UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

Case No. 1:21-cr-00421-JDB

JOHN MARON NASSIF,

Defendant.

DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS COUNT FOUR OF THE INFORMATION

On June 21, 2022, Mr. Nassif moved to dismiss Count Four of the Criminal Information, which charges him with parading, picketing, or demonstrating in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G). Doc. 30. The government filed a response in opposition on July 19, 2022. Doc. 34. In its Response, the government contends that (1) § 5104(e)(2)(G) is not overbroad and does not principally target speech; (2) § 5104(e)(2)(G) is not unconstitutionally vague because its application is limited to disruptive conduct; and (3) Count Four states an offense because it lists all the elements, as well as the time and place of the conduct. Mr. Nassif replies to the government's arguments below.[1]

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[1] The Response reproduces large sections of argument, word-for-word, from the government's opposition in a different case that analyzed a very different statute—one that did not involve picketing, parading, or demonstrating. *See United States v. Robertson*, Gov't Resp. to Mot. to Dismiss, 1:21-cr-00034 (Doc. 53), 2021 WL 8053648 (D.D.C. 2021). Significant portions of the duplicated language do not seem to fit this case. As a result, it is unclear which parts of the Response are intentionally argued versus accidentally included. *Compare, e.g.*, Gov't Resp. at 10 *with Robertson*, Gov't

I. Section 5104(e)(2)(G) is facially overbroad.[2]

A. An accurate construction of the statute compels the conclusion that it is overbroad.

While the government acknowledges that the first step in the overbreadth analysis is to construe the statute, it stops short of engaging with the text itself, instead simply stating that it "presents 'no ambiguity'" and that it "principally target[s] conduct rather than speech."[3] Gov't Resp. at 5. The government further states that "[t]he limitations inherent in the crime of conviction, moreover, render the

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Resp. to Mot. to Dismiss, 1:21-cr-00034, Doc. 53 at 21. To preserve this Court's time and resources, Mr. Nassif does not address the reproduced portions at length, but he is happy to provide supplemental briefing on the matter if the Court so desires.

[2] Mr. Nassif reiterates that he does not concede the statute is constitutionally applied to his conduct. *Cf.* Gov't Resp. at 4 ("Facial overbreadth challenges—in which a defendant asserts that a statute constitutionally applied to her, is nevertheless invalid . . ."). As he said in his Motion to Dismiss, it is simply premature for an as-applied challenge. Indeed, while the government argues that the charging document language is sufficiently specific, there is no way to ascertain from it what conduct for which Mr. Nassif is charged with parading, picketing, or demonstrating: mere presence, body language, audible speech, or something else. It would be impracticable for Mr. Nassif to challenge the constitutionality of the statute's application to unknown conduct.

[3] It bears mentioning that textual analysis was one major difference between the government's response in *Robertson* and the one here. Compare *Robertson*, Doc. 53 at 21 ("The operative verbs—obstruct, influence, or impede—principally target conduct rather than speech, *see supra* at 8-9, and those verbs are paired with the "corruptly" scienter requirement. . ." *with* Gov't Resp. at 5 ("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. . ."). In *Robertson*, the government addressed the text at length, as its *see supra* cite indicated. Here, it did not.

possibility of any such [protected-speech] prosecutions marginal at best, and any such case could be the subject of an as-applied challenge." Gov't Resp. at 6. The government does not state directly what those inherent limitations are, but in its vagueness discussion, it suggests that the statute is limited to those who engage in disruptive conduct. Gov't Resp. at 11. No such limitation is found in the text.

The government seems to contend not just that demonstrating is limited to conduct that is also disruptive, but that it actually *means* to engage in disruptive conduct. The sole authority it relies on for importing a "disruptive conduct" requirement is dicta from a non-binding district court opinion, *Bynum*, which the government states "does not inform the statutory challenge that Nassif presses here." Gov't Resp. at 7, 11; *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50 (D.D.C. 2000). Notably, *Bynum* did not definitively hold that the statute could only be applied to those who engaged in disruptive conduct. Rather, it opined that "'demonstrat[ing]' *appears* aimed at controlling only such conduct that would disrupt the orderly business of Congress." *Id.* at 58 (emphasis added).

Importantly, *Bynum* is not the most recent district court opinion to analyze the statute's meaning. In *Rivera*, the government made a similar argument as to the meaning of demonstrating:

> Well, then in Count 4, we have to show that the defendant demonstrated. It says that demonstrated means that conduct includes conduct that disrupts. So all this comes down to is whether or not the defendant engaged in conduct that disrupts. There's a question of did he intend to do that. Then there's a question of was the conduct that he engaged in disruptive.

United States v. Rivera, 1:21-cr-00060, Bench Trial Transcript, Doc. 64 at 173. However, the *Rivera* court evidently did not agree with that definition, concluding instead that demonstrating means one "took part in a 'public manifestation' in furtherance of 'some political or other cause.'" *United States v. Rivera*, No. CR 21-060, 2022 WL 2187851, at *7 (D.D.C. June 17, 2022).

Rivera contradicts the *Bynum* dicta that suggested the statute would not apply to people quietly praying, *see Bynum*, 93 F. Supp. 2d at 58, concluding that mere presence along with words or conduct ratifying an interest in the cause is sufficient to show demonstrating under § 5104(e)(2)(G). *Rivera*, 2022 WL 2187851 at *7 (reasoning that silently taking part in a public display of group feelings is "demonstrating" under the statute and explaining that the defendant was guilty of § 5104(e)(2)(G) where he identified with the demonstrators, believed they were patriots, and was present during the demonstration). *Rivera*'s construction of the statute to include even silent expression with no limitation to disruptive conduct aligns with plain text and indicates that *Bynum*'s optimistic view of the statute was a mistaken one.

Moreover, the district court's reasoning in *Jeanette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972), illustrates why an extra-textual "engage in disruptive conduct" limitation should not be read into § 5104(e)(2)(G):

> There is nothing in the prohibitions of § 193g which that construction preserved which is not also prohibited by other provisions of the Capital Grounds laws. The coexistence of § 193g with these prohibitions can, in reason, only imply that Congress must be taken, by the language it has used, to intend to prohibit absolutely assemblages which do not violate

> any of the more specific provisions. That purpose the Constitution does not countenance.

342 F. Supp. at 588. Here, if "parading, picketing, or demonstrating" means engaging in disruptive conduct, as the government seemingly contends, there is nothing in the prohibitions of § 5104(e)(2)(G) that is not also prohibited by other provisions of § 5104. The coexistence of subsection (G) with those other "prohibitions can, in reason, only imply that Congress must be taken, by the language it has used, to intend to prohibit absolutely [parading, picketing, or demonstrating] which do[es] not violate any of the more specific provisions."[4] And, indeed, "[t]hat purpose the Constitution does not countenance."

The government casts aside legislative history as having "limited value" as to the question of whether the statute is limited to disruptive conduct. But to the extent that the plain statutory text is ambiguous—and the government's "disruptive conduct" and "trespass" arguments imply that it is[5]—this Court should "look beyond the text in order to ascertain the intent of its drafters." *United States v. Williams*, 553

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[4] *Cf. Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2002) ("[T]he Board could rely on existing laws that bar visitors to the Capitol Grounds from 'utter[ing] loud, threatening, or abusive language, ... engag[ing] in any disorderly or disruptive conduct,' or 'obstruct[ing] ... or ... imped [ing] passage through or within' the Grounds.").

[5] The government does argue that the text is unambiguous, Gov't Resp. at 5, but that position is inconsistent with its contentions that (1) parading, picketing, and demonstrating mean to engage in disruptive conduct, and (2) that trespass is part of the statute's plainly legitimate sweep. Neither trespass nor disruption makes up part of the plain meaning of parading, picketing, or demonstrating.

U.S. 285, 307 (2008) (Stevens, J., concurring) (finding that legislative history made Congressional aims "abundantly clear").

Even setting aside the floor statements, which the government takes issue with, Representative Jerome Waldie explained in House Report 90-745:

> The instant bill is poorly drafted and quite likely unconstitutional in that it will be construed as being void for uncertainty.
>
> Probably the most elementary constitutional principle involves the necessity of drafting laws creating crimes with great certainty.
>
> Not even the proponents of this bill maintain that it is free of great ambiguities. Had the bill been considered by the Judiciary Committee there would undoubtedly have been amendments adopted that would have clarified the intent of the measure. However, this was a poorly drafted bill considered by a committee that is well-versed in public works, but not constitutional law and the result of the committee action has not been any clarification of the ambiguities in the measure…
>
> However, the basic objection that I believe relevant to this act is that it assumes a substantial number of citizens who visit our Capitol each year do so to "cause us trouble." Very few come here for that purpose and yet this act, by reason of its poorly drafted terms, will cause many of those who do visit us in all good faith the embarrassment of having committed a crime.
>
> I suggested that the qualifying phrase used in a portion of the misdemeanor section of the act, 'with intent to disrupt the orderly conduct of official business' should have been applied to all conduct sought to be controlled. The committee did not approve of this limitation. Without such a limitation, in my view, not only does the act become of questionable constitutionality, but it becomes an instrument capable of ensnaring innocent and well-meaning visitors within its provisions.
>
> It is no answer to say the family resting in the Rayburn Room, though guilty of a crime, will not be prosecuted. They should not be in a position that such an insulting determination need be made.

1967 U.S.C.C.A.N. 1739, at 1746-47 (expressing his minority view). Legislative history rarely answers a question directly, but here, it comes very close. The government urges this Court not to consider it, because the government believes it is

of "limited value." But its value is in showing that if Congress wanted the instant subsection to be limited to disruptive conduct, or conduct carried out with the intent to disrupt, it knew how to accomplish that. It deliberately chose to not include that language.

The legislative history does not "contravene" the plain text; on the contrary, it matches it. The text of § 5104(e)(2)(G) says nothing about disruptiveness, and the legislative history likewise shows that limiting the offense to disruptive conduct or intent was not the aim of Congress. In the words of the government, this Court should not "import an extra-textual requirement" that "would undercut the broad statute that Congress enacted." *Robertson*, Doc. 53 at 12.

The government also contends the legislative history is inapt because it addresses the scienter, rather than actus reus, element of the statute, pointing out that *intent* to disrupt was the suggested amendment. Gov't Resp. at 7 n.4. The government does not explain how an actus-reus, as opposed to scienter, categorization of an element would impact the overbreadth analysis here. Adding either disruptive conduct to the actus reus or "intent to disrupt" to the scienter element would limit the breadth of the statute in a similar fashion. *Cf. Rivera*, 2022 WL 2187851 at *6 (concluding that the evidence that showed the defendant knew his presence was unauthorized and that his continued presence was disruptive was sufficient to meet scienter requirement of 40 U.S.C. § 5104(e)(2)(D), which includes "intent to disrupt" language). Here, "knowingly and willfully intending to disrupt" and "knowingly and willfully engaging in disruptive conduct" is a distinction without a difference. *Cf.*

Rivera, 2022 WL 2187851 at *5 ("[T]he law permits the factfinder to infer that a person intends the natural and probable consequences of their actions.").

B. Section 5104(e)(2)(G), on its face, criminalizes a substantial amount of protected expressive activity.

Section 5104(e)(2)(G) explicitly criminalizes an enormous amount of protected expressive activity in the Capitol Buildings. The government makes the questionable argument that § 5104(e)(2)(G) does not principally target speech, noting that laws not targeted at speech are less likely to be found facially overbroad. Gov't Resp. at 5. In support of that proposition, it quotes *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). However, it excludes extremely important language from the full quote, which is as follows: "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct *necessarily associated with speech* (*such as picketing or demonstrating*)." *Id.* (emphasis added).[6] As such, its contention that the instant statute does not "principally target" speech strains credulity.

The government mentions only trespass and disruptive conduct as legitimate applications of § 5104(e)(2)(G), despite referring to "numerous constitutionally legitimate applications of the statute to conduct and unprotected speech." Gov't Resp.

[6] The undersigned does not believe the government was being intentionally misleading by excluding that portion of the quote. Rather, it seems likely that the exclusion was an unfortunate side effect of the government's duplication of its arguments from *Robertson*.

at 6. "[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). And here, although the government argues the statute does not reach too far, it does not explain what it covers.

The closest the government comes to doing so is when it states that Mr. Nassif's alleged "trespass . . . is illustrative of the numerous constitutionally legitimate applications of the statute to conduct and unprotected speech." Gov't Resp. at 6. But of course, "trespassing" is decidedly not "parading, picketing, or demonstrating." Although trespassing and demonstrating might often occur simultaneously in the same location, it would run afoul of the law to charge someone with parading, picketing, or demonstrating for the act of trespassing itself. *Cf. Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14, 25–26 (D.D.C. 2014) (Bates, J.) ("[A] Bud Light is not 'Single-Malt Scotch,' just because it is frequently served in a glass container, contains alcohol, and is available for purchase at a tavern.").

The government avers that Mr. Nassif "fails to identify a single actual example of a prosecution based on protected speech."[7] Gov't Resp. at 6. However, a facial overbreadth challenge need not identify actual examples of prosecution based on protected speech; there must simply exist "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not

[7] Notably, the government fails to identify a single actual example of a prosecution based on unprotected conduct. Even here, the government does not identify the actual conduct underlying this specific charge—other than "trespass," which is not prohibited by § 5104(e)(2)(G).

before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (explaining that overbroad statutes have "the potential to repeatedly chill the exercise of expressive activity"). Here, the current Capitol Police policy helps inform that analysis.[8] Like the plain text of § 5104(e)(2)(G), it is not limited to trespassers or disruptive conduct. The danger of Capitol Police enforcing the law in a way that matches their written policy cannot be accurately described as an unrealistic one. *Cf. Lederman v. United States*, 131 F. Supp. 2d 46, 54 (D.D.C. 2001) ("It is hard to conceive of much expression that a reasonable officer would *not* find to be conveying a message regarding some point of view.") (emphasis in original); *Rivera*, 2022 WL 2187851, at *7 (finding that demonstrating was shown where the defendant "took part in a 'public manifestation' in furtherance of 'some political or other cause.'").

The government describes *Lederman v. United States* as being of "marginal, if any, relevance" because it deals with a Capitol Police Regulation. Gov't Resp. at 7.

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[8] Capitol Police Regulation §12.1.10 defines "demonstration activity" to include "any protest, rally, march, vigil, gathering, assembly, projecting of images or similar conduct engaged in for the purpose of expressing political, social, religious or other similar ideas, views or concerns protected by the First Amendment of the United States Constitution." Traffic Regulations for the United States Capitol Grounds, *available at* https://www.uscp.gov/sites/uscapitolpolice.house.gov/files/wysiwyg_uploaded/US%20Capitol%20Grounds%20Traffic%20Regulations_Amended%20February%202019.pdf ; *see also* United States Capitol Police Guidelines for Conducting an Event on United States Capitol Grounds, *available at* https://www.uscp.gov/sites/uscapitolpolice.house.gov/files/wysiwyg_uploaded/Guidelines%20and%20Application%20for%20Conducting%20an%20Event%20on%20U.S.%20Capitol%20Grounds.pdf (last accessed July 25, 2022).

However, although *Lederman* is not directly on point, the concerns expressed by the court are relevant to the instant case. *Lederman*'s reasoning as to the dangers of the broadly-worded ban in that case—that it could "be selectively employed to silence those who expressed unpopular ideas regardless of whether the speaker created an obstruction or some other disturbance"—is also apt here.

Lederman's assessment that, if that ban were applied "literally and evenhandedly," congressional staffers arguing about policy would risk arrest, is equally applicable to the instant case. 89 F. Supp. 2d 29, 41 (D.D.C. 2000), *on reconsideration in part*, 131 F. Supp. 2d 46 (D.D.C. 2001). The instant statute does not limit itself to those who have no right to be in the Capitol Building, nor does it contain language restricting its application to disruptive conduct. And while *Lederman* did engage in a different, scrutiny-based forum analysis—which the government does not appear to argue is appropriate here—it indicated its reasoning would be the same even if it were not dealing with a public forum. *Id.* ("However, even if the area within the no-demonstration zone did constitute a nonpublic forum, section 158 as amended would still be constitutionally suspect.").

As the undersigned was drafting this Reply, it became clear the possibility of the law reaching congressional staffers is a realistic one. On July 25, 2022, six congressional staffers were arrested for having a peaceful sit-in in Senator Chuck Schumer's rarely-used ceremonial office in the Hart Senate Building (rather than the

leadership office in the Capitol Building he uses ordinarily).[9] Because the demonstration did not occur in the Senator's regular office, it did not disrupt his work. Nonetheless, the president of the Congressional Workers Union was taken away in handcuffs, along with six other staffers.[10]

II. Section 5104(e)(2)(G) is unconstitutionally vague.

A statute with terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Thus, "[a] law is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, if it fails to provide explicit standards to those who enforce it, or if it operates to inhibit the free exercise of First Amendment freedoms by chilling such exercise by its uncertain meaning." *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 59 (D.D.C. 2000).[11]

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[9] *See* "Congress Minutes: A Protest in Schumer's Office," Politico, https://www.politico.com/minutes/congress/07-25-2022/schumer-protest/ (July 25, 2022).

[10] *See* "Six staffers arrested after climate sit-in at Chuck Schumer's office," The Guardian, https://www.theguardian.com/us-news/2022/jul/25/chuck-schumer-sit-in-staffers-arrested (July 25, 2022).

[11] The government appears to question the viability of the First Amendment vagueness doctrine "under governing law." It relies on a citation to a D.C. Circuit case where the court assumed that the First Amendment vagueness doctrine applied to a union rule, with the government referring to it as "questioning the breadth of 'First Amendment vagueness doctrine.'" Gov't Resp at 8-9 n.6; *Quigley v. Giblin*, 569 F.3d 449, 458 (D.C. Cir. 2009). However, a D.C. Circuit case that assumes without deciding that the First Amendment vagueness doctrine applies to a union rule cannot render inviable the First Amendment vagueness doctrine—which is not a "theory" as the government avers, but actual "governing law" under Supreme Court precedent. *See,*

The government contends that of § 5104(e)(2)(G) is not vague because, "in short," parading, picketing, and demonstrating means "engag[ing] in disruptive conduct." Gov't Resp. at 11. But as the current Capitol Police regulation, the legislative history, and most importantly, the plain language show, the government's contention that the statute is limited to disruptive conduct is unsound. *See supra* Part I.A. Furthermore, the government's understanding of § 5104(e)(2)(G) cannot change the fact that men and women of ordinary intelligence—including the Capitol Police Board, apparently—must guess as to the meaning, nor could it change the statute's failure to provide explicit standards to those enforce it.

The government has argued that § 5104(e)(2)(G) principally targets disruptive, non-expressive conduct and trespassing, both here and in *Rivera*. Indeed, in *Rivera*, it went as far as directly stating that engaging in disruptive conduct in a Capitol Building and intent to do so were sufficient *on their own* to prove a violation of § 5104(e)(2)(G). *Rivera*, 1:21-cr-00060, Bench Trial Transcript, Doc. 64 at 173. And here, it also contends that trespassing in a Capitol Building after other people have trespassed and assaulted officers is *itself* demonstrating. Gov't Resp. at 6.

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e.g., United States v. Williams, 553 U.S. 285, 304 (2008) ("Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech."); *Smith v. Goguen*, 415 U.S. 566, 573 (1974). And indeed, the D.C. Circuit considered the First Amendment vagueness doctrine governing law even after *Quigley*. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 23 (D.C. Cir. 2009).

The government's contentions prove too much. If the government's argued standards are accurate, it is hard to fathom how § 5104(e)(2)(G) could be a bigger failure at explicitly laying them out. On the other hand, if the *Rivera* court is right, and public expression of interest in or sympathy for some cause is the meaning of demonstrating, it is difficult to overstate the chilling effect such a vague definition could have on First Amendment exercise in the Capitol Buildings. A group of congressional staffers applauding and cheering for the Capitol Police could meet that standard. Accordingly, § 5104(e)(2)(G) is unconstitutionally vague.

III. Alternatively, Count Four fails to state an offense.

The government correctly points out that echoing the statutory elements, along with specifying the time and place, can be sufficient to state an offense in many cases. Gov't Resp. at 11. However, "those cases involve criminal statutes that are sufficiently precise such that merely echoing the statutory language in the indictment provides enough specificity to apprise a reasonable defendant of his allegedly unlawful conduct." *United States v. Miller*, No. 1:21-CR-00119 (CJN), 2022 WL 1718984, at *4 (D.D.C. May 27, 2022). "'[I]t is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1881)).

According to the government, "parading, picketing, or demonstrating" means to "engage[ ] in disruptive conduct," and "principally targets conduct rather than

speech." Gov't Resp. at 5, 11. Thus, the Response makes the prohibited conduct alleged even more unclear than it was. At a minimum, § 5104(e)(2)(G) does not "expressly" set forth the purportedly required "disruptive conduct." And if parading, picketing, and demonstrating do not require speech, it is difficult to wager a guess as to what they do require. Particularly where, as the government's position necessarily implies, the words do not have their plain meaning, this is a crime "that must be charged with greater specificity." *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007).

CONCLUSION

For the reasons discussed above, the Court should dismiss Count Four of the Information and grant Mr. Nassif such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2022, I electronically filed the foregoing via this Court's CM/ECF system, which will send notice of such filing to all counsel of record.

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