

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 21 Cr. 668 (TNM)
	:	
MICK CHAN,	:	
	:	
Defendant.	:	

**UNITED STATES’ RESPONSE TO DEFENDANT’S MOTION TO DISMISS  
COUNTS I, II, AND IV OF THE INFORMATION**

The United States respectfully submits this opposition to defendant Mick Chan’s motion to dismiss counts within the information that allege violations of 18 U.S.C. § 1752 and 40 U.S.C. 5104. The defendant moves this Court to dismiss counts that charge him with a violation of 18 U.S.C. § 1752(a)(1), Entering and Remaining in a Restricted Building or Grounds (Count 1 in the information); 18 U.S.C. § 1752(a)(2), Disorderly and Disruptive Conduct in a Restricted Building or Grounds (Count 2 in the information); and 40 U.S.C. § 5104(e)(2)(G), Parading, Demonstrating, or Picketing in a Capitol Building (Count 4 in the information). (ECF No. 27).<sup>1</sup>

First, the defendant seeks to dismiss Counts 1 and 2 of the information, which allege violations of 18 U.S.C. § 1752. He contends that because the U.S. Capitol Police, not the U.S. Secret Service, barricaded the area around the U.S. Capitol, he should not be charged with violating the statute. This contention lacks merit. This Court has previously rejected this argument. *United States v. Griffin*, No. 21-cr-92 (TNM), 2021 WL 2778557 at \*2 (D.D.C. July 2, 2021); see also *United States v. Seefried*, 21-cr-287 (TNM), Minute Order (D.D.C. May 20, 2022). Several other judges in this District have rejected this argument as well. See, e.g., *United States v. Mostofsky*,

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<sup>1</sup> In his motion to dismiss, the defendant also states that he is charged with a violation of 18 U.S.C. § 1512(c)(2), however, the defendant has not been charged with violating that that statute.

21-cr-138 (JEB), 2021 WL 6049891 at \*12-13 (D.D.C. Dec. 21, 2021); *United States v. Nordean*, 21-cr-175 (TJK), 2021 WL 6134595 at \*18 (D.D.C. Dec. 28, 2021); *United States v. McHugh*, 21-cr-453 (JDB), ECF No. 51 (D.D.C. Feb. 1, 2022); *United States v. Caldwell*, No. 21-cr-28 (APM), ECF No. 415 (D.D.C. Sept. 14, 2021).

The defendant also contends that the § 1752 statute is not applicable because the former Vice President was not temporarily visiting the U.S. Capitol building on January 6, 2021. This contention also lacks merit. Again, this Court and other judges in this District have uniformly rejected this argument as well. *See, e.g., Griffin*, 21-cr-92, Minute Order, Mar. 22, 2022; *United States v. Puma*, 21-cr-454 (PLF), 2022 WL 823079, at \*16-\*19 (D.D.C. Mar. 19, 2022); *United States v. Andries*, 21-cr-93 (RC), 2022 WL 768684, at \*16-\*17 (D.D.C. Mar. 14, 2022); *McHugh*, 2022 WL 296304, at \*20-\*22; *Seefried*, 21-cr-287, Minute Order May 20, 2022.

Second, the defendant seeks to dismiss Count 4 of the information, which allege a violation of 40 U.S.C. § 5104(e)(2)(G) because it is overbroad and unconstitutionally vague. This contention lacks merit as the statute is constitutionally sound.

This Court should deny Defendant's motion to dismiss.

### **FACTUAL BACKGROUND**

On January 6, 2021, a Joint Session of the United States Congress convened in the United States Capitol building to certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the U.S. Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

The defendant traveled to Washington D.C. to participate in the events of January 6. After attending the rally where former President Trump spoke, the defendant walked to the restricted grounds of the U.S. Capitol grounds where he assisted other rioters in removing sections of a police barricade, removed plastic covering that protected scaffolding that was erected for the inauguration platform, entered the Capitol building while extending his middle finger in the direction of security cameras, walked through various area of the Capitol building before eventually exiting and rejoining rioters that were outside of the building.

### **LEGAL STANDARD**

A defendant may move to dismiss an indictment or count thereof for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). “[A]n indictment must be viewed as a whole, and the allegations must be accepted as true in determining if an offense has been properly alleged.” *United States v. Bowdoin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* “An indictment must contain every element of the offense charged, if any part or element is missing, the indictment is defective and must be dismissed.” *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017).

### **ARGUMENT**

#### **I. Counts Alleging Violations of 18 U.S.C. § 1752 are Lawfully Charged**

Section 1752 of Title 18, prohibits the unlawful entry into and disruptive or disorderly conduct in a “restricted buildings or grounds.” A “restricted building or grounds” is a “posted, cordoned off, or otherwise restricted area...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). At the time the defendant entered the U.S. Capitol grounds on January 6, the grounds were restricted because the Vice President, who was protected by the Secret Service, was present. The defendant’s conduct

accordingly falls within the Section 1752's plain sweep because he unlawfully entered restricted grounds while the Vice President was "temporarily visiting," as alleged in the superseding indictment.

**a) 18 U.S.C. § 1752 does not require the government to prove that the restricted area was restricted at the Secret Service's direction.**

The defendant argues that because the Capitol Police, not the Secret Service, barricaded and restricted the area around the Capitol, he should not be charged with violating 18 U.S.C. § 1752(a)(1) and (2). Courts in this district have rightly rejected this contention. *See, e.g., Mostofsky*, 2021 WL 6049891 at \*12-13; *Nordean*, 2021 WL 6134595 at \*18; *McHugh*, 21-cr-453, ECF No. 51; *Griffin*, 2021 WL 2778557 at \*2; *Caldwell*, 21-cr-28, ECF No. 415; *United States v. Seefried*, 21-cr-287, Minute Order, May 20, 2022.

Subsection 1752(c) defines the phrase "restricted buildings or grounds" as

any posted, cordoned off, or otherwise restricted area—

of the White House or its grounds, or the Vice President's official residence or its grounds;

of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or

of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.

18 U.S.C. § 1752(c)(1). It then defines the term "other person protected by the Secret Service" as "any person whom the United States Secret Service is authorized to protect under section 3056 of this title or by Presidential memorandum, when such person has not declined such protection." 18 U.S.C. § 1752(c)(2). The Vice President is a protectee of the Secret Service.

By its plain terms, then, Section 1752 prohibits the unlawful entry into a restricted or otherwise cordoned off area where "a person protected by the Secret Service is or will be temporarily visiting." *Wilson v. DNC Servs. Corp.*, 417 F. Supp. 3d 86, 98 (D.D.C. 2019), *aff'd*

831 F. App'x 513 (D.C. Cir. 2021). Section 1752, in other words, “focuses on perpetrators who knowingly enter a restricted area around a protectee, not on how it is restricted or who does the restricting.” *Griffin*, 2021 WL 2778557, at \*6. That straightforward analysis has a straightforward application here: a protected person (the Vice President) was present inside the U.S. Capitol building or on the U.S. Capitol grounds, and that some portion of the U.S. Capitol building and grounds was posted, cordoned off, or otherwise restricted, making it a “restricted building or grounds” under § 1752(c)(1). By engaging in prohibited conduct on those premises, The defendant violated 18 U.S.C. § 1752.

The defendant nonetheless urges the Court to import an extra-textual requirement that the Secret Service be required to designate the restricted area. That is so, the defendant claims, because it is the Secret Service who protects the President and others, so it is the Secret Service who must make the designation of a restricted area. That theory, in addition to finding no support in the text, fails for another obvious reason: Section 1752 is directed not at the Secret Service, but at ensuring the protection of the President and the office of the Presidency. *See* S. Rep. 91-1252 (1970); *see also* Elizabeth Craig, *Protecting the President from Protest: Using the Secret Service's Zone of Protection to Prosecute Protesters*, 9 J. Gender Race & Just. 665, 668–69 (2006). “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*, 2021 WL 2778557, at \*7; *see also* *Mostofsky*, 2021 WL 6049891 at \*13 (“The text plainly does not require that the Secret Service be the entity to restrict or cordon off a particular area.”). “If Congress intended a statute designed to safeguard the President and other Secret Service protectees to hinge on who outlined the safety perimeter around the principal, surely it would have said so.” *Griffin*, 2021 WL 2778557, at \*6. The defendant’s reading would have the Court create a “potentially massive procedural loophole” from the statute’s “silence.” *McHugh*, 21-cr-453, ECF No. 51, at 40. The Court should not do so.

The statute's history also undercuts the defendant's argument. *See Griffin*, 2021 WL 2778557, at \*4–\*5 (explaining how Congress has consistently “*broadened* the scope of the statute and the potential for liability”). While the earlier version of Section 1752 also did not say who must restrict a building or grounds, it did incorporate regulations promulgated by the Department of the Treasury (which at the time housed the Secret Service) governing restricted areas. *Id.* Even so, Congress subsequently struck subsection (d) and did not replace it with language limiting the law enforcement agencies allowed to designate a restricted area. Pub. L. 109-177, Title VI, Sec. 602, 120 Stat. 192 (Mar. 9, 2006). By eliminating reference to the Treasury Department (without replacing it with the Department of Homeland Security, which currently houses the Secret Service) indicates that the statute no longer depends (if it ever did) on whether the Secret Service has defined an area as “restricted.” Moreover, Defendant's reading of the statute, which would require the Secret Service to “cordon off” a private residence, “no matter how secure the location or how imposing the preexisting walls,” leads to “pressing absurdities.” *Griffin*, 2021 WL 2778557 at \*6.

**b) The Vice President can “temporarily visit” the U.S. Capitol**

Contrary to Section 1752's plain terms, purpose, and structure, the defendant argues that Vice President Pence could not have “temporarily visited” the U.S. Capitol on January 6, 2021, because he had an office there on that day. He is wrong. Other judges in this District have rightly rejected this contention as well. *See, e.g., McHugh*, 2022 WL 296304, at \*20–\*22; *United States v. Puma*, 21-cr-454 (PLF), 2022 WL 823079, at \*16–\*19 (D.D.C. Mar. 19, 2022); *United States v. Andries*, 21-cr-93 (RC), 2022 WL 768684, at \*16–\*17 (D.D.C. Mar. 14, 2022); *Griffin*, 21-cr-92, Minute Order, Mar. 22, 2022; *Seefried*, 21-cr-287, Minute Order, May 20, 2022.

The “ordinary meaning” of “temporarily visit” unambiguously includes a trip to one's office. *Andries*, 2022 WL 768684, at \*16 (it is “quite natural to say that a person ‘temporarily visits’ a place where she has an office.”). The term “temporary” means “[l]asting for a time only;

existing or continuing for a limited time; transitory.” *Temporary*, Black’s Law Dictionary (11th ed. 2019). The verb “visit” means, *inter alia*, “to go to see or stay at (a place) for a particular purpose (such as business or sightseeing)” or “to go or come officially to inspect or oversee.” See <https://www.merriam-webster.com/dictionary/visit>. Putting these definitions together, “someone is ‘temporarily visiting’ a location if they have gone there for a particular purpose, be it ‘business, pleasure, or sight-seeing,’ and for a limited time, which could be ‘brief’ or ‘extended’ while nonetheless remaining ‘temporary.’” *McHugh*, 2022 WL 296304, at \*20. People commonly go to their offices for one particular purpose (business), and for a limited time, often returning home at the end of the day. They may return the following day, but there is no reason why one cannot repeatedly “temporarily visit” the same location. One can “temporarily visit” a place where one has an office.

Vice President Pence was physically present at the U.S. Capitol for a particular purpose: he presided over Congress’s certification of the 2020 Presidential Election, first in the joint session, and then in the Senate chamber. While not specifically alleged in the superseding indictment, two other Secret Service protectees (members of the Vice President’s immediate family), also came to the U.S. Capitol that day for a particular purpose: to observe these proceedings. Furthermore, as President of the Senate, Vice President Pence oversaw the vote certification. Given the presence of the Vice President (and his family members), the U.S. Capitol plainly qualified as a building where “[a] person protected by the Secret Service [was] ... temporarily visiting.” 18 U.S.C. § 1752(c)(1)(B).

The defendant emphasizes Section 1752’s use of the term “temporarily” and cites cases where either the President or Vice President were “traveling *outside* of the District of Columbia ‘visiting’ that area for a ‘temporary’ purpose.” Section 1752, however, does not impose a requirement that the location being temporarily visited be outside of the District of Columbia.

Second, the visit to the U.S. Capitol *was* temporary: Vice President Pence (and his family) had traveled to the U.S. Capitol to oversee and attend the Joint Session of Congress, a proceeding of limited duration. At the close of the proceeding, they left, confirming the “temporary” nature of their visit. *See McHugh*, 2022 WL 296304, at \*20-21 (citing various dictionary definitions of “temporary” as “for a limited time” and finding that the Vice President can “temporarily visit” the U.S. Capitol).

The defendant offers two further observations, both irrelevant. First, he notes that Vice President Pence “lived and worked” in the District of Columbia. (ECF No. 59, at 24). But Section 1752(c)(1)(B) defines the restricted area by reference to “buildings or grounds,” not municipal borders. That Vice President Pence lived and worked in Washington, D.C. does not detract from the fact that he “temporarily visit[ed]” the U.S. Capitol on January 6. “Simply being in the visitor’s hometown does not mean a place cannot be ‘visited.’” *McHugh*, 2022 WL 296304, at \*22. Second, Defendant stresses that Vice President Pence had a permanent U.S. Capitol office. Section 1752(c)(1)(B), however, defines the restricted area by reference to the location of the protectee, not his office. When Vice President Pence traveled to the U.S. 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 “temporar[y].” Moreover, the U.S. Capitol is not the Vice President’s regular workplace; even if “there is some carveout in § 1752 for where a protectee normally lives or works, it does not apply to Vice President Pence’s trip to the Capitol on January 6, 2021.” *McHugh*, 2022 WL 296304, at \*22.

Such a “carveout,” taken to its logical end, would undermine the government’s ability to protect the President and Vice President by deterring and punishing individuals who seek unauthorized access to the President’s or Vice President’s location. It would restrict Section 1752(c)(1)(B)’s application to only locations outside the District of Columbia—on the view that

any visit by the President or Vice President to a location within municipal limits cannot be “temporary” because they reside in the District of Columbia. Second, under Defendant’s construction, Section 1752(c)(1)(B) would not apply where the President or Vice President temporarily stayed at their permanent residences in Delaware or California—on the view that such a trip would not qualify as “visiting.” Nor would it apply to Camp David, where there is a presidential cabin and office. In another strange scenario, a restricted area could exist when, as here, the Vice President’s family visits the U.S. Capitol (because they are Secret Service protectees without an office there), but not when the Vice President does, affording a higher level of protection for the family of the elected official than to the elected official himself (or herself). No support exists for Defendant’s effort to insert such large and irrational exceptions into the statute’s sweep. *See Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (courts will avoid a “statutory outcome ... if it defies rationality by rendering a statute nonsensical”).

Defendant’s position also defies Section 1752’s clear purpose. In drafting 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 comprehensively deters and punishes 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). Reading Sections 1752(c)(1)(A) and 1752(c)(1)(B) together protects the President and Vice President in their official homes and wherever else they 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 could expose the leaders of the Executive Branch even as they perform their official duties. That gap is both illogical and contrary to the statutory history of Section 1752, where, “at every turn,” Congress has “*broadened* the scope of the statute and the potential for liability.” *Griffin*, 2021 WL 2778557, at \*5 (D.D.C. July 2, 2021).

All the relevant metrics – plain language, statutory structure, and congressional purpose – foreclose Defendant’s crabbed reading of Section 1752(c)(1)(B). This Court should reject it. Defendant’s cited cases, involving either an arrest or conviction under Section 1752, do not discuss the “temporarily visiting” language. Mot. at 29–30 (citing *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005); *United States v. Junot*, 1990 WL 66533 (9th Cir. May 18, 1990) (unpublished); *Blair v. City of Evansville, Ind.*, 361 F. Supp.2d 846 (S.D. Ind. 2005)).

## **II. Section 5104(e)(2)(G) Does Not Violate the First Amendment and is Neither Overbroad Nor Vague**

### **a) The defendant’s First Amendment Claim Is Premature But Fails In Any Event Because Section 5104(e)(2)(G) Is A Permissible Restriction In A Nonpublic Forum.**

The defendant argues that Section 5104(e)(2)(G) constitutes an impermissible restriction on speech in a public place. That claim is premature because it requires an analysis of the defendant’s conduct, which is not before the Court at this stage in the case. In any event, the the defendant claim lacks merit. More than 20 years ago, Judge Friedman concluded that the Capitol building is a nonpublic forum and that Section 5104(e)(2)(G) is a “viewpoint neutral, reasonable regulation of both conduct and expressive activity” in such a forum. See *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 56 (D.D.C. 2000). The defendant offer no compelling reason to deviate from that sensible conclusion. A First-Amendment challenge involves three steps. First, the speech or conduct at issue must be protected under the First Amendment. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 797 (1985). If so, the analysis then focuses on “the nature of the forum, because to the extent to which the Government may limit access

depends on whether the forum is public or nonpublic.” *Id.* In particular, a given location may be a traditional public forum, a designated public forum, or a nonpublic forum. *See Bynum*, 93 F. Supp. 2d at 55. The third step “assess[es] whether the justification for exclusion from the relevant forum satisfies the requisite standard.” *Cornelius*, 473 U.S. at 797.

The defendant’s claim founders at the first step because he cannot establish at this point that their case involves speech or conduct protected by the First Amendment. *See Cornelius*, 473 U.S. at 797 (noting that where speech or conduct is not protected by the First Amendment, a court “need go no further”). They advance the blanket assertion that any violation of Section 5104(e)(2)(G), which makes it a crime for an individual to knowingly and willfully “parade, demonstrate, or picket” necessarily involves speech or conduct protected by the First Amendment. To be sure, certain conduct “such as picketing or demonstrating” may be so closely associated with speech as to warrant First Amendment protection, *see Virginia v. Hicks*, 539 U.S. 113, 124 (2003), at least where the picketing is “peaceful,” *see United States v. Grace*, 461 U.S. 171, 176 (1983). But there is no evidence of the defendant’s precise conduct before the Court; the record consists of the allegations in the information. The defendant may 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). It follows that Rule 12 “does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds” unless the government “has made a *full* proffer of evidence” or the parties have agreed to a “stipulated record,” *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (emphasis added)—neither of which has occurred here. Indeed, “[i]f contested facts surrounding the commission of the offense would be of any assistance in determining the validity of the motion, Rule 12 doesn’t authorize its disposition before trial.” *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010); *see Yakou*, 428 F.2d at

246-47 (“There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context”).

The defendant’s reliance on First Amendment challenges in civil cases is flawed. For example, in *Bynum*, the parties had agreed in their summary judgment motions that the plaintiff’s conduct—praying—garnered First Amendment protection. 93 F. Supp. at 54. In *Jeanette Rankin Brigade*, the cross-motions for summary judgment and the “variety of affidavits and exhibits,” 342 F. Supp. at 579, made clear that the plaintiffs’ conduct—which involved a march to protest the Vietnam war—likewise merited First Amendment protection. *Id.* at 578. Similarly, the cross-motions for summary judgment in *Lederman v. United States*, 89 F. Supp. 2d 29 (D.D.C. 2000), identified “undisputed,” *Id.* at 30, facts showing that the plaintiff sought to distribute leaflets, *id.* at 31, a practice long recognized as falling within the ambit of the First Amendment, *see Grace*, 461 U.S. at 176. And in *Cornelius*, the Supreme Court had a record on summary judgment from which it could conclude that the charitable soliciting of funds qualified as a “form of protected speech.” 473 U.S. at 796-97. No such record yet exists in this case, which involves the defendant’s participation in a siege at the United States Capitol that involved significant violence against uniformed police officers and forced lawmakers meeting in a Joint Session to evacuate from their respective chambers. This Court should therefore deny their First Amendment claim as premature.

To the extent the defendant seek to argue that Section 5104(e)(2)(G) contravenes the First Amendment, they must do after trial. *See United States v. Kokinda*, 497 U.S. 720, 724-25 (1990). In *Kokinda*, two the defendant were prosecuted for violating a United States Postal Service regulation that prohibited soliciting contributions outside of a post office. *Id.* at 723. As the defendant does here, they advanced a First Amendment claim, namely, that the regulation was an impermissible restriction in a public forum—the sidewalk outside the post office. *Id.* at 724. But they pressed that claim after a trial established precisely what their conduct entailed, where it took

place, and relevant facts about the sidewalk outside the post office. *Id.* at 724-25. Because, by contrast, the defendant’s First Amendment challenge is premature, this Court should “go no further.” *Cornelius*, 473 U.S. at 797.

In any event, the defendant’s First Amendment claim—that the Capitol building should be considered a public forum—lacks merit. A traditional public forum is a place that “by long tradition or government fiat” has been “used for assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Education Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983). A traditional public forum must bear “characteristics of public [places] traditionally open to expressive activity.” *Kokinda*, 473 U.S. at 727. Similarly, a location may be a “designated” public forum if the government “has affirmatively designated ‘for use by the public as a place for expressive activity.’” *Bynum*, 93 F. Supp. 2d at 55 (quoting *Perry Education Ass’n*, 560 U.S. at 45). In a public forum (whether traditional or designated), any restriction on speech or conduct is subject to “strict scrutiny,” *id.* at 726, which requires the government to show that the restriction “is necessary to serve a compelling state interest” and “is narrowly drawn to achieve that end.” *Perry Education Ass’n*, 560 U.S. at 45. By contrast, a nonpublic forum is one to which the government does not “grant general access.” *Cornelius*, 473 U.S. at 803. A restriction in a nonpublic forum is permissible where it is viewpoint neutral and reasonable. *Id.* at 806. As Judge Friedman concluded in *Bynum*, the Capitol building is a nonpublic forum. For one thing, government “ownership of property does not automatically open that property to the public.” *Kokinda*, 497 U.S. at 725. And notwithstanding occasional access to the Capitol building by members of the public, the building is “not open to meetings by the public at large,” and thus not generally “open to the public for limitless expression.” *Bynum*, 93 F. Supp.2d at 56. In short, “Congress has not opened the Capitol as a public forum for free and open public discourse.” *Id.*

That was especially true on January 6, 2021, when security precautions for the Joint Session and the upcoming presidential inauguration and the ongoing global pandemic meant that the Capitol building was not open to the public at large. But the defendant identifies nothing in First Amendment doctrine or otherwise that requires Congress to comprehensively outlaw every imaginable form of conduct to pass muster. Congress in Section 5104(e)(2)(G) reasonably took aim at conduct that disrupts its orderly business, *Bynum*, 93 F. Supp. 2d at 58, and did so in a viewpoint neutral manner. Nothing more is required.

**b) Section 5104(e)(2)(G) Is Neither Overbroad Nor Vague**

The defendant next argues that Section 5104(e)(2)(G) is both overbroad and unconstitutionally vague. Neither argument has merit. 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.” *Williams*, 553 U.S. at 292. “[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”).

The defendant’s challenge fails that 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*, 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 on the heels of others who had forcibly breached the building—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. Moreover, “[e]ven protected speech is not equally permissible in all places and at all times.” *Cornelius*, 473 U.S. at 799 (1985). As noted above, the Capitol Building

is a nonpublic forum, and the government may restrict speech inside the building as long as the restrictions are ‘viewpoint neutral’ and ‘reasonable in light of the purpose served by the forum,’” as these are. *Bynum* 93 F. Supp. 2d at 56 (citing *Cornelius*, 473 U.S. at 806 ). The limitations inherent in the crime of conviction thus 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 arguments lacks merit. First, he relies (Def. Mot. 4-6) on *Bynum*, *supra*, where Judge Friedman ruled that a Capitol Police regulation interpreting Section 5104(e)(2)(G) 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 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 asserts now. As noted above, Judge Friedman determined that Section 5104(e)(2)(G) was a reasonable, viewpoint neutral restriction in a nonpublic forum. Specifically, 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. 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’ reliance (Def. Mot. 13) 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* concluded that the entire 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. Finally, the defendant adverts at various points to statements during the House debate on the statute. But legislative history “is an uneven tool that cannot be used to contravene plain text.” *United States v. Bingert*, 21-cr-91, 2022 WL 1659163, at \*11 (May 25, 2022) (citing *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011)). The floor statements on which the defendant relies are “particularly ‘unreliable.’” *United States v. Powell*, 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, the defendant’s citation to the legislative history is misleading. They accurately quote (Mot. 10) 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), but omit the later discussion in which O’Neal makes clear that the basis for his concern was that the prohibition does not also include the Capitol Grounds. See 113 Con. 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”).

The defendant next contends that Section 5104(e)(2)(G) is unconstitutionally vague.<sup>2</sup> That contention is flawed. The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit

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<sup>2</sup> The defendant thus assert 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 it 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

the government from depriving any person of “life, liberty, or property, without due process of law.” U.S. Const. amend. 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 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,

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*Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983)). Even assuming that is a 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 their overbreadth challenge falls short.

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. Section 5104(e)(2)(G)’s prohibition on “willfully and knowingly . . . parad[ing], demonstrate[ing], or picket[ing] in any of the Capitol Buildings” gives rise to “no such indeterminacy.” *Williams*, 553 U.S. at 306. 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)).

In an opinion following a recent trial, Judge Kollar-Kotelly explained some of the statute’s operative terms, with no apparent difficulty:

First, “to ‘parade’ means to take part in “[a] march or procession, organized on a grand scale, in support of some political object.” “Parade,” Oxford English Dictionary (2nd ed. 1989); see also “Parade,” Merriam-Webster.com Dictionary (June 16, 2022) (“to march in or as if in a procession”). Similarly, to “demonstrate” means to take part in “[a] public manifestation, by a number of persons, of interest in some public question, or sympathy with some political or other cause; usually taking the form of a procession and mass-meeting.” “Demonstration,” Oxford English Dictionary (2nd ed. 1989); see also “Demonstration,” MerriamWebster.com Dictionary (June 16, 2022) (to take part in “a public display of group feelings toward a person or cause,” e.g., “peaceful demonstrations against the government” (emphasis original)).

Findings of Fact and Conclusions of Law, *United States v. Rivera*, No. 21-cr-60 (CKK), ECF No. 62, at 15 (D.D.C. June 17, 2022). She further found that “mere presence in a protest, along with other words or conduct that ratify interest in demonstrating, is ‘demonstrating’ for the purposes of a criminal statute that bars the actus reus of “‘demonstrating.’” *Id.* (citing *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), and *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). As *Rivera* shows, Section 5104(e)(2)(G)’s operative terms are readily construed and comprehensible. The statute is neither “so vague that it fails to give ordinary people fair notice of the conduct it punishes” nor “so standardless that it invites arbitrary enforcement.” *Johnson*, 576 U.S. at 595.8

**CONCLUSION**

For the foregoing reasons, the government respectfully requests that defendant's motion be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2022, I caused a copy of the foregoing motion to be served on attorney of record via email and the Court's electronic filing system.

/s/ Matthew Moeder  
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