SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA

v.

[redacted]

Defendants.

Case Nos. [redacted]

Judge Lynn Leibovitz

DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

Under Superior Court Rule of Criminal Procedure 12(b)(3)(B) and the First, Fifth, and Sixth Amendments to the United States Constitution, Defendants [redacted] ("the Moving Defendants") respectfully move to dismiss the Superseding Indictment returned on April 27, 2017 ("Indictment").

In support of this Motion, the Moving Defendants submit that, for the following reasons, no count against them states an offense:

- Count One (Inciting or Urging to Riot) does not allege facts sufficient to establish that any Moving Defendant "incited" or "urged" others to engage in riot. Moreover, Count One is unconstitutional because: (i) under binding case law, the First Amendment precludes the D.C. Riot Act from applying to disorder arising from a political demonstration, which is how the government seeks to apply the Act in Count One; (ii) Count One is otherwise irremediably vague and lacking in specificity as to the Moving Defendants; and (iii) if not irremediably vague, Count One impermissibly seeks to punish the Moving Defendants for constitutionally-protected speech.
- The felony charge in Count Two (Rioting) is fatally defective because "engag[ing] in a riot" is not a felony under any provision of the D.C. Code. Count Two is also unconstitutional in its entirety for similar reasons as Count One.
- Count Three (Conspiracy to Riot) is barred by Wharton's Rule, which precludes charging

a conspiracy where the object offense proscribes concerted action by multiple individuals, as the D.C. Riot Act does. Count Three also fails to allege facts sufficient to establish that the Moving Defendants knowingly and intentionally entered an agreement to engage in a riot. Finally, Count Three is unconstitutional for the same reasons as Count Two.

- Counts Four – Eight (Destruction of Property) are fatally defective as against the Moving Defendants because they are based on a *Pinkerton* theory of liability, and *Pinkerton* may not support a charge for a substantive offense where, as here, the underlying conspiracy charge is invalid. Moreover, Counts Four – Eight are invalid as against the Moving Defendants because the underlying conspiracy used to support these counts under *Pinkerton* is a conspiracy to commit a misdemeanor (*i.e.*, engaging in a riot under D.C. Code § 22-1322(b)), and a conspiracy to commit a misdemeanor cannot not support a felony charge under *Pinkerton*. Finally, like Counts Two and Three, Counts Four – Eight violate the First Amendment's right of association and the Fifth Amendment's due process clause, which collectively proscribe prosecuting an individual for engaging in a political protest marred by the allegedly unlawful conduct of other people.
- Count Eleven (Assault on a Police Officer (Misdemeanor)) is fatally defective because it invokes the former version of the Assault on a Police Officer ("APO") statute, rather than the version in effect as of January 20, 2017, and as a result charges conduct that is not a crime—*i.e.*, "resist[ing], oppos[ing], imped[ing], intimidat[ing], and interfer[ing] with" a law enforcement officer.

A supporting memorandum of points and authorities accompanies this Motion. In addition, a Motion to Set an Expedited Briefing Schedule is being filed contemporaneously.

Dated: May 26, 2017

Respectfully submitted,

/s/Seth A. Rosenthal
Seth A. Rosenthal (D.C. Bar No. 482586)
Nicholas M. DePalma (D.C. Bar No. 974664)
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 344-4741
Fax: (202) 344-8300
sarosenthal@venable.com
nmdepalma@venable.com
Counsel for [redacted]

/s/Joshua B. Shiffrin
Joshua B. Shiffrin, Esq. (D.C. Bar No. 501008)
Philip C. Andonian, Esq. (D.C. Bar No. 490792)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street NW Suite 1000
Washington, D.C. 20005
(202) 842-2600
pandonian@bredhoff.com
jshiffrin@bredhoff.com
Counsel for [redacted]

/s/ Roy L. Austin, Jr.
Roy L. Austin, Jr. (D.C. Bar No. 980360)
Traci D. Biswese (D.C. Bar No. 1023371)
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
The Eighth Floor
Washington, D.C. 20036
Phone: (202) 730-1300
Fax: (202) 730-1301
Raustin@hwglaw.com
Tbiswese@hwglaw.com
Counsel for [redacted]

/s/Michael J. Satin
Michael J. Satin (D.C. Bar No: 480323)
MILLER & CHEVALIER CHARTERED
900 16th St. NW
Washington, D.C. 20006

Telephone: (202) 626-6009
msatin@milchev.com
Counsel for [redacted]

/s/ L. Barrett Boss
L. Barrett Boss (D.C. Bar No. 398100)
Emily M. Gurskis (D.C. Bar No. 1023711)
COZEN O'CONNOR
1200 Nineteenth Street, N.W.
Suite 300
Washington, DC 20036
Telephone: (202) 912-4818
Facsimile: (866) 413-0172
bboss@cozen.com
Counsel for [redacted]

/s/ Margarita K. O'Donnell
Rachel Cotton (D.C. Bar No. 997132)
Margarita K. O'Donnell (D.C. No. 1005972)
ZUCKERMAN SPAEDER LLP
1800 M Street N.W., Suite 1000
Washington, DC 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
modonnell@zuckerman.com
rcotton@zuckerman.com
Counsel for [redacted]

/s/Lauren Moore
Lauren Moore (D.C. Bar No. 1009422)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, D.C. 20006
Phone: (202) 663-6027
Fax: (202) 663-6363
E-mail: lauren.moore@wilmerhale.com
Counsel for [redacted]

/s/Mark Goldstone
Mark Goldstone (D.C. Bar No. 394135)
9419 Spruce Tree Circle
Bethesda, MD 20814
301-346-9414
mglaw@comcast.net

Counsel for [redacted]

/s/Tara J. Plochocki
Tara J. Plochocki (D.C. Bar No. 989404)
LEWIS BAACH, P.L.L.C.
1899 Pennsylvania Avenue, NW
Suite 600
Washington, D.C. 20006
202-659-7217
tara.plochocki@lewisbaach.com
Co-Counsel for [redacted]

/s/ Donald P. Salzman
Donald P. Salzman (DC Bar No. 479775)
Colin V. Ram (DC Bar No. 989848)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7983
salzman@skadden.com
colin.ram@skadden.com
Counsel for [redacted]

/s/Baruch Weiss
Baruch Weiss (D.C. Bar No. 388977)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW Washington, DC
(202) 942-6836 (tel)
(202) 942-5999 (fax)
Baruch.Weiss@apks.com
Counsel for [redacted]

/s/Brett E. Marston
Brett E. Marston (D.C. Bar No. 994354)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW Washington, DC
(202) 942-6836 (tel)
(202) 942-5999 (fax)
Brett.Marston@apks.com
Counsel for [redacted]

/s/ Hilary Phillips
Hilary Phillips (D.C. Bar No. 496165)

THE PHILLIPS FIRM, DC
5335 Wisconsin Ave., Ste. 440
Washington DC 20015
202.885.5641 Office
202.689.5661 Direct Line
phillips@phillipsfirmdc.com
Counsel for [redacted]

/s/Mark B. Sweet
Mark B. Sweet (D.C. Bar No. 490987)
WILEY REIN LLP
1776 K Street NW
Washington, D.C. 20006
202.719.4649
MSweet@wileyrein.com
Counsel for [redacted]

/s/Gwyneth O'Neill
Gwyneth O'Neill (D.C. Bar No. 1030023)
John Copacino (D.C. Bar No. 289595
GEORGETOWN CRIMINAL JUSTICE CLINIC
600 New Jersey Ave NW
Washington, D.C. 20001
(202) 662-9582
gwyneth.oneill@georgetown.edu
copacino@georgetown.edu
Counsel for [redacted]

/s/David Schertler
David Schertler (DC Bar # 367203)
Megan L. Petry (DC Bar #1030113)
SCHERTLER & ONORATO, LLP
1101 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
dschertler@schertlerlaw.com
mpetry@schertlerlaw.com
Counsel for [redacted]

/s/Rachel Cicurel
Rachel Cicurel, D.C. Bar No. 1024378
Maneka Sinha, D.C. Bar No. 991681
PUBLIC DEFENDER SERVICE FOR THE
DISTRICT OF COLUMBIA

633 Indiana Avenue, N.W.
Washington, D.C.. 20004
(202) 824-2774; (202) 824-2766
rcicurel@pdsdc.org
msinha@pdsdc.org
Counsel for [redacted]

/s/Danny Onorato
Danny C. Onorato (DC Bar # 480043)
Shermineh C. Jones (DC Bar # 499900)
SCHERTLER & ONORATO, LLP
1101 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
donorato@schertlerlaw.com
sjones@schertlerlaw [redacted]

/s/Joseph A. Scrofano
Joseph A. Scrofano (D.C. Bar # 994083)
SCROFANO LAW PC
406 5th Street NW
Suite 100
Washington, DC 20001
jas@scrofanolaw.com
Counsel for [redacted]

/s/Christopher J. Mutimer
Christopher J. Mutimer (DC Bar # 1011284)
SCROFANO LAW PC
406 5th Street NW
Suite 130
Washington, DC 20001
cjm@scrofanolaw.com
Counsel for [redacted]

/s/Jay P. Myktyiuk
Jay P. Myktyiuk (DC Bar # 976596)
SCROFANO LAW PC
406 5th Street NW
Suite 120
Washington, DC 20001
jpm@scrofanolaw.com
Counsel for [redacted]

/s/ Jon W. Norris
Jon W. Norris (Bar # 426105)
Counsel for [redacted]
503 D Street NW
Suite 250
Washington, DC 20001
202-371-0300
202-842-2627 (fax)
jonnorrislaw@gmail.com
Counsel for [redacted]

__/s/Glenn F. Ivey_____
Glenn F. Ivey (Bar No. 414331)
LEFTWICH LLC
1400 K Street, NW, Suite 1000
Washington, DC 20005
(202) 434-9100
givey@leftwichllc.com
Counsel for [redacted]

/s/Justin Dillon
Justin Dillon (D.C. Bar No. 502322)
Scott Bernstein (D.C. Bar No. 1013992)
KAISERDILLON PLLC
1401 K Street NW, Suite 600
Washington, DC 20005
Telephone: (202) 640-2850
Fax: (202) 280-1034
jdillon@kaiserdillon.com
sbernstein@kaiserdillon.com
Counsel [redacted]

/s/Jason Downs
Jason Downs, (D.C. Bar No. #979476)
Murphy, Falcon, & Murphy, PA
One South Street, 23rd Floor
Baltimore, Maryland 21202
(410) 951-8744
Jason.downs@murphyfalcon.com
Counsel for [redacted]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA

v.

[redacted]

Defendants.

Case Nos. [redacted]

Judge Lynn Leibovitz

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

TABLE OF CONTENTS

In support of their Motion to Dismiss the Indictment, Defendants [redacted] (the "Moving Defendants") submit this memorandum of points and authorities.

INTRODUCTION

On January 20, 2017, the Metropolitan Police Department pursued, "kettled," and arrested *en masse* over 200 individuals who were protesting the inauguration of President Donald Trump because certain demonstrators in the group allegedly engaged in unlawful acts. To avoid having to establish the required, individualized probable cause for each demonstrator at preliminary hearings—which it knew it could not do—the government hastily secured a generic indictment charging a violation of the D.C. Riot Act against 63 demonstrators whose preliminary hearings were scheduled first. As the indicted individuals began to request specifics about the charge, and as preliminary hearings for the other demonstrators approached, the government secured a superseding indictment that collectively and indiscriminately attributed a small number of discrete, individual acts to an even larger number of demonstrators, 214 in total, charging all of them with "willfully engag[ing], incit[ing], and urg[ing] other people to engage in a riot." The indicted individuals, including the Moving Defendants, continued to ask questions and demand specifics, and some filed extensive motions to dismiss challenging, *inter alia*, the vagueness of

the allegations against them. So, on April 27, 2017, the government secured the most recent superseding indictment ("Indictment").

This Indictment does not cure any of the problems of its predecessors. To the contrary, it doubles down on them. It tacks on *seven* new felony counts against all defendants, as well as a charge for misdemeanor assault on a police officer against many of them, and although expressly naming a handful of individuals alleged to have committed the discrete unlawful acts that purportedly turned the protest into a "riot," it continues to attribute all of those acts collectively and indiscriminately to nearly everyone the MPD arrested on January 20, including the Moving Defendants. As with its predecessors, this Indictment does not allege that the Moving Defendants personally destroyed property or engaged in violence, nor does it allege that the Moving Defendants said anything to urge others to do so. Rather, the Indictment seeks to hold the Moving Defendants criminally responsible for participating in a large group protest and simply failing to walk away when a small number of other individuals in the group allegedly broke the law.

The government's unprecedented theory of non-individualized, "group" criminal liability has produced an Indictment that is overrun with fatal defects as against the Moving Defendants. Certain counts, including Count One alleging incitement to riot and Count Three alleging conspiracy, fail to allege facts sufficient to establish the offense charged. Other counts do not even allege a crime: Count Two alleges felony rioting when engaging in riot is not a felony; Count Three alleges conspiracy to engage in a riot when Wharton's Rule obviates that charge and correspondingly invalidates the charges for property destruction in Counts Four – Eight that are based on it; and Count Eleven (lodged against most but not all Moving Defendants) alleges assault on a police officer under a defunct version of the statute that sweeps far more broadly

than the operative version. Finally, all counts, save Count Eleven, fail to satisfy the stringent constitutional requirements for prosecuting individuals exercising their core First Amendment rights to free political speech and association. For these reasons, as well as the others set forth below, the Indictment should be dismissed in its entirety against the Moving Defendants.

FACTUAL BACKGROUND

This case arises out of a political demonstration that occurred on the morning of Inauguration Day, January 20, 2017. The Indictment contains 14 counts in total. The Moving Defendants, as well as approximately 100-200 others, depending on the count, are charged in nine of those counts, which assert different legal theories based on the same set of alleged facts. All of the Moving Defendants are charged in Counts One ("Inciting or Urging to Riot"), Two ("Rioting"), Three ("Conspiracy to Riot"), and Four through Eight ("Destruction of Property"). Eighteen of the Moving Defendants are also charged in Count Eleven ("Assault on a Police Officer (Misdemeanor)").[1] As with the previous indictments, none of the counts includes any allegations about the personal conduct of the Moving Defendants, other than that they participated in, and did not disassociate from, the January 20 protest.

I. Count One: Inciting or Urging to Riot

Count One of the Indictment charges the Moving Defendants (along with approximately 200 co-defendants) with violating the felony provision of the D.C. Riot Act, D.C. Code § 22-1322(d), which makes it a crime to "willfully incit[e] or urg[e] others to engage in [a] riot." The first paragraph of Count One alleges:

> On or about January 20, 2017, within the District of Columbia, [the Moving Defendants and approximately 200 other co-defendants] (hereinafter, "the Rioting

[1] Counts Nine, Ten, Twelve, Thirteen, and Fourteen charge other individual defendants with specific acts of property destruction and with assault on a police officer while armed.

> Defendants") willfully incited or urged other people to engage in a riot, that is, a public disturbance involving an assemblage of five or more persons, that by tumultuous and violent conduct and the threat thereof, resulted in serious bodily harm or property damage in excess of $5,000.

Indictment, Count One, ¶ 1. Count One proceeds to describe a series of discrete acts of property destruction and other unlawful acts allegedly committed between 10:19 am and 10:52 am, over 16 city blocks, during the demonstration. *Id.,* ¶¶ 7–37. Count One further describes alleged encouragement provided to the individuals who committed these unlawful acts. *Id.*, ¶¶ 39-40.

When Count One refers to all of the defendants collectively, it uses the term "Rioting Defendants." By contrast, when it refers to less than all of the defendants, it either identifies a defendant by name or uses the phrases "individuals participating in the Black Bloc" or "individual defendants." Critically, Count One does not identify any Moving Defendant by name as having committed or incited any alleged unlawful act, does not identify any Moving Defendant as an "individual participating in the Black Bloc," and does not otherwise allege that the "Rioting Defendants" (*i.e.,* all defendants) personally committed any act of property destruction or any other unlawful act. Count One attributes these unlawful acts, as well as conduct that purportedly "incited" or encouraged these acts, only to named individuals other than the Moving Defendants or to "individuals participating in the Black Bloc."

The conduct that Count One attributes to named individuals or "individuals participating in the Black Bloc," but *not* to any Moving Defendant, includes the following:

- "arm[ing] themselves with items that could be used to damage persons and property," such as hammers and crowbars, and bringing "face masks, gas masks, and goggles to eliminate or mitigate the effectiveness of crowd control measures that might be used by law enforcement," *id.,* ¶¶ 4-5;

- destroying certain property, including several storefront windows; spray-painting property; throwing a chair at a police officer; and charging at a police line formed to "kettle" protesters, *id.*, ¶¶ 10-12, 14, 16-20, 23, 25, 27, 30, 32, 34, 36;
- "voic[ing] commands to the Rioting Defendants and others to ensure that the group moved together," *id.*, ¶ 39;
- "cheer[ing] and celebrat[ing] the violence and destruction" and "chant[ing] 'Fuck it up,' 'Fuck Capitalism,' and 'Whose streets? Our streets'" before, during, and after the acts of violence and destruction," *id.*, ¶ 40; and
- "chang[ing] and remov[ing] their clothing in an attempt to alter their appearance or conceal from law enforcement their participation in the Black Bloc." *Id.*, ¶ 41

In contrast, the conduct that Count One attributes to the "Rioting Defendants"—who, by referring to all defendants, presumably includes the Moving Defendants—includes no acts of violence or destruction and no conduct that could be construed as willfully inciting such acts. According to Count One, the "Rioting Defendants":

- "gathered," along with "others," in and around Logan Circle, *id.*, ¶ 2;
- "used a tactic called the 'Black Bloc,'" in which some individual defendants (but not all defendants) wore "black or dark colored clothing, gloves, scarves, sunglasses, ski masks, gas masks, goggles, helmets, hoodies, and other face-concealing and face-protecting items to conceal their identities in an effort to prevent law enforcement from being able to identify the individual perpetrators of violence or destruction," *id.*, ¶ 3;
- "traveled together" for 16 blocks as a handful of named defendants and other unnamed "individuals participating in the Black Bloc" engaged in various unlawful actions, including damaging property, *id.*, ¶¶ 6-31, 33-35, 37, 39; and

- failed to disassociate themselves from the group, *id.*, ¶ 38.

II. Count Two: Rioting

Count Two charges the Moving Defendants, as well as the other defendants charged in Count One, with "willfully engag[ing]" in a riot. The factual allegations in support of this Count are identical to those in Count One. *Compare* Indictment, Count One, ¶¶ 1-42, *with* Indictment, Count Two, ¶¶ 1-42. As explained *infra* in Argument, Section II.A, Count Two erroneously charges that, by engaging in a riot, the Moving Defendants violated both D.C. Code § 22-1322(b) (a misdemeanor) and D.C. Code § 22-1322(d), the felony provision of the D.C. Riot Act. However, the Riot Act does not include a felony for "willfully engaging" in a riot. *See* D.C. Code § 22-1322(d). As with Count One, Count Two does not allege that any Moving Defendant personally committed an act of violence or property destruction that establishes "willfull[] engage[ment]" in a riot.

III. Count Three: Conspiracy to Riot

Count Three charges the Moving Defendants, as well as the other defendants charged in Count One, with conspiracy to engage in a riot. Specifically, Count Three alleges that the defendants "did knowingly and willfully combine, conspire, confederate and agree together to engage in a riot," in violation of the misdemeanor provision of the D.C. Riot Act, D.C. Code Section 22-1322(b). Indictment, Count Three (p. 31). Count Three further alleges that the "[o]bject" of the conspiracy was to "engage in a public disturbance" to destroy property, and that the alleged property destruction was accomplished by force, as well as by "the use of a 'Black Bloc,'" in which "individual participants in the conspiracy" wore black or otherwise concealing clothing and items such as goggles. *Id.* (pp. 31-32). Count Three alleges as overt acts the very same acts and course of conduct as Counts One and Two, *see id.*, ¶¶ 1-39; the only difference is

that Count Three refers to "members of the conspiracy" and does not differentiate between alleged "Rioting Defendants" and "individuals participating in the Black Bloc," *see id.*

Count Three does not identify any act by any of the Moving Defendants that is alleged to constitute an agreement between them and any other defendant; nor, as with Counts One and Two, does Count Three allege that any Moving Defendant committed or engaged in any act of violence or property destruction.

IV. Counts Four through Eight: Felony Destruction of Property

Counts Four through Eight charge the Moving Defendants, and the hundreds of other defendants charged in the preceding counts, with five separate instances of felony destruction of property, in violation of D.C. Code, Section § 22-303. Several of these acts are alleged to have occurred at the same time, and elsewhere in the Indictment, specific individuals—but none of the Moving Defendants—are identified as the actual perpetrators:

- Count Four charges all 214 defendants with breaking the windows of the Starbucks in the 1200 block of I Street NW. Indictment, Count Four (pp. 37–38). In Count One, it is alleged that this act occurred at 10:35 am and was carried out by defendants [redacted] "and other individuals participating in the Black Bloc." *Id.*, Count One, ¶ 17.
- Count Five charges all 214 defendants with breaking the windows of the Bank of America branch in the 1200 block of I Street NW. *Id.*, Count Five (pp. 39–40). In Count One, it is alleged that this act also occurred at 10:35 am and was perpetrated by defendants [redacted], "and other individuals participating in the Black Bloc." *Id.*, Count One, ¶ 18.

- Count Six charges all 214 defendants with breaking the windows of the Atrium Café in the 1200 block of I Street NW. *Id.*, Count Six (pp. 40–42). In Count One, it is alleged that this act also occurred at 10:35 am and was perpetrated by defendant [redacted] "and other individuals participating in the Black Bloc." *Id.*, Count One, ¶ 19.
- Count Seven charges all 214 defendants with breaking the windows of the McDonald's restaurant at 1235 New York Avenue NW. *Id.*, Count Seven (pp. 42–44). In Count One, it is alleged that this act occurred at 10:40 am and was perpetrated by defendant [redacted] "and other individuals participating in the Black Bloc." *Id.*, Count One, ¶ 23.
- Count Eight charges all 214 defendants with breaking the windows of the Starbucks located at the Crowne Plaza Hotel. *Id.*, Count Eight (pp. 44–45). In Count One, it is alleged that this act occurred at 10:46 am and was perpetrated by defendant [redacted] "and other individuals participating in the Black Bloc." *Id.*, Count One, ¶ 30.

The Indictment does not allege that the Moving Defendants had any particular role with respect to these alleged acts, nor does it identify where the Moving Defendants were located when any of the acts allegedly occurred.

V. Count Eleven: Assault on a Police Officer (Misdemeanor)

Count Eleven charges that 18 of the Moving Defendants, as well as approximately 82 other Defendants, "without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate, and interfere with" several law enforcement officers, in violation of 22 D.C. Code § 405(b). However, the Assault on a Police Officer ("APO") statute was amended effective June 30, 2016—prior to the offense alleged in Count Eleven—and now proscribes only "assault" on a police officer. *See* D.C. Code § 22-405(b).

Count Eleven does not specify the conduct alleged to constitute "assault[ing], resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a police officer within the meaning of the statute. Based on information provided in informal discovery conferences with the government, this count apparently refers to the allegations in Count One that "approximately two hundred individuals from within the group consisting of the Rioting Defendants and others participating in the Black Bloc, charged at [a] police line at 12th Street NW and L Street NW, in an attempt to avoid arrest by law enforcement." Indictment, Count One, ¶ 36.

ARGUMENT

Under Superior Court Rule of Criminal Procedure 12(b)(3)(B), a court must dismiss a charge if it "fail[s] to state an offense." Sup. Ct. R. Crim. P. 12(b)(3)(B). A charge fails to state an offense, *inter alia*, when the allegations, if proven, are insufficient to establish that the charged crime was committed, *United States v. Sanford, Ltd.*, 859 F. Supp. 2d 102, 107 (D.D.C. 2012); *United States v. Adkinson*, 135 F.3d 1363, 1371 n. 23 (11th Cir. 1998); when the conduct alleged in the indictment is not a crime, *see, e.g.*, *United States v. Sunia*, 643 F. Supp. 2d 51, 68 (D.D.C. 2009) (citing *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002)); *United States v. Akinyoyenu*, 199 F. Supp. 3d 106, 109 (D.D.C. 2016); *United States v. Cogswell*, 637 F. Supp. 295, 296 & n.2 (N.D. Cal. 1985); *United States v. Risk*, 672 F. Supp. 346, 357 (S.D. Ind. 1987), *aff'd*, 843 F.2d 1059 (7th Cir. 1988); *United States v. U.S. Sav. & Loan League*, 9 F.R.D. 450, 453 (D.D.C. 1949); and when the Constitution precludes the prosecution, *Conley v. United States*, 79 A.3d 270, 276 (D.C. 2013).

Importantly, when a constitutional challenge to a charge is made on the grounds that the charge "evidenc[es] possible conflict with [the First Amendment's] guarantees of free thought, belief and expression," the trial court may "uphold it only after subjecting its legal sufficiency to

exacting scrutiny." *United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C. 1955) (citing *Rumely v. United States*, 197 F.2d 166 (D.C. Cir. 1952)), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955).

In the sections that follow, we demonstrate that every count in the Indictment fails to state an offense against the Moving Defendants for multiple reasons, and, therefore, as to the Moving Defendants, the Indictment must be dismissed in its entirety.

Each argument on a given count is an independent and sufficient basis for dismissal of that count. As a result, the Court need not rule on multiple arguments with respect to a single count if it finds that one argument furnishes a basis for dismissal. For this reason, we address the non-constitutional arguments first in each section. That way, consistent with the doctrine of constitutional avoidance, the Court need not address constitutional issues.

I. Count One Fails to State an Offense for Multiple Independent Reasons

A. The Allegations in Count One Are Insufficient to Establish that the Moving Defendants "Incited" or "Urged" Others to Riot

An indictment fails to state an offense under Rule 12(b)(3)(B) if the defendant's alleged conduct is not proscribed by the statute the indictment invokes. *See, e.g.*, *Sunia*, 643 F. Supp. 2d at 68 (citing *United States v. Panarella*, 277 F.3d at 685); *Akinyoyenu*, 199 F. Supp. 3d at 109. "The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed." *Sanford, Ltd.*, 859 F. Supp. 2d at 107; *see also Adkinson*, 135 F.3d at 1371 n. 23 ("In order to be valid, an indictment must allege that the defendants performed acts which, if proven, constitute the violation of law for which they are charged.").

In reviewing the sufficiency of the facts alleged in a particular charge, the court is limited to the precise language used in the charge "because the Fifth Amendment requires that criminal prosecutions be limited to the unique allegations of the indictments returned by the grand jury."

Sunia, 643 F. Supp. 2d at 60 (quoting *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001)). The court "accordingly cabins its analysis to 'the face of the indictment and, more specifically, the language used to charge the crimes.'" *Akinyoyenu*, 199 F. Supp. 3d at 110 (quoting *Sunia*, 643 F. Supp. 2d at 60). Thus, "[i]t is perfectly proper, and in fact mandated, that [a] court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983); *U.S. Sav. & Loan League*, 9 F.R.D. at 453 (dismissing count in indictment because statute did not cover defendant's conduct).

In this case, Count One of the Indictment fails to allege facts establishing that any of the Moving Defendants "incited" or "urged" others to engage in a riot, in violation of D.C. Code. § 22-1322(d). The word "incite" means to "[e]ncourage or stir up (violent or unlawful behavior); [u]rge or persuade (someone) to act in a violent or unlawful way." *Incite*, English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/incite (last visited May 25, 2017)*; see also Incite*, *Black's Law Dictionary* (10th ed. 2014) ("To provoke or stir up (someone to commit a criminal act, or the criminal act itself)."). The word "urge" is a synonym, meaning "[t]ry earnestly or persistently to persuade (someone) to do something." *Urge*, English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/urge (last visited May 25, 2017). None of the allegations in Count One establish that any Moving Defendant did or said anything to "stir up," "encourage," "provoke" or "try earnestly or persistently to persuade" other individuals to engage in a riot.

In Count One, the only allegations made against the Moving Defendants are the allegations made against all "Rioting Defendants." Accordingly, the only allegations made against the Moving Defendants are that they gathered in Logan Circle, used a "tactic" called a

"Black Bloc" in which some individuals wore dark and concealing clothing, traveled as a large group over 16 city blocks as others allegedly committed certain unlawful acts, and failed to disassociate from the group. *See* Indictment, Count One, ¶¶ 2, 3, 6-40. There is nothing more. "[I]ndividuals participating in the Black Bloc" are arguably alleged to have "incited" others by voicing commands to move as a group, as well as by cheering and celebrating acts of violence and destruction, and by chanting slogans like "Fuck it up," "Fuck capitalism," and "Whose streets? Our streets." *Id.*, ¶¶ 39-40. But no Moving Defendant is identified as such an individual. *Id.*

Meeting in Logan Circle, wearing distinctive clothing, traveling as a group for 16 blocks, and failing to disassociate from the group is not conduct that amounts to "inciting" or "urging"—*i.e.*, "provoking," "stirring up," or "trying earnestly or persistently to persuade"—others to engage in a riot. At most (and setting aside the profound constitutional concerns raised by attempting to criminalize that conduct, *see* Sections I.B.1 & I.B.3, *infra*), that conduct amounts to "engaging" in a riot. And "engaging" in a riot and "inciting or urging" others to engage in a riot are different things. In contrast to "inciting" or "urging" others to engage in a riot, defined above, "engaging" in a riot means to "[p]articipate or become involved in" a riot, *not* to "stir up," "encourage" or "provoke" others to do so. *Engage*, English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/engage (last visited May 25, 2017)*; see also Engage*, *Black's Law Dictionary* (10th ed. 2014) ("To employ or involve oneself; to take part in; to embark on.").

Critically, Congress itself recognized the distinction between "engaging" and "inciting/urging" when it enacted the D.C. Riot Act, as it deliberately chose to proscribe "engag[ing]" in a riot in one misdemeanor section of the statute, *see* D.C. Code § 22-1322(b),

and "incit[ing] or urg[ing]" others to engage in a riot in other sections. D.C. Code § 22-1322(c) (misdemeanor) & (d) (felony). To read "engage" and "incite/urge" to mean the same thing and to cover the exact same conduct would violate two of the most venerable canons of statutory construction: words in a statute are construed according to their ordinary and natural meaning, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); and statutes "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Stevens v. D.C. Dep't of Health*, 150 A.3d 307, 315–16 (D.C. 2016) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)); *see also Wynn v. United States*, 80 A.3d 211, 219 (D.C. 2013) (reversing obstruction of justice conviction based on statutory prohibition against "harassment" of witness because defendant's conduct objectively did not constitute harassment, and expanding statute to reach this conduct would "would make the term 'harasses' meaningless").

Because the factual allegations in Count One do not establish that any Moving Defendant "incited" or "urged" others to engage in riot, Count One must be dismissed as against the Moving Defendants.

B. Count I Violates the First, Fifth, and Sixth Amendments

Even if the factual allegations in Count One were held to establish that the Moving Defendants incited a riot, Count One suffers from several fatal constitutional flaws. *First*, as the D.C. Circuit determined in a conclusive opinion that continues to bind District of Columbia courts, the First Amendment precludes the D.C. Riot Act from applying to disorder arising from political demonstrations; permitting it to be applied in such circumstances now would require it to be invalidated as unconstitutionally overbroad. *Second*, even if the Riot Act were applicable to disorder arising from political demonstrations, Count One is unconstitutionally vague and

lacking in specificity, in violation of the First, Fifth and Sixth Amendments, as it does not identify what *any* Moving Defendant did or said to incite a riot. *Third*, even if the Riot Act were applicable in this case, and even if the Court could somehow discern what Count One alleges the Moving Defendants did or said to incite a riot and declines to find it unconstitutionally vague, Count One violates the First Amendment by seeking to punish the Moving Defendants for engaging in protected expressive activity.

1. *The First Amendment Precludes the D.C. Riot Act from Applying to Disorders Arising from Political Demonstrations*

At the threshold, Count One must be dismissed because, in *United States v. Matthews*, 419 F.2d 1177, 1182 n.9 (D.C. Cir. 1969), the D.C. Circuit authoritatively interpreted the D.C. Riot Act not to apply to "disorders" arising from political demonstrations, which is how the government seeks to apply the Act here.

Congress enacted the D.C. Riot Act in late December 1967, *see* Pub. L. No. 90-226, § 901, 81 Stat. 734, 742 (Dec. 27, 1967) (codified as amended at D.C. Code § 22-1322), to "enable the law enforcement authorities to handle future riotous situations in the District of Columbia similar to those which had afflicted cities such as Newark and Detroit the summer before." *Matthews*, 419 F.2d at 1181.[2] Soon after the Act's passage, the D.C. Circuit in *Matthews* drew on that legislative purpose to sustain the statute against a constitutional attack on grounds of vagueness and overbreadth:

> There are few citizens indeed who do not know a public riot when they see one, or who would not understand at least the general objective of the restraints upon personal conduct Congress prescribed to be observed upon such a confrontation. The Congressional focus was, it is clear from the legislative history, upon

[2] *Matthews* concerned a prosecution brought against an individual for "engag[ing]" in a riot under the misdemeanor provision of the D.C. Riot Act, now D.C. Code § 22-1322(b). *Matthews*, 419 F.2d at 1184.

> mindless, insensate violence and destruction unredeemed by any social value and *serving no legitimate need for political expression*.

Id. at 1182 (emphasis added). Critically, the Court distinguished such "mindless, insensate violence" from "demonstrations such as the October 21, 1967, anti-Viet Nam War march." *Id.* at 1182 n.9.[3] The Court explained that "the great weight of the testimony before the Congress" indicated that "the statute was conceived of as directed to *disorders unrelated to political demonstrations*." *Id.* (emphasis added). The Court concluded that any other reading of the Act would "jeopardize the validity of the statute by making it trespass on protected First Amendment rights." *Id. Matthews*' narrowing construction of the Riot Act in the face of a First Amendment overbreadth challenge binds this Court. *See Davidson v. United States*, 137 A.3d 973, 974 n.2 (D.C. 2016).[4]

Matthews is not an outlier. Other courts have routinely narrowed anti-rioting statutes to save them from constitutional objections. *See, e.g.*, *State v. Douglas*, 278 So. 2d 485, 487 (La. 1973); *State v. Brooks*, 215 S.E.2d 111, 118–19 (N.C. 1975); *State v. Beasley*, 317 So. 2d 750, 753 (Fla. 1975); *People v. Tolia*, 214 A.D.2d 57, 63–65 (N.Y. 1995).

It is beyond question that the events alleged in Count One took place in the course of a political demonstration. Indeed, the events took place on the morning of a *presidential*

---

[3] "[T]he October 21, 1967 anti-Viet Nam War march" was not peaceful. It ended with the arrest of some 650 protesters after soldiers and U.S. Marshals repulsed protesters' attempt to storm the Pentagon, leaving nearly 50 people injured. *See, e.g.*, Ben A. Franklin, *War Protesters Defying Deadline Seized in Capital*, N.Y. Times, Oct. 23, 1967, at 1.

[4] *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), upon which the government appears to rely for its theory of prosecution, does not compel a different result. The question in *Carr* was whether a mass arrest was supported by probable cause. *Carr* did not purport to overrule *Matthews* or even call it into question. In any event, *Carr* issued long after February 1, 1971, and thus, unlike *Matthews*, does not bind District of Columbia courts. *See, e.g.*, *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971); *see also Bethea v. United States*, 365 A.2d 64, 71 (D.C. 1976).

inauguration. The government itself has admitted the political nature of the demonstration, referring to it as an "anti-capitalist block march." *See* Government's Omnibus Proposal for Grouping Cases, at 2 (March 17, 2017). The target of this prosecution is, therefore, precisely the type of political demonstration-related "disorder" that the D.C. Circuit held to be beyond the scope of the D.C. Riot Act. Given *Matthews*' authoritative interpretation of the D.C. Riot Act, Count One must be dismissed for failure to state an offense. *See United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012).

Alternatively, if it is the government's contention that it can prosecute alleged disorderly acts that occurred during a political demonstration under the Riot Act, then the Act is vulnerable to renewed challenge for overbreadth. The overbreadth doctrine forbids *any* application of a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). The doctrine recognizes that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *accord, e.g., Williams*, 553 U.S. at 292.

If, contrary to the limiting construction established in *Matthews*, the D.C. Riot Act were interpreted to permit the apparent theory of Count One—which seeks to punish the Moving Defendants for "incit[ing] or urg[ing] others to engage in [a] riot" based solely on their participation in a political demonstration marred by the unlawful acts of others—the Act would be unconstitutionally overbroad, since it would proscribe a substantial amount of protected

speech.[5] Judicial endorsement of the government's theory would threaten to deter and discourage protests on the streets of the Nation's capital. This is precisely what the overbreadth doctrine seeks to prevent. *See McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 252 (3d Cir. 2010) (striking a campus speech code because it chilled "[e]very word spoken by a student on campus," despite the many circumstances in which application of the code did not violate the First Amendment).

As *Matthews* commands, the D.C. Riot Act would be overbroad if applied to disorders arising from political demonstrations. Therefore, Count One, which targets a disorder arising from a political demonstration, must be dismissed. Alternatively, if the Court refuses to limit application of the Riot Act to disorders unrelated to political demonstrations, the Riot Act must be struck down as facially overbroad. That would also require dismissal of Count One.

2. *Even If the D.C. Riot Act Were Held to Apply to Disorders Arising from Political Demonstrations, Count One Is Unconstitutionally Vague and Lacking in Specificity as to the Moving Defendants*

An indictment must contain "the essential facts constituting the offense charged." Sup. Ct. R. Crim. P. 7(c)(1). In an indictment charging over 200 people with an offense—incitement of a riot—that consists of discrete individual acts, no fact is more "essential" than the identity of the specific individuals alleged to have committed those acts. *See Scales v. United States*, 367 U.S. 203, 224 (1961) ("In our jurisprudence guilt is personal . . . ."); *see also In re Winship*, 397 U.S. 358, 361-64 (1970) (emphasizing the vital importance of the due process clause's requirement of individualized proof of guilt beyond a reasonable doubt). Thus, to be facially valid, Count One must apprise *each defendant* of what *he or she* did to violate the law; it must,

[5] This is particularly so in light of the recognized First Amendment limitations on proscribing participation in political demonstrations marred by violence. *See* Section I.B.3, *infra*.

"first, contain[] the elements of the offense charged and fairly inform[] [the] defendant of the charge against which *he [or she]* must defend, and, second, enable[] *him [or her]* to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974) (emphasis added). Correspondingly, while Count One may use the language of the D.C. Riot Act in the government's "general description" of the offense, that language "must be accompanied with such a statement of the facts and circumstances as will inform *the accused* of the specific offence, coming under the general description, with which *he [or she]* is charged." *Id.* at 117-18 (emphasis added) (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). In other words, the charge of incitement to riot is "defective unless it also 'descends to particulars,'" enabling each defendant to prepare to meet the charge as against him or her. *Hsu v. United States*, 392 A.2d 972, 978 (D.C. 1978) (quoting *Russell v. United States*, 369 U.S. 749, 765 (1962)).

Russell provides a good example of what the "particulars" requirement means. The indictment in *Russell* charged an individual summoned to testify before the House of Representatives with violating the statute that proscribes Congressional witnesses from refusing "to answer any question pertinent to the question under inquiry." *Russell*, 369 U.S. at 751-53 & n.2. But the indictment failed to specify *which* question under inquiry the defendant allegedly refused to answer. In so doing, the Supreme Court found, it impermissibly failed to allege a fact "central to every prosecution under the statute." *Id.*, 755–56, 764.

Here, the "particulars" requirement means that, as to each individual defendant, Count One must specify how he or she "incited or urged" others to riot. That is because, like the charge of "refus[al] to answer any question pertinent to the question under inquiry" in *Russell*, a charge of "inciting or urging" others to riot, without more, is not sufficiently precise on its face to notify

each defendant of the unlawful actions he or she took. Under Rule 7(c), *Russell* and *Hamling*, each individual defendant is entitled to know the specific acts he or she committed or the specific statements he or she made to incite or urge others to riot.

Count One does not provide this indispensable, constitutionally-required information to the Moving Defendants. It does not identify a single act of incitement that any Moving Defendant committed. It does not describe a single utterance by any Moving Defendant.

Count One does allege statements that arguably "incited" others (even though those statements are plainly insufficient to satisfy the First Amendment's requirements for establishing incitement, *see* Section I.B.3., *infra*). In particular, Count One alleges that "individuals participating in the Black Bloc" voiced commands to move as a group, and that they also cheered and celebrated acts of violence and destruction, and chanted slogans like "Fuck it up," "Fuck Capitalism," and "Whose streets? Our streets," before, during, and after acts of violence and destruction. Indictment, Count One, ¶¶ 39-40. But again, Count One does not identify any Moving Defendant as having engaged in such speech, as it does not allege that any Moving Defendant was one of "the individuals participating in the Black Bloc" who issued orders, cheered, celebrated, or chanted.

There is, in short, no way to discern from Count One what any Moving Defendant is alleged to have done that, in the view of the grand jury, meets the statutory requirement of having "willfully incited or urged others to engage in [a] riot." As in *Russell*, "guilt depends . . . crucially" on facts that have been omitted from the indictment. *Russell*, 369 U.S. at 764.

The harms wrought by the vagueness and lack of specificity in Count One are tangible. The requirement that an indictment inform each individual defendant of the specific allegations made personally against him or her protects a number of core constitutional rights. First, as the

Sixth Amendment commands, it ensures that each defendant may adequately prepare his or her own defense. *See Russell*, 369 U.S. at 761, 763-65; *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001); *United States v. Hillie*, Criminal No. 16-cr-0030 (KBJ), 2017 WL 61930, at *7 (D.D.C. Jan. 5, 2017). Second, to give teeth to the protections the Fifth Amendment's grand jury clause furnishes against an overbearing sovereign, it ensures that each defendant is prosecuted based only on the unique allegations the grand jury returned, so that the government may not roam free post-indictment and obtain a conviction based on allegations of its own choosing—"facts not found by, and perhaps not even presented to, the grand jury which indicted [the defendant]." *Russell*, 369 U.S. at 770; *see also Stirone v. United States*, 361 U.S. 212, 216-18 (1960); *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000); *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979); *Hillie*, 2017 WL 61930, at *7, 14, 16. Third, the specificity requirement ensures that no defendant can be prosecuted again for the same offense, in violation of the Fifth Amendment's double jeopardy clause. *See Russell*, 369 U.S. at 763-64; *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978); *Hillie*, 2017 WL 61930, at *7. Fourth, in a case like this, involving scores of defendants, it guarantees each defendant is convicted based on his or her own conduct, rather than the conduct of others, as required by the Fifth Amendment's due process clause. *See Scales*, 367 U.S. at 224-25 ("In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.")

Finally, where, as here, an indictment charges conduct occurring during a political demonstration, the specificity requirement safeguards the First Amendment right to freedom of

speech and assembly. In the context of a political protest, like the Inauguration Day protest here, an indictment must be sufficiently specific to allow the trial court to determine whether the government is unlawfully prosecuting any individual for engaging in core First Amendment-protected activity. *Lattimore*, 127 F. Supp. at 407 ("[W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the Court will uphold it only after subjecting its legal sufficiency to exacting scrutiny."). As one court confronted with an indictment charging a group of protesters has observed, "[p]articularly considering the protest context in which the underlying conduct has occurred and the First Amendment implications raised, it is reasonable to require the government to more specifically identify the *precise* conduct upon which it seeks to hold *each defendant* criminally liable." *United States v. Buddenberg*, No. CR-09-00263 RMW, 2010 WL 2735547, at *9 (N.D. Cal. July 12, 2010) (emphasis added). This is consistent with the Supreme Court's admonition that, although "[t]he First Amendment does not protect violence . . . [w]hen such conduct occurs in the context of constitutionally protected activity . . . *'precision of regulation' is demanded.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (emphasis added) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). "[O]therwise there is a danger that one in sympathy with the legitimate aims of [a political] organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Claiborne*, 458 U.S. at 919 (quoting *Noto v. United States*, 367 U.S. 290, 299-300 (1961)). *See* Section II.B.3., *infra* (discussing cases recognizing the First Amendment's

demand for "precision of regulation" in criminal prosecutions of political demonstrators under anti-rioting statutes).

By failing to specify what any Moving Defendant allegedly did or said to incite or urge others to engage in a riot, Count One flouts these vital First, Fifth, and Sixth Amendment protections. *Buddenberg*, 2010 WL 2735547, is instructive in this regard. In *Buddenberg*, a two-count indictment charged a group of individuals with violating the Animal Enterprise Terrorism Act ("AETA") for participating in a series of threatening demonstrations at the homes of university bio-medical researchers whose work involved the use of animals. 2010 WL 2735547, at *1. Count Two, which charged a substantive violation of the AETA, "alleg[ed] no facts identifying what each defendant is alleged to have done, to whom, where or when." *Id.* at *3. Count One, which charged conspiracy to violate the AETA, recited the language of the AETA and included three overt acts that "offer[ed] a modest amount of factual information," including information specifically identifying individual defendants, "but the count [was] still quite generic." *Id.* at *4. The court dismissed the indictment for lack of specificity, finding that it did not "inform" the defendants "what they are alleged to have done in violation of the law," did not permit "the court . . . to determine whether the specific conduct charged is protected by the First Amendment," and did not "ensure that defendants are prosecuted on the basis of facts presented to the grand jury." *Id.* at *9.

Buddenberg is strikingly similar to this case. Here, as in *Buddenberg*, the events at issue arose in the context of a political demonstration; the language of the statute being used ("incited and urged") is broad, punishes expressive conduct, and is susceptible to application that sweeps in First Amendment activity; the indictment names a large group of people *en masse* (much larger than the group in *Buddenberg*); and the charge at issue does not specifically attribute any

of alleged acts or statements to the moving defendants. Therefore, as in *Buddenberg*, Count One here is fatally defective as to the Moving Defendants and must be dismissed.

One final, critical point: the government may not cure the manifest defects in Count One with a bill of particulars. As the Supreme Court has held, "it is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell*, 369 U.S. at 770; *United States v. Conlon*, 628 F.2d 150, 156 (D.C. Cir. 1980) ("[I]t is settled that a bill of particulars and a fortiori oral argument cannot cure a defective indictment."). That is because a bill of particulars does nothing to ensure that a defendant is prosecuted based only on the facts the grand jury considered and found, as the Fifth Amendment requires. *See Hillie*, 2017 WL 61930, at *16 (collecting cases) ("'[T]o permit the omission [of a material fact] to be cured by a bill of particulars would be to allow the grand jury to indict with one crime in mind and to allow the U.S. Attorney to prosecute by producing evidence of a different crime'; which would, in essence, 'usurp the function of the grand jury . . . and, in many cases, would violate due process by failing to give the accused fair notice of the charge he must meet.'" (quoting *United States v. Thomas*, 444 F.2d 919, 922-23 (D.C. Cir. 1971)) (alterations in original)). Accordingly, Count One of the Indictment must be dismissed, even if the government were to furnish each Moving Defendant a bill of particulars.

3. *Even If the D.C. Riot Act Applies to Disorder Arising from Political Demonstrations and Count One Is Not Unconstitutionally Vague, Count One Does Not Satisfy the Stringent First Amendment Requirements for Criminalizing Incitement*

As explained in Section I.A., *supra*, under the plain text of Section 22-1322(d), the conduct that Count One appears to attribute to the Moving Defendants, as "Rioting Defendants," is insufficient to establish that any Moving Defendant incited or urged others to riot. The stringent constitutional limitations on the kind of conduct that may be proscribed as unlawful

incitement reinforce this conclusion. That is, the First Amendment precludes prosecution for incitement to riot based on the conduct that Count One appears to allege against the Moving Defendants.

By proscribing incitement to riot, Section 22-1322(d) must be interpreted "with the commands of the First Amendment clearly in mind," so that the conduct it outlaws can be "distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). Accordingly, the Supreme Court has construed conduct that may constitute unprotected "incitement" extremely narrowly: the government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). To satisfy this exacting standard, the expressive conduct (i) must be directed at specific individuals, *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam) ("Since the uncontroverted evidence showed that [the defendant's] statement [that '[w]e'll take the fucking street again'] was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action."), (ii) must "specifically advocate for listeners to take . . . action," *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 244–46 (6th Cir. 2015) (quoting *Hess*, 414 U.S. at 109) (holding the statement "Islam is a Religion of Blood and Murder" was not proscribable incitement because it could not "be perceived as encouraging violence or lawlessness"); and (iii) must be uttered with the specific intent "to produce . . . imminent disorder." *Hess*, 414 U.S. at 109; *accord, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). This last requirement, specific intent, is "the determinative factor separating protected expression from unprotected criminal behavior." *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (quoting *United States v. Gilbert*, 813

F.2d 1523, 1529 (9th Cir. 1987)).

The conduct that Count One appears to attribute to the Moving Defendants (as "Rioting Defendants")—meeting at Logan Circle, forming a "Black Bloc" in which participants dressed distinctively, traveling together with a group, and failing to disassociate from the group—does not remotely satisfy these constitutional requirements. None of that conduct was directed at discrete individuals, none of it could be said to have articulated a clear message inciting others to violence, and none of it could be inferred to have been undertaken with the specific intent of inciting imminent lawlessness.

Because none of the acts Count One appears to attribute to the Moving Defendants constitutes constitutionally proscribable incitement, none of the facts alleged in Count One establish that the Moving Defendants "willfully incited or urged others to engage in [a] riot," as Section 22-1322(d) requires. Count One, therefore, violates the First Amendment and must be dismissed.

II. Count Two Fails to State an Offense for Multiple Independent Reasons

A. Count Two Impermissibly Charges the Moving Defendants with Felony Rioting, an Offense that Does Not Exist

A charge fails to state an offense if the conduct alleged is not proscribed by the relevant criminal statute. *See, e.g., Akinyoyenu*, 199 F. Supp. 3d at 109 (dismissing counts that alleged possession of a drug whose possession was not prohibited by the statute); *U.S. Sav. & Loan League*, 9 F.R.D. at 453.

Here, Count Two charges the Moving Defendants with a crime that does not exist. Specifically, Count Two charges the Moving Defendants with violating both Section 22-1322(b), a misdemeanor, and Section 22-1322(d), a felony, by "engag[ing] in a riot." But Section 22-1322(d) does not outlaw engaging in a riot; only Section 22-1322(b) does. Section 22-1322(d)

specifically proscribes "willfully incit[ing] or urg[ing] others to engage in [a] riot." Thus, by its terms, "engaging" in a riot does not violate Section 22-1322(d). Indeed, neither Section 22-1322(d) nor any other provision of the D.C. Riot Act punishes "engaging" in a riot as a felony. The Moving Defendants, therefore, may not be charged under the felony provision, Section 22-1322(d), for engaging in a riot. The felony charge in Count Two must be dismissed.[6]

B. Count Two Violates the First, Fifth, and Sixth Amendments

Count Two must be dismissed in its entirety on similar constitutional grounds as Count One: The First Amendment precludes the D.C. Riot Act from applying to disorders arising from political demonstrations; even if it does not, Count Two is unconstitutionally vague as to the Moving Defendants; and even if not unconstitutionally vague, the First Amendment forbids punishing the Moving Defendants for exercising their right of political association and assembly by participating in a political demonstration ultimately marred by the unlawful acts of others.

1. *The First Amendment Precludes the D.C. Riot Act from Applying to Disorders Arising from Political Demonstrations*

As explained in Section I.B.1., *supra*, the D.C. Circuit, in an opinion that binds District of Columbia courts, authoritatively construed the Riot Act not to apply to "disorders" arising from political demonstrations. Count Two charges the Moving Defendants under the Riot Act with having "engaged" in a riot that arose from a political demonstration. Therefore, like Count One, Count Two should be dismissed.

[6] The inclusion of the felony charge is not merely a technical defect. The Moving Defendants are entitled to know in advance of any further proceedings whether they face a ten year felony or a 180 day misdemeanor.

2. *Even If the D.C. Riot Act Applies to Disorders Arising from Political Demonstrations, Count II Is Unconstitutionally Vague and Lacking in Specificity as to the Moving Defendants*

Count Two is impermissibly vague and lacking in specificity as to the Moving Defendants for the same reasons as Count One. *See* Section I.B.2., *supra*. That is, Count Two fails to specify what any Moving Defendant did *personally* to "engage[] in a riot"—a charge that, like the charge of "inciting a riot" or the "refusal to answer" charge in *Russell*, must "descend to particulars" as to each individual defendant because, without more, it is too imprecise to notify any Moving Defendant what he or she did to violate the law. By failing to identify what any Moving Defendant did personally to engage in rioting, Count Two (i) fails to enable the Moving Defendants to adequately prepare their defenses; (ii) raises the impermissible possibility that the government may cast about for, and prosecute the Moving Defendants based on, "facts not found by, and perhaps not even presented to, the grand jury," *Russell*, 369 U.S. at 770; (iii) presents the constitutionally unacceptable risk that a future court, lacking clear guidance as to the factual basis of the government's current prosecution, could entertain the prosecution of the Moving Defendants a second time for the very same alleged offense; (iv) presents the similarly unacceptable risk that the Moving Defendants could be convicted based not on their own personal conduct, but the conduct of others, given the scores of individuals charged; and (v) impermissibly disables this Court from being able to determine whether the government is unlawfully seeking to prosecute individuals engaged in legitimate political advocacy based on the allegedly illegal actions of others. *See* Section I.B.2., *supra* and Section II.B.3., *infra*. Count Two must be dismissed.

3. *Even If the D.C. Riot Act Applies to Disorders Arising from Political Demonstrations and Count Two Is Not Unconstitutionally Vague, Count Two Violates the First Amendment by Seeking to Punish the Moving Defendants for Engaging in a Political Demonstration Marred by the Unlawful Acts of Others*

If Count Two is not held to be barred by *Matthews* or impermissibly vague, it nonetheless is due to be dismissed. Count Two seeks to hold the Moving Defendants criminally responsible for engaging in a riot based on the unlawful actions *other* people took during the January 20 demonstration, as it does not charge any of the Moving Defendants with personally committing any of the unlawful acts alleged. This guilt-by-association theory of criminal liability collides with well-worn First Amendment right of association and Fifth Amendment due process protections.

The Supreme Court has long held that that the Constitution "restricts the ability of the [government] to impose liability on an individual solely because of his association with another." *Claiborne*, 458 U.S. at 918–19 (citing *Scales*, 367 U.S. at 229). This restriction is grounded in the recognition that the First Amendment "right to associate does not lose all constitutional protection merely because some members of [a] group may have participated in conduct . . . that itself is not protected." *Id.* at 908. It is also grounded in the Due Process Clause of the Fifth Amendment, which requires that "[i]n our jurisprudence guilt is personal." *Scales*, 367 U.S. at 224–25. The "fundamental principle[]" of personal guilt "partakes of the very essence of the concept of freedom and due process of law." *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring). Under that principle, "when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity"—such as the relationship of the Moving Defendants to individuals alleged to have damaged property—"that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause

of the Fifth Amendment." *Scales*, 367 U.S. at 224–25.

These mutually reinforcing First and Fifth Amendment protections carry special force in criminal prosecutions of political demonstrators under rioting statutes like the one the government invokes here. That is because, as courts have observed, such prosecutions target "bifarious undertaking[s], involving both legal and illegal purposes and conduct, and is within the shadow of the first amendment." *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972). In recognition of this "duality" of purpose and conduct that "would usually exist in an undertaking involving activity of a group and out of which a riot arises," *id.* (citing *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969)), courts have applied stringent pleading and proof requirements. *First*, an individual must have a "guilty 'knowledge'" of the criminal conduct of the group with which he or she is accused of associating—that is, knowledge that the group "engages in criminal activity" or knowledge "linking him with the [group's] illegal activities."[7] *Scales*, 367 U.S. at 222 n.15, 226 & n.18, 228. *Second*, the individual must possess the "*specific intent"* to further the "illegal aims" of a group having both "legal and illegal aims." *Claiborne*, 458 U.S. at 919-20 (emphasis added) (quoting *Scales*, 367 U.S. at 229 and *Healy v. James*, 408 U.S. 169, 186 (1972)). That is, there must be "clear proof" that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to" unlawful means. *Scales* 367 U.S. at 229 (alterations in original) (quoting *Noto*, 367 U.S. at 299). Further, the government must prove such specific intent *strictissimi juris*— "according to the strictest law." *Claiborne*, 458 U.S. at 919 & n.54 (citing *Noto*, 367 U.S. at 299). "[O]therwise there is a danger that one in sympathy with the legitimate aims of [the group], but not specifically intending to accomplish

[7] In other contexts, courts have also required proof that a defendant was an "active" member of a group accused of having both legal and illegal aims. *See Scales*, 367 U.S. at 228.

them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto*, 367 U.S. at 299–300.

Practically speaking, the *strictissimi juris* standard requires "[s]pecially meticulous inquiry into the sufficiency of proof" so as to avoid "an unfair imputation of the intent or acts of some participants to all others"—which is a "real possibility in considering group activity . . . characteristic of political or social movements." *Dellinger*, 472 F.2d at 392. The standard "emphasizes the need for care in analyzing the evidence against a *particular defendant* . . . both by the jury in its fact-finding process and by the court in determining whether the evidence is capable of convicting beyond a reasonable doubt." *Id.* at 393 (emphasis added). Importantly, under the standard, "[t]he specific intent of one defendant . . . is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof." *Spock*, 416 F.2d at 173. This is a standard of proof more exacting than even the standard for a conspiracy charge, *see id.*, 173–74, and it compels an individualized inquiry as to *each defendant's* conduct and statements to determine if that defendant possessed the specific intent to further a group's criminal activity. *See, e.g.*, *Dellinger*, 472 F.2d at 392–407; *Spock*, 416 F.2d at 173, 176–79.

In *Claiborne*, the Supreme Court applied these principles in the context of a civil rights boycott of white merchants that was marred by acts of violence. 458 U.S. at 916. At issue in *Claiborne* was which groups of boycott participants could be held liable for damages. Recognizing that the "right to associate does not lose all constitutional protection merely because some members of [a] group may have participated in conduct . . . that itself is not protected," *id.* at 908, the Court limited liability to those who actually participated in violent acts. *Id.* at 924-29; *see also id.* at 919-20 (discussing *Scales* and *Noto*).

Indeed, in *Claiborne*, the Court affirmed that the constitutional protections afforded to individuals who participate in a political demonstration are so robust that they provide refuge even when those individuals are alleged to have *facilitated* the unlawful acts of others by, *e.g.*, wearing distinctive clothing. To ensure adherence to the boycott, certain boycott supporters allegedly terrorized other black citizens who defied the boycott by patronizing white-owned stores. *Id.* at 903–06. According to the plaintiffs, a group of local citizens—known as "Black Hats," in reference to their distinctive clothing—facilitated the violence not by committing acts of violence themselves, but by monitoring the white-owned stores to identify black citizens who broke the boycott. *Id.* at 903–04. Although the Supreme Court recognized "that violence contributed to the success of the boycott" and emphasized that "[t]he First Amendment does not protect violence," it nonetheless reversed the judgment against the Black Hats, among others. *Id.* at 916, 933. It did so because "[t]here is nothing unlawful in standing outside a store and recording names," and "[s]imilarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." *Id.* at 925. While observing that individual Black Hats "may be held responsible for the injuries that they caused" by committing specific acts of violence, the Court concluded that such liability must be "tailored to the consequences of their unlawful conduct" alone, and could not be based solely on their choice of clothing or their participation in the activity of monitoring white-owned stores. *Id.* at 926.

Since *Claiborne*, courts have repeatedly applied the same First and Fifth Amendment constitutional principles to preclude the mass arrest of participants in political protests where certain individuals may have broken the law. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1159 (10th Cir. 2008) ("[T]hat [the plaintiff] was a participant in an antiwar protest where some individuals may have broken the law is not enough to justify his arrest." (citing *Claiborne*, 458

U.S. at 908)); *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (Sotomayor, J.) (holding that the fact "that some demonstrators had allegedly violated the law, transforming [a] peaceful demonstration into a potentially disruptive one," did not justify the mass arrest of protesters) (citing *Claiborne*, 458 U.S. at 908). As the Second Circuit has explained, if the law were otherwise, "little . . . would prevent the police from ending a demonstration without notice for the slightest transgression by a single protester (or even a mere rabble rouser, wholly unconnected to the lawful protest)." *Id*.

Here, the government appears to contend that the Moving Defendants can be held criminally responsible for the unlawful acts that others committed during the January 20 demonstration on the ground that the Moving Defendants facilitated those unlawful acts by gathering in Logan Circle, wearing distinctive clothing, and moving together as a group for 16 blocks. But *Claiborne* plainly forecloses that theory, as do *Scales, Noto, Dellinger, Spock*, and all of the other authorities cited above. Count One contains no allegations establishing that any of the Moving Defendants either had knowledge of the purportedly illegal aims of the individual protestors alleged to have committed unlawful acts or had the specific intent to further those aims. As in *Claiborne,* wearing distinctive clothing and moving together in a group during a political protest simply does not suffice.

Because Count Two alleges no facts that satisfy the First and Fifth Amendment requirements for prosecutions based on guilt-by-association in the context of activity "in the shadow of the First Amendment," it should be dismissed.

III. Count Three Fails to State an Offense for Multiple Independent Reasons

Count Three charges the Moving Defendants with conspiracy to engage in a riot. Count Three fails to state an offense for multiple reasons. It is barred by Wharton's Rule. It fails to

state facts sufficient to allege the Moving Defendants' knowing participation in an unlawful agreement. It is barred by the binding decision in *Matthews*. Even if not barred by Wharton's Rule or *Matthews*, it is unconstitutionally vague as to the Moving Defendants. And even if not unconstitutionally vague—that is, even if the court can discern what the grand jury has alleged the Moving Defendants did to conspire to engage in a riot—Count Three violates the First and Fifth Amendments by seeking to punish the Moving Defendants for engaging in a political demonstration marred by the unlawful acts of others.

A. Because Engaging in a Riot Requires the Participation of Five or More People, Wharton's Rule Proscribes the Charge of Conspiracy to Engage in a Riot

Wharton's Rule prohibits a separate conspiracy charge where the underlying crime requires concerted action. Here, the Moving Defendants have been charged with conspiracy to "engage in a riot," which, by statute, already requires "an assemblage of 5 or more persons." D.C. Code § 22-1322(a). Accordingly, the separate conspiracy charge in Count Three fails as a matter of law.

Wharton's Rule is an exception to the general rule that a conspiracy to commit a substantive offense and the substantive offense itself are discrete crimes for which separate sanctions may be imposed. *Iannelli v. United States*, 420 U.S. 770, 781–82 (1975). Under Wharton's Rule, an agreement between multiple people to commit a crime cannot be prosecuted as a conspiracy when multiple people are necessary to commit the substantive offense. *United States v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993); *Pearsall v. United States*, 812 A.2d 953, 961–62 (D.C. 2002). More than one person is necessary to commit an offense if "the substantive statute requires [each participant's] existence as an abstract legal element of the crime." *Pearsall*, 812 A.2d at 962 (quoting *United States v. Boyle*, 482 F.2d 755, 767 (D.C. Cir. 1973)).

In determining whether Wharton's Rule applies, courts examine three criteria:

> [(1)] The parties to the agreement are the only persons who participate in commission of the substantive offense, [(2)] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . [and (3)] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.

Iannelli, 420 U.S. at 783–84 (internal citations and footnotes omitted).

These criteria are not applied rigidly. Instead, courts take a functional view and apply Wharton's Rule whenever "[t]he substantive offense . . . presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter." *Id.* at 785. In *Iannelli*, for instance, the Supreme Court held that a federal gambling statute, 18 U.S.C. § 1955, did not qualify for Wharton's Rule because "the . . . definition of 'gambling activities' pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy." 420 U.S. at 789. The Supreme Court continued: "Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of 'gambling activities' in § 1955 is significant. [Congress] chose . . . to define the substantive offense punished by § 1955 in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy." *Id.*

In this case, by contrast, the D.C. Riot Act is animated by exactly the same purpose as the law of conspiracy. The D.C. Code defines a riot as a "public disturbance involving an assemblage of 5 or more persons which . . . creates grave danger of damage or injury to property or persons." D.C. Code § 22-1322(a). This definition, by its very terms, contemplates the

concerted action of "5 or more persons." As such, the substantive offense of "engag[ing] in a riot" concerns the same group conduct that the law of conspiracy seeks to avert.

The legislative history of the D.C. Riot Act reinforces this conclusion. In congressional hearings, Fred M. Vinson, Jr., Assistant Attorney General for the Department of Justice's Criminal Division, explained that "[the participation of] five or more people . . . rise[s] to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively [sic], with regard to substantive offenses." *See* Hearings on H.R. 12328, H.R. 12605, H.R. 12721 and H.R. 12557 Before Subcomm. No. 4 of the H. Comm. on the District of Columbia, 90th Cong., 1st Sess. 18–19 (1967) (statement of Hon. Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice). This testimony from the Department of Justice—which drafted the D.C. Riot Act's "five or more" requirement—plainly shows an overarching intent to criminalize group activity and concerted action. Therefore, like the statutory text itself, the legislative history demonstrates that the D.C. Riot Act "presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter." *Iannelli*, 420 U.S. at 785.

Even on a rigid application of each of the three criteria set forth in *Iannelli*, Count Three fails as a matter of law. First, the indictment charges that the alleged co-conspirators were the only people who participated in the alleged substantive offense of "engag[ing] in a riot." Second, "the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Iannelli*, 420 U.S. at 782–83. The Supreme Court explained that this second factor is satisfied when the substantive offense is likely to generate additional agreements or

seeks the participation of additional people. *Id.* at 784 (noting that "[l]argescale gambling activities seek to elicit the participation of additional persons—the bettors—who are parties neither to the conspiracy nor to the substantive offense that results from it"). Here, the government has not alleged that any co-conspirators sought to recruit members beyond those who participated in the Inauguration Day protest. Nor has the government alleged that the conspiracy to engage in a riot was likely to contribute to criminal conduct other than that alleged in the indictment. Finally, the substantive offense of "engag[ing] in a riot" does not pose different kinds of threats than those addressed by the law of conspiracy. As noted above, the purpose of any prosecution for "engag[ing] in a riot" overlaps almost completely with the purpose of the law of conspiracy to punish group misconduct and concerted action. Wharton's Rule, therefore, bars Count Three.

B. The Allegations in Count Three Are Insufficient to Establish that the Moving Defendants Were Members of an Illegal Agreement

To convict a defendant of conspiracy, the government must establish that the defendant "(1) made 'an agreement between [one] or more people to commit a criminal offense; (2) knowing[ly] and voluntar[il]y participat[ed] in the agreement . . . with the intent to commit a criminal objective; and (3) commission[ed] in furtherance of the conspiracy at least one overt act . . . during the conspiracy.'" *In re T.M.*, 155 A.3d 400, 403 (D.C. 2017) (alternations and omissions in original) (quoting *Campos-Alvarez v. United States*, 16 A.3d 954, 965 (D.C. 2011)).

Although the Indictment describes in detail the "overt acts" allegedly committed by "members of the conspiracy," it does not allege that the Moving Defendants actually agreed to riot in the first place. That is, the Indictment does not charge facts sufficient to establish that the Moving Defendants knowingly and voluntarily participated in such an agreement with the intent to commit a criminal objective. It is simply not enough that the Indictment alleges that the

Moving Defendants gathered in Logan Circle with a large group, wore distinctive clothing, walked with the group for 16 blocks, and failed to disassociate from the group after certain unlawful acts were purportedly committed. All that these allegations establish is the Moving Defendants' presence on the scene and awareness of the alleged misconduct occurring around them. And it is axiomatic that the "mere presence [at the scene of a crime] or awareness [of it] is insufficient to make out a conviction for . . . conspiracy." *McCoy v. United States*, 890 A.2d 204, 211 (D.C. 2006); *see also* Criminal Jury Instructions for the District of Columbia, 7.102 (5th ed. 2012) (Conspiracy: Basic Instruction) ("mere presence at the scene of the agreement or of the crime, or merely being with other participants, does not show that [a defendant] knowingly joined in the agreement."). Accordingly, the facts alleged in Count Three are insufficient to establish the crime of conspiracy. *See supra* Section I.A (describing legal standard). For this reason, too, Count Three should be dismissed.

C. Count Three Violates the First, Fifth, and Sixth Amendments

1. *The First Amendment Precludes the Charge of Conspiracy to Violate the D.C. Riot Act from Applying to Disorders Arising from Political Demonstrations*

Count Three charges the Moving Defendants with conspiracy to engage in a riot. Because *Matthews* precludes applying the charge of "engag[ing] in a riot" to the facts of this case, *see* Sections I.B.1. & II.B.1., *supra*, it necessarily precludes a charge of conspiracy whose object is "engag[ing] in a riot." As with Counts One and Two, Count Three must be dismissed under *Matthews*.

2. *Even If the Charge of Conspiracy to Violate the D.C. Riot Act Applies to Disorders Arising from Political Demonstrations, Count Three Is Unconstitutionally Vague and Lacking in Specificity as to the Moving Defendants*

Count Three is unconstitutionally vague and lacking in specificity for the same reasons as Count Two, *see* Section II.B.2., *supra,* as Count Three charges a conspiracy whose object is the

unconstitutionally vague charge in Count Two, *i.e.*, "engag[ing] in a riot." Therefore, even if Count Three is not barred by Wharton's Rule, Rule 12(b)(3)(B) for failure to state an offense, or *Matthews*, it still must be dismissed.

3. *Even If the Charge of Conspiracy to Violate the D.C. Riot Act Applies to Disorders Arising from Political Demonstrations and Count Three Is Not Unconstitutionally Vague, Count Three Violates the First and Fifth Amendments by Seeking to Punish the Moving Defendants for Engaging in a Political Demonstration Marred by the Unlawful Acts of Others*

Inasmuch as the First and Fifth Amendments prohibit the government from prosecuting the Moving Defendants for "engaging in a riot" based on the conduct Count Two appears to attribute to them, *see* Section II.B.3., *supra*, the First and Fifth Amendments necessarily prohibit the government from prosecuting the Moving Defendants for conspiracy to commit the same conduct. Count Three contains no allegations that would support an inference that any of the Moving Defendants were active and knowing members of a conspiracy or that they acted with the specific intent to further the illegal aims of a group. Like Counts One and Two, all Count Three alleges against the Moving Defendants is that they gathered in Logan Circle with a large group, wore distinctive clothing, and traveled with the group for 16 blocks as a handful of *other* people—people the Moving Defendants are not even alleged to *know*—committed unlawful acts. Given the strict knowledge and specific intent requirements that the First and Fifth Amendments impose here, those paltry allegations do not suffice to sustain a charge of conspiracy to riot against the Moving Defendants. *See* Section II.B.3., *supra*; *see also Spock*, 416 F.2d at 168-69, 172 (applying *Scales* standard to charge of conspiracy involving First Amendment activities). For this reason, too, Count Three should be dismissed.

IV. Counts Four through Eight Fail to State an Offense for Multiple Independent Reasons

A. Counts Four through Eight Fail To State an Offense Based on a *Pinkerton* Theory of Liability

The government has charged the Moving Defendants with five counts of malicious destruction of property for breaking five different business storefront windows. The government does not allege that the Moving Defendants broke these windows themselves; instead, given the specific allegations in Counts One – Three, which explicitly identify the individuals alleged to have broken the windows, the government claims that the Moving Defendants are responsible for breaking them because of their alleged participation in the conspiracy charged in Count Three.

Under *Pinkerton v. United States*, a co-conspirator who does not directly commit a substantive offense may nevertheless be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement. 328 U.S. 640, 646–48 (1946). However, a defendant's participation in a conspiracy must be established beyond a reasonable doubt before *Pinkerton* liability may attach. *See United States v. Sampol*, 636 F.2d 621, 676 (D.C. Cir. 1980) (citing *United States v. Michel*, 588 F.2d 986, 999 (5th Cir. 1979)).

Here, Counts Four – Eight improperly charge the Moving Defendants on a *Pinkerton* theory, and must be dismissed, for two independent reasons.

1. *Pinkerton Liability Is Prohibited Because the Underlying Conspiracy Charge Is Invalid*

As explained above, both Wharton's Rule and the failure of the facts averred in Count Three to allege a conspiracy proscribe the charge of conspiracy to engage in a riot. Because the Indictment do not state an offense for conspiracy, the Moving Defendants may not be charged with property destruction on a *Pinkerton* theory. *See Sampol*, 636 F.2d at 676.

2. Pinkerton Liability for Felony Destruction of Property Is Prohibited Because the Underlying Conspiracy Charge is for a Conspiracy to Commit the Misdemeanor Offense of Engaging in a Riot

Imposition of *Pinkerton* liability often raises due process concerns. For instance, a number of courts have held that it violates due process to extend *Pinkerton* liability to defendants who play only a minor or marginal role in a conspiracy. *United States v. Bingham*, 653 F.3d 983, 997-98 (9th Cir. 2011); *United States v. Cherry*, 217 F.3d 811, 818 (10th Cir. 2000); *United States v. Collazo-Aponte*, 216 F.3d 163, 196 (1st Cir. 2000), *vacated on other grounds*, 532 U.S. 1036 (2001); *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996); *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

Similar due process concerns obtain where the government seeks to impose *Pinkerton* liability for felony offenses based on an underlying conspiracy that is only a misdemeanor. Yet that is what the government seeks to do here.

Counts Four – Eight charge over *two hundred* individuals with felony destruction of property. It is clear from the allegations in Counts One – Three that only a handful of those individuals actually broke the storefront windows identified in Counts Four – Eight. Therefore, as to the rest of the defendants named in Counts Four – Eight, including all of the Moving Defendants, the government seeks to convict them as co-conspirators under *Pinkerton.* The alleged conspiracy on which the government's *Pinkerton* theory is based is charged in Count Three. Under the District of Columbia's conspiracy statute, D.C. Code § 22-1805a, Count Three charges that all defendants conspired "to engage in a riot, in violation of 22 D.C. Code, Section 1322(b)." Section 22-1805a provides "that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the

maximum penalty provided for that offense." Under Section 22-1322(b), "engag[ing] in a riot"—the object of the charged conspiracy—is punishable "by imprisonment for not more than 180 days," which means that it is a misdemeanor. *See also* Section II.A., *supra*. Under Section 22-1805a, it follows that a conspiracy to engage in a riot is also a misdemeanor, punishable by no more than 180 days of imprisonment. The government thus seeks to impose *Pinkerton* liability on the Moving Defendants for five *felony* counts of malicious destruction of property, even though the underlying conspiracy is a misdemeanor.

Due process forbids the government from doing so, especially since the Moving Defendants are at best, for all the reasons set forth above, only alleged to be minor or marginal participants in the alleged conspiracy. Indeed, based on our research, no court has ever authorized imposition of *Pinkerton* liability for a felony offense when the underlying conspiracy is a misdemeanor; it is not clear that any prosecutor has even attempted to apply *Pinkerton* so audaciously. For this reason, too, Counts Four – Eight must be dismissed.

B. Counts Four through Eight Violate the First and Fifth Amendments

As explained, the First and Fifth Amendments prohibit the government from prosecuting the Moving Defendants for "engaging in a riot" for exercising their right of association by participating in a political demonstration that was marred by the unlawful actions of other people. *See* Section II.B.3., *supra.* For the very same reason, the First and Fifth Amendment prohibit the government from prosecuting the Moving Defendants for malicious destruction of property based on their participation in a political demonstration during which other people—not the Moving Defendants themselves—are alleged to have destroyed property.

The Moving Defendants are being charged in Counts Four – Eight based on the actions of others who participated in the same political demonstration. But neither Counts Four – Eight nor

the underlying conspiracy charge in Count Three contain allegations sufficient to support the inference than any of the Moving Defendants knew that other demonstrators would break the storefront windows identified in Counts Four – Eight, or that any of the Moving Defendants acted with the specific intent of having others break those windows. Again, given the strict knowledge and specific intent requirements that *Scales, Noto, Claiborne, Dellinger* and their progeny impose here, allegations that the Moving Defendants gathered in Logan Circle with a group of hundreds of people, wore distinctive clothing, and traveled with the group for 16 blocks as a small handful of *other* individuals broke storefront windows do not suffice to sustain charges of malicious destruction of property against the Moving Defendants. *See* Section II.B.3., *supra*. For this additional reason, Counts Four – Eight should be dismissed.

V. Count Eleven Charges Conduct that Does Not Violate the Recently Revised Assault on a Police Officer Statute

Count Eleven charges that Moving Defendants [redacted], and approximately 82 other defendants, "without justifiable or excusable cause, did assault, resist, oppose, impede, intimidate, and interfere with" several different law enforcement officers while they were engaged in the performance of their duties, in violation of D.C. Code § 22-405(b). Section 22-405(b) was amended last year, however, and it no longer proscribes resisting, opposing, impeding, intimidating, or interfering with a law enforcement officer. Now, Section 22-405(b) proscribes only "assault" on a police officer. And because Section 405(b) was amended effective June 30, 2016, it proscribed only "assault" on a police officer on the date of the offense alleged in Count Eleven.

The fact that Count Eleven includes the word "assault" does not save it. The grand jury charged that the Moving Defendants named in Count Eleven "assault[ed], resist[ed], oppose[d], impede[d], intimidate[d], and interfere[d] with" law enforcement officers. To "assault" officers is, by definition, different than to "resist, oppose, impede, intimidate or interfere with" officers—and all of those things are, by definition, different from one another. Therefore, it is impossible to know whether the grand jury found that a Moving Defendant named in count Eleven "assault[ed]" officers or, instead, merely "resist[ed]" or "oppose[d]" or "impede[d]" or "intimidate[d]" or "interfere[d] with" officers.

By alleging that the Moving Defendants "resist[ed], oppose[d], impede[d], intimidate[d], and interfere[d] with" law enforcement officers, Count Eleven charges the Moving Defendants with conduct that is not a violation of Section 22-405(b). For that reason, Count Eleven must be dismissed. *See supra* at 10 (citing cases dismissing charges where alleged conduct was not prohibited by statute).

CONCLUSION

Despite the well-established legal principles discussed here, the government advances this prosecution based on a set of vague, non-individualized allegations that can be interpreted, at best, as seeking to hold the Moving Defendants criminally responsible for engaging in a large political demonstration that was marred by the unlawful actions of a small number of other protestors. The government appears to believe that the D.C. Circuit's decision in *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), warrants its position. But *Carr* does nothing of the sort. *Carr* stands for the limited proposition that, when a law enforcement officer swears that *every single individual* within a large group of protestors "cheers and celebrates" the unlawful acts of a few, there is a triable issue under a civil summary judgment standard as to whether the

police had probable cause to arrest everyone in the group for engaging in a riot under D.C. Code § 22-1322(b).[8] *Carr* does not subvert the fundamental due process principle that "[i]n our jurisprudence guilt is personal," *Scales*, 367 U.S. at 224, so it does not hold that an individual protestor may be held criminally responsible for the unlawful conduct of other protestors. Nor does *Carr* subvert the First Amendment principle that an individual engaged in political protest does "not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected." *Claiborne*, 458 U.S. at 908. *Carr* also does not negate the requirement that an indictment state with particularity what each individual defendant has done to violate the law. And *Carr* does not call into question *Matthews'* binding construction that the D.C. Riot Act does not apply to disorders arising from political demonstrations. *Matthews*, 419 F.2d at 1182 n.9.

Carr, therefore, does not establish that the government may prosecute participants in a large group demonstration who are not alleged to have committed any acts of violence or property destruction or to have uttered anything to urge others to commit such acts, but who are alleged simply to have failed to walk away when a small number of other individuals did so.

But that is precisely what this Indictment does. Based on the government's misreading of *Carr*, the Indictment charges all of the Moving Defendants with inciting a riot, engaging in a riot, conspiracy to engage in a riot, and five counts of malicious destruction of property—all felonies in the government's view—yet refuses to identify what any of the Moving Defendants

[8] Although not relevant to this Motion, this limited holding in *Carr* is problematic under the First Amendment. That is because cheering and celebrating the unlawful acts of others does not meet any of the three requirements for criminalizing speech: it is not directed at specific individuals, does not specifically advocate for listeners to take action, and is not uttered with the specific intent to produce imminent lawless action. *See* Argument, Section I.B.3., *supra* (citing cases). *Carr* does not even cite, much less address, these constitutional restrictions on criminalizing "cheering and celebrating" disorderly conduct.

personally did or said to violate the law. Not a single act of alleged violence or property destruction, and not a single utterance alleged to have "incited" those acts, is attributed to any Moving Defendant. All such acts and utterances are attributed to either a small number of expressly identified individuals or to unidentified individuals who participated in the demonstration—but none to a Moving Defendant.

The consequence of the government's unprecedented, non-individualized theory of criminal liability is predictable: an indictment littered with fatal, irremediable defects. For all of the reasons set forth above, the Indictment should be dismissed against the Moving Defendants.

Dated: May 26, 2017

Respectfully submitted,

/s/Seth A. Rosenthal
Seth A. Rosenthal (D.C. Bar No. 482586)
Nicholas M. DePalma (D.C. Bar No. 974664)
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 344-4741
Fax: (202) 344-8300
sarosenthal@venable.com
nmdepalma@venable.com
Counsel for [redacted]

/s/Joshua B. Shiffrin
Joshua B. Shiffrin, Esq. (D.C. Bar No. 501008)
Philip C. Andonian, Esq. (D.C. Bar No. 490792)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street NW Suite 1000
Washington, D.C. 20005
(202) 842-2600
pandonian@bredhoff.com
jshiffrin@bredhoff.com
Counsel for [redacted]

/s/ Roy L. Austin, Jr.
Roy L. Austin, Jr. (D.C. Bar No. 980360)
Traci D. Biswese (D.C. Bar No. 1023371)

HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
The Eighth Floor
Washington, D.C. 20036
Phone: (202) 730-1300
Fax: (202) 730-1301
Raustin@hwglaw.com
Tbiswese@hwglaw.com
Counsel for [redacted]

/s/Michael J. Satin
Michael J. Satin (D.C. Bar No: 480323)
MILLER & CHEVALIER CHARTERED
900 16th St. NW
Washington, D.C. 20006
Telephone: (202) 626-6009
msatin@milchev.com
Counsel for [redacted]

/s/ L. Barrett Boss
L. Barrett Boss (D.C. Bar No. 398100)
Emily M. Gurskis (D.C. Bar No. 1023711)
COZEN O'CONNOR
1200 Nineteenth Street, N.W.
Suite 300
Washington, DC 20036
Telephone: (202) 912-4818
Facsimile: (866) 413-0172
bboss@cozen.com
Counsel for [redacted]

/s/ Margarita K. O'Donnell
Rachel Cotton (D.C. Bar No. 997132)
Margarita K. O'Donnell (D.C. No. 1005972)
ZUCKERMAN SPAEDER LLP
1800 M Street N.W., Suite 1000
Washington, DC 20036
Tel: (202) 778-1800
Fax: (202) 822-8106
modonnell@zuckerman.com
rcotton@zuckerman.com
Counsel for [redacted]

/s/Lauren Moore
Lauren Moore (D.C. Bar No. 1009422)

WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, D.C. 20006
Phone: (202) 663-6027
Fax: (202) 663-6363
E-mail: lauren.moore@wilmerhale.com
Counsel for [redacted]

/s/Mark Goldstone
Mark Goldstone (D.C. Bar No. 394135)
9419 Spruce Tree Circle
Bethesda, MD 20814
301-346-9414
mglaw@comcast.net
Counsel for [redacted]

/s/Tara J. Plochocki
Tara J. Plochocki (D.C. Bar No. 989404)
LEWIS BAACH, P.L.L.C.
1899 Pennsylvania Avenue, NW
Suite 600
Washington, D.C. 20006
202-659-7217
tara.plochocki@lewisbaach.com
Co-Counsel for [redacted]

/s/ Donald P. Salzman
Donald P. Salzman (DC Bar No. 479775)
Colin V. Ram (DC Bar No. 989848)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7983
salzman@skadden.com
colin.ram@skadden.com
Counsel for [redacted]

/s/Baruch Weiss
Baruch Weiss (D.C. Bar No. 388977)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW Washington, DC
(202) 942-6836 (tel)

(202) 942-5999 (fax)
Baruch.Weiss@apks.com
Counsel for [redacted]

/s/Brett E. Marston
Brett E. Marston (D.C. Bar No. 994354)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW Washington, DC
(202) 942-6836 (tel)
(202) 942-5999 (fax)
Brett.Marston@apks.com
Counsel for [redacted]

/s/ Hilary Phillips
Hilary Phillips (D.C. Bar No. 496165)
THE PHILLIPS FIRM, DC
5335 Wisconsin Ave., Ste. 440
Washington DC 20015
202.885.5641 Office
202.689.5661 Direct Line
phillips@phillipsfirmdc.com
Counsel for [redacted]

/s/Mark B. Sweet
Mark B. Sweet (D.C. Bar No. 490987)
WILEY REIN LLP
1776 K Street NW
Washington, D.C. 20006
202.719.4649
MSweet@wileyrein.com
Counsel for [redacted]

/s/Gwyneth O'Neill
Gwyneth O'Neill (D.C. Bar No. 1030023)
John Copacino (D.C. Bar No. 289595
GEORGETOWN CRIMINAL JUSTICE CLINIC
600 New Jersey Ave NW
Washington, D.C. 20001
(202) 662-9582
gwyneth.oneill@georgetown.edu
copacino@georgetown.edu
Counsel for [redacted]

/s/David Schertler
David Schertler (DC Bar # 367203)
Megan L. Petry (DC Bar #1030113)

SCHERTLER & ONORATO, LLP
1101 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
dschertler@schertlerlaw.com
mpetry@schertlerlaw.com
Counsel for [redacted]

/s/Rachel Cicurel
Rachel Cicurel, D.C. Bar No. 1024378
Maneka Sinha, D.C. Bar No. 991681
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA
633 Indiana Avenue, N.W.
Washington, D.C.. 20004
(202) 824-2774; (202) 824-2766
rcicurel@pdsdc.org
msinha@pdsdc.org
Counsel for [redacted]

/s/Danny Onorato
Danny C. Onorato (DC Bar # 480043)
Shermineh C. Jones (DC Bar # 499900)
SCHERTLER & ONORATO, LLP
1101 Pennsylvania Avenue, NW
Suite 1150
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
donorato@schertlerlaw.com
sjones@schertlerlaw.com
Counsel for [redacted]

/s/Joseph A. Scrofano
Joseph A. Scrofano (D.C. Bar # 994083)
SCROFANO LAW PC
406 5th Street NW
Suite 100
Washington, DC 20001
jas@scrofanolaw.com
Counsel for [redacted]

/s/Christopher J. Mutimer
Christopher J. Mutimer (DC Bar # 1011284)
SCROFANO LAW PC
406 5th Street NW
Suite 130
Washington, DC 20001
cjm@scrofanolaw.com
Counsel for [redacted]

/s/Jay P. Myktyiuk
Jay P. Myktyiuk (DC Bar # 976596)
SCROFANO LAW PC
406 5th Street NW
Suite 120
Washington, DC 20001
jpm@scrofanolaw.com
Counsel for [redacted]

/s/ Jon W. Norris
Jon W. Norris (Bar # 426105)
Counsel for [redacted]
503 D Street NW
Suite 250
Washington, DC 20001
202-371-0300
202-842-2627 (fax)
jonnorrislaw@gmail.com
Counsel for [redacted]

/s/Glenn F. Ivey
Glenn F. Ivey (Bar No. 414331)
LEFTWICH LLC
1400 K Street, NW, Suite 1000
Washington, DC 20005
(202) 434-9100
givey@leftwichllc.com
Counsel for [redacted]

/s/Justin Dillon
Justin Dillon (D.C. Bar No. 502322)
Scott Bernstein (D.C. Bar No. 1013992)
KAISERDILLON PLLC
1401 K Street NW, Suite 600
Washington, DC 20005
Telephone: (202) 640-2850
Fax: (202) 280-1034

jdillon@kaiserdillon.com
sbernstein@kaiserdillon.com
Counsel for [redacted]

/s/Jason Downs
Jason Downs, (D.C. Bar No. #979476)
Murphy, Falcon, & Murphy, PA
One South Street, 23rd Floor
Baltimore, Maryland 21202
(410) 951-8744
Jason.downs@murphyfalcon.com
Counsel for [redacted]

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Defendants' Motion to Dismiss the Indictment and Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss the Indictment were, on May 26, 2017, electronically filed and served on counsel for the Government as stated below:

Jennifer Kerkhoff, Esq.
Office of the United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530
Jennifer.kerkhoff@usdoj.gov

/s/Joshua B. Shiffrin
Joshua B. Shiffrin