

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES OF AMERICA**

**v.**

**HECTOR VARGAS SANTOS**

**Case No. 21-cr-47 (RDM)**

**GOVERNMENT OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS COUNT FOUR OF THE INFORMATION**

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this response to Defendant Hector Vargas Santos's Motion to Dismiss Count Four of the Information, charging him with violating Title 40 U.S.C. § 5104(e)(2)(G). ECF No. 52. The defendant's arguments lack merit and the motion should be denied.

**BACKGROUND**

The defendant was charged by criminal information with one count each of: (1) entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); (2) disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); (3) disorderly conduct on Capitol Grounds, in violation of 40 U.S.C. § 5104(e)(2)(D); and (4) obstructing or impeding passage through or within Capitol Grounds, in violation of 40 U.S.C. § 5104(e)(2)(E). ECF No. 3.

These charges stem from the defendant's conduct within the U.S. Capitol Building and Grounds on January 6, 2021, as a Joint Session of Congress convened in the Capitol to certify the 2020 U.S. Presidential Election. The Capitol's exterior grounds were closed to the public and surrounded by law enforcement officers, barricades, and signage on that day.

Before the Joint Session began at 1:00 p.m., a large crowd of individuals had assembled around the Capitol grounds and violently disassembled and trampled metal barriers that had prominent signs reading, “AREA CLOSED By order of the United States Capitol Police Board.” The defendant was among them on the West Front of the Capitol grounds, and was one of the first rioters to climb over green snow fencing in place. Outside the Capitol, between 12:53 and 2:00 p.m., law enforcement struggled to maintain control of the growing crowd. Crowd members, including the defendant, eventually forced their way through, up, and over additional barricades and advanced to the building’s exterior façade. During this time, Capitol Police officers attempted to maintain order and stop the crowd from entering the Capitol.

Just before 1:00 p.m., the defendant moved a barricade blocking members of the crowd from reaching the Lower West Terrace of the Capitol and ran up to the marble façade of the building. There, the defendant climbed up on a marble railing and waived a yellow “Don’t Tread on Me” flag, until several members of law enforcement ordered him to come off the railing. The defendant remained on the grounds for approximately two more hours, until he entered the building on the East side through the Rotunda Doors, at approximately 3:21 p.m. The defendant ultimately pushed through a line of officers into the Rotunda, where he filmed a video of himself on Facebook, stating “we took over this motherfucker, bro. We took over this motherfucking Capitol.” The defendant was then escorted from the building at approximately 3:27 p.m.

The defendant has now been convicted at a jury trial on all counts in the Information.

### **ARGUMENT**

The defendant argues that prosecuting him for his January 6<sup>th</sup> conduct violates the First Amendment and Fifth Amendments, both on as-applied and facial challenges. These claims fail.

## I. Legal Standard

A defendant may move before trial to dismiss an information, or a count thereof, for “failure to state an offense.” *See* Fed. R. Crim. P. 12(b)(3)(B)(v). The main purpose of a charging document, such as an indictment or (as here) an information, is to inform the defendant of the nature of the accusation. *See United States v. Ballestas*, 795 F.3d 138, 148-149 (D.C. Cir. 2015) (discussing purpose of an indictment). Thus, an information need only contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). When assessing the sufficiency of criminal charges before trial, an information “must be viewed as a whole and the allegations [therein] must be accepted as true.” *United States v. Bowdoin*, 770 F. Supp. 2d 142, 145 (D.D.C. 2011)). The “key question” is whether “the allegations ..., if proven, are sufficient to permit a petit jury to conclude that the defendant committed the criminal offense as charged.” *Id.*

Congress passed the predecessor statute to Section 5104, which prohibits certain “unlawful activities” in Capitol Buildings, or on Capitol Grounds, or both, in 1946. *See* Act of July 31, 1946, 60 Stat. 719, 720 (then codified at 40 U.S.C. § 193); *see Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 53 (D.D.C. 2000). One provision in the 1946 legislation made it a crime to “parade, stand, or move in processions or assemblages” or to display “any flag, banner or device designed or adapted to bring into public notice any party, organization, or movement” on Capitol Grounds. *See* 40 U.S.C. § 193g (1964).<sup>1</sup> In 1967, Congress enacted the provision at issue here, which makes it a crime to “willfully and knowingly parade, demonstrate, or picket in any of the Capitol Buildings.” 40 U.S.C. § 5104(e)(2)(G) (originally enacted as 40 U.S.C. § 193f(b)(7)). The 1967

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<sup>1</sup> The prohibition contained certain exceptions not relevant here. *See* 40 U.S.C. §§ 193j & 193k (1964).

legislation thus “ma[de] clear that the 1946 act relates not only to the Capitol Grounds but also to acts committed within the Capitol Building itself as well as other buildings located on the Capitol Grounds.” 113 Con. Rec. H29,390 (daily ed. Oct. 19, 1967) (statement of Rep. Anderson). In 1972, a three-judge panel of this Court struck down the prohibition in Section 193g (parading on Capitol Grounds), reasoning that although the government had a substantial interest in protecting the Capitol Grounds, that interest was not sufficient to “override the fundamental right to petition ‘in its classic form’ and to justify a blanket prohibition of all assemblies, no matter how peaceful and orderly, anywhere on Capitol Grounds.” *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 585 (D.D.C. 1972). In reaching that conclusion, the three-judge panel identified “existing laws regulating conduct” in the Capitol that its decision did not affect, including the prohibition at issue here. *See id.* at 587-88.

In the First Amendment context, as in others, “[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, constitutionally applied to him, is nevertheless invalid because it would be unconstitutional in a “substantial number” of *other* cases, *id.* at 449 n.6 (internal quotation marks omitted)—are even more exceptional. ““Because of the 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)); *cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting the “substantial social costs created by the overbreadth doctrine when it blocks application of a law to . . . constitutionally unprotected conduct”) (emphasis omitted).

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 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. *Hicks*, 539 U.S. at 124; see *id.* (observing that “an overbreadth challenge” to such a law will “[r]arely, if ever, . . . succeed”).

“To prevail on an as-applied First Amendment challenge,” a defendant “must demonstrate that the statute is unconstitutional as applied to his particular expressive activity.” *United States v. Caputo*, 201 F. Supp. 3d 65, 71 (D.D.C. 2016). The Court must “first assess whether [the defendant’s] conduct is, in fact, expressive, and then determine whether the challenged statute ‘is related to the suppression of free expression.’” *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 403, (1989)). If the statute is not related to expression, then the less stringent standard the Supreme Court announced in *United States v. O’Brien*, 391 U.S. 367, 377 (1968)), for regulation of noncommunicative conduct controls. *Caputo*, 201 F. Supp. 3d at 71. That test has four prongs: first, the challenged regulation must be “within the constitutional power of government”; second, it must “further[ ] an important or substantial government interest”; third, this interest must be “unrelated to the suppression of free expression”; and fourth, the incidental restriction on First Amendment freedoms must be “no greater than is essential to the furtherance of that interest.” *Id.* (citing *O’Brien*, 391 U.S. at 377).

Two judges in this Courthouse have denied similar challenges in the context of January 6<sup>th</sup> offenses. In *United States v. John Nassif*, 21-cr-421 (JDB), ECF No. 42, 2022 WL 4130841, (D.D.C. Sept. 12, 2022), the Honorable Judge Bates denied a similar motion based on facial challenge to 40 U.S.C. § 5104(e)(2)(G), and in *United States v. Ethan Seitz*, 21-cr-279, Judge Friedrich made an oral ruling denying the motion. See Att. A, *Seitz* transcript. This Court should follow the reasoning of those Judges opinions and deny this motion.

## **II. The defendant’s prosecution does not violate the First Amendment.**

The defendant contends that 40 U.S.C. § 5140(e)(2)(G) “tramples on all peaceful and orderly activities that could...fall under the three modes of First Amendment expression” in the statute. ECF No. 53, at 4. The defendant advances, essentially, three arguments: (1) Section 5104(e)(2)(G) is overbroad under the First and Fifth Amendments (ECF No. 53, at 10, 13-16); (2) Section 5104(e)(2)(G) violates constitutional vagueness and fair notice doctrines (ECF No. 53, at 10, 12-13); and (3) Section 5104(e)(2)(G) improperly restricts First Amendment activities (ECF No. 53, at 10-11). Each claim fails.<sup>2</sup>

### **A. Section 5104(e)(2)(G) is not unconstitutionally overbroad**

The defendant’s overbreadth challenge fails the demanding standard of a facial challenge to Section 5104(e)(2)(G). *See Washington State Grange*, 552 U.S. at 449-50. 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

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<sup>2</sup> In addition to lacking merit, these claims are untimely. This Court set a briefing schedule for all pre-trial motions well in advance of the trial date. Motions were due to be filed on or before September 19, 2022. *See* Minute Order April 18, 2022. The defendant first raised this challenge on the first day of trial, far outside the filing deadline, and should be dismissed for that reason as well.

that it is unlawful for him” to parade, demonstrate, or picket inside the Capitol Building. *Jeanette Rankin Brigade*, 342 F.Supp. at 583. 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). At the very least, the defendant cannot show that Section 5104(e)(2)(G) is “substantial[ly]” overbroad relative to its “plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 n.6 (internal quotation marks omitted). The defendant’s own prosecution—which involved physically trespassing into the restricted Capitol with a mob of individuals, and breaking through a police line to gain entry into the Rotunda where he live-streamed his actions on Facebook—is illustrative of the numerous constitutionally legitimate applications of the statute to conduct and unprotected speech. And far from showing a “realistic danger” of constitutionally problematic applications in other cases, *Taxpayers for Vincent*, 466 U.S. at 801, the defendant fails to identify a single actual example of a prosecution based on protected speech. The limitations inherent in the crime of conviction, moreover, render the possibility of any such prosecutions marginal at best, and any such case could be the subject of an as-applied challenge. Nothing at all calls for the “strong medicine,” *Los Angeles Police Dep’t*, 528 U.S. at 39 (internal quotation marks omitted), of overbreadth invalidation.

The defendant’s counterarguments lack merit. First, he relies (ECF No. 52, at 5) on *Bynum v. U.S. Capitol Police Bd.*, where Judge Friedman ruled that a Capitol Police regulation interpreting Section 5104(e)(2)(G)<sup>3</sup> that 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. As an initial matter, *Bynum*’s invalidation of a Capitol

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<sup>3</sup> At the time, the provision was Section 193(f)(b)(7).

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 the defendant presses here. Moreover, Judge Friedman in *Bynum* 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)). He reasoned that, although the regulation went too far, Section 5104(e)(2)(G) itself set forth “legitimate purposes,” *id.* at 57, that were “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,” *id.* at 58.<sup>4</sup> In short, Judge Friedman concluded that, unlike the regulation at issue in *Bynum*, the statute itself was not “substantial[ly]” overbroad relative to its “plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 n.6 (internal quotation marks omitted).

The defendant’s reliance (ECF No. 52, at 6) on *Lederman v. United States*, 89 F. Supp. 2d 29 (D.D.C. 2000), is also unavailing. Like *Bynum*, *Lederman* involved a challenge to a Capitol Police regulation, and is of marginal, if any, relevance for that reason. Furthermore, the regulation at issue there limited the areas within the Capitol *Grounds* in which individuals could engage in “demonstration activity,” which in *Lederman* involved the distribution of leaflets in support of the arts. *Id.* at 32. Relying in part on *Jeanette Rankin Brigade*, *supra*, Judge Roberts in *Lederman*

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<sup>4</sup> The defendant suggests (ECF No. 52, 5-7) that the legislative debate over what became Section 5104(e)(2)(G) undercuts Judge Friedman’s interpretation that the statute was designed to prevent conduct that disrupted congressional business. Even putting aside the limited value of legislative history on this point, the defendant confuses congressional debate about whether to add an additional intent requirement to the existing “willfully and knowingly” scienter in the statute with the actus-reus question—what type of conduct does “demonstrate” in Section 5104(e)(2)(G) encompass—at issue in *Bynum*.

concluded that the entire Capitol Grounds constitutes 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. The hypothetical “group of congressional staffers” whose conduct would violate the regulation (and who the defendant cites (ECF No. 52, at 17)) “stood outside the Capitol,” and thus “within a traditional public forum.” *Id.* at 41. But Section 5104(e)(2)(G)’s prohibition applies only within the nonpublic forum inside the Capitol buildings, rendering the hypothetical inapt.

**B. Section 5104(e)(2)(G) is not unconstitutionally vague.**

The defendant also contends (ECF No. 52, at 12-13) that Section 5104(e)(2)(G) is unconstitutionally vague on its face.<sup>5</sup> That contention is flawed.

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, “[g]enerally, a

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<sup>5</sup> The defendant thus asserts a facial vagueness challenge. As a general matter, one making such a facial vagueness challenge must demonstrate that the law is “impermissibly vague in all its applications”; one whose conduct is “clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Vill. of Hoffman Ests.*, 455 U.S. 489, 494-95 (1982). The defendant cannot surmount that demanding standard. Where the facial challenge relies on a First Amendment theory, a facial challenge may be available where the challenger shows that the law in question “reaches a substantial amount of constitutionally protected conduct.” *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (citing *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983)). Even assuming that is viable theory under governing law, *see Quigley v. Giblin*, 569 F.3d 449, 457-58 (D.C. Cir. 2009) (questioning the breadth of “First Amendment vagueness doctrine”), the defendant’s facial vagueness claim fails for the same reasons that his overbreadth challenge falls short.

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)). To avoid arbitrary enforcement, the law must not “vest[] virtually complete discretion” in the government “to determine whether the suspect has [violated] the statute.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

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; see *Smith v. Goguen*, 415 U.S. 566, 578 (1974). 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).

A statutory provision is therefore “not rendered unconstitutionally vague because it ‘do[es] not mean the same thing to all people, all the time, everywhere.’” *Bronstein*, 849 F.3d at 1107 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). A statute is instead vague where it fails to specify any “standard of conduct . . . at all.” *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). “As a general matter,” however, a law is not constitutionally vague where it “call[s] for the

application of a qualitative standard . . . to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.’” *Johnson*, 576 U.S. at 603-04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

The defendant fails to overcome the strong presumption that Section 5104(e)(2)(G) passes constitutional muster. See *United States v. Nat’l Dairy Products Corp.*, 372 U.S. 29, 32 (1963) (“The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.”). Section 5104(e)(2)(G) does not tie criminal culpability to “wholly subjective” terms such as “annoying” or “indecent” that are bereft of “narrowing context” or “settled legal meanings,” *Williams*, 553 U.S. at 306, nor does it require application of a legal standard to an “idealized ordinary case of the crime,” *Johnson*, 576 U.S. at 604. The statute requires that a defendant, acting willfully and knowingly, parades, pickets, or demonstrates—in short, engages in disruptive conduct—inside the Capitol building. See *Bynum*, 93 F. Supp. 2d at 57-58 (explaining that Capitol Police regulation at issue in that case was unnecessary because Congress had provided “more than sufficient guidance” in Section 5104(e)(2)(G)’s statutory text). While “it may be difficult in some cases to determine whether these clear requirements have been met,” “‘courts and juries every day pass upon knowledge, belief and intent—the state of men’s minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.’” *Id.* (quoting *American Communications Ass’n, CIO v. Douds*, 339 U.S. 382, 411 (1950)). For these reasons, the vagueness challenge must fail.

**C. The defendant’s prosecution under the charged statutes does not impermissibly restrict First Amendment activities.**

Other judges in this Courthouse have found that the criminal actions taken by defendants on January 6, 2021 is not expressive activity covered by the First Amendment, but mostly in the context of cases charged as violations of 18 U.S.C. § 1512(c)(2). See, e.g., *United States v. Nordean*, No. 21-cr-175, 579 F.Supp.3d 28, at \*13 (D.D.C. Dec. 28, 2021)(conduct done with the “inten[t] to obstruct Congress’s performance of its constitutional duties ... is simply not protected by the First Amendment.”); *United States v. Caldwell*, 581 F. Supp. 3d 1, 34 (D.D.C. 2021), reconsideration denied, No. 21-CR-28 (APM), 2022 WL 203456 (D.D.C. Jan. 24, 2022)(“[T]he indictment here reflects that the government is not prosecuting protected speech. Rather, it charges Defendants with conspiring ‘to stop, delay, and hinder the Certification of the Electoral College vote.’”) But, even assuming *arguendo* some aspect of the defendant’s conduct constitutes expressive First Amendment activity, the government’s decision to prosecute him under the charged statutes passes muster under *O’Brien*.

First, the violation of law charged here are “within the constitutional power of the government.” *O’Brien*, 391 U.S. at 377. The defendant does not (and cannot) contest the government’s right to prohibit trespassing and disorderly conduct on its property.

Second, “when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *O’Brien*, 391 U.S. at 376 (cleaned up). As the Honorable Judge Kelly has noted, “[t]he Government has a weighty interest in protecting Congress’s ability to function without ‘corrupt’ interference.” *Nordean*, 2021 WL 6134595, at \*14; *see also Caputo*, 201 F. Supp. 3d at 72 (noting “the Government’s profound interest in protecting the White House complex, the President, and the functionality of the

executive branch”). That interest reached its apex on January 6 when “Congress was convened in Joint Session to undertake one of its most solemn and constitutional duties.” *Nordean*, 2021 WL 6134595, at \*14.

Third, as noted above, other Judges in this Court have recognized that these interests are “unrelated to the suppression of free expression.” *O’Brien*, 391 U.S. at 377. In denying a defendant’s vindictive-prosecution claim in a January 6 matter, the Honorable Judge Kelly noted: “Nor do the four crimes that [the defendant] is charged with turn on the content of [his] potentially expressive actions.” *United States v. Jonathon Shroyer*, 21-cr-542, ECF No. 17. Rather, the charged statutes ensure the protection and normal functioning of the Congress.

Fourth, applying the charged statutes to the defendant’s conduct imposes no more than an “incidental limitation[] on First Amendment freedoms.” *O’Brien*, 391 U.S. at 376. The statutes “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). “Quite obviously, there were many avenues for [the defendant] to express [his] opinions about the 2020 presidential election, or [his] views about how Congress should perform its constitutional duties on January 6.” *Nordean*, 2021 WL 6134595, at \*14.

### **CONCLUSION**

The government respectfully requests the Court deny the defendant’s motion to dismiss Count 4 of the Information.

Respectfully submitted,

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