a violation of 18 U.S.C. § 231(a)(3), a seldom-invoked section of the criminal code authored by legislators to counter the protections of the Civil Rights Act and to silence civil rights leaders in 1968. Section 231(a)(3) broadly, and vaguely, prohibits an array of conduct deemed to interfere with law enforcement officers performing duties "incident to or during the commission of a civil disorder." Count One suffers multiple defects requiring dismissal.

First, Count One fails to sufficiently apprise Mr. Manley of the nature of the charge against him, in violation of Rule 7(c)(1)'s charging requirement and the constitutional right to be informed of the nature and cause of an accusation under the Sixth Amendment.

Second, § 231(a)(3) exceeds Congress's Commerce Clause authority by reaching purely intrastate interactions between individuals and local law enforcement officers that have always been the province of the States. Although the statutory language requires the existence of a "civil disorder" that affects commerce "in any way or degree," it does not require any causal nexus between the defendant's prohibited act and the purported commercial impact, nor does it require a substantial effect on commerce. No construction of the statute avoids constitutional infirmity

under the reasoning of *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

Third, as illuminated by the statute's origins, § 231(a)(3) is a content-based restriction on expression. Because of its broad reach and lack of legitimate federal interest in controlling local matters, the prohibition fails strict scrutiny and violates the First Amendment.

Finally, the statute is also unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause because it employs imprecise terms in defining the federal crime, providing both inadequate notice of the conduct prohibited and leaving insufficient guidance to avoid arbitrary and discriminatory enforcement.

Based on each of these grounds, separately and cumulatively, the Court should dismiss Count One.

I. Section 231(a)(3)'s text and legislative history

Count One of the Indictment against Mr. Manley charges a violation of 18 U.S.C. § 231(a)(3), alleging that, on or about January 6, 2021, Mr. Manley:

> 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/her duties incident to and during the commission of a civil disorder which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function.

Count One essentially tracks the language of the charged offense, entitled Civil Disorders, which provides:

> Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—

§ 231(a)(3). "Civil disorder" is defined 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).

Section 231(a)(3) was enacted as part of the Civil Obedience Act of 1968 (COA). Pub. L. 90-284, Apr. 11, 1968, Title X, which the Senate originally adopted as an amendment to the Civil Rights Act of 1968. 114 Cong. Rec. 1287-97 (Jan. 29, 1968)) (proposed); 114 Cong. Rec. 5529-5550 (Mar. 6, 1968)) (adopted).[1] Senator Russell B. Long of Louisiana, the author and primary proponent of the COA, "consistently opposed any legislation designed to improve the lot of blacks in the South" during his four decades in Congress.[2] In a Senate hearing in 1960, Senator Long made his support for racial apartheid clear, stating: "The colored man should be asked to understand that we believe that members of each race should go with their own kind, marry their own kind, and live with their own kind." 106 Cong. Rec. 4183 (Mar. 2, 1960).

As the Senate debated the Civil Rights Act of 1968, Senator Long proposed the COA as a rejoinder to both the civil rights bill and to the civil rights movement. 114 Cong. Rec. 1294-96 (Jan. 29, 1968). In Senate hearings between January and March of 1968, Senator Long expressed three related purposes that his amendment aimed to fulfill.

First, the COA would nullify legal protections proposed under the "hate crime" title of the Civil Rights Act by protecting individuals whose actions meet the criteria of a hate crime, and, in turn, prosecuting those individuals whose rights are protected under that law. 114 Cong. Rec. 1287-94, 1297 (Jan. 29, 1968). Second, the COA was designed to jail and silence specific

[1] Copies of cited congressional records can be provided to the Court upon request.

[2] Michael S. Martin, Russell Long: A Life in Politics, University Press of Mississippi, 2014, at 76.

civil rights leaders, including Dr. Martin Luther King, who had "addressed a tense crowd with inflammatory words," and later in jail, "wrote an inflammatory letter which gained wide recognition in its pleas for Negroes to disobey those laws they felt unjust." 114 Cong. Rec. 1294 (Jan. 29, 1968). Third, Senator Long promoted the COA to suppress civil rights advocacy in general, claiming the COA would "strike at" the "doctrine . . . that one should not obey the laws that stand in the way of alleged 'civil rights.'" 114 Cong. Rec. 1295 (Jan. 29, 1968).

II. Legal Standards

The Supreme Court has long held that "[i]t is an elementary principle of criminal pleading, that where the definition of an offence . . . includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars." *Russell v. United States*, 369 U.S. 749, 770 (1962) (internal quotation marks omitted). Indeed, a defendant must be apprised "with reasonable certainty, of the nature of the accusation against him." *Id.* An indictment may track the language of a statute only where the "words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Id.*

The Federal Rules of Criminal Procedure require than an indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Rule 12 provides that a defendant may move to dismiss the pleadings on the basis of a "defect in the indictment or information," including a "lack of specificity" and a "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(iii),(v). In considering a Rule 12 motion to dismiss, "the Court cannot consider facts beyond the four corners of the indictment," *United States v. Ring*, 628 F. Supp. 2d 195, 204 (D.D.C. 2009), and is "bound to accept [those

facts] as true," *United States v. Syring*, 522 F. Supp. 2d 125, 128 (D.D.C. 2007); *see also United States v. Sampson*, 371 U.S. 75, 78 (1962).

III. Discussion

To establish Mr. Manley is guilty of a § 231(a)(3) offense, the government must allege and prove beyond a reasonable doubt that the "civil disorder" on January 6 obstructed, delayed, or adversely affected either "commerce or the movement of any article or commodity in commerce" or "the conduct or performance of any federally protected function." As Count One essentially tracks the language of the statute, Mr. Manley is not aware, "with reasonable certainty, of the nature of the accusation against him." *Russell*, 369 U.S. at 770. The government fails to identify with any specificity Mr. Manley's conduct underlying the offense. Indeed, the government failed to specify which adverse effect—on interstate commerce or a federally protection function—underlies its allegation. As such, the facial insufficiency of Count One requires its dismissal.

Even if the Court finds Count One meets the pleading standards of the Fifth and Sixth Amendment and Rule 7(c), Count One must be dismissed because § 231(a)(3) is an unconstitutional exercise of Congress's power under the Commerce Clause. In addition, § 231(a)(3) is overbroad and unconstitutionally vague because §231(a)(3)'s imprecise and subjective standards fail to provide fair notice and creates significant risk of arbitrary enforcement. Further, several of the statute's terms are so broad and indefinite as to impose unqualified burdens on a range of protected expression.

A. Count One fails to sufficiently notify Mr. Manley of the charge against him

A facially valid indictment guarantees two core constitutional protections: (1) notice of the "nature of the accusation[s]"; and (2) protections against abusive criminal charging practices.

See United States v. Hitt, 249 F.3d 1010, 1016 (D.C. Cir. 2001); *Stirone v. United States*, 361 U.S. 212, 218 (1960). The former is established in the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." U.S. Const. Amend. VI, and protected under Federal Rule of Criminal Procedure 7(c)(1), which requires an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged" and include the "provision of law that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c)(1). The latter is established in the Fifth Amendment, guaranteeing that a "criminal defendant can only be prosecuted for offenses that a grand jury has actually passed up on, and that a defendant who is convicted of a crime so charged cannot be prosecuted again for that same offense." *United States v. Hillie* 227 F. Supp. 3d 57, 70 (D.C.C. 2017) (citing *Stirone*, 361 U.S. at 218).

The "careful drafting in the 'language of the indictment is essential because the Fifth Amendment requires that criminal prosecutions be limited to the unique allegations of the indictments returned by the grand jury.'" *Id.* (quoting *Hitt*, 249 F.3d at 1016). As such, an indictment is facially sufficient if it (1) "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend"; and (2) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). In other words, the question is whether the indictment "clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense." *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980).

Importantly, "[i]n order to meet the requirements of the Sixth Amendment, an indictment must contain every element of the offense charged *and* must fairly apprise the accused *of the conduct allegedly constituting the offense* so as to enable him to prepare a defense against those

allegations." *Hillie*, 227 F. Supp. 3d at 70 (emphasis in original). Although the language of the statute may be used, such language "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offen[s]e, coming under the general description, with which he is charged." *Id.* (quoting *Hamling*, 418 U.S. at 117–18). Thus, "[a]n indictment not framed to apprise the defendant 'with reasonable certainty[ ] of the nature of the accusation against him is defective, although it may follow the language of the statute.'" *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976) (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877)).

Count One of the Indictment tracks the language of § 231(a)(3) without any additional facts or circumstances pertaining to: (1) Mr. Manley's "act"; (2) how that act obstructed, impeded, and interfered with the duties of law enforcement; (3) the civil disorder; (4) how the civil disorder obstructed, delayed, and adversely affected commerce; (5) how the civil disorder obstructed, delayed, and adversely affected a federally protected function; and (6) the federally protected function.

In fact, Mr. Manley is left to wonder if the government is attempting to allege that the civil disorder obstructed, delayed, and adversely affected commerce *or* that the civil disorder obstructed, delayed, and adversely affected a federally protected function. If the government is attempting to allege the former, in addition to lack of notice, Count One is infirm because § 232(1) exceeds Congress's Commerce Clause authority. *See infra* Section III.B. If it is the latter, the government has failed to notify Mr. Manley *which* federally protected function was adversely affected. As an element of the offense, causing an "adverse effect" on a "federally protected function" leaves much uncertainty as to what actions the government is seeking to punish. Without this information, Mr. Manley cannot adequately prepare for trial or make other

pretrial arguments, such as failure to state an offense by failing to allege a proper federally protected function. Fed. R. Evid. 12(b)(3)(iii), (v). By failing to provide notice to Mr. Manley of the federally protected function at issue, he is left to guess "what was in the minds of the grand jury at the time they returned the indictment," depriving Mr. Manley of the "basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770.

Because Count One fails to provide adequate notice of the crime charged, it must be dismissed.

B. Section 231(a)(3) exceeds Congress's Commerce Clause authority

Section 231(a)(3) criminalizes "any act" to obstruct, impede or interfere with a local police officer or firefighter performing lawful duties "incident to and during the commission of a civil disorder which *in any way or degree* obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce." (emphasis added).

The § 231(a)(3) offense must be dismissed because it exceeds Congress's power under the Commerce Clause. The Commerce Clause gives Congress the "[p]ower . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Noneconomic intrastate activity may not be federally regulated unless "the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). In *Lopez*, the Supreme Court limited federal commerce power to three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce." 514 U.S. at 558-59.

It is evident § 231(a)(3) does not involve either the channels or instrumentalities of commerce.[3] And because § 231(a)(3) does not substantially affect interstate commerce, the statute constitutes an unconstitutional exercise of Congress's power.

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

To determine whether an activity has a "substantial effect" on interstate commerce, a court must consider the "controlling four-factor test" set forth in *Lopez*, and later articulated in *United State v. Morrison*: whether (1) the activity itself "has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms"; (2) "the statute contain[s] [an] express jurisdictional element"; (3) there is "legislative history [or] express congressional findings regarding the effects upon interstate commerce" of the regulated activity; and (4) "the link between [the regulated activity] and a substantial effect on interstate commerce is attenuated." *Morrison*, 529 U.S. at 610-612.

a. Section 231(a)(3) does not regulate economic activity and does not support any larger scheme of economic regulations

The act of interfering with the duties of law enforcement officers in a civil disorder is not commercial or economic in nature. Section 231(a)(3) therefore fails the first *Lopez* factor. *Lopez* itself demonstrates this.

In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990 because it did not substantially affect interstate commerce. The Supreme Court first provided examples of

[3] "A piece of legislation that regulates the 'channels' of commerce either facilitates or inhibits the movement of goods or people through interstate commerce." *United States v. Reed*, No. CR 15-188, 2017 WL 3208458, at *8 (D.D.C. July 27, 2017). "Congress regulates the 'instrumentalities' of commerce when it passes legislation that directs or inhibits the vehicles of economic activity—e.g., airplanes, steamships, automobiles, trains—or interstate means of communication—e.g., mail and wires." *Id.*

economic activity that is properly regulated: intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. 514 U.S. at 559-60. In contrast, the Gun-Free School Zones Act had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 567. Further, the Act was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.*

Relying on *Lopez*, the Supreme Court in *Morrison* concluded that the civil remedy for gender-motivated violence under the Violence Against Women Act was a regulation of noneconomic activity that exceeded Congress's commerce authority. 529 U.S. at 617. Even though the VAWA was enacted with the support of significant congressional findings regarding the "nationwide, aggregated impact" of gender-motivated violence on interstate commerce, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The "noneconomic, criminal nature of the conduct at issue was central" to the *Lopez* and *Morrison* rulings. *Morrison*, 529 U.S. at 610.

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

intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22.

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

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

Section 231(a)(3) technically contains a commercial nexus element, which requires the civil disorder to "*in any way or degree* obstruct[ ], delay[ ], or adversely affect[ ] commerce or the movement of any article or commodity in commerce." (emphasis added). But this jurisdictional requirement is insufficient to satisfy *Lopez*'s test, for several reasons.

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

Second, the statutory "incident to and during" connector further diminishes any required link to interstate commerce. Although the statute does not make clear whether the connector

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

Finally, the commercial nexus element of § 231(a)(3) does not require a substantial effect on interstate commerce, but instead requires a civil disorder that affects commerce "in any way or degree." The terms are virtual opposites. Substantial means "[c]onsiderable in extent, amount, or value," whereas the word "any" is expansive and unqualified. *Compare* SUBSTANTIAL, BLACK'S LAW DICTIONARY (11th ed. 2019) with ANY, BLACK'S LAW DICTIONARY (11th ed. 2019); *see St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978) (statutory language that covered "'any' act" was "broad and unqualified"). An "any way or degree" impact on commerce is not a "substantial" impact.[4]

---

[4] Although the Hobbs Act includes "in any way or degree" language, the Ninth Circuit has upheld this language only because "the Hobbs Act is directly aimed at economic activities" that themselves "affect[] commerce." *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996); *see Taylor v. United States*, 579 U.S. 301, 309 (2016) (in assessing constitutionality of Hobbs Act robbery of a drug dealer, noting that "to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is commerce over which the United States has jurisdiction" (internal quotation marks omitted)). Regulations on direct commercial impacts need not "substantially affect commerce to pass constitutional muster" because an activity with a de minimis impact on commerce will have the required substantial effect "through repetition" and "in aggregate." *Id.* (quoting *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995)); *see also United States v. Bremner*, 841 F. App'x 33, 33-34 (9th Cir. 2021) ("The individual circumstances of Bremner's alleged production of child pornography do not matter, because when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."). Such

Because the jurisdictional element does not limit the reach of § 231(a)(3) to activities that "substantially affect" interstate commerce, the second *Lopez/Morrison* factor is not satisfied.

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

Formal congressional findings are neither required nor sufficient to establish a valid exercise of federal commerce authority. *Lopez*, 514 U.S. at 562-63; *Morrison*, 529 U.S. at 614. Congressional findings may demonstrate that an activity "substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Lopez*, 514 U.S. at 563. But "the existence of congressional findings is not sufficient" when Congress merely offers a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615.

Here, Congress made no findings to establish that the activity regulated by § 231(a)(3) substantially affects interstate commerce beyond any impact "visible to the naked eye." The only potentially relevant findings relate to the impact of "riots" on interstate commerce. 114 Cong. Rec. 1294-95 (Jan. 29, 1968). Upon first proposing the COA, Senator Long stated certain facts, without citation, concerning what he called the "wholesale Negro violence," which he said "was an almost nightly affair in the streets of our cities" between 1965 and 1967. 114 Cong. Rec. 1295. For example, he said:

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

---

direct commercial impacts place activities such as Hobbs Act robbery under the first or second *Lopez* categories. By contrast, under § 231(a)(3), the language of "in any way or degree" attaches not to the offense conduct, but to the incidental occurrence of a civil disorder. In the context of an intrastate activity with an indirect impact on commerce, the language of "in any way or degree" fails the third *Lopez* category requiring a substantial effect.

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

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

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

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

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

Any causal chain that could link the activity proscribed under § 231(a)(3) to any substantial impact on interstate commerce is too far attenuated to place the activity within reach of Congress' commerce authority. The offense conduct of § 231(a)(3) need not affect commerce directly; it suffices that a person's acts interfered with an official's duties performed "incident to and during" any "civil disorder" that, in turn, affects commerce. Such an "incidental effect on interstate commerce . . . does not warrant federal intervention." *Musick v. Burke*, 913 F.2d 1390, 1397 (9th Cir. 1990). The noneconomic conduct penalized by § 231 is too attenuated to satisfy the "substantially affects" test for commercial impact.

Even if interference with police could affect commerce in the aggregate, considering the effect on a nationwide scale would be insufficient to place those acts within the federal

commerce authority. *See Morrison*, 529 U.S. at 617 ("reject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). Here, the paucity of cases prosecuted under § 231(a)(3) further negates any claim of an aggregate effect.

In sum, the four *Lopez/Morrison* factors demonstrate that § 231(a)(3) regulates purely local, noneconomic activities that do not "substantially affect" interstate commerce. As a result, § 231(a)(3) falls outside of Congress's power to regulate under the Commerce Clause.

C. Section 231(a)(3) violates the First Amendment by placing a significant burden on expressive conduct for the impermissible purpose of suppressing messages and viewpoints associated with the civil rights movement

Section 231(a)(3) violates the First Amendment in two ways. First, § 231(a)(3) is a substantially overbroad regulation of protected expression because it imposes steep criminal penalties on an expansive range of speech and expressive conduct. Second, § 231(a)(3) was enacted for the express legislative purpose of suppressing the content of messages favoring civil rights advocacy, and the statute's content-based text and purpose fail strict scrutiny. The statute's unconstitutionality requires dismissal of Count One.

1. Section 231(a)(3) burdens a substantial amount of constitutionally protected expression in relation to its legitimate sweep

"In the First Amendment context, . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 481 (2010). The First Amendment protects expressive conduct like cross-burning, flag-burning, and assembly in inconvenient places. *See Virginia v. Black*, 538 U.S. 343, 365-66 (2003) ("[S]ometimes the cross burning is a statement of ideology, a symbol of group solidarity"); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (flag burning constituted "expressive conduct" protected by the First

Amendment); *Clark v. Cmty. for Creative NonViolence*, 468 U.S. 288, 293 (1984) (assuming that "sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment"). Conduct is expressive under the First Amendment when it "is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018).

Section 231(a)(3) extends to a substantial amount of constitutionally protected speech and expressive conduct in excess of the law's legitimate sweep. Such broad criminal statutes like § 231(a)(3) "must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *see also Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."). Criminal laws that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Id.* Several of § 231(a)(3)'s terms are so broad and indefinite that they impose unqualified burdens on a range of protected expression.

First, 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. *Roy v. City of Monroe*, 950 F.3d 245, 252 (5th Cir. 2020) (acknowledging that "[s]tanding alone . . . a prohibition on 'any act [undertaken] in such a manner as to disturb or alarm the public' fails meaningfully to guide the police and thus poses a substantial risk of arbitrary or discriminatory enforcement").

Second, § 231(a)(3) imposes a substantial burden on protected expression by requiring that "any act . . . obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties." The term "interfere," which

the statute leaves undefined, reaches a broad range of speech and expressive conduct. The law's author acknowledged this when, in a Senate hearing two days after he introduced the COA, he criticized the term "interference" as used in the hate crime law by asking whether "almost anything could be regarded as an interference?" 114 Cong. Rec. 1819 (Feb. 1, 1968) (Sen. Long). In the context of § 231(a)(3), Senator Long's interpretation of "interference" rings true because "there are numerous examples in which a person's speech could interfere with . . . a police officer in the lawful discharge of the officer's duties."

Indeed, § 231(a)(3) authorizes a felony conviction for a bystander who yells at police to desist from an arrest, one who flips off officers to distract or to encourage resistance, or one who records police activity with a cell phone. *Hill*, 482 U.S. at 459 ("[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("[T]he First Amendment protects the filming of government officials in public spaces."). The First Amendment does not permit such an unqualified prohibition on "interference" with police duties because "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" *Hill*, 482 U.S. at 462–63.

Third, the term "civil disorder," as defined under § 232(1), is extremely far-reaching, applying to "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of . . . injury to the property." Rather than limiting the statute, § 231(a)(3)'s language reaches "any public disturbance" in the types of traditional public fora where First Amendment protections are at their zenith. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009) ("In traditional public fora .

. . First Amendment protections are strongest, and regulation is most suspect."). Moreover, the "civil disorder" definition sweeps broadly to cover incidents in which three or more persons cause an immediate danger of injury to persons or property. 18 U.S.C. § 232(1). The definition can just as easily be met by a violent mob of thousands as it can by the ejection of several unruly individuals from a bar, concert, or sporting event, or even by three teenagers whose skateboarding damages property.

Finally, to be convicted under § 231(a)(3), a person's interference with police duties must merely occur "incident to and during" the civil disorder, and it need not be shown that the defendant incited the civil disorder or engaged in "acts of violence" that the civil disorder "involves." The term "civil disorder" fails to limit the overbreadth of penalizing "any act" of interference with police duties.

For all those reasons, the Court should invalidate § 231(a)(3) for overbreadth.

2. Section 231(a)(3) regulates the content of protected expression without a permissible justification

The broad language of the statute and its purpose to target certain speech and political movements for civil rights invalidates the statute under the First Amendment.

a. The First Amendment requires strict scrutiny of content-based and viewpoint-based regulations of speech and expressive conduct

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "When the government restricts speech based on its content, a court will subject the restriction to strict scrutiny." *In re*

Nat'l Sec. Letter, 863 F.3d 1110, 1121 (9th Cir. 2017) (citing *Reed*, 576 U.S. at 162). "A speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 576 U.S. at 169. By contrast, viewpoint discrimination is a "more blatant" and "egregious form of content discrimination" which "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

In *Reed*, the Supreme Court clarified that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." 576 U.S. at 166. Before concluding that a law is content-neutral, *Reed* requires a court to inquire separately into the law's text and purpose. The two-step test asks (1) "whether the law is content neutral on its face"; and (2) whether "the purpose and justification for the law are content based." *Id.* at 165-166. A court "must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Id.* at 166. "The government's purpose is the controlling consideration" in determining content-neutrality. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

b. On its face, § 231(a)(3) regulates the content of protected expression

The "first step in the content-neutrality analysis" is "determining whether a law is content neutral on its face." *Reed*, 576 U.S. at 165. By its own sweeping terms, § 231(a)(3) authorizes criminal penalties for "any act" of speech or expressive conduct intended merely to "interfere with," that is, to criticize or challenge the manner in which police officers discharge their duties. In *Hill*, the Supreme Court considered a First Amendment overbreadth challenge to a law that similarly made it a crime to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." 482 U.S. at 455. The defendant in *Hill* shouted at police officers in an

admitted attempt to divert the officer away from a friend. *Id.* at 453-43. The Court concluded that the statute reached "verbal criticism and challenge directed at police officers," *id.* at 461, conferring authority on those officers "to make arrests selectively on the basis of the content of the speech," *id.* at 465 n.15.

As in *Hill*, § 231(a)(3) singles out forms of expression that contain messages that criticize, challenge, insult, or object to the actions of law enforcement officers. Thus, it is a content-based speech regulation. *Reed*, 576 U.S. at 163. The statute's terms "any act" and "interfere" are left unqualified and undefined, thereby allowing arrest and prosecution of one whose words have sufficiently provoked the anger of a police officer so as to even briefly "interfere" with his duties. In that way, § 231(a)(3) restricts speech "based on the message the speaker conveys[.]" *Reed*, 576 U.S. at 163.

c. Even if § 231(a)(3) were content-neutral on its face, its legislative history reveals a content-based purpose

The First Amendment generally prevents the government from proscribing speech and expressive conduct because of disapproval of ideas, like those animating the civil rights movement. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed."); *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). The Supreme Court in *Reed* recognized a "category of laws that, though facially content neutral, will be considered content-based regulations of speech" by virtue of having been "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). The First Amendment therefore requires courts to inspect a law's legislative

background for "animus toward the ideas" regulated. *Id.* at 165. If the law was "adopted by the government 'because of disagreement with the message [the speech] conveys," then, "like those [laws] that are content based on their face, [it] must also satisfy strict scrutiny." *Id.* at 164-65 (quoting *Ward*, 491 U.S. at 791).

Section 231(a)(3)'s content-based purpose brings it within this category of laws subject to strict scrutiny. The legislative history of § 231(a)(3) shows that it was enacted to suppress messages in support of civil rights and racial justice for Black Americans. During hearings, Senator Long explained the law's content-based purpose clearly and repeatedly: suppressing the content of expression related to civil rights and racial justice. *See supra* Section I. He singled out specific messages for punishment "because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). By singling out specific ideas and speakers as targets for his legislation, Senator Long's statements also reflected both a content-discriminatory and a viewpoint-discriminatory purpose.

d. Section 231(a)(3) fails under strict scrutiny because the burden it imposes on protected expression is only remotely connected to any potential federal interest

If this Court concludes that § 231(a)(3) is content-based on its face or in its legislative purpose, then strict scrutiny applies. *Reed*, 576 U.S. at 163-164. To overcome strict scrutiny, the government has the burden of proving "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Section 231(a)(3) cannot survive strict scrutiny because the relevant federal interest is remote and the statutory language lacks narrow tailoring.

First, the federal government's interest in prosecuting "any act" of interference with the duties of non-federal public officials is not readily apparent. Although the law anemically invokes an interstate commerce nexus, the intrastate noneconomic activities that the law targets

are wholly attenuated from interstate commerce. State and local laws amply protect police officers and firefighters from public obstruction in the circumstances covered by § 231(a)(3). It is these local jurisdictions, not the federal government, to which the Tenth Amendment reserves the right to enact such laws. Accordingly, there is no federal interest in regulating the content of expression targeted under § 231(a)(3).

Second, no government interest can support the broad scope of § 231(a)(3). The terms of § 231(a)(3) could extend felony criminal liability to challenges and criticism directed at police officers over the course of routine intrastate conflicts. By contrast, the federal law that punishes interference with federal, rather than local law enforcement officers, applies narrowly to forceful acts and can be charged as a misdemeanor. 18 U.S.C. § 111(a). The comparative lack of narrow tailoring in the language of § 231(a)(3) shows that the law was meant to burden expression rather than serve a compelling government interest. Under strict scrutiny, no compelling governmental interest that arises under § 231(a)(3) can justify its impermissible purpose and its weighty burden on protected expression.

D. The § 231(a)(3) charge must be dismissed because it is unconstitutionally vague

Count One of the Indictment must also be dismissed because § 231(a)(3) is unconstitutionally vague in violation of the Due Process clause because it chills protected speech, provides inadequate notice of criminal conduct, and invites arbitrary and discriminatory enforcement and prosecution.

"The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (internal quotation marks omitted). Vague laws offend the values of fair warning, non-

discriminatory enforcement of the law, and First Amendment freedoms. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A criminal statute is void for vagueness when it (1) "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," *United States v. Harriss*, 347 U.S. 612, 617 (1954); or (2) "encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

Vagueness concerns are most acute when the statute imposes criminal penalties and implicates the First Amendment by chilling exercise of protected expression. *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982); *see Smith v. Goguen*, 415 U.S. 566, 573 (1974) (Where "a statute's literal scope [reaches] expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."). Thus, § 231(a)(3) is subject to a particularly high level of scrutiny under this test. And because the statute's imprecise language both hinders a person of ordinary intelligence from discerning what conduct is prohibited and invites arbitrary and discriminatory enforcement, Count One must be dismissed.

For the same reasons the terms of the statute lend to its overbreadth, a person of ordinary intelligence must guess at the meaning of § 231(a)(3). *See* Section III.C.1. The terms and phrases "any act," "obstruct, impeded, or interfere," and "incident to and during the commission of a civil disorder" are extremely vague, and there is no articulated nexus between "the act" and the "civil disorder." *See id.* These phrases leave open the door for endless subjectivity, denying defendants fair notice and encouraging arbitrary enforcement. *See United States v. Kozminski*, 487 U.S. 931, 949-50 (1988) (holding statute unconstitutionally vague where liability "depend[ed] entirely upon the victim's state of mind").

The lack of express mens rea requirement under the statute further contributes to its vagueness. The Supreme Court has repeatedly affirmed 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." *Vill. of Hoffman Ests.*, 455 U.S. at 499. Without such mitigation, § 231(a)(3) creates "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Because the statute omits an express mens rea requirement, it is left to police, prosecutors, and judges to decide whether the statute requires knowledge or specific intent or neither. The absence of a scienter/mens rea element weighs in further favor of the statute's unconstitutionality.

A South Carolina ordinance with similar language to § 231(a)(3) was found unconstitutionally vague in *McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 554 (D.S.C. 2013). That ordinance provided: "It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties." *Id.* at 546. The *McCoy* court relied heavily on *Hill* in finding the ordinance unconstitutionally vague. First, the court noted that the ordinance in *Hill* covered protected speech: "though the City of Houston's ordinance [in *Hill*] did not specifically proscribe speech, it prohibited interruption 'in any manner,' so it must have prohibited both physical and verbal interruptions . . . and must have prohibited both physical and verbal opposition, molestation, and abuse." *Id.* at 549. Although the ordinance in *McCoy* also "[did] not specifically proscribe speech," the court found that "interfere with or molest" was not limited to physical acts, as one can "interfere verbally" or molest by "verbally annoy[ing] or harass[ing] [an] officer." *Id.* at 550. Therefore, "[b]ecause the Ordinance [did] not include any limitation on the types of interference or molestation proscribed," the court concluded that "the Ordinance cover[ed] protected speech." *Id.* And, like § 231(a)(3), the ordinance in *McCoy* lacked a scienter

requirement. *Id.* at 553. Because the ordinance implicated protected speech, the *McCoy* court held that it "failed to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorize[d] or even encourage[d] arbitrary and discriminatory enforcement." *Id.* at 552.

Like the ordinance in *McCoy*, § 231 (a)(3) "includes no objective standard to guide the police in determining that conduct constitutes unlawful interference," without which, the statute "authorizes, if not encourages, discriminatory enforcement." *Id.* Similarly, § 231(a)(3) proscribes interference with law enforcement duties, with no standard to guide law enforcement to discern what that interference should entail. Clarity cannot be found in the neighboring words, which are equally vague. By reaching a substantial amount of expressive conduct, and without clear boundaries, § 231(a)(3) chills free speech and invites discriminatory application by law enforcement and the government.

E. The rule of lenity dictates that Count One must be dismissed

Even if the Court finds that Count One as charged and § 231(a)(3) are not constitutionally infirm, it is plainly not unambiguously so. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates v. United States*, 574 U.S. 528, 547-48 (2015). The rule of lenity is applicable here, where the government urgers a reading of § 231(a)(3) that exposes individuals to 5-year prison sentences for committing *any* act that "obstruct[s], impede[s], or interfere[s]," with a law enforcement officer's duties during a civil disorder, which is *any way or degree* "obstructs, delays, or adversely affects commerce" or the performance of a "federally protected function." In determining the meaning of those terms, as they are used in § 231(a)(3), it would be "appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 548.

Because it failed to do so and the government has accused Mr. Manley such that it is not "clear and definite" that his conduct violates § 231(a)(3), this Court should resolve any ambiguities in Mr. Manley's favor by dismissing Count One. *See Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

IV. Conclusion

For the aforementioned reasons, Count One suffers from the following constitutional defects: (1) facial insufficiency, in violation of the Sixth Amendment; (2) exceeding Congress's Commerce Clause authority by reaching purely intrastate interactions between individuals and local law enforcement officers that have always been the province of the States; (3) violating the First Amendment as a substantially overbroad regulation of protected expression, and a content-based restriction on expression that fails strict scrutiny; and (4) using overly vague terms, violating the Fifth Amendment's Due Process Clause. Accordingly, Count One must be dismissed.

WHEREFORE, for all the reasons set forth above, as well as any other reasons which may become apparent at a hearing or the Court deems just, Defendant Manley respectfully requests that the Court grant this Motion and dismiss Count One of the Indictment.

Respectfully submitted,

/s/ Natasha Taylor-Smith
NATASHA TAYLOR-SMITH
Assistant Federal Defender

CERTIFICATE OF SERVICE

I, Natasha Taylor-Smith, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I caused a copy of the foregoing Defendant's Motion to Dismiss to be served by Electronic Case Filing ("ECF") upon Robert Craig Juman, Assistant United States Attorney, United States Attorney's Office, 500 E. Broward Blvd., Ft. Lauderdale, FL 33132, and Zachary Phillips, Assistant United States Attorney, United States Attorney's Office, 1801 California Street, Suite 1600, Denver, CO 80202.

/s/ Natasha Taylor-Smith
NATASHA TAYLOR-SMITH
Assistant Federal Defender

DATE: July 18, 2022