UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**No. 1:21-cr-691-TSC**
	:	
v.	:	
	:	
CHRISTIAN MATTHEW MANLEY,	:	
Defendant	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT ONE

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to defendant Christian Manley's Motion to Dismiss Count One of the Indictment, ECF No. 28, (hereinafter, "Defendant's Motion" or "Manley's motion"). Count One alleges Manley violated 18 U.S.C. § 231(a)(3). His arguments lack merit, and the motion should be denied.

BACKGROUND

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

From approximately 2:45 to 5:05 p.m., rioters occupied the area of the Capitol known as the Lower West Terrace ("LWT"). In the center of the LWT is an archway leading to an entrance to the Capitol Building. During this period, Metropolitan Police Department ("MPD") and U.S.

Capitol Police ("USCP") officers were defending the archway entrance from rioters attempting to break through and enter the Capitol.

From at least approximately 2:50 p.m., Manley was among the rioters at the LWT. On January 6, 2021, Manley brought two cans of bear deterrent/pepper spray, a collapsible police baton, and handcuffs with him. When first approaching the tunnel located in the LWT, Manley was holding bear deterrent/pepper spray. Manley was wearing a flak jacket, tan backpack, grey shirt, and baseball cap.

From his various positions in the LWT, Manley could see rioters attacking the officers defending the archway with, among other things, baseball bats, pepper spray, riot shields, and poles.

At approximately 2:53 p.m., Manley moved directly toward the archway of the tunnel in the LWT. Upon entering the archway, Manley had the bear deterrent/pepper spray in his left hand and then moved it to his right hand. Manley then sprayed the bear deterrent/pepper spray towards officers defending the tunnel. Immediately after emptying the spray, Manley threw the bear deterrent/pepper spray canister towards officers.

Manley then moved towards the rear of the archway where he assisted other rioters in removing police shields which were taken from officers and passed outside the tunnel to other rioters. Manley passed at least three riot shields from inside the tunnel to other rioters outside the tunnel. While passing one of the shields, Manley turned to the rioters outside the tunnel and yelled, "let's go!"

At approximately 2:55 p.m., Manley again sprayed officers with bear deterrent/pepper spray. While Manley was spraying the officers, other rioters were throwing objects at the officers protecting the tunnel.

Again, once the bear deterrent/pepper spray canister was empty, Manley threw the canister at the officers. In addition to throwing the two canisters towards officers, while in the tunnel, Manley threw a pipe towards officers as well as another unknown object. Further, Manley again assisted other rioters in passing police riot shields to other rioters to use against officers protecting the Capitol.

At approximately 2:57 p.m., Manley made his way to the front of the tunnel where the doors are situated on the Capitol. Manley positioned himself behind one of the doors and wedged his body against the wall and pushed the door against officers protecting the Capitol.

At approximately 2:59 p.m., Manley exited the tunnel while wiping his eyes. Manley walked down the stairs of the LWT waiving to other rioters for them to enter the archway.

Based on his actions on January 6, 2021, Manley was charged with the following: Count One, 18 U.S.C. § 231(a)(3) (Civil Disorder); Count Two, 18 U.S.C. § 111(a)(1) (Assault, Resisting, or Impeding Certain Officers); Count Three, 18 U.S.C. § 111(a)(1) and (b) (Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon); Count Four, 18 U.S.C. § 1752(a)(1) and (b)(1)(A) (Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon); Count Five, 18 U.S.C. § 1752(a)(2) and (b)(1)(A) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon); Count Six, 18 U.S.C. § 1752(a)(4) and (b)(1)(A) (Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon); Count Seven, 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building); and Count Eight, 40 U.S.C. § 5104(e)(2)(F) (Act of Physical Violence in the Capitol Grounds or Buildings). (ECF No. 6).

Manley now moves to dismiss Count One. (ECF No. 28). Manley contends § 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. (ECF No. 28, at 1). Manley also argues that the rule of lenity dictates that Count One must be dismissed in his memorandum of support. (ECF No. 28, at 25).

Each of Manley's arguments is without merit. The motion should be denied.

ARGUMENT

I. COUNT ONE OF THE INDICTMENT SETS FORTH ALL ELEMENTS NECESSARY TO CONSTITUTE A VIOLATION OF § 231(A)(3).

Manley misunderstands the purpose of an indictment and the low bar an indictment must clear to satisfy the federal rules and Constitution. Federal Rule of Criminal Procedure 7(c)(1) states, in relevant part, "[t]he indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged," and that "[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." As the D.C. Circuit explained in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), "[a]lthough an indictment must – in order to fulfill constitutional requirements – apprise the defendants of the essential elements of the offense with which they are charged, neither the Constitution, the Federal Rules of Criminal Procedure, nor any other authority suggests that an indictment must put the defendants on notice as to every means by which the prosecution hopes to prove that the crime was committed." *Id.* at 124. Indeed, "the validity of an indictment 'is not a question of whether it could have been more

definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)).

"While detailed allegations might well have been required under common-law pleading rules, . . . they surely are not contemplated by Rule 7(c)(1), which provides that an indictment 'shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007). As a mere notice pleading, an indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Id.* at 108; *Haldeman*, 559 F.2d at 123 ("The validity of alleging the elements of an offense in the language of the statute is, of course, well established."). An indictment is sufficient if it "first . . . contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second . . . enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Resendiz-Ponce*, 549 U.S. at 108 (cleaned up) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The indictment "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007). Only in the rare case where "guilt depends so crucially upon . . . a specific identification of fact" not included in the statutory language will an indictment that restates the statute's language be insufficient. *Haldeman*, 559 F.2d at 125 (quoting *Russell v. United States*, 369 U.S. 749, 764 (1962)).

Applying these principles, courts in this District have upheld the sufficiency of indictments far less specific than Manley's. For example, in *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017), the defendants were charged with offenses under 18 U.S.C. § 924(c). The indictment provided only "general detail as to the places where the offenses were committed:

namely, Mexico and the United States." *Id.* at 154. Regarding the time of the offense, the indictments alleged that the offenses had occurred over a two- and nine-year period. *Id.* Finally, the indictments "d[id] not specify a particular weapon that was possessed," or "specify whether the firearms were 'used, carried or brandished'" under the statute. *Id.* Nonetheless, the indictments in *Apodaca* were sufficient. *Id.* at 153-54.

Count One of Manley's indictment states that:

> On or about January 6, 2021, within the District of Columbia, CHRISTIAN 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 official duties incident to and during the commission of a civil disorder which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce and the conduct and performance of any federally protected function.

(ECF No. 6, at 2).

Count One of Manley's indictment is more specific than that in *Apodaca*. Here, Count One alleges the offenses took place specifically in this District. (ECF No. 6). Here, Count One notifies Manley of the exact day on which the alleged crime occurred: January 6, 2021. *Id.* And here, Manley admits that "Count One of the Indictment tracks the language of § 231(a)(3)." *Id.*; and (ECF No. 28, at 9). Manley demands specificity not required under the Constitution, the Federal Rules, or precedent in this District.

Manley's "complaint seems to result . . . from a general misunderstanding of the purpose of the indictment and, especially, from an inflated notion of what must be included therein."

Haldeman, 559 F.2d at 124. As the D.C. Circuit concisely explained in rejecting a similar argument in *Verrusio*:

> Verrusio contends that Count Two of the indictment failed to allege an official act because it failed to say "how Mr. Verrusio was going to use his position" to help United Rentals . . . . The indictment certainly need not allege precisely how Verrusio contemplated [committing the crime]. Would he do it by himself or ask someone else to do it? Would that someone else be Colonel Mustard or Professor Plum? With a candlestick or a rope, in the library or the study? Answering those questions is not required at the indictment stage.

762 F.3d at 14–15; *see also United States v. Williamson*, 903 F.3d 124, 131 (D.C. Cir. 2018) (affirming denial of a motion to dismiss a count charging the defendant with making a threat against a federal law enforcement officer "with intent to retaliate against such . . . officer on account of the performance of official duties," 18 U.S.C. § 115(a)(1)(B), because the "statute speaks in terms of a threat made 'on account of the performance of official duties,' not to draw attention to a particular official duty, but instead to assure that the threat generally relates to the officer's performance of official duties rather than to a personal dispute having nothing to do with the officer's job functions"). Manley's specificity argument fails.

Manley relies on *United States v. Hillie*, 227 F. Supp. 3d 57 (D.D. C. 2017), to argue that the indictment here is deficient. But the challenged indictment in *Hillie* only broadly stated the date of the offenses as "periods of time that span two to three years," the location of the offenses as "the District of Columbia," and was "devoid of any facts regarding the circumstances of *Hillie's* behavior" that led to the charges. *Id.* at 71-72. Indeed, the court in *Hillie* found it especially problematic that the government charged violations of the same statute in overlapping, multi-year periods, such that "one cannot tell whether the charges relate to distinguishable or separate offenses . . . and, indeed, it is not clear that these counts even reference different acts on the Defendant's part." Id. at 73. Here, there is no such problem. As noted above, the indictment tracks the statute, specifies the date of the offenses ("January 6, 2021"), and specifies their precise location ("within

the District of Columbia"). *See Resendiz-Ponce*, 549 U.S. at 108 (upholding sufficiency of indictment that echoed statute while specifying time and place of the offense and identity of the threatened officer); *Williamson*, 903 F.3d at 131 (same). Manley is in no way uncertain about what conduct "allegedly constitut[es] the offense." *Hillie*, 2127 F. Supp. 3d at 76. Manley is able to prepare a defense or invoke double jeopardy if he were prosecuted again for the same conduct.

II. SECTION 231 IS WITHIN CONGRESS' PLENARY POWER, WITHIN THEIR COMMERCE CLAUSE AUTHORITY, AND THE GOVERNMENT HAS A SECOND MEANS TO PROVE HIS CONDUCT VIOLATED 231 WHICH IS IGNORED BY MANLEY.

Manley's claim that Congress exceeded their Commerce Clause authority with § 231 fails because: 1) Congress has *plenary* power under Article I, Section 8, Clause 17, to legislate regarding matters affecting the District of Columbia; 2) the statue is within Congress's Commerce Clause authority because the statute includes an express jurisdictional element; and 3) the Government has alleged a second theory to prove Manley violated § 231 which he fails to challenge.

A. COUNT ONE'S ALLEGATION THAT MANLEY INTERFERED WITH POLICE DURING A CIVIL DISTURBANCE THAT AFFECTED COMMERCE IN THE DISTRICT OF COLUMBIA SUFFICIENTLY STATES A VIOLATION OF 18 U.S.C. 231(A)(3).

Manley contends that § 231(a)(3) violates the Commerce Clause of Article I, Section 8, Clause 3. (ECF No. 28, at 8). That claim is both misdirected and meritless because Congress's power under the Commerce Clause is not at issue in this case. In addition to its *limited* power to regulate foreign and interstate commerce under Clause 3, Congress has *plenary* power under Article I, Section 8, Clause 17, to legislate regarding matters affecting the District of Columbia. Congress exercised its Clause 17 power in 18 U.S.C. § 231(a)(3), which prohibits, *inter alia*, obstructing police officers performing their official duties during a civil disorder which has "any effect whatsoever" on commerce "within the District of Columbia." *See* 18 U.S.C. § 232(2)(C).

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

Regardless of whether § 231(a)(3) exceeds Congress's power under the Commerce Clause—and it does not—for cases such as Manley's involving criminal conduct committed wholly within the District of Columbia, that statute is within Congress's power under Clause 17. It states:

> The Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States….

U.S. Const. Art. I, § 8, Cl. 17.

Congress's power under Clause 17 "is plenary." *Palmore v. United States*, 411 U.S. 389, 397 (1973); s*ee also Hyde v. S. Ry. Co.*, 31 App. D.C. 466, 469 (D.C. Cir. 1908) ("The legislative power of Congress over the District of Columbia and the Territories [is] plenary, and [is] not depending upon the interstate-commerce clause"). "Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore*, 411 U.S. at 397. "Congress may legislate within the District for every proper purpose of government," and "[w]ithin the District of Columbia, there is no division of legislative powers such as exists between the federal and state

governments." *Neild v. D.C.*, 110 F.2d 246, 249 (D.C. Cir. 1940) (citing *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); and *O'Donoghue v. United States*, 289 U.S. 516 (1933)). "[W]hen it legislates for the District, Congress … exercise[es] complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." *Neild*, 110 F.2d at 250-51. "Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State . . . so long as it does not contravene any provision of the constitution of the United States.'" *Palmore*, 411 U.S. at 397 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)).

When enacting § 231(a)(3), Congress relied on its Clause 17 power. That statute prohibits "any act" that "obstruct[s], impede[s], or interfere[s] with any . . . law enforcement officer . . . engaged in [his] official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 231(a)(3) (emphasis added). "Commerce," as used in § 231(a)(3), "means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; *or (C) wholly within the District of Columbia*." 18 U.S.C. 18 U.S.C.A. § 232(2) (emphasis added).

Count One of the Indictment charges that 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 official duties incident to and during the commission of a civil disorder *which in any way and degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce…*

ECF No. 6, at 2 (emphasis added). Regardless of whether Congress had authority under the Commerce Clause to regulate such conduct in jurisdictions other than the District of Columbia, it did not and could not exceed its "plenary authority" to exercise "police power" within the District of Columbia. *See generally Darnell v. Markwood*, 220 F.2d 374, 375-77 (D.C. Cir. 1954) (reversing dismissal of complaint under the Sherman Act, 15 U.S.C. §§ 1, 2, and 3, alleging that defendants "restrain[ed] interstate trade and commerce, and trade and commerce in the District" of Columbia; although defendants' activities wholly within the District of Columbia "do not come within the control of the Commerce Clause, or, therefore, within either Sections 1 or 2 of the Sherman Act," "Section 3 … is not dependent upon the Commerce Clause but rests upon the plenary legislative power of Congress within the District of Columbia").

Last week, Judge Colleen Kollar-Kotelly rejected this same challenge § 231. *See United States v. Christopher Ray Grider*, 1: 21-cr-00022-CKK, ECF No. 114, at 7-8 (D.D.C. July 29, 2022) ("The Constitution endows Congress with plenary power over the District of Columbia."). Judge Kollar-Kotelly stated that "[n]ot only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Id.* at 7 (citing to *Palmore*, 411 U.S. at 397 (1973)). Judge Kollar-Kotelly stated that "[t]he prohibition of riots is, of course, a central police power and is one of the oldest common law and statutory crimes of Anglo-American law." *Id.* (citations omitted).

Because § 231(a)(3) was a valid exercise of Congress's 17 power, it is of no moment that the Commerce Clause does not also provide Congress with a basis to enact that statute. All of Manley's challenges to the commerce element of § 231(a)(3) are beside the point, because all are grounded upon limitations on Congress's power under Clause 3. (ECF No. 28, at 8-17).

Even for criminal statues with nation-wide application that do not single out commerce within the District for special protection, as § 232(2)(C) does with respect to § 231(a)(3), Commerce Clause challenges to prosecutions for crimes occurring wholly within the District must fail. *See United States v. Mahdi*, 598 F.3d 883, 896 (D.C. Cir. 2010) (rejecting claim that VICAR, 18 U.S.C. § 1959, "is facially unconstitutional as it violates the Commerce Clause"; "[I]t is impossible to see how a statute regulating conduct within the District of Columbia could exceed congressional authority under the Commerce Clause . . . Even if there were some doubt about § 1959's constitutionality outside the District of Columbia, 'we need not find the language of [§ 1959] constitutional in all its possible applications in order to uphold its facial constitutionality.'") (citation omitted); *accord United States v. Carson*, 455 F.3d 336, 368 (D.C. Cir. 2006) ("Within the District, Congress did not need to rely on its Commerce Clause authority.").

This Court should reject Manley's challenge to the commerce predicate in Count One, where Congress expressly targeted civil disorders that affected commerce within the District of Columbia.

B. COUNT ONE SUFFICIENTLY ALLEGES THAT THE CAPITOL RIOT ADVERSELY AFFECTED INTERSTATE COMMERCE.

Although this Court need not reach Manley's Commerce Clause challenge to § 231(a)(3), if it does, it should reject it. Judge Boasberg and district judges in other judicial districts that have addressed similar claims have held that § 231(a)(3) does not exceed Congress's Commerce Clause authority, even when applied to conduct outside the District of Columbia. "[T]he Court concurs with the Government and the other district courts that § 231(a)(3) contains a jurisdictional element that ensures a sufficient connection to interstate commerce in each application." *United States v. Mostofsky*, 2021 WL 6049891, at *7. "Section 231(a)(3) expressly limits the statute's sweep to instances where there is a civil disorder that affects interstate commerce and a defendant obstructs

law-enforcement officials lawfully conducting their duties incident to such disorder." *Id.*; s*ee also United States v. United States v. Phomma*, 561 F. Supp. 3d 1059, 1065 (D. Or. 2021) (notwithstanding *Lopez* and *Morrison*, "§ 231(a)(3) is within Congress's Commerce Clause authority because the statute includes an express jurisdictional element, requiring that the defendant's obstruction or interference with a law enforcement officer or firefighter must occur 'during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce.'"); *accord United States v. Howard*, 2021 WL 3856290, at *11 (E.D. Wis. Aug. 30, 2021); *United States v. Wood*, 2021 WL 3048448, at *4–6 (D. Del. July 20, 2021); *United States v. Pugh*, 1:20-cr-00073-TFM-B, ECF95 at 7-11 (S.D. Ala., May 13, 2021); *see generally United States v. Huff*, 630 F. App'x 471, 484-85 (6th Cir. 2015) (unpublished) (rejecting Commerce Clause challenge to a charge of transporting a firearm in furtherance of a civil disorder, in violation of 18 U.S.C. § 231(a)(2)).

In mounting his Commerce Clause challenge, Manley principally relies on *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). In both cases, the challenged statutes contained no "jurisdictional element" that required the Government to prove that the offense conduct affected interstate commerce. *Lopez*, 514 U.S. at 561-62 (Gun Free Schools Zone Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," in contrast to former 18 U.S.C. § 1202(a), "which made it a crime for a felon to 'receiv[e], posses[s], or transpor[t] in commerce or affecting commerce ... any firearm"); *Morrison*, 529 U.S. at 613 (Violence Against Women Act, "[l]ike the Gun-Free School Zones Act at issue in *Lopez*, . . . contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate

interstate commerce"; "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime").

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

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

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

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

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

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

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

The other on-point decisions agree. Contrary to Manley's contention that Congress's power under the Commerce Clause does not allow it to regulate non-commercial criminal activity, ECF No. 28, at 10, "under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction." *United States v. Hill*, 927 F.3d 188, 193 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 272 (2020) (federal Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249(a)(2), "may be constitutionally applied to an unarmed assault of a victim engaged in commercial activity at his place of work"). And contrary to Manley's contention that Congress's power under the Commerce Clause applies only to conduct that has a "substantial effect" on interstate commerce, ECF No. 28, at 12, "Congress may regulate violent conduct interfering with interstate commerce even when the conduct itself has a 'minimal' effect on such commerce." *Hill*, 927 F.3d at 199 (citing *Taylor v. United States*, 579 U.S. 301, 309 (2016) (upholding Hobbs Act conviction for robbery of a drug dealer; "where the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect.").

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

C. MANLEY'S CONDUCT ADVERSLY AFFECTED A FEDERALLY PROTECTED FUNCTION.

Manley claims that to convict him of violating 18 U.S.C. § 231(a)(3), that the Government must prove beyond a reasonable doubt that Manley committed "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." (ECF No. 28, at 8). That is wrong. Conduct involving a civil disorder that affects commerce or the movement of any article or commodity in commerce is one of two independent ways to violate § 231(a)(3):

> 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) (emphasis added).

As such, § 231(a)(3) is "a so-called 'divisible statute' . . . [that] sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile." *Descamps v. United States*, 570 U.S. 254, 257 (2013). As explained below, even if the Government could not factually or legally prove that Manley's conduct affected commerce or the movement of any article or commodity in commerce (which the Government can, as discussed above), that would be no basis to dismiss Count One. That's because the Indictment sufficiently alleged an adverse effect on the performance of any federally protected function within the District of Columbia.

Because Count One can stand on the independent ground that the Capitol riot allegedly affected a federally protected function in the District of Columbia (as well as commerce within the

District of Columbia and between the states), this Court need not resolve this claim. *Cf. Mostofsky*, 2021 WL 6049891, at *3 ("Since the Court can resolve the Motion purely on Commerce Clause grounds, it need not decide at this point whether any 'federally protected function' was affected that day.").

Manley does not challenge the ability of the Government to prove if his actions adversely affected a federally protected function. However, if this Court elects to address this claim, it should reject it. Count One sufficiently alleges an adverse effect on an Executive Department or agency.

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.

18 U.S.C. § 232(3).

Section 232(3)'s definition of "federally protected function," speaks broadly of "any function, operation, or action" performed under federal law, but specifies that such function, operation, or action be carried out by a "department, agency, or instrumentality of the United States or by an officer or employee thereof." "Law enforcement officer" is defined expansively to include "any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia[.]" 18 U.S.C. § 232(7).

The definition and use of the term, "federally protected function," also reveals the statute's broad scope. That term appears only three times in the United States Code—exclusively in connection with the civil disorder statute at issue here. *See* 18 U.S.C. §§ 231(a)(1), 231(a)(3), and 232(3). As used in § 231(a)(1) and (3), the term "federally protected function" appears alongside

(and as an alternative to) a broad invocation of Congress's expansive power to regulate under the Commerce Clause. In that context, "federally protected function" demonstrates Congress's intent to ensure that its anti-riot statute could reach any unlawful interference with law enforcement officers during a civil disorder that the federal government has authority to regulate.

If this case proceeds to trial, the government will rely on the following three instances of federally protected functions in order to prove a violation of § 231(a)(3).

1. The Vice-President's Participation In The Congressional Certification Vote Was Performing A Federally Protected Function.

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

2. The Capitol Police Protecting The U.S. Capitol Were Performing A "Federally Protected Function."

The Capitol Police have a statutory obligation to protect the U.S. Capitol. *See* 2 U.S.C. § 1961 (Capitol Police "shall police the United States Capitol Buildings and Grounds," and shall do so "under the direction of the Capitol Police Board"). The "purpose" of the Capitol Police Board, in turn, is "to oversee and support the Capitol Police in its mission." Pub. L. No. 108-7, div. H, § 1014(a)(1). Because an agency includes any "board," 18 U.S.C. § 6, it includes the

Capitol Police Board. And the Capitol Police, as its website describes, is "a federal law enforcement agency." *See* https://www.uscp.gov/the-department.

Law enforcement officers engaged in a regular responsibility—such as protecting the Capitol—whose responsibility is adversely affected by a civil disorder are no less protected under the statute than any other law enforcement officials. The courts have upheld convictions for violating § 231(a)(3) under similar circumstances. *See United States v. Dodge*, 538 F.2d 770, 780 (8th Cir. 1976) (law enforcement officers responding to civil disorder on federal enclave were "engaged in a federally-protected function"); *United States v. Jaramillo*, 380 F. Supp. 1375, 1377-78 (D. Neb. 1974) (§ 231(a)(3) properly invoked where the defendant interfered with FBI agents when they were responding to the Wounded Knee reservation for the purpose of "investigating [] reported crimes and the operation of the post office"; both were federally protected functions and "there was interference of both by the occupation of Wounded Knee").

3. **The U.S. Secret Service Protecting The Vice President Was Performing A Federally Protected Function.**

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

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

III. MANLEY'S FIRST AMENDMENT CHALLENGE TO COUNT ONE IS MERITLESS.

Manley contends that § 231(a)(3) is unconstitutionally overbroad under the First Amendment because it "imposes steep criminal penalties on an expansive range of speech and expressive conduct" and that § 231(a)(3) was enacted for "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." (ECF No. 28, at 15). Although, Manley makes conclusory statements about unrelated and irrelevant conduct he believes would violate § 231(a)(3), he makes no mention of his own conduct on January 6, much less explain how charging him with a violation of § 231(a)(3) undermined his own First Amendment rights that he intended to exercise that day. *Id.* at 15-22. Indeed, he does not even address the differences between "as applied" and facial First Amendment challenges.[1] Manley avoids addressing how attacking law enforcement at the Capitol was a First Amendment activity. Rather, his argument presents only facial challenges to the statute that do not depend in any way on its application to this case.

For instance, Manley argues that "by penalizing 'any act,' § 231(a)(3) reaches to the outer limits of verbal and expressive conduct without drawing any distinction that could exclude acts

[1] One raising a facial challenge must establish "that no set of circumstances exists under which [the challenged statute] would be valid or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010). The person challenging the statute need not show injury to himself. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). On the other hand, to prevail on an as-applied First Amendment challenge, the person challenging the statute must show that the regulations are unconstitutional as applied to their particular speech activity. *See Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984); *accord, Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014).

undertaken merely to convey a message or symbolic content." (ECF No. 28, at 16). He also contends that the word, "interfere," as it appears in the statute but which the statute does not define, "reaches a broad range of speech and expressive conduct." *Id.* at 16-17.

As every other judge in this district who has addressed this precise claim has held, 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 recently addressed an overbreadth challenge to § 231(a)(3). *See Williams*, 2022 WL 2237301, at *6-7. 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.[2] Judge 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

[2] Citing *United States v. McHugh*, 2022 WL 296304, at *17; *Mostofsky*, 2021 WL 6049891, at *8–9; *United States v. Nordean*, 2021 WL 6134595, at *17; and *United States v. Fischer*, 2022 WL 782413, at *3. Judge Berman Jackson also cited three out of district cases that reached the same result. *Williams*, 2022 WL 2237301, at *6, citing *Howard*, 21-cr-28 (PP), 2021 WL 3856290, at *11-12; *Phomma*, 561 F. Supp. 3d at 1067-68; and *Wood*, 2021 WL 3048448, at *7-8.

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)). 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); and *McHugh*, 2022 WL 296304, at *13 (same).

Those decisions properly applied controlling law. 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," *Hicks*, 539 U.S. at 124.

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 Viet Nam 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.* Manley, like in *Mechanic*, was a rioter performing acts of violence and his conduct is not protected by the First Amendment.

Apparently seeking to identify "a substantial number" of unconstitutional applications of § 231(a)(3), Manley contends the statute's prohibitions would apply to someone who "flips off officers to distract or to encourage resistance," or "records police activity with a cell phone." (ECF No. 28, at 17). He also contends that "civil disorder" which is "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of ... injury to the property," is "extremely far-reaching." *Id.* at 17-18. This would apply, he contends, to "three teenagers whose skateboarding damages property." *Id.* at 18.

Manley's examples 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). Manley 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.*

And because "the statute does not attempt to curtail speech the defendants may not challenge it as vague or overly broad if their own conduct may be constitutionally prohibited, since … one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Mechanic*, 454 F.2d at 853 (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)). Finally, "it is not just any public disturbance which is the subject of the section, but only public disturbances which (1) involve acts of violence (2) by assemblages of three or more persons, and which (3) cause immediate danger of or result in injury to (4) the property or person of any other individual." *Id.*

Manley's second argument against § 231(a)(3) attempts to use the words of one senator to "cloud a statutory text that is clear." *See Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). "Legislative

history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011); *Bd. of Educ. v. Mergens*, 110 S. Ct. 2356, 2368 (1990) ("We think that reliance on legislative history is hazardous at best . . . ."); *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1056 (1981) ("Resort to the legislative history of a statutory provision is not necessary when the meaning of the provision is plain from its language."). Manley ignores the words and intent of the other 534 congressmen and woman, the President, and every ruling on this issue in this District to create ambiguity where none exists.

Even if the legislative history was informative, which it is not, Manley's objections to the motives behind the legislation is no basis to find it unconstitutional if it does not target, directly or indirectly, protected minorities. *See Howard*, 2021 WL 3856290, at *7 (rejecting a similar challenge to § 231(a)(3)); *Wood*, 2021 WL 3048448, at *4 (same).

Manley 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.

IV. MANLEY'S VAGUENESS ARGUMENT IGNORES PRECIDENT AND THE PLAIN LANGUAGE OF THE STATUTE.

Manley's argument misconstrues the vagueness doctrine. The challenger must overcome the "strong presumptive validity that attaches to an Act of Congress," which has led the Supreme Court "to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language," *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Nor is a statute impermissibly vague because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances. *Skilling v. United States*, 561 U.S. 358, 403 (2010). Rather, a statute is vague only if it requires proof of an "incriminating fact" that is so indeterminate

as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306. The "touchstone" of the vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

Every court to consider vagueness challenges to § 231(a)(3) has rejected them. *E.g., Mechanic*, 454 F.2d at 853–54 ("§ 232, read in conjunction with § 231(a) (3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it"); *United States v. Banks*, 368 F. Supp. 1245, 1247 (D.S.D. 1973) (rejecting vagueness challenge to § 231(a)(3), following *Mechanic*), *abrogated on other grounds by United States v. Auginash*, 266 F.3d 781 (8th Cir. 2001); *see generally Wood*, 2021 WL 3048448, at *9 ("Defendant does not have standing to bring a facial vagueness challenge" to § 231(a)(3) because he failed to "demonstrate that [the statute] is vague as applied to his conduct"); *cf. United States v. Huff*, 630 F. App'x at 487-89 (unpublished) ("we reject Huff's void-for-vagueness argument [regarding § 231(a)(2) in all respects").

Manley ignores those decisions and argues that 18 U.S.C. § 231 is void for vagueness because "it chills protected speech, provides inadequate notice of criminal conduct, and invites arbitrary and discriminatory enforcement and prosecution." (ECF No. 28, at 22). A statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Johnson v. United States*, 576 U.S. 591, 612 (2015); *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)); *see also United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). As at least one judge in this district has concluded that neither applies to § 231. S*ee Nordean*, 2021 WL 6134595,

at *6. Constitutional statutory analysis begins with the statute's plain language. *United States v. Shill*, 740 F.3d 1347, 1351 (9th Cir. 2014).

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. at 607. Section 231(a)(3) criminalizes "any act to obstruct, impede, or interfere with any fireman or law enforcement officer" who is engaged in the lawful performance of his official duties during a civil disorder that obstructed, delayed, or adversely affected the conduct or performance of a federally protected function. 18 U.S.C. § 231(a)(3). And it does so in the context of a civil disorder, which is "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).

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

Here, Manley states "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." (ECF No. 28, at 23). The civil disorder statute punishes intentional conduct directed against firefighters and law enforcement officers working to protect

the public during violent protests. The statute prohibits only concrete "act[s]" that are performed with the specific purpose to "obstruct, impede, or interfere" with firefighters or law enforcement. Contrary to Manley's arguments, those terms are 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." *See Williams*, 553 U.S. at 306*; see also Nordean*, 2021 WL 6134595, at *16 ("Section 231(a)(3) does not carry the potential for misunderstanding or arbitrary enforcement . . . It prohibits any 'act' done "to obstruct, impede, or interfere" with law enforcement responding to a 'civil disorder.' 18 U.S.C. 231(a)(3). These terms are not 'dependent on the subjective reaction of others.").

The statute's scope consists primarily, if not exclusively, of conduct or unprotected speech, such as threats. In other words, the civil disorder statute prohibits not the presence at a civil disorder, but rather, "an act committed during the course of such disorder." *Mechanic*, 454 F.2d at 853. It covers intentional conduct, not "mere inadvertent conduct." *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972). Moreover, § 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. *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).

Manley's argument that the statute lacks an express mens rea ignores the fact that § 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). 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 § 231(a)(3) to include an intent requirement). This requirement that a defendant who violates § 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). 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.").

In *Williams*, Judge Berman Jackson 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." 2022 WL 2237301, 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 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").

As discussed above, because "the statute does not attempt to curtail speech the defendants may not challenge it as vague or overly broad if their own conduct may be constitutionally prohibited, since … one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Mechanic*, 854 F.2d at 853. However, Manley does not want to discuss his own conduct on January 6, 2021. Instead, he relies on the interpretation of a local ordinance in South Carolina instead of this District's interpretation of the statute at issue.

Manley relies on an argument that has failed repeatedly in this District. He argues that *McCoy v. City of Columbia*, 929 F. Supp. 2d 541 (D.S.C. 2013), which invalidated a local ordinance making it "unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties," is analogues. *Id.* at 546. A federal court's interpretation of a local ordinance is much different from this Court interpreting a federal statute. "It is well-settled that federal courts have the power to adopt narrowing constructions of federal legislation . . . Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos v. Barry*, 108 S. Ct. 1157, 1169 (1988) (citations omitted).

Judges in this District have recognized this and uniformly declined to followed *McCoy*. Judge Royce Lamberth in *United States v. McHugh* stated, "unlike § 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 utilizing the noscitur a sociis canon to give those words 'more precise content by the neighboring words with which it is associated.'" *McHugh*, 2022 WL 296304, at n.24; and *see also Bingert*, 2022 WL 1659163, at n.6 (stating § 231(a)(3) "contains a number of additional words that clarify and narrow the statute. McCoy is not relevant here.").

Similarly, Judge Berman Jackson recently denied a motion to dismiss a vagueness challenge to § 231(a)(3). *See Williams*, 2022 WL 2237301, at *6-7. Judge Jackson dismissed another inartful comparison to a local ordinance, noting that § 231(a)(3) and its "familiar and more targeted language" was not comparable to a local ordinance. *Id.* at n.3. Judge Jackson then pointed to the standard jury instructions for obstructing officers, which may ameliorate any vagueness. *Id.*

Manley 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 vague.

V. THE RULE OF LENITY DOES NOT APPLY HERE.

Manley contends the rule of lenity requires dismissal of Count One. (ECF No. 28, at 25). This claim also fails. The rule of lenity provides that, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Even in its most robust form, the rule of lenity only applies when, "after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime." *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *accord Barber v. Thomas*, 560 U.S. 474, 488 (2010) (holding that the rule of lenity only applies if, after considering text, structure,

history, and purpose, there remains a '"grievous ambiguity or uncertainty in the statute," such that the Court must simply "guess as to what Congress intended.")

A criminal statute is ambiguous when, for instance, it "has two possible readings," one favorable to the defendant and the other unfavorable. *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *accord United States v. Santos*, 553 U.S. 507, 512 (2008) (finding a statutory term ambiguous where two plausible readings of the term existed). But Manley ignores this textual point and instead restates his overbroad and vagueness claims. (ECF No. 28, at 25).

Manley's "rule of lenity" attacks on § 231(a)(3) all ignore the statutory text, precedent in and out of this District, and common sense There is no ambiguity or uncertainty in the statute or this District's ruling on the constitutionality of § 231(a)(3).

CONCLUSION

The government respectfully requests that Manley's motion to dismiss Count One of the Indictment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, I caused a copy of the foregoing motion to be served on counsel of record via electronic filing.

/s/ Brian Brady
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