UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
V.	)	CASE NO: 1:21-CR-496
MARK IBRAHIM,	)	
DEFENDANT.	)	

DEFENDANT'S MOTION TO DISMISS COUNT THREE OF THE INDICTMENT

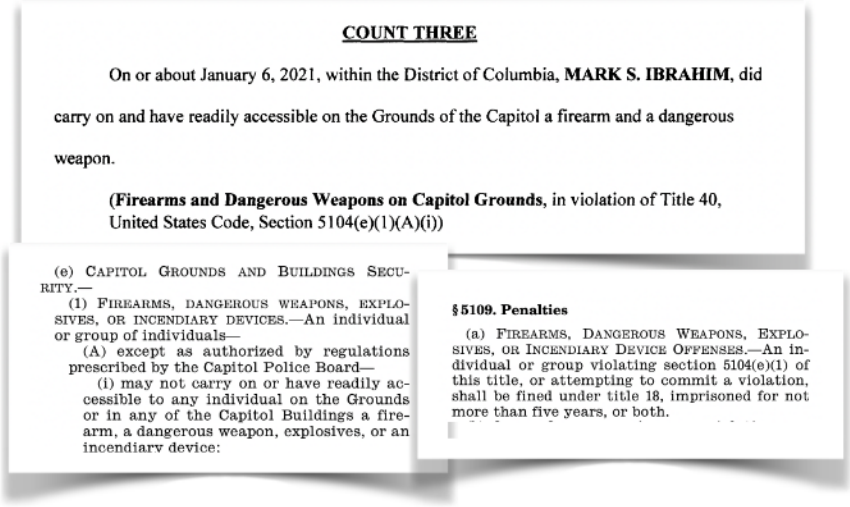
ACTUS NON FACIT REUM NISI MENS SIT REA

Pursuant to Fed. R. Crim. P. 12(b)(1) and 12(b)(3), Defendant moves to dismiss Count Three of the Indictment on the grounds that the Indictment under 40 U.S.C. § 5104(e)(1)(A)(i), a felony that lacks a scienter component, alleges felonious strict liability for otherwise innocent and constitutionally-protected conduct. The Indictment must be dismissed for violating Mr. Ibrahim's Sixth Amendment right to be notified of the "nature and cause" of the accusations against him and for failing to state a criminal offense.

In addition to a statutory challenge, the defendant further challenges this statute constitutionally, as violative of the Constitution, and as applied to him.

I. Summary

Mr. Ibrahim has been indicted in Count Three under 40 U.S.C. § 5104(e)(1)(A)(i) for carrying a firearm or having a firearm readily accessible on Capitol Grounds. See ECF No. 7



COUNT THREE

On or about January 6, 2021, within the District of Columbia, **MARK S. IBRAHIM**, did carry on and have readily accessible on the Grounds of the Capitol a firearm and a dangerous weapon.

(**Firearms and Dangerous Weapons on Capitol Grounds**, in violation of Title 40, United States Code, Section 5104(e)(1)(A)(i))

(e) CAPITOL GROUNDS AND BUILDINGS SECURITY.—
(1) FIREARMS, DANGEROUS WEAPONS, EXPLOSIVES, OR INCENDIARY DEVICES.—An individual or group of individuals—
(A) except as authorized by regulations prescribed by the Capitol Police Board—
(i) may not carry on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm, a dangerous weapon, explosives, or an incendiary device:

§ 5109. Penalties

(a) FIREARMS, DANGEROUS WEAPONS, EXPLOSIVES, OR INCENDIARY DEVICE OFFENSES.—An individual or group violating section 5104(e)(1) of this title, or attempting to commit a violation, shall be fined under title 18, imprisoned for not more than five years, or both.

("On or about January 6, 2021, within the District of Columbia, MARK S. IBRAHIM, did carry on and have readily accessible on the Grounds of the Capitol a firearm and a dangerous weapon."). The Indictment does not state a *mens rea* violation.

In relevant part, 40 U.S.C. § 5104(e)(1)(A)(i) states that an individual may not carry or have readily accessible a firearm on the Grounds of the Capitol, unless authorized by regulations prescribed by the Capitol Police Board. This strict-liability offense is punished as a felony under 40 U.S.C. § 5109(a) and 18 U.S.C. § 3559 — with a maximum sentence of five years in prison followed by up to one year of supervised release under 18 U.S.C. § 3583, up to 5 years of probation under 18 U.S.C. § 3561, up to a $250,000.00 fine under 18 U.S.C. § 3571, a special assessment of $100 under 18 U.S.C. § 3013, and the permanent loss of Second Amendment rights under 18 U.S.C. § 922(g)(1). *See also Scarborough v. United States*, 431 U.S. 563 (1977).

The offense charged against Mr. Ibrahim does not, on its face, require proof of scienter. There is no requirement of knowing or willful presence on Capitol Grounds, nor knowing or willful possession of a firearm. Therefore, 40 U.S.C. § 5104(e)(1)(A)(i) is a felony statute that lacks both (1) a scienter requirement for the possession of a firearm, and, (2) a scienter requirement for being present in locations designated as Capitol Grounds. Unlike walking into a building, there is no clear or distinct delineation between outdoor areas known as Capitol Grounds and outdoor areas that are part of Washington DC — therefore, there is no clear

delineation that shows where one set of laws ends and another begins. As the Defense has put on the record previously in ECF No. 37, Mr. Ibrahim was in lawful possession of his firearm under the laws of Washington DC on January 6, 2021.

Compare the felony firearm offense under 40 U.S.C. § 5104(e)(1) with the misdemeanor unauthorized entry offenses under 40 U.S.C. § 5104(e)(2), a section immediately following the firearms felony in the code book. Under 40 U.S.C. § 5104(e)(2), a "willfully and knowingly" *mens rea* requirement is imposed on the misdemeanor conduct of entering or remaining on the floor of either House of Congress. Yet, under 40 U.S.C. § 5104(e)(1)(A), there is complete silence on *mens rea* and felonious strict liability is imposed.

Mr. Ibrahim's Indictment mirrors the felony statute and excludes reference to intent. Mr. Ibrahim's Indictment fails to notify him of the nature and cause of the accusations against him, in violation of his Sixth Amendment right, because it lacks any mention of intent that he is alleged to have had at the time of the felonious offense. Furthermore, the Indictment and associated statute is a blatant violation of Mr. Ibrahim's constitutional rights and should be dismissed and enjoined from enforcement as unconstitutional.

II. Factual Background

On January 6, 2021, Mark Ibrahim attended the political protest in front of the United States Capitol Building in the District of Columbia. Mr. Ibrahim never entered the Capitol Building. After he observed some of the protesters becoming unruly and acting disrespectfully towards the law enforcement officers on duty at the event, Mr. Ibrahim folded up his flags to

disassociate himself from the protesters. Mr. Ibrahim caused no trouble for any officer at this protest, instead defending law enforcement from outraged protesters.

Mr. Ibrahim was criminally charged for being armed on Capitol Grounds pursuant to 40 U.S.C. § 5104(e)(1)(A)(i).

Although off duty at the time of the alleged offense, Mark Ibrahim was employed as a DEA agent. Mr. Ibrahim was issued a badge, firearm, and credentials by the DEA. In accordance with the DEA Agent's Manual, and per his training, Mr. Ibrahim was in possession of his firearm, badge, and credentials when he attended the protest on January 6.

Pursuant to 21 U.S.C. § 878, DEA law enforcement officers are authorized to carry firearms without limitation to official duty, giving DEA agents the right to carry firearms off duty. D.C. Code § 22–4505 permits federal police officers, who are otherwise authorized, to carry firearms in the District of Columbia. The DEA Agents Manual § 6122.11(B) goes even further and *requires* agents to maintain access to firearms while off duty, stating that DEA agents are "***required* to be available for duty with little or no advance notice**" and "***must have ready access* to their firearm in the event that they are recalled to duty**." Mr. Ibrahim was in compliance with this DEA agent requirement on January 6, 2021.

The DEA Agents Manual guides firearm possession by agents and notifies agents of unlawful use and possession of their firearms. DEA Agents Manual § 2735.20 (G) notifies agents of unlawful *use* of a firearm. "A DEA employee who has been authorized by the Administrator to carry a firearm shall not unlawfully brandish, threaten another person(s) with, or discharge a firearm." Mr. Ibrahim was in compliance with the DEA Agents Manual. And, the DEA Agents

Manual § 2735.20 (K) notifies agents of unauthorized *possession* of a firearm in a *federal facility*, stating:

> Title 18 U.S.C. § 930 prohibits the carrying or possession of any firearm or other dangerous weapon within Federal facilities, unless an exemption applies. Only active duty SAs and law enforcement officers (LEOs) in the lawful performance of their official duties, Federal officials, or members of the Armed Forces, if authorized by law, are exempt. Retired SAs, retired LEOs, non-active duty law enforcement personnel, and all other civilian employees and contractors are prohibited from entering Federal facilities with a firearm or other dangerous weapon. Violators of this statute can be fined and/or legally imprisoned.

Mr. Ibrahim never entered the Capitol Building or any other federal facility, remaining compliant with the DEA Agents Manual.

There is no further regulation, notice, or guidance for DEA agents on the use or possession of firearms off duty. DEA Agents are not advised that the grounds of the Capitol Building are different from any other federal grounds that permit them to carry their firearms.

Independent of privileges under 21 U.S.C. § 878 and D.C. Code § 22–4505, Mr. Ibrahim had a Second Amendment right to carry a lawfully possessed firearm in a public place. See *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022).

III) Statutory Challenge, Failure to State an Offense, and Violation of Sixth Amendment's "Nature and Cause" Clause

The defendant seeks dismissal of Count Three of his Indictment under 40 U.S.C. § 5104(e)(1)(A)(i), as penalized by 40 U.S.C. § 5109(a), pursuant to Fed. R. Crim. P. 12(b)(1) and 12(b)(3).

Mens rea is quintessential to criminal jurisprudence. In the United States, the Courts punish a guilty mind, not a guilty body. See *Morissette v. United States*, 342 U.S. 246 (1952). While the language describing scienter has evolved, "intent generally remains an indispensable element of a criminal offense." *United States v. United States Gypsum Co.*, 438 U. S. 422, 437 (1978).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory `But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a `vicious will.' (Footnotes omitted.)

Morissette v. United States, 342 U.S. 246, 250-251 (1952).

Without a *mens rea* requirement, 40 U.S.C. § 5104(e)(1) imposes felony criminal sanctions on a class of persons whose mental state— be it ignorance of the characteristics of weapons in their possession, ignorance of the characteristics of the outdoor location where they possess a firearm, or both— makes their actions entirely innocent. See *Rehaif v. United States*, 139 S. Ct. 2191, 2193 (2019) ("Possessing a gun can be entirely innocent"); s*ee also Staples v. United States*, 511 U.S. 600, 614-15 (1994) ("It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten year term of imprisonment if . . . they genuinely and reasonably believed [they were in lawful possession of firearms]"). And, the category of punishment is a key in analyzing this statute, for a felony is "as bad a word as you can give to man or thing." *Morissette*, 342 U.S. at 260 (internal citations omitted); see also

Staples, 511 U.S. at 618 (distinguishing felony offenses from infractions for purposes of strict liability analysis).

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court reviewed a felony firearm offense that lacked a scienter requirement for all elements — 18 U.S.C. § 922(g) as read with § 924(a)(2). The Court held that the felony firearm statute requires proof of scienter for the elements of the firearm offense — for both possession of the firearm *and* for knowledge of one's status as being forbidden from being able to possess the firearm. *Id.* The Court interpreted a portion of the statute requiring the defendant to have possessed the firearm "knowingly" to extend to the defendant's prohibition status on possession. *Id.* The Government must prove not only that the defendant knew he possessed a firearm, but also that *he knew he was a felon* when he possessed the firearm. *Greer v. United States*, 141 S. Ct. 2090, 2095 (2021).

Similarly, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Supreme Court extended the *mens rea* requirement of "knowingly" that was found in one portion of the statute to apply to both elements of felony statute 18 U.S.C. § 2252.

The Supreme Court has reviewed a few felony firearms cases with seemingly incomplete *mens rea* requirements, imposing a *mens rea* requirement on all elements of the statutes in each of their decisions. The cases concluded that Congress had not intended to impose criminal penalties for felonious possession of a gun without proof of scienter. *United States v. Class*, 930 F.3d 460, 469 (D.C. Cir. 2019).

> In two cases, including one decided very recently, the Supreme Court has concluded that restrictions on the possession of firearms require proof of scienter. *Rehaif*, 139 S.Ct. at 2200 ("[T]he Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."); *Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 128

> L.Ed.2d 608 (1994) ("[T]o obtain a conviction, the Government should have been required to prove that [the defendant] knew of the features of his [gun] that brought it within the scope of the [prohibition]."). The parallel [to 40 U.S.C. § 5104(e)(1)] is clear: *Rehaif* concerned a ban on possession of a gun by a person with a particular immigration status; *Staples* concerned a ban on possession of a particular type of gun; and this case [of the application of 40 U.S.C. § 5104(e)(1)] concerns a ban on possession of a gun in a particular place.

Class, 930 F.3d at 469. In *Class*, the D.C. Circuit reviewed 40 U.S.C. § 5104(e)(1), but on limited grounds. *Class*, 930 F.3d at 469 (noting that "the lack of a scienter requirement in the ban might raise issues of statutory construction" but choosing not to review the issue when the defendant waived this argument).

Yet all felony statutes are not ambiguous or incomplete in the same way. The statute in the *Rehaif* case was rehabilitable due to the fact that a scienter requirement was present in the portion of the provision dealing with possession of the firearm, which then could be extended in order to uphold a full and complete scienter requirement for the felony offense in question. A similar extension of the scienter requirement holds true for the statute in *X-Citement Video.* In the case of 40 U.S.C. § 5104(e)(1), however, there is zero scienter requirement. All the while, "*mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. United States Gypsum Co.*, 438 U. S. 422 (1978) (citing Supreme Court cases). What happens when there is no scienter provision to extend?

In *Staples v. United States*, the Supreme Court reviewed a federal statute that was entirely silent on scienter. *Staples v. United States*, 511 U.S. 600 (1994). In the law in question, 26 U.S.C. § 5861(d) stated that "[I]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." *Id.* at 605. The Supreme Court carefully distinguished felony offenses from misdemeanors and

infractions that carry "light penalties," as opposed to "imprisonment in the state penitentiary." 511 U.S. at 616. The Court noted that a review of early cases and common law suggests that "we should not… interpret any statute defining a felony offense as dispensing with *mens rea*." 511 U.S. at 618; see also *Morissette*, 342 U.S. at 263 (mere omission of a *mens rea* term will not be considered a sufficient indication of Congressional intent to dispense with the intent requirement in a felony statue). The Supreme Court stated that a scienter presumption, that a "defendant must know the facts that make his conduct illegal," applied to the statute at issue because the designation of an offense as a felony "suggest[ed] that Congress did not intend to eliminate a *mens rea* requirement," imposing an affirmative requirement on the government to prove that the statute in question was intended to be a strict liability offense. 511 U.S. at 618; see also *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1894 (2009) (SCALIA, J., dissenting) (noting that the court in *Staples* "infer[red] the common-law tradition of a *mens rea* requirement where Congress has not addressed the mental element of a crime").

Staples supports the standard, drawn on *Morissette*, that a "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (discussing the decision in *Staples*). "To be sure, a longstanding precept of criminal law is that, except in the case of 'public welfare' or 'regulatory' offenses, criminal statutory provisions should not be read to impose strict liability and should instead be construed as carrying a *mens rea* element when they are silent." *United States v. Ray*, 704 F.3d 1307, 1312 (10th Cir. 2013)(quoting *Staples*). Adherence to this principle helps to avoid "criminaliz[ing] a broad range of apparently innocent conduct." *Staples*, 511 U.S. at 610.

Decided in 1994, *Staples* did not discuss the Second Amendment, nor firearm possession as a constitutional right, instead referring to firearms as "regulated items." *Staples,* 511 U.S. at 619. Nonetheless, the Court reasoned that firearms, in general, are not of the same class as, for example, hand grenades and narcotics. *Id.* at 608-610. Firearms are commonplace and are often possessed lawfully. *Id.* at 609.

Accordingly, a statutory history of 40 U.S.C. § 5104(e)(1) and 40 U.S.C. § 5109(a) is in order. These code sections are recodification, without change, of 1967 laws, 40 U.S.C. §193f and 40 U.S.C. §193h. See Public Law 90-108 (Oct 20, 1967).[1] Prior to 1967, the law with respect to firearms was 40 U.S.C. §193f (1946), which only forbade the *discharge* of firearms on Capitol Grounds.[2] Enacted in 1967 in response to violent protests in front of the Capitol against the Vietnam War, 40 U.S.C. §193f and 40 U.S.C. §193h, in addition to creating strict liability for *possession* of firearms on Capitol Grounds, also designated the act as a felony. When recodifying these sections and enacting 40 U.S.C. § 5104 and 40 U.S.C. § 5109, under Public Law 107 - 217, the 107th Congress made no substantive changes in 2002.[3]

Mens rea elements for this law were discussed when the original law was enacted in 1967. See House Congressional Record, October 19, 1967; Senate Congressional Record, October 5, 1967.[4] Based on one Senator's summary, the believed that "[the] bill prohibits upon the Capitol Grounds and within the Capitol Buildings specific acts done with the intent, or which could have the effect, of interfering with or disrupting the legislative process…" Senate

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[1] Available at https://www.congress.gov/90/statute/STATUTE-81/STATUTE-81-Pg275-3.pdf

[2] Available at https://tile.loc.gov/storage-services/service/ll/uscode/uscode1958-02004/uscode1958-020040002/uscode1958-020040002.pdf.

[3] Available at https://www.govinfo.gov/app/details/PLAW-107publ217.

[4] Available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1967-pt22/pdf/GPO-CRECB-1967-pt22-2-1.pdf.

Congressional Record, October 5, 1967.[5] Representatives were particularly concerned about the inadequacy of the *mens rea* term "willfully" and added that offenses must be committed "willfully and knowingly," amending the misdemeanor portions of the statute to have a heightened *mens rea* requirement. The intent element for the firearms offense was also raised, and members of the House voiced their opposition to holding innocent people, individuals without intent, responsible for felony violations. While the discussion in the House was about either adding an intent element to the felony offense or changing the offense to a misdemeanor, the last Representative to speak stated that he believed the intent element "willfully" was applicable to other sections. "'Willfully' clearly includes bad intent. So what the gentleman is attempting to accomplish is already accomplished in the bill by the word 'willfully.' But it does not limit it to actually disrupting the House, as it appears in the bill… So as the bill is written, it is much broader…" Then, they voted, adding "willfully and knowingly" to the misdemeanor sections which originally required only willful intent, but leaving the felony firearms section unchanged.

Congress was in a hurry to pass the law on October 19, 1967, as a large anti-war protest was headed their way the next day and they wanted to announce a deterrent ahead of anticipated aggression from protesters. "[I]t seems to be anomalous that here we are rushing to get this thing through… we are certainly hurrying to protect ourselves," stated one Representative. It appears a mistake was made on the House floor as a result. At a minimum, there was no intention in either house of Congress for the firearms portion of the law to be a strict-liability felony.

[5] Available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1967-pt21/pdf/GPO-CRECB-1967-pt21-2-2.pdf.

When the revised Bill went back to the Senate, the law was enacted without any further discussion.[6] The only deduction from the record is that Congress enacted a strict liability felony offense in error and in haste, or under the impression that it will not be used to prosecute unintentional acts; "[c]ould … visitors to the Capitol innocently subject themselves to a criminal prosecution, without intent to violate the rules, or disrupt the Congress or its deliberations? Answer: No…," explained one member of the House.[7] On at least five occasions, members of the House stated that no prosecutor would prosecute someone who did not commit an act without intent.

Fast-forward to the year 2021 and Mr. Ibrahim, an off-duty federal officer who caused no trouble at the January 6 protest, was indicted under this statute without an allegation of intent.

In the statute charged against Mr. Ibrahim, just as in *Staples*, there is no evidence of express congressional intent to omit the necessity of scienter for felony conduct in 40 U.S.C. § 5104(e)(1)(A) or its predecessor; and, just as in *Staples*, the law in question, on its face, criminalizes otherwise lawful conduct.

Moreover, and more importantly, the legal treatment of firearms has changed since *Staples* in favor of protecting the Second Amendment. Possession of a firearm is no longer just the possession of a "regulated item," but is instead the exercise of a constitutionally-protected right. The Supreme Court has not analyzed felony statutes lacking scienter from the higher threshold of a statute that criminalizes a constitutional right to possess a firearm.

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[6] Available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1967-pt22/pdf/GPO-CRECB-1967-pt22-2-2.pdf.

[7] Available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1967-pt22/pdf/GPO-CRECB-1967-pt22-2-1.pdf.

Through *District of Columbia v. Heller*, 554 U. S. 570 (2008), *McDonald v. Chicago*, 561 U. S. 742 (2010), and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022), the Supreme Court has held that the Second Amendment protects an individual right to keep and bear arms for self-defense, both inside and outside the home. When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *Bruen,* 597 U.S. ___.

The fact that a constitutional right is at the heart of the felony violation under 40 U.S.C. § 5104(e)(1)(A) is of meaningful distinction. Possession of a firearm, in public, for self-defense, is a constitutional right. *Bruen*, 597 U.S. ___. Yet, an individual in lawful and constitutional possession of a firearm, in public, while standing outside the Grounds of the Capitol, is rendered immediately a felon and forevermore loses his constitutional right to possess a firearm by unwittingly stepping on outdoor space in Washington DC that is designated as "Capitol Grounds," in a straightforward reading of statutes 40 U.S.C. § 5104(e)(1)(A), 40 U.S.C. § 5109(a), and 18 U.S.C. § 922(g)(1). Thus, the lack of scienter requirement in 40 U.S.C. § 5104(e)(1) yields a permanent loss of a constitutional right without the government having to prove criminal intent. The fact that the Congressional record shows that Congress did not intend this result speaks volumes. Congress did not intend to create a strict liability felony that would be prosecuted against those who did not have criminal intent. The statute is simply erroneous, incomplete, and invalid — or, as the Court of Appeals for this district has more politely phrased it, this statute is "not a model of meticulous drafting." See *United States v. Chin*, 981 F.2d 1275, 1279 (D.C. Cir. 1992).

When interpreting a criminal statute that may not be clear on its face, "it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408 (2003); *Rewis v. United States*, 401 U.S. 808, 812 (1971). Any doubt about congressional intent or meaning of a statute — "that is, were we unable to find 'an unambiguous intent on the part of Congress' — we would 'turn to the rule of lenity to resolve the dispute.'" *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1246 (D.C. Cir. 2008) (internal citations omitted).

When interpreting federal criminal statutes that are silent on the required mental state, the intent is read into the statute to separate wrongful conduct from otherwise innocent conduct. *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015). Moreover, "courts may extend a *mens rea* requirement when ordinary tools of statutory interpretation — text, structure, purpose, and legislative history — compel that result." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1242 (D.C. Cir. 2008). While for some statutes general intent suffices, "some situations may call for implying a specific intent requirement into statutory text… [when] [s]uch a statute would run the risk of punishing seemingly innocent conduct." *Carter v. United States*, 530 U.S. 255, 269 (2000). The precise level of intent necessary for 40 U.S.C. § 5104(e)(1)(A) appears to be specific intent, at a minimum, per *Carter*, as otherwise innocent and constitutionally-protected conduct is penalized. *See also Ladner v. United States*, 358 U.S. 169, 178 (1958) (courts should "not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"); *accord Villanueva-Sotelo*, 515 F.3d at 1246.

Congress made a mistake in drafting 40 U.S.C. § 5104(e)(1)(A). Congress codified a felony statute without an express requirement of *mens rea*, punishing a guilty body, not a guilty mind. Code sections 40 U.S.C. § 5104(e)(1)(A) and 40 U.S.C. § 5109(a) create felonious strict liability, without Congressional intent to do so. *Staples* and its progeny indicate that at least a specific intent element must be read into the statute, yet the precise level of applicable *mens rea* has been rendered a more complicated constitutional question after *Heller* and *Bruen*.

At a bare minimum — *Staples*, its progeny, and the rule of lenity — instruct this court that the Indictment in Mr. Ibrahim's case is lacking a necessary *mens rea* component.

Furthermore, independent of, and inaddition to, the scienter and statutory insufficiency arguments outlined herein, 40 U.S.C. § 5104(e)(1)(A) is prefaced by the language "except as authorized by regulations prescribed by the Capitol Police Board." This language in a statute is not some superfluous nonsense that can be disregarded by the government in presenting an indictment to the grand jury — the proscribed activity of possessing a firearm is only a crime *if* the act is not authorized by the Capitol Police Board. See *United States v. Pickett*, 353 F.3d 62 (D.C. Cir. 2004) (overturning conviction and dismissing an indictment for failing state an essential element of the offense); *United States v. Thomas*, 444 F.2d 919, 922 (D.C. Cir. 1971) (noting that an indictment needs to "achieve the requisite degree of precision" and holding that an indictment is insufficient as a matter of law when "it describes the offense only in impermissibly broad and categorical terms"). Regulations prescribed by the Capitol Police Board are an indispensable element of the offense that must be pleaded in the Indictment, which the government has failed to do entirely. The indictment must contain the elements of the offense charged, fairly inform the defendant of the charge against which he must defend, and enable the

defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974).

Most importantly, the government owes a constitutional duty to a defendant in an indictment. The Fifth Amendment guarantees that no person shall be held to answer for an "infamous crime, unless on a presentment or indictment of a Grand Jury" and the Sixth Amendment guarantees that a person accused of a crime shall "be informed of the nature and cause of the accusation." U.S. Const. Amend. V, VI. A valid indictment "preserves the Fifth Amendment's protections against abusive criminal charging practice." *United States v. Hillie*, 227 F. Supp. 3d 57, 69 (D.D.C. 2017). This means that a defendant "shall be so fully and clearly informed of the charge against him as not only to enable him to prepare his defense and not be taken by surprise at the trial, but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense." *Sutton v. United States*, 157 F.2d 661, 663 (5th Cir. 1946).

The Indictment against Mr. Ibrahim fails to notify the defendant of both a requisite intent element *and* fails to plead a necessary element of the statute with regards to the Capitol Police Board, in violation of Mr. Ibrahim's Sixth Amendment right to be notified of the "nature and cause" of the accusations against him. As such, Count Three of the Indictment should be dismissed.

IV) Constitutional Challenge

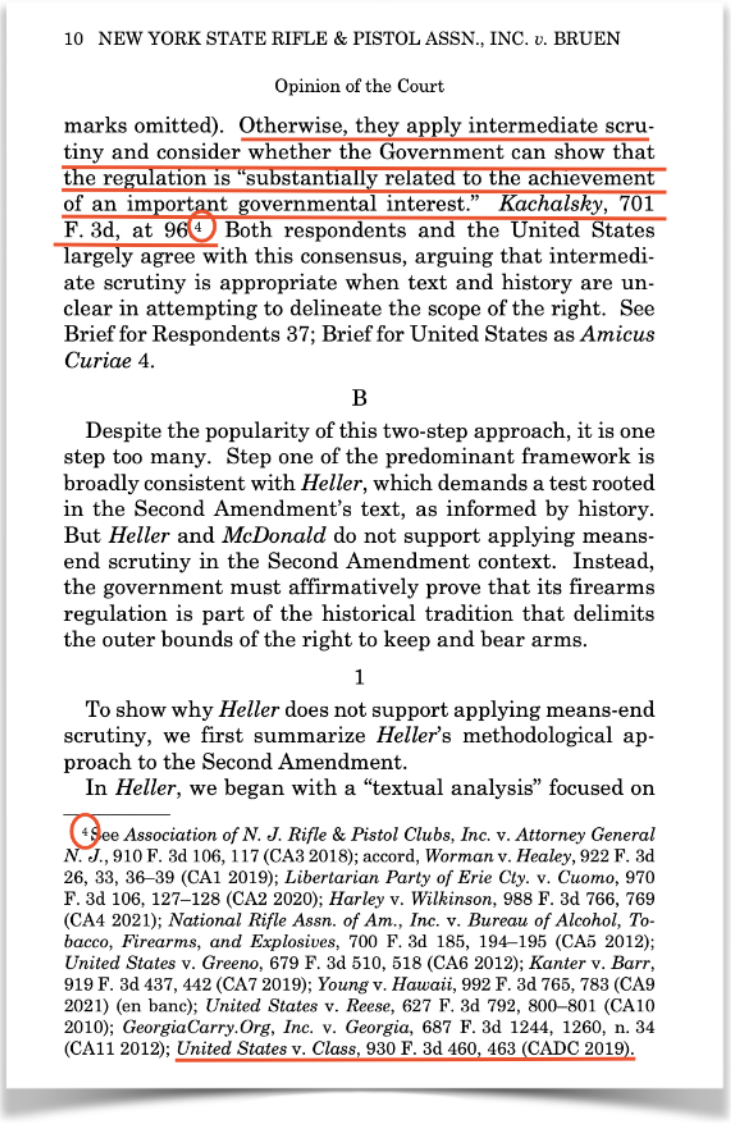
In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court invalidated a criminal abortion statute as "void on its face" because it lacked "a scienter requirement in the provision

directing the physician to determine whether the fetus is or may be viable," as the uncertainty had a "chilling effect on the exercise of constitutional rights." 439 U.S. at 394. While rare, constitutional challenges to federal statutes, both on their face and as applied to defendants, have been cautiously upheld. See, e.g., *United States v. Davis*, 139 S. Ct. 2319 (2019) (finding a federal felony statute unconstitutionally vague); *Kolender v. Lawson*, 461 U.S. 352 (1983) (holding a statute unconstitutionally vague for encouraging arbitrary enforcement); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)(same); *United States v. Reese*, 92 U.S. 214 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

In the present case, 40 U.S.C. § 5104(e)(1) is a law that infringes on a constitutional right — the Second Amendment right to carry a firearm outside the home. See *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022). Per *Bruen*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and if the government criminalizes activity otherwise consistent with the Second Amendment, it must justify its regulation by demonstrating that the law is consistent with our Nation's historical tradition of firearm regulation. *Bruen*, 597 U.S. ___ (2022) ("the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"). Thus, 40 U.S.C. § 5104(e)(1) should be reviewed for constitutional compliance.

In 2019, three years before the *Bruen* decision, the United States Court of Appeals for the District of Columbia indeed reviewed a constitutional challenge to 40 U.S.C. § 5104(e)(1).

United States v. Class, 930 F.3d 460 (D.C. Cir. 2019). While noting that a statutory challenge may be appropriate, the Court held that a constitutional challenge to this law fails. *Id.* at 469-70. But the Court reviewed the law by applying "intermediate scrutiny" or "means-end scrutiny" to the regulation of a Second Amendment right to bear arms. See *Bruen*, 597 U.S. ___ (2022) (n.4). Three years later, in *Bruen*, the Supreme Court invalidated intermediate and means-end scrutiny tests with regard to Second Amendment context, specifically noting the D.C. Circuit's *Class* decision in Footnote 4 as one that has applied the wrong level of scrutiny. *Id.* As such, the *Class* decision does not preclude a constitutional challenge to 40 U.S.C. § 5104(e)(1).



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marks omitted). Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is "substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F. 3d, at 96[4] Both respondents and the United States largely agree with this consensus, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right. See Brief for Respondents 37; Brief for United States as *Amicus Curiae* 4.

B

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

1

To show why *Heller* does not support applying means-end scrutiny, we first summarize *Heller*'s methodological approach to the Second Amendment.

In *Heller*, we began with a "textual analysis" focused on

[4] See *Association of N. J. Rifle & Pistol Clubs, Inc.* v. *Attorney General N. J.*, 910 F. 3d 106, 117 (CA3 2018); accord, *Worman* v. *Healey*, 922 F. 3d 26, 33, 36–39 (CA1 2019); *Libertarian Party of Erie Cty.* v. *Cuomo*, 970 F. 3d 106, 127–128 (CA2 2020); *Harley* v. *Wilkinson*, 988 F. 3d 766, 769 (CA4 2021); *National Rifle Assn. of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F. 3d 185, 194–195 (CA5 2012); *United States* v. *Greeno*, 679 F. 3d 510, 518 (CA6 2012); *Kanter* v. *Barr*, 919 F. 3d 437, 442 (CA7 2019); *Young* v. *Hawaii*, 992 F. 3d 765, 783 (CA9 2021) (en banc); *United States* v. *Reese*, 627 F. 3d 792, 800–801 (CA10 2010); *GeorgiaCarry.Org, Inc.* v. *Georgia*, 687 F. 3d 1244, 1260, n. 34 (CA11 2012); *United States* v. *Class*, 930 F. 3d 460, 463 (CADC 2019).

Congress does not have the power to permanently deprive individuals of their constitutional rights through strict liability criminal convictions, nor the power to delegate control over the exercise of a Second Amendment right to a Capitol Police Board. In 40 U.S.C. § 5104(e), Congress handed over care and review of Second Amendment issues and criminal exemption to the Capitol Police Board, allowing unelected bureaucrats to decide who should be

allotted exercise of Second Amendment rights, who should be exempt from felonious culpability, handing responsibility for defining crimes to a relatively unaccountable board and thus "eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019).

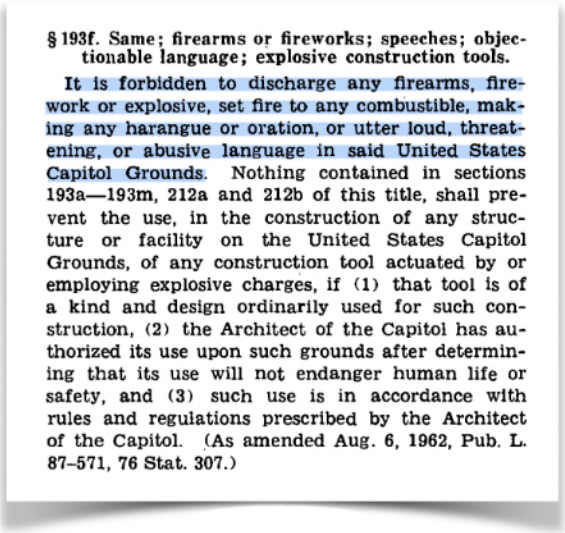
Congress also has no right to regulate the exercise of Second Amendment rights on a whim or exclusively for their own personal interests. Instead, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. ___ (2022). Bruen "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* If not, the law should be invalidated just like the Supreme Court has done in *Colautti* and *Davis*.

The government carries a very heavy burden of having to affirmatively prove that 40 U.S.C. § 5104(e)(1) is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms outside the Capitol Building. 40 U.S.C. § 5104(e)(1) broadly regulates the peaceful possession of firearms in outdoor spaces outside of the Capitol Building.

The first stone of the Capitol Building was laid in 1793 by President Washington. It was not until 1967, 174 years later, that Congress introduced a law to prohibit the possession of firearms on the grounds of the Capitol, penalizing otherwise innocent exercise of the Second Amendment as a strict-liability felony. See

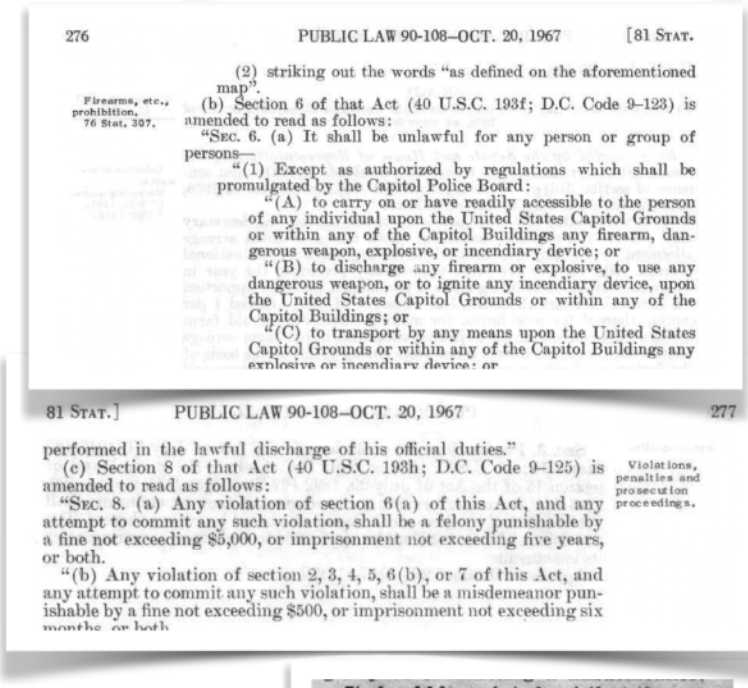
Public Law 90-108 (Oct 20, 1967).[8] Prior to 1967, the law with respect to firearms in this arena was 40 U.S.C. §193f (1946), which only forbade the *discharge* of firearms on Capitol Grounds.[9]

When the 1967 law was debated in Congress, the Second Amendment was not mentioned. See House Congressional Record, October 19, 1967; Senate Congressional Record, October 5, 1967; *see also* discussion in Section III *supra*. Congressmen discussed their own firearms and the exceptions they need to carve out for themselves. They discussed their own security interests. But the Second Amendment was not mentioned by any Senator or Representative. In passing, one Representative alluded to the Second Amendment, stating **"we have introduced an unconstitutional element,"** also noting that the statute is vague, referring to the broad possession of firearms prohibition. That was as close as Congress reached a discussion of the Second Amendment. While heavily concerned about First



§ 193f. Same; firearms or fireworks; speeches; objectionable language; explosive construction tools.

It is forbidden to discharge any firearms, firework or explosive, set fire to any combustible, making any harangue or oration, or utter loud, threatening, or abusive language in said United States Capitol Grounds. Nothing contained in sections 193a—193m, 212a and 212b of this title, shall prevent the use, in the construction of any structure or facility on the United States Capitol Grounds, of any construction tool actuated by or employing explosive charges, if (1) that tool is of a kind and design ordinarily used for such construction, (2) the Architect of the Capitol has authorized its use upon such grounds after determining that its use will not endanger human life or safety, and (3) such use is in accordance with rules and regulations prescribed by the Architect of the Capitol. (As amended Aug. 6, 1962, Pub. L. 87–571, 76 Stat. 307.)



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(2) striking out the words "as defined on the aforementioned map".

Firearms, etc., prohibition. 76 Stat. 307.

(b) Section 6 of that Act (40 U.S.C. 193f; D.C. Code 9–123) is amended to read as follows:

"SEC. 6. (a) It shall be unlawful for any person or group of persons—

"(1) Except as authorized by regulations which shall be promulgated by the Capitol Police Board:

"(A) to carry on or have readily accessible to the person of any individual upon the United States Capitol Grounds or within any of the Capitol Buildings any firearm, dangerous weapon, explosive, or incendiary device; or

"(B) to discharge any firearm or explosive, to use any dangerous weapon, or to ignite any incendiary device, upon the United States Capitol Grounds or within any of the Capitol Buildings; or

"(C) to transport by any means upon the United States Capitol Grounds or within any of the Capitol Buildings any explosive or incendiary device; or

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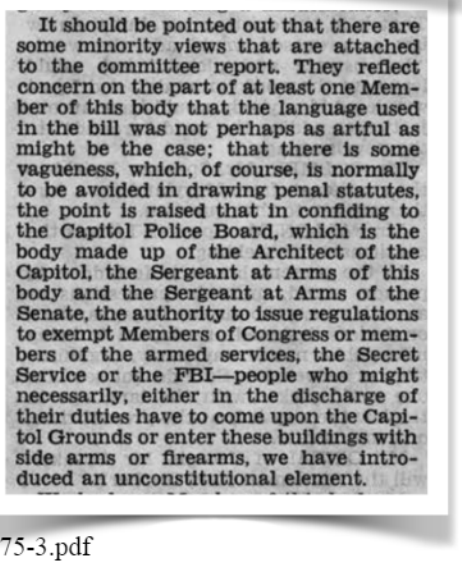
performed in the lawful discharge of his official duties."

(c) Section 8 of that Act (40 U.S.C. 193h; D.C. Code 9–125) is amended to read as follows:

Violations, penalties and prosecution proceedings.

"SEC. 8. (a) Any violation of section 6(a) of this Act, and any attempt to commit any such violation, shall be a felony punishable by a fine not exceeding $5,000, or imprisonment not exceeding five years, or both.

"(b) Any violation of section 2, 3, 4, 5, 6(b), or 7 of this Act, and any attempt to commit any such violation, shall be a misdemeanor punishable by a fine not exceeding $500, or imprisonment not exceeding six months, or both.



It should be pointed out that there are some minority views that are attached to the committee report. They reflect concern on the part of at least one Member of this body that the language used in the bill was not perhaps as artful as might be the case; that there is some vagueness, which, of course, is normally to be avoided in drawing penal statutes, the point is raised that in confiding to the Capitol Police Board, which is the body made up of the Architect of the Capitol, the Sergeant at Arms of this body and the Sergeant at Arms of the Senate, the authority to issue regulations to exempt Members of Congress or members of the armed services, the Secret Service or the FBI—people who might necessarily, either in the discharge of their duties have to come upon the Capitol Grounds or enter these buildings with side arms or firearms, we have introduced an unconstitutional element.

[8] Available at https://www.congress.gov/90/statute/STATUTE-81/STATUTE-81-Pg275-3.pdf

[9] Available at https://tile.loc.gov/storage-services/service/ll/uscode/uscode1958-02004/uscode1958-020040002/uscode1958-020040002.pdf.

Amendment rights of the People, Congress entirely brushed over the People's Second Amendment rights.

Under today's standard, congressional disregard for the Second Amendment is no longer an acceptable oversight or *faux pas*. "The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. *Heller*, 554 U. S., at 635. It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Bruen*, 597 U.S. ___.

In the *Heller* and *Bruen* decisions, the Supreme Court explicitly compared the Second Amendment to the First Amendment and ordered that deprivation of either one should be treated under the same analysis. *Bruen*, 597 U.S. ___ (2022) ("[the] Second Amendment standard accords with how we protect other constitutional rights"); *District of Columbia v. Heller*, 554 U. S. 570, 582, 595, 606, 618, 634-635 (2008). The Supreme Court was clear in expressing a lack of a hierarchy of constitutional rights; discarding the notion that the Second Amendment is not of secondary concern. *See id.*

Congressional disregard for the People's Second Amendment in vaguely drafting a felonious strict-liability law for the mere possession of firearms in outdoor areas designated as "Capitol Grounds" does not comport with *Bruen*. The constitutional test outlined in *Bruen* is "reliance on history to inform the meaning of [the] constitutional text—especially text meant to codify a *pre-existing* right." *Bruen*, 597 U.S. ___. The test outlined in *Bruen* requires this court "to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* As discussed previously, there has never been a broad

prohibition on the mere possession of firearms on Capitol Grounds, even though the Capitol has been part of America since 1793. The mere possession of firearms, without explicit statutory intent to use the arms for unlawful purposes, was codified in 1967 with only the interests of Congressmen in mind, no one else. Prior to 1967, only the *discharge* of a firearm on Capitol Grounds was forbidden. Congress did not codify a law consistent with the Second Amendment's text and historical implementation. The current law, on its face and in its inception, is unconstitutional.

The broad scope of "Capitol Grounds" with respect to the Second Amendment deprivation on such grounds is also of particular concern. In *Jeannette Rankin Brigade,* the D.C. Circuit reviewed one of the Capitol Grounds protection laws passed by Congress and reasoned that "Capitol Grounds" were defined by the government too broadly, the definition "so extensive" that it interfered with the exercise of the First Amendment. *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.C. 1972). "The Capitol Grounds (excluding such places as the Senate and House floors, committee rooms, etc.) have traditionally been open to the public; indeed, thousands of people visit them each year." *Id.* The Court concluded that "[w]hile some substantial governmental interests in the Capitol Grounds may warrant protection, none have been alleged which are sufficiently substantial 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 the Capitol Grounds." *Id.* at 585.

The *Bruen* decision makes clear that First Amendment analysis is equally applicable to Second Amendment issues. Thus, the *Jeannette Rankin Brigade* analysis for the First Amendment must apply to this Second Amendment issue as well. Just as the D.C. Circuit

enjoined the government from enforcing untailored speech restrictions on Capitol Grounds, so too should this court enjoin the government from enforcing untailored firearms restrictions on these same grounds. See *Jeannette Rankin Brigade*, 342 F. Supp. at 588 (the D.C. Circuit declared "Section 193g to be void on its face because of the constitutional infirmities exposed hereinbefore" and permanently enjoined the government from enforcing this law).

"In some cases, [the *Bruen*] inquiry will be fairly straightforward." *Bruen*, 597 U.S. ___. This holds true for the law in question. Between firmly restricting firearm possession in an area not historically restrictive of the Second Amendment, delegating control of constitutional rights to a Capitol Police Board, and holding otherwise innocent people strictly liable for a felony offense that is alleged to have taken place in an overly broad area that has already been enjoined from First Amendment restriction — this statue is simply constitutionally infirm.

Considering the history of a lack of firearms regulation on Capitol Grounds, and in light of the constitutional application of the Second Amendment, 40 U.S.C. § 5104(e)(1)(A) must be voided and the government enjoined from enforcing the law. Furthermore, the Indictment against Mr. Ibrahim for an unconstitutional law must be dismissed pursuant to Fed. R. Crim. P. 12(b)(1).

Moreover, the statute's delegation of authority over criminality and Second Amendment rights to a Capitol Police Board does not comport with *Davis,* which was particularly concerned with "eroding the people's ability to oversee the creation of the laws they are expected to abide" in "vague statutes" that "threaten to hand responsibility for defining crimes to relatively unaccountable police." *Davis*, 139 S. Ct. at 2325. The exact fear outlined in *Davis* comes to fruition in 40 U.S.C. § 5104(e)(1).

As applied to Mr. Ibrahim specifically, the statute creates a felonious violation for a federal police officer who was otherwise within lawful bounds of firearm possession and who was otherwise following the law and his agency's protocols. The statute as applied to Mr. Ibrahim imposes strict liability for stepping foot on grounds that this District has already ruled as too broadly regulated with respect to the First Amendment, and can thus be extrapolated under *Bruen* and *Jeannette Rankin Brigade* as too broadly regulated with respect to the Second Amendment. Moreover, the governance over Mr. Ibrahim's individual innocence or criminality cannot be in the hands of bureaucrats in the Capitol Police Board. Maybe the Capitol Police Board even excused Mr. Ibrahim's possession, but the government nonetheless indicted Mr. Ibrahim; we cannot know, after all, as the government did not plead this issue in the Indictment. What is certain is that Mr. Ibrahim is being feloniously prosecuted with the goal of being permanently deprived of his Second Amendment rights, and therefore his career, for unwittingly standing on the wrong city block. As applied, the statute and the Indictment citing this statute violate Mr. Ibrahim's Second Amendment rights and his due process rights.

Count Three of the Indictment should be dismissed and the government enjoined from enforcement of this statute generally and as against Mr. Ibrahim.

V. Conclusion

For any and for all of the reasons stated herein, any one of which would independently suffice, Count Three of the Indictment must be dismissed.

Respectfully submitted,
By Counsel:

/s/
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CERTIFICATE OF SERVICE FOR CM/ECF

I hereby certify that on August 18, 2022, I will electronically file the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/
Marina Medvin, Esq.