UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Case No. 22-cr-92 (DLF)**
v.	:	
	:	
BRIAN GLENN BINGHAM,	:	
	:	
Defendant.	:	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS THREE, FOUR, FIVE, AND SIX

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits its Response in Opposition to Defendant's Motion to Dismiss Counts Three, Four, Five, and Six of the Indictment. *See* ECF No. 53. As set forth below, Defendant's motion to dismiss should be denied for two reasons. *First*, Counts Three and Four properly charge Defendant with entering and remaining in a restricted building or grounds under 18 U.S.C. § 1752(a)(1), and engaging in disorderly and disruptive conduct therein under 18 U.S.C. § 1752(a)(2). As courts in this district have unanimously held, Defendant's reading that only the U.S. Secret Service can designate the "restricted building or grounds" contravenes section 1752's plain language and legislative history. And the Vice President "temporarily visited" the U.S. Capitol Building on January 6, 2021, which brings Defendant's conduct within the broad sweep of section 1752. *Second*, Counts Five and Six of the Indictment under 40 U.S.C. §§ 5104(e)(2)(D) and 5104(e)(2)(G) are neither unconstitutionally overbroad nor vague. This Court has already rejected similar arguments in *United States v. Seitz*, No. 21-cr-279 (DLF), ECF No. 51 at 11-19 (D.D.C. Aug. 17, 2022).

FACTUAL BACKGROUND

On January 6, 2021, Defendant Brian Bingham unlawfully entered the U.S. Capitol building and made his way to an area just outside the Speaker's Lobby, which leads directly to the House chamber. While there, Defendant took photographs and shouted at police officers guarding the

entrance to the Speaker's Lobby, where another rioter had just been shot by law enforcement. Several minutes later, Defendant engaged officers in a physical altercation as those officers tried to clear the crowd out of the Capitol building. Despite verbal commands by officers to leave the building, Defendant confronted, grabbed, pushed, and struck a D.C. Metropolitan Police Department officer. As the Defendant continued the altercation, several other officers came to assist and were eventually able to push Defendant out of a doorway. Later that same day, Defendant exchanged Facebook messages saying, "I got to manhandl[e] 5 cops and live to tell." A few days later, he sent additional Facebook messages discussing the incident in which he explained that "[t]here was one scuffle I got in between the one cop and the crowd, he was being dirty."

On March 18, 2022, a grand jury returned a six-count indictment against Defendant. As relevant to Defendant's Motion to Dismiss, Counts Three and Four charge Defendant with knowingly entering and remaining in a restricted building or grounds, and engaging in disorderly and disruptive conduct with the intent to impede and disrupt the orderly conduct of government business in violation of 18 U.S.C. §§ 1752(a)(1) and (a)(2). Counts Five and Six allege that Defendant violated 40 U.S.C. §§ 5104(e)(2)(D) and (G) by willfully and knowingly engaging in disorderly and disruptive conduct in the Capitol building with the intent to impede, disrupt, and disturb the orderly conduct of Congress and willfully and knowingly parading, demonstrating, and picketing in any Capitol building.

LEGAL STANDARD

Federal Rule of Criminal Procedure 12 permits a party to raise in a pretrial motion "any defense, objection, or request that the court can determine *without a trial on the merits*." Fed. R. Crim. P. 12(b)(1) (emphasis added). A defendant may move before trial to dismiss an indictment, or a count thereof, for "failure to state an offense." *See* Fed. R. Crim. P. 12(b)(3)(B)(v).

However, the Federal Rules of Criminal Procedure state that an indictment is only required to contain "a plain, concise, and definite written statement of the essential facts constituting the offense

charged." Fed. R. Crim. P. 7(c). An indictment is sufficient under the Constitution and Rule 7 if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," *Hamling v. United States*, 418 U.S. 87, 117 (1974). An "indictment must be viewed as a whole and the allegations must be accepted as true at this stage of the proceedings." *United States v. Bowdoin*, 770 F. Supp. 2d 142, 145 (D.D.C. 2011). "[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And an indictment need not inform a defendant "as to every means by which the prosecution hopes to prove that the crime was committed." *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

Because pretrial dismissal of an indictment "directly encroaches upon the fundamental role of the grand jury, dismissal is granted only in unusual circumstances." *United States v. Ballestas*, 795 F. 3d 138, 148 (D.C. Cir. 2015) (internal quotation marks omitted). The court must decide "whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed." *Bowdoin*, 770 F. Supp. 2d at 146 (D.D.C. 2011).

ARGUMENT

Defendant retreads arguments that have been raised and rejected in numerous January 6 cases. For the reasons explained below, the Court should reject Defendant's arguments here as well.

I. THE INDICTMENT PROPERLY CHARGES 18 U.S.C. §§ 1752(a)(1) AND 1752(a)(2).

A. Section 1752 Does Not Require the Government to Prove that the Secret Service Designated the Restricted Area.

Defendant argues that Counts Three and Four should be dismissed for failure to state an offense because the U.S. Capitol Police—not the U.S. Secret Service—designated the "restricted area" around the U.S. Capitol on January 6, 2021. *See* ECF No. 53 at 3-6. Nothing in the express language of section 1752 requires that the Secret Service designate the "restricted area." And

Defendant's attempt to read such a requirement into the statutory language goes against the common sense reading of the text and its legislative history, as numerous courts in this district have held. *See, e.g.*, *United States v. Grider*, 617 F. Supp. 3d 42, 53 (D.D.C. July 29, 2022); *United States v. Bingert*, 605 F. Supp. 3d 111, 131 (D.D.C. 2022); *United States v. Puma*, 596 F. Supp. 3d 90, 109 (D.D.C. 2022); *United States v. Andries*, No. 21-cr-93 (RC), 2022 WL 768684, at *14 (D.D.C. Mar. 14, 2022); *United States v. Bozell*, No. 21-cr-216 (JDB), 2022 WL 474144, at *8 (D.D.C. Feb. 16, 2022); *United States v. McHugh*, 583 F. Supp. 3d 1, 30-32 (D.D.C. 2022); *United States v. Nordean*, 579 F. Supp. 3d 28, 59 (D.D.C. 2021); *United States v. Mostofsky*, 579 F. Supp. 3d 9, 28 (D.D.C. 2021); *United States v. Griffin*, 549 F. Supp. 3d 49, 57 (D.D.C. 2021).

Section 1752 makes it a crime to knowingly enter or remain "in any restricted building or grounds" and to engage "in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds." 18 U.S.C. §§ 1752(a)(1), (a)(2).[1] The plain language of section 1752 imposes no requirement that the "restricted buildings or grounds" must be restricted by the Secret Service for there to be a violation of the statute. Defendant's attempt to read such a requirement as implied in the statutory language goes against the common sense reading of the text. Indeed, "the only reference in the statute to the Secret Service is to its protectees. Section 1752 says nothing about who must do the restricting." *Griffin*, 549 F. Supp. at 55; *see also Bingert*, 605 F. Supp.3d at 131 ("[D]efendants fashion a bizarre requirement, seemingly out of thin air: that *only* the Secret Service can designate an area as restricted" (emphasis in original)). Where, as here, the words of the statute are unambiguous, "the judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020).

[1] The statute defines "restricted building or grounds" to mean "any posted cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). Through a cross-reference, section 1752 makes clear—and Defendant does not appear to dispute—that "person[s] protected by the Secret Service" include the Vice President. *Id.* § 1752(c)(2); *see id.* § 3056.

Even if the language of section 1752 were ambiguous, and it is not, the legislative history of section 1752 confirms the plain reading of the text. As Defendant recognizes, when section 1752 was first enacted in 1970, the Secret Service was part of the Treasury Department. *See* ECF No. 53 at 3. The original version of the statute explicitly incorporated regulations promulgated by the Treasury Department governing restricted areas. *See United States v. Bursey*, 416 F.3d 301, 306-07 (4th Cir. 2005) (noting that definition of restricted area required interpretation of Treasury regulations). Specifically, subsection (d) of section 1752 gave authority to Treasury to "prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President is or will be temporarily visiting." Pub. L. No. 91-644, Title V, § 18, 84 Stat. 1891-92 (Jan. 2, 1971). However, when Congress revised section 1752 in 2006, it struck subsection (d) from the statute, eliminating the requirement that "restricted building or grounds" be defined or designated by the Secret Service or any other law enforcement agency. Pub. L. No. 109-177, Title VI, § 602, 120 Stat. 192, 252 (Mar. 9, 2006). In 2012, Congress further reinforced this interpretation by adding subsection (c), which explicitly defines "restricted building or grounds." Pub. L. No. 112-98, Title I, § 2, 126 Stat. 263 (March 8, 2012). Contrary to Defendant's reading, the legislative history shows that Congress deliberately excised any requirement that the Secret Service designate the restricted area.

Both the plain language and legislative history of section 1752 confirm that there is no requirement—express or implied—that an area be restricted by a particular law enforcement agency, as courts in this district have unanimously held. *See Grider*, 617 F. Supp. at 53 (collecting cases and explaining that "nothing in the statutory text requires the Secret Service to be the entity to restrict or cordon off a particular area, nor does Grider point to any provision in the statute in support of such a proposition" (internal quotation marks omitted)).[2] Accordingly, the Government need not allege that

[2] As every other court to address this issue has concluded, the language of section 1752 is not

the Secret Service designated a restricted perimeter around the Capitol building and grounds on January 6, 2021. Defendant's contention that Counts Three and Four are defective should be rejected.

B. The Vice President Was "Temporarily Visiting" the Capitol on January 6, 2021.

Defendant next argues that, even if the Capitol Police were authorized to restrict the area around the Capitol, section 1752(c)(1)(B) does not apply because the Vice President was not "temporarily visiting" the Capitol on January 6. The same argument has been rejected by every court in this district to have considered Defendant's "strained reading of this fairly straightforward phrase." *United States v. Anthony Williams*, No. 21-cr-377 (BAH) (D.D.C. June 8, 2022), ECF No. 88 at 5-7.[3]

Section 1752 defines "restricted building or grounds" to mean "any posted cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service is or will be *temporarily visiting*." 18 U.S.C. § 1752(c)(1)(B) (emphasis added). Because the statute does not define "temporarily visiting," the court must give those words their plain meaning. *See Puma*, 596 F. Supp at 112. Defendant suggests that the plain meaning of "temporary" is "lasting for a time only" and "visiting" means "invited to join or attend an institution for a limited time." ECF No. 53 at 7. Even under these definitions, Vice President Pence was temporarily visiting the Capitol on January 6, as courts in this district have unanimously found using the same or similar definitions. *See Williams*, 2022 WL 2237301, at *19 ("[Vice President Pence] went to the Capitol with a discrete purpose: to certify the Electoral College votes, a process that by law is contemplated to take one day"); *Puma*, 596 F. Supp. 3d at 112 ("Under these definitions, Mr. Pence was temporarily visiting the Capitol on January 6, 2021: he was there for a limited time only in order to preside over

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ambiguous, and the Court need not resort to the rule of lenity. *See Griffin*, 549 F. Supp 3d at 57-58.

[3] *See also United States v. Riley Williams*, No. 21-cr-618 (ABJ), 2022 WL 2237301, at *19 (D.D.C. June 22, 2022); *Bingert*, 605 F. Supp. 3d at 131-32; *Puma*, 596 F. Supp. 3d at 109, 112-14; *Andries*, 2022 WL 768684, at *16-17; *McHugh*, 583 F. Supp. 3d at 32-35.

and participate in the Electoral College vote certification"); *Andries*, 2022 WL 768684, at *16 ("[Vice President Pence] went to the Capitol for the business purpose of carrying out his constitutionally assigned role in the electoral count proceeding; he intended to and did stay there only for a limited time").

Defendant nonetheless urges the Court to adopt a more restrictive interpretation of "temporarily visiting" to reach only "temporary travel to a location where the person does not normally live or work on a regular basis." ECF No. 53 at 7. According to Defendant, this would exclude time spent in the Capitol building because it "is a federal government building in the District of Columbia where he worked" and where the Vice President maintained a permanent office as President of the Senate. *Id.* The structure of the statute makes clear that Defendant's reading "would produce absurd results." *Williams*, ECF No. 88 at 6. If "temporarily visiting" were construed narrowly as Defendant suggests, an individual could violate section 1752 at the official residence of a Secret Service protectee or at a location that the protectee visits briefly outside of Washington, D.C., but not at any location in Washington, D.C. (other than an official residence) where the protectee works or maintains an office—unless that location is otherwise "restricted in conjunction with an event designated as a special event of national significance." 18 U.S.C. § 1752(c)(1)(C). Such a carveout would undermine the government's ability to protect the President and Vice President by restricting section 1752's application to only locations outside the District of Columbia and their official residence. *See Puma*, 596 F. Supp. 3d at 114 ("[Defendant's] proposed construction would leave an arbitrary gap in the application of the law by excluding such locations from its reach.").

In addition to defying the statute's structure, this enforcement gap would also undermine section 1752's purpose. In enacting section 1752, Congress sought to protect "not merely the safety of one man, but also the ability of the executive branch to function in an orderly fashion and the capacity of the United States to respond to threats and crises affecting the entire free world." *United*

States v. Caputo, 201 F. Supp. 3d 65, 70 (D.D.C. 2016) (quoting *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1528 (D.C. Cir. 1984)). To that end, the statute is designed to deter and punish individuals who seek unauthorized access to the White House grounds and the Vice President's residence—fixed locations where the President and Vice President live and work, 18 U.S.C. § 1752(c)(1)(A); and also any other "building or grounds" where they (or other protectees) happen to be "temporarily visiting," 18 U.S.C. § 1752(c)(1)(B). Construing the statutory provisions together, section 1752(c)(1)(A) and (c)(1)(B) protect the President and Vice President in their official residences and wherever else they may go. Interpreting the statute as Defendant suggests would create a gap in section 1752's coverage by removing areas, such as the U.S. Capitol, from protection. It would undermine the very purpose of section 1752 by endangering the leaders of the Executive Branch even as they perform their official duties. That gap is both illogical and contrary to congressional purpose where, "at every turn," Congress has "*broadened* the scope of the statute and the potential for liability." *Griffin*, 549 F. Supp. 3d at 56 (emphasis in original).

Moreover, despite having formal office space set aside at Capitol, "the Vice President is principally an executive officer who spends little time at the Capitol and likely even less in her 'office' there." *McHugh*, 583 F.Supp.3d at 35; *accord Andries*, 2022 WL 768684, at *17 ("Like a President who maintains an office at his home-state residence, and like the CEO who maintains a reserve office at her firm's satellite location, Vice President Pence held an office at the Capitol, but did not use that office as his primary, regular workspace."). Thus, when Vice President Pence traveled to the Capitol on January 6 to oversee the Joint Session of Congress, he was "visiting" the building. And because Vice President Pence intended to leave at the close of the session, this visit was "temporary."

Finally, the cases cited by Defendant—which involve either an arrest or conviction under section 1752 at a place other than the U.S. Capitol Building—do not discuss the "temporarily visiting" language. *See* ECF No. 53 at 8 (citing *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005); *United*

States v. Junot, 902 F.2d 1580 (9th Cir. 1990) (unpublished); *Blair v. City of Evansville, Ind.*, 361 F. Supp. 2d 846 (S.D. Ind. 2005)). But "the fact that those situations clearly qualify" under section 1752 "does not mean that the relevant situation on January 6 cannot count as well." *Williams*, ECF No. 88 at 6. This Court should therefore reject Defendant's crabbed reading of "temporarily visiting" under section 1752(c)(1)(B).

II. THE INDICTMENT PROPERLY CHARGES 40 U.S.C. §§ 5104(e)(2)(D) AND 5104(e)(2)(G).

Defendant's motion to dismiss Count Five under 40 U.S.C. § 5104(e)(2)(D)[4] and Count Six under 40 U.S.C. § 5104(e)(2)(G) is without merit and should be denied. Defendant advances two arguments: (i) section 5104(e)(2)(G) is substantially overbroad under the First Amendment, and (ii) section 5104(e)(2)(G) is unconstitutionally vague on its face. *See* ECF No. 53 at 9-15. The same meritless arguments have been rejected in other January 6 cases. *See United States v. Gray*, No. 21-cr-495 (ABJ), 2023 WL 2998862, at *11-14 (D.D.C. Jan. 26, 2023); *United States v. Rhine*, No. 21-cr-687 (RC), 2023 WL 372044, at *13-16 (D.D.C. Jan. 24, 2023); *United States v. Nassif*, 628 F. Supp. 3d 169, 177-84 (D.D.C. 2022); *United States v. Seitz*, No. 21-cr-279 (DLF), ECF No. 51 at 11-19 (D.D.C. Aug. 18, 2022).

A. Section 5104(e)(2)(G) Is Not Substantially Overbroad Under the First Amendment.

As this Court has held, section 5104(e)(2)(G) is not substantially overbroad. *See Seitz*, ECF No. 51 at 12-14. In the First Amendment context, "[f]acial challenges are disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Facial overbreadth challenges—in which a defendant asserts that a statute is invalid because it would be unconstitutional in a "substantial number" of *other* cases—are even more exceptional. *Id.* at 449 n.6. "'Because of the

[4] Defendant does not support his motion to dismiss Count Five (40 U.S.C. § 5104(e)(2)(D)) with any argument. *See* ECF No. 53 at 9-15.

wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment,'" overbreadth is "'strong medicine' to be employed 'only as a last resort.'" *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

The Supreme Court has therefore "vigorously enforced the requirement that a statute's overbreadth be *substantial* . . . relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801. And laws that are "not specifically addressed to speech" are far less likely to present such a danger. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

Here, Defendant's challenge fails this demanding standard. Because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers," the "first step in overbreadth analysis is to construe the challenged statute." *Williams*, 553 U.S. at 293. The prohibition in section 5104(e)(2)(G) presents "no ambiguity"; it "tells the citizen that it is unlawful for him" to parade, demonstrate, or picket inside the Capitol Building. *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972). The operative verbs—parade, demonstrate, and picket—principally target conduct rather than speech, and those verbs are paired with the "willfully and knowingly" scienter requirements. *See Williams*, 553 U.S. at 294 (focusing on scienter requirement in determining that statute was not overbroad). And the subsequent six words—"in any of the Capitol Buildings"—make clear that the statute prohibits conduct within a nonpublic forum, which cabins the overbreadth of which Defendant complains. *Nassif*, 628 F. Supp. 3d at 179.

Defendant cannot show that section 5104(e)(2)(G) is substantially overbroad relative to its plainly legitimate sweep.

Defendant's own prosecution—which involves physically trespassing into the restricted area of the Capitol and participating in the civil disorder by obstructing and assaulting law enforcement—is illustrative of the numerous constitutionally legitimate applications of the statute to conduct. And far from showing a "realistic danger" of constitutionally problematic applications in other cases, *Taxpayers for Vincent*, 466 U.S. at 801, Defendant fails to identify a single prosecution based on protected speech. The scienter limitations render the possibility of any such prosecutions marginal at best, and any such case could be the subject of an as-applied challenge *in that case*. Nothing calls for the "strong medicine" of an overbreadth invalidation.

Defendant's reliance on *Bynum v. U.S. Capitol Police Board*, 93 F. Supp. 2d 50 (D.D.C. 2000), is misplaced. ECF No. 53 at 10-11. In *Bynum*, Judge Friedman ruled that a Capitol Police regulation interpreting the predecessor statute to section 5104(e)(2)(G), which defined "demonstration activity" to include "holding vigils" and "sit-ins," swept too broadly because it "invited the Capitol Police to restrict behavior that is no way disruptive." 93 F. Supp. 2d at 53, 57. For starters, *Bynum*'s invalidation of a Capitol Police regulation—which was applied to an individual who was denied permission to pray inside the Capitol building—does not inform the statutory challenge that Defendant presses here.[5] Moreover, in *Bynum*, Judge Friedman concluded that the inside of the Capitol building is a nonpublic forum, where the government may restrict First Amendment activity if "the restrictions are 'viewpoint neutral' and 'reasonable in light of the purpose served by the forum.'" *Id.* at 56 (citing *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985)); *see Nassif*, 628 F. Supp. 3d at 180. Judge Friedman reasoned that,

[5] Defendant's invocation of the current Capitol Police regulation interpreting section 5104(e)(2)(G) is similarly inapposite. Defendant does not—and could not—challenge that regulation in this case.

although the regulation swept too broadly, section 5104(e)(2)(G) sets forth "legitimate purposes" that are "aimed at controlling only such conduct that would disrupt the orderly business of Congress—not activities such as quiet praying, accompanied by bowed heads and folded hands." *Bynum*, 93 F. Supp. 2d at 57, 58. The court ultimately concluded that, unlike the regulation at issue in *Bynum*, the statute itself was not substantially overbroad relative to its plainly legitimate purpose. *See id.* at 55-56; *Nassif*, 628 F. Supp. 3d at 180-81.

Defendant's reliance on *Lederman v. United States*, 89 F. Supp. 2d 29 (D.D.C. 2000), is equally unavailing. ECF No. 53 at 12. Like *Bynum*, *Lederman* involved a challenge to a Capitol Police regulation not at issue here, and is of marginal, if any, relevance for that reason alone. Moreover, the regulation limited "demonstration activity," which in *Lederman* involved the distribution of leaflets in support of the arts, to approximately 250 feet around the Capitol building. *Id.* at 32. The *Lederman* court concluded that the Capitol grounds constitute a traditional public forum, *id.* at 37, and that although the regulation left open alternative channels for expression, its imposition of a total ban burdened more speech than necessary. *Id.* at 38-39. A hypothetical "group of congressional staffers . . . who stood outside the Capitol arguing about the latest campaign finance bill" would fall within the regulation's sweep. *Id.* at 41. Here, by contrast, section 5104(e)(2)(G)'s prohibition applies only within the nonpublic forum inside the Capitol buildings, rendering such a hypothetical inapplicable. As this Court has held, section 5104(e)(2)(G) does not cover a substantial amount of protected expressive activity. *See Seitz*, ECF No. 51 at 14.

Finally, unable to rely on the statutory language and precedent to support his argument, Defendant points to select statements during the congressional debate on section 5104(e)(2)(G). But Defendant's "reliance on legislative history is misplaced where the plain text of the statute leaves no need to resort to alternative methods of interpretation." *Nassif*, 628 F. Supp. 3d at 183. The floor statements on which Mitchell relies are "particularly 'unreliable.'" *United States v. Powell*, No. 21-

cr-179, ECF No. 73, at 6 (D.D.C. July 8, 2022) (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921)). For example, in at least one instance, Defendant's citation to the legislative history is misleading. He accurately quotes Representative O'Neal's statement that O'Neal is "a little bit disturbed" about the language of the predecessor to section 5104(e)(2)(G). *See* ECF No. 53 at 10. But Defendant omits the later discussion in which Representatives O'Neal makes clear that the basis for his concern was that the prohibition does not also include the Capitol Grounds. *See* 113 Cong. Rec. H29,390 (daily ed. Oct. 19, 1967) (statement of Rep. O'Neal) (asking if "anyone would have an objection to adding the word 'grounds' to the new language").

B. Section 5104(e)(2)(G) Is Not Unconstitutionally Vague.

Defendant is also incorrect in asserting that section 5104(e)(2)(G) is "unconstitutionally vague on its face." ECF No. 53 at 12. His argument should be rejected consistent with other January 6 cases. *See Nassif*, 628 F. Supp. 3d at 182-84; *Seitz*, ECF No. at 51 at 15-17.

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV. An outgrowth of the Due Process Clause, the "void for vagueness" doctrine prevents the enforcement of a criminal statute that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). To ensure fair notice, "'a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)).

A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling v. United States*,

561 U.S. 358, 403 (2010). "'Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'" *Bronstein*, 849 F.3d at 1107 (quoting *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam)). Rather, a provision is impermissibly vague only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306. The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

Here, Defendant fails to overcome the strong presumption that section 5104(e)(2)(G) passes constitutional muster. Section 5104(e)(2)(G) does not tie criminal culpability to "wholly subjective" terms such as "annoying" or "indecent" that have no "narrowing context" or "settled legal meanings." *Williams*, 553 U.S. at 306; *see Nassif*, 628 F. Supp. 3d at 183. Nor does it require application of a legal standard to an "idealized ordinary case of the crime" as opposed to "real-world conduct." *Johnson*, 576 U.S. at 604. That the statute makes it unlawful to "willfully and knowingly … parade, demonstrate, or picket in any of the Capitol Buildings," gives rise to "no such indeterminacy." *Williams*, 553 U.S. at 306; *see Nassif*, 628 F. Supp. 3d at 183 ("This language provides sufficient guidance as to what is prohibited"). While section 5104(e)(2)(G) may "require a person to conform his conduct to an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask," it "does not render the statute constitutionally infirm." *Nassif*, 628 F. Supp. 3d at 183, 184 (cleaned up).

C. Count Five Properly States an Offense.

Defendant also seeks to dismiss Count Five, which charges a violation of 40 U.S.C. § 5104(e)(2)(D), but does not advance any arguments in support of dismissal. Count Five of the Indictment satisfies Federal Rule of Criminal Procedure 7(c)(1), which requires "a plain, concise, and

definite written statement of the essential facts constituting the offense charged." Specifically, Count Five "contains the elements of the offense changed" and "fairly informs" Defendant of the charge against which he must defend—*i.e.*, his conduct violated the statute on January 6, 2021, in the District of Columbia. *Hamling*, 418 U.S. at 117. Nothing more is required. To the extent that Defendant argues that section 5104(e)(2)(D) is also unconstitutionally overbroad and vague, this argument has already been rejected by courts in this district. *See Rhine*, 2023 WL 372044, at *13-16; *United States v. Baez*, No. 21-cr-507, 2023 WL 3846169, at *7-10 (D.D.C. June 2, 2023).

CONCLUSION

For these reasons, the United States respectfully requests that the Court deny Defendant's motion to dismiss.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
DC Bar No. 481052

By: */s/ Jake E. Struebing*
JAKE E. STRUEBING
Assistant United States Attorney
601 D Street, N.W.
Washington, DC 20530
D.C. Bar No. 1673297
(202) 252-6931
Jake.Struebing@usdoj.gov

CHRISTOPHER D. AMORE
Assistant United States Attorney
United States Attorney's Office
Capitol Siege Section Detailee
601 D Street, N.W.
Washington, DC 20530
N.Y. Bar No. 5032883
(973) 645-2757
Christopher.Amore@usdoj.gov

CERTIFICATE OF SERVICE

I certify that, on November 6, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification to all counsel of record.

By: */s/ Jake E. Struebing*

JAKE E. STRUEBING
Assistant United States Attorney
601 D Street, N.W.
Washington, DC 20530
D.C. Bar No. 1673297
(202) 252-6931
Jake.Struebing@usdoj.gov