SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

United States of America District of Columbia, v. Aaron M. Cantú.	Case No. 2017 CF2 001304 Chief Judge Robert E. Morin Motions Hearing: April 6, 2018

DEFENDANT AARON M. CANTÚ'S MOTION TO DISMISS THE INDICTMENT

Defendant Aaron M. Cantú is an established journalist who is facing eight criminal charges, including multiple felonies, as a result of his presence at a demonstration during the 2017 Presidential Inauguration. He respectfully moves the Court to dismiss the indictment on the grounds that the charges against him impermissibly infringe his First Amendment rights. The indictment is not narrowly tailored to advance any substantial government interest, and the government failed to provide Mr. Cantú with adequate notice that his newsgathering activities could subject him to felony prosecution, as is required under the U.S. Constitution and Super. Ct. Crim. R. 7. For these reasons and those set forth in the accompanying statement of points and authorities, Mr. Cantú respectfully moves this Court to dismiss the indictment with prejudice.

Dated: January 19, 2018

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT AARON M. CANTÚ'S MOTION TO DISMISS THE INDICTMENT

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INTRODUCTION

The government has charged journalist Aaron M. Cantú with eight offenses, including multiple felonies, based on his first-hand newsgathering activity at a demonstration held during the 2017 Presidential Inauguration. Mr. Cantú is a journalist, not a rioter. The charges against him are based on nothing more than his presence at a demonstration. Mr. Cantú was present at the demonstration in order to provide on-the-ground reporting of an historic event. His newsgathering activity is protected by the First Amendment to the U.S. Constitution, and the government may not prosecute him for it. The indictment should be dismissed.

The First Amendment protects the "important role" of the press in our democracy. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). It ensures that the government may only regulate the activities of journalists like Mr. Cantú when, at a minimum, the government has a substantial justification for its actions and the government goes no further than necessary to further those interests. *See, e.g.*, *Abney v. United States*, 451 A.2d 78, 83 (D.C. 1982). Here, where the government has not only attempted to regulate newsgathering activities, but to *criminally prosecute* a journalist for them, particular scrutiny is warranted.

The indictment does not withstand that scrutiny, because the government has not established that the criminal charges against Mr. Cantú are narrowly tailored to further a substantial government interest. Rather than meaningfully tailor its prosecution of Mr. Cantú, the government indiscriminately arrested all people present at the demonstration and then brought criminal charges against Mr. Cantú based merely on his presence at the demonstration. The indictment in this case alleges that Mr. Cantú was present at the demonstration, wore dark clothing, and followed the crowd. All of those facts are consistent with Mr. Cantú's role as a journalist. The indictment does not contain any specific allegations that Mr. Cantú himself engaged in any violent or destructive

acts. Instead, it alleges that he remained with the crowd while *others* engaged in violent conduct and property destruction. Accepting the government's broad theory of liability—namely, that a journalist can be criminally liable for the acts of others based only on his presence at a demonstration—would severely chill protected newsgathering activities.

Even if the Court accepts the government's theory of liability, it should dismiss the indictment because Mr. Cantú did not have fair notice that his newsgathering activities would be criminal. The indictment charges Mr. Cantú with rioting, inciting a riot, conspiring to riot, and five counts of destruction of property, all based on his mere presence at a demonstration. No language in the D.C. riot statute put Mr. Cantú on notice that he would be subject to criminal prosecution for following along with a demonstration to cover it as a journalist. And the indictment itself fails to provide the notice required under the Superior Court Criminal Rules.

Allowing Mr. Cantú's prosecution will set a dangerous precedent by telling journalists who engage in on-the-ground reporting that they can be subject to felony prosecution for doing their jobs. The government has failed to justify that extreme result. The Court therefore should dismiss Mr. Cantú's indictment with prejudice.

BACKGROUND

Mr. Cantú's Journalism

Aaron M. Cantú is an established journalist. At twenty-nine years old, he has distinguished himself as a talented reporter who is willing to engage in first-hand reporting, even under dangerous circumstances, in order to provide accurate and timely information to the public. Mr. Cantú graduated from Tufts University in 2011 with a degree in International Relations and a minor in Media Studies. While in college, he interned at a local newspaper and reported while studying abroad in Chile. After teaching sixth-grade writing in Houston, Texas, as part of Teach

for America, Mr. Cantú decided to pursue journalism full-time and moved to the East Coast for an internship with *The Nation*.

In the five years that followed, Mr. Cantú worked as a freelance journalist. During that time, he published over 120 articles with twenty-eight different publications, including *The Nation*, *Vice News*, *The Washington Spectator*, *Gothamist*, and *Al Jazeera*. In October 2016, Mr. Cantú became a senior editor of *The New Inquiry*, an online magazine that primarily publishes articles and essays on social and political issues. In April 2017, Mr. Cantú became a full-time staff reporter for the *Santa Fe Reporter*, a weekly newspaper in Santa Fe, New Mexico. His current responsibilities at the *Santa Fe Reporter* include covering issues of significant public interest and writing reviews, news stories, and features.

As a reporter, Mr. Cantú has regularly covered social activism and political protests. He has extensively covered the Black Lives Matter movement and demonstrations related to police violence.[1] This reporting included the police responses to such protests, which sometimes involved the use of force against protesters.[2] Mr. Cantú has also authored stories involving social activism more generally,[3] including black bloc protests. In December 2014, for example, Mr. Cantú

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[1] *See, e.g.*, Raven Rakia & Aaron Miguel Cantú, *The Fight for the Soul of the Black Lives Matter Movement*, Gothamist, Apr. 7, 2015, http://gothamist.com/2015/04/07/black_lives_matter_movement.php; Aaron Cantú, *New Yorkers Surge Into The Streets, Demanding Justice For Eric Garner*, The Nation, Dec. 4, 2014, https://www.thenation.com/article/new-yorkers-surge-streets-demanding-justice-eric-garner/; Aaron Miguel Cantú, *In New York City, Police Brutality Is Bringing People Together*, Vice, Aug. 19, 2014, https://www.vice.com/en_us/article/ppmmxk/police-brutality-is-bringing-people-together-819.

[2] *See, e.g.*, Aaron Cantú, *Video: NYPD Uses Military-Grade Sonic Weapon on Eric Garner Protesters*, AlterNet, Dec. 5, 2014, https://www.alternet.org/news-amp-politics/video-nypd-uses-military-grade-sonic-weapon-eric-garner-protesters; Aaron Cantú, *How Police Use Military Tactics to Quash Dissent*, AlterNet, Nov. 19, 2014, https://www.alternet.org/how-police-use-military-tactics-quash-dissent; Aaron Miguel Cantú, *Politicians and Police Celebrate the 'Right Way' to Protest Police Brutality*, Vice, Aug. 25, 2014, https://www.vice.com/en_us/article/gq88nw/the-right-way-to-protest-police-brutality-825.

[3] *See, e.g.*, Aaron Miguel Cantú, *Anti-Gentrification Protesters Vs. Brooklyn Real Estate Summit*, Gothamist, June 17, 2015, http://gothamist.com/2015/06/17/gentrification_protest_brooklyn.php; Aaron Cantú, *Farmworkers Hit NYC to Protest Wendy's Labor Practices*, The Nation, Oct. 17, 2013, https://www.thenation.com/article/farmworkers-hit-nyc-protest-wendys-labor-practices/; Hannah K. Gold &

attended a demonstration in New York City where he described the "thousands of people in Washington Square Park," including "black-clad anarchists."[4] Indeed, Mr. Cantú covered black bloc protests for years before they became mainstream news.[5] He has traveled within the United States and abroad to document and report on important events, such as protests in Ferguson, Missouri, that took place after a police officer killed an unarmed African-American man. He also has regularly reported on law enforcement and the criminal justice system.[6]

Mr. Cantú's journalism is characterized by in-depth, first-person investigation. His stories provide an up-close perspective on newsworthy events. His reporting often includes interviews of individuals (such as activists) who are part of the events being reported. This unique point of view is distinctive from much of the mainstream media. Mr. Cantú is especially valuable within the journalism industry because he is willing and able to report on events taking place under particularly volatile circumstances. He follows an established tradition of journalists who provide

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Aaron Miguel Cantú, *Here's How New Yorkers Reacted to the Ferguson Grand Jury Decision*, Vice, Nov. 25, 2014, https://www.vice.com/en_us/article/heres-how-new-yorkers-reacted-to-the-ferguson-grand-jury-decision-1125.

[4] Aaron Cantú, *30,000 March in New York City to Demand End to Racist, Violent Policing*, AlterNet, Dec. 14, 2014, https://www.alternet.org/civil-liberties/30000-march-new-york-city-demand-end-racist-violent-policing-photos.

[5] *See* Rick Paulas, *What to Wear to Smash the State*, N.Y. Times, Nov. 29, 2017, https://www.nytimes.com/2017/11/29/style/black-bloc-fashion.html (describing a "so-called black bloc" and reporting on why "black-clad anarchists" wear black).

[6] *See, e.g.*, Aaron Miguel Cantú, *Thin Blue Spin*, The Baffler, Sept. 2016, https://thebaffler.com/salvos/social-media-spin-cantu; Aaron Cantú, *Who's behind unpaid prison labor in Texas?*, LittleSis, Apr. 27, 2016, https://news.littlesis.org/2016/04/27/whos-behind-unpaid-prison-labor-in-texas/; Aaron Miguel Cantú, *Policing for Wealth*, Truthout, Sept. 28, 2014, http://www.truth-out.org/news/item/26416-policing-for-wealth; Aaron Miguel Cantú, *Beyond Drones and Stop-and-Frisk*, Truthout, June 17, 2014, http://www.truth-out.org/news/item/24396-beyond-drones-and-stop-and-frisk; Aaron Cantú, *Activists Rally as Brooklyn DA Throws A Wrench in Bratton's Racial "Broken Windows" Policing*, AlterNet, Apr. 25, 2014, https://www.alternet.org/civil-liberties/activists-rally-brooklyn-da-throws-wrench-brattons-racial-broken-windows-policing; Aaron Cantú, *America on lockdown: Why the private prison industry is exploding*, Salon, Apr. 15, 2014, https://www.salon.com/2014/04/15/america_on_lockdown_why_the_private_prison_industry_is_exploding_partner/.

the world with vivid accounts of historic events (such as social movements, protests, and wars) by embedding themselves within the very events on which they are reporting.

Mr. Cantú closely followed the 2016 Presidential Election. He published a noteworthy piece based on his reporting from the Republican National Convention in July 2016. As part of that reporting, Mr. Cantú embedded himself with political protesters at the Convention. In his piece on the Convention, he vividly recounted what it was like inside a highly-charged political demonstration: "[O]ur movement was tightly controlled. Endless droves of black-armored cops on bicycles flanked our formation, directing us toward the downtown skyline. Low-flying helicopters added to the sense of urban militarism."[7] Mr. Cantú intended to augment this reporting with his coverage of the 2017 Presidential Inauguration.

Mr. Cantú's Arrest and Prosecution

On January 20, 2017, Mr. Cantú attended Inauguration Day in his capacity as a freelance journalist, intending to report on the Inauguration and the protests surrounding it. Mr. Cantú viewed this as an opportunity to continue his coverage of the demonstrations at the Republican National Convention. Embedding with the demonstrators was consistent with the way he had previously covered other protests and social movements. His publisher at *The New Inquiry*, Rachel Rosenfelt, confirmed that she expected to publish Mr. Cantú's article about the Inauguration in *The New Inquiry* unless he could place it in another publication at a higher rate.

Mr. Cantú observed the Inauguration demonstration the government has characterized as a "black bloc" protest for about forty minutes. At that point, D.C. police surrounded about 200 individuals (including Mr. Cantú and other mere witnesses to the demonstration, such as legal

[7] Aaron Cantú, *Dark Days at the Republican National Convention*, The Washington Spectator, July 21, 2016, https://washingtonspectator.org/rnc-trump-2016/.

observers and medics) and would not allow them to leave for more than seven hours. The police then arrested the entire group—including Mr. Cantú and several other journalists—and charged them under the D.C. riot statute.[8]

Mr. Cantú's indictment charges him with eight counts: inciting or urging to riot, rioting, conspiracy to riot, and five separate counts of destruction of property. The indictment provides no specific allegations about Mr. Cantú's alleged role in the riot. Instead, Mr. Cantú's name was simply dropped into a cookie-cutter indictment drafted to cover other defendants. The most the indictment alleges is that Mr. Cantú was present at the demonstration, followed along with it, and was wearing dark clothing—all of which are consistent with reporting on the Inauguration Day demonstration as a journalist.

STANDARD OF REVIEW

Under Super. Ct. Crim. R. 12(b)(3)(B), a defendant may file a pretrial motion to challenge "a defect in the indictment," including "failure to state an offense." "An indictment clearly fails to charge an offense if the Constitution precludes the prosecution." *Conley v. United States*, 79 A.3d 270, 276 (D.C. 2013). Once a defendant raises a constitutional challenge to an indictment, the government bears the burden of demonstrating that the indictment is constitutionally valid. *See Bloch v. District of Columbia*, 863 A.2d 845, 850 (D.C. 2004).

ARGUMENT

I. THE INDICTMENT SHOULD BE DISMISSED BECAUSE IT VIOLATES MR. CANTÚ'S FIRST AMENDMENT RIGHTS AS A JOURNALIST

The First Amendment provides that the government "shall make no law . . . abridging the freedom . . . of the press." U.S. Const. amend. I. It protects against not only "censorship of the

[8] D.C. Code § 22-1322(a) (2013), *formerly* D.C. Code § 22-1122(a) (1981), defines a "riot" as "a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons."

press . . . but any action of the government by means of which it might prevent such free and general discussion of public matters." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249-50 (1936) (internal quotation marks omitted). The government's prosecution of Mr. Cantú is the most severe type of government restriction possible. The government is not simply trying to limit what Mr. Cantú publishes as a journalist, but to actually prosecute and imprison him for exercising his First Amendment newsgathering right.

When an individual engaged in protected activity is arrested and prosecuted, the First Amendment requires the Court to carefully scrutinize the government's actions to determine whether the prosecution "furthers an important or substantial government interest" that is "unrelated to the suppression of free expression" or other First Amendment rights and whether the "restriction on alleged First Amendment rights is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Courts have often applied this scrutiny to government prosecutions of individuals exercising their First Amendment speech rights. *See United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C. 1955) (dismissing indictment charging perjury based on defendant's statements about whether he was Communist), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955); *Abney v. United States*, 451 A.2d 78, 83-84 (D.C. 1982) (reversing defendant's conviction for violating unlawful entry ordinance during a protest); *Bloch v. District of Columbia*, 863 A.2d 845, 851 (D.C. Ct. App. 2004) (overturning conviction for crossing a police line near the White House during a political demonstration); *Dayton v. Esrati*, 707 N.E.2d 1140, 1147 (Ohio Ct. App. 1997) (affirming dismissal of criminal charges for trespass and disturbing a lawful meeting when defendant was engaged in protected expressive activity).

Courts similarly have applied this heightened scrutiny when journalists have faced sanctions for newsgathering activities. *See, e.g.*, *Bartnicki v. Vopper*, 200 F.3d 109, 119-123, 129

(3d Cir. 1999) (reversing civil wiretapping liability for media defendants), *aff'd*, 532 U.S. 514 (2001); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (holding that reporters need not answer certain grand jury questions), *superseded on other grounds by statute*, *as recognized in In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988). Close scrutiny is especially warranted here, where the government is charging a journalist with eight criminal counts, *including multiple felonies,* for actions undertaken in order to report on an historic event. And if the government cannot satisfy that scrutiny, the indictment must be dismissed. *See Abney*, 451 A.2d at 84.

The government does not dispute that Mr. Cantú is a journalist. According to the government's theory in the indictment, he can nonetheless be criminally prosecuted simply because he attended a demonstration for newsgathering purposes, wore clothing that fit in with the crowd, and followed along with the crowd. It would be unconstitutional to allow a prosecution against a journalist based on such meager allegations.

A. Newsgathering is subject to First Amendment protection, especially when the newsgathering concerns political demonstrations and law enforcement activity

The U.S. Supreme Court has long recognized the importance of protecting newsgathering activity: "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). A journalist has an "undoubted right to gather news from any source by means within the law." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (internal quotation marks omitted). The First Amendment protects the press because of "the important role it can play as a vital source of public information." *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (internal quotation marks omitted); *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). As the D.C. Circuit has recognized, "[t]he point of ultimate interest (of the First Amendment) is not the words of the speakers, but the minds of the

hearers." *Dellums v. Powell*, 566 F.2d 167, 195 (D.C. Cir. 1977) (internal quotation marks omitted). Without journalists reporting newsworthy events, the public will not find out about them.

The Department of Justice similarly has recognized the importance of affording ample room for newsgathering activity. The Department's published guidance about subpoenaing, arresting, or prosecuting journalists specifically provides that, "[b]ecause freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities." 28 C.F.R. § 50.10(a)(1) (2015). This guidance recognizes that the First Amendment requires "balanc[ing]" government interests such as "[p]rotecting national security" and "ensuring public safety" against "the essential role of the free press in fostering government accountability and an open society." 28 C.F.R. § 50.10(a)(2) (2015). This is the Department's longstanding position: As far back as 1973, the Department recognized that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." 28 C.F.R. § 50.10 (1973).

In fact, this case doubly implicates the First Amendment, because not only was Mr. Cantú present as a journalist to gather and disseminate the news, but the newsworthy event he was covering was a *political demonstration.* Political demonstrations plainly are protected activities under the First Amendment. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969). And here, the demonstration took place on a particularly important day to the Nation—the day of a Presidential Inauguration. Under these circumstances, the government should have to provide especially good reasons for criminalizing Mr. Cantú's newsgathering activity. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (explaining that the free press is a "constitutionally chosen

means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

Finally, the need for robust protection of press activity is especially acute when journalists report on law-enforcement activity, such as the mass arrests that occurred at the Inauguration demonstration. As the Supreme Court has recognized, the press "has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field," where the press "guards against the miscarriage of justice by subjecting the police . . . to extensive public scrutiny and criticism." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586-87 (1976) (internal quotation marks omitted). Press coverage of law enforcement has a "salutary effect on the functioning of government," especially because law enforcement officials "are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik*, 655 F.3d at 82-83.

B. The indictment impermissibly burdens Mr. Cantú's newsgathering activity

In this case, the police detained and then arrested Mr. Cantú for being present at a demonstration as a journalist. The police approached a group of more than 200 individuals who were present at the demonstration and barred them from leaving, finally arresting them more than seven hours later. The police confiscated their belongings, including cell phones, and held them in jail overnight. The next day, prosecutors summarily and indiscriminately charged them all with essentially the same crimes.

Arresting and charging Mr. Cantú for being present at a demonstration for purposes of reporting on it substantially burdens his First Amendment rights. A reporter's right to attend an event and disseminate information about it to the public is impeded when the government prohibits or burdens those activities. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (noting that "banning photography or note-taking at a public event would raise

serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes").

Here, the government's conduct amounts to an outright ban on newsgathering at demonstrations, because the government effectively has made mere attendance at such events criminal. Prosecution of journalists not only imposes severe penalties on the individual journalists arrested and charged, but it significantly deters other members of the press from exercising their constitutional rights. *See Morse v. S.F. Bay Area Rapid Transit Dist. (BART)*, No. 12-CV-5289 JSC, 2014 WL 572352, at *8 (N.D. Cal. Feb. 11, 2014) (journalist who was arrested at a protest for taking photographs showed that his arrest would "chill or silence a person of ordinary firmness from future First Amendment activities"). The effect is to keep information from the public; journalists cannot publish eyewitness accounts of events that they do not attend for fear of prosecution. And that effect on public discourse is particularly acute in a case like this one, where the journalist was reporting on a political demonstration on a day of great national importance (a Presidential Inauguration).

It is significant that the government does not dispute that Mr. Cantú is a journalist, one who has routinely covered social movements and protests (and the police reaction to them). Mr. Cantú's conduct in reporting on the Inauguration Day demonstration is consistent with his previous reporting activities. He was aware that there was a high risk there would be a substantial law enforcement response to protests on Inauguration Day. Nevertheless, as in past reporting activities, he decided that it was important to be present to provide a first-hand account of the response to the Inauguration. The fact that the government arrested him for such activity—and continues to seek to prosecute him—impermissibly infringes on his First Amendment right to engage in newsgathering. The government's conduct, from the time Mr. Cantú was first detained,

has significantly impaired his ability to do his job as a journalist and report on the events of the Inauguration Day demonstration.

Notably, at least eight other journalists—Alexander Contompasis, Evan Engel, Matthew Hopard, Shay Horse, John Keller, Cheney Orr, Alexander Rubinstein, and Alexei Wood—also were arrested and charged in this case. The government dropped the charges against seven of them, all except Wood. And Wood—who was charged using the same generic allegations as Mr. Cantú—was acquitted by a jury in the first group trial on this matter on December 21, 2017. Moreover, although the government decided just yesterday to voluntarily dismiss charges against 129 defendants, it has elected to continue prosecuting Mr. Cantú, even though all the indictment alleges is his presence at the demonstration. Given the dearth of specific allegations in Mr. Cantú's indictment and the government's acknowledgment that Mr. Cantú is a journalist, the government bears a heavy burden to justify the indictment.

C. The indictment shows no government interest sufficient to justify prosecuting Mr. Cantú for attending the demonstration as a journalist

Because Mr. Cantú is a journalist who was engaged in newsgathering activity during the Inauguration Day demonstration, the burden is on the government to demonstrate that it has a substantial interest in arresting and prosecuting him—one that is unrelated to the suppression of First Amendment rights—and that the prosecution is narrowly tailored to further that interest. *See, e.g.*, *Abney*, 451 A.2d at 83. And it is an especially heavy burden here, because the effect of the government's prosecution is to prevent reporting on a political demonstration at an historic event and on the resulting law enforcement activity. The indictment does not satisfy the government's burden.

The indictment does not include allegations of criminal activity specific to Mr. Cantú. Instead, his name was simply inserted into a template that charged more than 200 other defendants

who were present during the demonstration with the same conduct. Where a journalist's First Amendment rights are at stake, this type of unspecific, cookie-cutter indictment is insufficient to sustain criminal charges. That is especially true because the conduct alleged in the indictment is consistent with Mr. Cantú covering the demonstration as a reporter—which plainly is protected newsgathering activity. And the indictment evidences no significant government interest that justifies criminally prosecuting Mr. Cantú for that newsgathering activity. The indictment therefore fails First Amendment scrutiny on its face.

Count One, for instance, which charges inciting or urging to riot, alleges that Mr. Cantú "gathered" with others, "wore black or dark colored clothing," and "moved" with a group—but that is the extent of the specific allegations against Mr. Cantú. *See* Indictment 1-7. Of course Mr. Cantú wore dark clothing and moved with the group; he was reporting on a demonstration made up of a group of people in dark clothing who were moving. His conduct was similar to an embedded war correspondent who wears military-issued protective gear and moves with the unit of soldiers he is covering, or a reporter covering a hurricane who wears rain gear and follows the storm. Mr. Cantú's presence at a demonstration does not make him a violent protester, just as an embedded war correspondent's presence during a war does not make him a soldier. No jury is needed to understand that common-sense distinction.

Count Two, which charges rioting, and Count Three, which charges conspiracy to riot, repeat the same specific allegations as in Count One—Mr. Cantú gathered, wore dark clothing, and moved. *See* Indictment 7-19. Counts Four through Eight, for destruction of property, insert Mr. Cantú's name into boilerplate language about the elements of the crimes at issue but do not provide any details of Mr. Cantú's alleged involvement. *See* Indictment 19-21. In fact, earlier in the indictment, the government identifies the specific individuals who it believes actually

destroyed property. *See, e.g.*, Indictment 3-4. Counts Four through Eight apparently were inserted into Mr. Cantú's indictment simply because he "moved" with a group of demonstrators to gather information to report. But simply being present does not make Mr. Cantú liable for someone else's property damage. Nor can the government justify the indictment on the ground that Mr. Cantú's mere presence in the crowd endangered police. "When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). In Mr. Cantú's case, a boilerplate indictment containing allegations consistent with newsgathering does not survive the scrutiny necessary under the First Amendment.

To be sure, the government may have a substantial interest in prosecuting individuals who engage in destructive or violent criminal conduct. However, the government has no legitimate interest—much less a substantial interest—in prosecuting Mr. Cantú for doing his job as a journalist. The government must establish that the indictment is narrowly drawn, that is, that the government action is "no greater than is essential to the furtherance of th[e government] interest." *O'Brien*, 391 U.S. at 377. A sprawling prosecution that engulfs a journalist, anchored by a general indictment alleging only that the journalist engaged in newsgathering, plainly does not meet that standard. This indictment is insufficient as to Mr. Cantú because it fails to state facts that distinguish his lawful newsgathering from criminal conduct.

D. Even if the Court believes the indictment is sufficient, this prosecution should not go forward because Mr. Cantú's First Amendment interests outweigh the government's interest in prosecuting a reporter who was merely present at a demonstration

There are no allegations in the indictment supporting the view that, on Inauguration Day, Mr. Cantú was doing anything other than gathering information for reporting. But even if this Court believed that Mr. Cantú violated the charged criminal laws through his presence at the

demonstration, this prosecution still would be unconstitutional. The government may not enforce a generally applicable law in a manner that significantly burdens First Amendment interests and is disproportionate to the government interest at stake.

Courts have consistently recognized that statutes—even those advancing legitimate government interests—are unconstitutional when they infringe on First Amendment rights in application. *See, e.g.*, *Lattimore*, 127 F. Supp. at 407; *Abney*, 451 A.2d at 83-84; *Bloch*, 863 A.2d at 851. For example, in *Abney*, the D.C. Court of Appeals held that an unlawful entry statute and regulation were unconstitutional as applied to an individual sleeping on a portion of the Capitol grounds to protest the denial of his Veterans Administration benefits. *See* 451 A.2d at 80, 84. The court recognized the government's interest in "unimpeded traffic flow" on the Capitol grounds, but determined that the protester's conduct "implicated the First Amendment" and that his particular conduct—his "mere presence" on Capitol grounds—did not actually impede the flow of traffic near the Capitol. *Id.* at 82, 84. The court held that the unlawful-entry statute was unconstitutional as applied to Abney's conduct, because it "constituted a greater restriction of his First Amendment freedom than was necessary to further the government's legitimate interests." *Id.* at 84.

This case is like *Abney*. Mr. Cantú's conduct was "an integral part of and necessary to" his protected First Amendment activity. *Id.* Mr. Cantú's signature reporting style requires getting close to the action, following and moving with events, and obtaining firsthand accounts from participants. Covering an event from a distance would not allow Mr. Cantú to provide the vivid, first-hand accounts for which he is known. And here, as in *Abney*, the government has not established that its arrest and prosecution of Mr. Cantú are sufficiently narrowly drawn to survive First Amendment scrutiny. The indictment does not allege with any specificity that Mr. Cantú

engaged in violence or posed a threat to the public; it alleges that he dressed in dark colors and followed the demonstration.

"There is nothing talismanic about neutral laws of general applicability, for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 677 (1991) (Souter, J., dissenting) (citation and internal quotation marks omitted). The government cannot apply facially neutral laws in a way that targets and impedes protected newsgathering activity without a strong justification. For that reason, a court dismissed charges against journalists arrested while covering the Occupy Wall Street protests. *See* Alicia Calzada, *NPAA Attorney Obtains Another Dismissal in Cases Against Photojournalists Covering Occupy Protests*, NPPA, Feb. 21, 2012, http://blogs.nppa.org/advocacy/2012/02/21/nppa-attorney-obtains-another-dismissal-in-cases-against-photojournalists-covering-occupy-protests/.

The same result is justified here: Even if the indictment sufficiently alleged that Mr. Cantú's presence at the demonstration violated D.C. law, the government has identified no substantial interest in prosecution that outweighs his interest in reporting on historic events or the public's right to receive that reporting. First Amendment protection of Mr. Cantú's newsgathering activity plainly outweighs the government's law enforcement interests in prosecuting him.

II. THE INDICTMENT ALSO SHOULD BE DISMISSED BECAUSE THE D.C. RIOT STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. CANTÚ AND THE INDICTMENT VIOLATES RULE 7

A. The riot statute is unconstitutionally vague when applied to Mr. Cantú's newsgathering

The Court also should dismiss the indictment because the D.C. riot statute is vague as applied to Mr. Cantú and his alleged conduct, all of which is consistent with his presence at the demonstration as a journalist. A statute is impermissibly vague as applied to a particular defendant

when it fails to put the defendant on notice that "the statute prohibit[s] his particular conduct." *Leiss v. United States*, 364 A.2d 803, 807 (D.C. 1976); *see* U.S. Const. amend. V (Due Process Clause). The law must give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) (per curiam) (internal quotation marks omitted). "This is particularly important . . . where a statute affects First Amendment rights." *In re J.A.*, 601 A.2d 69, 73 (D.C. 1991). "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Here, Mr. Cantú had no reason to believe that the conduct alleged in the indictment would subject him to prosecution for inciting, urging, engaging in, or conspiring to create a riot, or destruction of property stemming from a riot. The D.C. riot statute prohibits "willfully engag[ing] in" (or inciting or urging participation in) "a riot," and defines a "riot" as an assemblage of five or more people that creates "grave danger" to persons or property by "tumultuous and violent conduct." D.C. Code § 22-1322 (2013). As explained above, the indictment alleges that Mr. Cantú "gathered" with others, "wore black or dark colored clothing," and "moved" with a group. *See* Indictment 1-19. Mr. Cantú had previously engaged in these same activities when he covered other social movements and protests as a journalist. And all of his conduct alleged in the indictment is consistent with his presence at the Inauguration Day demonstration as a journalist engaged in newsgathering activity. Mr. Cantú had no reason to believe that following along with a demonstration as an embedded journalist could constitute the type of "tumultuous and violent" conduct that violates the D.C. riot statute. Nor did he have reason to believe that the statute—which requires an affirmative act that constitutes "willfully engag[ing] in" a riot or "willfully incit[ing] or urg[ing]" others to do the same, D.C. Code § 22-1322(b)-(c) (2013)—would be interpreted to criminalize mere presence for newsgathering. Further, nothing in the statute put Mr.

Cantú on notice that, as a reporter, he should legally be required to peel off from the crowds once alleged violence or property destruction began. Because he could not reasonably be expected to understand that the D.C. riot statute would be applied to his newsgathering conduct, he cannot be held criminally liable under that statute. *See Palmer*, 402 U.S. at 546.[9]

B. The indictment violates Rule 7 for failing to provide adequate notice of any criminal conduct

Rule 7 of the Superior Court Criminal Rules also requires that an indictment provide proper notice to a defendant. That rule requires that an indictment be both "plain" and "definite," and that it recite the "essential facts constituting the offense charged." Super. Ct. Crim. R. 7(c)(1). This rule "permits the accused to be informed of the nature and cause of the accusation." *Roberts v. United States*, 752 A.2d 583, 586 (D.C. 2000) (internal quotation marks omitted). "The indictment must . . . be sufficiently definite to enable the court to ensure, at trial, that the defendant is being tried only for the acts with which the grand jury has charged him, and not for different conduct." *Id.* "Thus, an indictment will not issue on abstract charges." *D.C. Metro. Police Dep't v. Broadus*, 560 A.2d 501, 505 (D.C. 1989).

There is nothing "plain" or "definite" about an indictment (like this one) that leaves a journalist guessing as to when his newsgathering activity will be considered criminal. An indictment must delineate the precise "facts" that converted Mr. Cantú's newsgathering activity into criminal conduct. The indictment here does not do so. It alleges only that Mr. Cantú was

[9] Counts One through Three of the indictment charge Mr. Cantú with inciting or urging to riot, rioting, and conspiracy to riot. Counts Four through Eight charge Mr. Cantú with destruction of property, under the government's theory that anyone involved in a riot or in a conspiracy to riot also is liable for *any* property destruction that takes place during the riot. Indeed, the indictment does not contain any specific allegations of Mr. Cantú engaging in property destruction; Counts Four through Eight simply drop his name into generic allegations stating the elements of the alleged offense. Thus, the destruction of property counts in the indictment are entirely derivative of the rioting counts—and of the D.C. riot statute, which is vague as applied to Mr. Cantú—and should similarly be dismissed as vague as to him.

present and marched with the crowd, and then relies upon boilerplate allegations that group Mr. Cantú with 200 other individuals. The indictment is devoid of even a single, specific fact that distinguishes Mr. Cantú's newsgathering from any alleged criminal conduct. Such "abstract charges" are too vague to withstand scrutiny under Rule 7. Accordingly, the indictment should be dismissed under Rule 7 for failure to provide Mr. Cantú with adequate notice of conduct in which he engaged while newsgathering that is allegedly criminal.

III. THE INDICTMENT SHOULD BE DISMISSED FOR THE ADDITIONAL REASON THAT IT WILL SIGNIFICANTLY CHILL THE PRESS

Mr. Cantú's prosecution not only burdens his First Amendment rights, but it provides a frightening warning to journalists everywhere that they can be prosecuted for their first-hand reporting of events that become volatile.

Mr. Cantú uses an embedded style of journalism to provide a unique, first-hand perspective. This allows him to gain access to sources and information that he otherwise could not obtain were he merely observing on the sidelines. This type of reporting is especially important to provide contemporaneous and accurate reporting to the public. For that reason, the Reporters Committee for Freedom of the Press contacted the U.S. Attorney's Office about this case, urging the dismissal of charges against Mr. Cantú. The Reporters Committee explained: "Journalists routinely run toward the center of any action, so they can better serve the public by reporting an event they personally witness, rather than something recounted by bystanders." Letter from Bruce D. Brown, Exec. Dir., Reporters Comm. for Freedom of the Press et al., to Channing D. Phillips, U.S. Attorney for the District of Columbia 1 (Feb. 27, 2017) (on file with defendant).

Mr. Cantú's brand of journalism continues a time-honored tradition of journalists who have embedded themselves to provide first-hand accounts of important events. American history is replete with examples of journalists sacrificing their own personal comfort or safety for the sake

of a worthwhile story. For instance, Thomas Paine's *The American Crisis* drew on the author's experience marching with the Continental Army at Fort Lee.[10] Later, in the nineteenth century, Nellie Bly "feign[ed] mental illness" to access a New York mental institution for ten days, allowing her to pull back the curtain on the inhumane conditions there for patients.[11] At the turn of the 20th century, journalist and editor Enrique Salazar of Santa Fe embedded with his countrymen in Northern New Mexico as they resisted land theft by outsiders.[12] And during World War II, the writer Martha Gellhorn "stowed away on a hospital ship and snuck ashore as a stretcher bearer" to report on the D-Day invasion.[13]

Mr. Cantú and other journalists like him are carrying on these traditions of First Amendment-protected reporting, using techniques that enable them to "pen stories from the inside out."[14] This approach starts from the premise that "the best socially engaged journalism . . . is rooted in participation, spiked with empathy, and resists being reduced to spectacle fodder."[15] It is with these goals in mind that Mr. Cantú has traveled across the country and abroad covering social movements and political protests, including the events of January 20, 2017. And Mr. Cantú is just one member of a new generation of journalists who continue to fuel robust public debate by reporting on social activism.

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[10] *See* Nathaniel Lande, *Dispatches from the Front* 13 (1996).

[11] Arlisha R. Norwood, *Nellie Bly*, National Women's History Museum (2017), https://www.nwhm.org/education-resources/biographies/nellie-bly.

[12] *See* Juan González & Joseph Torres, *News for All the People* 165-67 (2012).

[13] Rick Lyman, *Martha Gellhorn, Daring Writer, Dies at 89*, N.Y. Times, Feb. 17, 1998, http://www.nytimes.com/1998/02/17/arts/martha-gellhorn-daring-writer-dies-at-89.html?mcubz=1.

[14] Bradley L. Garrett, *Why Gonzo Journalism is Crucial to Our Understanding of Cities and Their Tribes*, Guardian, May 20, 2015, https://www.theguardian.com/cities/2015/may/20/gonzo-journalism-cities-tribes-ethnographer-hunter-s-thompson.

[15] *Id.*

The government's prosecution threatens all reporters, including this new generation, by signaling that reporters may be *criminally prosecuted* simply for exercising their constitutional rights and trying to better inform the public. It also specifically targets a growing group of freelance reporters, who often lack the institutional support of mainstream news organizations and are counted on to provide coverage of more dangerous and violent situations.[16] This prosecution tells reporters to stay home and avoid the risk of prosecution rather than to go to the scene of newsworthy events. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) (explaining that the "risk" of "criminal penalties" will make a person hesitate before exercising First Amendment rights, in case he "guesses wrong" and is criminally prosecuted). These journalists will be effectively censored by fear of prosecution, thereby impeding the free flow of information to the public. *Smith v. California*, 361 U.S. 147, 150-54 (1959). That is precisely the outcome the Supreme Court has warned against. Freedom of the press is "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

Mr. Cantú's prosecution threatens society's ability to enjoy—under the protection of the First Amendment—"the widest possible dissemination of information from diverse and antagonistic sources." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (citation and internal quotation marks omitted). For this reason as well, the Court should dismiss the indictment against Mr. Cantú.

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[16] *See* Allison Shelley, *The Dangerous World of Freelance Journalism*, L.A. Times, Sept. 6, 2014, http://latimes.com/opinion/op-ed/la-oe-shelley-freelance-journalists-foley-sotloff-20140907-story.html ("Reporting on the world has become far more dangerous for journalists in recent years, in part because so many more of us are freelance.").

CONCLUSION

For the foregoing reasons, Mr. Cantú respectfully requests that this Court dismiss the indictment with prejudice.

Dated: January 19, 2018

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

United States of America District of Columbia, v. Aaron M. Cantú.	Case No. 2017 CF2 001304 Chief Judge Robert E. Morin Motions Hearing: April 6, 2018

[Defendant's Proposed] Order Granting Motion to Dismiss the Indictment

This Court, having considered Defendant Aaron M. Cantú's Motion to Dismiss the Indictment, this __ day of _____, 2018, hereby

ORDERS that pursuant to Super. Ct. Crim. R. 12(b)(3)(B), Defendant's Motion is GRANTED and the Indictment is DISMISSED WITH PREJUDICE.

_____
Chief Judge Robert E. Morin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

United States of America District of Columbia, v. Aaron M. Cantú.	Case No. 2017 CF2 001304 Chief Judge Robert E. Morin Motions Hearing: April 6, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2018, I caused a copy of the foregoing Motion to Dismiss the Indictment to be served upon Jennifer Kerkhoff and Rizwan Qureshi via CaseFileXpress. A courtesy copy was sent to co-defendants' counsel via CaseFileXpress.

Dated: January 19, 2018

Respectfully submitted,

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