NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 11-7086

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LINDSAY HUTHNANCE,
Plaintiff-Appellee,

v.

DISTRICT OF COLUMBIA *et al.*,
Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(The Honorable Royce C. Lamberth, Chief Judge)

BRIEF FOR APPELLEE LINDSAY HUTHNANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties are listed in the Brief for Appellants (there are no intervenors or amici).

B. Rulings Under Review

In addition to the information in the Certificate in the Brief for Appellants, the July 19, 2011 opinion of the District Court (Lamberth, C.J.) denying Defendants' post-trial motion is published at *Huthnance v. District of Columbia*, 793 F. Supp. 2d 183 (D.D.C. 2011). The District Court's March 31, 2011 entry of judgment is not published.

C. Related Cases

Plaintiff's counsel is not aware of any related cases.

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GLOSSARY

Dkt.	Docket (an entry in the District Court docket)
MPD	The D.C. Metropolitan Police Department
PD-163	The MPD's Arrest/Prosecution Report
PX	Plaintiff's Exhibit

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by giving a jury instruction to cure Defendants' repeated testimony about the supposed contents of an inadmissible radio dispatcher's report – testimony that not only was hearsay, but was given in violation of an express order.

2. Whether the supposed error in that curative instruction was harmless in any event, as the Court held.

3. Whether the Court erred by instructing the jury as to the elements of disorderly conduct using language taken verbatim from the D.C. Court of Appeals' opinion interpreting the applicable statutory provision.

4. Whether the alleged error in that disorderly conduct instruction was also harmless in any event, as the District Court held.

STATEMENT OF THE CASE

The jury in this case found that Defendants violated Plaintiff Lindsay Huthnance's First Amendment rights by arresting her based on the content of her speech, and her Fourth Amendment rights by arresting her for disorderly conduct without probable cause. In doing so, the jury necessarily found that Defendants had arrested Ms. Huthnance because she had criticized and stood up to them – *i.e.*, for "contempt of cop" – rather than because she woke up neighbors or caused

traffic to stop, as Defendants claimed at trial (but had not said in the Arrest/Prosecution Report ("PD-163") they prepared at the time of the encounter).

Defendants' brief asserts (at 3) that the trial "was in essence a credibility contest between Huthnance and the arresting officers . . . ." To the contrary, the credibility contest was between the arresting officers, on one side, and all on the other side, Plaintiff, the neutral eyewitnesses including a Metropolitan Police Department ("MPD") sergeant, the PD-163 that Defendants themselves had prepared at the time of the incident, and a separate missing witness instruction that Defendants do not challenge on appeal. Needless to say, Defendants lost that contest.

Defendants now ask this Court to have the jury's verdict set aside on the basis of two jury instructions given by the District Court (Lamberth, C.J.). Not only are Defendants' arguments meritless, but many of them were not raised below; and the Court in any event correctly found that any supposed error was harmless.

We show in Part I that the Court's rulings concerning the dispatcher's report were well within its discretion. The report was properly excluded for three separate reasons: it was not on Defendants' exhibit list, no foundation for its admission was laid, and its relevance was foreclosed by Rule 30(b)(6) testimony from the District. The curative instruction about the report was proper because

Defendants repeatedly elicited hearsay testimony about its supposed contents, even after the Court ordered them not to. We also show that any supposed error in these rulings was harmless, as the District Court found. In particular, the instruction, which was not even mentioned during closing arguments, had no bearing on the overall credibility contest in this case.

We then show in Part II that the jury instruction on disorderly conduct was correct, as its language was taken verbatim from the D.C. Court of Appeals' decision addressing the applicable statutory provision. We also show that any error in this instruction was harmless. If the jury had believed Defendants' version of events, it would have ruled for them under the instruction that the Court gave. Moreover, this instruction does not even relate to Defendants' liability under Plaintiff's First Amendment claim, and it therefore cannot affect the judgment in any event.

STATEMENT OF FACTS

A. The Events as Testified to by Plaintiff and Corroborated by Neutral Eyewitnesses.

Plaintiff Lindsay Huthnance holds a degree in International Relations from the University of North Carolina and master's degree from a school in Strasbourg, France. JA 606. She has also studied at the Sorbonne. *Id.* She subsequently worked at Oxford Analytica, Inc., an international consulting group, and at the Brookings Institution. JA 608. At the time of the incident she was

working as Manager of Research and Special Projects for the Moroccan American Center. *Id.*

Ms. Huthnance testified that on the evening of November 15, 2005, she and her then-boyfriend, Adrien Marsoni, had dinner with two friends before going to the Raven Bar and Grill. JA 611-12. She shared a bottle of wine at dinner and had two or three beers later at the bar. JA 661. Having to be at work the next morning between 8:30 and 9:00 a.m., she and Mr. Marsoni left the bar around 11:45 p.m. and walked north on Mt. Pleasant Street towards their home, stopping after half a block to buy cigarettes at the 7-Eleven. JA 610, 612-13.

Noticing an unusually large number of police officers and vehicles outside the 7-Eleven, as well as several inside, Plaintiff "inquired as to what was going on" but was told it was none of her business. JA 613-14.[1] Frustrated that her legitimate question was rebuffed, she remarked to Mr. Marsoni that this was a "nice use of my tax dollars." JA 614. An officer said, "what, what was that," and she replied, "I wasn't talking to you" and left the store. *Id.*

Within seconds, a man confronted Mr. Marsoni. JA 617. Mr. Marsoni cursed at the man, and Plaintiff and Mr. Marsoni continued walking away, towards home. *Id.* Shortly thereafter, they realized two police officers were following

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[1] Although Defendants' brief asserts (at 5 n.1) that the 7-Eleven "serves as an MPD substation," Defendant Antonio admitted on cross-examination that "it really isn't a substation" and is "not an MPD facility." JA 883.

them. *Id*. The officers stopped them and asked for identification. *Id*. Plaintiff declined and asked for an explanation for the stop. *Id*. After the officers repeatedly refused to answer her questions, Plaintiff loudly said, "I want your badge number" (JA 617, 623-24) – which, as the expert explained at trial, was tantamount to announcing her intention to file a complaint against the officer (JA 783). (At trial, Plaintiff demonstrated for the jury how loudly she asked for the officer's badge number. JA 623-24) Plaintiff was immediately told to place her hands on the wall and was handcuffed. JA 617. She never yelled, never waved her arms wildly, and never cursed. JA 626. There were no other people watching, no cars slowing, no buses stopping, and no lights going on in apartment buildings (as two of the Defendants later claimed at trial). JA 626-27.

The jury also heard testimony from two neutral eyewitnesses – Mr. Marsoni and MPD Sergeant Michael Smith. Both corroborated Plaintiff's account of the events.[2]

Mr. Marsoni testified that, on the evening of the arrest, he and Ms. Huthnance had dinner with friends, went to the Raven Bar where they had two beers each, and then stopped at the 7-Eleven on the way home to buy cigarettes.

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[2] Although Mr. Marsoni was dating Plaintiff at the time of the arrest, they broke up "early or mid 2006." JA 692. Plaintiff has since married another man, moved to New Zealand, and had a child. JA 605. Before the trial, Mr. Marsoni had not seen her in four years. JA 692-93.

JA 694-96, 710.[3] Four or five police officers were in the 7-Eleven, including Defendants Antonio and Acebal. JA 696-97. Plaintiff commented this was "a waste of tax money," bought cigarettes, and the two left. JA 696-99. As they stepped outside, someone stepped in front of Mr. Marsoni and asked "what [his] problem was." JA 699. Startled, Mr. Marsoni cursed at the man, and he and Plaintiff kept walking. *Id.* Shortly thereafter, feeling followed, they turned and saw "several police officers and the man that [Mr. Marsoni] cursed at" standing before them. JA 701. The officers asked them to provide identification – which Mr. Marsoni, a French citizen who was in the United States on a work visa, did – and told them to put their hands against the wall. JA 702. Plaintiff protested, raising her voice as she asserted that the officers had no right to stop them. JA 704. After several unsuccessful attempts to elicit why they were being stopped, Plaintiff asked for the officer's badge number. JA 702-04. Thereupon, Defendant Acebal handcuffed Plaintiff. JA 703-04.

Mr. Marsoni testified that Plaintiff never cursed at the officers and never yelled or screamed. JA 704, 707-08. He demonstrated for the jury the volume at which Plaintiff had spoken. JA 707-08. He also testified that there were no other people watching, no cars slowing, no buses stopping, and no lights going on in

[3] Mr. Marsoni expressly denied that they left the bar at 2:00 a.m., noting that he had to work at 8:00 the next morning. JA 710-11.

apartment buildings. JA 708-09. Finally, Mr. Marsoni testified that the incident at and outside the 7-Eleven occurred before midnight. JA 710. He also testified that the incident did not occur and could not have occurred at 2:00 a.m., as Defendants claimed. JA 710-11.

MPD Sgt. Smith was the Defendant officers' immediate supervisor at the time of the arrest. SJA 1072. Sgt. Smith testified (through extracts from his deposition testimony) that on the night of Plaintiff's arrest, he visited the 7-Eleven on Mt. Pleasant Street around midnight to get coffee. JA 752. Returning to his car, he saw Defendants Antonio and Acebal outside the 7-Eleven, "talking to some lady … [h]er and a guy." *Id.* The woman was not handcuffed and was simply talking to the officers. JA 753. There was no yelling; indeed, although the group was only 50 feet away, Sgt. Smith could not hear what they were saying. *Id.* The woman's behavior "didn't get [Sgt. Smith's] attention at all." JA 753-54. No crowd had gathered to watch. JA 754-55. Sgt. Smith likewise did not recall the woman yelling inside the 7-Eleven. JA 753.

It was undisputed at trial that the person to whom Sgt. Smith saw Defendants talking was Plaintiff. Indeed, Defendant Antonio testified at trial that Sgt. Smith was present during the incident with Plaintiff:

- "Based on what I heard as she exited the store, the officers inside the store should have and <u>Sergeant Smith, who was inside that 7-Eleven</u>, should have done something about it

instead of making us come out of our vehicle." JA 894 (emphasis added).

- "[T]he officers that were in the 7-Eleven, including Sergeant Smith, when the incident took place and we were handling the situation, they all chose to leave the 7-Eleven." JA 902 (emphasis added).

Furthermore, given that Sgt. Smith is an MPD official, Defendants could have called him testify at trial if they believed they could obtain clarifying or different testimony as to whether Plaintiff was the person to whom he saw Defendants talking or as to the events of that evening. Defendants did not do so, as Plaintiff's counsel emphasized to the jury during closing arguments. JA 1026, 1029.[4]

B. The PD-163.

1. The Contents of the Report.

The PD-163 (Arrest/Prosecution Report) that Defendants prepared and submitted on the night of Plaintiff's arrest was notable in three respects: (1) the only events alleged in the Statement of Facts were that Plaintiff yelled obscenities at police officers; (2) there was no reference to any impact on other people from

[4] The record also precludes any argument that Sgt. Smith's testimony could be harmonized with Defendants'. Sgt. Smith testified that Plaintiff was with Defendants and not yelling. *See* page 7 *supra*. By contrast, Defendant Acebal testified that Plaintiff's yelling was "continuous" throughout the encounter (JA 935-36), and Defendant Antonio testified that Plaintiff only stopped yelling for "a couple seconds here and there" when walking away from the officers (JA 900-01).

the alleged yelling; and (3) the report betrayed Defendants' animus toward Plaintiff. JA 226-27.

First, the only "facts" alleged in the PD-163's "Statement of Facts" were that Plaintiff screamed obscenities at police officers. According to the report, Plaintiff "yelled" an obscenity at the officers in the 7-Eleven as she was leaving it. She was "advised to move along" but she "continue[d] to curse at officers." On that basis alone, Plaintiff "was stopped for identification purposes so she could be issued a 61 D (citation)." Plaintiff demanded the officer's badge number; the officer told her to turn around and place her hands against the wall and to stop screaming. The report then states: "I advised D-1 [Plaintiff] for the third and final time to refrain from screaming and her response was 'fuck you little bitch.' At that time a breach of the peace occurred and D-1 was placed under arrest for disorderly conduct."[5]

Second, although it was undisputed at trial that the police were required to document evidence that a considerable number of persons (excluding police officers) were disturbed in order to find probable cause to arrest Plaintiff for disorderly conduct – as Defendants' brief admits (at 14) – the PD-163 contained no reference whatsoever to any impact on other people. It said nothing about lights coming on in apartment buildings, traffic stopping, or bystanders gathering to watch.

[5] As noted above, Plaintiff testified that she never said any such thing.

Third, the report betrayed Defendants' antipathy toward Plaintiff. In the section of the report captioned "M.O.," Defendants wrote "Hates Police." Defendants also checked a box in the report falsely describing Plaintiff as a "female impersonator."

2. The Completeness of the PD-163.

Numerous witnesses at trial, including high-ranking MPD officers, the Defendants' own expert witness, and the Defendants themselves, testified that police officers are trained and expected to record all pertinent information about an arrest on the PD-163 – *i.e.*, facts sufficient to show probable cause for the arrest. JA 888-91 (Antonio) (agreeing it is "crucial for documenting all of the essential facts that an officer will be called upon to recall at a later date," specifically including all the elements of the offense); JA 984, 987 (Gallagher); JA 746-51, 755-58 (Sgt. Smith); JA 732-34 (Lt. Neal). Indeed, Inspector Michael Eldridge, Director of the Disciplinary Review Branch, testified that "there is an aphorism or a saying in police work that if it ain't in the report, it didn't happen." JA 742. The jury also saw MPD General Order 401-5, directing that PD-163s "shall be carefully executed," and should describe all the circumstances leading up to the arrest and any other facts relevant to establishing probable cause for the arrest. JA 884-86.

3. The PD-163 Did Not Allege Facts Sufficient to Establish Probable Cause to Arrest Plaintiff.

As many witnesses testified at trial, the PD-163 did not allege facts sufficient to establish probable cause to arrest Plaintiff for disorderly conduct. For example, Inspector Eldridge agreed that the PD-163 did not establish probable cause because "there was no evidence that members of the public were disturbed," which is "one of the elements" of the offense. JA 741. *Accord* JA 755-58 (Sgt. Smith);[6] JA 769-79, 782-88, SJA 1090 (Chief Longo); JA 903 (Defendant Antonio); JA 988-89 (defense expert Gallagher). Indeed, Defendants' brief expressly admits (at 14) that the "facts" listed in the PD-163, even if true, did not establish probable cause to arrest Plaintiff. The District also formally admitted that under D.C. law, the circumstances alleged in the PD-163 provided no basis for Defendants to issue a 61 D citation – which, according to the PD-163 (JA 227), was Defendants' supposed basis for stopping Plaintiff for identification in the first place. SJA 1084 (PX 44 at Request No. 39, admitted at JA 779-81).

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[6] Sgt. Smith further testified that he would have expected the officers to document in the Arrest Report that a crowd had formed, that citizens were coming out of their homes, that cars were slowing down or stopping, or that citizens were complaining, if any of those things had happened as a result of Plaintiff's alleged disturbance. JA 751, 756.

C. Defendants' Trial Testimony.

1. Defendants' Testimony Beyond the PD-163.

At trial, in an apparent effort to satisfy the requirements for probable cause, Defendants Antonio and Acebal testified that:

- People gathered to watch Ms. Huthnance. JA 834-35.
- Lights came on in the windows of nearby apartment buildings (JA 939) and people looked out the windows of the buildings (JA 835, 939, 944).
- A Metro bus stopped, blocking traffic, so the driver could watch Ms. Huthnance (JA 835-36, 857), and taxis stopped too (JA 836, 857-58).

As noted above, these supposed facts, meant to show an impact on third parties, are entirely absent from the PD-163.[7]

2. Defendants' Testimony Contradicting the PD-163.

Defendants' testimony also affirmatively contradicted the statements that were contained in the PD-163, as well as each other's testimony. The narrative in the PD-163, which was signed by Defendant Acebal, describes Defendant Acebal as the officer primarily interacting with Plaintiff. JA 227 ("I observed a white female, D-1 . . . D-1 turned around and yelled in my face . . . I advised D-1 to turn around . . . D-1 refused my commands . . . I advised D-1 for the third and

[7] By contrast, consistent with the PD-163, Defendant Morales testified that did not he see any buses or taxis stopping, people standing outside the apartment buildings across the street, people looking out of windows, or lights going on. SJA 1105-06.

final time . . .") (emphasis added). At trial, however, Defendant Antonio testified that he was the primary actor and decision-maker with respect to Plaintiff's arrest. JA 826-37, 841-42. He said that Defendant Acebal's only participation was to ask for Plaintiff's identification after he told her to do so. *Id.*

On cross-examination, Defendant Antonio was confronted with the contrary narrative in the PD-163, which (as just quoted) described Defendant Acebal as the primary actor and decision-maker. JA 866-67. In response, Defendant Antonio claimed that "when you're working as a unit . . . it is the unit doing the narrative" and that the pronouns in the PD-163 ("I" and "my") are "referring to everybody that was in the unit." JA 868-69. He was forced to admit that MPD does not train officers to write PD-163s in this fashion, but he then claimed this was a special practice of "TAC units." JA 872. Then, confronted with a PD-163 written by a TAC unit in which each officer is referred to by name, he tried to further refine his testimony, claiming that "that's how we wrote our reports in the TAC unit, that's not how we were told to write the reports." *Id.*; SJA 1092-93.

Defendant Antonio also tried to explain the inconsistency between his testimony and the narrative in the PD-163 by claiming that Defendant Acebal was described as the arresting officer in the PD-163 because he, Defendant Antonio, was acting as her field training officer and was "not allowed to take arrests as a field training officer." JA 870. But he could not ground this assertion in any

rule or policy. JA 870-71. Moreover, when pressed about why, if he was her training officer, he had not reviewed the PD-163 more closely to ensure that it included the additional facts he had testified to at trial, he again contradicted himself by saying that "I was not acting as her training officer" at the time of the arrest. JA 895. Plaintiff's counsel immediately pointed out this inconsistency and Defendant Antonio was forced to admit it. JA 896-98.

Defendant Acebal's trial testimony, for its part, conflicted with both the narrative in the PD-163 and Defendant Antonio's trial testimony. Where the PD-163 narrative put her in the leading role, and Defendant Antonio's testimony had ascribed that role to himself, she testified at trial that both she and Defendant Antonio had substantially interacted with Plaintiff — both approaching Plaintiff and asking her to move along, both stopping her for identification, both again telling her to stop yelling, and both eventually ordering her to place her hands against the wall. SJA 1095-99. But Defendant Acebal was extensively impeached with her own deposition testimony, in which she had attributed to herself every act described in the PD-163 and had not attributed a single affirmative act to Defendant Antonio. SJA 1100-03.[8]

[8] Not only were Defendants Antonio and Acebal impeached in ways too numerous to detail here, but the jury heard that, during the break between their depositions, which occurred on the same day, they met together with defense counsel for half an hour, after which Defendant Antonio testified directly contrary to the damaging

D. Defendants' Improper Testimony Concerning the Dispatcher's Report and the Curative Jury Instruction.

Early in discovery, Plaintiff served document requests on the District for "[a]ll Documents referring or relating to the arrest and detention of Plaintiff (and any encounter that preceded it) . . . including . . . any police reports . . . and all radio communications/transmissions relating to Plaintiff's arrest, detention, and transportation . . . ." JA 212. The District's responses failed to identify or produce any document relating to any such radio communications or transmission. JA 115. On June 6, 2008, Plaintiff filed a motion to compel the District to respond to that document request, among others. JA 69, 71.

On July 28, 2008, the District served an amended response stating, in relevant part, that "the District has search [sic] several sources in an effort to obtain any radio communications pertaining to the plaintiff arrest. As result [sic] of its search, the District has concluded that there are no radio communications related to plaintiff's arrest, however see Attachment 21, radio log related to plaintiff's arrest." JA 213. The radio log (or "dispatcher's report") produced by the District, however, was a one-line entry that did not list Plaintiff's name, listed an address different than the 7-Eleven, and indicated a dispatch time of 2:05 a.m. rather than around midnight. *See* JA 208. To ascertain why the District

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deposition testimony that Defendant Acebal had just given. JA 881-82, 922-26; JA 595-96 (Redacted copy of Antonio's Deposition).

believed the entry might relate to plaintiff's arrest, Plaintiff served a Rule 30(b)(6) deposition notice on the District for testimony on radio calls. JA 150 ¶ 23.

On October 29, 2009, the District produced Travis Dupree, a supervisor at the District's Office of Unified Communications, as its Rule 30(b)(6) witness. This was the first deposition in the case. Plaintiff's counsel asked Mr. Dupree whether the personal identifying number on the dispatcher's report (the "Case Number") matched Plaintiff's personal identifying number on the PD-163 (the "CCN"). Mr. Dupree answered "No. It's different." JA 217-18. Thus, as Defendants admit, "the District's Rule 30(b)(6) deponent did not link the dispatch report to Huthnance's arrest" (Defs.' Br. at 35). Although Defendants assert (*id.*) that Plaintiff employed "very limited questioning on the issue," the transcript in fact shows that Plaintiff asked Mr. Dupree three separate times whether the personal identifying numbers matched, and each time he said that they did not. JA 218. Defendants did not object to these questions. *Id.*

On January 21, 2010, the District Court entered an order requiring the parties to file their pretrial statement by March 3, 2010. JA 153. The order provided that the pretrial statement must include each party's Exhibit List, describing "each exhibit to be offered in evidence, with each exhibit identified by number, title, and date (if applicable)." The order further stated that "[t]here is a strong presumption that any exhibit not listed in accordance with this court's order

will not be admitted at trial." JA 154. Pursuant to this order, the parties submitted their Pretrial Statement on March 3, 2010. JA 160. Defendants' Exhibit List did not include the dispatcher's report. JA 178. Plaintiff's Exhibit List did not include that document either. JA 175-78. Defendants never moved to amend their Exhibit List to add the report. Based on the District's Rule 30(b)(6) testimony and the absence of this document from Defendants' Exhibit List, Plaintiff reasonably understood that this document in fact did not relate to Plaintiff's arrest.

At trial, consistent with the express allegations in the Complaint (JA 52 ¶ 9) and with her deposition testimony, Plaintiff testified that her arrest occurred around midnight. *See* page 4 *supra*. Defendants again did not move to amend their exhibit list to add the dispatcher's report. Instead, after Plaintiff rested her case, Defendants elicited hearsay testimony during their direct examination of Defendant Antonio as to the supposed contents of the report:

> Q. So at 2:05 the arrest of Ms. Huthnance was called in to dispatch?
>
> A. Correct.
>
> Q. How do you know it was at exactly 2:05?
>
> A. In preparing for the trial, I observed a dispatcher's report.
>
> Q. And that dispatcher's report indicated that it was called in at 2:05 a.m?
>
> A. Correct.

JA 846 (emphasis added).

The next day, Plaintiff filed a written motion to preclude any further testimony and any evidence relating to the dispatcher's report. JA 198. The grounds were that the report "was not listed on Defendants' exhibit list and, moreover, the basis upon which Defendants claim its relevance was foreclosed by the testimony of the District's Rule 30(b)(6) witness on matters related to radio transmissions." *Id*. Defendants argued against the motion. JA 874-79. The Court granted the motion and entered both oral and written orders precluding any further testimony or evidence about the report. JA 879 (oral ruling); JA 245-46 (written order).

Later that day, in direct violation of that order, Defendants again elicited testimony as to the supposed contents of the dispatcher's report from their expert witness, Mr. Gallagher – not once, but twice. First, on direct examination, Mr. Gallagher testified that the dispatcher's report corroborated the time set forth in the PD-163:

> Q. Is this [the PD-163] a perfect narrative?
>
> A. No, it isn't a perfect narrative.
>
> Q. Why do you say that?
>
> A. I'd say there have been certain inaccuracies, but minor, pointed out already in it. Dates -- and I don't say that the times -- <u>the times from the evidence that I've seen about the dispatch runs, they certainly corroborate the time on this particular document. So, I don't consider that a mistake or an inaccuracy.</u>

JA 959 (emphasis added). Then, shortly thereafter, Mr. Gallagher again testified about the dispatcher's report in an effort to bolster part of the PD-163:

> Q. Now, with respect to the narrative itself [in the PD-163], you mentioned that there were some other typographical errors, for instance, one of the things that was pointed out to the jury has to do with the date of arrest being identified as 11/15?
>
> A. Correct.
>
> Q. And then, of course, this was the female impostor information -- yeah, impersonator in Box 29, and there were some other items. Do these items or these matters that the plaintiff brought to the jury's attention, do they negate the lawfulness of the arrest?
>
> A. No, I can't see that at all. <u>Basically we know that from other records that the event took place in the morning of the 16th of October</u> and –
>
> MR. MOUSTAKAS: Your Honor, permission to approach the bench.

JA 960-61 (emphasis added).

Upon approaching the bench, Plaintiff's counsel objected that Defendants' expert witness had just twice testified as to the supposed contents of the dispatcher's report, once by name, in direct violation of the order that the Court had just entered. JA 961. Defendants' counsel admitted that the testimony had violated the order and apologized to the Court, although he claimed that the fault was the witness's, not his. JA 961-62.

Because Defendants' repeated hearsay testimony, contrary to the District's Rule 30(b)(6) witness, came at a point in the case when Plaintiff could no longer

gather and introduce evidence to rebut it, Plaintiff's proposed jury instructions included a curative instruction to address that testimony. JA 251. It provided:

> There has been testimony about a dispatcher's report that allegedly shows the time that the arresting officers reported Ms. Huthnance's arrest. However, the defendants did not introduce this document into evidence. You may infer that the dispatcher's report was not introduced into evidence because it does not exist or because it contains information that would have been unfavorable to the defendants' case.

Id. Defendants did not propose any alternative instruction to address their improper testimony concerning the report. JA 291. Instead, they merely argued again that the testimony concerning the report was not inconsistent with the Rule 30(b)(6) testimony. *Id*. At the conference on the proposed jury instructions, the Court heard arguments as to the proposed instruction. JA 1002-13. The District Court concluded that Plaintiff was entitled to the proposed instruction as a remedy for Defendants' improper testimony concerning the report. JA 1013. Accordingly, as one paragraph of the 17 pages of jury instructions, the Court gave the jury the curative instruction proposed by Plaintiff. JA 309.

E. **The "Missing Witness" Jury Instruction**.

As noted above, one of the many factors undermining Defendants' credibility was a separate "missing witness" instruction against Defendants, which Defendants do not challenge on appeal and which Plaintiff's counsel emphasized

during closing arguments. During trial, Defendant Antonio gave testimony about both a police officer ("Crowley") and a civilian ("Elena") who supposedly had witnessed the incident. JA 904-05, 912-15. Neither of these persons had been identified in the District's interrogatory answers or admissions or in Defendant Antonio's deposition testimony.[9] Based on this further misconduct, the District Court gave the jury a missing witness instruction as follows:

> Before this trial began, Ms. Huthnance asked the defendants to identify witnesses to the encounter leading up to her arrest and to identify police officers in or around the 7-Eleven during the same time. During the course of this trial, defendants identified for the first time a civilian eyewitness named "Elena" and a police officer named "Crowley" present in or around the 7-Eleven at the time of Ms. Huthnance's encounter with police.
>
> However, those witnesses did not testify at trial. You may infer that the testimony that those witnesses would have offered would have been unfavorable to the defendants.

JA 309.

F. <u>The Disorderly Conduct Jury Instruction</u>.

Defendants contended that Plaintiff had been properly arrested for disorderly conduct. Thus, to enable the jury to decide whether Plaintiff was arrested without probable cause, the District Court instructed the jury as to the crime of disorderly conduct.

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[9] *See* JA 579, admitted at JA 810-11 (interrogatory answer); JA 1011-12 (describing admission); *id.* (quoting deposition testimony).

In the District of Columbia, the crime of disorderly conduct is codified in D.C. Code § 22-1321. Although the statute was completely overhauled in 2011 using an entirely different structure and wording, it provided at the time of Plaintiff's arrest as follows:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such person or by placing a hand in the proximity of such person's pocketbook, or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than $250 or imprisoned not more than 90 days, or both.

Thus, at the time in question, the statute required that a person engage in conduct that violates one of five enumerated subsections, and that he do so with intent to breach the peace or under circumstances in which a breach of the peace may occur.

The PD-163 states that Plaintiff was arrested for "Disorderly Conduct (Loud & Boisterous)." JA 226. As Defendants' brief admits (at 7 n.3), the words "Loud & Boisterous" are a reference to subsection 3 of the statute. Subsection 3 applies where a person, with the requisite breach-of-the-peace intent or circumstances, "shouts or makes a noise either outside or inside a building during

the nighttime to the annoyance or disturbance of any considerable number of persons."

Plaintiff, accordingly, proposed an instruction that explained subsection 3 using, verbatim, the D.C. Court of Appeals' language from its only opinion interpreting subsection 3, which was *In re T.L.*, 996 A.2d 805 (D.C. 2010). JA 260-61. Defendants proposed an instruction saying that "[p]roof of an actual or impending breach of the peace is not required" and omitting any explanation of subsection 3 – even though they also cited the *In re T.L.* opinion. JA 229-30. Defendants also asked the Court to instruct the jury as to subsection 1 of the statute. *Id*. Plaintiff objected on the ground that the D.C. Court of Appeals had held that, for a person's speech to violate subsection 1, it must be "likely to produce violence on the part of others," but Defendants had admitted that Plaintiff's conduct did not satisfy that requirement. JA 271-72, citing *Martinez v. District of Columbia*, 987 A.2d 1199, 1202 (D.C. 2010). Following oral argument, the Court adopted Plaintiff's instruction. JA 1022.

G. <u>The Jury Verdict</u>.

The jury rendered a verdict finding that Defendants Acebal and Antonio had violated Plaintiff's First Amendment, Fourth Amendment, and Fifth Amendment rights and had committed the torts of false arrest and assault and battery. JA 324-26. The jury also found that the District of Columbia was deliberately

indifferent to Plaintiff's First, Fourth, and Fifth Amendment rights. JA 327. The jury awarded Plaintiff compensatory damages of $90,000 against all Defendants, and awarded punitive damages of $2,500 against Defendant Antonio and $5,000 against Defendant Acebal. JA 328. The jury found that Defendant Morales was not liable. JA 324-28.

H. The Order on Defendants' Post-Trial Motions.

On July 19, 2011, the District Court issued a 48-page opinion thoroughly addressing Defendants' post-trial motions for judgment NOV or a new trial. JA 426. First, the Court held that there was ample evidence to sustain the jury's verdict of liability on Plaintiff's First and Fourth Amendment claims. JA 443-51. Second, the Court granted Defendants judgment NOV on Plaintiff's Fifth Amendment equal protection claim. JA 451-55. The Court reasoned that, although the evidence showed that the District unlawfully refused to inform Plaintiff about citation release, there was no evidence that it treated validly-arrested persons any differently. *Id.* Finally, the Court rejected Defendants' various arguments for a new trial. JA 455-72.

STANDARD OF REVIEW

The District Court's decision to exclude the dispatcher's report is reviewed for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997); *United States v. Ashton*, 555 F.3d 1015, 1018 (D.C. Cir. 2009). The Court's

decision to give a curative jury instruction about that document, and the phrasing of that instruction, are reviewed for abuse of discretion. *United States v. Tse*, 375 F.3d 148, 158 (1st Cir. 2004); *Czekalski v. Lahood*, 589 F.3d 449, 453 (D.C. Cir. 2009). The District Court's jury instructions concerning disorderly conduct are "proper if, when viewed as a whole, they fairly present the applicable legal principles and standards." *Czekalski*, 589 F.3d at 452 (citations omitted). "[T]he choice of the language to be used in a particular instruction . . . is reviewed only for abuse of discretion." *Id.* at 453.

SUMMARY OF ARGUMENT

1. The District Court did not abuse its discretion in excluding the dispatcher's report. It was not on Defendants' Exhibit List, no foundation for its admission was provided, and its relevance to Plaintiff's arrest was foreclosed by the District's Rule 30(b)(6) testimony. Its admission after Plaintiff had rested her case, moreover, would have caused substantial unfair prejudice.

2. The District Court likewise did not abuse its discretion in giving an instruction to cure Defendants' repeatedly eliciting and giving hearsay testimony as to its supposed contents, including twice after the Court had expressly ordered them not to. Not only were the terms of the instruction appropriate, but Defendants proposed no alternative instruction, thereby waiving any argument that the Court should have adopted a different remedy for their misconduct.

3. In any event, any supposed error relating to the dispatcher's report was harmless, as the District Court found, because it did not affect the outcome of the case. As a threshold matter, there is no record evidence establishing that the document even relates to Plaintiff, contrary to the unsupported assertions in Defendants' brief. The jury instruction about Defendants' hearsay testimony concerning the report was not even mentioned during closing arguments, the Court expressly instructed the jury that it was expressing no opinion as to witness credibility, and neither the existence nor the contents of the report was central to the case. Moreover, Defendants' credibility was overwhelmingly compromised not by this instruction, but instead by the many contradictions between their trial testimony and the rest of the record evidence, and by the missing witness instruction that they do not challenge on appeal.

4. The jury instruction defining disorderly conduct was correct. With respect to the subsection of the statute that Plaintiff was arrested for violating, the instruction correctly quoted verbatim from the D.C. Court of Appeals' only decision interpreting that subsection. Although Defendants asked for an instruction under another subsection, the D.C. Court of Appeals has held that that other subsection applies only where the person's speech produced a threat of violence, which Defendants admitted was not the case here. The District Court also correctly held that any supposed error in the disorderly conduct instruction

was harmless. If the jury had believed Defendants' version of the facts, it would have found for them under the disorderly conduct instruction that the Court gave. Moreover, because the disorderly conduct instruction only related to Plaintiff's Fourth Amendment claim, any supposed error in that instruction did not affect Defendants' liability on Plaintiff's First Amendment claim. As such, it could not affect Plaintiff's recovery and this Court need not even consider this issue.

ARGUMENT

I. DEFENDANTS' ARGUMENTS RELATING TO THE DISPATCHER'S REPORT ARE MERITLESS.

A. The Court Did Not Abuse its Discretion in Excluding the Report.

Although Defendants briefly assert (at 34-35) that the District Court erred by excluding the dispatch report, they maintain (at 35) that this Court "need not even consider that error." Given the conclusory nature of Defendants' presentation, the Court should not do so.

In any event, the District Court's exclusion of the dispatcher's report (and any hearsay testimony about it) was well within its discretion for three separate reasons. First, as Defendants admit (at 35), the report was not on their Exhibit List, which was a precondition for admission into evidence. *See* pages 16-17 *supra*.[10] A court does not abuse its discretion when it excludes evidence to enforce a

[10] Defendants, moreover, did not move to amend their Exhibit List to add this document, even though they filed various other motions seeking relief from other deadlines.

pretrial order, including the deadline for identifying trial exhibits.[11] Second, there was no showing (or proffer) that the report met any exception to the hearsay rule.[12] A court does not abuse its discretion when it excludes hearsay evidence. Fed. R. Evid. 802. Third, the District's Rule 30(b)(6) witness had testified that the identification number on the report did not match Plaintiff's (*see* page 16 *supra*), and hence use of the report would have contradicted that testimony. A court does not abuse its discretion when it excludes evidence that is contrary to a party's Rule 30(b)(6) testimony,[13] or whose relevance has not been established, *see* Fed. R. Evid. 402.

Likewise, the Court plainly did not abuse its discretion in concluding that the prejudice to Plaintiff from admitting the report would outweigh any supposed harm

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[11] *See*, *e.g.*, *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 645–46 (7th. Cir. 2011) ("the district court did not abuse its discretion by rejecting the new exhibit" that was "disclosed long after the time for disclosure of exhibits"); *Santana v. City of Denver*, 488 F.3d 860, 867 (10th Cir. 2007) ("It is generally not an abuse of discretion for a court to exclude evidence based upon failure to timely designate.").

[12] As Defendant Antonio did not create the report and was not its custodian, his testimony could not have, and did not, lay a foundation for its admission.

[13] *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) ("The law is well-settled that corporations have an 'affirmative duty' to make available as many persons as necessary to give 'complete, knowledgeable, and binding answers' on the corporation's behalf.") (emphasis added, citations omitted); *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (Oberdorfer, J.) ("Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.").

to Defendants from enforcing the grounds for its exclusion. Plaintiff prepared her case for trial, and had already presented her entire case-in-chief, based on the understanding that there was no record reflecting a radio dispatch for her arrest. That understanding was properly based on both the District's Rule 30(b)(6) testimony and the absence of any such record from Defendants' Exhibit List. Plaintiff would have been prejudiced if the Court had permitted Defendants to sandbag her by suddenly coming forward with just such a record more than halfway through trial. Among other things, that would have denied Plaintiff the opportunity to gather and introduce evidence showing that the document, even if it related to Plaintiff, did not support Defendants' story as to the time of the arrest. For example, Plaintiff could have obtained and put on proof that a dispatch call is not required to effectuate an arrest, but only to generate a number utilized during the subsequent paperwork process – meaning that the dispatch call relating to Plaintiff easily could have been made hours after Plaintiff was arrested, a possibility that the District Court expressly recognized. JA 458.[14] As such, the District Court's exclusion of the report was well within its broad discretion.

[14] Indeed, Plaintiff testified that she was left sitting for hours at the police station before her paperwork was processed. JA 640-42.

B. The Instruction Concerning Defendants' Testimony About the Report Was Correct.

1. The Instruction Was Given to Remedy Defendants' Repeatedly Eliciting Hearsay Testimony, Including in Violation of Court Order.

Defendants' brief misleadingly implies (at 21, 35-36) that the District Court gave a "missing evidence" instruction regarding the dispatcher's report simply because Defendants did not put the report into evidence. To the contrary, the District Court gave that instruction in order to remedy Defendants' recurrent improper eliciting of hearsay testimony concerning that report. As shown in detail at pages 15-20 above:

- The report was inadmissible because it was not included on Defendants' Exhibit List, it was hearsay, and the District's Rule 30(b)(6) witness denied any link to Plaintiff. *See* pages 16-17 *supra*.

- Nevertheless, Defendants elicited testimony from Defendant Antonio asserting that the dispatcher's report corroborated his recollection of the time of the arrest. *See* page 17 *supra*. That testimony concerning the supposed contents of the report, offered to prove the "truth" of Defendant Antonio's story, was improper hearsay.[15] This misconduct also was likely willful, since Defendant Antonio's direct examination surely had been prepared in advance.

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[15] *See, e.g.*, *United States v. Davis*, 596 F.3d 852, 856 (D.C. Cir. 2010) ("If the testimony of the witness purports to repeat an out-of-court statement, hearsay is the

- The Court thereupon ordered Defendants not to elicit any further testimony about the report. *See* page 18 *supra*. Nevertheless, later that day, Defendants elicited two further statements by their expert, Mr. Gallagher, that the dispatch report corroborated part of the PD-163. *See* page 18-19 *supra*. Not only was that testimony inadmissible hearsay, it also violated the order that the Court had just entered, as Defendants' counsel admitted. *See* page 18-19 *supra*.

In short, Defendants elicited three pieces of testimony concerning the contents of the dispatcher's report that were hearsay and violated a court order. Plaintiff was entitled to a curative instruction concerning that testimony and Defendants were properly subject to sanctions.

2. The Curative Instruction Was Within the Court's Broad Discretion, and Defendants Have Waived Any Contrary Argument.

A "district court has considerable leeway as to the phrasing and timing of a curative instruction." *United States v. Tse*, 375 F.3d 148, 158 (1st Cir. 2004)

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proper objection.") (citations omitted); *People v. Hernandez*, 286 A.D.2d 623, 624 (N.Y. App. Div. 2001) (trial court properly barred questioning "detective concerning the contents of a document not in evidence, since the questions asked sought to elicit hearsay"); *Robinson v. State*, 842 So. 2d 892, 892-93 (Fla. Dist. Ct. App. 2003) (reversing conviction because trial court allowed hearsay testimony as to contents of document not in evidence); *State v. Courtney*, 258 S.W.3d 117, 119-22 (Mo. Ct. App. 2008) (same). His testimony also violated the best evidence rule codified in Fed. R. Evid. 1002. *See, e.g.*, *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 221-23 (3d Cir. 2009) (explaining and applying rule).

(citation omitted).[16] And the court's latitude is even broader where, as here, the misconduct is repeated or violates a court order. *See, e.g.*, *McWhorter v. City of Birmingham*, 906 F.2d 674, 676 (11th Cir. 1990) (also citing other cases).

The District Court's instruction to cure Defendants' repeated eliciting of hearsay testimony in violation of its order was well within its broad discretion. Indeed, given that the Defendants did not include the report on their Exhibit List, that there was no basis for its admissibility, and that even now there is no record evidence that the report relates to Plaintiff, the report indeed did not exist for purposes of the trial.

Defendants did not suggest any other form of instruction to address their misconduct, merely arguing that no misconduct had occurred. JA 1002-10. Defendants therefore waived any argument for a different instruction.[17] In any event, the Court had ample reason not to select an alternative cure. An instruction merely exhorting the jury to disregard the testimony would likely have been ineffectual given Defendants' multiple repetitions of the improper testimony. And

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[16] *Accord United States v. Darby*, 306 F. App'x 776, 777 (3d Cir. 2009) (holding that the "District Court did not abuse its discretion in composing the curative instruction").

[17] *See, e.g.*, *Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010) ("issues not raised before judgment in the district court are usually considered to have been waived on appeal") (citation omitted); *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010) ("because neither [appellant] pressed this argument in the district court, they cannot do so for the first time here").

an order declaring a mistrial would have rewarded rather than punished Defendants. Plaintiff had already waited years to get her day in court (in every instance due to Defendants' delays), and because she had moved to New Zealand before trial (*see* note 2 *supra*), a mistrial would have been particularly prejudicial. Such an order also would have further prejudiced Plaintiff by stopping the trial after Plaintiff's litigation strategy had been revealed to Defendants through her direct case.

Moreover, the instruction that the Court actually gave was a measured one. It simply told the jury that "[y]ou may" – not "must" – infer that the document was not introduced into evidence because it either did not exist or contained information unfavorable to defendants. Any theoretical impact on Defendants' credibility was further diminished by the Court's instruction to the jury that "I have not meant to express, or to suggest, any opinion about which witnesses should be believed . . . ." JA 308. And, contrary to Defendants' assertions (at 36, 44), there is no reason to conclude the jury inferred from the instruction that Defendants had lied, rather than that the report was unfavorable in some respect.[18]

[18] Defendants' argument also stands the situation on its head. It was Defendants' improper testimony that sought to suggest to the jury that Plaintiff was lying. The District Court merely addressed that misconduct.

3. The "Missing Evidence" Cases Cited by Defendants are Inapposite.

Defendants cite (at 36-37) several cases in which courts have given a missing witness or evidence instruction when the party that controlled a witness or document failed to produce it at trial, arguing that the test applied in those cases was not met here. As a threshold matter, this argument is waived because Defendants did not raise it below.[19] Defendants merely argued that the testimony had been proper, not that this instruction could not be used to remedy improper testimony. *See* page 20 *supra*.

In any event, the cases cited by Defendants address the predicates for giving an instruction if a party fails to produce a document in its control.[20] Here, the instruction was given to address very different misconduct –Defendants' eliciting of improper testimony and continuing to do so even after having been ordered not to. Defendants' misconduct here was far more egregious than in cases where a missing evidence instruction is regularly given. And nothing in those cases

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[19] *See* Fed. R. Civ. P. 51(c)(1) & (d)(1)(A); *Parker v. District of Columbia*, 850 F.2d 708, 715 (D.C. Cir. 1988) (District waived objection to instruction by not "stating distinctly the matter objected to and the grounds of the objection" prior to the charging of the jury.).

[20] *See, e.g.*, *Wynn v. United States*, 397 F.2d 621, 625 (D.C. Cir. 1967).

remotely suggests that the Court could not use this instruction to address Defendants' repeated improper testimony concerning the report.[21]

C. **Any Supposed Error Was Harmless, as the District Court Found.**

The District Court correctly held that any supposed error relating to the dispatcher's report exclusion and instruction was harmless in any event. JA 458-59. Under Fed. R. Civ. P. 61, Fed. R. Evid. 103, and 28 U.S.C. § 2111, a verdict cannot be set aside on the basis of harmless error. Error is harmless unless it "affected the outcome of the district court proceedings." *Czekalski v. Lahood*, 589 F.3d 449, 453 (D.C. Cir. 2009) (citations omitted).[22] And Defendants, as the party asserting error, have the burden to prove that any error was not harmless. *Shinseki v. Sanders*, 556 U.S. 396, 407-10 (2009) (discussing harmless error rule in civil cases).

Defendants have not shown and cannot show that the rulings relating to the dispatcher's report "affected the outcome" of the case. With respect to exclusion of the document itself, there is no evidence in the record establishing that the report

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[21] *Cf. Webb v. District of Columbia*, 146 F.3d 964, 972-73 (D.C. Cir. 1998) (endorsing use of similar instruction to remedy evidentiary misconduct); *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) ("'[A] district court may impose issue-related sanctions,' such as an adverse inference instruction," where "'a party's misconduct has tainted the evidentiary resolution of the issue.'") (quoting *Shepherd v. Am. Broadcasting Co.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995)).

[22] *See also United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1276 (D.C. Cir. 2010) (error is harmless if it can be said with even "fair assurance" that the outcome was not "substantially swayed" by the error).

in fact related to Plaintiff. The only record evidence concerning that document is the testimony of the District's Rule 30(b)(6) witness that this document did not relate to Plaintiff. *See* page 16 *supra*. The assertions concerning the document in Defendants' brief (at 17-21) rely solely on statements that "government counsel" supposedly made to Plaintiff's counsel "[d]uring a recess in proceedings" that supposedly "explained" that the District's Rule 30(b)(6) witness "had been wrong." Defs.' Br. 19. Those assertions, which are not supported by record evidence or an offer of proof as required by Fed. R. Evid. 103(a)(2), carry no legal weight. *See, e.g.*, *United States v. Thompson*, 279 F.3d 1043, 1047-48 (D.C. Cir. 2002). Because there is no record evidence linking the document to Plaintiff, Defendants cannot possibly establish that its exclusion affected the outcome of the case.

Likewise, the District Court correctly held that any supposed error in the instruction relating to the testimony about the dispatcher's report was harmless. First, the instruction was not even mentioned during closing argument. Thus, contrary to the misleading suggestion in Defendants' brief (at 43), it was never used to attack Defendants' credibility.[23] This fact alone eviscerates any assertion

[23] Defendants falsely suggest (at 43) that Plaintiff's counsel invoked the instruction by arguing that the arresting officers "'manufacture[d]' evidence." The transcript belies that assertion. Plaintiff's counsel actually argued that the officers "manufacture a new set of facts" "every time they learn a new fact that hurts their case," and was made with specific reference to the discrepancies between their trial

that the instruction played a pivotal role. *See, e.g.*, *United States v. Sistrunk*, 622 F.3d 1328, 1334 (11th Cir. 2010) (alleged error in instruction harmless where counsel did not refer to the instruction during closing argument).

Second, Defendants overstate the import of the instruction. It merely told the jury that it "may" make an inference and was accompanied by an instruction that the Court was not expressing "any opinion about which witnesses should be believed." *See* JA 308, 309. The instruction did not even order the jury to disregard the testimony if the jury found it credible. Also, there is no reason to believe – as Defendants assert – that the jury drew an inference (completely absent from the words of the instruction) that Defendant Antonio or Mr. Gallagher had lied, rather than simply that the report was unfavorable in some respects. And the instruction did not even apply to Defendant Acebal's testimony.

Third, Defendants' credibility was overwhelmingly undermined in numerous respects having nothing to do with this instruction. As shown in detail above:

- Defendants' testimony as to the incident was contradicted by the neutral eyewitnesses, including MPD Sgt. Smith (*see* pages 5-7 *supra*);[24]

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testimony, on the one hand, and the PD-163 and testimony of Sgt. Smith, on the other hand. JA 1030.

[24] Defendants' assertion (at 43) that Sgt. Smith's testimony had "obvious support from the missing evidence instruction" is utterly unsupported. The instruction made no express or implied reference to his testimony. To the contrary, it was

- Defendants' testimony contradicted what was contained in their own PD-163 (*see* pages 12-14 *supra*);

- Defendants' testimony also asserted numerous facts that were not contained in their PD-163, in the face of procedures making clear that the PD-163 would have contained all pertinent facts (*see* page 12 *supra*);

- Defendants' trial testimony also conflicted extensively with each other's trial testimony and with their deposition testimony (*see* pages 12-14 *supra*); and

- Defendants' credibility was still further eroded by the Court's instruction that the jury could infer that two supposed witnesses about whom Defendant Antonio testified would have testified unfavorably to defendants (*see* pages 20-21 *supra*) – an instruction that Defendants do not challenge on appeal and on which Plaintiffs' counsel focused the jury's attention during closing argument (JA 1043-44).

This avalanche of credibility problems refutes Defendants' assertion (at 42) that "[t]he time of the arrest went to the heart of the credibility contest at trial." That assertion also does not support Defendants' argument concerning the dispatcher's report for still further reasons. As the District Court correctly

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Defendants' own testimony that placed Sgt. Smith on the scene at the time of the incident with Plaintiff. *See* pages 7-8 *supra*.

observed, there is no record evidence establishing that the dispatch call was made when Plaintiff was arrested, rather than two hours later. JA 458. Moreover, even if Plaintiff had been arrested at 2:00 a.m., that would not have meant she had more to drink than if she was arrested at midnight. Contrary to the misleading assertions in Defendants' brief (at 27, 44), Plaintiff did not testify to a "one-beer-every-half-hour consumption rate." Plaintiff testified that she had consumed two or three beers. JA 612, 661. Consistent with that testimony, Plaintiff merely agreed with defense counsel that, if one divides the length of the time she was at the bar (about an hour and a half) by two or three beers, that mathematically calculates to roughly one beer each 30 minutes during that hour and a half period. JA 661. Plaintiff's testimony was also confirmed by Mr. Marsoni, who testified that she "drank two beers." JA 695. Moreover, Defendants' further speculation that the jury might have concluded that Plaintiff had been intoxicated, and therefore engaged in disorderly conduct, is also refuted by Sgt. Smith's testimony that Plaintiff was not screaming or acting in any other manner that caught his attention. *See* page 7 *supra*. Finally, in light of the entire record, the District Court specifically found that "the time of arrest wasn't a dispositive issue in this case." JA 459; *see also* JA 458 ("the time of the arrest wasn't determinative of liability"). Indeed, Plaintiff's counsel likewise

advised the jury that any issue as to the time of the arrest was "irrelevant" and "doesn't matter." JA 1032-33.

Finally, Defendants' argument (at 45) that the instruction "likely influenced the jury's decision to award punitive damages" is patently meritless. The jury awarded twice as much in punitive damages against Defendant Acebal as against Defendant Antonio, even though the curative instruction related to testimony by Defendant Antonio, not Defendant Acebal. This shows that the punitive damages were based on the Defendants' relative responsibility for the wrongful arrest, not on the imagined impact of the curative instruction. For all these reasons, even if the instruction had been error, which it wasn't, Defendants cannot show that it substantially swayed the jury's verdict.

II. DEFENDANTS' ARGUMENT CONCERNING THE DISORDERLY CONDUCT INSTRUCTION IS MERITLESS.

A. The Disorderly Conduct Instruction Was Correct.

Defendants' argument concerning the jury instruction on disorderly conduct fundamentally miscomprehends the statute defining that offense as it existed at the time of Plaintiff's arrest. (The statute is quoted in full on page 22 above.) As the plain terms of this statute show, and as the D.C. Court of Appeals has held, disorderly conduct under the statute required both (1) conduct that violates one of the five enumerated subsections and (2) that the defendant acted with "intent to provoke a breach of the peace" or "under circumstances such that a breach of the

peace may be occasioned thereby." *See, e.g.*, *Martinez v. District of Columbia*, 987 A.2d 1199, 1201-02 (D.C. 2010) (§ 1321 has "two elements necessary for conviction" – an enumerated subsection and the introductory breach-of-the-peace clause); *In re T.L.*, 996 A.2d at 810 ("Regardless of the subsection allegedly violated, however, the introductory 'breach of the peace' clause qualifies it and sets forth an essential element of the offense; namely, that the defendant act with intent to provoke a breach of the peace or under circumstances such that one may occur.").

Defendants note (at 46-47) that "[t]he introductory breach-of-the-peace clause of D.C. Code § 1321 is an essential element of the offense that applies to all the subparts of that section, not just subsection (3) . . . ." But the breach-of-the peace clause is not the only element and, as just shown, it does not stand alone – it must be carried out through conduct described by one of the five subsections. Thus, the question in any given case is whether the defendant violated the statute by engaging in the conduct set forth in the allegedly applicable subsection of the statute and by engaging in that conduct with intent or in circumstances to breach the peace. *See In re T.L.*, 996 A.2d at 810 (the introductory breach-of-the-peace clause "qualifies" the enumerated subsections).[25]

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[25] Defendants therefore are wrong when they argue (at 50) that "[p]roperly instructed, the jury could have reasonably found … probable cause to arrest Huthnance for disorderly conduct because there was a breach of the peace under

Here, as Defendants acknowledge (at 7 & n.3), the PD-163 stated that Plaintiff had been arrested under subsection (3) of § 22-1321. As we now show, the District Court correctly instructed the jury as to the elements of disorderly conduct under subsection (3). We then show that the Court did not err in refusing to instruct the jury concerning any of the other subsections of § 22-1321.

1. The Instruction Correctly Described the Elements of Disorderly Conduct Under Subsection (3).

Defendants concede (at 47-48) that the District Court's instruction as to the conduct that violates subsection (3) was derived from the words of the D.C. Court of Appeals' decision construing that subsection, *In re T.L.*, 996 A.2d 805, 810 (D.C. 2010). That included, specifically, the statements in the District Court's instruction that subsection (3) is violated "when the speech is 'so unreasonably loud as to unreasonably intrude on the privacy of a captive audience' or so 'loud and continued' as to 'offend[] a reasonable person of common sensibilities and disrupt[] the reasonable conduct of nighttime activities such as sleep.'" *In re T.L.*, 996 A.2d at 813.

Reflecting that subsection (3) is expressly limited to making noise "outside or inside a building during the nighttime," *In re T.L.* held that subsection (3) is directed at "disturbing people in their homes by making a racket in the middle of

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the totality of the circumstances here." The statute does not simply require a breach of the peace, but specific conduct violating one of the five enumerated subsections.

the night . . . ." *Id.* at 810-14. Thus, the references in the *In re T.L.* decision, and in the jury instruction here, to a "captive audience" and to "wak[ing]" people or disrupting "sleep" all flow from the plain language of the statute limiting the proscribed conduct to making noise "outside or inside a building during the nighttime."[26]

Defendants nevertheless argue the instruction was error because "[t]he offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility." Defs.' Br. at 48 (quoting *District of Columbia v. Jordan*, 232 A.2d 298, 299 (D.C. 1967)). As just shown, however, the D.C. Code contained no "offense known as breach of the peace"; instead, the disorderly conduct statute required intent to breach the peace through specific conduct listed in five enumerated statutory subsections. And the cases cited by Defendants (at 48-49 & n.9) did not address the kind of conduct required to breach the peace in a case involving subsection (3) of § 22-1321, which is the statutory provision at issue here and which is explicitly limited to making loud noises at night inside or outside a building to the disturbance of a considerable

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[26] Specifically, the court in *In re T.L.* explained that a "captive audience" means "unwilling listeners, such as persons in their homes . . . who cannot readily escape from the undesired communication, or whose own rights are such that they should not be required to do so." 996 A.2d at 813 n.19 (internal quotation marks and bracketing omitted).

number of persons.[27] Those cases therefore do not suggest, much less establish, that the District Court's instruction was too narrow. Likewise, Defendants' assertions (not found in the PD-163) that bystanders gathered or that traffic stopped are irrelevant to the plain language of subsection (3).

2. The Court Correctly Did Not Instruct the Jury Under Any Other Subsections of the Statute.

Apart from subsection (3), the only subsection that Defendants asked the Court to instruct the jury on was subsection (1). JA 229. The District Court correctly rejected that request because Plaintiff's conduct, as alleged by Defendants, could not be found to have violated subsection (1) as it has been construed by the D.C. Court of Appeals.

Specifically, that court has held that, where the "conduct" consisted only of speech, subsection (1) requires proof that the speech was "likely to produce violence on the part of others." *Martinez*, 987 A.2d at 1202. In both *In re W.H.L.*,

[27] Some of those cases involved other subsections of § 22-1321, as discussed below. The others involved different laws (or common law rules) from other states and different facts as well. In *People v. Albert*, 611 N.E.2d 567 (Ill. App. Ct. 1993), for example, the law broadly prohibited acting "in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." *Id.* at 569. Moreover, the evidence showed that the defendant's yelling in a residential neighborhood had woken her neighbors. *Id.* at 568. In *Polk v. Maryland*, 835 A.2d 575, 576 (Md. 2003), the statute at issue broadly provided that "[a] person may not willfully fail to obey a reasonable and lawful order of a law enforcement officer made to prevent a disturbance to the public peace." The cases cited by Defendants are also largely from long ago and predate cases that, like *Martinez*, have narrowed the interpretation of disorderly conduct in cases involving speech.

743 A.2d 1226, 1228 (D.C. 2000) and *Shepherd v. District of Columbia*, 929 A.2d 417, 418 (D.C. 2007) the court held that, under subsection (1) of § 22-1321, "[o]ne circumstance where a breach of the peace may be occasioned is where the defendant uses words likely to produce violence on the part of others." In *Martinez*, the defendant "loudly and repeatedly used vulgarities" directed at police officers who stopped her for reckless driving but "did not act violently or threaten violence." 987 A.2d at 1200. Further, although bystanders assembled in response to her yelling, she did not "direct any verbal abuse at the onlookers," nor "was there any evidence that any bystander reacted with violence or was likely to have done so in response to Martinez's behavior." *Id.* The District argued that, even though Martinez's speech was not likely to produce violence, subsection (1) was "not narrowly confined" to that situation and that her yelling violated subsection (1) because it would "annoy," "disturb," or "be offensive to others." *Id.* at 1201-02. The court rejected that interpretation in light of First Amendment considerations. Specifically, the court held that "[i]n interpreting the 'breach of the peace' requirement of D.C. Code § 22-1321 in pure 'words' cases . . . we do not perceive room for [an] alternative, undefined 'nuisance' criterion . . . that would permit conviction without threat of violence." *Id.* at 1204. The court thus held that "[b]ecause the government failed to prove that Martinez committed a breach of the peace, as required for conviction of disorderly conduct under D.C. Code § 22-

1321, we must reverse her conviction and remand for entry of a judgment of acquittal." *Id.*

Martinez forecloses Defendants' argument that they could have had probable cause to arrest Plaintiff under subsection (1). Here, as in *Martinez*, even if Plaintiff had been yelling vulgarities as Defendants contended, there was no evidence that Plaintiff threatened violence. Likewise, as in *Martinez*, even if any onlookers had gathered to watch, there was no evidence that Plaintiff directed any verbal abuse at the onlookers or that any bystander reacted with violence or was likely to have done so. The District Court, therefore, correctly declined to instruct the jury on the elements of subsection (1) of § 22-1321. *Accord Wesby v. District of Columbia*, No. 1:09-CV-0501 (RLW), 2012 U.S. Dist. LEXIS 5680, at *33 (D.D.C. Jan. 18, 2012) ("Pursuant to the then-existing version of D.C. Code § 22-1321(1), . . . an arrest would have required evidence that each of the Plaintiffs used words likely to produce violence.").[28]

B. Even if the Disorderly Conduct Instruction Had Been Erroneous, Any Supposed Error Was Harmless.

Defendants' brief also fails to show that the outcome at trial likely would have been different if their proposed instruction on disorderly conduct had been

[28] Similarly, although it long predated *Martinez*, the court in *United States v. Cumberland*, 262 A.2d 341, 343 n.9 (D.C. 1970), upheld a disorderly conduct arrest because after repeated hostile conduct by the defendant the officer "reasonably could have feared serious violence."

given to the jury. Defendants testified at trial that Plaintiff screamed "at the top of her lungs" for an extended period of time. JA 834, 840-41. Defendants also testified that, in response to the supposed screaming, lights were coming on in the neighboring apartment buildings and people were coming to the windows to see what was happening. *See* page 12 *supra*.

If the jury had believed that testimony, it would have ruled for Defendants under the instructions that the Court delivered. Specifically, if the jury had believed Defendants' testimony that Plaintiff was screaming for an extended period of time and that lights in apartment buildings were coming on at 2:00 in the morning, the jury would have found that Plaintiff had "caused a noise in the night time" that "was so unreasonably loud as to unreasonably intrude on the privacy of a captive audience, or was so loud and continued as to offend a reasonable person of common sensibilities and disrupt the reasonable conduct of basic nighttime activities such as sleep" and that "did wake, or was likely to wake a considerable number of people from sleep, or did intrude, or was likely to intrude on the reasonable expectation of tranquility in the home of a considerable number of people."

The jury, however, evidently – and entirely reasonably – simply did not believe Defendants' testimony. In other words, the reason why Defendants lost was that the jury did not believe their testimony, not that the instructions

improperly allowed the jury to believe Defendants and yet rule for Plaintiff. As such, Defendants cannot satisfy their burden of proving that any supposed error in the instruction was prejudicial.

C. **The Supposed Error Did Not Affect Plaintiff's First Amendment Claim and Would Not Alter the Judgment.**

Even if the disorderly conduct instruction was error (it wasn't), and even if that error did affect the jury's consideration of whether Plaintiff was arrested without probable cause in violation of her Fourth Amendment rights (it didn't), this supposed error would provide no basis for overturning the jury's separate verdict holding Defendants liable for violating Plaintiff's First Amendment rights. That verdict provides an independent basis for Plaintiff's full recovery from Defendants of the total damages awarded by the jury. *See* JA 324-28, at 325 (verdict form).

With respect to Plaintiff's First Amendment claim, the Court instructed the jury that Plaintiff's "speech in this case was protected under the First Amendment." JA 317. The Court then instructed the jury that, on this claim, "[y]ou should find for Ms. Huthnance and against the defendant officers if you find, by a preponderance of the evidence, that Ms. Huthnance's exercise of protected First Amendment rights was a substantial or motivating factor in the defendant officer's decision to arrest her." *Id.* Thus, the jury was instructed that Plaintiff's First Amendment claim turned on the Defendants' actual, subjective intent in arresting her. Furthermore, the instruction on Plaintiff's First Amendment

claim neither referenced nor incorporated the disorderly conduct instruction. Defendants did not challenge the instruction on Plaintiff's First Amendment claim on this ground.

In sum, any purported error in the disorderly conduct instruction would provide no basis to alter the judgment on Plaintiff's First Amendment claim. This Court therefore need not address this entire disorderly conduct issue because it would not affect Plaintiff's recovery. *See, e.g.*, *Smith v. District of Columbia*, 413 F.3d 86, 104 (D.C. Cir. 2005) (where jury found District liable on both section 1983 and negligence claims and awarded plaintiff single sum, this Court declined to review District's argument that challenged only one of the claims).

III. DEFENDANTS' ARGUMENT FOR BIFURCATION IN THE EVENT OF A RETRIAL IS MOOT AND MERITLESS.

Because the District Court committed no error, much less prejudicial error, Defendants' argument that any retrial should be bifurcated is moot. Defendants' argument is wrong in any event. First, Defendants admit (at 51) that denial of their motion to bifurcate does not justify a new trial. It follows that the same ruling would not be prejudicial error in any retrial. Second, as the District Court correctly observed in denying Defendants' new trial motion (JA 456), whether to bifurcate is committed to the district court's discretion.[29] Although Defendants cite

[29] *See, e.g.*, *Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 635 (D.C. Cir. 2010) ("We review for abuse of discretion the decision to separate issues for trial.").

one case that was bifurcated, there are many other cases in which courts have denied motions to bifurcate *Monell* claims. *See, e.g.*, *In re Bayside Prison Litig.*, 157 F. App'x 545 (3d Cir. 2005) (district court did not abuse discretion in declining to bifurcate *Monell* claims).[30] Here, the District Court's reasons explaining why the individual defendants were not prejudiced by the trial (JA 456-57) would apply equally to any retrial, including that much of the evidence relevant to Plaintiff's *Monell* claim is already admissible in support of her claims against the individual defendants (*e.g.*, their lack of proper training).

CONCLUSION

For all of the foregoing reasons, the District Court's judgment should be affirmed.

[30] *See also*, *e.g.*, *Marcum v. Scioto County.*, No. 1:10-cv-0790, 2012 U.S. Dist. LEXIS 93042 (S.D. Ohio July 5, 2012); *Warren v. Dart*, No. 1:09-cv-3512, 2012 U.S. Dist. LEXIS 70792 (N.D. Ill. May 22, 2012); *Bastilla v. Village of Cahokia*, No. 3:06-cv-0150, 2010 U.S. Dist. LEXIS 1939 (N.D. Ill. Jan. 11, 2010); *Martinez v. City of Oxnard*, No. 2:98-cv-9313, 2005 U.S. Dist. LEXIS 32189 (C.D. Cal. June 23, 2005); *Rosa v. Town of East Hartford*, No. 3:00-cv-1367, 2005 U.S. Dist. LEXIS 5302 (D. Conn. Mar. 31, 2005).

Respectfully submitted,

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July 30, 2012

CERTIFICATE OF SERVICE

I certify that on July 30, 2012, electronic copies of this brief were served through the Court's ECF system, to:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,402 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in the Times New Roman, 14-point font.

/s/Andrew Hudson
Attorney for Plaintiff
July 30, 2012

STATUTORY ADDENDUM

Except for the below, all applicable statutes are contained in the Brief for Appellants:

28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

CERTIFICATE OF SERVICE

I, Andrew S. Hudson, hereby certify that on September 25, 2012, I transmitted the foregoing "Brief for Appellee Lindsay Huthnance," revised per F.R.A.P. 30(c), to the Clerk of the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF filing system. Also on that date, I certify that the following counsel of record were served via the CM/ECF system:

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