No.

In the Supreme Court of the United States

TIA PUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Pugh's prosecution under the Civil Obedience Act exceed Congress' authority to legislate interstate and foreign commerce?

2. Did Pugh's prosecution under the Civil Obedience Act violate her First Amendment Rights?

3. Is the language of the Civil Obedience so vague as to violate her Due Process Rights?

PARTIES TO THE PROCEEDING

All parties to this case are set out in the caption.

RULE 29.6 STATEMENT

No corporate entities are involved in this case.

STATEMENT OF RELATED CASES

There are no cases directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Tia Pugh respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Included in the Civil Rights Act of 1968–a landmark law that applied the Bill of Rights to American Indians and forbade racial housing discrimination–is the peculiar Civil Obedience Act of 1968. What is now 18 U.S.C. §231 was originally Title X of the 1968 Civil Rights Act, having been seemingly tacked on to the end of the bill. It was signed into law one week after Dr. King's assassination. The first individuals prosecuted under this Act were protestors at the 1968 Democratic National Convention in Chicago. While it was drafted with Vietnam War protestors and Black Panthers in mind, today it is used to charge protestors from both the left-wing and right-wing politically. With the revival of prosecutions under this law, it is time to revisit the Constitutionality of the language of this broad and vaguely-worded law.

OPINIONS BELOW

The opinion of the court of appeals is reported at 90 F.4th 1318. The orders denying the petitions for rehearing and rehearing *en banc* were not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2024. The petition for rehearing *en banc* was denied March 11, 2024. Pugh invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Your Petitioner was charged with and convicted of violating 18 U.S.C. §231(a)(3), which states:

> 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–
> Shall be fined under this title or imprisoned not more than five years, or both.

The Civil Obedience Act defines "civil disorder" as "...any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. §232(1).

STATEMENT

Concerning the United States District Court's jurisdiction, it has original jurisdiction, exclusive of State Courts, over all offenses against the laws of the United States (here, the Civil Obedience Act). 18 U.S.C. §3231. The incident made the basis of the charges occurred in Mobile, which makes venue proper in the Southern District

of Alabama. 18 U.S.C. §3237.

On May 31, 2020, Tia Pugh was one of thousands of participants in a march and rally in Mobile, Alabama, concerning the highly publicized deaths of George Floyd and Breonna Taylor as the result of encounters with law enforcement. This type of protest occurred many times over in cities much larger and smaller than Mobile. This was an authorized and fairly-well organized protest. The protest had been pre-approved by the City of Mobile. The City of Mobile Police Department was present for speeches given at Mardi Gras Park, near the Mobile Government Plaza, and Cathedral Park, across from the Cathedral of the Immaculate Conception, and stood along with protestors during the march.

Pugh, along with close to a thousand fellow citizens, marched down Water Street. The crowd turned down Government Street, heading in the direction of Government Plaza. A small portion of the crowd did not turn, and continued straight, near the U.S. Interstate Highway 10 on-ramp, located between the local maritime and children's museums. City of Mobile police officers quickly cut the small group off before reaching the ramp. Soon, a contingent of police officers with body armor and gas masks formed a wall in front of the protestors. They were flanked by mounted police.

While there had been shouting and chanting, no one in the smaller group tried to breach the police officer's formed line, or engage in any other type of physical contact with the officers. Close to a half-hour into this standoff, City of Mobile police fired tear gas into the crowd. At some point during the ensuing commotion, the front passenger window of a City of Mobile Police vehicle was broken.

Despite dozens of police officers, many in riot gear, being present, the broken window was not discovered until after the crowd disbursed. The City of Mobile Police Department called on the help of local television stations to find footage of the incident. After finding video and asking the public for help identifying the person of interest, the City of Mobile Police Department was arrested on misdemeanor charges. She was booked and posted bond with the City of Mobile Municipal Court.

This story should have concluded with Pugh pleading to the misdemeanors in city court and paying restitution to the police department. But the City of Mobile decided to make a federal case out of a broken window. Pugh was served with a complaint and arrested for violating the Civil Obedience Act. She then appeared in the United States District Court for the Southern District of Alabama, case no. 20-cr-00073.

Pugh went from protesting for the rights of others to asserting her own. She moved to dismiss the indictment as violating the United States Constitution. In response, the Government attempted to clean up problems in the first indictment and obtained a superseding indictment. Pugh continued moved to dismiss those charges as well, so she could go back to municipal court where this case belonged. Her motion was ultimately denied by the district court.

Pugh was tried and convicted of violating the Civil Obedience Act, and was sentenced by the district court to time served.

REASONS FOR GRANTING THE PETITION

The Civil Obedience Act does not have a sufficient connection to interstate or foreign commerce for it to fall within Congress' authority under the Commerce Clause. U.S. Const. Art.I §8. The Civil Obedience Act also employs vague and overly broad language that violates not only First Amendment protections of speech, but also Fourteenth Amendment due process guarantees. A revival in the use of this statute in recent years calls for renewed scrutiny of its language.

I. The Civil Obedience Act exceeds Congress' Commerce Clause powers to prosecute Pugh for a broken window.

The portion of the statute relevant to Commerce Clause jurisdiction states: "...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). This Court has stated that while the interpretation of the Commerce Clause has certainly gotten more generous over the years, it is not "without effective bounds." *U.S. v. Morrison*, 529 U.S. 598,608 (2000)(citing *U.S. v. Lopez*, 514 U.S. 549,557 (1995)).

A. The Civil Obedience Act does not have a sufficiently specific connection to interstate commerce.

In order to further protect the line between national and local from disappearing, This Court has set out three general areas where Congress has power

to regulate commerce:

> (1) the use of the "channels" of interstate commerce;
> (2) the "instrumentalities" of interstate commerce; and
> (3) activities having a substantial relation to interstate commerce.

Lopez at 558-559 (1995)(citations omitted). When determining what has a "substantially affects" interstate commerce, This Court has set out the following test:

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

U.S. v. Morrison, 529 U.S. 598,610-12 (2000).

Review of federal criminal statutes is to be done in light of the fact that the Constitution reserved general police power to the States. "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618 (citing *Cohens v. Virginia*, 6 Wheat. 264, 426, 428, 5 L.Ed. 257 (1821)). "We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)(cleaned up); *see also Morrison*, 529 U.S. at 618-19 (quoting *Lopez*).

The conduct sought to be barred by federal criminal statute must have a direct affect on interstate commerce. "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison* at 529 U.S. 617-18 (citing *Lopez* 514 U.S. at 568). In its decision, the Court of Appeals eschewed This Court's statement on this matter, citing *United States v. Castleberry*, 116 F.3d 1384 (11th Cir. 1997). *See Pugh*, 90 F.4th at 1327. However, *Castleberry* predates *Morrison*.

As with the statute in question in *Lopez*, the Anti-Riot Act "...is not an essential part of a larger regulation of economic activity." *Lopez* at 561. It is found within the Civil Rights Act of 1968, the other portions of which do not directly relate to "civil disorder." The Civil Obedience Act states prohibits conduct that occurs "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." The statute's plain language allows for the Federal Government to punish someone for engaging in completely intrastate activity, so long as it is during a "civil disorder" that affects interstate commerce. That falls into the "affect in the aggregate" category This Court has said in *Morrison* and *Lopez* does not pass Constitutional muster.

B. Pugh's conduct itself did not impact interstate commerce.

If it is determined that the prohibited conduct mus be what affects interstate commerce, the facts of this case do not show that happened. The Government put on evidence asserting that the events during which Pugh knocked out a window affected commerce because traffic had to be diverted away from Downtown Mobile. The problem with that argument is the City of Mobile had already diverted traffic away from Downtown Mobile for the protest. These events happened in a bend along the march route. The City of Mobile planned for and in a sense participated in the march, as the Chief of Police was at the head of the line for the march.

In either circumstance (Pugh's conduct must affect commerce, or it merely must to occur during something else that affects commerce), The Civil Obedience Act does not fall within Congress' Commerce Clause powers.

II. The Civil Obedience Act impermissibly abridges individuals' free speech rights, as protected by the First Amendment.

As mentioned, the Civil Obedience Act was passed during a turbulent time in this Country. It was directed at the civil unrest over the Vietnam War and the Civil Rights movement. With the return of the days of civil unrest that has occurred in recent years, the Civil Obedience Act has come back into play. This Court's standards show that the Civil Obedience Act impermissibly affects The People's free speech rights.

A. The Civil Obedience Act is an improper legislative 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. 460,473 (2010)(quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442,449, n.6 (2008)). The Civil Obedience Act, like other legislative sweeps, "must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. 451,459 (1987).

The prohibition of "any act" such as found in §231(a)(3) does not do a sufficient job of "meaningfully [guiding] the police and thus poses a substantial risk of arbitrary or discriminatory enforcement." *Roy v. City of Monroe*, 950 F.3d 245,252 (5th Cir. 2020).

Similarly, the term "interfere" in §231(a)(3) is overly broad and is subject to more scrutiny than the Panel affords. "Interfere" in this statute was not defined by Congress. *Cf.* 18 U.S.C. §232. The Court of Appeals pushed aside Pugh's argument argument by absorbing the word "interfere" into the words "obstruct" and "impede" in order to bolster its defense of the statute. *See Pugh*, 90 F.4th at 1329-30. However, that ignores instances where interfere has meant something less than obstruction. "Indeed, 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." *McCoy v. City of Columbia*, 929

F.Supp.2d 541,550 (D.S.C. 2013)(striking down as overly broad a city ordinance that stated "It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties.").

Just as with the City of Houston ordinance declared unconstitutional by the Supreme Court, the language of §231(a)(3) is not narrowly tailored so as to provide guidance to law enforcement, but instead arms police with "unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *City of Houston v. Hill* 482 U.S. at 465.

While the Civil Obedience Act defines "civil disorder", it is also overly broad. The term covers "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). That could mean anything from a handful of drunks fighting outside of a bar to the January 6, 2021, riots. Such is overly broad so as to encroach on the Tenth Amendment reservation of Furthermore, the prohibited act need only occur "incident to and during" a civil disorder. There is no requirement that "any act" be an act of violence, or for the purpose of causing or furthering a civil disorder. A police officer who trips over someone kneeling in prayer during a riot, petitioning The Lord to bring peace to his community, can be found to have unlawfully impeded a law enforcement officer

incident to and during a civil disorder. This overbreadth is unconstitutional.

B. The Civil Obedience Act impermissibly regulates content of protected speech.

The Civil Obedience Act regulates content in that it only covers speech and expression directed at police officers and firefighters. The Supreme Court has been clear that restriction of expresion based on message, ideas, and subject matter violates the First Amendment, and content-based statutes are subject to strict scrutiny. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).

The Court of Appeals attempts to distinguish this case from *City of Houston v. Hill* by asserting that the Houston ordinance only covered speech, and then assumes The Civil Obedience Act only covers conduct. *Pugh*, 90 F.4th at 1331. While the *Hill* Court mentioned that "assault" of an officer was found in the Texas Penal Code, but the ordinance at issue prohibited anything that would "oppose, molest, abuse, or interrupt" an officer. *Hill* at 460-61. Not every physical opposition, touching, or interruption of an officer would equate to an assault of that officer.

The Panel assumes that "any act" in the statute only covers conduct and not speech. It dismisses any such discussion of "any act" covering speech as "hypothetical". That is not the case. *Cf. McCoy v. City of Columbia, supra* (where the ordinance held unconstitutional contained the word "interfere", which was held to be both speech and

conduct)[1].

The Civil Obedience Act does not survive strict scrutiny because it restricts protected content without a compelling interest and without being narrowly tailored to achieve that interest. See *Reed*, 576 U.S. at 171. As set out above terms like "any act" and "interfere" are incredibly overbroad. The statute deals specifically with police officers and firefighters. There are laws on the books in each state that prohibit things such as assaulting an officer, obstructing of justice, obstructing governmental operations, resisting arrest, and even failing to obey a lawful command. In fact, Pugh was originally, and appropriately, charged in municipal court for criminal mischief. The Civil Obedience Act is superfluous and redundant in light of all these state laws, meaning there is no need to have a federal statute such as this.

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[1]Furthermore, the basis of the arrest under the unconstitutional ordinance was the plaintiff "back-pedaling" while an officer tried to arrest him. See *McCoy v. City of Columbia* 2013 WL 936607 (D.S.C. Jan. 16, 2013)(the Magistrate's report, while not fully adopted by the District Court, sets out more detailed facts about the incident giving rise to the arrest).

III. The unconstitutional vagueness of Civil Obedience Act violates Due Process.

A. The vagueness of the statute does not adequately provide the public with notice of prohibited conduct and will likely lead to arbitrary enforcement, as well as have a chilling effect on Protected Speech.

The vagueness discussed more in-depth above also violates The Due Process Clause because it (1) fails to provide sufficient notice that would enable ordinary people to understand what conduct it prohibits; or (2) encourages arbitrary and discriminatory enforcement. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Besides the aforementioned vagueness, The Civil Obedience Act also lacks a *mens rea* element, which is often a fatal flaw. A statute without an intent/scienter element "is little more than 'a trap for those who act in good faith.'") *Colautti v. Franklin*, 439 U.S. 379,395 (1979)(quoting *United States v. Ragen*, 314 U.S. 513,524 (1942)). A statute is also found to be vague when the crime is dependent on the subjective reaction of others rather than the acts or intentions of the defendant. *See, e.g., United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (a prohibition on "unjust or unreasonable rates or charges" without attempt to define those terms, was unconstitutionally vague).

The Civil Obedience Act leaves it up to the interpretation of the officer what constitutes "any act" that "interferes" or "impedes". Someone who is not participating

in the civil disorder can nonetheless be considered by prosecutors to be "incident to and during" the civil disorder.

The fact that The Civil Obedience Act is vague and overly broad, leaving important elements of the crime up to the interpretation of the prosecutor and law enforcement, can result in a chilling effect on otherwise protected speech. See *Virginia v. Hicks*, 539 U.S. 113,119 (2003); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789,799 (1984).

B. This Court will not re-write the statute to cure its defects.

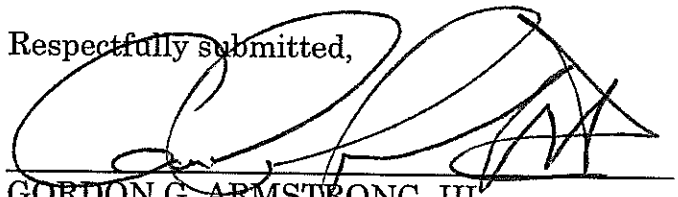
This Court has directed to treat unconstitutionally vague laws as a nullity. *See United States v. Davis*, 588 U.S.445 (2019). It then becomes Congress' job to get it right under the Constitution. *See id.*

The Court of Appeals opines that because conduct can be restricted under §231(a)(3), it is not unconstitutional, and dismiss other possibilities as "hypothetical". *Pugh* at 1331. However, This Court's rulings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591,602 (2016); accord *Sessions v. Dimaya*, 584 U.S.148 (2018) (reaffirming *Johnson*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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June 10, 2024

APPENDIX

APPENDIX A

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13136

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TIA DEYON PUGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:20-cr-00073-TFM-B-

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,□ District Judge.

BRASHER, Circuit Judge:

This appeal raises questions of first impression about the constitutionality of 18 U.S.C. § 231(a)(3), which prohibits impeding law enforcement officers during a civil disorder affecting interstate commerce. During a riotous protest in Mobile, Alabama, Tia Pugh shattered the window of a police car that was blocking protestors from walking onto the interstate. After the government charged Pugh with impeding law enforcement during a civil disorder, she moved to dismiss the indictment. She argued that Section 231(a)(3) is facially unconstitutional because it: (1) exceeds Congress's power to legislate under the Commerce Clause, (2) is a substantially over- broad regulation of activities protected by the First Amendment,

> (3) is a content-based restriction of expressive activities in violation of the First Amendment, and (4) is vague in violation of the Fifth Amendment's Due Process Clause. The district court rejected these arguments, Pugh's case went to trial, and a jury found her guilty. Pugh argues that the district court erred in rejecting her four challenges to the constitutionality of Section 231(a)(3). We disa- gree and affirm Pugh's conviction.

□ Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

I.

In May 2020, protesters planned to march through the streets of downtown Mobile, Alabama, to protest police brutality after the death of George Floyd. Mobile police officers developed an operational plan to protect the protestors and the public. As part of that plan, the police placed traffic units in the area to redirect protesters away from Interstate 10, which was near the protest route.

On the day of the protest, Tia Pugh and a group of protestors deviated from the planned protest route and approached a ramp to Interstate 10. The ramp they approached was near Exit 26B of Interstate 10, an exit used by commercial vehicles car- rying hazardous materials across state lines. In response, the police attempted to block access to the ramp by forming a barricade. The police, in coordination with the Alabama Department of Transportation, shut down traffic along the ramp and closed the exit. The Alabama Department of Transportation also rerouted vehicles on the interstate, which slowed traffic and forced commercial vehicles carrying hazardous materials to take a longer route.

The protest eventually devolved into a riot. Police officers used tear gas to disperse people from the highway. Around that time, Pugh smashed a police car window with a baseball bat before running away. Pugh's attack immobilized the vehicle, and police officers had to be "pulled off of the barricade line to guard the vehicle" and the equipment inside.

A grand jury indicted Pugh on one count of impeding law enforcement during a civil disorder in violation of 18 U.S.C.
§ 231(a)(3). Pugh moved to dismiss the indictment on the ground that Section 231(a)(3) is unconstitutional. As relevant here, Pugh argued that the statute was facially unconstitutional because it:
(1) exceeds Congress's authority under the Commerce Clause;
(2) too broadly regulates speech and expressive conduct protected by the First Amendment; (3) constitutes a content-based restriction of expressive activities protected by the First Amendment; and
(4) fails to provide fair notice and encourages arbitrary and discriminatory enforcement, in violation of the Fifth Amendment's Due Process Clause. After a grand jury issued a superseding indictment, Pugh renewed her motion to dismiss and reasserted her arguments.

The district court denied Pugh's motion and rejected each of her arguments.

The case went to trial, and the government pre- sented evidence and testimony about the protest, its impact on in- terstate commerce, and Pugh's conduct. The district court in- structed the jury that Pugh could be found guilty of violating Section 231(a)(3) only if the government established beyond a reason- able doubt that: (1) Pugh "knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with one or more law enforcement officers"; (2) at the time of the act or attempted act, the "officer or officers were engaged in the lawful performance of their official du- ties incident to and during a civil disorder"; and (3) "the civil disor- der obstructed, delayed, or adversely affected interstate commerce or the movement of any article or commodity in interstate com- merce in any way or to any degree."

The jury found Pugh guilty of violating Section 231(a)(3). The district court sentenced Pugh to time served and imposed monetary penalties and restitution. Pugh timely appealed.

II.

We generally review a district court's order denying a motion to dismiss an indictment for an abuse of discretion. *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017) (citing *United States v. Di Pietro*, 615 F.3d 1369, 1370 n.1 (11th Cir. 2010)). But "[w]e review a challenge to the constitutionality of a statute de novo." *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007) (emphasis added) (citing *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005)); *accord Focia*, 869 F.3d at 1285 (quoting *Di Pietro*, 615 F.3d at 1370 n.1).

III.

Section 231(a)(3) punishes "[w]hoever commits or attempts to commit any act to obstruct, impede, or interfere with any fire- man or law enforcement officer" who is "lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder." 18 U.S.C. § 231(a)(3). The civil dis- order must be one "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." *Id.* A related provision defines "civil disorder" and "commerce" for Section 231(a)(3). *See id.* § 232(1)–(2). A "civil disorder" 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." *Id.* § 232(1). And "commerce" is defined as "commerce (A) between any State or the District of Co- lumbia 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." *Id.* § 232(2).

Pugh argues that Section 231(a)(3) is unconstitutional because it (1) exceeds Congress's authority under the Commerce Clause, (2) is a substantially overbroad regulation that criminalizes activities protected by the First Amendment, (3) is a content-based restriction of expressive activities in violation of the First Amend- ment, and (4) is vague in violation of the Fifth Amendment's Due Process Clause.

These four arguments are all facial challenges to the constitutionality of Section 231(a)(3). "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regu- lation itself." *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001) (quoting *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000)). Generally, "a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the [law] would be valid' or show that the law lacks 'a plainly legitimate sweep.'" *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 238 (2021) (alteration in original) (citation omitted) (first quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); and then quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

In determining whether a statute meets this standard, we "consider[] only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). Although "the underlying facts" of the case "are largely irrelevant" in a facial challenge, *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1365 (11th Cir. 2021) (citing *Patel*, 576 U.S. at 415; *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 674 n.4 (11th Cir. 1984)), the facts may establish that circumstances exist under which the statute is valid, *see United States v. Paige*, 604 F.3d 1268, 1274 (11th Cir. 2010) (rejecting facial challenge under the Commerce Clause because the law "was constitutionally applied to [the defendant's] conduct" (citing *Horton*, 272 F.3d at 1329)). And for all arguments but First Amendment ones, the "fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly in- valid" because federal courts "have not recognized an 'overbreadth' doctrine outside the limited context of the First Amend- ment." *Salerno*, 481 U.S. at 745 (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984)).

With these principles in mind, we next consider Pugh's four facial challenges to the constitutionality of Section 231(a)(3).

A.

We will start with Pugh's argument that Section 231(a)(3) is facially unconstitutional because it exceeds Congress's power under the Commerce Clause. Pugh's argument turns on whether the jurisdictional element of the statute—the requirement that the civil disorder "in any way or degree obstruct[], delay[], or adversely af- fect[] commerce"—is enough to limit the statute's scope to constitutional applications. 18 U.S.C. § 231(a)(3). We believe that it is.

Under the Commerce Clause, Congress has the power to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. The Supreme Court has "identified three broad categories of [interstate] activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276–77 (1981)). The three categories are: (1) "the use of the channels of interstate commerce," *id.* (citing *United States v. Darby*, 312 U.S. 100, 114 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)); (2) "the instrumen- talities of interstate commerce, or persons or things in interstate commerce," *id.* (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *S. Ry. Co. v. United States*, 222 U.S. 20 (1911); *Perez*, 402 U.S. at 150); and (3) "those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce," *id.* at 558–59 (citations omitted).

Under our precedents, if a criminal statute contains a jurisdictional element that limits the statute to constitutional applications, that jurisdictional element "immunizes [the statute] from . . . [a] facial constitutional attack." *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001) (citing *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)); *see also United States v. Morrison*, 529 U.S. 598, 611–12 (2000). The reason is that "[w]hen a statute ex- pressly requires that the proscribed conduct have an appropriate nexus with interstate commerce, courts can 'ensure, through case- by-case inquiry,' that each application of the statute is constitutional, and thus the statute should not be struck down as being facially unconstitutional." *Ballinger*, 395 F.3d at 1228 n.5 (quoting *Lopez*, 514 U.S. at 561).

Pugh argues that the jurisdictional element in Sec- tion 231(a)(3) is not enough to limit its scope to constitutional ap- plications. Under the relevant part of the statute, a jury must find that a defendant committed an "act to obstruct, impede, or inter- fere with" a law enforcement officer while that officer was per- forming "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). The statute's ju- risdictional element criminalizes acts during civil disorders that "*af- fect[] commerce* or the movement of any article or commodity *in commerce*." *Id.*

(emphases added). "The 'in commerce' language de- notes the first two *Lopez* categories—regulation of the channels and of the instrumentalities of commerce." *Ballinger*, 395 F.3d at 1231. And "[t]he 'affecting commerce' language invokes the third *Lopez* category—regulation of intrastate activities that substantially affect

commerce." *Id.* Congress, therefore, invoked the full scope of its commerce power in Section 231(a)(3).

Pugh says this element fails because its broadest reach—any act to obstruct an officer during a civil disorder that "adversely af- fects commerce"—is beyond Congress's power to regulate. She points to three parts of this phrase that, she says, make it overinclu- sive. First, she says this language does not limit the statute's reach to intrastate "activities that 'substantially affect' interstate com- merce" because the element is directed to acts that merely "affect" commerce. Second, she says that the jurisdictional element is too removed from her actions. That is, the jury was not required to find that her "act" affected interstate commerce—the jury needed to find only that the "civil disorder" in which her act occurred af- fected interstate commerce. Third, she argues that the use of the phrase "incident to" further attenuates the link between the crimi- nal act and the civil disorder that must affect commerce.

Pugh's first argument is foreclosed by our precedent, which approves of the "affect" language. In *United States v. Castleberry*, 116 F.3d 1384 (11th Cir. 1997), we upheld the Hobbs Act against a com- merce clause challenge. *See id.* at 1387. That "Act prohibits extor- tion or robbery that 'in any way or degree obstructs, delays, or af- fects commerce or the movements of any article or commodity in commerce.'" *Id.* at 1386 (quoting 18 U.S.C. § 1951(a) (1994); and citing *Stirone v. United States*, 361 U.S. 212, 218 (1960)). The defend- ant in *Castleberry* argued that the jurisdictional element of the Hobbs Act did not require a sufficient connection between the

criminal act of robbery and interstate commerce. *See id.* at 1387. But we disagreed. We instead held that, because the statute "con- tains a jurisdictional requirement that the [criminal act] be con- nected in any way to interstate commerce," the statute survived a facial challenge. *Id.* The jurisdictional element here is the same as the one in *Castleberry* in using "affect" instead of "substantially af- fect."

Pugh's second argument—that the criminal act is too re- moved from any connection to commerce—is not so easily re- solved. Unlike the Hobbs Act, Section 231(a)(3) does not require that the criminal act itself be linked to commerce—it requires only that the civil disorder "incident to and during" which the criminal act occurred be linked to commerce. Does this more removed con- nection make a difference in the result?

We believe the answer is "no." Although the Supreme Court has not approved this precise language, the Court has concluded that a similarly removed jurisdictional element satisfies the Com- merce Clause. In *Russell v. United States*, 471 U.S. 858 (1985), the Court upheld the constitutionality of a statute that criminalizes the arson of "any building . . . used . . . in any activity affecting inter- state or foreign commerce." *Id.* at 859 (alterations in original) (quoting 18 U.S.C. § 844(i)). There, the statute did not link the criminal act of arson itself to interstate commerce but rather the destroyed property. Still, the Court held that the government could convict a Chicago arsonist who set fire to a Chicago property as long as the property sat in the broader commercial market. *Id.* at

860. There was no need for a jury finding that the arson itself af- fected interstate commerce.

It seems clear from *Russell* that the jurisdictional element of interstate commerce need not link directly to the criminalized act itself as long as the object of the criminal act is sufficiently con- nected to interstate commerce. In *Russell*, the Court upheld the statute because commercial buildings were "used in an activity af- fecting [interstate] commerce," and thus criminals who burned those buildings down necessarily affected interstate commerce. *Id.* at 862. There was a logical connection between the criminal act and commerce, even though the act's effect on commerce was me- diated through the victim of the crime. Likewise, Section 231(a)(3) makes it illegal to "impede . . . any fireman or law enforcement of- ficer" who is trying to quell a civil disorder that "in any way or de- gree . . . adversely affects commerce." Just as Congress had the power to outlaw the burning of commercial buildings in *Russell* be- cause of the buildings' effect on interstate commerce, Congress has the power to outlaw interference with police as they try to elimi- nate civil disorders that affect interstate commerce.

Pugh's contrary view would anomalously allow Congress to criminalize creating a civil disorder that affected interstate com- merce but not a person's interference with an officer's efforts to stop that disorder. Such an irrational line is inconsistent with the scope of Congress's authority. Congress has the "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States,'" even by regulating

conduct that is not itself interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (quoting U.S. Const. art. I, § 8). We therefore reject Pugh's argument that the jurisdictional element of Sec- tion 231(a)(3) is too attenuated.

Having resolved Pugh's second argument, we turn to Pugh's third and final point. She notes that the language of the stat- ute criminalizes impeding an officer engaged in "his official duties *incident to* and during commission of a civil disorder" affecting in- terstate commerce. 18 U.S.C. § 231(a)(3) (emphasis added). She complains that "incident to" further removes the impeding act from the jurisdictional element. We disagree.

Pugh rightly defines the adjectival form of incident as "[d]ependent on, subordinate to, arising out of, or otherwise con- nected with (something else, usu. of greater importance)." *Incident, Black's Law Dictionary* (11th ed. 2019). But Pugh erroneously argues that this language means that the statute requires that the officer's duties be only incidentally related to a civil disorder affecting inter- state commerce. Pugh misunderstands how the phrase "incident to" is used in legal parlance. Consider "search incident to arrest." This doctrine does not allow an officer to search anything inci- dentally related to an arrest, however removed. Instead, it requires the search to connect to or arise out of arrest, limiting the search to the person of the arrestee or an area they control. *See Birchfield v. North Dakota*, 579 U.S. 438, 460 (2016) (quoting *United States v. Robinson*, 414 U.S. 218, 224 (1973)). That same reasoning applies to this statute.

Lastly, we think that the conduct Pugh was convicted for strongly suggests that the jurisdictional element is constitutional. *See Paige*, 604 F.3d at 1274. Pugh interfered with a police officer's ability to open an interstate highway by disabling a police car near an exit ramp. Her criminal act required commercial vehicles to be rerouted as they transported hazardous material. Her conduct is perhaps a quintessential example of the nexus between a criminal act and interstate commerce.

Pugh's facial challenge therefore fails under the Commerce Clause.

B.

Next, Pugh asserts that Section 231(a)(3) violates the First Amendment because it broadly prohibits protected speech and ex- pressive conduct. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Under that provision, "a law may be invalidated as [facially] overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legiti- mate sweep." *Ams. for Prosperity Found.*, 141 S. Ct. at 2387 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). While "'[s]ubstan- tial overbreadth' is not a precisely defined term[,] . . . we know it requires 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232 (11th Cir. 2018) (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

Pugh must carry a heavy burden to establish unconstitu- tional overbreadth. To prevail on this claim, Pugh must establish "from the text of the [challenged provisions] and from actual fact that a substantial number of instances exist in which [the provi- sions] cannot be applied constitutionally." *Cheshire Bridge Holdings*, 15 F.4th at 1370–71 (alterations in original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)). Courts have "vigor- ously enforced the requirement that a statute's overbreadth be *sub- stantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492
U.S. 469, 485 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (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 (such as picketing or demonstrating)." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

Our "first step in overbreadth analysis is to construe the chal- lenged statute." *Williams*, 553 U.S. at 293. Then we consider whether Pugh has established that "the statute, as we have con- strued it, criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

According to Pugh, Section 231(a)(3) applies to a range of speech and expressive conduct, including "yell[ing] at police to de- sist from an arrest, flip[ping] off officers to distract or to encour-
age resistance, or record[ing] police activity with a cell phone."

But we cannot say Section 231(a)(3) affects much speech at all. "The 'mere fact that one can conceive of some impermissible ap- plications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Williams*, 553 U.S. at 303 (quoting *Taxpay- ers for Vincent*, 466 U.S. at 800).

The government must prove four elements under Sec- tion 231(a)(3). First, the government must establish that the de- fendant committed (or tried to commit) "any act to obstruct, im- pede, or interfere with any fireman or law enforcement officer." 18 U.S.C. § 231(a)(3). Second, the fireman or law enforcement officer must have been "lawfully engaged in the lawful performance of his official duties." *Id.* Third, the fireman or law enforcement officer must have been performing those official duties "incident to and during the commission of a civil disorder." *Id.* Fourth, the civil dis- order must have "in any way or degree obstruct[ed], delay[ed], or adversely affect[ed] commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function." *Id.*

Pugh argues that the first element regulates speech, focusing particularly on the word "interfere." Section 231(a)(3)'s first ele- ment requires that the defendant "commit[] or attempt[] to com- mit any act to obstruct, impede, or interfere with any fireman or law enforcement officer." *Id.* The words "commit any act to ob- struct, impede, or interfere" are not statutorily defined. We may therefore look to "dictionaries in existence around the time of en- actment"—around 1968—to interpret the "plain and ordinary

meaning" of these words. *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (quoting *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)).

It is hard to see how either "obstruct" or "impede" apply to speech or expressive conduct, except at the margins. In ordinary language around the time of Section 231(a)(3)'s enactment, "ob- struct" meant "to block or close up by an obstacle." *Webster's Sev- enth New Collegiate Dictionary* 583 (7th ed. 1969) (defining "obstruct further to mean "to hinder from passage, action, or operation: im- pede" and "to cut off from sight"); *accord The Random House College Dictionary* 918 (1973). And, in the specific context of "obstructing an officer," it "implie[d] forcible resistance." *Obstructing an officer*, *Black's Law Dictionary* (rev. 4th ed. 1968). Likewise, around that time, "impede" meant "to interfere with the progress of" and to "block." *Webster's Seventh New Collegiate Dictionary* 418 (7th ed. 1969); *accord Black's Law Dictionary* (rev. 4th ed. 1968) (defining "im- pede" as "[t]o obstruct[,] hinder[,] check[, or] delay"); *The Random House College Dictionary* 666 (1973) (defining "impede" as "to retard in movement or progress by means of obstacles or hinderances" and to "ostruct" or "hinder"). Therefore, around the time Sec- tion 231(a)(3) was enacted, the terms to "obstruct" and to "impede" were similar and meant to block through an obstacle, forcible re- sistance, or by other means. One cannot block a fireman or law enforcement officer with speech alone.

The term "interfere" carries a slightly broader meaning. To "interfere" meant "to come in collision or be in opposition" and to

"clash" as well as "to enter into or take a part in the concerns of others." *Webster's Seventh New Collegiate Dictionary* 441 (7th ed. 1969); *accord The Random House College Dictionary* 694 (1973) (defin- ing "interfere" as "to come into opposition, as one thing with an- other, esp[ecially] with the effect of hampering action or proce- dure," as well as "to take part in the affairs of others" and "med- dle"). In legal contexts, "interfere" meant "to check; hamper; hin- der; disturb; intervene; intermeddle; interpose; to enter into, or to take part in, the concerns of others." *Black's Law Dictionary* (rev. 4th ed. 1968). But in the context of Section 231(a)(3) the term "inter- fere" is "narrowed by the [] canon of *noscitur a sociis*—which coun- sels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294 (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Con- struction* § 47:16 (7th ed. 2007)). That is, the surrounding words— "obstruct" and "impede"—cabin the scope of "interfere." *Cf. Paresky v. United States*, 995 F.3d 1281, 1288 (11th Cir. 2021) (ex- plaining that because the word "'sum' [in a statute] finds itself trav- eling with 'tax' and 'penalty,' [] we therefore use [] *noscitur a sociis*
. . . to understand [its] meaning"). Although "interfere," by itself,
could include speech, it is best read in Section 231(a)(3) alongside "obstruct" and "impede" as prohibiting someone from hindering a law enforcement officer or fireman with more than mere words.

Having interpreted Section 231(a)(3) as focused on obstruc- tive *conduct*, we turn to Pugh's facial overbreadth challenge and whether she has established that the statute "criminalizes a

substantial amount of protected expressive activity." *United States v. Dean*, 635 F.3d 1200, 1205 (11th Cir. 2011) (quoting *Williams*, 553 U.S. at 297). It is obvious that the statute does not. We need not decide today whether the statute might prohibit certain kinds of expressive activities that have the effect of blocking police officers from quieting a riot—such as directing others to riot. It is sufficient to say that Pugh cannot identify from the text of Section 231(a)(3) or from any actual prosecutions that "a substantial number of in- stances exist in which [the provisions] cannot be applied constitu- tionally." *Cheshire Bridge Holdings*, 15 F.4th at 1370–71 (alteration in original) (quoting *N.Y. State Club Ass'n*, 487 U.S. at 14).

One last point: Pugh says that we must declare this statute unconstitutional under the Supreme Court's decision in *City of Houston v. Hill*, 482 U.S. 451 (1987). We disagree. In *Hill*, the Su- preme Court held unconstitutional a city ordinance that made it "unlawful to interrupt a police officer in the performance of his or her duties." *Id.* at 453. But there are two crucial differences between Section 231(a)(3) and the municipal ordinance in that case.

First, the municipal ordinance in *Hill* prohibited only *verbal* interference with law enforcement. *See id.* at 460–61. As the Court explained, state law preempted the municipal ordinance insofar as it prohibited any physical assault on a police officer. *See id.* at 460. So the only field of operation for the ordinance was to "prohibit[] verbal interruptions of police officers." *Id.* at 461. Unlike that mu- nicipal ordinance, Section 231(a)(3) is directed at conduct, not speech.

Second, in *Hill*, there was real-world evidence that the mu- nicipality was enforcing its ordinance to prohibit speech. The target of the statute's enforcement in *Hill* was arrested for shouting at of- ficers, "[w]hy don't you pick on somebody your own size?" *Id.* at
454. He had been arrested three other times for similar speech. *See id.* at 455 n.4. And he introduced evidence that others had been charged for similar speech crimes, including "several reporters." *Id.* at 455. Here, on the other hand, it is merely hypothetical that Sec- tion 231(a)(3) could be enforced against speech. And "[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.'" *Williams*, 553 U.S. at 303 (quoting *Taxpayers for Vincent*, 466 U.S. at 800). Unlike the arrestee in *Hill*, Pugh cannot establish that Section 231(a)(3) prohibits a *substantial* amount of protected conduct as required to succeed on her facial overbreadth challenge.

C.

Having dealt with Pugh's overbreadth argument, we turn to Pugh's other First Amendment claim. Pugh asserts that, on its face, Section 231(a)(3) is a content-based restriction of activities pro- tected by the First Amendment. "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*, 576 U.S. 155, 163 (2015) (citing *Sorrell v. IMS Health Inc.*, 564
U.S. 552, 563–66 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980);
Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)). "In other words, a regulation is content-based if it 'suppress[es], disadvantage[s], or

impose[s] differential burdens upon speech because of its content,' . . . *i.e.*, if it draws 'facial distinctions defining regulated speech by particular subject matter.'" *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (some alterations in original) (ci- tation omitted) (first quoting *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 642 (1994); and then quoting *Reed*, 576 U.S. at 163–64).

To determine whether a regulation is a content-based re- striction of speech, we first consider whether the regulation, "'on its face[,]' draws distinctions based on the message a speaker con- veys." *Reed*, 576 U.S. at 163 (quoting *Sorrell*, 564 U.S. at 566). If the law is facially content neutral, we then consider whether the regu- lation "cannot be 'justified without reference to the content of the regulated speech[]' or [] [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (fourth alteration in original) (quotation marks omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Section 231(a)(3) is not a content-based regulation of speech. If it affects speech at all, Section 231(a)(3) is content-neutral. It ap- plies to "*any* act to obstruct, impede, or interfere with any fireman or law enforcement officer" performing official duties "incident to and during the commission of a civil disorder" affecting commerce or a federally protected function. 18 U.S.C. § 231(a)(3) (emphasis added). In criminalizing "any act to obstruct, impede, or interfere," *id.*, the statute does not "draw[] distinctions based on the message" conveyed by the relevant act, *Reed*, 576 U.S. at 163. Instead, Sec- tion 231(a)(3) applies as long as the act is "to obstruct, impede or

interfere with any fireman or law enforcement officer" performing official duties.

Still, Pugh asserts that Section 231(a)(3) "singles out forms of expression that . . . criticize, challenge, insult, or object to the ac- tions of law enforcement officers." But the statute does not distin- guish between acts that are critical of law enforcement and acts that are neutral toward, or favor, law enforcement. *Cf. McCullen v. Coak- ley*, 573 U.S. 464, 479 (2014) (holding that a statute was not a con- tent-based restriction because "[w]hether petitioners violate[d] the [a]ct 'depend[ed]' not 'on what they say,' . . . but simply on where they say it" (citation omitted) (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27 (2010))).

Moreover, Pugh has not successfully established that Sec- tion 231(a)(3) was enacted to suppress expressive content. Because the broad language of the statute "help[s] confirm that it was not enacted to burden a narrower category of disfavored speech" but is instead content-neutral and because there is no evidence to the contrary, we hold that § 231(a)(3) is not a content-based regulation of speech. *Id.* at 481 (citing Elena Kagan, *Private Speech, Public Pur- pose: The Role of Governmental Motive in First Amendment Doctrine*, 63
U. Chi. L. Rev. 413, 451–52 (1996)).

D.

Finally, Pugh asserts that Section 231(a)(3) violates the Fifth Amendment's Due Process Clause because it is vague on its face. The Fifth Amendment's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without

due process of law." U.S. Const. amend. V. "[T]he [g]overnment violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes[] or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

"[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Humanitarian L. Project*, 561 U.S. at 20 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982)). Accordingly, we have held that "a facial vagueness challenge" cannot be maintained "by one to whom a statute may be constitutionally applied." *Di Pietro*, 615 F.3d at 1373 (citing *Hu- manitarian L. Project*, 561 U.S. at 17–20).

Here, Section 231(a)(3) constitutionally applies to Pugh's conduct. Her act of disabling a police car on an interstate ramp dur- ing a civil disorder undoubtedly obstructed the law enforcement response to the riot in which she was participating. Accordingly, Pugh "may not challenge the statute on vagueness grounds based on its application to others." *Id.*

IV.

The district court's order denying Pugh's motion to dismiss, Pugh's conviction, and her sentence are **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	§	**UDGMENT IN A CRIMINAL 'ASE**
	§	
v.	§	
	§	Case Number: **1:20-CR-00073-001**
TIA DEYON PUGH	§	USM Number: **18021-003**
	§	**Gordon G. Armstrong, III, Esquire**
	§	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.

☐ pleaded nolo contendere to count(s) which was accepted by the court

☒ was found guilty on count 1 of the Superseding Indictment on 5/19/2021, after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 USC § 231(a)(3) - Obstructing Law Enforcement during Civil Disorder	05/31/2020	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

August 19, 2021

Date of Imposition of Judgment

/s/Terry F. Moorer

Signature of Judge

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

September 1, 2021

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TIME SERVED as to count 1.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the
☐ United States Marshal. The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Page 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment
TOTALS	$100.00	$572.63			

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☒ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. (or see attached). However, pursuant to 18 U.S.C. § 3644(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Restitution in the amount of

$572.63 to be paid to:

City of Mobile
Attn: Jennifer Wesson or Princetta Craig
2460 Government Street
Mobile, Alabama 36605

☐ If applicable, restitution amount ordered pursuant to plea agr._____

☐ The defendant must pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Page 6 may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that: ☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of the $100.00 special assessment and $572.63 in restitution is due immediately, balance due not later than _____, or

☒ in accordance with ☐ C, ☐ D, ☒ E, or F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
The special assessment and restitution are to be paid through the Clerk, U.S. District Court to the extent not already paid. If restitution is to be paid in installments, the Court orders that the defendant make at least minimum monthly payments in the amount of $50; and, further orders that interest shall not accrue on this indebtedness. The defendant is ordered to notify the Court of any material change in the defendant's ability to pay restitution.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

☐ Defendant shall receive credit on her restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,
(5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIM. ACT. NO. 1:20-cr-73-TFM**
	)	
TIA DEYON PUGH	)	
	)	

MEMORANDUM OPINION AND ORDER

The Grand Jury for the Southern District of Alabama indicted the defendant, Tia Deyon Pugh ("Pugh" or "Defendant") on June 24, 2020. The Indictment charged Defendant with one count of impeding law enforcement during civil disorder in violation of 18 U.S.C. § 231(a)(3). *See* Doc. 16. Now pending before the Court is Defendant's *Motion to Dismiss Indictment* (Doc. 52, filed 1/26/21), *Motion to Dismiss Superseding Indictment* (Doc. 75, filed 5/5/21), and the *Supplemental Motion to Dismiss Superseding Indictment* (Doc. 82, filed 5/7/21). The United States filed its responses and Defendant filed her replies. *See* Docs. 66, 68, 70, 71, 91.

The Court held a hearing on April 15, 2021. Based on the motion briefing, the arguments of the parties, and for the reasons set forth herein, the Defendant's *Motion to Dismiss Superseding Indictment* (Doc. 75) and *Supplemental Motion to Dismiss Superseding Indictment* (Doc. 82) are **DENIED** while the *Motion to Dismiss Indictment* (Doc. 52) is **DENIED as moot**.

I. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts are not seemingly in dispute, but at this stage in proceedings, the Court must generally accept as true the facts presented by the Government as it is not the role of the Court to act as find finder on a motion to dismiss. The "true" facts will ultimately be determined by a jury.

On May 25, 2020, George Floyd died while in police custody in Minneapolis, and as a result, protests were held nationwide. On May 31, 2020, a peaceful protest against police brutality followed a planned route through downtown Mobile, Alabama. Among others at the head of the march was Chief of the Mobile Police Department Lawrence Battiste, IV. A smaller group of protesters left the planned route and went to the intersection of Government Street and Water Street, where an on-ramp leads to the westbound side of the Interstate 10 highway ("I-10"). I-10 is an interstate highway that connects the east and west coasts of the United States and runs through Mobile, Alabama. Law enforcement officers constructed a makeshift barricade of marked law enforcement vehicles to block access to I-10. When the protestors would not disperse, the police deployed tear gas in an effort to disperse the crowd. After the use of tear gas, one of the protesters, allegedly Pugh, used a bat to break out the window of a police cruiser that was parked on the ramp. She then fled into the crowd of protestors. The incident was captured on video by a local news crew.

Eventually, the Mobile Police Department ("MPD") identified Pugh, arrested her, and charged her with state offenses of Inciting a Riot and Criminal Mischief, Third Degree. After her arrest on state charges, on June 5, 2020, the United States charged Pugh, via Complaint, with a violation of 18 U.S.C. § 231(a)(3). *See* Doc. 1. Pugh was arrested and had her initial appearance, preliminary hearing, and

detention hearing on June 9, 2020. *See* Docs. 5, 9, 12, 14. Pugh was released with conditions. *See* Docs. 12, 15.

> On June 24, 2020, the Grand Jury returned a one-count Indictment with the same charge.

See Doc. 16. The Indictment in totality states as follows:

> On or about May 31, 2020, in the Southern District of Alabama, Southern Division, the defendant, TIA DEYON PUGH, did knowingly commit an act, and attempt to commit an act, to obstruct, impede, and interfere with any law enforcement officer lawfully engaged in the performance of an official duty incident to and during the commission of a civil disorder, which in any way and to any degree obstructed, delayed, and adversely affected commerce and the movement of any article commodity in commerce, in violation of Title 18, United States Code, Section 231(a)(3).

Id. In part due to the COVID-19 pandemic and at the request of both Defendant and the Government, the trial date was delayed multiple times.[1]

On January 26, 2021, on the eve of trial, Defendant filed her first Motion to Dismiss Indictment (Doc. 52) which asserts the Indictment suffers multiple defects that require dismissal. The motion presents four reasons for dismissal. First, 18 U.S.C. § 231(a)(3) exceeds Congress' Commerce Clause authority. Second, 18 U.S.C. § 231(a)(3) is a content-based restriction on expression, fails strict scrutiny, and violates the First Amendment. Third, 18 U.S.C. § 231(a)(3) is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. Finally, the boilerplate allegations in the indictment violate the presentment and notice functions of grand jury indictments under the Fifth and Sixth Amendments as well as Fed. R.

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[1] [1] A detailed accounting of the multiple delays is summarized in the Court's order on March 25, 2021 delaying the trial to May 17, 2021. *See* Doc. 65.

Crim. P. 7(c). The first three arguments pertain to the constitutionality of the statute while the fourth argument, made in the alternative, challenges the sufficiency of the indictment. The Government filed its response on March 26, 2021. *See* Doc. 66. The Government argues that Pugh fails to carry her burden to show that 18 U.S.C. § 231(a)(3) is unconstitutional and further argues that the Indictment is sufficient. On April 12, 2021, Pugh filed a reply to the Government's response with further assertions as to the unconstitutionality of the statute. *See* Doc. 68. On the eve of the scheduled hearing, the Government filed a supplemental response (Doc. 70) to which the Defendant replied (Doc. 71). The Court held a hearing on the motion on April 15, 2021.

Subsequent to the hearing, the Government obtained from the Grand Jury a superseding indictment which charged Pugh with the same single-count violation of 18 U.S.C. § 231(a)(3), but added a factual summary of Defendant's alleged actions preceding the recitation of the charge. *See* Doc. 73.

Pugh filed her Motion to Dismiss Superseding Indictment where she incorporates by reference her prior motion to dismiss and its arguments. *See* Doc. 75. She followed with a supplement to her motion arguing that the superseding indictment is still deficient. *See* Doc. 82. The Government filed its response on May 12, 2021 addressing both the newly filed motion to dismiss and the supplement. *See* Doc. 91.

The Court finds that no hearing is necessary on the new motion/response and both are fully submitted and ripe for review.

II. DISCUSSION AND ANALYSIS – CONSTITUTIONAL CHALLENGES

To address a threshold matter, both parties include extensive briefing on the legislative history of 18 U.S.C. § 231(a)(3) and discuss the racial motivations for voting for or against it. *See* Doc. 1 at 3-9; Doc. 66 at 16-18; Doc. 68 at 2-7. However, the Government's argument is correct that the Court does not go into legislative history without first looking at the statute's plain language. *See* Doc. 66 at 16.

The mandatory starting point in statutory interpretation is the statute's plain language. *Meridor v. United States AG*, 891 F.3d 1302, 1307 (11th Cir. 2018). And, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525

U.S. 432, 438, 119 S. Ct. 755, 760, 142 L. Ed. 2d 881 (1999); *see also United States v. Williams*, 790 F.3d 1240, 1245 (11th Cir. 2015) (internal quotations and citation omitted) ("Only when a statute's meaning is inescapably ambiguous will this Court turn to legislative history to aid in interpretation."). The Supreme Court reiterated this point just recently in *Bostock v. Clayton County*, --- U.S. ---, 140 S. Ct. 1731, 1749, 207 L. Ed. 2d 218 (2020). "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Id.* "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* (citations omitted).

Therefore, the Court first looks at language of the statute at issue, which is as follows:

> 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—Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 231(a)(3). "The term 'civil disorder' means 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). "The term 'commerce' 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. § 232(2).

> The term "federally protected function" means 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).

> The term "law enforcement officer" means 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; and such term shall specifically include members of the National Guard (as defined in section 101 of title 10), members of the organized militia of any State, or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia not included within the National Guard (as defined in section 101 of title 10), and members of the Armed Forces of the United States, while engaged in suppressing acts of violence or restoring law and order during a civil disorder.

18 U.S.C. § 232(7).

The Court does not find that the language or definitions are inescapably ambiguous. In discrete parts, the statute makes it illegal to: "commit any act" to "obstruct, impede, or interfere" with a "law enforcement officer" who is "lawfully engaged in the lawful performance of his official duties" in connection with "a civil disorder," where the act "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." Though arguably broad, the statute is clear. Therefore, the Court finds the legislative history has no bearing. Much like the Supreme Court noted in *Bostock*, even if the statute's application reaches beyond what the legislators may have intended or expected to address, if no ambiguity exists about how the law applies to the facts before the Court, then the legislative history is not considered. *Bostock*, 140 S. Ct. at 1749 (citations omitted). "'[I]t is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" *Id.* (quoting *Oncale v. Sundowner Offhsore Servs.*, 523 U.S. 75, 79, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1997)). The only exception to this consideration may be under the First Amendment challenge when considering whether the law is content-neutral or content-based, which the Court will address.

Additionally, it is unclear whether Pugh asserts a selective prosecution argument. While Pugh argues that 18 U.S.C. § 231(a)(3) is seldom invoked, she never makes a clear selective prosecution claim. While 18 U.S.C. § 231(a)(3) prosecutions may not be common, it is clearly being applied now to a variety of persons – between the few cases that stemmed from the George Floyd protests that turned into civil

disorder and more recently the cases asserted against some participants in the events on January 6, 2021 at the U.S. Capitol. Each of the 18 U.S.C. § 231(a)(3) prosecutions that arose from those protests encompass individuals of a variety of races and genders with extremely different ideology. Thus, the Court finds that to the extent Pugh asserts a selective prosecution claim, the claim fails.

The Court now turns to the Pugh's first three challenges – all of which relate to the constitutionality of the statute.

A. Commerce Clause

Pugh argues that "§ 231(a)(3) unconstitutionally exceeds Congress' 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." Doc. 52 at 12. To the extent Pugh makes a general facial challenge to the constitutionality of the statute as to the interstate commerce requirement, the Court will address it below. However, to the extent Pugh makes a specific factual challenge as to whether the conduct at issue is sufficient to have a substantial effect on interstate commerce, that issue is not yet ripe. The Court cannot presume that either party's version of the facts will ultimately prove true at trial, nor should it at this stage in the proceedings. Should a question remain as to whether the Government has proved that the alleged activities establish the necessary nexus to commerce, Pugh may again raise this issue at trial. *See United States v. Ramos*, Crim. Act. No. 1:02-cr-730-14-AT-AJB, 2016 U.S. Dist. LEXIS 183591, at *20, 2016 WL 8222072, at *7 (N.D. Ga. Dec. 19, 2016), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 16634, 2017 WL 512752 (N.D. Ga. Feb. 6, 2017); *United States*

v. Alvarado-Linares, Crim. Act. No. 1:10-cr-086, 2011 U.S. Dist. LEXIS 155112, at *6-8, 2011 WL 7807742, at *2 (N.D. Ga. Nov. 14, 2011), *report and recommendation adopted* 2012 U.S. Dist. LEXIS 64824, 2012 WL 1632048 (N.D. Ga. May 8, 2012).

Turning to the facial challenge of the statute, the Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "This tripartite clause is commonly known as the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause, respectively." *United States v. Davila-Mendoza*, 972 F.3d 1264, 1269 (11th Cir. 2020). At play in this statute is the Interstate Commerce Clause.

> [The Supreme Court has] identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

Gonzales v. Raich, 545 U.S. 1, 16, 125 S. Ct. 2195, 2205, 162 L. Ed. 2d 1 (2005)

Pugh relies primarily on *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) and *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). In *Lopez*, the Supreme Court identified the following three categories of activity that Congress may regulate under its Commerce Clause power: (1) channels of interstate commerce;(2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59, 115 S. Ct. at 1629-30; *see also Taylor v. United States*, --- U.S. ---, 136 S. Ct. 2074, 2079, 195 L. Ed.

2d 456 (2016) (quoting *Lopez*). Next, in *Morrison*, the Supreme Court instructed courts to consider four factors to determe whether a regulated activity "substantially affects" interstate commerce: (1) whether Congress made findings regarding the regulated activity's impact on interstate commerce; (2) whether the statute contains an "express jurisdictional element" that limits its reach; (3) whether the regulated activity is commercial or economic in nature; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. *Morrison*, 529 U.S. at 610-12, 120 S. Ct. 1749-51. Recently, the Supreme Court stated that the third category –those that "substantially affect" commerce – "may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." *Taylor*, 136 S. Ct. at 2079.

The Court agrees with the Government where it notes that 18 U.S.C. § 231(a)(3) contains a jurisdictional element that materially distinguishes it from the statutes struck down in *Lopez* and *Morrison*. In sum, 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. For example, in *United States v. Castleberry*, the Eleventh Circuit upheld the Hobbs Act because it contained a jurisdictional element that states "in any way or degree obstructs, delays, or affects commerce or the movements of any article or commodity in commerce," the "substantially affects" test is not applicable, and the Government need only show a minimal effect on interstate commerce to support a conviction. 116 F.3d 1384, 1387 (11th Cir. 1997). In *United States v. Scott*, the Court held that 18 U.S.C. § 922(g) was not a facially unconstitutional exercise of Congress' power under the Commerce

Clause because it contains an express jurisdictional requirement, and the element was satisfied when there was a minimal nexus to interstate commerce. 263 F.3d 1270, 1273 (11th Cir. 2001); *see also United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011) (citing *Scott* and reiterating holding); *United States v. Thomas*, 810 F. App'x 789, 796 (11th Cir. 2020) (reiterating facial challenge failed with the amended § 922(g) due to the amendment including explicit jurisdictional requirement "affecting interstate commerce.").[2]

Though not binding, the Court finds the language from other circuit cases to be instructive. The Sixth Circuit states "[i]ndeed, we regard the presence of such a jurisdictional element as the touchstone of valid congressional use of its Commerce Clause powers to regulate non-commercial activity." *United States v. Coleman*, 675 F.3d 615, 620 (6th Cir. 2012) (upholding the Sex Offender Registration and Notification Act ("SORNA") with an explicit jurisdictional element that is not directed as economic activity). As noted by the Fourth Circuit "Congress may regulate violent conduct interfering with interstate commerce even when the conduct itself has a 'minimal' effect on such commerce." *United States v. Hill*, 927 F.3d 188, 199 (4th Cir. 2019) (citations omitted).

Though Pugh valiantly attempts to distinguish these cases from the situation at hand, the Court cannot find sufficient distinction to stray from the binding principles espoused by the Eleventh Circuit. The Court agrees that for the

[2] [2] In this Circuit, "[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2 (effective Dec. 1, 2014); *see also Henry v. Comm'r of Soc. Sec.*, 802 F.3d 1264, 1267 n.1 (11th Cir. 2015) (per curiam) ("Cases printed in the Federal Appendix are cited as persuasive authority.").

jurisdictional element to be meaningful, it must be more than a "pretextual incantation evoking the phantasm of commerce." *United States v. Maxwell*, 446 F.3d 1210, 1218 (11th Cir. 2006) (quoting preceding opinion in *United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004)). However, the Court finds that, from a facial challenge, the jurisdictional language in 18 U.S.C. § 231(a)(3) is sufficiently established and not merely language with no substance.

In the statute at hand, first, there must be a civil disorder that, in turn, affects commerce as defined by 18 U.S.C. § 232(2) where law enforcement (or a fireman) is engaged in the lawful performance of his duties incident to, or during, that same civil disorder and then the defendant commits or attempts to commit an act to obstruct, impede, or interfere with the performance of those duties. The jurisdictional hook as stated already limits the conduct to specific circumstances. It does not encompass all instances where a person interferes with law enforcement. Rather 18 U.S.C. § 231(a)(3) is restricted to contemporaneous interference with law enforcement officers performing their duties during civil disorders affecting interstate commerce. Despite Pugh's attempts to distinguish from the above principles, she cites no case where a statute has been invalidated where there is an explicit jurisdictional hook, nor did the Court find one in its own independent research. Therefore, the Court finds that 18 U.S.C. §231(a)(3) with its jurisdictional hook is sufficient to survive a facial challenge. Whether or not a case can survive a factual challenge is to be decided on a case-by-case basis and is a matter for the jury and/or court at trial.

B. First Amendment – Freedom of Speech

Pugh also argues that 18 U.S.C. § 231(a)(3) violates the First Amendment in two ways. Doc. 52 at 21. First, that it is a "substantially overbroad regulation of protected expression because it imposes steep criminal penalties on an expansive range of speech and expressive conduct." *Id.* Second, because it 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." *Id.*

> A statute may be overbroad if "it prohibits a substantial amount of protected speech."

United States v. Williams, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

"Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973) (citations omitted). Further, an otherwise constitutional statute "may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 2302, 33 L. Ed. 2d 222 (1972); *see also City of Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987) ("[I]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."). "As a general matter, laws may not restrict speech simply because of its content or

assemblies simply due to distaste for the common cause of those meeting, but reasonable time, place, and manner regulations are permissible to further significant governmental interests." *United States v. Huff*, Crim. Act. No. 3:10-CR-73, 2011 U.S. Dist. LEXIS 36766, at *3-4, 2011 WL 1308099, at *1 (E.D. Tenn. Jan. 3, 2011) (internal quotations omitted) (quoting *Grayned*, 408 U.S. at 116, 92 S. Ct. at 2303). Finally, "[r]arely, 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 (such as picketing or demonstrating)." *Virginia v. Hicks*, 539 U.S. 113, 124, 123 S. Ct. 2191, 2199, 156 L. Ed. 2d 148 (2003).

The Court first notes that 18 U.S.C. § 231(a)(3) is not a specific statute regulating speech, but rather applies to conduct; however, the statute does not apply to all conduct, but rather conduct in the midst of a civil disorder. Though there is not much caselaw on the statute, at least one circuit specifically addressed the matter. *See United States v. Mechanic*, 454 F.2d 849 (8th Cir. 1971). In *Mechanic*, the Eighth Circuit states "[t]he short answer to the defendants' contention that the statute prohibits protected speech is that, as we read it, § 231(a) (3) has no application to speech, but applies only to violent physical acts." *Id.* at 852. The Government, here, also notes the same interpretation in *United States v. Rupert*, Crim. Act. No. 0:20-cr-104, 2021 U.S. Dist. LEXIS 46798, 2021 WL 942101 (D. Minn. Mar. 12, 2021). However, one major point in *Rupert* is that it is bound by Eight Circuit precedent and this Court is not.

The Court here agrees that 18 U.S.C. § 231(a)(3) applies to conduct, but not

necessarily the more stringent view of the Eight Circuit that it only applies to violent physical acts. 18 U.S.C. § 231(a)(3) specifically states "any act to obstruct, impede, or interfere." 18 U.S.C. § 231(a)(3).

The only place where violence is referenced is in the definition of "civil disorder" where it means "any public disturbance involving acts of violence." 18 U.S.C. § 232(1). The Eight Circuit links the violence of the civil disturbance to the act of the individual. However, while that may very well be the case in such situations, it does not necessarily require it. Rather, the act must simply be one that obstructs, impedes, or interferes with law enforcement who are engaged in the performance of duties incident to, and during the commission of, a civil disorder. It is possible under this statutory construction to have a nonviolent act which accomplishes the same goal. Therefore, this Court construes the statute more broadly to include exactly what it says: "any act."

Moreover, "[u]nlawful conduct is not protected conduct. The First Amendment does not give individuals the right to break a generally applicable law for expressive purposes." *United States v. Huff*, 630 F. App'x 471, 486 (6th Cir. 2015) (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65-66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)). Much like the Sixth Circuit's analysis in *Huff* as it relates to 18 U.S.C. § 231(a)(2) – a sister provision to the statute at issue here – there is nothing in 18 U.S.C. § 231(a)(3) that prohibits expression or association. Rather, it makes unlawful the deliberate act of obstructing, impeding, or interfering with law enforcement performing their duties at a civil disorder. The fact that the Court could conjure some hypothetical scenario of prosecutorial overreach does not invalidate an entire statute on a facial challenge under the First Amendment. *See Williams*, 553 U.S. at 303, 128 S. Ct. at 1844 (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104

S. Ct. 2118, 80 L. Ed. 2d 772 (1984)) ("The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). Rather, such a scenario could be challenged in an "as-applied" challenge.

Pugh also argues that 18 U.S.C. § 231(a)(3) regulates the content of protected expression

without a permissible justification. To succeed in a typical facial attack, Pugh would have to establish "that no set of circumstances exists under which [18 U.S.C. § 231(a)(3)] would be valid

. . . or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010) (internal citations and quotations omitted). Further, "[i]n the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby 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." *Id.* at 473, 130 S. Ct. at 1587 (citation and internal quotations omitted).

Finally, the Supreme Court's precedents "allow the government to 'constitutionally impose reasonable time, place, and manner regulations' on speech, but the precedents restrict the government from discriminating 'in the regulation of expression on the basis of the content of that expression.'" *Barr v. Am. Ass'n of Political Consultants*, --- U.S. ---, 140 S. Ct. 2335, 2346, 207

L. Ed. 2d 784 (2020) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 520, 96 S. Ct. 1029, 47 L. Ed. 2d

196 (1976)). Content-based laws are subject to strict scrutiny and content-neutral laws are subject to a lower level of scrutiny. *Id.* (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163-66, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)). "In order to determine whether a regulation of speech is content based, we must first consider whether, 'on its face,' it 'draws distinctions based on the message a speaker conveys.'" *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1317 (11th Cir. 2020) (quoting *Reed*,

576 U.S. 155, 135 S. Ct. at 2226). The Court "may also consider whether the regulation was enacted due to an impermissible motive, i.e., the suppression of free expression." *Id.* (citations omitted). "When a regulation is content based on its face, strict scrutiny applies and there is no need for the speaker to also show an improper purpose." *Id.* (citing *Reed*, 135 S. Ct. at 2228).

In looking at 18 U.S.C. § 231, the Court finds it is content-neutral on its face, so the Court must look to the second part of the *Reed* test – whether the regulation was enacted for the suppression of free expression. Even considering the extensive discussion that Pugh devotes to Senator Russell B. Long of Louisiana and her argument that his involvement somehow establishes the discriminatory intent of 18 U.S.C. § 231, the Court cannot find that to be true. Even assuming that Senator Long did intend what Pugh asserts, the negative intentions of a single senator cannot be imputed to all proponents of the bill. Moreover, as shown in the ultimate vote, the bill passed with Senator Long voting in the negative and other high-profile civil rights supporters voting for the bill. Though the time frame in question clearly had a sharp divide among Congress on the rights and beliefs of those involved in the Civil Rights Movement, that alone cannot establish a content-based intent. Rather, the statute on its face is content neutral and applies to a limited category of expressive conduct – civil disorder affecting interstate commerce and then the act to,

or attempt to obstruct, impede, or interfere with, law enforcement or firemen performing their official duties involving the civil disorder. There is nothing to indicate that it is content-based because it does not apply to any particular speech – it does interfere with any lawful public gatherings to express ideology or speak out

on various matters. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citation omitted). Thus, strict scrutiny would not apply.[3]

C. Due Process Clause

Pugh next challenges the statute arguing that it is unconstitutionally vague and violates the Due Process Clause of the Fifth Amendment.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859, 144 L. Ed. 2d 67 (1999) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966)). Further, the "void-for-vagueness doctrine requires that a penal statute 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *United States v. Marte*, 356 F.3d 1336, 1342 (11th Cir. 2004) (quoting *United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002)). That said, "litigants cannot argue that a law is vague based on how it might apply to a

[3] The Government argues that even if 18 U.S.C. § 231(a)(3) regulated speech to a degree that a

hypothetical scenario." *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1334 (M.D. Ala. 2019). Instead, courts "consider whether a statute is vague as applied to the particular facts at issue." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18, 130 S. Ct. 2705, 2718-19, 177 L. Ed. 2d 355 (2010). That is because "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 18-19, 130 S. Ct. 2719 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. level of scrutiny applied, the Court should apply intermediate scrutiny. *See* Doc. 66 at 38. The Court disagrees. As noted by Justice Thomas in his concurring opinion in *Bruni v. City of Pittsburgh*, 141 S. Ct. 578, 208 L. Ed. 2d 562 (2021), it would appear that in the context of a First Amendment challenge, intermediate scrutiny "is incompatible with current First Amendment doctrine as explained in [*Reed*] and *McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)." *Bruni*, 141 S. Ct. at 578 (Thomas, J., concurring) (quoting *Price v. Chicago*, 915 F.3d 1107, 1117 (7th Cir. 2019). Strict scrutiny would apply if a law were determined to be content-based.

The Supreme Court clarified that the general rule applies to vagueness challenges that implicate the First Amendment. *See Holder*, 561 U.S. at 20, 130 S. Ct. at 2719. "[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. That rule makes no exception for conduct in the form of speech." *Id.* (internal citations omitted); *see also United States v. Di Pietro*, 615 F.3d 1369, 1372 (11th Cir. 2010) (citing *Holder*, the holding that void-for-vagueness challenges are separate and

distinct from overbreadth challenges, and the inability to bring challenges that fall squarely within the rule prohibiting a facial vagueness challenge by one to whom a statute may be constitutionally applied.).

While Pugh argues in her reply brief that "the government provides only a passing defense of the statute under the void for vagueness provision of the Due Process Clause," the Court notes that she merely glosses over the United States' primary defense on the challenge – i.e., that she lacks standing to bring a facial vagueness challenge. *Compare* Response, Doc. 66 at 39-40 *with* Reply, Doc. 68 at 29-31. When considering the law above, Pugh must first demonstrate that 18 U.S.C. § 231(a)(3) is vague as applied to her before she may raise a facial vagueness challenge.

Pugh fails to do so. By Pugh's own argument, "the statute leaves individuals uncertain regarding criminalized conduct." Moreover, Pugh seeks to have the Court declare that 18 U.S.C. § 231(a)(3) is unconstitutionally vague for either (or both) grounds: that the statute fails to provide fair notice and susceptible to arbitrary and discriminatory enforcement. This is the precise kind of challenge prohibited by binding caselaw. *Di Pietro*, 615 F.3d at 1373.

Consequently, Pugh lacks standing to raise a general facial vagueness challenge pursuant to the Due Process Clause and the motion to dismiss is denied on this basis.

III. DISCUSSION AND ANALYSIS – SUFFICIENCY OF THE INDICTMENT

In the alternative, Pugh challenges the sufficiency of the indictment. Doc. 52 at 37-38; Doc. 82 generally. In its original response and at the hearing, the Government asserted that the Indictment tracks the language of the statute and conforms with the requirements of Fed. R. Crim.

P. 7(c). The Court disagrees.

"In 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. To comply with the Federal Rules of Criminal Procedure, an Indictment "must 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).

> "An indictment is considered legally sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Jordan*, 582 F.3d 1239, 1245 (11th Cir. 2009) (citation and quotations omitted). "In determining whether an indictment is sufficient, we read it as a whole and give it a 'common sense construction.'" *Id.* (citing *United States v. Gold*, 743 F.2d 800, 813 (11th Cir. 1984) and *United States*
> *v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976)). "In other words, the indictment's 'validity is to be determined by practical, not technical, considerations.'" *Jordan*, 582 F.3d at 1245 (citing *Gold*, 743 F.2d at 812).

United States v. Schmitz, 634 F.3d 1247, 1259-60 (11th Cir. 2011); *see also United States v. Chalker*, 966 F.3d 1177, 1190 (11th Cir. 2020) (quoting *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002)) ("[An indictment] is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the

charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense."). In making this determination, the Court must take the allegations in the indictment as true. *United States v. Plummer*, 221 F.3d 1298, 1302 (11th Cir. 2000).

The original Indictment against Pugh stated:

> On or about May 31, 2020, in the Southern District of Alabama, Southern Division, the defendant, TIA DEYON PUGH, did knowingly commit an act, and attempt to commit an act, to obstruct, impede, and interfere with any law enforcement officer lawfully engaged in the performance of an official duty incident to and during the commission of a civil disorder, which in any way and to any degree obstructed, delayed, and adversely affected commerce and the movement of any article commodity in commerce, in violation of Title 18, United States Code, Section 231(a)(3).

Doc. 16.

While this may track the statute (precisely the Court might add), it provides no information as to exactly what conduct Pugh did to violate the statute. If an indictment tracks the language of the statute, it must be accompanied with a statement of facts and circumstances that will inform the accused of the specific offense, coming under the general description, with which he is charged. *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006); *see also Hamling v. United States*, 418 U.S. 87, 117-18, 94 S. Ct. 2887, 3908, 41 L. Ed 2d 590 (1974) (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)) ("Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific [offense], coming under the general description, with which he is charged."). More

recently, the Eleventh Circuit stated "[w]hile it is generally enough for an indictment to track statutory language . . . simply tracking statutory language does not suffice when the resulting indictment fails to 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the [offense] intended to be punished." *United States v. Johnson*, 981 F.3d 1171, 1179 (11th Cir. 2020) (citation and internal quotations omitted).

The Indictment contains no information that establishes that (1) at the time of Pugh's conduct that civil disorder existed, (2) the civil disorder(s) in some way interfered with, obstructed, delayed or adversely affected commerce, (3) law enforcement was lawfully responding to that civil disorder, and (4) that Pugh knowingly committed an act to obstruct, impede, or interfere with those efforts by doing ____. The Court deliberately places a blank in the fourth number because that is the point. The Indictment says nothing other than Pugh violated 18 U.S.C. § 231(a)(3). There is no "To Wit:" clause identifying the conduct or some other means to relay exactly what Pugh allegedly did. In fact, by adding "on or about" in front of the date, the Government then expands the date to a reasonable timeframe before and after May 31, 2020. Rather, at some unspecified place and generalized range of days/time, Pugh did something that the Government alleges violated the statute.

In no way does this satisfy the pleading requirements or satisfy the Eleventh Circuit's discussion on charging requirements. Put differently, the Government skipped the first requirement of Rule 7(c)(1): that there "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1).

As a point of comparison, in reviewing the Government's Supplemental Response (Doc. 70), the Court pulled the Indictment from the comparator case, *Rupert*, Civ. Act. No. 0:20-cr-104 from the District of Minnesota's docket sheet. Though the Government relies upon this case for another purpose, the Court finds the Indictment in that case to contain far more detail than the instant matter. *See id.*. D. Minn. Docket Sheet, Doc. 12. The Indictment in the *Rupert* case is six pages long. Admittedly, it contains three counts, but leads with an extensive statement of facts with precise details as to exactly what/when/where Rupert allegedly did. Only then does it move to a recitation of the statute in Count 1 incorporating the preceding paragraphs.

In the instant case, the Government attempted to argue that Pugh had the original Complaint (Doc. 1) to rely upon. However, while a Complaint is a proper means to initiate a criminal case, the Indictment is the controlling document here and cannot incorporate by reference the prior information.

As such, the Court finds that the original Indictment was fatally deficient. However, dismissal of that Indictment has been rendered moot by the Grand Jury issuing a Superseding Indictment. Therefore, the Court now turns to Pugh's assertion that the Superseding Indictment is also deficient. *See* Doc. 82.

The Superseding Indictment includes the same charge as the original Indictment, but now leads with two sections entitled "General Allegations" and "Pugh's Contact with Law Enforcement" which are then incorporated into the single-count charged. *See* Doc. 73 at ¶¶ 1-9.

Pugh alleges it is still insufficient for several reasons. First, "the use of the

conclusory term 'civil disorder'" does not include the statutory definition in § 232(1) or the relationship to the "act" charged. *See* Doc. 82 at 2. Second, it fails to include "violent" in front of "act" as required by *Mechanic*. *Id.* Third, "the inclusion of the term 'knowingly' does not include a specific intent." *Id.* at 3. Fourth, the Superseding Indictment fails to specify how the alleged civil disorder or Defendant's act obstructed, delayed, and adversely affected commerce and the movement of any article or commodity in commerce. *Id.* at 3-4. The Government timely filed its response.[4] *See* Doc. 91.

Here, the Court finds that the Superseding Indictment does meet the requirements of Rule 7(c) in that the indictment contains "a plain, concise, and definite written statement of the essential facts constituting the offense charged." As it still tracks the language of the statute, the Government has now included the accompanying statement of facts and circumstances that informs the accused of the specific offense, coming under the general description, with which she is charged. *Sharpe*, 438 F.3d at 1263.

With regard to Pugh's first argument, the Court agrees with the Government that it is not required that the indictment define legal terms of art – like "civil

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[4] The United States indicated that it was not separately ordered to respond to the supplemental motion to dismiss the superseding indictment, but addressed both in a combined response "out of an abundance of caution." *See* Doc. 91 at 2, n. 1. However, the Court would have thought given the short time before May 17 trial date and the fact the supplement came in *prior* to the Court's ordered response deadline of May 12 that it would have been obvious that the Court expected the Government to address *both* matters.

disorder." The definition of civil disorder is not a question of fact, but rather a legal term of art. While the fact-finder may find whether or not civil disorder existed, it does not get to define the term. The "legal definition . . . does not change with each indictment" and "it is a term sufficiently definite in its legal meaning to give a defendant notice of the charge against [her]." *Id.*

Next, Pugh avers that the failure to include the term "violent" in front of "act" renders the indictment deficient under the *Mechanic* analysis. As the Court noted earlier in this opinion, the undersigned does not agree with the non-binding analysis from the Eighth Circuit case that violence is required. *Supra* pages 12-13. The Court construes the statute more broadly to include exactly what it says: "any act." Therefore, the omission of the word "violent" does not render the Superseding Indictment deficient.

Third, Pugh alleges, "the inclusion of the term 'knowingly' does not include a specific intent." The Court is not persuaded. While an indictment should set forth the "essential facts" of the charged offense as required by Fed. R. Crim. P. 7(c)(1), it is not necessary to recite the entirety of the evidence the government will present at trial to support the charge. *See United States v. Lehder-Rivas*, 955 F.2d 1510, 1519 (11th Cir. 1992); *United States v. Martell*, 906 F.2d 555, 558 (11th Cir. 1990). The language of the Superseding Indictment tracks the statute and includes

sufficient facts to put Defendant on notice of the charges against her. The issue of the jury finding the link of Pugh's intent behind her actions to the statute's element to disrupt, impede, and interfere with law enforcement is a matter for jury instructions and/or the jury verdict form.

Finally, Pugh's final (and in her words) "perhaps most [notable]" argument, the Superseding Indictment is silent as to how the alleged civil disorder or the defendant's act "in any way and to any degree obstructed, delayed, and adversely affected commerce and the movement of any article and commodity in commerce." Doc. 82 at 3. Again, an indictment need not be a recitation of every issue that is going to be addressed at trial. It need not address every factual issue of "who, what, where, when, why," but merely must address the essential elements of the offense, notify the accused of the charges to be defended against, and enable the defendant to rely upon a judgment as a bar against double jeopardy. *Chalker*, 966 F.3d at 1190. Moreover, the jurisdictional interstate commerce element may be proven in multiple ways – much like the same element in 18 U.S.C. § 922(g). An indictment need not specify every way that it intends to prove its case.

The Court is satisfied that the Superseding Indictment meets those three requirements. The Superseding Indictment sufficiently alleges the elements of the offense, that: (1) at the time of Pugh's alleged conduct, civil disordor existed; (2) that civil disorder in some way interfered with, obstructed, delayed, or adversely affected interstate commerce; (3) law enforcement was lawfully responding to that civil disorder; and (4) Pugh knowingly acted to obstruct, impede, or interfere with those law enforcement efforts by using a bat to smash the police vehicle's window. The

Court is quite certain that Pugh (and her counsel) are on notice of the elements, the charges, and the ability to rely upon any judgment (if one occurs) as a bar against double jeopardy.

Therefore, the Court finds that the Superseding Indictment is sufficient and as it is the controlling charging document, the request for dismissal is due to be denied.

IV. CONCLUSION

For the reasons articulated above, Defendant's *Motion to Dismiss Superseding Indictment* (Doc. 75) and *Supplemental Motion to Dismiss Superseding Indictment* (Doc. 82) are **DENIED** while the *Motion to Dismiss Indictment* (Doc. 52) is **DENIED as moot**.

DONE and **ORDERED** this 13th day of May 2021.

/s/ Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE