

No. _____

IN THE
Supreme Court of the United States

TAWANNA HILLIARD

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1513(e) of Title 18 of the United States Code prohibits “tak[ing] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense” “with the intent to retaliate.”

The questions presented in this Petition are:

1. Whether § 1513(e) is facially overbroad in that, as interpreted by the court of appeals, the statute can be violated by mere speech alone.
2. Whether a conviction under § 1513(e) is unconstitutional as applied to a person who was convicted under that law for assisting in the publication online of the post-arrest interviews of two informants without any further non-speech conduct.
3. Whether § 1513 is unconstitutionally vague in that its prohibition against “any action harmful,” even with a retaliatory intent, fails to provide adequate notice of what the law prohibits and encourages arbitrary and discriminatory enforcement.

LIST OF PARTIES TO THE PROCEEDING

Tawanna Hilliard, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

PROCEEDINGS BELOW

To counsel's knowledge, all proceedings directly related to this petition include:

- *United States v. Hilliard*, No. 23-6256 (2d Cir. Aug. 2, 2024).
- *United States v. Hilliard*, No. 18 Cr. 581 (E.D.N.Y. Mar. 30, 2023).

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OPINION BELOW

The court of appeals' summary order (Pet. App. 1-6) is unpublished but available at 2024 WL 3634201.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2024 (App. 1). This petition intends to seek review of the order dated August 2, 2024, by the Second Circuit Court of Appeals in case No. 23-6256. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was tried in the district court on charges of witness tampering, witness harassment, witness retaliation and obstruction of justice. The jury acquitted Petitioner of tampering and harassment but convicted her of witness retaliation and obstruction of justice.

Petitioner challenges her conviction and sentence on charges of witness retaliation and conspiracy to commit witness retaliation, under 18 U.S.C. § 1513(e) and (f), and obstruction of justice and conspiracy to obstruct justice, under 18 U.S.C.

§ 1512(c)(2) and (k). Petitioner's case centers on her actions related to two YouTube videos she helped publish that depicted cooperating witnesses involved in a law enforcement investigation into criminal activities of the 5-9 Brims gang, of which her son was a member.

The events leading to her conviction began when Petitioner's son was arrested on state charges, alongside another gang member and the gang member's girlfriend, following a robbery. Both the gang member and his girlfriend cooperated with the authorities, providing information on the gang's activities. Video recordings of their interviews were subsequently disclosed to Petitioner's son's attorney in the state proceedings. No protective order was entered in that case, and thus no restriction on sharing the state's disclosures. Acting on her son's request, Petitioner acquired these recordings from his lawyer and, eventually, coordinated with others to upload them online. The videos were titled "NYC Brim Gang Member SNITCHING!" and "NYC Brim Gang Member Girlfriend SNITCHING." Upon her conviction, the district court sentenced Hilliard to a term of 33 months in prison to be followed by supervised release.

Petitioner filed as-applied and overbreadth challenges to the retaliation law, 18 U.S.C. § 1513(e), in the district court, as well as a challenge to that statute on vagueness grounds. The district court denied the motions.

The Court of Appeals for the Second Circuit affirmed the district court by summary order. That court had jurisdiction under 28 U.S.C. § 1291.

As to the as-applied challenge, the court concluded that Petitioner’s uploading of the videos was speech integral to criminal conduct and thus unprotected. As to overbreadth, the court held that § 1513(e)’s lawful applications were not substantially disproportionate to applications that would violate the First Amendment. As to vagueness, the court concluded that § 1513(e) provided Petitioner with fair notice that assisting in the publication of the videos with the intent to retaliate against them would violate the law.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Misapplied This Court’s Decision in *Giboney v. Empire Storage & Ice Co.*

The decision of the court of appeals relied on its conclusion that the speech was “the very vehicle of the crime itself.” *United States v. Hilliard*, No. 23-6256, 2024 WL 3634201, at *2–3 (2d Cir. Aug. 2, 2024) (quoting *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007)). But, although the court of appeals relied on this Court’s decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), it applied a looser standard than *Giboney* provided.

In *Giboney*, this Court held that it is not “an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was *in part* initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” 336 U.S. at 502 (emphasis added). In that case, the Court upheld an injunction against picketing by an ice peddlers’ union in Missouri. Critical to the Court’s decision was that the union’s “sole, unlawful immediate objective” was to convince an ice company to break the law by refusing to sell to

nonunion businesses. *Id.*; see also *id.* at 498 (“sole immediate object”); *id.* at 501 (“sole immediate purpose”).

But *Giboney* is patently inapplicable here. The speech-integral doctrine applies only if the offending speech is “part” of some other unlawful non-speech conduct. *Id.* at 502. That is, the government cannot properly invoke the exception unless there is some unlawful conduct other than the speech to which the speech is integral. In solicitation and aiding-and-abetting cases, for example, speech that solicits or facilitates a particular criminal act is integral to the underlying unlawful activity. See, e.g., *United States v. Hansen*, 599 U.S. 762, 783 (2023) (cleaned up) (“We have applied [the speech-integral-to-unlawful-conduct exception] many times, including to the promotion of a particular piece of contraband, solicitation of unlawful employment, and picketing with the sole, unlawful and immediate objective of inducing a target to violate the law.”). But here, neither the statute nor the jury instructions required the jury to find that the illegal conduct involved anything beyond the publication of the videos. And the government expressly invited the jury to convict Petitioner for her communications alone. Because the jury was not required to find any unlawful conduct to which Petitioner’s speech was integral, *Giboney* does not apply.¹

¹ See, e.g., *United States v. Sryniawski*, 48 F.4th 583, 588 (8th Cir. 2022) (“Congress may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that Congress has criminalized. To qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as antitrust conspiracy”); *United States v. Osinger*, 753 F.3d 939, 954

Even when some unlawful activity other than speech is at issue, *Giboney* imposes a stricter intent requirement than the recklessness standard that this Court articulated for true threats in *Counterman v. Colorado*, 600 U.S. 66 (2023). Specifically, *Giboney* requires proof that the defendant’s “sole immediate purpose” was unlawful. 336 U.S. at 501. Without this limitation, the speech-integral exception would threaten to criminalize speech lacking any unlawful intent merely because it has some superficial connection to unlawful activity.

Here, the jury was not required to find Petitioner’s “sole immediate purpose” was to further some unlawful activity. Indeed, the district court instructed the jury that “The intent to retaliate *need not have been the only reason* so long as it was a substantial motivating behind the defendant's actions.” JA 1564 (emphasis added).² And Petitioner advanced a non-retaliatory purpose at trial which formed Petitioner’s central defense and was supported by recorded phone calls introduced into evidence. Specifically, Petitioner’s son informed her in those calls that the informant was attempting to divert attention from himself by claiming that Petitioner’s son, rather than he, was the informant. The defense maintained that the videos were published in order to discredit the informant in his efforts to slander Petitioner’s son. *See Hilliard*, 2024 WL 3634201, at *2 (describing Petitioner’s defense). Far from finding that retaliation was Petitioner’s sole,

(9th Cir. 2014) (Watford, J., concurring) (“If a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn’t apply.”).

² This citation is to the joint appendix filed in the court of appeals.

immediate purpose, the jury could have credited the defense and at the same time convict her for witness retaliation because it needed only to find that retaliation was only one of Petitioner's intentions.

The reliance of the court of appeals on the speech-integral doctrine here was especially misplaced where a finding that petitioner intended to incite violence, intimidation or any other unlawful act was not necessary to Petitioner's conviction. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), Mississippi merchants sought damages for an NAACP-organized boycott against the organization and its officers, including Charles Evers. Evers warned boycott violators, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902 (internal quotation marks omitted). The organization publicized names of those who violated the boycott, and some experienced violent retaliation, creating an "atmosphere of fear." *Id.* at 904. This Court acknowledged that Evers's remarks "might have been understood as . . . intending to create a fear of violence." *Id.* at 927. But the Court explained that listeners' reactions were irrelevant to the constitutional protection afforded speech. Evers "did not transcend the bounds of protected speech" because his advocacy was not "directed to inciting or producing imminent lawless action," *id.* at 928-929 (emphasis added), and there was no evidence that "any [speaker] specifically intended to further an unlawful goal," *id.* at 925 n.68 (emphases added).

Here, Petitioner's conviction under § 1513(e) required a finding only that Hilliard engaged in "any action harmful" to the informants no matter how

insignificant, including embarrassment or harm to reputation. The government was free to argue to the jury that Petitioner wanted to violently harm the informants, as indeed the government did. But, in acquitting Hilliard of every count that required the government to prove that she used harassment, intimidation or threats, the jury flatly rejected the notion that Hilliard intended violent harm. Thus, it is not just possible but likely that the jury found that the intended effect of the publication of the videos was to annoy and embarrass the informants or damage their reputations. As § 1513(e) was interpreted by the court of appeals, such an intent falls within the statute's broad sweep. But it is also protected speech because, as *Giboney* instructs, some unlawful activity other than the speech itself must be involved.

Mere emotional distress, even if caused for the purpose of retaliation, cannot be the unlawful activity that removes First Amendment protection. This Court's reasoning in *Counterman* is instructive here. At issue in that case was Colorado's stalking statute. The statute made it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. § 18-3-602(1)(c) (2022); *Counterman*, 600 U.S. at 70. This Court held that when the state prosecutes someone based on a theory that their speech amounted to a "true threat," the state must prove that "the defendant had some subjective understanding of the threatening nature of his statements." *Counterman*, 600 U.S. at 69.

Although, unlike the stalking statute in *Counterman*, § 1513(e) arguably requires proof of a subjective mental state – intent to retaliate – the harm can be minimal, as it likely was in this case. Under *Counterman*, speech merely meant to cause emotional distress is protected should the speech be prosecuted under a harassment or stalking statute. According to the court of appeals in this case, however, the same speech loses its protection merely because the prosecution chose to use the retaliation statute. Making constitutional protection of speech contingent on the prosecution’s decision of which offense to charge is absurd. *Cf. Small v. United States*, 544 U.S. 385, 387 (2005) (interpreting the phrase “convicted in any court” in the federal gun possession statute, 18 U.S.C. § 922(g), to encompass only domestic, not foreign, convictions in order to avoid anomalies caused by the contrary interpretation).

Certiorari is appropriate when “a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(a). Here, the court of appeals misapplied *Giboney*, and its decision conflicts with *Claiborne Hardware*.

The decision also chills large amounts of speech. Any criticism of a government witness that results in that witness’s emotional distress or even embarrassment can be punished by up to ten years’ imprisonment. And the power to punish the speaker rests entirely with the government. If a United States Attorney’s Office disapproves of the manner in which one of its witnesses has been criticized, it alone wields the authority to censure that speech, which is what

happened here. Certiorari should be granted to reinstall the bedrock, free-speech protections that the Constitution requires.

II. Section 1513(e)’s Prohibition against “Any Action Harmful” Fails to Provide Adequate Notice of What the Law Prohibits and encourages Arbitrary and Discriminatory Enforcement

For similar reasons, this case raises significant issues regarding the Fifth Amendment’s requirement to provide notice to the accused and to avoid inviting arbitrary enforcement. Due Process demands that the Government provide clear notice of what it commands or forbids. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Thus, a statute is unconstitutionally vague if it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or if the statute “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Granted, one may conceive of legitimate applications of a witness retaliation statute, such as workplace retaliation for whistleblowing, which motivated the inclusion of § 1107 of the Sarbanes-Oxley Act of 2002 (“SOX”). *See Yates v. United States*, 574 U.S. 528, 540-41 (2015) (describing the placement in the United States Code of various criminal provisions of SOX); *United States v. Camick*, 796 F.3d 1206, 1220 n.7 (10th Cir. 2015) (“18 U.S.C. § 1513(e) is a codification of section 1107 of the Sarbanes–Oxley Act of 2002, which Congress enacted to prevent the type of corporate fraud that led to the collapse of Enron Corporation.”). But this Court’s “holdings 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 (2015) (emphasis in original).

By its plain terms, § 1513(e) – in particular the *actus reus* “any action harmful” – punishes a “breathtaking amount” of legitimate activity. *Van Buren v. United States*, 593 U.S. 374, 393 (2021). Section 1513(e) can be used to punish anyone who does anything likely to bring about any delay, emotional distress, annoyance or loss of reputation no matter how insignificant. Thus, filing suit against a witness, slashing their tires, littering on their lawn, making a noise disturbance at their place of business, are all punishable under § 1513(e).

To take the example of this case, the informant’s reputation in a gang that forbids its members from cooperating with law enforcement was no doubt harmed when he was exposed as an informant. The code of his criminal enterprise forbade it. Surely, the Fifth Amendment does not permit criminal punishment on the basis of a person’s damaged reputation among other criminals. But the jury in this case was permitted to convict on those grounds. The government explicitly urged the jury to convict on that basis. JA 1373-74 (“The second element of witness retaliation that the Government has to prove is that the defendant’s action or actions were harmful. You’ve seen harm to both Khalif and Sasha. Harm to their reputations, but more importantly, harm to their safety.”). There is no reason to believe that, having acquitted Petitioner of making threats or harassing the witnesses in this case, the jury then found that she threatened their physical safety.

Justice Gorsuch’s comments on the aggravated identity theft statute, 18 U.S.C. § 1028A, apply with equal force here:

Depending on how you squint your eyes, you can stretch (or shrink) [§ 1028A’s] meaning to convict (or exonerate) just about anyone.

Doubtless, creative prosecutors and receptive judges can do the same. Truly, the statute fails to provide even rudimentary notice of what it does and does not criminalize. We have a term for laws like that. We call them vague. And “[i]n our constitutional order, a vague law is no law at all.”

Dubin v. United States, 599 U.S. 110, 133 (2023) (Gorsuch, J., concurring) (quoting *United States v. Davis*, 588 U.S. 445, 447 (2019)). Because it does not set limits on the standard of conduct it proscribes, § 1513(e) is unconstitutionally vague.

The government’s evidence in this case showed nothing more than a loss of reputation or, at most, a non-specific apprehension over physical harm. Petitioner’s conviction should not stand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

/s

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Appendix

2024 WL 3634201

Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Tyquan HILLIARD, Defendant,
Tawanna Hilliard, Defendant-Appellant.

23-6256

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August 2, 2024

Appeal from a March 15, 2023 judgment of the United States District Court for the Eastern District of New York ([Chen, J.](#)).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

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PRESENT: [ALISON J. NATHAN](#), [MARIA ARAÚJO KAHN](#), Circuit Judges, [RICHARD K. EATON](#), Judge.*

SUMMARY ORDER

*1 Defendant-Appellant Tawanna Hilliard appeals from her conviction and sentence for witness retaliation and conspiracy to commit witness retaliation, in violation of [18 U.S.C. § 1513\(e\)](#) and [\(f\)](#), and for obstruction of justice and conspiracy to obstruct justice, in violation of [18 U.S.C. § 1512\(c\)\(2\)](#) and [\(k\)](#). We assume the parties' familiarity with the underlying facts, procedural history, and issues on

appeal, to which we refer only as necessary to explain our decision.

Hilliard's conviction arose from her role in helping post to YouTube two videos of witnesses cooperating with federal authorities who were investigating criminal activity by the 5-9 Brims gang. Hilliard's son, a member of the gang, had been arrested along with another gang member and that gang member's girlfriend on state charges after a robbery. The other gang member and his girlfriend cooperated with a federal officer and video recordings of their interviews were produced to counsel for Hilliard's son in the state criminal proceedings. At the request of her son, Hilliard obtained the recordings from her son's lawyer and coordinated with gang members to post the videos online with titles referring to "NYC Brim Gang Member SNITCHING!" and "NYC Brim Gang Member Girlfriend SNITCHING." Gov't App'x at 278; App'x at 282. The videos quickly garnered thousands of views, causing at least one of the witnesses to receive violent threats and to have to be moved by federal agents for her own safety.

After Hilliard was convicted, the district court sentenced her principally to 33 months' incarceration. On appeal, Hilliard raises various challenges to her conviction and argues that her sentence is procedurally unreasonable because the district court erroneously applied the sentencing enhancement under Sentencing Guidelines § 2J1.2(b)(1)(B). We reject each of Hilliard's arguments and so affirm the district court's judgment.

I. Challenges to the Witness Retaliation Counts

The jury convicted Hilliard of witness retaliation under [18 U.S.C. § 1513\(e\)](#), which makes it a crime to "knowingly, with the intent to retaliate, take[] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense[.]"

Hilliard argues that she was unconstitutionally convicted for speech protected under the First Amendment—her uploading of the videos.¹ In the alternative, she argues that even if her own activity in this case was not constitutionally protected

speech, [Section 1513\(e\)](#) is facially overbroad. And she further argues that [Section 1513\(e\)](#) is unconstitutionally vague. We are not persuaded by any of these challenges to the witness retaliation statute.

*2 We begin with Hilliard's as-applied First Amendment argument, which fails for the simple reason that Hilliard's uploading the videos in these circumstances was unprotected speech. "From 1791 to the present ... the First Amendment has permitted restrictions upon the content of speech in a few limited areas," which "historic and traditional categories" include "speech integral to criminal conduct."  [United States v. Stevens](#), 559 U.S. 460, 468 (2010) (cleaned up); see  [Giboney v. Empire Storage & Ice Co.](#), 336 U.S. 490, 498 (1949); [Friend v. Gasparino](#), 61 F.4th 77, 89 (2d Cir. 2023). Thus, "speech is not protected by the First Amendment when it is the very vehicle of the crime itself."  [United States v. Gagliardi](#), 506 F.3d 140, 148 (2d Cir. 2007) (cleaned up).

In this case, by convicting Hilliard, the jury found that she intentionally retaliated and conspired to retaliate against witnesses and that her "speech was an integral part of the retaliation." App'x at 1549. Because the First Amendment "does not 'extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute,' " Hilliard's conviction does not raise a First Amendment problem. [Friend](#), 61 F.4th at 89 (quoting  [Giboney](#), 336 U.S. at 498). Speech is unprotected when, as here, it is "the very vehicle of the crime itself[.]"  [Gagliardi](#), 506 F.3d at 148 (quotation marks omitted).

To the extent Hilliard argues that her speech was not actually integral to any witness retaliation, we analyze that argument as a challenge to the sufficiency of the evidence and reject it. See [United States v. Hunt](#), 82 F.4th 129, 135 (2d Cir. 2023) ("Where, as here, a defendant contends that the evidence did not establish that his speech was [in a category of unprotected speech], he challenges the sufficiency of the evidence supporting his ... conviction.").

We evaluate sufficiency challenges "deferentially, construing the evidence in the light most favorable to the government, crediting every inference that could have been drawn in its favor." *Id.* (quotation marks omitted). Under that standard of review, we will affirm a conviction if "any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quotation marks omitted).²

There was ample evidence for the jury to find that Hilliard knowingly took actions harmful to the witnesses with retaliatory intent, and that her speech was an integral part of that intentional conduct. The jury was presented with evidence that Hilliard was familiar with the Brims and their practice of punishing cooperators with violence. That evidence included gang-related documents and correspondence found at her apartment, as well as her own notes on the videotaped interviews that memorialized one witness's concern that "[t]hey are gonna get me if I write statements." App'x at 590; see Gov't App'x at 290. As the district court reasoned, even Hilliard's defense—that she wanted to expose the witnesses as cooperators to rebut a rumor that her son was cooperating, because her son was in danger for being thought a cooperator—implicitly demonstrated that she knew just how dangerous and harmful it was to be thought of as a "snitch" by gang members.

*3 All this, combined with the fact that Hilliard coordinated the dissemination of the interview recordings with gang members and used a gang-related account name to post them, supports the jury's finding that Hilliard intended what she knew would likely follow from her actions. There was sufficient evidence to find that Hilliard's speech was simply a means by which she furthered and carried out a course of intentional retaliation against the witnesses, thus falling comfortably within the category of unprotected speech integral to criminal conduct.

Hilliard also argues that, even if [Section 1513\(e\)](#) was constitutionally applied to her, the statute is facially overbroad. We review overbreadth claims *de novo*. See [United States v. Thompson](#), 896 F.3d 155, 161 (2d Cir. 2018). An overbreadth claim is a special kind of facial challenge that allows litigants to whom a statute can be lawfully applied to nonetheless seek invalidation of the law because it "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep."  [United States v. Hansen](#), 599 U.S. 762, 770 (2023) (quotation marks omitted). Because overbreadth doctrine is "strong medicine that is not to be casually employed," for a law to be overbroad its "unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to

the statute's lawful sweep.” *Id.* (quotation marks omitted). “In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case.” *Id.*

Hilliard fails to justify the use of such strong medicine here. The witness retaliation statute can be validly applied to all manner of non-speech retaliatory conduct: from physical violence, to harm to a witness's property, to firing a witness from a job. It can also be validly applied to various forms of unprotected speech, such as reckless true threats. Given the broad scope of its lawful applications, Section 1513(e) is not facially overbroad. Even if Hilliard could hypothesize realistic potential applications of the law that would violate the First Amendment, she cannot demonstrate that they are “substantially disproportionate” to its “lawful sweep.” *Hansen*, 599 U.S. at 770. To the extent any applications of Section 1513(e) might raise First Amendment questions, “as-applied challenges can take it from here.” *Id.* at 785.

Nor does Hilliard succeed on her vagueness argument, which she appears to advance as both an as-applied and a facial challenge. A law is unconstitutionally vague in violation of due process “if it (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Brokamp v. James*, 66 F.4th 374, 403 (2d Cir. 2023) (quotation marks omitted). Criminal statutes are generally held to a higher standard than civil statutes regarding vagueness. See *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982). And vagueness analysis is especially “stringent” when a statute impinges on speech. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 19 (2010) (quotation marks omitted). On the other hand, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Id.* (cleaned up). In reviewing vagueness challenges *de novo* we “presume that acts of Congress are not unconstitutionally vague.” See *United States v. Houtar*, 980 F.3d 268, 273 (2d Cir. 2020).

“[W]e first consider [Hilliard's] as-applied challenge 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,’ ” a rule that “ ‘makes no exception for conduct in the form of speech.’ ” *Brokamp*,

66 F.4th at 403 (quoting *Holder*, 561 U.S. at 20). Hilliard's conduct is clearly covered by Section 1513(e). The jury found that Hilliard knowingly retaliated against the witnesses for providing truthful information to a law enforcement officer, by publicly branding them as “snitches” in a way intentionally designed to call the Brims’ attention to their cooperation with the government, to enable the gang to meet such cooperation with violent punishment. The statute's language readily provides fair notice that this conduct violates its prohibition against knowingly taking “any action harmful” against a witness “with the intent to retaliate.” 18 U.S.C. § 1513(e). And since Hilliard's conduct is clearly proscribed by Section 1513(e), she cannot mount a challenge to its vagueness as applied to others. See *Brokamp*, 66 F.4th at 403.

II. Challenges to the Obstruction Counts

*4 Hilliard argues that the court erroneously instructed the jury on her obstruction charges and that there was insufficient evidence to convict on those charges. Neither argument succeeds.

Plain error review applies to Hilliard's jury instruction claim, because she did not object to the instructions below. See *Hunt*, 82 F.4th at 138. But even if it did not, we find no error with the district court's instructions. Hilliard was charged and convicted under 18 U.S.C. § 1512(c), which covers anyone who “corruptly ... obstructs, influences, or impedes any official proceeding, or attempts to do so[.]” 18 U.S.C. § 1512(c)(2). The provision covers obstruction in the form of “impairing the availability or integrity” of “things used in an official proceeding,” including not just “records, documents, or other objects” but also “witness testimony or intangible information.” *Fischer v. United States*, 144 S. Ct. 2176, 2186 (2024) (cleaned up). The term “official proceeding” is defined to include various federal proceedings including “a proceeding before ... a Federal grand jury.” 18 U.S.C. § 1515(a)(1)(A). The obstructed proceeding “need not be pending or about to be instituted at the time of the offense,” *id.* § 1512(f)(1), but must be “reasonably foreseeable to the defendant,” *United States v. Pugh*, 945 F.3d 9, 21 (2d Cir. 2019) (quotation marks omitted). Finally, the government need not prove that the defendant knew that the relevant proceeding was or would be a federal one. 18 U.S.C. § 1512(g)(1); see *Pugh*, 945 F.3d at 21.

Hilliard contends that the court should have instructed the jury that the government had the burden to prove that “she knew that there was an ‘official proceeding,’ ” and that she “knew that the proceeding was specifically before a grand jury[.]” Appellant’s Br. at 54–55. But the statute requires neither knowledge of a pending proceeding nor knowledge that a proceeding is or will be federal. To the extent that Hilliard argues that the indictment in this case specifically charged her with obstructing a proceeding she knew to be federal, we disagree. Consistent with the statute, the indictment charged her with obstructing an official proceeding, which in fact turned out to be federal.

Hilliard also challenges the sufficiency of the evidence supporting her conviction on the obstruction charges, claiming that the evidence at most showed that Hilliard knew of or reasonably foresaw a law enforcement investigation, and did not intentionally direct any obstructive conduct at an official proceeding before a grand jury. In essence, her claim is that there was insufficient evidence to satisfy the nexus requirement of the statute. As we have explained, [Section 1512\(c\)\(2\)](#) requires “a ‘nexus’ between the defendant’s conduct and the pending, or foreseeable, official proceeding.” [Pugh](#), 945 F.3d at 21 (quotation marks omitted). This is satisfied when “the defendant’s acts have a relationship in time, causation, or logic with the judicial proceedings,” meaning that the defendant’s conduct “must have the natural and probable effect of interfering with the due administration of justice.” *Id.* at 22 (quotation marks omitted).

There was enough evidence for the jury to find this required link between Hilliard’s conduct and a reasonably foreseeable federal grand jury proceeding. From watching (and taking notes on) the videotaped interviews, Hilliard knew that there was a federal investigation into a pattern of criminal activity related to the Brims and that the government had received significant cooperating testimony about that activity. She also knew that her son and the witnesses had already been arrested by state authorities for some of the same conduct that was being federally investigated as part of a larger pattern of criminal activity. It was thus foreseeable that an official proceeding, such as a grand jury proceeding, would follow. *Cf. Pugh*, 945 F.3d at 22 (reasoning that defendant’s knowledge of a citizen criminally charged for attempting to

join ISIS supported the inference that a similar proceeding was foreseeable to him for his similar conduct). The fact that “every inquiry from [federal law enforcement] might not render a grand jury investigation reasonably foreseeable is of no avail” to Hilliard, because in these circumstances “there was sufficient evidence of foreseeability in this case.” [United States v. Bindow](#), 804 F.3d 558, 590–91 (2d Cir. 2015), *abrogated on other grounds by* [Ciminelli v. United States](#), 598 U.S. 306 (2023).

*5 Finally, sufficient evidence supports a finding that Hilliard’s retaliation—effectively placing a target on the witnesses’ backs in retaliation for their cooperation with the government—had “the natural and probable effect” of interfering with the reasonably foreseeable grand jury investigation. [Pugh](#), 945 F.3d at 22 (finding that destruction of devices “to impair their use [as evidence] in a reasonably foreseeable official proceeding” satisfied nexus requirement).

“Viewed in the light most favorable to the government, and drawing all reasonable inferences in its favor, as we must,” the evidence was sufficient for the jury to conclude that Hilliard foresaw an official proceeding and retaliated against witnesses in order to impede use of their testimony in that proceeding. *Id.* at 23. Hilliard therefore cannot sustain the “heavy burden” of her sufficiency challenge. [United States v. Krivovoi](#), 80 F.4th 142, 155 (2d Cir. 2023) (quotation marks omitted).

III. Evidentiary Challenges

Hilliard also argues that the district court wrongly admitted unfairly prejudicial gang-related evidence and wrongly excluded as irrelevant evidence that the video recordings of the interviews Hilliard posted were not subject to a protective order. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence,” and the fact is “of consequence in determining the action,” but relevant evidence may be excluded if “its probative value is substantially outweighed” by a risk of (among other things) “unfair prejudice.” [Fed. R. Evid. 401, 403](#).

We review a district court’s evidentiary rulings “for abuse of the district court’s broad discretion, reversing only when the

court has acted arbitrarily or irrationally.”  *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006) (quotation marks omitted). Our “highly deferential” review acknowledges “the district court’s superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice.” *United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016) (quotation marks omitted).

Here, the district court did not abuse its discretion with respect to either category of evidence. Hilliard emphasizes the potentially unfair prejudicial impact of gang-related evidence, highlighting testimony from an ex-Brims member about crimes the gang committed and the fact that he was shot for being a suspected cooperator, as well as testimony interpreting gang-related documents and terms. But evidence about Hilliard’s familiarity with the Brims and about how that gang treats cooperators was clearly relevant to Hilliard’s intent in bringing the witnesses’ cooperation with the government to gang members’ attention. It was highly probative of what she knew would happen if she exposed their cooperation to gang members, and therefore of what she may have intended in doing so. Additionally, evidence of the Brims’ criminal activity was relevant to establishing the basis for the federal investigation and eventual grand jury proceeding that Hilliard obstructed. While Hilliard complains generally about the potential unfair prejudice of evidence associating her with a criminal gang, she fails to show that the district court abused its broad discretion.

Nor did the district court abuse its discretion in deciding to exclude evidence that the videotaped interviews were not subject to a protective order in the state proceedings against Hilliard’s son, absent any evidence that Hilliard was aware of this fact. Hilliard was not charged with violating a protective order. Whether or not the recordings were subject to a protective order is a fact that, standing on its own, does not make any element of Hilliard’s charged offenses more or less likely to be true. As the district court put it, there were “many rules she probably didn’t violate, but it’s not an issue in this case.” App’x at 321; cf.  *United States v. Dawkins*, 999 F.3d 767, 792 (2d Cir. 2021) (explaining the general inadmissibility of “good acts” evidence).

*6 Importantly, the district court allowed that Hilliard could discuss *her awareness* of the lack of a protective order as relevant to her intent, supporting an argument that she

thought she was doing nothing wrong in posting the videos online. But the court determined—correctly—that the mere fact that the videos were not covered by a protective order was irrelevant “[w]ithout some connection to Ms. Hilliard herself.” App’x at 322. Simply put, it was not of consequence to the charged offenses that she did not also commit some other violation.

IV. Sentencing Challenge

Finally, Hilliard challenges the procedural reasonableness of her sentence, arguing that the district court wrongly applied a sentencing enhancement for an offense that “involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice[.]”  U.S.S.G. § 2J1.2(b)(1)(B). The district court applied this enhancement because it found that Hilliard’s posting the videos constituted an implicit threat to the witnesses, in order to interfere with the grand jury investigation. Hilliard argues that these findings were clearly erroneous, but we need not resolve that dispute because any error was clearly harmless.

The court unequivocally stated that it “would have given [the same] sentence regardless of the applicable advisory guidelines range.” App’x at 1727. This “unambiguous indication” assures us that any potential error in applying the enhancement was harmless. *United States v. Feldman*, 647 F.3d 450, 459 (2d Cir. 2011); see  *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (“confidently” finding harmless error where “the district court unequivocally stated that it would impose the same 65-year sentence” regardless of a sentencing enhancement dispute).

* * *

We have considered Hilliard’s remaining arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

Not Reported in Fed. Rptr., 2024 WL 3634201

Footnotes

- * Judge Richard K. Eaton, of the United States Court of International Trade, sitting by designation.
- ¹ Contrary to the government's argument, we conclude that Hilliard did not waive this argument by failing to raise it in the district court. In her motion to dismiss the (operative) superseding indictment, Hilliard argued not only that [Section 1513\(e\)](#) is facially overbroad but also that it was “unconstitutional as applied” to her. *See* Gov't App'x at 28, 31-33.
- ² Hilliard argues that we should apply the constitutional facts doctrine, under which courts “conduct an independent review of the record ... to be sure that the speech in question actually falls within the unprotected category[.]” [Hunt, 82 F.4th at 135](#) (cleaned up). We do not think the doctrine needs to be applied here, because the determination of whether Hilliard's speech was integral to her criminal conduct does not involve “elusive constitutional standards” and is more an “ordinary question[] of fact” than one “implicat[ing] legal principles.” *Id.* at 136 (quotation marks omitted). But we do not need to resolve this dispute because, even if we reviewed the record without any deference to the jury's findings, we would still conclude that the government proved beyond a reasonable doubt that Hilliard's speech was integral to her retaliation.

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United States District Court, E.D. New York.

UNITED STATES of America,

v.

Tawanna HILLIARD, Defendant.

19-CR-358 (S-1) (PKC)

|

Signed July 18, 2022

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MEMORANDUM & OPINION

PAMELA K. CHEN, United States District Judge:

*1 The Court memorializes and further explains the reasoning behind its April 5, 2022, decision denying Defendant's Motion to Dismiss Counts One and Two of the Superseding (S-1) Indictment, which charges Defendant, respectively, with conspiracy to engage in witness retaliation and witness retaliation, in violation of 18 U.S.C. §§ 1513(f) and 1513(e). (4/5/2022 Dkt. Order.)

BACKGROUND

Defendant **Tawanna Hilliard** was indicted on August 8, 2019, in a seven-count indictment on charges of conspiracy to tamper with witnesses, witness tampering, conspiracy to

harass witnesses, witness harassment, conspiracy to obstruct justice, obstruction of justice, and unauthorized computer access. (Indictment, Dkt. 1.) On February 23, 2022, the Government filed a Superseding (S-1) Indictment against Defendant, adding charges of conspiracy to retaliate against witnesses and witness retaliation against two witnesses, John and Jane Doe, for their provision of truthful information to a law enforcement officer about the actual or possible commission of a federal crime, in violation of 18 U.S.C. § 1513(f) and 18 U.S.C. § 1513(e) (collectively, "Counts 1 and 2"). (See Superseding Indictment, Dkt. 72, 1–2.)

On March 25, 2022, Defendant filed a motion to dismiss Counts 1 and 2, arguing that 18 U.S.C. § 1513(e) ("Section 1513(e)") is unconstitutionally vague and overbroad. (Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def.'s Mot."), Dkt. 84.) The Government filed its opposition to the motion to dismiss on April 4, 2022. (Government's Memorandum of Law in Opposition to the Defendant's Motion to Dismiss ("Gov. Opp."), Dkt. 92.) On April 5, 2022, the Court denied Defendant's motion to dismiss Counts 1 and 2, indicating that "[a] written decision will follow." (4/5/2022 Dkt. Order.)¹

DISCUSSION

I. Legal Standards

Vagueness and overbreadth challenges "are distinct concerns, the first implicating the Due Process Clause[s] and the latter the First Amendment."  *United States v. Farhane*, 634 F.3d 127, 136 (2d Cir. 2011) (citations omitted). A vagueness challenge to a statute can be brought either as an "as-applied" challenge or a facial challenge. An as-applied challenge is "often raised as [a] defense [] to individual prosecutions," in which a criminal defendant "asserts that a law cannot constitutionally be applied to [their] individual circumstances."  *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018) (citations omitted). A facial vagueness challenge, on the other hand, claims "that a statute is so fatally indefinite that it cannot constitutionally be applied to anyone." *Id.*

A. Vagueness Challenges

“A statute can be impermissibly vague for either of two independent reasons.”  *Hill v. Colorado*, 530 U.S. 703, 732 (2000). First, a statute is unconstitutionally vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Id.* Second, a statute can be unconstitutionally vague “if its vagueness makes the law unacceptably vulnerable to ‘arbitrary enforcement.’” *United States v. Demott*, 906 F.3d 231, 237 (2d Cir. 2018) (quoting  *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). Therefore, “all vagueness challenges—whether facial or as-applied—require [an] answer to two separate questions: whether the statute gives adequate notice, and whether it creates a threat of arbitrary enforcement.”   *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). The Second Circuit has held that district courts presented with both as-applied and facial vagueness challenges to a statute should analyze the as-applied argument first, because a facial challenge on vagueness can “depend[] upon whether the challenged regulation was constitutional as applied to the plaintiff.” *Id.*

*2 When a statute is challenged under the first vagueness ground (*i.e.*, the notice ground), courts must conduct an “objective inquiry” to determine “whether the law presents an ordinary person with sufficient notice of or the opportunity to understand what conduct is prohibited or proscribed, not whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question.”  *Copeland*, 893 F.3d at 114 (quotations and citations omitted). Courts have also found that a statute’s “scienter requirement may mitigate a law’s vagueness, especially where the defendant alleges inadequate notice.” See  *id.* at 121 (quotations and citations omitted).

As for challenges based on the second vagueness ground (*i.e.*, the arbitrary and discriminatory enforcement ground), a court should reject such a challenge if it finds “either (1) that a statute as a general matter provides sufficiently clear standards to minimize the risk of arbitrary enforcement or (2) that, even without such standards, the conduct at issue falls within the core of the statute’s prohibition, so that the enforcement was not the result of the unfettered discretion that law enforcement officers and factfinders might have in

other, hypothetical applications of the statute.” *Thibodeau v. Portuondo*, 486 F.3d 61, 67–68 (2d Cir. 2007).

B. Overbreadth Challenges

A different analysis applies for overbreadth challenges. Whereas a vagueness challenge can be either facial or as-applied, all First Amendment overbreadth challenges are necessarily facial challenges. See *United States v. Thompson*, 896 F.3d 155, 162–63 (2d Cir. 2018). This is because “an overbreadth challenge by its nature assumes that the measure is constitutional as applied to the party before the court.”   *Farrell*, 449 F.3d at 498. A court’s “first step in [an] overbreadth analysis is to construe the statute,” since “it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”  *United States v. Williams*, 553 U.S. 285, 293 (2008). The next step is to determine whether the statute, as construed, “criminalizes a substantial amount of protected expressive activity.”  *Id.* at 297. A statute is facially invalid for overbreadth if its “application to protected speech [is] substantial” both “in an absolute sense” and “relative to the scope of the law’s plainly legitimate applications.” See  *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003); see also  *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) (“Only a statute that is substantially overbroad may be invalidated on its face.”). Because of this high standard, “overbreadth challenges to statutes that primarily target conduct, rather than speech or conduct ‘necessarily associated with speech’” will “‘rarely, if ever,’ succeed.”  *United States v. Thompson*, 141 F. Supp. 3d 188, 199 (E.D.N.Y. 2015) (quoting  *Hicks*, 539 U.S. at 124). Examples of “conduct necessarily associated with speech” include picketing or demonstrating.  *Hicks*, 539 U.S. at 124. Lastly, the party challenging the statute on overbreadth grounds “bears the burden of demonstrating” that the statute is unconstitutionally overbroad.  *Id.* at 122.

II. 18 U.S.C. § 1513(e) Is Not Unconstitutionally Vague

Defendant contends that Section 1513(e) is unconstitutionally vague, “both facially and as applied.” (Def.’s Mot., Dkt. 84, 5.) Defendant’s entire vagueness argument is presented in three paragraphs and can be distilled into two separate points. First, Defendant claims that “the ordinary person does not understand that posting a

video on the internet of a witness's post-arrest statement is subject to criminal penalties.” (*Id.*, Dkt. 84, 5.) The Court construes this as a facial vagueness challenge based on the “adequate notice” ground. Separately, Defendant asserts that “[t]he danger of arbitrary enforcement is illustrated by this very case,” (*id.*, Dkt. 84, 6), which the Court understands as an-applied challenge premised on the “arbitrary and discriminatory enforcement” ground of vagueness.

*3 As explained above, district courts generally start by analyzing as-applied vagueness challenges. See   *Farrell*, 449 F.3d at 485 (citations omitted). Defendant's as-applied argument is spare to the point of being impossible to discern. Defendant's argument is premised on a single fact, *i.e.*, that she “had a career” as a “federal employee,” and a single assertion, *i.e.*, that the Government “offers no evidence that she was unsatisfactory in her performance of that job or that she was found to be untrustworthy.” (Def.’s Mot., Dkt. 84, 6.)

These two points utterly fail to inform the Court's primary inquiry: whether the statute provides sufficiently clear standards to minimize the risk of arbitrary enforcement. See *Thibodeau*, 486 F.3d at 67–68. Section 1513(e) makes it a crime to “knowingly, with intent to retaliate, take[] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense....” 18 U.S.C. § 1513(e). Defendant does not identify specific parts of the statute that supposedly encourage or authorize discriminatory or arbitrary enforcement. In fact, Congress made clear in enacting Section 1513(e) that only defendants who act “with intent to retaliate” against witnesses, and specifically witnesses who have provided truthful information about federal criminal activity, can be prosecuted under this statute. See 18 U.S.C. § 1513(e). Furthermore, the Government cannot charge individuals with violating Section 1513(e) unless the allegedly criminal actions were “harmful,” which explicitly includes “interference with ... lawful employment or livelihood.” *Id.* These are the types of “clear standards [that] minimize the risk of arbitrary enforcement,” such that the Court cannot find that the statute is unconstitutionally vague. *Thibodeau*, 486 F.3d at 67–68; see also *United States v. Nurse*, No. 15–CR–112, 2015 WL 7074570, at *4 (M.D.

Ala. Aug. 7, 2015) (similarly interpreting Section 1513(e) as not being void for vagueness).

Furthermore, Defendant's alleged criminal conduct falls within “the core of the statute's prohibition.” *Thibodeau*, 486 F.3d at 67–68. In its superseding indictment and motions *in limine*, the Government alleged that Defendant violated Section 1513(e) by posting videos of John and Jane Doe, who were arrested with Defendant's son after all three fled from the commission of a robbery of a cellular telephone store. (See Superseding Indictment, Dkt. 72, 1–2; Government's First Motion *in limine* (“Gov. motion *in limine*”), Dkt. 79, 8–9.) The Government also alleged that Defendant's posting of the videos, which were of John and Jane Doe's post-arrest statements to law enforcement, led to death threats against John and Jane Doe, (Gov. motion *in limine*, Dkt. 79, 11), and that the decision to tag individuals and characterize their actions as “snitching” is part of the “overwhelming evidence” the Government had gathered of Defendant's intent to retaliate, (*id.*, 20). Based on the language of the statute and the Government's allegations as of April 5, 2022, the Court is convinced that Defendant's alleged criminal actions are exactly the type of conduct that Section 1513 is intended to prohibit. Therefore, the Government's decision to prosecute Defendant for conspiring to violate, and violating, Section 1513 “was not the result of the unfettered discretion that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.” *Thibodeau*, 486 F.3d at 67–68.

*4 Defendant's facial vagueness challenge fares no better. Defendant's motion not only fails to identify any specific words or phrases in the statutory provision that are vague, but relies solely on a law review article to support her position that Section 1513(e) fails to adequately notify “the ordinary person” of the conduct it prohibits. (See Def. Mot., Dkt. 84, 5–6) (citing Eugene Volokh, *Crime-Facilitating Speech*, 57 Stan. L. Rev. 1095, 1207 (2005).) A law professor's legal commentary is, of course, no substitute for binding case law, and this Court does not find it to be even persuasive authority on how ordinary people would understand Section 1513 or whether it is unconstitutionally vague. Further, neither party has identified any decisions finding that Section 1513(e) is unconstitutionally vague because it fails to provide adequate notice of the prohibited conduct. (See Def. Mot., Dkt. 84, 5–6; see also Gov. Opp.,

Dkt. 92, 6–7 (explaining that Defendant “has not identified a single case in which a court held that taking retaliatory action against whistleblowers [in violation of 18 U.S.C. § 1513] is constitutionally protected, and the government is aware of none”).)

Indeed, both parties cite the Sixth Circuit decision in *United States v. Edwards*, which rejected a similar argument that a defendant was not on notice that posting pictures on Facebook of a cooperating witness testifying during trial could violate Section 1513(e) because of the statute's vague language. See 783 F. App'x 540 (6th Cir. 2019) (“*Edwards I*”). The panel in *Edwards I* rejected the defendant's vagueness challenge, finding that the language of Section 1513(e) uses “plain, common language,” such that “[a]n ordinary person can understand that posting” pictures identifying a cooperating witness on the Internet would be “harmful action” that falls within the ambit of the statute. *Id.* at 542, 545. Furthermore, the Sixth Circuit concluded that the statute's scienter requirements “dramatically narrow[ed] the universe of possible offending activity,” which would provide even more notice to an ordinary person as to the conduct that would be actually criminalized under Section 1513(e). *Id.* at 545.

The Sixth Circuit's analysis of Section 1513(e) is not only persuasive, but consistent with the Second Circuit's precedents on analyzing lack-of-notice vagueness challenges. See, e.g., *Copeland*, 893 F.3d at 121 (“To be sure, a statute's scienter requirement may mitigate a law's vagueness, especially where the defendant alleges inadequate notice.”) (brackets and quotations omitted). This Court finds that an ordinary person reviewing the language of Section 1513(e) would be on notice that the conduct alleged in Counts 1 and 2 of the Superseding Indictment, *i.e.*, posting videos online of co-defendants' post-arrest statements to law enforcement officers implicating a co-conspirator and/or fellow gang member, coupled with naming those co-defendants and characterizing their actions as “snitching,” is prohibited by Section 1513(e).

Accordingly, the Court rejects Defendant's facial and as-applied vagueness challenges to the Section 1513(e) crimes charged in Counts 1 and 2 of the Superseding (S-1) Indictment.

III. 18 U.S.C. § 1513(e) Is Not Unconstitutionally Overbroad

Defendant argues that Section 1513(e) “sweeps too broadly by outlawing clearly protected expression that belongs in the public sphere.” (Def.'s Mot., Dkt. 84, 3.) However, as the Government points out, Defendant “does not identify any constitutionally problematic application of the statute.” (Gov. Opp., Dkt. 92, 4.) The fact that Defendant fails to put forth any protected expressions that this statute would criminalize is not surprising, given the overall statutory construction. Section 1513(e) requires the Government to prove beyond a reasonable doubt that a defendant (1) knowingly acted against a person who provided truthful information to law enforcement about a federal crime; (2) that such action was taken with intent to retaliate against the person providing such information; and (3) that the act was harmful to either that person or other persons. See *United States v. Edwards*, 291 F. Supp. 3d 828, 832 (S.D. Oh. 2017) (similarly construing the language of Section 1513(e)). The plain language of the statute makes clear that defendants violate this law if they acted “knowingly” and “with intent to retaliate.” In other words, the conduct must be intentionally threatening to the victim, which, as a general matter, removes it from the protections of the First Amendment. See *United States v. Santos*, 801 F. App'x 814, 816 (2d Cir. 2020) (summary order) (finding that “[a]lthough [statute prohibiting threats against public officials] criminalizes certain speech, the Supreme Court has held that the First Amendment does not afford protection to speech that constitutes a ‘true threat.’”) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)). The scienter requirements in Section 1513(e) “weigh[] heavily against a conclusion that the statute is overbroad” because they “dramatically narrow the universe of possible offending activity.” See *United States v. Edwards*, 2020 WL 9607176, at *3 (6th Cir. 2020) (“*Edwards II*”). Another strong indication that the statute is not overbroad is the fact that the language of Section 1513(e) is not “specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstration).” *Hicks*, 539 U.S. at 124.² The Supreme Court has advised that overbreadth challenges are rarely successful against statutes that are not focused on speech or speech-related activities, see *id.*, and the Court finds that Section 1513(e) is no exception.

*5 The remaining points in Defendant's motion are no more persuasive. After citing to *Edwards I* and another out-of-circuit case in which criminal prosecution was brought under Section 1513(e), *United States v. Snow*, No. 19-CR-18, 2022 WL 252183 (W.D. Va. Jan. 26, 2022), Defendant summarily concludes that a “substantial number of the statute's applications are unconstitutional.” (See Def. Mot., Dkt. 84, 5). This argument is as incorrect as it is brief and conclusory. In neither case did the defendants successfully challenge the constitutionality of Section 1513(e). See Mot. to Dismiss, *Snow*, No. 19-CR-18, Dkts. 120, 126 (seeking to dismiss some claims, but not the claim relating to Section 1513(e); *Edwards I*, 783 F. App'x at 545 n.3 (explaining that “[n]othing in this opinion should be construed to comment on whether § 1513(e) is overbroad or violative of the First Amendment” because the “issue was neither brought nor briefed before” the panel in *Edwards I*); see also *Edwards II*, 2020 WL 9607176, at *3 (finding that defendant “Edwards has not made a substantial case that Section 1513(e) is overbroad”). Other cases cited by Defendant are also inapposite as those cases involve charges brought under completely unrelated statutes, such as state laws criminalizing witness retaliation. (See Def. Mot., Dkt. 84, 5 (citing *Lee-Purvis v. Pennsylvania*, 314 F. Supp. 3d 665 (E.D. Pa. 2018), in which the defendant was charged with and convicted of, *inter alia*, violating Pennsylvania's witness retaliation statute).)

Another section of Defendant's brief cites to a litany of Supreme Court opinions that recite uncontested principles of First Amendment law, none of which pertain to the overbreadth doctrine. (See Def. Mot., Dkt. 84, 3–4.) For example, Defendant asserts that the Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), already “settled the issue that even speech intended to cause economic harm is constitutionally protected.” (Def. Mot., Dkt. 84, 4.) Defendant fails to address, however, that *Claiborne* involved an economic boycott over racial discrimination by white merchants, which is the type of peaceful political “expression on public issues [that] has always rested on the highest rung of the hierarchy of First Amendment values[.]” *Claiborne*, 458 U.S. at 913—not intentionally threatening conduct as alleged here.³ The Court finds that *Claiborne* is plainly inapplicable to this case and that Defendant has otherwise failed to satisfy her burden of showing that Section 1513(e) criminalizes any, no less “a

substantial amount of[,] protected expressive activity,” see *Williams*, 553 U.S. at 297, and accordingly has failed to show that this statute is unconstitutionally overbroad.⁴

CONCLUSION

*6 For the reasons stated herein, this Court finds that 18 U.S.C. § 1513(e) is neither unconstitutionally overbroad nor unconstitutionally vague. Defendant's motion to dismiss Counts 1 and 2 of the Superseding Indictment is accordingly denied.

All Citations

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Footnotes

- ¹ The Court recites only those facts necessary to resolve this Motion, and relies only on those facts that were known to the Court as of April 5, 2022.
- ² The same is true for the other subsections of 18 U.S.C. § 1513. Courts have recognized that Congress’ purpose in enacting the statute that included 18 U.S.C. § 1513(a)–(d) was “to strengthen existing legal protection for victims and witnesses of federal crimes,” many of whom cooperate with law enforcement at their “own risk.” *See, e.g.,*  *United States v. Ferrugia*, 604 F. Supp. 668, 675 (E.D.N.Y. 1985) (citations omitted).
- ³ Furthermore, the fact that “harm” under Section 1513(e) includes economic harm, namely, “interference with lawful employment or livelihood”—which is what Defendant appears to be obliquely referencing in her argument—does not make the statute constitutionally overbroad. *See Edwards*, 2020 WL 9607176, at *2 (rejecting similar arguments about overbreadth of Section 1513(e) based on *Claiborne*).
- ⁴ In the overbreadth challenge, Defendant relies once again on the law review article by Professor Volokh who asserts that “publishing the names of crime witnesses can help the public evaluate whether witnesses’ stories are credible or not.” (*See* Def. Mot., Dkt. 84, 3.) Yet, the article is again unhelpful to Defendant because the conduct alleged here goes far beyond simply publishing the names of crime witnesses. The Government alleges that John and Jane Doe were not mere bystanders or third-party crime witnesses or victims, but were co-conspirators of Defendant’s son (*see* Gov. motion *in limine*, Dkt. 79, 8–9); that Defendant posted their videotaped post-arrest statements to law enforcement, not just their names (*id.*, 19); and that, at least as to John Doe, there is “overwhelming” evidence that Defendant’s actions were motivated by a desire to retaliate or otherwise harm him (*id.*, 20). Therefore, the law review article, even if the Court were to give it any weight, describes a far more innocuous situation than the facts alleged in this case.